

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170117

Docket: A-9-16

Citation: 2017 FCA 14

**CORAM: SCOTT J.A.
BOIVIN J.A.
GLEASON J.A.**

BETWEEN:

SYLVIE THERRIEN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on January 17, 2017.
Judgment delivered from the Bench at Ottawa, Ontario, on January 17, 2017.

REASONS FOR JUDGMENT OF THE COURT BY:

GLEASON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on January 17, 2017).

GLEASON J.A.

[1] We have before us an appeal from the judgment of the Federal Court, dismissing the appellant's application for judicial review of the decision of the Office of the Public Sector Integrity Commissioner of Canada in which the Commissioner determined that he had no authority to deal with the appellant's reprisal complaint by virtue of subsection 19.3(2) of the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 (the *PSDPA*). The Federal Court's

judgment was issued on December 9, 2015, and its Reasons and Judgment are reported as *Therrien v. Canada (Attorney General)*, 2015 FC 1351, 261 A.C.W.S. (3d) 778.

[2] In this appeal we are required to step into the shoes of the Federal Court and determine whether it selected the appropriate standard of review and whether it applied the selected standard correctly: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559. While we agree that the Federal Court selected the appropriate standards of review, namely reasonableness in respect of the Commissioner's determination under subsection 19.3(2) of the *PSDPA* and correctness in respect of the appellant's procedural fairness allegations, we believe that the Federal Court made reviewable errors in its application of those standards.

[3] More specifically, in the circumstances of this case, we believe that the Commissioner violated the appellant's procedural fairness rights as Commission staff told the appellant's counsel that the factors the Commissioner would be considering in assessing whether he would inquire into the appellant's reprisal complaint were the factors enumerated under paragraph 19.3(1)(a) of the *PSDPA*. The appellant accordingly made submissions to the Commissioner as to why he ought not exercise his discretion to decline to inquire into the complaint under paragraph 19.3(1)(a) of the *PSDPA*.

[4] However, the Commissioner did not review the matter under paragraph 19.3(1)(a) of the *PSDPA*, but, rather, dismissed the complaint under subsection 19.3(2) of the *PSDPA* and at no

time indicated to the appellant that the latter subsection was being considered as a basis for refusing an inquiry into the complaint.

[5] There is a meaningful difference between the two statutory provisions.

Paragraph 19.3(1)(a) of the *PSDPA* affords the Commissioner discretion to decline to deal with a complaint where the Commissioner is of the opinion that the subject matter of the complaint either has been or ought more appropriately be dealt with under a procedure provided under another Act of Parliament or a collective agreement. Subsection 19.3(2), on the other hand, is cast in mandatory terms and requires the Commissioner to dismiss a complaint where its subject matter is being dealt with by a body (other than a law enforcement agency) acting under another Act of Parliament or a collective agreement. Given these differences, a complainant may well make different submissions under the two provisions.

[6] In the circumstances of this case, where Commission staff indicated to the appellant that only paragraph 19.3(1)(a) would be considered by the Commissioner, the Commissioner was bound to disclose that he was also considering subsection 19.3(2) of the *PSDPA* before deciding to dismiss the complaint under the latter provision. The Commissioner's failure to do so violated the appellant's rights to procedural fairness as the appellant was misinformed as to the issues being examined by the Commissioner. The appellant therefore had no way of knowing the case she had to meet.

[7] While the foregoing is sufficient to dispose of this appeal, we think it also prudent to examine the Commissioner's interpretation of subsection 19.3(2) of the *PSDPA* to provide guidance for the redetermination to be conducted by the Commissioner.

[8] We believe that the Commissioner's determination that the subject matter of the appellant's complaint was being dealt with by a body acting under the grievance process provided in the *Public Service Labour Relations Act*, S.C. 2003, c. 22, (the *PSLRA*) was unreasonable as the Commissioner failed to ascertain whether the Public Service Labour Relations and Employment Board (the PSLREB) would be hearing the suspension and dismissal grievances on their merits and, if so, whether in the course of so doing would be examining the subject matter of the reprisal complaints. As it turns out, the employer objected to the jurisdiction of the PSLREB to hear the merits of the grievances contesting the suspension and termination of the appellant, arguing that the impugned decisions were of an administrative as opposed to a disciplinary nature. If the employer's position is upheld, the PSLREB will not conduct a review of the suspension, revocation of reliability status and termination decisions to assess whether the employer had cause for imposing them.

[9] Failure to consider these issues renders the Commissioner's determination unreasonable as subsection 19.3(2) of the *PSDPA* requires that the PSLREB entertain the merits of a grievance that deals with the subject matter of the reprisal complaint. The PSLREB may be called upon to examine the subject matter of a reprisal complaint where it hears a grievance that alleges a violation of an anti-reprisal provision in a collective agreement or where it examines the reprisal allegations in the context of a disciplinary grievance as part of its assessment of whether the

employer possessed cause for the actions in question. Thus, in the context of a grievance, it is only where the Commissioner is satisfied that the substance of a reprisal complaint is being dealt with on its merits by the PSLREB that subsection 19.3(2) of the *PSDPA* might reasonably be found to apply. To ascertain whether this is so, it may often be necessary for the Commissioner to await the outcome of proceedings before the PSLREB prior to determining whether subsection 19.3(2) of the *PSDPA* is applicable.

[10] The Commissioner's interpretation, which found the mere referral of a grievance to the PSLREB to come within subsection 19.3(2) of the *PSDPA*, is incompatible with the intent and purpose of the *PSDPA*, which is designed to provide protection from reprisals to public servants in addition to the rights they possess under the *PSLRA*.

[11] It therefore follows that we allow this appeal with costs before this Court and the Federal Court and remit the appellant's reprisal complaint to the Office of the Public Sector Integrity Commissioner of Canada for redetermination in accordance with these Reasons. Costs before the Federal Court are fixed in the all-inclusive amount of \$2,500.00, and before this Court in the all-inclusive amount of \$2,500.00.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-9-16

STYLE OF CAUSE: SYLVIE THERRIEN v.
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JANUARY 17, 2017

REASONS FOR JUDGMENT OF THE COURT BY: SCOTT J.A.
BOIVIN J.A.
GLEASON J.A.

DELIVERED FROM THE BENCH BY: GLEASON J.A.

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