

Federal Court



Cour fédérale

Date: 20130913

Docket: T-1443-12

Citation: 2013 FC 951

Ottawa, Ontario, September 13, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

DENNIS WESTBROOK

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Cheryl Fraser, the Assistant Commissioner in the Human Resources Branch of the Canada Revenue Agency, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Assistant Commissioner denied the Applicant's grievance challenging the response to his harassment complaint as outlined in a letter dated January 27, 2010 from Peter Poulin, Assistant Commissioner, Information and Technology Branch.

I. Background

[2] The Applicant was employed by the Canada Revenue Agency [the Agency] as a Computer Systems Analyst. Beginning in March 2007, he reported to Beverley Miranda, a Project Leader.

[3] On September 23, 2008, the Applicant filed a complaint which alleged that between July 2007 and December 2007, he was the subject of harassment by Ms. Miranda. In his complaint, the Applicant alleges that Ms. Miranda's management style constituted personal harassment, as it was "demeaning, offensive, and aggressive." The Applicant states that this harassment culminated in his leave of absence due to illness on October 2, 2007. The Applicant subsequently expanded on his allegations regarding Ms. Miranda. Of relevance to this proceeding are five allegations of harassment. In particular, these allegations are that Ms. Miranda:

- i) Wrongly accused the Applicant of arriving late to work;
- ii) Called the Applicant and other employees about a workplace barbecue as a guise to see if they were at their desks, making them feel as though they were being "spied upon";
- iii) Wrongly accused the Applicant of spending too much time at work discussing personal issues;
- iv) Demanded in a disrespectful, irate and unprofessional manner that the Applicant change a cost estimate, and then physically intimidated him; and
- v) Told the Applicant to go home after stating that he was "no good to her" at work;

[4] In February 2009, Susan Palmai from Quintet Consulting Corporation [the Investigator] was retained by the Agency to conduct an investigation into the Applicant's complaint. The Investigator accepted a written response from Ms. Miranda regarding the Applicant's complaint and conducted

various interviews between June and August 2009. In November 2009, the Investigator released her Preliminary Investigation Report, to which the Applicant replied with comments. On December 23, 2009, the Final Investigation Report was released to the Agency.

[5] On January 27, 2010, Mr. Poulin dismissed the Applicant's complaint. In response, the Applicant filed a grievance. A hearing was held on April 30, 2012, in which the Applicant gave written representations alleging various flaws in the investigation.

[6] Following the hearing, Ms. Fraser rendered a decision on June 20, 2012, which dismissed the Applicant's grievance in a one-page letter. Ms. Fraser stated that she reviewed his grievance, the Investigator's report and the submissions presented by the Applicant and his representative at the hearing before concluding that "the merits of (the Applicant's) complaint were fairly and thoroughly considered and that the investigation process was conducted appropriately."

II. Issue

[7] The issue raised in the present application is as follows:

A. Was the Canada Revenue Agency's decision reasonable?

III. Standard of review

[8] Both parties agree that the standard of review is reasonableness (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 16, 28; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-48; *Newfoundland and Labrador Nurses' Union v*

Newfoundland and Labrador (Treasury Board), 2011 SCC 62 [*Newfoundland and Labrador Nurses Union*]; et al).

IV. Analysis

A. *Was the Canada Revenue Agency's decision reasonable?*

[9] Canada Revenue Agency's Preventing and Resolving Harassment Policy states, in part:

Harassment is defined as:

A form of misconduct/improper behaviour by an employee, that is directed at and offensive to, another employee, and which that person knew or ought to have known, would be unwelcome and cause offence or harm. It comprises objectionable conduct, comment or display that demeans, belittles or causes personal humiliation or embarrassment, and any acts of intimidation or threats, which detrimentally affects individual well-being or the work environment.

[10] The Applicant contends that the Investigator's report was deficient in how it dealt with the evidence presented concerning Ms. Miranda's alleged harassment of the Applicant. Particularly, he submits there were two errors in evaluating the evidence:

- i) In assessing credibility, the Investigator failed to properly consider the unresolved inconsistencies between the Applicant's testimony and Ms. Miranda's testimony; and
- ii) The Investigator failed to consider the more probable version of events, as provided by the Applicant and compared against Ms. Miranda's evidence.

[11] In failing to address these deficiencies in the Investigator's report, the Applicant's position is that the Agency's reasons for its decision were unreasonable, as the decision and record do not shed light on why the Agency decided as it did.

[12] While not as clear as the reasons for the credibility issues in the decision could be, I must disagree with the Applicant's characterization and criticism of the Agency's decision as being unreasonable. Moreover, while the Court should not have to guess as to the reasons or substitute its reasons for those of the decision maker, that is not the case here.

[13] It is not the Court's role to conduct an in-depth analysis of the record to justify the reasons underlying the Agency's decision. That being said, the record here is relatively clear in showing how the Agency arrived at its decision. The initial decision of January 27, 2010, references the Investigator's report and provides a summary of conclusions reached on the evidence. The final decision by the Agency on June 10, 2012, likewise references the Investigator's report. One is not left to guess at the reasons; they are articulated in the January 27, 2010 letter, and supported by the Investigator's report. In the instant application, it is reasonable to treat the Investigator's report and the initial decision as part of the final decision. To sever the final decision from these components would be artificial and contrary to the deference accorded to administrative decision-makers on the reasonableness standard.

[14] Accordingly, the reasoning applied by the Agency in reaching its final decision is within the guidance offered by *Newfoundland and Labrador Nurses Union*, at para 15, that courts may "... look to the record for the purpose of assessing the reasonableness of the outcome." It is reasonable to incorporate the Investigator's report and the initial decision within the reasoning of the Agency's final decision (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37; *Ralph v Canada (Attorney General)*, 2010 FCA 257 at paras 14, 16).

[15] The Investigator's report and the initial decision demonstrate that the Applicant's complaints were thought to be unfounded for various reasons, including denials by Ms. Miranda, a lack of corroborative evidence by the Applicant, and the fact that certain incidences did not meet the definition of harassment. These reasons allow the Court to understand why the tribunal made its decision (*Newfoundland and Labrador Nurses Union*, at para 22), including an assessment of credibility based on the evidence.

[16] The Investigator's report and the initial decision, in dealing with the five issues raised by the Applicant in this application, made a number of findings. With regard to the first and second issue raised by the Applicant, the Investigator's report stated at page 29:

Ms. Miranda's assertion that, as supervisor, she would walk to the area of the employees she supervises to make contact with them at the end of the day or at any other time is in no way inconsistent with her supervisory responsibility.

Furthermore, the initial decision of January 27, 2010 states at page 2:

The witnesses' testimonies did not provide evidence that would suggest that Ms. Miranda exceeded her supervisory role by her occasional visits to the team's cubicle area.

[17] With regard to the third issue, the Investigator's report states at page 28:

Ms. Miranda did not deny that she went to his (the Applicant's) desk but denied that she asked what he and Mr. Wong talked about" (page 28).

[18] At page 29, the Investigator makes findings relevant to the fourth issue raised by the Applicant:

There is no witness evidence to suggest that Ms. Miranda had physically intimidated employees in the workplace.

No one witnessed any physical intimidation and, in fact, Mr. Tripp said he had concerns about the way in which BCCE team members treated Ms. Miranda. Mr. Lessard concurred that Ms. Miranda did not use unprofessional language or yell at her employees.

[19] In relation to both the third and fourth issue, the initial decision states at page 3:

This allegation is therefore deemed to be unfounded on the basis of a lack of evidence corroborating the allegation.

[20] Finally, with regard to the fifth issue, the Investigator's report states at page 30 that:

Mr. Westbrook provided no evidence in support of his allegation and did not deny that four days after the alleged 20 September 2007 incident, Ms. Miranda approved his request to attend a seminar on depression. None of the witnesses had heard or were able to provide reliable evidence that Ms. Miranda had made the statements alleged by Mr. Westbrook.

At page 4 the initial decision concludes on the fifth issue by stating:

Given that Mr. Westbrook has not produced evidence to support his allegation, it is deemed to be unfounded.

[21] The cases cited by the Applicant in support of his assertion that credibility must be assessed are largely inapplicable on the facts of the instant application. In *Canada (Attorney General) v Tran*, 2011 FC 1519 at para 19, the concern over a failure to assess credibility arose on the basis of the investigator's failure to interview a crucial witness. In *6245820 Canada Inc v Perrella*, 2011 FC 728 at para 56, the failure to assess credibility was premised on the improper reliance on an outdated principle of interpretation which gave preference to a positive statement over a negative one. In *Yu v Canada (Attorney General)*, 2011 FC 38 at para 27, failure to assess credibility was discussed in the context of procedural fairness.

[22] Furthermore, *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at para 27, comments on the need to assess credibility in circumstances similar to this application:

Evidence tendered by a witness with a personal interest in the matter may also be examined for its weight before considering its credibility because typically this sort of evidence requires corroboration if it is to have probative value. If there is no corroboration, then it may be unnecessary to assess its credibility as its weight will not meet the legal burden of proving the fact on the balance of probabilities.

[23] In the instant application, the Investigator interviewed all the relevant witnesses and based her findings on the circumstances of the case and the evidence provided from these witnesses, and the Applicant's concern is in relation to the adequacy of reasons on substantive review, not the absence of reasons on procedural fairness grounds.

[24] The five central allegations of harassment as alleged by the Applicant were found not to be substantiated by the Agency on the evidence. While there is no question that there were personality issues between the Applicant and Ms. Miranda, the nature of their conflict was not before me to decide, but rather whether the decision of Ms. Fraser was reasonable or not, based on the record before me. The findings by Ms. Fraser based on the Investigator report and Mr. Poulin's decision are within the range of acceptable outcomes as set out in *Dunsmuir*. While the Investigator did not explicitly address credibility in her report, the reasoning provided was not simply an arbitrary choice to accept Ms. Miranda's version over the Applicant's, but a reasoned finding which looked to corroborative evidence and the circumstances of the case.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is dismissed with costs to the Respondent to be taxed;

“Michael D. Manson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1443-12

STYLE OF CAUSE: Westbrook v Canada Revenue Agency

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: September 9, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** MANSON J.

DATED: September 13, 2013

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