Federal Court Cour fédérale

Date: 20220615

Docket: T-966-21

Citation: 2022 FC 906

Ottawa, Ontario, June 15, 2022

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

DALE KOHLENBERG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Dale Kohlenberg is a lawyer with the Department of Justice. He seeks judicial review of a decision by an Assistant Deputy Minister [ADM] to dismiss his grievance alleging defamation by a senior labour relations adviser.

[2] The ADM dismissed Mr. Kohlenberg's grievance on the ground that it was not brought within the prescribed time period. In the alternative, the ADM found that the allegedly defamatory statements benefited from the defences of qualified privilege and justification. The ADM also found that Mr. Kohlenberg's claim for damages was excessive.

[3] It is doubtful that the manner in which the ADM dealt with the issue of timeliness was reasonable. However, it is not necessary for the Court to reach a definitive conclusion on this question. The application for judicial review must be dismissed because the ADM's analysis and conclusions respecting the alleged defamation were reasonable.

II. Background

[4] Mr. Kohlenberg has been employed by the Department of Justice for more than 26 years. He is a legal counsel in the Saskatoon Office of the Prairie Region and an "excluded" employee, meaning that he is excluded from collective bargaining because he sometimes provides advice on labour relations.

[5] In 2011, the Department of Justice issued new general work descriptions for all lawyers in the practitioners group. Mr. Kohlenberg's position was classified as Legal Advisor – Regions – LA-2A (now LP-02) with a generic work description.

[6] Mr. Kohlenberg grieved both the classification and the work description. His grievance was dismissed at all levels. Mr. Kohlenberg brought an application for judicial review, which

was allowed by Justice Henry Brown for lack of procedural fairness. Justice Brown observed that, were it not for the breach of procedural fairness, he would have found the ADM's decision to be reasonable (*Kohlenberg v Canada (Attorney General)*, 2017 FC 414 [*Kohlenberg 1*] at paras 89-90).

[7] The certified tribunal record produced in *Kohlenberg 1* included a confidential memorandum [Confidential Memorandum] written by a senior labour relations adviser in 2014. The Confidential Memorandum was addressed to the ADM, and provided an analysis and recommendations respecting Mr. Kohlenberg's grievance.

[8] Mr. Kohlenberg says that the following statements in the Confidential Memorandum were defamatory:

> You will note that the grievor did not meet expectations for 2013-2014. As an aside, [he] was disciplined for the behaviours described in his 2013-2014 PREA [Performance Review and Employee Appraisal].

[9] Mr. Kohlenberg successfully grieved his 2013-2014 PREA, and he therefore maintains that the statement respecting his failure to meet expectations was false. The second-level grievance upheld the PREA narrative, but found that Mr. Kohlenberg had not been given a sufficient opportunity to improve. His performance rating was changed to "fully meets" approximately one month before the Confidential Memorandum was written.

[10] Mr. Kohlenberg admits that he was disciplined for a single instance of improper behaviour described in his 2013-2014 PREA, but he denies that this constituted multiple "behaviours". He says the statement in the Confidential Memorandum exaggerated the extent of his misconduct, and was in any event irrelevant to the ADM's consideration of his grievance respecting his job classification and work description.

[11] On August 16, 2015, Mr. Kohlenberg sent a letter to departmental officials in which he asserted that the statements in the Confidential Memorandum were defamatory. He demanded a letter of apology, the delivery of a further memorandum to the ADM informing her of the false statements, a full retraction of the Confidential Memorandum, compensation in the amount of $100,000, and the name(s) of the person(s) who had supplied the information conveyed in the allegedly defamatory statements. Mr. Kohlenberg said that if his demands were not met, then he may commence a civil action.

[12] Counsel for the Attorney General of Canada responded to Mr. Kohlenberg on September 15, 2015, informing him that as a public servant he did not have a right of action against the Crown. Instead, the available recourse was through the departmental grievance process.

[13] There followed an exchange of correspondence between Mr. Kohlenberg and counsel for the Attorney General respecting whether he was barred from bringing a civil action by virtue of s 236 of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 (now *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2). Counsel for the Attorney General reiterated in a letter

dated November 19, 2015 that the grievance process was the appropriate mechanism for Mr. Kohlenberg to pursue his claim.

[14] Mr. Kohlenberg submitted his grievance alleging defamation on December 31, 2015.

[15] Mr. Kohlenberg's grievance was denied at all levels. The ADM who dismissed the grievance at the final level found that the complaint was untimely, because it was submitted more than four months after Mr. Kohlenberg became aware of the allegedly defamatory statements. The ADM also found that the allegation of defamation was not substantiated.

