Federal Court Cour fédérale

Date: 20210107

Docket: T-1357-19

Citation: 2021 FC 29

Ottawa, Ontario, January 7, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

MARY LLOYD

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application for judicial review concerns the decision of the Canada Revenue Agency ("CRA") to deny the Applicant's grievance regarding the CRA's decision to transfer the Applicant out of her position at its Criminal Investigation Division ("CID") due to credibility concerns.

[2] The Applicant argues that the CRA's decision is unreasonable because it placed undue weight on the Public Prosecution Service of Canada's ("PPSC") legal opinions regarding the Applicant's credibility. In doing so, the Applicant argues that the CRA failed to reasonably account for the relevant policies that bore on its decision and the proceedings that predicated it.

[3] For the reasons that follow, I find that the CRA's decision is unreasonable. The CRA's rationale for weighing the PPSC's legal opinions over other competing considerations fails to meet the requisite standard of intelligibility, justification, and transparency. I therefore allow this application for judicial review.

II. Facts

A. *The Applicant*

[4] The Applicant assumed her position at the CID in 2004. In 2005, the Applicant was diagnosed with fibromyalgia and in January 2006, she took extended sick leave from work. In August 2007, the Applicant was in a bicycle accident that resulted in her remaining away from work until November 2009.

[5] In February 2006, while on leave, the Applicant filed a grievance against her employer based on a failure to accommodate her medical condition (the "Discrimination Grievance"). The Applicant requested that the CRA provide her with a copy of relevant workplace information so that she may prepare for the hearing of the Discrimination Grievance. In response to this request, the CRA directed the Applicant to its IT Department, which then provided the Applicant

with CDs containing copies of the hard drive of her workplace computer. The CDs were obtained without the explicit authorization of management and contained confidential taxpayer information.

[6] During the Discrimination Grievance hearing in 2008, the Applicant disclosed that she possessed the CDs and had copied one of its contents onto her friend's computer. Based on the disclosure of that information, the CRA's Internal Audit and Fraud Control Directorate ("IAFCD") conducted an investigation into the Applicant's conduct.

[7] In a decision dated February 6, 2009, the Public Service Labour Relations and Employment Board, now the Federal Public Sector Labour Relations and Employment Board (the "Board"), found that the CRA discriminated against the Applicant by failing to accommodate her medical condition (*Lloyd v Canada Revenue Agency*, 2009 PSLRB 15 at para 48).

[8] On November 3, 2009, the Applicant informed the CRA that she was ready to return to work on November 30 on a part-time basis. On November 6, 2009, the CRA indefinitely suspended the Applicant without pay pending the completion of the IAFCD's investigation.

[9] On December 22, 2010, the IAFCD released the report of its investigation. The IAFCD's report found that the Applicant breached the CRA's policy regarding the security and protection of confidential taxpayer information, and that the Applicant breached section 241 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) ("*ITA*"), by disclosing taxpayer information without

authorization. Pursuant to these findings, the CRA suspended the Applicant for 40 days on March 17, 2011. The Applicant grieved that suspension (the "Suspension Grievance").

[10] On June 13, 2011, the Applicant returned to work but was reassigned to the Special Enforcement Program on an interim basis, where she would not conduct investigations. On January 17, 2012, the CRA informed the Applicant that as a result of concerns stemming from her misconduct, she was precluded from participating in criminal investigations and that, as of January 23, 2012, she would therefore be transferred to the Small and Medium Enterprises division ("SME").

[11] The concerns regarding the Applicant's misconduct stem from the Supreme Court's decision in *R v McNeil*, 2009 SCC 3 [*McNeil*]. In *McNeil*, the Court held that all Crown prosecutors must disclose to defence counsel any "serious misconduct" by individuals involved in an investigation that is "either related to the investigation, or […] could reasonably impact on the case against the accused" (at para 15). The CRA investigators, such as the Applicant, conduct investigations for cases of tax evasion and fraud. Pursuant to *McNeil*, the CRA must disclose all findings of serious misconduct made by its investigators to the PPSC, which is tasked with prosecuting tax-related offences. The PPSC then considers the impact that an investigator's *McNeil* concerns may have on its prosecution and whether such concerns would need to be disclosed to defence counsel.

