

Federal Court



Cour fédérale

Date: 20180717

Docket: T-811-17

Citation: 2018 FC 742

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 17, 2018

Present: The Honourable Mr. Justice Diner

BETWEEN:

LYNE BRASSARD

Applicant

and

**JIRKA DANEK, YVON PARIZEAU AND THE
ATTORNEY GENERAL OF CANADA**

Respondents

JUDGMENT AND REASONS

I. Nature of the matter

[1] Lyne Brassard filed sexual harassment complaints with the Canadian Human Rights Commission (the Commission) against Jirka Danek and Yvon Parizeau, two public servants who were her managers in her government job. The investigator advised the Commission to dismiss the two complaints filed by Ms. Brassard, a recommendation that the Commission adopted.

Ms. Brassard filed an application for judicial review of the two refusals by the Commission and, for the following reasons, I reject it, with costs.

II. Preliminary facts

[2] Ms. Brassard started her job as an administrative assistant with the Information Technology Services Directorate at Public Works and Government Services Canada (PWGSC) in August 2010. Her job had a probationary period, and her contract was to expire on August 23, 2011. Ms. Brassard worked mainly for Mr. Danek. Between mid--December 2010 and mid-January 2011, Mr. Parizeau replaced Mr. Danek on an acting basis.

[3] On October 8, 2010, Ms. Brassard had to meet with her management team regarding her performance, and her management team gave her an evaluation. Then, in December 2010, the management team gave her an action plan. In January and April 2011, it met with Ms. Brassard again regarding her performance problems.

[4] In May 2011, Ms. Brassard filed an internal complaint against Mr. Danek and Mr. Parizeau. John Rath-Wilson conducted that internal investigation. In September 2011, he concluded that Ms. Brassard's complaint was unfounded.

[5] Ms. Brassard was dismissed before the end of her contract, on June 28, 2011, because she did not meet the position's requirements. Shortly thereafter, Ms. Brassard filed a grievance challenging her dismissal on July 5, 2011.

[6] On December 20, 2011, the Senior Assistant Deputy Minister dismissed Ms. Brassard's grievance. Subsequently, Ms. Brassard's union did not support her application for referral of the grievance in arbitration. So, Ms. Brassard asked the Public Service Labour Relations Board to hear her complaint; it refused because the application deadline had passed.

[7] In January 2012, Ms. Brassard filed complaints of harassment and discrimination with the Commission against Mr. Danek, Mr. Parizeau, and PWGSC. The Commission decided not to deal with the complaints on the basis of subsection 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c. H-6 (the Act), because the same allegations had been examined earlier during the harassment complaint and grievance review conducted internally.

[8] The judicial review of this decision was heard by the Federal Court (*Brassard v Canada (Attorney General)*, 2015 FC 1355 [*Brassard*]). In *Brassard*, Madam Justice St-Louis held that the complaint against PWGSC was handled adequately according to the grievance process. However, the complaint against Mr. Danek and Mr. Parizeau was not handled properly in the internal review due to a lack of procedural fairness. For this reason, the Commission's rulings with respect to Mr. Danek and Mr. Parizeau were deemed unreasonable. In June 2016, the Commission opened two new investigations to examine the complaints that Ms. Brassard filed against Mr. Danek and Mr. Parizeau.

III. The Commission's Decisions

[9] The Commission decided to adopt the recommendations in the Investigation Report, and it notified Ms. Brassard and any other person added as a party in writing that “having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted.”

[10] The Commission shared its two decisions in a letter addressed individually to each party; in the letter, it stated that it decided to dismiss Ms. Brassard's complaint under subparagraph 44(3)(b)(i) of the Act.

[11] It is recognized in case law that when the Commission does not provide reasons for its decision, it is considered to have adopted the reasoning in the previous investigation: *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184, paragraph 72 [*Union*]; *Cerescorp Company v Marshall*, 2011 FC 468, paragraph 49 [*Cerescorp*].

[12] In her two investigations in this case, the Commission's investigator noted that Ms. Brassard claimed to have been harassed by Mr. Danek and Mr. Parizeau because of her gender, in violation of section 14 of the Act. Those two reports are summarized below.

A. *Investigation of Mr. Danek*

[13] Ms. Brassard claims to have been harassed because she is a woman and refused the sexual advances of Mr. Danek. She supports her allegations in the six following “examples”:

1) Mr. Danek had a threatening manner once when a travel expense claim was rejected and

another time when certain people were not invited to a meeting due to a lack of communication. 2) He kissed some work colleagues and that embarrassed the applicant. 3) He seduced female employees and offered them gifts to placate them because he was doing “illegal things.” 4) He made negative comments about the applicant when he provided employment references. 5) He refused to transfer the applicant “because she did not like him enough.” Lastly, 6) he refused to put the applicant on a list of candidates so that she could get a job in her field.

[14] The investigator held interviews with Ms. Brassard, Mr. Danek and six PWGSC employees, most of whom held positions equal in rank to that of Ms. Brassard, meaning they worked in the same team as Ms. Brassard and therefore held positions under the supervision of Mr. Danek.

[15] Regarding the allegation of threatening behaviour when a travel expense claim was refused and when certain people were not invited to a meeting, the investigator asked Ms. Brassard what Mr. Danek did that constituted sexual assault. She replied that Mr. Danek overreacted when his travel expense claim was refused and that, because she is a woman, it was sexual harassment. She also argued that Mr. Danek’s threatening manner when certain people were not invited to the meeting in question constituted sexual harassment “because she is a woman and he could crush her in the workplace.”

[16] Mr. Danek indicated in his interview with the investigator that Ms. Brassard had made several mistakes when preparing the claims. He said that Ms. Brassard did not follow the procedure and did not ask for help from her colleagues. He argued that he never raised his voice

with Ms. Brassard. The other persons interviewed also stated that Ms. Brassard made several mistakes in the course of her employment, particularly on travel expense claims, and that Mr. Danek did not raise his voice; one person indicated that he raised his voice, but “he did not shout and was not threatening.”

[17] Moreover, the investigator noted that, in the documentary evidence, there was a performance evaluation and an action plan for Ms. Brassard, as well as email exchanges about meetings. These documents clearly indicated that Ms. Brassard had made several mistakes. On balance, the investigator concluded that the allegations that Mr. Danek behaved in a threatening manner were unfounded.

[18] The investigator then reviewed the allegation of inappropriate sexual behaviour, namely the “hugging and kissing” (including the kisses on the side of the mouth or cheeks) and the “illegal things” that Mr. Danek did. Ms. Brassard indicated that it was sexual harassment because she is a woman and that she did not want to be perceived as a woman who was there to get work “another way.”

[19] Mr. Danek, on the other hand, indicated that he kissed people on the cheek when he had not seen them for a long time and that it was not inappropriate behaviour. Moreover, Ms. Brassard never told him that this behaviour made her uncomfortable. He denied doing any “illegal things.” For example, the flowers and chocolates he gave his employees on special occasions were gifts to thank them for their work.

[20] In interview, the colleagues of Ms. Brassard who were “kissed” confirmed that the behaviour was not at all sexual in nature. They also said that the gifts were given on special occasions, such as Christmas. The investigator concluded in her recommendations report that, even if Ms. Brassard was “kissed,” these actions were not targeted at her and that, in any case, they did not constitute sexual harassment.

[21] Lastly, regarding Mr. Danek’s alleged refusal to support Ms. Brassard’s professional development, Ms. Brassard was of the view that this behaviour constituted sexual harassment because Mr. Danek wanted “to make her life miserable.”

[22] Regarding the alleged assignment, Mr. Danek indicated that he was never approached in relation to a possible assignment. Ms. Brassard instead asked her colleagues to support her and sign the approval form for her assignment. Mr. Danek affirmed that when he found out, he called the hiring manager to inform him of Ms. Brassard’s performance problems. He claimed that he never received a reference request for the complainant and therefore never provided any.

[23] The investigator indicated in her report that, based on the evidence, Ms. Brassard was not offered an assignment. Moreover, Ms. Brassard acknowledged that Mr. Danek never said he would support her because she “did not like him enough,” as she alleged in her written complaint against Mr. Danek. The investigator found that the evidence did not support the allegation that he had made negative comments about Ms. Brassard. On the other hand, he did not accept Ms. Brassard’s bids for training in her field of study and interest due to budgetary constraints.

[24] On balance, the Commission, by adopting the investigator's recommendations, deemed that the evidence gathered did not support Ms. Brassard's allegations that she had been sexually harassed by Mr. Danek, that the alleged behaviour was related to her gender and that Mr. Danek behaved in a threatening manner toward her.

B. *Investigation of Mr. Parizeau*

[25] Ms. Brassard argued that Mr. Parizeau approached her in November 2010 while she was near the photocopier and put his arm around her shoulder saying "you and I, we get along well together," and "his hand brushed against her chest." Ms. Brassard also alleged that he approached her desk in December 2010, leaned on the arm of her chair and looked at her chest. Finally, Ms. Brassard claims that he told her during a meeting in December 2010 that she would have to get used to his style of management or she would lose her job.

[26] The investigator met with Mr. Parizeau and Ms. Brassard's work colleagues (the same people she met with for the investigation of Mr. Danek, including Mr. Danek) for an interview. The investigator noted straightaway that Ms. Brassard specified during her interview that Mr. Parizeau did not tell her that she would have to get used to his style of management or she would lose her job, as she claimed in her written complaint against Mr. Parizeau.

[27] Mr. Parizeau denied the allegations that he tried to touch and look at Ms. Brassard's chest. Furthermore, Ms. Brassard's work colleagues did not witness these events. The conclusion of the internal investigation conducted by Mr. Rath-Wilson was that the allegations were unfounded. One of Ms. Brassard's work colleagues who was interviewed indicated that

Mr. Parizeau “acted inappropriately toward her by looking at her chest once,” but she did not file a complaint.

[28] The investigator reviewed the evidence pertaining to these allegations. She noted that the Supreme Court defined sexual harassment in the workplace in *Janzen v Platy Enterprises Ltd* [1989] 1 SCR 1252, at page 1284, and that the Federal Court also addressed harassment in *Canada (Human Rights Commission) v Canada (Armed Forces)*, [1999] 3 FC 653 [also known as *Franke*], at paragraph 29.

[29] After considering the case law and the legislation, the investigator concluded that the evidence did not support the complainant’s allegations and that, moreover, even if there had been sufficient evidence in support of the allegation that Mr. Parizeau looked at Ms. Brassard’s chest, this act does not satisfy the test for sexual harassment.

[30] Ultimately, the Commission decided that the referral of complaints against Mr. Danek and Mr. Parizeau to the Tribunal was not justified because Ms. Brassard did not present sufficient evidence in support of her allegations.

IV. Issue and standard of review

[31] This case raises just one question: Are the Commission’s two rulings reasonable?

[32] The respondents maintain that the standard of review applicable in this case is the standard of reasonableness: *Halifax (Regional Municipality) v Nova Scotia (Human Rights*

Commission), 2012 SCC 10 [*Halifax*], paragraph 17. I agree (see also *Wagmatcook First Nation v Oleson*, 2018 FC 77, paragraph 16). Breaches of procedural fairness must be reviewed on a standard of correctness (*Southern Chiefs Organization Inc. v. Dumas*, 2016 FC 837, paragraphs 23 and 24), but Ms. Brassard did not report such violations nor did she demonstrate that any occurred; I will get back to this later.

V. Positions of the parties

A. *Applicant*

[33] Ms. Brassard argued that the investigator cannot really have “reviewed the party positions and all the written evidence submitted during the investigation” because she is still awaiting the information she requested under the *Access to Information Act* (RSC 1985, c. A-1).

[34] Ms. Brassard also stated that the quality of the investigator’s report is unacceptable because the Commission caused serious harm by preventing her, the applicant, from producing certain documents. Ms. Brassard indicated that “the investigation process was very brief [...] [and she] feels that it shows a lack of transparency and good faith.”

[35] She said that the Commission went ahead with producing its final report, without notifying her, and that the Commission acted expeditiously without taking into account the rights and remedies of the applicant during this important stage of the investigation.

[36] Ms. Brassard added that the Commission never informed her of the deadlines for filing information that she tried to obtain through her access to information request and never gave her a “deadline” for sending additional information after her telephone interview with the investigator on January 10, 2017.

[37] Ms. Brassard argued that the Commission did not consider all the documentary evidence, particularly the emails she entered into evidence, such as the one dated June 16, 2011, between Mr. Danek and a woman named Elizabeth Stoqua. Ms. Brassard claimed that this mistake was addressed at paragraph 49 in *Gosal v Canada (Attorney General)* (2011 FC 570):

It is not disputed that, where a party’s submissions to the Commission allege substantial and material omissions in the investigation *and* provide support for that assertion, the Commission must refer to those discrepancies and, even briefly, indicate why it is of the view that they are either not material or are not sufficient to challenge the recommendation of the investigator (*Herbert v. Canada (Attorney General)*, 2008 FC 969, at paragraph 26).

[38] Ms. Brassard stated that the Commission strayed from its mandate, which was to evaluate the behaviour of Mr. Danek and Mr. Parizeau in the workplace. She argued that she “was shown the door” because she filed a complaint of sexual harassment against Mr. Danek and Mr. Parizeau with the Commission, that the whole situation was “covered up” as “unsatisfactory performance” and that the two men “did everything” to fire her. Ms. Brassard also argued that the Commission strayed from the definition of sexual harassment in its analysis. She added that the Commission did not take into account the fact that the persons interviewed are still employed by PWGSC because they accepted Mr. Danek’s behaviour.

B. *Respondents*

[39] The respondents submit that the Commission's findings are reasonable if they have a rational basis (*Halifax*, paragraph 47). They contend that the Commission must follow the principle of procedural fairness; however, considering the administrative and financial realities of the investigation, it does not need to be perfect (*Tahmourpour v. Canada (Attorney General)*, 2005 FCA 113, paragraph 39).

[40] The Commission enjoys a broad discretion that allows it to decide if, given the circumstances surrounding the complaint, pursuing the investigation is justified (*Union*, paragraph 61 to 63). If the Commission deems that the evidence is insufficient, it must dismiss the complaint (*Cerescorp*, paragraph 48).

[41] First, regarding the complaint against Mr. Danek, the respondents say that the Commission's decision is reasonable. The evidence does not support the allegation that Mr. Danek acted in a threatening manner. In fact, the evidence shows that Ms. Brassard had performance problems.

[42] Second, the argument that Mr. Danek engaged in inappropriate sexual behaviour, kissed his colleagues on the side of the mouth and cheeks and did "illegal" things is unfounded. There was no evidence to support the allegations that Mr. Danek engaged in illegal acts and behaved inappropriately. Therefore, it was reasonable for the Commission to find that, based on the evidence, this behaviour did not amount to sexual harassment against Ms. Brassard.

[43] Third, regarding the argument that Mr. Danek refused to support Ms. Brassard's professional development, the respondents submitted that the investigator undertook an extensive review of the evidence of both parties. She aptly explained how she saw each incident at issue and why she did not see a relationship between the incidents and the definition of sexual harassment. The investigator's findings are consistent with the case law, particularly the Franke case.

[44] As for the allegations against Mr. Parizeau, according to the respondents, the result is equally valid because the investigator also analyzed the testimonial and documentary evidence and reasonably concluded that the evidence did not support Ms. Brassard's allegations. Although one of the persons interviewed mentioned that Mr. Parizeau had looked at her chest, it should be noted that such an act does not, according to the applicable judge-made test, constitute sexual harassment, and that the investigator's findings are consistent with the decision made in *Franke*.

[45] Lastly, regarding Ms. Brassard's statement that she did not have the opportunity to present additional evidence because she was still awaiting a response to her request for access to information (request still pending), the respondents argue that it should not be accepted. Ms. Brassard filed her original complaints in 2012 with the Commission and has had the opportunity to obtain the necessary supporting evidence since then. The respondents added that the documents in question are not obviously crucial and, therefore, would not change the outcome.

VI. Analysis

[46] I cannot agree with Ms. Brassard's arguments that the Commission make an unreasonable decision. The investigator did not fail in her duty to review the evidence and did not produce her report in a very perfunctory manner. As for the arguments about procedural fairness, I see no error in how the Commission and the investigator approached and conducted the process. I will start with the argument that there was a lack of procedural fairness.

[47] Ms. Brassard had ample time to present the documents she says she does not have. The Commission re-opened the two investigations of Mr. Danek and Mr. Parizeau in June 2016 and, when the investigator phoned Ms. Brassard for her interview in January 2017 (eight months after the complaints were opened), she still had not received the documents for which she was waiting. The Commission's ruling was made in May 2017, four months after the telephone interview, a year after the complaints filed with the Commission were re-opened and a little over five years after the original filing of the first requests with the Commission in January 2012.

[48] Moreover, Ms. Brassard did not explain what type of information she expected to receive and provide to the Commission, nor its relevance. The respondents suggested this was a fishing expedition. It is true that up until now, Ms. Brassard has not explained how the unspecified information might influence decisions about the alleged acts of discrimination.

[49] Ms. Brassard also maintains that the investigator was biased. However, she did not specify what the investigator's prejudices were or provide any examples. Thus, an informed

person, who reviewed the matter realistically and practically, would not reach the conclusion that the investigation, or the report, raises a reasonable apprehension of bias (*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369, p. 394). Allegations of bias are serious and must be based on concrete evidence (*Vo v. Canada (Citizenship and Immigration)*, 2018 FC 230, paragraph 23).

[50] Ms. Brassard subsequently maintained that the decision was unreasonable because the investigator—and by extension the Commission—had not examined all the evidence. However, the investigator clearly noted what Ms. Brassard advanced by listing her allegations and explanations. Nevertheless, based on the documentary and testimonial evidence, the investigator did not find that Ms. Brassard's complaints were founded. I am satisfied that the investigator based her finding on the testimonial and documentary evidence rather than on Ms. Brassard's interview, particularly the testimonial evidence of the other people working in her office. This type of argument is merely a disagreement with the assessment of the evidence and, ultimately, the result of the decision; it is not an error.

[51] Ms. Brassard also submitted that the Commission did not consider all the evidence. Specifically, she reproached the Commission for ignoring certain emails and, in particular, one key email between Mr. Danek and Ms. Elizabeth Stoqua.

[52] Note that these emails, including this key email, were not presented to the Commission and therefore do not appear in the certified tribunal record. They were not included in the file that the applicant presented to this Court either. These documents were only presented to the court on the day of the judicial review hearing.

[53] The respondents objected to the filing of this fresh evidence. I have two comments in this regard. Firstly and as a general rule, new evidence cannot be filed during a judicial review because the Court's role is to examine if, based on the record before it, the decision contains errors (*Toki v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 606, paragraph 28). I agree with the respondents.

[54] Nevertheless, even if I were to accept the fresh evidence, and particularly the email in question, I am not convinced that the result would be different. This was an email between Mr. Danek and another manager. Although Mr. Danek expressed his frustration with Ms. Brassard as an employee in rather crude terms, there was no content of a sexual nature that might support Ms. Brassard's allegations of sexual harassment.

[55] Lastly, Ms. Brassard alleged that the Commission strayed from its mandate to assess the behaviour of Mr. Danek and Mr. Parizeau. That is clearly not the case. The investigator aptly noted and analyzed each of Ms. Brassard's allegations and conducted a detailed and complete investigation, which the Commission duly supports, as it is reasonable based on the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*]). Based on the evidence and testimony that accompanied the complaints and was gathered during the investigations, it was

entirely appropriate for the administrative tribunal to find that the complaints were unfounded—a rational and acceptable solution in light of all the known facts and submissions presented. The decision, and the underlying reasons, for not referring the complaints to the tribunal, satisfy the transparency, intelligibility and justification criteria, and the conclusion falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, paragraph 47).

VII. Costs

[56] Generally, the costs follow the outcome of the case, which means that they are awarded to the successful party (*MacFarlane v. Day & Ross Inc.* 2014 FCA 199, paragraph 6). As explained in *Cowessess First Nation No. 73 v. Pelletier*, 2017 FC 859, paragraph 22, our Court has the discretionary power to determine the amount of costs, to allocate them, and to designate who must pay them.

[57] Based on the submissions made in Court during the hearing and later in the letters from Ms. Brassard and the respondents' counsel, as well as the factors for exercising discretionary power set out in subsection 400(3) of the *Federal Court Rules*, SOR/98-106, I award the respondents \$500 in costs.

VIII. Conclusion

[58] Ultimately, Ms. Brassard is asking our Court to re-evaluate the facts and decide in her favour. However, the Commission's decision is reasonable considering the facts and the law. The investigator analyzed each of Ms. Brassard's allegations, interviewed her, as well as the third parties and other employees, and analyzed the documentary evidence. The investigator explained how she reached the various conclusions in her analysis and indicated why she preferred certain evidence. The application for judicial review must therefore be dismissed.

JUDGMENT in T-811-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. with costs payable to the respondents in the amount of \$500.

“Alan S. Diner”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-811-17

STYLE OF CAUSE: LYNE BRASSARD v. JIRKA DANEK ET AL.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 11, 2018

JUDGMENT AND REASONS: DINER J.

DATED: JULY 17, 2018

APPEARANCES:

Lyne Brassard SELF-REPRESENTED

Gabrielle White FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Deputy Attorney General of Canada FOR THE RESPONDENTS
Ottawa, Ontario