SUPREME COURT OF YUKON

Citation: *Schaer v. Yukon (Government of)* 2018 YKSC 46

Date: 20181005
S.C. No.: 17-AP014
Registry: Whitehorse

BETWEEN:

ANDREW SCHAER

PETITIONER

AND

JUSTIN FERBEY, DEPUTY MINISTER DEPARTMENT OF ECONOMIC DEVELOPMENT, GOVERNMENT OF YUKON

RESPONDENT

S.C. No.: 17-A0183

BETWEEN:

GOVERNMENT OF YUKON

PETITIONER

AND

ANDREW SCHAER

RESPONDENT

Before: Mr. Justice L.F. Gower

Appearances:

I.H. Fraser — Counsel for the Government of Yukon
Andrew Schaer — Appearing on his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] Andrew Schaer has applied for judicial review of a decision by the Deputy Minister, Justin Ferbey ("DM Ferbey"), in the Department of Economic Development of the Government of Yukon (referred to here also as "YG"), made on November 8, 2017, rejecting Mr. Schaer on probation (the "rejection decision"). At that time, Mr. Schaer was employed by YG in the department as a Senior Business Development Advisor. DM Ferbey relied on s. 104 of the Yukon *Public Service Act,* R.S.Y. 2002, c. 183 ("*PSA*"), in making the rejection. That section provides that a "deputy head", which includes a Deputy Minister, may "reject" an employee "for cause" by written notice at any time during a probationary period. Mr. Schaer argues that he was not in fact rejected on probation for non-disciplinary reasons. He alleges that his termination was in retaliation for his 'blowing the whistle' on the actions of certain co-workers and a supervisor, which he claims constitute discrimination, bullying and abuse. Accordingly, Mr. Schaer says that he was terminated for disciplinary reasons pursuant to s. 121(a) of the *PSA*, for alleged misconduct, which ordinarily would have entitled him to pursue an appeal (grievance) to an adjudicator pursuant to ss. 130(1) and 136(1) of the *PSA.* Thus, he argues that when YG purported to reject him on probation for non-disciplinary reasons, he was denied his right to adjudication. Mr. Schaer seeks to have the rejection decision quashed and his employment with YG reinstated, with no loss of benefits accrued in the meantime.[1]

[1] Mr. Schaer's original petition, filed January 12, 2018, also sought to judicially review DM Ferbey's reconsideration decision of December 27, 2017, which resulted from an internal (non-legislated) appeal process offered by YG, which Mr. Schaer availed himself of. However, Mr. Schaer filed an amended petition on March 26, 2018, which narrowed the scope of his judicial review application solely to the rejection decision.

[2] YG opposes the judicial review application and makes a cross-application for a permanent injunction to restrain Mr. Schaer from breaching his obligation of confidentiality, arising from the "Solemn Affirmation of Office" that he executed when he commenced his employment with YG. In particular, YG seeks to restrain Mr. Schaer from publishing the contents of secret digital recordings he made of conversations he had with colleagues and clients of his department during his employment.

[3] The proceeding filed first in time was *Andrew Schaer v. Justin Ferbey, Deputy Minister Department of Economic Development, Government of Yukon*, S.C. No. 17-AP014 ("*Schaer v. Yukon*"), and the second is *Government of Yukon v. Andrew Schaer*, S.C. No. 17- A0183 ("*Yukon v. Schaer*").

[4] I presided at a case management conference on March 20, 2018, on *Yukon v. Schaer*. At that time, counsel for YG indicated that he had no objection to Mr. Schaer's proposal that his application for judicial review and YG's petition for a permanent injunction be heard together. On March 29, 2018, while ruling on two interlocutory applications[2], I directed that both the judicial review and permanent injunction applications would be heard at the same time, because both are related and arise out of the same factual context, and because it would be a more efficient use of judicial resources.

FACTUAL BACKGROUND

[5] On May 10, 2017, Mr. Schaer commenced his employment with YG. In doing so, he executed the following Solemn Affirmation of Office:

> I do solemnly and sincerely affirm that I will truly and faithfully and to the best of my skill and knowledge execute and perform the duties that devolve upon me by reason of

[2] Cited as 2018 YKSC 17.

> my appointment or employment in the Public Service, including the duty not to disclose or make known, without due authority in that behalf, any matter that comes to my knowledge by reason of such appointment or employment. (my emphasis)

[6] Mr. Schaer was subject to a period of probation of six months, which was set to expire November 9, 2017. On November 3, 2017, this period of probation was extended a further six months to May 9, 2018 (The letter, extending Mr. Schaer's probation, was dated October 26, 2017. However, it was not delivered to him until November 3, 2017).

[7] There is a dispute between the parties about whether Mr. Schaer's job performance was appropriately evaluated, as required by s. 17.11 of the *Collective Agreement* between YG and the Public Service Alliance of Canada. Mr. Schaer effectively argues that he only had one such evaluation meeting with his supervisor, Eddie Rideout, on June 20, 2017, and received no indication that his performance was unsatisfactory prior to the decision to extend his probation. YG's representative, DM Ferbey, has deposed that there were multiple meetings and communications regarding Mr. Schaer's performance:

1) June 20, 2017 - meeting between Mr. Schaer and Mr. Rideout;
2) July 18, 2017 - meeting between Mr. Schaer and Mr. Rideout;
3) July 19, 2017 - follow-up email from Mr. Rideout to Mr. Schaer regarding their meeting the previous day;
4) August 3, 2017 - meeting between Mr. Schaer and Mr. Rideout; and
5) October 20, 2017 - meeting between Mr. Schaer and DM Ferbey.

[8] The meeting to extend Mr. Schaer's probation was held on November 3, 2017. Mr. Schaer met with Mr. Rideout and Assistant Deputy Minister, Stephen Rose ("ADM

Rose"). According to ADM Rose's notes of that meeting, Mr. Rideout initially indicated to Mr. Schaer that the extension was not punitive, but was intended to address issues such as Mr. Schaer's ability to listen, his "taking over" of meetings, and getting to understand the needs and interests of the department's clients. Mr. Rideout indicated Mr. Schaer's communication style was being perceived by others as "aggressive".

[9] Immediately after that meeting, Mr. Schaer requested a follow-up meeting with ADM Rose, alone, and attempted to persuade him to rescind the letter extending his probation. During the meeting, Mr. Schaer showed ADM Rose a list of quotes that he had on his cell phone, which I understand were quotes of statements made by his supervisor or other co-workers. ADM Rose described Mr. Schaer as being "clearly agitated" during the meeting, and it was his impression that Mr. Schaer showed him the quotes to try to threaten him into taking back the extension letter and passing him through probation, in order to avoid their publication.

[10] Later that day, at 2:56 p.m., Mr. Schaer sent an email to DM Ferbey, and cc'd the email to ADM Rose and the Minister of Economic Development, Ranj Pillai. In the email, Mr. Schaer admitted that, since commencing his employment, he had been both documenting and digitally sound recording his conversations and meetings "with all internal and external stakeholders", i.e. colleagues and clients. He again complained that his job performance had not been properly assessed pursuant to s.17.11 of the *Collective Agreement*. Mr. Schaer also went on to relay 23 allegations about statements and conduct of Mr. Rideout, and other co-workers, which he implied were inappropriate and were examples of his employer's "heavy-handed tactics". In concluding, he asked DM Ferbey to rescind the letter extending his probation:

> … failing which, I shall forthwith avail myself of both civil remedies (including litigation) and those afforded me pursuant to the Collective Agreement.

[11] On November 4, 2017, Mr. Schaer alleges that he was examined at the Whitehorse General Hospital for severe chest pain and shortness of breath. He claims to have been diagnosed with Precordial Catch Syndrome ("PCS"), which he described as "a stress-related, painful medical condition which further triggers severe anxiety". He believes that the PCS is the direct result of the stress he experienced as a result of the discrimination and workplace wrongdoings, as well as Mr. Rideout's interference with his employment.

[12] Further, after Mr. Schaer was given the letter extending his probation period on November 3, 2017, he was invited by ADM Rose to meet with his supervisor to discuss how to address the performance issues that required his attention. This was confirmed in an email from Mr. Rideout to Mr. Schaer, entitled "Follow-up to Friday meeting - next steps", wherein Mr. Rideout said that he had booked off one and a half hours Monday afternoon:

> … to advance the discussion around next steps, including development of the PPP [Personal Performance Plan], options for YG professional development, etc. I trust this will provide us an opportunity to come to mutual agreement on a clear path forward.

[13] Mr. Schaer responded by email to Mr. Rideout on November 6, 2017, and cc'd it to ADM Rose, as follows:

> On the advice of counsel, I must respectfully decline to engage in any further discussion relating either directly or indirectly to either our meeting of November 3, 2017 or the Deputy Minister's letter [extending the probation, which was dated October 26, 2017].

[14] On November 8, 2017, DM Ferbey met with Mr. Schaer and provided him with a letter of the same date "releasing" him on probation, pursuant to s. 104 of the *PSA*, effective immediately.[3] In the letter, DM Ferbey said that Mr. Schaer's digital recording of meetings and conversations without consent was "highly inappropriate" and had "irreparably damaged the Government of Yukon's trust and confidence in [him] as an employee". DM Ferbey further stated that Mr. Schaer had the right to appeal that decision by written notice to himself within ten days.[4]

[15] Later on November 8, 2017, Mr. Schaer met with a representative of the Yukon Employees Union ("YEU"), Dan Robinson, to discuss his rejection on probation. According to Mr. Schaer, Mr. Robinson stated that, because he had not apprised the YEU of the alleged workplace discrimination and wrongdoings when they first occurred, the union could not represent him in a grievance of same. Mr. Robinson further advised Mr. Schaer that the employer had the right to reject an employee on probation. Mr. Schaer unsuccessfully appealed that decision to Ms. Robyn Benson, the National President of the Public Service Alliance of Canada, and currently takes the position that the YEU has breached its "duty of fair representation" in failing to take on his grievance.

[16] Mr. Schaer appealed the release on probation to DM Ferbey and attended a hearing with him on December 12, 2017. On December 27, 2017, DM Ferbey provided Mr. Schaer with his written decision not to reinstate his employment.

[17] It is not seriously contested by Mr. Schaer that, beginning on November 30, 2017, and continuing through to and including March 8, 2018, he published information

[3] As stated earlier, the language in the section refers to a *rejection* on probation ("A deputy head … may … reject [an] employee … ", and that is how I have referred to the action in these reasons.
[4] The internal (non-legislated) appeal process offered by YG, which I referred to earlier in para. 1.

from his secret recordings of his supervisor and co-workers via a Twitter account, a website and his email address. By my count, there were approximately 28 such separate publications. I understand that in some of these communications Mr. Schaer posted links to the actual recordings, the transcripts of those recordings, and to a copy of the first affidavit he filed in support of his petition for judicial review.

[18] Mr. Schaer alleges that various statements made by his supervisor and co-workers constitute racial discrimination against Aboriginal persons, linguistic discrimination against Francophones, and religious discrimination against Christians. The allegations regarding religious and Francophone discrimination were included in Mr. Schaer's email to DM Ferbey, ADM Rose and Minister Pillai, dated November 3, 2017. However, the allegation regarding racial discrimination was not.

[19] Mr. Schaer maintains the position that YG has not investigated any of these allegations of workplace misconduct. On the other hand, DM Ferbey has deposed that he directed Mr. Schaer's allegations to be "fully investigated" and that he is advised by the Director of Human Resources, Charmaine Cheung, that this was done. He further deposed that he is familiar with the outcomes of those investigations and is satisfied that "appropriate corrective measures were taken wherever [those] were required". It is unclear whether these investigations included the allegation of racial discrimination.

