

Federal Court



Cour fédérale

**Date: 20180209**

**Docket: T-405-17**

**Citation: 2018 FC 157**

**Ottawa, Ontario, February 09, 2018**

**PRESENT: The Honourable Madam Justice McDonald**

**BETWEEN:**

**PAUL GAREAU**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

[1] Paul Gareau seeks judicial review of a decision of the Assistant Deputy Minister, Human Resources, Global Affairs Canada [ADM] in response to his grievance filed under s. 208(1) of the then *Public Sector Labour Relations Act* [PSLRA] and pursuant to the Treasury Board *Policy on Harassment Prevention and Resolution* [the *Policy*]. The ADM granted Mr. Gareau's grievance in part and agreed that he was entitled to greater clarity on why his harassment complaint was denied. However, ultimately the ADM declined to provide the promised clarity.

[2] For the reasons that follow, this judicial review is allowed. The ADM decision which agreed to provide the explanations—and then declined to do so—as procedurally unfair and unreasonable.

I. Background

[3] At the relevant time Mr. Gareau was the Deputy Director at the Centre for Learning and International Affairs and Management.

[4] In August 2014 Mr. Gareau filed a harassment complaint against his supervisor, AS. Mr. Gareau's complaint fell under the authority of the Department of Foreign Affairs, Trade and Development. Mr. Gareau alleged that AS had agreed to extend his term as Deputy Director, but then reneged on this after a verbal exchange when Mr. Gareau voiced concerns about AS's comments relating to the French language. Mr. Gareau also alleged that AS disparaged him to another member of the team and gave him poor, unjustified performance evaluations and references.

[5] In refusing to extend his term as Deputy Director, AS claimed to rely on complaints about Mr. Gareau but refused to disclose the nature of the complaints or the identity of the complainants.

[6] In response to the harassment complaint, the Respondent retained J. Simkins & Associates to conduct an investigation. The Final Investigation Report [the Report], dated

November 30, 2015, concluded that AS did not abuse his authority and therefore did not harass Mr. Gareau by refusing to extend his term as Deputy Director.

[7] In a letter dated January 6, 2016, Barbara Carswell, Director, Values and Ethics & Workplace Wellbeing, adopted the conclusions of the Report.

[8] On April 5, 2016, Mr. Gareau wrote to the Respondent seeking a redetermination of the harassment complaint because, among other things, the Report focused on the decision to not renew his position, but did not address the specific instances of alleged harassment. The Report also did not expressly state that there was no harassment.

[9] On May 20, 2016, Barbara Richardson, Inspector General, concluded that the Report and investigation were satisfactory. According to Ms. Richardson, the Report focused on the substance of Mr. Gareau's complaint, being the refusal of AS to extend his term.

[10] On June 8, 2016, Mr. Gareau filed a grievance pursuant to s. 208(1) of the PSLRA. He grieved, claiming as follows: errors in the investigative process by focusing only on AS's refusal to extend his term; the lack of focus on the specific allegations of harassment as claimed; and the lack of an express finding on whether there was harassment. Mr. Gareau also sought a removal of the investigation report from his file and a new investigation.

[11] In response to this, on September 29, 2016, the ADM issued the Final Level Grievance Decision. In this decision the ADM agreed with Mr. Gareau that the investigative report lacked

particulars on the specific instances of harassment. The ADM therefore returned the grievance complaint to the investigators, requesting that each allegation of harassment be articulated with greater clarity in a supplementary report.

## II. Decision Under Review

[12] On February 15, 2017, the ADM rendered a decision titled “Addendum to the Final Level Grievance Response” [Addendum Decision].

[13] In the Addendum Decision, the ADM notes that the investigators conducted a three day re-examination of all materials related to the investigation. The ADM notes that “greater clarity was offered as to why the Final Investigation Report did not separate and speak to each initial allegation; mainly due to their generic nature.”

[14] The Addendum Decision further states:

“Accordingly, I was reassured that, under no circumstance, the outcome of the investigation’s conclusion would change, since each allegation was duly considered and embedded throughout the investigation and while writing the Final Investigation Report.

Although the initial intent was to write an annex to the original Final Investigation Report, after having seen the assessment, I now consider it would be redundant and add little value.”

[15] The ADM was satisfied that “the spirit of the Final Level Grievance Response Letter” was respected.

[16] It is the Addendum Decision which is the subject of this judicial review.

III. Issues

[17] The parties generally agree that the issues for determination are as follows:

- A. Striking Evidence
- B. What is the appropriate standard of review?
- C. Did Mr. Gareau have a legitimate expectation?
- D. What is the appropriate remedy?

IV. Analysis

A. *Striking Evidence*

[18] As a preliminary matter, the Respondent objects to the court considering paragraph 8 of the Affidavit of Marc Leclaire affirmed on May 4, 2017 and filed on behalf of Mr. Gareau on the basis that it contains general allegations of procedural unfairness which are not at issue in this case.

[19] Affidavits must generally contain relevant information which would be of assistance to the Court in determining the issues in dispute (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18). Relevancy is concerned with a connection between two facts which makes it possible to infer the existence of one from another; a fact is not relevant to another if it does not have real probative value with respect to the other (*Cloutier v The Queen*, [1979] 2 SCR 709 at 731).

[20] Here the narrow issue on review is the Addendum Decision. In his original grievance Mr. Gareau raised procedural fairness issues regarding delay and the failure to advise him of additional evidence gathered following the interim report. In the Final Level Grievance Decision, the ADM considered these submissions and concluded that the investigation respected the principles of procedural fairness. Thus, the Final Level Grievance Decision finally determined the general procedural fairness claims, pursuant to s.214 of the PSLRA. On this judicial review, Mr. Gareau seeks review of the Addendum Decision only.

[21] Therefore any procedural fairness arguments raised earlier are not relevant to the finding in the Addendum Decision that a supplementary report was not required.

[22] Accordingly, paragraph 8 of the Affidavit of Marc Leclaire has not been considered for the purpose of these Reasons.

B. *What is the appropriate standard of review?*

[23] The main issue in this case is the legitimate expectation component of procedural fairness. This Court has traditionally applied the standard of correctness to issues of procedural fairness (*Anderson v Canada (Attorney General)*, 2013 FC 1040 at paras 35-36 [*Anderson*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

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

FCA 132 at paras 11-14). It is unclear if the correctness standard is the default standard for issues of procedural fairness.

[25] Yet in another decision the Federal Court of Appeal in *Canada (Attorney General) v McBain*, 2017 FCA 204 at para 9 the Court noted that: “Breaches of procedural fairness will ordinarily render a decision invalid, and the usual remedy is to order a new hearing (*Cardinal v Director of Kent Institution*, [1985] 2 S.C.R. 643”. In that case, the Court reviewed the issue on a standard of review of correctness.

[26] In this case, whether the standard of review is correctness or reasonableness, it does not alter my conclusion that the failure of the ADM to follow through on a promise yields a decision that is invalid.

C. *Did Mr. Gareau have a legitimate expectation?*

[27] The Final Level Grievance Decision granted part of Mr. Gareau’s grievance. The context of this decision related back to the details of the incidents outlined in Mr. Gareau’s original harassment complaint, which made four allegations, three of which referred to AS making “statements damaging to my reputation,” “undermining my performance” and “falsely accusing me and undermining me behind closed doors.” In support of these allegations Mr. Gareau pointed to specific incidents. For example, Mr. Gareau alleged that AS approached members of his team encouraging them to complain or disparage Mr. Gareau. He also alleged that AS took punitive action against him in his performance report.

[28] Mr. Gareau acknowledges that the investigator recounted these specific allegations. However, in the “Analysis and Conclusions” section of the Report, the investigator notes that the major focus of the complaint “has to do with AS’s decision not to renew Mr. Gareau’s appointment as Deputy Director...” but no reasons are offered on the specific harassment allegations raised by Mr. Gareau.

[29] Mr. Gareau was told by the ADM in the Final Level Grievance Decision that he would receive details on the specifics of the harassment allegations. The question is whether this gives rise to a legitimate expectation which was violated, thereby breaching Mr. Gareau’s procedural fairness rights.

[30] The content of the duty of fairness is described in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. What fairness requires is defined by (1) nature of the decision (2) nature of the statutory scheme (3) 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 agency itself.

[31] The concept of legitimate expectations is explained by the Supreme Court of Canada in *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 68 [*Mavi*] as follows:

[68] Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker’s statutory duty. Proof of reliance is not a requisite. See *Mount Sinai Hospital Center*, at



paras. 29-30; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 78; and *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131. It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking: *Brown and Evans*, at pp. 7-25 and 7-26.

[32] The Respondent argues that the doctrine of legitimate expectations does not apply in this case because the representations were made about a particular substantive outcome. Therefore, according to the Respondent, one of the prerequisites to the application of legitimate expectations set out in *Mavi* does not arise in this case.

[33] However, here, the representation by the ADM was in relation to the process of providing Mr. Gareau the details he sought. It was not about a reconsideration of the substance of the original harassment complaint. Furthermore, there is no suggestion that the ADM did not have the requisite authority to make the Addendum Decision.

[34] The procedural issue which arises here is the *lack of reasons* in the Report on key findings. This failing was acknowledged by the Final Level Grievance Decision. That decision promised to provide the reasons which were lacking in the Report. This is a matter of procedure because, in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 22 [*Newfoundland Nurses*], the Supreme Court held that a failure to provide reasons where required amounts to a breach of procedural fairness.

[35] Further, in the context of harassment investigations, an investigative report constitutes and supplements the reasons for decision (*Canada (Attorney General) v Sketchley*, 2005 FCA

404 at para 37; *Marszowski v Canada (Attorney General)*, 2015 FC 271 at para 49). This is supported by this Court’s jurisprudence on the thoroughness of investigative reports, which holds that the question “whether an investigative report is thorough...is an issue of procedural fairness” (*Anderson*, at para 35; *Shaw v Royal Canadian Mounted Police*, 2013 FC 711 at para 28). Therefore, whether reasons were provided—whether the investigative report analyzed the Applicant’s allegations—is a matter of procedure in this context.

[36] While I acknowledge that reasons are not always required as a matter of procedural fairness (*Newfoundland Nurses*, at para 20), given the heightened duty of fairness required here, Mr. Gareau was entitled to a responsive decision on the allegations he raised.

[37] The *Policy* itself codifies the procedural fairness requirements and requires a *higher* content of procedural fairness, because of the significant consequences of harassment investigations “for everyone involved” (*Potvin v Canada (Attorney General)*, 2005 FC 391 at para 19). Additionally, if a legitimate expectation exists, it will “generally attract heightened procedural fairness requirements” (*Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 at para 26).

[38] The Final Level Grievance Decision recognized this absence of reasons and promised a provision of reasons on these key allegations. According to *Newfoundland Nurses*, this is a matter of procedure about which Mr. Gareau had an expectation.

[39] Therefore, the Final Level Grievance Decision meets the test in *Mavi* for creating a legitimate expectation that the details sought by Mr. Gareau would be provided. This was communicated in a clear and unequivocal way. Given a legitimate expectation on the part of Mr. Gareau, and the high level of procedural fairness owed in the circumstances, the Respondent breached the Applicant's procedural fairness rights.

D. *What is the appropriate remedy?*

[40] In his Notice of Application Mr. Gareau asks, pursuant to s.18.1(3) of the *Federal Courts Act*, that the matter should be set aside and remitted back for determination with directions to order a new investigation of his harassment complaint.

[41] The Respondent argues that Mr. Gareau is really seeking *mandamus*, or an order for a directed verdict, which is an extraordinary remedy (*McIlvenna v Bank of Nova Scotia (Scotiabank)*, 2017 FC 699 at para 56 [*McIlvenna*]) and in any event, an entirely new investigation is disproportionate to the narrow basis for the Addendum Decision.

[42] An order for directions ordering a new investigation does not fit with the basis on which the Addendum Decision was rendered. The procedural flaws in the decision do not taint the entire investigative process, and there is no indication in the record that the decision on the merits would be different. However, Mr. Gareau is entitled to reasons on the substance of his harassment complaint.

[43] In *McIlvenna*, this Court held that it would be inappropriate for the Court to refer a matter back to the Canadian Human Rights Commission with a direction to refer the complaint to the Canadian Human Rights Tribunal. Even though there were reasons for allowing the judicial review, the Court held that it was “not the Court’s function to make that [redetermination and referral] decision for the Commission” (*McIlvenna*, at para 63). Instead, the Court was limited to remitting the matter for reconsideration to the Commission.

[44] This case is analogous. Here, given the narrow factual basis of the Addendum Decision, it would be an inappropriate extension of the Court’s remedial role to order a fresh investigation. It is not a circumstance where returning the case to the administrative tribunal would be “pointless”: *Giguère v Chambre des notaires du Québec*, 2004 SCC 1 at para 66. In this case, under the *Policy* and as defined in the *Investigation Guide for the Policy on Harassment Prevention and Resolution*, the Respondent is responsible for finding investigators who fit certain criteria. It is up to the Respondent, in light of the discretion afforded to it, to correct the decision in response to the errors identified in these reasons (*McIlvenna*, at para 63).

[45] Instead, the Court can order a remedy similar to the one in *McIlvenna*: an order remitting the matter to the Respondent for reconsideration.

V. Costs

[46] The parties agreed to costs in the amount of \$4,000.00 to the successful party. I therefore award Mr. Gareau costs of \$4,000.00.

**JUDGMENT in T-405-17**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is granted and the Decision of February 15, 2017 is set aside and the matter is returned for redetermination; and
2. The Applicant is entitled to costs in the amount of \$4,000.00.

"Ann Marie McDonald"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-405-17

**STYLE OF CAUSE:** PAUL GAREAU v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** DECEMBER 11, 2017

**JUDGMENT AND REASONS:** MCDONALD J.

**DATED:** FEBRUARY 9, 2018

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