Federal Court  Cour fédérale

Date: 20130320

Docket: T-1613-11

Citation: 2013 FC 292

Ottawa, Ontario, March 20, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

FLORENCE THOMAS

Applicant

and

ATTORNEY GENERAL OF CANADA and WILLIAM MURPHY

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Ms. Florence Thomas, seeks judicial review of a decision made by the Regional Director General of Public Works and Government Services Canada [PWGSC] Atlantic Region, Mr. Ken Swain ("the PWGSC Director"), on August 26, 2011, dismissing the harassment complaint against the respondent, Mr. William Murphy, arising from a negative reference provided by him with respect to the applicant.

Background

[2] The applicant, Ms. Florence Thomas, began working as an Accommodations Manager for PWGSC in January 2007. In June 2010, she applied for a position with Health Canada which required a reference. The respondent, William Murphy, who was the applicant's current supervisor, agreed to provide the reference.

[3] Ms. Tamela Quigg ("the Interviewer") conducted the reference checks for Health Canada on July 29, 2010 by telephone. The reference check consisted of a series of questions that were asked for all candidates in the competition for the Health Canada position and of all persons providing references for the candidates.

[4] On September 22, 2010, Ms. Thomas learned that she had been screened out of the competition for the Health Canada position as a result of Mr. Murphy's reference. She requested that this be reconsidered and provided Health Canada with her most recent performance review, also signed by Mr. Murphy, which did not raise the same performance issues. Ms. Thomas was advised by Health Canada that Mr. Murphy's negative reference was given more weight in light of his role as her current and immediate supervisor and she remained screened out of the competition.

[5] On January 11, 2011, the applicant initiated a harassment complaint, alleging repetitive and cumulative incidents of harassment from January 2007 to October 2010, including the negative reference provided by the respondent, Mr. Murphy. This complaint consisted of a six-page cover letter broadly describing the allegations and a 66-page harassment complaint report,

along with 64 pages of other documents, including her work description, performance reviews, and work history. She filed an eight-page addendum to her complaint in March 2011, alleging retaliation for her initial harassment complaint.

[6] Mr. Swain, as Regional Director General for the Atlantic Region, is the delegated manager responsible for the harassment complaint process in the Atlantic Region.

[7] In accordance with the Treasury Board Policy on Prevention and Resolution of Harassment in the Workplace ("the Treasury Board Policy") and the applicable PWGSC Guideline, which mirrors the Treasury Board policy and provides more detail about how the policy is implemented within PWGSC, an independent third-party, Ms. Linda Foy ("the Investigator"), was retained to investigate the complaint and produce a written report of her findings to Mr. Swain.

[8] The Investigator interviewed several people, including Ms. Thomas and Mr. Murphy, as well as the Interviewer, Ms. Quigg. The Investigator received evidence about the reference process and interview from both Ms. Quigg and Mr. Murphy.

[9] Ms. Quigg indicated that she sent an email to Mr. Murphy on July 28, 2010 confirming the interview and attaching the reference questions. She indicated that during the phone interview she asked Mr. Murphy the questions, took notes of his answers and read his answers back to him to confirm or clarify his comments. She indicated that only about 10% of his answers regarding Ms. Thomas were positive.

[10] Mr. Murphy indicated that he believed that he gave Ms. Thomas "a pretty good reference" and that his answers were taken out of context by the Interviewer. He indicated that the negative comments he made referred to an earlier period in their working relationship and that the Interviewer misinterpreted what he meant by comments such as "very controlling" and "takes some initiative". Mr. Murphy did not recall that Ms. Quigg read his comments back to him, nor did he recall receiving an email in advance from Ms. Quigg with the reference questions, due to the high volume of email he receives.

[11] The Investigation Report includes several of the questions and answers provided by Mr. Murphy as recorded by Ms. Quigg. The Report notes that the applicant's position was that Mr. Murphy knew or should have known that his reference would be communicated to Health Canada. The Report further notes that the Health Canada representative described the reference as "the worst they had ever received". The Investigator summarized the steps taken by Ms. Thomas to provide additional information and prior performance reviews as well as Ms. Thomas' conversations with Mr. Murphy about the negative reference.

[12] On June 22, 2011, the Investigator provided Ms. Thomas with a draft Investigation Report which included a detailed summary of the evidence gathered, but without the analysis or findings. Ms. Thomas was invited to comment on the draft and did so on July 21, 2011 by providing detailed comments under the relevant parts of the draft report, totalling approximately 38 additional pages.

[13] The Investigator then finalised the report and provided it to Mr. Swain, the PWGSC Director. Mr. Swain informed the applicant by letter dated August 26, 2011 that he had dismissed the allegations against the respondent, stating:

> I have carefully reviewed the final investigation reports, prepared by Linda Foy, into your allegations of harassment against William (Bill) Murphy ….
>
> […] I agree with the findings of this report which, based on the evidence provided, concludes the allegations are unfounded.

[14] It should be noted that Mr. Swain's letter refers to two reports because the Investigator also investigated a complaint by Ms. Thomas against another person. The results of that process are not at issue in this application for judicial review.

Decision under review

[15] It is well settled that in the absence of evidence to the contrary, the investigation report upon which a decision is based forms part of the decision: *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392 at para 37. The PWGSC Guideline also confirms that "the facts gathered through an investigation will be submitted to the DM [Deputy Minister] representative in a final report that will form the basis for a decision".

[16] The Report summarised the facts and the relevant sections of the Treasury Board Policy and PWGSC Guideline. The Investigator considered the six specific allegations arising from Ms. Thomas's overall complaint against Mr. Murphy, which alleges "repeated persistent cumulative patterns of behaviour directed at the complainant that are directly related to exclusion from group activities, unfair treatment, refusal to allow her to participate in a team environment; misuse of

authority; treatment of favo[u]ritism; intentional exclusion from training; patterns of mistreatment" which resulted in her feeling "demeaned, humiliated and embarrassed".

[17] The application for judicial review relates to the decision regarding only one of the allegations;

> f) July 29, 2010 – Bill Murphy is alleged to have harassed Florence Thomas by, in bad faith, providing an unjustified negative verbal reference during a competitive process run by Health Canada […] in order to intentionally damage Ms. Thomas' career, and opportunities for promotion, and to drag down her morale and intellectual character.

[18] The Investigator concluded that "[b]ased on the balance of probabilities, the evidence collected during the investigation does not support the allegation that Bill Murphy harassed Florence Thomas as stated in (a) through (f)". Mr. Swain, the PWGSC Director, agreed with the findings and concluded that the allegations were unfounded.

Issues

[19] This application for judicial review raises three issues: first, whether the Federal Court has jurisdiction to consider the application for judicial review, and if so; second, whether the decision, which includes the Investigation Report, is reasonable and; third, whether the investigation and decision-making process breached the Treasury Board Policy and the PWGSC Guideline, and the general principles of procedural fairness.

Does the Federal Court have jurisdiction to hear the application for judicial review?

[20] The respondent submits that the applicant is barred from seeking relief before this Court because she failed to follow the grievance process.

[21] The respondent submits that the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [*PSLRA*], provides a comprehensive scheme to address employment disputes in the public service: *Dubé v Canada (Attorney General)*, 2006 FC 796, [2006] FCJ No 1014 at para 30; *Hagel v Canada (Attorney General)*, 2009 FC 329, [2009] FCJ No 417 at para 26; *Van Duyvenbode v Canada (Attorney General)*, [2007] OJ No 2716, 158 ACWS (3d) 763 at para 9.

[22] Section 208 of the *PSLRA*, entitles employees to present individual grievances in various situations, including "as a result of any occurrence or matter affecting his or her terms and conditions of employment".

[23] According to the respondent, the harassment complaint was brought pursuant to the Treasury Board Policy, the objective of which is to foster a respectful and harassment-free work environment. As this falls within the meaning of "an occurrence or matter affecting his or her terms and conditions of employment" under paragraph 208 (1) (b) of the *PSLRA*, the respondent submits that the complaint should, therefore, be addressed through the grievance process.

[24] The respondent also argues that courts should not jeopardize the legislative scheme under the *PSLRA*, and that applicants should exhaust grievance mechanisms before seeking judicial

review by the Federal Court: *Glowinski v Canada (Treasury Board)*, 2006 FC 78, 286 FTR 217 at paras 17-18 [*Glowinski*].

[25] The relevant provisions of the *PSLRA* are:

208. (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	**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*) by the interpretation or application, in respect of the employee, of	*a*) par l'interprétation ou l'application à son égard :
(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	(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) a provision of a collective agreement or an arbitral award; or	(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;
(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	*b*) par suite de tout fait portant atteinte à ses conditions d'emploi.
[…]	[…]
Limitation	Réserve
(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 <u>if the policy expressly provides that an</u>	(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 <u>si la ligne</u>

employee who avails himself or herself of the complaint procedure is precluded from presenting an individual grievance under this Act.	directrice prévoit expressément cette impossibilité.
[…]	[…]
214. If an individual grievance has been presented up to and including the final level in the grievance process and it is not one that under section 209 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken on it.	**214.** Sauf dans le cas du grief individuel qui peut être renvoyé à l'arbitrage au titre de l'article 209, la décision rendue au dernier palier de la procédure applicable en la matière est définitive et obligatoire et aucune autre mesure ne peut être prise sous le régime de la présente loi à l'égard du grief en cause.
[…]	[…]
236. (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms. or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.	**236.** (1) Le droit de recours du fonctionnaire par voie de grief relativement à tout différend lié à ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.
Application	Application
(2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.	(2) Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.
[…]	[…]
[emphasis added]	[je souligne]

[26] There is merit to the argument that the *PSLRA* is intended to provide a comprehensive regime and should be relied upon to address employment disputes and promote efficient labour relations in the Public Service rather than resorting to the courts. Reliance on the court would, among other things, turn an informal process into a very formal process and would likely make reintegration into the workplace and restoration of a good working relationship more difficult. However, there is nothing in the *PSLRA* that statutorily bars the applicant from pursuing judicial review of the final decision.

[27] Subsection 208 (1) entitles an employee like the applicant to present a grievance. Subsection 208 (5) precludes some matters from the grievance process where the employee pursues a complaint procedure established by a policy of the employer that clearly precludes pursuing a grievance. However, that is not the situation here. The Treasury Board Policy on harassment does not preclude a grievance.

[28] The Treasury Board Policy is also silent on the recourse mechanisms available if the decision is unsatisfactory to one or the other party. It says only that "[i]f a complaint on the same issue is or has been dealt with through another avenue of recourse, the complaint process under this policy will not proceed further and the file will be closed". Again, that is not the situation here.

[29] In this case, the applicant could have brought a grievance upon receipt of the decision, but she did not.

[30] The case law cited by the respondent establishes that the *PSLRA* (like its predecessor) constitutes a comprehensive dispute resolution system for public service employees.

[31] However, I do not agree that the cases relied upon establish that an applicant must follow a grievance process to the exclusion of the Federal Court.

[32] In *Vaughan v Canada*, 2005 SCC 11, [2005] 1 SCR 146 at para 33 [*Vaughan*], Justice Binnie noted that the language in section 91 of the *Public Service Staff Relations Act*, RSC 1985, c P-35 [*PSSRA*] (the predecessor to the *PSLRA*) does not oust the jurisdiction of the courts. Still, he identified several reasons why the court should decline to exercise its jurisdiction. In that case, an employee had brought an action directly against the Crown due to the denial of early retirement incentives. Justice Binnie went on to state, at para 39:

> Sixthly, where Parliament has clearly created a scheme for dealing with labour disputes, as it has done in this case, courts should not jeopardize the comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts. While the absence of independent third-party adjudication may in certain circumstances impact on the court's exercise of its residual discretion (as in the whistle-blower cases) the general rule of deference in matters arising out of labour relations should prevail.

[33] In *Glowinski*, above, the applicant sought judicial review of a decision made based on another Treasury Board policy governing pay rates upon appointment, rather than pursuing a grievance. Justice Kelen considered the case law, including *Vaughan*, and stated the issue as follows, at para 15:

> The question for this Court, therefore, is whether there was an adequate alternative remedy available to the applicant in the review at bar? Were there circumstances demonstrating that internal grievance resolution alone would be an inadequate remedy?

[34] Justice Kelen considered the application of section 91 of the *PSSRA*, which entitled an employee to grieve a provision dealing with the terms and conditions of employment. Justice Kelen concluded, at para 18:

> In the Court's view, the statutory grievance process would have been an adequate alternative remedy to judicial review in this case. There is no allegation that the grievance levels up to and including the final level are incapable of granting the applicant the relief sought. The Court should decline jurisdiction under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, by reason that the applicant failed to exhaust the available and alternate remedy of grieving the respondents' decision to the *final level* prior to commencing this application for judicial review.
>
> [emphasis in original].

[35] As in *Glowinski*, I find that the appropriate question is whether there was an adequate alternative remedy available to the applicant; i.e. were there circumstances to show that the internal grievance process would be an inadequate alternative remedy?

[36] The applicant submits that she had two choices following the decision: to grieve or to apply for judicial review. She submits that the grievance process could not objectively determine whether PWGSC dealt with the harassment complaint properly. The remedy she seeks is a new investigation into the harassment complaint. As that would not be achieved through the grievance process, the applicant asserts that the only effective remedy is judicial review, i.e. there is no adequate alternative remedy.

[37] In the circumstances of this case, the Court will exercise its jurisdiction to consider the application for judicial review. That being said, in the majority of employment-related disputes and complaints, the *PSLRA* will provide the appropriate recourse and should be relied upon.

Standard of review

[38] The parties agree that the reasonableness standard applies to the decision regarding the harassment complaint, including how the decision-maker relied upon the Investigation Report in coming to his decision. They also agree that the correctness standard applies to issues of procedural fairness: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*].

[39] The role of the court on judicial review where the standard of reasonableness applies is not to substitute any decision it would have made but, rather, to determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at para 47. There may be more than one reasonable outcome. "However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome": *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59.

[40] The Treasury Board Policy provides for the competencies of harassment Investigators. The Investigators must possess the requisite knowledge about the harassment Policy and other relevant policies, the applicable statutes and the organisational culture and have a range of skills

and abilities and the appropriate training and experience. As a result, the Investigator, Linda Foy, who was retained to conduct this investigation, is considered to have the necessary expertise and deference would be owed to the Investigation Report and the decision upon which it is based unless it does not meet the *Dunsmuir* standard. In *Dunsmuir*, the Court noted at para 49:

> In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

Is the decision, which includes the Investigation Report, reasonable?

[41] The applicant submits that the Investigator failed to exercise her jurisdiction insofar as she failed to make specific findings of credibility and arrived at her conclusions based on an illogical or improper analysis.

[42] With respect to credibility, the applicant submits that there was contradictory evidence and, therefore, the Investigator should have made findings about the credibility of the witnesses she interviewed.

[43] The applicant further submits that in determining whether harassment occurred, the Investigator should have objectively considered the conduct while remaining sensitive to the context that would affect the victim's perception of the conduct. The applicant argues that the Investigator focussed instead on Mr. Murphy's intention, and therefore the Investigator's findings are unreasonable.

[44] For reference, the definition of harassment as set out in the PWGSC Guideline is the same as that in the Treasury Board policy, but includes some additional examples;

> Harassment is any improper conduct by an individual, that is directed at and offensive to another person or persons in the workplace, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat. This may include degrading remarks, jokes or taunting, insulting gestures, displays of offensive pictures or unwelcome comments about someone's personal life. It includes harassment within the meaning of the *Canadian Human Rights Act*, which prohibits discrimination based on race, national or ethnic origin, color, religion, age, sex (including pregnancy or childbirth), sexual orientation, marital or family status, physical or mental disability, or conviction for an offence for which a pardon has been granted.

[45] The definition is broad. While the applicant submits that it does not require the intention to harass, it does require that the conduct be improper and that the individual knew or ought to have known that their conduct would cause harm**.**

[46] It should also be noted that the allegation made by Ms. Thomas against Mr. Murphy was more specific, as set out earlier in these reasons;

> f) July 29, 2010 – Bill Murphy is alleged to have harassed Florence Thomas by, in bad faith, providing an unjustified verbal reference during a competitive process run by Health Canada […] in order to intentionally damage Ms. Thomas' career, and opportunities for promotion, and to drag down her morale and intellectual character.
>
> [emphasis added]

Should the investigator have made credibility findings?

[47] The applicant relies on *Canada (Attorney General) v Tran*, 2011 FC 1519, [2011] FCJ No 1836 at para 21 [*Tran*], in asserting that an investigator must assess credibility, particularly in cases where there is a "he said, she said" situation, when deciding whether to refer a complaint to a tribunal (in that case, the Canadian Human Rights Tribunal).

[48] In *Tran*, the issue was whether the Canadian Human Rights Commission was obliged to refer a complaint whenever there was contradictory evidence. The Court concluded that "a conflict in the evidence does not automatically trigger a Tribunal hearing".

[49] Although in the present case the Investigator faced contradictory evidence based on less-than-perfect note-taking and recall of both the Health Canada Interviewer and Mr. Murphy, there was no jurisprudence cited to support the argument that the requirements are the same as those of the Canadian Human Rights Commission.

[50] The applicant submits that the Health Canada Interviewer provided "uncontradicted" and "direct" evidence that she read the respondent's answers back to him. The Investigator concluded that there was "no proof" that the Interviewer read the answers back, but failed to make adverse credibility findings pertaining to the Interviewer. According to the applicant, this constitutes a finding based on no evidence and it is sufficient to justify setting aside the decision: *Toronto Board of Education v Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 SCR 487, [1997] SCJ No 27 at paras 44-45, 78.

[51] The applicant argues that the failure to assess the Interviewer's credibility renders the Investigation report and the PWGSC Director's subsequent decision unreasonable.

[52] The applicant submits that several responses provided by Mr. Murphy, which were noted in the Investigation Report, were self-serving and reflect upon his credibility, but were not addressed by the Investigator.

[53] The Investigation Report sets out the answers provided by Mr. Murphy as recorded by Ms. Quigg. These answers were candid. The Investigator, in her analysis of the specific complaint, noted that the evidence was contradictory as to whether the Interviewer's notes properly reflect what Mr. Murphy said. She noted Mr. Murphy' position that many of his answers were taken out of context. She also noted the Interviewer's statement to the effect that she does not usually conduct reference checks and that the Interviewer may have misunderstood certain references and may not have noted everything about the resolution of past conflicts.

[54] The Interviewer's notes of the interview were not a transcript; the notes were based on the Interviewer's understanding Mr. Murphy's responses. While there is uncertainty as to whether the answers were read back to Mr. Murphy in accordance with the usual practice, his answers as recorded by the Interviewer are the basis of Ms. Thomas' allegations. The email sent to Mr. Murphy in advance of the interview does not confirm the specific process that was to be followed.

[55] While the Investigator used the phrase, "there is no proof that she did so" with respect to whether or not the Inteviewer, Ms. Quigg, read the answers back to Mr. Murphy, there was no requirement of proof and this may simply have been a poor choice of words. The Investigator clearly noted the contradictory evidence on this issue.

[56] In my view, the Investigator did not have to make credibility findings with respect to the witnesses she interviewed. The Investigator based her findings on a large volume of material and the information provided by the witnesses. Her role was to assess the evidence, to weigh it and to determine whether the allegation of harassment had been established. If the Investigator had found that a witness was not credible, she may have so indicated. However, she may have found both Mr. Murphy and Ms. Quigg to be credible, albeit that their recollection of the process was not perfect and differed in some respects.

[57] Moreover, the final decision-maker, Mr. Swain, was aware of this contradiction as it was described in the report.

Did the Investigator reach Improper or Illogical Conclusions?

[58] The applicant submits that specific comments made by the Investigator are improper and irrelevant to the allegation of harassment. For example:

> Even if the interviewer misinterpreted or misrepresented some of what Mr. Murphy told her, it is clear that Mr. Murphy did indicate that he felt Ms.Thomas was not a strong team player and that she created drama.
>
> Investigation Report (para 93)

> […] has not seemingly been able to let go of the issues that have been addressed and … she continues to harbour suspicions and resentment against some of her co-workers, whether founded or not, part of Mr. Murphy's experience of Ms. Thomas has been the fact that she hasn't gotten along well with her peers, and that she is intense and emotional.
>
> Investigation Report (para 93)

> The evidence, then, suggests that although the information the Health Canada interviewer recorded was embarrassing and humiliating for Ms. Thomas, Mr. Murphy's actual comments may not have been as severe as recorded. Mr. Murphy's conduct does not appear to be improper because the evidence does not demonstrate that he was intentionally trying to damage Ms. Thomas' career… Further, had Mr. Murphy felt so negatively about Ms. Thomas, it would seem likely that he would have skirted any difficult areas with the Health Canada interviewer in an attempt to facilitate Ms. Thomas' departure from [his unit].
>
> Investigation Report (para 94)

[59] The applicant points out that the definition of 'harassment' in the PWGSC Guideline, as well as in the jurisprudence, establishes that intent is not necessary for harassment to occur. The applicant argues that the Investigator improperly focussed on the respondent's intentions, rather than the applicant's perceptions and as a result the Investigator's findings are unreasonable.

[60] With respect to the Investigator's conclusion that "Mr. Murphy's actual comments may not have been as severe as recorded", the applicant submits that this acknowledges that the comments were, to some extent, severe and it is unreasonable for the Investigator to conclude that this is not harassment.

[61] A review of the Investigation Report and the record shows that the Investigator considered the parties' comments and evidence, as well as the notes, records and statements of the Interviewer. The Investigator set out the specific questions and responses as recorded by the Interviewer, Ms. Quigg. It is apparent that many of the comments were not favourable to Ms. Thomas.

[62] The Investigator noted at the outset of the report that the Treasury Board Policy on harassment requires that several factors be considered including the severity and impropriety of the act and the circumstances and context of each situation. The context for the alleged harassment by Mr. Murphy was, therefore, taken into account - i.e. as part of a reference for a position.

[63] The Investigator considered six allegations in her investigation. The overview provided in the report, which details the history of the working relationship, provided additional context. The allegation of harassment arising from the reference provided by Mr. Murphy is specifically addressed in 11 pages of the 20-page report.

[64] The Investigator recounted the information that was provided to her and noted where the information was contradictory. The Investigator noted that the interviewer admitted to possible misinterpretation of some comments and indicated that she did not usually conduct reference checks. The Investigator also noted the comments or explanations offered by Mr. Murphy, which indicated that his responses were primarily about personal suitability, that no definition of diversity had been provided to him, that the comments he made would require some understanding of the position occupied by Ms. Thomas (for example, the meaning of ISO and the limited scope for

initiative) and that he had indicated that some conflicts were in the past and had since improved. All of these nuances were captured in the Report to inform the final decision-maker, Mr. Swain.

[65] The applicant also submits that the Investigator's comment that Mr. Murphy would have been more likely to say positive things about Ms. Thomas to facilitate her departure from his unit is flawed logic, as it assumes that an employer might be dishonest. Moreover, this does not address whether the comments amounted to harassment.

[66] I view this comment as being related to the Investigator's overall assessment of whether Mr. Murphy provided responses to the Interviewer with the intent to harm Ms. Thomas. The Investigator found that Mr. Murphy's comments were not intended to be harmful. The Investigator was simply noting that this practice does occur – and speculating that it could have occurred in this case, but did not.

[67] While the definition of harassment is broad and does not require intent to harass, the specific allegation made by Ms. Thomas did allege that Mr. Murphy's comments were intended to damage her career. Therefore, the Investigator's finding that there was no such intent is not improper.

[68] The key issue is whether the reasons for the decision, i.e. the Investigation Report and the accompanying record, support the finding that there was no harassment. As noted above, deference is owed to such decision-makers, given their expertise in dealing with harassment complaints.

[69] The Investigator assessed and weighed all of the information and evidence and, on the balance of probabilities, found that the comments provided by Mr. Murphy for the reference, several of which were not favourable even taking into account the possible explanations offered, were not improper and did not amount to harassment.

[70] As noted above, it is not the role of the Court to reweigh the evidence or to substitute its preferred outcome.

[71] The Investigator did not make any general findings that comments made in the context of a reference check, which should be candid and honest, can not constitute harassment. However, in the circumstances of the case before her, she considered the entire context, including the conflicting information, and concluded that the comments were humiliating and embarrassing but they were not improper. The Investigator found that Mr. Murphy was providing information and opinion based on his experience and perspective as Ms. Thomas' manager. The Investigator's conclusion that the comments did not constitute harassment is reasonable.

Were the investigation and decision-making process conducted in accordance with the requirements of procedural fairness?

[72] The applicant submits that the investigation and decision-making process breached the Treasury Board Policy and the PWGSC Guideline, as well as the general principles of procedural fairness. The applicant argues that she should have been provided with a copy of the Investigator's final report, which included the Investigator's analysis and conclusions, before it was provided to Mr. Swain in order to provide additional comments on the findings. The applicant also argues that

Mr. Swain should have been provided with her comments on the draft report, which would have provided an opportunity for her to influence his decision.

[73] The applicant relies on *Potvin v Canada (Attorney General)*, 2005 FC 391, [2005] FCJ No 547 [*Potvin*], which held that harassment cases require a high level of procedural fairness in light of the "significant consequences" for the parties involved. The applicant argues that procedural fairness, therefore, requires that the applicant have an opportunity to make representations in response to an investigation report and to have those representations considered by the final decision-maker.

[74] The applicant acknowledges that she provided comments on the draft report, but emphasised that the draft did not include the Investigator's analysis or findings and, therefore, that she was unaware of the "case that she had to meet".

[75] I find that choice of words odd, given that it was the applicant who made allegations against Mr. Murphy. The applicant did not have a "case to meet". That would more likely be the concern of the respondent, Mr. Murphy. The applicant had provided extensive submissions and supporting documents which were considered by the Investigator, in addition to the interviews that were conducted. The applicant had an adequate opportunity to establish her allegations.

[76] The applicant also argues that she submitted extensive evidence about the reference check and the allegations of harassment that the Investigator did not analyse or assess in the

Report. The applicant submits that the Investigation was, therefore, not thorough and violated the principles of procedural fairness.

[77] I find that there was no break of procedural fairness.

[78] In *Potvin,* the Court held that the Policy at issue in that case (the Policy on Prevention and Resolution of Harassment in the Workplace for the Tax Court of Canada) codified the extent of the requirements of procedural fairness owed in the circumstances.

[79] In the present case, the Treasury Board Policy and the PWGSC Guideline set out the requirements to be met which address procedural fairness in responding to such complaints.

[80] Mr. Swain, as the delegated manager responsible for harassment complaints in the Atlantic region, received Ms. Thomas' complaint in March. It was reviewed by the Labour Relations and Compensation Manager to determine how best to respond. Mr. Swain then determined that an investigation into the allegations of harassment should be conducted and he directed that an independent third party investigator be retained to do so. The steps taken by Mr. Swain reflect the Policy and the Guideline.

[81] The Investigator also followed the procedure set out in both the Treasury Board Policy and the PWGSC Guideline. The Investigator provided a draft report to Ms. Thomas in June and invited her to provide comments. Ms. Thomas provided extensive comments on the draft, some of which reiterated the earlier submissions. The Investigator attested that she had read all the

comments provided by Ms. Thomas on the draft report and revised the report to reflect the comments, where she felt that their inclusion "would provide pertinent context or further a determination as to the veracity of the allegations".

[82] The Investigator provided Mr. Swain with a written report summarising the information gathered and setting out her analysis and findings with respect to each allegation, along with the original complaint and all the supporting documents provided by Ms. Thomas.

[83] The Investigator received and considered over 66 pages of the original complaint, 64 pages of supporting documents, the eight-page addendum and approximately 38 pages of comments on the draft report. In addition, the Investigator interviewed several witnesses. The fact that the Investigator did not refer to all of the evidence in her report is not a reviewable error: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 16.

[84] With respect to the opportunity to comment on the report, the applicable paragraph of the Treasury Board Policy provides:

> g) Complainants and respondents can expect to review a copy of the draft report. They will be informed in writing of the outcome of the investigation and will receive a copy of the final report.
>
> [emphasis added]

[85] The PWGSC Guideline provides:

> 4. the investigator will provide a draft report to the DM [Deputy Minister] representative;

> 5. the complainant(s) and the respondent(s) will be provided with a copy of the draft report and will be given the opportunity to respond in writing on any factual errors or omissions. These rebuttals will form part of the final report;
>
> 6. the facts gathered through an investigation will be submitted to the DM representative in a final report that will form the basis for a decision.
>
> [emphasis added]

[86] As noted, both the complainant and respondent had the opportunity to provide comments on the draft report.

[87] There is no requirement in either the Treasury Board Policy or the PWGSC Guideline that the applicant be allowed to review and comment upon the final report. The Guideline provides that the applicant can rectify factual errors or omissions found in the draft report. This does not provide a right to rebut the Investigator's findings and analysis before the final report is presented to the decision-maker. If that were the case, parties would be in a position of contesting the decision before it is even made, simply because they disagree with the investigator's analysis.

[88] The applicant submitted that to respect principles of procedural fairness, the proper approach would be to provide the final report to the parties for comment.

[89] I do not agree that procedural fairness requires such an approach. A requirement that the Investigator provide the penultimate report with findings and analysis to the parties before submitting the report to the DM representative would lead to potentially endless investigation, as the

parties would likely continue to comment on or rebut each others' comments. It would also undermine the role and mandate of the independent Investigator and would relegate the Investigator to the position of merely gathering information, summarising it and making suggestions. It would then place the DM representative, who is the decision-maker, in the position of reviewing all the material, reviewing the draft report and the comments of each party on the draft and on each other's comments – in effect doing much of the investigation him or herself. This was not contemplated by the applicable Policy or Guideline and would not be effective or practical, given the many other responsibilities of the DM representative, including with respect to other complaints under the Policy and Guideline. The investigation must be delegated and the DM representative must then make a decision based on the final report of the independent investigator.

[90] To reiterate, there was no breach of procedural fairness in this case. The applicant had the opportunity to comment on the draft report and those comments were considered.

[91] The Investigator considered all the information and there is no evidence that the investigation was not thorough.

Conclusion

[92] The decision was based on the Investigation Report that examined six specific allegations. The Investigator considered the troubled work relationship which provided the context for all the allegations. While some of the Investigator's comments may appear to be less relevant to the allegation of harassment arising from the negative reference, they are relevant to the overall

investigation. The application for judicial review focuses only on the allegations of harassment arising from the negative reference.

[93] The implications of a possible harassment complaint for those providing a reference and for prospective employers seeking a reference are significant. If the person giving the reference must be cautious to ensure that their answers do not fall within the broad definition of harassment, the prospective employer may not receive candid information and may not have any confidence in the answers provided.

[94] In this case, the Investigator did not specifically address whether comments made in the context of a reference could constitute harassment. The Investigator only examined whether the specific comments made by the respondent, Mr. Murphy, in the circumstances of this case, constituted harassment.

[95] Having found jurisdiction to consider the application for judicial review of the final decision of the PWGSC Director, the role of the Court is not to reweigh the evidence or to make new findings – or in this case to determine whether harassment did or did not occur. Rather, it is to determine whether the decision falls within a range of possible outcomes that are defensible with respect to the facts and the law. Based on the Investigation Report and the record before the Court, I find that the decision was reasonable.

[96] There was no breach of procedural fairness. The investigation and decision-making process followed the Treasury Board Policy and the PWGSC Guideline. The applicant had ample

opportunity to set out her allegations and to comment on the draft report prepared by an independent Investigator. The Investigation Report noted that the applicant had provided comments and that the Report had been revised to reflect these comments where appropriate.

[97] The application for judicial review is dismissed.

[98] The parties agreed that costs in the amount of $3,000 plus disbursements would follow the cause.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed with costs payable to the respondent, the Attorney General of Canada, in the amount of $3,000 plus disbursements.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	FLORENCE THOMAS v. ATTORNEY GENERAL OF CANADA ET AL
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 24, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	KANE J.
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