Federal Court  Cour fédérale

Date: 20170331

Docket: T-2064-15

Citation: 2017 FC 338

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 31, 2017

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

YACINE AGNAOU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision made on November 9, 2015, by Joe Friday, the Public Sector Integrity Commissioner [the Commissioner], to dismiss the reprisal complaint the applicant filed on January 5, 2013, with the Office of the Public Sector Integrity Commissioner [PSIC].

I. *Legal framework*

[2] Section 19 of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [the Act] prohibits taking any reprisal against a public servant or directing that one be taken against a public servant. Subsection 2(1) of the Act defines the word "reprisal" as any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33:

> (a) a disciplinary measure;
>
> (b) the demotion of the public servant;
>
> (c) the termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;
>
> (d) any measure that adversely affects the employment or working conditions of the public servant; and
>
> (e) a threat to take any of the measures referred to in any of paragraphs (a) to (d).

[3] With the entry into force of the Act on April 15, 2007, it became possible for a public servant working in the public sector to make a protected disclosure regarding a series of wrongdoings: a misuse of public funds or a public asset; a gross mismanagement in the public sector; an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment; a serious breach of a code of conduct established under the Act; and knowingly directing or counselling a person to commit one of these wrongdoings (subsection 2(1), "wrongdoing", "protected disclosure", "public servant", "public sector"; section 8, paragraphs (*b*) to (*f*) of the Act).

[4] The disclosures can be made at various times and at various levels: internally, to a supervisor or to the senior officer in a department or agency (section 12); externally, to the Commissioner (section 13), or, if there is not sufficient time to make the disclosure of a serious offence under an Act of Parliament or of an imminent risk of substantial and specific danger, the disclosure may be made to the public (subsection 16(1)). In this regard, as an independent agent of Parliament, the Commissioner plays an essential watchdog role, investigating not only disclosures of wrongdoings received from public servants (section 13), but also any other wrongdoing of which he or she may have become aware during the course of an investigation or as a result of information provided by a person who is not a public servant (section 33). However, the disclosure system would go unheeded if the Act did not also ensure the protection of the public servants who make disclosures.

[5] That is why the Act expressly allows the Commissioner to conduct investigations (sections 19.7 to 19.9), to oversee conciliation (sections 20 to 20.2) and to refer to the Public Servants Disclosure Protection Tribunal of Canada [the Tribunal] a reprisal complaint filed by a public servant under section 19.1 of the Act if, after receipt of the investigator's report pursuant to section 20.3 of the Act, the Commissioner is of the opinion that an application to the Tribunal is warranted (section 20.4). In such cases, the Commissioner may apply to the Tribunal for a determination of whether or not a reprisal was taken against the complainant and, if a reprisal was taken, for (a) an order respecting a remedy in favour of the complainant (paragraph 20.4(1)(*a*) of the Act); or (b) an order respecting a remedy in favour of the complainant and an order respecting disciplinary action against any person or persons identified by the Commissioner in the application as being the person or persons who took the reprisal

(paragraph 20.4(1)(*b*) of the Act). Evidently, the success of the protection regime depends on the expeditiousness of the Commissioner's investigations and the confidence of stakeholders in the remedy mechanisms.

[6] Furthermore, the creation of the Tribunal—a specialized and independent tribunal tasked with determining whether or not a reprisal was taken and ordering the appropriate remedy, which may include taking disciplinary action against any person who took the reprisal—is a markedly different approach from traditional labour relations models (see, in particular, *El-Helou v Courts Administration Service, Power and Delage*, 2011 CanLII 93945 (CA PSDPT), 2011-PT-01 at paragraph 48 [*El-Helou 1*]). The importance of the Commissioner's application, once made to the Tribunal, does not come from the fact that it proves the truth of its contents, since that is not the case. Nevertheless, the Commissioner's application under section 20.4 of the Act is essential because it allows the Tribunal to carry out its decision-making function and, if applicable, to order an appropriate remedy (sections 21.7 and 21.8). With respect to reprisals, unlike the Commissioner, the Tribunal has the power, in the same manner and to the same extent as a superior court of record, to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that it considers necessary for the full hearing and consideration of the application (paragraph 21.2(1)(*a*) of the Act). In addition, the Tribunal is comprised of judges of the Federal Court or other superior courts. These judges are therefore particularly qualified to decide on any issue of evidence or law that may arise as part of the Commissioner's application.

