Federal Court of Appeal  Cour d'appel fédérale

Date: 20171024

Docket: A-30-17

Citation: 2017 FCA 211

CORAM: **NADON J.A.**
STRATAS J.A.
LASKIN J.A.

BETWEEN:

MURLIDHAR GUPTA

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on October 3, 2017.

Judgment delivered at Ottawa, Ontario, on October 24, 2017.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: NADON J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Overview

[1] Dr. Murlidhar Gupta, a research scientist at Natural Resources Canada, appeals from the judgment of Justice Brown of the Federal Court (2016 FC 1416), dismissing Dr. Gupta's application for judicial review of a decision of the Public Sector Integrity Commissioner.

[2] In his decision, the Commissioner determined among other things that he would not conduct an investigation into a disclosure by Dr. Gupta under the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46, in which he alleged that he had been harassed by senior managers and other employees of NRCan. While the Commissioner concluded that the harassment alleged could comprise a serious breach of a code of conduct, and could therefore constitute wrongdoing within the meaning of the Act, he decided that Dr. Gupta's allegations could more appropriately be dealt with through an internal complaint procedure at NRCan. On this basis he relied on paragraph 24(1)(*f*) of the Act, which authorizes the Commissioner to decline to commence an investigation if the Commissioner is of the opinion that there is a valid reason for not dealing with the subject-matter of the disclosure.

[3] Dr. Gupta submits that the application judge erred in failing to find that he was denied procedural fairness because he was not given notice that the Commissioner might rely on the availability of a more appropriate recourse, and on paragraph 24(1)(*f*), to decide not to investigate the harassment element of his disclosure. He submits that if he had been given notice, he would have provided further evidence and made further submissions to the Commissioner.

[4] For the reasons set out below, I conclude that there was no denial of procedural fairness. Even assuming that, as Dr. Gupta submits, persons making disclosures are entitled to notice of the grounds on which the Commissioner may rely in deciding not to investigate, the information made available to Dr. Gupta and his counsel provided adequate notice that the Commissioner might rely on the availability of another recourse as a reason for deciding not to investigate the alleged harassment. I would accordingly dismiss the appeal.

II. Scheme of the Act

[5] The *Public Servants Disclosure Protection Act* establishes a procedure for the disclosure of alleged wrongdoings in the public sector, including the protection of persons who disclose them. The wrongdoings to which the Act applies are enumerated in section 8. By paragraph 8(*e*), they include a serious breach of a code of conduct applicable in the public sector.

[6] The Act authorizes a public servant to disclose to his or her supervisor or a designated senior officer information that the public servant believes could show that wrongdoing has been or is about to be committed, or that the public servant has been asked to commit wrongdoing. The public servant also has the option of disclosing this information to the Commissioner. The Commissioner is appointed by the Governor in Council after consultation with the leader of every recognized party in the Senate and House of Commons and approval of the appointment by resolution of the Senate and House of Commons.

[7] The duties of the Commissioner include providing information and advice regarding the making of disclosures, receiving, recording and reviewing disclosures to establish whether there are sufficient grounds for further action, conducting investigations of disclosures, reporting the findings of investigations and making recommendations to chief executives concerning the measures to be taken to correct wrongdoings. The Commissioner is also charged with receiving, reviewing, investigating and otherwise dealing with complaints made in respect of reprisals – measures taken against a public servant because the public servant has made a good faith disclosure, either under the Act or in another specified manner. When the Commissioner

conducts an investigation, subsection 19.7(2) of the Act provides that the investigation should be "conducted as informally and expeditiously as possible."

[8] By subsection 24(1) of the Act, the Commissioner is given the right to refuse to commence an investigation. The Commissioner may exercise this right both for certain reasons specified in the provision, and (as provided in paragraph 24(1)(*f*)), for any reason that the Commissioner considers a "valid reason." Because much of the argument in this appeal centred on subsection 24(1), I set out the provision in full:

Right to refuse	Refus d'intervenir
24. (1) The Commissioner may refuse to deal with a disclosure or to commence an investigation – and he or she may cease an investigation – if he or she is of the opinion that	24. (1) Le commissaire peut refuser de donner suite à une divulgation ou de commencer une enquête ou de la poursuivre, s'il estime, selon le cas :
(*a*) the subject-matter of the disclosure or the investigation has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament;	*a*) que l'objet de la divulgation ou de l'enquête a été instruit comme il se doit dans le cadre de la procédure prévue par toute autre loi fédérale ou pourrait l'être avantageusement selon celle-ci;
(*b*) the subject-matter of the disclosure or the investigation is not sufficiently important;	*b*) que l'objet de la divulgation ou de l'enquête n'est pas suffisamment important;
(*c*) the disclosure was not made in good faith or the information that led to the investigation under section 33 was not provided in good faith;	*c*) que la divulgation ou la communication des renseignements visée à l'article 33 n'est pas faite de bonne foi;
(*d*) the length of time that has elapsed since the date when the subject-matter of the disclosure or the investigation arose is such that dealing with it would serve no useful purpose;	*d*) que cela serait inutile en raison de la période écoulée depuis le moment où les actes visés par la divulgation ou l'enquête ont été commis;

(*e*) the subject-matter of the disclosure or the investigation relates to a matter that results from a balanced and informed decision-making process on a public policy issue; or	*e*) que les faits visés par la divulgation ou l'enquête résultent de la mise en application d'un processus décisionnel équilibré et informé;
(*f*) there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation.	*f*) que cela est opportun pour tout autre motif justifié.

[9] The Act does not prescribe the process for the Commissioner to follow before deciding whether to exercise what has been described as the "wide" discretion not to commence an investigation (*Detorakis v. Canada (Attorney General)*, 2010 FC 39, 358 F.T.R. 266 at para. 43). In particular, the Act does not specify that the Commissioner will communicate to persons who have made disclosures the basis on which the Commissioner is considering exercising this discretion. However, it includes among the Commissioner's duties (in paragraph 22(*d*)) the duty to "ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected, including persons making disclosures […]".

III. The disclosure form

[10] The Office of the Commissioner provides a disclosure form for public sector employees to use in making disclosures to the Commissioner. Part (C) of the form is headed "Other Proceedings." It begins with "Explanatory Notes" that refer to three provisions of the Act:

> (1) subsection 23(1), which as the notes explain provides that the Commissioner may not deal with a disclosure or commence an investigation if a person or body acting

under another Act of Parliament is dealing with the subject-matter of the disclosure or the investigation other than as a law enforcement authority;

(2) paragraph 24(1)(*a*), which as the notes explain provides that the Commissioner may refuse to deal with a disclosure or to commence an investigation – and may cease an investigation – if the Commissioner is of the opinion that the subject-matter of the disclosure or the investigation has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament; and

(3) subsection 24(2), which as the notes explain provides that the Commissioner must refuse to deal with a disclosure or to commence an investigation if the Commissioner is of the opinion that the subject-matter of the disclosure or the investigation relates solely to a decision that was made in the exercise of an adjudicative function under an Act of Parliament.

[11] The explanatory notes do not refer to paragraph 24(1)(*f*).

[12] The form goes on, still under the heading "Other Proceedings," to ask three questions:

(1) Have you reported this alleged wrongdoing to a supervisor or to any other person at your place of work?

(2) Have you reported this alleged wrongdoing to another person or body, outside of your place of work, acting under another Act of Parliament?

(3) Is the subject-matter of this disclosure of wrongdoing currently being dealt with or has it been dealt with by another person or body, pursuant to another Act of Parliament? [emphasis in original]

[13] If the answer to any of the questions is "Yes," the form asks for details and any supporting documentation. It also provides for an "Unknown" answer to the third question as an alternative to a "Yes" or a "No."

[14] Part (D) of the form is headed "Declaration." It includes the following statement, which precedes the signature line: "I understand that it is my responsibility to provide the Commissioner with all of the information required by this form, and to attach to this form any relevant documentation."

IV. Dr. Gupta's first disclosure

[15] In January 2014, Dr. Gupta, assisted by counsel employed by his union, the Professional Institute of the Public Service of Canada, made a disclosure of wrongdoing to the Commissioner. He asserted that his supervisor had directed him to divert contract funds for an unauthorized purpose. He answered the first "Other Proceedings" question in Part (C) of the disclosure form "Yes," and provided details. He answered the second and third questions "No."

[16] In a decision rendered in April 2014, the Commissioner determined not to commence an investigation into Dr. Gupta's allegations. In his letter setting out his decision, the Commissioner specifically referred to paragraph 24(1)(*f*) of the Act:

> One of the primary objectives of investigations of wrongdoing under the *Act* is to bring matters to the attention of Chief Executives. Given that this issue has been investigated and addressed internally by NRCan, pursuant to s. 24(1)(*f*) of the *Act*, I will not commence an investigation into your allegations […].

[17] Dr. Gupta sought judicial review of this decision. In an affidavit filed in support of the application, Dr. Gupta's counsel deposed that he had not been aware until he received the Commissioner's letter that the Commissioner was considering not investigating Dr. Gupta's allegations on the bases identified in the letter, and that if he had been aware of it and had been afforded the opportunity, he would have submitted further argument and evidence.

[18] The application for judicial review did not proceed. Based on information provided in the affidavit of Dr. Gupta's counsel and his own review of the matter, the Commissioner determined that a new analysis of Dr. Gupta's complaint should be undertaken so that Dr. Gupta would have an opportunity to speak with the case analyst at the Office of the Commissioner – an opportunity that he had not been given earlier – and provide whatever further information he believed may be relevant. The Commissioner would then render a new decision on whether any of Dr. Gupta's allegations would be investigated.

V. Dr. Gupta's amended disclosure

[19] Following a meeting and telephone conversations with the case analyst, Dr. Gupta, again assisted by counsel, submitted an amended disclosure form to the Office of the Commissioner.

The amended form provided additional information in support of the initial disclosure, and added allegations of harassment, intimidation and mobbing against senior managers and other NRCan employees.

[20] Dr. Gupta again answered the first "Other Proceedings" question in Part (C) of the disclosure form "Yes," and provided further details and documents. He also again answered the second and third questions "No," but nonetheless included information in the box following the second question that the matter had been reported to senior management at NRCan, and that he had communicated his concerns for his and his family's wellbeing to the Prime Minister of Canada.

[21] In the further documentation that he provided with the amended disclosure, Dr. Gupta advised that he had reported his concerns twice to the Deputy Minister, but had received no response. He also submitted that the conduct that was the subject of his complaint violated the Values and Ethics Code for the Public Sector and NRCan's own Values and Ethics Code.

VI. The Commissioner's decision

[22] The Commissioner accepted the case analyst's recommendation that no investigation be conducted, and decided not to investigate either Dr. Gupta's initial disclosure or the allegations of harassment in the amended disclosure. Only the latter element of his decision is in issue in this appeal.

[23] In his decision, the Commissioner agreed that the harassment alleged could constitute a breach of the Values and Ethics Code for the Public Sector, and that it was possible that it could constitute a serious breach of a code of conduct, and therefore wrongdoing within the meaning of paragraph 8(*e*) of the Act.

[24] The Commissioner stated that he had, however, decided to exercise his discretion not to conduct an investigation into the alleged harassment. He explained that the disclosure mechanism under the Act was not intended to replace existing recourses and that, in the exercise of his discretion, he had to determine whether a disclosure investigation was "the best tool to address a given situation." He noted that the Treasury Board Secretariat's Directive on the Harassment Complaint Process established a process to deal with harassment in the core public administration, including NRCan, and stated that "it appears that the subject-matter of [Dr. Gupta's] allegations could more appropriately be dealt with in accordance with the internal complaint procedure at NRCan." In these circumstances, he concluded, he was exercising his discretion under paragraph 24(1)(*f*) of the Act not to conduct an investigation.

VII. Application for judicial review

[25] Dr. Gupta applied to the Federal Court for judicial review of the Commissioner's decision not to investigate the matters raised by the amended disclosure. The grounds that he put forward included both that he had been denied procedural fairness, because he had not been given notice that the Commissioner might rely on the availability of other recourses in exercising his discretion under paragraph 24(1)(*f*) of the Act not to investigate, and that the decision not to investigate was unreasonable.

[26] The application judge dismissed the application. He found that the disclosure form brought to Dr. Gupta's attention the possibility that the Commissioner could decide not to investigate based on the availability of an alternative recourse. Dr. Gupta had completed Part (C) of the form both when he made his initial disclosure and when he submitted his amended disclosure, and would have been aware of its contents and substance. The application judge saw Dr. Gupta's main argument as in effect that he should have been given a copy of the case analyst's report to the Commissioner, which would have included specific reference to paragraph 24(1)(*f*). He noted that this Court had determined in *Agnaou v. Canada (Attorney General)*, 2015 FCA 29, 478 N.R. 118, that fairness in this context does not include the right to comment on the case analyst's report. He reasoned that if there is no right to comment on the report, there can be no right to see it in the first place. He also observed that the relatively limited content of procedural fairness even at the investigative stage, the wide discretion whether to conduct investigations that the Act gives the Commissioner, and the assistance that Dr. Gupta had from counsel made it difficult for Dr. Gupta to argue successfully that he was not aware of the grounds on which the Commissioner might decide not to investigate. He noted that while the Commissioner's decision referred to paragraph 24(1)(*f*), the core rationale for the decision, as expressed in paragraph 24(1)(*a*), was specifically set out in the disclosure form.

[27] The application judge found it unnecessary to address the unreasonableness ground, because Dr. Gupta did not take issue at the hearing with the findings of the Commissioner or the reasonableness of his decision.

VIII. Standard of review

[28] In an appeal from an order of the Federal Court disposing of an application for judicial review, this Court is to determine whether the Federal Court selected the correct standard of review and applied it correctly. In practice, this means that this Court must step into the shoes of the application judge, and focus on the administrative decision rather than the decision under appeal (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45 and 46).

[29] The parties agree that because the issue raised by Dr. Gupta is one of procedural fairness, the proper standard of review of the decision of the Commissioner is correctness. The Court indicated in oral argument that it was content to proceed on this basis, recognizing that the standard of review for matters of procedural fairness in another case may call for further consideration (*El-Helou v. Courts Administration Service*, 2016 FCA 273 at para. 43, citing *Bergeron v. Canada (Attorney General)*, 2015 FCA 160, 474 N.R. 366 at paras. 67 to 71).

IX. The content of procedural fairness in the context of a decision whether to investigate

[30] Paragraph 22(*d*) of the Act, excerpted in paragraph 9 above, provides that persons making disclosures have a right to procedural fairness in relation to investigations. But it does not dictate the level of procedural fairness to be accorded to them. On this question, the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at paras. 21 to 28, governs. There the Supreme Court held that the content of procedural fairness is flexible and variable; it depends on factors that

include the extent to which the process provided for approximates the judicial process, the nature and terms of the statutory scheme and the importance of the decision to the individuals affected by it.

[31] The parties here agree that the procedural fairness to which persons making disclosures are entitled at the stage of the Commissioner's decision whether to investigate the disclosure is at the lower end of the spectrum. In my view, their agreement faithfully reflects the *Baker* factors, including, in particular, the extent to which the process provided for approximates the judicial process and the nature and terms of the statutory scheme. In giving the Commissioner the discretion whether to conduct, or refuse to conduct, an investigation of a disclosure, Parliament chose not to provide for an adjudicative, adversarial process, or a scheme resembling the judicial process in any other respect. Instead, the scheme that it put in place is limited and investigatory in nature: all that it appears to contemplate is that the discloser will submit information and supporting documentation that he or she believes establishes wrongdoing that warrants investigation by the Commissioner, and that the Commissioner will evaluate that information and documentation and decide whether to investigate. Even if the decision is made to investigate, subsection 19.7(2) requires, as already noted, that the investigation "be conducted as informally and expeditiously as possible." It is logical therefore that any procedures preceding the decision whether to investigate should be at least as informal and expeditious.

[32] The parties' agreement is also consistent with this Court's reasons in *Agnaou v. Canada (Attorney General)*, 2015 FCA 30 at para. 45, 476 N.R. 156. There, this Court adopted the analysis of the *Baker* factors by the Federal Court in *Detorakis*, above, at paragraph 106, an

analysis that led the Federal Court to the conclusion that "the [Act] does not require that someone making a disclosure […] has a right to be heard or a right to make further submissions after the complaint has been made."

[33] Dr. Gupta submits that even if the content of procedural fairness at the stage of a decision whether to investigate is relatively limited, the person making the disclosure must still be given notice of the "threshold issues" or "factors" that the Commissioner may consider in deciding whether to refuse to investigate. Dr. Gupta submits that he was not given notice that the availability of alternate recourse was a potential "threshold issue." In reliance on this Court's decision in *Gladman v. Canada (Attorney General)*, 2017 FCA 109 at para. 40, he also submits that at a minimum procedural fairness must include "the right to be informed of undisclosed adverse material facts being considered by a decision-maker and to make submissions about them (in some form) […]."

[34] In my view, it is not necessary to decide in this appeal whether fairness in this context requires notice of this nature, or whether recognizing a requirement to this effect would risk complicating and over-judicializing a process that was intended to be informal and expeditious. In my view, even if procedural fairness requires this sort of notice in this context, in the circumstances here Dr. Gupta had adequate notice that the Commissioner might decide not to investigate his disclosure of alleged harassment based on the assessment that the subject-matter could more appropriately be dealt with through another process.

X. Adequacy of the notice provided

[35] Like the application judge, I conclude for several reasons that Dr. Gupta had adequate notice or that, to use the terms employed in *Gladman*, above, the possibility that the Commissioner might rely on alternate recourse in deciding not to investigate was not an "undisclosed adverse material fact."

[36] First, when the Commissioner decided in April 2014 not to investigate Dr. Gupta's disclosure as then formulated, the Commissioner expressly relied on paragraph 24(1)(*f*) and the fact that NRCan had conducted an internal investigation as grounds for not commencing an investigation. This decision communicated to Dr. Gupta and his counsel that the bases on which the Commissioner might refuse to conduct an investigation included the availability of another recourse, and that the Commissioner saw this factor as one coming within paragraph 24(1)(*f*).

[37] Second, as discussed in paragraph 10 above, the disclosure form that Dr. Gupta submitted included a section, under the heading "Other Proceedings," that specifically inquired about reports made to others and any actions or decisions taken as a result of those reports. While the explanatory notes that preceded the questions referred to subsection 23(1), paragraph 24(1)(*a*) and subsection 24(2) of the Act, and did not mention paragraph 24(1)(*f*), the questions themselves were not specifically linked to particular provisions of the Act. The effect of including the "Other Proceedings" portion of the form was to communicate that "Other Proceedings" were potentially in play. Dr. Gupta did not submit in this Court (or, it appears, in

the Federal Court) that “Other Proceedings” could not constitute a “valid reason” for refusing to commence an investigation within the meaning of paragraph 24(1)(*f*).

[38] Third, in his revised disclosure and the supplementary information that he submitted, Dr. Gupta provided information about other recourses – information concerning the reports of wrongdoing that he had made to others and what if anything had resulted from them. As noted in paragraph 20 above, he advised in the amended disclosure form itself that he had made complaints to his supervisor and other more senior officials within NRCan and communicated his concerns about harassment to the Prime Minister of Canada. He added in the document providing follow-up to a teleconference with the case analyst from the Office of the Commissioner that he had twice contacted the Deputy Minister to express his concerns, but that he had received no response. His addressing these matters confirmed that he understood them to be relevant, and it was open to him to elaborate further on these matters as he saw fit. Again, the absence of a specific reference to paragraph 24(1)(*f*) is of no moment when his disclosure dealt in substance with other recourses and when it was open to the Commissioner to rely on paragraph 24(1)(*f*) in that regard.

[39] While not perhaps an independent reason, the fact that Dr. Gupta was assisted by counsel also in my view contributes to the conclusion that the information provided and available to him was adequate to give him notice (see, for example, *Thomas v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 241 at para. 3; *Richter v. Canada (National Parole Board)*, [1992] F.C.J. No. 3, 53 F.T.R. 245, 1992 CarswellNat 734 at para. 13).

[40] This case therefore differs not only from *Gladman*, above, but also from *Therrien v. Canada (Attorney General)*, 2017 FCA 14, on which Dr. Gupta further relies. In that case staff of the Office of the Commissioner told the discloser's counsel that the factors the Commissioner would be considering in deciding whether to investigate the complaint were those set out in a specific provision of the Act. The discloser accordingly made submissions as to why the Commissioner should not exercise his discretion under that provision. However, in deciding not to investigate the Commissioner relied on a different provision. This Court concluded that given the differences between the two provisions, the discloser might well have made different submissions had she been told of the Commissioner's intention. The misinformation provided to the discloser thus violated her right to procedural fairness. Here, in contrast, no misinformation was communicated.

[41] There was some discussion at the hearing as to whether the Commissioner could have relied on paragraph 24(1)(*a*) rather than paragraph 24(1)(*f*) of the Act in deciding not to investigate. Given the Commissioner's reliance on paragraph 24(1)(*f*) and the absence of submissions that this reliance was impermissible, I also see no need to resolve this question.

XI. Disposition

[42] I would therefore dismiss the appeal. In accordance with the parties' agreement on costs, I would order that Dr. Gupta pay to the respondent costs in the amount of $2,450.00, all-inclusive.

"John B. Laskin"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-30-17
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APPEARANCES:

David Yazbeck	FOR THE APPELLANT
Abigail Martinez	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l. Barristers and Solicitors	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT