

CANADA / JUDGMENT

Brown v. Canada (Attorney General)

2024 FC 1884

COURT

Federal Court

DECIDED

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Ottawa, Ontario, November 25, 2024

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

DAVID BROWN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the third and final level delegated decision-maker of the Treasury Board Secretariat of Canada [TBS], dated February 2, 2024 [Decision]. The Decision denied two grievances filed by the Applicant on October 27, 2022, and June 29, 2023, alleging unfair, inappropriate, potentially unlawful, discriminatory treatment, censorship and reprisals by management. The Decision dismissed both grievances on the basis that the decision-maker had no jurisdiction regarding his complaints under the Canada Labour Code, RSC 1985, c L-2 [Canada Labour Code], that in a great number of respects the Applicant's complaints concerned matters related to a previous grievance concerning Leave Code 699 matters (that was set aside on judicial review and is therefore over and done with), and that there was no evidence of wrongdoing, discrimination or threat of reprisals. I am not persuaded the Decision is unreasonable and therefore this application will be dismissed.

I. Facts [2] The Applicant has worked as a Senior Policy Analyst at TBS since March 2020. The Applicant's position is classified as PE-05 (Personnel Administration), which is unrepresented; however, his terms and conditions of employment follow the Economics and Social Science Services Collective Agreement [EC Collective Agreement]. Not having a union which might advise and represent him, he comes to this Court representing himself.

[3] The Applicant identifies as neurodivergent and a person with a mental health disability.

A. Background (1) First internal grievance and investigation [4] The Applicant has been before this Court twice concerning related but separate decisions, both of which were set aside by this Court and remitted back to TBS for redetermination (see *Brown v Canada (Attorney General)* 2023 FC 1748 [Brown 2023] and *Brown v Canada (Attorney General)* 2024 FC 823 [Brown 2024]. Brown 2023 (in which the Court found the Applicant had been unreasonably assessed in an earlier grievance concerning TBS COVID-19 directives re payroll Code 699) summarizes surrounding facts:

[3] In broad strokes, the Applicant had an underlying mental health condition that was exacerbated by the COVID-19 pandemic to such a serious extent he was unable to work as of May 1, 2020 and for some time thereafter. His departmental employer, TBS, required him to use up his accumulated sick leave notwithstanding a direction from TBS dated April 10, 2020, that "all employees (i.e. critical and non-critical employees who are working remotely or on-site), who are unable to work because of a COVID-19-related illness, will no longer be required to take sick leave and instead will be eligible for 'Other leave with Pay (699)'. He unsuccessfully grieved this determination to the third level.

(2) Notices of Occurrence filed pursuant to the Canada Labour Code [5] This case concerns, among other things, two Notices of Occurrence [NoO] the Applicant filed with his employer pursuant to the Canada Labour Code and Work Place Harassment and Violence Prevention Regulations, SOR/2020-130.

[6] The Applicant's first NoO was responded to by letter dated November 29, 2022. The Designated Recipient determined:

the allegations in [the Applicant's] Notice of Occurrence fall outside the scope of the definition provided in the Code and as applied under the Workplace Harassment and Violence Prevention Regulations. It is plain and obvious that the allegations do not relate to work place violence or harassment even if accepted as true. As such, no further action will be taken with respect to [the Applicant's] above-noted Notice of Occurrence.

[7] On March 6, 2023, the Applicant then filed a further labour standards complaint with the Labour Program of Employment and Social Development Canada [Labour Program] concerning the employer's investigation. In a letter dated May 30, 2023, the Labour Program closed the Applicant's file, stating:

Having investigated your complaint, in my opinion, the employer has complied with the requirements of the Act.

Upon further review of the first Notice of Occurrence (NoO #1) along with the second Notice of Occurrence (NoO #2) and the investigation reports, the allegations identified in NoO #1 and NoO #2 have been investigated and no further action is required.

Therefore, it has been determined that the employer is in compliance with Paragraph 125(1)(z.16) of the Canada Labour Code Part II, and Subsection 25(1) of the Work Place Harassment and Violence Prevention Regulation.

The Labour Program of Employment and Social Development Canada can, therefore, take no further action on your behalf.

[Emphasis added]

B. Grievances at issue [8] Although the Applicant raises a multitude of proceedings in his record, the only decision under judicial review is the Final Level Grievance Response (Internal Grievances 322231 and 322274), dated February 2, 2024. The Decision concerns these two grievances (filed within 8 months of each other) [collectively the Grievances]. The Grievances allege that management's treatment towards the Applicant was unfair, inappropriate, potentially unlawful, and discriminatory. They also raise concerns about the Employer's application of the Leave Code 699 COVID-19 policy, wrongdoing within the organization, and the Applicant's fear of reprisal for raising such concerns.

- (1) Grievance 322231 [9] Grievance 322231 is the second grievance filed by the Applicant, counting the one dealt with by this Court in Brown 2023. Specifically, Grievance 322231, submitted October 26, 2022, makes three primary allegations concerning 1) adequacy and timeliness of responses from management, 2) harassment in the form of discrimination, and 3) potential wrongdoing. He also notes his fear of reprisal.
- [10] The Applicant says the “inaction and non-response” from management to his many questions negatively impacted his return to work and worsened his mental health situation to the point that he was forced to go on leave again. The Applicant alleges this meets the definition of harassment in the form of discrimination, and that management did not meet its legislative responsibility to provide him with a healthy and safe work environment.
- [11] In June 2022, the Applicant wrote that he “has not yet received answers to many of his questions... or even to be explicitly told where management would not be in a possibility of answering” them. The Applicant requested answers to his questions as corrective action for Grievance 322231:

If they are not answered and addressed in some other form or fashion, I would like all of my outstanding questions and issues to be addressed. In particular, I would like the following answered and corrective action taken.

