

VALERIE ANDRUSZKIEWICZ

-and-

ATTORNEY GENERAL OF CANADA

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	12-MAY-2023
D	Elizabeth Silva
OTTAWA, ON	1

Notice of Appeal

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at (*place where Federal Court of Appeal (or Federal Court) ordinarily sits*).

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the [Federal Courts Rules](#) and serve it on the appellant's solicitor or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the [Federal Courts Rules](#) instead of serving and filing a notice of appearance.

Copies of the [Federal Courts Rules](#), information concerning the local offices of the Court and other necessary information may be obtained on

request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(Date)

May 12, 2023

Issued by: Elizabeth Silva
(Registry Officer)

Address of local office: Federal Court of Appeal, Ottawa
90 Sparks Street,
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TO: Attorney General of Canada
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AND TO : Canada Border Services Agency (CBSA)
191 Laurier Avenue West, 6th Floor
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Respondents

Appeal

THE APPELLANT APPEALS to the Federal Court of Appeal from the Judgement and Reasons Order: As per Section 27 of the Federal Courts Act, I am requesting to present to the Federal Court of Appeal:

1. The Federal Court of Canada's judicial review decision to dismiss the Applicant's submission for a judicial review against the fourth level grievance decision by their employer the CBSA. The Honourable Mr. Justice Little denied the application on April 12, 2023. I wish to have this decision reviewed, based on the following information below.
2. The fourth level grievance denial from the CBSA, dated August 17, 2020. The Applicant had grieved that the harassment investigation that they filed against members of their senior management team in 2018 was actioned with several errors and policy violations that were not procedurally fair. The CBSA had determined that they were in agreement with how the investigation was conducted and its subsequent decisions. I wish to have this decision re-addressed.

THE APPELANT ASKS:

For the foregoing reasons, this appeal requests that the Federal Court decision to deny the judicial review application is dismissed;

That the original grievance decision be put aside and a new review of the grievance by an impartial third party be completed.

THE GROUNDS OF APPEAL are as follows:

1. In The Honourable Mr. Justice Little's Federal Court judicial review application decision, he stated The applicant has not shown that she was deprived of procedural fairness in either the grievance process or the harassment investigation, and has not demonstrated the final level grievance decision was unreasonable.

2. The Court overlooked the questionable approaches and actions of the decision maker and the investigator during the course of the harassment complaint. The evidence brought forth by the Applicant demonstrated several anomalies committed by the investigator and CBSA personnel during the course of the harassment investigation . The Honourable Mr. Justice Little further states in point 35 of his decision that, the Court cannot determine whether the final level decision maker, or the investigator into the harassment complaints, rendered decisions about the harassment complaints that were correct on the evidence. If this was the case, the disputed decisions from this investigation should have been equally weighed when determining if the grievance decision was reasonable.
3. The Court overlooked the fact that the final decision maker failed to authenticate the findings from the Senior Labour Advisor's precis and simply adopted his recommendation. Point 18 states:” The final level decision maker (CBSA's Vice-President, Human Resources) rendered a written Reply to Grievance (Final Level) dated August 17, 2020 (the “Reply to Grievance”). The decision maker confirmed having reviewed the circumstances giving rise to the applicant's grievance and that she had taken into account the applicant's points raised at the final level consultation. “ This is never proven anywhere in documentation. The grievance reply letter, a standard formatted reply with an electronic signature does now equal a fulsome review. In *Burlacu v. Canada*, paragraph 4, it states: “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.”
4. The Court overlooked the Applicant's replies to their concerns over the contents of the precis. Point 54 in the decision record states : “ The applicant's written submissions did not link her submissions about the underlying investigation with the contents of either the Reply to Grievance or the Précis, nor did her oral submissions until asked by the Court.” On April 22, 2022, the Applicant sent cross examination questions that addressed specific concerns on what information the precis contained. This included questions regarding the investigator and the CBSA's controversial actions during the course of the investigation. The Applicant did not receive clarifying answers. This cross-examination content was included in the Respondent Record for the Court to review. At the time of the court case on

October 6, 2022, during the Applicant's testimony, they were prepared to discuss the grievance decision concerns a little later on in their testimony. The Court pre-emptively questioned the Applicant ; to state that the Applicant did not discuss the grievance until asked by the Court is inaccurate.

5. The Court overlooked that in the precis, cross examination and subsequent replies, the Senior Labour advisor admitted to reviewing the Applicant's labour relations file, reading it and claiming that the information in it that demonstrated procedural unfairness was not relevant. In December 2019 and January 202, in talking with the Applicant, the Advisor told the Applicant that they would review the information the Applicant would send plus the contents of their labour relations file to assist him in rendering a final level grievance decision they could share with the final level decision maker. In this decision report, in point 83 it states: " I am not persuaded that the advisor also had to go through the applicant's entire "labour relations file" in order to deal with the grievance. " Although the Court says this, the Advisor did review it and ignored information that would have demonstrated procedural unfairness. Whether the Court suggests this is not necessary, it was completed.
6. The Court overlooked an opportunity to intervene on the decision maker's final decision. Points brought forward by the Applicant in regards to the harassment investigation clearly demonstrated sufficiently central /sufficiently serious shortcomings in the investigation. To begin with, one of my harassment allegations was described by CBSA Labour Relations as The CBSA then analyzed this allegation as " abusing of a situation of formal authority to undermine an employee's performance without just cause and without explanation may constitute harassment." The investigator ended up interviewing the respondents about " denying me an observer". The proper allegation should had been investigated. Next, in one of my witness' testimony, they state that my manager had told them that if they had done (the specified action) that they were not in trouble. Yet, the same manager was trying to find out if I had done (the specified action) to discipline me. This information was in front of the senior labour relations advisor and the final level decision maker and these serious shortcomings were ignored by both.
7. The Court overlooked the lack of procedural fairness to have the Applicant's full story/voice heard in this investigation. Although the

