

Federal Court



Cour fédérale

Date: 20130628

**Docket: T-412-12
T-413-12**

Citation: 2013 FC 727

Ottawa, Ontario, June 28, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

CHANTAL HOULE-MRAK

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] These applications relate to two allegations of harassment and abuse of authority against the Chairperson and Chief Executive Officer of the Canada Agricultural Review Tribunal, Dr. Don Buckingham. The applicant to set aside two final level grievance decisions which affirmed the disposition of her harassment complaints.

[2] For the reasons that follow, the applications are dismissed.

Facts

Background

[3] At the time of the allegations, the applicant was employed by Agriculture and Agri-Food Canada (the Department) as the Registrar of the Tribunal. The Tribunal is small, with three employees, the applicant, the Assistant Registrar, Rosemary Shannon, and the Appeals Management Coordinator, Lise Sabourin.

[4] Dr. Buckingham was appointed as the new Chairperson of the Tribunal on July 2, 2009. Soon after his appointment, the applicant went on sick leave in relation to her pregnancy and subsequently commenced maternity leave.

[5] Prior to her departure on maternity leave, the applicant appointed Ms. Shannon, the Assistant Registrar, to the position of Acting Registrar. The applicant told Ms. Shannon that she would be available to assist her during her leave. Ms. Shannon eventually went on sick leave for seven months.

[6] The applicant told her replacement and the other employees “not to change a thing” in the operation of the office while she was on leave. However, Dr. Buckingham intended to implement new policies for the office, assuming a more hands on role than his predecessor.

[7] Ms. Shannon gave evidence that Dr. Buckingham “asserted himself as the boss,” managing leave requests and setting the hours of work. In contrast, the previous Chairperson left administrative and management matters to the applicant. Ms. Shannon recalls Dr. Buckingham

saying that not everyone liked the applicant's style. Dr. Buckingham told Ms. Shannon not to contact the applicant during work hours. Dr. Buckingham said that he wanted the applicant to enjoy her leave and that he considered her continued involvement to be contrary to the better management of the office.

[8] Ms. Sabourin, the Appeals Management Coordinator, agreed that Dr. Buckingham had a different style than the former chairperson who "kept to himself."

The First Allegation

[9] The applicant and Dr. Buckingham had several conflicts during her leave and immediately upon her return to the office. On October 6, 2010, soon after her return to work, she filed her first complaint. The substance of the allegations are as follows:

- a. During her seven weeks of sick leave Dr. Buckingham called her "almost daily" and asked her to speak at his "inauguration". Afterwards, he requested that she return her phone, blackberry, keys and parking pass. She explained that she told the employees to call her anytime for advice. He was "furious" with her and told her not to interfere with management of the Tribunal.
- b. On January 18, 2010, she went to the office to see Dr. Buckingham to discuss options with regards to Ms. Shannon's sick leave. He met her and was "furious" saying that she had no business being in the office while on leave. He said that her role was going to be very different when she got back. The applicant considered this derogatory and belittling. She described him as "shaking" with his arms and legs crossed "trying so hard to contain himself."

- c. In March of 2010, Dr. Buckingham left her voice messages telling her to return the keys and parking pass, though she had already done so. She told him that Ms. Shannon had the keys and that he should stop harassing her. He sent a letter apologising. Later that month she tried to look at job postings in Publiservice and discovered that her email account had been disabled. Dr. Buckingham confirmed that he did not want her accessing email during her maternity leave. She described a heated disagreement as to whether she could contact employees at the office.
- d. On her first day back at work, September 10, 2010, Dr. Buckingham yelled at her for being late. He had informed her by letter on September 1, 2010 that she should begin work at 8:30 am. On September 9, 2010 she informed him that she could not be in until 9:30 am, and then arrived at 10:00 am due to issues with her home and child.
- e. On September 13, 2010, the applicant wrote to Andrea Lyon, Associate Deputy Minister and John Knuble, Deputy Minister to explain her conflict with Dr. Buckingham and what she perceived as his lack of understanding about his role as Tribunal Chair. Two days later Dr. Buckingham confronted her about whether she contacted the Department. The applicant became fearful and requested that security be present.

[10] Sylvie Labelle, the Senior Manager of Strategic Planning Human Resources and Financial Management, gave evidence that employees are entitled to access job opportunities while on leave. They may do so by going into the office or calling a phone line. She said it was standard practice to disable both email and telephone during extended leave. This became formal policy on April 30,

2010. Steven Robineau, Principal Consultant, Labour Relations, agreed that Dr. Buckingham was within his rights to cancel the applicant's email.