[16] Mr. Kohlenberg sought judicial review of the denial of his defamation grievance. Justice Richard Mosley allowed the application, finding that the ADM's decision was both procedurally unfair and unreasonable (*Kohlenberg v Canada (Attorney General)*, 2020 FC 1066 [*Kohlenberg 2*]).

[17] Justice Mosley held that the failure of the ADM to inform Mr. Kohlenberg that the timeliness of the grievance was in issue amounted to a breach of procedural fairness (*Kohlenberg 2* at paras 28-29):

> In the process leading up to the decision, the Respondent did not raise any concerns about the timeliness of the grievance. To the contrary, Department officials led him to believe that his claim was timely. In the letter dated September 15, 2015, 30 days after the Applicant sent his complaint letter, the Department informed the Applicant of his right to grieve this dispute. In addition, the letter from the Department dated November 19, 2015, reiterated that the grievance process was the appropriate process to pursue his claim.

[18] Justice Mosley also found the ADM had not applied the correct legal test for defamation, rendering her decision unreasonable (*Kohlenberg 2* at paras 31-35). The defamation grievance was remitted to a different ADM for redetermination.

[19] The decision of the ADM that is the subject of this application for judicial review was rendered on June 11, 2021. The ADM once again found that Mr. Kohlenberg's grievance was not timely. In the alternative, she found that the disputed statements satisfied the *prima facie* test for defamation, but two defences were applicable: justification and qualified privilege. She also found that Mr. Kohlenberg's claim for damages was excessive.

[20] The ADM nevertheless granted Mr. Kohlenberg's request for a letter of apology, together with confirmation that the inaccurate statements in the Confidential Memorandum had been corrected and removed from his personnel file. The letter of apology and confirmation was appended to the decision denying the grievance.

III. Issues

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

A. Was the ADM's decision procedurally fair?

B. Was the ADM's decision reasonable?

IV. Analysis

A. *Was the ADM's decision procedurally fair?*

[22] Questions of procedural fairness are subject to a reviewing exercise that is best reflected in the correctness standard, although strictly speaking no standard of review is being applied (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-56). The ultimate question is whether the applicant knew the case to meet, and had a full and fair opportunity to respond (*Siffort v Canada (Citizenship and Immigration)*, 2020 FC 351 at para 18).

[23] The level of procedural fairness owed to an employee in an internal grievance process is at the low end of the spectrum (*De Santis v Canada (Attorney General),* 2020 FC 723 [*De Santis*] at para 28, citing *Canada (Attorney General) v Allard*, 2018 FCA 85 at para 41). The employee has the right to be informed of any prejudicial facts, and the right to respond to those facts (*De Santis* at para 30).

[24] Mr. Kohlenberg says he was informed by the ADM that the timeliness of the grievance remained in issue just one day prior to the hearing. In her decision, the ADM relied upon the Government of Canada *Directive on Terms and Conditions of Employment* [Directive] and s 68(1) of the *Public Service Labour Relations Regulations*, SOR/2005-79 (now *Federal Public Sector Labour Relations Regulations*, SOR/2005-79 [FPSLRR]).

[25] Mr. Kohlenberg says that he was not given specific notice of the ADM's possible reliance on the FPSLRR. He therefore argues that he was not informed of the case to be met, or

given a full and fair opportunity to respond. He also asserts that the ADM could not have granted two of the remedies he sought, namely an apology and a retraction of the disputed statements, if the grievance was untimely.

[26] The day before the grievance was to be heard, the ADM sent Mr. Kohlenberg an e-mail message in which she stated the following:

> […] I wanted to inform you, in advance of the hearing, that the timely filing of the grievance is still an issue under consideration. Therefore you will have an opportunity to make submissions on the timeliness of this grievance. If you feel you may need additional time to provide these submissions, I will grant you a reasonable period of time.

[27] Mr. Kohlenberg did not raise any objection to the procedure proposed by the ADM. Rather, he said he would provide an addendum to his submissions, and he would also address the issue of timeliness in oral argument. He did both.

[28] The Respondent says that the FPSLRR are law, not facts, documents, or arguments outside Mr. Kohlenberg's possession or knowledge. Notice of the law need not be given; it is presumed (citing *Paszkowski v Canada (Attorney General)*, 2006 FC 198 at para 67).

[29] The ADM informed Mr. Kohlenberg that the timely filing of the grievance remained in issue before rendering her decision. He responded in writing in advance of the hearing, and with oral submissions during the hearing. The ADM afforded him the opportunity to make further written submissions after the hearing. He did make written submissions after the hearing, but these were confined to other matters.

[30] I therefore conclude that the ADM's decision was procedurally fair.

B. *Was the ADM's decision reasonable?*

[31] The ADM's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 15). The Court must consider the outcome of the administrative decision in light of its underlying rationale, and ensure that the decision is transparent, intelligible and justified (*Vavilov* at para 15).

(1) Timeliness

[32] In his submissions to the ADM, Mr. Kohlenberg took the position that the 25-day limitation period in the collective agreement did not apply to him as an excluded employee. Furthermore, he had given written notice of his intention to seek redress for defamation on August 16, 2015, three days after he discovered the allegedly defamatory statements. Counsel for the Attorney General informed him in writing, on two separate occasions beyond the 25-day period, that the grievance process was the appropriate recourse mechanism, and did not suggest that a grievance would be untimely. As Justice Mosley observed in *Kohlenberg 2*, departmental officials led him to believe the grievance would be timely.

[33] The ADM held that, as an excluded counsel at the LP-02 (formerly LA-2A) group and level, Mr. Kohlenberg remained subject to the terms and conditions of employment contained in

the LP collective agreement. According to the Directive, employees in excluded positions are assigned to the collective agreements for the bargaining units to which they would be assigned if their positions were not excluded. The ADM noted departmental lawyers were informed on February 20, 2014 that the terms and conditions of excluded employees would align with the LP collective agreement, which prescribes a time limit of 25 working days for filing grievances.

[34] Even if this were not the case, the ADM found that the FPSLRR prescribe a time limit for filing grievances of 35 calendar days from the day on which the grievor first had knowledge of any matter affecting the employee's terms and conditions of employment.

[35] The ADM found that Mr. Kohlenberg's first communication to departmental officials respecting the alleged defamation was a "letter of demand" in anticipation of possible civil litigation, and was neither a grievance nor a notice of intention to file a grievance. He became aware of the alleged defamation on August 13, 2015, but did not file the grievance until December 31, 2015. This was well outside the 25 working day or 35 calendar day limitation period.

[36] The ADM expressed respectful disagreement with Justice Mosley's finding in *Kohlenberg 2* that departmental officials had led Mr. Kohlenberg to believe his claim was timely. She did not accept that the letters from counsel for the Attorney General dated September 15 and November 19, 2015 served to extend the timelines, or otherwise led Mr. Kohlenberg to believe the Department of Justice had waived the applicable time limits. The letters only directed him to the appropriate recourse mechanism.

[37] The ADM noted that the extension of grievance timelines is clearly outlined in the LP collective agreement, and an extension may be approved only with the agreement of both the lawyer (or union if applicable) and the employer, *i.e.*, the manager delegated to hear the grievance. Requests for extensions of time are also addressed in s 61 of the FPSLRR.

[38] The ADM concluded that the onus was on Mr. Kohlenberg to act within the prescribed timeframes. He could have sought clarification earlier, or submitted a protective grievance to preserve his rights. She therefore concluded that the grievance was not filed within the prescribed time periods of 25 working days or 35 calendar days, and could be dismissed on this ground alone.

[39] It is a well-established principle of labour law that, to the greatest extent possible, a grievance should not be won or lost on the technicality of form, but on its merits (*Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42 at para 68). Mr. Kohlenberg gave written notice to departmental officials of his intention to seek redress for defamation on August 16, 2015, three days after he discovered the allegedly defamatory statements.

[40] While Justice Mosley's finding in *Kohlenberg 2* that departmental officials had led Mr. Kohlenberg to believe his grievance would be timely may not have been strictly binding on the ADM, it was entitled to significant weight. It would perhaps have been more reasonable, in all of the circumstances, for the ADM to consider the possibility of granting an extension of time.

Instead, she informed Mr. Kohlenberg just one day before the hearing of the grievance that timeliness remained an issue to be considered.

[41] It is doubtful that the manner in which the ADM dealt with the issue of timeliness was reasonable. However, it is not necessary for the Court to reach a definitive conclusion on this question. The application for judicial review must be dismissed because the ADM's analysis and conclusions respecting the alleged defamation were reasonable.

(2) Defamation

[42] A plaintiff in a defamation action must prove three things in order to obtain judgment and an award of damages: (1) the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) the words in fact referred to the plaintiff; and (3) the words were published, meaning they were communicated to at least one person other than the plaintiff (*Grant v Torstar Corp*, 2009 SCC 61 [*Torstar*] at para 28).

[43] The test is objective and is to be judged by the standard of an ordinary, right-thinking member of society. This is someone "who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility" (*Kohlenberg 2* at para 33, citing *Engel v Edmonton Police Association*, 2017 ABQB 495 at para 59).

[44] The ADM accepted that the erroneous statement in the Confidential Memorandum that Mr. Kohlenberg "did not meet expectations for 2013-14" would tend to lower his reputation in the eyes of a reasonable person. She also accepted that the words referred to Mr. Kohlenberg and were published, meaning they were communicated to at least one other person, *i.e.*, the third level decision maker.

[45] The ADM acknowledged that the tort of defamation is one of strict liability. Falsity and damages are presumed. Once a plaintiff has satisfied the three requirements of the *Torstar* test, the onus shifts to the defendant to establish a defence in order to escape liability.

[46] The ADM found that the defence of qualified privilege applied. Qualified privilege arises if the person making a communication has a duty to publish the information to the person to whom it is published, and the recipient has a corresponding duty or interest to receive it (citing *Bent v Platnick*, 2020 SCC 23 [*Platnick*] at para 121).

[47] Qualified privilege attaches to the occasion upon which the communication is made, not to the communication itself (*Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 [*Hill*] at para 143). The occasion upon which the communication is made will benefit from qualified privilege for the purposes of a defamation defence even if, as occurred here, the communication itself has been made public.

[48] An occasion of qualified privilege exists if the person making the communication has "an interest or duty, legal, social, moral or personal, to publish the information in issue to the person

to whom it is published” and the recipient has “a corresponding interest or duty to receive it” (*Platnick* at para 121). The test is an objective one: whether persons of ordinary intelligence and moral principle, or the great majority of right-minded persons, would have considered it a duty to communicate the information to whom it was published (*Mann v International Association of Machinists and Aerospace Workers*, 2012 BCSC 181 at para 86).

[49] In *Martin v Lavigne*, 2011 BCCA 104, the British Columbia Court of Appeal said the following about the reciprocity of the duty or interest in issue (at para 36):

> The requirement of reciprocity of duty or interest between the publisher and the recipient of the defamatory remarks is at the heart of the defence. Identifying the duty or interest of both involves a contextual analysis. Relevant factors to be considered include “the nature of the statement, the circumstances under which it was made, and by whom and to whom it was made” [...]. Where the circumstances in which the defamatory words were made give rise to a special relationship between the publisher and the recipients of the communication, the defence of qualified privilege will be available as it is an occasion which the interests of society justify protection so as to facilitate an open and frank exchange of communication.

[50] In this case, the ADM found that the information contained in the Confidential Memorandum was communicated by a labour relations officer to a senior manager to assist in the determination of a final level grievance. She therefore concluded that the requisite reciprocal duty existed.

[51] The ADM reasonably found that the circumstances giving rise to labour relations privilege also constituted an “occasion” that attracted qualified privilege for the purpose of a defamation defence. The occasion arose from a duty on the part of a labour relations adviser to

provide candid and frank advice to a senior manager, who had a corresponding duty to use the information in resolving a final level grievance. The ADM supported her analysis by recounting the social interests justifying protection of the occasion to facilitate the open exchange of information (citing the Wigmore criteria endorsed by the Supreme Court of Canada in *R v National Post*, 2010 SCC 16).

[52] Qualified privilege may be defeated where the limits of the duty or interest have been exceeded, or where the dominant motive is malice (*Hill* at paras 145-146). The information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given (*Hill* at para 147).

[53] The Supreme Court of Canada affirmed in *Platnick* that qualified privilege is defeated when the information communicated in a statement is not relevant to the discharge of the duty or the exercise of the right giving rise to the privilege, or when the information is not reasonably appropriate to the legitimate purposes of the occasion (at para 127).

[54] Mr. Kohlenberg does not allege that the senior labour relations adviser acted with malice, although he speculates that those who provided inaccurate information regarding his performance reviews and disciplinary history may have had improper motives. Rather, Mr. Kohlenberg argues that the statements regarding his performance reviews and disciplinary history were wholly irrelevant to the determination of his grievance respecting the classification and work description of his position with the Department of Justice.

[55] In *Wang v British Columbia Medical* Association, 2014 BCCA 162, the British Columbia Court of Appeal (*per* Newbury JA) explained that qualified privilege is not easily defeated by a claim of excess (at para 99):

> Once a privileged occasion has been established, courts are somewhat reluctant to permit it to be defeated by a claim of 'excess'. According to Brown [on Defamation]:
>
> > In light of the policy supporting qualified privileges, the question of excess should not be viewed narrowly. The language used by the defendant on a privileged occasion is not to be subjected to too strict a scrutiny and all excess found to defeat the protection which the privilege affords. [At §13.7(5).]
>
> The same principle was referred to in the Privy Council's decision in *Laughton v. Bishop of Sodor and Man* (1872) L.R. 4 P.C. 495, quoted approvingly in Lord Dunedin's speech in *Adam v. Ward* at 330:
>
> > To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications. [At 508.]
>
> Expressing the same point in more colourful terms, the Court in *Birchwood Homes Ltd. v. Robinson* [2003] EWHC 293 (Q.B.) observed that "a person speaking on a privileged occasion should not be regarded as a tightrope walker without a safety net, with the judge waiting underneath with bated breath hoping for a tumble." (At para. 27.)

[56] The standard of relevance limiting what may be said without losing the protection of qualified privilege is not the same as the one that informs the law of evidence. Hyperbole, exaggeration and unsubstantiated allegations are all protected so long as they are logically relevant, even if only remotely so. Statements will exceed the bounds of qualified privilege only

when they are shown to be motivated by a purpose ulterior to the occasion's focus (*Angle v LaPierre*, 2006 ABQB 198 at para 234).

[57] According to the Confidential Memorandum, one of the reasons Mr. Kohlenberg advanced in support of his grievance respecting the classification and work description of his position was his personal expertise, particularly in relation to real property, and the complexity of the files assigned to him. The Confidential Memorandum included the following excerpt from Mr. Kohlenberg's grievance:

> I am even looked to by some client department officials in Ottawa, for advice, because they prefer to consult with me for my recognized expertise rather than with their own department Legal Services counsel files in the Prairies ... I am regarded by many present and former Justice colleagues within our Region and beyond, as possessing superior legal expertise in a wide range of legal issues ... I have given presentations to recent Justice-wide conferences for Real Property Law practitioners and for Commercial Law practitioners. I am often consulted by colleagues across the Department about legal issues (more so since those conferences) and I am occasionally, with management's knowledge and approval, requested to provide comments on drafts of national legal advisory memos ... Within our Prairie Region, I have given at least one presentation at every Prairie Region CLASS symposium that has been held since their inception several years ago. The Work Description provided to me failed to acknowledge the large amount of highly complex, sensitive, difficult, and/or large legal file work that I routinely perform, and which requires the legal expertise and skills of and is provided by Justice senior or general counsel.

[58] Mr. Kohlenberg says that he described the manner in which he performed his duties only to illustrate the nature of his position, and he did not intend to put his personal performance in issue. However, given the manner in which he presented the grievance, it cannot be said that his performance reviews and disciplinary history were logically irrelevant. Information that is even

remotely relevant to the occasion's focus will benefit from qualified privilege. There is no evidence that the senior labour relations adviser was motivated by an ulterior purpose.

[59] I therefore conclude that the statements of the senior labour relations adviser concerning Mr. Kohlenberg's performance reviews and disciplinary history benefited from qualified privilege. The ADM reasonably dismissed Mr. Kohlenberg's grievance on this basis.

[60] Furthermore, the ADM reasonably found the senior labour relations adviser's statement that Mr. Kohlenberg had been disciplined for behaviours described in his 2013-2014 PREA to be substantially true. The ADM acknowledged that the use of the word "behaviours" (plural) may have implied that Mr. Kohlenberg was disciplined for behaviours involving more than one or several incidents. However, she also observed that this could be reasonably interpreted as indicating he was disciplined for several behaviours arising from the same incident.

[61] The ADM noted that she should avoid putting the worst possible meaning on the words complained of, and should consider whether another plausible alternative meaning was intended (citing *WIC Radio Ltd v Simpson*, 2008 SCC 40 at para 56 and *Pizza Pizza Ltd v Toronto Star Newspapers Ltd*, [1998] 42 OR (3d) 36).

[62] Even if the statement respecting Mr. Kohlenberg's disciplinary history were unsubstantiated, it would still benefit from qualified privilege. In addition, the ADM reasonably found the main thrust of the statement that Mr. Kohlenberg was disciplined for inappropriate behaviour to be true.

[63] There is no merit to Mr. Kohlenberg's assertion that the ADM could not have granted him an apology or agreed to amend his personnel file without first upholding his grievance. Nothing prevents a manager from expressing regret for a mistake and correcting the record, even in the absence of a formal grievance.

V. Conclusion

[64] The application for judicial review is dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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