Federal Court  Cour fédérale

Date: 20210419

Docket: T-1529-19

Citation: 2021 FC 339

Ottawa, Ontario, April 19, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

ALEXANDRU-IOAN BURLACU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is employed at the Canada Border Services Agency ("CBSA") as a Senior Program Officer in the Case Review Unit, Inland Enforcement Operations and Case Management Division. In January 2019, he made a complaint of workplace harassment against two senior CBSA labour relations officials. In April 2019, the CBSA Vice-President (Intelligence and Enforcement Branch) determined that the complaint would not be investigated

because the conduct complained of did not meet the definition of workplace harassment set out in the Treasury Board of Canada Secretariat's *Policy on the Prevention and Resolution of Harassment in the Workplace*. The applicant filed a grievance of this decision. In a decision dated September 12, 2019, the CBSA Vice-President (Human Resources Branch) denied the grievance. The applicant, who is self-represented, now applies for judicial review of that decision under subsection 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. He contends that the decision should be set aside because it is unreasonable and because the requirements of procedural fairness were not respected.

[2] For the reasons set out below, I do not agree. This application for judicial review must, therefore, be dismissed.

II. BACKGROUND

[3] The timeframe of events giving rise to this application spans from the spring of 2018, when the conduct that is the focus of the harassment complaint occurred, to September 2019, when the applicant's grievance was denied. While the federal public service policies and procedures protecting employees from workplace harassment and governing the harassment resolution process have been amended since then, the same policies and procedures were in effect throughout the period with which this application is concerned. These policies and procedures are set out in three documents in particular: the *Policy on Harassment Prevention and Resolution* (effective October 1, 2012) mentioned above (the "Policy"), the *Directive on the Harassment Complaint Process* (effective October 1, 2012) (the "Directive"), and the *Guide on Applying the Harassment Resolution Process* (dated December 31, 2012) (the "Guide"). Among

other important things, these instruments help to achieve the broader objectives set out in the *Values and Ethics Code for the Public Sector* (dated December 15, 2011) (the "Code"), including that public servants act and be treated by their organizations in accordance with the values articulated in the Code – namely, respect for democracy, respect for people, integrity, stewardship and excellence.

A. *The Definition of Harassment*

[4] The Policy defines harassment (*harcèlement*) as follows:

> Improper conduct by an individual, that is directed at and offensive to another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises objectionable act(s), comment(s) or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the *Canadian Human Rights Act* (i.e. based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and pardoned conviction).
>
> Harassment is normally a series of incidents but can be one severe incident which has a lasting impact on the individual.

[5] The same definition is set out in the Directive.

[6] For its part, the Guide highlights the specific elements of the definition to assist determinations as to whether a complaint of harassment is admissible – i.e. whether the conduct complained of meets the definition of harassment. The Guide states:

> For a complaint to be deemed admissible, the different elements of the definition should be present:

> - The respondent displayed a potentially improper and offensive conduct;
> - The behaviour was directed at the complainant;
> - The complainant was offended or harmed;
> - The respondent knew or reasonably ought to have known that his or her behaviour would cause offence or harm;
> - The behaviour occurred in the workplace or at any location or any event related to work […].

[7] The Guide also states the following with respect to the distinction drawn in the definition between repetitious behaviour and a single event:

> It is important to consider the severity and impropriety of the behaviour (act, comment or display) in the circumstances and context of each situation. Essentially, the definition of harassment means that more than one act or event need to be present in order to constitute harassment and that taken individually, this act or event need not constitute harassment. It is the repetition that generates the harassment. In other words, workplace harassment consists of repeated and persistent behaviours towards an individual to torment, undermine, frustrate or provoke a reaction from that person. It is a behaviour that with persistence, pressures, frightens, intimidates or incapacitates another person. Each behaviour, viewed individually, may seem inoffensive, however, it is the synergy and repetitive characteristic of the behaviours that produce harmful effects.
>
> Please note that one single incident can constitute harassment when it is demonstrated that it is severe and has an important and lasting impact on the complainant.

[8] Finally, the Guide provides examples of conduct that does not constitute harassment, examples of conduct that may constitute harassment, and examples of conduct that does constitute harassment: see Annex A of the Guide. These examples would assist not only the officials who are responsible for dealing with harassment complaints but also any federal public

service employee who may be considering whether experiences they have been subjected to at work could constitute harassment.

B. *The Harassment Complaint Process*

[9] The Directive in effect when the applicant submitted his complaint prescribed the minimum requirements of the harassment complaint process and stated "expected results in order to ensure the timely and efficient resolution of complaints" (see paragraph 5.1). To these ends, the Directive outlined five steps for designated officials to follow when resolving harassment complaints:

> **6.1 The designated officials are responsible for the following:**
>
> **6.1.1** Ensuring that the harassment complaint process is carried out promptly; respects the principles of procedural fairness towards the complainant, the respondent and all other parties involved; and that it contains the following five steps**:**
>
> **Step 1 – Acknowledging receipt** of the complaint while ensuring that:
>
> - employees understand that if a complaint on the same issue is or has been dealt with through another avenue of recourse, the complaint process under this directive will not proceed further and the file will be closed.
>
> - the written complaint is submitted within 12 months of the last incident or event of alleged harassment (unless there are extenuating circumstances); and
>
> - the parties are made aware of the options for informal resolution from the outset and throughout the process.
>
> . . .
>
> **Step 2 – Reviewing the complaint** to determine whether the allegation(s) meets the definition of harassment as described in this

> directive (see Appendix A). The respondent is notified of the complaint whether or not the complaint is admissible.
>
> **Step 3 – Exploring options** for resolving the complaint while ensuring that consideration is given to informal resolution processes. Should there be an investigation, the person conducting the investigation is appropriately qualified and applies the principles of procedural fairness.
>
> **Step 4 – Rendering a decision and notifying in writing** the parties involved as to whether or not the allegations were founded.
>
> **Step 5 – Restoring** the well-being of the workplace while ensuring that:
>
> - the work unit manager in consultation with the Informal Conflict Resolution practitioners and other relevant organizational resources addresses the needs of the parties concerned and the work unit throughout the complaint process as well as any detrimental impacts resulting from the incidences of harassment; and
>
> - the work unit manager takes timely corrective and/or disciplinary measures, if warranted, including addressing reprisal or risk of reprisal.
>
> . . .
>
> For additional information on the application of the steps in the harassment complaint process, consult the Guide on Applying the Harassment Resolution Process.
>
> [note and footnotes omitted]

[10] As the foregoing suggests, the Guide provides additional information concerning what is involved in each of these five steps. Notably, the Guide states the following, among other things, with respect to Step 2:

> If the person responsible for managing the complaint process determines that the allegations are frivolous or do not satisfy the definition of harassment, he or she informs the complainant that the complaint cannot be accepted and provides the reasons for his decision.

