Federal Court  Cour fédérale

Date: 20220808

Docket: T-1428-20
T-1429-20

Citation: 2022 FC 1179

Ottawa, Ontario, August 8, 2022

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ALEXANDRU-IOAN BURLACU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Alexandru-Ioan Burlacu, is a Senior Program Officer employed by the Canada Border Services Agency [CBSA]. He is self-represented on these Applications.

[2] Mr. Burlacu seeks judicial review of the final decisions rendered in three individual grievances. The three Applications for judicial review were heard together. In two of the

Applications, the underlying grievances take issue with the Employer's processing of two formal harassment complaints (Court dockets T-1428-20 and T-1429-20). This Judgment and Reasons addresses those two Applications.

[3] The third Application (Court docket T-1459-20) arises from the Employer's refusal to grant leave for a specific purpose. That matter is considered and decided separately in *Burlacu v. Canada (Attorney General)*, 2022 FC 1177.

II. Background

A. *Court Docket T-1428-20 - grievance no. 2019-3941-130514 [514 Grievance]*

[4] In October 2018, Mr. Burlacu submitted a formal harassment complaint alleging harassment by his former manager. In October 2019, more than 12 months after he had initiated the harassment complaint, Mr. Burlacu submitted a grievance pursuant to subsection 208(1) of the *Federal Public Service Labour Relations Act*, SC 2003, c 22, s 2 [FPSLRA]. In the grievance, he alleged the authority responsible for handling the harassment complaint had failed to abide by the *Directive on the Harassment Complaint Process* [Directive], which provides that designated officials must normally complete required steps in the harassment complaint process within 12 months. Mr. Burlacu alleged the failure to respect the terms of the Directive amounted to a failure to exemplify, with respect to him, values and behaviours detailed in the *Values and Ethics Code for the Public Sector* [Code], which he asserts forms a part of the terms and conditions of his employment. Mr. Burlacu requested the grievance be allowed, the harassment

complaint submitted to an independent impartial investigator and that he "be made whole and be granted any and all other remedies deemed just."

[5] The final level decision-maker [decision-maker] acknowledged Mr. Burlacu's harassment complaint had been outstanding for approximately 23 months but noted the complaint had been in abeyance with the consent of the Applicant for some of this time to allow different dispute resolution processes to be explored. The decision-maker acknowledged the 12-month timeline normally associated with the completion of a harassment review process had been exceeded but did not find that the delay constituted a failure to reflect and respect the values detailed in the Code. The decision-maker noted that the harassment complaint had been accepted and a third-party investigation authorized by the time she issued her decision. Therefore, the decision-maker concluded that to the extent the harassment complaint would be investigated, the grievance was partially granted and no further corrective measures would be forthcoming.

B. *Court Docket T-1429-20 - grievance no. 2020-3941-132123 [123 Grievance]*

[6] The 123 Grievance arises from a second formal complaint of harassment against Mr. Burlacu's director. The harassment complaint was initiated in March 2019. In July 2020, Mr. Burlacu submitted a grievance alleging the Employer's failure to respect the 12-month period provided for in the Directive constituted a failure to exemplify, with respect to him, values and behaviours detailed in the Code. In the grievance, Mr. Burlacu also requested that the decision-maker recuse herself.

[7] In response, the final level decision-maker first refused the request to recuse herself. Then, the decision-maker acknowledged the harassment complaint processing time had marginally exceeded 12 months but concluded the delay did not constitute a failure to abide by the Directive or the Code. The decision-maker further noted that a delegated authority had ultimately determined that the conduct in issue in the harassment complaint did not fall within the definition of harassment and there was no reason to intervene in respect of this decision. The grievance was denied.

III. Issues and standard of review

[8] The Parties submit, and I agree, that the Applications raise the following issues:

A. As a preliminary matter, is judicial review of the 514 grievance premature?

B. Did the decision-maker observe the principles of natural justice and procedural fairness in determining the 514 grievance and the 123 grievance? and

C. Are the decisions reasonable?

[9] With respect to the standard of review, the Parties agree that the impugned decisions themselves are to be reviewed against the presumptive standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

[10] A reasonable decision is one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). A reasonableness review focuses on the decision actually made and considers both the reasoning process and the outcome (*Vavilov* at para 83). A reasonableness

inquiry begins with the reasons provided and considers whether the decision, as a whole, is transparent, intelligible, and justified (*Vavilov* at paras 15 and 83). Reasons must justify the decision to those to whom the decision applies but they are to be considered in light of the history and context of the underlying process – they need not be perfect or address all issues raised (*Vavilov* at paras 86, 91 and 94). Reasons, when considered within the context of the record, that fail to address an essential issue will generally be found to be unreasonable (*Vavilov* at para 98).

