Federal Court  Cour fédérale

Date: 20130111

Docket: T-1111-10
T-669-11

Citation: 2013 FC 18

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, January 11, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

CHANTAL RENAUD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicant, Chantal Renaud, is a former employee of the Financial and Administrative Services Directorate of the Office of the Privacy Commissioner of Canada [the Office of the Commissioner, or the employer]. She is seeking judicial review of a decision of Privacy Commissioner Jennifer Stoddart [the Commissioner] dated March 18, 2011, by which the Commissioner dismissed two final-level grievances filed by the applicant under the internal

grievance resolution procedure adopted in accordance with section 208 of the *Public Service Labour Relations Act*, SC 2003, c 22 [the PSLRA].

[2] After a long investigation, it was concluded, under the terms of the impugned decision, that two workplace harassment complaints filed by the applicant against two employees in the directorate to which she reported in the course of her duties—namely, Patricia Garand, Director, Financial and Administrative Services; and Tom Pulcine, Director General, Corporate Services—were unfounded. The applicant is not contesting the merits of the findings of the decision maker; instead, she argues that the principles of procedural fairness were breached at various stages in the investigation and handling of her grievances.

[3] Having considered the evidence on record and the oral and written submissions of the parties, and having deliberated on the issues raised by the parties, I conclude that the intervention of this Court is not required in the present case, although I am of the opinion that there were certain irregularities in how the investigation of the applicant's harassment complaints was handled. Let me explain.

II. Factual background

[4] The applicant was hired in October 2007 to work as a financial officer in the Financial and Administrative Services Directorate of the Office of the Commissioner. Her immediate superior at the time was John McKinley, who in turn reported to Mr. Pulcine.

[5] The applicant has been living with chronic juvenile rheumatoid arthritis since the age of 12. In June 2008, she had to take time off from work because of problems with her knees, and this time off turned into a period of long-term sick leave lasting from June 30 to September 30, 2008.

[6] During her absence, Mr. McKinley resigned, and his position remained vacant until October 8, 2008, when it was filled by Ms. Garand. In the interim, Mr. Pulcine apparently became more involved in managing Financial and Administrative Services; he retained the services of a consultant, Pamela Grochot, to supervise the employees until Ms. Garand could assume her duties, and some employees had to take on new tasks.

[7] When she returned to work on October 1, 2008, the applicant handed Mr. Pulcine a request for reimbursement of tuition fees for a part-time CMA/MBA program, in accordance with a verbal agreement made with Mr. McKinley when she was hired, so she claims. Mr. Pulcine asked her to wait until Ms. Garand's arrival before submitting all the relevant documentation. It was also at this time that the applicant learned that the Financial and Administrative Services Directorate would be restructured and that some changes would be made to her work description.

[8] When she arrived, Ms. Garand was instructed to restructure the Financial and Administrative Services Directorate of the Office of the Commissioner and to fix certain problems with operations and interpersonal relations that appeared to have surfaced after Mr. McKinley left.

[9] Even before Ms. Garand arrived, the applicant had expressed her unhappiness with not having exactly the same work description upon her return to work, including the supervision of employees, and with the fact that one of the employees in the group, Caroline Moloughney, was now carrying out certain duties that had previously been assigned to her and that this same employee had been promoted from the AS-3 level to the F1-1 level (the applicant was an F1-2 level employee). The applicant even contacted the Office of the Auditor General to find out whether certain duties now assigned to Ms. Moloughney could actually be performed by an F1-1 level employee.

[10] When she started working in her position on October 8, 2008, Ms. Garand held a meeting with all employees to introduce herself and tell them about the nature of her mandate. She informed the employees that until further notice, the status quo would be maintained and that everyone would be reporting to her.

[11] Right from the earliest contacts between the applicant and Ms. Garand, the question of reimbursing the applicant's tuition fees was raised. Ms. Garand asked the applicant questions about this and, after consulting with the accounting department, determined that this expense had not been approved in advance, in writing, as required by the policy then in force. Despite Ms. Garand's initial refusal, on December 24, 2008, the applicant was reimbursed for her university fees for the fall 2008 semester, further to the claim she had submitted on October 1, 2008. However, in December 2008, Ms. Garand met with the applicant and told her that the employer would be enforcing the existing policy and would no longer provide financial

assistance for her education or granting her leave to pursue her studies, as had been the case up to that time.

[12] Furthermore, at a staff meeting held on October 30, 2008, in connection with the restructuring project assigned to Ms. Garand, the applicant learned that certain organizational changes would be introduced in the directorate, resulting in a new work description for her and for the employees who previously reported to her. It is alleged that the applicant openly expressed her dissatisfaction with this, which surprised Ms. Garand and prompted her to reply that if any employees were not happy, they could send her their résumés, and she would help them find other jobs in the public service (this incident will be dealt with later in these reasons).

[13] The applicant went on sick leave again from January 14 to February 13, 2009. During her absence, Ms. Garand set up a new Finance Accounting Operations communication group. The applicant learned through one of her colleagues that her name was not on the email distribution list for this group. On January 25, 2009, she sent Ms. Garand an email stating that, given her varied tasks, she too should be part of this new group. Ms. Garand allegedly did not respond to this email, so the applicant contacted the information technology department and asked that her name be added to the list in question. Shortly thereafter, she noticed that she had been removed from the list again.

[14] In February 2009, Ms. Garand asked the applicant to provide more details about her training and her university diplomas. She also informed the applicant that her checks had

indicated that the applicant's tuition reimbursement claim included interest charges for a late payment.

[15] On March 4, 2009, the finance group held a meeting, but the applicant was not invited to take part in it. One employee reportedly asked Ms. Garand why the applicant was not there and was told that the applicant was too busy to attend.

[16] The work environment became increasingly fractious and difficult for the applicant. She stopped communicating by email with Ms. Garand and refused to meet with her in person. Near the end of February 2009, she asked Mr. Pulcine to move her further away from Ms. Garand, but he refused to do so. Mr. Pulcine had to remind the applicant several times that Ms. Garand was still her immediate superior.

[17] On March 11, 2009, the applicant filed her first psychological harassment complaint against Ms. Garand. In March 2009, the applicant received a warning from Mr. Pulcine to the effect that it was important that she keep any discussions regarding this harassment complaint confidential. On several occasions, the applicant repeated her request to be separated from Ms. Garand before she went on sick leave again on April 2, 2009. On April 7, 2009, she handed in a doctor's note recommending that she be separated from Ms. Garand, and when she returned to work on April 15, 2009, she was assigned an office on the second floor and was told that she now reported to Mr. Pulcine.

[18] On May 4, 2009, the applicant filed a second psychological harassment complaint, this time against Mr. Pulcine, in which she essentially alleges that he abused his authority over her, made degrading remarks about the quality of her work and repeatedly threatened her with disciplinary action.

[19] On June 29, 2009, the employer hired Quintet Consulting Corporation [Quintet] to analyse the applicant's complaints and allegations in relation to the *Policy on the Prevention and Resolution of Harassment in the Workplace* [the Policy]; on November 2, 2009, Quintet was instructed to investigate the allegations that were deemed admissible. Quintet submitted two preliminary reports on May 1, 2010, and its final reports on September 30, 2010. It concluded that all of the applicant's complaints and allegations should be rejected.

[20] On May 8, 2009, the applicant went on long-term sick leave again, and on August 6, 2010, at the employer's request, an occupational health medical officer from Health Canada assessed her state of health. After conducting this assessment, Health Canada informed the employer that for purely medical reasons, the applicant was unable [TRANSLATION] "to re-enter the labour force in her former place of work . . ." but could hold another equivalent position (Letter from Dr. John Given, October 15, 2010). On the day of the hearing before this Court, the applicant had been working in another position in the public service for more than two years and seemed perfectly content in this position.

[21] However, before leaving her job, the applicant filed several individual grievances against her employer under subparagraph 208(1)(*a*)(i) of the PSLRA, including the two final-level grievances which are the subject of this application for judicial review.

[22] The other grievances concern a complaint against the new work description that was imposed on her when she returned from sick leave in October 2008 (filed on December 8, 2008), a complaint against the employer's initial refusal to reimburse her tuition fees in November 2008 (filed on March 11, 2009) and a complaint against a disciplinary action taken against the applicant on April 1, 2009 (filed on April 24, 2009), on the ground that the disciplinary action amounted to discrimination on the basis of her disability. The last grievance was brought before this Court for judicial review after being rejected by the employer. After the hearing on the merits in December 2010, the applicant discontinued her application for judicial review.

[23] Before examining the procedure that ended in the rejection of the grievances at issue, I think it is helpful to briefly review the statutory framework for the individual grievance process in the public service, as well as the policies applicable to the present case.

III. Statutory framework governing grievances in the public service

The PSLRA

[24] Under the special scheme of the PSLRA, only grievances related to an arbitral award, the interpretation or application of a collective agreement or a disciplinary action resulting in termination, demotion, suspension or financial penalty may be referred to adjudication (section 209 of the PSLRA). However, subsection 208(1) defines the wide scope of the right of

public service employees to present an individual grievance concerning any other decision or action by the employer that deals with their conditions of employment, subject to certain exceptions which do not apply in the present case. This provision is worded as follows:

208. (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	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*) by the interpretation or application, in respect of the employee, of	*a*) par l'interprétation ou l'application à son égard :
(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	(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) a provision of a collective agreement or an arbitral award; or	(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale
(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment	*b*) par suite de tout fait portant atteinte à ses conditions d'emploi

[25] As I have already mentioned, the complaints against Ms. Garand and Mr. Pulcine were made under subparagraph 208(1)(*a*)(i) of the PSLRA. The applicant presented them because she feels aggrieved by the application, in respect of her, of an instrument made or issued by the employer that deals with her conditions of employment, specifically, the application of the

Policy, which was not contemplated in the collective agreement covering the applicant at that time.

[26] According to the case law of this Court, there is a "sharp divide between matters that can be referred to adjudication and those that cannot under the scheme of the Act" (*Boudreau v Canada (Attorney General)*, 2011 FC 868 at para 20 [*Boudreau*]). Individual grievances filed under subsection 208(1) of the PSLRA are heard and decided in accordance with the procedures established under the policies of the employer that were in force at the relevant time. This is a purely internal grievance resolution procedure leading to a "final and binding" decision at the final level, with no further action being allowed to be taken under the PSLRA. Section 214 of the PSLRA provides as follows:

214. If an individual grievance has been presented up to and including the final level in the grievance process and it is not one that under section 209 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken on it.	214. Sauf dans le cas du grief individuel qui peut être renvoyé à l'arbitrage au titre de l'article 209, la décision rendue au dernier palier de la procédure applicable en la matière est définitive et obligatoire et aucune autre mesure ne peut être prise sous le régime de la présente loi à l'égard du grief en cause.

[27] In *Vaughan v Canada*, 2005 SCC 11, [2005] 1 SCR 146 [*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.

[28] At paragraph 37 of that decision, Justice Binnie, writing on behalf of the majority, rejects the idea that this type of internal procedure could raise concerns regarding the institutional impartiality of the decision maker, in that case, one of the employer's senior officials:

> . . . Efficient labour relations is undermined when the courts set themselves up in competition with the statutory scheme (*St. Anne Nackawic*, at p. 718; *Weber*, at para. 41; *Regina Police*, at para. 26). I do not agree with the appellant's broad suggestion, however obliquely made, that the departmental procedure reeks of conflict of interest. The appellant's own success with his 1995 grievance shows this not to be true in practice. The suggestion that departmental officials have an interest in denying ERI benefits to an employee who comes within the applicable policies so as to constitute some sort of institutional bias is simply not credible. If the facts in another case were to disclose a more particular and individualized conflict problem (as in the whistle-blower cases) other considerations will come into play.

[29] The Federal Court of Appeal, too, addressed the issue of impartiality in *Canada (Attorney General) v Assh*, 2006 FCA 358, in which it was asked to identify the criteria to be used to assess potential conflicts of interest under certain Treasury Board Secretariat policies. Writing on behalf of the Federal Court of Appeal, Justice Evans held that a reviewing court must apply a less deferential standard of review to remedy any injustices that could result from having a public servant's grievance be decided by the employer rather than by a third party:

> . . . I said in *Vaughan* (at paragraph 139) [*Vaughan v Canada*, [2003] 3 FC 645 (CA)] <u>that the informal nature of the grievance process under section 91 [now section 208 of the PSLRA], and the</u>

> fact that it is not independent of the employer, suggest that a court should not afford much deference to internal grievance boards' decisions on questions that are not purely factual in nature. As already noted, Mr. Assh had no right to refer his grievance to an independent Adjudicator under section 92 [now section 209 of the PSLRA].
>
> On the other hand, it is appropriate, in my opinion, for the Court to give due consideration to the Department's factual assessment of the characteristics of their clientele and the nature of the relationship that they have with Veterans Affairs' employees.
>
> On balance, this factor suggests that correctness is the appropriate standard of review on the interpretation of the Code's apparent conflict of interest provisions and, subject to the point made in the previous paragraph, their application to the facts of a particular case.
>
> [Emphasis added]

[30] Author Christopher Rootham's remarks on this subject are also of some interest. In *Labour and Employment Law in the Federal Public Service*, Toronto: Irwin Law (2007), at pages 308-9, he notes that in the context of access to information requests, the Supreme Court has already endorsed the approach of Justice Evans of the Federal Court of Appeal, according to which senior officials of federal institutions "are likely to have an institutional predisposition towards restricting the public right of access and construing the exemptions broadly" (see *Macdonell v Quebec (Commission d'accès à l'information),* 2002 SCC 71 at para 8). This raises the question of why such institutional biases would be less likely in an internal grievance procedure where certain relatively considerable institutional interests would come into play.

[31] On this point, I note with respect that I think that the effectiveness and the legitimacy of the internal grievance procedure provided for under section 208 of the PSLRA will only be

guaranteed if the reviewing court exercises its residual jurisdiction while bearing in mind the particular features of the statutory scheme, such as the absence of an independent decision maker, for instance, although this could be a relatively conclusive factor, depending on the circumstances (*Vaughan*, above, at para 22).

[32] Finally, it should be noted that a recent line of authority in this Court and in the Federal Court of Appeal points out that section 214 of the PSLRA is a relatively weak privative clause, and that the absence of an independent decision maker at the final level of the procedure should be interpreted as a factor favouring a lower degree of deference (see *Appleby-Ostroff v Canada (Attorney General),* 2010 FC 479 at paras 15-16, affirmed on this point in 2011 FCA 84 at paras 20-23; *Backx v Canada (Canadian Food Inspection Agency),* 2010 FC 480 at para 22).

[33] As regards psychological harassment, the respondent submits that the employer is a third party in relation to the complainant and to the employee or employees named in the complaint, the ultimate objective of the employer being, rather, to provide a peaceful and harassment-free workplace. Although this argument may have some foundation in theory, it must be nuanced where, as in the case of Mr. Pulcine, the employee named in the complaint is at a hierarchical level close to that of the senior executives of the department or organization concerned.

Grievance procedure under the Policy on Harassment

[34] On June 1, 2002, the Treasury Board, in its capacity as the employer of the federal public service, introduced a process for ensuring a harassment-free workplace. The definition and the examples of conduct constituting harassment within the meaning of the Policy set out a broader

concept of harassment than the grounds of discrimination under the *Canadian Human Rights Act*, RSC, 1985, c H6, and impose specific requirements designed to foster the prevention and effective resolution of complaints related to harassment in the public service.

[35] The complaint resolution process includes six steps that must be taken without undue delay, that is, normally within a period of less than six months: (1) the complainant files a written complaint with the delegated manager, who is a senior official who has been designated as the person accountable for handling the complaint; (2) the delegated manager acknowledges receipt of the complaint and evaluates its compliance with formal requirements; (3) the delegated manager reviews the content of the complaint to ensure that it does indeed concern allegations of harassment; (4) the delegated manager proposes mediation; (5) if mediation is not undertaken or has not resolved the complaint, an independent investigator conducts an investigation and prepares a report of the findings and proposed conclusions; and (6) the delegated manager or the employer makes a decision or takes corrective action.

[36] Given their crucial role throughout the process, the Policy provides that delegated managers "are expected to be impartial in any complaint process in which they are involved" and "are expected to apply the established steps in the complaint process". As regards investigations, the Policy provides that the delegated manager is expected to "assign a mandate to the investigator(s) and ensure that persons conducting investigations are qualified in accordance with the Competencies Profile for Internal and External Harassment Investigators, that they are impartial, that they have no supervisory relationship with the parties, and that they are not in a position of conflict of interest".

[37] Investigators are expected "to abide by their assigned mandate" and "apply the principles of procedural fairness". Another obligation that is relevant to the present case is the investigator's obligation to have complainants, respondents and witnesses review "their statement as recorded by the investigator, to confirm its accuracy, prior to the final report being submitted". The investigator is therefore expected to receive written confirmation of the accuracy of the testimonies and to make any necessary changes to the final report.

[38] The investigation is subject to the requirements set out in the *Investigation Guide for the Policy on Harassment Prevention and Resolution and Directive on the Harassment Complaint Process* [Investigation Guide]. The Investigation Guide defines five criteria that must be met to justify a finding of workplace harassment:

> To substantiate the allegations, the investigation must demonstrate that, according to the balance of probability:
>
> a. The respondent displayed an **improper and offensive conduct** including objectionable acts, comments or displays, or acts of intimidation or threats, or acts, comments or displays in relation to a prohibited ground of discrimination under the *Canadian Human Rights Act*;
>
> b. The behaviour was **directed at** the complainant;
>
> c. The complainant was **offended or harmed**, including the feeling of being demeaned, belittled, personally humiliated or embarrassed, intimated or threatened;
>
> d. The respondent **knew or reasonably ought to have known** that such behaviour would cause offence or harm; and
>
> e. The behaviour occurred in the **workplace** or at any **location or any event related to work**, including while on travel status, at a conference where attendance is sponsored by the employer, at employer sponsored training

> activities/information sessions and at employer sponsored events, including social events.

[39] The Investigation Guide lays out the seven stages of an investigation. It establishes the timetable applicable to each of the stages and allows the parties to react as the investigation unfolds. At the various stages of the investigation, the investigator is expected to

(i) accept the employer's mandate and "[conduct] an independent investigation in a thorough, timely, discreet, and sensitive manner";

(ii) as a preliminary step, gather information, review the allegations, clarify them, corroborate the information with the parties and prepare an investigation plan;

(iii) interview each party and the witnesses and identify the relevant facts. At this stage, the Policy provides that the investigator is subject to the principles of procedural fairness described in Section II of the Investigation Guide. The investigator is required to, among other things, uphold the right to be heard and to present evidence, the right to review statements to confirm their accuracy and the right to access and rebut the findings;

(iv) after having validated the relevant facts with the parties, prepare and present to the delegated manager and the parties a preliminary summary of facts including a concise statement of the allegations and a description of the context and the evidence gathered for each allegation;

(v) collect all "additional information" provided by the parties and incorporate it into the report;

(vi) determine whether, on the basis of the "final disclosure of the facts" and on the balance of probabilities, the alleged behaviour occurred and, if so, whether the behaviour meets the definition of harassment set out in the Policy; and

(vii) prepare the final report relying on the information from the final disclosure of the facts and make recommendations to the delegated manager regarding the complaint and the allegations.

IV. Procedure followed in handling the applicant's harassment complaints

[40] In accordance with the procedure implemented by the Policy, Maureen Munhall, Director, Human Resources Management, was appointed to manage the process for resolving the applicant's harassment complaints. It was Ms. Munhall who gave Quintet the mandate to investigate the two complaints.

i. Beginning of the investigation: evaluating the admissibility of the allegations

[41] The initial review of the complaints was assigned to Mr. Morissette from Quintet. A first meeting was held in August 2009 between Mr. Morissette and the applicant and her union representative. The purpose of this meeting was to evaluate the main elements of the two complaints to determine whether the allegations met the definition of harassment set out in the Policy.

[42] On October 22, 2009, a summary and evaluation of the allegations in the harassment complaints was sent to the applicant. Regarding the complaint against Ms. Garand, it was

decided that there was cause for investigation into the allegations related to the negative impact of the reorganization of Financial Services in the Office of the Commissioner, the difficulties associated with the reimbursement of the applicant's tuition fees, the problems with the requests for education leave and other types of leave, and the breach of an alleged verbal agreement concerning the applicant's CMA/MBA courses.

[43] As for the harassment complaint against Mr. Pulcine, the applicant accused him of having taken various reprisals against her after she made her complaint against Ms. Garand, particularly by not keeping to her work schedules, by making negative remarks about her complaint, by changing her duties and functions, by keeping Ms. Garand as her immediate supervisor and by refusing to reimburse her for parking or taxis.

[44] In both cases, certain allegations were deemed to be inadmissible, and although the applicant expressed her dissatisfaction with this at first, she followed the recommendation of her union representative and waited for the results of the investigation before filing a grievance.

ii. Preliminary investigation reports

[45] On May 19, 2010, the applicant received copies of the preliminary investigation reports prepared by Ms. Paradis, regarding her complaints against Ms. Garand and Mr. Pulcine, respectively. The issues raised in the complaint against Ms. Garand were summarized by Quintet as follows:

1. Did Ms. Garand harass Ms. Renaud during the restructuring by excluding her from the consultation process and taking away some of her responsibilities?

2. Did Ms. Garand harass Ms. Renaud by breaching the conditions of the verbal agreement between her and Mr. Kinley regarding her CMA/MBA program?
3. Did Ms. Garand harass Ms. Renaud by not respecting her absences and leave requests related to her CMA/MBA program?
4. Did Ms. Garand harass Ms. Renaud by bullying her and by repeatedly breaching the training agreement?

[46] The issues raised in the complaint against Mr. Pulcine were summarized as follows:

1. Did Mr. Pulcine harass Ms. Renaud by summoning her to a meeting without considering her working hours or an appointment she had, and by telling her that he would decide the outcome of her complaint and that she would not win?
2. Did Mr. Pulcine harass Ms. Renaud by not immediately removing her from Ms. Garand's supervision?
3. Did Mr. Pulcine harass Ms. Renaud by changing her functions and by taking other action stemming from these changes, such as restricting overtime, reminding her to keep the harassment proceedings confidential and prohibiting her from contacting staff in Finances for advice?
4. Did Mr. Pulcine harass Ms. Renaud by refusing to reimburse her for parking and by denying her leave to prepare for an exam?

[47] In a letter appended to the preliminary reports, Ms. Munhall invited the parties and their witnesses to submit their written comments on the contents of the reports directly to Ms. Paradis.

[48] Neither report contains any conclusions or comments by the investigator. They simply summarize the testimonies and certain relevant excerpts from the documentary evidence presented by the applicant, the respondents and the witnesses.

[49] On June 14, 2010, the applicant submitted her comments on the preliminary reports to the investigator. These comments were contained in a 38-page document for the complaint against Ms. Garand and a 50-page document for the complaint against Mr. Pulcine. In these comments, she alleges that the investigator was not impartial, that part of her own testimony was omitted, that the employer's evidence consisted of hearsay unsupported by documentary evidence, and that the investigator placed too much importance on the testimonies of two external consultants who did not personally witness the events and whose testimonies had more to do with her abilities than with the facts surrounding her harassment complaints.

[50] On that same occasion, the applicant asked that signed copies of the statements of four witnesses she had called, namely, Lise Fecteau and Marielaine Hang (co-workers), Johanne Séguin (Support Officer, Technology Management) and Julie Latour (Workplace Health and Safety Officer), be sent to her. According to the applicant, their version of the facts as summarized in the preliminary reports did not accurately reflect the testimonies given. The applicant repeated her request in writing on October 3 and again on October 10, 2010, before finally being told that she could not have access to the witnesses' written statements before the end of the investigation, on the ground that the investigation file belongs to the employer.

[51] In the months from June to December 2010, the applicant was unsuccessful in obtaining copies of the witnesses' statements despite her efforts and her repeated requests to the investigator and the employer. Finally, in response to a formal access to information request, the applicant was informed that her witnesses had not signed their statements and that Ms. Fecteau and Ms. Hang, after reading the preliminary reports, had asked by email that corrections be made to their statements.

iii. Dismissal of grievances regarding the preliminary reports

[52] On June 14 and 20, 2010, the applicant filed two grievances against Ms. Paradis, one for each of the preliminary investigation reports. Ms. Munhall rejected both grievances at the first and second levels because the investigation process was still ongoing and no decision had been made yet. Ms. Munhall added that the reports in question had been sent out simply to allow the parties to comment on the evidence that had been presented.

[53] The applicant did not wait until the end of the investigation. By application for judicial review, dated July 13, 2010, she asked this Court to intervene with regard to Ms. Munhall's decisions to refuse to accept her grievances (docket T-1111-10).

[54] In support of her application for judicial review, the applicant relies on the same grounds as those rejected by Ms. Munhall. She confirmed at the hearing that this application was not moot, since neither the final reports nor the third-level decision corrected the problems with the preliminary reports.

iv. Final reports and rejection of grievances

[55] The final investigation reports were completed on September 30, 2010. By letter dated October 19, 2010, Commissioner Stoddart notified the applicant that her complaints had been rejected on the basis of the conclusions of the final reports by Quintet.

[56] In these reports, Quintet concludes that the applicant's main allegations against Ms. Garand and Mr. Pulcine were unfounded, either because the evidence did not establish the likelihood that the alleged behaviour occurred, or because the alleged behaviour was not "harassment" within the meaning of the Policy. On this point, the investigator states that only the factual observations of the parties and witnesses, not their hypothetical analyses or conclusions sought, were considered in the final reports.

v. Third-level decision by Commissioner Stoddart

[57] On November 22, 2010, the applicant filed another individual grievance under subparagraph 208(1)(*a*)(i) of the PSLRA regarding the decision of Commissioner Stoddart to reject her harassment complaints on the basis of the final reports. The applicant felt aggrieved by an incorrect application of the Policy in respect of her. She submitted that, among other things, the investigator was not impartial and fair, did not comply with the principles of procedural fairness, was biased and did not make sure that each person was heard and had fair opportunity to present his or her position, in accordance with the Policy. She added that the investigator did not meet the criteria set out in the Competencies Profile for Internal and External Harassment Investigators, to which the Policy refers.

[58] The applicant argues that her complaint was rejected on the strength of erroneous testimonies, as the investigator refused to correct the statements by Ms. Fecteau, Ms. Hang and Ms. Latour that she had recorded. In support of this argument, the applicant filed affidavits by Ms. Fecteau, Ms. Hang and Ms. Latour, sworn in December 2010. Copies of these affidavits were allegedly hand delivered to Commissioner Stoddart for the grievance hearing.

[59] The testimonies of Ms. Fecteau, Ms. Hang and Ms. Latour basically concern the meeting held on October 30, 2008, at which Ms. Garand allegedly said that if the employees were unhappy with their new duties, they could send her their résumés so she could help them find another job in the public service. The applicant alleged in her harassment complaint against Ms. Garand that this remark was aimed at her personally.

[60] According to the preliminary and final reports on the complaint against Ms. Garand, none of the witnesses could remember what exactly Ms. Garand had said. However, Ms. Fecteau, Ms. Hang and Ms. Latour state in their affidavits that they remember the meeting and what Ms. Garand said perfectly, and that after they received the preliminary report, they sent the investigator their comments and asked her to change their stories with regard to this point. The final report does not reflect the requested changes.

[61] The applicant adds that the investigator censored and falsified the testimony of Ms. Latour, and that she failed to consider Ms. Séguin's testimony, which was favourable to the applicant. We will return later to the content and relevance of these testimonies.

[62] The final-level grievance hearing was held on February 8, 2011, before Commissioner Stoddart. In her final-level grievance, which is the subject of this application for judicial review, the applicant challenged the conclusions of the two final investigation reports on which the Commissioner had relied in rejecting her harassment complaints on October 19, 2010. Basically, the applicant alleged that the investigator had not acted impartially and fairly towards her and had breached the principles of procedural fairness.

[63] The grievance was rejected in its entirety by letter dated March 18, 2011. The reasons for this decision are terse, but Commissioner Stoddart states that she considered all the documents filed by the applicant and that Quintet's representatives were consulted for additional information regarding the questions raised by the grievance. Concerning the new versions of the testimonies of Ms. Fecteau, Ms. Hang and Ms. Latour, Quintet's representatives state that they did not have any impact on the conclusions of the investigation. Commissioner Stoddart adds that, having reviewed the documents submitted, she is satisfied that the investigation was conducted in accordance with the Policy and that the investigator did not breach the principles of procedural fairness. She therefore upheld her decision of October 19, 2010.

[64] On April 18, 2011, the applicant filed an application for judicial review of the Commissioner's decision to reject her final-level grievance (docket T-669-11). On May 16, 2011, Madam Prothonotary Tabib ordered that the two applications for judicial review (dockets T-1111-10 and T-669-11) be heard jointly. These reasons contain the relevant facts, the analysis and the Court's decision regarding the two applications for judicial review made under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

V. Issues

[65] Although the parties have framed them differently, the issues raised in this case may be summarized as follows:

1. Which decision(s) should this application for judicial review concern?
2. What is the appropriate standard of review?
3. Did the investigation process meet the requirements set out in the Policy on harassment?
4. Did the Commissioner breach the principles of procedural fairness in rejecting the applicant's third-level grievance?
5. Preliminary issue: Which decision(s) should this application for judicial review concern?

[66] The applicant is self-represented. Convinced that her harassment complaints are well founded, she is asking this Court to appoint a new investigator to conduct a new, impartial and competent investigation that respects the principles of procedural fairness. She is also asking that her file be referred back to a delegated manager appointed by the Labour Relations Board. Finally, she is seeking monetary compensation for the investigator's alleged breaches of the principles of procedural fairness, as well as lost wages and benefits.

[67] The applicant's cause of action is limited to the breaches of procedural fairness. She accuses the Commissioner of failing to comply with the requirements of the Policy and of not trying to correct the procedural irregularities that occurred at various stages of the investigation,

but she is also challenging, more generally, the conclusions of the final investigation reports, as well as the summary of the testimonies and the framing of the issues. The applicant submits that from the beginning of the investigation process, Mr. Morissette refused to hear all the events of the complaint chronologically because, she claims, he wanted to protect the respondents. She further submits that Ms. Munhall was not impartial in her work as delegated manager because she refused to hear her grievance against the preliminary investigation reports, and that Ms. Paradis breached in a number of respects the procedural fairness duties which all investigators have under the Policy and the Investigation Guide.

[68] The respondent is of the opinion that the conclusions of the investigation reports should not be attacked directly by application for judicial review, given that these conclusions could be, and in fact were, challenged in a grievance under section 208 of the PSLRA.

[69] The respondent's argument that, in principle, the Court should limit this judicial review to the decisions rendered by the administrative decision maker at the final grievance level is correct.

[70] Thus, the decisions of Ms. Munhall finding that the applicant's grievances of June 14 and June 21, 2010, regarding the preliminary report, were inadmissible so long as a final decision had not been made are not directly subject to judicial review. At this stage of the proceedings, the application for judicial review was clearly premature.

[71] It is therefore the decision of Commissioner Stoddart rejecting the applicant's final-level grievance which must be reviewed. However, since the Commissioner and the delegated manager seem to rely essentially on the conclusions of the investigation reports in their decisions, and given the brevity of the reasons given by the Commissioner, I am of the opinion that it is up to the Court to more closely examine the procedure followed, including the conduct of the investigation that led to the rejection of the applicant's harassment complaints.

[72] The individual grievance presented to the Commissioner concerned the application of the Policy and the Investigation Guide in respect of the applicant, and this is what the Court must review. It would be impossible for the Court to review the Commissioner's final decision independently of the investigation process and its conclusions since the Commissioner has given no reasons for decision and has essentially adopted Quintet's conclusions.

VI. Applicable standard of review

[73] The question of which standard of review should apply to the substantive conclusions of the impugned decision is not in issue here since, as was mentioned above, the applicant's arguments are limited to breaches of procedural fairness.

[74] The parties agree that the standard applicable to questions of procedural fairness is the correctness standard of review (*Sketchley v Canada*, 2005 FCA 404 at paras 46 and 111; *Hagel v Canada (Attorney General)*, 2009 FC 329, at para 28 [*Hagel*]). However, they did not address the issue of the nature and scope of the duty of fairness that applies in the context of a workplace harassment grievance.

[75] It has been trite law since *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], that the duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular case. The Supreme Court of Canada has set out the following non-exhaustive list of factors to be considered: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the decision-making body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the decision-making body.

[76] Weighing the factors that are the most relevant to the present case, I come to the conclusion that the duty of procedural fairness lying on a decision maker in the context of a grievance that includes allegations of harassment is a heavy one. First, a decision made in response to a workplace harassment complaint clearly may have serious consequences for everyone involved (not only the alleged victim, but also the respondents) and may compromise their respective personal and professional interests. On this point, I adopt the following remarks of Justice Gibson in *Puccini v Canada (Director General, Corporate Administrative Services, Agriculture Canada)* (TD), [1993] 3 FC 557, at para 28:

> The laying of an harassment complaint is a serious matter. It exposes the complainant to serious prejudice. The laying of the complaint will inevitably become known in the workplace. The atmosphere there will inevitably become difficult. Sides will be taken. Relationships will be strained. . . . In each case of abuse of authority there is by definition a power imbalance. The complainant risks further abuse, however subtle, of that imbalance. On the other side, the alleged harasser will also suffer in terms of

> prestige, reputation, possible loss of authority and respect. It is therefore important that steps be taken to mitigate the negative effects and to deal with the complaint quickly. But it is at least equally important that the complaint be dealt with fairly, both in terms of the complainant and the alleged harasser.

[77] Several characteristics of the statutory scheme governing non-adjudicable individual grievances, such as the skeletal nature of the procedural protections afforded by the PSLRA in this type of grievance, the absence of an independent decision maker and the "final and binding" nature of the decision, subject to the availability of judicial review, also favour finding a heavy duty of procedural fairness (see *Hagel*, above, at para 34).

[78] Although the process provided for in the Policy is an informal administrative process, it is not unthinkable that the duty of fairness would be of the same intensity in a workplace harassment grievance as it is in a classification grievance (see *Hagel*, above, at para 35). The Policy describes in detail the various steps to be taken and the rules that apply when presenting a harassment grievance, while a designated manager of the employer manages the complaint and follows up on the investigation in accordance with the grievance resolution mechanism under section 208 of the PSLRA. All this creates, in my view, a legitimate expectation (in terms of fairness and transparency in the decision-making process) on the part of the complainant, who is entitled to expect that the procedure set up by the employer is followed in every respect.

[79] I now turn to the applicant's arguments concerning, directly or indirectly, the Commissioner's decision to reject the grievances at issue.

VII. Did the investigation process meet the requirements set out in the Policy on harassment?

[80] The applicant is challenging several aspects of the process followed in handling her harassment complaints. Having heard the applicant's oral arguments, I am of the opinion that, on the whole, the investigation was conducted impartially and fairly, but that, in a number of instances, the process fell short of meeting the specific requirements of the Policy and the investigator and the employer were somewhat less than transparent.