C. *The Applicant's Harassment Complaint*

[11] The applicant presented his harassment complaint on January 31, 2019, by way of an email addressed to Jacques Cloutier, the CBSA Vice-President, Operations Branch. The complaint concerned the conduct of two senior labour relations officials at the CBSA. One was the Director General of Labour Relations and Compensation (the "Director"). The other was the Acting Manager of Labour Relations (the "Manager"). Previously during the material time, the Manager had held the position of Labour Relations Advisor, Labour Relations Operations and HR Redress Division, with the CBSA. In their respective roles, both the Director and the Manager had dealt with prior workplace complaints and grievances made by the applicant.

[12] In his January 2019 harassment complaint, the applicant itemized the following specific respects in which he alleged that the Director and the Manager had engaged in conduct that constituted harassment.

[13] First, in the spring of 2018, the applicant had at least four outstanding grievances relating to issues in his workplace. In an email to the Director dated April 4, 2018, the Manager (who at the time was still in her role as Labour Relations Advisor) summarized the history and current status of the four grievances. She then provided some additional observations about the applicant, including that he "often questions management decisions to the point of near insubordination."

[14] The applicant was not an intended recipient of this email. It appears that he obtained a copy of it through a request under the *Privacy Act*, RSC 1985, c P-21.

[15] In his harassment complaint, the applicant alleged that the Manager's statement that he "often questions management decisions to the point of near insubordination" was defamatory of him. He submitted that the statement, standing on its own as well as in the context of the April 4, 2018, email was a "false accusation to destroy [his] reputation" and therefore constituted harassment. (Annex A to the Guide mentions "Comments, repeated insinuations or false accusations to destroy a person's reputation" as an example of conduct which generally would constitute harassment.)

[16] The applicant was unaware of any response from the Director to this email. This gave rise to the second part of his harassment complaint. The applicant alleged that the Director's "acceptance of the defamatory e-mail, without any indication of having challenged any of the information he was being presented, and his subsequent failure to recuse himself from being the decision-maker on [the applicant's] grievances" constituted harassment.

[17] The third part of the harassment complaint relates to a letter to the applicant dated April 17, 2018, from Mr. Cloutier. (As noted above, the applicant submitted the harassment complaint at issue here to Mr. Cloutier; further, as will be seen below, it was Mr. Cloutier who dealt with it in the first instance.)

[18] The letter concerned an earlier complaint the applicant had made about an issue in his workplace. In material part, the April 17, 2018, letter stated the following (bolding in original):

> This is further to the allegations of harassment you mentioned during the grievance consultation of December 28, 2017 and in your email sent to your director on April 6, 2018 against your previous and current management team. When allegations of harassment are received, as the delegated manager, I must review the allegations to determine whether they meet the definition of harassment as defined in the Treasury Board of Canada Secretariat's *Policy on Harassment Prevention and Resolution* (Policy). A copy of the Policy is attached.
>
> . . .
>
> I wish to assure you that all allegations of harassment are taken very seriously. In order to review your complaint in accordance with the Policy, I require detailed information in order to determine whether the allegations made by you fall within the definition of harassment as per the Policy. Please identify the allegations for each respondent and provide me with the following:
>
> 1) date(s) on which the incident(s) occurred and by whom;
>
> 2) specific details regarding the incident(s); and
>
> 3) any other pertinent information.
>
> Please provide this information no later than **April 30, 2018**. You can email this additional information to the attention of [. . .], Labour Relations Advisor at the following address [. . .].
>
> Please be advised that if you choose not to provide any additional information by **April 30, 2018**, I will make a determination based on the information available to me.
>
> . . .

[19] This letter from Mr. Cloutier was cc'd to the Manager (who, at the time, was still in her role as Labour Relations Advisor and, as indicated in the body of the letter, was the suggested point of contact for the applicant in relation to this other complaint). The applicant alleged that the letter had been written by the Manager and was sent to him at her direction. Accordingly, his

complaint of harassment was with respect to the Manager rather than Mr. Cloutier. The applicant alleged that the letter constituted harassment because it mischaracterized the concerns he had raised previously as being a complaint of harassment, it stipulated an unreasonably short deadline for his response, and it conveyed an "ultimatum" – indeed, a "threat" (if no additional information was provided by the deadline, Mr. Cloutier would render a decision on the basis of the information available to him, which would presumably be a negative decision). The applicant alleged that the letter caused him "great offence and distress."

[20] Fourth, the applicant contended that this aspect of the Manager's alleged harassment of him continued and was compounded by the Manager drafting a follow-up email on June 11, 2018, dealing with the same subject as the April 17, 2018, letter. The draft email suggested that the applicant should be given four days to provide the information that had been requested of him. This email was never sent to the applicant. (It appears that the applicant also obtained this draft email through a *Privacy Act* request.)

[21] Finally, the applicant alleged that the Manager, now in her role as Acting Manager of Labour Relations, "tolerated her subordinates providing [the applicant's] managers with advice relating to [his] subsequent labour relations matters that was improper, unfair and disrespectful and caused [him] great offence and harm." The applicant provided two examples he said demonstrated this. One was a first level response dated September 26, 2018, signed by Jacqueline Frood (Acting Manager, Inland Enforcement, Operations and Case Management) denying a grievance concerning the handling of earlier grievances the applicant had filed. The

applicant alleged that the decision was illogical, showed disregard for him and his submissions, caused him "great offence" and had "negatively affected" his mental and physical health.

[22] The second example was an email from Ms. Frood dated May 23, 2018, denying the applicant's request for the advancement of 162.45 hours of sick leave. The applicant alleged that the decision was inconsistent with applicable policies and practices and that the reasons given for denying his request were a mere pretext.

[23] According to the applicant, the link between these communications and the Manager was that his managers (presumably Ms. Frood, among others) had confirmed to him that they had sought Labour Relations guidance with respect to his grievances; consequently, according to the applicant, the Manager was responsible for the contents of these communications.

[24] In an undated letter to the applicant, Mr. Cloutier acknowledged receipt of the January 31, 2019, harassment complaint and described in general terms the procedure that would be followed in dealing with it. Mr. Cloutier wrote that once he had had the opportunity to review all of the allegations, he would advise the applicant of his decision as to whether the allegations met the Policy's definition of harassment and if he would proceed with the investigation of some or all of the allegations. Mr. Cloutier also noted the following: "In light of the concerns you raised in your harassment complaint against [the Director] and in the spirit of cooperation in the hopes to resolve this situation, Jacqueline Rigg, Vice-President, Human Resources Branch, has agreed to oversee the National Integrity Centre of Expertise for the handling of this file." Finally, Mr. Cloutier informed the applicant that the coordinator for the file would be

Camille Cloutier-McNicoll, Harassment Prevention and Resolution Advisor, and that the applicant could contact her directly for any further information or clarification that he required. (The record indicates that Ms. Cloutier-McNicoll worked at the National Integrity Centre of Expertise, a section within CBSA's Labour Relations and Compensation Branch whose mandate includes dealing with workplace harassment complaints.)

D. *The Decision Regarding the Harassment Complaint*

[25] In a letter dated April 25, 2019, Mr. Cloutier informed the applicant that his complaint of harassment would not be investigated further. The entirety of the substance of the decision is set out in the letter as follows:

> Following the letter sent to you on January 21, 2019 where I acknowledged receipt of your harassment complaint against [the Director and the Manager], I have reviewed the allegations that you provided and have determined that the allegations do not fall within the definition of harassment as defined in the Policy. As such, your complaint will not be investigated further.

(I note parenthetically that the date of January 21, 2019, appears to be a typographical error; the applicant did not submit this harassment complaint until January 31, 2019.)

[26] On May 2, 2019, the applicant contacted Ms. Cloutier-McNicoll by email. He stated that he had received Mr. Cloutier's decision regarding his harassment complaint and noted that "the decision does not state which part of the definition of harassment the allegations do not meet." The applicant asked Ms. Cloutier-McNicoll to let him know if he "could obtain additional information regarding the decision." He did not receive a response to this email.

E. *The Applicant's Grievance*

[27] The applicant presented a grievance of Mr. Cloutier's decision under section 208 of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22 ("*FPSLRA*"). This provision states:

Presentation	**Présentation**
Right of Employee	**Droit du fonctionnaire**
208 (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	**208 (1)** Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(a) by the interpretation or application, in respect of the employee, of	**a)** par l'interprétation ou l'application à son égard :
(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or	**(i)** soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,
(ii) a provision of a collective agreement or an arbitral award; or	**(ii)** soit de toute disposition d'une convention collective ou d'une décision arbitrale;
(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	**b)** par suite de tout fait portant atteinte à ses conditions d'emploi.

[28] Section 209 of the *FPSLRA* provides that certain types of grievances can be referred for adjudication but the applicant's grievance did not qualify for this. As well, the parties agreed

that the grievance would be taken directly to the final level, as provided for by the Collective Agreement. By the operation of section 214 of the *FPSLRA*, the decision concerning the applicant's grievance would be "final and binding for all purposes of this Act and no further action under this Act may be taken on it," subject only to judicial review.

[29] The respondent submits that the decision maker dealing with the applicant's grievance was to make a *de novo* determination of the issues raised in the grievance and no deference was owed to any of Mr. Cloutier's determinations. The applicant does not dispute this characterization of the decision maker's mandate when determining a grievance under section 208 of the *FPSLRA*.

[30] The applicant represented himself in the presentation of his grievance. His point of contact was Isabelle Guay, Senior Labour Relations Advisor, Labour Relations and HR Redress Division, with the CBSA.

[31] The applicant articulated the grounds for his grievance on four separate occasions.

[32] First, in the form he completed on May 7, 2019, to initiate the grievance process, the applicant submitted that Mr. Cloutier's decision not to investigate the complaint of harassment was made "in a manner that is inconsistent with the requirements of the Policy on Harassment Prevention and Resolution and of the provisions of related instruments." The applicant also submitted that the decision does not exemplify, with respect to him, "the values of 'Respect for Democracy' and 'Respect for People', and their respective behaviours, as mandated by the

Values and Ethics Code for the Public Sector." The applicant further grieved the failure of his employer to comply with the requirements of the latter Code by failing to treat him in accordance with the values of the Public Sector and "by failing to take the necessary steps to integrate these values, and their respective expected behaviours," into the decision made with respect to the harassment complaint and the process used to deal with that complaint. By way of remedy, the applicant requested that the grievance be allowed, that Mr. Cloutier's decision be set aside, and that the complaint of harassment be submitted to an independent and impartial investigator. The applicant also requested that he "be made whole and be granted any and all other remedies deemed just."

[33] Second, on May 14, 2019, the applicant provided written submissions in support of his grievance by way of an email to Ms. Guay. In these submissions, he raised the following four points:

a) The applicant had made two inquiries about the status of his harassment complaint (one by email on April 12, 2019; the other by email on April 23, 2019) but he did not receive a response to either. This was contrary to the requirement for the handling of harassment complaints (as set out in the governing instruments and, implicitly, in the Code) that the applicant was entitled to timely communication about the status of his complaint.

b) The Guide states with respect to Step 2 of the process for reviewing a harassment complaint that if the decision maker determines that the allegations do not satisfy the definition of harassment, he or she should inform the complainant that the complaint cannot be accepted and provide "the reasons" for the decision. Contrary to what was

required, Mr. Cloutier did not provide any reasons for his determination that the conduct the applicant complained of did not meet the definition of harassment.

c) Mr. Cloutier was in a conflict of interest because the harassment complaint concerned, among other things, a letter (the one dated April 17, 2018) that he himself had signed. According to the applicant, in determining that the conduct complained of did not come within the definition of harassment, Mr. Cloutier was "effectively deciding that he himself had not condoned/facilitated harassment."

d) Employees of the National Integrity Centre of Expertise who had advised Mr. Cloutier concerning the harassment complaint were also in a conflict of interest because they are "subordinates" of the Director, who was one of the respondents named in the complaint. According to the applicant, no reasonable person would conclude that these employees would be able to provide impartial advice about whether the allegations relating to their "superior" met the definition of harassment.

[34] Third, on May 15, 2019, the applicant attended a grievance presentation meeting with a representative of the decision maker. There is no evidence on the record as to who the applicant met with, how long the meeting lasted, or what occurred during the meeting.

[35] Fourth, on June 14, 2019, the applicant sent Ms. Guay an email raising an additional issue. He stated that the previous day he had received some records he had requested under the *Privacy Act*. They included an email exchange between Mr. Cloutier and the Manager on September 24, 2018.

[36] By way of background, the applicant had sent an email to Mr. Cloutier on September 12, 2018. That email pertained to records the applicant had obtained from another *Privacy Act* request which, he submitted in his email to Mr. Cloutier, related to the same matters as had given rise to the April 17, 2018 (see paragraph 18, above). The records the applicant had just received indicated that, at Mr. Cloutier's request, the Manager had drafted a response to the applicant's September 12, 2018, email for him.

[37] According to the applicant, this exchange demonstrated that there was a "close working relationship" between Mr. Cloutier and the Manager on harassment-related matters and that this raised "additional concerns" regarding Mr. Cloutier's impartiality when it came to assessing the applicant's harassment complaint against the Manager. According to the applicant, Mr. Cloutier was "unable to exemplify, towards [the applicant], the level of fairness required by the Code and the Directive when deciding whether to investigate [his] harassment allegations regarding [the Manager]."

III. DECISION UNDER REVIEW

[38] The decision denying the grievance was communicated to the applicant in a "Reply to Grievance" dated September 12, 2019, signed by Diane Lorenzato, Vice-President, Human Resources Branch, with the CBSA.

[39] In its entirety, the decision states the following:

> The following is in response to the grievance you filed in which you alleged that the decision of the Vice-President of Intelligence and Enforcement Branch Jacques Cloutier not to investigate your

> harassment complaint (2019-NHQ-HC-128813) was inconsistent with the requirements of the *Policy on Harassment Prevention and Resolution*. As corrective action you requested that your harassment complaint be submitted to an independent and impartial investigator.
>
> I have carefully reviewed the circumstances giving rise to your grievance and have carefully considered the points you raised during the grievance consultation and your written submissions.
>
> I am satisfied that in accordance with the Treasury Board Secretariat's *Directive on the Harassment Complaint Process* and the *Policy on Harassment Prevention and Resolution*, your harassment complaint was properly reviewed and assessed against the definition of harassment and deemed not to meet the definition of harassment. I am also satisfied with the content of Mr. Cloutier's letter to you dated April 25, 2019 and his decision therein.
>
> As such, I find that the harassment policy and directive, in addition to the *Values and Ethics Code for the Public Sector*, have been complied with, respected and followed.
>
> Accordingly, your grievance is denied and the corrective action you requested will not be forthcoming.

IV. STANDARD OF REVIEW

[40] As noted, the applicant challenges both the substance of the decision denying his grievance and the process by which that decision was made.

[41] With respect to the substance of the decision, the parties agree, as do I, that it should be reviewed on a reasonableness standard. Reasonableness is now the presumptive standard of review for administrative decisions, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Canada (Minister of Citizenship and*

Immigration) v Vavilov, 2019 SCC 65 at para 10). There is no basis for derogating from this presumption here.

[42] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). In determining whether a decision is reasonable, the reviewing court should focus on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83).

[43] The requirement that an administrative decision be reasonable follows from the fundamental principle that the exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). Thus, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96).

[44] On judicial review, the court "must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

[45] The burden is on the applicant to demonstrate that the decision is unreasonable. He must establish that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[46] With respect to process, there is no dispute in the present case about how a reviewing court should determine whether the requirements of procedural fairness were met. The reviewing court must conduct its own analysis of the process followed and determine whether it was fair having regard to all the relevant circumstances, including those identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28: see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54, and *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31. This is functionally the same as applying the correctness standard of review: see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 34 and 50; *Vavilov* at para 54; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. That being said, invoking a standard of review is somewhat beside the point (*Canadian Pacific Railway Co* at paras 50-55). This is because, at the end of the day, what matters "is whether or not procedural fairness has been met" (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 at para 35). The burden is on the applicant to demonstrate that it was not.

V. ANALYSIS

[47] In the specific circumstances of this case, it will be helpful to begin by explaining why I have concluded that the decision to reject the applicant's grievance is reasonable. Central to my

analysis of this issue is the application of the definition of harassment to the conduct complained of by the applicant. This analysis, in turn, will provide a foundation for my conclusion that there was no breach of the requirements of procedural fairness which would warrant reconsideration of the matter.

A. *Is the Decision Rejecting the Grievance Unreasonable?*

[48] The applicant contends that the decision rejecting his grievance is unreasonable because it lacks justification, transparency and intelligibility. The conclusory statement in the decision that the harassment complaint "was properly reviewed and assessed against the definition of harassment and deemed not to meet the definition of harassment" effectively amounts to no reasons at all for the decision maker's conclusion. The statement that the decision maker was "also satisfied with the content of Mr. Cloutier's letter [to the applicant] dated April 25, 2019 and his decision therein" adds nothing to one's understanding of why the grievance was denied because that letter was equally conclusory and bereft of analysis. Further, as the applicant correctly notes, his concerns about the lack of impartiality in the process are not addressed at all in the decision.

[49] I agree with the applicant that the reasons given for rejecting his grievance leave something to be desired, particularly considering the detailed submissions the applicant provided in support of his grievance. However, I do not agree that this therefore leaves the applicant – or a reviewing court – unable to understand why his grievance was denied on its merits. On the contrary, viewed against the legal and factual constraints on the decision maker – in particular, the circumstances described by the applicant and the definition of harassment – this was the only

reasonable result. On the other hand, I do agree with the applicant that the decision does not display the hallmarks of reasonableness when it comes to the issue of impartiality. Whether this entitles him to a remedy is, however, another question. I address this below.

[50] When the decision maker has given reasons for the decision, a reviewing court should begin its inquiry "by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Vavilov* at para 84, internal quotation marks omitted). On review, "close attention" should be paid to a decision maker's reasons; they "must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made" (*Vavilov* at para 97). When the reasons are scant or non-existent, this exercise will be of limited utility. Indeed, as the Supreme Court also noted in *Vavilov*, "an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided" (at para 137). In the present case, while technically reasons were provided for rejecting the grievance, functionally they barely rise above the level of there being no reasons at all. Nevertheless, I "must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable" (*Vavilov* at para 138).

[51] The majority in *Vavilov* also made the following important observation: "But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape" (at para 138). The determinative

question is whether the outcome – that is, the denial of the applicant's grievance – is tenable in light of the relevant legal constraints.

[52] As I will explain, I have concluded that the decision maker's determination that the conduct alleged by the applicant does not come within the definition of harassment is not only a tenable outcome, it is the only tenable outcome. I have also concluded, albeit for slightly different reasons, that there is no basis to interfere with the decision because of the decision maker's failure to address the applicant's concerns about a lack of impartiality in the process by which his harassment complaint was assessed.

(1) Is the conclusion that the harassment complaint was reviewed and assessed properly against the definition of harassment reasonable?

[53] To determine whether Mr. Cloutier had reviewed and assessed the applicant's complaint of harassment properly against the definition of harassment, the decision maker dealing with the applicant's grievance had to determine for herself whether the conduct complained of by the applicant came within the scope of the definition of harassment. While she might have expressed her finding more directly, it is clear from the Reply to Grievance that the decision maker concluded that the conduct complained of did not come within the definition of harassment. However, while we know *what* her decision was (the grievance was denied), and we know *why* she made this decision (Mr. Cloutier had properly found that the conduct complained of by the applicant did not come within the definition of harassment), the decision is silent about how and why the decision maker made this latter determination. Despite the decision maker's failure to explain how and why she had made this determination, in my view it is the only

reasonable conclusion. As a result, while the decision itself could have exemplified the hallmarks of reasonableness better, it is nevertheless justified in relation to the relevant factual and legal constraints that bear on it.

[54] I have reached this conclusion for the following reasons.

[55] First, there is no meaningful sense in which the Director's failure to respond to the Manager's email of April 4, 2018 (which included the statement that the applicant "often questions management decisions to the point of near insubordination") was conduct directed at the applicant. This is a necessary condition for conduct to constitute harassment under the definition in the Policy. The same is true of the Manager allegedly "tolerating" others who in turn provided advice to the applicant's managers that was "improper, unfair and disrespectful and caused [him] great offence and harm." Without in any way suggesting that an act of omission could never constitute harassment, I am satisfied that the behaviour of the Director and the Manager identified by the applicant in his complaint could not reasonably constitute harassment in the circumstances of this case. It clearly falls outside the definition of harassment in the Policy.

[56] Second, there is no reasonable basis to conclude that the Manager's statement in the April 4, 2018, email to the Director that the applicant "often questions management decisions to the point of near insubordination" was conduct *directed at* the applicant given that it was included in an email that was not intended for him. Even assuming for the sake of argument that the applicant is correct that the comment was improper and unprofessional, there is no

reasonable basis for finding that the Manager either knew or ought to have known that it would come to the applicant's attention. There is, therefore, no reasonable basis on which it could be found that the comment constituted harassment within the meaning of the definition. Similarly, there is no reasonable basis on which it could be found that the draft follow-up email of June 11, 2018, was conduct *directed at* the applicant given that it was never sent to him. Again, this alleged conduct clearly falls outside the definition of harassment.

[57] Third, the only alleged conduct by the Manager that was directed at the applicant and of which the applicant would have been aware at the material time was the letter of April 17, 2018. However, there is no reasonable basis for concluding that its contents were potentially improper or offensive or that the Manager knew or ought to have known that the act of sending the letter would cause the applicant offence or harm. The contents of the letter were entirely in accordance with the Directive, including that complaints of harassment be handled fairly, confidentially, effectively and in a timely manner. Even if the Manager made a mistake in treating the applicant's concern as a complaint of harassment or in imposing an unduly short deadline for a response, there is no reasonable basis to find that she knew or ought to have known that doing so would cause the applicant offence or harm. There is, therefore, no reasonable basis on which it could be found that the letter constituted harassment within the meaning of the definition.

[58] I am conscious that, as a general rule, I should respect the legislature's intention to entrust to the administrative decision maker the determination of a grievance like the one brought by the applicant: see *Vavilov* at para 142. However, I am confident that the foregoing analysis

does not trench unduly on the role of the administrative decision maker, even though I have provided an explanation of why the conduct complained of by the applicant did not constitute harassment which the decision maker herself did not give in her decision. This is not a case where I must overlook a flawed basis for the decision and substitute my own justification for the outcome for that of the administrative decision maker: see *Vavilov* at para 96. Nor is this a case where the decision becomes intelligible only if the reviewing court corrects an error in reasoning, impermissibly fills in logical gaps in the decision, or relies on information of which the applicant could not have been aware when he received the decision. It is clear from the Reply to Grievance that the decision maker concluded that the conduct complained of by the applicant did not come within the definition of harassment. Reading the decision holistically and contextually, it is also clear why the decision maker came to this conclusion, despite the fact that she did not explain this as thoroughly as she should have. This is because the decision maker could not reasonably have come to any other conclusion. When the conduct complained of by the applicant is viewed against the definition of harassment, the only conclusion a reasonable decision maker could reach is that the conduct does not come within the scope of the definition. To use a familiar metaphor, one can understand why the decision was made and why the result is justified because the dots are there for all to see and there is only one way to connect them: cf. *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, quoted with approval in *Vavilov* at para 97.

[59] Finally, even if, contrary to the foregoing, I were persuaded that the decision is unreasonable because it lacks the hallmarks of justification, transparency and intelligibility, I would not send the matter back for redetermination. This is because no useful purpose would be

served by remitting the matter when no other outcome could reasonably be reached: see *Vavilov* at para 142 and the cases cited therein, including *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at 228-30.

> (2) Did the decision maker commit a reviewable error in failing to address the applicant's concerns about a lack of impartiality in the process by which his harassment complaint was handled?

[60] For slightly different reasons, I reach the same conclusion with respect to whether the decision maker committed a reviewable error in failing to address the applicant's concerns about a lack of impartiality in the process by which his harassment complaint was handled.

[61] As set out above, in his grievance the applicant squarely raised concerns about a lack of impartiality in the handling of his harassment complaint. While he did not raise these concerns expressly in the initial presentation of his grievance, he did do so in his subsequent submissions. In his email to Ms. Guay dated May 14, 2019, the applicant submitted that Mr. Cloutier was in a conflict of interest because, in assessing the harassment complaint, he was effectively determining whether he himself had condoned or facilitated harassment (since he had signed the April 17, 2018, letter that formed part of the basis of the complaint). The applicant also submitted that employees with the National Integrity Centre of Expertise were in a conflict of interest, and consequently could not give impartial advice concerning the complaint, because one of the respondents named in the complaint – the Director – was their superior. In his subsequent email to Ms. Guay on June 14, 2019, the applicant raised the additional concern with respect to Mr. Cloutier that he and the Manager had such a close working relationship that Mr. Cloutier would not be able to judge the applicant's complaint against the Manager impartially.

[62] Despite the applicant clearly expressing these concerns about a lack of impartiality in the harassment complaint process, the decision to reject his grievance is completely silent about this issue. In my view, the failure to address the applicant's concerns renders this aspect of the decision unreasonable. Even allowing for the fact that the decision maker dealt with this matter before the Supreme Court of Canada released its decision in *Vavilov*, which affirmed "the need to develop and strengthen a culture of justification in administrative decision making" (at paras 2 and 14), and also recognizing that the grievance determination process is meant to be an informal and expeditious mechanism for resolving issues in the workplace, the decision maker could not simply ignore the applicant's concerns about a lack of impartiality in the harassment complaint process.

[63] As the Supreme Court emphasized in *Vavilov*, the principles of justification and transparency "require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties" (at para 127). Whether the harassment complaint process was and/or would appear to be impartial was a key issue for the applicant, at least by the time he was framing his formal submissions in support of his grievance. The decision maker's failure to grapple with this issue at all, let alone meaningfully, calls into question whether she was actually alert and sensitive to the matter before her (cf. *Vavilov* at para 128). Unlike the issue of whether the conduct giving rise to the harassment complaint fell within scope of the definition of harassment, I am unable to determine whether the decision maker even turned her mind to this issue. Moreover, even if I were prepared to assume that she had turned her mind to this issue, both the applicant and the Court are left entirely in the dark as to why she decided this issue against the applicant. Critically, the decision maker never

states the test she applied or the factors she considered in concluding (as she must have done if she considered the issue at all) that the applicant's concerns about a lack of impartiality did not warrant allowing the grievance. No light is shed on this by any other part of the record. In this key respect, the decision lacks all the essential hallmarks of reasonableness.

[64] While this would ordinarily entitle the applicant to a redetermination of this issue by another administrative decision maker, in the particular circumstances of this case, I am not persuaded that this is warranted. This is because, as I will explain, there is no merit to any of the concerns the applicant raised about a lack of impartiality in the process followed in dealing with his harassment complaint. Consequently, no reasonable decision maker could decide the matter differently.

[65] There is no question that the applicant was entitled to a procedure for determining whether to proceed with an investigation of his harassment complaint that not only was impartial but that also would appear to be impartial. This is a fundamental right of procedural fairness: see *Oleynik v Canada (Attorney General)*, 2020 FCA 5 at para 54. That being said, it is important to bear in mind that the question of whether the requirements of procedural fairness were met in the harassment determination process is not directly before me. Rather, I am considering the reasonableness of the decision on the applicant's grievance, in connection with which the applicant raised concerns about a lack of impartiality in the harassment determination process. Be that as it may, however, the absence of any reasons on this issue from the decision maker who determined the grievance necessitates looking past that decision and examining how the applicant's harassment complaint was dealt with in order to determine whether the outcome of

the grievance is justified. This is an example of how, in the words of *Vavilov* (at para 138), reasonableness review "takes a different shape" in the absence of reasons.

[66] While the applicant did not always distinguish between the two, it is apparent from his submissions in support of his grievance that he was alleging that the harassment determination process was tainted by actual bias and that there would be a reasonable apprehension of bias. He raised these allegations with respect to both Mr. Cloutier and employees of the National Integrity Centre of Expertise (presumably Ms. Cloutier-McNicoll in particular).

[67] Looking first at Mr. Cloutier, the evidence does not support a reasonable apprehension of bias on his part, let alone any basis for a finding of actual bias. Significantly, the applicant knew that Mr. Cloutier was the one who would be determining whether his allegations fell within the scope of the definition of harassment. The applicant also knew that his complaint rested, in part, on the letter of April 17, 2018, which Mr. Cloutier had signed. The applicant was clear in his harassment complaint that he was singling out the Manager as the one who was responsible for the contents of this letter, not Mr. Cloutier. He did not name Mr. Cloutier as a respondent in his complaint, nor did he raise any concerns at the time about him dealing with the complaint.

[68] The applicant presented detailed and comprehensive submissions in support of his harassment complaint. It is apparent from those submissions and, indeed, from the record as a whole, that the applicant is highly versed not only in the principles and procedures applicable to harassment complaints but also the laws, principles, policies, practices and agreements governing employment in the federal public service generally. If the applicant had had a genuine concern

that Mr. Cloutier was effectively determining whether he himself had condoned or facilitated harassment, he would have raised it at the time. Further, although he did not learn about the September 24, 2018, email exchange between Mr. Cloutier and the Manager until after Mr. Cloutier had made his decision, this exchange is so trifling as to be incapable of supporting the suggestion that it reveals a close working relationship between the two that undermined Mr. Cloutier's ability to be impartial. A reasonable and informed person, viewing the matter realistically and practically – and having thought the matter through – could only conclude that there is no basis for the applicant's concerns about Mr. Cloutier's lack of impartiality: see *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259, 2003 SCC 45, at para 60.

[69] Applying the same test, I reach the same conclusion with respect to employees of the National Integrity Centre of Expertise. Without more, the mere fact that all employees in the Labour Relations and Compensation Branch, which includes the National Integrity Centre of Expertise, are subordinates of the Director is incapable of reasonably supporting any concern about a lack of impartiality (whether actual or apprehended) on the part of those employees: see *Oleynik* at paras 67-68. Further, the applicant knew that the Centre would be advising Mr. Cloutier regarding his harassment complaint. The applicant also knew that, in light of the concerns he had raised in his harassment complaint against the Director, arrangements were made for Jacqueline Rigg, Vice-President, Human Resources Branch, to oversee the Centre in its handling of this file (see paragraph 24, above). The applicant did not raise any objection to this at the time. If he had had a genuine concern about the independence and impartiality of the National Integrity Centre of Expertise, he would have raised it. A reasonable and informed person would take his failure to do so, among all the other circumstances of the case, into

account in assessing the concerns about a lack of impartiality the applicant raised for the first time in his grievance. Such a person, viewing the matter realistically and practically – and having thought the matter through – could only conclude that there is no reasonable basis for the applicant's concerns about a lack of impartiality on the part of the National Integrity Centre of Expertise.

[70] In summary, while I have found that the decision below is deficient because it did not address in any way the applicant's concerns about a lack of impartiality, no useful purpose would be served by remitting the matter for reconsideration of this issue. This is because the same outcome is inevitable: see *Vavilov* at para 142. No reasonable decision maker could conclude that the grievance should be allowed on the basis that the decision not to proceed with an investigation of the harassment complaint was tainted by bias, whether actual or reasonably apprehended.

(3) Conclusion

[71] For the foregoing reasons, the applicant has not persuaded me that there is any substantive basis to interfere with the decision to reject his grievance.

[72] For the sake of completeness, I note that it follows from this that I am also satisfied that the decision maker did not err in concluding that the substance of the decision not to proceed further with the applicant's harassment complaint is consistent with the values articulated in the Code.

B. *Were the Requirements of Procedural Fairness Met?*

[73] Before addressing this issue, it is necessary to set out one additional aspect of the background to this case.

[74] In response to this application for judicial review, the respondent produced a tribunal record certified in accordance with Rule 318 of the *Federal Courts Rules*, SOR/98-106. The record was certified by Ms. Guay on October 7, 2019, in the following terms:

> I, the undersigned, Isabelle Guay, Senior Labour Relations Advisor, Labour Relations and HR Redress Division, of Canada Border Services Agency, do hereby certify that the materials enclosed and listed below constitute all relevant materials which were in the file before the final-level decision-maker, excluding any privileged materials, at the time the grievance was denied.

[75] The Rule 318 Certificate then lists a number of documents which are organized into thirteen separate tabs. The first of these tabs contains a document entitled "Analysis of the Harassment Complaint" along with several documents submitted by the applicant that are presumably attachments to the Analysis document. The Analysis document indicates that it was prepared by Camille Cloutier-McNicoll, Harassment Prevention and Resolution Advisor. It is undated.

[76] There is no dispute that the Analysis document had not previously been disclosed to the applicant. As will be discussed below, the applicant contends that the failure to provide him with an opportunity to comment on the contents of this document before the decision to reject his grievance was made breached the requirements of procedural fairness.

[77] The lack of a date on the document creates some uncertainty about when it was prepared and, consequently, about when it was considered during the decision-making process. The same document is also attached as an exhibit to an affidavit Ms. Guay provided in response to this application but Ms. Guay does not provide any direct evidence about when the Analysis was prepared. She simply states that, as provided for in Step 2 of the Directive (see paragraph 9, above), Ms. Cloutier-McNicoll "conducted the review and determined that the allegations did not fall within the purview of the Policy" and "recommended that the complaint not be accepted for further investigation." (In response to a question submitted by the applicant by way of written examination pursuant to Rule 99 of the *Federal Courts Rules*, Ms. Guay confirmed that she did not know when the Analysis was completed.)

[78] There can be no question that the Analysis was prepared in response to the January 31, 2019 harassment complaint; it refers specifically to the complaint and quotes from it extensively. What is less clear is whether the Analysis was relied on by the initial decision maker – namely, Mr. Cloutier. The document itself states that its purpose "is to provide you with an analysis and recommendation to address the harassment complaint filed by the complainant" but there is no addressee so it is unclear who "you" is referring to. As for Ms. Guay's affidavit, it merely implies that Mr. Cloutier considered the Analysis in making his decision.

[79] It will be recalled that the initial letter from Mr. Cloutier acknowledging receipt of the January 2019 harassment complaint stated that Ms. Cloutier-McNicoll had been appointed coordinator for the file. While better evidence on the preparation and use of the Analysis

document would have been desirable, I am satisfied that the only reasonable inference is that Ms. Cloutier-McNicoll prepared it for Mr. Cloutier and that he considered it in rendering his April 25, 2019, decision. The Analysis would therefore also have been before the decision maker dealing with the applicant's grievance of Mr. Cloutier's decision (as the Rule 318 certification in fact states).

[80] The Analysis document is seven pages in length, oriented in landscape layout. The first page sets out several general principles concerning complaints of harassment. It identifies the elements of harassment "which are necessary to establish whether or not a complaint can be receivable" (these are the elements highlighted in the Guide, as set out in paragraph 6, above). It notes that, "in most cases," harassment is not a single incident; rather, it is "the repetition that generates the harassment" (quoting from the Guide – see paragraph 7, above). It is also noted that, nevertheless, "one severe incident which has a lasting impact on the individual" can constitute harassment. The definition of harassment in the Policy is quoted verbatim. Finally, it is noted that "the burden of proof lies with the complainant to demonstrate evidence of *prima facie* harassment; it is not sufficient for the complainant to feel that he has been harassed to establish the basis of the complaint."

[81] The next five and one-half pages of the Analysis document consist of a table with columns under the following headings:

Reference Number	Date	Allegations (copy/past	Status for investigation	Respondent	Witness	Analysis/Observations

		e from complaint)				

[82] Under these headings, the applicant's harassment complaint is broken down into five rows, each with its own reference number. Each row corresponds to a specific allegation made by the applicant, namely: (1) the Manager sending the April 4, 2018, email; (2) the Director accepting the April 4, 2018, email without comment, and his subsequent failure to recuse himself from other grievances; (3) the Manager advising Mr. Cloutier to send the April 17, 2018, letter; (4) the Manager's preparation of the draft email dated June 11, 2018; and (5) the Manager tolerating her subordinates providing the applicant's managers with advice that was improper, unfair and disrespectful and which caused the applicant "great offence and harm."

[83] As suggested by the heading for the third column, Ms. Cloutier-McNicoll filled in this column by copying and pasting extensively from the applicant's complaint as set out in his email of January 31, 2019. She also provided cross-references to various documents the applicant had provided in support of his complaint, which evidently were attached as appendices to the Analysis (although those documents are not labelled consistently in the record).

[84] The only substantive input from Ms. Cloutier-McNicoll is found in the column headed "Analysis/Observations." While she analyzes and annotates each of the allegations separately, Ms. Cloutier-McNicoll reaches broadly similar conclusions with respect to all of them: the parties against whom the allegations of harassment had been made were performing the normal and proper functions of their respective managerial roles and any communications were

transmitted in a respectful, professional and confidential manner. Such conduct, in Ms. Cloutier-McNicoll's view, "does not generally constitute harassment."

[85] On the seventh page of the document, Ms. Cloutier-McNicoll states her conclusion as follows: "After careful analysis of the allegations, it has been determined that the allegations do not fall within the purview of the Policy." In light of this finding, she recommends that the complaint not be accepted for further review and investigation.

[86] The applicant contends that the requirements of procedural fairness were not met because he was not provided with the Analysis document before the decision was made to deny his grievance. He argues that, since the Analysis must have formed part of the basis of Mr. Cloutier's decision not to proceed to an investigation of his harassment complaint, the failure to provide it to him left him unable to make his case in support of his grievance of that decision fully and fairly. This undermined the fairness of the grievance determination process and, as a result, the decision rejecting the grievance must be set aside.

[87] I am prepared to assume without deciding that the document should have been provided to the applicant and that he should have been given an opportunity to address its contents before a decision was made on his grievance. It is therefore unnecessary to determine the scope or intensity of the applicant's procedural fairness rights under the principles and factors set out in *Baker* at paragraphs 21-28. I would, however, add this. My willingness to make this assumption implies that I am not persuaded by the respondent's submission – hinted at in its Memorandum of Argument but advanced more forcefully at the hearing of this application – that the Analysis

document is protected by some sort of advisory privilege. There is no suggestion that the document was included in the Certified Tribunal Record or as an exhibit to Ms. Guay's affidavit inadvertently. The submission that the applicant was never entitled to disclosure of the document because it is privileged cannot be reconciled with the fact that it was disclosed not once but twice without objection in the context of this application. Nor is it consistent with the position advanced by the respondent elsewhere in its Memorandum of Argument that it is reasonable to "incorporate" the Analysis "within the reasoning" of the final decision on the grievance.

[88] While I am prepared to assume without deciding that the applicant should have had an opportunity to address the contents of the Analysis document before a decision on his grievance was made, in the particular circumstances of this case, I am satisfied that there is nothing the applicant could have said about the contents of the document that would have made any difference to the result of his grievance. As a result, the failure to provide the applicant with an opportunity to address Ms. Cloutier-McNicoll's Analysis was a purely technical breach of the requirements of procedural fairness which occasioned no substantial wrong or miscarriage of justice. Consequently, there is no basis for this Court to interfere with the decision below. See *Federal Courts Act*, paragraph 18.1(5)(a); see also *Khosa* at para 43 and *Mobil Oil Canada Ltd* at 228-29.

[89] I begin by noting that much of the contents of the document were already known to the applicant from other sources when he submitted his grievance. The applicant was very familiar with the definition of harassment and with the policies and procedures concerning harassment

complaints that are set out on the first page of the document. He also knew what was included in the column summarizing his allegations since, as noted above, this was copied and pasted directly from his complaint. The applicant was also familiar with the documents attached to the Analysis document which he himself had submitted in connection with his harassment complaint. In these respects, the applicant's situation is similar to the one considered in *Blois v Canada (Attorney General)*, 2018 FC 354, particularly at para 37 of that decision. I also note that there is no suggestion that Ms. Cloutier-McNicoll misstated any of the applicable principles or policies or any aspect of the applicant's harassment complaint. Moreover, the conclusion reached in the Analysis – that the applicant's allegations do not fall within the Policy's definition of harassment – is the very same as the conclusion communicated to him by Mr. Cloutier in the letter of April 25, 2019.

[90] On the other hand, the applicant was not aware of the analysis of the allegations that Ms. Cloutier-McNicoll provided to support her conclusion. This analysis would have been considered by Mr. Cloutier when he decided not to refer the harassment complaint for further investigation. This forms the crux of the applicant's contention that the requirements of procedural fairness were not met and that he was prejudiced in the presentation of his grievance as a result. The applicant contends that the Analysis document is necessary to understand why his harassment complaint was dismissed. Without knowing this, he could not effectively make his case when he grieved that decision.

[91] I do not agree.

[92] Mr. Cloutier stated in his April 25, 2019, decision that the harassment complaint would not be investigated further because the applicant's allegations did not fall within the definition of harassment. The applicant knew what that definition states. He also knew what his allegations were. This is all he needed to attempt to demonstrate that Mr. Cloutier's decision was wrong. Like the decision rejecting the applicant's grievance, Mr. Cloutier's decision to dismiss the harassment complaint is entirely comprehensible if one compares the conduct alleged by the applicant to the definition of harassment. While this is the process engaged in by Ms. Cloutier-McNicoll in her analysis, in the particular circumstances of this case, it is not necessary to see that analysis to understand why the harassment complaint was dismissed.

[93] On this application for judicial review, the applicant offers a detailed critique of several aspects of Ms. Cloutier-McNicoll's analysis. For example, he submits that Ms. Cloutier-McNicoll erred in viewing his complaints in isolation, as opposed to considering them synergistically; he takes issue with her characterization of the Manager and the Director as having simply been acting in the discharge of their managerial functions; he objects to Ms. Cloutier-McNicoll's characterization of their communications as having been professional and respectful; and he suggests that her "analysis" does not amount to any analysis at all. The applicant offers this critique in an effort to demonstrate the arguments he could have presented in support of his challenge to Mr. Cloutier's decision if only he had known about the Analysis and been given an opportunity to address it. According to the applicant, depriving him of an opportunity to make these arguments before the decision maker considering his grievance undermined the fairness of the grievance determination process.

[94] The difficulty for the applicant, however, is that none of these arguments would have been capable of persuading a reasonable decision maker to reach a different conclusion about whether the conduct he alleged in his harassment complaint fell within the definition of harassment. Critically, none of his arguments address the reasons why the allegations could not constitute harassment, as I have set out above (see paragraphs 55-57). Whatever issues the applicant may have had with Ms. Cloutier-McNicoll's analysis, none of them could reasonably support a different result in the particular circumstances of this case. Consequently, even assuming that the applicant should have been given an opportunity to address the Analysis as part of the grievance process, the failure to do so did not occasion any substantial wrong or miscarriage of justice.

VI. COSTS

[95] The respondent seeks costs in the range of $1500 to $2500. This request was not supported by a bill of costs. While acknowledging that this range may be higher than what is typically seen in costs awards against self-represented litigants in judicial review applications, the respondent contends that it is warranted by the fact that the manner in which the applicant pursued this matter made it unnecessarily complex.

[96] I do not agree. This matter concerned issues that are obviously important to the applicant. He should not be penalized simply because he presented his case as thoroughly as he did. Nevertheless, since he did not prevail in this application, he must bear some responsibility for the respondent's costs. In all the circumstances, I am satisfied that a lump sum award in favour of the respondent in the amount of $750 would be appropriate and just.

VII. CONCLUSION

[97] For these reasons, the application for judicial review is dismissed with costs.

JUDGMENT IN T-1529-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review of the decision of Diane Lorenzato, Vice-President, Human Resources Branch, Canada Border Services Agency, dated September 12, 2019, is dismissed.
2. Costs are awarded to the respondent in the lump sum amount of $750, inclusive of taxes and disbursements.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1529-19
STYLE OF CAUSE:	ALEXANDRU-IOAN BURLACU v THE ATTORNEY GENERAL OF CANADA

HEARING HELD BY VIDEOCONFERENCE ON JANUARY 11, 2021 FROM OTTAWA, ONTARIO

JUDGMENT AND REASONS:	NORRIS J.
DATED:	APRIL 19, 2021

APPEARANCES:

Alexandru-Ioan Burlacu	ON HIS OWN BEHALF
Noémie Fillion	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT