

Federal Court



Cour fédérale

Date: 20130509

Docket: T-996-12

Citation: 2013 FC 489

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, May 9, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

CHRISTINE GIRARD

Applicant

and

**THE DEPARTMENT OF HUMAN
RESOURCES AND SKILLS DEVELOPMENT
CANADA (HUMAN RESOURCES BRANCH)**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Christine Girard (the applicant) asked her employer for a leave of absence without pay for one year, but her employer refused her request. The applicant filed a grievance against this decision, which grievance was dismissed. She also filed a harassment complaint.

[2] The facts alleged in the harassment complaint were found not to meet the definition of harassment set out in the *Policy on the Prevention and Resolution of Harassment in the*

Workplace (the Policy) in force at that time. The applicant filed a grievance against this decision, and this grievance, too, was dismissed at the second level of the grievance process on April 20, 2012.

[3] The applicant is now applying for judicial review of this decision under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[4] For the reasons that follow, I find that this application should be dismissed.

I. Facts

[5] At the relevant time, the applicant was employed by the Department of Human Resources and Skills Development Canada (HRSDC). She performed the duties of a labour relations manager at the PE-05 level until October 25, 2010, when she was appointed to a position at a higher group and level (EX-01) on an acting basis. The applicant was notified on August 29, 2011, that she would have to return to her substantive position because of operational requirements.

[6] In the meantime, on August 26, 2011, the applicant had been interviewed for a position in the Labour Relations Branch. The applicant alleges that when she was asked about the biggest ethical dilemma she had ever had to deal with in the workplace, she told Sylvain Dufour, who was presiding over the interview, that her example was a bit sensitive, given her duties, and she asked for his assurance that her answer would not be repeated outside the context of the interview. Mr. Dufour apparently assured her that such would be the case, and the applicant then

told the committee about her example, which concerned a situation involving one of the respondent's assistant deputy ministers. The applicant states that while she was telling the committee about her example, Mr. Dufour suddenly stopped her, told her very firmly that he did not want to hear any more about it and ordered her to think carefully about the people sitting around the table when she chose an example of an ethical dilemma.

[7] On September 20, 2011, the applicant notified her employer that she had applied for an assistant director general's position with the city of Lévis and that she had been offered the job. She therefore requested a one-year leave of absence without pay from her position in the federal public service. The request was denied on September 26, 2011, because of operational requirements. Unhappy with this decision to deny her leave without pay, the applicant filed a grievance on October 23, 2011. This grievance, which was dismissed at the final level of the grievance process on April 20, 2012, is not at issue in the present application for judicial review.

[8] Having still not returned to her duties after being denied leave without pay, the applicant was notified on November 23, 2011, that she was on unauthorized leave without pay. On December 12, 2011, the applicant filed a grievance against the decision finding her to be on unauthorized leave without pay. On April 20, 2012, this grievance, too, was dismissed, and it is no longer at issue in the present application for judicial review.

[9] On December 12, 2011, the applicant also filed a harassment complaint under her employer's Policy, in connection with the denial of her request for unpaid leave. On January 17, 2012, Brenda Marcoux, Delegated Manager for the Prevention and Resolution of Harassment in

the Workplace, dismissed the complaint on the grounds that the applicant's allegations did not constitute harassment within the meaning of the Policy. She reached this conclusion because (1) the alleged vexatious, abusive and offensive conduct connected with the denial of her request for unpaid leave did not disclose any act, comment or display that demeaned, belittled, or caused personal humiliation or embarrassment to the applicant; and (2) the incident described by the applicant, which occurred during the interview with Mr. Dufour, did not meet the definition of harassment set out in the Policy. The applicant grieved the dismissal of her complaint, and on April 20, 2012, the Assistant Deputy Minister dismissed all three of the applicant's grievances at the final level.

II. The impugned decision

[10] Although the Assistant Deputy Minister dismissed all three of the applicant's grievances in his decision, only the portion of the decision concerning the grievance relating to the harassment complaint is at issue in the present application for judicial review.

[11] After reviewing the information in the file and analyzing the situation, the Assistant Deputy Minister adopted the decision and reasons of Delegated Manager Brenda Marcoux, who had found that the evidence presented by the applicant in support of her complaint did not meet the definition of harassment set out in the Policy. His reasons are summed up in one paragraph:

[TRANSLATION]

Finally, as regards your grievance concerning the dismissal of your harassment complaint, I support the decision of the Delegated Manager for the Prevention and Resolution of Harassment in the Workplace to the effect that the evidence you presented does not meet the definition of harassment as stipulated in the Treasury Board Secretariat's *Policy on the Prevention and Resolution of Harassment in the Workplace*.

III. Issues

[12] This application for judicial review essentially raises two issues:

- (a) Did the Assistant Deputy Minister breach the principles of procedural fairness by failing to ask the applicant to present her position personally?
- (b) Did the Assistant Deputy Minister err in finding that the applicant's allegations did not constitute harassment within the meaning of the Policy?

IV. Analysis

[13] The grievance at issue in this case was filed by the applicant under subsection 208(1) of the *Public Service Labour Relations Act*, SC 2003, c 22 [PSLRA]. The applicant is of the opinion that she was harmed by the application of the Policy. Subsection 208(1) of the PSLRA reads as follows:

208. (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved

(a) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or

(ii) a provision of a collective

208. (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :

a) par l'interprétation ou l'application à son égard :

(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,

(ii) soit de toute disposition

agreement or an arbitral
award; or

d'une convention collective ou
d'une décision arbitrale;

(b) as a result of any
occurrence or matter affecting
his or her terms and conditions
of employment.

b) par suite de tout fait portant
atteinte à ses conditions
d'emploi.

[14] As the applicant's individual grievance cannot be referred to adjudication under section 209 because it is not related to one of the enumerated subjects, the decision taken at the final level in the process provided for in section 208 is final and binding, and no further action may be taken under the PSLRA.

[15] The complaint resolution process provided for under the Policy has six steps, which may be summarized as follows:

- (a) Filing a complaint: The complainant must submit a complaint, in writing, setting out the nature of the allegations, the name of the respondent, the relationship of the respondent to the complainant, the date and description of the incident(s), and, if applicable, the names of the witnesses;
- (b) Screening and acknowledgment of the complaint: The complaint is screened to determine whether it was filed within the prescribed time (i.e., within one year of the alleged harassment) and whether it includes the information listed in the first step;
- (c) Review of the complaint: The delegated manager reviews the complaint and determines at this stage whether the allegations are related to harassment;
- (d) Mediation: If the delegated manager decides that the allegations constitute harassment within the meaning of the Policy, he or she must offer mediation;

- (e) Investigation: If the situation cannot be resolved through mediation, the delegated manager may launch an investigation and appoint an investigator. If the delegated manager is satisfied that he or she has all the facts and that the parties have been heard, he or she may also decide not to undertake an investigation and to proceed to the final step;
- (f) Decision: The delegated manager reviews all the relevant information and decides what action to take.

[16] There is no need to proceed to an analysis of the standard of review where the case law has already determined this issue in a satisfactory manner: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62, [2008] 1 SCR 190. This Court has already determined that the reasonableness standard applies to a decision maker's findings of fact in an individual grievance presented under subsection 208(1) of the PSLRA: see *Hagel v Canada*, 2009 FC 329 at para 27, 352 FTR 22, aff'd in 2009 FCA 364, 402 NR 104 [*Hagel*]; *Tibilla v Attorney General of Canada*, 2011 FC 163 at paras 17-18 (available on CanLII). As for questions of procedural fairness, it is trite law that the applicable standard is correctness: *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392.

- (a) Did the Assistant Deputy Minister breach the principles of procedural fairness by failing to ask the applicant to present her position personally?

[17] The applicant submitted that the Assistant Deputy Minister was obliged to launch an investigation or at least allow the parties to be heard in accordance with the *audi alteram partem*

rule, as provided under the Policy. According to the applicant, the Assistant Deputy Minister not only refused to launch an investigation, but also never contacted or tried to contact the applicant to give her the opportunity to assert her rights and have her workplace harassment complaint heard.

[18] There is no doubt that grievors are entitled to some degree of procedural fairness: see *Hagel*, above, at paras 34-35. However, the case law has established that procedural fairness may vary, depending on the context, and that a hearing is not always required for a party to be heard. In the present case, neither the PSLRA nor the Policy provides for a duty to hold a hearing, and the applicant has not referred the Court to any other instrument providing for such a duty. The real issue is whether the applicant had a real opportunity to present her position and make her arguments: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28 (available on CanLII).

[19] Under the Policy, an investigation is launched only if the facts submitted in support of the complaint relate to harassment. However, as was mentioned above, the Delegated Manager concluded after reviewing the complaint (third step) that the facts did not meet the definition of harassment. She therefore did not have to complete the other steps in the process and proceed with an investigation.

[20] It should be noted that the applicant was specifically notified of the steps set out under the Policy and of the fact that the Delegated Manager would review her allegations to determine whether they met the definition of harassment. The applicant was also warned that she would not

be contacted unless it was deemed necessary. Despite this, the applicant did not think it necessary to provide the Delegated Manager with additional information, nor did she provide the Assistant Deputy Minister with further evidence for her grievance. Indeed, in the present application for judicial review, she did not adduce any new facts that she had been unable to present and that the decision makers had failed to consider.

[21] In the circumstances, I find that the applicant had an adequate opportunity to make representations and inform the decision makers of any facts she deemed to be relevant to establishing that she had been harassed. Accordingly, the Court's intervention is unwarranted since there was no breach of the principles of procedural fairness.

(b) Did the Assistant Deputy Minister err in finding that the applicant's allegations did not constitute harassment within the meaning of the Policy?

[22] The applicant submitted that the Assistant Deputy Minister erred in not accepting the facts alleged in her complaint as proven and in finding, having regard to the evidence on file, that the facts did not establish that she had been harassed. In her view, the Assistant Deputy Minister and the Delegated Manager did not consider the intimidation to which she was subjected and did not make the connection between the threats made against her at the interview with Mr. Dufour and the reprisals that followed and resulted in, among other things, her being denied leave without pay.

[23] It is true that the reasons of the Assistant Deputy Minister are very brief and do not really elaborate on his reasons for concluding that the applicant's complaint does not meet the definition of harassment under the Policy. However, one should not lose sight of the fact that the Assistant Deputy Minister endorsed the decision of the Delegated Manager, thereby adopting her reasons as his own. Here is what the Delegated Manager wrote in her letter to the applicant, dated January 17, 2012:

[TRANSLATION]

In your complaint, you state that the respondents acted toward you in a way that was vexatious, abusive and offensive. I note that you describe how the three respondents were involved in the decision to deny you leave without pay for personal needs. You also describe this situation as unreasonable interference in your career. Having reviewed the facts set out in your complaint, I cannot find any act, comment or display that demeaned, belittled, or caused personal humiliation or embarrassment to you.

Although I can understand your disappointment with the decision and the process followed in making it, I cannot conclude that your allegations meet the definition of harassment found in the *Policy on the Prevention and Resolution of Harassment in the Workplace*.

Regarding the incident that occurred during the interview when Mr. Dufour allegedly cut you off and told you to think carefully about the people around the table, this incident, as you described it, does not meet the definition of harassment in the *Policy on the Prevention and Resolution of Harassment in the Workplace*.

Consequently, your complaint will not be investigated, and the file will be closed.

[24] The Policy defines harassment as follows:

... any improper conduct by an individual that is directed at and offensive to another person or persons in the workplace, and that the individual knew, or ought reasonably to have known, would cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or

threat. It includes harassment within the meaning of the *Canadian Human Rights Act*.

[25] These reasons are entirely intelligible and give the applicant the reasons for which her complaint was dismissed. Even if a delegated manager accepts as proven the facts brought to his or her attention at the review stage of the complaint, he or she must nevertheless determine whether the facts constitute harassment within the meaning of the Policy and may, if necessary, ask for additional information in this regard. This is exactly what the Delegated Manager did in this case.

[26] Indeed, it was only in her application for judicial review that applicant submitted that she had felt intimidated. The file does not support this allegation. Moreover, it should be noted that it was not the refusal to renew her secondment that led to the applicant's grievance, but the refusal to grant her leave without pay. On this point, there is every indication that the decision was made strictly for operational reasons, as evidenced in particular by the memorandum to the Assistant Deputy Minister, Human Resources Branch, regarding the applicant's request for leave without pay.

[27] The applicant's disappointment is understandable, given that she had applied for a position outside the public service and would no doubt have appreciated having a security net if she discovered that the position that she ended up accepting even before presenting her grievance was not to her liking. However, the fact that she disagreed with the findings of the Assistant Deputy Minister and the Delegated Manager, and that she would clearly have preferred that they

drew different inferences from the facts brought to their attention, is not enough to show that the decisions are unreasonable.

[28] In light of the evidence on record, I therefore find that it was not unreasonable for the Assistant Deputy Minister to dismiss the applicant's grievance and to confirm the decision of the Delegated Manager according to which the allegations in the complaint did not lead to a finding of harassment within the meaning of the Policy. Accordingly, this application for judicial review must be dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed, with costs.

“Yves de Montigny”

Judge

Certified true translation
Michael Palles

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-996-12

STYLE OF CAUSE: CHRISTINE GIRARD v THE DEPARTMENT OF
HUMAN RESOURCES AND SKILLS
DEVELOPMENT CANADA (HUMAN RESOURCES
BRANCH)

PLACE OF HEARING: Québec, Quebec

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REASONS FOR JUDGMENT: DE MONTIGNY J.

DATED: May 9, 2013

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