[81] The arguments of the applicant are as follows, in chronological order.

Investigation and investigation reports

[82] The applicant submits that right from the first stage of the investigation, Quintet refused to investigate the 15 allegations she made with the help of her union representative. She also says that Ms. Munhall and Commissioner Stoddart both refused to listen to her when she wrote to them on this subject. Although those decisions are not the subject of the present judicial review, I am of the opinion that there was no wrongdoing in the preliminary assessment of the allegations. The fact that the applicant's many allegations were whittled down to four main ones against each of the respondents does not mean the applicant did not have the opportunity to be heard. The purpose of her meeting with Mr. Morissette was to verify all the allegations and to determine whether they met the definition of harassment set out in the Policy. All this is perfectly consistent with the procedure established under the Policy and the Investigation Guide. Having read the decisions dated October 22, 2009, of Ms. Munhall, I find that many of the alleged facts were grouped together under other allegations, as opposed to ignored, as the applicant claims.

Moreover, these conclusions regarding the lack of factual evidence and the absence of a *prima facie* case for investigation are clear and exhaustive. This argument is, in my view, without merit.

[83] The applicant submits that the investigator did not meet the criteria listed in the Competencies Profile for Internal and External Harassment Investigators, but she does not specify the criteria that Ms. Paradis allegedly does not meet, nor does she offer any evidence supporting this allegation. This argument, too, is without merit.

[84] The applicant raised several questions regarding the testimonies of Ms. Fecteau, Ms. Hang and Ms. Latour, as they are summarized in the investigation report concerning the complaint against Ms. Garand, and regarding the fact that the investigator did not consider the testimony of Ms. Séguin. To sum up, the applicant accuses the investigator of

1. not ensuring that her witnesses had access to a summary of their testimony so that they could certify its accuracy by signing and dating a written copy of the statements taken (see Section II, Stage 2 of the Investigation Guide). The investigator was able to get the respondents' witnesses to sign, so she should have been able to do the same with the applicant's witnesses;
2. not incorporating the changes requested by Ms. Fecteau, Ms. Hang and Ms. Latour into the final investigation report;
3. failing to incorporate part of the testimony of Ms. Latour into the investigation report, when this testimony was relevant and favourable to the applicant;

4. failing to include Ms. Séguin's testimony in the final investigation report, when this testimony was relevant and favourable to the applicant;
5. failing to disclose to the applicant the relevant information she requested; and
6. not ensuring that Mr. McKinley testified for the purposes of the investigation, as the applicant requested.

[85] The applicant submits that some of the comments she made to the investigator after reading the preliminary reports were not incorporated into the final reports. As was mentioned above, the applicant filed two documents totalling 88 pages of comments. Upon reading these documents, it becomes clear that the applicant's comments are not restricted to the version of the facts that she provided but also extend to the versions of the facts given by the respondents and other witnesses. It is also clear that there are more arguments than there is relevant factual evidence in these documents. It appears that the applicant wants control over the evidence considered by the investigator, which is something that she obviously cannot do.

[86] Regarding the testimony of Ms. Séguin, the investigator explains that she did not refer to it because it had nothing to do with the applicant's allegations. This explanation is reasonable, in my opinion, since that testimony was given in relation to an allegation that was deemed to be inadmissible.

[87] As for the fact that Mr. McKinley did not give testimony for the investigation, the applicant alleges that after she learned that he had not returned the investigator's telephone calls,

she insisted that the investigator keep trying to reach him, since his testimony was the key to proving a number of allegations concerning the verbal agreement to reimburse her tuition fees.

[88] The investigator had a duty to interview all the witnesses concerned (see Investigation Guide, Stage 4), conduct an exhaustive investigation and verify any gaps or inaccuracies with the witnesses (see Annex 7 of the Investigation Guide). However, the testimony of Mr. McKinley would only have confirmed the existence of a verbal agreement between him and the applicant regarding the reimbursement of her fees, education leave, etc. Since I am of the opinion that the question of whether or not there was a verbal agreement is not determinative in the circumstances, I cannot conclude that the investigator breached her duty to conduct an exhaustive investigation, notwithstanding the fact that no other witness could corroborate the applicant's testimony on this point. In other words, the applicant could have been the victim of harassment even if there were no verbal agreement, but just because there allegedly was such an agreement, that does not mean that the fact that it was repudiated for being against the employer's policy must necessarily be regarded as workplace harassment. Rather, it is the overall circumstances that must be considered.

[89] The applicant submits that the investigator did not follow the Investigation Guide when interviewing Ms. Simoneau and Ms. Grochot, two external consultants who did not witness the facts alleged by the applicant. The applicant argues that their testimonies contain falsehoods and derogatory comments about her abilities and should not have been accepted by the investigator.

[90] I do not agree with the applicant that the investigator failed in her duty to distinguish between facts and opinion and to focus on direct, first-hand evidence of relevant facts, not hearsay (see Annexes 6 and 7 of the Investigation Guide). I also do not agree that the testimonies of the consultants should have been left out of the report because they are not directly related to the applicant's allegations (see Section II, Stage 2 of the Investigation Guide). There is nothing in the analysis section of the final report to indicate that the investigator based her conclusion regarding the first question on the consultants' testimonies. These testimonies were used, rather, to place the analysis in the context of the events of October 2008, particularly the changes to the applicant's duties, of which the consultants had personal and direct knowledge. The applicant's abilities, as well as the degree of the employer's satisfaction with her performance, are definitely relevant facts that may justify certain administrative action taken by the employer. This evidence was even more relevant in the context of the mandate given to Ms. Garand to restructure the directorate and make it more harmonious and effective.

[91] In light of the sworn affidavits that were filed in the Court record (and before Commissioner Stoddart), it seems clear that the final report concerning the complaint against Ms. Garand does not accurately reproduce the versions of Ms. Fecteau, Ms. Hang and Ms. Latour, and that the investigator breached her duty to validate the facts by having all the witnesses sign written copies of their statements. The investigator refused to make the changes requested by the witnesses, on the ground that she doubted their credibility. She took notes during the interviews with the witnesses and preferred to rely on those instead of a version approved by the witnesses. However, the Investigation Guide is clear on this. This is an informal hearing, witnesses do not take an oath, and their depositions are neither recorded nor taken down

by a court reporter. The investigator could choose either to have her interview notes approved and signed or to send a statement for approval and signature. She could not substitute her own assessment of a witness's version of the facts for an approved version.

[92] However, the corrections that the investigator allegedly did not take into account essentially concern what Ms. Garand said at the meeting on October 30, 2008. Ms. Garand herself confirmed having mentioned, in response to some negative comments from certain employees, that [TRANSLATION] "if they were not happy, they could give her their résumés and she would see to circulating them among her colleagues working in finance in the federal government" (final report on harassment complaint against Ms. Garand, at p 11 of 37). Since Ms. Garand admitted having said this, the question of whether the versions of the other witnesses regarding this subject were corrected has little impact.

[93] One may well wonder why the applicant had so much difficulty in obtaining from the investigator and the employer the comments made by her witnesses regarding the preliminary report on the complaint against Ms. Garand, and in finding out that the witnesses had not approved and signed their statements as required by the Investigation Guide. Over a period of several months, the applicant tried to have this cleared up, without success. She had to make an access to information request, and an ad-hoc commissioner had to be appointed before she could finally access the information to which she was entitled.

[94] This lack of transparency, although it had no impact on the outcome of this case, definitely contributed to convincing the applicant that the investigator and the delegated manager could not be impartial.

Delegated manager

[95] The applicant submits that Ms. Munhall was in a conflict of interest when she agreed to testify for the purposes of the investigation while she was at the same time acting as delegated manager. The applicant adds that the delegated manager, as Director of Human Resources, reported to the respondents and was not impartial. Finally, she submits that Ms. Munhall was not impartial in the investigation because she refused to accept the applicant's complaints without doing the required checks after the preliminary reports were received.

[96] For the reasons that follow, I find that none of these allegations is founded in the present case.

[97] First, Ms. Munhall had no personal interest in the applicant's complaints. Such would be the case, for example, if the delegated manager had been personally involved, directly or indirectly, in one of the events that gave rise to the applicant's allegations. Nor are there any grounds to suspect that Ms. Munhall had an institutional interest in seeing the applicant's complaints rejected. Moreover, the delegated manager did not make decisions on the merits of the complaints for which she was responsible. Her role was limited to managing the complaint (see the Treasury Board guide *Harassment: dealing with the complaint process*, Role and

expectations of the delegated manager), which further reduces the chances of any conflict of interest in the circumstances.

[98] The applicant questions the impartiality of the delegated manager, given the close relationship between the Director of Human Resources Management and Mr. Pulcine. However, there is simply no evidence before this Court, other than the applicant's general accusations, supporting a finding of institutional bias or any lack of independence.

[99] This is also reflected in the testimony of Ms. Munhall as it appears in the investigation reports. Ms. Munhall spoke to the facts of which she and she alone had knowledge. Regarding the complaint against Ms. Garand, she testified that she contacted Mr. McKinley in February 2009 to ask him for details about the applicant's education agreement, and that Mr. McKinley confirmed having agreed to extend an existing agreement that the applicant had with her former employer. This testimony confirmed the applicant's position.

[100] Regarding the complaint against Mr. Pulcine, Ms. Munhall testified that she had received only one claim from the applicant for reimbursement of parking fees, dated April 24, 2009. While the applicant accused Mr. Pulcine of harassing her by refusing to reimburse her parking expenses, Mr. Pulcine claimed that he had not been involved because the applicant's parking expenses claim had been authorized in advance by Ms. Munhall. It therefore seems to me the testimony of Ms. Munhall on this point actually favours the applicant.

[101] On the whole, the applicant has not proved that the testimony of Ms. Munhall was more favourable to the respondents' position. As regards the duties of delegated managers, I find that the duty to be impartial is not incompatible with giving testimony on facts of which a delegated manager has personal knowledge, except of course if it shows bias in favour of one party or the other. That is not the case here.

VIII. Did the Commissioner breach the principles of procedural fairness in rejecting the applicant's third-level grievance?

[102] Despite the fact that the grievance process has multiple levels, after the applicant's complaints had been rejected, it was decided that her grievance should be referred directly to the final level. Neither the decision maker nor the respondent could explain the reasons for this decision.

[103] It is important to note that the applicant is not accusing Commissioner Stoddart of breaching the principles of procedural fairness in the handling of her third-level grievance. She is essentially accusing her of not remedying the irregularities in the investigation and the breaches of the investigator's duties in conducting the investigation. More specifically, the applicant argues that the Commissioner should have made the necessary inquiries with the employees concerned (that is, the applicant's witnesses) to ensure that their testimonies were accurately reflected in the final reports, as opposed to casting doubt on their credibility.

[104] For these reasons, I am of the opinion that there is no evidence that the procedural irregularities could have had any impact whatsoever on the outcome of the applicant's complaints on the merits. Accordingly, even if the Commissioner had taken the necessary steps to remedy the investigation's shortcomings, her third-level decision on the applicant's grievances would still have been correct. The applicant's application for judicial review will therefore be dismissed.

IX. Costs

[105] In light of the special circumstances of the case, particularly the lack of transparency on the part of the investigator and the employer, there will be no award as to costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. The applications for judicial review in dockets T-1111-10 and T-669-11 are dismissed.

2. Without costs.

"Jocelyne Gagné"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1111-10 and T-669-11
STYLE OF CAUSE:	Chantal Renaud v Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 6, 2012
REASONS FOR JUDGMENT & JUDGMENT:	THE HONOURABLE MADAM JUSTICE GAGNÉ
DATED:	January 11, 2013

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