[11] Regarding the September 10, 2010 incident, Ms. Shannon's evidence was that Dr. Buckingham did not yell, but she agreed that he "sounded furious".

[12] Dr. Buckingham changed the applicant's job description. In a memorandum dated September 1, 2010, Dr. Buckingham advised that all staff members would now report directly to him, rather than to the applicant. On September 10, 2010, Dr. Buckingham wrote to the applicant explaining that he considered changes necessary to improve efficiency at the Tribunal and requested that she prepare a report of her views on the issue. He also set out her hours of work.

[13] On October 6, 2010, Dr. Buckingham sent a memorandum regarding the hours of work and lunch breaks to all employees. In a separate email directly to the applicant, he explained that she could not combine her morning and afternoon fifteen minute breaks with her lunch, because these breaks are for the purpose of health and safety. He stated that she could take one hour for lunch if she extended her work day by 30 minutes.

[14] The applicant says that she developed anxiety and panic attacks as a result of the "toxic atmosphere" at work. She explains that she had gone above and beyond her duties, but had been belittled and treated like a person in an entry level job.

[15] On October 15, 2011, the applicant's physician reported that she had situational anxiety and cervical strain and that the primary cause was workplace harassment.

The Second Allegation

[16] On October 26, 2010, the applicant requested Dr. Buckingham's permission to attend training for supervisors and managers.

[17] Dr. Buckingham replied that the reporting structure for the Tribunal had changed in September, 2010 and that she was not a supervisor or manager:

Firstly, I must respond to your comment that you regard yourself as a supervisor or manager. You made a similar statement in your harassment complaint. As you are aware, the reporting structure at the Tribunal changed in September 2010. There are no employees that report to you and I have not since delegated to you any overseeing responsibilities in that regard. As such, you are accorded with no supervisory or managerial authorities.

[18] He did not approve her request to attend the training session, but stated that they could revisit the matter once her learning plan and new work description had been finalized.

[19] The applicant filed a second complaint on September 18, 2011 with regards to this email.

She alleged:

- a. Dr. Buckingham improperly and unilaterally changed her job description, contrary to the applicable policy, guidelines and her collective agreement.
- b. The email contained offensive, demeaning and belittling language.

[20] The applicant accepts that she cannot give legal advice, but objected to the removal of her managerial duties including managing financial and human resources.

Investigation into the First Complaint

[21] The applicable Harassment Policy provides that an investigator will deliver a report to the delegated manager, in this case Johanne Bélisle, Assistant Deputy Minister.

[22] The Department retained Charron Human Resources Inc to conduct the investigation. Deborah Jelly interviewed witnesses and provided a report to Ms. O'Flaherty in July of 2011, the Director of Labour Relations and is responsible for advising Ms. Bélisle

[23] Ms. O'Flaherty identified what she perceived as errors and weaknesses in the report, in particular the acceptance of the evidence of one witness over another without explanation. She also considered the conclusions to be unsupported. Ms. O'Flaherty advised the investigator that she could not recommend the report in its current form and two further drafts were ultimately submitted to Ms. O'Flaherty for review. Ms. O'Flaherty states that her goal was not to direct a conclusion but rather to ensure that all relevant evidence was considered.

[24] However, Ms. Jelly's evidence was that she had many discussions with Ms. O'Flaherty regarding her conclusions, in particular with respect to whether Dr. Buckingham threatened the applicant's job security.

[25] The final report was provided to Ms. Bélisle on September 7, 2011. The investigator concluded that allegations one through four were not substantiated but that allegation five was partially substantiated.

[26] Ms. Jelly determined that the evidence was inconclusive with regards to the January 18, 2010 meeting. Dr. Buckingham recalled telling the applicant that upon her return she would no longer be permitted to dispense legal advice or issue subpoenas, as she is not a lawyer. He denied telling her that her role would be “drastically different.” Ms. Jelly concluded that it would be reasonable for Dr. Buckingham to take measures to ensure Tribunal procedures complied with the legislation.

[27] With regards to the parking pass, keys and mobile devices, Ms. Jelly determined that Dr. Buckingham’s conduct was within the scope of his managerial authority.

[28] Ms. Jelly found that Dr. Buckingham had not harassed the applicant with regards to her being late for work, but did consider his conduct on September 15, 2010 to constitute harassment and abuse of authority. Ms. Jelly found that Dr. Buckingham had become angry and frustrated, and forbid the applicant from contacting the Department. Ms. Jelly considered there to be an implied threat regarding the applicant’s entitlement to make a complaint.

[29] Finally, Ms. Jelly found that she could not determine on a balance of probabilities that Dr. Buckingham threatened the applicant’s job security.

The Harassment Decisions

[30] In a letter dated November 1, 2011, Ms. Bélisle accepted the report but rejected the applicant's request for financial compensation. Ms. Bélisle stated that compensatory damages are not provided for under the Harassment Policy and that there was no evidence that the applicant's mental distress was caused by the one incident which was found to be harassment.

[31] Ms. Bélisle also referenced the Treasury Board Policy on Legal Assistance and Indemnification which states that legal assistance will not be provided to Crown servants involved in internal administrative recourse mechanisms such as harassment complaints.

[32] Ms. Bélisle refused the request to re-credit the applicant all of the 1057.5 hours of sick leave, but did credit 187.5 hours so that she would not have a negative balance.

[33] Ms. Bélisle also noted that the applicant had received a letter of apology from Dr. Buckingham.

[34] Ms. Bélisle determined that compensation for maternity leave was not appropriate as the harassment took place after her return. Finally, Ms. Bélisle determined that the applicant should receive reintegration and career development support.

[35] The applicant filed a grievance from Ms. Bélisle's decision on November 21, 2011, arguing that she did not take appropriate corrective measures. The applicant sought reinstatement of 1057.5 hours of sick leave, \$6,000 for legal expenses and \$10,000 for mental distress.

[36] In a decision dated November 3, 2011, Ms. Bélisle advised the applicant that the allegations in her second complaint did not meet the criteria for harassment and therefore would not be addressed under the harassment complaint process.

[37] The applicant grieved this decision on November 14, 2011, arguing that Ms. Bélisle failed to consider whether the subject matter of the complaint constituted an abuse of authority and erred in concluding that the allegations did not meet the criteria for harassment.

The Decision Under Review

[38] Claude Carrière, the Associate Deputy Minister, rendered a third and final decision for both grievances on February 2, 2012.

[39] In the first decision, Mr. Carrière stated that the corrective measures contained in Ms. Bélisle's November 1, 2011 decision were sufficient and that the additional measures were not warranted in this case. He agreed that damages for mental distress and reimbursement for legal fees were not provided for under the Harassment Policy and further concluded that they would not be warranted even if permitted.

[40] In the second decision, Mr. Carrière confirmed that the allegations in the applicant's second harassment complaint did not meet the criteria for harassment and therefore they could not be an abuse of authority. Mr. Carrière stated that even a flawed managerial decision does not generally constitute harassment. With respect to the particular email, there was no indication of impropriety.

Mr. Carrière also considered the applicant's allegation that the Department interfered with the investigation of the previous harassment complaint and that Dr. Buckingham discriminated against her during her maternity leave but determined that these arguments were not relevant to the grievance.

Legislation and Policy

[41] The Tribunal's enabling legislation is section 4.1 of the *Canada Agricultural Products Act*, RSC 1985, c 20 (4th supp). The Tribunal is an independent, quasi-judicial body which reviews monetary penalties assessed by the Canadian Food Inspection Agency, Canada Border Services Agency and the Pest Management Regulatory Agency arising from regulatory action in respect of agriculture and agri-food.

[42] The Chairperson and Chief Executive Officer is an Order-in-Council appointment. The employees are members of the federal public service.

[43] The *Public Service Labour Relations Act*, RSC 2003, c 22, exists to facilitate the resolution of labour disputes expeditiously, inexpensively and with little formality. It includes a comprehensive scheme for grievances. Subsection 66(1) of the Public Service Labour Relations Board Regulations provides that an employee must set out in the provided form the nature of each act or omission giving rise to the grievance.

[44] Sections 209 and 209.1 of the *Canada Labour Code*, RSC 1985, c L-2 are also relevant. Section 209 provides that employees on leave are entitled, on written request, to be informed in

writing of every employment, promotion or training opportunity that arises. Section 209.1 provides that employees on leave are entitled to be reinstated to the position that the employee occupied when commencing leave, or to a comparable position.

[45] The Harassment Policy contains the following definitions:

Harassment – 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 picture or unwelcome comments about someone's personal life. It includes harassment within the meaning of the Canadian Human rights Act ...

Abuse of authority is a form of harassment. It occurs when an individual misuses the power and authority inherent in his or her position to endanger a person's job ... managers must exercise their authority legitimately and in good faith. ... the investigator should consider whether there is any foundation for the actions, observations or conclusions reached by the manager or whether there is evidence of improper intent on behalf of the accused. In order to make a finding of Abuse of Authority, the conduct must also meet the definition of harassment.

Issues

Applicant

[46] The parties accept that the appropriate standard of review is reasonableness.

[47] The applicant makes the following submissions regarding the first decision:

- a. Mr. Carrière erred in concluding that the corrective measures were sufficient.

- b. The Harassment Policy allows for corrective measures which must be interpreted to include compensation.
- c. Mr. Carrière erred in finding that damages were not warranted.
- d. The founded allegation of harassment need not be the sole cause for her mental distress, only a contributing cause.
- e. The Harassment Policy states that the Delegated Manager must ensure that complainants have access to support and advice, and there is nothing which states that this cannot include legal advice. The Policy on Legal Assistance and Indemnification is not applicable.

[48] The applicant makes the following submissions regarding the second decision:

- a. The tone of the email is sarcastic, malicious and condescending.
- b. The evidence of Steven Robineau, Principle Consultant Labour Relations, confirms that a job description can only be changed following certain procedures. Dr. Buckingham could not arbitrarily alter a job description. The changes “had nothing to do with the allocation of work”.
- c. Mr. Carrière erred in failing to consider the unilateral change to her job description and discrimination based on sex (maternity leave).
- d. Mr. Carrière erred in failing to consider the Department’s interference in the investigation of her first complaint. Ms. O’Flaherty, played an instrumental role in

advising Dr. Buckingham on issues relating to her leave, and therefore had a conflict of interest.

- e. Mr. Carrière ignored relevant evidence regarding the change to her position and ignored applicable law, namely human rights legislation.

[49] As a remedy, the applicant seeks return of sick leave and damages for mental distress. I note that these remedies are not available on judicial review.

Respondent

[50] Regarding the first complaint, the respondent submits that:

- a. The applicant does not satisfy the test for damages for mental distress.
- b. The applicant could have claimed compensation for mental distress under the *Government Employees Compensation Act*.
- c. Sick leave is a no fault system and re-crediting the days she took would constitute unjust enrichment. The applicant did not sustain damages as she received her full salary and benefits while on leave.
- d. Section 6.1.11 of the Policy on Legal Assistance and Indemnification is directly applicable and bars payment for the applicant's legal fees.
- e. The Department did not interfere with the investigation.

[51] Regarding the second complaint, the respondent submits that:

- a. The decision not to investigate the complaint was reasonable.

- b. The applicant should have grieved Dr. Buckingham's decision to change her work duties rather than alleging harassment. If she had done so, the issue would have been entirely different.
- c. It is impermissible to raise new issues at the third level grievance stage. In her initial grievance the applicant does not allege discrimination on the basis of sex during her maternity leave or that the Department interfered with the first investigation.
- d. The applicant could have filed a grievance regarding any interference.

Analysis

[52] As noted at the outset, this application for judicial review should be dismissed.

[53] The appropriate remedy consequent on an established complaint of harassment is a discretionary matter. In my view, an apology combined with re-crediting 187.5 hours of sick leave was reasonable. The applicant has not grieved the decision to dismiss the majority of her allegations, leaving only one incident of harassment. While the Harassment Policy may permit damages, it is reasonable to find that damages would not be appropriate in these circumstances.

[54] While I find the degree of engagement by the Department in the investigator's report troubling, this matter was not the subject of the applicant's grievances and therefore cannot be remedied in this judicial review. I agree with the respondent's submissions that the applicant could have filed a separate grievance for this issue.

[55] I also consider it reasonable for the Department to decline to investigate the applicant's second complaint. I agree with the respondent that the applicant could have grieved any improper change to her job duties, which would involve a different test than that for harassment. Managerial errors do not necessarily rise to the level of harassment. There is no evidence to support the applicant's assertions that Dr. Buckingham had no legitimate purpose in changing her job duties.

[56] Finally, I agree with the respondent that the applicant did not allege discrimination on the basis of sex until the final level grievance decision and that the allegations cannot evolve from the subject of the initial complaint.

[57] Insofar as the remedies are concerned, managers have a broad discretion under their general managerial authority as well as Harassment Policy to correct substantive complaints. While Mr. Carrière's final level grievance decision that he could not compensate the applicant for her legal costs is incorrect, the error is immaterial, as he expressly addressed the question and determined that he would not compensate for her legal fees in any event. This decision is reasonable, given the objective of the policy, which is to encourage non-adversarial resolution of workplace issues, as well as the degree of success achieved by the applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that the applications are dismissed. There is no order as to costs.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-412-12
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STYLE OF CAUSE: CHANTAL HOULE-MRAK v ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: Ottawa, ON

DATE OF HEARING: May 6, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** RENNIE J.

DATED: June 28, 2013

APPEARANCES:

Ms. Chantal Houle-Mrak

FOR THE APPLICANT
(ON HER OWN BEHALF)

Mr. Martin Desmeules

FOR THE RESPONDENT

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