

Federal Court



Cour fédérale

Date: 20171207

Docket: T-129-16

Citation: 2017 FC 1123

Ottawa, Ontario, December 07, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

KATHARINE GREEN

Applicant

and

**ABORIGINAL AFFAIRS AND NORTHERN
DEVELOPMENT CANADA AND THE
ATTORNEY GENERAL OF CANADA**

Respondents

JUDGMENT AND REASONS

[1] Katharine Green seeks judicial review of the decision of the Associate Deputy Minister of Aboriginal Affairs and Northern Development Canada [AANDC] (now Indigenous and Northern Affairs Canada), Hélène Laurendeau [Laurendeau], regarding a performance pay grievance filed under s. 208 (1) of the former *Public Service Labour Relations Act* [PSLRA] (now the *Federal Public Sector Labour Relations Act*). Ms. Green obtained her performance pay

as a result of the grievance but was not successful on her claim that her performance pay was wrongfully withheld as a disciplinary measure for 3 years.

[2] This judicial review application was heard along with two related matters where Ms. Green is the Applicant, being court files T-1721-15 and T-845-16.

[3] For the reasons that follow, this judicial review is dismissed without costs.

I. Background

[4] Ms. Green is the Director, Research and Policy in the Specific Claims Branch of AANDC and had yearly performance reviews and ratings and was entitled to receive performance pay in keeping with her reviews. For the 2012-13 and 2013-14 years, she only received her performance pay after filing grievances.

[5] This judicial review concerns the grievance filed with respect to her performance pay for the 2014-15 year.

[6] On June 29, 2015, Ms. Green received a letter from Colleen Swords, Deputy Minister. This letter confirmed Ms. Green's performance ratings for 2014-15 and associated performance pay entitlement in the amount of \$8,204.00.

[7] Having not received her performance pay, Ms. Green sent emails in September and October 2015 requesting clarification for the delay.

[8] On November 30, 2015 Ms. Green filed a grievance seeking:

1. The immediate payment of the 2014-15 performance pay in the amount of \$8,204.00 without further interference, with interest, and full compensation for all damages, including financial damages;
2. A complete review of the 2014-15 performance ratings;
3. A full explanation as to why, by whom and on what authority the performance pay was allegedly wrongfully withheld for the three consecutive years; and
4. The ceasing of “ongoing obstructive, punitive and retaliatory behaviours” against Ms. Green.

[9] Ms. Green confirmed in her grievance that she wished to proceed to a final level grievance decision.

[10] On December 1, 2015, Ms. Green’s grievance was acknowledged.

[11] On December 15, 2015, Ms. Green was contacted to clarify whether she wanted to proceed with a grievance hearing, submit a written submission in support of her grievance, or have management render a decision based on the grievance itself. Ms. Green confirmed that her preference was that a decision be rendered on the information provided in the grievance.

II. Decision Under Review

[12] On December 21, 2015, Laurendeau rendered the final-level response to Ms. Green’s grievance. She acknowledged an administrative error delayed the payment of Ms. Green’s

performance pay. Specifically, Ms. Green's signed performance agreement could not be located. The performance agreement was found in a secure cabinet on December 3, 2015. Once the agreement was located, her performance pay was processed.

[13] Ms. Green's request for interest and damages was denied as according to Laurendeau, interest is not payable on money owed by the Crown.

[14] The other relief sought by Ms. Green was denied as Laurendeau considered the request for review of her 2014-15 performance ratings was "untimely". In any event, Laurendeau concluded that Ms. Green was treated fairly and properly under the *Directive on the Performance Management Program for Executives*.

[15] Therefore, Ms. Green's grievance was partially upheld.

III. Standard of Review

[16] The standard of review for individual grievances under s. 208(1) of the *PSLRA* is reasonableness (*Kohlenberg v Canada (Attorney General)*, 2017 FC 414 at para 18).

[17] This Court has traditionally found the standard of review for procedural fairness issues to be correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79).

[18] However, the Federal Court of Appeal has recently noted that the standard of review on matters of procedural fairness is in flux (*Vavilov v Canada (Citizenship and Immigration)*, 2017

FCA 132 at para 11; *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at paras 67-72). In some cases, the Federal Court of Appeal has deferred to the “choice of procedures” made by administrative decision-makers regarding procedural fairness rights (*Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at paras 39-42).

[19] However, as discussed below, the majority of Ms. Green’s procedural fairness arguments are issues that go to the substance of the decision under review. For that reason, they are assessed under the reasonableness standard.

IV. Issues

[20] The following issues arise in this application:

A. Preliminary Matters

(1) Style of Cause

(2) Applicant’s Affidavit

B. Is the decision reasonable?

C. Was there a breach of procedural fairness?

V. Analysis

A. *Preliminary Matters*

(1) Style of Cause

[21] Pursuant to Rule 303(2) of the *Federal Courts Rules* the Respondent requests that it be identified in the style of cause as “Attorney General of Canada.” The Respondent argues that government departments should not be named as parties (*Abi-Mansour v Canada (Attorney General)*, 2015 FC 882 at para 23).

[22] Although Ms. Green argues that the Respondent simply wants to avoid having AANDC named in litigation, she does not point to any authority which permits the naming of individual government departments.

[23] Accordingly, the Respondent’s request is granted and the style of cause shall be amended accordingly.

(2) Applicant’s Affidavit

[24] The Respondent also objects to evidence contained in the Affidavit of Ms. Green which includes information which was not before the decision-maker. In particular the Respondent objects to exhibits referenced in paragraphs 3(a), (b), (c), 5-19 and 20, 23 inclusive of the Affidavit of Ms. Green sworn to on February 29, 2016, and objects to the exhibits which correspond to those impugned paragraphs, being Exhibits 1-3 and 5-18 inclusive. Finally, the

Respondent objects to any references made to these exhibits in Ms. Green's Memorandum of Fact and Law.

[25] The general principle is that a court on judicial review must confine itself to the record before the decision-maker (*Bekker v Canada*, 2004 FCA 186 at para 11) subject to certain exceptions (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20).

[26] Affidavits are sometimes necessary to bring the attention of the court to procedural defects that cannot be found in the record. The Federal Court of Appeal has held that, in such cases, it may be necessary for evidence introduced via affidavit to supplement the record (*McFadyen v Canada (Attorney General)*, 2005 FCA 360 at para 15). At the same time, the onus is on the applicant to object and adduce the evidence supporting an objection based on procedural fairness before the original decision-maker (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 26). Here there is no evidence of these arguments being raised before Laurendeau. It is therefore not appropriate for this Court to consider this evidence.

[27] The following paragraphs and exhibits of Ms. Green's Affidavit have not been considered for the purpose of these reasons:

- a. Paragraphs 3 (a), (b), (c)
- b. Paragraphs 5-19, inclusive
- c. Paragraphs 20, 23
- d. Exhibits 1-3, inclusive

e. Exhibits 5-18, inclusive.

B. *Is the decision reasonable?*

[28] Ms. Green argues that the decision is unreasonable as it failed to consider material facts, failed to address the substance of the complaint, and failed to provide a meaningful remedy.

(1) Material Facts

[29] Ms. Green argues that as part of her grievance she requested “a full explanation as to why, by whom, and on what authority my Performance Pay has been wrongfully withheld for the past three consecutive years.” She argues that the grievance decision is unreasonable as it failed to respond to this portion of her grievance.

[30] The *PSLRA*, at the time of Laurendeau’s decision, provided a comprehensive legislative scheme for the resolution of employment-related disputes. The relevant provisions are as follows:

Right of employee

208 (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved

(a) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute or regulation, or of a direction or other

Droit de fonctionnaire

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) par l’interprétation ou l’application à son égard :

(i) soit de toute disposition d’une loi ou d’un règlement, ou de toute directive ou de tout

instrument made or issued by the employer, that deals with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award; or

(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.

[...]

Binding effect

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.

autre document de l'employeur concernant les conditions d'emploi,

(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;

b) par suite de tout fait portant atteinte à ses conditions d'emploi.

[...]

Décision définitive et obligatoire

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.

[31] The grievance decision under review relates primarily to Ms. Green's 2014-15 performance pay. Although Ms. Green raises an issue with the delay in receiving her performance pay for the previous 2 years, her performance pay grievances for the years 2012-13 and 2013-14 received final level responses and were determined with finality pursuant to s.214 of the *PSLRA*. Therefore "no further action" could be taken by Laurendeau pursuant to s. 214, in

respect of these grievances in the context of her 2014-15 performance pay grievance. Ms. Green's remedy in relation to the earlier grievances was to seek judicial review.

[32] The fact that the previous grievances are not directly referenced in the Laurendeau decision is not sufficient to render the decision unreasonable. While Ms. Green sought to put evidence into the record on this judicial review relating to these past grievances, for the reasons outlined above, this is improper and the evidence was not considered.

[33] Furthermore, for the grievance decision to be reasonable, one need only be able to understand the reasoning and the outcome of the decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Newfoundland Nurses*]). Here, it is clear that Laurendeau granted Ms. Green's proposed remedy regarding the real substance of her core complaint - the 2014-15 performance pay grievance. Her reasoning for doing so is clear.

[34] Essentially, Ms. Green seeks to collaterally attack the final level decisions respecting the previous grievances by seeking to reopen those decisions on this judicial review. This would render the process outlined in the *PSLRA* meaningless and subvert Parliament's legislative intent in establishing a distinct grievance process under the *PSLRA*. Laurendeau, under s.214 of the *PSLRA*, could not consider the previous grievances as a part of the decision under review. This Court on judicial review must respect Parliament's legislative intent (*Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 31), and courts cannot "jeopardize the

comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts...” (*Vaughan v Canada*, 2005 SCC 11 at para 39).

[35] Therefore, the decision under review is reasonable.

(2) Failure to consider the substance of the complaint

[36] Ms. Green argues that the Respondent failed to address the particulars as to how the performance agreement was located.

[37] Laurendeau was under no obligation to address this particular issue in order to make her decision reasonable. Laurendeau noted that there was an “administrative error,” and from that description, one can understand the result and reasoning of the decision. The circumstances behind that administrative error add nothing to the reasons (*Newfoundland Nurses*, at para 16).

(3) Remedy

[38] Ms. Green argues that the decision is unreasonable for denying her claim for damages arising from the delay.

[39] Ms. Green’s claim for financial damages before Laurendeau was not substantiated by any evidence. Her only proven loss - her performance pay - was remedied by the Laurendeau decision.

[40] Notwithstanding the lack of evidence substantiating her claim for damages, Ms. Green cannot seek monetary compensation on judicial review. It is well-accepted that this Court on judicial review does not have jurisdiction to award monetary damages because such damages are not contemplated by s.18.1(3) of the *Federal Courts Act* (*Canada v Tremblay*, 2004 FCA 172 at para 28; *Lac v Canada (Attorney General)*, 2014 FC 565 at para 34).

[41] On a review of Laurendeau's decision, there were good reasons for granting and denying the various remedies sought by Ms. Green. The substance of her 2014-15 performance pay grievance was granted. The Laurendeau decision is reasonable.

C. *Was there a breach of procedural fairness?*

[42] The majority of Ms. Green's submissions with respect to procedural fairness are essentially issues with the adequacy of Laurendeau's reasons. As an illustration, Ms. Green argues that Laurendeau's "administrative error" explanation was not sufficient in the circumstances.

[43] It is incorrect to frame "adequacy of reasons" as a procedural fairness issue. *Newfoundland Nurses* at paras 21-22 holds that it is a substantive issue. The substantive arguments made by Ms. Green with respect to the reasonableness of the decision and the explanation offered by Laurendeau are addressed above.

[44] The submissions with respect to procedural fairness are without merit.

VI. Costs

[45] Although this judicial review is dismissed, in light of the conduct of the Respondent in delaying payment to Ms. Green of her performance pay, I decline to award costs to the Respondent.

JUDGMENT in T-129-16

THIS COURT'S JUDGMENT is that

1. The Respondent shall be identified as Attorney General of Canada.
2. The judicial review is dismissed.
3. No costs are awarded.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-129-16

STYLE OF CAUSE: KATHARINE GREEN v ABORIGINAL AFFAIRS AND
NORTHERN DEVELOPMENT CANADA AND THE
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

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