Federal Court Cour fédérale

Date: 20220808

Docket: T-1459-20

Citation: 2022 FC 1177

Ottawa, Ontario, August 8, 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] Mr. Alexandru-Ioan Burlacu, the self-represented Applicant, is a Senior Program Officer employed by the Canada Border Services Agency [CBSA]. He requested clarification from his employer about whether he could prepare a disclosure of wrongdoing under the *Public Servants Disclosure Protection Act,* SC 2005 c 46 [PSDPA] during his worktime or whether he would be required to request leave. The Employer took the position that the disclosure documentation was

to be completed on Mr. Burlacu's personal time and that leave would not be approved for this purpose.

[2] Following the Employer's refusal to grant leave, Mr. Burlacu presented grievance no. 2019-3941-130335 [335 Grievance]. He alleged that, in requiring he prepare a wrongdoing disclosure on his own time, the Employer did not respect the 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. The grievance stated:

> I hereby grieve, pursuant to subsection 208(1) of the *Federal Public Sector Labour Relations Act*, the failure of the Employer to exemplify, with respect to me, the values of "Respect for Democracy" and "Respect for People" and their respective expected behaviours, as mandated by the *Values and Ethics Code for the Public Sector*, which is a term and condition of my employment, by failing to take steps to integrate the values of the Public Sector into its decisions, actions, policies, processes, and systems regarding the submission of disclosure of wrongdoing, including by unfairly requiring me to use my own time to prepare such a disclosure.
>
> I hereby request that this grievance be allowed and that:
>
> 1. The Employer adopt a policy/process regarding the submission of disclosures of wrongdoing that exemplifies the values of the Public Sector;
>
> 2. I be granted up to 7.5 hours of work time or leave with pay for the purpose of preparing a disclosure of wrongdoing; and
>
> 3. I be made whole and be granted any and all other remedies deemed just.

[3] After summarizing the nature of the grievance, the corrective action sought and the circumstances, the final level decision-maker [decision-maker] denied the grievance. The

decision-maker held the grievance was in pith and substance a request for leave under the collective agreement:

> A review of the CBSA *Internal Guidelines on Disclosures of Wrongdoing* states the following:
>
> > The purpose of the PSDPA [*Public Servants Disclosure Protection Act*] is to encourage employees in the public sector to come forward if they have reason to believe that wrongdoing has taken place or is about to take place, and to protect them against reprisal when they do so.
>
> The intention of the PSDPA is to support employees in coming forward with concerns of wrongdoing that may be encountered during the course of their employment.
>
> The pith and substance of your grievance is your request for leave with pay under Article 52.01(b) of the collective agreement. As the matter pertains to the interpretation and application of the collective agreement, bargaining agent support is required as leave with or without pay (other reasons) is governed by the collective agreement.
>
> I find that the Employer has abided by the *Values and Ethics Code for the Public Sector* in that management undertook to review the appropriate policies and leave provisions when considering your request and acted within its rights to deny discretionary leave. I note that management provided you with access to the equipment and information that you required, but advised that you would have to complete the complaint on your own time. I do not find this arrangement to be unreasonable.
>
> In view of the foregoing, your grievance is denied and the corrective actions requested will not be forthcoming.

[4] Mr. Burlacu seeks judicial review of the final level decision and submits that the decision is unreasonable. The Respondent argues the decision is reasonable but first submits the decision is not properly before the Court.

[5] For the following reasons, I have concluded that the impugned decision in issue is not properly before the Court and dismiss the Application for that reason. I am also of the view that the decision is nonetheless reasonable.

II. Analysis

[6] The Respondent submits that the matter grieved engages the Employer's human resource management rights stemming from paragraph 7(1)(e) and subsection 11.1(1) of the *Financial Administration Act*, RSC 1985, c F-11, and terms and conditions set out in the collective agreement. The Respondent relies upon subsection 208(4) of the *Federal Public Sector Labour Relations Act,* SC 2003, c 22, s 2 [FPSLRA], which provides that an individual grievance relating to the interpretation of the collective agreement may only be presented where the employee has the approval of and is represented by the bargaining agent, which was not the case here:

Limitation	Réserve
(4) An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.	(4) Le fonctionnaire ne peut présenter de grief individuel portant sur l'interprétation ou l'application à son égard de toute disposition d'une convention collective ou d'une décision arbitrale qu'à condition d'avoir obtenu l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale et d'être représenté par cet agent.

