

Federal Court



Cour fédérale

**Date: 20230804**

**Docket: T-1513-22**

**Citation: 2023 FC 1076**

**Ottawa, Ontario, August 4, 2023**

**PRESENT: The Honourable Madam Justice Rochester**

**BETWEEN:**

**KEVIN HAYNES**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant, Kevin Haynes, is self-represented. He is a software developer who has been employed with Employment and Social Development Canada [ESDC] since 2008. He is employed as a program analyst in the Innovation and Information Technology Branch.

[2] Mr. Haynes was diagnosed with autism at the age of 3 years old. Initially he did not request accommodation for his disability, however, in 2016 he provided a doctor's note that confirmed his disability and prescribed certain workplace accommodations.

[3] On May 10, 2021, Mr. Haynes presented a formal grievance containing thirteen allegations of workplace harassment and discrimination, and seeking a number of corrective measures, along with compensation [Grievance]. Mr. Haynes states that he commenced the Grievance with the aim of putting a stop to the workplace harassment, discrimination, and violence that he has suffered. The allegations include an ongoing refusal to accommodate Mr. Haynes' disability. Mr. Haynes also stated in his Grievance that he was subject to differential treatment based on the intersectionality of his race and disability. A central theme in Mr. Haynes' Grievance is that he has been denied work that is at or above his level, thus resulting in him being idle rather than remaining busy and challenged at work.

[4] On June 23, 2022, following a final level grievance hearing, the Assistant Deputy Minister, Darlene de Gravina [Decision Marker] rendered her decision allowing the Grievance in part [Decision].

[5] Mr. Haynes seeks judicial review of the Decision on the basis that it is flawed and the Decision Marker failed to render a decision that is transparent, justified and intelligible. The Respondent submits that it was reasonable of the Decision Maker to conclude that she did not have sufficient information to determine Mr. Hayes' allegations of discrimination and

harassment, and her determination that an administrative investigation would be required is clear and coherent.

[6] For the reasons that follow, this application for judicial review is allowed.

## II. Background

[7] In his pleadings and during the hearing, Mr. Haynes highlighted that the present Grievance is not the first complaint that he has lodged with his employer concerning accommodation for his disability, discrimination and harassment. In Mr. Haynes' submission, the present process is the culmination of a problem that ESDC has avoided addressing and resolving for years. Mr. Haynes highlights that a number of the issues raised predate the Grievance by several years.

[8] Mr. Haynes has previously filed four complaints under ESDC's harassment policy, of which two were dismissed and two were allowed in part. A judicial review of the designated official's decision to accept the findings of the four investigation reports was dismissed (2020 FC 536), as was the appeal (2023 FCA 158).

[9] With respect to the present Grievance, filed on May 10, 2021, the parties agreed to have it transmitted directly to the second level decision, thereby avoiding the first level decision. An offer of mediation was made, however, it was declined by Mr. Hayes on the basis that he felt that his superiors had not been honest and transparent with him.

[10] Mr. Haynes had numerous exchanges with the second level decision maker, the Director General of the Innovation Information and Technology Branch, Mr. Nasser Alsukayri, prior to the decision being rendered. In particular, Mr. Alsukayri proposed engaging the Duty to Accommodate Centre of Expertise, to which the Applicant agreed, in order to seek to ensure that Mr. Haynes was fully accommodated.

[11] Following the hearing on June 11, 2021, Mr. Alsukayri also requested additional time until July 30, 2021, to consider the matter, to which Mr. Haynes agreed. On July 30, 2021, Mr. Alsukayri requested an additional extension in order that he may seek further information from Mr. Haynes and conduct a thorough analysis given the nature of the Grievance. On August 2, 2021, Mr. Haynes refused the request and asked for the decision to be rendered the next business day. On August 3, 2021, Mr. Alsukayri denied the Grievance, highlighting that in the absence of clarifications in relation to the allegations, he could not conclude that management failed in its duty to accommodate or breached the ESDC Code of Conduct and/or failed to create and maintain a healthy workplace free from harassment, discrimination, and violence. He equally concluded that Mr. Haynes had not demonstrated that his protected characteristics were a factor in the actions of his supervisors.

[12] In parallel to the continued grievance process, on September 1, 2021, Mr. Haynes and his employer entered into a Duty to Accommodate Agreement, which includes all of the accommodations prescribed in the doctor's note provided by Mr. Haynes.

[13] In September 2021, the Grievance was transferred to the final level decision maker, the Chief Information Officer, Mr. Peter Littlefield. On September 3, 2021, Mr. Littlefield offered that a facilitated discussion with a practitioner from the Office of Informal Conflict Management take place in order for management to listen to the concerns and understand the issues raised in the Grievance. On September 7, 2021, Mr. Haynes declined that offer and requested that the process continue. Consequently, the Grievance hearing was held on September 8, 2021, as scheduled.

[14] Following the hearing, there were efforts to engage in settlement discussions. There were meetings on October 4 and 18, 2021, and a number of exchanges followed in November. On November 25, 2021, Mr. Haynes informed Mr. Littlefield that if a further settlement discussion is not scheduled by the end of the day, then he will no longer attempt settlement discussions and requested a decision on the Grievance within the next four days. On November 29, 2021, Mr. Littlefield responded that he has remained willing to continue discussions, but noted Mr. Haynes' request and confirmed that he would issue a decision by December 1, 2021.

[15] On December 1, 2021, Mr. Littlefield issued the final level decision denying the Grievance and the requested corrective measures. On the issue of discrimination, Mr. Littlefield was of the view that Mr. Haynes did not provide sufficient information to demonstrate that his protected characteristics were a factor in the decisions relating to performance management and assigning meaningful work. On harassment, Mr. Littlefield was of the view that some of the information provided meets the *prima facie* definition of harassment, and stated that he was currently exploring options available to him in order to determine whether harassment in fact

occurred. He concluded, however, that without validation of Mr. Haynes' allegations, he could not conclude that Mr. Haynes was harassed.

[16] Mr. Haynes sought judicial review of Mr. Littlefield's final level decision on January 4, 2022. Mr. Haynes raised a number of grounds including failing to consider all the issues and the evidence presented, along with failing to address all the allegations. The Respondent requested that the application for judicial review be granted and be remitted for redetermination. On February 15, 2022, the Court set aside Mr. Littlefield's decision and remitted the matter for redetermination (Judgment of Justice Simon Fothergill dated February 15, 2022, in T-13-22). Pursuant to the Judgment, Mr. Haynes was provided with a further opportunity to present evidence and make submissions prior to any redetermination. No costs were awarded. Mr. Haynes appealed on the issue of costs, which remains pending.

[17] For the redetermination, the matter was assigned to the Decision Marker, Ms. de Gravina. During the period between March and May 2022, Mr. Haynes had a number of exchanges with a senior human resources advisor relating to accommodations for the hearing, additional documents for the Decision Marker, extending the hearing time and the pre-hearing document review period. In parallel, in April 2022, Mr. Haynes amended his Grievance to include additional heads of damages, namely general, special, moral, punitive, aggravated, pecuniary, and non-pecuniary damages, along with damages for defamation, infliction of mental distress, and pain and suffering.

[18] On June 3, 2022, the Grievance hearing was held. On June 10, 2022, the Decision Maker wrote to Mr. Haynes stating that in light of the arguments presented at the hearing, she felt that there are sufficient concerns to support looking into the allegations in a more thorough manner and proposed that an external firm be mandated to conduct a preliminary review of the allegations. The Decision Maker acknowledged that Mr. Haynes expressed during the hearing that he felt there had been undue delays and that in the past he has not wished to put the Grievance in abeyance while an investigation is conducted. The Decision Maker noted that it was her first contact with the file and as such wished to present two options:

**Option 1** To provide a final level grievance response within the timelines established by the grievance procedure (i.e. by July 4, 2022). The grievance response and corrective measures would be based on the information currently available to me. Despite the aforementioned, I am unable to appropriately respond to the allegations of harassment and whether you have or have not been provided with a workplace free of harassment as your allegations have not been fully assessed/investigated.

**Option 2** A mutual agreement to place the grievance in abeyance pending the results of the investigation. Upon completion of the investigation process, a grievance response would be prepared within which corrective measures could be considered.

[19] On June 14, 2022, Mr. Hayes replied and requested that the decision be issued within the timelines established by the grievance procedure. Mr. Haynes also conveyed that if the Decision Maker is unable/unwilling to respond to the allegations in his Grievance then she is unable/unwilling to conduct a redetermination despite the Respondent agreeing to do one in the context of his application for judicial review.

[20] On June 15, 2022, the Decision Maker responded as follows:

In response to your message below, I would like to clarify that while I remain unable to arrive at a finding of harassment, discrimination and/or violence without an investigation into the allegations you have raised, it is incorrect to assume that I am unwilling to do so. Indeed, as I have outlined in my communication below, I am committed to mandating an external firm to review the incidents you have brought forward in order to determine if there is founded discrimination, harassment and/or violence.

[21] She notes that Mr. Hayes has declined to place the Grievance in abeyance pending an investigation and states that she will respect his decision and commit to rendering a decision within twenty business days.

[22] On June 23, 2022, the Decision Maker rendered the Decision, allowing the Grievance and corrective actions in part. The Decision Maker recognized that “management was unable to provide [Mr. Haynes] with a performance rating at the end of 2020-2021,” but noted that a talent management plan has been established for 2021-2022 and she “trust[s] that moving forward, the responsibilities expected of managers, as outlined in the Directive on Performance Management, will be respected.”

[23] As to allegations 1 through 7, which the Decision Maker grouped under the heading performance management and discrimination (on the basis of disability and race), she accepted that Mr. Haynes experienced adverse impacts in that he was not provided with the full standards when it comes to assignment of duties and performance management. She found, however, that she was unable to determine whether Mr. Haynes’ disability or race was a factor with respect to performance management and as such “made the decision to mandate an external firm to review the incidents [Mr. Haynes] has brought forward and conduct an administrative investigation into



the matter.” She further states that Mr. Haynes was offered an abeyance pending a completion of the investigation but declined it and as such the Decision was issued.

[24] As to allegations 8 through 12, which the Decision Maker grouped under the heading harassment, the Decision Maker stated that based on the evidence presented, she was unable to conclude that harassment occurred. She noted that she remained concerned with the incidents brought to her attention and will therefore include them in the mandate to the investigator.

[25] Finally, as to allegation 13 with respect to workplace accommodations, the Decision Maker noted Mr. Haynes’ allegation that he was not fully accommodated, despite the Duty to Accommodate Agreement. She stated that she was therefore prepared to work with his management team to ensure the most recent information on Mr. Haynes’ functional limitation is obtained and that it is properly reflected in an updated agreement once he is fit to return to the workplace. Mr. Haynes was not at work at the time of the Decision, having gone on medical leave in November 2021.

[26] On July 22, 2022, Mr. Haynes commenced the present application for judicial review of the Decision, seeking to have the Decision quashed along with an order that a third-party investigation be ordered with certain criteria, that the corrective measures be granted, that the Respondent cease harassing, discriminating and abusing Mr. Haynes, and costs.

[27] On January 30, 2023, the week prior to the hearing of this matter, I convened a pre-hearing conference given the nature of the allegations and Mr. Haynes’ disability. I canvassed

with Mr. Haynes and the Respondent the issue of any accommodations that Mr. Haynes may need on the day of the hearing. I granted Mr. Haynes' request for his mother, Dr. Haynes, to sit with him at the counsel table during the hearing. I went over the various possibilities for breaks and time management during the daylong hearing so that Mr. Haynes would have an understanding of how the day would unfold and be aware that there is flexibility in terms of the timing and length of breaks. Counsel for the Respondent and Mr. Haynes agreed to continue the discussion on time allocation and planning during the week leading up to the hearing. At the request of the Court, counsel for the Respondent and Mr. Haynes also agreed to discuss the issue of costs in order to assess whether there was any scope for an agreement on costs prior to the hearing.

[28] On February 7, 2023, the daylong hearing took place. Dr. Haynes was permitted to sit with and assist Mr. Haynes at the counsel table during the hearing. Breaks were offered and taken when required. I thank the parties for their cooperation and their efforts to ensure that the hearing proceeded in a smooth and orderly fashion.

### III. Issue and Standard of Review

[29] While a number of issues were raised, the determinative issue in my view is whether the Decision is reasonable.

[30] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law that constrain the decision maker

(*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [Vavilov]).

[31] It is Mr. Haynes who bears the onus of demonstrating that the Decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court that “there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency”, and that such alleged shortcomings or flaws “must be more than merely superficial or peripheral to the merits of the decision” (*Vavilov* at para 100).

[32] 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. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125; *Clark v Air Line Pilots Association*, 2022 FCA 217 at para 9).

#### IV. Analysis

[33] Mr. Haynes submits that the Decision fails to satisfy the standard of reasonableness because, among other things, the Decision Maker did not provide any justifications, reasoning or logic for the allegations that she denied and/or rejected. Mr. Haynes argues that the Decision is unintelligible, as all the allegations were not addressed and one cannot ascertain which of the 13 allegations were granted and which were not.

[34] Mr. Haynes emphasizes that he does not know the reasons for the Decision Maker's findings on the allegations, and that she was wrong to bundle the allegations into two groups, namely Performance Management and Discrimination (allegations 1 through 7) and Harassment (allegations 8 through 12). Allegation 13 was treated as a standalone issue. This bundling, in Mr. Haynes' view, was a mischaracterization of a number of the allegations and leads to further confusion in terms of understanding the reasons for the Decision.

[35] During the hearing, Mr. Haynes went through each of the 13 allegations and his requested corrective measures in light of the Decision and presented his analysis of whether each item was "outlined, analyzed, allowed, denied, justified" by the Decision Maker. In Mr. Haynes' submission, the overwhelming majority of the allegations were not analyzed and justified. Mr. Haynes pleads that given that he refused the Decision Maker's offer of an investigation, she had an obligation to render a decision containing reasons and justifications for her findings. It was not open to her, in Mr. Haynes' view, to avoid addressing his arguments and opt for an investigation. Mr. Haynes' submits that the Decision Maker had sufficient information to rule on these issues and ought to have done so.

[36] The Respondent submits that, given the context and the evidentiary record, it was reasonable of the Decision Maker to conclude that there was insufficient information to determine Mr. Haynes' allegations of discrimination and harassment and thus commit to mandating an external firm to conduct an administrative investigation. The Respondent highlights that the evidence submitted to the Decision Maker by Mr. Haynes includes a list of the

names of employees and the dates of the incidents, but no details of the incidents themselves or further information as to what actually occurred.

[37] The Respondent further highlights that the Grievance lists the extracts of the policies, codes, and legislation that Mr. Haynes alleged were breached but provides no specific examples or incidents. The Respondent relies on the summary of the Grievance hearing where Ms. Brindamour, a Senior Human Resources Advisor, requested further information about the incidents. Mr. Haynes indicates that he had provided a spreadsheet with the names of employees but states, “I did not get into specifics because it is a lot and I was told not to because if there was an investigation that is when the specifics would happen.”

[38] As to corrective measures, the Respondent highlights that during the Grievance hearing, Mr. Haynes was asked about corrective measures, what could be done to resolve the situation and what he was seeking to achieve. The Respondent notes that Mr. Haynes responded that it would be hard for him to talk about corrective measures when he does not know what the decision will be yet. He communicated that “there is no point for me to talk about what I would like to see done when we are not at a point to even talk about corrective measures because we have yet to determine if any thing wrong has been done in the first place.” Mr. Haynes further communicated that he “did list the correct measures but at the same time to even discuss something that is premature unless the grievance is granted then we talk about the corrective measures.”

[39] The Respondent submits that the Decision Maker in effect had three options: (i) she could have rejected the allegations as unfounded, as had been as has been the case previously; (ii) she could have granted the Grievance in the absence of substantiated allegations; or (iii) she could seek to acquire further information through a third party investigator. The Respondent argues that option (ii) is not a viable option and thus in opting for an investigation, the Decision Maker was seeking to assist Mr. Haynes. In effect, the Decision is ultimately a positive development for him. In the Respondent's view, the Decision Maker was seeking to assist Mr. Haynes and was committed to getting to the bottom of the allegations contained in the Grievance. The Respondent suggests that Mr. Haynes even tacitly agreed with the Decision Maker that an investigation was appropriate, given Mr. Haynes had requested that a third-party investigation take place as part of his prayer for relief in the present application for judicial review.

[40] It is clear from the Decision that the Decision Maker was concerned with the incidents that were raised and accepted that Mr. Haynes was not provided with the full standards with respect to the assignment of duties and performance management. In light of the foregoing, one can appreciate why the Decision Maker opted to move forward with an investigation rather than render a decision dismissing elements of the Grievance.

[41] The difficulty is that the Decision Maker had informed Mr. Haynes after the hearing, in her email dated June 10, 2022, that she was unable to appropriately respond to the allegations based on the information before her and proposed placing the Grievance in abeyance pending the results of an investigation. Equally, she had offered him the option of providing the final level grievance response within the required timeline. Mr. Haynes was provided with the two options

(quoted in Section II (Background) of this Judgment above) and opted to have the decision issued within the timelines of the grievance procedure rather than proceed with an investigation. Consequently, the Decision Maker responded again highlighting her inability to arrive at a finding of harassment, discrimination and/or violence without an investigation, but confirming that she would respect his decision to have the decision rendered within twenty business days.

[42] I find that the Decision fails to meet the standard of reasonableness as set out in *Vavilov*. Specifically, I find that “there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (*Vavilov* at para 100). The Decision concludes with: “Consequently, your grievance and the corrective actions that you requested are allowed in part to the extent of what is outlined above”. I agree with Mr. Haynes that it is not entirely clear from the Decision which allegations were dismissed or allowed, and which ones the Decision Maker declined to decide on.

[43] Ultimately, the Decision Maker was obliged to render a final level grievance decision on the allegations based on the record before her, as Mr. Haynes had not consented to placing the matter in abeyance in order to allow for an investigation. By seeking to avoid rendering such a decision on a number of the allegations, the Decision Maker ultimately rendered a decision that fails to meet the standard of reasonableness. For this reason, this application for judicial review is allowed.

V. Remedy and Costs

[44] In his amended notice of application for judicial review, Mr. Haynes seeks an order (i) quashing the Decision; (ii) that the Respondent conducts an external third-party investigation on all 13 of the allegations; (iii) that the selected investigator specializes and has expertise in the intersectional areas of disability, mental/psychological abuse/violence/trauma and anti-black racism; (iv) allowing Mr. Haynes to review the credentials of the candidates who are being considered to conduct the investigation; (v) requiring that Mr. Haynes and the Respondent agree to the selection of the investigator; (vi) allowing the investigator to expand the scope of the investigation if there are other violations and/or breaches of policies or legislation uncovered during the investigation; (vii) that the Respondent cease and desist harassing, discriminating and psychologically/mentally abusing Mr. Haynes; (viii) granting all the corrective measures outlined in the updated grievance in April 2022; (ix) that the Respondent cease and desist from engaging in further reprisals or retaliation against Mr. Haynes; (x) costs, disbursements and any other costs the Court deems necessary; and (xi) that the Respondent adhere to this Court's orders without delay.

[45] As to item (viii), the corrective measures outlined in the updated grievance, Mr. Haynes grouped them into two categories, first "injunctions" and second "damages". The items in the first category are:

- To be provided with a harassment-free, non-discriminatory, non-violent, and safe work environment immediately.
- To ensure no further harassment, discrimination and violence occurs in the future.



- To ensure no further reprisals/retaliations will be made against myself.
- The employer ensure that I am provided with a fair, equitable, transparent and achievable performance agreement at the start of the fiscal year.
- The employer to ensure that I be provided with a fair, equitable and achievable SMART performance agreement work objectives/performance indicators.
- The employer ensure that I am provided with a fair, equitable and transparent end of the year performance agreement evaluation at the end of the fiscal year.
- The employer ensure that their management follow all applicable performance management policy guidelines that are applicable to Mr. Kevin Haynes.
- That the employer immediately fully complies with all accommodations outlined in my doctor's notes.
- The employer immediately and fully complies with Mr. Kevin Haynes's workplace accommodation request agreement.
- The employer that there are no more breaches of the ESDC Code of Conduct policy with regards to Mr. Kevin Haynes.
- The employer immediately and fully complies with ESDC Five-Step Duty to Accommodate Policy.

[46] The measures in the second category, "damages", are that ESDC pay general damages, special damages, moral damages, punitive damages, aggravated damages, pecuniary damages, non-pecuniary damages, damages for defamation, damages for intentional and negligent infliction of mental distress, and damages for pain and suffering.

[47] In his memorandum and his oral submissions, Mr. Haynes sought costs on a full indemnity basis on the basis of an allegation that the Respondent has engaged in "reprehensible and outrageous" conduct. Mr. Haynes alleges that the Respondent has consistently avoided

addressing and resolving the situation, adding that this is the second judicial review that he has had to endure and that he should not have to bear the financial cost of access to justice.

[48] With respect to Mr. Haynes' requested relief regarding a third-party investigation and his role in selecting/approving one, he submits that in 2018 the Respondent appointed an investigator in relation to previous complaints but the "investigator conducted a bias[ed] investigation in the Respondent's favour". In this respect, I note that Mr. Haynes had sought judicial review of the designated official's decision to accept the findings of that investigator. The Federal Court dismissed the application for judicial review (2020 FC 536) and the Federal Court of Appeal dismissed the appeal (2023 FCA 158).

[49] The Respondent submits that they are not in bad faith and the record shows that they have repeatedly sought to engage in settlement discussions and twice offered an independent investigation. The Respondent highlights that they consented to a redetermination to avoid a hearing on the first judicial review and have committed to an investigation and further accommodations despite Mr. Haynes not having met his burden in terms of proving his allegations in the Grievance. The Respondent pleads that even though the Decision Maker did not have enough information and evidence to conclude that discrimination and harassment had occurred, she acted out of concern and was committed to finding out more through an investigation.

[50] The Respondent submits that if Mr. Haynes is successful, the appropriate recourse is to remit the matter back for redetermination. A directed result, in the Respondent's view, is an

exceptional remedy that is used where a particular outcome is inevitable – which is not the case for the remedies requested by Mr. Haynes.

[51] As to full-indemnity costs, the Respondent highlights that Mr. Haynes has not submitted any evidence in support of his claim for costs. The Respondent pleads that self-represented litigants are not entitled to costs, other than a moderate allowance if they can demonstrate there was an opportunity cost by foregoing remunerative activity.

[52] I am mindful that remitting the matter back for redetermination will result in a third final-level response to the present Grievance. I am cognizant of the frustration expressed by Mr. Haynes at the time this matter has taken since he first filed his Grievance and I am sensitive to his descriptions of the impact of this on his well-being.

[53] This is not an appropriate case, however, for this Court to require a specific result from the administrative decision maker. The Supreme Court of Canada in *Vavilov* stated that, as a general rule, the courts should respect the legislature’s intention to entrust the matter to the administrative decision maker, however, there are scenarios where declining to remit the matter would serve no useful purpose as a particular outcome is inevitable (at para 142). Directing a particular result is an exceptional power should only be exercised in the clearest of cases, which will rarely be the case where the issue in dispute is essentially factual in nature (*Burlacu v Canada (Attorney General)*, 2022 FC 1467 at para 40; *Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at para 14).

[54] The Federal Court of Appeal has instructed that a court may require a specific verdict of an administrative organization to which a file is being returned, but this power must only be used in the most clear-cut cases, such as when there is only one possible outcome (*Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48 at para 17 [*Yansane*]). Once the assessment of evidence may affect the outcome, it is better to let the administrative decision-maker render a decision, even though the decision may need to be reviewed for reasonableness again (*ibid*). The Federal Court of Appeal in *Yansane* cautions against issuing directions and instructions to the administrative decision maker when allowing an application for judicial review:

[18] In my view, the same caution is warranted for the directions and instructions that this Court may issue when it allows an application for judicial review. We must never lose sight of the fact that such directions or instructions depart from the logic of a judicial review, and that their abusive or unjustified use would go against Parliament's desire to give specialized administrative organizations the responsibility for ruling on questions that often require expertise that common law panels are lacking. This is especially the case for eligibility and weighing of evidence, which are central to the mandate of administrative decision-makers.

[55] Consequently, and given that the present matter does turn on the administrative decision maker's assessment of the evidence supporting Mr. Haynes' 13 allegations, it is not, in my view, appropriate for me to issue an order granting the corrective measures identified above that Mr. Haynes sought in his Grievance. In other words, this is not a clear-cut case where a particular outcome is inevitable.

[56] Nor it is appropriate for me to order the remainder of the relief sought, aside from a redetermination, in light of the instructions from the Federal Court of Appeal. Questions in

relation to the possibility of an external third-party investigation and the next steps for a redetermination shall be left to the specialized administrative organization, namely the grievance process at the ESDC.

[57] I do, however, consider it appropriate, given the context of the present matter, to make a comment in *obiter* as to the redetermination. Among the list of accommodations contained in the note of Dr. Lotwin dated December 1, 2016, is that certain decisions (i.e., why no work is being assigned) should be clearly explained to Mr. Haynes by email. Extrapolating that to the redetermination, and being conscious of the arguments raised by Mr. Haynes in the present application, it would be beneficial if any resulting decision itemizes each of the 13 allegations and clearly explains why each one is being allowed or dismissed in light of the record.

[58] As to the issue of costs, I agree with the Respondent that Mr. Haynes is not entitled to full-indemnity costs. While I have sympathy for Mr. Haynes' frustration in the face of a second application for judicial review, and the associated time and the toll on his mental health, upon a review of the record, I have not been convinced that the Respondent displayed blameworthy and malicious pre-litigation conduct.

[59] As to costs generally, self-represented litigants may be awarded a moderate allowance above the costs of their direct disbursements to reflect the time and effort they devoted to preparing and presenting their case, and insofar as they forewent other remunerative activities (*Sherman v Canada (Minister of National Revenue)*, 2003 FCA 202 at paras 47-52; *Yu v Canada (Attorney General)*, 2011 FCA 42 at para 37 [Yu]). Where a self-represented litigant has incurred

an opportunity cost by foregoing remunerative activities it justifies a moderate allowance, although such costs should not exceed those which would otherwise have been eligible for counsel under the applicable Tariff, had they been appointed (*Yu* at 37; *Air Canada v Thibodeau*, 2007 FCA 115 at para 24).

[60] Mr. Haynes has not submitted any evidence that of a lost opportunity cost in the sense that he was obliged to forego remunerative activity in order to prepare and present his case. Instead, Mr. Haynes submits that the ESDC's failure to accommodate him played a major role in him having to go on sick leave. Mr. Haynes' opportunity cost, in his view, is that he should have been spending the time healing rather than having to work on and present his application for judicial review.

[61] While I have no doubt that Mr. Haynes found working on the present application challenging and I commend him for his preparation and presentation of his case, I am bound by the Federal Court of Appeal's decision in *Yu* to award such compensation only insofar as Mr. Haynes has incurred an opportunity cost by foregoing remunerative activity (*Yu* at para 37-38). Mr. Haynes is entitled, however, to his disbursements before this Court, payable by the Respondent.

## VI. Conclusion

[62] For the foregoing reasons, Mr. Haynes' application for judicial review is allowed. The Decision dated June 23, 2022, is hereby set aside, with disbursements awarded to Mr. Haynes.

[63] As detailed above, in her Decision, the Decision Maker committed to mandating an external firm to review the incidents raised by Mr. Haynes in his Grievance. To the extent that an investigation is in fact in progress or is intended to commence, these reasons shall have no effect vis-à-vis such investigation, and nothing herein shall be construed as interrupting, cancelling or negating such investigation.

**JUDGMENT in T-1513-22**

**THIS COURT’S JUDGMENT is that:**

1. The Applicant’s application for judicial review is allowed;
2. The final level grievance decision issued by Employment and Social Development Canada’s Assistant Deputy Minister dated June 23, 2022, is set aside;
3. The matter is remitted to a different final level decision maker for redetermination in accordance with these reasons;
4. The Applicant shall be provided with an opportunity to present further evidence, should he wish, and make submissions prior to any redetermination; and
5. The Respondent will reimburse the Applicant for his disbursements in this Court.

“Vanessa Rochester”

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1513-22

**STYLE OF CAUSE:** KEVIN HAYNES v THE ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** FEBRUARY 7, 2023

**JUDGMENT AND REASONS:** ROCHESTER J.

**DATED:** AUGUST 4, 2023

**APPEARANCES:**

Kevin Haynes

FOR THE APPLICANT  
(SELF-REPRESENTED)

Chris Hutchison  
Peter Doherty

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Attorney General of Canada  
Ottawa, Ontario

FOR THE RESPONDENT