

Court of King's Bench of Alberta

Citation: Campbell v Alberta (Public Interest Commissioner), 2024 ABKB 372

Date: 20240621
Docket: 2303 01187
Registry: Edmonton

2024 ABKB 372 (CanLII)

Between:

Mary Lynne Campbell

Applicant

- and -

Alberta (Public Interest Commissioner)

Respondent

**Reasons for Decision
of the
Honourable Justice J.S. Little**

I. INTRODUCTION

[1] The Applicant Ms. Campbell seeks judicial review of a decision (Decision) of an acting Public Interest Commissioner (the Commissioner) given under the *Public Interest Disclosure (Whistleblower Protection Act, SA 2012, c P-25.5* (the Act). The Decision relates to Ms. Campbell's time as Superintendent of Schools at the Sturgeon Public School Division (the Division).

[2] Broadly, the Act is intended to provide a mechanism whereby members of the public or employees can report "wrongdoing" of public officials, including school superintendents. That wrongdoing is then investigated, and a decision issued.

[3] The relevant portion of section 2(2) of the Act reads:

(2) The purposes of this Act are:

- a) to facilitate the disclosure and investigation of significant and serious matters in or relating to departments, public entities, offices, or prescribed service providers, that an employee believes may be unlawful, dangerous to the public or injurious to the public interest,
- b) to protect employees who make those disclosures,
- c) to manage, investigate and make recommendations respecting disclosures of wrongdoings and reprisals,
- (c.1) to provide for the determination of appropriate remedies concerning reprisals,
- d) to promote public confidence in the administration of or services provided by departments, public entities, offices, and prescribed service providers...

[4] Wrongdoings are defined in section 3(1) of the Act, the relevant portions of which read:

3(1) This Act applies in respect of the following wrongdoings in or relating to departments, public entities, offices, or prescribed service providers or relating to employees:

(c) gross mismanagement, including an act or omission that is deliberate and that shows a reckless or wilful disregard for the proper management of:

- (iii) employees, by a pattern of behaviour or conduct of a systemic nature that indicates a problem in the culture of the organization relating to bullying, harassment, or intimidation;

[5] Following an investigation under the Act, the Commissioner issued the Decision which in paras 44 and 45 state:

(44) I conclude, on the balance of probabilities, that Ms. Campbell committed a wrongdoing by grossly mismanaging employees of the Division contrary to section 3(1)(c)(iii) of the Act. This conclusion is based upon the following findings:

- a. Ms. Campbell's conduct resulted in a problem in the culture of the Division related to bullying, harassment, and intimidation.
- b. Ms. Campbell's acts constituted a pattern of behaviour or conduct of a systemic nature.
- c. Ms. Campbell's acts were deliberate and showed a reckless or wilful disregard for proper management.

(45) While Ms. Campbell believes her conduct and management style were appropriate, the overwhelming weight of evidence provided by over 85% of the Division's Central Office employees supports my findings. Ms. Campbell's inappropriate conduct created a culture of fear within the Division demonstrating a reckless or wilful disregard for the proper management of the Division.

[6] Ms. Campbell challenges the Decision on three grounds:

- 1. The Commissioner breached the duty of procedural fairness owed to her.

2. The investigation breached the duty of impartiality owed to her.
3. The Decision was substantively unreasonable.

II. PRIVATIVE CLAUSE

[7] Before turning to the grounds referred to above, it is necessary to deal with section 52 of the Act to determine any limits on the Court's jurisdiction to review the Decision:

52(1) Subject to subsection (2), no decision, report or proceeding of the Commissioner is invalid for want of form and, except on the ground of lack of jurisdiction, no proceeding or decision of the Commissioner shall be challenged, reviewed, quashed, or called into question in any court.

(2) A decision of the Commissioner concerning a reprisal may be questioned or reviewed by way of an application for judicial review seeking an order in the nature of certiorari or mandamus if the application is filed with the Court of King's Bench and served on the Commissioner no later than 30 days after the date of the decision, report, proceeding or reasons, whichever is latest.

[8] The Decision does not involve a reprisal, so only section 52(1) applies, which purports to exclude judicial review except on the ground of lack of jurisdiction.

[9] Notwithstanding the specific language of section 52(1), I am of the view that it cannot be given full effect. Support for this acknowledgment, and guidelines for how this case must be approached in light of section 52(1), may be found in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*) at para 24:

Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely: *Dunsmuir*, at para. 31; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, at pp. 236-37; *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048, at p. 1090. *Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.* [emphasis added]

[10] Counsel for the Commissioner argues that the law is not that settled and refers to Justice Stratas' decision in *Democracy Watch v Canada Attorney General*, 2022 FCA 208 for a thoughtful explanation that *Vavilov* may not be determinative of this particular issue. I note, however, that Justice Stratas was ruling on an interlocutory matter and specifically stated that he would leave the substantive interpretation of a putative privative clause to the full panel of the court (paras 59-60).

[11] In any event, the clause in question there, as does the one here, permits review on jurisdictional grounds. Both counsel here acknowledge that the procedural fairness ground argued by Ms. Campbell here is jurisdictional.

III. FACTS

[12] More detailed facts will be reviewed throughout this decision. But the following non-contentious facts establish context.

[13] Ms. Campbell was hired as Superintendent of the Division in the summer of 2018 “with a specific mandate to change and improve the culture of the Division” (Decision at para 4). In May, 2021, the Commissioner’s office received a complaint alleging that Ms. Campbell was grossly mismanaging her employees contrary to section 3(c)(iii) of the Act.

[14] The Commissioner conducted preliminary interviews with the complainant and witnesses and determined that the allegation warranted further investigation. She notified Ms. Campbell in July, 2021 that she would be conducting an investigation, and that Ms. Campbell would “be provided with an opportunity to respond and participate in an interview with an investigator from my office” (Extract of Key Evidence (EKE), Tab 5).

[15] I note that the initial complaint was made by the then Associate Superintendent of Schools, though that information was not provided to Ms. Campbell at the time.

[16] Ms. Campbell was on approved medical leave for part of the investigation and resigned before its conclusion. But the Commissioner determined it to be in the public interest that the investigation continue.

[17] In November, 2021, at a time when Ms. Campbell was on that approved medical leave, the Commissioner provided her with a summary of preliminary investigative findings after the first round of interviews of thirty-four people, whose names were not disclosed to Ms. Campbell.

[18] On April 1, 2022, Ms. Campbell provided a written response and identified individuals who would support her position. The Commissioner then interviewed certain of those individuals and provided to her a further summary. Ms. Campbell responded to that summary on May 25, 2022. The Commissioner granted several extensions of time to provide a response while Ms. Campbell was hospitalized.

[19] With her responses and through her counsel, Ms. Campbell raised concerns about the procedure being employed. Because the names of complainants had not been provided to her, “she argued that without witness identities and details about specific events described in the investigational summaries, she was unable to provide a full or meaningful response to the evidence against her” (Decision at para 6).

[20] The Commissioner concluded in the Decision that the process conformed with the principles of natural justice and procedural fairness required by the Act: Ms. Campbell was given the substance of the evidence, an opportunity to respond, and she presented substantial counter arguments.

IV. GROUNDS

[21] As stated earlier, Ms. Campbell challenges the Decision on the grounds of procedural unfairness, partiality or bias, and unreasonableness.

1. Procedural Unfairness

[22] Counsel agree that this ground hinges on an interpretation of the level of procedural fairness afforded to Ms. Campbell.

[23] They also largely agree that that level is determinable primarily from the criteria established in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (*Baker*), recognizing that those criteria must be assessed in light of the “procedures and safeguards required in a particular situation”: *Moreau-Berube v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74 (*Moreau-Berube*).

[24] Where the parties diverge is how the *Baker* factors apply to this situation and whether certain procedures and guidance in the Act itself modify those criteria and the *Moreau-Berube* safeguards.

A. Baker Factors

[25] *Baker* at paras 23-28 establishes five non-exhaustive factors to consider in determining the content or level of procedural fairness required in an administrative proceeding. Only four of those factors have application here.

i. The Nature of the Decision Being Made, and the Process Followed in Making it.

[26] As a professional administrator, Ms. Campbell’s managerial and administrative styles and actions were being challenged. The complaint was one of gross mismanagement of employees. The nature of the decision, therefore, is akin to one involving professional discipline. Those proceedings generally follow a two step process with an investigation first, followed by a hearing. See, for example, ss 55- 56 of the *Legal Profession Act*, RSA 2000, c L-8 which require a hearing if a complaint is not dismissed after the investigation stage.

[27] While the Commission argues that the process used in Ms. Campbell’s case was merely an investigation and that the matter was then referred to the Minister for further action, effectively the Decision disposed of this matter, since there is no appeal and no further statutory recourse by the person being investigated.

[28] Ms. Campbell’s case shares some important characteristics found in *Chapman v Canada (Attorney General)*, 2019 FC 975 (*Chapman*), which is also a case of a finding of gross mismanagement but under federal whistleblower legislation. In rejecting the federal government’s argument that an investigation was very different from a judicial process, the Court held:

Canada overlooks that this was not merely an investigation; it was a process leading to a decision that there was workplace wrongdoing. It involved extensive interviews, evidence gathering, and the potential for punishment. In my view, it was not unlike wrongful dismissal actions or arbitration hearings. Each of those involves a process leading to a decision on employee misconduct. (para 26)

ii. The Nature of the Statutory Scheme

[29] This factor requires an analysis of the role of the decision and the terms of the statute. The Supreme Court noted, for example, that if no appeal is permitted and the decision is determinative of the issue, a higher level of procedural fairness is required. Arguably both factors apply to this Decision.

[30] Section 18(2) of the Act states: “An investigation is to be conducted as informally as possible and within the time period set out in the regulations, if any.” Regulation AR 71/2013

requires that an investigation be completed within 120 days of the complaint (section 3(7)(c)), subject to extensions permitted under section 5.

[31] Arguably, this means that an investigation under the Act is not intended to be as expansive as, for instance, a public inquiry. I accept that.

[32] Section 18(3) of the Act states: “The Commissioner must ensure that the right to procedural fairness and natural justice in an investigation is respected, including in respect of individuals making disclosures, individuals alleged to have committed a wrongdoing and witnesses.”

[33] The Commission argues that this merely codifies the common law and does not create a higher standard than would be required in an investigation as opposed to a judicial proceeding. I can accept the first part of this argument, but as pointed out above, I am not persuaded that the implications here are less serious than they might be in a judicial proceeding.

[34] The Commission further argues that in considering the level of procedural fairness, it must be noted that a finding of gross mismanagement of employees is not the most serious “wrongdoing” which the Act addresses. But there is no hierarchy of “wrongdoings” in the Act.

[35] They do range from contravention of a statute or regulation, which conceivably might be relatively minor, to acts or omissions “which create a substantial and specific danger to the life, health or safety of individuals”, which is obviously serious, through to “gross mismanagement ... of public funds, the delivery of public services or, in this case, “employees, by a pattern of behaviour or conduct of a systemic nature that indicates a problem in the culture of the organization relating to bullying, harassment or intimidation”.

[36] As pointed out earlier, that is a very serious allegation of wrongdoing against a senior manager of a large government or quasi-government department.

[37] I do not accept the Commission’s argument that “gross mismanagement of employees” is only “moderately serious in the context of wrongdoings contemplated by the Act”, particularly when that gross mismanagement is accompanied by the further modifiers that it involves systemic problems and a culture of bullying, harassment, or intimidation.

iii. The Importance of the Decision to Those Affected.

[38] Technically, Ms. Campbell’s employment with the school board was not affected by the Decision. She had resigned, after about forty years of service, before the Decision was released.

[39] Counsel for the Commission points out that the Decision is not a public document. The Act requires that it go to the government minister responsible for the entity and to the trustees of the school board. The Act also requires in section 22(4) that the Commissioner notify the person who made the disclosure that a report has been prepared, together with any information the Commissioner considers appropriate in the circumstances.

[40] In this case, the Decision was disseminated more widely. Once it went to the board, the board sent a copy to all employees. The reputational damage, therefore, can only be inestimable given that the position that she had attained was the apex of her chosen career and those who worked in her department now have not only knowledge that a report of some sort was prepared but the sordid details of the alleged mismanagement. And not only is the reputational damage inestimable, but the Decision would put paid to any thought of post-career consulting in any sector if Ms. Campbell had any expectations in that respect.

[41] I do not wish to imply that the Commissioner played a role in distributing the Decision when not authorized to do so. But I do mean to say that it is reasonable to assume that a Decision respecting gross mismanagement by a manager will have serious consequences whether widely disseminated or not.

iv. The Commission’s Choice of Procedures

[42] Lastly, from *Baker*:

...the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: *Brown and Evans*, supra, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, per Gonthier J. (para 27)

[43] There were no institutional constraints evident from the Commissioner’s decision. There was no evidence of a budget. An investigator interviewed forty people. There was nothing that mandated that only complainants be interviewed, and no interview permitted for the alleged wrongdoer. Nor was a reason given for Ms. Campbell not being interviewed when that was promised to her.

[44] A possible constraint, and one ultimately successfully challenged by Ms. Campbell, was the Commissioner’s decision not to reveal to Ms. Campbell the names of any of the complainants. The Commissioner defended that decision on the basis of the confidentiality requirements of the Act, but nowhere in the Act does it prohibit release of those names.

[45] When counsel for Ms. Campbell during the investigation requested further particulars including names and sufficient details to allow Ms. Campbell to identify the questionable incidents, the Commissioner responded that “Witness and whistleblower confidentiality is a foundational pillar of the whistleblowing regime”. That may be an arguable point when current employees are blowing the whistle, but when former employees are witnesses, they cannot suffer any possible consequences from their former boss.

[46] Release of all or some of the names may also have assisted the Commissioner in determining the credibility of witnesses. The Decision refers to the Commissioner’s acceptance of the credibility of all witnesses, yet only the investigator interviewed them – not the Commissioner. I would think that credibility is difficult to determine from a summary of another’s interview. And the person being investigated could be expected to have some insight into the possible reasons for some of the more virulent allegations.

[47] Support for that argument may be found in Ms. Campbell’s affidavit, for which I gave leave to be filed just before the hearing. In it, she deposes that she did not know the names of any of the witnesses or complainants until just before the hearing of this application, after the Commissioner was ordered to release them to her as a result of Justice Friesen’s decision in *Campbell v Alberta (Public Interest Commissioner)*, 2024 ABKB 269. Justice Friesen held that the Commissioner could not redact those names from the certified copy of proceedings required to be filed for this application.

[48] Ms. Campbell deposes that two of the complainants, whose interviews are reflected at pages 2070 and 2083 of the Record, had applied for her position at the same time she had but were not short-listed. That kind of information may have been useful to the Commissioner and the investigator in determining credibility of those particular witnesses.

Conclusion on the *Baker* Factors

[49] Weighing those factors, I conclude that the Commission owed a high degree of procedural fairness to Ms. Campbell.

B. Was Ms. Campbell afforded that high degree?

[50] As was found in *Chapman*, I find that withholding the names of all of the witnesses was procedurally unfair insofar as Ms. Campbell was thereby denied the ability to fully respond to the numerous incidents alleged.

[51] In addition, Ms. Campbell in her initial response to the summary of the preliminary investigation included that because she was hospitalized, she did not have access to the records that might have assisted her in her defence. By way of example, she referred to allegations of wrongful dismissal of employees but was not permitted by the Commissioner to obtain the records of counsel she engaged to assist with those terminations. Perhaps the Commissioner was right that those records were protected by solicitor/client privilege, but no effort was made to have privilege waived.

[52] Further, the Commissioner did acknowledge to counsel during the investigation that there were certain allegations that Ms. Campbell could not respond to but that those allegations were not considered. If such information is being withheld for reasons of confidentiality, the Commissioner must at least disclose the “gist” of the allegations (*Earhart v Canada (Attorney General)*, 2019 ONCA 980 at para 59. I note that *Earhart* dealt with a written directive from the prison official to provide the “gist” of an allegation when the name of the witness needed to be kept confidential. But that directive, in my view, codifies the common law obligation respecting disclosure of sufficient information that a response can be formulated.

[53] I find that the procedure employed by the Commissioner deprived Ms. Campbell of the procedural fairness to which she was entitled given the *Baker* factors.

2. Partiality or Bias

[54] With respect to this second ground, I decline to make a ruling. But I will make two observations.

[55] First, I find it curious that the language of the complaint that initiated the investigation tracked exactly the language of the statute. From section 2 of the Commissioner’s Overview section of the Decision:

On May 17, 2021, my office received a disclosure of wrongdoing alleging that Ms. Campbell grossly mismanaged employees by a pattern of behaviour or conduct of a systemic nature that indicates a problem in the culture of the organization relating to bullying, harassment or intimidation, a wrongdoing as defined in section 3(c)(iii) of the Act.

[56] Based on the language of the complaint, the Commissioner should have been very skeptical. I would think that a more typical complaint from an employee would be that a boss is

nasty or controlling or bullying or otherwise treated that person disrespectfully in one particular incident. When a complaint tracks exactly the language of the legislation, it suggests that the complainant may have a particular agenda in mind.

[57] Second, in the Recommendations/Observations section of the Decision, after the Commissioner declined to make recommendations for change because Ms. Campbell was no longer employed by the school division, the Commissioner had this to say:

My office works to foster a culture that supports whistleblowers, and where management and employees share a common goal of detecting and remedying wrongdoing. In this case, my investigative staff inform me of the professionalism and accommodation extended to them by the Division's employees and newly appointed Board Chair. My office will readily support the new Superintendent and CEO and the Board in continuing to foster this cultural shift and realize the organizational benefits of a positive whistleblower culture.

[58] Given this statement, which in my view suggests that the Commissioner is taking on a more proactive role in administration of a department as opposed to the role specified in section 2(2) of the Act, future complainants may find that they face a reverse onus if they make a complaint against the new administration.

3. Reasonableness

[59] Again, I decline to make a ruling on this ground. My reasoning is that *Vavilov* in para 24 referred to above¹ requires that I exercise restraint in the face of a Legislature's choice of what level of review is appropriate for particular administrative decisions.

[60] But again, I make an observation. A decision which denies a person procedural fairness has only a remote chance of being reasonable.

V. REMEDY

[61] Counsel for the Commissioner argues that if the Decision is quashed, it must go back to the Commissioner for a re-investigation, on the basis that *Vavilov* speaks to quashing alone as being an extraordinary remedy.

[62] He further argues that:

- the original decision-maker has retired so that it would be heard by fresh ears,
- whistleblowers are entitled to have their issues addressed and that quashing without remitting would leave them in limbo,
- quashing without remitting would discourage future whistleblowers from participating in the process, and
- quashing alone would effectively be stating that no wrongdoing occurred.

¹ "Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review."

[63] Counsel for Ms. Campbell seeks to have the Decision quashed without it being remitted back to the Commissioner since Ms. Campbell is long retired and a re-investigation at this point would serve no useful purpose.

[64] I see no merit in sending the decision back to permit the Commissioner to remedy the investigation process. I would expect that a new Commissioner might adopt certain of the recommendations from this decision and that at least some of the whistleblowers might continue to participate. But I further expect that most would wonder why they are being asked to participate again in a process for a workplace which, according to the Decision, is now functioning well, and that they would be satisfied that they achieved their goals with the first investigation.

[65] The Decision is quashed.

[66] Counsel may seek a ruling on costs if they cannot agree. Those costs will include costs of the application before Justice Friesen in accordance with para 65 of her decision.

I thank both counsel for their comprehensive briefs and cogent oral submissions.

Heard on the 14th day of June, 2024.

Dated at the City of Edmonton, Alberta this 21st day of June, 2024.

J.S. Little
J.C.K.B.A.

Appearances:

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