[7] The Respondent argues the essence of the grievance concerns relations between the bargaining agent and the Employer, and that as parties to the collective agreement, the proper forum for review after a final decision in the grievance process is adjudication before the Federal Public Sector Labour Relations and Employment Board. It is argued that allowing this Application, would expand the scope of the individual grievances under section 208 of the FPSLRA beyond that which is provided for in statute.

[8] Mr. Burlacu acknowledges the Employer's right to approve or deny leave and submits that this is the reason he relied upon a breach of the Code in advancing his grievance. He points to the grievance form itself and particularly section 1A which includes a box labelled "Collective Agreement (if applicable)" a box he left blank when filing the grievance. He also points to the submissions made to the decision-maker, in which he specifically states that he is not grieving a violation of the collective agreement.

[9] Mr. Burlacu's submissions together with the record establish that Mr. Burlacu neither sought nor intended to frame the grievance as a violation of the collective agreement. However, objectives or intentions cannot alter or change the substance of the grievance, which relates to an application of the collective agreement.

[10] The jurisprudence recognizes that an employer cannot choose to interpret a grievance in the way it prefers (*Burlacu v Canada (Attorney General),* 2021 FC 610 [*Burlacu 610*]). Similarly, a grievor cannot avoid legislatively prescribed process and procedures through artful drafting where the issue raised engage matters subject to those prescribed processes.

[11] The 335 Grievance engages issues relating to the interpretation of the collective agreement and the exercise of managerial discretion pursuant to that agreement. In reaching this conclusion, I note the following:

A. Article 52 of the applicable collective agreement permits Mr. Burlacu's employer to grant leave with or without pay at its discretion for purposes other than those specified in the Agreement, and Mr. Burlacu requested leave with pay under this Article;

B. the Employer decided not to provide Mr. Burlacu worktime or leave with pay, resulting in Mr. Burlacu filing a grievance; and

C. the requested corrective actions include providing up to 7.5 hours of worktime or leave with pay and that the employer adopt a new policy or process regarding employee submissions under the PSDPA.

[12] In *Burlacu 610*, the Court was not prepared to find the applications premature because it was unclear that other avenues were available to address the applicant's concerns. However, in this case it is clear that the 355 Grievance challenges decisions relating to the application of the collective agreement, and that subsection 208(4) of the FPSLRA is of application. The impugned decision is not properly before the Court.

[13] While not necessary, I will briefly address the argument that the decision is unreasonable.

[14] Mr. Burlacu submits the decision unreasonably focused on the issue of leave and failed to consider his request that time spent completing the disclosure form be treated as worktime. I

agree that the decision-maker's reasons do not expressly address the issue of worktime. However, the overarching issue concerned the Employer's failure to pay Mr. Burlacu for the time required to complete the disclosure form. This concern is addressed and answered by the decision-maker and as such, I would not intervene on this basis alone.

[15] Mr. Burlacu further argues the decision lacks justification, transparency and intelligibility. I disagree. The decision must be read as a whole and within the context of the record. The decision-maker having reasonably concluded that the grievance engaged, in pith and substance, the interpretation and application of the collective agreement, nonetheless addressed the Employer's alleged failure to exemplify the values and behaviours set out in the Code. While the reasons in support of the conclusion that the Employer had abided by the Code were brief, they set out a logical and rational explanation in support of that conclusion. When considered within the context of the whole decision, the reasons reflect the attributes of a reasonable decision, as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

III. Conclusion

[16] For the above reasons, the Application is dismissed. The Respondent is entitled to costs, which are fixed at $250 inclusive of all fees and disbursements.

JUDGMENT IN T-1459-20

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. Costs are awarded to the Respondent in the all-inclusive amount of $250.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1459-20
STYLE OF CAUSE:	ALEXANDRU-IOAN BURLACU v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCCE
DATE OF HEARING:	OCTOBER 26, 2021
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DATED:	AUGUST 8, 2022

APPEARANCES:

Alexandru-Ioan Burlacu	FOR THE APPLICANT (ON HIS OWN BEHALF)
Jena Montgomery	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT