Federal Court of Appeal | Cour d'appel fédérale

Date: 20240628

Docket: A-149-22

Citation: 2024 FCA 117

CORAM: **MACTAVISH J.A.**
MONAGHAN J.A.
HECKMAN J.A.

BETWEEN:

DALE KOHLENBERG

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Saskatoon, Saskatchewan, on May 29, 2024.

Judgment delivered at Ottawa, Ontario, on June 28, 2024.

REASONS FOR JUDGMENT BY: HECKMAN J.A.

CONCURRED IN BY: MACTAVISH J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

HECKMAN J.A.

[1] The appellant, Dale Kohlenberg, a lawyer with the Department of Justice (DOJ), appeals the decision of the Federal Court in *Kohlenberg v. Canada (Attorney General)*, 2022 FC 906, [2022] F.C.J. No. 912 (QL) (*per* Fothergill J.). The Court dismissed the appellant's application for judicial review of a decision by Assistant Deputy Minister (ADM) Elisabeth Eid to dismiss his grievance seeking damages for defamation by a senior labour relations advisor (LRA).

I. Background

[2] On July 9, 2012, the appellant grieved a work description provided by management on the grounds that it did not accurately reflect the work that he did or was expected to do. The grievance was dismissed at the third level by ADM Marie-Josée Thivierge.

[3] The appellant sought judicial review of the decision dismissing his grievance. The Federal Court allowed the application: *Kohlenberg v. Canada (Attorney General)*, 2017 FC 414, [2017] F.C.J. No. 485 (QL) (*per* Brown J.) [*Kohlenberg 1*]. It decided that ADM Thivierge's decision was procedurally flawed because she had failed to disclose to the appellant two staff memoranda that contained relevant and material information on the matter she was to decide. Had it not quashed the decision for procedural unfairness, the Federal Court would have upheld the decision on its merits as reasonable.

[4] One of the two staff memoranda was a confidential memorandum (the "memo") written by a senior LRA and addressed to ADM Thivierge. This memo contained two statements (the "statements") that the appellant argues were defamatory:

> You will note that the grievor did not meet expectations for 2013-2014. As an aside, [he] was disciplined for the behaviours described in his 2013-2014 PREA [Performance Review and Employee Appraisal].

[5] The appellant maintains, and the respondent admits, that the first statement (the "did not meet" statement) was false because he had successfully grieved this assessment of his performance in his 2013-2014 PREA shortly before the memo was written. With regard to the

second statement (the “disciplined for behaviours” statement), the appellant argues that while he was disciplined for a single instance of improper behaviour, the use of the plural “behaviours” was defamatory.

[6] Shortly after becoming aware of the memo, the appellant threatened to bring a civil action in defamation against its author. Following an exchange of correspondence with counsel for the Attorney General about the availability of a civil action, he eventually submitted a grievance alleging defamation.

[7] ADM Johanne Bernard dismissed the grievance on the grounds that it was untimely and that the allegation of defamation was not substantiated. The Federal Court quashed this decision because it was arrived at in a procedurally unfair manner since the appellant was not informed that the timeliness of his grievance was an issue. It also found the decision unreasonable because ADM Bernard had not applied the correct legal test for defamation. The Federal Court remitted the matter to a different decision maker: *Kohlenberg v. Canada (Attorney General)*, 2020 FC 1066, [2020] F.C.J. No. 1116 (QL) (*per* Mosley J.) [*Kohlenberg 2*].

[8] ADM Eid dismissed the grievance, though she provided the appellant with a letter of apology and confirmation that the memo had been retracted and replaced with a version correcting his 2013-2014 PREA rating.

[9] ADM Eid held that the grievance was untimely because the appellant had failed to file it within the applicable time limits. In her view, the correspondence from counsel for the Attorney

General had neither served to extend these time limits nor otherwise led the appellant to believe they had been waived.

[10] ADM Eid also decided that, even if the appellant had proven that the statements were defamatory in the sense of tending to lower his reputation in the eyes of a reasonable person, that they referred to him and that they were communicated to another person (citing *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 at para. 28), the respondent had established defences to escape liability.

[11] She found that the main thrust of the "disciplined for behaviours" statement—that the appellant had been disciplined for inappropriate behaviour—was substantially true. Moreover, she held that both the "disciplined for behaviours" and the "did not meet" statements were covered by the defence of qualified privilege. Relying on *Bent v. Platnick*, 2020 SCC 23, [2020] 2 S.C.R. 645 at paragraph 121, she concluded that an occasion of qualified privilege existed because the senior LRA was duty-bound to provide the third level decision maker, ADM Thivierge, with information, analysis and recommendations to assist her in deciding whether to allow or dismiss the grievance and because ADM Thivierge had a reciprocal duty to receive this candid and confidential advice.

[12] In his application for judicial review, the appellant challenged ADM Eid's decision on procedural and substantive grounds. The Federal Court dismissed his application.

[13] The Federal Court found that the appellant had been treated fairly, citing *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at paragraphs 34–56, and *Siffort v. Canada (Citizenship and Immigration)*, 2020 FC 351, [2020] F.C.J. No. 327 (QL) at paragraph 18. ADM Eid had informed the appellant of the case he had to meet in advance of the hearing, including that the timeliness of the grievance remained a live issue, and had given him opportunities to make his case, including by making further written submissions after the hearing. It also concluded ADM Eid was not required to give notice of her reliance on regulations, notice of the law being presumed.

[14] The Federal Court reviewed the merits of the decision on the reasonableness standard. While it expressed doubt that ADM Eid had reasonably addressed the timeliness issue, it concluded that it was not necessary to decide the question, because it was of the view that her analysis and decision to dismiss the appellant's defamation claim were reasonable. In particular, the Federal Court concluded that ADM Eid had reasonably concluded that the defence of qualified privilege applied to the statements and that the defence of justification applied to the "disciplined for behaviours" statement.

II. The role of this Court on this appeal and the standards of review

[15] On this appeal, this Court's role is to step into the shoes of the reviewing court and focus on the administrative decision. We are to ask whether the application judge chose the correct standard of review and applied it properly: *Agraira v. Canada (Public Safety and Emergency*

Preparedness), 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45–47; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, 462 D.L.R. (4th) 585 at paras. 10–12.

[16] I am satisfied that the Federal Court applied the correct standards of review to the question of whether the decision was procedurally fair and to the substance of ADM Eid's analysis and conclusions on the defamation questions, including whether the respondent had succeeded in establishing defences to the appellant's defamation claim.

[17] With regard to the substance of ADM Eid's decision, reasonableness is the presumptive standard and there is no indication that Parliament intended another standard to apply: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 17. The appellant observes that ADM Eid's decision has a potentially broad impact on the federal civil service grievance regime because it involves the application of the law of defamation within the federal civil service grievance process and the interpretation of section 63 of the *Public Service Labour Relations Regulations*, SOR/2005-79 (now titled the *Federal Public Sector Labour Relations Regulations*, SOR/2005-79 [*FPSLRR*]). That provision addresses when untimely grievances may be rejected. As such, he argues, the decision involves general questions of law of central importance to the legal system as a whole that must be reviewed on a correctness standard.

[18] The category of general questions of law of central importance to the legal system as a whole is narrow; it is not, as the Supreme Court explained, "a broad catch-all category for correctness review": *Vavilov* at para. 61. The fact that a dispute is of wider public concern or

involves a question that, when framed in a general or abstract sense, touches an important issue, is not sufficient for a question to fall within that category: *Vavilov* at para. 61. This Court has held that such questions:

> … must be "general questions of law" of "fundamental importance" and "broad applicability" with "significant legal consequences" for "the legal system", "the justice system", "the administration of justice as a whole", or "other institutions of government". They must be questions that require "uniform", "consistent", "final" and "determinate" answers, failing which the constitutional principle of the rule of law will suffer.
>
> *Portnov v. Canada (Attorney General)*, 2021 FCA 171, [2021] F.C.R. 501 at para. 12 [citations omitted].

[19] The questions raised by ADM Eid's decision do not transcend the federal civil service grievance regime in which they arise, as the jurisprudence on this category of legal questions requires. Nor does the fact that the common law principles governing the law of defamation emanate from courts make their application in the federal public service grievance context a general question of law of central importance to the legal system as a whole: *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616 at para. 44. The Federal Court appropriately reviewed the merits of ADM Eid's decision on the reasonableness standard.

[20] The appellant conceded at the hearing that if this Court upholds as reasonable ADM Eid's decision that the respondent successfully established defences to his defamation claim and that these defences were not defeated by the appellant, that is sufficient to dispose of this appeal and we need not examine the reasonableness of ADM Eid's decision that the grievance was untimely.

[21] Accordingly, I will focus my reasons on the reasonableness of ADM Eid's analysis and conclusions on the appellant's defamation claim and, in particular, on the respondent's defences to this claim.

[22] Before turning to this issue, I find that the Federal Court correctly determined that ADM Eid's decision that the appellant's grievance was untimely was procedurally fair because she gave him an opportunity to address the issue in writing and at the hearing. I agree with the Federal Court that the duty of fairness did not require ADM Eid to provide the appellant notice that she would be relying on the *FPSLRR*.

III. ADM Eid's decision on the defamation claim was reasonable

[23] 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 paras. 85, 90. The role of this Court is to examine ADM Eid's reasons with respectful attention to understand the reasoning process she followed to arrive at her decision: *Vavilov* at para. 84. We must read her reasons holistically and contextually in light of the record before her: *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900 at para. 31; *Vavilov* at paras. 96–97.

[24] In detailed reasons, ADM Eid set out the legal framework applicable to the appellant's defamation claim and applied it to the evidence in the record before her. The appellant conceded at the hearing that, for the most part, he took no issue with this legal framework but contested

ADM Eid's application of the framework to the facts. However, in applying the reasonableness standard, this Court must refrain from reweighing and reassessing the evidence considered by ADM Eid; our intervention into ADM Eid's application of the framework to the facts will be justified only if the appellant establishes that she fundamentally misapprehended or failed to account for the evidence before her: *Vavilov* at paras. 125–26.

A. *The "disciplined for behaviours" statement*

[25] Relying on *Green v. Bush*, 2017 MBQB 83, [2017] M.J. No. 135 (QL) at paragraph 38, and *Jian v. Sing Tao Daily Ltd.*, 2014 ONSC 287, [2014] O.J. No. 3351 (QL) at paragraph 46, ADM Eid observed that establishing that a defamatory expression is substantially true is a defence to a defamation claim. As noted in *Jian*, it is not necessary to prove the truth of each word so long as the substance of the allegations is justified. In *Bent v. Platnick* at paragraph 107, the Supreme Court confirmed that to establish the defence of justification, a defendant must "prove the substantial truth of the '"sting", or main thrust, of the defamation'" [citations omitted].

[26] ADM Eid observed that while the use of "behaviours" in the plural form could imply that the appellant was disciplined for behaviours involving more than one incident, it could be reasonably interpreted as implying that he had been disciplined for several behaviours from one incident. Most significantly, she concluded that the main thrust of the statement—that the appellant had been disciplined for the behaviours described in his 2013-2014 PREA—was that he was disciplined for inappropriate behaviour. In her view, this remained true.

[27] The appellant claimed that he was disciplined in December 2013 for one behaviour in a single incident: sending an email critical of management to a broad departmental distribution list. However, documents in the record before ADM Eid, including the discipline letter, indicated that the discipline was imposed in the context of an incident of misconduct preceded by similar wilful acts of inappropriate behaviour characterized as ongoing misconduct. In light of the evidence in the record before her, I find that it was open to ADM Eid to conclude that the main thrust of the "disciplined for behaviours" statement was that the appellant was disciplined for inappropriate behaviour and that this statement was substantially true.

[28] The appellant argued that his position is supported by a passage from the Federal Court's judgment in *Kohlenberg 1* at paragraph 84, where Justice Brown observed that while "the plural use of the word 'behaviour' indicates that there was more than one incident … leading to the Applicant being disciplined," there was in fact "only one behaviour for which he had [been] disciplined." In my view, the Federal Court quashed ADM Thivierge's decision because the memo containing relevant and material information was not disclosed to the appellant, contrary to the rules of procedural fairness. While these *obiter* comments support the Federal Court's conclusion that the memo should have been disclosed, they were not made as part of an inquiry into whether the "disciplined for behaviours" statement was substantially true.

[29] Accordingly, ADM Eid's decision that the respondent had established the defence of justification in respect of the "disciplined for behaviours" statement is reasonable. The appellant has not shown that, in coming to this conclusion, she fundamentally misapprehended or failed to account for the evidence before her.

B. *The "did not meet" statement*

[30] ADM Eid held that the statements occurred on an occasion of qualified privilege and that the appellant had not defeated this defence. Since I have found that she reasonably held that the respondent established a defence of justification for the "disciplined for behaviours" statement, I need only examine whether she reasonably concluded that the respondent established a defence of qualified privilege in respect of the "did not meet" statement.

[31] ADM Eid relied on *Bent v. Platnick* at paragraph 121 for the proposition that an occasion of qualified privilege exists if a person making a communication has a duty to publish the information to the person to whom it is published, and the recipient has a corresponding duty or interest in receiving it. She found that such an occasion exists when a senior LRA provides confidential advice to assist senior officers charged with making final level grievance decisions. In ADM Eid's view, the senior LRA who authored the memo was responsible for providing information, analysis and recommendations to the final level decision maker to assist in her deliberations on whether to allow or deny the grievance. ADM Eid found that the final level decision maker had a corresponding duty to receive this information "to discharge [her] duties in an informed manner."

[32] The appellant raised no convincing arguments to challenge ADM Eid's finding that qualified privilege attached to the occasion on which the senior LRA made the statements. Instead, the appellant argued that the defence of qualified privilege was defeated.

[33] Following an analytical framework consistent with that laid out by the Supreme Court in *Bent v. Platnick* at paragraphs 128 and 136, ADM Eid found that the qualified privilege was not defeated because the appellant had failed to establish 1) that the scope of the privilege was exceeded because the statements were irrelevant to the work description grievance, or 2) that their author was motivated by malice.

[34] In *Bent v. Platnick*, the Supreme Court noted, at paragraph 128, that qualified privilege may be defeated when the limits of the duty or interest have been exceeded. This may occur "when the information communicated in a statement is not relevant to the discharge of the duty … giving rise to the privilege, or when the information is not reasonably appropriate to the legitimate purpose of the occasion" [citations omitted]. It explained, at paragraph 136, that another way to defeat the defence of qualified privilege is to establish malice on the part of the person making the statement by showing an actual, express motive to speak dishonestly or reckless disregard for the truth.

[35] The appellant submits that ADM Eid erred in dismissing his claim that the defence of qualified privilege was defeated because the statements were irrelevant to the work description grievance or because he had established malice on the part of the senior LRA who made the statements.

[36] Before addressing this submission, I pause to note that at paragraphs 129 and 130 of *Bent v. Platnick*, in determining whether the publisher's inclusion in her communication of specific libellous references to Dr. Platnick exceeded the scope of qualified privilege, the majority asked

whether naming Dr. Platnick in the communication was *necessary* to discharge the duty giving rise to the privilege. This has raised questions as to the place of "relevance" as distinguished from "necessity" in the analysis of the scope of qualified privilege: see e.g. *Thatcher-Craig v. Clearview (Township)*, 2023 ONCA 96, 480 D.L.R. (4th) 639 at para. 75, n. 2.

[37] It is not necessary to canvass this issue further here. Firstly, the parties did not raise the question of necessity before this Court and took no issue with ADM Eid's focus on the relevance of the statements. Secondly, ADM Eid found that, in the specific labour relations context of this case, to fulfill the duty giving rise to the occasion of qualified privilege, the senior LRA was "required to give more information rather than less" [emphasis added] to the final level decision maker. Since the senior LRA was duty-bound to give ADM Thivierge as much evidence as may be relevant to adjudicate the grievance in an informed manner, the requirements of relevance and necessity were coextensive. Accordingly, in light of ADM Eid's finding that evidence with respect to the PREA objectives and ratings was "generally relevant to understanding duties performed in the context of a work description grievance," its publication became necessary. I am therefore satisfied that, while ADM Eid invoked the language of relevance rather than necessity in defining the scope of qualified privilege, her decision was nevertheless justified in relation to the relevant legal constraints that bore on her decision: *Vavilov* at para. 100.

(1) ADM Eid reasonably found that the "did not meet" statement was not irrelevant to the work description grievance

[38] ADM Eid held that the communications did not exceed the scope of the qualified privilege. Examining relevance in the context of the connection between the senior LRA's

statements and the privileged occasion, she found that "evidence with respect to PREA objectives and ratings, and to performance more generally, is generally relevant to understanding duties actually performed in the context of a work description grievance." In finding that the statements fell within the scope of qualified privilege, ADM Eid emphasized that the senior LRA had testified that ADM Thivierge, the third level decision maker, "was very detail-oriented and expected more information rather than less from her advisors."

[39] The appellant argued that a statement about the 2013-2014 PREA was not relevant to the work description grievance. Firstly, the PREA spoke to how well he had performed his duties, not whether the description of duties he was expected to perform was accurate. Secondly, it related to a time period subsequent to the employer's issuance in 2011 of the work description at issue in the grievance.

[40] In the 2013-2014 PREA, appended to the memo, the appellant's supervisor set out a summary of the duties undertaken by the appellant that year (including, for example, managing the community pasture divestiture project and coordinating the work of a paralegal, junior counsel, and legal assistant). It also set out the appellant's objectives for that year (including, for example, assisting the Deputy Regional Director and Regional Director to triage requests for legal services and implementing the actions identified for the Prairie Regional Office in the Process Optimization initiative). At the hearing before this Court, the appellant recognized that some aspects of the PREA were potentially relevant to the work description grievance.

[41] Although the 2013-2014 PREA postdates the employer's issuance of the 2011 work description, the memo documented that, at the second level of the work description grievance, the appellant's November 9, 2012, submissions argued that he routinely performed duties at an LP-03 level. For example, the appellant observed that client department officials in Ottawa consulted with him rather than their own department counsel because of his superior legal expertise in a wide range of issues. He submitted that he performed "very complex, sensitive, difficult and/or legal file work" that required the legal expertise and skills of senior or general counsel. The memo also documents that the precise nature of the appellant's current duties and responsibilities was in issue in deliberations that led to the October 4, 2013, second level response.

[42] Accordingly, based on the record before her, it was reasonable for ADM Eid to conclude that the statement relating to the 2013-2014 PREA was not irrelevant to the appellant's work description grievance and to the discharge by the senior LRA of his duty to provide the final level decision maker with information to assist her in deciding the grievance.

[43] This is so despite ADM Bernard's finding, in her March 26, 2019, decision dismissing the appellant's defamation grievance, that the information in the memo regarding the disciplinary action and the 2013-2014 PREA was "not relevant to the final level work description grievance." By allowing the appellant's application for judicial review of ADM Bernard's decision in *Kohlenberg 2* and remitting it for reconsideration by a different decision maker, the Federal Court set aside that decision in its entirety and for all purposes: *Burton v. Canada (Citizenship and Immigration)*, 2014 FC 910, 245 A.C.W.S. (3d) 647 at para. 30; *Ouellet v. Canada (Attorney*

General), 2017 FC 586, 280 A.C.W.S. (3d) 527 at paras. 27–28. ADM Eid was not bound in any way by that decision and was free to reach her own conclusions on the matters arising from the appellant's grievance. For these reasons, the appellant's argument that ADM Eid could not reasonably come to a different conclusion than ADM Bernard on the relevance of the 2013-2014 PREA cannot succeed.

(2) ADM Eid reasonably found that the appellant did not establish that the statements were motivated by malice

[44] ADM Eid rejected the appellant's claim that the statements were motivated by malice. She found that the evidence established that the senior LRA, who was "as a matter of practice" required to give his very detail-oriented senior manager more information rather than less, believed the statements to be true. In this context, she noted, the PREAs were potentially relevant to the work description grievance and the discipline was directly related to his PREA. Finally, the ADM observed that the senior LRA had denied there was any reason for him to prejudice the final level decision maker against the appellant.

[45] The appellant argued before us that, in making the statements, the senior LRA sought to provide information to the final level decision maker that she might use to deny the grievance. This, in his view, was an improper ulterior motive amounting to malice. The respondent submitted that when the senior LRA recommended the appellant's grievance be dismissed based on his review of the evidence and applicable law and subject to submissions at the grievance hearing, and when he brought to ADM Thivierge's attention information that she might consider

relevant to disposing of the grievance, he was simply performing the duty that gave rise to the occasion of qualified privilege.

[46] In his submissions, the appellant essentially urges this Court to reweigh the evidence in the record regarding the presence of malice and to come to a different view than that of ADM Eid. This we cannot do. The appellant has not established that, in coming to her conclusion, ADM Eid fundamentally misapprehended or failed to account for the evidence before her. Based on this evidence, including the transcript of the appellant's cross-examination of the senior LRA, it was not unreasonable for her to conclude that the appellant had not established the statements were motivated by malice.

IV. Conclusion

[47] Given my conclusion that ADM Eid reasonably decided the respondent has established that the "disciplined for behaviours" statement was substantially true and that the "did not meet" statement occurred on an occasion of qualified privilege, it follows that her decision that the respondent had established defences to the appellant's defamation claim is reasonable. Accordingly, as noted above, I need not consider the appellant's arguments on the issue of timeliness.

[48] I would dismiss the appeal and award the respondent costs fixed in the amount of $2,500.

"Gerald Heckman"
J.A.

"I agree.
Anne L. Mactavish J.A."

"I agree.
K. A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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