Federal Court Cour fédérale

Date: 20210615

Dockets: T-2006-19
T-2087-19
T-2088-19

Citation: 2021 FC 610

Ottawa, Ontario, June 15, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ALEXANDRU-IOAN BURLACU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] These three applications for judicial review were ordered consolidated. Each challenges a final level decision of the Canada Border Services Agency [CBSA], Mr. Burlacu's employer.

[2] The relevant facts relating to the three applications are as follows.

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[3] This application relates to the decision on grievance 2019-3941-129585 [Grievance 585] submitted on June 5, 2019. In that grievance, Mr. Burlacu grieves:

> [T]he failure of the Employer to exemplify, with respect to me, the values of "Respect For Democracy" and "Respect for People" and their respective expected behaviours, as mandated by the Values and Ethics Code for the Public Sector, which is a term and condition of my employment, evidenced by the unfair manner in which it has dealt with grievances nos. 2018-3941-126855, 2018-3941-126992, 2018-3941-127321, 2018-3941-128097, 2018-3941-128112, 2018-3941-128507, 2018-3941-128548, 2019-3941-128642, including failing to provide me with a final-level response to these grievances on or before May 29, 2019.

The corrective action requested included that he be provided with final level responses and be reimbursed for the six hours of vacation leave he took in order to prepare submissions for the grievances.

[4] By decision dated December 2, 2019, CBSA "partially granted" the grievance as the final level responses were not given in the time specified, but stated that no further correction action will be forthcoming as they had now been provided. Specifically it stated:

> With respect to Article 18.17 of the *Border Services* (FB) Collective Agreement, I find that you were not provided with the final level response to your grievances within the established timelines. Nevertheless, I note that the Employer provided you with final level replies on [four separate dates following the filing of grievance 585].
>
> As a result, since you've received a final level response to all eight (8) grievances, this present grievance has been rendered moot. Regarding your request for reimbursement of vacation leave, I find that there are no provisions in the FB Collective Agreement to provide employees with paid leave to prepare grievance

> submissions; the use of vacation leave was therefore appropriate and will not be reimbursed.

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[5] This application relates to the decision on grievance 2019-3941-129587 [Grievance 587] submitted June 10, 2019. In that grievance, Mr. Burlacu grieves:

> [T]he failure of the Employer to exemplify, with respect to me, the values of "Respect For Democracy" and "Respect for People" and their respective expected behaviours, as mandated by the Values and Ethics Code for the Public Sector, which is a term and condition of my employment, by failing to provide me with a final-level response to grievance no. 2019-3941-129113 on or before June 6, 2019.
>
> I further grieve the failure of the Employer to comply with section 124 of the Canada Labour Code, which it itself invoked, by failing to appreciate the urgency of resolving grievance no. 2019-3941-129113. As a result, the Employer did not seek to find an informal resolution to the matters underlying the grievance, despite my request that it do so, nor, in the alternative, did it provide a final-level response to grievance no. 2019-3941-129113 on or before June 6, 2019, thus failing to comply with the requirements of section 124 of the Canada Labour Code and leaving me in my current situation.

[6] By decision dated December 20, 2019, the employer responds denying the grievance:

> I find that you were not provided with a final level response to your grievance within the established timelines, however, the reply has since been provided to you. As such, this grievance is deemed moot.
>
> Notwithstanding the above, I also find that management has complied with section 124 of the Canada Labour Code.
>
> Accordingly, your grievance is denied as it is now moot and the corrective action you seek will not be forthcoming.

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[7] This application relates to a decision on grievance 2018-3941-129113 [Grievance 113] submitted on March 28, 2019. In that grievance, the applicant alleges that the employer has adopted and imposed an unfair interpretation of section 124 of the *Canada Labour Code*. He requests that the grievance be allowed, that the employer cease imposing its unfair interpretation of section 124 and that he be made whole and be granted any and other remedies that are deemed just. Grievance 113 reads as follows:

> I hereby grieve, pursuant to subsection 208(1) of the Federal Public Sector Labour Relations Act, the interpretation and application, with respect to me, of section 124 of the Canada Labour Code.
>
> I further grieve the failure of Employer to exemplify, with respect to me, the values of "Respect For Democracy" and "Respect for People" and their respective expected behaviours, as mandated by the Values and Ethics Code for the Public Service, which is a term and condition of my employment, by adopting and imposing its unfair interpretation of section 124.

[8] By decision dated December 20, 2019, the employer responds denying the grievance:

> I find that the Employer complied with and appropriately applied section 124 of the Code by separating you from those named as respondents in your workplace violence complaint and by changing your work reporting relationship. Management has the delegated authority to manage their workforce, which includes and is not limited to assigning work duties and establishing reporting structures. I note that an independent third party confirmed that the actions taken by management were appropriate given the circumstances.
>
> Accordingly, the grievance is denied and the corrective action you seek will not be forthcoming.

[9] The applicant submits that these decisions are unreasonable. Moreover, he submits that he ought to have been asked to provide his submissions on the issue of mootness prior to the decisions being rendered and he says that this is a breach of procedural fairness.

[10] The respondent submits that the applications raise issues that are either adjudicable before the Federal Public Sector Labour Relations and Employment Board or can be addressed by a complaint mechanism under the *Canada Labour Code*, RSC, 1985, c L-2. Accordingly, it submits that these applications are premature because the available administrative procedures have not been exhausted and therefore these applications should be dismissed. The respondent further submits that these decisions are reasonable and the procedure followed was fair.

[11] As a preliminary matter, the respondent submits that the applicant's affidavit "contains argumentative statements contrary to the *Federal Courts Rules*" and asks the Court to strike paragraphs 8, 9, 10(b),(d)and (e), 12, 20, and 28, and their supporting exhibits. For his part, Mr. Burlacu, in oral submissions, acknowledges that his paragraph 9 expresses his opinion as repeated in his written submissions, and he agrees that it ought to be struck. He submits that the other impugned paragraphs recite facts and are not speculative. He notes and objects to several paragraphs of the respondent's supporting affidavit as not being based on facts; namely paragraphs 7, 8, and 9.

[12] I agree with both parties that some of the affidavit paragraphs are improper and do not express facts as required by Rule 81(1); however, having reviewed them and considered the submissions of the parties on the merits, nothing turns on whether they should be struck or not,

as none are relevant to the merits of the applications and none have been afforded any weight. Accordingly, it is not necessary to address this preliminary matter.

[13] The respondent also submits that these applications ought to be dismissed as premature. It submits that the issues arising from these three applications are adjudicable either before the Federal Public Sector Labour Relations and Employment Board [the Board] or the mechanisms set out in the *Canada Labour Code*.

[14] It submits that these matters are adjudicable before the Board because the "pith and substance of the grievances relate to the interpretation and application of the Collective Agreement" and thus fall under paragraph 209(1)(a) of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 "which delineates the Board's jurisdiction to hear grievances of these matters, with the approval of the employee's bargaining agent." Other aspects of the decisions under review, those involving the employer's alleged use of threats of disciplinary action because the applicant sought to enforce his rights under the *Canada Labour Code*, and contravening it by failing to make timely decisions, are said by the respondent to fall under the complaint and enforcement mechanisms in section 133 and 127.1 of the *Canada Labour Code*.

[15] I am unable to agree with this submission. In my view, the respondent has interpreted the grievances in its own way, without examining exactly what the grievance forms state is the nature of the applicant's grievance.

[16] As he stated forcefully at the oral hearing, none of these grievances are based on the Collective Agreement, or any alleged breach thereof. The grievance form itself in Section 1A contains a box labelled "Collective Agreement (if applicable)" and in each case, that box was left empty by the applicant. In each grievance, the applicant alleges that the conduct complained of violates a term and condition of his employment, namely the principles set out in the Values and Ethics Code for the Public Service [the Values and Ethics Code].

[17] He submits, and I agree, that the Values and Ethics Code is a term and condition of his employment because it states that:

> Acceptance of these values and adherence to the expected behaviours is a condition of employment for every public servant in the federal public sector, regardless of their level or position. A breach of these values or behaviours may result in disciplinary measures being taken, up to and including termination of employment.

[18] He further submits, and I agree, that pursuant to paragraph 208(1)(a) of the *Federal Public Sector Labour Relations Act*, he is entitled to grieve alleged violations of that policy:

> 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, … [emphasis added]

[19] It is not clear to me that the applicant ever directly challenged a workplace health and safety concern that could then be subject to adjudication under the *Canada Labour Code*.

Rather, his objection appears to have been that when he complained about the employer reassigning him, the employer first evoked as its authority section 129(5) of the *Code* which permits an employer to require an employee to remain at a safe location if he has exercised his right under subsection 129(1.3) and then, when he pointed out that he had not exercised any of his rights under subsection 129(1.3), the employer evoked sections 124 and 128.1(3). He argued that only section 124 could apply. It states: "Every employer shall ensure that the health and safety at work of every person employed by the employer is protected" but argued in his grievance that the employer, having found no danger to him in his position, could not interpret that provision as authority for removing him from his position.

[20] On those facts, I am not prepared to find that these applications are premature as it is unclear that there are other avenues that specifically address the applicant's concerns. Further, none were suggested in the grievance responses.

[21] Mr. Burlacu submits that he was denied procedural fairness in that the employer responded to the earlier grievances and then took the position that the grievances about the late decision-making was moot, without permitting him an opportunity to respond. I do not find this to be a breach of procedural fairness. Circumstances change and the employer is required to address the facts as they stand at the time of the response.

[22] Which leaves the question of whether the decisions under review are reasonable. I find that they are not.

[23] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 127, the Supreme Court of Canada articulated what is meant by a reasonable decision being both justified and transparent:

> The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties. [emphasis added]

[24] The reasons need not address every submission but, at a minimum, they must demonstrate to the recipient that the decision-maker listened to him.

[25] The Federal Court of Appeal in *Jog v Bank of Montreal*, 2020 FCA 218 held that when a decision-maker fails to grapple with all the relevant evidence before him or her, then the decision "lacks the transparent, intelligible and justified explanation required by Vavilov (at para. 15) and thus, is unreasonable." The same holds true if the decision-maker fails to grapple with the alleged basis of the matters before him or her.

[26] The decision-maker here failed to engage with the real issues in dispute. Each of the grievances references the Values and Ethics Code and alleges that the actions of the employer complained of in the grievance violate it. Yet, as the applicant notes, there is not one reference in any of these decisions to that document. I cannot find that the employer turned its mind to the issues raised by Mr. Burlacu.

[27] Mr. Burlacu properly noted that the employer was under no obligation to agree with him that the Values and Ethics Code had been breached by the actions complained of, but if it was of that view, it is required to explain why.

[28] Mr. Burlacu is entitled to his costs, which are fixed at $1,500.00 for all three of these applications together.

[29] A copy of these Reasons shall be placed in each of the Court files.

JUDGMENT IN T-2006-19 / T-2087-19 / T-2088-19

THIS COURT'S JUDGMENT is that these applications are allowed, the decisions under review are set aside, the grievances are to be reviewed by a different decision maker who shall render a new final response to each, and costs to the Applicant are fixed at $1,500.00.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-2006-19 / T-2087-19 / T-2088-19
STYLE OF CAUSE:	ALEXANDRU-IOAN BURLACU v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 25, 2021
JUDGMENT AND REASONS:	ZINN J.
DATED:	JUNE 15, 2021

APPEARANCES:

Alexandru-Ioan Burlacu	APPLICANT (ON HIS OWN BEHALF)
Véronique Newman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

- Nil -	SELF-REPRESENTED APPLICANT
Attorney General of Canada Department of Justice Canada Ottawa, Ontario	FOR THE RESPONDENT