

Federal Court



Cour fédérale

Date: 20171207

Docket: T-845-16

Citation: 2017 FC 1122

Ottawa, Ontario, December 07, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

KATHARINE GREEN

Applicant

and

**INDIGENOUS AND NORTHERN AFFAIRS
CANADA AND THE ATTORNEY GENERAL
OF CANADA**

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Associate Deputy Minister of Aboriginal Affairs and Northern Development Canada [AANDC] (now Indigenous and Northern Affairs Canada), Hélène Laurendeau, dismissing Katharine Green's grievance filed under s. 208(1) of the *Public Service Labour Relations Act* [PSLRA] (now the *Federal Public Sector Labour Relations Act*). Ms. Laurendeau concluded that there was no harassment within the meaning of the *Treasury Board Secretariat Policy on Harassment Prevention and Resolution*

[the *Policy*] and the *Treasury Board Secretariat Directive on the Harassment Complaint Process* [the *Directive*].

[2] In her harassment grievance, Ms. Green claims that she was not given an opportunity to respond to a harassment complaint filed against her by her subordinate, referred to as MG, and that this alleged denial of procedural fairness constituted harassment under the *Policy*. She further argues that Laurendeau erred in concluding that her complaint was time-barred by the 12 month time limit for harassment complaints as set out in the *Directive*.

[3] This judicial review application was heard with two related judicial review applications filed by Ms. Green in court files T-1721-15 and T-129-16.

[4] The Applicant has named the Department of Indigenous and Northern Affairs Canada as a Respondent. Under Rule 303(2) of the *Federal Courts Rules*, the proper Respondent in this case is the Attorney General of Canada, as individual departments cannot be named as respondents. The style of cause is amended accordingly.

[5] For the reasons that follow, this judicial review is dismissed.

I. Background

[6] On June 19, 2012, MG filed a harassment grievance against Ms. Green [MG grievance]. Ms. Green was notified of this grievance on June 21, 2012.

[7] On June 27, 2012, a grievance hearing was held. MG also had a second meeting involving his grievance on July 24, 2012. Ms. Green was not invited to participate in these meetings nor was she provided with a copy of the grievance. On July 26, 2012 a decision was made which “partially upheld” MG’s grievance and he was reassigned to another department. The decision did not make any findings on the harassment allegations.

[8] On August 5, 2012 Ms. Green was advised that MG’s grievance was “not upheld” and that he was being reassigned.

[9] On March 28, 2013 Ms. Green filed her own grievance alleging that the MG grievance was mishandled. This grievance also included allegations against other employees, which is the subject of the T-1721-15 application.

[10] In February 2015, in the context of a separate grievance before the Public Service Labour Relations and Employment Board [PSLREB], the Respondent disclosed the 2012 MG grievance decision to Ms. Green. This decision noted that MG’s grievance was “partially upheld.” In response to this, on November 30, 2015, Ms. Green filed a harassment complaint under the *Policy* alleging a violation of “natural justice and procedural fairness” in the failure to provide her the documentation regarding the MG grievance, and the alleged failure to be clear about the resolution of the MG grievance.

[11] On February 3, 2016, Joe Wild, Senior Assistant Deputy Minister, Treaties and Aboriginal Government, dismissed Ms. Green’s harassment complaint because it was filed

outside the 12 month period provided for in the *Directive*, and because the actions of the decision-maker on the MG grievance did not meet the definition of harassment in the *Policy*.

[12] On March 4, 2016 Ms. Green grieved this decision pursuant to s. 208(1) of the *PSLRA*.

II. Decision Under Review

[13] The April 28, 2016 final level decision of Laurendeau is the decision under review [Laurendeau decision].

[14] Laurendeau denied Ms. Green's grievance because it was filed outside the 12 month timeframe provided for in the *Directive*. While the *Directive* provides for an extension of this timeframe in "extenuating circumstances," Laurendeau concluded that no such circumstances were identified. Further, the Laurendeau decision noted that at the relevant time, Ms. Green was advised that MG was reassigned as corrective action in response to his grievance. Therefore, according to Laurendeau, since the harassment portion of the MG grievance was not upheld, there was no incorrect information provided to Ms. Green. Laurendeau found that the disclosure provided to Ms. Green in response to the PSLREB complaint was not new information, because the material facts associated with that disclosure—that MG was transferred in response to his grievance—were reported to Ms. Green in 2012. Laurendeau further concluded that there was no obligation to disclose any portion of the MG grievance regarding the transfer to Ms. Green.

III. Issues

[15] Ms. Green raises the following issues with the Laurendeau decision:

- A. Is the decision reasonable?
- B. Was there a breach of procedural fairness amounting to harassment under the *Policy*?

IV. Standard of Review

[16] The standard of review for decisions under the *Policy* is reasonableness because it involves the interpretation and application of the *Policy* and *Directive* (*Marszowski v Canada, Attorney General*), 2015 FC 271 at para 37).

[17] With respect to the procedural fairness issues raised by Ms. Green, this Court has traditionally applied the correctness standard of review (*Mission Institution v Khela*, 2014 SCC 24 at para 79).

[18] However, the Federal Court of Appeal has recently noted that the standard of review on matters of procedural fairness is in flux (*Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at para 11; *Bergeron v Canada (Attorney General)*, 2015 FCA at paras 67-72).

[19] Here the argument is that the alleged violation of procedural fairness amounts to harassment under the *Policy*. Ms. Green argues that the violations of procedural fairness meet the definition of harassment under the *Policy*.

[20] Therefore, whether Ms. Green's procedural fairness allegations constitute harassment is a matter which involves the interpretation and application of the *Policy*. This is reviewable on the reasonableness standard.

V. Analysis

A. *Is the decision reasonable?*

[21] Ms. Green argues that details of MG's harassment complaint were hidden from her and that she was misled about the outcome of his grievance until the PSLREB proceedings in 2015. Therefore, she argues the finding that her grievance was filed outside the 12 month time frame is unreasonable and the "extenuating circumstances" exception in the *Directive* should have applied.

[22] The core of the Laurendeau decision is that Ms. Green's grievance was filed too late, that is, outside the 12 month time frame. The events at issue in the MG grievance took place in 2012. Ms. Green did not file her grievance until 2015. Therefore, Laurendeau found that the application of the exception was not warranted in these circumstances.

[23] In fact, there was no actual finding on the harassment allegations made in the MG grievance. Ms. Green's name is not referenced in the decision. Ms. Green was advised by email on August 5, 2012 that the grievance was not upheld and the reassignment of MG was explained. Ms. Green raised objections to reassignment as a remedy to the grievance. However on August 5, 2012, Ms. Green was advised that the reassignment remedy was granted to MG. As the

reassignment of MG is Ms. Green's fundamental issue with the Laurendeau decision, she should have grieved the reassignment decision in 2012.

[24] The only "new" information that Ms. Green learned from the written decision, which she received in 2015, was the description that the grievance was partially upheld, referring to the fact that the corrective action sought by MG in the form of reassignment was granted. However, the nomenclature used to describe the resolution of MG's grievance, from "not upheld" in the email to Ms. Green to "partially upheld" in the letter to MG, does not alter the core of the decision which was a reassignment and no finding on the harassment component of the MG grievance.

[25] Given the deference owed to Laurendeau in the interpretation and application of the *Directive*, her decision that no exception to the 12-month timeframe existed on the facts is reasonable.

B. *Was there a breach of procedural fairness amounting to harassment under the Policy?*

[26] Ms. Green argues that she was deprived of the right to know and respond to the allegations made against her by MG and that this amounted to harassment.

[27] However, before Ms. Green can argue that she was deprived of certain rights, she must first establish that she had those rights in the MG grievance process.

[28] The *Policy* and *Directive* codify the content of procedural fairness in this case (*Potvin v Canada*, 2005 FC 391 at para 23). This Court has held that the duty of fairness owed in a

grievance procedure under the *PSLRA* is at the low end of the scale (*Hagel v Canada (Attorney General)*, 2009 FC 329 at para 35, aff'd at 2009 FCA 364). As such, beyond notifying a respondent of a harassment complaint, which occurred here, the *Policy* and *Directive* do not generally extend formal rights of disclosure or involvement to Ms. Green, as the person about whom a complaint has been made.

[29] Further the fact that no finding was made on the harassment component of the MG grievance, Ms. Green has failed to demonstrate that there was any general unfairness in the way the process unfolded involving MG's grievance.

[30] However, even if there was procedural unfairness on these facts, that would not be sufficient for Ms. Green to succeed. Having framed her procedural fairness argument as a harassment complaint, Ms. Green must meet the harassment definition in the context of the *Policy* (*Houle-Mrak v Canada (Attorney General)*, 2013 FC 727 at para 55), which provides as follows.

Harassment (harcèlement)

improper conduct by an individual, that is directed at and offensive to another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises objectionable act(s), comment(s) or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of

Harcèlement (harassment)

comportement inopportun et offensant, d'un individu envers un autre individu en milieu de travail, y compris pendant toute activité ou dans tout lieu associé au travail, et dont l'auteur savait ou aurait raisonnablement dû savoir qu'un tel comportement pouvait offenser ou causer préjudice. Il comprend tout acte, propos ou exhibition qui diminue, rabaisse, humilie ou embarrasse une personne, ou tout acte d'intimidation ou de

intimidation or threat. It also includes harassment within the meaning of the Canadian Human Rights Act (i.e. based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and pardoned conviction).

menace. Il comprend également le harcèlement au sens de la Loi canadienne sur les droits de la personne (c.-à-d. en raison de la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée).

Harassment is normally a series of incidents but can be one severe incident which has a lasting impact on the individual.

Le harcèlement est normalement défini comme une série d'incidents mais peut être constitué d'un seul incident grave lorsqu'il a un impact durable sur l'individu.

[31] On the facts presented, Laurendeau concluded that there had been no denial of any procedural fairness rights in violation of the *Policy*. This is a reasonable conclusion. While Ms. Green argued that the reassignment of MG undermined her managerial authority, this alone is insufficient to demonstrate harassment. There was no evidence that the decision and process followed in reassigning MG constituted an “objectionable act” which caused “personal humiliation or embarrassment.”

[32] Considering the deference owed in the application of the *Policy*, it was reasonable for Laurendeau to find that the procedural allegations did not give rise to harassment in the *Policy*. Ms. Green was advised that she had no rights to disclosure. Laurendeau’s decision that there was no obligation to disclose the content of the grievance to Ms. Green is reasonable as there was no actual harassment finding made in the MG grievance.

[33] Given that Laurendeau acted consistently with the *Policy* and *Directive*, there is no reason for this Court to interfere with the decision-maker's application of the *Policy* and no procedural fairness issues arise.

VI. Conclusion

[34] In her Notice of Application, Ms. Green seeks compensation for mental distress and pecuniary damages suffered.

[35] Notwithstanding the lack of evidence substantiating this claim for damages, Ms. Green cannot seek monetary compensation on judicial review. It is well-accepted that this Court on judicial review does not have jurisdiction to award monetary damages because such damages are not contemplated by s. 18.1(3) of the *Federal Courts Act* (*Canada v Tremblay*, 2004 FCA 172 at para 28; *Lac v Canada (Attorney General)*, 2014 FC 565 at para 34).

[36] The application for judicial review is dismissed with costs to the Respondent in the amount of \$2,000.00.

JUDGMENT in T-845-16

THIS COURT'S JUDGMENT is that

1. This judicial review is dismissed;
2. The Respondent shall have costs in the amount of \$2,000.00.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-845-16

STYLE OF CAUSE: KATHARINE GREEN v INDIGENOUS AND
NORTHERN AFFAIRS CANADA AND THE
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: OCTOBER 10, 2017

JUDGMENT AND REASONS: MCDONALD J.

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APPEARANCES:

Mr. Andrew Lister FOR THE APPLICANT

Mr. Richard Fader FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Lister-Beaupré FOR THE APPLICANT
Barristers and Solicitors
Ottawa, Ontario

Attorney General of Canada FOR THE RESPONDENTS
Ottawa, Ontario