Federal Court  Cour fédérale

Date: 20220726

Docket: T-1139-18

Citation: 2022 FC 1112

Ottawa, Ontario, July 26, 2022

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ALEXANDRU-IOAN BURLACU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Alexandru-Ioan Burlacu, represents himself on this Application. He is a Senior Program Officer employed by the Canada Border Services Agency [CBSA] who has applied for judicial review of the final level decisions rendered in respect of four separate grievances. He also seeks an order pursuant to Rule 302 of the *Federal Courts Rules*, SOR/98-106 [Rules], allowing the review of the four separate decisions by way of this single Application.

[2] I am satisfied that hearing the four decisions by way of a single Application will allow a just and cost-efficient determination of the matters on their merits. However, after careful consideration of the Parties' submissions I am not persuaded that Court's intervention is warranted. For the reasons that follow, the Application is dismissed.

II. Background

[3] The four grievances in issue reflect Mr. Burlacu's concern regarding his Employer's failure to (1) establish a learning plan for him, and (2) exemplify, with respect to him, values and behaviours detailed in the *Values and Ethics Code for the Public Sector* [Code], which he asserts forms a part of the terms and conditions of his employment. Mr. Burlacu's concerns relating to the Code arise in the context of acting appointments within his workplace.

[4] Following is a short summary of each grievance:

A. *Grievance 2017-3941-125197 [197 Grievance]*

[5] In August 2017, Mr. Burlacu's acting manager verbally informed him that her appointment was being extended and that she would continue to act as his manager. On September 14, 2017, Mr. Burlacu grieved the fact that he had not been informed in writing of the name of his manager or the length of the acting appointment. He asserted this was contrary to the Code and therefore contrary to the terms and conditions of his employment. Mr. Burlacu sought written identification of his manager and, if it was an acting assignment, confirmation of the period of the acting assignment. He further sought a letter of apology from the individual who

had the responsibility of providing him with notice in writing. Finally, he requested that he "be made whole and be granted any and all other remedies deemed just."

[6] The final level decision maker concluded the Code did not impose a duty on the Employer to provide Mr. Burlacu the name of his manager in writing. The decision maker nevertheless noted that CBSA had provided Mr. Burlacu with the name of his manager in writing in October 2017. The decision maker partially allowed the grievance and decided no further corrective action would be forthcoming.

B. *Grievance 2017-3941-125198 [198 Grievance]*

[7] On September 15, 2017, Mr. Burlacu grieved his Employer's failure to establish a personal learning plan for him in the fiscal year 2017-2018 as required pursuant to the Treasury Board of Canada Secretariat's *Directive on Performance Management*. Despite having submitted a proposed training plan to management, Mr. Burlacu did not receive a formal response accepting his plan. As corrective action, Mr. Burlacu sought to have a learning plan established for the fiscal year 2017-2018, that a letter of apology from the individual who had the responsibility to ensure his manager established the learning plan and that he "be made whole and be granted any and all other remedies deemed just."

[8] The final level decision maker acknowledged that management had not established a learning plan for the fiscal year 2017-2018 and had therefore failed to meet the requirements of the *Directive on Performance Management*. However, the 2017-2018 fiscal year had ended by the time the final level decision was rendered. The final level decision maker granted the

grievance in part, informing Mr. Burlacu that management would ensure a learning plan would be completed for the 2018-2019 fiscal year once he submitted his proposed training. The final level decision maker advised no other requested corrective action would be forthcoming.

C. *Grievance 2017-3941-125292 [292 Grievance]*

[9] On September 20, 2017, Mr. Burlacu submitted a grievance asserting the Employer's extension of the acting appointments of two Senior Program Advisors within the workplace had been done in an unfair manner. This, he asserted, amounted to a failure by the Employer to exemplify, with respect to him, values and behaviours mandated by the Code. Mr. Burlacu requested he be granted an acting appointment within his workplace and that he "be made whole and be granted any and all other remedies deemed just." Mr. Burlacu later filed complaints under subsection 77(1) of the *Public Service Employment Act*, SC 2003, c 22, ss 12-13 [PSEA], challenging the appointments.

[10] Mr. Burlacu's grievance was denied. The final level decision maker found recourse was available to Mr. Burlacu pursuant to subsection 77(1) of the PSEA and therefore the appointments could not form the subject matter of a grievance (subsection 208(2) of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [FPSLRA]). The final level decision maker noted Mr. Burlacu had exercised his right to recourse in respect of the acting appointments under the PSEA and further found there to be no evidence supporting the view that the extension of the acting appointments was done in an unfair manner.

D. *Grievance 2018-3941-126551 [551 Grievance]*

[11] On February 28, 2018, Mr. Burlacu initiated a grievance objecting to the third level determination of the 197 grievance. He expressed the view that the third level response failed to adequately address his argument, that it did not explain how the information he had provided was considered by the third level decision maker and that it invoked an irrelevant section of the FPSLRA. All this, he submitted, failed to exemplify values mandated by the Code. He sought a letter of apology and that he "be made whole and be granted any and all other remedies deemed just."

[12] The final level decision maker found the third level response to the 197 grievance did not violate the Code and it addressed the matter as presented by Mr. Burlacu. The grievance was denied and no corrective measures taken.

III. Preliminary Matter – is it appropriate to consider the four decisions by way of a single Application?

[13] In seeking an order pursuant to Rule 302, Mr. Burlacu notes the four grievances were dealt with together on the same day and by the same final level decision maker. He notes the issues raised on judicial review are the same with respect to each of the grievances. Finally, he notes that two of the grievances (197 and 551) are directly linked. The Respondent has not opposed the request.

[14] The four grievances in issue, although individually decided, were considered by the same decision maker, generally involve similar surrounding circumstances and raise similar issues on judicial review. Each of these factors have been held to be relevant in considering a request pursuant to Rule 302 (*Whitehead v Pelican Lake First Nation*, 2009 FC 1270; *Canadian Assn of the Deaf v Canada*, 2006 FC 971). Allowing Mr. Burlacu to challenge the four decisions by way of a single Application would also be consistent with the general principle set out in Rule 3 that the Rules be interpreted in a manner that secures the just, most expeditious and least expensive determination of every proceeding.

[15] Mr. Burlacu will be allowed to challenge the four grievance decisions by way of a single Application.

IV. Issues and Standard of Review

[16] Mr. Burlacu has identified two issues:

A. Did the decision maker observe the principles of natural justice and procedural fairness in dealing with the four grievances?

B. Are the decisions reasonable in each case?

[17] The Respondent does not disagree with the issues as framed by Mr. Burlacu but raises a third issue. The Respondent submits the Application for Judicial Review is premature with respect to the 197 grievance, the 292 grievance and the 551 grievance.

[18] The applicable standard of review is not in dispute. The Parties agree the decisions are to be reviewed against the presumptive standard of reasonableness *(Canada (Minister of*

Citizenship and Immigration) v Vavilov, 2019 SCC 65 [*Vavilov*]. The reasonableness standard of review is a deferential but robust form of review (*Vavilov* at paras 12-13, 75 and 85). A reasonable decision is one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law constraining the decision maker (*Vavilov* at para 85). In conducting a reasonableness review, the Court does not ask what decision it would have made but instead focuses on the decision actually made and considers whether the decision as a whole is transparent, intelligible and justified (*Vavilov* at paras 15 and 83).

[19] The Parties also agree that in assessing procedural fairness, the Court is required to consider whether the procedure was fair having regard to all of the circumstances. Issues of fairness require a reviewing court to focus on the nature of the substantive rights involved and the consequences for the individual in determining whether a fair and just process was followed. While this is best reflected in the correctness standard of review, strictly speaking no standard of review is being applied (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]).

I. Analysis

A. *Is judicial review premature?*

[20] The Respondent submits Mr. Burlacu's complaints were improperly grieved and judicial review of the 197, 292 and 551 grievance decisions is premature. For this reason the Respondent submits the decisions should not be judicially reviewed and by implication argues the grievances should not have been considered by the final level decision maker. The Respondent also argues

the Application for Judicial Review of the three decisions amounts to an abuse of process as Mr. Burlacu has brought claims in other forums that rely on the same facts.

[21] Subsection 208(1) of the FPSLRA establishes an employee's right to present a grievance. Subsection 208(2) of the FPSLRA limits that right, providing that where an administrative procedure for redress exists under another federal statute, an employee may not present an individual grievance:

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.
Limitation	**Réserve**
(2) An employee may not present an individual grievance in respect of which	**(2)** Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de

an administrative procedure for redress is provided under any Act of Parliament, other than the Canadian Human Rights Act.	réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la Loi canadienne sur les droits de la personne.

[22] The remedy available by way of an alternative administrative procedure captured by subsection 208(2) need not provide an employee with an equivalent or better remedy. However, the alternative procedure must provide a real remedy, one that meaningfully and effectively deals with the substance of the grievance (*Canada (Attorney General) v Boutilier*, [2000] 3 FC 27 at para 23 [*Boutilier*]).

[23] In regard to the 197 grievance, the Respondent notes Mr. Burlacu has separately commenced a proceeding under section 127.1 of the *Canada Labour Code*, RSC 1985, c L-2 [CLC], alleging a likelihood of injury to his health in the course of employment. Mr. Burlacu does not dispute that he commenced such a proceeding. The Respondent submits the availability of the complaint process under the CLC triggers subsection 208(2) of the FPSLRA. On the facts as disclosed, I disagree.

[24] The basis for the 197 grievance is that Mr. Burlacu's Employer failed to identify Mr. Burlacu's manager in writing. By contrast, Mr. Burlacu initiated the CLC complaint because of the Employer's alleged oral assertions to Mr. Burlacu to the effect that his efforts to obtain the information in writing bordered on insubordination.

[25] The CLC complaint alleging a likelihood of injury to Mr. Burlacu's health within the workplace was unquestionably commenced within the context of the 197 grievance. However, it

raises and engages a separate and distinct issue. The 197 grievance is neither premature nor an abuse of process.

[26] Turning to the 292 grievance, the Respondent submits the grievance is, in pith and substance, a staffing complaint for which an administrative procedure for redress is provided in the PSEA. Specifically, subsection 77(1) of the PSEA states:

Grounds of complaint	**Motifs des plaintes**
77 (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of	**77 (1)** Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement de la Commission des relations de travail et de l'emploi , présenter à celle-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :
(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);	**a)** abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);
(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or	**b)** abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas;
(c) the failure of the Commission to assess the	

complainant in the official language of his or her choice as required by subsection 37(1).	**c)** omission de la part de la Commission d'évaluer le plaignant dans la langue officielle de son choix, en contravention du paragraphe 37(1).

[27] Subsection 208(2) of the FPSLRA encompasses administrative redress procedures provided for under other Acts of Parliament. However, the provision was originally enacted to address the possibility of duplicate proceedings under both the FPSLRA on the one hand and the PSEA on the other (*Chopra v Canada (Treasury Board),* [1995] 3 FC 445 at para 14 [*Chopra*]). The Respondent asserts this is the very circumstance that arises here.

[28] The 292 grievance was triggered by the Employer's decision to extend the acting appointments of two employees in a manner that Mr. Burlacu alleges was unfair. The grievance is, at its core, related to an internal appointment process and the PSEA specifically provides an administrative process for redress where complaints arise from internal appointments. In addition, Mr. Burlacu has initiated a complaint under subsection 77(1) of the PSEA in respect of the internal appointments that are the subject of the 292 grievance.

[29] The issues relating to fairness and transparency raised in the 292 grievance, including the exemplification of the values and expected behaviours set out in the Code, are relevant to and can be considered and addressed by way of the PSEA complaint process. For example, the justification template for non-advertised appointments within the CBSA directs hiring managers to consider fairness and transparency and that document makes specific reference to the Code

(Applicant's Record at pages 252 -255; also see *Renaud v Deputy Minister of National Defence*, 2013 PSST 26 at paras 34-36).

[30] I acknowledge Mr. Burlacu's preferred remedy as stated in the 292 grievance; appointment to an acting position within the workplace, is not available under the PSEA (see s 82). However, as I have noted above, an alternative process need only provide a real and meaningful remedy to trigger the application of FPSLRA subsection 208(2) (*Boutilier* at para 23).

[31] Mr. Burlacu relies on *Burlacu v Canada (Attorney General)*, 2021 FC 610, where the Court rejected similar arguments relating to prematurity on the basis that it was unclear that the other avenues of complaint identified by the respondent specifically addressed the applicant's concerns (at para 20). In this instance, it is not only clear that the alternative administrative procedure addresses Mr. Burlacu's complaint, but Mr. Burlacu has in fact pursued the alternative avenue of complaint.

[32] The 292 grievance is premature. It should not have been considered and determined under the FPSLRA. The subject matter of the 292 grievance engages issues that are to be properly considered and decided by way of the procedure provided for under the PSEA, a process Mr. Burlacu has actually pursued.

[33] I am also of the view that the 551 grievance is not properly before the Court.

[34] The 551 grievance essentially takes issue with the third level decision rendered in the 197 grievance.

[35] The applicable collective agreement provides that a grievor may present a grievance at each succeeding level in the grievance procedure beyond the first level where a decision is not satisfactory to the grievor (*Agreement between the Treasury Board and the Public Service Alliance of Canada with respect to the Border Services Group*, March 17, 2014, Article 18.16 [Collective Agreement]). Mr. Burlacu's objections to the third level decision in the 197 grievance are matters that could be properly raised and advanced in presenting the 197 grievance at the fourth and final level.

[36] Mr. Burlacu presented the 197 grievance at the fourth and final level. In my view, the initiation of a separate grievance to express dissatisfaction with the third level decision in the 197 grievance improperly duplicates the proceeding both within the grievance process and by extension before this Court on judicial review. I agree with the Respondent's view that the effect is to frustrate the purpose of the procedure as provided for in the Collective Agreement and the FPSLRA.

[37] In summary, subsection 208(2) of the FSPLRA is of application in respect to the 292 grievance. The 551 grievance ignores the grievance procedure and process provided for in the Collective Agreement and the FPSLRA. The result is that both are premature, an abuse of process and therefore improperly before the Court.

[38] I will now turn to the procedural fairness concerns Mr. Burlacu has raised in relation to the 197 and 198 grievances.

B. *There was no breach of procedural fairness*

[39] What fairness requires in any given circumstance is variable and contextual (*CPR* at para 40, citing *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 682). The content of the duty and degree of fairness required are questions informed by the five non-exhaustive factors set out in *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817.

[40] In this instance, Mr. Burlacu argues procedural fairness and natural justice obligations were not observed because:

A. An email stating Mr. Burlacu "often questions management decisions to the point of near insubordination" was available to the final level decision maker but had not been disclosed to Mr. Burlacu, thereby preventing him from fully and fairly presenting his case or making submissions regarding concerns that the statement may have negatively biased the decision maker against him;

B. A grievance précis before the final level decision maker stated that his learning plan had not been finalized for 2017-2018 because of harassment issues raised by him against his Director. He submits this rationale was raised for the first time in the précis and it was not a justification he could have anticipated or disputed, as the harassment concern was only raised after the 2017-2018 fiscal year had ended. It could not have impacted the finalization of the learning plan.

[41] Mr. Burlacu argues the degree of fairness owed in this circumstance is heavy or on the high end of the spectrum because his grievances have been advanced in the context of allegations of harassment. I disagree.

[42] *Renaud v Canada (Attorney General),* 2013 FC 18, upon which Mr. Burlacu relies, is readily distinguishable. The grievances in that case involved the outcome of an investigation into two harassment complaints. The grievances clearly and directly involved issues of harassment. In this instance, Mr. Burlacu acknowledges the grievances in issue do not deal directly with harassment but arise in the context of underlying harassment concerns.

[43] There is no dispute that the grievor is owed a duty of procedural fairness within the grievance process. That duty is satisfied where the grievor knows the case to meet and has had the opportunity to respond. In this instance, the record discloses that Mr. Burlacu has had the opportunity to make representations at every level in the grievance process; he has engaged with his Employer in seeking to resolve his complaints and has had the opportunity make submissions following those engagements.

[44] The assertion that Mr. Burlacu pursues his opinions to the point of near insubordination was not novel or new to Mr. Burlacu. In October 2017, he himself identified this as being the view of his Employer. In fact, it was the Employer's expression of this view that Mr. Burlacu relied upon in commencing a proceeding under subsection 127.1 of the CLC. Therefore, the information contained in the email was reflected in the record and known to Mr. Burlacu. The inclusion of this statement in an email received by the final level decision maker but not

disclosed to Mr. Burlacu was not, in these circumstances, unfair or a breach of procedural fairness.

[45] Nor was the failure to disclose the grievance précis a breach of fairness. Mr. Burlacu expresses concern that the précis includes an explanation for the failure to finalize his learning plan, an explanation that was illogical and that he could not have anticipated. While this may be the case, the final level decision maker acknowledged a learning plan was not established and partially granted the grievance on this point. In this context, no breach of fairness has been established.

[46] Mr. Burlacu also submits he had no way of knowing the final level decision maker would be an individual acting in the role of Vice-President of the Human Resources Branch. This does not raise a fairness concern. It is not suggested that Mr. Burlacu was unaware the grievances would be considered by the Employer's Vice-President of Human Resources or the Employer failed to comply with its obligation under subsection 65(1) of the *Federal Public Sector Labour Relations Regulations*, SOR/2005-79, to provide Mr. Burlacu with the name or title of the decision maker.

[47] The process by which Mr. Burlacu's grievances were considered and determined was fair in the circumstances. There was no breach of natural justice.

C. *The final level determinations in the 197 and 198 grievance are reasonable*

(1) 197 Grievance

[48] Mr. Burlacu submits the 197 grievance decision "does not contain any discernable reasons" for concluding there is no obligation under the Code to identify an employee's manager in writing. I disagree.

[49] In the 197 grievance, Mr. Burlacu asserts the Employer violated the Code "by refusing to confirm in writing" the identity of his acting manager. The final level response was that "[u]nder the *Value and Ethics Code for the Public Sector*, there is no obligation to provide the name of your supervisor in writing." This is both a statement of fact and a conclusion in respect of the issue raised. This statement and conclusion, while brief, is transparent, intelligible and justified.

[50] Mr. Burlacu notes his written submissions in support of the grievance identified various policies and regulations to support his position that the Employer was required to provide the information in writing. He submits the decision maker's failure to engage with and address these submissions also renders the decision unreasonable.

[51] I am sympathetic to this argument but am not prepared to intervene on this basis. The decision indicates Mr. Burlacu was provided the name of his manager in writing on October 3, 2017. The grievance was partially allowed on this basis. As the reviewing judge, I would have preferred some analysis and consideration of the arguments and submissions Mr. Burlacu

advanced. However, the decision maker's failure to provide that analysis is insufficient on these facts to justify intervention on judicial review. The primary relief sought was, in fact, granted.

(2) 198 Grievance

[52] I also satisfied the 198 grievance response was reasonable. The final level decision acknowledges the Employer's failure to complete a personal learning plan for the 2017-2018 fiscal year as it was required to do. Because the final decision was rendered after the conclusion of the 2017-2018 fiscal year, it was not unreasonable for the corrective action to focus on the issuance of a personal learning plan for the then-current fiscal year.

[53] Mr. Burlacu submits, and I agree, that the remedy described, issuance of a personal learning plan for the then-current fiscal year, cannot be accurately characterized as a "corrective action." The Employer is otherwise obligated to produce the plan. However, this does not render the decision unreasonable.

[54] Mr. Burlacu further argues that the decision maker's failure to engage with and meaningfully grapple with the additional corrective measures sought – a letter of apology and any other remedy deemed just – renders the decision unreasonable.

[55] The principles of justification and transparency require a decision maker's reasons to meaningfully account for the central issues and concerns raised (*Vavilov* at para 127). However, a decision maker need not grapple with every issue raised (*Vavilov* at para 128). In this case, the crux of the grievance was a failure to provide a personal learning plan. That failure was acknowledged and the grievance granted in part. In this circumstance, the requested corrective

actions do not constitute “central issues or concerns” such that the decision maker was required to account for them.

[56] Mr. Burlacu suggests the obligation to address the corrective measures he sought flows from the preamble to the FPSLRA, which states in part that the government is committed to the fair and credible resolution of matters arising in respect of terms and conditions of employment. I do not believe the general objectives of the legislation as detailed in the preamble impose the obligation Mr. Burlacu suggests.

[57] The decision in issue acknowledges and addresses the central issue raised by the grievance. The Employer’s failure is noted and the grievance granted in part. Focusing on the decision actually made as opposed to the decision either the Court or Mr. Burlacu would have preferred, I am satisfied it reflects the required attributes of transparency, intelligibility and justification. The decision was reasonable.

II. Conclusion

[58] For the above reasons, the Application is dismissed.

[59] The Respondent seeks and is granted costs in the fixed amount of $500, inclusive of fees and disbursements.

JUDGMENT IN T-1139-18

THIS COURT'S JUDGMENT is that:

1. The Applicant's request, pursuant to Rule 302 of the *Federal Court Rules*, SOR/98-106, that the four decisions be considered by way of this single Application for Judicial Review is granted.
2. The Application is dismissed.
3. Costs to the Respondent in the all-inclusive amount of $500.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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