

Federal Court



Cour fédérale

Date: 20180119

Docket: T-95-17

Citation: 2018 FC 55

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 19, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ELMIRE AUGUSTIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [FCA], of the final level's decision made December 23, 2016, in response to a grievance, dismissing certain harassment allegations.

[2] For the reasons set out below, the application for judicial review is dismissed. The administrative process, that of the adjudication before the Federal Public Sector Labour Relations and Employment Board [“Board”], must be exhausted before the Court can exercise its judicial review jurisdiction.

II. Background

[3] The applicant was an accounting officer between 2012 and 2016 at the Treasury Board of Canada Secretariat, through Indigenous and Northern Affairs Canada [INAC]. At the time of the events described in the grievance, her supervisor was Lorraine Morin, and her manager was Benoit Labelle.

[4] The applicant alleges that she was the target of acts and comments amounting to harassment by her managers, Ms. Morin and Mr. Labelle, during meetings on July 10, 2015, July 14, 2015, and December 11, 2015. The meeting of July 10, 2015, was with both managers to assess the directed work objectives. Those on July 14, 2015, and December 11, 2015, were meetings between Ms. Morin and the applicant, the latter for a mid-year performance review.

[5] On December 21, 2015, the applicant submitted a letter addressed to her managers, relating her version of the events experienced in the work place.

[6] On December 24, 2015, a meeting took place between Ms. Morin, Mr. Labelle, and the applicant, with the purpose of offering informal conflict resolution between the parties. The managers explained to the applicant that it was an issue of perception and an interpersonal conflict.

[7] On January 15, 2016, the applicant filed an official harassment complaint with INAC. The complaint is not part of the application for judicial review.

[8] On January 18, 2016, the applicant submitted a grievance under subsection 208(1) of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22 [FPSLRA], alleging a violation of the Treasury Board Secretariat's *Policy on Harassment Prevention and Resolution* [Policy], i.e. that she was harassed by her managers.

[9] Shortly after, the applicant, on her family doctor's recommendation, was forced to take disability leave from January 20 to April 29, 2016.

[10] The harassment allegations and grievance submitted by the applicant were assessed at the three levels of grievance. The grievance was dismissed at the first level, since the allegations did not fall within the definition of harassment and the employee did not show evidence of discrimination. That being said, the decision-maker recognized that [TRANSLATION] "the use of familiar inappropriate expressions in the work place goes against the values and ethics code" and certain measures were taken to address this situation, including training for the managers and supervisors of the Branch in question.

[11] On July 18, 2016, the grievance was partially allowed at the second level, since the expressions used "went against the INAC Values and Ethics Code." However, it was maintained in the decision that there was no harassment.

III. Impugned decision

[12] On December 23, 2016, Paul Thoppil dismissed the grievance at the final level, since the alleged incidents did not fall within the definition of harassment according to the Policy or the *Agreement between Treasury Board and the Association of Canadian Financial Officers* [the Collective Agreement]. The decision-maker found that the employee did not show evidence of discrimination. In the same decision, the decision-maker took measures to address the situation, such as training for the managers, assigning the applicant to another work team and another supervisor, in accordance with her medical assessment dated April 18, 2016.

[13] On January 20, 2017, the applicant filed a notice of application for judicial review of the final-level decision. The applicant hereby maintains that the respondent did not reasonably consider the facts and the applicable law to arrive at his decision.

[14] On February 2, 2017, the applicant referred the final-level decision concerning the grievance for adjudication before the Board.

IV. Issues

[15] This application raises the following issues:

- A. Is the application for judicial review premature?
- B. Do the reasons for the decision breach the principles of procedural fairness? If not, is the decision reasonable?

V. Relevant statutory provisions

[16] The following sections of the FPSLRA are relevant:

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 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.

Limitation

(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the Canadian Human Rights Act.

Droit du 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 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.

Réserve

(2) Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la Loi canadienne sur les droits de la personne.

Limitation

(3) Despite subsection (2), an employee may not present an individual grievance in respect of the right to equal pay for work of equal value.

Réserve

(3) Par dérogation au paragraphe (2), le fonctionnaire ne peut présenter de grief individuel relativement au droit à la parité salariale pour l'exécution de fonctions équivalentes.

Limitation

(4) An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.

Réserve

(4) Le fonctionnaire ne peut présenter de grief individuel portant sur l'interprétation ou l'application à son égard de toute disposition d'une convention collective ou d'une décision arbitrale qu'à condition d'avoir obtenu l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale et d'être représenté par cet agent.

Limitation

(5) An employee who, in respect of any matter, avails himself or herself of a complaint procedure established by a policy of the employer may not present an individual grievance in respect of that matter if the policy expressly provides that an employee who avails himself or herself of the complaint procedure is precluded from presenting an individual grievance under this Act.

Réserve

(5) Le fonctionnaire qui choisit, pour une question donnée, de se prévaloir de la procédure de plainte instituée par une ligne directrice de l'employeur ne peut présenter de grief individuel à l'égard de cette question sous le régime de la présente loi si la ligne directrice prévoit expressément cette impossibilité.

Limitation

Réserve

(6) An employee may not present an individual grievance relating to any action taken under any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Order to be conclusive proof

(7) For the purposes of subsection (6), an order made by the Governor in Council is conclusive proof of the matters stated in the order in relation to the giving or making of an instruction, a direction or a regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Reference to Adjudication

209 (1) An employee who is not a member as defined in subsection 2(1) of the Royal Canadian Mounted Police Act may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

(a) the interpretation or application in respect of the

(6) Le fonctionnaire ne peut présenter de grief individuel portant sur une mesure prise en vertu d'une instruction, d'une directive ou d'un règlement établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

Force probante absolue du décret

(7) Pour l'application du paragraphe (6), tout décret du gouverneur en conseil constitue une preuve concluante de ce qui y est énoncé au sujet des instructions, directives ou règlements établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

Renvoi d'un grief à l'arbitrage

209 (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire qui n'est pas un membre, au sens du paragraphe 2(1) de la Loi sur la Gendarmerie royale du Canada, peut renvoyer à l'arbitrage tout grief individuel portant sur :

a) soit l'interprétation ou l'application, à son égard,

employee of a provision of a collective agreement or an arbitral award;

de toute disposition d'une convention collective ou d'une décision arbitrale;

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

(c) in the case of an employee in the core public administration,

c) soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)d) de la Loi sur la gestion des finances publiques pour rendement insuffisant, soit de l'alinéa 12(1)e) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

(ii) la mutation sous le régime de la Loi sur l'emploi dans la fonction publique sans son consentement alors que celui-ci était nécessaire;

(d) in the case of an employee of a separate agency designated under

d) soit la rétrogradation ou le licenciement imposé pour toute raison autre

subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

Application of paragraph (1)(a)

(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.

Application de l'alinéa (1)a)

(2) Pour que le fonctionnaire puisse renvoyer à l'arbitrage un grief individuel du type visé à l'alinéa (1)a), il faut que son agent négociateur accepte de le représenter dans la procédure d'arbitrage.

Designation

(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).

Désignation

(3) Le gouverneur en conseil peut par décret désigner, pour l'application de l'alinéa (1)d), tout organisme distinct.

VI. Analysis

[17] I agree with the respondent that the application is premature, because there is an alternative recourse by Parliament. This administrative law principle is well illustrated by the Supreme Court of Canada and the Federal Court of Appeal: *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 SCR 146 (warning against recourse to the courts without referral to the adjudication set out therein), [*Vaughan*]; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paragraphs 35–38, [2012] 1 SCR 364; *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 at paragraphs 30–33, [2011] 2 FCR 332.

[18] Parliament provided an administrative procedure for dispute resolution under the FPSLRA. The FPSLRA allows employees to present an individual grievance concerning various issues, such as discrimination or harassment: FPSLRA, section 208. After presenting the grievance to the final level, employees can choose to refer their grievance to adjudication: FPSLRA, section 209. In this case, the applicant received the final-level decision and then filed a notice of adjudication.

[19] The applicant's reference to adjudication demonstrates that the administrative procedure is premature. I note that the applicant attached the grievance as an appendix to the notice of adjudication, which included the same series of facts and allegations. In fact, the corrective measures sought in adjudication include that the employer cease and avoid all acts of harassment toward the applicant and seek to keep the healthy and safe work place free from harassment.

[20] The applicant submits that it is necessary to make a distinction between the issue of harassment and the issue of discrimination. She stresses that this application for judicial review concerns the issue of harassment, whereas the adjudication procedure concerns the issue of discrimination. That being said, the applicant claims that the Court should exercise its judicial review jurisdiction, because the adjudication before the Board concerns a different issue.

[21] In my opinion, the distinction suggested by the applicant is not justified. If the Court exercises its judicial review jurisdiction, the Court and the Board would review the same series of facts in the same context. In fact, the corrective measures sought also concern the issue of harassment.

[22] All useful recourse, including the recourse to the adjudication before the Board, must be exhausted before the Court exercises its judicial review jurisdiction. The adjudication procedure for the grievance before the Board should follow its course before an application for judicial review is commenced: *Vaughan*, above, at paragraph 39; *Estwick v. Canada (Treasury Board)*, 2004 FC 970 at paragraph 34, 132 ACWS (3d) 907.

[23] And so, the Court refuses to exercise its judicial review jurisdiction and dismisses the application, because the adjudication procedure before the Board constitutes the appropriate recourse. Under the circumstances, it is not necessary to consider the second issue.

VII. Conclusion

[24] For these reasons, the Court dismisses the application for judicial review.

[25] The parties have agreed on costs in the amount of \$2,000. I agree with their agreement and proposed amount.

JUDGMENT IN T-95-17

THE COURT ORDERS that: the application for judicial review is dismissed with costs of \$2,000 to the respondent.

“Richard G. Mosley”

Judge

Certified true translation
This 1st day of October, 2019

Lionbridge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-95-17

STYLE OF CAUSE: ELMIRE AUGUSTIN v. ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: NOVEMBER 14, 2017

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