Federal Court  Cour fédérale

Date: 20150303

Docket: T-1717-13

Citation: 2015 FC 271

Vancouver, British Columbia, March 3, 2015

PRESENT: The Honourable Madam Justice Heneghan

Docket: T-1717-13

BETWEEN:

NICK MARSZOWSKI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Nick Marszowski (the "Applicant") seeks judicial review of a decision made by Mr. Ron Hallman, President of the Canadian Environmental Assessment Agency (the "CEAA"). In that decision, dated September 16, 2013, Mr. Hallman dismissed, in part, a grievance filed by the Applicant pursuant to the *Public Service Labour Relations Act*, S.C. 2003, c.22 s. 2 (the "Act"), which is Part I of the *Public Service Modernization Act*, S.C. 2003 c. 22.

[2] The Attorney General of Canada (the "Respondent") represented the decision-maker pursuant to subsection 303(2) of the *Federal Courts Rules*, SOR/98-106 (the "Rules").

I. BACKGROUND

[3] The details below are taken from the Tribunal Record and the affidavits filed by the Applicant, and Johanne Gagnon, a paralegal with the Treasury Board Secretariat, Legal Services, for the Respondent.

[4] The Applicant is employed with the CEAA. On May 7, 2012 he filed a harassment complaint against Mr. Dean Stinson O'Gorman. The complaint raised allegations of harassment by Mr. Stinson O'Gorman towards the Applicant from August 2010 to May 2012.

[5] The Applicant is an EC-04 Policy Analyst who began working with the CEAA in May 2008, in the Economic and Social Science Service Group.

[6] Mr. Stinson O'Gorman joined the CEAA in August 2010 as Acting Director of Policy Analysis. He was appointed Director of Review Panels in April 2011.

[7] Between August 2010 and May 2012 the Applicant worked under the supervision of Mr. Stinson O'Gorman in various roles across several divisions, including Cabinet Affairs, Aboriginal Affairs and Review Panels.

[8] The Applicant alleges that during this time, Mr. Stinson O'Gorman engaged in a pattern of conduct towards him that rises to the level of harassment.

[9] The alleged harassment began in August 2010, while the Applicant was working on a temporary assignment in Cabinet Affairs. The Applicant alleges that when he advised Mr. Stinson O'Gorman that he was only working in Cabinet Affairs until September, Mr. Stinson O'Gorman asked the Applicant if he was "trying to pull a fast one on [him]?" According to the Applicant, this incident marked the beginning of Mr. Stinson O'Gorman's negative attitude towards him.

[10] The Applicant also claims that while he was working in Cabinet Affairs, Mr. Stinson O'Gorman made requests of him that implied he was not competent. In November 2010, Mr. Stinson O'Gorman expressed reservations about a new assignment for the Applicant because he believed that the Applicant did not have the right attitude at work.

[11] In November 2011, while working on an assignment with the Review Panels division at the Department of Aboriginal Affairs, the Applicant became aware that he was not being invited to weekly team meetings held by Mr. Stinson O'Gorman.

[12] On December 14, 2011, Mr. Stinson O'Gorman met with the Applicant and advised him that his assignment in Review Panels would not be extended. When the Applicant asked Mr. Stinson O'Gorman why his assignment was being terminated early, Mr. Stinson O'Gorman allegedly replied that he was not going to waste resources on him.

[13] On January 5, 2012 the Applicant made an access to information and privacy request ("ATIP request") pursuant to the *Privacy Act*, R.S.C. 1985 c. P-21. Prior to making this request, the ATIP coordinator, Karuna Gomes, advised the Applicant that Mr. Stinson O'Gorman had asked her to ask the Applicant if he understood the implications of making such a request.

[14] Included in the results of the ATIP request was an email dated October 18, 2011 between Mr. Stinson O'Gorman and a colleague, Kurt Saunders. In that email Mr. Stinson O'Gorman asked, in relation to the Applicant's request for vacation leave, whether they should "suspend [their] liberal elitist sensibilities to accommodate rednecks?"

[15] The Applicant initiated a formal harassment complaint in May 2012 pursuant to the Treasury Board Secretariat's *Policy on the Prevention and Resolution of Harassment*, (the "TBS Policy"). Quintet Consulting Corporation (the "Investigator") was retained to investigate the complaint.

[16] The Investigator's report (the "Report") dated May 31, 2013, identified six grounds for the complaint as follows:

1. Mr. Stinson O'Gorman demeaned the Applicant;
2. Mr. Stinson obstructed the Applicant's opportunity to work in Aboriginal Affairs;
3. Mr. Stinson O'Gorman set the Applicant up for failure;
4. Mr. Stinson O'Gorman insulted the Applicant in an email;
5. Mr. Stinson O'Gorman threatened the Applicant in relation to his ATIP request; and

6. Mr. Stinson O'Gorman made false accusations about the Applicant so that he could hire a friend.

[17] The Report concluded that grounds 1, 2, 3 and 6 were unfounded, but that there was merit to grounds 4 and 5 of the Applicant's complaint.

[18] On July 10, 2013, the Applicant received a copy of the Report and the decision of Mr. Yves Leboeuf, Vice President, Operations Sector of CEAA. In his decision, Mr. Leboeuf accepted the conclusion that grounds 1, 2, 3 and 6 were unfounded, but rejected the conclusion that grounds 4 and 5 constitute harassment. He found that the incidents were not part of a pattern of conduct rising to the level of harassment. He also found that the Applicant had not established that the conduct had any lasting impact on him.

[19] On July 10, 2013, the Applicant grieved Mr. Leboeuf's decision on the basis that the employer did not assess allegations made in his harassment complaint based on the six factors identified in the TBS Policy and that the decision had overruled the Investigator's conclusions. For corrective action, he asked that the allegations be reassessed, that his sick leave be restored, and "to be made whole."

[20] Pursuant to section 40.17 of the Economics and Sciences Services (EC) Collective Agreement, the grievance proceeded to a final grievance hearing held by CEAA President Ron Hallman on August 22, 2013. The Applicant was represented by his counsel, Mr. Paul Champs.

Mr. Sylvan Campeau, Manager, Human Resources, also attended. The Applicant presented a "Summary of Points," disputing Mr. Leboeuf's conclusions.

II. DECISION UNDER REVIEW

[21] Mr. Hallman's decision, dated September 16, 2013, states that he reviewed the Report, Mr. Leboeuf's July 10, 2013 decision, as well as several policy documents, including the TBS Policy, the Policy on Harassment and Prevention and Resolution, the Directive on the Harassment Complaint Process, and the Investigation Guide for the Policy on Harassment Prevention and Resolution Directive on the Harassment Complaint Process ("TBS Investigation Guide"). He also considered the information submitted by Mr. Champs at the grievance hearing.

[22] Mr. Hallman noted that neither party challenged the facts gathered in the Report; as such, he accepted that the Report provided an accurate description of events.

[23] Mr. Hallman said that according to TBS Policy, the delegated complaints manager has discretion to decide whether to accept the Investigator's conclusions or not. If the complaints manager does not accept the Investigator's conclusions, then written rationale should be provided to the parties. Mr. Hallman was satisfied that Mr. Leboeuf had provided a satisfactory written rationale justifying his decision.

[24] Mr. Hallman was also satisfied that Mr. Leboeuf's decision was made in good faith, in accordance with the applicable policy documents, including the six factors from the TBS Policy referenced by Mr. Marszowski in his grievance complaint.

[25] Notwithstanding his findings regarding Mr. Leboeuf's decision, Mr. Hallman accepted Mr. Marszowski's claim that the incidents impacted his sick days. He directed the Agency to credit 150 hours (20 days) of sick leave to Mr. Marszowski's leave balance. He directed Human Resources to schedule a harassment awareness and prevention presentation for CEAA's Executive Committee. He confirmed that there would be no reprisal against Mr. Marszowski as a result of the grievance process.

[26] Mr. Hallman could not consider Mr. Marszowski's request to "be made whole" via a promotion, because such an appointment would be inconsistent with the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13, which is Part III of the *Public Service Modernization Act*, *supra*, the Public Service Commission's Appointment Framework and principles of merit, fairness, transparency and representativeness.

III. **SUBMISSIONS**

The Applicant's Submissions

[27] The Applicant argues that he suffered a breach of procedural fairness because he was deprived of the opportunity to make submissions about the Report before Mr. Hallman. Mr. Hallman was the final decision-maker who accorded deference to Mr. Leboeuf and the Applicant submits that he should have been given the opportunity to present arguments about the Report to Mr. Leboeuf.

[28] The Applicant further argues that the decision of Mr. Hallman was unreasonable. He specifically challenges the finding that there was no harassment and alleges that the decision-maker failed to consider the pattern of conduct.

[29] The Applicant further argues that the decision-maker unreasonably found that there was no lasting impact or the behaviour upon the Applicant and that this finding was essential to finding harassment.

[30] Finally, the Applicant submits that Mr. Hallman unreasonably deferred to the Report and the conclusions of Mr. Leboeuf.

The Respondent's Submissions

[31] The Respondent argues that in alleging a breach of procedural fairness, the Applicant is confusing the determination made by Mr. Leboeuf, the delegated complaints manager, and the decision made by Mr. Hallman, as the final decision-maker in the grievance process.

[32] The Respondent argues that the Applicant's complaint was initiated and pursued according to the TBS Policy. Following the presentation of the complaint, an investigation ensued. The parties were provided with a preliminary version of the Report and given the opportunity to provide written comments before the final version of the Report was sent to the delegated manager, Mr. Leboeuf. The TBS Policy does not provide complainants with a right to make further submissions directly to the delegated manager.

[33] The Respondent argues that the Applicant was dealt with fairly at all stages of the process, including at the final grievance hearing where he had the opportunity to make oral and written submissions and where he was represented by counsel.

[34] The Respondent submits with respect to the merits of the decision, that the final decision-maker reasonably concluded that there was no harassment. Mr. Hallman reasonably accepted the conclusion of Mr. Leboeuf and did not blindly accept those findings since he allowed the Applicant's grievance in part.

IV. DISCUSSION AND DISPOSITION

[35] The first matter to be addressed is the applicable standard of review.

[36] Questions of procedural fairness are reviewable on the standard of correctness; see the decision in *Sketchley v. Canada (Attorney General),* [2006] 3 F.C.R 392 at paragraph 47 (F.C.A.).

[37] The decision on the grievance is reviewable on the standard of reasonableness since it involves the interpretation and application of the TBS Policy; see the decision in *Tibilla v. Canada (Attorney General),* 2011 FC 163 at paragraphs 17-18.

(1) Was there a breach of procedural fairness?

[38] In my opinion, the Applicant has not shown any breach of procedural fairness. In his written submissions, he mistakenly identified the final decision-maker as Mr. Leboeuf, when in fact Mr. Hallman made the decision that is the subject of judicial review.

[39] The Applicant participated in an oral hearing before Mr. Hallman, with the assistance of Counsel. In this hearing, the Applicant presented a written "Summary of Points", which was considered by that decision-maker.

[40] The content of the duty of fairness varies according to the circumstances; see the decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 21 to 27.

[41] One factor that is relevant in assessing the duty of fairness is the legitimate expectations of the parties. In this case, those legitimate expectations were set by the TBS Policy which provides that the parties can "expect to review their statement as recorded by the investigator, to confirm its accuracy, prior to the final report being submitted."

[42] The Applicant submitted a written complaint and responded to the preliminary report. He had an opportunity to present his case. There was no legitimate expectation that he would be allowed to make further submissions to Mr. Leboeuf after the final Report was filed.

[43] The Applicant argued that the importance of the interest at stake, that is harassment affecting his employment, favours a higher degree of procedural fairness as discussed in *Potvin*

v. Canada (Attorney General) (2005), 280 F.T.R. 93 at paragraphs 18 and 19 and *Kane v. Bd. of Governors of U.B.C.*, [1980] 1 S.C.R. 1105 at page 1113.

[44] However, in this case, the impact on the Applicant's career is not of the same degree as in *Kane, supra*. In the present case, the Applicant's right to continue his employment was not affected.

[45] The Applicant's right to comment on the Report before it was forwarded to Mr. Leboeuf was in accordance with the TBS Policy and the required degree of procedural fairness was met.

[46] Turning now to the Applicant's argument that Mr. Leboeuf erred in imputing a requirement of "lasting impact" into the definition of harassment, I note that Mr. Leboeuf did not address the evidence that the alleged harassment affected the Applicant, causing him to take time off on sick leave.

[47] However, Mr. Leboeuf's decision is not under review. Mr. Hallman accepted the grievance, in part, and he credited some sick leave to the Applicant. His decision was reasonable in this regard.

(2) Did Mr. Hallman err in deferring to the conclusions of Mr. Leboeuf?

[48] Although his Notice of Application raises this issue of deference as a ground for review, the Applicant did not explicitly raise arguments on this point in his written submissions.

[49] However, Mr. Hallman was in the position to review all the evidence, including the Report, and to entertain the submissions of the Applicant. Investigation reports are considered an extension of the agency for which they are prepared; see the decision in *Sketchley, supra*. Investigation reports can be considered part of the final decision where the decision references the report; see the decision in *Westbrook v. Canada Revenue Agency*, 2013 FC 951 at paragraph 13.

[50] In discerning the reasons of a decision-maker, a court may look at the record to assess the reasonableness of the outcome; see the decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708 at paragraph 15. Based on the record before him, Mr. Hallman's final decision was reasonable.

[51] There is no basis to grant any relief to make the Applicant "whole", he has received a credit of sick time and otherwise, he remains employed.

[52] In the result, the Application for Judicial Review is dismissed.

[53] Although the Respondent seeks costs, in the exercise of my discretion respecting costs, pursuant to Rule 400 (1) of the Rules, I make no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed; in the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR/98-106, I make no order as to costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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