Federal Court  Cour fédérale

**Date: 20151019**

**Docket: T-1533-14**

**Citation: 2015 FC 1175**

**Toronto, Ontario, October 19, 2015**

**PRESENT: The Honourable Mr. Justice Diner**

**BETWEEN:**

**MARC GRAVELLE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## JUDGMENT AND REASONS

### I. Nature of the Matter

[1] This is a judicial review of a decision (*Gravelle v Deputy Head (Department of Justice)*, 2014 PSLRB 61 [*Gravelle*]) by an adjudicator [Adjudicator] of the Public Service Labour Relations Board [PSLRB] appointed under the *Public Service Labour Relations Act*, SC 2003, c 22, s 2. The Applicant was an employee of the Department of Justice [the DOJ]. He grieved four decisions by the DOJ:

A. The termination of his employment on July 6, 2011;

B. The revocation of his reliability status on July 7, 2011;

C. The suspension of his employment, effective February 8, 2011;

D. A one-day suspension of his employment on January 26, 2011.

[1] The Adjudicator ultimately dismissed the termination grievance, found the indefinite suspension grievance to be moot, found that he lacked jurisdiction over the revocation of status grievance, and allowed the grievance on the one-day suspension.

## II. Facts

[2] The Applicant was employed by the DOJ as a Human Resources assistant. His superiors testified before the Adjudicator that they were not satisfied with his work: it was often late, contained errors that needed later correction, or was incomplete. He was also reprimanded for, among other things, having made offensive comments about management and using vulgar language in communications.

[3] In December 2010, the Applicant went for lunch with a former co-worker that was considerably longer than his allotted lunch break of thirty minutes. As a result, on January 26, 2011, he was placed on a one-day suspension.

[4] In January 2011, the Applicant switched offices and phone numbers with Denis Ouellette, his direct supervisor. Mr. Ouellette then received a phone call about car repairs for the Applicant.

Mr. Ouellette testified that he had previously seen the Applicant consulting car repair and resale websites and was suspicious that the Applicant was conducting a personal business at his government workplace. These suspicions were conveyed to Mr. Ouellette's superiors, who gave a mandate to Denis Roussel, an Information Technology [IT] specialist, to investigate.

[5] Mr. Roussel conducted an investigation of the Applicant's email account and made several findings, including that the Applicant's internet usage was abnormally high; that he had been conducting a business selling cars, car parts, and equipment from his work computer; and that in November and December of 2009 he had sent several documents relating to staffing processes and containing personal information of other employees to his personal email, including testing information for positions that he had applied for and the names of other applicants.

[6] The Applicant was suspended on February 7, 2011, the day Mr. Ouellette's report was submitted in draft form. A final version was submitted to the Applicant to discuss at a meeting with his superiors, but he did not appear. On the basis of the report, his superiors then recommended to the Deputy Minister that he be terminated for misconduct.

[7] The Applicant's employment was terminated on July 6, 2011, although the Deputy Minister made the decision retroactive to the date of suspension. The termination was based on inappropriate and excessive internet use, his disciplinary record, and a breach of trust in accessing and sending himself unauthorized personnel information, a serious privacy breach.

These various factors in turn led to a breach of trust with his employer. The Applicant's reliability security clearance status was revoked the next day.

## III. The Decision

[8] The Adjudicator found that the DOJ had ample justification to terminate the employment relationship. While there was insufficient evidence to find that he had used the network to conduct personal business from the workplace, it was clear that the Applicant used the network disproportionately relative to his own needs, far in excess of other employees, including those whose duties required high internet usage, such as IT department employees. The Adjudicator also found that the Applicant had forwarded the confidential staffing documents to his personal email for his own, improper use. As a result, the DOJ had to report this disclosure of personal information to the Office of the Privacy Commissioner and to advise all 108 affected employees of the privacy breach. The Adjudicator found that this justified the termination of his employment.

[9] As for the suspension, the Adjudicator found that it was moot since the termination had been made retroactively effective to the first day of the suspension. The Adjudicator could find "no federal public service jurisprudence supporting an argument that…the employer cannot backdate the termination" (*Gravelle* at para 102). This backdating had the effect of rendering the suspension and termination into a unique and singular disciplinary measure so that a separate grievance on each issue was unnecessary.

[10] As for the third issue raised in this matter, the Adjudicator concluded that he lacked jurisdiction to review the revocation of the Applicant's reliability status. He would only have such jurisdiction had it been a disciplinary measure (including discipline in disguise), but the Adjudicator found that it was rather a purely administrative action.

[11] Finally, the Applicant grieved a fourth issue – the one-day suspension of January 2011 for having taken the long lunch in December 2010. The Applicant argued that the lunch was abnormally long because of delays in service. The Adjudicator found that taking a long lunch did not constitute misconduct that merited a one-day suspension and allowed this grievance.

## IV. Issues

[12] The Applicant is seeking that the Court:

A. Quash the termination, revocation, and the IT report;

B. Send the three grievances to a different adjudicator, with instructions that the new adjudicator has jurisdiction to review the reliability decision;

C. Declare:

i. that the DOJ did not have just cause to terminate;

ii. that he did not send confidential documents to his personal address, run a business on his work computer, or use the electronic network in excess;

iii. that the Adjudicator made erroneous findings of fact and errors of law in ignoring evidence;

iv. that the DOJ's investigation was inappropriate and conducted in bad faith and as a result did not have the authority to retroactively terminate;

D. Reinstate his former position, re-establish his reliability status, and order payment of wages and benefits to which he would be entitled had he not been terminated;

E. Grant him costs for the litigation.

## V. Standard of Review

[13] The standard of review that applies to a decision by an adjudicator of the PSLRB is reasonableness (*King v Canada (Attorney General)*, 2013 FCA 131 at para 3). Reasonableness "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9 at para 47). This is a highly deferential standard: as noted in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 59, "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".

## VI. Analysis

### A. *Respondent's Preliminary Objections*

[14] As a preliminary matter, the Respondent raises two points. First, the Respondent points to Rule 81 of the *Federal Courts Rules*, SOR/98-106, which requires that the content of affidavits before the Court "be confined to facts within the deponent's personal knowledge". The Respondent argues that large sections of the Applicant's Affidavit are argumentative,

opinionated, or speculative and that the Court should only consider those portions of the Affidavit that relate to facts about which the Applicant had personal knowledge, that are relevant to the matter at hand, and most significantly, that were before the Adjudicator.

[15] As to the evidence itself, introduced by way of annexes to Mr. Gravelle's Affidavit contained in the Application Record, the Respondent notes that on judicial review the Court should only consider evidence that was before the decision-maker, save in exceptional cases, of which this is not one. As stated by Justice Létourneau in *Bekker v Canada*, 2004 FCA 186 at para 11, "barring exceptional circumstances such as bias or jurisdictional questions...the reviewing Court is bound by and limited to the record that was before the judge or the Board."

[16] Examples of exceptional circumstances were discussed by Justice Stratas in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20:

> There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review…
>
> (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review.
>
> (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness…
>
> (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding.

[17] I agree with the Respondent. Per my ruling at the hearing, the Applicant has indeed raised opinion argument and speculation in his originating Affidavit. He has also attached to the Affidavit contained in his Application Record a significant amount of evidence that was not before the Adjudicator. He has not satisfied the Court that this new evidence qualifies for the exceptions nor has he made clear how his new allegations relate to the reasonableness of the underlying decision.

[18] As explained to the Applicant in my ruling at the hearing, the focus of a judicial review is on the evidence that was before the decision-maker and the errors the decision-maker might have made in assessing that evidence. Anything extraneous to that, such as the new evidence and the allegations contained within the Applicant's Affidavit, should not be considered.

B. *Admissibility of the Applicant's Reply Affidavit*

[19] An additional preliminary issue that was addressed at the hearing was the Applicant's Reply Affidavit. On September 16, 2015, the Applicant filed a motion for an order under Rule 312 of the *Federal Courts Rules* to file an additional affidavit. Because it was filed so late in relation to the September 28 judicial review before this Court, it was decided that the motion would be heard at the outset of the hearing.

[20] The Applicant's Reply Affidavit and associated documents seek to adduce evidence that the Applicant could not have sent the emails that contained the personnel information. He states that the new documents demonstrate that he was sick for most of the month of December.

[21] There is a high bar to accepting new evidence in further affidavits on judicial review. As this Court has held previously, applications for judicial review are summary proceedings that should be determined without undue delay, and the discretion of the Court to permit the filing of additional material should be exercised with great circumspection: *Mazhero v Canada (Industrial Relations Board)*, 2002 FCA 295 at para 5.

[22] In *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 [*Forest Ethics*] at paras 4-6, Justice Stratas articulated the test for admissibility under Rule 312:

A. The evidence must be admissible on the application for judicial review;

B. The evidence must be relevant to an issue that is properly before the reviewing court;

C. If these two preliminary requirements are met, the Court may exercise its discretion, considering the following:

i. Was the evidence sought to be adduced available when the party filed its Affidavits or could it have been available with the exercise of due diligence?

ii. Is the evidence sufficiently probative that it could affect the result?

iii. Will the evidence cause substantial or serious prejudice to the other party?

[23] For many of the same reasons I indicated above in my first procedural ruling (i.e. that the new evidence the Applicant submitted with his first Affidavit application should not be considered), the evidence contained in the further Affidavit does not pass the first step of the test above. It does not fall into any of the admissibility exceptions nor is it relevant to the reasonableness of the Adjudicator's decision.

[24] Even if the new evidence was admissible and relevant, there are still discretionary reasons not to accept it. It is clear, for example, that the Applicant has had this evidence since the summer of 2014 but only submitted it in September 2015, even though he filed his original Affidavit on August 1, 2014. He offers no explanation as to why the new evidence was not submitted at that point.

[25] Finally, the Respondent has explained why it would be prejudicial to admit this new evidence, including the fact that the proceedings would be further delayed by having to seek affidavit evidence. This would introduce further strains not only on the Respondent but on the resources of this Court as well.

[26] For all the reasons above, I decided not to exercise my discretion to admit the Reply Affidavit and its related contents.

C. *Issues and Analysis*

[27] As explained above, this is a judicial review of a PSLRB decision, and as such, falls under the purview of section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [the Act], under which this Court may only grant relief if it is satisfied that the PSLRB:

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| (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction; | a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer; |
| (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; | b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter; |
| (c) erred in law in making a | c) a rendu une décision ou une |

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| decision or an order, whether or not the error appears on the face of the record; | ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier; |
| (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; | d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose; |
| (e) acted, or failed to act, by reason of fraud or perjured evidence; or | e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages; |
| (f) acted in any other way that was contrary to law. | f) a agi de toute autre façon contraire à la loi. |

[28] Section 18.1(3) of the Act lays out the remedies available to a successful applicant in a judicial review:

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| (3) On an application for judicial review, the Federal Court may | (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut : |
| (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or | a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable; |
| (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal. | b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral. |

[29] Section 18.3 makes clear that many of the Applicant's requests are beyond the power of this Court to provide. As noted by Justice Sharlow in *Sosiak v Canada (Attorney General)*, 2003 FCA 205 at para 14:

> An application for judicial review is not a trial. The task of a reviewing court is to determine whether the tribunal erred in deciding as it did, based on the documents the tribunal was given and the oral evidence it heard, and if such an error is found, to determine whether the nature of the error is such as to warrant intervention of the court.

[30] Furthermore, this Court can only intervene if the Applicant identifies specific errors of such a serious nature that they render the Adjudicator's decision unreasonable, as defined in *Dunsmuir* and *Khosa*. Anything else is beyond its power as a reviewing body to address.

[31] In terms of reviewable issues, then, the Applicant does allege an error on the part of the Adjudicator. The Applicant is of the opinion that evidence brought before the Adjudicator in the testimony of Denis Roussel, specifically on the determination that he had sent the personnel files to his personal email, is not credible. Mr. Roussel, the Applicant asserts, played a key role in a series of emails that suggest the destruction and manipulation of relevant evidence. The Applicant states that he brought his concerns about Mr. Roussel to the attention of the Adjudicator and that it was an error on the part of the Adjudicator to rely on that evidence anyway.

[32] Furthermore, Mr. Gravelle submits that there was insufficient proof to conclude that he sent the emails: just because they came from his computer does not mean he sent them, nor did the DOJ ever demonstrate that his computer was not hacked. Much of the new evidence the

Applicant has sought to adduce relates to these arguments – that the DOJ has had security breaches in the past, that the software Mr. Roussel used in his investigation is flawed, and that the Applicant did not send the emails in question at all.

[33] An assessment of the Adjudicator's conclusions on these grounds, however, discloses no reviewable error. It is clear that the Adjudicator considered Mr. Roussel's testimony carefully and not uncritically. For example, he excluded some of Mr. Roussel's findings from the decision on the grounds that they were irrelevant and demonstrated a "lack of respect for the grievor's privacy" (*Gravelle* at para 93). The Adjudicator also took note of the Applicant's position on the emails (which was, at the time, that he did not remember sending them) and on Mr. Roussel's investigation (that it was "full of flaws").

[34] Despite the weaknesses in Mr. Roussel's evidence, and the points conceded to the Applicant, the Adjudicator concluded that, "[w]hen I balance all the evidence in front of me, I am convinced that the grievor sent those documents to his home address" (*Gravelle* at para 88).

[35] As the Respondent pointed out, the PSLRB hearing took place over 13 days. The Applicant was represented by able and experienced counsel. The parties adduced into evidence more than 120 documents, including a 392-page investigation report. Sufficient reasons were provided as to why this investigation was requested. The Adjudicator explained the detailed manner in which the investigation was conducted and the careful steps that went into its testing, drafting and preparation.

[36] The Adjudicator also described how he came to the conclusion that on a balance of probabilities, the Applicant improperly forwarded confidential employer information from his work to his personal email. The Adjudicator weighed the evidence received from the investigators, compared it to that received from the Applicant, and decided, on the basis of all that was before him, that he preferred the evidence of the employer to that of the employee.

[37] Similarly, the Adjudicator after reviewing the case law, explained (a) that the termination nullified the effect of the suspension, since it was retroactive and justified, and (b) that the removal from reliability status was a purely administrative decision of the employer. It is my conclusion that both of these conclusions were justified and reasonable.

[38] The process and the outcome fit comfortably with the principles of justification, transparency, and intelligibility as set out by *Khosa*. I do not feel that it is open to this reviewing court to substitute its own view of a preferable outcome to him.

[39] Ultimately, the Applicant today is challenging findings of fact. In *Rohm and Haas Canada Ltd v Canada (Anti-Dumping Tribunal)*, [1978] FCJ No 522, the Federal Court of Appeal set out three conditions that must be met before a reviewing court can interfere with a tribunal's decision. There must be (i) an erroneous finding of fact, which must have (ii) been made in a capricious manner without regard to the materials before it, and (iii) the decision below must have been based on this erroneous findings.

[40] I do not find that any of these conditions have been met in this case.

## VII. Conclusion

[41] Based on the evidence before the PSLRB, the Adjudicator came to a well-reasoned and carefully considered decision on the question of whether the Applicant's actions breached the trust of his employer on several occasions, ultimately resulting in his termination. It was open to the Adjudicator to make the conclusion he did.

[42] Despite the best efforts of the Applicant, who did his utmost to present his case as a self-represented litigant, his submissions disclose no reviewable error in the Adjudicator's decision. Instead, they draw this Court's attention to issues that it cannot, in this application, consider. This matter is therefore denied. Given the circumstances and taking into account Mr. Gravelle's present situation, I will make no order as to costs. Mr. Gravelle should appreciate, as discussed at the hearing, that this is an exception to the norm with respect to costs.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**

1. This judicial review is dismissed.

2. There are no questions for certification.

3. There is no award as to costs.

"Alan S. Diner"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1533-14 |
| **STYLE OF CAUSE:** | MARC GRAVELLE v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | SEPTEMBER 29, 2015 |
| **JUDGMENT AND REASONS:** | DINER J. |
| **DATED:** | OCTOBER 19, 2015 |

**APPEARANCES:**

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| Lesa Brown | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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