[12] The Applicant grieved her transfer to the SME on the basis that it was inappropriate in light of her medical condition. On August 2, 2012, the Commissioner of the CRA overturned

that transfer and returned the Applicant to her original role at the CID. The CRA, however, refused to assign the Applicant investigation casework due to her *McNeil* concerns.

[13] In a decision dated July 23, 2015, the Board considered the Applicant's Suspension Grievance and her claim that her transfer to the SME was discriminatory (*Lloyd v Canada Revenue Agency*, 2015 PSLREB 67 [*Second Board Decision*]). The Board dismissed the component of the Applicant's grievance concerning her 40-day suspension, finding that "the evidence clearly supports the employer's reasons for imposing discipline" (*Second Board Decision* at para 360). However, the Board upheld the component of the Applicant's grievance concerning her transfer to the SME, finding that the CRA had again "engaged in discriminatory practice" (*Second Board Decision* at para 424).

[14] In a decision dated April 13, 2016, the Federal Court of Appeal set aside the *Second Board Decision* (*Lloyd v Canada (Attorney General)*, 2016 FCA 115 [*Lloyd FCA*] at para 2). With respect to the allegations that the Applicant breached CRA policy and section 241 of the *ITA* by downloading the CDs onto her friend's computer, the Court held that the Board either dismissed these allegations as irrelevant or made no findings on them (*Lloyd FCA* at paras 15-16, 22). Accordingly, the Court found that "there was no factual basis upon which it could be concluded that section 241 of the *ITA* was breached" (*Lloyd FCA* at paras 16-17). The Suspension Grievance was therefore remitted back to the Board for redetermination (*Lloyd FCA* at para 25).

[15] In a decision dated August 28, 2017, the Board reconsidered the Suspension Grievance. The Board affirmed that there was no evidence of an ongoing risk of the disclosure of taxpayer

information, nor any factual basis that the Applicant knowingly disclosed taxpayer information in contravention of section 241 of the *ITA* (*Lloyd v Canada Revenue Agency*, 2017 FPSLREB 22 [*Third Board Decision*] at para 153). The Board concluded that the Applicant did not commit "serious acts of misconduct constituting group 5 offences" under the CRA's *Discipline Policy*, but rather that the Applicant's misconduct was comparable "to the unauthorized use of CRA vehicles, stores, or equipment," which is a group 3 offence (*Third Board Decision* at paras 149, 166). Accordingly, the Board held that the Applicant's 40-day suspension was "excessive in all the circumstances," and lowered her suspension to 6 days (*Third Board Decision* at para 168).

[16] During the course of the Applicant's grievances, as described above, the CRA requested four legal opinions from the PPSC regarding the Applicant's *McNeil* concerns. The first and second opinions were provided to the CRA in March 2011 and May 2015. Both of those opinions held that the Applicant was unsuitable for her role at the CID because her copying of the CDs constituted serious misconduct, and that the Applicant's *McNeil* concerns may therefore jeopardize a prosecution by the PPSC if she was involved in its investigation.

[17] In September 2017, following the *Third Board Decision*, the PPSC provided its third legal opinion, which affirmed that the reduction of the Applicant's suspension "did not change [its] substantial advice from 2015." In February 2018, the CRA requested a fourth legal opinion from the PPSC as to whether the passage of time and a modified workload could rehabilitate the Applicant's credibility and alleviate her *McNeil* concerns. In its fourth legal opinion, the PPSC indicated that while the initial concerns remained, the Applicant's credibility might be restored with time and a carefully supervised work plan with increasing responsibility.

[18] In a letter dated September 20, 2018, the CRA formally notified the Applicant that she could not remain in her position at the CID due to her *McNeil* concerns. The CRA provided the Applicant with 11 alternative positions for her consideration at an equivalent level that would accommodate her medical needs. In that letter, the CRA informed the Applicant that her refusal to accept another position "may result in termination of [her] employment with the CRA for non-disciplinary reasons."

[19] On November 13, 2018, the Applicant grieved the CRA's decision to transfer her out of the CID. On January 28, 2019, the CRA denied that grievance (the "Second Grievance Decision"). On July 22, 2019, Mr. Dan Couture, Assistant Commissioner of the Human Resources Branch of the CRA (the "Assistant Commissioner"), affirmed the Second Grievance Decision and denied the Applicant's grievance (the "Final Grievance Decision"). The Final Grievance Decision is the decision at issue in this application for judicial review.

[20] On December 27, 2019, the Applicant formally accepted a position on a without prejudice basis as an Excise Tax Auditor, with her appointment effective January 6, 2020.

B. *Decision Under Review*

[21] In the Final Grievance Decision, the Assistance Commissioner held that the CRA was unable to assign the Applicant key activities of a CID investigator for the reasons set out in the Second Grievance Decision. To understand the reasoning of the Final Grievance Decision, it is therefore necessary to examine the reasoning of the Second Grievance Decision.

[22] In the Second Grievance Decision, the CRA concluded that the Applicant's *McNeil* concerns were still relevant despite the passage of time. The CRA further concluded that even though the *Third Board Decision* reduced the Applicant's suspension to 6 days — well below the 29-day threshold of what constitutes serious misconduct under the CRA's *McNeil Policy and Procedures* ("*McNeil Policy*") — it was the PPSC's legal opinion that the Applicant's copying of the CDs still constituted serious misconduct. Accordingly, the Applicant's misconduct would likely require a *McNeil* disclosure that may jeopardize a prosecution. Based on the Applicant's on-going *McNeil* concerns, the Second Grievance Decision upheld the CRA's decision to transfer the Applicant out of the CID.

III. Preliminary Matter: Style of Cause

[23] At the request of the Respondent, and without objection from the Applicant, the style of cause in this proceeding is amended to name the Attorney General of Canada as the proper Respondent pursuant to Rule 303(3) of the *Federal Courts Rules*, SOR/98-106 ("*Rules*").

IV. Preliminary Issue: Admission of Affidavit Evidence

A. *Affidavit of Kalyn Lord*

[24] In her application record, the Applicant submitted an affidavit of Ms. Kalyn Lord, affirmed October 7, 2019, which contains 9 exhibits of documentary evidence. The Respondent submits that Ms. Lord's affidavit should be struck or disregarded by this Court because it contains evidence that was not before the Assistant Commissioner.

[25] The Applicant submits that Ms. Lord's affidavit should be admitted because it does not contain controversial facts but rather completes the record. The Applicant asserts that the evidence in Ms. Lord's affidavit is reflected in the Final Level Grievance Precis authored by Ms. Ivana Windle, *Lloyd FCA*, and the Board's decisions — all of which the Assistant Commissioner was obligated to consider.

[26] It is well established that evidence that was not before the decision maker and that goes to the merits of the matter is not admissible in an application for judicial review (*Henri v Canada (Attorney General)*, 2016 FCA 38 at para 39, citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 19). There are, however, some exceptions to this rule: general evidence of a background nature that is of assistance to the Court; evidence that is relevant to an alleged denial of procedural fairness by the decision-maker that is not evident in the record before the decision-maker; and evidence that demonstrates the complete lack of evidence before a decision-maker for an impugned finding (*Love v Canada (Privacy Commissioner)*, 2015 FCA 198 at para 17, citing *Access Copyright* at para 20).

[27] I accept the Applicant's argument that Ms. Lord's affidavit provides general evidence of a background nature and therefore meets the first exception outlined in *Access Copyright*. Exhibits 1-2 of Ms. Lord's affidavit contain the CRA's work descriptions and policies, and were thus before or readily available to the Assistant Commissioner. The remaining exhibits contain information that goes to merits of the previous proceedings, of which the Assistant Commissioner is expected to have considered.

B. *Affidavit of Martin Ranger*

[28] The Applicant brings a motion for this Court to strike or disregard paragraphs 2, 25, 31-41, 116, 118, 131 of the Respondent's memorandum because they are "not in evidence, are taken out of context, and are not supported by any references to the record." In the alternative, the Applicant submits that this Court should admit the affidavit of Mr. Martin Ranger, affirmed July 7, 2020, pursuant to Rule 312(a) of the *Rules* because it serves the interests of justice, assists this Court, and will not prejudice the Respondent (*Rosenstein v Atlantic Engraving Ltd*, 2002 FCA 503 at paras 8-9).

[29] The Respondent submits that the facts at issue in the motion are conceded by the Applicant to be true. The Respondent further submits that by mentioning the change in the Applicant's employment, the Respondent was discharging its duty to keep the Court informed of pertinent developments (*Logeswaren v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1374 at paras 13-18). The Respondent consents to the admission of Mr. Ranger's affidavit.

[30] In my view, given that the parties agree upon the admissibility of Mr. Ranger's affidavit, there is no need to strike the impugned paragraphs of the Respondent's memorandum. Both parties clearly acknowledge that the facts contained in the impugned paragraphs are true, and the Applicant has the opportunity to respond to those facts by way of Mr. Ranger's affidavit.

V. Issues and Standard of Review

[31] This application for judicial review raises the following issues:

A. Is Ms. Lloyd's application for judicial review moot?

B. Is the Final Grievance Decision reasonable?

[32] It is common ground between the parties that the applicable standard of review for the Final Grievance Decision is reasonableness. I agree. Reasonableness is the presumed standard of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10). This presumption is rebutted and a correctness standard applies in two instances: where required by legislative intent or by the rule of law (*Vavilov* at paras 10, 17). In my view, neither of the two instances enumerated in *Vavilov* that require deviating from the reasonableness standard apply in the case at hand.

[33] Reasonableness review is concerned with both the outcome of the decision and the reasoning process that led to that outcome (*Vavilov* at para 87). A reasonable decision is one that is justified, transparent, and intelligible — it must be based on an internally coherent and rational chain of analysis that is justified in relation to the relevant facts and law (*Vavilov* at paras 85, 99). Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally be unreasonable (*Vavilov* at para 98).

[34] That being said, reasonableness review is not a "line-by-line treasure hunt for error" (*Vavilov* at para 102). The party challenging a decision must establish that the decision contains flaws that are more than superficial or peripheral to its merits; a decision's flaws must be sufficiently central or significant to render it unreasonable (*Vavilov* at para 100). A reviewing

court should refrain from reweighing or reassessing evidence before the decision maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

[35] Finally, a relevant consideration in determining whether a decision is reasonable is the potential impact of that decision on the individual to whom it applies (*Vavilov* at para 106). Administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, and therefore bear a heightened responsibility to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law (*Vavilov* at para 135).

VI. Analysis

A. *Is the Applicant's application for judicial review moot?*

[36] The Applicant submits that the dispute between the parties is not moot because it is still tangible and concrete (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, [1989] SCJ No 14 [*Borowski*] at para 16). The Applicant submits that she is still challenging the CRA's decision to transfer her out of the CID — a position that she wishes to return to and that she left under the threat of termination.

[37] The Respondent submits that the dispute is moot because the Applicant voluntarily accepted an investigative position at an equivalent group and level. The Respondent asserts that the without prejudice basis of the Applicant's acceptance of a new position is not determinative of the question of mootness (*Sherman v Pfizer Canada Inc*, 2015 FCA 107 at para 12).

