Federal Court of Appeal | Cour d'appel fédérale

Date: 20221115

Docket: A-140-21

Citation: 2022 FCA 197

CORAM: **STRATAS J.A.**
RENNIE J.A.
MONAGHAN J.A.

BETWEEN:

ALEXANDRU-IOAN BURLACU

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on November 15, 2022.
Judgment delivered from the Bench at Ottawa, Ontario, on November 15, 2022.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on November 15, 2022).

STRATAS J.A.

[1] The appellant, a Canada Border Services Agency employee, appeals from the judgment of the Federal Court dated April 19, 2021: 2021 FC 339 (*per* Norris J.). The Federal Court dismissed the appellant's application for judicial review. The appellant sought judicial review from the dismissal of a grievance he had brought.

[2] In his grievance, the appellant complained against two senior colleagues at the Agency for workplace harassment. The Agency refused to investigate the complaint because the impugned conduct was not workplace harassment under Treasury Board policy. The appellant grieved that decision. In the end, the decision-maker on the grievance denied it. Although the reasons are regrettably sparse, reading the reasons in light of the record one can see that the decision-maker was of the view that the impugned conduct did not constitute harassment.

[3] In this Court, the appellant appeals from the Federal Court's dismissal of his judicial review. He asks this Court to overturn the dismissal, set aside the grievance decision, and order it to be redetermined.

[4] The Federal Court properly identified and applied the reasonableness standard. It properly found that the decision under review, in particular the finding that the impugned conduct did not constitute harassment (at para. 58), was reasonable. Therefore, we will dismiss the appeal substantially for the reasons of the Federal Court. In doing this, we reiterate the Federal Court's dissatisfaction with the decision-maker's reasons on the grievance. Although it is possible to discern the basis for the decision on the grievance, it would have been better if the appellant received a more detailed explanation in the reasons.

[5] The appellant submits that the decision-maker on the grievance did not deal with the violations of the *Values and Ethics Code* that governs the conduct of employees in this workplace and that formed part of his grievance. The appellant says that the process followed in the grievance lacked "respect" and "fairness". In response, the respondent submits that this

vague allegation cannot be sustained: the *Code* does not set specific, enforceable behavioural expectations but only general workplace values.

[6] The decision-maker on the grievance did deal with this issue, albeit briefly, in the second-last paragraph of the reasons. Here again, regrettably, the reasons are brief and conclusory. But, in light of the entire record before the decision-maker, we agree with the respondent that the alleged violations of the *Code* in this context and in these particular circumstances could not be reasonably found by the decision-maker to be enforceable. The allegation of lack of respect and fairness in the process was quite vague and lacked particularity: Appeal Book at 163-164. Further, as the Federal Court found, the procedural shortcomings in the grievance process were of no consequence to the outcome: the decision-maker reasonably found that no conduct falling within the definition of harassment was present and harassment was the dominant substance of the appellant's grievance.

[7] The appellant cites a private communication between two superiors that he says disparaged him. The appellant was not a party to the communication. He says that this constituted rumour-mongering that constituted harassment and a violation of the *Code*. Further, the appellant says that their disparaging view of him influenced their decision-making and the decision-maker on the grievance should have so found. In our view, the decision-maker on the grievance reasonably did not find harassment based on this communication. Performance evaluations and assessments of employees are made by superiors on the basis of discussions among them all the time. Those discussions, by themselves, without more, cannot reasonably meet the applicable definition of harassment. A single communication containing a negative

comment cannot reasonably constitute rumour-mongering rising to the level of harassment. In this regard, we agree with the Federal Court's comments on this point at paragraph 55 of its reasons.

[8] The appellant submits, as he did in the Federal Court, that the grievance was procedurally unfair and so the grievance decision must be quashed and sent back for redetermination.

[9] Regardless of which standard of review, if any, is applied to this issue of procedural fairness, we reject this submission. As the Federal Court found, at best there was only a technical, inconsequential breach that made no practical difference in these circumstances: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 142, citing *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 111 D.L.R. (4th) 1 at 228-30 S.C.R.; and see, *e.g.*, *Canada (Human Rights Commission) v. Saddle Lake Cree Nation*, 2018 FCA 228 at para. 20, *Gauthier v. Canada (Attorney General)*, 2018 FCA 96 at paras. 8-9 and *Gupta v. Canada (Attorney General)*, 2016 FCA 50 at para. 15. In this regard, we adopt the reasons of the Federal Court at paragraph 88.

[10] The Federal Court also found that the grievance decision was deficient because it did not address the appellant's concern about a lack of impartiality. But it declined to send the matter back for redetermination because, as a substantive matter, the grievance would still have to be dismissed (at paras. 64-65). In the Federal Court's view, dismissal of the grievance was the only reasonable substantive outcome that was available given the facts and the law.

[11] This remedial option was open to the Federal Court: *Vavilov* at para. 142; and see, *e.g.*, *Maple Lodge Farms v. Canada (C.F.I.A.)*, 2017 FCA 45, 411 D.L.R. (4th) 175, *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1 at paras. 53-54 and *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52 at paras. 54 and 88. We review the Federal Court's remedial decisions using the appellate standard of review: *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209 at paras. 88-89; *Makivik Corporation v. Canada (Attorney General)*, 2021 FCA 184. Here, applying the appellate standard of review, the Federal Court neither erred in law nor committed palpable and overriding error.

[12] In making these remedial decisions, the Federal Court did not slip into making its own decisions on the merits of the grievance—a matter reserved to the decision-maker on the grievance. In other words, in no way was it conducting a form of illegitimate correctness review. Rather, in this case, the Federal Court kept to its role as a reviewing court conducting genuine reasonableness review. Throughout it acted in accordance with *Vavilov* and within the remedial limits prescribed by it.

[13] Therefore, the appeal will be dismissed with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-140-21

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE NORRIS DATED APRIL 19, 2021, DOCKET NO. T-1529-19

STYLE OF CAUSE:	ALEXANDRU-IOAN BURLACU v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 15, 2022
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. RENNIE J.A. MONAGHAN J.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

APPEARANCES:

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