

Federal Court



Cour fédérale

Date: 20221118

Docket: T-952-19

Citation: 2022 FC 1581

Ottawa, Ontario, November 18, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

ANGELA JOSHI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Me Angela Joshi, is self-represented although she is a member of the Barreau du Québec and the Law Society of Ontario. She was formerly employed as a Labour Affairs Officer, Health and Safety, in the Labour Program at Employment and Social Development Canada [ESDC]. Me Joshi seeks judicial review of a decision dated June 4, 2019 [Decision], by Danièle Besner, Director General, Workplace Management Directorate and

Designated Official for Harassment Prevention and Resolution [Decision Marker], in which she accepted the results of an investigation that determined certain allegations met the definition of harassment under the Treasury Board Secretariat's Policy on Harassment Prevention and Resolution [Policy].

[2] The harassment complaint that formed the basis for the Decision was filed by Me Joshi's former spouse. Me Joshi and her former spouse both worked for the ESDC at the same workplace. In September 2017, the spouses, who share two children, separated. Shortly thereafter, Me Joshi's former spouse commenced a relationship with a co-worker [Co-Worker], who was also employed at the same workplace. The interpersonal issues between Me Joshi, her former spouse, and the Co-Worker, spilled over into the workplace. Each of the three individuals filed complaints against each other, which resulted in six (6) final reports being produced by an externally appointed investigator, Robert Cantin of Textus Inc. [Investigator]. The final reports were released in June 2019. While other investigations and reports were raised in the present proceedings for context, it is the Decision referenced above that forms the subject of the present judicial review.

[3] No disciplinary measures were imposed on Me Joshi by ESDC as a result of the Decision. Moreover, by the time this matter was heard, neither Me Joshi nor her former spouse remain employed with ESDC.

[4] Me Joshi seeks to quash the investigation report and the resulting Decision. She submits that the Investigator was not competent for the appointment, was biased, and conducted a tainted

inquiry with an untenable outcome. She pleads that her legitimate expectations surrounding the investigation, the procedures that would be followed, and application of the Policy were breached. She raises in particular the actions of a number of individuals at ESDC who were involved in the lead-up to the multiple complaints and investigations. Me Joshi argues that given the context and the timelines of the multiple complaints, the Center for Harassment Expertise lacked the jurisdiction to receive the complaint that forms the subject of the Decision, and in any event at a minimum, should have flagged this complaint as secondary and potentially vexatious. Me Joshi further submits that the Investigator and the Decision Maker breached procedural fairness, as she was not made fully aware of the case she had to meet and thus did not have a fair opportunity to respond to it. She also raises a number of concerns regarding the contents of the Certified Tribunal Record [CTR]. Finally, Me Joshi argues that the Decision is unreasonable on the basis that the Investigator: (i) disregarded the vast and overwhelming majority of her evidence; (ii) selectively quoted what evidence of hers he did refer to; (iii) made numerous factual errors relating to the evidence submitted by Me Joshi, her former spouse, the Co-worker with whom the former spouse was having a relationship, and other employees; and (iv) erroneously accepted Me Joshi's former spouse's evidence at face value.

[5] The Respondent, the Attorney General, pleads that the matter is both moot and premature. The Attorney General submits that the process was procedurally fair, specifically there was no bias, bad faith, or lack of qualification on the part of the Investigator or the Decision Maker, nor were Me Joshi's legitimate expectations breached. The Attorney General notes that the CTR did not include the binder of evidence that had been submitted by Me Joshi to the Investigator, but pleads that the record is not deficient as the material was in the possession

of Me Joshi who included it in the Application Record. The Attorney General submits that the Investigator is presumed to have weighed all the evidence and that the resulting Decision was reasonable.

[6] For the reasons that follow, and despite the impassioned and able submissions of Me Joshi on her own behalf, this application for judicial review is dismissed.

II. Background

[7] Me Joshi became a Labour Affairs Officer at ESDC in May 2015. In May 2016, her former spouse was hired in a parallel departmental branch at ESDC in the same workplace.

[8] In September 2017, Me Joshi and her former spouse separated and divorce proceedings were commenced. The former spouse subsequently became involved with another Co-Worker in the same workplace, also employed in the Labour Program at ESDC.

[9] On October 2, 2017, Me Joshi and her former spouse were both present in the workplace for the first time since April 2017, following respective periods of family and parental leave. They remained employed in the shared workplace until April 3, 2018, when Me Joshi departed the workplace on unpaid medical leave. She has not returned to the workplace since that time.

[10] During that period, the interpersonal issues between Me Joshi, her former spouse, and the Co-Worker, spilled over into the workplace, given that interaction took place at the workplace.

This resulted in a number of complaints to management by all three people involved and a number of additional co-workers were drawn in.

[11] On December 5, 2017, Me Joshi complained to management by way of email that she was experiencing workplace harassment and violence and wished to engage the formal procedure outlined in Part XX of the *Canada Occupational Health and Safety Regulations* [Part XX].

[12] In the two weeks following Me Joshi's departure on medical leave in April 2018, her former spouse and the Co-Worker she was involved with each submitted a harassment complaint against Me Joshi under the Policy and a workplace violence complaint under Part XX, totalling four complaints. In addition, earlier, in March 2018, the Co-Worker had also submitted a workplace violence complaint on behalf of the former spouse.

[13] On May 28 and June 6, 2018, Me Joshi was notified of the complaints against her by her former spouse and the Co-Worker. On July 6, 2018, Me Joshi confirmed that she would be filing a harassment complaint against her former spouse and the Co-Worker.

[14] The Investigator was appointed as both the Investigator under the Policy for the harassment complaints and as the Competent Person pursuant to Part XX for the workplace violence complaints.

[15] The Investigator met with the complainants, as well as fifteen (15) co-workers/witnesses, for interviews. Documentary evidence was submitted to the Investigator by the complainants,

certain co-workers and management. In March 2019, copies of the preliminary reports were provided to the complainants. The purpose of this was to present the evidence gathered to the complainants so as to provide them with the opportunity to submit clarifications or observations.

[16] On June 6, 2019, Me Joshi was notified of the results of the investigations under the Policy and Part XX, and provided with the final reports. Save for the Decision, in which the complaint was determined to be partially founded, the remaining complaints against Me Joshi were determined to be unfounded.

[17] On June 7, 2019, Me Joshi filed this application for judicial review. The application for judicial review identified all six final reports and decisions. It has since been clarified at the hearing of this matter that Me Joshi is seeking to have the Decision quashed, and the other investigations and decisions have been referred to for context.

[18] Finally, it bears mention, because it was raised in the context of the present proceedings, that the relationship between Me Joshi and her former spouse can certainly be described as acrimonious. Since the time of the separation, there have been ongoing proceedings in the Superior Court of Quebec in relation to spousal support, child support, the family patrimony and custody of the couple's two children. Judgments, orders, and extracts from the pleadings, in the family proceedings have been included in the record. The disputes between the former spouses over custody have been particularly contentious. The most recent judgment was rendered by Justice Vaillancourt on July 8, 2022, following a six-day trial.

[19] In addition, on March 16, 2018, the former spouse filed a criminal complaint against Me Joshi for criminal harassment, sexual assault, and forcible confinement, resulting in Me Joshi's arrest at her home in front of her children on the same day. Following a criminal trial, where Me Joshi represented herself, Justice Lanctôt concluded on March 10, 2022 that she believed Me Joshi and acquitted her of the charges of sexual assault and forcible confinement. On March 24, 2022, the prosecution withdrew the last remaining charge of criminal harassment.

[20] It is thus clear from the record that this has been an incredibly challenging few years for Me Joshi. As will be discussed in greater detail below, Me Joshi's concern is that the Decision will be weaponized by her former spouse in the context of other proceedings involving Me Joshi.

III. Preliminary Issue

[21] Me Joshi designated the Minister of Labour as the Respondent. The Attorney General submits, and I agree, that as the Minister of Labour is not personally affected by the order sought in the present application, the proper party to be named is the Attorney General of Canada (Rule 303(1) and (2), *Federal Court Rules*, SOR/98-106). Me Joshi does not contest this point.

[22] The style of cause shall therefore be amended so that the Attorney General of Canada appears as the Respondent.

IV. Issues and Standard of Review

[23] The issues in this application for judicial review are:

- 1) Is the application for judicial review moot?
- 2) Is the application for judicial review premature?
- 3) Was the Investigator biased and/or incompetent?
- 4) Was there a breach of Me Joshi's legitimate expectations?
- 5) Was the process procedurally fair?
- 6) Is the Decision reasonable?
- 7) If successful, what is the appropriate remedy under the circumstances?

[24] Breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a “reviewing exercise ... ‘best reflected in the correctness standard’ even though, strictly speaking, no standard of review is being applied” (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]). The focus of the reviewing court is essentially whether the procedure followed by the decision maker was fair and just (*Canadian Pacific* at para 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[25] As to the merits of the Decision, the presumptive standard is one of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]). Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). It is Me Joshi, the party challenging the Decision, who bears the burden of demonstrating that it is unreasonable (*Vavilov* at para 100). In conducting a reasonableness review, the Court must determine whether the Decision is “based on an internally coherent and rational chain of

analysis” and is “justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at paras 85-86).

[26] The focus must be on the decision actually made, including the justification offered for it, and not the conclusion the Court itself would have reached in the administrative decision maker’s place. The standard of reasonableness is rooted in the principle of judicial restraint and deference, and requires reviewing courts to show respect for the distinct role that Parliament has chosen to confer on administrative decision makers rather than on the courts (*Vavilov* at paras 13, 46, 75).

V. Analysis

[27] I find that the determinative issue in the present application is the issue of mootness.

[28] The leading case regarding the principles of mootness remains *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. As described by the Supreme Court in *Borowski*, the doctrine of mootness is an aspect of the general policy or practice pursuant to which a court may decline to decide a case that raises merely a hypothetical or abstract question. If a decision will have no practical effect on the rights of the parties then a court will decline to decide a case. Consequently if, subsequent to the initiation of a proceeding, events occur which affect the relationship of the parties such that no present live controversy between them exists, the case is said to be moot. The matter will therefore not be heard unless the court exercises its discretion to depart from this general policy or practice (*Borowski* at 353).

[29] In order to determine whether an application is moot, a two-step analysis must be undertaken. The Federal Court of Appeal summarized this analysis in *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 [*Democracy Watch*] as follows:

[10] As the leading authority on mootness – the Supreme Court’s decision in *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342 at 353-363 – makes clear, the mootness analysis proceeds in two stages. The first question is whether the proceeding is indeed moot: whether a live controversy remains that affects or may affect the rights of the parties. If the proceeding is moot, a second question arises: whether the court should nonetheless exercise its discretion to hear and decide it.

[30] As to the first step of the analysis, whether there is a live controversy, the Federal Court of Appeal has recently stated that this step requires an assessment of whether the tangible and concrete dispute between the parties has disappeared (*Fibrogen, Inc v Akebia Therapeutics, Inc*, 2022 FCA 135 at para 30 [*Fibrogen*]).

[31] As to the second step of the analysis, when the Court considers whether to nonetheless exercise its discretion, three factors are relevant: (1) the presence of an adversarial relationship between the parties; (2) the concern for judicial economy; and (3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework (*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 18; *Borowski* at paras 31, 34, 40; *Democracy Watch* at para 13). The consideration of these three factors is not a mechanical process, rather the discretion is to be exercised cumulatively while recognizing that the factors may not all point in the same direction (*Democracy Watch* at para 13).

[32] The Federal Court of Appeal has recently stated in *Fibrogen* that the prospect of future litigation is not a sound basis upon which to hear an otherwise moot proceeding:

[43] With rare exceptions, such as when a matter is evasive of review or there is an important point of law of wider interest and application, the prospect of future litigation is not a sound basis upon which a court should exercise its discretion to hear an otherwise moot proceeding.

[33] The Federal Court of Appeal in *Hakizimana v Canada (Public Safety and Emergency Preparedness)*, 2022 FCA 33 [*Hakizimana*], has also recently emphasized the need for the sound use of judicial resources (at para 22).

[34] The Attorney General submits that there is no longer a live controversy between the parties and that the Court should decline to exercise its discretion to decide the matter despite its mootness. The Attorney General pleads that: (i) there is no longer a live workplace controversy involving Me Joshi; (ii) she no longer has an employment relationship with ESDC nor does her former spouse, so no future workplace conflict may arise; (iii) she was not disciplined as a result of the Decision; (iv) a fresh investigation would neither be possible nor would it advance the objectives under the Policy; (v) the retention and disposal periods for investigations under the Policy is two years from the last administrative decision; (vi) the Policy requires that the investigation remain confidential; and (vii) the possibility of her former spouse making allegations in future proceedings as to workplace events is not sufficient reasons to decide a moot matter.

[35] Me Joshi acknowledges that there is no longer a live controversy between the parties, but pleads that the matter is not moot and the Court should exercise its discretion to decide the

matter. She states that many of the negative consequences over the past several years have flowed from the investigation and the Decision. Me Joshi submits that her former spouse's allegations of harassment in the workplace formed the basis of the criminal charges and were instrumental in permitting her former spouse to successfully block regular access to their children in the context of proceedings before the Superior Court. She pleads that her former spouse is using the fact that the "Federal Government" rendered the Decision and is a "credible source" of information, and will thus capitalize on that in future proceedings. Me Joshi implores the Court to assist her on the basis that there is no other forum through which she can address the results of what she submits was a procedurally unfair and unfounded investigation. She states that the conclusions reached in the investigation "do not serve [a] workplace or employment purpose, but continue to cause extreme harm to [the] Applicant in the rest of her life, completely outside the employment context."

[36] I find the present application for judicial review to be moot. There is no longer a tangible and concrete dispute between the parties. Neither Me Joshi nor her former spouse have an employment relationship with ESDC. Me Joshi was not disciplined as a result of the Decision and the termination of her employment on April 27, 2022, was based on administrative reasons, namely her extended sick leave without pay and her inability to return to work. Simply put, the ESDC no longer has jurisdiction over her. I conclude that there is no longer a live controversy between Me Joshi and the Respondent that affects the rights of the parties.

[37] Having determined that the present application is moot, I now turn to the question of whether I should nonetheless exercise my discretion to decide the matter despite its mootness.

Having considered the three factors guiding the Court's exercise of discretion in departing from the usual practice of declining to hear and decide cases that are moot, cited above, I am of the view that exercising my discretion is not warranted.

[38] The issues raised by Me Joshi revolve around her concern that because the workplace issues have been used in the past by her former spouse in the context of disputes outside of the workplace, they will be utilized again in the future in this fashion and will cause her harm.

[39] Given the issues raised by Me Joshi, I find that the second factor, the concern for judicial economy, applies in the present context. This factor weighs against deciding the moot application. In so finding, I am guided by the jurisprudence of the Federal Court of Appeal. In *Hakizimana*, the Federal Court of Appeal describes the second factor as “whether there is any practical utility in deciding the matter or whether it is a waste of judicial resources” (*Hakizimana* at para 20; *Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 at para 9 [*CUPE*]). The Federal Court of Appeal has emphasized “the need for the sound use of judicial resources” (*Hakizimana* at para 22).

[40] Moreover, the Federal Court of Appeal is clear that the prospect of future litigation, with rare exceptions that do not apply in the present case, is not a sound basis upon which a court should exercise its discretion to decide an otherwise moot proceeding (*Fibrogen* at para 43). The Federal Court of Appeal has concluded that the mere fact that potential negative consequences may occur in the future do not justify proceeding with an otherwise moot matter (*Hakizimana* at

paras 12-22, and the cases cited therein). A court should not hear and decide a matter based on speculation as to circumstances that may arise (*Fibrogen* at para 43).

[41] The Decision does not impose obligations on either party, and does not have any practical consequences as between them (*CUPE* at para 11). Me Joshi's concerns all relate to potential future harm in the context of disputes with her former spouse, outside the workplace environment. As to the criminal proceedings, those are now completed and Me Joshi has been acquitted. What remains, however, are future steps in family proceedings before the Superior Court. In the most recent decision, a lengthy judgment by Justice Vaillancourt following a six-day trial, the history of the proceedings between Me Joshi and her former spouse are set out. The context and the procedural history alone comprise 55 paragraphs. Justice Vaillancourt does mention in one paragraph that both Me Joshi and her former spouse lodged complaints for harassment in the workplace and the results of those investigations.

[42] In rendering his reasons, Justice Vaillancourt mentions that his judgment is based on the evidence before him and not on any prior orders and judgments in the case (para 77). As to proceedings outside the family proceedings, they were mentioned in the context of parental time with the children, along with many other issues. Justice Vaillancourt noted in the history that their relationship finished very badly, complaints of workplace harassment were lodged and that police intervention had occurred. Nevertheless, he is convinced they love their children. Justice Vaillancourt noted the history of the dispute and how the custody arrangements had been impacted in 2018 (before the Decision) by the allegations by the former spouse that she had been sexually assaulted and harassed, and by other factors unrelated to the foregoing (at para 103).

[43] Justice Vaillancourt stated that he gave far less weight to the parties' allegations of workplace harassment than they did at the hearing. He noted the outcome of the workplace complaints but added that while the parties' relationship was clearly both bad and toxic, he was not overly concerned about the future since the parties no longer have to deal with each other in the same workplace (at para 106).

[44] I agree with the Attorney General that even if Me Joshi succeeds, and the Decision is quashed, there is no guarantee that her former spouse will refrain from raising the harassment allegations as she has done in the past even before the Decision was rendered. This was the case with the allegations that resulted in the criminal proceedings, even though Me Joshi had been acquitted and the remaining complaint withdrawn. This was equally the case in the context of the workplace complaints, where material from the family and criminal proceedings was provided to the Investigator.

[45] Furthermore, the impact of the Decision in future family proceedings is speculative. Justice Vaillancourt was not overly concerned about workplace issues from the past given that the former spouses no longer work together. Moreover, and importantly, Me Joshi's concerns relate to the impact of the investigation and the Decision on her family proceedings, an issue that is best dealt with by a judge of the Superior Court who is seized of the matter.

[46] In line with the guidance from the Federal Court of Appeal, given that the harm raised by Me Joshi is based on speculation as to circumstances that may arise in future family litigation, I

therefore decline to decide to exercise my discretion to nevertheless decide the present application for judicial review.

[47] Finally, it was clear during the hearing of this matter that it is emotive one and arises from circumstances that have been exceptionally challenging for Me Joshi. I certainly have sympathy for the challenges that Me Joshi has faced over the past four years, and understand her desire to have the matter heard on its merits. Indeed, she raises a number of arguable points concerning the investigation and the resulting Decision. That being said, while parties to litigation may want reasons, this desire cannot negate a finding that a case is moot (*Coalspur Mines (Operations) Ltd v Canada (Environment and Climate Change)*, 2021 FC 759 at para 11).

[48] Having found that the application for judicial review is moot, it is unnecessary for me to address the remaining issues raised by the parties.

VI. Conclusion

[49] For the foregoing reasons, given there no longer remains a live controversy between the parties, and I have not been persuaded that it is appropriate to exercise my discretion to render a decision on the merits, this application for judicial review is dismissed.

[50] The Attorney General does not seek costs, and as such, none shall be awarded.

JUDGMENT in T-952-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;
2. The style of cause is amended to name the Attorney General of Canada as the Respondent; and
3. No costs are awarded.

“Vanessa Rochester”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-942-19

STYLE OF CAUSE: ANGELA JOSHI v MINISTER OF LABOUR

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: NOVEMBER 8, 2022

JUDGMENT AND REASONS: ROCHESTER J.

DATED: NOVEMBER 18, 2022

APPEARANCES:

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FOR THE RESPONDENT