Federal Court  Cour fédérale

Date: 20230529

Docket: T-897-22

Citation No.: 2023 FC 746

Vancouver, British Columbia, May 29, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

SAMAN ABDI

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

JUDGMENT & REASONS

[1] The applicant, Mr. Abdi, requests that the Court set aside a final level grievance decision made on March 2, 2022, by the Assistant Deputy Minister for Western Canada and Territories of Employment and Social Development Canada ("ESDC"). The decision denied the applicant's grievance related to the termination of his employment during a probationary period.

[2] The applicant submitted that the decision should be set aside as unreasonable, applying the principles described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653. He also raised an argument about procedural fairness.

[3] For the reasons that follow, this application for judicial review will be dismissed.

I. **Events Leading to this Application**

[4] The applicant holds a Bachelor of Arts and Master of Arts degree from Simon Fraser University.

[5] In early 2021, the applicant received an offer to join Service Canada as a Payment Services Officer. By letter dated January 11, 2021 the applicant was hired under a term employment contract from January 25, 2021 to January 21, 2022 and was subject to a 12-month probationary period.

[6] On January 25, 2021, the applicant began to work at the Vancouver Employment Insurance Call Centre. As a new hire, the applicant participated in a "structured training program" comprising four phases.

[7] The first phase was classroom training. During that phase, the applicant was required to take five examinations. Like all new Payment Services Officers, the applicant had to achieve a minimum passing grade of 75% on three out of the five examinations.

[8] In February and March, 2021, the applicant attended the classroom training phase, mostly online due to the COVID-19 pandemic. He wrote the five examinations. Unfortunately, he did not achieve the minimum passing grade of 75% on three examinations. His marks were: 81%, 60%, 80%, 73% and 72%.

[9] After the applicant did not achieve a passing grade on the second test and on the fourth test, he met with the EDSC's acting Team Leader to discuss the outcome, the reasons for it, how he might improve and how he could obtain employee support. The acting Team Leader confirmed their discussions by emails to the applicant dated February 26, 2021 and March 22, 2021.

[10] Following the applicant's unsuccessful grade on the fifth test, ESDC released the applicant from his employment during probation by letter dated March 24, 2021. He had not satisfactorily performed the duties of a Payment Services Officer because he did not pass three out of the five tests as required.

[11] On April 27, 2021, with the support of his union, the applicant commenced a grievance. The grievance advised that the employer's "rejection on probation was an action taken in bad faith". The grievance stated that the employer did not provide the applicant with "the necessary training and support" and "did not provide support when the client reached out for help and accommodation which led to the failing grade." The applicant made a presentation in support of his grievance dated May 14, 2021.

[12] By letter dated May 28, 2021, ESDC denied the applicant's grievance at the first level.

[13] On June 1, 2021, the applicant transmitted his grievance to the second level. He provided a presentation with his union representative to support his grievance at a grievance consultation on September 13, 2021.

[14] By letter dated October 5, 2021, ESDC denied the applicant's grievance at the second level.

[15] On October 6, 2021, the applicant transmitted his grievance to the third and final level. He provided a written submission for a consultation on February 22, 2022. The applicant and his union representative attended the consultation, as did the decision maker, her chief of staff and a senior labour relations officer.

[16] The next day, a request was made to confirm the accuracy of the applicant's test scores. An email dated February 23, 2022, confirmed that the applicant's scores had been reviewed and verified.

[17] On February 28, 2022, the senior labour relations officer sent a 9-page written memorandum dated February 22, 2022, entitled "Final Level Grievance Overview" (the "Grievance Overview") for the decision maker's review.

II. **The Decision Under Review**

[18] By letter dated March 2, 2022, ESDC issued its final level grievance response, which denied the applicant's grievance.

[19] After setting out the applicant's statement of his grievance and the requested corrective action, the decision-maker confirmed that she had reviewed the applicant's submissions at the grievance consultation held on February 22, 2022, as well as all documents made available to her.

[20] The decision maker summarized that, among other things, the applicant indicated that he experienced multiple technical and hardware issues, identified training concerns, and disagreed with the performance expectations in relation to the grade point cut-off for written examinations. In addition, he outlined personal concerns that were causing him stress.

[21] The decision maker found no evidence of the improper handling of his case to warrant intervention. The employer had ensured that the applicant was provided with the necessary resources and support to become a fully trained Payment Services Officer. Although he was offered the opportunity to identify additional support and explore the duty to accommodate on multiple occasions, the applicant declined. Despite efforts to assist him in meeting the requisite work requirements, he was unable to consistently meet the required performance standards. The decision maker found this was a legitimate employment-related reason for his termination on probation.

[22] The decision maker confirmed that local management had not received any requests for references for him and reassured him that the employer was not creating barriers for him to secure new employment.

[23] The decision maker acknowledged the applicant's request that his test scores be verified. Local management advised the decision maker that his scores had been reviewed and were found to be accurate.

[24] The applicant's grievance was therefore denied.

III. **Analysis**

[25] On this application, the standard of review is reasonableness, as described in *Vavilov*: *Burlacu v. Canada (Attorney General)*, 2022 FC 1467, at para 14; *Kohlenberg v. Canada (Attorney General)*, 2022 FC 906, at para 31.

[26] Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision has the attributes of transparency, intelligibility and justification: *Vavilov*, at paras 12-13 and 15. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov*, esp. at paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33, 61.

A. Was the Final Level Grievance Decision Reasonable?

[27] The applicant's grievance raised the following specific arguments:

- two of his test scores were just below the passing grade of 75%, and should be "rounded up" so that he would pass;
- there was inadequate training, including because the training did not appropriately account for employees' differing needs and stresses during the pandemic;
- the applicant received insufficient support, particularly IT support, during the training phase;
- the applicant experienced several personal stressors, including the breakdown of his car, which caused them not to sleep well; and
- following communications between the applicant and the acting Team Leader, the applicant cancelled a medical appointment for which he had waited for several months.

[28] The applicant's submissions to the Court reiterated most of these points. His written submissions were that training was online and argued that IT would respond to employees in 24 hours "if they feel like it". His position was that the employer failed to train him and then blamed him for it. He argued that the employer had not been fair and reasonable with him, and had acted in bad faith (citing *Wallace v United Grain Growers*, [1997] 3 SCR 701).

[29] At the hearing, the applicant explained that training phase occurred first in person for two or three days, and then occurred through his laptop computer. He was in British Columbia but IT support was in Ontario, which meant he was alone and working remotely.

[30] The applicant submitted that he missed the 75% threshold by just one mark on the final test; to terminate his employment on this basis was unfair during the pandemic.

[31] I sympathize with the applicant's sense of frustration, particular during the pandemic.

[32] The respondent's position was that the employer had the discretion to assess each new employee's suitability (referring to section 62 of the *Public Service Employment Act*, SC 2003, c 22 (the *"PSEA"*)). The respondent referred to *Kot v Canada (Attorney General)*, 2022 FCA 133, *Canada (Attorney General) v. Alexis*, 2021 FCA 216 and *Jacmain v. Attorney General (Can.) et al.*, [1978] 2 SCR 15, and to *PSEA* sections 12, 13. The respondent emphasized that the decision to terminate the applicant's employment was solely performance-based, as a result of failing to consistently achieve the required performance standards on the examinations. All employees had to be treated equally.

[33] In addition, the respondent noted that the employer offered the applicant additional training assistance during the classroom training phase, and personal support through the Employee Assistance Program. The respondent pointed to the emails sent to the applicant dated February 26 and March 22, 2021, confirming discussions after his second and fourth test results, which included references to these topics and discussions about possible accommodations for the applicant. However, the applicant refused all offers of additional support and assistance.

[34] I have carefully read the applicant's grievance and ESDC's decisions at the first, second and final levels. I reviewed his written submissions to the Court on this application and listened

attentively to his articulate oral submissions at the hearing. I again considered his arguments while preparing these Reasons.

[35] Applying the principles in *Vavilov* and *Canada Post,* I have concluded that the Final Level Decision was reasonable.

[36] The Court's assessment of the reasonableness of the Final Level Decision may include consideration of the reasons for the decisions at the first and second grievance levels: *Veillette v Canada (Revenue Agency),* 2020 FC 544, at para 27. The assessment may also consider the contents of the written Grievance Overview prepared for the decision maker at the final level: *Meguellati v Canada (Attorney General),* 2020 FC 1010, at para 24; *Veillette*, at para 27.

[37] Most of the applicant's submissions concerned whether the Final Level Decision was correct on the merits. However, as I explained at the hearing, this judicial review proceeding does not permit the Court to intervene if it disagrees with the Final Level Decision. I am not permitted to re-examine the evidence to decide what I would have done in decision-maker's place, nor can I correct the decision if I were to disagree with it. I have to determine whether that decision was "reasonable", using standards established by the appellate courts and this Court in previous cases.

[38] As the respondent submitted, employers have "considerable discretion to assess the suitability of probationary employees and there is minimal scope for review of their decisions": *Kot,* at para 15. Considering also section 62 of the *PSEA*, I see no basis to find that the Final

Level Decision did not respect the legal constraints bearing on it: *Vavilov*, at paras 83, 99 and 101; *Canada Post,* at paras 2, 30, 32 and 41.

[39] The Supreme Court in *Vavilov* contemplated that the reviewing court may consider whether and how evidence before the decision-maker constituted a constraint on the decision-maker. However, as already noted, the reviewing court may not reweigh or reassess the evidence and, except in unusual circumstances, may not analyze and decide for itself whether the decision was correct: *Vavilov,* at paras 83, 116, 124, 125-126.

[40] In this case, the Final Level Decision was supported by the Grievance Overview, which summarized and analyzed the grievance and the applicant's position. I am not persuaded that the Final Level Decision, read with the first and second level decisions, failed to address any material aspect of the applicant's position or the factual circumstances related to his grievance. The applicant did not contend that the decision maker did not understand his grievance or failed to address any particular argument he made. He did not point to any contemporaneous evidence that contradicted any of the statements or conclusions in the Final Level Decision, such as the statement that he was offered the opportunity to identify additional supports for him but he declined. Indeed, that conclusion is consistent with the record before the decision maker (see emails to the applicant dated February 26, 2021, and March 22, 2021, from the acting Team Leader, confirming discussions with him after the second and fourth tests).

[41] I note that the applicant did not contest that he was advised at the outset of his employment, and reminded after each of the unsuccessful second and fourth tests, that he had to achieve a minimum passing grade of 75% on at least three tests or his employment would cease.[1]

[42] There is no basis for the Court to intervene on the argument that the Final Level Decision should have concluded that the termination of the applicant's employment was made in bad faith, as he alleged. The applicant did not identify any particular incident or conduct that supported his position, including at the time his employment ended after the fifth test on March 24, 2021. Whether one applies the criteria described in *Wallace* or *Kot,* it was open to the decision maker on the record to conclude that the applicant had not shown that the employer failed to be candid, honest, fair or sensitive, and that his termination was not a camouflage, a sham or made in bad faith.

[43] For these reasons, I find no basis to conclude that the Final Level Decision was unreasonable.

B. Did ESDC Breach the Applicant's Procedural Fairness Rights?

[44] The applicant submitted that he was deprived of procedural fairness because the ESDC did not disclose to him an email exchange in mid-September 2021. The exchange was part of the internal inquiries made by the employer during the grievance process around the time of the second level grievance.

[1] The applicant was initially advised that he had to achieve 75% on all five tests, but that was corrected later.

[45] The email exchange occurred between a Human Resources Specialist Advisor and the Service Manager who had been the decision maker at the first level grievance. The Advisor posed questions and the Service Manager answered. The material topics included whether the applicant's training was different from other classes (the answer was, not much), whether the applicant had IT issues (initial issues were resolved by the second day of training), any loss of class time due to IT or illness, or any lack of support or accommodation (no to all; the concerns were raised only after the exam results), and management's awareness of personal struggles and stressors (yes, but these were not raised as an issue at a time that would prevent him taking any test).

[46] The applicant did not receive a copy of this email exchange until he received the affidavit filed in this Court by the respondent, which set out the chronology of events leading to the Final Level Decision and attached the documents before the final level decision maker. One of those documents was the email exchange.

[47] The applicant characterized the email exchange as "fictitious" and alleged that the employer "failed miserably" by not disclosing it.

[48] The respondent argued that level of procedural fairness owed to an employee in an internal grievance process is at the low end of the spectrum (citing *De Santis v Canada (Attorney General)*, 2020 FC 723, at para 28 and *Hagel v. Canada (Attorney General)*, 2009 FC 329, at para 35). The employee has the right to be informed of any prejudicial facts, and the right to respond to those facts. However, there is no right to disclosure of every single document in the

employer's possession. The respondent referred to *De Santis*, at paras 28 and 30; and *Moodie v Canada (Attorney General)*, 2014 FC 433, at para 66. See also *Clarke v Canada (Attorney General)*, 2016 FC 977, at paras 15-17.

[49] The respondent submitted that the applicant knew the case to meet because he initiated the grievance process (citing *De Santis,* at para 30). The purpose of the email exchange was to verify his own allegations during the second level grievance. The respondent submitted that the applicant did not explain how the content of the email exchange prejudiced his ability to know the case to meet.

[50] Neither party made submissions concerning the factors in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 22-28.

[51] After careful consideration, I am not persuaded that the employer deprived the applicant of procedural fairness through non-disclosure prior to the Final Level Decision.

[52] The Court's review of procedural fairness issues involves no deference to the decision maker. The question is whether the procedure was fair having regard to all of the circumstances, focusing on the nature of the substantive rights involved and the consequences for the individual(s) affected: *Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69, at paras 46-47; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121, esp. at paras 49 and 54.

[53] The legal context for procedural fairness in this case was described by the Federal Court of Appeal in *Gladman v Canada (Attorney General),* 2017 FCA 109 :

> [40] Unless the legislator provides otherwise, the right to be informed of undisclosed adverse material facts being considered by a decision-maker and to make submissions about them (in some form) is the minimum level of fairness owed to anyone whose rights, privileges or interests are being impacted by a public decision-maker. As noted by the Supreme Court of Canada and this Court, such disclosure and a corresponding opportunity for submissions prevent an impacted individual like Dr. Gladman from being kept in the dark about a process that will ultimately decide for or against his or her interests and ensure that the impacted individual is in a position to meaningfully challenge a decision using the recourse that is available: [citations omitted] …

[54] The high-level question in this case is whether the applicant was sufficiently aware of the employer's factual position on his grievance to be able to participate meaningfully and respond to it with his own evidence and arguments: see *Moodie,* at para 66. The precise issue is whether there were new and material adverse facts in the email exchange that should have been disclosed to the applicant before the Final Level Decision was made. In my view, the applicant has not identified any such undisclosed new and material adverse facts.

[55] First, the context of the present case is a third and final level grievance decision commenced by the applicant following his termination as a probationary employee. The level of procedural fairness is at the low end of the spectrum, but includes some participatory rights such as a right to be heard: *Baouya v Canada (Transportation Accident Investigation and Safety Board),* 2023 FC 90, at para 36; *Kohlenberg*, at para 23; *De Santis*, at para 28, citing *Canada (Attorney General) v Allard,* 2018 FCA 85, at para 41.

[56] In the employment grievance context, the Court has recently held that procedural fairness does not require an employer to disclose emails or a pre-decision memorandum (such as the Grievance Overview); the procedural fairness question relates to whether there are substantive facts in the document that were new or unknown to the grievor: *Burlacu v Canada (Attorney General),* 2022 FC 1179, at paras 16-19; *Burlacu v Canada (Attorney General),* 2022 FC 1112, at paras 40, 43-45; *Burlacu v Canada (Attorney General),* 2021 FC 864, at para 29.

[57] Second, in this case, as in *De Santis*, the applicant commenced the grievance, and therefore he (and his union representative) articulated its factual basis and framed the issues. The applicant was obviously aware of what happened during his employment. He was present for the events that supported his claims and he participated in email and in-person communications with the employer. The applicant made presentations, assisted by a union representative, during consultation meetings at all three levels of the grievance process.

[58] Third, as the respondent observed, some contents of the email exchange reflected information in other documents that the applicant had in his possession before the Final Level Decision on March 2, 2022. The contents of the September 2021 email exchange that concerned additional support offered to (but declined by) the applicant, reflected the contents of the earlier emails to the applicant from the acting Team Leader dated February 26, 2021, and March 22, 2021. As noted already, those emails confirmed the conversations between the applicant and the acting Team Leader after his first two unsuccessful test results.

[59] In addition, prior to the Final Level Decision, the applicant received the first and second level decisions. These two decisions provided him with additional information about the employer's position, to which he had to respond if he were to succeed at the final level grievance.

[60] In the first level decision, ESDC advised that the applicant's "supervisor asked multiple times if [he] required any accommodation or additional supports throughout [his] training, and each time, [the applicant] stated that [he] did not." The first level decision advised that the applicant was encouraged to make use of the Employee Assistance Program. It further explained the pandemic posed many challenges and caused a shift in the way that training and services were being delivered, but that the adaptations did not surmount the reasons why the applicant did not meet performance expectations during his training.

[61] The second level decision agreed with the first. It concluded that the employer ensured the applicant was provided with the necessary resources and support to become a fully trained Payment Services Officer. It also stated that he was offered the opportunity to identify additional supports and explore the duty to accommodate on multiple occasions, which he declined.

[62] Fourth, at the hearing, the applicant advised that he disagreed strongly with the contents of the email exchange, but provided no specifics. He did not identify anything in the email exchange that was new to him. The applicant also did not explain how or why his grievance arguments were affected by any specific facts that were not disclosed, nor how he would have responded differently if he had received the email exchange earlier. The applicant did not point

to evidence before the decision maker (or attempt to introduce new evidence) that contradicted the contents of the email exchange. As Justice Zinn found in *Clarke*, a more specific and detailed response was required from the applicant before I could conclude that there were new and material undisclosed adverse facts in the email exchange that deprived him of procedural fairness: *Clarke*, at para 17. See also *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320, at paras 52-54, 61-64.

[63] Lastly, from my own review of the email exchange, the Grievance Overview and the grievance decisions at all three levels, I do not find any undisclosed information in the email exchange that could have moved the needle materially in the applicant's favour at the final level grievance. As an example, the email exchange did not refer to any possible errors in the applicant's test scores that led to the termination of his employment, or any new evidence to support his claim of bad faith. The email exchange dealt with communications with the applicant himself. As the Final Level Decision advised, the accuracy of his grades was later confirmed.

[64] In all of these legal and factual circumstances, I conclude that the applicant has not demonstrated that there were any undisclosed new and material adverse facts in the email exchange that resulted in procedural unfairness at the final level grievance.

IV. **Conclusion**

[65] For these reasons, the application will be dismissed. The respondent did not request costs.

JUDGMENT IN T-897-22

THIS COURT'S JUDGMENT is that:

1. The application is dismissed, without costs.

"Andrew D. Little"
Judge

FEDERAL COURT

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DOCKET:	T-897-22
STYLE OF CAUSE:	SAMAN ABDI v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING	JANUARY 12, 2023
JUDGMENT AND REASONS:	LITTLE J.
DATED:	MAY 29, 2023

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