Pertaining to potential wrongdoing:

1. Previously the policy guidance pertaining to the use of code 699 was as follows: “The use of other leave with pay (699) should be granted on a case-by-case basis, and only after remote or alternate work, or flexible work hours have been considered, and generally only after other relevant paid leave has first been used by the employee (i.e. Family related leave and paid sick leave, etc.).” (reference TBS IN-BRIEF, Effective Nov 9th, 2020). In TBS, during the time period that this policy was in effect, in cases where individuals used all of their relevant leave and could not do remote or alternate work, or flexible work hours, did they receive code 699 support or not?
2. If management across the organization were not providing this support, would this be considered wrongdoing?
3. At a minimum, would management's actions be considered unfair and/or inappropriate?
4. When I raised these and similar questions with management all the way up the line to the Clerk of the Privy Council, is it fair and/or appropriate that I received little to no response whatsoever for over a year?

In the event that management has committed wrongdoing and/or unfairly treated employees (that used all of their relevant leave and could not do remote or alternate work, or flexible work hours) in not following the organizations own policy guidance identified above, and if employees deserve it, I would like these employees to be reimbursed in some form or fashion and in part or in whole for the time that they should have received code 699 support.

Also, in the event that management has committed wrongdoing and/or unfairly treated employees (that used all of their relevant leave and could not do remote or alternate work, or flexible work hours) in not following the organizations own policy guidance identified above, and if the managers and advisors who are implicated in this deserve it, I would like implicated individuals to return a portion of their performance pay and/or benefits commensurate with their involvement in this wrongdoing and/or unfair treatment.

Pertaining to personal restitution:

5. Is it fair and/or appropriate that my executive director directed me to not send any long emails to anyone and when I repeatedly raised this and my fear of punishment, that management refused to take action for months and speak out in favor or against this behavior?
6. Despite my repeated engagement and follow-up, is it fair and/or appropriate that management not tell me the rationale behind the use of code 699 for over a year which harmed my mental health and led me to believe this was unjustified discrimination?
7. Is it fair and/or appropriate that I be assessed up to my occupational group and level while on a gradual return to work and not working full-time when this expectation was never clearly communicated to me until much later (approximately 10 months)?
8. Is it fair and/or appropriate that my manager tell me my contributions were not providing enough value to Canadian taxpayers.
9. Is it fair and/or appropriate that management did not address my concerns of fear of reprisal for over a year?
10. Is it fair and/or appropriate that management did not answer non-opinion based questions?
11. Is it fair and/or appropriate for management to not speak out on issues pertaining to the health and wellbeing of employees when we have potentially discriminatory policies?
12. Is it fair and/or appropriate that the acting Deputy Minister tell me it is inappropriate that I share my experience with others when I expressly asked everyone to please redact anything that they did not feel comfortable with and indicated I would send everything through an ATIP process to protect the privacy of others?
13. Is it fair and/or appropriate that no one tell me what would be an appropriate way for me to communicate my experience when I have asked repeatedly?
14. Is it fair and/or appropriate for management to continue to not respond to my questions and issues for months when I have clearly said this is harming my mental health and I have provided a letter from my doctor stating that answering my questions would help with my rehabilitation?

15. Is it fair and/or appropriate that management has not apologized for their inaction and non-response, in some cases for over a year and counting?
16. Are the delays that I have experienced in being afforded a healthy and safe work environment fair and/or appropriate and as such should I bear the full impact of these delays?

If I deserve it, I would like to be reimbursed (pension, pay and benefits) in part or in whole for the time that I was unable to work due to this negative work situation that harmed my mental health to the extent that I was unable to work and function.

If management and/or those who have advised them deserve it, I would like them to return a portion of their performance pay and/or benefits commensurate with their involvement in my situation and their non-response and inaction.

- [12] Grievance 322231 also grieved issues regarding the application of the Leave Code 699 COVID-19 policy, management's comments on the Applicant's performance, and the non-response of management to his questions. These matters concerned his first grievance which was ultimately decided in his favour after this Court granted judicial review in Brown 2023.
- [13] In addition to the actual grievance document, the Applicant filed supporting and supplementary documentation on over a half-dozen occasions.
- [14] On November 29, 2022, the Designated Recipient informed the Applicant that the allegations in the second NoO fell outside the definitions of violence and harassment in the Canada Labour Code. The letter stated that if the Applicant disagreed with the determination, he may contact the Labour Program. As noted above, the Applicant did so but the Labour Program found that the employer had complied with the requirements of the Canada Labour Code.
- [15] On June 26, 2023, the Applicant sought to add the denial of his second NoO to Grievance 322231. The Labour Relations Advisor replied that the decision regarding the NoO fell outside the timeline of his second grievance, and therefore would change the nature of the grievance.
- [16] She informed him that new events could only be considered through a separate grievance.
- (2) Grievance 322274 [17] Therefore, on June 29, 2023, the Applicant filed his third grievance (Grievance 322274) which challenged the Labour Program's decision regarding the Applicant's second NoO. The Applicant also grieved management's treatment of him in 2023, such as ignoring him, and allegedly censoring him. Grievance 322274 alleged discrimination on the part of management. For this grievance, the Applicant provided additional material documents consisting of some 400 pages.

[18] In fact, Grievance 322274 largely overlaps with Grievance 322231. It pertains to Article 16 of the EC Collective Agreement (no discrimination) on the ground of disability. As noted, it also raises new allegations of censorship and silencing by management. The corrective action requested by the Applicant for this grievance was once again for management to answer questions posed by the Applicant:

Overall, I would like to be accommodated with answers to all of my outstanding issues and questions and if management is not able to answer my questions, to be specifically told this and why. I want to be guided and have the freedom to share my experience in an appropriate way and a formal public apology for how I have been treated over the past two years. I would like an investigation into my second notice of occurrence and public investigation into how my situation has been handled as there could be corruption in the internal notice of occurrence process within TBS and how the Labour Program has dealt with my second notice of occurrence.

In addition to the questions that I have asked in my second grievance, in particular, I would like the following answered and corrective action taken.

1. If formal processes are ongoing, does it mean that management and the organization do not need to respond to and/or answer my outstanding questions and issues?
2. Is it fair and/or appropriate for management to ignore me for weeks and or months and repeatedly just point me to the formal processes rather than addressing the issues that I am raising that have had such a debilitating impact on me?
3. Is it fair that my entire management structure up to the new CHRO infringe on my freedom of speech to speak truth to power by directing me to cease emailing, writing, copying or otherwise directing questions to multiple individuals related to my outstanding issues and questions? This is very similar to what my executive director said to me but this direction was given from my entire management structure and in writing. What will be the impact if I disobey this direction and will I be punished and/or receive reprisal?
4. Is it fair to silence and censor me in the event that people may feel intimidated, without first giving me an opportunity to address any concerns they may have and or remove them from the correspondence if they so desire?
5. Despite my repeated engagement and follow-up, is it fair and/or appropriate that management never clarify that the rationale they told me a year after I raised the issue of fair treatment of Code 699 was not the full rationale of why we implemented code 699 at the beginning of the pandemic when I had my mental health illness directly related to COVID-19.

6. Is it fair and/or appropriate that management disregarded jurisprudence in my situation that states the employer has a duty to accommodate employees who appear to require it, even if they do not request it, on the basis of the “ordinary person test?” If an ordinary person had the same information about an employee as the employer has, would he or she realize that the employee required accommodation?”
7. Is it fair and/or appropriate for management to continue to not respond to my questions and issues for months when I have clearly said this is harming my mental health and I have asked for accommodation and provided a letter from my doctor stating that answering my questions would help with my rehabilitation?
8. Is it fair and/or appropriate that management has not apologized for their inaction and non-response, in some cases for over 2 years and counting, despite their commitment to do so?
9. Are the delays that I have experienced in being afforded a healthy and safe work environment fair and/or appropriate and as such should I bear the full impact of these delays?
10. Is it fair and/or appropriate for the organization to ask me to lie on my form and only agree to submit my work related mental health injury to the Labour Program if I indicate I intend to make a claim?
11. Is it fair and/or appropriate for the Labour Program to not respond to my complaint and questions for months?
12. Is it fair and/or appropriate for the Labour Program to subsequently change their determination when TBS clearly broke the harassment and violence prevention regulations?
13. Is it fair and/or appropriate that I be free to share all of the details of my experience and if so how can I do this in an appropriate fashion?
14. Is it fair and/or appropriate that I be a whistleblower pertaining to my situation because my organization has tried to silence me and has broken the harassment and violence prevention regulations and how can I do this to avoid breaking my duty of loyalty and avoid any disciplinary actions?

If management and/or those who have advised them deserve it, I would like them to return a portion of their performance pay and/or benefits commensurate with their involvement in my situation because they have not treated me fairly through their advice non-response and inaction. In many instances, their behavior has not demonstrated the key leadership competencies and this has had and continues to have a negative effect on me and my ability and freedom to work in a healthy and safe workplace.

[19] On September 5, 2023, the Applicant submitted 44 pages of additional written submissions in relation to his Grievances.

- [20] The Grievances proceeded directly to the second level. After September 5, 2023, and before the second-level grievance hearing, the Applicant provided further additional documentation on September 15, 2023, and October 26, 2023.
- [21] The second level grievance hearing was held on November 7, 2023. Following the second grievance hearing and before the second-level grievance decision was issued on December 8, 2023, the Applicant again added additional material on November 15, 2023, and again on November 17, 2023.
- [22] Both grievances were denied at the second level on December 8, 2023. On December 15, 2023, the Applicant requested that the grievances be transmitted to the final level. In making his request, he submitted six additional pages of argument replying to the second level grievance decision. Again, he appended further material.
- [23] On December 22, 2023, Mr. Andrew Lemieux, a Senior Labour Relations Advisor, invited the Applicant to his final level grievance hearing, to be held on January 22, 2024. In reply, the Applicant agreed and provided an “Abridged Compendium of Applicant’s Record.”
- [24] The Final Level grievance hearing was held on January 22, 2024. The hearing was two hours long at the Applicant’s request, as opposed to the one hour normally afforded grievors. The documentary material comprised over 1,000 pages. A Final Level Grievance Response denying both grievances was issued on February 2, 2024.

C. Procedural note [25] Note that the Second Level Grievance Response which denied both grievances was also before the final level decision-maker, as was an accompanying Precis prepared by TBS staff that included a timeline of events and staff recommendations.

II. Decision under review [26] The Decision found that no wrongdoing or discrimination by the Employer occurred toward the Applicant. The Decision states it “reviewed the details surrounding the Employer’s denial of [the Applicant’s] request for Other Leave with Pay – Code 699 (‘Leave Code 699’) for the period May 1, 2020, to Nov 9, 2020, which was the subject of [his] previous grievance,” but held that “[a]s this matter is the subject of a separate grievance, it will not be addressed here.” See also Brown 2023, which reviewed this earlier and separate grievance and ordered it reconsidered; it was ultimately decided in his favour.

- [27] Further, the Decision found that disagreeing with management and respectful communication of that disagreement was not a basis to fear reprisals, that there was no evidence of wrongdoing, and no evidence of reprisals:

The concerns you raised appear to be directly related to your own disagreement with how the Employer applied the policy governing the use of Leave Code 699 to your own situation. Having a different interpretation than the Employer of an Employer policy is not in itself a basis for an allegation of wrongdoing. Respectfully and appropriately communicating to your management that you disagree with the Employer’s interpretation of its own policy, without further evidence or particulars, is not a reasonable basis on which to fear reprisal from your management. Furthermore, I have not been presented with any evidence to lead me to conclude that any

wrongdoing actually occurred. I have also not been presented with any evidence to lead me to conclude that you were subjected to reprisal as a result of respectfully and appropriately communicating disagreement with how the Employer had been applying the policy governing the use of Leave Code 699 to employees, or for any other reason.

.... I have not been presented with any evidence to lead me to conclude that your management was doing anything other than communicating to you their concerns, based on their observations during your gradual-return-to-work period, about whether you were well enough to return to work, or whether any workplace accommodations may be required to help support you in achieving a successful return to work. While I appreciate that you found these conversations difficult, your management was making good-faith efforts to facilitate a successful return to work.

[28] The Applicant had requested as corrective measure “an investigation into [his] second notice of occurrence and public investigation into how [his] situation has been handled,” raising concerns of potential corruption. On this issue, the Decision held the employer (TBS) had no jurisdiction to review the final decision of the Labour Program under the Canada Labour Code and that the appropriate recourse mechanism for the Applicant to raise such concerns is under the Labour Program, which is separate from TBS and in respect of which “TBS does not have any control.”

[29] The Decision concludes there was no wrongdoing or discrimination, and that the Applicant was obliged to adhere to the Government of Canada’s Values and Ethics Code for the Public Sector which sets out values and expected behaviours that guide public servants in all activities related to their professional duties. As a public servant, the Decision stated, “you have an obligation to work collaboratively and respectfully with your colleagues and to follow the direction of your management”:

It is clear to me that you disagree with how the Employer applied a policy to your personal situation. I do appreciate that you feel frustrated by this. Your management communicated to you on a number of occasions how it was applying a policy to your personal situation and responded to your questions and concerns. You then filed a grievance (322152) to formally present your disagreement, which is the proper forum in which to do so.

The Values and Ethics Code for the Public Sector describes the values and expected behaviours that guide public servants in all activities related to their professional duties. As a public servant, you have an obligation to work collaboratively and respectfully with your colleagues and to follow the direction of your management, notwithstanding any disagreement you may have with how your management has applied an internal policy to your personal situation. It is important for you to review and understand these obligations.

I strongly encourage you to find an appropriate and constructive way for you to manage what appears to be a very challenging issue for you. If you are unsure how to appropriately share your concerns or experiences, you should consult your direct manager for guidance and clarification. You are also reminded that the Employee Assistance Program is available to all employees and additional useful resources can be found on the Mental health and wellness hub.

Based on the information before me, I have concluded that no wrongdoing occurred and that you were not subject to discrimination. Consequently, the grievances and corrective actions are denied.

[30] I also note that the Decision relied on the Precis prepared by TBS staff, which specifically addresses the issues of whether the Applicant should have been accommodated in the form of receiving answers to his many questions. This Precis forms part of the Decision and states:

Non-Response:

Management responded to his inquiries reasonably and in good faith when appropriate. He sent repeated messages to large group of parties, and it took management some time to involve the necessary stakeholders to respond to his questions/concerns.

...

Management trying to Silence The grievor:

If an employee does not agree with a decision made, the expectation is to address the issue with their direct line of management. The email sent to the grievor on June 8, 2023, outlined the expectation for him to cease sending correspondence to all levels of government and if he has any concerns, to address them with his management team. The intent is not to silence him, only to have him communicate in the appropriate chain of command.

...

(5) Grievor's repeated inquiries to management; direction grievor received from management to limit his communications beyond his immediate management

Over the past approximately three years, the grievor has repeatedly sent questions to various levels of management as well as to other individuals outside of the organization, including the Prime Minister. In many instances, the grievor did not receive replies. In some instances, the grievor received replies, however, the grievor does not feel that his questions were answered. He believes that he has suffered workplace violence or harassment as a result. He also believes that he has been discriminated against on the basis that his mental health disabilities necessitate an accommodation to receive timely replies to his inquiries and that he has suffered harm as a result of not receiving fulsome and timely response. All the grievor's questions stem from his initial request for Leave Code 699 for his sick leave from approximately May to November 2020, though later questions also focus on what he believes was a failure by various parties to respond to his questions in a timely manner.

While it may have been preferable for management to have more promptly engaged with the employee to attempt to bring these inquiries to a closure, and to have directed the grievor to cease these repeated inquiries to a multitude of parties, it's not clear that the grievor was subject to workplace harassment or violence, nor that the grievor was discriminated against. Indeed, these allegations were the subject of the grievor's complaints contained within the Notices of Occurrences, both of which were dismissed by the Designated Recipient. These dismissals were subsequently upheld by the Labour Program, the group responsible for compliance with the relevant legislative requirements, in its May 30, 2023, letter to the grievor.

Finally, the grievor appears to mistakenly believe that section 2(b) of the Canadian Charter of Rights and Freedoms, which establishes the right to freedom of expression, enshrines a right for him to communicate anything to anyone within his workplace organization, and to parties outside the organization about issues that have arisen during his ongoing employment. However, management does have discretion to direct the employee to limit his communications within the workplace to designated individuals, as well as to reasonably enforce workplace policies, even if this involves restricting what he may communicate and to whom.

[Emphasis added]

III. Issues [31] The Applicant (whose 29-page single-spaced Memorandum does not in any respect follow the format required by Rule 70 of the Federal Courts Rules, SOR/98-106 [Federal Courts Rules],) does not clearly set out his specific issues. Instead, his Memorandum generally raises whether the Decision is reasonable and whether the grievance process was procedurally fair.

[32] He also asks the Court to answer a number of questions that, in my respectful view are largely rhetorical and are not core issues to be determined on this application for judicial review. These include:

Should the organization's decision to deny the Applicant's grievance be set aside to be redetermined with instructions to reimburse the Applicant his salary for this time period in whole or in part; and if not, could it order the Applicant be allowed to utilize the sick leave credits he previously accumulated in lieu of the long term disability leave without he needed to take following May 26, 2021?

If there are noted concerns with accommodations while on a gradual return to work and an individual is in the process of undertaking a fitness to work assessment to determine appropriate accommodations, should management,

- a) offer interim accommodations based on the "ordinary person test," and/or;
- b) wait to assess the individual up to his or her occupational group and level until appropriate accommodations are implemented?

Does a designated recipient have the right to unilaterally determine that a notice of occurrence does not meet the definition of harassment and violence?

If a principal party insists that they believe a notice of occurrence meets the definition of harassment and violence and insists on proceeding with an investigation, does the employer or designated recipient have the right to deny proceeding with an investigation?

Does the Labour Program have the authority to declare that certain individuals' actions and conduct do not need to be investigated if other individuals similar actions and conduct have already been investigated, particularly in light of the fact that the investigation reports upon which this decision was made were determined by the Federal Court to be procedurally unfair?

Should there be an investigation into the Applicant's second notice of occurrence?

Should I be censored and silenced from even engaging with my own management when it is impacting my health and wellbeing? Is mentioning people by name when I ask them questions intimidation?

[33] The Respondent raises the following issues:

An evidentiary issue regarding the Applicant's reliance on unsworn facts as well as unsworn evidence that was not before the decision-maker;

Whether the internal grievance process leading to the decision under review was procedurally fair;

Whether the decision was reasonable;

If the application for judicial review is allowed, what is the appropriate remedy?

[34] Respectfully, the primary issues to be determined are whether the Decision is reasonable and whether the grievance process was procedurally fair.

IV. Standard of review [35] The parties agree, and I concur, that the standard of review for procedural fairness is correctness and the standard for the Decision itself is reasonableness.

A. Reasonableness [36] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

[31] 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 para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (Vavilov, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (Vavilov, at para. 97, citing *Newfoundland Nurses*).

- [32] A reviewing court should consider whether the decision as a whole is reasonable: “what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review” (Vavilov, at para. 90). The reviewing court must ask “whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (Vavilov, at para. 99, citing Dunsmuir, at paras. 47 and 74, and Catalyst Paper Corp. v. North Cowichan (District), 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
- [33] Under reasonableness review, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (Vavilov, at para. 100). The challenging party must satisfy the court “that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable” (Vavilov, at para. 100).
- [Emphasis added]
- [37] In the words of the Supreme Court of Canada in Vavilov, a reviewing court must be satisfied the decision-maker’s reasoning “adds up”:
- [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker’s reasoning “adds up”.
- [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: Dunsmuir, at para. 47; Catalyst, at para. 13; Nor-Man Regional Health Authority, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.
- [106] It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely: the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[Emphasis added]

[38] The Supreme Court of Canada in *Vavilov* at paragraph 86 states, “it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies.” *Vavilov* provides further guidance that a reviewing court decide based on the record before them:

[126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker’s approach would also have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

[Emphasis added]

[39] *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are “exceptional circumstances.” The Supreme Court of Canada instructs:

[125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from “reweighing and reassessing the evidence considered by the decision maker”: *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court’s deferring to a lower court’s factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

[Emphasis added]

[40] The Federal Court of Appeal held in *Doyle v Canada (Attorney General)*, 2021 FCA 237 [Doyle] that the role of this Court is not to reweigh and reassess the evidence unless there is a fundamental error:

[3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director’s decision, the reviewing

court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.

- [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

B. Procedural fairness [41] Questions of procedural fairness are reviewed on the correctness standard as established many years ago by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at paragraph 43. That said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at paragraph 69, the Federal Court of Appeal says a correctness review may need to take place in “a manner ‘respectful of the [decision-maker’s] choices’ with ‘a degree of deference’”: *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42.” And see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [per Rennie JA].

- [42] In this connection, and while there is ongoing debate on the matter, I will follow more recent jurisprudence of the Federal Court of Appeal which relied on “the long line of jurisprudence, both from the Supreme Court and” the Federal Court of Appeal itself, that “the standard of review with respect to procedural fairness remains correctness”: *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at paragraph 35 per de Montigny JA (as he then was).

- [43] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 50, the Supreme Court of Canada explains what is required on the correctness standard of review:

- [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal’s decision was correct.

- [44] I also rely on *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, where Justice Rennie for the Federal Court of Appeal at paragraph 56 ruled:

- [56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an a priori decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice—was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.

[Emphasis added]

V. Submissions and analysis A. Preliminary issue: Portions of the Applicant's Record and Memorandum will be struck [45] As a preliminary issue, the Respondent submits portions of the Applicant's Record (Vol. 1, Tabs 2-6, pages 13-1956 and Vol. 2, Tab 8, pages 261-8) and his page 2 of his Memorandum are not admissible because among other things they contain unsworn facts and were not specifically before the decision-maker. The Respondent submits these portions should be struck from the record to avoid potential misapprehensions of fact, prejudice to the Respondent, and veering outside the scope of applications for judicial review.

[46] Justice Bédard determines in *Chamberlain v Canada (Attorney General)*, 2015 FC 50 at paragraph 27 that the proper record on judicial review is limited to the evidentiary record before the administrative tribunal, with limited exceptions:

[27] It is well established that as a general rule, the proper record on judicial review is limited to the evidentiary record that was before the administrative tribunal. There are a few exceptions to that principle, one of which is when new evidence is adduced before the Court to support allegations of breaches of procedural fairness on the part of the administrative tribunal (*Chamberlain FC* at para 17). The state of the law in that regard is well summarized by Justice Stratas in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 18-29, 428 NR 297, where he explained the rule and its exceptions:

18 Now before the Court is an application for judicial review from this decision on the merits. In such proceedings, this Court has only limited powers under the Federal Courts Act to review the Copyright Board's decision. This Court can only review the overall legality of what the Board has done, not delve into or re-decide the merits of what the Board has done.

19 Because of this demarcation of roles between this Court and the Copyright Board, this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitxsan Treaty Society v. Hospital Employees' Union*, 1999 CanLII 7628 (FCA), [2000] 1 F.C. 135 at pages 144-45 (C.A.), "[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial de novo, of questions that were not adequately canvassed in evidence at the tribunal or trial court." See also *Kallies v. Canada*, 2001 FCA 376 at paragraph 3; *Bekker v. Canada*, 2004 FCA 186 at paragraph 11.

20 There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker (described in paragraphs 17-18, above). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative

decision-maker. Three such exceptions are as follows:

- (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: see, e.g., *Estate of Corinne Kelley v. Canada*, 2011 FC 1335 at paragraphs 26-27; *Armstrong v. Canada (Attorney General)*, 2005 FC 1013 at paragraphs 39-40; *Chopra v. Canada (Treasury Board)* (1999), 1999 CanLII 8044 (FC), 168 F.T.R. 273 at paragraph 9. Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider. In this case, the applicants invoke this exception for much of the Juliano affidavit.
- (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness: e.g, *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980) 1980 CanLII 1877 (ON CA), 29 O.R. (2d) 513 (C.A.). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
- (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite*, supra.

[Emphasis added]

- [47] The Respondent submits, and with respect I agree, that none of the recognized exceptions noted are established in this case. Moreover, the Applicant has not provided a sworn affidavit as is required by Rule 306 of the Federal Courts Rules. The Respondent submits and I also agree that the admission of these documents in the circumstances would create procedural unfairness for the Respondent because they are precluded from testing this evidence in absence of an affidavit and therefore were deprived of an opportunity to properly respond.
- [48] I appreciate the Applicant asks for flexibility in this regard but the impugned material is not properly before the Court. In any event, I am not persuaded what the Applicant seeks to add, would have made a difference because, as the Respondent well details in a four page appendix to their Memorandum, a great deal of the impugned material is contained directly or inferentially in other material before the decision-maker, and as such, is deemed to have been considered.
- [49] In particular, the Respondent's Appendix A suggests many (if not all) of the documents the Applicant says are missing are contained in the Certified Tribunal Record [CTR]. The Respondent provides a detailed table outlining the relevant page numbers. Notably the allegedly missing documents are summarized in both the Applicant's 44-page "Supporting

Document for Grievances - Detailed Breakdown of Allegations” and in an email thread filed by the Applicant of over 120 pages titled “RE: David's deteriorating situation and Grievance 322152.” The Applicant himself represents these two documents are “the two most comprehensive sources of information about [his] experience.”

- [50] I also note the CTR is over 1200 pages long, and the Applicant made at least 7 filings of supplementary material over the period leading up to the final-level TBS hearing (September 5 to December 22, 2023, as noted above).
- [51] In addition, whether self-represented or not, the Applicant in my view should comply with rules such as those pointed out by the Respondent. See generally *Curtis v Canada (Human Rights Commission)*, 2020 FCA 149 at paragraph 31 and *Wagg v Canada*, 2003 FCA 303 at paragraph 25. This is because the Rules ensure fundamental fairness between parties before this Court. The duty to provide a supporting affidavit allows the Respondent, if it wishes, to cross-examine on the documents and to know fully in a timely way the case it has to meet. Rule 306 benefits both sides of a dispute, including self-represented Applicants such as the Applicant.
- [52] The impugned documents will be struck.

B. The grievance was procedurally fair [53] The Applicant submits the Decision is not procedurally fair because it did not review or consider “the main documents upon which [his] case rests.” The Applicant submits this warrants a new investigation. As just discussed there is no merit in this submission.

- [54] The Respondent submits the process was procedurally fair noting that “[t]he level of procedural fairness owed to an employee in an internal grievance process is at the low end of the spectrum” (*Kohlenberg v Canada (Attorney General)*, 2022 FC 906 at para 23, citing *De Santis v Canada (Attorney General)*, 2020 FC 723 at para 28, citing *Canada (Attorney General) v Allard*, 2018 FCA 85 at para 41).
- [55] The Respondent, correctly in my view, submits the Applicant had no legitimate expectation that every page he submitted would be reviewed; moreover, “practically speaking, government operations would crawl to a halt if government officials were expected to review every page of a capacious labour relations file.” The Respondent relies upon *Andruszkiewicz v Canada (Attorney General)*, 2023 FC 528 at paragraphs 64, 83 [per Little J]. With respect, I agree with Justice Little. This Decision is not required to address “each and every detailed argument or piece of evidence mentioned” by the Applicant (*Vavilov* at para 91; *Caron v Canada (Attorney General)*, 2022 FCA 196, at para 45; and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 25: procedural fairness does not expect arbitrators “to respond to every argument or line of possible analysis”).

- [56] Nor am I persuaded in the circumstances especially given the very extensive materials provided by the Applicant on numerous occasions leading to the hearing itself, that the decision-maker had to go through the Applicant's entire "labour relations file" to deal with these grievances.
- [57] I reiterate my earlier conclusion and am not persuaded any missing documents occasioned procedural fairness because, in my respectful opinion, Appendix A to the Respondent's Memorandum satisfies me that many (if not all) of the allegedly "missing" documents are dealt with in the CTR. As noted already, the Respondent provides a detailed table outlining the relevant page numbers. Notably, documents allegedly missing are also summarized in a 44-page document filed by the Applicant, namely "Supporting Document for Grievances - Detailed Breakdown of Allegations." In addition, the record contains an email thread of over 120 pages prepared by the Applicant entitled "RE: David's deteriorating situation and Grievance 322152." The Applicant himself describes these two documents as "the two most comprehensive sources of information about [his] experience." I also note the CTR is over 1200 pages long, and that the Applicant made a half-dozen or more filings over the period leading to the hearing.
- [58] There is no merit in the Applicant's procedural unfairness argument. He had the benefit of an impartial decision-maker. He certainly knew the case he has to answer. And he both had and certainly availed himself of his right to a full and fair chance to respond.
- [59] The Respondent also submits, properly in my view, that the Applicant impermissably departs from his Notice of Application, contrary to Rule 301 of the Federal Courts Rules, by making the arguments just reviewed. The Applicant's Notice of Application in relevant detail states:

The grounds for this application are:

...

3. The Respondent erred in law and/or failed to observe a principle of natural justice and procedural fairness or other procedure that it was required by law to observe when it did not take into account the severity of the impact of the organization's conduct on the Applicant as a person with a mental health disability and provided insufficient reasons for its decision;

...

and

6. Such further and other grounds as the Applicant may advise and this Honourable Court may permit.

- [60] Notably, there is no allegation of missing documents.

- [61] Just recently in *DA v Canada (Attorney General)*, 2024 FC 1626 at paragraphs 33-39, Justice Fothergill sets out and applies settled jurisprudence concerning new arguments that goes beyond the Notice of Application, to the effect that applicants must set out in their notices of application the grounds on which they rely, and cannot present new grounds in their memoranda, even if the respondent is not prejudiced. I agree with the following:
- [33] This ground for judicial review was not included in the Applicants' Notice of Application. The only grounds advanced that relate to procedural fairness concern the Investigator's failure to interview PA and BA.
- [34] Applicants must set out in their notices of application the grounds on which they rely, and cannot present new grounds in their memoranda of fact and law, even if the respondent has not been prejudiced (Federal Courts Rules, SOR/98-106, s 301(e); *Tl'azt'en Nation v Sam*, 2013 FC 226 [*Tl'azt'en Nation*] at para 6). While Justice James O'Reilly held in *Tl'azt'en Nation* that there may be some room for discretion in permitting grounds not included in the notice of application to be advanced (at para 7), this discretion is exercised only rarely.
- [35] In *Canada (Attorney General) v Iris Technologies Inc*, 2021 FCA 244, the Federal Court of Appeal (per Laskin JA) reinforced that the requirements of Rule 301 are not merely technical; they ensure among other things that respondents have adequate notice of the case being brought against them so that they can meaningfully respond. If an applicant finds its initial description of the grounds and relief claimed in the notice of application too narrow, it may move for leave to amend under Rule 75 (at para 41, citing *SC Prodal 94 SRL v Spirits International BV*, 2009 FCA 88 and *Astrazeneca AB v Apotex Inc*, 2006 FC 7, *aff'd*, 2007 FCA 327). The Court of Appeal continued (at para 42):

It has been stated in decisions of the Federal Court that "there is some room for discretion [in applying the requirements of rule 301] where, for example, relevant matters have arisen after the notice was filed; the new issues have some merit, are related to those set out in the notice, and are supported by the evidentiary record; the respondent would not be prejudiced, and no undue delay would result": see, for instance, *Tl'azt'en Nation v. Sam*, 2013 FC 226 at paras. 6-7. But this Court has resisted expanding the availability of an exception beyond cases in which the notice of application contains a "basket clause," and the applicant seeks declaratory relief that is necessarily ancillary to the relief expressly requested: *SC Prodal* at paras. 11-12.

- [36] The Applicants' Notice of Application contains a "basket clause" in the enumerated grounds for the application: "Such further and other grounds as counsel may advise and this Honourable Court may permit". However, the Applicants do not seek, by means of the new procedural fairness argument, declaratory relief that is necessarily incidental to the relief expressly requested. The two procedural fairness arguments are distinct. One concerns the Investigator's failure to interview key witnesses mentioned in the course of the Applicants' interviews, although not explicitly identified by them as potential witnesses. The other concerns the denial of a reasonable opportunity to rebut evidence that arose during the investigation process and to see the preliminary reports.

[37] The Applicants acknowledge that this Court's decision in Marentette was not a relevant matter that arose after the Notice of Application was filed. The decision merely applied existing law to the facts of that case.

[38] Furthermore, it is unclear how the Applicants might have rebutted the evidence that arose during the investigation process. The evidence consisted primarily of the January Letter they had themselves written. The Applicants had a full and fair opportunity to explain the basis for their numerous allegations against the Complainant, and the Investigator nevertheless found the most serious allegation to be unsubstantiated. The remaining allegations in the January Letter consisted primarily of negative portrayals of the Complainant's character and demeanour.

[39] The investigation of the Harassment Complaint was procedurally fair.

[Emphasis added]

[62] I note the Applicant in this case filed his Notice of Application on March 26, 2024, and filed his written materials on July 5, 2024. In other words, he had over three months to move to amend his Notice of Application but did not do so.

C. The Decision is reasonable [63] The Applicant submits the decision is unreasonable. Many of his submissions on unreasonableness concern his separate and previously decided (in his favour) grievance regarding Leave Code 699 COVID-19. It was reasonable that these were not considered in the Decision. Other submissions deal with actions and decisions in relation to the Labour Program, which in my view and with respect were reasonably determined to be outside the scope of the decision-maker.

[64] Speaking generally, in this Court the Applicant's submissions largely summarize the context surrounding his Grievances. He does not address whether the final Decision is reasonable as determined by the tests for reasonableness set out by the Supreme Court of Canada in Vavilov, as discussed above in Part IV, A, above.

[65] I understand the Applicant disagrees with the Decision, as he does with the Labour Program's dismissal of his complaint about the investigation re his NoOs. It is trite to observe a party may not succeed on judicial review simply because they disagree with a procedurally fair and reasonable decision.

[66] On judicial review, the Applicant must demonstrate that the Decision is unreasonable as defined in Vavilov. This the Applicant did not do.

[67] In this connection, the Respondent submits the Decision provided transparent, justifiable, and intelligible reasons and was therefore reasonable as explained in Vavilov. I agree. The Respondent also emphasizes that the Applicant is raising new issues while re-arguing what was before the decision-maker, which is not the purpose of judicial review. I again agree.

[68] I also agree it was reasonable for the decision-maker to exclude the Leave Code 699 issue which fell under a separate grievance and process. The Applicant succeeded in having that grievance set aside by this Court in Brown 2023. He obtained the result he asked for and received pay for a period of time where he had been unreasonably told to claim sick leave. With respect, that decision in his favour was and is, in my view the end of the road for that grievance. Many of the matters raised in the Grievances now under review are simply requests for answers to a flurry of questions relating to what no longer needs to be answered or. In my respectful view, the decision-maker quite reasonably declined to consider them further.

(1) Adequacy and timeliness of responses and harassment in the form of discrimination [69] On these issues, the Applicant essentially argues management did not meet its obligation to ensure a safe and healthy workplace free of discrimination because it did not answer his (seemingly endless) requests for explanations and answers, despite knowing the impacts this was having on the mental health of Applicant. The Applicant seems to submit the Decision was unreasonable for not recognizing his subjective need for answers.

[70] It is not in dispute that these events had a profound impact on the Applicant. However, the Respondent submits the Decision was reasonable in finding management's actions did not constitute harassment. I agree. I am unable to find any unreasonableness in the decision-maker's conclusion regarding harassment. Mere personal disagreement with a reasonable management decision does not in my view constitute harassment; if it were otherwise, management could be required to make unreasonable decisions. That with respect is not the purpose of a grievance nor the goal of judicial review.

[71] In fact, the Respondent correctly points to a number of examples where the Applicant was provided answers, but it does not seem there were any answers capable of satisfying him. For instance, the Applicant at one point received a response to two of his questions by email dated October 12, 2021. On October 18, 2021, he posed additional questions and allegations that his questions have not been answered. Following another response from management, the Applicant sent dozens more questions and sub-questions by an email dated December 17, 2021, that is over six pages in length.

[72] He sent this email to 11 recipients.

[73] These questions include:

3e If you felt harassed and discriminated against, how would you feel if your ADM did not respond to you for a month?

...

16a What is leadership in this context?

16b Is leadership protecting the policy and reputation of the public service or protecting and supporting the mental health and wellbeing of employees?

16c Is my mental health being sacrificed for the greater good of all Canadians?

...

17a Is nothing fair and reasonable?

[74] In my respectful view, these questions are largely rhetorical and do not require answers; they are allegations in the form of questions. I was pointed to no authority for the Applicant's argument that he is entitled to or may expect management to engage with him on seemingly endless questions of this nature.

[75] With every sympathy for the Applicant, I agree with the Respondent. As an employee he has the right to disagree with management. He also has remedies. He pursued them, but did not succeed. Ultimately he has to live with the reasonable decisions (i.e., those made in accordance with law established by the Supreme Court of Canada in *Vavilov*) arrived at in a procedurally fair manner. In my view, as already noted, the decision-maker reasonably declined to re-litigate issues in relation to his ultimately successful grievance re Leave Code 699. Again, I know of no authority — nor did the Applicant supply one — for the proposition that an employee who succeeds on one grievance may in file a second grievance because he wants more answers or further and better answers. The answer is that he succeeded; with that, his first grievance was finished and done with and may no longer be re-litigated.

[76] The Applicant is also seeking judicial review because the decision-maker declined to consider the dismissal of his labour standards complaint by the Labour Program relating to the two NoOs under the Canada Labour Code. With respect, I find the decision-maker reasonably declined to deal with determinations by the Labour Program. I appreciate the Applicant asked that they be reviewed in by way of the Grievances. But asking is not enough. He could only succeed if the TBS decision-maker had jurisdiction (the legal power) to review and set aside Labour Program decisions. The decision-maker determined that "TBS does not have control over the Labour Program and cannot intervene in its process." The Respondent logically submits it would have been unreasonable for the decision-maker to attempt to intervene, or exercise power over a process that does not belong to the TBS but to a different department.

[77] In the absence of any evidence or even well grounded submissions to the contrary, I find it reasonable for the decision-maker to direct the Applicant to go to the Labour Program if he is unhappy with the results of his NoOs. And, with respect, the Applicant did just that. However, as confirmed by letter dated May 30, 2023, and summarized in the *Precis*, the Labour Program disagree with the Applicant. TBS reasonably determined that reviewing Labour Board determinations is outside its jurisdiction.

(2) No evidence of wrongdoing [78] The Applicant makes a number of submissions about alleged wrongdoing. In my view allegations of government wrongdoing are very serious. They should not be lightly raised. The onus is on the Applicant to establish wrongdoing has occurred. The Applicant failed to meet the onus on him to do so. In my respectful view, the

Decision's finding that the Applicant had not provided evidence of wrongdoing is reasonable. With respect, the Applicant simply disagrees with the finding that the conduct he pointed to (denial of pay required by COVID19 payroll code 699) does not constitute wrongdoing. In this connection the Applicant once again impermissibly asks the Court to reweigh, reconsider and second guess the decision-maker. These functions are withheld from this Court on judicial review - see Vavilov and Doyle cited above - where there are neither exceptional circumstances nor fundamental error as here.

- (3) Censorship and silencing [79] On April 1, 2022, the Applicants Assistant Deputy Minister, Executive and Leadership Development Applicant sent the Applicant, who was concerned, an email "confirming that there will not be any negative consequences from you sending long emails to your distribution list that you choose. You can communicate your thoughts without worrying about the number of words used. However, I would ask that these messages be respectful and adhere to the Code of values and ethics to which we all need to follow [emphasis added]."

[80] Fourteen months (and many emails later) his Assistant Deputy Minister Champion for Mental Health sent the Applicant a direction dated June 8, 2023:

... [O]n May 24, 2023, Ms. Bogden provided you with a number of contacts available to provide you with information and answers to your questions, specifically when they are related to each of the recourses that are currently on-going. Given that you have designated contacts and on-going recourse mechanisms for each process, please ensure that you direct all future correspondence to the appropriate contacts as they have been provided to you. These are the contacts who are best placed to answer your questions.

... I know you have made several requests for advice and direction from TBS leadership concerning the appropriateness of your communications and interactions with others including senior leadership, designated officials, and subject matter experts, to name a few. The Employer's direction is as follows: please cease emailing, writing, copying or otherwise directing questions to multiple individuals on these matters other than the appropriate contacts for the issues that you are repeatedly raising. These communications are disruptive, unproductive, and may be viewed as intimidation by the individuals you specifically named and personally identify.

[Emphasis added]

- [81] The Applicant at the hearing said he gets upset and that writing lengthy emails is a way he processes and gets through his feelings. He takes the position he is entitled to communicate with whoever he chooses. I disagree for two reasons. First, in the circumstances it appears to me the direction is a reasonable balancing of the rights of the Applicant, the employer and other employees and the workforce. Secondly, I was given no authority supporting this argument.

[82] With respect, employees have the right to complain to management and to do so in writing through proper channels to responsible decision-makers. I am not persuaded there is any unreasonableness, in the circumstances of this case, with the employer directing the Applicant to limit his communications to designated management personnel. This focusses his quest for answers on responsible personnel. It also ensures the work of others is not interrupted or disrupted unnecessarily. Nor is there any unreasonableness in management requiring civility in correspondence from the Applicant.

[83] Moreover, it seems to me once again the Court is asked to reweigh and second guess management's response to the seemingly endless correspondence generated by the Applicant. The Court will not intervene in weighing and assessing the evidentiary basis for this direction, having regard to Vavilov and Doyle. The Decision appropriately balanced the Applicant's right to freedom of expression and management's rights in respect of the workplace and the rights of those not involved to work productively without unnecessary interruptions or disruption. I find no infringement of the Applicant's rights under s 2(b) of the Canadian Charter of Rights and Freedoms.

VI. Conclusion [84] Given the above, and with respect, this application must be dismissed.

VII. Costs [85] The Respondent is not seeking costs.

JUDGMENT in T-405-24

THIS COURT'S JUDGMENT is that:

All of Vol. 1, Tabs 2-6, pages 13-1956 and Vol. 2, Tab 8, pages 261-8 of the Applicant's Record together with page 2 of the Applicant's Memorandum are struck from the record.

The application for judicial review is dismissed without costs.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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T-405-24

STYLE OF CAUSE:

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PLACE OF HEARING:

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BROWN J.

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