[11] Issues of procedural fairness require the reviewing Court consider whether the procedure was fair having regard to all of the circumstances. The Court is required to focus on the nature of the substantive rights involved and the consequences for the individual in determining whether a fair and just process was followed. While this is best reflected in the correctness standard of review, strictly speaking no standard of review is being applied (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

IV. Analysis

A. *Judicial review of the 514 Grievance is not premature*

[12] The Respondent argues that the pith and substance of the 514 Grievance is the harassment complaint, which, as the record demonstrates, is ongoing. The Respondent relies on *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61, in submitting that the interests of justice and reasons of judicial economy support the view that the administrative process engaged by the harassment complaint should be exhausted prior to the Court intervening.

[13] The Respondent's submissions are not persuasive. The grievance does not engage a consideration of the substance of the harassment allegation. The 514 Grievance alleges non-compliance with the process set out in the directives and policies that govern the Employer's processing of harassment complaints and alleges a resulting breach of the Code for that reason. It has been previously held, and I agree, that the Code is a term and condition of Mr. Burlacu's employment (*Burlacu v Canada (Attorney General),* 2021 FC 610 at para 17 [*Burlacu 610*]).

[14] I acknowledge that in seeking submission of the harassment complaint to an independent and impartial investigator as corrective action in this grievance, Mr. Burlacu has somewhat muddied the waters. However, the requested relief does not change the true nature and character of the 514 Grievance. It is a separate and distinct proceeding addressing a separate and distinct concern: delay in the processing of the harassment complaint. Judicial review of the final level decision in the 514 Grievance does not risk the Court's premature involvement in the issues engaged by the ongoing administrative process that is considering the harassment allegation.

[15] I therefore conclude the Application seeking judicial review of the final decision in the 514 Grievance is not premature.

B. *No breach of procedural fairness*

(1) 514 Grievance

[16] Mr. Burlacu submits the Employer owed him a heavy duty of fairness in this matter as his grievances arise in the context of harassment allegations. He submits the Respondent's failure to

disclose a précis of the grievance that had been prepared for and provided to the final level decision-maker was contrary to the duty of fairness owed and the principles of natural justice. Specifically, he submits that – because the length of the abeyance periods for the harassment complaints were not accurately addressed in the précis and he was unaware of this issue – the duty of fairness required he be invited to make submission on the issue that would be central to the final decision.

[17] Mr. Burlacu relies on *Renaud v Canada (Attorney General),* 2013 FC 18 [*Renaud*], in asserting that he was owed a heavy duty of fairness as the grievances relate to allegations of harassment. I disagree. Although the 513 and 123 Grievances arise in the context of complaints alleging harassment, the grievances themselves only address issues and concerns relating to process. They do not, as noted above (paragraphs 14 and 15), engage the substance of the harassment allegations. This distinguishes these matters from *Renaud*.

[18] Mr Burlacu was entitled to know the case to meet and the opportunity to respond. He does not argue that the précis incorporated substantive facts and circumstances unknown to him, the exception being the accuracy of the identified periods of abeyance. However, this was not a determinative issue. The précis highlighted that there was uncertainty in respect of when certain periods of abeyance ended but further stated and acknowledged, “the processing time of this complaint has exceeded what is to be considered normal, regardless of the abeyance periods”.

[19] Mr. Burlacu was aware of the case to meet and made submissions. There was no breach of procedural fairness.

(2) 123 Grievance

[20] Mr. Burlacu argues the 123 Grievance process was procedurally unfair for three reasons. First, he submits the final level decision-maker had an interest in the outcome of the grievances because she was accountable for the body that handled CBSA harassment complaints. He submits the decision-maker was effectively asked to determine "whether she [had] properly discharged her supervisory responsibilities".

[21] There is little merit to this argument. There is nothing in the record to suggest that an informed person, having considered the matter realistically, would conclude the decision-maker would have been influenced by her role and responsibilities. The decision-maker considered the recusal request and rejected it for reasons that are transparent and justified – her role did not in itself create a conflict, and she was sufficiently removed from Mr. Burlacu's situation to render an objective decision. Further, and as noted by Justice Henry Brown in *Kohlenberg v Canada (Attorney General),* 2017 FC 414, the concept of bias generally does not apply to pre-adjudicative processes such as the grievance process:

> [75] I also agree, and there was no dispute, that the law is as set out in the Bias Decision, namely, that the concept of bias generally does not apply to pre-adjudicative processes such as these grievance processes. As stated in Brown & Beatty:
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> > The requirement of impartiality, however, does not apply to the pre-arbitration stages of the proceeding. Further, it has been held that considerations of "bias" are not relevant in the composition and operation of internal dispute-resolution mechanisms prior to the appointment of a board of arbitrators.
> >
> > Donald JM Brown & David M Beatty, *Canadian Labour Arbitration*, ch 1 at para 1:5210; see also *Wewaykum Indian Band v Canada*, [2003] 2 SCR

> 259 at para 77; *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paras 19-24.

