

Federal Court



Cour fédérale

Date: 20150529

Docket: T-1553-13

Citation: 2015 FC 685

Ottawa, Ontario, May 29, 2015

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

CHARBEL EL-HELOU

Applicant

and

**COURTS ADMINISTRATION SERVICE,
LAURENT FRANCOEUR, FRANCINE CÔTÉ,
ÉRIC CLOUTIER, DAVID POWER AND
ÉRIC DELAGE**

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] Mr. Charbel El-Helou, the Applicant, seeks judicial review of the Public Sector Integrity Commissioner's [the Commissioner] decision of August 23, 2013, dismissing the reprisal complaint he presented to the Office of the Public Sector Integrity Commissioner [OPIC] on July 3, 2009, against the Courts Administration Service [CAS] and four of its employees [collectively

referred as the Respondents]. A fifth employee was added as a Respondent during the investigation.

[2] Mr. El-Helou alleged having been subject to reprisals after divulging what he believed to be acts of wrongdoing on the part of certain employees of CAS.

[3] It is worthy to note that the decision under review is the second rendered by the Commissioner concerning Mr. El-Helou's complaint. The Commissioner's first decision, rendered on April 18, 2011 [the April 18, 2011 decision], dismissed two allegations of reprisal, and referred a third one [the third allegation] to the Public Servants Disclosure Protection Tribunal [the Tribunal]. Mr. El-Helou applied for judicial review of the April 18, 2011 decision to dismiss two of the allegations, and his application was allowed by Madam Justice Anne Mactavish on September 21, 2012 (*El-Helou v Canada (Courts Administration Services)*, 2012 FC 1111 [*El-Helou v CAS 2012*]).

[4] Upon concluding that there had been flaws in the investigation process, Justice Mactavish set aside the April 18, 2011 decision, and ordered that further investigation be conducted in accordance with her Reasons.

[5] Further investigation was conducted, which led, as we will read below, to the Commissioner's second decision on August 23, 2013 [the August 23, 2013 decision]. The Commissioner maintained the initial dismissal of the allegations, but also addressed the third allegation, although it had already been referred to the Tribunal. The Commissioner found that

there were no reasonable grounds to believe that this third allegation could be considered a reprisal, but that his authority to dismiss the allegation as granted by Section 20.5 of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [the Act] was *functus officio*, and he thus notified the Tribunal of his new finding.

[6] Mr. El-Helou now seeks judicial review of the Commissioner's August 23, 2013 decision. He submits that the third allegation should not have been revisited, and that the further investigation was flawed, resulting in a breach of procedural fairness. He further submits that the Commissioner erred in his interpretation of the legislative standard of "reasonable grounds for believing" found in subsection 20.4(3) of the Act, thus failing to consider the explanations provided by the Respondents through the lens of pretexts, and thus failing to look for the "subtle scent" of reprisal.

II. Background

A. *General*

[7] Between August 2006 and February 2010, Mr. El-Helou worked in the Information Technology Services at CAS. In 2009, when the disclosures of wrongdoing and reprisals at issue in this proceeding occurred, Mr. El-Helou was Director, Client Services and Infrastructure.

[8] CAS provides administrative services to the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court of Canada and the Tax Court of Canada. It is part of the "public

sector”, as defined by subsection 2(1) of the Act, and its employees are thus “public servants” within the meaning of the Act.

[9] The individual Respondents were, at all material times, employees of CAS: Mr. Laurent Francoeur, as Director General, Information Technology Services; Ms. Francine Côté, as Deputy Chief Administrator, Corporate Services; Mr. Éric Cloutier, as Director, Information Management, Mr. David Power, as Senior Counsel and Mr. Éric Delage, as Director General, Administrative Facilities and Security Services.

[10] Mr. El-Helou reported to Mr. Francoeur, except from May 25 to June 15, 2009, when he reported to Mr. Cloutier while Mr. Francoeur was away from the office. Mr. Francoeur and Mr. Cloutier in turn both reported to Mr. Power.

[11] From September 2008 to September 2009, Mr. Power was also Senior Officer for CAS, and thus responsible for dealing with disclosures of wrongdoing made by CAS employees. In addition, from February 23 to May 29, 2009 he was Acting Deputy Chief Administrator, Corporate Services, and Ms. Francine Côté replaced him in that position on June 1, 2009.

[12] In or around late January 2009, Mr. Francoeur requested that Mr. El-Helou “provide copies of e-mails exchanged between” a member of the judiciary and a designated individual for a specific time frame. This request was warranted by a police investigation into threatening emails sent to the member.

[13] Mr. El-Helou reviewed the emails received during the identified period of time, and provided the ones he believed to be relevant. Mr. Francoeur later indicated that the search had to include all the member's incoming and outgoing emails for the particular time frame.

[14] Mr. El-Helou was concerned for the member's privacy rights, but nonetheless completed the task. However, on or about March 9, 2009, he created a "support ticket" in the member's name, which prompted a notification email informing the member of the scope of the information request. That prompted an immediate negative reaction from the member; on March 23, 2009, Mr. El-Helou met with the member and the Associate Chief Justice to discuss this issue, and he was then advised by them not to mention their discussion.

[15] On the other hand, Mr. El-Helou's disclosure to the member was considered as a possible breach of security by his superiors.

B. *Protected disclosures of wrongdoing*

[16] Mr. El-Helou made two separate protected disclosures of wrongdoing to Mr. Power.

[17] The first disclosure was made on March 24, 2009. On this date, Mr. Power met with Mr. El-Helou in order to discuss his disclosure of information to the member, but Mr. El-Helou refused to discuss the matter as per the Associate Chief Justice's instructions. At the same meeting, on another topic, Mr. El-Helou informed Mr. Power about his concerns of possible collusion between certain companies involved in a contract proposal for CAS and a misuse of public funds. Mr. Power informed Mr. El-Helou he could not discuss the matter, having already

provided legal advice on this particular contract in his capacity as Senior Counsel, but referred Mr. El-Helou to a colleague. Mr. Power said he advised Mr. El-Helou that he could make a disclosure of wrongdoing to the Commissioner, a fact disputed by Mr. El-Helou. The first disclosure of wrongdoing thus pertains to an allegation of misuse of public funds in awarding a procurement contract.

[18] The second disclosure was made on March 25, 2009, when Mr. El-Helou met again with Mr. Power to inform him that the request he received in late January to provide copies of some of the member of the judiciary's emails was inappropriate and that it violated said member's privacy rights. The second disclosure of wrongdoing thus pertains to the review and copy of emails from the member's account.

[19] On April 29, 2009, Mr. Francoeur provided Mr. El-Helou with a positive year-end Written Performance Assessment.

[20] On May 12, 2009, Mr. El-Helou was informed by Ms. Aline Duval, Departmental Security Officer, that his security clearance would be upgraded to the "Top Secret" level for the purposes of his position, pending the signature of a form. However, Ms. Duval subsequently put Mr. El-Helou's security upgrading file on hold, responding to instructions from Mr. Delage, who had himself received instructions from Mr. Guénette to that effect. Indeed, a further investigation had to be conducted on the possible breach of security related to the unauthorized disclosure of information to the member of the judiciary.

[21] Mr. El-Helou alleges that Mr. Cloutier sought negative comments from CAS employees in the period between May 25 to June 15, 2009, while replacing Mr. Francoeur as Acting Director General, Information Technology Services, and as per Mr. Francoeur's instructions. On the contrary, Mr. Cloutier alleges that seven CAS employees approached him, on their own volition, with concerns about Mr. El-Helou during that time frame.

[22] On June 5, 2009, Ms. Francine Côté informed Mr. El-Helou that he was temporarily re-assigned to other duties pending an investigation of the workplace by Quintet, an external investigator, as a result of allegations concerning his behaviour and management style. Mr. Francoeur was also removed from his duties pending the completion of this investigation. The purpose of the investigation was to determine whether Mr. El-Helou had engaged in harassment, and to examine the state of relations between Mr. El-Helou and Mr. Francoeur.

C. *Reprisal complaint*

[23] On July 3, 2009, Mr. El-Helou filed a reprisal complaint to the OPIC, who initiated an investigation into the following three allegations of reprisal:

- (1) That Mr. Laurent Francoeur asked Mr. Éric Cloutier to obtain information about Mr. El-Helou's management style, and solicit negative comments about him from his subordinates while Mr. Cloutier was temporarily acting for Mr. Francoeur;
- (2) That Ms. Francine Côté temporarily re-assigned Mr. El-Helou to other duties and removed his supervisory responsibilities; and
- (3) That Mr. Éric Delage withheld Mr. El-Helou's Top Secret security clearance.

[24] On December 8, 2009, a meeting was held after Mr. El-Helou advised CAS he was planning to leave the organization. Mr. El-Helou then asked Mr. Power for references, but Mr. Power responded that he would wait to read the Quintet report.

[25] Mr. El-Helou was also provided with an agreement document prepared by Mr. Power following the December 8, 2009 meeting, a document he was at liberty to modify. This agreement, never signed by Mr. El-Helou, sought his acknowledgement that he had breached security by informing the member of the judiciary about the email investigation.

