Federal Court Cour fédérale

Date: 20241011

Docket: T-307-24

Citation: 2024 FC 1626

Ottawa, Ontario, October, 11, 2024

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

D.A. and L.M.

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants DA and LM are employed by the Canada Revenue Agency [CRA] in Charlottetown, Prince Edward Island. At the relevant time, they served as employee representatives on the CRA's regional Occupational Health and Safety [OHS] Committee. They were also members of the executive of the Union for Taxation Employees [UTE], Local 90002.

[2] The Applicants seek judicial review of the CRA's decision [Decision] to accept the findings and recommendations contained in two investigation reports prepared in accordance with the *Work Place Harassment and Violence Prevention Regulations*, SOR/2020-130 [*WPHVP Regulations*], enacted under Part II of the *Canada Labour Code*, RSC 1985, c L-2. The reports concluded that a harassment complaint [Harassment Complaint] made against the Applicants by another member of the OHS Committee was well-founded.

[3] On July 24, 2024, Associate Judge Sylvie Molgat granted the Applicants' motion for an Order maintaining the confidentiality of the names of the parties to the Harassment Complaint and those who participated in the investigation, and any information that would tend to identify them. Associate Judge Molgat directed that these individuals be referred to by their initials.

[4] The Harassment Complaint arose from a letter dated January 11, 2023 [January Letter] written by the Applicants and addressed to the UTE Regional Vice President, who was also a member of the CRA's National Health and Safety Policy Committee. The January Letter was six pages long, and expressed numerous concerns about the dysfunction of the regional OHS Committee. The Applicants attributed this dysfunction to the behaviour of another member of the OHS Committee [Complainant].

[5] For the reasons that follow, the investigation of the Harassment Complaint was procedurally fair, and the CRA's Decision was reasonable. The application for judicial review is dismissed.

II. Background

A. *The January Letter*

[6] In the January Letter, the Applicants asserted that the Complainant:

(a) "maintained a lingering and unprofessional animosity and adversarial disposition";

(b) "maintained a vexatious and toxic hostility";

(c) "made clear that he held a grudge";

(d) "is openly biased and hostile";

(e) "stands as an impassable barrier toward the harmonious operation of the OHS Committee";

(f) is viewed by the employees as a "pure partisan";

(g) is viewed by employees as having his own agenda "which runs contrary to the harmonious operation of the OHS Committee";

(h) deleted a hazardous T4009 incident report [T4009 Report] without due process and proper investigation; and

(i) plays an “antagonistic role” leading to conflict in the workplace, and is therefore a “toxic actor” in the eyes of employees.

[7] On January 13, 2023, a Labour Relations Officer of the UTE forwarded the January Letter by e-mail to the Assistant Director of the CRA’s National OHS program, indicating that he wished to discuss it. The content of the January Letter was then shared with the Assistant Director of the Workplace Health and Safety Operations Section. The January Letter was provided to the Complainant on February 15, 2023.

[8] The Complainant submitted the Harassment Complaint on March 17, 2023. He identified four potential witnesses with knowledge of the circumstances, including his supervisor, NP.

[9] On August 3, 2023, the CRA notified the Applicants that they were the responding parties to the Harassment Complaint. The CRA asked the Applicants to identify any potential witnesses, and advised them that the Complainant had named NP as a witness. On August 9, 2023, the Applicants identified each other and four senior UTE representatives as potential witnesses.

[10] On October 31, 2023, the CRA informed the Applicants that Jeanette Bicknell [Investigator] had been appointed to investigate the Harassment Complaint pursuant to the *WPVHP Regulations*.

B. *The Investigation*

[11] The Investigator interviewed the Complainant on November 22, 2023. The Complainant denied the allegations made in the January Letter. In particular, he maintained that the T4009 Report had not been deleted.

[12] The Investigator interviewed LM on November 29, 2023. The Investigator asked LM about the basis for her belief that the Complainant had deleted the T4009 Report. LM said she had learned this from a co-worker, PA, who had previously acted as the employer co-chair of the regional OHS Committee. She said the remaining allegations were based on what she had been told by DA and her own observations regarding the Complainant's demeanour.

[13] The Investigator interviewed the Complainant's supervisor, NP, on December 8, 2024. NP stated that she had conducted her own investigation into the allegation that the Complainant had deleted the T4009 Report. She confirmed that the T4009 Report had not been deleted. The Investigator's notes of her interview of NP include the following:

> **[The Complainant] is alleged to have removed a T4009 from the system. He denies this. Can you speak to this?**
>
> The T4009 was not deleted but edited. She's not sure who edited it. It may have been edited to remove confidential information.
>
> She had to do her own investigation, as [the Complainant] reported to her.
>
> T4009 – part of reporting system for hazards and injury in the workplace. It is an old system and is no longer used. This was in approx 2019 or so

> What happened with the T4009: An employee filed a T4009 related to extreme cold temperature. The union rep/employee co-chair said that the T4009 was deleted by the [Complainant] without an investigation.
>
> [The Complainant] is alleged to have said that he deleted it b/c the employee filed another process (a grievance).
>
> She asked [the Complainant] to explain what happened, as she could not recall the T4009 coming up in the system. It would have been about 5 years ago.
>
> [The Complainant] told her that the T4009 had not been deleted, and a request to delete it had not been made.
>
> Rather, the employee co-chair edited the T4009 to say that the incident resulted in a work refusal. But a T4009 was not the proper method to report a work refusal.
>
> The person who filed the T4009 and the employee co-chair did not use the proper method.

[14] DA asked that he be permitted to provide his responses to the Investigator’s questions in writing. He did so on December 20, 2023. He identified PA as the source of the allegation that the Complainant had deleted the T4009 Report. DA said he had also spoken with BA, the employee who filed the report, who confirmed that nothing had ever come of it.

[15] The Applicants mentioned PA and BA in their respective interviews, but did not name them as potential witnesses. When the Applicants were asked at the conclusion of their interviews if additional people should be contacted, they both said no. It is undisputed that the Investigator never spoke to PA or BA about the allegation respecting the T4009 Report.

[16] The Investigator delivered her reports, one in respect of each of the Applicants, on January 10, 2024. The reports were substantially the same. The Investigator found that the

contents of the January Letter met the definition of harassment, and made recommendations to prevent occurrences of harassment in the future. The CRA confirmed its acceptance of the Investigator's findings and recommendations by letter dated January 17, 2024.

C. *The Decision under Review*

[17] Subsection 122(1) of the *Canada Labour Code* provides as follows:

harassment and violence means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment;	***harcèlement et violence*** Tout acte, comportement ou propos, notamment de nature sexuelle, qui pourrait vraisemblablement offenser ou humilier un employé ou lui causer toute autre blessure ou maladie, physique ou psychologique, y compris tout acte, comportement ou propos réglementaire.

[18] The Investigator found that "many of the allegations in the [January Letter] are vague and refer to character dispositions (such as 'toxic' and 'biased') rather than to concrete actions."

[19] The Investigator made the following additional findings in the two investigation reports:

> When I asked the Responding Party the basis for these different allegations, they referred to the Principal Party's "negative tone;" to the fact that Principal Party "disagreed" with them and the other members of the workplace committee; and to second-hand information relayed by others. I have not been asked to make a finding of fact regarding these allegations. My interview with the Responding Party did not provide evidence of the nature that would support them.

> The most serious allegation is that the Principal Party removed a workplace report from the system. There is no evidence to support this allegation.
>
> […]
>
> There is no question that the Responding Party's beliefs were sincere and genuinely held. However, that alone does not make them appropriate for inclusion in a formal written workplace communication.

III. Issues

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

A. Was the investigation of the Harassment Complaint procedurally fair?

B. Was the CRA's Decision reasonable?

IV. Standard of Review

[21] The CRA's Decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10). The Court will intervene only where "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).

[22] The criteria of "justification, intelligibility and transparency" are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[23] Procedural fairness is subject to a reviewing exercise best reflected in the correctness standard, although strictly speaking no standard of review is being applied (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). The ultimate question is whether an applicant had a full and fair chance to be heard (*Siffort v Canada (Citizenship and Immigration)*, 2020 FC 351 at para 18).

[24] In the context of workplace harassment and violence investigations, the serious consequences for all parties involved attract a high level of procedural fairness (*Marentette v Canada (Attorney General)*, 2024 FC 676 [*Marentette*] at paras 40-44).

V. Analysis

A. *Was the investigation of the Harassment Complaint procedurally fair?*

[25] The Applicants' Notice of Application lists the following procedural fairness grounds for the application:

> (f) The investigator failed to interview two key witnesses whose names were provided by the Applicants and who had information about [the Complainant] removing a workplace report from the system;

(g) By failing to interview key witnesses, the investigator denied the Applicants' their rights to procedural fairness and natural justice;

[26] The Applicants did not identify PA or BA as necessary witnesses in their initial responses to the Harassment Complaint, nor at the conclusion of their interviews. However, the Applicants did mention them in the course of their interviews.

[27] An investigation will not be procedurally unfair due to a lack of thoroughness merely because the investigator did not interview every witness proposed by a party. The ultimate determination of whom to interview is a matter for the investigator, not the complainant. The investigator is entitled to control the investigation process, subject only to the requirement of fairness (*Andruszkiewicz v Canada (Attorney General)*, 2023 FC 528 [*Andruszkiewicz*] at paras 97-98, aff'd, 2024 FCA 105).

[28] In conducting judicial review, the Court will consider what information the prospective witness may have provided to the investigator (*Andruszkiewicz* at para 97). PA was a former employer co-chair on the OHS Committee, and BA was the person who submitted the T4009 Report. The Investigator's notes of her interview with NP, the Complainant's supervisor, indicated that and BA had used the wrong process to register a work refusal. Importantly, NP confirmed that the T4009 Report was not in fact deleted.

[29] It was open to the Investigator to base her conclusions respecting the allegation that the Complainant had deleted the T4009 Report on her interview with the Complainant's supervisor.

NP had personal knowledge of the circumstances, and it is doubtful that PA or BA could have provided additional information that would have altered the Investigator's findings.

[30] The deletion of the T4009 Report was the "most serious" allegation made by the Applicants against the Complainant, but there were many others. For the most part, these consisted of negative comments regarding the character and demeanour of the Complainant, whom the Applicants described as unprofessional, adversarial, vexatious, toxic, biased, partisan, and antagonistic. The Investigator was concerned with the propriety of these descriptions in a workplace communication, and whether they rose to the level of harassment. PA and BA could not have provided relevant evidence regarding these questions.

[31] The Investigator's failure to interview PA and BA did not render the investigation of the Harrassment Complaint procedurally unfair.

[32] In their Memorandum of Fact and Law, the Applicants advance an additional complaint regarding the procedure adopted by the Investigator. They say they were not given an opportunity to rebut evidence that arose during the investigation process, nor an opportunity to see the preliminary reports. The Applicants rely on Justice Henry Brown's decision in *Marentette* (at para 52, citing Justice Luc Martineau's decision in *Provonost v Canada (Revenue Agency)*, 2017 FC 1077 at para 15):

> Procedural fairness was breached. It was impossible for the applicant to anticipate the testimony of the executives and/or employees interviewed after the meeting on July 6, 2016. <u>The investigator should have given her a reasonable opportunity to rebut any unfavourable evidence that was gathered in her absence and to respond to any of the managers' allegations that their</u>

> behaviour in the work place did not constitute violence or harassment. Even though the investigator had to act quickly, and his investigation had to be confidential, he had to ensure that every person who could be affected by the findings in his report was heard and was able to make submissions to him. [Emphasis original.]

[33] This ground for judicial review was not included in the Applicants' Notice of Application. The only grounds advanced that relate to procedural fairness concern the Investigator's failure to interview PA and BA.

[34] Applicants must set out in their notices of application the grounds on which they rely, and cannot present new grounds in their memoranda of fact and law, even if the respondent has not been prejudiced (*Federal Courts Rules*, SOR/98-106, s 301(e); *Tl'azt'en Nation v Sam*, 2013 FC 226 [*Tl'azt'en Nation*] at para 6). While Justice James O'Reilly held in *Tl'azt'en Nation* that there may be some room for discretion in permitting grounds not included in the notice of application to be advanced (at para 7), this discretion is exercised only rarely.

[35] In *Canada (Attorney General) v Iris Technologies Inc*, 2021 FCA 244, the Federal Court of Appeal (*per* Laskin JA) reinforced that the requirements of Rule 301 are not merely technical; they ensure among other things that respondents have adequate notice of the case being brought against them so that they can meaningfully respond. If an applicant finds its initial description of the grounds and relief claimed in the notice of application too narrow, it may move for leave to amend under Rule 75 (at para 41, citing *SC Prodal 94 SRL v Spirits International BV*, 2009 FCA 88 and *Astrazeneca AB v Apotex Inc*, 2006 FC 7, aff'd, 2007 FCA 327). The Court of Appeal continued (at para 42):

> It has been stated in decisions of the Federal Court that "there is some room for discretion [in applying the requirements of rule 301] where, for example, relevant matters have arisen after the notice was filed; the new issues have some merit, are related to those set out in the notice, and are supported by the evidentiary record; the respondent would not be prejudiced, and no undue delay would result": see, for instance, *Tl 'azt'en Nation v. Sam*, 2013 FC 226 at paras. 6-7. But this Court has resisted expanding the availability of an exception beyond cases in which the notice of application contains a "basket clause," and the applicant seeks declaratory relief that is necessarily ancillary to the relief expressly requested: *SC Prodal* at paras. 11-12.

[36] The Applicants' Notice of Application contains a "basket clause" in the enumerated grounds for the application: "Such further and other grounds as counsel may advise and this Honourable Court may permit". However, the Applicants do not seek, by means of the new procedural fairness argument, declaratory relief that is necessarily incidental to the relief expressly requested. The two procedural fairness arguments are distinct. One concerns the Investigator's failure to interview key witnesses mentioned in the course of the Applicants' interviews, although not explicitly identified by them as potential witnesses. The other concerns the denial of a reasonable opportunity to rebut evidence that arose during the investigation process and to see the preliminary reports.

[37] The Applicants acknowledge that this Court's decision in *Marentette* was not a relevant matter that arose after the Notice of Application was filed. The decision merely applied existing law to the facts of that case.

[38] Furthermore, it is unclear how the Applicants might have rebutted the evidence that arose during the investigation process. The evidence consisted primarily of the January Letter they had

themselves written. The Applicants had a full and fair opportunity to explain the basis for their numerous allegations against the Complainant, and the Investigator nevertheless found the most serious allegation to be unsubstantiated. The remaining allegations in the January Letter consisted primarily of negative portrayals of the Complainant's character and demeanour.

[39] The investigation of the Harassment Complaint was procedurally fair.

B. *Was the CRA's Decision reasonable?*

[40] When a decision maker adopts an investigator's recommendations and provides no reasons or only brief reasons, courts have treated the investigator's report as constituting the decision maker's reasoning (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37). The parties agree that the Investigator's reports form a part of the decision under review.

[41] The Applicants say that the Investigator failed to consider the protected nature of the Applicants' speech in the January Letter. The Applicants maintain that they communicated their criticisms of the Complainant in their capacities as UTE representatives to the UTE Senior Vice President, and that the content of the January Letter was subject to labour relations privilege or qualified privilege.

[42] The Respondent replies that this argument was not advanced before the Investigator, and conducting a legal analysis of questions of legal privilege was beyond the scope of her mandate. Qualified privilege arises only in the context of defamation, and is not applicable here.

[43] A court has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so. Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal. Raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-26).

[44] The question of whether the January Letter was subject to labour relations privilege or qualified privilege is not properly before this Court. Furthermore, I am not persuaded that either privilege applies in the circumstances.

[45] Labour relations privilege must be established on a case-by-case basis applying the four *Wigmore* factors: (1) the communication must originate in a confidence that it will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation (*Zhang v Treasury Board (Privy Council Office)*, 2010 PSLRB 46 at paras 36-39). The burden of proving that the privilege applies falls upon the party asserting the privilege (*R v National Post*, 2010 SCC 16 at paras 56-60).

[46] The Applicants said nothing to the Investigator about the application of the *Wigmore* factors. Nor have they addressed them before this Court.

[47] While the January Letter was directed to the attention of the UTE Regional Vice President, it is unclear whether it was intended to be received by him in this capacity. The January Letter was titled “Request from the Employee Co-Chair of Occupational Health and Safety and the Employee Alternate Co-Chair for intervention and assistance from the Health & Safety Policy Committee of CRA regarding dysfunctional OHS Committee”. The January Letter began with the following:

> We are compelled to convey matters of concern to the OHS Policy Committee of the Canada Revenue Agency (CRA). We are requesting your assistance in referring the below concerns to said Policy Committee via the employee representative […].

[48] The Investigator said the following about whether the January Letter was a confidential communication:

> The letter was intended for consideration by a national body and so was not confidential. As far as I have been able to determine, the letter was not marked “Confidential.” The allegations were serious enough that the Responding Party should have realized that they would have to be investigated by the Principal Party’s supervisor.

[49] There was nothing in the January Letter to indicate it was intended as an internal union communication. To the extent that labour relations privilege ever attached to the January Letter, it was waived when the UTE Labour Relations Officer disclosed it without conditions to the Assistant Director of the CRA’s national OHS program.

[50] Qualified privilege is an aspect of defamation law and has no application here. Even if the underlying principle could afford the Applicants some latitude in the way they expressed their concerns about the Complainant's conduct, it is doubtful this would extend to their broad and personal attacks on his character (see *Bent v Platnick,* 2020 SCC 23 [at para 129).

[51] There is no basis for the Applicants' assertion that the CRA's Decision undermines the purpose and objectives of Part II of the *Canada Labour Code* by discouraging employees from raising concerns about workplace health and safety matters. The *Canada Labour Code* seeks to ensure workplace health and safety, and also confers upon employees the right to complain of workplace harassment and violence. The two objectives can and must coexist. As the Investigator observed:

> A different letter, with no unsubstantiated allegations and clear, detailed statements of fact about the actions taken by the Principal Party, would not have met the definition of harassment and violence in the workplace.

[52] The CRA's Decision was reasonable.

VI. Conclusion

[53] The application for judicial review is dismissed. By agreement of the parties, no costs are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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