[22] Second, Mr. Burlacu argues that the decision-maker's unnecessary reference in the grievance decision to the conclusion reached in the harassment complaint – that the conduct complained of did not constitute harassment – and then stating there was no reason to intervene in that decision, suggests the decision-maker had a closed mind and raises a reasonable apprehension of bias. Again, this argument is not persuasive. The grievance alleged a failure to process the harassment complaint within a 12-month period and sought, as corrective action, the submission of the harassment complaint to an independent and impartial investigator. In this context, while it may not have been necessary to reference the outcome of the harassment complaint process, the statement is not unrelated to the issues raised and responds to the specific corrective action Mr. Burlacu had sought.

[23] Finally, Mr. Burlacu again submits the failure to disclose the grievance précis was a breach of fairness. For substantially the reasons set out above (see paragraphs 17-19), I conclude this is not the case.

C. *The final level decisions are unreasonable*

[24] In deciding the 514 Grievance, the decision-maker summarized the grievance, reviewed the circumstances, including the timelines, and then wrote:

> While the processing time of your complaint exceeds the 12 month period normally associated with completion of a harassment review process, I do not agree that these delays constitutes [*sic*] a

> failure to abide by the *Values and Ethics Code for the Public Sector.*

[25] A similar approach is adopted in deciding the 123 Grievance, the decision in that case stating:

> While the actual processing time of your complaint marginally exceeds the 12 month period normally associated with completion of a harassment review process, I do not agree that this delay constitutes a failure to abide by the *Directive* or the *Values and Ethics Code for the Public Sector.*

[26] Both decisions recognize that the timeline set out in the Directive have been exceeded and then conclude, without the benefit of any analysis or reasoning, that the failure does not constitute a breach of the Code.

[27] Justice Zinn's statement in *Burlacu 610*, is of application here:

> [27] Mr. Burlacu properly noted that the employer was under no obligation to agree with him that the Values and Ethics Code had been breached by the actions complained of, but if it was of that view, it is required to explain why.
>
> [Emphasis added.]

[28] The Respondent submits the Code has no bearing on the decisions because in pith and substance the issues raised involve harassment and therefore the decisions must be considered in the context of the Directive which requires process steps normally be completed in 12 months unless there are extenuating circumstances.

[29] I disagree for two reasons. Firstly, Mr. Burlacu has framed the grievance in terms of a violation of the Code and the terms and conditions of his employment. Mr. Burlacu is entitled to a decision that is responsive to the issues he has raised (*Vavilov* at para 127, *Burlacu 610* at para 27).

[30] Secondly, even if I were convinced that it was reasonable for the decision-maker to decide the grievance based on the Directive, the decision nonetheless lacks in transparency and justification. Although the decision references the Directive's contents, it does not explain why, and having accepted that the normal 12-month processing period had been exceeded, the delay did not constitute a failure to abide by the Directive. While abeyance periods, administrative processing errors and other circumstances disclosed on the record might explain such a conclusion, it is not for a reviewing court to infer a rationale that might have been relied upon to justify the decisions (*Vavilov* at para 98).

[31] Although not argued, there is jurisprudence indicating that the final level grievance précis may be considered as forming part or serve as reasons if the précis was relied on by the decision-maker (*Wanis v Canadian Food Inspection Agency*, 2013 FC 963 at para 21). In this instance the précis does not assist the Respondent as it provides little in the way of analysis or explanation to support the conclusion that the acknowledged processing delays did not constitute a failure to abide by the Directive or the Code.

[32] Mr. Burlacu has advanced additional arguments challenging the reasonableness of the decision. I need not address or express an opinion on these submissions as the failure to address

essential issues and provide some justification for the conclusions reached renders the decisions unreasonable.

V. Conclusion

[33] For the above reasons, the Applications are allowed.

[34] Mr. Burlacu is entitled to his costs, which are fixed for the two Applications at the all-inclusive amount of $500.

[35] A copy of these Reasons shall be placed in each of the Court Dockets.

JUDGMENT IN T-1428-20 AND T-1429-20

THIS COURT'S JUDGMENT is that:

1. The Applications are allowed.
2. The decisions are set aside and are returned for redetermination by a different decision-maker.
3. Costs are awarded to the Applicant in the all-inclusive amount of $500.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1428-20 AND T-1429-20
STYLE OF CAUSE:	ALEXANDRU-IOAN BURLACU v THE ATTORNEY GENERAL OF CANADA
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APPEARANCES:

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