[7] It must be kept in mind that the Commissioner's role is not to determine the credibility of the persons involved or to decide on complex issues of law, but rather to decide whether there is an objective basis that warrants the Tribunal investigating the reprisal complaint on the merits. Thus, by conducting an investigation into a reprisal complaint (sections 19.3 to 19.7), the investigator, who submits a report and recommendations to the Commissioner, must not undermine the Tribunal's adjudicative function (*El-Helou v Courts Administration Service*, 2011 CanLII 93947 (CA PSDPT), 2011-PT-04 at paragraph 43 [*El-Helou 4*]). At the risk of repeating myself, the Commissioner acts as a filter and not as a shield against otherwise admissible reprisal complaints. In fact, paragraph 20.4(3)(*a*) should be read in correlation with subsection 19.1(1), which stipulates that a public servant or a former public servant who "has reasonable grounds for believing that a reprisal has been taken against him or her" may file a complaint. It is in this context that the Commissioner must determine whether "there are reasonable grounds for believing that a reprisal was taken against the complainant" (paragraph 20.4(3)(*a*)). That being said, the expression "reasonable grounds for believing" refers to an evidentiary threshold that is less demanding than the "balance of probabilities" standard of proof that typically applies in civil trials and before many administrative tribunals, including the Tribunal (*El-Helou 4* at paragraphs 34–46).

[8] By analogy, in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] SCJ No. 39 at paragraph 114 [*Mugesera*], the Supreme Court of Canada specifies that the "reasonable grounds [for believing]" standard found in paragraph 19(1)(*j*) of the former *Immigration Act*, RSC 1985, c I-2, "requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities" and that

"reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information". In addition, as the Supreme Court also states, "it is important to distinguish between proof of questions of fact and the determination of questions of law" and, in that regard, the "reasonable grounds" standard "applies only to questions of fact" (*Mugesera* at paragraph 116).

[9] However, the existence of "reasonable grounds" is not the only factor that affects the exercise of the Commissioner's discretion. Among the other relevant factors set out by Parliament in subsection 20.4(3) of the Act, the Commissioner is asked to take into account whether the investigation into the complaint could not be completed because of lack of cooperation on the part of one or more chief executives or public servants (paragraph 20.4(3)(*b*)); whether the complaint should be dismissed on any ground mentioned in paragraphs 19.3(1)(*a*) to (*d*) (section 19.3 and paragraph 20.4(3)(*c*)); and, having regard to all the circumstances relating to the complaint, whether it is in the public interest to make an application to the Tribunal.

[10] In the case at bar, the impugned decision was made pursuant to section 20.5 of the Act, which allows the Commissioner, after receipt of the investigator's report prepared under section 20.3 of the Act, to dismiss a reprisal complaint if the Commissioner "is of the opinion that an application to the Tribunal is not warranted in the circumstances", which is the basis for this application for judicial review.

II. *Factual background and chronology of decisions rendered in connection with the protected disclosure and the applicant's reprisal complaint*

[11] Essentially, the applicant accused his former employer, the Public Prosecution Service of Canada [PPSC], of having taken reprisal on September 10, 2012, following the protected disclosure that he had made to his supervisors in winter 2009 (internally) and subsequently in October 2011 to the PSIC (externally), [TRANSLATION] "in a case of gross mismanagement in handling File A (PSIC-2011-D-1422)."

[12] With respect to the reprisal he alleges to have been taken against him, the applicant states the following in his complaint:

> [TRANSLATION]
>
> On June 18, 2012, I exercised my right of priority with the PPSC to fill one of two level LA-2B legal counsel positions at its headquarters. The two positions in question had been posted on June 15, 2012, by the Department's senior management, which announced that it had decided to fill the positions with two of its qualified employees from a pool created in July 2009. However, at that time, I had an active right of priority since November 1, 2010, that gave me priority for appointment from that pool for which I was also qualified and which had produced six appointments previously (the last application that was selected before those in dispute had been posted on October 17, 2010).
>
> Senior management at the PPSC maneuvered in the weeks that followed to usurp the position to which I was clearly entitled. For my part, I very quickly understood that management at the PPSC was seeking every means to prevent me from holding a position in "their" organization because of my disclosure in the file [A] case (see your file **PSIC-2011-D-1422**). Thus, on June 20, 2012, I alerted the Priority Branch of the Public Service Commission (PSC) in the hope that it would protect my rights. They informed me that PPSC management had been notified that no appointment from the pool could be made ahead of mine.
>
> Unfortunately, the PSC's Priority Branch could do nothing more against the determination of the PPSC's senior management to

> prevent me from obtaining my position. Thus, on September 13, 2012, the Director General of Human Resources at the PPSC informed me that the decision to fill the two positions by reclassification rather than from the pool was irrevocable and had been made jointly with the PPSC's senior management (i.e. the Director of Public Prosecutions and his two Assistant Directors).

[13] The applicant also states in his complaint that the following people were responsible for the reprisals: Brian Saunders, Director of Public Prosecutions; George Dolhai, Assistant Director and Senior General Counsel; André A. Morin, Chief Federal Prosecutor; and Denis Desharnais, Director General, Human Resources Directorate. More specifically, those individuals had allegedly reclassified the two positions in question in order to prevent the appointment of the applicant—who had priority appointment status at the time—to one of the positions because the applicant had made a protected disclosure (internally and externally).

[14] This is not the first time that a decision by the Commissioner on a reprisal complaint from the applicant has been subject to judicial review (see docket T-429-13/A-110-14). It should be noted that, on February 12, 2013, following a summary examination by a PSIC analyst, Mr. Friday, who was Deputy Commissioner at the time, had refused to deal with the complaint on the grounds that it was beyond his jurisdiction—which is a grounds for refusing to deal with a complaint under paragraph 19.3(1)(*c*) of the Act—even though he was satisfied that the reclassifications in question could constitute a form of "reprisal" within the meaning of subsection 2(1) of the Act. Firstly, the Deputy Commissioner concluded that the emails cited by the applicant (especially those that were exchanged on April 1 and 2, 2009) did not constitute an internal disclosure within the meaning of section 12 of the Act because there had been no specific mention of wrongdoings within the meaning of section 8 of the Act. Secondly, the

second condition set forth in the definition of "reprisal" (subsection 2(1) of the Act) was not "satisfied" because the applicant had not demonstrated how his managers could have been aware of the existence of the protected disclosure that he had made on October 13, 2011, to the Commissioner (file PSIC-2011-D-1422, which itself refers to the internal disclosure made during winter 2009 regarding File A, which is addressed later in these reasons at paragraphs 23–27). Thus, in his letter dated February 12, 2013, the Commissioner explains that he [TRANSLATION] "was refusing to deal with the complaint under paragraph 19.3(1)(*c*) of the Act because there was no connection between the protected disclosure and the reprisal supposedly taken against [the applicant]."

[15] The applicant sought judicial review of that initial negative decision by the Deputy Commissioner. Following the unfavourable judgment rendered by Justice Annis on January 27, 2014 (*Agnaou v Canada (Attorney General)*, 2014 FC 87, [2014] FCJ No. 117), on February 2, 2015, the Federal Court of Appeal allowed the applicant's appeal (*Agnaou v Canada (Attorney General)*, 2015 FCA 29, [2015] FCJ No. 116 [*Agnaou FCA 29*]). Essentially, the Federal Court of Appeal ruled that the Commissioner must not summarily dismiss a reprisal complaint unless it is plain and obvious that it cannot be dealt with for one of the reasons described in subsection 19.1(3) of the Act (*Agnaou FCA 29* at paragraphs 66–69). Thus, the issue was to determine whether the Commissioner could reasonably conclude that it was plain and obvious that the emails cited by the applicant were not an internal disclosure within the meaning of section 12. In this regard, the Federal Court of Appeal found that a person who makes a disclosure does not have to refer to the Act in a communication with one of his or her supervisors, nor does he or she have to mention the definition of wrongdoing in section 12, the

Commissioner or any other agency, to permit a finding that he or she made an internal disclosure within the meaning of section 12. In short, the Act does not require a public servant to convey the fact that he or she is in the process of making a disclosure within the meaning of the Act (*Agnaou FCA 29*, at paragraph 75).

[16] As for the nature of the disclosure of wrongdoings, Justice Gauthier states the following at paragraph 88 of her reasons for judgment:

> The phrase "gross mismanagement" used in section 8 of the Act is not defined and depends, of course, on the organization involved. Here, given the very nature of the PPSC's mandate, the file is on the whole rather unusual, and it is difficult to determine the exact parameters of what could constitute such a wrongdoing. The public interest is often an important consideration when deciding whether to institute criminal proceedings, and it is true that this decision should not be subject to undue interference. The analyst also concluded that there was no evidence of bad faith on the appellant's part. In such circumstances, the appellant could believe that he was disclosing evidence of gross mismanagement to his supervisor.

[17] The judgment by the Federal Court of Appeal also recognizes that, *prima facie*, there was a direct causal link between the allegation of reprisal and the internal disclosure to the supervisors, while the email dated April 1, 2009, did not exclude the possibility that the disclosure would also be made externally (*Agnaou FCA 29* at paragraphs 73–89, particularly paragraphs 77, 78 and 87). Consequently, the Federal Court of Appeal ruled that the decision not to deal with the reprisal complaint was unreasonable and referred the case back to the Commissioner, while specifying, given the long period of time elapsed since the complaint was filed, "that this is an exceptional case where it is necessary to declare this complaint admissible".

[18] At the same time, in a separate judgment delivered on February 2, 2015, the Federal Court of Appeal dismissed the appeal that the applicant had filed against the judgment rendered by Justice Annis on January 27, 2014, to dismiss his application for judicial review that sought to have set aside the Deputy Commissioner's decision not to investigate the applicant's disclosure of wrongdoing made on October 13, 2011, pursuant to section 13 of the Act (*Agnaou v Canada (Attorney General)*, 2015 FCA 30, [2015] FCJ No. 117, affirming 2014 FC 86, [2014] FCJ No. 102). Note that in that protected disclosure, the applicant reiterated that the actions of the managers of the Quebec Regional Office [QRO] and individuals at PPSC Headquarters had violated a number of Canadian laws, while his supervisors and their subordinates had committed wrongdoings during the winter of 2009 when they opposed the laying of charges in File A using methods that undermined the integrity of Canada's objective, transparent and independent prosecution system.

[19] In the case at bar, the Deputy Commissioner's decision to close the file regarding those allegations of wrongdoings was made on September 6, 2012, while the reprisals alleged by the applicant in the complaint under review regarding the staffing process were taken on September 13, 2012.

[20] In principle, with respect to external disclosures, subsection 27(1) of the Act provides that "[w]hen commencing an investigation, the Commissioner must notify the chief executive concerned and inform that chief executive of the substance of the disclosure to which the investigation relates." However, in his letter of refusal to deal with the reprisal complaint dated February 12, 2013, the Deputy Commissioner explains that in the applicant's particular case,

[TRANSLATION] “the chief executive was never contacted because we never commenced an investigation. As a result, we never notified the PPSC of the disclosure.”

III. *Investigation into the reprisal complaint*

[21] On February 17, 2015, after the case was referred by the Federal Court of Appeal, a PSIC investigator was designated under subsection 19.7(1) of the Act by Mr. Friday, who was Acting Commissioner at the time, to investigate the allegations of reprisals filed by the applicant. In the letter that he sent to the applicant, the Acting Commissioner specified the following:

> [TRANSLATION]
>
> The Office of the Commissioner will investigate the allegation of reprisals taken against you on September 13, 2012, following your protected disclosure that was allegedly made on April 2, 2009, under section 12 of the Act. More specifically, the investigation will concern your allegation that the managers of the Public Prosecution Service of Canada (PPSC) identified above reclassified two positions for the purpose of preventing you from being appointed to one of those positions as a priority candidate.

[22] Based on the information and documents compiled by the investigator, the primary facts of the case appear to be as follows.

[23] Initially, the applicant had been working at the QRO as a federal Crown prosecutor on the economic crimes team since 2003. On January 24, 2006, the applicant was assigned File A, a tax-related file for which he had to make recommendations for prosecution. More specifically, the applicant had to determine whether it was necessary to institute criminal proceedings against the subsidiary of a multinational corporation that had failed to respond to requests for

information from the Canada Revenue Agency [CRA or the client]. After analyzing the file, the applicant did recommend that the client institute proceedings.

[24] However, certain managers at the PPSC did not share the applicant's opinion. In addition, on November 4, 2008, the applicant met with the QRO's general counsel, as well as the assistant chief federal prosecutor. The assistant prosecutor found that it would be premature to institute proceedings because the CRA's General Appeals Branch had received a notice of objection to the reassessments issued against the corporation in question. The applicant's new supervisor took the same position when he asked for a second opinion. Nevertheless, the applicant maintained his position that it was necessary to initiate proceedings. On February 10, 2009, he submitted his final recommendation to the QRO's general counsel. Various meetings with QRO members followed in order to discuss the issues associated with such proceedings.

[25] On March 4, 2009, the applicant was informed that the QRO would not institute proceedings in File A. Faced with this refusal, the applicant announced that he intended to appeal that decision to the supervisors at the PPSC. On March 24, 2009, the general counsel committee met and confirmed the earlier decision. However, the applicant did not attend that meeting and therefore could not share his point of view.

[26] On April 1, 2009, in a final attempt, the applicant met with the chief prosecutor once again to try to convince him of the necessity of such proceedings, but he was unsuccessful. He was subsequently removed from File A. As objective evidence corroborating the disclosure of

wrongdoings, the applicant produced the emails sent to his supervisor, Sylvie Boileau, including the email dated April 2, 2009, in which he stated:

> [TRANSLATION]
>
> Given that the external stakeholders have already been notified of our Chief Prosecutor's decision, I can only reassess the appropriateness of my efforts to convince the Director of Public Prosecutions that this decision was made contrary to our organization's policies and is a disservice to the public interest.
>
> In the coming weeks, I will focus on my active cases and think about what action to take in this serious matter. My decisions will be defined by my responsibilities as a Crown prosecutor, as they are set forth in our laws and policies. If necessary, the competent authorities will inform our Chief Prosecutor of my decisions.
>
> [Our emphasis.]

[27] As we can see, the applicant threatened the employer that he would go further and was considering every possibility ([TRANSLATION] "what action to take in this serious matter"), which naturally includes a disclosure to the Commissioner, even though that was not expressly mentioned in the email from April 2, 2009. Following that disclosure, the working relationships between the applicant and his supervisors quickly deteriorated. On April 7, 2009, the applicant's managers, indicating that they were concerned about his health, immediately put him on medical leave until he submitted a physician's note stating that he could resume his duties. In May 2009, the applicant filed three grievances, four harassment complaints, and a complaint under section 127.1 of the *Canada Labour Code*, RSC 1985, c L-2, to dispute the validity of the measures taken by the employer.

[28] On June 26, 2009, a memorandum of understanding [the Memorandum] to settle the grievances and complaints in question was reached between the parties. Mr. Dolhai signed the

Memorandum as the employer's representative. In light of the advantages described in the Memorandum, the applicant agreed to leave the PPSC and vacate his office on July 3, 2009, and not to return to the PPSC, either during or after his leave, including during the period in which his priority would remain valid with the Public Service Commission. In addition, he agreed not to file any other complaints, grievances or any other remedy stemming from the complaints and grievances listed in Appendix 1 of the Memorandum.

[29] In July 2009, the applicant qualified in a pool for two counsel positions at the PPSC, a competition for which he had already applied in 2008. On June 18, 2012, the applicant asserted his right of priority. On September 13, 2012, nearly one week after the Deputy Commissioner's decision not to investigate the applicant's disclosure regarding the handling of File A, the PPSC informed the applicant that the position for which he qualified with his priority status would be filled through reclassification rather than through the pool that had been created. That decision was irrevocable and made jointly with the PPSC's senior management. In the applicant's view, this reprisal was clearly linked to the internal disclosure made in winter 2009 and/or the external disclosure on October 13, 2011.

[30] As previously described, the applicant filed a complaint with the PSIC regarding that reprisal on January 5, 2013, and, following the legal saga surrounding the Commissioner's first refusal to bring that complaint before the Tribunal, the case was referred back to the Commissioner, who ordered that an investigation be conducted. In addition, on August 13, 2015, Commissioner Friday notified the applicant that the PSIC had completed the analysis of the information obtained during the investigation and asked the applicant to send him any additional

information or comments on the preliminary investigation report [PIR]. On August 25, 2015, the same request was sent to the employer and to the individuals named in the reprisal complaint.

[31] Following his investigation, the investigator concluded that the Memorandum dated June 26, 2009, was a ground for not dealing with the reprisal allegations made in the complaint on January 5, 2013. Since [TRANSLATION] "any connection that is reasonably possible between the alleged disclosure and the alleged reprisal was broken by the existence of this Memorandum and its terms", the investigator did not find that there were reasonable grounds for believing that reprisals had been taken against the applicant. As a result, the investigator recommended that the complaint be dismissed.

[32] The applicant, who did not agree with the investigator's finding, submitted his comments and additional information, while the employer and the individuals named in the reprisal complaint made no submissions. The conclusions of the PIR are reiterated in the investigator's final report. After receiving the final investigation report on November 9, 2015, the Commissioner dismissed the reprisal complaint.

IV. ***Decision subject to this application for judicial review***

[33] The Commissioner essentially affirmed the rationale given by the investigator in his final report.

[34] In the letter of dismissal dated November 9, 2015, the Commissioner stated that he had considered the applicant's submissions regarding the investigator's report and noted the following:

> [TRANSLATION]
>
> In your comments in response to the PIR, you stated that your commitment described in the Memorandum was limited to not returning to the PPSC to resume the duties that you held upon signing the release. However, the Memorandum is not worded as such: it clearly indicates that you are not to return to the "Service", meaning the PPSC in general. Regardless of the type of actions taken by the PPSC in handling your priority application in the summer of 2012, the evidence obtained during the investigation suggests that the PPSC acted in accordance with the signed Memorandum, a Memorandum which you were prepared to violate by asserting a right of priority to return to the PPSC.
>
> I am not required to rule on the merits or the content of that Memorandum. However, I must consider it in order to be able to assess the context in which the PPSC made its decision to reclassify positions. That information is essential for analyzing whether a causal link exists between the alleged reprisal and the alleged disclosure.
>
> As a result, and for the reasons previously indicated regarding that link, I have no reasonable grounds for believing that your failure to be appointed is linked to your alleged disclosure. That decision by the PPSC is related to the implementation of the Memorandum dated June 26, 2009.
>
> On the basis of the information presented earlier, I have therefore decided to dismiss your reprisal complaint under section 20.5 of the Act.

[35] On December 9, 2015, the applicant filed this application for judicial review to have that second negative decision by the Commissioner reviewed.

V. *Discovery of evidence not disclosed to the applicant*

[36] At the same time as he was instituting these proceedings, the applicant made an access to information request to obtain a full copy of the investigation file. A few days later, the applicant received a copy of the certified tribunal record. He thus learned that the investigator had interviewed Kathleen Roussel and Mr. Morin as part of his investigation. The applicant is now basing certain arguments on this information.

[37] According to the applicant's reading, Mr. Morin told the investigator that he had advised those responsible for the appointment process to verify how the applicant's right of priority would apply. Mr. Morin also indicated several times that the Memorandum from 2009 had no connection with the situation surrounding File A or even the issue of the disclosure. In addition, Ms. Roussel stated that the right of priority stemmed from a statute that no agreement could contravene. Worse yet, although Ms. Roussel was not present when the Memorandum was signed, she had been informed that, at the time of the Memorandum, various opinions had been issued to address the contentious legal issue underlying the Commissioner's refusal to refer the complaint to the Tribunal, namely whether the applicant's right of priority could be limited by a clause in the Memorandum, which apparently had been answered in the negative.

[38] After having heard the contents of those interviews, it also became clear to the applicant that the PSIC's decision ran completely counter to what those two individuals (who could be called as witnesses before the Tribunal) had reported to the investigator. The respondent interprets the statements in question differently. Recordings of the interviews and transcripts prepared by the applicant were submitted to the Court.

VI. ***Respective positions of the parties***

[39] Both parties agree that the standard of reasonableness applies to the review of the merits of the Commissioner's decision, while the standard of correctness applies to any issue of procedural fairness the applicant has raised in this case.

[40] To date, the applicant has continued to argue that the Memorandum does not affect his right to priority under the *Public Service Employment Act*, RSC 1985, c P-33, and that the Memorandum cannot be cited by the employer or interpreted by the Commissioner as legally prohibiting him from making a protected disclosure. This is a question of law that does not fall within the Commissioner's jurisdiction. It should be decided by the Tribunal after it has heard all relevant testimony and assessed the credibility of the witnesses.

[41] The applicant submits that Commissioner Friday also failed in his duty of procedural fairness by refusing to recuse himself on May 5, 2015, after former Commissioner Mario Dion recused himself on the grounds that he knew certain people who were mentioned in the applicant's complaint.

[42] In light of all the foregoing, the applicant is now asking this Court to invalidate the impugned decision. The applicant is also seeking a directed verdict from this Court, since he has lost all confidence in the impartiality of the Commissioner and PSIC personnel.

[43] The respondent, the Attorney General of Canada, who is defending the employer's interests in this case, argues in his memorandum that the impugned decision was reasonable and that there had been no violation of the rules of procedural fairness.

[44] The Court heard the oral submissions from counsel during a hearing in Montreal on December 19, 2016. During the hearing, the Court raised a certain number of issues regarding the Commissioner's powers and the manner in which the PSIC personnel had conducted the investigation. Without going into the details, it became clear that certain aspects of the decision and of the investigation were problematic, which raised the issue of the appropriate remedy in the event that the Court found that there were grounds to intervene. At the end of the hearing, the parties agreed to ask this Court to suspend its deliberations in the hope of reaching a settlement that was acceptable to all parties. However, they were unable to reach a full agreement, resulting in the applicant insisting that the Court render a reasoned decision on the merits of the application for judicial review.

VII. ***New developments***

[45] On January 16, 2017, the Commissioner informed the Court and the parties that it was in the public interest to revoke his decision from November 9, 2015, and apply to the Tribunal to deal with the applicant's complaint. The letter to the applicant reads as follows in that regard:

> [TRANSLATION]
>
> Paragraph 20.4(3)(*d*) of the Act provides that, in light of the circumstances of the complaint, I must consider the public interest when I decide to apply to the Public Servants Disclosure Protection Tribunal (the Tribunal) to deal with a complaint. Considering the issues raised in your application for judicial review, the remarks made by Justice Martineau, the desire expressed by Justice

> Martineau for this case to be settled to the satisfaction of the parties, and the length of this affair (which began in 2013 and includes two proceedings before the Federal Court and one before the Federal Court of Appeal), I am of the opinion that it has become a matter of public interest to apply to the Tribunal to deal with your complaint.
>
> Canadian jurisprudence establishes that an organization like the Office of the Commissioner can reopen a case under certain circumstances. After carefully weighing the issues of procedural fairness and natural justice, I have concluded that the need for flexibility and a response to the developments in this case prevail over the finality of the decision made on November 9, 2015. I note that my conclusion is consistent with the teachings of the Supreme Court of Canada in *Chandler v Alberta Association of Architects*, [1989] 2 S.C.R. 848, which dealt with exceptions to the application of the finality of administrative decisions.
>
> Pursuant to paragraph 20.4(1)(*a*) of the Act, I will apply to the Tribunal for a determination of whether reprisal was taken against you regarding your allegation that you were not appointed to a LA-2B position because you made a protected disclosure and, if applicable, for an order respecting a remedy in your favour.
>
> The parties before the Tribunal will be yourself, the Commissioner, and the Public Prosecution Service of Canada as your former employer at the time the reprisal allegedly took place. The Tribunal may also add other parties.
>
> I find that setting aside my decision from November 9, 2015, and my application to the Tribunal correspond to the orders sought in your application for judicial review. In that regard, I am also prepared to award you an amount that corresponds to the costs that the Court would award you.

[46] One may wonder if, by dismissing the reprisal complaint, the Commissioner had become *functus officio*, and whether he could set aside the decision from November 9, 2015, on his own initiative, especially since the judicial review process had begun and the parties had been heard by this Court. However, the respondent's concessions rendered this contentious aspect of the case moot. In fact, the respondent has now decided to consent to this application for judicial

review and is not opposed to the impugned decision being set aside and the case being referred back to the Commissioner with the appropriate directions, if applicable.

VIII. ***Conclusions of the Court***

[47] Considering the developments in the case and also being satisfied pursuant to subsection 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7, that there was a breach of procedural fairness and that the Commissioner's conclusion is unreasonable in the case at bar, the Court will allow the application for judicial review and set aside the decision rendered by the Commissioner on November 9, 2015.

[48] The issue that remains is whether, as the applicant now submits, the Court should also issue a direction under subsection 18.1(3) of the *Federal Courts Act* that compels the Commissioner to apply to the Tribunal not only for a determination of whether a reprisal was taken, but also, if necessary, pursuant to paragraph 20.4(1)(*b*) of the Act, for an order respecting a remedy in favour of the complainant and an order respecting disciplinary action against any person or persons identified in the application as being the person or persons who took the reprisal.

[49] First, certain clarifications must be made regarding the parties to the proceedings and the Tribunal's powers, depending on whether this is an application by the Commissioner for an order pursuant to subsection 20.4(1) of the Act or an application by the Commissioner aimed specifically at the orders set forth in paragraph 20.4(1)(*b*) of the Act.

[50] In either case, the Commissioner, the public servant and the employer are parties to the proceedings before the Tribunal (paragraphs 21.4(2)(*a*), (*b*) and (*c*) and paragraphs 21.5(2)(*a*), (*b*) and (*c*)). However, because this is an application for the orders provided in paragraph 20.4(1)(*b*), the person or persons identified in the application as being the person or persons who may have taken the alleged reprisal must be parties to the proceedings (paragraph 21.5(2)(*d*)).

[51] In addition, although the Tribunal may add, as a party to the proceedings for an order under paragraph 20.4(1)(*a*) of the Act, a person identified as being a person who may have taken the alleged reprisal (subsection 21.4(3)), the Tribunal finds that in the absence of an application by the Commissioner under paragraph 20.4(1)(*b*) of the Act, it does not have the authority to order disciplinary action against any person who, according to it, took the reprisal (*El-Helou v Courts Administration Service*, 2011 CanLII 93946 (CA PSDPT), 2011-PT-02 at paragraph 48).

[52] Moreover, the particular manner in which the Commissioner should exercise his discretion regarding the contents of the application for orders to the Tribunal (paragraph 20.4(1)(*a*) or paragraph 20.4(1)(*b*) of the Act) was never really addressed by the parties to the proceedings, while the persons identified in the reprisal complaint as being the persons who may have taken the alleged reprisal were not heard by the Court and have not had the opportunity to assert their point of view before the Commissioner regarding the contents of the applicant's application for orders to the Tribunal.

[53] Since this involves the exercise of the discretion conferred on the Commissioner under paragraphs 20.4(1)(*a*) or 20.4(1)(*b*) of the Act, the Court is referring the case back to the Commissioner for the sole purposes of determining—in the event that the Tribunal were to decide that reprisal was taken against the applicant—if he is applying to the Tribunal, if applicable, not only to order a remedy in favour of the applicant (section 21.7 of the Act), but also to order disciplinary action against any person the applicant has identified in his complaint as having taken the reprisal (section 21.8 of the Act), after having allowed the parties and persons identified in the complaint to make written submissions in this regard.

[54] Lastly, the Court has broad discretion in the award of costs under section 400 of the *Federal Courts Rules*, SOR/98-106, particularly in cases involving self-represented litigants (*Yu v Canada (Attorney General)*, 2011 FCA 42, [2011] FCJ No. 162 at paragraph 37; *Air Canada v Thibodeau*, 2007 FCA 115, [2007] FCJ No. 404 at paragraph 24; *Sherman v Canada (Minister of National Revenue)*, 2003 FCA 202, [2003] FCJ No. 710 at paragraphs 46–52; *Chédor v Canada (Citizenship and Immigration)*, 2016 FC 1205).

[55] Although the applicant is representing himself, he is acting as counsel. He is claiming a fixed sum of $12,000 in costs assessed, while the respondent is instead proposing the award of $3,000. It is undeniable that the applicant has put a great deal of time and energy into this case. That being said, there is no evidence of bad faith or wrongdoing on the respondent’s part that may justify awarding a punitive amount as costs. In addition, the scale and complexity of the issues, as well as the questions of public interest raised by these proceedings, appear significant enough to me to justify a reasonable allocation to the applicant.

[56] Given the outcome of the proceedings, and considering all the relevant factors and the particular circumstances of this case, the Court is satisfied that a sum of $4,000, including all taxable fees and disbursements, roughly corresponds to what the applicant would have otherwise received as costs had he been represented by independent counsel in this case.

JUDGMENT

THE COURT ALLOWS the application for judicial review;

THE COURT ORDERS that the Commissioner apply under subsection 20.4(1) of the *Public Servant Disclosure Protection Act*, SC 2005, c 46 [the Act], to the Public Servants Disclosure Protection Tribunal [the Tribunal] to deal with the applicant's reprisal complaint and determine whether a reprisal was taken against the applicant [the application to the Tribunal];

THE COURT REFERS the case back to the Commissioner for the sole purposes of determining, by exercising the discretion conferred on him under paragraphs 20.4(1)(*a*) or 20.4(1)(*b*) of the Act, whether the application to the Tribunal includes an application to the Tribunal for an order, in the event that reprisal was taken against the complainant, if applicable:

a) respecting a remedy in favour of the applicant (paragraph 20.4(1)(*a*) of the Act);

b) respecting a remedy in favour of the applicant and respecting disciplinary action against any person or persons identified in the application as being the person or persons who took the reprisal (paragraph 20.4(1)(*b*) of the Act);

after having allowed the parties and persons identified in the applicant's reprisal complaint to make written submissions in this regard;

THE COURT ORDERS the respondent to pay the amount of $4,000 to the applicant in costs, including all taxable fees and disbursements.

"Luc Martineau"

Judge

Certified true translation
This 4th day of May 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2064-15
STYLE OF CAUSE:	YACINE AGNAOU v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	DECEMBER 12, 2016
JUDGMENT AND REASONS:	MARTINEAU J.
DATED:	MARCH 31, 2017

APPEARANCES:

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