[38] In my view, this matter is not moot. The dispute between the parties remains tangible and concrete because the Applicant intends to return to her position at the CID if she is successful in her legal proceedings (*Borowski* at para 16). Furthermore, the CID position still exists. This matter is not an instance in which the subject of dispute has disappeared, such as the laws at issue being repealed or the parties concerned having passed away (*Borowski* at paras 18-23).

[39] I do not accept the Respondent's submission that the Applicant voluntarily transferred out of the CID. As clearly stated in the CRA's letter dated September 20, 2018, the Applicant's refusal to accept an alternative position "may result in termination of [her] employment with the CRA for non-disciplinary reasons." I agree with the Applicant that it would be troubling for the CRA, a government entity, to use an employee's transfer made under threat of termination as a basis to dismiss the judicial review of its grievance decisions.

B. *Is the Final Grievance Decision reasonable?*

(1) Applicant's submissions

[40] The Applicant submits that the Final Grievance Decision is unreasonable because the CRA "misapplied the *McNeil* test and relevant case law" by finding that a minor disciplinary incident that occurred over ten years ago constitutes serious misconduct that is capable of jeopardizing a prosecution. The Applicant asserts that the Final Grievance Decision failed to justify its reliance on the PPSC's legal opinions in light of the decision in *Lloyd FCA*, the *Third Board Decision*, and the CRA's own *McNeil Policy* and *McNeil Q&As*.

[41] Specifically, the Applicant argues that the Final Grievance Decision is unreasonable for four reasons: the Applicant's misconduct was not serious; the Applicant's misconduct has no realistic bearing on her credibility; the Applicant's misconduct does not need to be disclosed due to the passage of time and the existence of a sunset clause; and the CRA unreasonably relied upon the PPSC's legal opinions.

[42] The Applicant submits that the CRA did not reasonably weigh the evidence that the Applicant's misconduct was not serious. The Applicant notes how *Lloyd FCA* and the *Third Board Decision* discounted the finding that her misconduct breached CRA policy and section 241 of the *ITA*.

[43] The Applicant asserts that it was unreasonable for the CRA not to apply its own *McNeil Policy* to the Applicant's misconduct. The CRA's *McNeil Policy* contains a non-exhaustive list of examples of serious misconduct that must be disclosed to the PPSC for the purposes of *McNeil* concerns, which the Applicant argues are dissimilar from her own actions. Such examples include: falsification of expense accounts; use of the CRA's electronic networks for unlawful activities; forgery; obstructing an investigation; embezzlement; misrepresentation for personal gain; soliciting or accepting a bribe; theft; violation of legislation enforced by the CRA; obtaining leave fraudulently; unauthorized disclosure of taxpayer or other sensitive/confidential information; and misconduct for which a suspension in excess of 29 days was received.

[44] The Applicant submits that it was unreasonable for the CRA to find that the Applicant's misconduct could affect her credibility. The Applicant notes that the CRA itself copied the CDs for the Applicant, and that the Applicant did not act in a deceitful or dishonest manner.

Furthermore, the CRA previously stated that the Applicant was credible and that the "only information viewed and accessed from the CD was one email for the purposes of a labor relations trial" (*Third Board Decision* at para 119).

[45] The Applicant relies on *Municipal Association of Police Personnel v Halifax (Municipality)*, 2012 CanLII 97776 (Arbitrator: Bruce P. Archibald, Q.C.) [*Halifax*], in which an employer continuously denied an employee's request to transfer positions because of *McNeil* concerns, despite four years having passed and the discipline no longer being on the employee's record. In *Halifax*, the conduct at issue was the forging of a parking pass, for which the employee was suspended for 30 days (at paras 4-6). The arbitrator framed the employee's misconduct as "a minor career transgression," and concluded that the employer's failure to consider the employee's rehabilitation was an "unreasonable exercise of management rights characterized by arbitrariness" (*Halifax* at paras 45, 48).

[46] The Applicant asserts that her misconduct should not be characterized as serious when compared to the misconduct in *Halifax*, given that she was only suspended for six days and did not commit fraud. The Applicant further asserts that it is unreasonable for the CRA, like the employer in *Halifax*, not to consider her rehabilitation.

[47] The Applicant submits that under the CRA's *McNeil Q&As*, the passage of time is a relevant consideration in assessing *McNeil* concerns. Specifically, the *McNeil Q&As* note that "the older the disciplinary misconduct is, the less relevant it will become to the matter." The *McNeil Q&As* further note that the existence of a sunset clause in a collective agreement, although not determinative of whether disclosure is necessary, is a relevant consideration for the

PPSC in determining whether *McNeil* concerns need to be disclosed. The Applicant submits that the sunset clause in her collective agreement requires notices of disciplinary action to be expunged after two years have elapsed.

[48] The Applicant submits that the CRA unreasonably relied upon the PPSC's legal opinions. The Applicant asserts that the PPSC's opinions are "flawed and superficial" because they do not discuss the relevant case law, the CRA's own *McNeil Policy*, nor provide any explanation for how the PPSC arrived at its conclusion. The Applicant asserts that the PPSC perceived the Applicant's *McNeil* risk as a "nuisance and a distraction" and therefore did not engage with the merits of her concerns.

(2) Respondent's submissions.

[49] The Respondent submits that the expertise of the CRA and the PPSC must be considered when assessing the reasonableness of the Final Grievance Decision (*Vavilov* at paras 31, 93). The Respondent further submits that the factual context in which the Final Grievance Decision was reached should be considered in assessing whether it was reasonable. The Respondent notes that the Applicant frustrated her role as an investigator by engaging in misconduct, and that it would be a strain on public resources if the Applicant's misconduct jeopardized a prosecution.

[50] The Respondent submits that there is a distinction between serious misconduct for the purposes of internal discipline and for the purposes of *McNeil* disclosure. Although misconduct may result in minor disciplinary consequences, the Respondent notes that it may still have significant credibility impacts upon a prosecution (*R v Melvin*, 2009 NSSC 249 at paras 56-58).

The Respondent submits that the CRA reasonably accounted for the Applicant's reduction in disciplinary action by seeking further advice from the PPSC, who maintained its position despite this development. The Respondent notes that the CRA's *McNeil Policy* only provides examples of misconduct to be included in an investigator's *McNeil* report, and that it is the PPSC who ultimately determines what constitutes a *McNeil* concern.

[51] The Respondent submits that the Applicant is attempting to attack the reasonableness of the PPSC's legal opinions, which are not the decisions under review. The Respondent asserts that the Assistant Commissioner's role was to accept the PPSC's opinions "at face value" and not to assess their merits. Accordingly, the Respondent submits that the Assistant Commissioner reasonably relied on the PPSC's opinions, which were drafted by senior counsel. The Respondent asserts that the Applicant cannot claim the PPSC's legal opinions are superficial on the basis that they lack the level of detail she expects.

[52] The Respondent notes that, as stated in its opinions, the PPSC cannot rely on the Applicant's credibility being restored. Under the CRA's *McNeil Policy,* the Respondent highlights that even misconduct which took place 15 years ago needs to be disclosed to the PPSC. The Respondent asserts that it is the PPSC's responsibility to make its *McNeil* disclosure and exercise its discretion accordingly (*McNeil* at para 18).

[53] The Respondent notes that the *McNeil Q&As* do not require the PPSC to consider sunset clauses. The Respondent submits that *McNeil* concerns must be disclosed to the PPSC regardless of whether a sunset clause has removed the Applicant's misconduct from her employment record.

[54] According to the Respondent, *Halifax* is distinguishable from the case at hand because the Applicant's misconduct is difficult to characterize as a minor career transgression. Furthermore, unlike the employer in *Halifax*, the CRA assessed the Applicant's *McNeil* concerns over time by requesting legal opinions from the PPSC on four separate occasions.

(3) Discussion

[55] Given the history of this matter — that the CRA twice discriminated against the Applicant, and that the CRA twice transferred her out of the CID against her will — the Assistant Commissioner was under a heightened responsibility to provide reasons that demonstrate he considered the consequences of his decision and to justify those consequences in light of the relevant facts and law (*Vavilov* at para 135). In my view, the Assistant Commissioner did not uphold that responsibility. The Assistant Commissioner failed to address, either in his reasons or in a manner that can be inferred from the record, how *Lloyd FCA*, the *Third Board Decision*, and the CRA's *McNeil Policy* seemingly contradict the finding that the Applicant's misconduct was serious (*Vavilov* at para 98).

[56] While the Second Grievance Decision notes that the "quantum of discipline" that the Applicant ultimately received falls below the threshold of serious misconduct as defined in the CRA's *McNeil Policy*, the Assistant Commissioner failed to grapple with why this misconduct should nonetheless continue to bar the Applicant from her position at the CID. Instead, the Assistant Commissioner relies entirely on the legal opinions of the PPSC, which found that the Applicant's misconduct demonstrated a "severe lack of judgment" and therefore still carried *McNeil* concerns.

[57] I agree with the Respondent that it is not the Assistant Commissioner's role to question the PPSC's legal opinions, and it was therefore reasonable for him to rely on those opinions "at face value." However, the PPSC's opinions were only one of many competing considerations. The Assistant Commissioner cannot reasonably rely on the PPSC's opinions alone without justifying his reasons for doing so in light of the relevant facts and law that bore on his decision, specifically those in *Lloyd FCA*, the *Third Board Decision*, and the CRA's *McNeil Policy* (*Vavilov* at para 85).

[58] I accept the Respondent's argument that, as was held in the Second Grievance Decision, examples of serious misconduct under the CRA's *McNeil Policy* are non-exhaustive, and what constitutes such conduct is ultimately a "judgment call" to be made by the PPSC. However, the Assistant Commissioner was still required to rationalize his reliance on the PPSC's legal opinions in light of the fact that the Applicant's actions significantly diverged from the examples of serious misconduct enumerated under the CRA's *McNeil Policy*. Without providing reasons for doing so, I find that the Final Grievance Decision is not justified, transparent and intelligible (*Vavilov* at para 99).

[59] I also accept the Respondent's argument that the sunset clause in the Applicant's collective agreement does not preclude the need to disclose her misconduct to the PPSC. As stated in the CRA's *McNeil Q&As*, although the passage of time is relevant in determining the weight of misconduct, an employee's *McNeil* concerns must still be disclosed to the PPSC even if the misconduct that gave rise to those concerns is no longer on the employee's record.

[60] Finally, I do not accept the Respondent's argument that the Board found that the Applicant's misconduct was serious in the *Third Board Decision*. As noted by the Applicant, the Board in that case held that the Applicant's misconduct was *more* serious than a group 1 offence, and that it was therefore analogous to a group 3 offence (*Third Board Decision* at paras 164-166).

VII. Costs

[61] The parties agree that the successful party should be awarded costs in the amount of $4,000, inclusive of disbursements. Considering the parties' agreement, I award costs to the Applicant payable forthwith by the Respondent in the amount of $4,000.

VIII. Conclusion

[62] I find that the Final Grievance Decision is unreasonable. This application for judicial review is therefore allowed.

[63] As a remedy, the Applicant has requested that this Court substitute its own decision for that of the Assistant Commissioner's. I do not consider this matter to fall into the category of limited scenarios in which such a remedy is warranted, as a particular outcome upon redetermination is not so inevitable that remitting the matter would serve no useful purpose (*Vavilov* at para 142). I therefore order the Final Grievance Decision to be set aside and the matter returned back for redetermination.

JUDGMENT IN T-1357-19

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to name the Attorney General of Canada as the proper Respondent.

2. The decision under review is set aside and the matter returned back for redetermination.

3. Costs in the amount of $4,000 inclusive of disbursements are awarded to the Applicant.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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