Federal Court  Cour fédérale

Date: 20130429

Docket: T-1296-11

Citation: 2013 FC 438

Ottawa, Ontario, April 29, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

MAHMOOD KHALID

Applicant

and

NATIONAL RESEARCH COUNCIL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Dr. Mahmood Khalid [applicant] seeks judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of the final level grievance decision of Mr. John Coleman [decision-maker], Vice-President of the National Research Council of Canada [NRC or employer], made on April 29, 2011. In that decision, the decision-maker dismissed the applicant's grievance which challenged the employer's decision to not rescind his pre-retirement transition leave agreement [PRTL], as he had requested.

[2] To respond to the applicant's request, the employer had to exercise its discretion to determine whether exceptional or unforeseen circumstances justified granting the applicant's request to rescind his PRTL. In refusing to do so, the employer took into account, amongst other considerations, the financial and operational conditions prevailing at the NRC at the time, and the fact that the applicant's request was based on changes in his personal circumstances which were unrelated to the NRC.

[3] For the reasons that follow, this application for judicial review will be dismissed.

Facts

[4] On July 16, 2009, while employed by the NRC Institute of Aerospace Research, the applicant applied for a two-year PRTL from April 29, 2010 to April 29, 2012. The purpose of this application was to enable the applicant to work in Europe and to be closer to his ailing mother who then lived in the United Kingdom. The applicant's declared intentions were to take a position as a seasonal lecturer at the von Karman Institute for Fluid Dynamics [VKI] in the UK.

[5] A PRTL is a special working arrangement whereby an eligible employee who is within two years of being eligible for full retirement can have his or her work week reduced. By the end of the leave period the employee is required to resign. While on a PRTL, the employee's pay is adjusted in accordance with the reduced working hours, but pension and benefits coverage and premiums remain unaffected.

[6] The Treasury Board's Directive on Leave and Special Working Arrangements, which applies to the NRC's PRTL Program, requires employees on a PRTL to maintain a minimum of 60% of their workload during the leave period.

[7] Unknown to the employer at the time the applicant's PRTL was filed and approved, the applicant had accepted the position of Head of Department Aeronautics/Aerospace Department at the VKI in Belgium and was expected to start on September 1, 2009. The applicant had signed a binding contract with the VKI on April 29, 2009, some three months before applying for a PRTL.

[8] In order for the applicant to be available to work at the VKI on September 1, 2009 and to be within two years of retirement at the beginning of his PRTL period, he needed to take an eight-month vacation leave starting on September 1, 2009, immediately prior to the beginning of his PRTL in May 2010.

[9] The applicant first inquired with the Pay and Benefits department of the NRC on July 13, 2009 and asked Ms. Plescia, an NRC Pay and Benefits Advisor, to send him some information on the PRTL program. On July 14, 2009, Ms. Plescia replied to the applicant by email and forwarded him three links to the NRC's web site. These links provided all relevant information regarding the program, including the requirement to work 60% of the workable hours during the two-year period. The same day, the applicant sent Ms. Plescia a new email, advising her that he was unable to open the last web site link, the one containing the form to be filled and submitted. He did not mention any difficulties opening the links providing the relevant information on the program.

[10] The applicant completed the application form on July 16, 2009, and under the heading "Leave period" the applicant indicated "40% of mandatory hours to be worked out with supervisor". He did not complete the section "Please indicate days to be taken off" and forwarded the form to the NRC. During the week that followed, Dr. Zan, the applicant's supervisor, had questioned him on two occasions to ascertain whether he fully understood the terms and conditions of the PRTL program, given the significant consequence that the applicant's resignation would be required at the end of the two-year period.

[11] An exchange of emails followed between the applicant and Ms. Plescia whereby the applicant wanted to know his take home pay if he was to work 40% of his workable time (and not take off 40% of the workable time) and Ms. Plescia wanted to know what days during the week the applicant intended to take off. It seems quite obvious when reading this series of emails that there was a misunderstanding between the two concerning the applicant's intention.

[12] Meanwhile, the applicant had sent an email to Dr. Zan on July 23, 2009 asking him to proceed with his PRTL. Dr. Zan did so that same day by signing the application form and forwarding it to the Pay and Benefits department.

[13] On August 4, 2009, Ms. Plescia sent an email to the applicant advising him that she had received his application form, that it was incomplete and that she was sending it back to him with the incomplete sections highlighted. The applicant then filled the section "Please indicate days to be taken off" by indicating "Tuesday and Thursday".

[14] The applicant moved to Europe in September of 2009 and commenced his new employment as the Head of Department Aeronautics/Aerospace Department at the VKI. As noted earlier, the applicant admittedly did not fully disclose his employment at the VKI to the NRC.

[15] On October 1, 2009, after having read the communiqué concerning the applicant's appointment at the VKI, Dr. Zan sent the applicant an email reiterating what was said to the applicant in July 2009, that is that based on the employer's conflict of interest guidelines, he was required to disclose his VKI arrangement to the NRC Conflict of Interest Office.

[16] Some four months later, in an email dated February 8, 2010, the applicant informed Dr. Zan that he would resign from his position with the VKI, as he "never got over missing [his] friends and Canada." He asked Dr. Zan if there was a way to retract his PRTL arrangement. Dr. Zan provided a brief response to this email stating that he would try to find out what could be done.

[17] On February 9, 2010, the applicant sent an email to Denise Le Voguer, an NRC Human Resources Generalist, advising her of changes in his family situation (his mother's death in October 2009, his divorce from his wife and his children's request that he return to Canada) and his desire to revert to his full-time position.

[18] On February 18, 2010, the applicant was advised by an NRC Conflict of Interest Officer that "While there would be no difficulties for him to continue to teach at VKI, while continuing his NRC regular duties during his upcoming pre-retirement period, we had major concerns that serving as Head of Department Aeronautics/Aerospace Department at VKI, which included leading research

activities, would not be in line with the NRC's approach to managing conflict of interest." The applicant responded that the NRC's refusal to accept his departmental head position was consistent with his plans to resign and return to Canada.

[19] On February 11, 2010, the applicant informed Dr. Zan and Ms. Le Voguer that as a result of Ms. Desjardins' determination, he was left with no alternative but to resign his position at the VKI and report back to the NRC.

[20] On February 17, 2010, Dr. Zan wrote to the applicant stating that the pre-retirement arrangement seemed to be binding and irrevocable.

[21] On February 18, 2010, the applicant emailed Jerzy Komorowski, NRC Director General, indicating that as a result of changes in his family circumstances he wished to return to Canada and would like to have his pre-retirement plan cancelled. He also stated that he had just learned from his correspondence with Ms. Desjardins that the Treasury Board requirement for work during the pre-retirement phase was a minimum of a 60% workload, rather than the 40% that he believed he had agreed to according to his request for leave.

[22] On February 19, 2010, the applicant sent a further email to Ms. Le Voguer, reiterating the fact that he had relied on the employer's approval of his application as an acknowledgment that he would be permitted to work at a 40% workload during the leave period. He noted that he would not have proceeded with the PRTL had he been told that he was required to commit to working a 60%, rather than a 40%, workload.

[23] By letter dated March 23, 2010, Mr. Komorowski informed the applicant that the NRC would not be entertaining the applicant's request to cancel the PRTL agreement and that he was committed to three days of work per week under the agreed arrangement, which represented a 60% workload.

[24] Upon his return to Canada, on June 15, 2010, the applicant grieved the employer's decision to not cancel his PRTL agreement. During the grievance process, the applicant reiterated that he only found out about the 60% workload requirement in February 2010 and that he would never have taken a pre-retirement leave had he been initially informed of that condition. The NRC took the position that any failure on its part to clarify the situation after the application was submitted was immaterial given that the applicant should have informed himself of the policy and its various requirements.

[25] On February 11, 2011, Mr. Komorowski denied the applicant's grievance at the first level. This decision was maintained by the final level decision-maker on April 29, 2011 following a hearing held on March 29, 2011; hence the present application for judicial review.

[26] The decision-maker found that the NRC management exercised its judgement and its managerial responsibilities in a fair and reasonable manner in handling the applicant's PRTL application and his subsequent request to have it rescinded. In fact, while the Treasury Board's Directive and the NRC pre-retirement program both allowed for the possibility of cancellation in "exceptional or unforeseen circumstances" at the employer's discretion, the financial and operational considerations equally needed to be taken into account. In support of the management's

decision, the decision-maker also noted that no additional revenues or major contracts were expected upon the applicant's return and that additional expenses could impact the already challenged financial situation of the institute.

[27] Although there was reasonable evidence supporting the applicant's contention that until shortly before his return to Canada he was not aware of the requirement to work an average of three days per week as opposed to two, this did not render the initial decision unreasonable. There was shared responsibility for the misunderstanding between the NRC and the applicant. As such, while the NRC had the "opportunity" to help clarify the situation regarding the applicant's minimum obligations under the pre-retirement leave program, the applicant had a "responsibility" to inform himself of all applicable terms and conditions of the policy and he failed to do so. The decision-maker further noted that this misunderstanding was not the only reason that triggered the applicant's decision to rescind his pre-retirement leave arrangement and that the applicant's decision to resign from the VKI and return to his full-time position with the NRC did not confer any obligations on the employer to accede to his request.

Issues

[28] This application for judicial review raises the following issues:

1) What is the appropriate standard of review applicable to the decision-maker's decision?
2) Did the decision-maker commit a reviewable error in deciding to not rescind the applicant's July 2009 PRTL agreement?

[29] The second issue is twofold as the applicant asserts two reviewable errors on the part of the decision-maker. He submits that the rationale for denying his request to rescind the PRTL agreement was unreasonable in view of the evidence. In addition, he argues that the NRC committed a negligent misrepresentation when it approved the applicant's request for PRTL as submitted without making any clarifications regarding the percentage of the workload requirement, and that in disposing of this issue, the decision-maker either failed to apply or incorrectly applied the legal principles relating to negligent misrepresentation.

[30] Significantly, during oral submissions, counsel for the respondent argued that the applicant did not raise a claim for negligent misrepresentation before the decision-maker. Counsel for the applicant replied that the issue of negligent misrepresentation was implicitly argued and that it was in fact the substance of the applicant's grievance before the decision-maker.

Applicable Standard of Review

[31] The two-step process in the standard of review analysis set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] requires the reviewing court to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" and, where this first inquiry proves unfruitful, to "proceed to an analysis of the factors making it possible to identify the proper standard of review" (*Dunsmuir* , above at para 62). The focus of the analysis remains on the nature of the issue that was before the tribunal under review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 4, [2009] 1 SCR 339 [*Khosa*]). Other factors to consider in determining whether an administrative decision-maker is entitled to deference include

the existence of a privative clause, a discrete and special administrative regime in which the decision-maker has special expertise and the nature of the question of law (*Dunsmuir*, above, at para 55). As per *Dunsmuir*, deference is generally appropriate where a tribunal is interpreting its own home statute or statutes that are closely connected to its function, with which the tribunal has particular familiarity. Deference may also be warranted where a tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context (*Dunsmuir*, above, at para 54; *Khosa*, above, at para 25; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 16, [2011] SCJ No 53).

[32] The parties in this case disagree on the standard of review to be applied to the final level grievance decision made by the employer. The applicant is of the view that although the existence of "exceptional or unforeseen circumstances" as intended by the policy is a question of fact reviewable on the standard of reasonableness, any consideration by the decision-maker of legal principles that fall outside of his expertise, namely those relating to the applicant's allegation of negligent misrepresentation by the employer, should be reviewed against the standard of correctness (*Canada (Attorney General) v Assh*, 2006 FCA 358, [2006] FCJ No 1656 [*Assh*]).

[33] In *Assh*, the Federal Court of Appeal was called upon to decide whether a final level determination of whether there was a conflict of interest in violation of the employer's Conflict of Interest Code was a question of law. The Court held that determining the existence of conflicts of interest engaged the application of common law concepts, independent of the decision-maker's institutional expertise and concluded that correctness was the appropriate standard for

reviewing the final level grievance decision regarding the interpretation of the Conflict of Interest Code (*Assh*, above, at paras 42-46, 50 and 53).

[34] The respondent referred the Court to a number of decisions for the proposition that the standard of reasonableness should be applied to non-adjudicative final level grievance decisions which interpret and apply internal procedures and policies (*Hagel v Canada (Attorney General)*, 2009 FC 329 at para 27, [2009] FCJ No 417 [*Hagel*]; *Peck v Canada (Parks Canada)*, 2009 FC 686 at para 23, [2009] FCJ No 1707; *Insch v Canada (Revenue Agency)*, 2009 FC 869 at para 14, [2009] FCJ No 1525; *Spencer v Canada (Attorney General)*, 2010 FC 33 at para 32, [2010] FCJ No 29).

[35] As Justice O'Keefe noted in *Backx v Canada (Canadian Food Inspection Agency)*, 2010 FC 480 at para 22, [2010] FCJ No 559, as the case law regarding the appropriate standard of review for various final level decisions made under the *Public Service Labour Relations Act*, SC 2003, c 22 [PSLRA] is not settled in the jurisprudence, a contextual approach is preferable.

[36] While I agree with the respondent that on judicial review of non-adjudicable grievance decisions made by a public employer, this Court has generally adopted the standard of reasonableness in reviewing primarily factual questions that involve the application of various administrative employer policies to specific circumstances, I do not believe that the cases cited by the respondent are determinative. None of those cases involved a situation where, like in this case, the relevant policy was or became part of the employee's terms and conditions of employment and where the employee alleged, in part, that the employer breached its duty of care.

[37] In *Appleby-Ostroff v Attorney General of Canada*, 2010 FC 479, [2010] FCJ No 558 [*Appleby-Ostroff*], Justice O'Keefe held that when a guideline, policy or directive became part of an employee's terms and conditions of employment and when the employee grieved to the employer under the PSLRA alleging that the employer breached the policy, the final level grievance decision made by the employer was not to be accorded deference. The Court specified that this was not because the applicable policy was law, as it was not, but because it had become part of the employee's terms and conditions of employment so that the employee was entitled to a correct final level grievance decision. Although *Appleby-Ostroff* concerned the unilateral assumption of policies by the employer into the terms and conditions of the employees' contract of employment and the issue of the applicability of either of two distinct policies, I believe that the Court's determination remains instructive for the purposes of the present case. The interpretation and application of an internal policy that forms part of the applicant's legal and binding contract of employment (the PRTL agreement) cannot be regarded as a factual or primarily factual question, particularly where an issue of negligent misrepresentation by the employer arising out of the employment relationship is raised.

[38] With regard to the expertise of the decision-maker, it has been held that "the lack of an independent arbitrator under the final level grievance process is a strong indicator that such decision-makers are to be afforded less deference" (*Appleby-Ostroff*, above, at para 52; *Assh*, above, at para 44). In deciding the applicant's grievance, the decision-maker exercised managerial functions and not legal expertise. I am mindful of the fact that the purpose of the legislative regime is to "facilitate the resolution of labour disputes expeditiously, inexpensively and with relatively little formality" (*Canadian Federal Pilots Assn v Canada (Attorney General)*, 2009

FCA 223 at para 55, [2009] FCJ No 822) and that final level decision-makers are generally given deference when interpreting and applying internal policies and procedures (*Peck v Canada (Parks Canada)*, 2009 FC 686 at para 21, [2009] FCJ No 1707). However, in my view, this does not extend to contractual obligations arising out of an individual employee's employment contract governed by the employer's policies. Furthermore, I note that the privative clause of section 214 of the PSLRA has been found to be relatively weak compared to the language of section 233 which protects decisions made by independent adjudicators (*Appleby-Ostroff*, above, at para 53; *Hagel* above, at paras 23-24; *Assh*, above, at para 35).

[39] Considering all of these factors, I am of the view that while the employer's reading and application of the policy in determining the terms and conditions of the applicant's contract of employment, as well as the decision-maker's disposition of the applicant's claim of negligent misrepresentation regarding the percentage of the workload requirement, point towards the standard of correctness, the decision-maker's factual assessment of whether the applicant's circumstances amounted to "exceptional or unforeseen circumstances" warranting the cancellation of the PRTL agreement is worthy of deference. This was the question that was put before the decision-maker in this case.

[40] I shall therefore review the first question against the standard of correctness and the second question against the standard of reasonableness.

Review of the Impugned Decision

The reasonableness of the impugned decision

[41] The decision-maker found that the applicant's circumstances were of a personal nature and were given full consideration at the time that the applicant's request was approved. Yet the decision-maker held that the alleged change of circumstances must be balanced with the employer's financial and operational considerations under the policy, which were prevailing in the applicant's case and which were considered both when the applicant's PRTL was approved and when his request to rescind it was denied.

[42] *Dunsmuir*, above, at para 47, teaches us that reasonableness is primarily concerned with the existence of justification, transparency and intelligibility within the decision-making process and that reasonable decisions will fall within a range of possible acceptable outcomes which are defensible in respect of the facts and law.

[43] It would be difficult for the Court to question, on the deferential standard of reasonableness, the decision-maker's balancing of concurring managerial concerns referred to in the impugned decision, given the employer's discretion and expertise over the subject-matter. It would also be difficult to question his findings i) that when the applicant applied for a PRTL in July 2009, there were likely "job applications, personal contacts, and possibly even interviews underway on [the applicant's] part with VKI about this challenging career opportunity before [he] departed NRC" – since it was subsequently known through discovery that a binding employment contract was signed with the VKI in April 2009 – and ii) that the applicant's reasons for wanting to return to Canada and to his full time job with the NRC had nothing to do with the terms of his PRTL arrangement or with his newly discovered potential conflict of interest.

[44] The decision-maker accepted the applicant's position that he only discovered the 60% workload requirement in February 2010. He qualified the situation as a misunderstanding and attributed the responsibility for that misunderstanding to both the applicant and the employer. That characterisation by the decision-maker is reasonable when we consider all the evidence before the Court.

[45] First, the primary and complete source of information available to the applicant was provided by Pay and Benefits when an email was sent to him, at his request, with the three links to the NRC's web site. All the terms and conditions of the program were included, such as the right to "have [the employee's] workweek reduced by up to 40 per cent." The applicant replied to that email stating that he could not open the link containing the form to be submitted. He did not mention that he could not open the link containing the terms and conditions of the program. The applicant stated in an affidavit filed in support of his application that in fact, he could not open any of the three links sent by Ms. Plescia. He did not say so at the time he received the email and he cannot now put the blame on the NRC for not ensuring he had all the relevant information on hand before applying for a PRTL. This is even more the case when one considers that Dr. Zan had recommended twice to the applicant to make sure he fully understood the PRTL program before filing his application, as the consequence was significant, and that Dr. Zan waited a week before approving the applicant's application form.

[46] Second, the application form itself, which was completed by the applicant after he had presumably perused the terms and conditions of the program and it does not reflect the applicant's assertion that he expected to be working 40% of his workable hours during the PRTL period. Under

the section "Leave Period" he indicated "40% of mandatory hours to be worked out with supervisor" and under the section "Please indicate days to be taken off" he wrote "Tuesday and Thursday." The latter clearly indicated that the applicant would work 60% of his workable hours on Monday, Wednesday and Friday. Although the possibility exists that the applicant meant otherwise, given the information he submitted, it is difficult to place the entire responsibility on the employer for not having clarified the situation with him.

[47] Third, the applicant argues that if he knew of the requirement to work 60% of his workable hours, he would not have applied for a PRTL and he would not have accepted the position at the VKI. This argument is undermined by the fact that the applicant signed an indefinite contract of employment with the VKI on April 29, 2009, some three months prior to applying for a PRTL. It is also weakened by the fact that the applicant was far from being transparent with his employer during his negotiations with the VKI and during the discussions with the employer regarding his PRTL application. He only abided by the NRC's Conflict of Interest Policy after Dr. Zan noticed the communiqué announcing the applicant's appointment as Head of Department Aeronoutics/Aerospace Department at VKI. In fact, it could be that if the NRC would have known of the applicant's true intentions at the time he applied for a PRTL, the applicant may have been required to choose between his appointment at the VKI and the NRC's PRTL program.

[48] Fourth, the series of emails sent by the applicant to the NRC from February 8 to February 18, 2010 clearly indicates that the reasons for the applicant's decision to return to Canada are strictly related to a change in his personal circumstances. The applicant's mistaken impression that he only had to work 40% of his workable hours during the PRTL leave and the fact that he could be

prevented from working at the VKI due to a conflict with the interest of the NCR appear to be afterthoughts on the applicant's part.

The applicant's claim for negligent misrepresentation

[49] If the applicant's claim for negligent misrepresentation was not argued before the decision-maker, it may well be that the issue was not viewed as contentious and it should therefore not be considered by this Court on judicial review. The jurisprudence is well-established that on judicial review, a decision cannot be impugned on the basis of an issue not raised before the administrative decision-maker, unless the new issue is a jurisdictional one, which is not the case here (see *Toussaint v Canada (Labour Relations Board)*, [1993] FCJ No 616 (FCA), at para 5; *Shubenacadie Indian Band v Canada (Canadian Human Rights Commission) (re Macnutt)*, [1997] FCJ No 1481 at paras 37-43; and *Nametco Holdings Ltd v Canada (Minister of National Revenue)*, 2002 FCA 149, at para 2).

[50] However, neither party had mentioned that fact in their written representations, and it was unclear at the outcome of the hearing before the Court whether, and how, this argument was presented to the decision-maker. Therefore, I will assess the applicant's claim.

[51] Two issues should be addressed with regard to the applicant's claim of negligent misrepresentation against the NRC: i) whether the constitutive elements for liability in negligence are established, and in the affirmative ii) whether a partial defence for contributory negligence is available to the employer as a result of the applicant's failures.

i) Whether the constitutive elements for liability in negligence are established

[52] As per *Spinks v Canada* (CA), [1996] 2 FC 563 at para 20, [1996] FCJ No 352 [*Spinks*], citing *Queen v Cognos Inc*, [1993] 1 SCR 87 [*Cognos*], the legal test for liability in negligence includes five constitutive elements: i) there must be a duty of care based on a "special relationship" between the representor and the representee; ii) the representation in question must be untrue, inaccurate, or misleading; iii) the representor must have acted negligently in making said representation; iv) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and v) the reliance must have been detrimental to the representee in the sense that damages resulted.

[53] It has been held that "foreseeable reliance is sufficient to create a special relationship in most cases" (*Spinks*, above, at para 22). There is no doubt that in the circumstances of this case the applicant at least partially relied on the employer when he asked Ms. Plescia to forward to him, as promised, "some information on pre retirement leave facility". Considering the reasonable foresight of the applicant's risk by the employer, the Court can conceivably come to the conclusion that a duty of care arose out of the employment relationship in the circumstances.

[54] While in email correspondence with Ms. Plescia the applicant communicated his intention to have a 40% workload during his transition leave, he received from the NRC Pay and Benefits Advisor all the precise information which should have clearly indicated that the policy only permitted a 40% reduction of working hours. Of greater importance, the applicant was aware that once his PRTL application was approved he was required to resign his position at the end of the leave period.

[55] With respect to the second and third criteria, it should be noted that the applicant was never provided with information that does not correspond to the content of the policy. Furthermore, he did receive a signed approval of his application as it was filled out. If this approval was inaccurate or misleading, which might not be the case, the applicant must bear the responsibility.

[56] Was the employer's communication of web links to the relevant policies sufficient to discharge its duty of reasonable care? In the circumstances of this case, I am of the opinion that it was. The applicant had been working for the NRC for over 27 years and was therefore familiar with its organisation and general policies. The evidence of email communication between the applicant and the NRC Pay and Benefits Advisor shows that the applicant inquired about his take home pay if he would be working 40% of his regular working hours. Instead of correcting or contradicting him, Ms. Plescia replied that she needed to know the exact days a week he intended to take off. In *Spinks*, above, at para 29, the Federal Court of Appeal made clear that "a person may be "misled" by a failure to divulge as much as by advice that is inaccurate or untrue. In the same way that absent information can be "erroneous", as discussed above, missing information can be misleading. […] Consequently, the duty may be breached not only by positive misstatements but also by omissions, for they may be just as misleading." If the duty of care was discharged through email correspondence, a misleading omission in such an email would raise a significant problem. However, that is not the case. It appears from the July 13 email that the applicant himself relied primarily on information that he requested be sent to him in writing. That is confirmed by Dr. Zan's first refusal to sign the applicant's PRTL application before he had familiarized himself with the PRTL terms and conditions.

[57] As per *Cognos*, above, at para 121, "the applicable standard of care should be the one used in every negligence case, namely the universally accepted, albeit hypothetical, "reasonable person." The standard of care required by a person making representations is an objective one." Applying that standard, I find that the employer acted with care by recommending that the applicant familiarize himself with the PRTL program and by making sure he understood its term and conditions. The mere fact that the applicant chose not to review the documentation sent and chose not to advise Ms. Plescia that he could not open the web site link - providing her with the opportunity to make the information available otherwise as she probably did with the application form - do not amount to negligence or omission on the employer's part.

[58] The forth criterion for liability in negligent misrepresentation requires actual and reasonable reliance on alleged misrepresentation. The applicant states that he relied on both his email exchange with the NRC Pay & Benefits Advisor and the fact that his application form was approved by his direct supervisor, Dr. Zan. In the circumstances, it would have been more reasonable for the applicant to rely on the information and documentation provided and on the recommendations of Dr. Zan than on a few confusing emails in which the parties simply and clearly misunderstood each other. In her emails, Ms. Plescia does not confirm the applicant's understanding, nor does she provide an answer to his request to be informed of his take home pay should he be working 40% of his working hours. Basically, in her July 20 email, Ms. Plescia asks the applicant which days he intends to take **as leave without pay** and the applicant replies that, for the sake of argument, he **would work on** Tuesday and Thursday. This information contradicts his application form where he states instead that he would take leave on Tuesday and Thursday.

[59] The applicant's alleged reliance on the NRC's approval of his application form favours the respondent's position rather than the applicant's. Since the NRC had reasons to believe that the applicant had familiarized himself of the PRTL policy, it was reasonable to read the application form as conforming with the terms and conditions of the program, that is that the applicant intended to take "40% of mandatory hours to be worked out with supervisor" as his leave period, to be taken off on Tuesdays and Thursdays.

[60] Finally, the applicant submits that as a result of the NRC's negligent representation, he lost his full-time employment with the NRC. Again, he had accepted the position with the VKI three months prior to applying for a PRTL and three months prior to any representation having been made by the employer. Furthermore, he had decided to resign from his employment at the VKI due to a change in his personal circumstances and prior to having discovered that he misunderstood the terms and conditions of the PRTL program. Therefore, the misunderstanding regarding the percentage of statutory workable hours under the PRTL program is not the *causa causans* for the applicant's alleged damages.

[61] Accordingly, I am of the opinion that none of the five constitutive elements required to conclude that the NRC is liable for negligent misrepresentation were adequately established on the facts of this case.

ii) *The partial defence for contributory negligence*

[62] Having determined that the NRC did not commit a negligent misrepresentation in law in the applicant's case, there is no need to determine whether the applicant was contributory negligent and participated in causing his own damages.

[63] The application will therefore be dismissed. Costs shall follow the event.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The respondent shall have his costs of the application.

"Jocelyne Gagné"

Judge

SOLICITORS OF RECORD

DOCKET:	T-1296-11
STYLE OF CAUSE:	MAHMOOD KHALID V. NRCC
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 30, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	GAGNÉ J.
DATED:	April 29, 2013

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