

Federal Court



Cour fédérale

Date: 20100727

Docket: T-735-08

Citation: 2010 FC 784

Ottawa, Ontario, July 27, 2010

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

YURI BOIKO

Applicant

and

NATIONAL RESEARCH COUNCIL

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Dr. Yuri Boiko worked as a research officer at the National Research Council on a probationary basis from November 2001 to July 2004, when the Council dismissed him. Prior to his dismissal, Dr. Boiko had complained that he had been harassed by his supervisor. Ultimately, in 2008, the Council dismissed his complaint, mainly on the grounds that it was moot, given that both Dr. Boiko and his supervisor no longer worked at the Council.

[2] Dr. Boiko also maintains that he was wrongly dismissed, but that issue is before another decision-maker. There was some confusion about whether Dr. Boiko was seeking judicial review of that decision, too, but he made clear at the hearing that he was not. Therefore, the sole issue before me is whether the Council erred when it dismissed Dr. Boiko's harassment complaint. I have concluded that the Council treated Dr. Boiko fairly and did not render an unreasonable decision. Therefore, I can find no basis for overturning the Council's decision and must, therefore, dismiss this application for judicial review.

II. Factual Background

[3] Dr. Boiko filed a formal harassment complaint on September 12, 2003. Shortly thereafter, he and his supervisor participated in a process aimed at resolving the matter by mediation, but it failed. In January 2004, the Council engaged an independent investigator. The investigator interviewed Dr. Boiko for close to eight full days. Dr. Boiko supplied the names of witnesses and about 70 documents that he said supported his complaint. The investigator also interviewed Dr. Boiko's supervisor, but the interviews could not be completed because the supervisor was on sick leave.

[4] Near the end of June 2004, the investigator made another attempt to mediate the complaint. He failed. On July 15, 2004, the Council dismissed Dr. Boiko on the grounds of his allegedly unsatisfactory performance on probation.

III. The Council's Decision

[5] By way of a letter dated April 11, 2008, the Council dismissed Dr. Boiko's complaint. In the same letter, the Council dismissed Dr. Boiko's grievance arising from his dismissal on probation. As mentioned, that part of the decision is not before me.

[6] In the letter, the Council explained that its decision was delayed due to the unavailability of Dr. Boiko's supervisor. The supervisor was on extended sick leave and, ultimately, the Council dismissed him. The Council had originally undertaken to keep Dr. Boiko's complaint active and to complete the investigation when the supervisor returned to work. However, given that the supervisor never did return to work (except for a few days), and that Dr. Boiko had also been terminated, the Council concluded that the complaint was moot. It explained that the purpose of resolving complaints was "to ensure that the harassment does not continue". As the parties were no longer present in the workplace, that purpose had already been served.

IV. Did the Council Err?

[7] Dr. Boiko contends that the Council erred in two respects: by treating him unfairly, and by concluding unreasonably that his complaint was moot. I can find no unfairness in the process leading to the Council's decision, and cannot conclude that the decision was unreasonable.

[8] Dr. Boiko argues that the Council treated him unfairly by relying on the tentative conclusions of the investigator, without providing him an opportunity to make further submissions.

He bases this argument on a statement of the Council's Director of Labour Relations, Mr. Steve Blais. Mr. Blais states in his affidavit that the investigator informed him in June 2004 that, based on his thorough investigation up to that point, Dr. Boiko's complaint was unsubstantiated. It remained for the investigator to conclude his interviews of Dr. Boiko's supervisor. As mentioned, the supervisor remained on sick leave (except for some 30 days of sporadic attendance). As a result, the interviews were never concluded.

[9] I see nothing unfair in this process. First, notwithstanding what the investigator may have said to Mr. Blais in 2004, the Council dismissed Dr. Boiko's complaint on the sole basis that it was moot. There is no indication that the merits of the complaint were taken into account. Second, at the time he spoke to Mr. Blais, the investigator had not yet arrived at a conclusion. He could only have stated a preliminary point of view. Further, he had spent considerable time interviewing Dr. Boiko, had reviewed his documents, had spoken to witnesses, and had begun his interviews of the supervisor. I can see nothing unfair about this process. Had the investigator completed his interviews of the supervisor, he may well have invited Dr. Boiko to comment on the supervisor's statements before arriving at his final conclusion. But that stage of the investigation was never reached and no final conclusion was ever made about the substance of the complaint.

[10] As for the Council's decision on mootness, Dr. Boiko argues that his complaint should not have been considered moot because the circumstances giving rise to it were bound up with the Council's assessment of his performance during his probationary period. Essentially, he says that his performance was rated poorly in part because he was being harassed by his supervisor. Therefore, the Council should have completed its analysis of his harassment complaint so that it

could be taken into account in deciding whether his dismissal on probation was justified. The fact that the supervisor was on sick leave complicated the investigation but it did not, according to Dr. Boiko, render the complaint moot.

[11] I understand Dr. Boiko's concern that his allegation of harassment and his dismissal on probation are connected. If they were treated in complete isolation, he would lose the opportunity to argue that his performance reviews were tainted by the harassment. At the extreme, he observes, if harassment complaints were rendered moot whenever complainants had left the workplace, employers could freely harass and then dismiss employees with impunity.

[12] In my view, however, the fact that Dr. Boiko's complaint may be relevant to his performance appraisals (and his challenge to his dismissal) does not mean that the Council erred in concluding that the complaint itself was moot. Dr. Boiko's complaint related to the conduct of a single individual who, for reasons apparently unconnected with the complaint or the facts surrounding it, no longer worked at the Council. In the circumstances, it was reasonable for the Council to conclude that there would be nothing gained in deciding the merits of a dispute between two former employees.

[13] It remains open to Dr. Boiko to argue before another decision-maker that the Council's decision to dismiss him was unreasonable and, more particularly, to support his challenge by referring to the harassment he allegedly endured. However, I can find no error in the Council's conclusion that his formal harassment complaint was moot.

V. Conclusion and Disposition

[14] The Council's conclusion that Dr. Boiko's harassment complaint became moot after both Dr. Boiko and his supervisor stopped working at the Council was not unreasonable. Further, Dr. Boiko was treated fairly throughout the investigation of the complaint. Accordingly, I must dismiss this application for judicial review. The Council presented a bill of costs totalling \$7,760.41 in fees and disbursements. Dr. Boiko maintained that he does not have the financial resources to pay costs on that scale because he is currently pursuing further studies and has an outstanding student loan. In the circumstances, I would fix costs in the amount of \$1,500.00.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. Costs in the amount of \$1,500.00 are awarded to the respondent.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-735-08

STYLE OF CAUSE: BOIKO v. NATIONAL RESEARCH COUNCIL

PLACE OF HEARING: Ottawa, ON.

DATE OF HEARING: May 4, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: July 27, 2010

APPEARANCES:

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REPRESENTED

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