Federal Court  Cour fédérale

Date: 20240530

Docket: T-1150-23

Citation: 2024 FC 823

Ottawa, Ontario, May 30, 2024

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

DAVID BROWN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision of the Applicant's employer the Treasury Board Secretariat of Canada [TBS] dated May 4, 2023 [Decision]. The Decision adopted findings of an Investigator after an investigation of a Notice of Occurrence filed by the Applicant pursuant to the *Workplace Harassment and Violence Prevention Regulations*, SOR/2020-130 [*Regulations*]. The *Regulations* are enacted pursuant to the *Canada Labour*

Code, RSC 1985, c L-2 [*Canada Labour Code*]. These new *Regulations* were enacted in 2022 to replace workplace violence and harassment matters previously covered by the *Canada Occupational Health and Safety Regulations*, SOR/86-304.

II. Facts

[2] Since March 2020, the Applicant has worked as a Senior Policy Analyst at TBS. The Applicant's position is not represented by a union; however, his terms and conditions of employment follow the Economics and Social Science Services Collective Agreement [EC Collective Agreement].

[3] In November 2020, the Applicant requested retroactive approval of discretionary leave with pay [code 699 leave] from May 1, 2020 to the end of June 2020, following a period when he was on certified paid sick leave, between May 1, 2020 to September 21, 2020.

[4] At this time, TBS determined the appropriate leave for the Applicant was to claim paid sick leave (not discretionary paid code 699 leave).

[5] On February 17, 2021, the Applicant filed a grievance on the denial of paid code 699 leave pursuant to paragraph 21.17 of the EC Collective Agreement. The employer denied his grievance up to and including the final level.

[6] As is now a matter of public record, the Applicant sought judicial review of the final level grievance decision. On December 22, 2023, his application for judicial review of the code 699 grievance was granted and this Court remanded it for redetermination by the employer: see

Brown v Canada (Attorney General), 2023 FC 1748. The Court's judgment was not before the Investigator or final level decision maker below.

[7] On December 17, 2021, the Applicant submitted a Notice of Occurrence [NOO] to the TBS Designated Recipient Unit. The NOO named eight respondents and identified thirteen witnesses in respect of 18 allegations of workplace violence and or harassment between December 2020 and May 2022, stemming from events that occurred in the context of the denial of code 699 leave and the Applicant's subsequent grievances.

[8] The Applicant grouped the allegations into three broad categories: (a) harassment in the form of discrimination based on disability; (b) inappropriate performance management practices; and (c) unresponsive, delayed response and/or misleading/inappropriate responses from management. The NOO was amended and finalized in the Summer of 2022.

[9] The Applicant and the employer engaged in a negotiated resolution process, without success. In September 2022, pursuant to the *Regulations*, the employer selected an Investigator to investigate the allegations in the NOO.

[10] In October 2022, the Applicant received a copy of the Investigator's resume.

[11] In November 2022, the Applicant was told he would be contacted by the Investigator to set up an appointment and begin the investigation process. The Applicant was interviewed and sent a summary of his position. He met with the Investigator three additional times.

[12] The Investigator prepared a separate report concerning each of the seven responding parties interviewed. The Investigator did not prepare a report for one responding party because that person did not respond to requests for an interview.

[13] On March 27, 2023, the Investigator's reports were shared with the employer's Designated Recipient Unit, which was given the opportunity to comment on the draft reports and recommendations.

[14] In each report, the Investigator concluded the Applicant's allegations did not meet the definition of workplace harassment and violence.

[15] On May 4, 2023, the reports were sent to the Applicant by email, as accepted by the employer.

[16] However, and of critical importance, neither then nor at any time was the Applicant given a synopsis (or any information) about what the responding parties or others interviewed told the Investigator about his allegations, nor was he given a copy of the Investigator's preliminary reports or recommendations.

[17] The Applicant who is self-represented filed a detailed written rebuttal to these reports with his Court filings, entitled "David Brown's Feedback and Analysis of Notice of Occurrence (NOO) Reports." The Respondent objected to its inclusion and asked that it be struck from the record.

[18] I should add that complicating (but not insurmountably so) the record in this matter (as was the case in the code 699 grievance judicial review) is the fact that throughout the many steps in the code 699 grievance, and the many steps in the present proceedings under the *Regulations*, the Applicant was simultaneously engaged in an extensive email campaign within the public service in his effort to change Canadian government policy in relation to the treatment of public servants with mental health challenges related to and during the COVID-19 pandemic. Responses to him were often met with detailed critiques, additional advocacy, requests for additional answers and the like which led some to decline further engagement with the Applicant, leading him in some cases to expand and escalate his concerns to higher levels of management including the Clerk of the Privy Council who is Canada's most senior public servant.

III. Decision under review

[19] The Investigator's reports all conclude that the NOO did not meet the definition of workplace harassment and violence.

[20] Nevertheless, over the course of the reports, the Investigator made several organization wide recommendations to TBS to avoid recurrences of similar issues:

> 1. The organization should implement a process to provide a single point of reference, or case manager, to manage communications from employees with multiple requests for information in order to coordinate efforts and ensure that questions raised do not go unanswered, summarize responses provided and document instances where no answer will be provided. This communication could come in the form of email responses or a regular and ongoing dialogue in person or virtually with the employee and the case manager. This role should be separate and distinct from the designated recipient function.

2. The organization should review its practices in dealing with individuals who are unrepresented and explore options and resources to provide support and guidance to unrepresented individuals who require assistance in order to even the existing imbalance in this dynamic. Labour Relations experts have a role in supporting managers, but there is a need to support unrepresented employees who desire assistance.

3. The organization should provide training for managers in dealing with gradual return to work situations and review its return to work practices to ensure that expectations around performance and volume of work are clearly outlined and that employees who are on a gradual return to work arrangement are supported by their manager, with assistance from the disability management unit and/or the external insurance provider to ensure that any concerns are highlighted and dealt with as early as possible.

4. The organization should ensure that managers maintain regular touch points with employees on long-term leave from the organization to maintain connection, provide support, and ensure that managers notify appropriate HR employees of any long-term leave situations.

5. The organization should enhance training to managers on mental health and employee support to better address the needs of employees with mental health concerns. This training should include guidance on understanding mental health issues, recognizing potential triggers, and providing appropriate accommodations and support. By ensuring that all employees involved in these processes are equipped with the right knowledge and skills, the organization can create a more inclusive and supportive work environment.

6. The organization should provide additional training for those working in HR fields, including Disability Management, OSH, and Labour Relations, in communicating with and supporting employees with mental health issues. While the use of emails is important as a written record of information exchanged, their use without complementary personal contact or conversations may not be the most suitable form of communication for employees dealing with mental health issues. The choice of communication medium, i.e., offering a video or personal meeting in addition to communication in writing, should be offered to employees rather than driven by organizational practice or convention.

IV. Relevant legislative provisions

[21] Part II of the *Canada Labour Code* defines workplace harassment and violence:

> **122 (1) Definitions in this Part**
>
> ***harassment and violence*** means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment;

[22] Employers in the federally regulated sector must comply with the *Regulations* which are enacted pursuant to paragraph 125(1)(z.16) of the *Canada Labour Code*:

> **Specific duties of employer**
>
> **125 (1)** Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,
>
> > **(z.16)** take the prescribed measures to prevent and protect against harassment and violence in the work place, respond to occurrences of harassment and violence in the work place and offer support to employees affected by harassment and violence in the work place;

[23] The relevant prescribed measures in the *Regulations* are:

> **Information for investigator**
>
> **29** An employer or the designated recipient must provide the investigator with all information that is relevant to the investigation.

Investigator's report

30 (1) An investigator's report regarding an occurrence must set out the following information:

(a) a general description of the occurrence;

(b) their conclusions, including those related to the circumstances in the work place that contributed to the occurrence; and

(c) their recommendations to eliminate or minimize the risk of a similar occurrence.

Identity of persons

(2) An investigator's report must not reveal, directly or indirectly, the identity of persons who are involved in an occurrence or the resolution process for an occurrence under these Regulations.

Copies of report

(3) An employer must provide a copy of the investigator's report to the principal party, responding party, the work place committee or health and safety representative and, if they were provided with notice under subsection 15(1), the designated recipient.

V. Issues

[24] The Applicant raises the following issues:

1. The investigation procedure was deficient/unreasonable;
2. The investigation did not consider systemic discrimination, and
3. The Investigator was biased.

[25] The Respondent raises the following issues:

1. Whether the Applicant's affidavit should be struck?
2. What is the applicable standard of review?

3. Was the decision reasonable?
4. Was the investigative process procedurally unfair?
5. Whether the style of cause should be amended?

[26] Because the Court concludes the Decision is not procedurally fair, as required by decisions under the previous regulations of Justice Gagné (as she then was) in *Renaud v Canada (Attorney General)*, 2013 FC 28 and of Justice Martineau in *Provonost v Canada (Revenue Agency)*, 2017 FC 1077 , and as required under the current *Regulations* by *Marentette v Canada (Attorney General)* 2024 FC 676 [*Marentette*], it is not necessary to deal with the reasonableness issue.

VI. Submissions of the parties and analysis

A. *Standard of review*

(1) Procedural fairness

[27] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at paragraph 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [per Rennie JA].

[28] In this, and while there is an ongoing debate, the Court follows the Federal Court of Appeal which relied on "the long line of jurisprudence, both from the Supreme Court and" the Federal Court of Appeal itself, and held that "the standard of review with respect to procedural fairness remains correctness": *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA (as he then was):

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.
>
> [Emphasis added]

[29] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 50, the Supreme Court of Canada explains what is required on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[30] That said, a procedurally unfair decision may nonetheless be upheld on judicial review if the answer is legally inevitable. In *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 [*Mobil Oil*], Justice Iacobucci for the Court held at pp. 228:

> In light of these comments, and in the ordinary case, Mobil Oil would be entitled to a remedy responsive to the breach of fairness or natural justice which I have described. However, in light of my disposition on the cross-appeal, the remedies sought by Mobil Oil in the appeal per se are impractical. While it may seem appropriate to quash the Chairman's decision on the basis that it was the product of an improper subdelegation, it would be nonsensical to do so and to compel the Board to consider now Mobil Oil's 1990 application, since the result of the cross-appeal is that the Board would be bound in law to reject that application by the decision of this Court.
>
> The bottom line in this case is thus exceptional, since ordinarily the apparent futility of a remedy will not bar its recognition: Cardinal, supra. On occasion, however, this Court has discussed circumstances in which no relief will be offered in the face of breached administrative law principles: e.g., *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561. As I described in the context of the issue in the cross-appeal, the circumstances of this case involve a particular kind of legal question, viz., one which has an inevitable answer.

[31] *Mobil Oil* was followed by the Federal Court of Appeal in *Canada (Attorney General) v McBain*, 2017 FCA 204 [*McBain*], per Justice Boivin JA at paragraphs 9-10:

> [9] 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 CanLII 23 (SCC), [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78 (QL)).
>
> [10] Exceptions to this rule exist where the outcome is legally inevitable (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202 at pp. 227-228; 1994 CarswellNfld 211 at paras. 51-54) [*Mobil Oil*] or where the breach of procedural fairness has been cured in the appellate proceeding (*Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97, [2010] B.C.J. No. 316 (QL) at para. 38 [*Taiga Works*]).

(2) Role of the Court in reweighing and reassessing the evidence on judicial review

[32] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*] makes it clear that the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances." The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[33] To the same effect, the Federal Court of Appeal confirms in *Doyle v Canada (Attorney General)*, 2021 FCA 237 [*Doyle*] that the role of this Court on judicial review is not to reweigh and reassess the evidence unless there is a fundamental error:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.

> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.
>
> [Emphasis added]

B. *Breach of procedural fairness*

[34] Each of the parties addressed the impact of the Court's recent decision in *Marentette,* where the Court granted judicial review and set aside a procedurally unfair a decision under these new *Regulations*.

[35] The decision under review in *Marentette* was set aside because, as here, at no time prior to the Applicant receiving the final reports of the Investigator was he given a synopsis (or any information) and opportunity to respond to what the responding parties and others told the Investigator about his allegations, nor a copy of the Investigator's draft reports.

[36] The Applicant asks that the Decision be set aside on this basis (and others).

[37] The Respondent disagrees, submitting *Mobil Oil* and *McBain* apply. However, and with respect, the Respondent invites the Court to weigh and assess the evidentiary record and inferences without the benefit of what the Applicant might have said had he been asked for comment, and of course, without the benefit of what the Investigator might have concluded having heard and considered those comments.

[38] That is not permitted. As *Vavilov* instructs and *Doyle* makes clear, the weighing and assessing of evidence forms no part of the Court's role on judicial review. In a properly functioning and procedurally fair investigation in this case, that task falls to the Investigator not this Court.

[39] I agree with the Applicant, and will order the employer's Decision set aside because of breach of procedural fairness.

[40] An issue then becomes how best and most efficiently to deal with this matter once it goes back. It could be sent back to be redone entirely by a different investigator from scratch. However, as the Applicant decries, this matter has already taken a great deal of time to get to this point.

[41] I also observe the Investigator interviewed some 20 individuals and produced seven reports, all of which appear detailed although I make no finding on their merits or reasonableness. I have found the process procedurally incomplete but have made and make no finding on the merits or reasonableness of the seven reports.

[42] In this case, having regard to paragraph 18.1(3)(b) of the *Federal Courts Act*, RSC 1985, c F-7, and as an "appropriate" direction, I will order this matter remitted back to where it was up until the breach of procedural fairness took place, in the hope the same Investigator may resume the investigation in a procedurally correct process by affording the Applicant an opportunity to

comment on what the responding parties and witnesses said, and her draft reports. After that the Investigator will be free to proceed as deemed fit and submit her final report(s).

[43] It may be the Applicant will simply ask the Investigator to review the document he filed entitled “David Brown’s Feedback and Analysis of Notice of Occurrence (NOO) Reports.” It may be that when he is asked for comment, he will file some other document. The process and response are for the Investigator and Applicant to sort out.

[44] If the same Investigator is not available, I see no reason in this case why a new investigator may not step into the shoes of the first Investigator and with the benefit of work already done, and having afforded the Applicant the opportunity to comment, and taking whatever steps might then be appropriate, the investigator may then complete the required report(s). I raised this at the hearing without objection.

[45] In this manner, a measure of response to the Applicant’s complaints of delay will be furnished.

[46] Of necessity, I now address two further points raised by the Applicant.

[47] First, the Applicant submits segregating the allegations into seven individual reports does not result in a comprehensive investigation into the allegations. The Applicant submits the allegations were investigated out of context, and as standalone incidents, rather than assessing the impact of the actions combined as experienced by a person with a mental health disability such as the Applicant.

[48] With respect, there is no merit in this complaint. First, as noted at the outset of these reasons, the Investigator provided "organization" wide recommendations not just solutions targeted at the individual Applicant. Secondly, as a matter of law and procedure, it is for the Investigator to control the investigation, not the Applicant. No breach of fairness arose in this respect. In this I rely (as the Respondent did) on *Andruszkiewicz v Canada (Attorney General)*, 2023 FC 528 [*Andruszkiewicz*], where my colleague Justice Little at paragraph 98 states:

> [98] The investigator is also entitled to control the investigation process, subject only to the requirement of fairness: *Rosianu*, at para 34.

[49] Second, the Applicant alleges bias against the Investigator, arguing the Investigator conducted the investigation through the lens of her own past professional experience as an executive in the federal public service. There is no merit in this argument because there is no evidence meeting the high bar the Applicant must establish in his allegation the Investigator had a "closed mind", as set out in *Andruszkiewicz* at paragraph 138. Allegations of bias are serious and must not be made casually or without foundation. This was done here. The making of baseless allegations of bias may, and in this case, will have cost consequences addressed shortly.

VII. Conclusion

[50] The application for judicial review will be granted in accordance with these Reasons and with the directions set out in the Judgment.

VIII. Costs

[51] The parties' joint proposal was that if the Applicant is successful, the Respondent shall pay him $100.00 in all-inclusive costs, and if the Respondent is successful, no costs would be awarded against the Applicant. Because of the Applicant's unfounded allegation of bias, I am not awarding him costs even though he succeeds on this judicial review.

IX. Style of cause

[52] The style of cause will be amended to name the Attorney General of Canada as the sole Respondent with immediate effect.

JUDGMENT in T-1150-23

THIS COURT'S JUDGMENT is that:

1. Judicial review is granted and the Decision of TBS is set aside.
2. This matter is remanded back to TBS for redetermination after the same or a different investigator completes their report(s) having provided the Applicant with an opportunity to review and make submissions on evidence gathered in his absence and comment on the Investigator's preliminary reports and recommendations before it is sent to TBS.
3. The style of cause is amended with immediate effect to name the Attorney General of Canada as sole Respondent.
4. There are no costs awarded.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1150-23
STYLE OF CAUSE:	DAVID BROWN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 22, 2024
JUDGMENT AND REASONS:	BROWN J.
DATED:	MAY 30, 2024

APPEARANCES:

David Brown	FOR THE APPLICANT (ON HIS OWN BEHALF)
Lauren Benoit	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT