Federal Court  Cour fédérale

Date: 20171215

Docket: T-464-16

Citation: 2017 FC 1159

Ottawa, Ontario, December 15, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

JOHN BILES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review application of a decision by the Public Sector Integrity Commissioner [the Commissioner], dated February 19, 2016, dismissing the complaint of reprisals the Applicant filed with the Commissioner on December 19, 2014 pursuant to section 19.1 of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [the Act]. The Applicant is

alleging that reprisal measures were taken against him for having cooperated in an investigation into a disclosure of wrongdoing made under the Act in 2013.

[2] Following an investigation into the Applicant's reprisal complaint, the Commissioner determined that there were no reasonable grounds to believe that a reprisal had been taken against him, thereby concluding that an application to the Public Servants Disclosure Protection Tribunal [Tribunal] was not warranted in the circumstances of the case.

II. Background

A. *What Lead to the Reprisal Complaint*

[3] The Applicant has been an employee of Citizenship and Immigration Canada [CIC] (now known as Immigration, Refugees and Citizenship Canada) for the last seventeen years or so, specializing on newcomers' settlement and integration issues. In November 2010, he took a position as Special Advisor to the Director General, Integration, at CIC's national headquarters in Ottawa. His main role in that new position was to take the "policy lead" for all settlement related research partnerships.

[4] While in that position, he became the subject of a departmental investigation triggered by an internal disclosure made under the Act [the Internal Disclosure] in relation to certain allegations of impropriety, including a potential conflict of interests with a service provider organization which receives contribution funding and research data from CIC and with which the Applicant's spouse was allegedly associated. This occurred in May 2013.

[5] The Internal Disclosure alleged that the Applicant had been giving that organization – the Western Consortium on Integration, Citizenship and Cohesion [WCICC] – preferential treatment and had at times assisted it beyond what is permitted by a CIC employee, resulting in the Applicant committing wrongdoings within the meaning of section 8 of the Act. In particular, the Applicant was suspected of misusing public funds, engaging in gross mismanagement in the public sector and seriously breaching CIC's Code of Conduct.

[6] In September 2014, the Applicant was advised that the investigation into the Internal Disclosure had found no wrongdoing. At that point in time, the Applicant was no longer in his position of Special Advisor to the Director General, Integration, having accepted a regional assignment allegedly to escape "the systemic harassment" he experienced while the Internal Disclosure was being investigated. While on this assignment, which began in May 2014, the Applicant says he was tasked with performing a high volume of staffing actions that required a staffing sub-delegation which could only be authorized by CIC's Deputy Minister, a position held at the time by Ms. Anita Biguzs.

[7] The Applicant claims that by December 12, 2014, while all of his colleague's sub-delegation applications had been processed and approved, even though they had applied after him, his was still being processed. He contends that Ms. Biguzs deliberately stalled his application, which would normally have taken one to two months to be processed, because of his cooperation with the Internal Disclosure investigation, where he raised serious questions respecting the lack of clarity of the case made against him, procedural fairness and the failure of

the investigatory process to follow a clear and established framework as required by Treasury Board policies.

[8] At about the same time as he was found to have committed no wrongdoing following the Internal Disclosure investigation, the Applicant applied for an interchange assignment with a not for profit organization, the Immigration Access Fund Society of Alberta [IAF], claiming he was forced to entertain this assignment in order to escape Ms. Biguzs' reprisals. Despite, he says, having been assured by staff personnel and senior management that this interchange would occur within a short period of time, the start date of the interchange was pushed back on four occasions and the interchange was ultimately refused when the then Human Resources Director General at CIC, Ms. Katherine Parker, on the recommendation of the Workplace Effectiveness Branch of the Human Resources Directorate, advised him that she would not support it. That recommendation was based on the Branch's opinion that given the Applicant's current and past experience and expertise at CIC, his affiliation to a funding recipient benefiting from a fund he was currently supervising at CIC would put him in a conflict of interests situation as it could give rise to the perception that IAF would be receiving an advantage that other organizations may not have access to when presenting funding proposals to CIC.

[9] The Applicant takes issue with the fact that Ms. Parker interfered with the interchange review process by inquiring with IAF about any relationship it may have with WCICC. This was a way, he claims, to revive the allegations of the Internal Disclosure, a move which, in his view, was both abusive and unethical given the results of the Internal Disclosure investigation, and caused IAF to reconsider the interchange assignment offer if this were to pose any risk to it.

[10] According to the person who acted as his Director when he took the regional assignment, the Applicant is an exceptional employee who is valued and highly regarded.

B. *The Reprisal Complaint and the Case Admissibility Analysis*

[11] As indicated at the outset of these Reasons, the Applicant filed his reprisal complaint on December 19, 2014. The complaint was directed at both Ms. Parker, for her intervention into the interchange review process, and Ms. Biguzs, for withholding the issuance of the staffing sub-delegation authority. It was based on subsection 2(d) of Act which defines "reprisal" as any measure, among others, that "adversely affects the employment or working conditions of the public servant."

[12] In the case of Ms. Parker, the Applicant complained that her alleged reprisal effectively prevented him from taking an interchange assignment to escape the reprisals of Ms. Biguzs and precluded him from leaving the public service to take a job in the private sector where he could apply the skills he had developed over his years at CIC to advance the settlement and integration of newcomers to Canada. As for Ms. Biguzs' alleged reprisal, the Applicant complained that it deprived him of the necessary tools to perform his job which resulted in departmental managers concluding that he should neither be promoted nor supported in his career aspirations, thereby adversely impacting his career advancement and working conditions.

[13] The Commissioner proceeded first to an admissibility assessment of the Applicant's complaint pursuant to section 19.4 of the Act. On February 6, 2015, following that assessment, he notified the Applicant that he would investigate the allegation "that Ms. Parker adversely

affected your employment conditions, as defined at s.2(d) of the *Act*, when she interfered with your interchange request, and refused to provide a positive recommendation to said request on December 8, 2014" [the Parker Complaint].

[14] However, the Commissioner also decided he would not commence an investigation into Ms. Biguzs' alleged reprisals on the basis that these allegations were, pursuant to subsection 19.3(1)(c) of the Act, beyond his jurisdiction. In particular, the Commissioner noted that although he could appreciate that the sub-delegation would facilitate his staffing activities, measures had been put in place to mitigate the Applicant's lack of delegation, allowing him thereby to participate in staffing processes and, apart from the ability to sign staffing requests or letters of offers, to complete the remaining elements of his position. The Commissioner was not persuaded, therefore, that the delay in considering the Applicant's request for the staffing sub-delegation adversely affected his employment or working conditions.

[15] The Commissioner reached a similar conclusion regarding the effects of that delay on the Applicant's career advancement, noting that Ms. Biguzs had yet to approve or deny his request for such sub-delegation and that there was no information on file showing that he had not been promoted, nor supported in his career aspirations as a result of the delay in obtaining it.

[16] The Applicant did not judicially challenge the Commissioner's decision not to deal with the reprisal allegations respecting Ms. Biguzs.

C. *The Investigation into the Parker Complaint*

[17] Ms. Gail Gauvreau, a Senior Investigator with the Office of the Commissioner, was designated to investigate the Parker Complaint. In a letter dated July 8, 2015, Ms. Gauvreau advised counsel for the Applicant that she wished to arrange a date and time to interview the Applicant. She also outlined in that letter, based on the information CIC had provided to date, her understanding of the process followed within CIC to review and ultimately dismiss the Applicant's interchange request.

[18] On July 23, 2015, counsel for the Applicant acknowledged receipt of Ms. Gauvreau's letter. He emphasized the need for a broader context investigation that would go beyond a narrow comparison of the basic processes utilized for interchange cases and cover, given, in his view, the inextricability between the Internal Disclosure investigation and the interchange review process, issues such as:

a) Whether Ms. Biguzs and the "senior administration" at CIC were involved in Ms. Parker's decision not to recommend the interchange with IAF or engaged in the decision on interchange;
b) How references to WCICC found their way into the correspondence between Ms. Parker and the IAF;
c) Whether the Internal Disclosure investigation was inappropriately introduced into the interchange process; and
d) Whether the interchange process received the same treatment as others in the same period of time or whether it was subject to systemic delays as reprisal.

[19] Counsel also provided a list of eight witnesses who should be interviewed by Ms. Gauvreau, including Ms. Biguzs and the Board Chair of IAF, Ms. Laura Wood, as well as a number of current and former CIC's senior managers. Finally, he informed Ms. Gauvreau that the Applicant was still awaiting a decision from Ms. Biguzs on his staffing sub-delegation request. According to the Respondent, said sub-delegation was received by the Applicant in December 2015.

[20] In the course of her investigation, Ms. Gauvreau interviewed a total of nine (9) persons, including the Applicant, Ms. Parker and Ms. Wood, from IAF. In the fall of 2015, based on new information gathered during her investigation, she considered recommending expanding said investigation and prepared to that effect, for the Commissioner's review, a draft Notice of Expanded Investigation in which she wrote:

> 24. The investigation focused on Ms. Parker as she is the identified alleged reprisor in this case, however it appears that senior management may have been involved in some way in the attempt to collect information that related to the [Internal Disclosure] investigation.
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> 25. To proceed further in this case, would involve the collection of information that may relate to other individuals, specifically the Deputy Minister, Ms. Bigusz (sic).
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> 26 This office should not commence the collection of information, or proceed to ask questions that relate to the actions of a person once suspicion that their actions might be a contravention to the [Act], until such time as the Commissioner has directed that the investigation be expanded and the individual formally notified.
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> 27. As such, it is recommended that the investigation be expanded to include the Deputy Minister, Ms Bigusz (sic).

[21] With her draft Notice of Expanded Investigation, Ms. Gauvreau also prepared a draft letter to the Clerk of the Privy Council and Secretary of the Cabinet intended to inform her that an investigation under the Act into the alleged conduct of Ms. Biguzs would be undertaken. The letter indicated that this investigation would "examine whether Ms. Bigusz' alleged interference with Mr. Biles's interchange request and his ability to function effectively in his current position, is tied to Mr. Biles's cooperation in an investigation pursuant to the *Act*."

[22] Ms. Gauvreau's recommendation was based on new information pointing to Ms. Biguzs as the "driving force" behind Ms. Parker's inquiry into any relationship IAF might have with WCICC, the organization whose relationship with the Applicant had been the subject of the Internal Disclosure.

[23] At the same time as she considered recommending an expanded investigation into the Parker Complaint, Ms. Gauvreau also considered recommending conciliation and prepared a draft Conciliation Recommendation. On November 16, 2015, the Director of Operations with the Office of the Commissioner, Mr. Raynald Lampron, in the absence of Ms. Gauvreau, warned counsel for the Applicant, in an email, that there was no guarantee that the "other party" would wish to move forward with conciliation or that the Commissioner would approve it, and he emphasized that the content of his email was not to be understood or received "as an undertaking that a conciliation will be recommended, or […] will take place, or that in the event that it is recommended and approved, that it will take place before Christmas," as contemplated by the Plaintiff.

[24] According to the evidence on file, conciliation was considered by the Commissioner on December 22, 2015 when he reviewed Ms. Gauvreau's preliminary investigation report. There was no conciliation for the Parker Complaint.

[25] On December 2, 2015, Ms. Gauvreau, after conducting a review of the evidence on file with Mr. Lampron, abandoned the idea of recommending an expanded investigation, being of the view at that point that said evidence was not sufficient to support a recommendation to that effect. No expanded investigation into the Parker Complaint was therefore commenced.

[26] On December 23, 2015, the Commissioner released Ms. Gauvreau's preliminary investigation report. He also disclosed at the same time a potential conflict of interest on the part of Ms. Gauvreau for being indirectly related to Ms. Parker, something Ms. Gauvreau was unaware of until December 1, 2015. In the sake of prudence and of ensuring that the integrity of the investigation was beyond doubt, the Commissioner decided that the reminder of the investigation would be completed by someone other than Ms. Gauvreau. The investigation was completed by Mr. Lampron. Nothing in this case turns on this potential conflict of interests.

[27] Both sides commented on the preliminary investigation report. In particular, the Applicant stressed again the need to investigate the broader context, that is the connection between Ms. Parker's intervention in the interchange review process and the Internal Disclosure investigation, and the role of Ms. Biguzs in this respect.

D. *The Final Investigation Report and the Commissioner's Decision Dismissing the Parker Complaint*

[28] On February 19, 2016, the Commissioner released the final investigation report, adopting in their entirety the findings, analysis and recommendation of the report's author, Mr. Lampron.

[29] Mr. Lampron was first satisfied that the Applicant had cooperated in good faith in an investigation into a disclosure - the Internal Disclosure investigation - as contemplated by the Act's definition of "reprisal." He then proceeded to determine, pursuant to that definition, whether being refused an interchange request amounts to a measure adversely affecting the employment or working conditions of the public servant who has applied for it. He noted in that regard that no public servant is entitled as a matter of right to participate in an interchange. He stressed that government's policies on interchange programs set out strict responsibilities on departments' deputy heads to address any question of real, apparent or potential conflict of interest that may arise as a result of an interchange.

[30] That said, Mr. Lampron acknowledged that "the denial by an employer of a professional interchange to an employee who meets all the eligibility criteria and where the exchange would support the objectives of the Interchange Program, as well as those of participants, organizations and the Government of Canada, could correspond to a measure that adversely affects the employment or working conditions of a public servant" and could, if linked to the public servant's cooperation in an investigation, constitute reprisal.

[31] Being satisfied that Ms. Parker "had at least some knowledge of Mr. Biles' participation in the [Internal Disclosure] investigation," Mr. Lampron proceeded to determine whether there was a link between that participation and Ms. Parker's role in turning down the interchange request. He found there was no such link. His overall assessment of the evidence in this regard is found at paragraphs 82 and 83 of the final investigation report:

> 82. The evidence indicates that Ms. Parker was unaware of the interchange request until November 14, 2014, and at that time she only saw the request as an item on a list of work being conducted by the Workplace Effectiveness Branch. She did not see a copy of Mr. Biles' request until November 27th. She was unable to act upon that request until the Values and Ethics report was completed. There is no evidence that she interfered with the recommendation made by Ms. Eliane Habib, the Workplace Investigations and Ethics Officer assigned to review Mr. Biles' Confidential Report. Ms Habib recommended that the interchange not proceed. Ms. Habib's Director, Ms. Lapointe agreed with Ms. Habib's recommendation and indicated that no pressure was placed upon her with respect to reaching any decision nor was she told the interchange should not be supported. She reached her decision solely on the work descriptions and Mr. Biles' work with the Department. Upon completion of Ms. Lapointe's review, the file went to Ms. Parker for her review and decision.
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> 83. Ms. Parker's e-mail to the organization was unnecessary as she had a solid recommendation from her staff that the interchange would have constituted a conflict of interests between Mr. Biles work at the CIC and the duties he would undertake at the IAF. Ms. Parker's additional inquiry with the IAF may have been unnecessary and as such somewhat questionable, that notwithstanding, this action had no effect on the recommendation and decision with respect to Mr. Biles' interchange request. Ms. Habib's recommendation was not tied in any manner to the internal disclosure investigation carried out under the *Act*. With or without the inquiry made to the IAF, the recommendation would have been the same, which was that Mr. Biles' request be rejected on the basis of an apparent conflict of interest.

[32] Mr. Lampron further noted that the Applicant's interchange request was processed in 45 days, which is well within the 21 to 90 day range an interchange request is usually processed,

and that Ms. Parker only took four (4) working days to reach her decision once she was provided with all the required documentation. As such, he was satisfied that the processing of the Applicant's interchange request "was not excessively long and fell within the standard time frame."

[33] Based on the totality of the evidence, Mr. Lampron concluded that there were no reasonable grounds for the Commissioner to believe that a reprisal was taken against the Applicant for having cooperated in a disclosure investigation under the Act. Therefore, he recommended that the Commissioner find that the Applicant was not the subject of reprisal action on the part of CIC and dismiss his complaint in accordance with section 20.5 of the Act.

[34] As previously indicated, the Commissioner adopted Mr. Lampron's findings and recommendation, but he also dealt with two other issues which are relevant to the present proceedings.

[35] First, he dismissed the Applicant's contention that Ms. Gauvreau had a closed mind to the evidence before her, notwithstanding the fact that it is Mr. Lampron who concluded the investigation. The Commissioner was satisfied that Ms. Gauvreau had fully considered all the circumstances of the Parker Complaint, including the fact that Ms. Parker had some knowledge of the Internal Disclosure investigation when she was called upon to review her staff's recommendation regarding the Applicant's interchange request.

[36] Second, the Commissioner addressed the Applicant's claim that the investigation into the Parker Compliant shall be broadened pursuant to subsection 33(1) of the Act, to include how Ms. Parker acquired knowledge of the Internal Disclosure. He held that a reprisal complaint cannot form the basis of a new investigation under subsection 33(1) as this provision is meant to apply only to investigations undertaken in the context of the disclosure of a wrongdoing. He also held that it would not be unusual for Ms. Parker, in her capacity as the Director of Human Resources, to have some knowledge of disclosure investigations within CIC.

III. Issues and Standard of Review

[37] The Applicant challenges both the reasonableness and procedural fairness of the impugned decision, claiming the Commissioner "committed several interrelated legal and procedural errors in rendering his decisions of February 19, 2016."

[38] On reasonableness, the Applicant submits that the Commissioner erred in (i) mischaracterizing the allegations against Ms. Bigusz as requiring a "new investigation"; (ii) interpreting and applying subsection 33(1) of the Act, and (iii) interpreting and applying the notion of "reprisal" as it arises on the allegations in the underlying reprisal complaint.

[39] Both parties agree that the applicable standard of review is reasonableness (*Agnaou v Canada (Attorney General)*, 2015 FCA 29, at para 31 [*Agnaou*]; *Gupta v Canada (Attorney General)*, 2016 FCA 50, at para 4). That standard is met where the impugned decision fits comfortably with the principles of justification, transparency and intelligibility and falls within a

range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47, [2008] 1 SCR 190).

[40] On procedural fairness, the Applicant claims that the Commissioner failed to (i) consider contextual information pertaining to Ms. Biguzs and Ms. Beck and, therefore, to investigate key evidence, (ii) refer the matter to conciliation in violation of his legitimate expectations, (iii) access and assess potentially relevant redacted information contained in the Certified Tribunal Record, and (iv) investigate relevant information on the ground that it constitutes hearsay. Again, both parties agree that these issues are subject to the correctness standard of review (*Agnaou*, at para 30), although the Respondent claims, relying on *Bergeron v Canada (Attorney General)*, 2015 FCA 160, that where the thoroughness or sufficiency of the Commissioner's investigation is put in issue, the reasonableness standard is then triggered.

IV. Analysis

A. *The Act's Reprisal Complaints Scheme*

[41] According to its Preamble, the Act is designed to enhance confidence in federal public institutions "by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings." The purpose of the Act, therefore, is two-fold: it is to "denounce and punish wrongdoings in the public sector and, ultimately, build public confidence in the integrity of federal public servants" while at the same time protecting from reprisals "the persons making disclosures and other persons taking part in an investigation into wrongdoings" (*Agnaou*, at paras 60 and 62).

[42] The Act, at section 2, defines a "reprisal" as follows:

reprisal means any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33:	***représailles*** L'une ou l'autre des mesures ci-après prises à l'encontre d'un fonctionnaire pour le motif qu'il a fait une divulgation protégée ou pour le motif qu'il a collaboré de bonne foi à une enquête menée sur une divulgation ou commencée au titre de l'article 33 :
(a) a disciplinary measure;	a) toute sanction disciplinaire;
(b) the demotion of the public servant;	b) la rétrogradation du fonctionnaire;
(c) the termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;	c) son licenciement et, s'agissant d'un membre de la Gendarmerie royale du Canada, son renvoi ou congédiement;
(d) any measure that adversely affects the employment or working conditions of the public servant; and	d) toute mesure portant atteinte à son emploi ou à ses conditions de travail;
(e) a threat to take any of the measures referred to in any of paragraphs (a) to (d). (représailles)	e) toute menace à cet égard. (reprisal)

[43] Subsection 2(2) of the Act specifies that every reference in the Act to a person who has taken a reprisal includes a person who has directed the reprisal to be taken.

[44] Reprisals complaints may be filed by any “public servant or former public servant who has reasonable grounds for believing that a reprisal has been taken against him or her” (subsection 19.1(1) of the Act). They are to be received, reviewed, investigated and otherwise dealt with by the Commissioner (subsection 22(i) of the Act).

[45] Within 15 days from when it is filed, the Commissioner must decide whether or not to deal with the complaint (subsection 19.4(1) of the Act). He may refuse to deal with the complaint where he is of the opinion that (i) the complaint’s subject-matter has been - or could be - adequately dealt with according to a procedure provided for under any other act of Parliament or a collective agreement, (ii) the complaint is beyond the jurisdiction of the Commissioner, or (iii) the complaint was not made in good faith (subsection 19.3(1) of the Act).

[46] If the Commissioner decides to deal with the complaint, he sends a written notice of his decision to the complainant and to the person or entity that has the authority to take disciplinary action against each person who participated in the taking of measures alleged by the complainant to constitute reprisals (subsection 19.4(2) of the Act). If he decides otherwise, then he must inform the complainant of his decision and provide reasons for the decision (subsection 19.4(3) of the Act).

[47] Where he decides to deal with the compliant, the Commissioner may designate a person to investigate it (subsection 19.7(1) of the Act). That person, when commencing an investigation, must notify the deputy head or chief executive of the department concerned of the substance of the complaint. The investigator may also similarly notify any other person he or she considers

appropriate, including every person whose conduct is called into question by the complainant (subsection 19.8 of the Act).

[48] The investigation is then to be conducted as informally and expeditiously as possible (subsection 19.7(2) of the Act). In the course of the investigation, the investigator may recommend to the Commissioner that a conciliator be appointed to attempt to bring about a settlement of the complaint (subsection 20(1) of the Act). The appointment of a conciliator is left to the discretion of the Commissioner (subsection 20(2) of the Act) and the terms of any settlement resulting from conciliation are subject to the approval of the Commissioner (subsection 20.2(1) of the Act).

[49] When conciliation is not recommended, is deemed not to be warranted by the Commissioner or is deemed warranted but fails, the investigator submits a report to the Commissioner as soon as possible after the conclusion of his or her investigation (subsection 20.3 of the Act). After receipt of the investigator's report, the Commissioner may either dismiss the complaint or refer it to the Tribunal (subsections 20.4(1) and 20.5 of the Act).

[50] Referral will occur where the Commissioner is of the opinion that an application to the Tribunal is warranted for a determination of whether or not a reprisal was taken against the complainant and for an order respecting a remedy in favour of the complainant in cases where the Tribunal determines that a reprisal was taken (subsection 20.4(1) of the Act). In considering whether to apply to the Tribunal, the Commissioner must take into account the factors set out in subsection 20.4(3) of the Act, that is:

a) Whether there are reasonable grounds for believing that a reprisal was taken against the complainant;

b) Whether the investigation into the complaint could not be completed because of a lack of cooperation on the part of one or more deputy heads, chief executives or public servants;

c) Whether the complaint should be dismissed on any ground set out in subsection 19.3(1)(a) to (d); and

d) Whether it is in the public interest to make an application to the Tribunal having regard to all the circumstances relating to the complaint.

[51] The complaint must be dismissed when the Commissioner is of the opinion that an application to the Tribunal is not warranted in the circumstances (subsection 20.5 of the Act).

[52] In *Agnaou*, the Federal Court of Appeal characterized the procedure established under the Act for the processing of reprisals complaints as being "very different" from the one established for the processing of wrongdoing disclosures. It also stressed the similarity of the Act's reprisal complaints procedure to the complaint procedure set out in the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA] (*Agnaou*). These differences and similarities were set out as follows:

> [62] Parliament has established a very different process for reprisal complaints. In fact, this process is similar to the one provided for in the CHRA. There too, the public interest is a major concern. The disclosure of wrongdoings must be promoted while protecting the persons making disclosures and other persons taking part in an investigation into wrongdoings. However, as is often the case for complaints filed under the CHRA, reprisals complained of have a direct impact on the careers and working conditions of the public servants involved. The Act provides that a specific tribunal shall be established to deal with such matters, and that the Tribunal

> will be able to grant remedies to complainants, as well as impose disciplinary action against public servants who commit wrongdoings, where the Commissioner recommends it.
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> [63] In the process applicable to these complaints, the role of the Commissioner is similar to that of the Commission. Like the Commission, he or she handles complaints and ensures that they are dealt with appropriately. To do so, the Commission reviews complaints at two stages in the process before deciding whether an application to the Tribunal is warranted to protect the public servants making disclosures.
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> [64] The Commissioner must decide whether or not to deal with a reprisal complaint within 15 days after receiving it. The grounds on which a complaint may be summarily dismissed are far more limited than those provided under section 24 (disclosures). They are in the same nature as those set out in section 41 of the CHRA and are even more limited than the latter, since subsection 19.3(1) does not allow the Commissioner to refuse to deal with a complaint if it is found to be frivolous or abusive.
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> [65] After investigating, the Commissioner re-examines the complaint in light of the factors described in subsection 20.4(3) of the Act, which include, among others, whether "there are reasonable grounds for believing that a reprisal was taken", and whether the complaint should be dismissed for one of the reasons set out in paragraphs 19.3(1)(*a*) to (*d*). He or she will dismiss the complaint if an application to the Tribunal is not warranted (section 20.5). These provisions of the Act are substantially the same as those found in subsections 44(1) and 44(3) of the CHRA, as interpreted by the case law.

[53] Because of the similarity as to how they are to be processed and determined, the case law on complaints to the Canadian Human Rights Commission was held to be "helpful" when considering reprisals complaints filed with the Commissioner (*Agnaou*, at para 40).

[54] In the CHRA context, it is now firmly established that the investigation leading to a decision to dismiss or refer a complaint to the Canadian Human Rights Tribunal must be both neutral, that is fair and unbiased, and thorough (*Slattery v Canada (Human Rights Commission)*,

[1994] 2 FC 574; 1994 CarswellNat 271 at para 50 [*Slattery*]). As to the thoroughness requirement, the Court will generally intervene "where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence" (*Slattery*, at para 57). Evidence is "obviously crucial" in that context where "it should have been obvious to a reasonable person that the evidence an applicant argues should have been investigated was crucial given the allegations in the complaint" (*Gosal v Canada (Attorney General)*, 2011 FC 570 at para 54 [*Gosal*], citing *Beauregard v Canada Post*, 2005 FC 1383, at para 21).

[55] Also, although the investigator is under no obligation to interview each and every person suggested by the parties (*Slattery*, at para 70), his or her investigation might not meet the thoroughness threshold if the investigator fails to interview key witnesses, that is individuals who were "central players" in the events giving rise to the complaint (*Sanderson v Canada (Attorney General)*, 2006 FC 447 and *Gravelle v Canada (Attorney General)*, 2006 FC 251).

B. *The Commissioner's Decision Must be Set Aside*

[56] In determining whether a complaint should be dismissed or pursued before the Tribunal, the Commissioner must, as we have seen, take into account whether reasonable grounds exist for believing that a measure was taken against a complainant as a result of a protected disclosure (subsection 20.4(3)(a) of the Act). This test requires, for a measure to be viewed as a reprisal, that there be a connection between the protected disclosure and the alleged measures.

[57] Here, as I understand his position, the Applicant claims that there is an inextricable connection between the Internal Disclosure investigation and the review process of his

interchange request. He says, in this regard, that by raising concerns directly related to the Internal Disclose investigation, senior management at CIC, led by Deputy Minister Biguzs, has inappropriately attempted to interfere with the interchange review process, which, among other things, caused IAF to reconsider its interchange offer. This is so, the argument goes, because senior management was unable to establish any wrongdoing on his part through the Internal Disclosure investigation.

[58] The Applicant claims that regardless of the outcome of his interchange request, this attempt amounts, in and of itself, to a reprisal within the meaning of the Act and should therefore have been investigated as part of the Parker Complaint. There were sufficient elements in the evidence gathered by Ms. Gauvreau, he says, to expand the investigation to include these allegations, something Ms. Gauvreau considered at some point, but ultimately declined to recommend to the Commissioner. The Applicant notes that this evidence, which he describes as "circumstantial evidence" providing key context to the way the interchange review process took place, is, for all intents and purposes, absent from both the preliminary and final investigation reports.

[59] That evidence can be found in Ms. Gauvreau's Notice of Expanded Investigation, under the heading "New Information Related to Additional Individual." It can be summarized as follows:

a) Ms. Parker first dealt with the Applicant's interchange request file on November 14, 2014, the date on which Ms. Beck asked Ms. Parker to verify a rumour she had heard that the Applicant had left the public service;

b) Shortly thereafter, Ms. Parker was told by the Director of the Workplace Effectiveness Branch at the time, Ms. Josée Lapointe, that Ms. Beck had been "after her" to obtain information on Mr. Biles' wife, something Ms. Lapointe did not feel comfortable doing;

c) Ms. Parker eventually spoke to Ms. Beck, confirming that the Applicant had not left the public service and was in the process of an interchange application. As a result of that conversation, it was her understanding that Ms. Biguzs was the "driving force" behind obtaining the information about the Applicant's wife and later, about any ties the IAF might have with the WCICC;

d) In a subsequent meeting with her team, Ms. Parker was again told by Ms. Lapointe that Ms. Beck was after her to obtain a confidential report from the Applicant. It continued to be Ms. Parker's understanding that Ms. Biguzs was asking Ms. Beck for that information in an effort to clear up and resolve any conflict of interests issues;

e) In that respect, Ms. Parker told Ms. Gauvreau that since the Applicant's Director General "did not clear it up," she thought she could solve everyone's problem by checking with the IAF about "any relationship" with WCICC, which she did on December 3, 2014 by sending an email to Ms. Wood; in fact, the Applicant's Director General and Ms. Lapointe, according to Ms. Parker, had both refused to approach the Applicant to obtain the information relating to WCICC. To the extent that those refusals were related to concerns about the right to collect or even ask for such information, Ms. Parker disagreed, being of the view that the Department had the right to collect that information in the context of the interchange request so as to avoid any conflict of interests;

f) When asked by Ms. Gauvreau why she had made that inquiry, Ms. Parker stated that she believed, from her conversations with Ms. Beck, that the request for that inquiry came from Ms. Biguzs through Ms. Beck, as she had no access to Ms. Biguzs. She believed that Ms. Biguzs' interest in pushing for that information was to try "to mitigate any damage that might occur" from the interchange.

g) As a possible explanation as to why Ms. Biguzs would have suspicions that there might be damage that needed to be mitigated, Ms. Parker responded that she had heard that "there was something about Mr. Biles' wife working for a [service provider organization] (WCICC) and it would be better for the department to have a confidential report about the situation as opposed to not having one." Although she claimed not having read or had access to the Internal Disclosure investigation report, she was aware that the Internal Disclosure involved allegations of conflict of interest against the Applicant, tied to his wife's employment with a certain organization.

h) At the time she contacted Ms. Wood, Ms. Parker was aware that the Workplace Effectiveness Branch was recommending that the Applicant's interchange with IAF not be supported as it would result in a conflict of interest. And,

i) Finally, Ms. Parker stated being "really surprised" that the Applicant's staffing sub-delegation request had still not been approved by Ms. Biguzs, despite being recommended by the Applicant's Director General and signed off by her. She said that the Applicant was the only person "doing that job in Canada" who had not received his staffing sub-delegation; she found the situation "very strange" and "unheard of in their work environment."

[60] The Commissioner, who adopted Mr. Lampron's findings, concluded that although Ms. Parker's inquiry about the relationship between IAF and WCICC was both questionable and unnecessary, "open[ing] the door to questions as to why she would conduct further inquiries," this action on Ms. Parker's part had no effect on the recommendation and decision with respect to the Applicant's interchange request, as that recommendation, emanating from someone at the Workplace Effectiveness Branch, was made without any evidence of interference or pressure from Ms. Parker or CIC's Senior management.

[61] The Respondent claims that this decision is reasonable as the investigation showed that the recommendation not to go ahead with the interchange request would have been the same with or without the inquiry made to IAF by Ms. Parker. This, according to the Respondent, provided the Commissioner with a rational basis to conclude that the denial of the Applicant's interchange request was not due to his cooperation in the Internal Disclosure investigation.

[62] The Respondent further contends that the Commissioner's decision denying the Applicant's request that the scope of the investigation be expanded pursuant to section 33 of the Act was legally sound as that provision can reasonably be interpreted as applying only in the context of disclosure investigations.

[63] Both contentions, even assuming they are well-founded, do not provide, in my view, a complete answer to the Applicant's entire claim. I see two aspects of the Parker Complaint which are neither addressed by the Commissioner, something that brings into question the thoroughness

of the investigation conducted in this case, and the justification, transparency and intelligibility of the decision itself.

[64] First, as noted by Ms. Gauvreau, as a result of Ms. Parker's inquiry and the subsequent questioning by IAF, the Applicant was advised by the president of the IAF that the organization would need to reconsider the interchange assignment offer if it were to pose any risk to it. The need to reconsider was however never carried out as the Applicant was advised by Ms. Parker, on December 8, 2014, that she was unable to provide him with a positive recommendation to approve the interchange opportunity, and that he should therefore refrain from pursuing employment with IAF.

[65] As mentioned earlier, Mr. Lampron qualified Ms. Parker's intervention as "somewhat questionable" and "unnecessary" but ultimately concluded that such intervention had been of no real impact as the Applicant's interchange request was destined to fail due to a conflict of interest. Such rational, in my view, is flawed.

[66] In order to be considered a victim of reprisal resulting from Ms. Parker's intervention, the Applicant, as required by section 2 of the Act, needed to demonstrate (i) that he had cooperated in good faith in an investigation into a disclosure; (ii) that Ms. Parker's inquiry had adversely affected his employment or working conditions; and (iii) that there was a connection between him cooperating in the Internal Disclosure and the alleged adverse measure.

[67] It is uncontested that the Applicant cooperated in an investigation under the Act. As a matter of fact, he was not the typical whistleblower. He was the alleged wrongdoer defending himself against a disclosure. It is also clear from the final investigation report that Mr. Lampron, and by extension, the Commissioner, considered that the denial of an interchange opportunity could correspond to a measure adversely affecting the employment or working conditions of a public servant within the meaning of subsection 2(d) of the Act.

[68] According to what was put before Ms. Gauvreau, Ms. Parker's intervention, which resulted from her knowledge of the Internal Disclosure, including of the fact WCICC was the organization at issue in that investigation, had the effect of making AIF reconsider the interchange offer made to the Applicant.

[69] In my view, it does not matter that Ms. Parker's decision to deny the interchange request was supported by an independent recommendation made by someone who was not aware of the Internal Disclosure investigation against the Applicant or that said request had to be denied in the end. The simple fact that Ms. Parker intervened could very well be seen as detrimental to the Applicant's career because it created a doubt in AIF's mind as to whether appointing him was suitable at a time where the allegations of wrongdoing against the Applicant, which involved his and his wife's relationships with WCICC, had been held to be unfounded.

[70] Since that doubt would have been caused by something that had nothing to do with the interchange request *per se* and everything to do with the Internal Disclosure investigation, I believe the Commissioner erred in not turning his mind to determine whether Ms. Parker's

intervention raised reasonable grounds for believing that a reprisal had been taken against the Applicant in such a context. In other words, the Commissioner, as contended by the Applicant, ignored key evidence in this respect, thereby affecting the reasonableness of his decision.

[71] My second concern with the impugned decision has to do with the thoroughness of the investigation. In particular, I am concerned by Ms. Gauvreau's failure to investigate what she thought, at some point during her investigation, should be looked at through an expanded investigation, that is whether Ms. Biguzs, through Ms. Beck, had inappropriately attempted to interfere with the interchange review process by raising concerns directly related to the Internal Disclose investigation.

[72] To the extent that a parallel can be drawn with the role of the Canadian Human Rights Commission, I am cognizant of the fact the Commissioner, when it comes to reprisals complaints, performs a screening function, and that his role in this regard is to determine whether an inquiry by the Tribunal is warranted having regard to all the circumstances of the complaint, the central component of that role being to assess "whether there is a reasonable basis in the evidence for proceeding to the next stage," not "to determine if the complaint is made out" (*Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, at paras 52-53). I am cognizant too that as a general rule, this means that the Court should refrain from dissecting the investigator's report on a microscopic level or second-guessing his or her approach (*Attaran v Canada (Attorney General)*, 2013 FC 1132, at para 100) or from interfering in the Commissioner's decision simply because it might have come to a different conclusion on the

evidence (*Bell v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FC 113, at para 38 (FCA)).

[73] That being said, I am at a loss in the present case as to what prompted Ms. Gauvreau's change of heart given the amount of information pointing to the need for an expanded investigation into Ms. Biguzs' alleged interventions in the interchange review process, as the description of that information at paragraph 59 of these Reasons clearly reveals in my view.

[74] Ms. Gauvreau's notes are far from clear in this respect. They read as follows:

> Reviewed evidence with a view of determining the validity of proceeding with expanded investigation. Raynald Lampron indicated that he thought the evidence favoured the ADM (based solely on the draft report) however he wanted to ensure we examined the total evidence collected to date with a view to determining whether the DM or ADM or both should be the subject of an expanded investigation. If there was insufficient evidence for either or both, then we would proceed with the PIR as discussed in the meeting of the 23rd November.
>
> Reviewed information on file and determined that if failure to provide delegation was not addressed the evidence invoking the DM and ADM was hearsay evidence of conjuncture on the part of some witnesses (such as Ms. Parker who believed that the ADM or DM wanted certain information). The evidence on the file was not sufficient to support a recommendation of an expanded investigation.

[75] If this means, as it appears to be the case, that expanding the Parker Complaint investigation into the role played by Ms. Biguzs or Ms. Beck in the interchange review process was not warranted because of the purely conjectural nature of the allegations supporting such a course of action, then I agree with the Applicant that this justification is ill-founded. An investigator under the Act is a person designated by the Commissioner to "investigate a

complaint" (subsection 19.7(1)). That person's primary role is one of fact-finding; it is not that of an adjudicative body (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 77; *Tekano v Canada (Attorney General)*, 2010 FC 818 at para 30). Ms. Gauvreau's role, therefore, was to gather the evidence and then assess its reliability in her report to the Commissioner. She had no authority to pre-emptively dismiss the statements and documents supporting the case for an expanded investigation on the mere basis that it was hearsay. Even an adjudicator cannot dismiss evidence out of hand because it is hearsay evidence; he must consider it (*Basra v Canada (Attorney General)*, 2010 FCA 24, at para 22).

[76] Therefore, besides the ill-founded hearsay justification, I fail to see any other basis explaining why Ms. Gauvreau, despite having made a rather compelling case for an expanded investigation in her draft Notice of Expanded Investigation, finally decided not to pursue this course of action. To the extent the Applicant claims that Ms. Biguzs' attempt to interfere with the interchange review process by reviving the Internal Disclosure investigation was, in and of itself, a reprisal within the meaning of the Act, I am satisfied that by not pursuing that course of action, Ms. Gauvreau "failed to investigate obviously crucial evidence" (*Slattery*, at para 57) from key witnesses, that is from individuals who appeared to be "central players" in the events giving rise to the Parker Complaint. I am satisfied too that this caused that important aspect of the Applicant's complaint to be overlooked in the decision dismissing said complaint. Claiming that the alleged actions of Ms. Biguzs, if established, amounted to a measure adversely affecting the employment or working conditions of the Applicant in the particular circumstances of this case, is not devoid of any merit; it required the attention of the Commissioner.

[77] The Applicant has been saying all along that the investigation into the Parker Complaint should not limit itself to a narrow comparison of the basic processes utilized for interchange cases and should consider the broader context in which the interchange request review took place, including whether the Internal Disclosure investigation was inappropriately introduced into the interchange process and what role, if any, Ms. Biguzs played in that regard. That broader context, the Applicant has continuously claimed, was the source of a reprisal action distinct from the actual refusal of the interchange request.

[78] Although contemplated at one time, this inquiry was never made and I fail to see on the record any satisfactory explanation for this. Whether I look at it from the lenses of the standard of correctness or that of reasonableness, I find that the Commissioner's investigation lacked in thoroughness.

[79] As Mr. Lampron said in the final instigation report, Ms. Parker's ill-advised inquiry with IAF opened the door to questions as to why she acted the way she did. In the broader context of this case, these questions implicate Ms. Biguzs. They were raised by the Applicant but they were never answered. This is the main flaw of this whole investigation and it warrants the Court's intervention.

[80] The Applicant may have been mistaken in claiming that the investigation into the Parker Compliant be expanded pursuant to section 33 of the Act since, without making any decision regarding this question, the application of this provision in the context of a reprisal complaint investigation appears highly unlikely. That being said, the Commissioner was nevertheless under

a duty to conduct a thorough investigation, something, for the reasons I just gave, he and his investigator on this file failed to do.

[81] I conclude, therefore, that the Commissioner's decision dismissing the Parker Complaint must be set aside as key evidence was ignored and crucial aspects of said complaint were not investigated. There is no need, in these circumstances, to determine the other issues raised by the Applicant against the impugned decision, which, according to the Applicant, are, in any event, all interrelated.

[82] The Applicant is entitled to his costs for this application.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The decision of Public Service Integrity Commissioner, dated February 19, 2016, is set aside and the matter is remitted to the Office of the Public Service Integrity Commissioner for further investigation and redetermination in accordance with these reasons; and
3. Costs are awarded to the Applicant.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	JOHN BILES v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
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APPEARANCES:

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