investigator in a harassment investigation has leeway in how they process parts of an investigation, there are still Treasury Board policies that need to be followed in ensure procedural fairness. An Applicant's voice goes further than their testimony alone.

In the Treasury Board Investigative Guide for the Policy on Harassment Prevention and Resolution and the Directive on the Harassment Complaint Process it states: "the complainant is normally interviewed first, followed by the respondent since they are most closely related to the allegations and will be in a position to provide the most relevant information. Other witnesses should be interviewed in the order of the expected value of their contribution for addressing key investigative questions." The investigator interviewed the Applicant's witnesses before the respondents. The policy is set this way because it would allow the investigator to assess the validity of the applicant / respondent testimony by asking specific question to the witnesses, thus allowing a full voice. The way these interviews were completed, it did not allow testimony verification of the respondent (witnesses interviewed first cannot negate or support respondent testimony of actions. Respondent testimony is left unchecked). The Applicant's witnesses could not offer full support of the Applicant's statements, therefore not allowing the Applicant to be truly heard.

Also, in the Treasury Board policy it states that the questions provided to respondents should be pertinent to the allegations. In reviewing the questions that the investigator asked the respondents, no specific questions are asked about the actual allegations. This is another example of the Applicant not being provided a full voice during the investigation.

8. The Court misinterpreted the procedural fairness requirement for the Applicant's case.

Although Procedural fairness in a grievance has been decided in the Federal Court to be " low", procedural fairness is also context driven. The courts or the administrative bodies are looking at the specific context of that case to decide what is procedurally fair in the circumstances of that case. The four pillars of procedural fairness are being fair in processes, being transparent in actions, providing opportunity for voice, and being impartial in decision making.

The main points of the Applicant's grievance were the policy violations committed by the investigator and CBSA personnel. Therefore, the main context would be primarily policies that are more stringent and must be followed. The questions would rise, were the important policies of the Treasury Board broken in this case and did not allow procedural

fairness?(aside from the ones that allows investigator discretion). The answer is yes. Examples of this are as follows: interview schedule did not allow fair opportunity for voice; allowing one witness to remove themselves and forcing another witness to remain involved (who they were witnesses for is not crucial) did not allow an opportunity for a voice; the CBSA not applying the mandatory compliance monitoring throughout a harassment investigation removes the transparency and impartiality of the investigation.

- 9. The Court misinterpreted the Treasury Board policy, the Directive on the Harassment Complaint Process. Point 133 of the Federal Court decision states: “ The applicant also submitted that Step 5 in the Treasury Board Directive on the Harassment Complaint Process (restoring the well-being of the workplace) was not implemented, rendering the investigation incomplete. However, the Investigation Reports found no harassment so the fifth step here is, strictly speaking, inapplicable. That is not to say that the workplace did not need some work towards improvement and healing, only that the absence of a completed Step 5 does not support a finding of procedural unfairness. “

The Directive on the Harassment Complaint Process define 5 steps that are essential when completing a harassment complaint in the federal government:

- Step 1 – Acknowledging receipt
- Step 2 – Reviewing the complaint
- Step 3 – Exploring options for resolving the complaint
- Step 4 – Rendering a decision and notifying in writing the parties involved as to whether or not the allegations were founded.
- Step 5 – Restoring the well-being of the workplacewhile ensuring that the work unit manager in consultation with the Informal Conflict Resolution practitioners and other relevant organizational resources addresses the needs of the parties concerned and the work unit throughout the complaint process as well as any detrimental impacts resulting from the incidences of harassment; and

The Directive does not specifically state that all steps need to be actioned, unless there is harassment. It states that these are essential steps when completing a harassment complaint in the federal government.

10. In light of these above points, the Court erred in deciding that the grievance decision was reasonable. Point 74 in the Federal Court Decision states “ While technically no standard of review applies, the Court’s review exercise is akin to correctness. Reasonableness is further defined as “ concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.”

Returning to my first point : In The Honourable Mr. Justice Little’s Federal Court judicial review application decision, he stated The applicant has not shown that she was deprived of procedural fairness in either the grievance process or the harassment investigation, and has not demonstrated the final level grievance decision was unreasonable.

With the points presented, the correctness, transparency, justification and intelligibility of the decision to reject the judicial review should be re-examined. I believe the appeal points I have made above will demonstrate that the grievance decision was not made reasonably.

Dated : May 12, 2023

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