Federal Court  Cour fédérale

Date: 20230616

Docket: T-1345-22

Citation: 2023 FC 853

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 16, 2023

PRESENT: Mr. Justice Régimbald

BETWEEN:

BENOÎT GOSSELIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Benoit Gosselin [the applicant] is seeking judicial review of a decision by Marc-André Meunier, Assistant Commissioner of the Canadian Coast Guard's Central Region, a division of the Department of Fisheries and Oceans Canada [Assistant Commissioner] dated June 3, 2022, in which the Assistant Commissioner adopted the findings of an investigation report that had

determined that some of the alleged actions committed by the applicant were inappropriate and constituted workplace harassment as defined in the *Policy on Harassment Prevention and Resolution* [the Policy].

[2] Although the applicant had retired prior to the Assistant Commissioner's decision, for the purposes of that decision, he remained an "employee" within the meaning of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [the Act]. Accordingly, it was open to the applicant to file a grievance against the decision.

[3] By proceeding by way of judicial review at the outset, the applicant failed to exhaust all internal remedies. The application for judicial review is therefore dismissed.

II. Background

[4] Between September and December 2020, the applicant, who was at the time Manager and Foreman of Marine Aids in the Canadian Coast Guard, was the subject of eight harassment complaints made by a member of his team [the complainant].

[5] On January 28, 2021, following the applicant's responses to the allegations in the complaints, the Assistant Commissioner decided to appoint an impartial third party from Fisheries and Oceans Canada's Office of the Ombuds as the competent person to conduct an administrative investigation into the allegations [the investigator].

[6] Between January 28, 2021, and April 20, 2022, the investigator, David Proulx, questioned the applicant and the complainant about each of the allegations. The investigator also interviewed several witnesses provided by both parties. During that process, the applicant provided numerous documents to the investigator in response to the allegations, and commented on all the facts collected by the investigator. Following this collection of information, the investigator proceeded with an analysis to determine whether the incidents that occurred constituted harassment as defined by the Policy.

[7] On October 1, 2021, the applicant received an initial preliminary summary of the facts from the Assistant Commissioner, for the purpose of submitting his comments.

[8] In his comments in response to this preliminary report, the applicant openly criticized the investigator's competency, opining that the document he had been provided was of poor quality, and was not only biased in favour of the complainant, but was also in breach of several principles of procedural fairness. The applicant also maintained that the requirements set out in the *Investigation Guide for the Policy on Harassment Prevention and Resolution and Directive on the Harassment Complaint Process* [the Investigation Guide] were not satisfied in this preliminary report.

[9] On October 6, 2021, the investigator responded to the issues raised by the applicant and told him to clarify his arguments in his comments on the preliminary summary of facts. He also stated that he had validated the accuracy of the testimony and was open to communicating with additional witnesses. He also considered it appropriate not to include the documentary evidence

in an appendix, given that the complainant did not refute the version of the facts and that he presumed the good faith of the participants in the investigation as long as there were no contradictions in their statements.

[10] On October 14, 2021, Mr. Gosselin retired a year earlier than planned. He is therefore no longer an employee of the federal public service.

[11] On March 1, 2022, a second summary of the facts prepared by the investigator was submitted to the applicant for comment. In this second report, the applicant noted that, despite spelling errors and certain problems with the evidence accepted, all of his supporting documentation that had been omitted from the first preliminary summary dated October 1, 2021, was included. The applicant opined that the outcome of the investigation appeared predetermined, although his comments had been taken into account.

[12] On April 20, 2022, the investigator delivered his final investigation report to the Assistant Commissioner, in which he found that the harassment complaint was founded in part. He stated that the evidence showed that the applicant had harassed the complainant within the meaning of the Policy by making malicious statements in the presence of subordinates and peers.

[13] On June 3, 2022, the Assistant Commissioner notified the applicant that he had concluded that the aforementioned allegations of harassment were well founded, that he was adopting the investigator's report and recommendations, and that the case was closed. The Assistant Commissioner stated that he had [TRANSLATION] "reviewed the final report, including

the investigator's analyses and recommendations" and concluded that only two of the eight allegations were founded. As the applicant was now retired, no corrective action would be taken against him.

[14] Throughout the proceedings, the applicant obtained and was able to make submissions on the contents of the investigator's preliminary reports. He raised procedural issues relating to the handling of the complaints and the investigation. In particular, the applicant complained of a conflict of interest with the people responsible for handling the complaint, the incompetence of the investigator, a number of spelling mistakes, erroneous or arbitrary findings of fact, and violations of procedural fairness including a reasonable apprehension of bias.

III. Parties' Arguments

A. *Applicant's Arguments*

[15] The applicant essentially submitted three arguments in support of his application for judicial review, namely:

(1) the lack of professionalism and usurpation of the authority on the part of the Assistant Commissioner and the investigator;

(2) breaches of procedural fairness during the complaint process and in the decision; and

(3) the unreasonableness of the decision.

(1) Lack of professionalism and usurpation of authority

[16] First of all, the applicant maintained that no details concerning the Assistant Commissioner's competency and expertise were disclosed to the applicant during the complaint process. The applicant questioned Mr. Meunier's competence, given that his questions concerning the applicable laws and the procedures to be followed remained unanswered. The Assistant Commissioner also failed to follow up with the applicant or provide any justification for the delays involved, which was contrary to the Policy.

[17] In addition, the applicant accused the Assistant Commissioner of usurping his authority by failing to comply with several of the provisions of the Policy and the *Directive on the Harassment Complaint Process*. He was of the opinion that the Assistant Commissioner had exceeded his authority because three of the allegations had already been resolved through internal resolution procedures.

[18] The applicant also criticized the investigator, Mr. Proulx, for lacking the professional competency required to investigate the harassment complaint. He maintained that the Assistant Commissioner should have provided some clarification as to the process followed in appointing Mr. Proulx. The applicant alleged that he was unable to accept or reject the choice of investigator, and that upon receipt of the first preliminary report, he noticed that Mr. Proulx had provided a poor-quality document that failed to comply with several of the provisions set out in the Policy.

[19] He added that Mr. Proulx had exceeded the authority assigned to him in his role as investigator, given that the Office of the Ombuds was not given the mandate to conduct administrative investigations until April 1, 2022, and that, as a result, on January 28, 2021, the day on which Mr. Proulx was appointed as investigator, he did not have the authority to carry out the mandate assigned to him in the present case.

[20] The applicant was of the view that the fact that the "Office of the Ombuds" was involved had given him a false sense of confidence in the investigator, who in reality lacked the competency to carry out his investigation mandate.

[21] The applicant also criticized the investigator for having exceeded his authority by deliberately altering his notes in order to corroborate the complainant's testimony, disregarding a number of relevant testimonies and pieces of evidence, using faulty logical reasoning and imputing intentions to the applicant.

(2) Breaches of procedural fairness

[22] According to the applicant, the Assistant Commissioner breached the principles of procedural fairness by rendering a decision based on an investigation that had not been carried out in accordance with the procedures set out in the Investigation Guide.

[23] He maintained that the duty of procedural fairness is also set out in the *Guide on Applying the Harassment Resolution Process* [Application Guide].

[24] He alleged that the investigator showed bias by disregarding his version of the facts and accepting only the complainant’s version. He maintained that the investigator admitted to having removed segments from his notes to avoid creating confusion, thereby compromising the integrity of the evidence and the investigator’s impartiality.

[25] The applicant added that during the complaint process, his right to be heard was neglected, as he was twice threatened with having the proceeding continue without his participation if he refused to actively participate. Since the investigator ignored all the documentary evidence provided by the applicant and did not contact the three witnesses identified by him, his legal right to submit evidence had also been breached.

[26] The applicant further contended that his right to be accompanied during the investigation was not respected, given the significant risk of a conflict of interest with the complainant and his union.

[27] He alleged that his legal right to review his statement to confirm its accuracy, as set out in the Investigation Guide, was not respected. Lastly, he argued that his right to the presumption of innocence had been violated, given that the attitude of the parties involved in the proceeding appeared to be tainted by a negative bias.

(3) Unreasonableness of decision

[28] Third, the applicant argued that the Assistant Commissioner's decision was unreasonable in that he failed to justify all the essential elements of his decision. The applicant was of the view

that the absence of reasons suggested that the decision-maker refused to exercise his authority by failing to make a determination on the allegations of harassment when, in the final report, he concluded that each of the elements considered was relevant. He maintained that the decision was also unreasonable given that the Assistant Commissioner failed to take into account the evidence submitted to him, and because the decision was based exclusively on the investigator's findings, which were erroneous and arbitrary, all the more so because the investigator allegedly altered his notes so that the testimony would corroborate his findings.

B. *Respondent's Arguments*

[29] The Attorney General of Canada [the AGC] pointed out that the present application was not properly before the Court, given that the applicant had not exhausted all other available remedies before seeking judicial review. The AGC argued that the applicant cannot circumvent the grievance process provided for in section 208 of the Act and section 18 of the Collective Agreement by submitting an application for judicial review. The AGC noted, citing *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*] and the Investigation Guide, that in the absence of exceptional circumstances, an applicant must first challenge the outcome of an investigation report by filing a grievance. Failing to comply with this process would run counter to the general principle of non-interference in administrative proceedings.

[30] The respondent further maintained that the threshold for qualifying circumstances as "exceptional" and allowing the Court's intervention was high and generally did not include breaches of procedural fairness committed prior to the issuance of the final administrative decision (*Gupta v Canada (Attorney General)*, 2020 FC 952; see also *Harelkin v University of*

Regina, [1979] 2 SCR 561 [*Harelkin*] at pages 584–585 and *Nosistel v Canada (Attorney General)*, 2018 FC 618 [*Nosistel*]).

[31] The respondent alleged that section 18.02 of the applicant's Collective Agreement provided him with an opportunity to file a grievance with regard to any provision of a statute or regulation or any directive or other document of the employer regarding conditions of employment.

[32] The AGC pointed out that parties dissatisfied with an investigation report may challenge its outcome by filing a grievance in accordance with the grievance process set out in section 18 of the employee's Collective Agreement, or under subsection 208(1) of the Act (as set out in the Investigation Guide).

[33] The respondent maintained that the investigation followed the Policy's procedures and that, contrary to the applicant's contentions, neither the Assistant Commissioner nor the investigator breached the principles of procedural fairness during the course of this case. Throughout the investigation process, the applicant provided numerous documents and was questioned by the investigator. He provided a complete record with his responses to the allegations and had the opportunity to review and comment on all of the facts gathered before the final investigation report was written.

[34] The respondent maintained that, in addition to providing his preliminary investigation reports to the applicant for correction and comment, the investigator also provided a summary of his interviews with the witnesses in the preliminary investigation reports.

C. *Applicant's Reply at Hearing*

[35] At the hearing, the applicant submitted in reply that there was no internal remedy in this case, since he had retired. Thus, in his view, he was no longer an "employee" within the meaning of section 206 of the Act, and that furthermore, under subsection 206(2), a grievance is available to "former employees" only when there is a disciplinary measure involving suspension or dismissal. Since no disciplinary measure had been imposed, he argued that no grievance was available to him as a "former employee". Lastly, section 208 did not apply in this case, given that, once again, he was retired. Since he was no longer an "employee" within the meaning of the Act, he no longer had access to the grievance process.

IV. Analysis

A. *Applicant Required to Exhaust All Alternative Remedies Available to Him*

[36] Absent exceptional circumstances, "parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted" (*CB Powell* at para 30). At paragraphs 31–33 of *CB Powell*, the Federal Court of Appeal pointed out the following:

> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or

bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, *e.g., Consolidated Maybrun, supra* at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, *e.g., Consolidated Maybrun, supra* at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48).

[33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of*

> *Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted:
> see *Harelkin*, *supra*; *Okwuobi*, *supra* at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.
> [Emphasis added.]

[37] The recognized principle that the Court cannot consider an application for judicial review until the applicant has exhausted all avenues of redress under the appropriate administrative processes has been reaffirmed on numerous occasions, most recently by this Court in *Association of Justice Counsel v Canada (Attorney General)*, 2022 FC 1090 at para 44, *Nosistel* at paras 50–53 and by the Federal Court of Appeal in *Gupta v Canada (Attorney General)*, 2021 FCA 202 [*Gupta FCA*], *Agnaou v Canada (Attorney General)*, 2019 FCA 264 and *Coldwater Indian Band v Canada (Indian Affairs and Northern Development)*, 2014 FCA 277.

[38] The fundamental issue in this case is whether there was indeed an adequate remedy that the applicant ought to have pursued first. In this case, the respondent relied on section 18.02 of the Collective Agreement, as well as section 208 of the Act, and argued that the applicant was required to exhaust an adequate internal remedy, namely the grievance process, before seeking judicial review before the Court. Section 18.02 of the Collective Agreement states:

> **18.02** Subject to and in accordance with section 208 of the *Federal Public Sector Labour Relations Act*, 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.

[39] At the hearing, the applicant argued that no other remedy existed, given that he was no longer an "employee" within the meaning of section 206 of the Act, having retired. In addition, as a "former employee" within the meaning of subsection 206(2), he could not file a grievance, since no disciplinary measures had been imposed in his case. Finally, as he was no longer an "employee" within the meaning of section 206, he no longer had access to the grievance process provided for in sections 208 and 209 of the Act.

[40] In his memorandum, in support of his argument that he was entitled to file an application for judicial review, the applicant relied on the Investigation Guide, which states:

> Parties who are dissatisfied with the investigation report may challenge it through different means:
>
> 1. By applying for judicial review to the Federal Court of Canada; . . .
>
> 2. By filing a grievance in accordance with the grievance procedure under the employee's collective agreement, if applicable. . . .

[41] The applicant also relied on the Application Guide, which states that "[t]he decision could also be challenged in Federal Court where the review would focus on whether or not the process respected the principles of procedural fairness".

[42] Finally, still in his memorandum, the applicant relied on the decision in *Shoan v Canada (Attorney General)*, 2016 FC 1003 [*Shoan*] to assert that he was not required to file a grievance before applying to the Court for judicial review. He maintained that according to *Shoan*, this application was not limited solely to the Assistant Commissioner's decision, but also included the entire complaint handling process.

[43] The applicant therefore argued that there was no bar to him seeking judicial review before the Court.

[44] First of all, while I agree with the applicant that, according to *Shoan*, the entire complaint process was part of the Assistant Commissioner's decision, that decision does not support the applicant's contention that he was entitled to seek judicial review before the Court without first having exhausted all available internal remedies. In *Shoan*, a member of the Canadian Radio-television and Telecommunications Commission was appointed by the Governor-in-Council. As a result, the Act did not apply to him because of the exclusion of Governor-in-Council appointees in paragraph 206(1)(a) of the Act. Since no recourse was available to Mr. Shoan under the Act or elsewhere, he was entitled to avail himself of the remedy of judicial review.

[45] Second, the definition of "employee" in section 206 of the Act is broader in scope than the applicant suggests. In *Canada (Attorney General) v Santawirya*, 2019 FCA 248, the Federal Court of Appeal recently considered the issue and found that the scope of the term "employee" was broad and included any person who was no longer employed in the public service if the facts giving rise to the grievance occurred while the person was still an employee:

> [11] Section 208 provides that an "employee" can file a grievance under the PSLRA. The law is clear, however, that the scope of the term "employee" is broader than the definition set out in subsection 206(1) of the legislation, which confines "employee" to "a person employed in the public service of Canada." If the material facts giving rise to a grievance occurred while a person was an employee, that person is entitled to file a grievance, even if his or her employment has subsequently ended. There are many examples of the application of this principle in the case law, stretching back close to half a century (*The Queen v. Lavoie*, [1978] 1 F.C. 778 (C.A.) at p. 783, 18 N.R. 521; *Salie v. Canada (Attorney General)*, 2013 FC 122 at paras. 60-61, 225 A.C.W.S. (3d) 1001; *Price v. Canada (Attorney General)*, 2016 FC 649 at para. 24).
>
> . . .
>
> [19] The jurisprudence concerning the interpretation of "employee" under the PSLRA requires a nexus between the material facts which underlie the grievance and the grievor's status as an employee. The Federal Court of Appeal in *Lavoie* stated that "any person who feels himself to be aggrieved as an 'employee'" is entitled to grieve (p. 783, emphasis in original). Read in context, it is clear that the Court made this statement to guard against a situation where a person who had a grievance *while employed* would not be deprived of the right to grieve by a termination of employment or retirement (p. 783).
>
> [20] The principle emanating from *Lavoie* is that if the material facts transpired while the aggrieved person was employed then the Board has jurisdiction regardless of whether that person is still employed when he or she files a grievance. If the material facts did not transpire while the aggrieved person was employed then the Board does not have jurisdiction. The Board's role is to determine the factual basis for the grievance and to assess whether or not sufficient material facts occurred while the grievor was employed.

> [Italics in original. Emphasis added.]

[46] Lastly, as Christopher Rootham writes in *Labour and employment law in the Federal Public Service* (Toronto: Irwin law, 2007) at pages 283–284, a retiree may remain an "employee" within the meaning of the Act and file a grievance:

> (7) Rights of Former Employees to File Grievances
>
> Under the PSSRA, there was some controversy (at the outset) over whether former employees had the necessary standing to file grievances. Notwithstanding the absurdity of arguing that an employee who was dismissed (Allegedly without just cause) did not have the standing to file a grievance because she was a former employee, this was precisely the position taken by the employer in *Canada (Treasury Board) v. Lavoie.* The Federal Court of Appeal concluded that a former employee does have the standing to present a grievance against her dismissal, based on the language of PSSRA, stating:
>
> > In my view, the introductory words of section 90(1) of the Public Service Staff Relations Act must be read as including any person who feels himself to be aggrieved as an "employee". Otherwise a person who, while an "employee" had a grievance – e.g. in respect of classification or salary – would be deprived of the right to grieve by a termination of employment – e.g. by a lay-off. It would take very clear words to convince me that this result could have been intended.
>
> The Federal Court has subsequently confirmed that there is no legal impediment to a bargaining agent negotiating benefits for its members that continue to apply after a member is no longer part of the bargaining unit, and that former employees are entitled to enjoy retroactive benefits that would have accrued during their employment, unless there are "very clear words" denying those former employees that retroactive entitlement.
>
> The PSLRA now specifically addresses the standing of former employees. Section 206(2) of the PSLRA reads:
>
> > (2) Every reference in this Part to an "employee" includes a former employee for the purposes of any

> provisions of this Part respecting grievances with respect to
>
> (a) any disciplinary action resulting in suspension, or any termination of employment, under paragraph 12(1)(c), (d) or (e) of the Financial Administration Act; or
>
> (b) in the case of a separate agency, any disciplinary action resulting in suspension, or any termination of employment, under paragraph 12(2)(c) or (d) of the Financial Administration Act or under any provision of any Act of Parliament, or any regulation, order or other instrument made under the authority of an Act of Parliament, respecting the powers or functions of the separate agency
>
> It is possible that subsection 206(2) actually limits the rights of former employees to bring grievances to the situations enumerated therein; however, the better view is that section 208 is broad enough to encompass grievances by former employees concerning all matters that occurred while they were employees. It is inconceivable that the PSLRA would permit collective agreements to contain retroactive benefits, while at the same time prohibiting former employees from enforcing their right to those retroactive benefits that would have accrued while they were still employed. [Citations omitted. Emphasis added.]

[47] Since it is not disputed that the facts giving rise to the investigation report occurred while the applicant was an employee, I therefore conclude that the applicant was still an "employee" for the purposes of section 208 of the Act and that there was an adequate internal remedy available, namely the grievance process set out in section 18.02 of the Collective Agreement. The fact that the applicant left his employment and retired cannot allow him to circumvent the prescribed proceeding (see *Martell v AG of Canada & Ors*, 2016 PECA 8 at para 22).

[48] It therefore follows that the applicant's argument that, under subsection 206(2), he was unable to file a grievance as a "former employee" given that he had not been suspended or

dismissed, is irrelevant. The applicant was still an “employee” within the meaning of subsection 206(1) for the purposes of his legal right to file a grievance concerning facts that existed while he was still an employee.

[49] As for the applicant’s argument raised at the hearing that he did not have access to adjudication under section 209, the question is also irrelevant here. The applicant may seek judicial review when there is no other adequate remedy. In the event that adjudication was not a remedy that was available to the applicant, he would then be entitled to seek judicial review before this Court following the “final and binding” decision on the grievance at the “final level in the grievance process”, under section 214 of the Act (*Renaud v Canada (Attorney General)*, 2013 FC 18 [*Renaud*] at paras 24–27). A grievance under section 208 remains an adequate remedy even if the grievance is not eligible for adjudication under section 209, and the Federal Court has jurisdiction to hear an application for judicial review once the decision has been rendered at the final level in the grievance procedure (*Gupta FCA* at paras 1–2, 5–6; *Chickoski v Canada (Attorney General)*, 2016 FC 1043).

[50] Until then, for the purposes of section 208, the applicant is still an “employee” and can file his grievance.

[51] The decision in *Price v Canada (Attorney General)*, 2016 FC 649 [*Price*] at paragraphs 6–12 illustrates both aspects. In *Price*, the applicant retired in June 2011, and nevertheless filed a grievance in August 2011 under section 208 of the Act (even though he had retired) regarding the last performance rating assigned while he was an employee. The grievance

was not within the scope of section 209—it was therefore not eligible for adjudication. Since he had reached the "final level of the grievance process" without success, the applicant filed an application for judicial review, which was allowed by the Court on the grounds of breach of procedural fairness (*Price v Canada (Attorney General)*, 2015 FC 696; see also *Renaud*; *Nosistel* at paras 41–43). The applicant in this case may therefore avail himself of his legal right to grieve and, once that process has been completed, he may seek judicial review before this Court, if necessary.

B. *Application Does Not Present "exceptional circumstance" Allowing Court to Hear Judicial Review*

[52] The Court still retains the authority to hear a judicial review, notwithstanding the availability of an internal remedy, where the application presents an "exceptional circumstance". However, the threshold for characterizing a circumstance as "exceptional" is high and does not generally include breaches of procedural fairness committed before the administrative decision was made, or the unreasonableness of the decision itself.

[53] In this case, the applicant alleges three types of errors, namely (a) the lack of professionalism, incompetence, and usurpation of power on the part of the Assistant Commissioner and the investigator; (b) a breach of procedural fairness and an apprehension of bias; and (c) arbitrary findings of fact and the unreasonableness of the decision.

[54] In *Nosistel*, the Court explained the type of circumstances that might be considered "exceptional":

> [53] I recognize that the doctrine of exhaustion allows certain exceptions. However, the range of situations that allow for this general rule to be set aside are narrow since the threshold for exceptionality is high (*CB Powell* at para 33). Exceptional circumstances may emerge in very rare decisions where a court grants a writ of prohibition or an injunction against administrative decision-makers before or after the administrative process has begun. Conversely, concerns raised about procedural fairness or of bias or partiality "are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted" (*CB Powell* at para 33). There are no exceptions in this case that would allow the doctrine of exhaustion to be bypassed. [Emphasis added.]

[55] One of the applicant's main issues was whether the proceedings, and in particular the conflicts of interest of the union members and the investigator's authority, gave rise to a reasonable apprehension of bias. Here again, the *Nosistel* decision states that these are not "exceptional circumstances" giving rise to judicial review, before having first exhausted the appropriate internal remedies available:

> [68] Moreover, I am not convinced that the lack of trust and apprehension of bias alleged by Ms. Nosistel against CSC are sufficient to preclude the case from being referred back to the administrative decision-maker. In *Vaughan*, the Supreme Court warned against accessing the courts to short-circuit the grievance process and avoid having to follow the adjudication provided under it. It also held that absence of recourse to independent adjudication under section 91 of the former scheme (now section 208 of the PSLRA) is not in itself a sufficient reason for the courts to get involved, except on the basis of judicial review.
>
> [69] Moreover, in general, the pleadings filed by Ms. Nosistel do not make it possible to establish the material facts on which her multiple allegations of bias and bad faith by CSC are based. I also find the evidence to be insufficient to support the argument that nearly all of CSC's managers had a conflict of interest or bad faith toward Ms. Nosistel. It cannot be presumed that there is a conflict of interest in the context of addressing grievances: the Supreme Court openly rejected the argument that there is an "institutional bias" in the implementation of grievance processes under the

> PSLRA by senior officials, regardless of the department or agency (*Vaughan* at para 37).
>
> [70] Ms. Nosistel would have had to present facts disclosing a more particular and individualized conflict problem (as in the whistle-blower cases) for other considerations to come into play (*Vaughan* at para 37). Although Ms. Nosistel's Grievances were handled improperly by CSC, the allegations of bias, conflict of interest and bad faith that Ms. Nosistel is trying to make are vague and non-specific and refer more to her former colleagues at CSC than to the decision-makers in this case. I must note that all of these issues raised by Ms. Nosistel are essentially factual in nature, and her allegations of bias do not make it possible at this stage to discredit the entire grievance process to the point of convincing the Court not to refer the case back to CSC.

[56] As was stated in *Vaughan v Canada*, 2005 SCC 11, section 214 of the Act demonstrates Parliament's intent that workplace disputes be resolved through the grievance process, and that the Federal Court should not circumvent the exclusive grievance process set out in section 208 lightly (*Gupta FCA* at para 13).

[57] In *Gupta FCA* at paragraphs 7–8, the Federal Court of Appeal recently noted that breaches of procedural fairness committed before the administrative decision was rendered did not constitute an "exceptional circumstance" allowing a litigant to seek judicial review before exhausting the internal remedies provided. The Court of Appeal pointed out that this principle applies in particular when the alleged breach of procedural fairness is committed in the course of an investigation leading to a management decision that could be the subject of a grievance (see also *Harelkin* at pages 584–585; CB Powell at para 33; *Nosistel* at paras 41–44, 50–53; *McCarthy v Canada (Attorney General)*, 2020 FC 930 at para 35).

[58] In this case, there is insufficient evidence to show that the conflicts of interest or allegations of bias were such as to discredit the entire grievance process, to the point of persuading the Court to allow the applicant to submit his application for judicial review, rather than returning the matter to the administrative decision-maker.

[59] Indeed, it should be noted that the investigator was an impartial third party from the Office of the Ombuds of Fisheries and Oceans Canada. Although the applicant was unable to have recourse to a union representative, because of what he considered to an apparent conflict, he was nonetheless able to make his arguments and submit his evidence to the investigator. If there was a breach of procedural fairness in this case, the circumstance was not so exceptional as to warrant judicial review of the matter. The applicant would be able to make this argument if he was to file his grievance.

[60] Lastly, the applicant is seeking judicial review on the basis that the investigator's mandate was invalid (the Office of the Ombuds had no authority to investigate), that the investigator was incompetent, and that he drew findings from arbitrary facts. In my view, these are substantive issues as to the reasonableness of the decision that must be argued at the grievance stage. These are not "exceptional circumstances" that give rise to judicial review without first exhausting the appropriate internal remedies available.

[61] Thus, given the fact that in this case the alleged breaches occurred during the investigation and decision-making process, the applicant is required to file a grievance and argue his case at that stage.

[62] Although the Court has the discretion to allow the application for judicial review to proceed, the issue is whether the facts are sufficiently exceptional to justify the Court's intervention at this stage. In the present case, Mr. Gosselin has not convinced me that the doctrine of exhaustion of remedies does not apply, or that the facts under consideration allow him to seek judicial review before exhausting existing remedies.

[63] Mr. Gosselin presented no evidence that the grievance process was inadequate in his case. Rather, his argument rests on the fact that, being retired, he simply does not have access to the grievance process. This position is erroneous. Consequently, and despite the fact that the applicant is now retired, he must still submit a grievance before filing an application for judicial review, given that the facts alleged occurred while he was employed by the federal public service.

[64] In fact, the grievance process provides him with an appropriate and adequate remedy. Neither the fact that the applicant is retired, nor the alleged conflict of interest of certain union members, demonstrates a negative predisposition on the part of the employer that would make the proposed internal recourse inadequate. The circumstances are simply not sufficiently exceptional to warrant the Court's intervention.

[65] Lastly, the applicant argued that the delays incurred since the beginning of the proceedings were exaggerated. He pointed out that, as of June 3, 2022, more than 618 days had elapsed since the start of the investigation. In addition, according to the mandate given to the investigator, his final report should have been submitted more than a year earlier, on May 31,

2021. The applicant relied on requirement 6.1.1 of the *Directive on the Harassment Complaint Process*, which stipulates that the investigator must, among other things, ensure that the harassment complaint process is carried out without delay.

[66] In my opinion, the alleged delay is not a sufficiently exceptional fact that would warrant the Court's intervention at this stage. As has been pointed out in *Gupta FCA*, some cases take more than five or even ten years. In this case, similarly to *Gupta FCA*, a period of approximately two and a half years was "not inordinately long in light of the need for an investigation and detailed nature of the appellant's submissions to the investigator" (*Gupta FCA* at para 11).

V. Conclusion

[67] In the present case, the applicant has access to the grievance process and must avail himself of this appropriate remedy before applying to the Court for judicial review. In addition, no facts are sufficiently exceptional to justify circumventing the normal rule requiring the applicant to exhaust available internal remedies, namely the grievance procedure in this case (*Gupta FCA* at paras 13–14).

[68] Lastly, in his Memorandum of Fact and Law, the respondent claims costs. However, no argument has been presented in support of these, nor as to the amount claimed. In the circumstances of this application, where an important issue has been brought before the Court, the Court exercises its discretion not to grant costs against the applicant.

JUDGMENT in T-1345-22

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed, without costs.

"Guy Régimbald"
Judge

Certified true translation
Sebastian Desbarats

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1345-22
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PLACE OF HEARING:	QUÉBEC, QUEBEC
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APPEARANCES:

Benoît Gosselin	FOR THE APPLICANT (ON HIS OWN BEHALF)
Daniel Côté-Finch	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT