Federal Court  Cour fédérale

Date: 20140127

Docket: T-1823-12

Citation: 2014 FC 86

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 27, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

AGNAOU, YACINE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application pursuant to section 51.2 of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [the Act or the PSDPA], for judicial review of a decision dated September 6, 2012 [the decision], of the Office of the Public Sector Integrity Commissioner [the Office of the PSIC], which refused to accept the applicant's disclosures of wrongdoing.

II. Background

[2] The applicant, Yacine Agnaou, worked as a federal Crown prosecutor at the Public Prosecution Service of Canada [PPSC], Quebec Regional Office [QRO]. He worked at the PPSC from October 20, 2003, to June 2009, as part of the Economic Crime Team. In October 2008, the applicant was assigned several files by PPSC management. These files included a certain file "A", in which the applicant wanted to prosecute under the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [the ITA]. There is no need to go into the details of this file in the context of the present judicial review.

[3] On November 4, 2008, the applicant informed one of the deputy chief federal prosecutors that he wished to prosecute in file "A". The chief prosecutor informed him that she believed it to be premature to prosecute in the file; in response, the applicant shared his objections with her. On December 24, 2008, the applicant, who, as a result of their disagreement on file "A", believed that he could no longer trust his supervisory relationship with this chief prosecutor, asked to be assigned to a different supervisor, a request the Management Committee agreed to. On January 27, 2009, the applicant met with his new supervisor and shared his views on file "A". The new supervisor expressed a similar opinion to that of the first supervisor, namely that it would be wise not to prosecute too quickly in file "A".

[4] Following this meeting, the applicant became convinced that the mission of these managers was to ensure that no proceedings were instituted in file "A".

[5] On February 10, 2009, the applicant had a meeting with the general counsel of the Economic Crime Team, during which the applicant informed this general counsel that he wished to prosecute in file "A".

[6] Between February 10 and February 24, 2009, a number of meetings and conversations took place between the three managers and the applicant, in which the applicant was able to explain his position on the authorization of proceedings in file "A". A final meeting was held on February 24, 2009, between the applicant and the three managers, during which it became clear that the applicant's position had become irreconcilable with that of the managers.

[7] On March 9, the General Counsel Committee met without the applicant's knowledge to recommend not authorizing prosecution in this file.

[8] On March 24, 2009, the applicant's managers informed him of the management team's final decision: not to authorize prosecution in file "A".

[9] Following these events, the applicant decided to disclose what he believed to be wrongdoing on the part of his superiors at the PPSC. After a discussion with the Registrar of the Office of the PSIC on June 9, 2009, he decided not to make a disclosure right away, explaining in his memorandum of fact and law that he [TRANSLATION] "had noted that there were no objective criteria to guide how his disclosure would be handled, [and] there was an arbitrariness in how discretion was exercised within the office".

[10] On June 29, 2009, the applicant informed the Registrar of the Office of the PSIC that he was leaving the PPSC to go on study leave and that he wished to take some time to think before making a disclosure.

III. The applicant's disclosure

[11] On October 13, 2011, the applicant filed a disclosure with the person responsible for the initial assessment of disclosures at the Office of the PSIC, in which he alleged that the actions of the managers at the QRO and individuals at PPSC National Headquarters failed to comply with several laws of Canada. He alleged that his superiors and their subordinates had committed wrongdoing when they objected to the filing of charges in file "A" using means that undermined the integrity of Canada's objective, transparent and independent system of prosecution.

[12] An analyst from the Office of the PSIC analyzed the applicant's disclosure and recommended not dealing with it; this recommendation was verified by a case analysis manager and Legal Services before it was submitted to the Deputy Commissioner.

[13] The Deputy Commissioner upheld the analysis and the recommendation, and refused to deal with the disclosure.

IV. Decision at issue

[14] In a letter dated September 6, 2012, the Deputy Commissioner refused to deal with the applicant's disclosure on the ground that the events described in the disclosure were the result of a balanced, informed decision-making process and that there was no information to suggest that any wrongdoing had been committed (paragraphs 24(1)(*e*) and (*f*) of the Act).

Paragraph 8(*a*) of the Act

[15] Regarding paragraph 8(*a*) of the Act, the Deputy Commissioner noted that the relevant provisions of the ITA (231.2, 231.6 and 238) relate to the requirement to provide documents or information and to the offences and punishment relating to violations of sections 230 to 232 of the

ITA. These provisions describe the obligations of taxpayers and not those of the managers of the QRO; the section cannot therefore be applied to wrongdoing committed by the managers of the QRO for the purpose of an investigation initiated by the Office of the PSIC.

Paragraph 8(*a*) of the Act

[16] Regarding paragraph 8(*c*) of the Act, the Deputy Commissioner noted that the *Federal Prosecution Service Deskbook* speaks of the delegated independence of Crown counsel. The Deskbook notes that responsible prosecutorial decision-making often requires consultation with colleagues or superiors, so although a large measure of independence is conferred on Crown counsel, absolute discretion is not.

[17] The applicant alleged that the facts submitted in support of his recommendations to prosecute were more than sufficient to satisfy anyone that there was a reasonable likelihood of conviction and that the public interest required prosecution under section 238 of the ITA. The applicant also alleged that the decision not to prosecute was based on false information.

[18] The Deputy Commissioner nonetheless maintained that the decision of the chief prosecutors of the PPSC not to prosecute in file "A" was based on the facts of the file and that they were authorized to make such a decision in an objective and independent manner. The fact that the applicant did not agree with the decision does not suggest that wrongdoing had been committed. Moreover, regarding the QRO's practices in respect of the decision not to involve the applicant in the final decision, and the applicant's allegation that two managers of the PPSC had an [TRANSLATION] "unusual" interest in file "A", the information provided by the applicant did not support his allegations of gross mismanagement.

V. Issues

1. What is the applicable standard of review?

2. Did the procedure followed by the Deputy Commissioner breach procedural fairness?

3. Was the Deputy Commissioner's decision reasonable?

VI. Statutory provisions

Public Servants Disclosure Protection Act, SC 2005, c 46	*Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles*, LC 2005, ch 46
8. This Act applies in respect of the following wrongdoings in or relating to the public sector:	**8.** La présente loi s'applique aux actes répréhensibles ci-après commis au sein du secteur public ou le concernant :
(*a*) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act;	*a*) la contravention d'une loi fédérale ou provinciale ou d'un règlement pris sous leur régime, ŕ l'exception de la contravention de l'article 19 de la présente loi;
. . .	[…]
(*c*) a gross mismanagement in the public sector;	*c*) les cas graves de mauvaise gestion dans le secteur public;
12. A public servant may disclose to his or her supervisor or to the senior officer designated for the purpose by the chief executive of the portion of	**12.** Le fonctionnaire peut faire une divulgation en communiquant à son supérieur hiérarchique ou à l'agent supérieur désigné par l'administrateur général de

the public sector in which the public servant is employed any information that the public servant believes could show that a wrongdoing has been committed or is about to be committed, or that could show that the public servant has been asked to commit a wrongdoing.

l'élément du secteur public dont il fait partie tout renseignement qui, selon lui, peut démontrer qu'un acte répréhensible a été commis ou est sur le point de l'être, ou qu'il lui a été demandé de commettre un tel acte.

13. (1) A public servant may disclose information referred to in section 12 to the Commissioner.

13. (1) Le fonctionnaire peut faire une divulgation en communiquant au commissaire tout renseignement visé á l'article 12.

(2) Nothing in this Act authorizes a public servant to disclose to the Commissioner a confidence of the Queen's Privy Council for Canada in respect of which subsection 39(1) of the *Canada Evidence Act* applies or any information that is subject to solicitor-client privilege. The Commissioner may not use the confidence or information if it is disclosed.

(2) La présente loi n'a pas pour effet d'autoriser le fonctionnaire á communiquer au commissaire des renseignements confidentiels du Conseil privé de la Reine pour le Canada visés par le paragraphe 39(1) de la *Loi sur la preuve au Canada* ou des renseignements protégés par le secret professionnel liant l'avocat á son client. En cas de communication de tels renseignements, le commissaire ne peut pas les utiliser.

22. The duties of the Commissioner under this Act are to

22. Le commissaire exerce aux termes de la présente loi les attributions suivantes :

. . .

[...]

(*b*) receive, record and review disclosures of wrongdoings in order to establish whether there are sufficient grounds for

b) recevoir, consigner et examiner les divulgations afin d'établir s'il existe des motifs suffisants pour y donner suite;

further action;

24. (1) The Commissioner may refuse to deal with a disclosure or to commence an investigation -- and he or she may cease an investigation -- if he or she is of the opinion that	**24.** (1) Le commissaire peut refuser de donner suite à une divulgation ou de commencer une enquête ou de la poursuivre, s'il estime, selon le cas :
. . .	[…]
(*e*) the subject-matter of the disclosure or the investigation relates to a matter that results from a balanced and informed decision-making process on a public policy issue; or	*e*) que les faits visés par la divulgation ou l'enquête résultent de la mise en application d'un processus décisionnel équilibré et informé;
(*f*) there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation.	*f*) que cela est opportun pour tout autre motif justifié.

VII. Standard of review

[19] According to the Federal Court in *Detorakis v Canada (Attorney General)*, 2010 FC 39, at paragraph 29 [*Detorakis*], the standard of reasonableness should apply to a decision of the Office of the PSIC not to pursue an investigation under paragraph 24(1)(*a*) of the Act.

[20] Questions of procedural fairness and of natural justice are to be dealt with on a standard of correctness, as the respondent reminds us, relying on the Supreme Court of Canada's decision in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paragraph 43.

VIII. Analysis

[21] The disclosure regime is for anyone who has information that a public servant may have committed a wrongdoing within the meaning of section 8 of the Act. Sections 12 and 13 of the Act allow public servants to disclose to the Commissioner any information that the public servant believes could show that a wrongdoing within the meaning of section 8 of the Act has been committed.

[22] The Commissioner may refuse to deal with a disclosure or to start an investigation if he finds that there are insufficient grounds for further action (paragraph 22(*b*)). If he is satisfied that there is enough evidence, he may nonetheless refuse to proceed under paragraphs 24(1)(*d*) and (*e*) if he is of the opinion that the subject-matter of the disclosure relates to a matter that results from a balanced and informed decision-making process on a public policy issue or there is a valid reason for not dealing with the subject-matter of the disclosure.

[23] If an applicant alleges having being the victim of a reprisal as a result of the applicant's disclosure, the Commissioner may also refuse to deal with a complaint for the reasons set out in subsection 19.3(1), which includes grounds related to the jurisdiction of the Office of the PSIC and if he or she is of the opinion that the complaint was not made in good faith. The discretion provided under subsection 24(1) is of very broad scope: see *Detorakis*, above, at paragraph 106(i):

> i. The discretionary power under section 24(1) is extremely wide. Its apparent objective is to allow the PSIC to decide whether it is in the public interest to investigate a complaint or to determine, on the basis of the information provided by a complainant, whether the matter could be better dealt with under another Act. The PSIC's office must be taken to have some expertise in this matter.

[24] However, I share the opinion of Justice Mactavish in *El-Helou v Canada (Courts Administration Service)*, 2012 FC 1111 [*El-Helou*], that given the similarities between the complaint mechanisms established under the PSDPA and the *Canadian Human Rights Act*, RSC 1985, c H-6 [the CHRA], the body of jurisprudence that has been developed in the human rights context is very useful for determining the scope of the PSDPA.

[25] I would therefore like to refer to *Canada Post Corporation v Canadian Human Rights Commission*, 1997 CanLII 16378 (FC), in which Justice Rothstein discusses, at paragraph 3, why the Commissioner should refrain from refusing to deal with a complaint at the earliest stages except in the most plain and obvious cases:

> **[3]** A decision by the Commission under section 41 is normally made at an early stage before any investigation is carried out. Because a decision not to deal with the complaint will summarily end a matter before the complaint is investigated, the Commission should only decide not to deal with a complaint at this stage in plain and obvious cases. The timely processing of complaints also supports such an approach. A lengthy analysis of a complaint at this stage is, at least to some extent, duplicative of the investigation yet to be carried out. A time consuming analysis will, where the Commission decides to deal with the complaint, delay the processing of the complaint. If it is not plain and obvious to the Commission that the complaint falls under one of the grounds for not dealing with it under section 41, the Commission should, with dispatch, proceed to deal with it.

[26] Regarding procedural fairness, I refer to the principles set out in *Detorakis*, above, at paragraph 106, for when the Commissioner decides not to continue to the investigation stage:

> **106** . . .
>
> a. Section 22(*d*) of the PSDP Act imposes a general obligation to ensure procedural fairness but the Act does not elaborate upon what may be required in any specific instance. In the present case we are dealing with someone who indicated that he wanted to submit a complaint under section 13 of the Act.

> b. The Applicant was made fully aware prior to making his submissions on April 16, 2008 that subsection 24(1)(*a*) was a threshold issue and that the PSIC might not proceed to investigate the complaint because of subsection 24(1)(*a*).
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> c. There is nothing to suggest, when he made his submissions on April 16, 2008, that the Applicant expected, or might reasonably expect, before a decision was made on the threshold issue of 24(1)(*a*), that he would have an opportunity to submit further arguments or evidence or that the analyst would have further discussions with him on that issue.
>
> d. The PSDP Act does not require that someone making a disclosure under section 13 has a right to be heard or a right to make further submissions after the complaint has been made. And, on the facts of the present case, no further information was required for the PSIC to make a decision under subsection 24(1)(*a*).
>
> e. As Justice L'Heureux-Dubé made clear in *Baker*, "the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected … ."
>
> . . .
>
> k. The PSIC is fixed with a specific duty under section 22(*b*) of the PSDP Act to review disclosures in order to determine "whether there are sufficient grounds for further action." Hence, the PSIC was obliged in this case to consider and address the threshold issue that arose under subsection 24(1)(*a*). The choice of procedure adapted was to provide the Applicant with an account of how complaints are made, to specifically identify the subsection 24(1)(*a*) issue that he faced, and then to permit him to make written submissions.
>
> l. As I have already indicated, nothing occurred in this case to raise the Applicant's legitimate expectations above the general scheme of the Act or the information and advice that was provided to him by Mr. Calvert in the phone call of April 16, 2008 on the basis of which the Applicant made his submissions.

Procedural fairness

[27] The applicant alleges that the Deputy Commissioner of the Office of the PSIC breached procedural fairness in the following manner:

- He did not give the applicant an opportunity to comment on the findings regarding the admissibility of his disclosure before confirming the decision not to carry out an investigation.

- He did not personally review all of the relevant facts submitted by the applicant in support of his disclosure before confirming the decision not to investigate, and he lacked the necessary knowledge for working in French.

- His decision was inadequate in light of all the facts submitted by the applicant in support of his disclosure.

- In his decision, he failed to consider the entire factual framework submitted by the applicant in support of his disclosure.

[28] The applicant supports his arguments on procedural fairness mainly by relying on *El-Helou*, above. First, he submits that the parties to a complaint made under the Act must be informed of the substance of the evidence on which the decision to reject the complaint will be based and be given the opportunity to react to this evidence and to make any relevant submissions regarding it. However, in *El-Helou*, above, the Commissioner decided to proceed to the investigation stage, during which an investigator sought information from people other than the applicant. In the matter at bar, only Mr. Agnaou provided the Commissioner with information to support his allegations with which he was fully familiar.

[29] Second, the applicant submits that, in *El-Helou*, above, at paragraph 79, the Court found that an error had been made by "breach[ing] . . . the explicit representation made by the investigator that Mr. El-Helou would be afforded an opportunity to comment on the investigator's findings prior to a decision being made by the Interim Commissioner in relation to his complaint". The Court had seen this as a breach of a legitimate expectation, which includes, according to the Court, "procedures which an administrative authority has voluntarily undertaken to follow. However, for a legitimate expectation to be created, the undertaking has to be "clear, unambiguous and unqualified": See D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Canvasback Publishing, 2011), at p. 7:1710.". In the present case, no promise was made. On the contrary, the applicant had been warned that he would not be given an opportunity to comment on the decision. In any event, the Deputy Commissioner offered him the opportunity to provide additional comments after being informed of the decision.

[30] In the matter at bar, it is my opinion that the principles described in *Detorakis*, above, should apply in order to dispose of the issues. Consequently, the Office of the PSIC was not obliged to allow the applicant to reply, and even if it had been, the Deputy Commissioner sent the applicant a letter on September 13, 2012, seven days after the initial decision, inviting him to submit any additional, new information that might have an impact on the analysis that had been performed.

[31] Moreover, the applicant's affidavit reveals that he was informed of the stages in reviewing the admissibility of his disclosure throughout the process. The applicant notes in his affidavit that after he received the Deputy Commissioner's decision, he wrote to the Executive Director of the Office of the PSIC to find out what procedure to follow afterwards in order to file submissions on

the errors identified in the Deputy Commissioner's decision. As mentioned above, the Deputy Commissioner replied by inviting him to provide additional information.

[32] This demonstrates that the applicant was sufficiently involved in the handling of his file, especially as the duty of procedural fairness is minimal in disclosure cases at the admissibility review stage.

[33] Regarding the criticism raised against the Deputy Commissioner, I am satisfied that he followed the usual procedure, which involves a multi-disciplinary approach and various levels of review of the case by a Legal Services analyst and himself.

Reasonableness of the decision

[34] In *Detorakis*, above, the Court recognized that the scope of the discretionary power conferred on the Commissioner under subsection 24(1) of the Act is extremely wide and requires a high degree of deference. However, the Commissioner should only find a complaint inadmissible if the case is plain and obvious.

[35] In the matter at bar, what the applicant's memorandum of fact and law clearly reveals is an honest difference of opinion between an employee and his supervisor, which the applicant admitted. Several meetings took place between the applicant and his supervisors regarding the file in question, and the applicant had many opportunities to express his opinion. Ultimately, his superiors, who have more experience in criminal prosecutions, and who had also received input from the applicant's

colleagues, decided not to prosecute: this was the result of a balanced, informed decision-making process. This type of decision falls directly within the expertise and authority of these people.

[36] The applicant alleges [TRANSLATION] "gross misconduct" on the part of his superiors, but even if I accept this gross misconduct as being true, the fact remains that this type of decision falls strictly within the very broad and flexible discretion of prosecutors and that the procedure followed was balanced and informed. Moreover, this broad discretion was exercised over an equally broad issue. As Justice Binnie noted in *R v Regan*, [2002] 1 SCR 297, at paragraph 168, "the exercise of prosecutorial discretion is, within broad limits, effectively non-reviewable by the courts".

[37] The fact that one of the applicant's superiors, an expert in the field in question, did not agree with the applicant on the file in question does not mean that a wrongdoing was committed. It is entirely normal for there to be disagreements between counsel, such as the applicant and his superiors, but this does not mean that a wrongdoing was committed or that the Office of the PSIC is obliged to investigate the disclosure.

[38] The applicant also claims that there is an error in the reasons of the Deputy Commissioner's decision that reveals a misunderstanding of the scope of his allegations, in that he never alleged that a wrongdoing within the meaning of paragraph 8(*a*) had been committed. In the documentation submitted by the applicant in support of his disclosure, he checked the box corresponding to a disclosure made under paragraph 8(*c*) of the Act, and not paragraph 8(*a*). However, he explicitly alleged that the wrongdoings committed by his superiors included violations of the ITA, which is an enactment of Parliament. The Office of the PSIC therefore concluded that he wished to allege that

this paragraph had been breached, even though he did not check the correct box. This is entirely reasonable.

[39] It is clear, ultimately, that the applicant's disclosure is the result of a difference in opinion between him and his superiors and not of the commission of a wrongdoing. The Commissioner, by refusing to investigate, respected the duties of procedural fairness and made an entirely reasonable decision in light of the law, the facts and the evidence on the record.

[40] The application for judicial review is therefore dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed.

"Peter Annis"

Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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