ISSUES

[20] I regret to say that I found the issues raised in Mr. Schaer's outline and written argument, filed on May 14 and 18, 2018 respectively, somewhat difficult to follow. They are varied, diffuse and often repetitive.

[21] In contrast, I found the issues as stated by YG's counsel to be much more concise and helpful. They are generally stated as follows:

1) Should certain portions of Mr. Schaer's affidavits be struck out because they fail to comply with Rule 49(12) of the *Rules of Court*, or are otherwise offensive under Rule 20(26)?

2) Was DM Ferbey's rejection of Mr. Schaer for cause during his probationary period a "contrived reliance" on s. 104 of the *PSA*, or a "sham" or a "camouflage" to disguise a disciplinary dismissal under s. 121(a) of the *PSA*?

3) If the rejection decision was a disguised disciplinary dismissal, should judicial review be granted?

4) Should a permanent injunction be granted to restrain Mr. Schaer from further breaches of the obligation of confidentiality contained in the Solemn Affirmation of Office?

ANALYSIS

[22] It is important to state at the outset of my analysis what is not at issue in these proceedings. Following the amendment to Mr. Schaer's petition on March 26, 2018, it is clear that he has narrowed his request for judicial review to the rejection decision on November 8, 2017. Thus, neither the decision to extend his probation period for an additional six months, made on November 3, 2017, nor the reconsideration (appeal) decision by DM Ferbey, on December 27, 2017, are at issue. As a result, I have given little or no attention to the facts and circumstances surrounding either of the latter two

decisions, except to the extent that they touch upon the judicial review of the rejection decision.

[23] I will now deal with the issues in the order as stated above.

1. *Should certain portions of Mr. Schaer's affidavits be struck out because they fail to comply with Rule 49(12) of the Rules of Court, or are otherwise offensive under Rule 20(26)?*

[24] YG's principal complaint here is that there are many statements in Mr. Schaer's three affidavits, and especially his first affidavit filed January 23, 2018, which amount to improper assertions of opinion, and are therefore unnecessary and scandalous. I agree that there are several statements in Mr. Schaer's various affidavits where he prefaces his opinion by stating "I believed then as I do now that ...", or "I verily believe that …". However, it is important to recognize that Mr. Schaer is representing himself in these proceedings and he is not a lawyer. Further, in many of these instances it appears that what Mr. Schaer was attempting to do was to lay out his arguments in support of his various positions, rather than simply expressing an opinion. Finally, I note that this issue was not raised by YG's counsel until his written outline was filed on May 22, 2018, which was after Mr. Schaer had filed his outline and written argument. Therefore, Mr. Schaer had only two days to prepare for the issue before the hearing on May 24th.

[25] For all these reasons, I feel that striking out the numerous passages identified by YG's counsel would seriously undermine Mr. Schaer's ability to make his case as best he can as a self-represented litigant. Therefore, I decline to strike any of the passages, but I will not give them any weight where they amount to nothing more than unsubstantiated expressions of opinion or pure speculation.

2. *Was DM Ferbey's rejection of Mr. Schaer for cause during his probationary period a "contrived reliance" on s. 104 of the PSA, or a "sham" or a "camouflage" to disguise a disciplinary dismissal under s. 121(a) of the PSA?*

[26] YG's counsel correctly described this as the "central issue" in this case. Certainly, it was the issue which Mr. Schaer principally focused upon in his outline and written argument.

[27] Section 104 of the Yukon *PSA* states:

> A deputy head or unit head may at any time during the probationary period or at any time during the extended probationary period of an employee, reject that employee for cause by written notice to the employee. S.Y. 2002, c.183, s.104.

[28] The language referring to the rejection of the employee "for cause" is virtually identical to that in s. 28(3) of the now repealed federal *Public Service Employment Act*, R.S.C. 1985, c. P-33 ("*PSEA*"). Further, pursuant to the now repealed federal *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35, ("*PSSRA*"), an adjudicator appointed under that *Act* only had jurisdiction over a grievance from a termination of employment where the matter involved disciplinary action resulting in a discharge, suspension or financial penalty. I mention this federal legislation here because it comes up in the case law, which I discuss later in these reasons.

[29] Similarly, in the Yukon, a dismissed employee may only seek adjudication of his or her termination if it was done for disciplinary reasons under Part 8 of the *PSA.* However, an employee has no right to seek adjudication of a rejection for cause under s. 104 of that *Act*, because rejection is not considered to be disciplinary, providing it was based on legitimate performance-based concerns.

[30] This issue was addressed by the Supreme Court of Canada in *Jacmain v. A. G. (Can.),* [1978] 2 S.C.R. 15 ("*Jacmain*"). In that case, Mr. Jacmain was rejected on probation and attempted to have his grievance over that rejection referred to adjudication. The majority of the Supreme Court described the purpose of probation, quoting from the unanimous opinion of the arbitrators in *Re United Electrical Workers & Square D Co. Ltd.*, as follows:

> [31] An employee who has the status of being 'on probation' clearly has less job security than an employee who enjoys the status of a permanent employee. One is undergoing a period of testing, demonstration or investigation of his qualifications and suitability for regular employment as a permanent employee, and the other has satisfactorily met the test. The standards set by the company are not necessarily confined to standards relating to quality and quantity of production, they may embrace consideration of the employee's character, ability to work in harmony with others, potentiality for advancement and general suitability for retention in the company. (my emphasis)

[31] De Grandpré J., speaking for the majority at p. 37, quoted Heald J. in the Court of Appeal, as follows:

> In my view, the whole intent of section 28 [of the federal *PSEA*] is to give the employer an opportunity to assess an employee's suitability for a position. If, at any time during that period, the employer concludes that the employee is not suitable, then the employer can reject him without the employee having the adjudication avenue of redress … (my emphasis)

[32] However, because de Grandpré J. concluded that Mr. Jacmain's dismissal was not a case of disciplinary action, he did not find it necessary to decide whether the adjudicator had jurisdiction when the rejection was clearly a disciplinary action. That issue was not resolved until the later decision of the Supreme Court in *Langlois v.*

Ministère de la Justice (Que.), [1984] 1 S.C.R. 472 ("*Langlois*"), which I will return to shortly.

[33] Before doing so, there are two other important points to draw from *Jacmain.*

[34] The first is that there can be no finding of contrivance, sham or camouflage so long as there is at least one legitimate performance-related reason for the rejection. This is evident from the following passage, where de Grandpré J., at p. 36, again quotes from Heald J. in the Court of Appeal:

> … There could only be disciplinary action camouflaged as rejection in a case where no valid or bona fide grounds existed for rejection … (my emphasis)

At p. 37 de Grandpré J. continued:

> The employer's right to reject an employee during a probationary period is very broad. To use the words of s. 28 of the *Public Service Employment Act*, mentioned above, it is necessary only that there be a reason. Counsel for the appellant forthrightly acknowledged at the hearing that at first glance the legislative provision allows the employer to advance almost any reason, and that the employer's decision cannot be disputed unless his conduct was tainted by bad faith … (my emphasis)

[35] The second important point to be drawn from *Jacmain* is that the same conduct might simultaneously constitute both cause for rejection on probation and justification for disciplinary action. Although the employer must choose how to treat the conduct, the choice is entirely within the employer's discretion. De Grandpré J. makes this point by again quoting Heald J. at p. 36:

> … I have no hesitation in expressing the view that the conduct complained of in this case is a classic example of behaviour which would justify rejection of an employee during a probation period … It might **also** be ground for disciplinary action even during a probationary period. However, on the facts here present, it is clear that the employer intended to reject and did in fact reject during

> probation and was, in my view, quite entitled so to do … (my emphasis)

See also *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134 ("*Tello*"), at para. 116.

[36] Returning to *Langlois*, the Supreme Court confirmed its view that the majority in *Jacmain* had decided that an adjudicator would have jurisdiction under the federal *PSSRA* to determine whether a dismissal was in fact a rejection on probation or a disciplinary action, and to proceed in the latter case. After examining the various judgments in *Jacmain,* Chouinard J., speaking for the Court, concluded, at p. 483:

> … in the opinion of five judges of this Court, whereas during his probationary period an employee may be rejected without such administrative action being subject to adjudication, an adjudicator has jurisdiction under the *Public Service Staff Relations Act* to examine whether the action was in fact a rejection or a disciplinary discharge, and to proceed in the latter case.

[37] Thus, had Mr. Schaer's dismissal been referred to adjudication, which it was not, the adjudicator would have had jurisdiction to determine whether the dismissal was a genuine rejection for cause or a disciplinary termination. In that event, the employer would have had the initial burden to establish that the termination was based on a *bona fide* dissatisfaction as to the suitability of the employee, i.e. for a legitimate employment-related reason. If the adjudicator determined that this was the case, then he or she would have had no jurisdiction to proceed further, subject to the employee/grievor satisfying his or her burden to establish that the rejection on probation was a sham or a contrivance to camouflage what was truly a disciplinary action. If the adjudicator was satisfied that this was the case, then he or she would have the jurisdiction to continue the adjudication: *Tello*, at para. 112. In other words, if the decision to terminate was not

based on suitability for continued employment, then an arbitrator, or possibly a court on judicial review, may conclude that the decision was one which was arbitrary and also may have been made in bad faith: *Tello*, at para. 110.

[38] This discussion brings me to what I understand to be Mr. Schaer's principal argument on this issue. He submits that the failure of YG to undertake and complete a Personal Performance Plan ("PPP"), as required by s. 17.11 of the *Collective Agreement* between YG and the Public Service Alliance of Canada, is a complete defence to his dismissal. Mr. Schaer's argument is based on his assertions that he was not provided with a warning of his performance shortcomings, nor any opportunity to rectify those shortcomings before the end of his probationary period.

[39] Section 17.11(1)(a) of the *Collective Agreement* states:

> (i) A regular employee shall have his/her job performance evaluated at the following times:
>
> > 1) prior to the completion of the employee's probationary period …
>
> …
>
> (iii) During the regular employee's probationary period, his/her immediate supervisor will, on an informal basis, advise the employee on the standard of his/her performance and conduct. If the supervisor perceives the probationary employee's performance or conduct as being unsatisfactory, he/she shall advise the employee of the specific areas of concern, the standard of performance and/or conduct expected of the employee and the method for improvement. (my emphasis)

[40] YG concedes that a PPP was not completed prior to Mr. Schaer's rejection on probation. However, it maintains that it still had a legitimate employment-related reason to reject Mr. Schaer, and that was the complete breakdown of the relationship of trust

between him and his employer as a result of his secret digital recordings of conversations he had with colleagues and clients since the commencement of his employment.

[41] In this regard, YG relies on two arbitration decisions: *Smith v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 126 ("*Smith*"); and *Kagimbi v. A.G. (Can.)*, 2014 FC 400 ("*Kagimbi*").

[42] In *Smith,* the grievor was a correctional officer at the Edmonton Institution for Women, in Alberta. She was hired subject to a 12-month period of probation. She was terminated by way of rejection on probation. The letter of termination from the employer set out the following grounds for the rejection:

- she had been absent without leave;
- she had tried to enter the institution with a paring knife in her lunch bag;
- she did not follow instructions regarding the confidentiality of the disciplinary process;
- she used vulgar and abusive language toward her supervisor;
- she ignored instructions about shift changes;
- she tried to obtain drugs to control pain from the Health Care Unit; and
- she failed to respond to radio transmissions.

[43] Ms. Smith grieved because she was not given direction or an opportunity to improve her performance before the rejection. She argued that the rejection on probation was a sham or a camouflage for what was truly disciplinary action. In particular, she argued that she did not receive a performance appraisal, which deprived her of an opportunity to improve or correct any performance deficiencies. Ms. Smith

said that this failure constituted bad faith on the part of the employer. The arbitrator disagreed, holding that the onus on the employee to establish bad faith or contrivance was "a very difficult standard for the grievor to meet" (para. 29). The adjudicator also stated that the grievor should not have needed a performance appraisal to tell her that being absent without leave or being insubordinate, for example, was not acceptable conduct in the workplace (para. 31). Although the adjudicator acknowledged that, in some cases, the absence of a performance appraisal could amount to bad faith, but that this was not such a case. She concluded that the failure to provide the employee with a performance appraisal did not alter the fact that the employer had legitimate reasons to be dissatisfied with her suitability and to reject her on probation (para. 31).

[44] In *Kagimbi*, the grievor again was a correctional officer hired subject to a period of 12 months' probation. In that case, the employee's supervisor prepared a performance appraisal report, in which he noted: that Ms. Kagimbi's performance was unsatisfactory; that she was having difficulty performing her duties; and that she seemed to lack confidence and required constant supervision (para. 6). That same day, based on this report, the grievor was dismissed by the warden. In the dismissal letter, the warden explained that, although Ms. Kagimbi had taken a second training session, there had been no improvement in her performance and she did not meet expected objectives with respect to mastering security equipment and security posts, the ability to learn and the ability to react to a critical incident (para. 7).

[45] Ms. Kagimbi grieved the dismissal. Ultimately, the adjudicator dismissed the grievance on the basis that he did not have jurisdiction and the grievor applied for judicial review.

[46] The Federal Court judge hearing the judicial review relied upon *Jacmain*, as well as the Federal Court of Appeal decision in *Canada (Attorney General) v. Penner*, [1989] 3 FC 429, and the Federal Court decision in *Canada (Attorney General) v. Bergeron*, 2013 FC 365. Like the adjudicator in *Smith,* the judge in *Kagimbi* noted that the employee had "a heavy burden" to demonstrate that the termination was based on a cause other than a *bona fide* dissatisfaction as to suitability (para. 29). In other words, that the employer had acted in bad faith or that the termination was a camouflage or a sham.

[47] The employee argued that the fact she had not been confronted or informed of her shortcomings in her work prior to the day of her dismissal constituted bad faith on the part of the employer.

[48] The judge held that the adjudicator reasonably concluded that the employer's decision was made in good faith and was based on dissatisfaction with the employee's ability to do the work in question (paras. 33 and 34). She also held that there was no requirement to inform the employee of shortcomings prior to the rejection on probation, although that might be advisable in some cases:

> 33 Certainly, the employer could have shown the reports to the applicant so that she could improve her weaknesses, but that is not a criterion required to reject an employee on probation. As the adjudicator properly stated in his decision at para 77:
>
> > . . . in a rejection on probation, the employer must demonstrate good faith in its decision to terminate employment during probation. It cannot use a rejection on probation to camouflage another form of dismissal. **However, it does not mean that the employer is required to be transparent with the employee during his or her probation and to inform the employee of shortcomings in his or her work, to**

> **give the employee a chance to correct them**.
> Common sense and good management practices
> would dictate doing so, but the law does not require it.
>
> … (underlining already added; my bolding)

[49] As I understand him, Mr. Schaer submits that one of the reasons he says the employer was not acting in good faith is because of the language in s. 17.11 of the *Collective Agreement*, which he says is mandatory. Accordingly, Mr. Schaer submits that there was an absolute requirement on the employer to undertake and complete the PPP before extending his probation, and certainly before rejecting him on probation. However, I repeat that the decision to extend his probation is not before me. Further, Mr. Schaer has provided no case law or other authority in support of this argument. On the contrary, it would appear from the *Smith* decision, just discussed above, that the absence of a performance appraisal prior to termination is not fatal and does not automatically lead to a finding of bad faith.

[50] In addition, it cannot fairly be said that Mr. Schaer was not put on notice as to the employer's concerns regarding his workplace performance.

[51] Mr. Schaer maintains that he only had one meeting with his supervisor, Mr. Rideout, on June 20, 2017, where there was a brief mention of feedback from a few individuals about Mr. Schaer's "aggressive" communication style. Mr. Rideout's memo of that meeting also includes the following statement:

> … Andy did not appreciate this feedback and vehemently
> denied that there is an issue with his behaviour.

[52] However, I find that there were a number of other occasions where this issue was raised with Mr. Schaer prior to his rejection on probation.

[53] I find on a balance of probabilities that there was a meeting between Mr. Schaer and Mr. Rideout on July 18, 2017. Mr. Schaer disputes this on the basis that the meeting is not recorded in his work calendar and that if there were such a meeting, it most certainly would have been recorded there. I reject this supposition for two reasons.

[54] First, the overall tenor of the evidence before me is that there were occasionally unscheduled brief meetings between Mr. Schaer and his superiors and co-workers, and that there was generally an open door policy within the department to allow this to occur. Therefore, it does not seem particularly surprising to me that there would have been no recording of the meeting in the calendar.

[55] Second, Mr. Rideout sent an email to Mr. Schaer on Wednesday, July 19, 2017 stating as follows:

> Andy, thank you for taking the time to meet with me Tuesday.
> As discussed, concerns have again been raised regarding your stakeholder engagement initiatives.
> There is a concern that you are pitching ideas to departmental clients rather than actively listening and providing cursory business advice. In addition, it has been raised that clients have perceived your interactions as aggressive in both behaviour and idea generation. Specifically this has been raised by [First Nation client] development corporations.
> This behaviour has also been brought to my attention by colleagues within the department.
> I ask that you give some thought to how to approach client engagement, and that you focus on gaining further understanding of the relationships the department currently has with clients, and our impacts on those. Please refrain from taking any client meetings while I am on annual leave without first checking in with Ian, who is Acting on my behalf. (my emphasis)

[56] Mr. Schaer maintains that the reference to the meeting with Mr. Rideout on "Tuesday" had to have been with respect to Tuesday, June 20th, a month prior. In my

view, that is an unreasonable and tortuous interpretation of what took place. First, the memo prepared by Mr. Rideout regarding the June 20th meeting does not reflect the content of Mr. Rideout's email of July 19th as to what was discussed at the earlier meeting. Further, it is simply logical that Mr. Rideout's reference to the meeting on "Tuesday" would have been more likely the day before, rather than a month earlier. Finally, when Mr. Schaer replied to Mr. Rideout later on July 19, 2017, he in no way suggested that the meeting occurred a month earlier. Nor did he express any surprise as to why the issue was being raised only then. His reply stated in part:

> … I have neither been 'pitching' ideas to persons outside of [the department], nor acting in any way which could be characterized as aggressive with either internal or external stakeholders.
>
> …
>
> I am at a loss to explain these 'complaints'.

[57] Mr. Schaer also disputes that there was a meeting between him and Mr. Rideout on August 3, 2017. Again, his rationale is that, as there was no record of the meeting in his workplace calendar, it could not have taken place. I reject that argument for the same reason I just stated above. Further, there is evidence that Mr. Rideout specifically prepared a memorandum following that meeting. Mr. Schaer suggested that this memorandum had to have been a total fabrication, based on Mr. Rideout's apparent *animus* towards him. I reject that argument as well. Mr. Schaer can point to little or no evidence of such *animus* prior to August 3rd, and certainly none that would plausibly cause Mr. Rideout to conduct himself in such a nefarious manner. Mr. Rideout's memo of the August 3rd meeting includes the following statements:

- Upon my return from annual leave I had an interaction with Andy in my office.
- I was in the middle of responding to a Ministerial Casework when he came to my door for “have you got 30 seconds?”. These interactions typically take 15 - 30 minutes so I said I didn’t at that moment.
- Andy stormed off to his desk, to which I went to his cubicle and asked him to come to my office, to which he replied “Ok, so we’re doing this now. Let’s do this”
- Andy proceeded to inform me that he is aware that I am actively trying to fire him. He stated that Ian, Corey and Tara-Lee are all working to have him fired.
- He stated that he had notes and records of all our interactions and that I needed to be careful of how I progressed over the next few months.
- He controlled the conversation, and was very forceful with his language.
- At the time I just conserved [as written] that he was blowing off steam due to receiving the July 19 email. Upon reflection, I now realize he was threatening me, and was setting the stage for future interactions.

[58] Mr. Schaer does not dispute that he also had a meeting with DM Ferbey on October 20, 2017, although he disagrees to some extent as to how that conversation unfolded. In any event, it was clear that if Mr. Schaer had some concerns about workplace misconduct, he could have raised those concerns with DM Ferbey on that occasion. He did not. Further, if Mr. Schaer was concerned that he was not receiving adequate feedback about his job performance, he could have raised that issue as well. He did not.

[59] Further, it is important to remember that after the letter, extending his probation period on Friday, November 3, 2017, was given to Mr. Schaer, he was invited by ADM Rose to subsequently meet with Mr. Rideout to discuss how to address the performance issues that required his attention. This was confirmed in an email from Mr. Rideout to Mr. Schaer, wherein Mr. Rideout said that he had booked one and a half

hours to meet with him on the following Monday afternoon for that purpose. Mr. Schaer declined the invitation to attend that meeting. Had the meeting taken place, it may well have resulted in the completion of a PPP within the extended period of Mr. Schaer's probation.

[60] Finally, on this subject of notifying Mr. Schaer of his performance shortcomings, when DM Ferbey rejected Mr. Schaer on probation at their meeting on November 8, 2017, his letter specifically stated that Mr. Schaer had refused to participate in a meeting with Mr. Rideout to discuss how YG could assist him in improving his work performance.

[61] The other reason I understand Mr. Schaer to argue that YG did not act in good faith is that he was acting as a "whistleblower", when he made and ultimately disclosed his secret recordings. He argues that his actions in that regard should be seen as an exception to the "duty of loyalty" owed by a public servant who is critical of the government he or she serves.

[62] For the sake of convenience, I will repeat briefly what I said about this sub-issue in my reasons on the two interlocutory applications, cited at 2018 YKSC 17.

[63] The leading case in this regard is *Fraser v. Canada (Public Service Staff Relations Board)*, [1985] 2 S.C.R. 455 ("*Fraser*"), which summarized the law in this area as follows:

> 41 ... As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This

> would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government. (my emphasis)

[64] In *Read v. Canada (Attorney General)*, 2006 FCA 283 ("*Read*"), the Federal Court of Appeal recognized that *Fraser* continues to be good law. Even though it was a pre-*Charter* case, the Court recognized that the common law duty of loyalty, as enunciated in that case, constitutes a reasonable limit under s. 1 of the *Charter of Rights and Freedoms,* to the freedom of expression under s. 2 (para. 109). The Court also commented as follows:

> …
>
> While the freedom of public servants and, in the present case, members of the RCMP, to speak out is protected in common law and by the Charter, the "whistleblower" defence must be used responsibly. It is not a license for disgruntled employees to breach their common law duty of loyalty or their oath of secrecy. In this case, the confidential documents disclosed by the applicant … do not disclose either an illegal act by the RCMP or a practice or policy which endangers the life, health or safety of the public … (emphasis already added) (para. 52)

[65] The Federal Court of Appeal in *Read* also commented on the purpose of the *Fraser* exceptions to the common law duty of loyalty as follows:

> 119 … It is important to remind ourselves that the purpose of the exceptions formulated in *Fraser*, is not to encourage or allow public servants to debate issues as if they were

> ordinary members of the public, unencumbered by responsibilities to their employer. Rather, the purpose of the exceptions, as I understand them, is to allow public servants to expose, **in exceptional circumstances**, government wrongdoing. It appears to me that the exceptions are sufficiently broad to allow public servants to speak out when circumstances arise where disclosure must take precedence over the duty of loyalty. (my emphasis)

[66] As I stated earlier, Mr. Schaer alleges that various statements made by Mr. Rideout and certain co-workers constitute racial discrimination against Aboriginal persons, linguistic discrimination against Francophones, and religious discrimination against Christians. He also maintains that YG has not investigated any of these allegations of workplace misconduct. Clearly, he considers his actions here to fall within one of the exceptional circumstances giving rise to the whistleblower defence.

[67] I disagree.

[68] None of this conduct can fairly be characterized as the government engaging in "illegal acts". That said, I do not dispute that several of the comments Mr. Schaer has emphasized can properly be described as inappropriate in a workplace context. However, the evidence is that DM Ferbey directed that Mr. Schaer's allegations be "fully investigated". Further, DM Ferbey deposed that the department's Director of Human Resources advised him that investigations were completed. He further deposed that he is familiar with the outcomes of those investigations and is satisfied that "appropriate corrective measures were taken wherever [those] were required."[5] Mr. Schaer has provided no evidence to the contrary. Indeed, he acknowledged in his first affidavit that in January 2018 the Public Service Alliance of Canada advised him that there was an

[5] As I stated earlier, it remains unclear whether these investigations included the allegation of racial discrimination, as that was not mentioned in Mr. Schaer's email of November 3, 2017 to DM Ferbey, ADM Rose and Minister Pillai.

ongoing investigation into his workplace misconduct allegations, and that the YEU was representing one of the employees that Mr. Schaer had made allegations against. I find that this corroborates DM Ferbey's evidence in this regard.

[69] Nor is this a situation where it can be said that the government's policies have jeopardized the life, health or safety of the public servant or others. Again, as I understood him, and it was not always easy to do so, Mr. Schaer seemed to argue weakly that his experience of severe chest pain and shortness of breath on November 4, 2017, somehow constituted a jeopardy to his "life, health or safety", presumably caused by the policy of YG in not taking his workplace concerns seriously. I reject this argument as well. First, given the heavy burden on Mr. Schaer to establish bad faith, I conclude that it was necessary for him to do more than simply assert this health issue, without providing any corroborative expert medical opinion. Second, there is absolutely no evidence that any "policies" of YG were threatening Mr. Schaer's health. Rather, it would seem that Mr. Schaer was reacting to the stress of his probation being extended. However, at that point, his employment had not yet been terminated. Third, to the extent that Mr. Schaer alleged, in his email of November 3, 2017, that his supervisor and co-workers performed various illegal or discriminatory acts, there is no evidence that these acts adversely affected his health in any way at the time they allegedly occurred. Finally on this topic, Mr. Schaer cannot argue that his health was jeopardized by YG's reaction to his threat to go public with these allegations, because he had not yet made any such threat (I will return to this last point shortly).

[70] Returning to the language summarizing the exceptions to the duty of loyalty in *Fraser* (see para. 63 above), nor can it fairly be said that Mr. Schaer's conduct and

subsequent criticism of YG had no impact on his ability to continue to perform effectively his duties as a public servant. Clearly, DM Ferbey felt that Mr. Schaer had irreparably damaged YG's trust and confidence in him as an employee by undertaking the secret recordings.

[71] In any event, the whistleblower exception or defence is not absolute. Rather, it requires a balancing of interests. For example, as in *Read*, if a purported whistleblower has used the threat of going public with allegations of misconduct to protect himself from discipline or termination, then the defence is unlikely to succeed (para. 86). It must also be remembered that YG is not seeking to undo what has already been done by Mr. Schaer in making public his various allegations. Rather, it is applying to prevent him from making further disclosures of confidential information acquired during his employment. Finally, I am not persuaded on a balance of probabilities that Mr. Schaer can argue that he was terminated because of his threat to publish the allegations in his email to the DM, ADM and the Minister, of November 3, 2017. A close reading of that email does not disclose any such threat.

[72] I conclude from all this, that YG had a legitimate employment-related reason to reject Mr. Schaer on probation. This was the complete breakdown of the relationship of trust between him and his employer as a result of the secret digital recordings he had made since the commencement of his employment. While one might argue that such conduct might also be grounds for disciplinary action, it is clear from the evidence that YG elected to reject Mr. Schaer on probation rather than take disciplinary action. It had every right to do so: *Jacmain*, at p. 36.

[73] Further, given the record of occasions when Mr. Schaer was apprised of his aggressive communication style, and the fact that he was given the opportunity to meet with his supervisor to discuss how the employer could assist him in improving his work performance, it cannot fairly be said that YG was acting in bad faith when it rejected Mr. Schaer on probation without having completed a PPP.

[74] Nor can it be said that Mr. Schaer's conduct constituted exceptional circumstances justifying his public criticism of the conduct of fellow government employees. Thus, Mr. Schaer's actions do not give rise to the whistleblower defence to the duty of loyalty owed by a government employee. Consequently, YG's rejection decision cannot be said to have been made in bad faith.

[75] In short, Mr. Schaer has not discharged his heavy burden to demonstrate that the rejection was based on a cause other than a *bona fide* dissatisfaction as to suitability, and that the termination was a mere camouflage or a sham to cover up what was really a disciplinary action.

3. *If the rejection decision was a disguised disciplinary dismissal, should judicial review be granted?*

[76] If I am correct in my conclusion that the rejection decision was not a disguised disciplinary dismissal, then I need not answer this question. However, in the event I am incorrect in that conclusion, then I will attempt to do so briefly.

[77] The Supreme Court of Canada has made it clear that judicial review is a discretionary remedy and that one of the discretionary grounds for refusing to undertake judicial review is that there is an adequate alternative remedy.

[78] In *Strickland v. Canada (Attorney General)*, 2015 SCC 37, Cromwell J. for the majority stated:

> 40 One of the discretionary grounds for refusing to undertake judicial review is that there is an adequate alternative. …
>
> …
>
> 42 … As Brown and Evans put it, "in each context the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant's grievance?": topic 3: 2100 (emphasis [already] added).
>
> 43 … Ultimately, this calls for a type of balance of convenience analysis … As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant ..." [*Canada (Auditor General) v. Canada (Minister of Energy*, *Mines and Resources*, [1989] 2 S.C.R. 49, at p. 96].

[79] Furthermore, the Supreme Court has cautioned courts to be especially reluctant to intervene by way of judicial review where the impugned decision affects the employment status of an employee who is subject to a collective bargaining regime, where the union is the exclusive bargaining authority for the employee. This was acknowledged by the Court of Appeal of Yukon in *Alford v. Government of Yukon*, 2006 YKCA 9, as follows:

> 14 The general principle is that an individual represented by a union lacks standing to seek judicial review of an arbitration decision conducted between an employer and union. This principle emerges from the exclusive bargaining authority of the union and the objective of promoting harmonious and stable labour relations. In ***Noël v. Société d'énergie de la Baie James***, [2001] 2 S.C.R. 207, 2001 SCC 39 LeBel J. described this principle:
>
> > [62] ... even in discipline and dismissal cases, the normal process provided by the Act ends with arbitration. That process represents the normal and exclusive method of

> resolving the conflicts that arise in the course of administering collective agreements, including disciplinary action. In fact, this Court gave strong support for the principle of exclusivity and finality in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at pp. 956-957 and 959, *per* McLachlin J.. That approach is also intended to discourage challenges that are collateral to disputes which, as a general rule, will be definitively disposed of under the procedure for administering collective agreements. While judicial review by the superior courts is an important principle, it cannot allow employees to jeopardize this expectation of stability in labour relations in a situation where there is union representation. Allowing an employee to take action against a decision made by his or her union, by applying for judicial review where he or she believes that the arbitration award was unreasonable, would offend the union's exclusive right of representation and the legislative intent regarding the finality of the arbitration process, and would jeopardize the effectiveness and speed of the arbitration process. (my emphasis)

[80] In the case at bar, Mr. Schaer attempted to obtain the assistance of the YEU to grieve his rejection on probation, but the union declined. According to Mr. Schaer's first affidavit, the reason the union declined was because he had not apprised it of the workplace discrimination and wrongdoings when they first occurred. Therefore, the union could not represent him in a grievance of same. The fact that Mr. Schaer currently takes the position that the union has breached its duty of fair representation in failing to take on his grievance is a dispute between himself and the union. It forms no part of this judicial review.

[81] Had Mr. Schaer acted in a timely fashion in bringing his complaints to his union, he may well have had the union's assistance in grieving his rejection on probation as a disguised disciplinary dismissal. Therefore, he had an adequate alternative remedy and judicial review of the rejection decision should be declined.

4. *Should a permanent injunction be granted to restrain Mr. Schaer from further breaches of the obligation of confidentiality contained in the Solemn Affirmation of Office?*

[82] As I understand him, Mr. Schaer has taken the position that he is no longer bound by any obligation of confidentiality because his defence of whistleblowing is an exception to the common law duty of loyalty to his employer. However, I have already concluded above that Mr. Schaer does not have a defence of whistleblowing in this case.

[83] Even if I am incorrect in concluding that Mr. Schaer does not have a whistleblowing defence, as was suggested by the Federal Court of Appeal in *Read*, there must be strong justification for any breach of the obligation of confidentiality owed by a government employee to his or her employer. The Court in *Read* specifically stated that the whistleblower defence must be used responsibly and that it is not a license for disgruntled employees to breach their common law duty of loyalty or their oath of secrecy. Further, the Court said that justifications for breaching this loyalty only arise in "exceptional circumstances". Mr. Schaer has established no such circumstances. Finally, there is absolutely no evidence that any <u>further</u> disclosures by Mr. Schaer would meet the test established by the Supreme Court in *Fraser* that disclosure is necessary to expose government illegality or to protect the life, health or safety of the public.

[84] The Supreme Court has also stated that the loss of confidentiality is itself a "detriment", even if the information disclosed has no commercial value or causes no monetary loss: *Cadbury Schweppes v. FBI Foods*, [1999] 1 S.C.R. 142, at para. 53 ("*Cadbury*"). Further, injunctive relief is available in appropriate circumstances to

restrain the apprehended or continued misuse or disclosure of confidential information: *Cadbury*, at para. 78.

[85] Accordingly, I grant a permanent injunction to restrain Mr. Schaer from any further breaches of the obligation of confidentiality contained in the Solemn Affirmation of Office. This, of course, prevents Mr. Schaer from publishing any further information arising from any of his secret recordings during his employment with YG.

CONCLUSION

[86] Mr. Schaer's petition seeking judicial review of the rejection decision is dismissed.

[87] YG's petition seeking a permanent injunction to restrain Mr. Schaer from further breaches of the obligation of confidentiality is granted.

[88] As YG was the successful party on these cross applications, it is entitled to its taxed party and party costs.

[89] I direct YG's counsel to prepare the order resulting from these reasons. I waive the requirement for Mr. Schaer's signature approving the form of the order, but I direct that the draft order come to me for review before it is issued.

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GOWER J.