D. *First investigation and first decision by the Commissioner*

[26] On April 14, 2011, Ms. Gail Gauvreau, the previous investigator, completed her investigation report into the three allegations of reprisal. In her report, she dismissed the first two allegations of reprisal, but determined that the third allegation, i.e the withholding of Mr. El-Helou's Top Secret security clearance, may have been a reprisal measure. Mr. Power was added as an alleged reprisal perpetrator following additional allegations made during the course of the investigation. On April 14, 2011, the final investigation report was completed. It recommended that the third allegation be assessed by the Tribunal, while the other two be dismissed.

[27] On April 18, 2011, the Commissioner rendered his decision; he found that he had "reasonable grounds to believe that [Mr. El-Helou's] Top Secret security clearance was withheld [from him] as a reprisal measure that adversely affected [his] employment or working conditions". On May 16, 2011, the Commissioner filed a Notice of Application with the

Registrar of the Tribunal in regard to this allegation. Mr. Delage and Mr. Power, as well as CAS, were made parties with respect to this allegation as their conduct was called into question.

[28] The Commissioner dismissed the two other allegations.

E. *Judicial review of the first decision*

[29] On May 19, 2011, Mr. El-Helou filed an application for judicial review of the April 18, 2011 decision before this Court.

[30] On October 20, 2011, the Tribunal suspended its proceedings pending the Court's decision on judicial review.

[31] On September 21, 2012, Justice Mactavish allowed Mr. El-Helou's application for judicial review (*El-Helou v CAS 2012*). She considered that the process followed by the OPIC had not been fair and did not address Mr. El-Helou's other arguments. She found the process was flawed because:

- (1) The parties were never made aware of the substance of the evidence that had been obtained by the investigator, nor did they have any opportunity to respond to the investigator's findings;
- (2) The investigator acted unfairly in making a clear, unambiguous and unqualified representation as to the process that would be followed in the investigation and then failing to follow through with her undertaking with respect to the following situations:

- (a) The investigator failed to provide the parties with a summary of her findings as well as provide them with an opportunity to respond to those findings;
 - (b) The investigator was aware of Mr. El-Helou's claim of a threat of a further security investigation by his employer, and recognized that it could potentially constitute a reprisal measure but failed to address this issue in her report with the result that this allegation was never considered by the Commissioner; and
 - (c) The investigator failed to interview Mr. Guénette;
- (3) The investigator failed to interview either of the two CAS employees identified by Mr. El-Helou in relation to an issue central to one of his allegations of reprisal.

[32] Justice Mactavish set aside the April 18, 2011 decision, and ordered that the matter be remitted back to the OPIC for further investigation in accordance with her Reasons.

[33] It is important to note that Justice Mactavish framed Mr. El-Helou's application as one seeking judicial review of "the decision dismissing two of his allegations of reprisal" (*El-Helou v CAS 2012* at para 2), and that, while reviewing the procedure followed with regards to the third allegation, she further pointed out that :

I note that the evidence of the former Chief Administrator of CAS [Mr. Guénette] was relevant to the issue of the alleged withholding of Mr. El-Helou's Top Secret security clearance. Given that this issue has been referred to the Tribunal for a hearing, the prejudice to Mr. El-Helou in this regard was limited, but was not entirely eliminated in that Mr. El-Helou does not have the benefit of notes or a transcript of an interview with the former Chief Administrator as he heads into the Tribunal hearing (*El-Helou v CAS 2012* at para 90).

[34] On November 23, 2012, the Tribunal ordered the continued suspension of the proceedings pending the completion of further investigation.

F. *Further investigation and second decision by the Commissioner*

[35] As per Justice Mactavish's decision, a further investigation of Mr. El-Helou's complaint was conducted. The new investigator, Ms. Jenny-Lee Harrison, assessed the following five allegations of reprisal:

- (1) That Mr. Laurent Francoeur asked Mr. Éric Cloutier to solicit employees for the purposes of securing negative information about Mr. El-Helou;
- (2) That Ms. Francine Côté temporarily re-assigned Mr. El-Helou to other duties and removed his supervisory responsibilities;
- (3) That Mr. Éric Delage and Mr. David Power withheld Mr. El-Helou's Top Secret security clearance starting in May 2009, until his departure in February 2010;
- (4) That Mr. El-Helou was required to acknowledge having breached his security obligation and duty of loyalty to his employer in order to obtain a professional reference from Mr. Power; and
- (5) That Mr. El-Helou was required to acknowledge having breached his security obligation and duty of loyalty to his employer in order to prevent a security investigation from occurring.

[36] On May 16, 2013, after conducting a full review of the evidence and carrying out all additional necessary investigation, Ms. Harrison completed her Preliminary Investigation Report. The parties were then given an opportunity to review and comment on her findings, analysis and proposed recommendations to the Commissioner. Mr. El-Helou's comments were received on June 18, 2013. On or about July 8, 2013, Ms. Harrison submitted her response to Mr. El-Helou's comments to the Commissioner for consideration, but not to the parties. Ms. Harrison completed the Investigation Report on July 29, 2013, and remitted it to the Commissioner.

[37] In her report, Ms. Harrison's concludes, in substance, that there was no nexus between the disclosures and the reprisals, as the potential repressors did not know about the disclosures.

[38] Following the Investigation Report, the Commissioner rendered a new decision detailed in the next section.

III. Impugned decision

[39] On August 23, 2013, the Commissioner issued a new decision. He found that there was insufficient evidence to believe, on reasonable grounds, that any reprisal measure had been taken against Mr. El-Helou, and therefore dismissed all allegations that were not previously referred to the Tribunal, under Section 20.5 of the Act.

[40] The Commissioner found that Mr. El-Helou's disclosures to Mr. Power on March 24 and 25, 2009, constituted protected disclosures, but that there was insufficient evidence to establish there were reasonable grounds to believe that any reprisal measure was taken against Mr. El-

Helou because of these disclosures. On the contrary, according to the Commissioner, “the measures taken by the employer and the respondents were in response to events that are unrelated to the protected disclosures, namely, complaints from some of [Mr. El-Helou]’s employees and his alleged security breach”.

[41] With regards to the third allegation, the one that had previously been referred to the Tribunal, the Commissioner found that on the basis of the analysis in the Investigation Report, there were no reasonable grounds to believe that Mr. El-Helou had been the subject of reprisal by the withholding of his Top Secret security clearance.

[42] Given his previous application to the Tribunal, the Commissioner questioned his own ability to now dismiss this third allegation pursuant to Section 20.5 of the Act. He found that his authority was *functus officio* in this respect and stated that his duty required him to adopt the position that is in the public interest, having regard to the nature of the complaint, and that this duty included informing the Tribunal of new facts and circumstances, which he did.

IV. Issues

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

- (1) Did the Commissioner err in law by reconsidering his decision to refer the third allegation to the Tribunal for adjudication?
- (2) Did the Commissioner arrive at his decision in breach of the rules of procedural fairness?

- (3) Did the Commissioner err in law by failing to properly interpret and apply the Act or the relevant principles concerning the law of reprisals?

V. Standard of review

[44] Mr. El-Helou submits that the first issue attracts a correctness standard since it constitutes a general question of law that is of central importance to the legal system. The Respondents submit that the first issue must be assessed under the reasonableness standard. The Respondents relied on the decisions in *Berberi v Canada (Attorney General)*, 2013 FC 921 and *Elsipogtog First Nation Band Council v Peters*, 2012 FC 398 to support their views.

[45] I conclude, as the Federal Court of Appeal recently ruled, that the correctness standard is to be applied (*Canadian Association of Film Distributors and Exporters v Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc*, 2014 FCA 235 at para 58), as it involves the interpretation of the *functus officio* principle.

[46] I agree with the parties that the second issue attracts a review under the correctness standard as it relates to considerations of procedural fairness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). However, the Respondents point out that deference is owed to the Commissioner in respect to the choices of procedure especially since under the Act, the decision-maker determines its own procedure.

[47] Finally, I agree with the parties that the third issue must be dealt with under the reasonableness standard. In fact, it is related to issues of mixed fact and law, and therefore calls for deference (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Submissions of the parties

[48] Mr. El-Helou submits that the April 18, 2011 decision of the Commissioner to file an application to the Tribunal with regards to the third allegation was a final one and that the Commissioner had no authority to reconsider it (*Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 at para 20). Mr. El-Helou relies on a case from this Court to support his argument that the Commissioner was *functus officio* with respect to his screening role, once he had referred Mr. El-Helou's third allegation to the Tribunal (*Canadian Museum of Civilization Corporation v Public Service Alliance of Canada (Local 70396)*, 2006 FC 703 at para 60 [*Canadian Museum*]).

[49] Mr. El-Helou submits that Justice Mactavish's decision pertained to the Commissioner's decision to dismiss two of the allegations, i.e. the ones he had not referred to the Tribunal, and that it did not pertain to the third allegation, the one about the withholding of the Top Secret security clearance, already referred to the Tribunal.

[50] Mr. El-Helou further submits that several violations of procedural fairness occurred in the present case. Despite the fact that he had the opportunity to comment on the preliminary report, he submits that he had no meaningful opportunity to provide comments before the Commissioner rendered his final decision as the outcome had already been determined in the preliminary report.

He also argues he should have been provided with the opportunity to comment on the final report.

[51] Moreover, Mr. El-Helou notes that the investigator prepared a response to his comments on the preliminary report; a response she submitted to the Commissioner as part of her final report, but did not disclose to the parties. Mr. El-Helou submits that its content influenced the Commissioner's final decision, and that the fact it was not disclosed deprived him of the opportunity to reply, thus violating the duty of fairness.

[52] By way of additional submissions, Mr. El-Helou submits that two new recent decisions of the Federal Court of Appeal [FCA], *Agnaou c Canada (Procureur Général)*, 2015 CAF 30 [*Agnaou # 1*] and *Agnaou c Canada (Procureur Général)*, 2015 CAF 29 [*Agnaou # 2*] have no negative impact on his arguments. Mr. El-Helou submits the factual situation in the *Agnaou # 1* decision is distinguishable as the complaint was at a different stage of the procedure and of a different nature and that it must be reviewed with caution. He also submits that in *Agnaou # 2*, the FCA reaffirmed the similarity between the cases under the *Canadian Human Rights Act*, RSC 1985, c H-6 and the cases under this Act. He stresses that in his case, the investigator (which he refers to as the "Analyst" in his additional submissions) made findings of fact and law that influenced the Commissioner, which opened the opportunity for him to provide comments, and that this was not addressed in the *Agnaou* decisions.

[53] Mr. El-Helou also submits that he should have been provided with transcripts of witness interviews, or sufficiently detailed notes or summaries, in order to allow him to comment on the witness testimony.

[54] On the investigation process itself, Mr. El-Helou submits it lacked thoroughness and neutrality. In fact, Mr. El-Helou submits that the investigator never took a hard look at the evidence, which, taken as a whole, could have led, on a circumstantial basis, to an inference of reprisal. According to Mr. El-Helou, the investigator was biased and made little or no attempt to assess the Respondents' credibility while extensively assessing his credibility. Finally, Mr. El-Helou submits that Ms. Harrison's investigation was influenced by misinformation about Mr. El-Helou's conduct and credibility shared by the previous investigator.

[55] Mr. El-Helou submits that the Commissioner applied the wrong legal test, relying only on direct evidence of reprisal, while it should have assessed whether there were "reasonable grounds" to believe a reprisal had been taken against him. Mr. El-Helou alleges that the Commissioner must look at the evidence to see if there is "some basis" to support the allegation of reprisal, or evidence of a "subtle scent" of reprisal and must examine the explanations thoroughly to ensure they are not pretexts, which it failed to do in this case.

[56] The Respondents submit that Justice Mactavish's decision of September 21, 2012, quashed the Commissioner's entire April 18, 2011 decision, including the decision to refer the security clearance withholding allegation to the Tribunal, and that the Tribunal no longer holds jurisdiction to deal with that allegation. In the alternative, the Respondents submit that if this

Court was to find that Justice Mactavish's decision did not expressly quash the referral, the Commissioner had authority to reconsider it, and to reverse the decision.

[57] On the procedural fairness issue, the Respondents submit that the investigator fulfilled her duty of procedural fairness to an extent even higher than what Mr. El-Helou was entitled to. Since the investigator's response to Mr. El-Helou's comments did not add facts to the record but rather consisted in "arguments", this material did not undermine Mr. El-Helou's ability to know the substance of the case. On the argument that Mr. El-Helou should have been provided with the opportunity to comment on the final report, the Respondents oppose the notion that this approach would not fulfill the objective under subsection 19.7(2) of the Act that investigations be carried out as informally and expeditiously as possible.

[58] The Respondents further submit that Mr. El-Helou, having been provided with the Investigator's Report and with an opportunity to comment on it, was sufficiently aware of the substance of the case (*El-Helou v CAS 2012* at paras 75-76). The Respondents allege that the conversation between Ms. Harrison and Ms. Gauvreau did not taint the former's neutrality. The Respondents point out that Ms. Harrison did not rely on hearsay of the previous investigator who had found Mr. El-Helou not to be credible, but that the evidence showed, on the contrary, that Ms. Harrison spoke directly to the concerned investigator, who denied those allegations.

[59] In their additional submissions regarding the *Agnaou* decisions, the Respondents, in substance, submit that they in fact confirm their position that Mr. El-Helou had no supplemental right to comment on the internal response the investigator provided to the Commissioner. The

decisions reinforce their proposition that no promise to this effect was made to him, thus eliminating any claim to a legitimate expectation, that the action of the investigator was a legitimate exercise of her responsibilities, and that the Commissioner can, subject to certain conditions, receive assistance from internal personnel.

[60] The Respondents point out that the standard of proof for the Commissioner to defer the complaint to the Tribunal is set out at subsection 20.4(3) of the Act, which refers to “reasonable grounds for believing”. Hence the Commissioner’s gatekeeper function implies that the standard of proof cannot be interpreted as requiring only “some basis” for referral to the Tribunal or a “subtle scent”. Moreover, the Respondents put forth that the question of pretext and alternative explanations only arise when a nexus between a protected disclosure and alleged reprisals are established, which is not the case here. Finally, the Respondents argue that Mr. El-Helou has pointed to no evidence to show that the alleged repressors were in fact aware of the disclosures.

VII. Analysis

[61] For the reasons stated below, this application for judicial review will be allowed in part.

A. *The Commissioner’s reconsideration of the third allegation*

[62] When Justice Mactavish ordered that the April 18, 2011 decision of the Commissioner be set aside, and decided to remit the matter to the OPIC, she specified that the further investigation had to be done in accordance with her Reasons. In paragraph 2 of her decision, Justice Mactavish specifically indicated that “Mr. El-Helou seeks judicial review of the decision dismissing two of

his allegations of reprisal”. Hence, the judicial review solely dealt with the Commissioner’s decision to dismiss two of the allegations of reprisal and the Commissioner’s decision with regards to the third allegation was thus, not on the table. Therefore, Justice Mactavish’s order to set the “decision” aside only concerned the “decision to dismiss the two allegations” and not the decision to refer the third allegation to the Tribunal.

[63] As a result, the Commissioner was indeed *functus officio*, and failing an order from this Court, had no authority to revisit this finding [*Canadian Museum* at para 60]. Since Justice Mactavish did not allow a re-examination of the decision to refer the third allegation to the Tribunal, the Commissioner was bound by the April 18, 2011 decision (see *Shuchuk v Alberta (Worker’s Compensation Board)*, 2012 ABCA 50 at para 32 [*Shuchuk*]).

[64] I do not accept the Respondents’ argument that even if this Court finds that Justice Mactavish did not quash the April 18th, 2011 referral, it was within the Commissioner’s authority to reconsider the referral and to reverse its decision in respect of it. There is no indication in the Act that the OPIC keeps his screening powers alive once it has made a decision to either dismiss a complaint or refer it to the Tribunal (see *Canadian Museum* at para 64). As the Alberta Court of Appeal stated in *Shuchuk* at para 38, “[a]n applica[nt] should not be left to believe that obtaining judicial review necessarily puts at hazard even such earlier findings as the applicant has already obtained and which were unchallenged at that time”. Since the duty of a Tribunal on redetermination is to follow the reviewing Court’s directions as provided by the principle of *stare decisis* (*Canada (Commissioner of Competition) v Superior Propane Inc*, 2003 CAF 53 at para 54; Donald J.M. Brown and The Honourable John M. Evans, *Judicial Review of*

Administrative Action in Canada, (Toronto, On : Carswell, 2013, 2014) (loose-leaf revision 3), ch 12 at pp 12-108,12-109) and the Commissioner failed in this respect, the Court must intervene with regards to this section of his decision.

B. *The alleged breach of procedural fairness*

[65] Investigations conducted by the OPIC have to be both neutral and thorough (see *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 at para 49 aff'd. in (1996) 205 NR 383 (FCA); *El-Helou v CAS 2012* at para 91). The Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 23-27 [*Baker*] set out relevant factors to determine the duty of procedural fairness' scope. These factors include the statutory scheme and the terms of the statute.

[66] The Act states, at subsection 22(d), that the Commissioner has a duty to ensure respect of the right to procedural fairness and natural justice of all persons involved in investigations. Moreover, subsection 19.7(2) provides that investigations are to be conducted as informally and as expeditiously as possible. In addition, as per subsection 22(f), the Commissioner is to establish its own procedure in processing disclosures since the Act does not provide specific procedural requirements. In *Baker* at para 27, the Supreme Court recognized the Board as the master of its own procedure, and determined it is therefore entitled to deference towards his procedural choices as "the statute leaves to the decision-maker the ability to choose its own procedures".

[67] In her decision, Justice Mactavish pointed to issues relating to procedural fairness, and particularly to failures by the former investigator to follow through on her undertakings. The Commissioner addressed those issues in this case. In fact, Mr. El-Helou was provided with a preliminary report and he was given an opportunity to comment this report. Moreover, Ms. Harrison assessed all the allegations submitted by Mr. El-Helou, and conducted an interview with Mr. Gu nette.

[68] Mr. El-Helou argues that not providing him with the opportunity to comment on Ms. Harrison’s response to his own comments to her preliminary investigation report constituted a breach of procedural fairness, since it influenced the Commissioner’s decision and was prejudicial to him and to his counsel. However, I am satisfied that Ms. Harrison’s response did not add facts to the record but rather addressed Mr. El-Helou’s comments. The Supreme Court has held that no new evidence can be presented to Board members in the absence of the parties, and that a breach of the *audi alteram partem* rule will only occur where “a new policy or a new argument is proposed at a full board meeting and a decision is rendered on the basis of this policy or argument without giving the parties an opportunity to respond” (*International Woodworkers of America, Local 2-69 v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282 at paras 87, 91, 94 [*International Woodworkers*]).

[69] In the present case, no new argument or facts were presented to the Commissioner by Ms. Harrison’s response. Furthermore, “the criteria for independence are not absence of influence but rather the freedom to decide according to one's own conscience and opinions” (*International Woodworkers* at para 84). Ms. Harrison’s response did not bind the Commissioner. Hence, no

breach of procedural fairness occurred in this matter and Mr. El-Helou and his counsel suffered no prejudice. I side with the Respondents in that the *Agnaou* decisions support this conclusion.

[70] I agree with the Respondents that the opportunity given to Mr. El-Helou to comment on the preliminary report was sufficient for him to be aware of the substance of the case (*Radulesco v Canada (Canadian Human Rights Commission)*, [1984] 2 SCR 407; *El-Helou v CAS 2012* at para 73).

[71] Mr. El-Helou argues that he was entitled to a full summary of the evidence obtained in the investigation. However, this is a higher standard than required by the case law. In fact, the Federal Court of Appeal in *Paul v Canadian Broadcasting Corp*, 2001 FCA 93 at para 43, stated that the parties will be informed of the substance of the evidence obtained by the investigator where the investigation report is disclosed to them and where they have an opportunity to make representations in response to the report. This is exactly what Mr. El-Helou was provided with. I do not subscribe to his arguments that he was denied a meaningful opportunity to make representations before the final report was issued, as the preliminary report bore the hallmarks of a final report.

[72] On the neutrality and the thoroughness of the Commissioner's decision, I agree with the Respondents that the Commissioner made no error. As pointed out by both parties, Ms. Harrison directly spoke to one of the previous investigator, Ms. Scichilone, who confirmed that Mr. El-Helou had not changed his story to her. Therefore, Ms. Harrison did not rely on hearsay and no misinformation occurred.

[73] It is also noteworthy that the Commissioner indicates in his August 23, 2013 decision that he carefully considered the Respondents' evidence and explanations "in order to gauge whether their explanations constitute mere pretext in response to the allegations of reprisal". Upon review of the investigation report, I find that Ms. Harrison made a thorough assessment of the evidence. Therefore, I find that the investigation was thorough and neutral, and showed no breach of procedural fairness.

C. *The Commissioner's application of the Act*

[74] In considering whether an application to the Tribunal is warranted, the Commissioner must examine whether there are "reasonable grounds for believing that a reprisal was taken against the complainant" (subsection 20.4(3) of the Act). Mr. El-Helou submits that the Commissioner applied a higher threshold than required by assessing whether a "reprisal has taken place".

[75] The Court finds the Commissioner applied the proper test. He namely stated that his "task is not to determine whether or not the reprisals are proven, but rather to screen and investigate the complaint and to apply the factors stated at subsection 20.4(3) of the Act in order to determine whether an application to the Tribunal is warranted". The Commissioner found that the measures in play were not reprisal measures as provided in the Act.

[76] The Commissioner concluded that the evidence failed to establish, on reasonable grounds, that the reprisal measures Mr. El-Helou complained about were related to the protected disclosures he made to Mr. Power. The Commissioner found that Mr. Gu nette, Ms. C t , Mr.

Francoeur, Mr. Cloutier and Mr. Delage were not aware of Mr. El-Helou's protected disclosures to Mr. Power, that there was therefore no nexus between the protected disclosures and the measures complained of, and consequently, that no reprisals occurred.

[77] As there was no evidence to establish such a nexus, and as the investigation was properly conducted, the Commissioner made no reviewable error in dismissing allegations 1, 2, 4 and 5.

VIII. Conclusion

[78] For the aforementioned reasons, this application for judicial review is allowed in part.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed in part;
2. The decision of the Public Sector Integrity Commissioner pertaining to the allegation already referred to the Public Servants Disclosure Protection Tribunal is quashed;
3. The Public Servants Disclosure Protection Tribunal must adjudicate on the allegation referred by the Public Sector Integrity Commissioner following the May 16, 2011 Notice of Application;
4. The matter is not remitted to the Public Sector Integrity Commissioner;
5. The decision of the Public Sector Integrity Commissioner to dismiss the other allegations is upheld; and
6. Each party supports his costs.

"Martine St-Louis"

Judge

Appendix

<p><i>Public Servants Disclosure Protection Act, SC 2005 c 46</i></p> <p>Designation of complaint investigator</p> <p>19.7 (1) The Commissioner may designate a person as an investigator to investigate a complaint.</p> <p>Informality</p> <p>(2) Investigations into complaints are to be conducted as informally and expeditiously as possible.</p> <p>[...]</p> <p>Application to Tribunal</p> <p>20.4 (1) If, after receipt of the report, the Commissioner is of the opinion that an application to the Tribunal in relation to the complaint is warranted, the Commissioner may apply to the Tribunal for a determination of whether or not a reprisal was taken against the complainant and, if the Tribunal determines that a reprisal was taken, for</p> <p>(a) an order respecting a remedy in favour of the complainant; or</p> <p>(b) an order respecting a remedy in favour of the complainant and an order respecting disciplinary action against any person or persons identified by the Commissioner in the application as being the person or persons who took the reprisal.</p>	<p><i>Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles, LC 2005 c 46</i></p> <p>Nomination</p> <p>19.7 (1) Le commissaire peut charger une personne d'enquêter sur une plainte.</p> <p>Absence de formalisme</p> <p>(2) L'enquête est menée, dans la mesure du possible, sans formalisme et avec célérité.</p> <p>Demande présentée au Tribunal</p> <p>20.4 (1) Si, après réception du rapport d'enquête, le commissaire est d'avis que l'instruction de la plainte par le Tribunal est justifiée, il peut lui demander de décider si des représailles ont été exercées à l'égard du plaignant et, le cas échéant :</p> <p>a) soit d'ordonner la prise des mesures de réparation à l'égard du plaignant;</p> <p>b) soit d'ordonner la prise des mesures de réparation à l'égard du plaignant et la prise de sanctions disciplinaires à l'encontre de la personne ou des personnes identifiées dans la demande comme étant celles qui ont exercé les représailles.</p>
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<p>[...]</p> <p>Factors</p> <p>(3) In considering whether making an application to the Tribunal is warranted, the Commissioner must take into account whether</p> <p>(a) there are reasonable grounds for believing that a reprisal was taken against the complainant;</p> <p>(b) the investigation into the complaint could not be completed because of lack of cooperation on the part of one or more chief executives or public servants;</p> <p>(c) the complaint should be dismissed on any ground mentioned in paragraphs 19.3(1)(a) to (d); and</p> <p>(d) having regard to all the circumstances relating to the complaint, it is in the public interest to make an application to the Tribunal.</p>	<p>[...]</p> <p>Facteurs à considérer</p> <p>(3) Dans l'exercice du pouvoir visé au paragraphe (1), le commissaire tient compte des facteurs suivants :</p> <p>a) il y a des motifs raisonnables de croire que des représailles ont été exercées à l'égard du plaignant;</p> <p>b) l'enquête relative à la plainte ne peut être terminée faute de collaboration d'un administrateur général ou de fonctionnaires;</p> <p>c) la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 19.3(1)a) à d);</p> <p>d) il est dans l'intérêt public de présenter une demande au Tribunal compte tenu des circonstances relatives à la plainte.</p>
<p>[...]</p> <p>Dismissal of complaint</p> <p>20.5 If, after receipt of the report, the Commissioner is of the opinion that an application to the Tribunal is not warranted in the circumstances, he or she must dismiss the complaint.</p> <p>Duties</p> <p>22. The duties of the Commissioner under this Act are to</p>	<p>[...]</p> <p>Rejet de la plainte</p> <p>20.5 Si, après réception du rapport d'enquête, le commissaire est d'avis, compte tenu des circonstances relatives à la plainte, que l'instruction de celle-ci par le Tribunal n'est pas justifiée, il rejette la plainte.</p> <p>Attributions</p> <p>22. Le commissaire exerce aux termes de la présente loi les attributions suivantes :</p>

<p>[...]</p> <p>(d) ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected, including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;</p> <p>[...]</p> <p>(f) establish procedures for processing disclosures and ensure the confidentiality of information collected in relation to disclosures and investigations;</p> <p>[...]</p>	<p>[...]</p> <p>d) veiller à ce que les droits, en matière d'équité procédurale et de justice naturelle, des personnes mises en cause par une enquête soient protégés, notamment ceux du divulgateur, des témoins et de l'auteur présumé de l'acte répréhensible;</p> <p>[...]</p> <p>f) établir des procédures à suivre pour le traitement des divulgations et assurer la confidentialité des renseignements recueillis relativement aux divulgations et aux enquêtes;</p> <p>[...]</p>
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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1553-13

STYLE OF CAUSE: CHARBEL EL-HELOU v COURTS ADMINISTRATION SERVICE, LAURENT FRANCOEUR, FRANCINE CÔTÉ, ÉRIC CLOUTIER, DAVID POWER AND ÉRIC DELAGE

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