COURT OF APPEAL OF YUKON

Citation: *Schaer v. Yukon (Department of Economic Development)*, 2019 YKCA 11

Date: 20190628
Docket: 18-YU832

Between:

Andrew Schaer

Appellant
(Applicant)

And

**Justin Ferbey, Deputy Minister,
Department of Economic Development, Government of Yukon**

Respondent
(Respondent)

Before: The Honourable Mr. Justice Savage
The Honourable Madam Justice Fisher
The Honourable Madam Justice Smallwood

On appeal from: An order of the Supreme Court of Yukon, dated October 5, 2018 (*Schaer v. Yukon (Government of)*, 2018 YKSC 46, Whitehorse Dockets 17-AP014 and 17-A0183).

The Appellant, appearing in person:	A. Schaer
Counsel for the Respondent:	I.H. Fraser
Place and Date of Hearing:	Whitehorse, Yukon November 23, 2018
Place and Date of Judgment:	Vancouver, British Columbia June 28, 2019

Written Reasons by:
The Honourable Madam Justice Smallwood

Concurring Reasons by:
The Honourable Madam Justice Fisher (Page 13, para. 45)

Concurring Reasons by:
The Honourable Mr. Justice Savage (Page 16, para. 55)

Summary:

The appellant was dismissed for cause during his probationary employment with the respondent government. His petition for judicial review of the decision to reject him on probation was dismissed. Held: Appeal dismissed. Although the chambers judge did not address the standard of review, the decision to release the appellant on probation withstands scrutiny on either a reasonableness or a correctness standard. Per Fisher J.A., concurring: The chambers judge did not identify the correct standard of review, which was reasonableness, nor did he apply it correctly. Instead, he determined the factual and legal issues before him as if he were hearing a summary trial. However, the record established that the decision to dismiss the appellant fell within a range of reasonable outcomes and therefore there is no basis for this court to interfere with the order dismissing the petition.

Reasons for Judgment of the Honourable Madam Justice Smallwood:

Introduction

[1] This appeal concerns the dismissal for cause of a public service employee while on probation and whether that dismissal was reasonable.

[2] The appellant, Andrew Schaer, was a probationary employee of the Government of Yukon who was dismissed for cause during his probationary period. He appealed that decision to the Deputy Minister who dismissed his appeal. Mr. Schaer then sought judicial review of the decision to reject him on probation. His Amended Petition was dismissed by the chambers judge and Mr. Schaer now appeals from the order dismissing his Amended Petition.

Background

[3] Andrew Schaer was hired as a Senior Business Development Advisor in the Department of Economic Development, Government of Yukon. His employment commenced on May 10, 2017, with a six-month probationary period, which could be extended for further periods of time, not to exceed an additional six-months. Mr. Schaer's position was included in a bargaining unit and was covered by a collective agreement.

[4] In October 2017, Justin Ferbey, the Deputy Minister of Economic Development decided to extend Mr. Schaer's probationary period for six months to

address performance issues that had been raised. A letter dated October 26, 2017, (and delivered on November 3, 2017) advised Mr. Schaer of that decision.

[5] Following a meeting on November 3, 2017, in which Mr. Schaer was advised of the extension of his probationary period, Mr. Schaer sent an e-mail to the Deputy Minister, copying the Assistant Deputy Minister and the Minister. In the e-mail, Mr. Schaer advised that he had been "both documenting and (digitally) sound recording my interaction (conversations and meetings) with *all* internal and external stakeholders". In addition, he complained about the extension of his probationary period, complained that he had not received feedback on his job performance as required by the Collective Agreement, and made a number of allegations of harassment, bullying and abuse of authority that he claimed to have experienced in the workplace.

[6] Mr. Schaer was invited to meet with his supervisor to discuss how to address the performance issues raised in the Deputy Minister's letter. On November 6, 2017, Mr. Schaer emailed his supervisor indicating that, on the advice of counsel, he refused to engage in further discussions related to the November 3, 2017 meeting or the Deputy Minister's letter.

[7] On November 8, 2017, the Deputy Minister advised Mr. Schaer in a letter that he was releasing him on probation pursuant to s. 104 of the *Public Service Act,* R.S.Y. 2002, c. 183 [*PSA*], effective immediately.

[8] Mr. Schaer appealed the decision of the Deputy Minister pursuant to an internal process and attended a hearing before the Deputy Minister on December 12, 2017. On December 27, 2017, the Deputy Minister decided not to reinstate Mr. Schaer's employment.

[9] Mr. Schaer filed a Petition seeking judicial review of the Deputy Minister's decision of December 27, 2017, dismissing his appeal. The Petition was later amended to instead seek judicial review of the Deputy Minister's November 8, 2017

decision to release Mr. Schaer while on probation. He sought to have the November 8, 2017 decision quashed and his employment reinstated.

[10] The Government of Yukon also filed a Petition seeking 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 employment with the Government of Yukon.

[11] The two matters were heard together. On October 5, 2018, the chambers judge, Justice Gower, dismissed Mr. Schaer's application for judicial review and granted the Government of Yukon's application for a permanent injunction.

[12] The Appellant appeals from the order of Gower J. to dismiss his petition. He seeks that the order be set aside and requests that this court grant the relief sought in his Amended Petition.

On Appeal

[13] This is an appeal from an order made in a petition for judicial review. The role of an appellate court on an appeal from a judicial review is, as stated in *Compagna v. Nanaimo (City),* 2018 BCCA 396 at para. 33:

> … to determine whether the chambers judge identified the correct standard of review and applied that standard correctly. The appellate court should focus on the administrative decision under review and effectively step into the shoes of the chambers judge: *Dr. Q. v. College of Physicians and Surgeons of British Columbia,* 2003 SCC 19 at para. 43; *Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36 at paras. 45-47; *Fraser Mills Properties Ltd. v. Coquitlam (City)*, 2018 BCCA 328 at para. 12.

[14] In the rare circumstances where a chambers judge has to make original findings of fact, deference is owed to those findings: *Fraser Mills Properties Ltd. v. Coquitlam (City)*, 2018 BCCA 328 at para. 12.

[15] The parties' submissions on appeal and before the chambers judge focused on the November 8, 2017 decision of the Deputy Minister to release Mr. Schaer on probation rather than the Deputy Minister's later decision dismissing Mr. Schaer's appeal of his release on probation. The Deputy Minister's dismissal of Mr. Schaer's

appeal is the final decision, which should normally be the decision under review. However, the appeal proceeded under an internal process ("non-legislated" as described by the chambers judge), that decision is not before us, and the Deputy Minister's reasoning for the dismissal of Mr. Schaer's appeal is not clear in the record. In any event, the parties appear to have approached this case as though the December 27, 2017 decision of the Deputy Minister was made on the same basis as the November 8, 2017 decision.

[16] In this case, I do not think that this distinction makes a difference. Both decisions were made by the Deputy Minister and the issues under consideration do not turn on the differences between the decision to reject Mr. Schaer on probation and the appeal of that decision to the Deputy Minister. For these reasons, I am content to deal with the decision to reject Mr. Schaer on probation as was argued before us, and before the chambers judge.

Standard of Review

[17] There are two possible standards of review in a judicial review of a decision made by a tribunal or administrative decision-maker: correctness or reasonableness: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[18] The standard of reasonableness is one where deference is afforded to the decision and there is a review of the administrative decision-maker's reasoning process and decision. Deference is shown with respect to the facts and the law. Ultimately, the decision must be within a range of possible, acceptable outcomes. Applying the reasonableness standard involves a search for justification, transparency and intelligibility in the decision-making process: *Dunsmuir, supra* at paras. 47–49.

[19] There is a difference in approach when considering judicial review versus appellate review of a decision, as stated in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53 at paras. 30–31:

> The concept of deference is also what distinguishes judicial review from appellate review. Although both judicial and appellate review take into account the principle of deference, care should be taken not to conflate the two. In the context of judicial review, deference can shield administrative decision makers from excessive judicial intervention even on certain questions of law as long as these questions are located within the decision makers' core function and expertise. In those cases, deference would therefore extend to protect a range of reasonable outcomes when the decision maker is interpreting its home statute (see R.E. Hawkins, "Whither Judicial Review?" (2010), 88 *Can. Bar Rev.* 603).
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> By contrast, under the principles of appellate review set down in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, an appellate court owes no deference to a decision maker below on questions of law which are automatically reviewable on the standard of correctness. In *Khosa*, a majority of the Court confirmed that these principles of appellate review should not be imported into the judicial review context.

[20] In this case, the chambers judge did not explicitly discuss the standard of review. Reviewing the decision as whole, it does not appear that the chambers judge gave deference to the decision maker but he instead undertook his own analysis and made his own determination of the issues. While this was not the correct approach to take, I would not interfere with the decision of the chambers judge to dismiss the petition. The Deputy Minister's decision to release Mr. Schaer on probation withstands scrutiny on either a reasonableness or a correctness standard. The role of this court then is to focus on the Deputy Minister's decision and undertake the judicial review analysis.

[21] In his written submissions, Mr. Schaer accepts the reasonableness standard when he argues that the chambers judge failed to properly apply the reasonableness standard when considering the Deputy Minister's decision to reject him on probation. The standard of review for decisions related to the termination of employment in the public service is one of reasonableness: *Dunsmuir, supra* at paras. 66–71.

Applicable Law

[22] Under s. 104 of the *PSA*, an employee on probation can be rejected for cause. The section states:

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

[23] The effect of a rejection under s. 104 is that the person ceases to be an employee on the termination date: s. 105 of the *PSA.* The *PSA* does not contain a right of appeal or review of the termination of an employee on probation. Moreover, pursuant to s. 78(3) of the *Public Service Labour Relations Act*, R.S.Y. 2002, c. 185, an employee cannot access the grievance procedure for a release for cause during the probationary period.

[24] This is contrasted with Part 8 of the *PSA* which deals with the suspension and dismissal of employees and provides an employee with the right to appeal or seek adjudication of the decision. An employee can be suspended or dismissed under s. 121 on several grounds including misconduct, neglect of duties, and unsatisfactory performance. An employee who is dismissed on probation may only seek adjudication of their termination if it was done for disciplinary reasons: *Jacmain v. A.G. (Canada)*, [1978] 2 S.C.R. 15.

[25] The right to appeal to an adjudicator under Part 8 does not include decisions regarding the employment status of probationary employees. An employee rejected on probation for cause cannot seek adjudication of their dismissal as it is not considered a disciplinary decision: *Alford v. Government of Yukon,* 2006 YKCA 9 at para. 20.

[26] The right of an employer to reject an employee on probation is broad. An employer can terminate a probationary employee as long as it is based on a legitimate performance-based concern. There can be no finding that a dismissal was contrivance, sham or camouflage for a disciplinary dismissal as long as there is at least one legitimate performance related reason for the dismissal: *Jacmain* at p. 36–38.

[27] The conduct in question may justify rejection of an employee on probation and may also ground disciplinary action. The employer must choose how to treat the conduct and the choice is entirely within the employer's discretion: *Jacmain* at p. 36.

Analysis

[28] The letter rejecting Mr. Schaer on probation referred to the extension of probation decision, which had been communicated to Mr. Schaer at a meeting on November 3, 2017, and to Mr. Schaer's subsequent e-mail in which he disclosed "documenting and (digitally) sound recording my interaction (conversations and meetings) with *all* internal and external stakeholders".

[29] The Deputy Minister characterized the act of digitally recording meetings and conversations as "highly inappropriate" and that it had "irreparably damaged" the employer's trust and confidence in Mr. Schaer.

[30] The Deputy Minister went on to note, with respect to Mr. Schaer's claims of harassment, bullying and abuse of authority by his supervisor, that Mr. Schaer had not previously raised any concerns about harassment, bullying or abuse of authority prior to his e-mail.

[31] The Deputy Minister noted that Mr. Schaer had been invited to a follow-up meeting to discuss concerns about his work performance but had declined to engage in any further discussions related to the meeting or the probation extension letter. The Deputy Minister determined that Mr. Schaer's "refusal to participate in such discussions" made it impossible to engage in meaningful dialogue regarding his "performance and conduct". As such, the Deputy Minister concluded that the employment relationship was no longer tenable.

[32] A review of the materials filed on appeal demonstrate that the Deputy Minister's assessment of the facts was supported by the evidence. Mr. Schaer, in his e-mail, admitted that he had been digitally recording conversations and meetings with co-workers and external stakeholders. There is no evidence that Mr. Schaer raised the issue of harassment, bullying or abuse of authority with anyone prior to

November 3, 2017. As well, in an e-mail sent to his supervisor on November 6, 2017, Mr. Schaer declined to engage in any further discussion about the meeting or the probation extension letter.

[33] Is the conduct outlined in the Deputy Minister's November 8, 2017 letter sufficient to justify rejection on probation pursuant to s. 104 of the *PSA*? In my view, the answer is yes. The Deputy Minister's letter referred to legitimate performance-based concerns related to Mr. Schaer's conduct as a probationary employee, amply supported by the evidence.

[34] The revelation that Mr. Schaer had been secretly recording all co-workers and external stakeholders took an employment relationship with some performance-based concerns to the breaking point, resulting in the complete breakdown of trust in that relationship. In my view, a dismissal motivated by such a breakdown constitutes cause for dismissal under s. 104 of the *PSA*.

[35] Mr. Schaer has raised claims, in this court and before the chambers judge, that he was a whistleblower. He claims that his actions in recording others and later advising the Deputy Minister and other department officials of his actions were done to expose the harassment, bullying and abuse of authority he had been subjected to and justified the breach of his common law duty of loyalty to the employer.

[36] Government employees owe a duty of loyalty to their employer. The "whistleblower" defence is intended to be used in exceptional circumstances to expose government wrongdoing and to justify the employee's breach of their common law duty of loyalty to their employer and their oath of secrecy. It is to be used responsibly to expose illegal acts or government policies that jeopardize the life, health or safety of the public servant or others. It is not a licence for disgruntled employees to breach their duty of loyalty: *Read v. Canada (Attorney General),* 2006 FCA 283 at paras. 34, 52 and 119; see also *Anderson v. IMTT-Quebec Inc.,* 2013 FCA 90 at para. 19.

[37] The conduct that Mr. Schaer complained of cannot be characterized as illegal acts or government policies that jeopardize the life, health or safety of the public servant or others. Some of the incidents are examples of inappropriate workplace behaviour which were, according to the evidence, investigated and dealt with once they were reported. The record shows that Mr. Schaer did not raise any concerns about harassment, bullying or abuse of authority in the workplace with his supervisor, or anyone else within the department, until after he had been notified of the extension of his probation. Further, Mr. Schaer's e-mail advising that he had been recording meetings and conversations indicated that he had been engaged in recording since commencing his employment. If Mr. Schaer began recording when his employment began and not in response to a specific incident, it is difficult to reconcile his actions in secretly recording all co-workers and external stakeholders with his claim that he did so as a whistleblower.

[38] Mr. Schaer's conduct in secretly recording conversations and meetings from the commencement of his employment provided the Government of Yukon with a legitimate performance-related reason to reject him on probation. His actions resulted in the complete breakdown in trust in the employment relationship. As there was a legitimate performance-related reason to reject Mr. Schaer on probation, it follows that the Deputy Minister's November 8, 2017 decision was reasonable.

[39] In the face of Mr. Schaer's admitted conduct, the employer had the option of rejecting Mr. Schaer on probation pursuant to s. 104 of the *PSA* or undertaking disciplinary action under Part 8 of the *PSA.* The Government of Yukon elected to reject Mr. Schaer on probation as it had the right to do. The Deputy Minister's decision was within a range of possible, acceptable outcomes. A review of the Deputy Minister's decision reveals that there was justification, transparency and intelligibility in the decision-making process.

[40] Mr. Schaer has also argued that the failure of the Government of Yukon to complete a performance plan as required by the collective agreement before

rejecting him on probation is evidence of bad faith and demonstrates that his dismissal was contrived to camouflage a disciplinary dismissal.

[41] This argument is simply an attempt to re-try this matter, which is not our role. I would, however, note that the conduct referred to in the Deputy Minister's November 8, 2017 letter related to the concerns that precipitated the extension of Mr. Schaer's probation. The Deputy Minister referred to these concerns as being about Mr. Schaer's perceived aggressive communication style, his ability to listen, and his ability to respect and understand different ideas and perspectives. While the probation extension letter did not outline any concerns and simply advised Mr. Schaer that his probation was being extended, the record shows that performance-related concerns were discussed with Mr. Schaer at the November 3, 2017 meeting, as well as on a number of earlier occasions.

[42] Mr. Schaer was invited to meet on November 6, 2017, to develop a plan to address the concerns. Mr. Schaer's response was to decline to engage in any further discussion relating to the meeting or the probation extension letter. The refusal to address the concerns which warranted the extension of probation could also give rise to a legitimate performance-related concern sufficient to warrant rejection for cause on probation. Indeed, the Deputy Minister's letter referred to Mr. Schaer's refusal to participate in discussions about his conduct as making it impossible to engage in meaningful dialogue and resulting in the employment relationship being no longer tenable.

[43] Given my conclusions on these issues, it is not necessary to address the other issue raised by Mr. Schaer, whether there was an adequate alternate remedy to judicial review.

Disposition

[44] A review of the Deputy Minister's decision reveals that there was a legitimate performance-related reason for rejecting Mr. Schaer on probation, which was supported by the evidence, and that the decision falls within the range of possible,

acceptable outcomes. For these reasons, I would dismiss the appeal with costs to the Government of Yukon.

"The Honourable Madam Justice Smallwood"

Reasons for Judgment of the Honourable Madam Justice Fisher:

[45] I agree with the disposition of this appeal made by my colleague, Justice Smallwood. I would like to address some of the procedural issues that arise from the manner in which this case was presented to and addressed by the judge below.

[46] As Justice Smallwood has pointed out, this is an appeal from an order made in a petition for judicial review. As such, the role of this court is to determine whether the chambers judge identified the correct standard of review and applied that standard correctly. In this case, the chambers judge made no mention of the standard of review and proceeded to determine the factual and legal issues before him as if he were hearing a summary trial. Upon a review of the record, it appears that the judge fell into error in this regard due, at least in part, to the approach taken by the parties, an approach that continued on appeal.

[47] The appellant sought to judicially review the November 8, 2017 decision of the Deputy Minister rejecting him on probation under s. 104 of the *PSA*. The respondents to the petition were Justin Ferbey, the Deputy Minister who made the decision, the Department of Economic Development, and the Government of Yukon. There is no response to the appellant's petition contained in the appeal record before this court. In the absence of this pleading, the only way to determine the approach taken by the respondents to the petition is by the materials filed in support of their position.

[48] Included in those materials is a detailed affidavit sworn by Mr. Ferbey himself, setting out his evidence not only about the factual background leading up to his decision but also the reasons for his decision. Given the nature of a judicial review, I consider it highly unusual for a decision maker to provide such evidence. The reasons for the decision are set out in the November 8, 2017 letter rejecting the appellant from probation, and the facts leading up to this decision can be discerned from the record that was available to the Deputy Minister.

[49] I appreciate that the appellant, as a self-represented petitioner, contested many of the facts. However, rather than assess whether the Deputy Minister's decision was reasonable (the standard of review mandated by *Dunsmuir v. New Brunswick*), the chambers judge proceeded to determine whether Mr. Ferbey's decision was a "contrived reliance" on s. 104 of the *PSA* to "disguise a disciplinary dismissal", which the parties described as the "central issue".

[50] I appreciate that there may be occasion, in a judicial review, where a chambers judge may be called on to make findings of fact, but such circumstances will be rare. I also appreciate that this was a decision regarding employment, which engaged the various provisions of the *PSA* and the *Public Service Labour Relations Act*, as outlined by my colleague. However, parties and reviewing judges must not lose sight of the limitations of judicial review. It is not the role of the reviewing court to conduct a trial of an issue. Unfortunately, this is what the parties presented to the chambers judge.

[51] This misconception continued on appeal, reflected in the parties' approach to the standard of review. The appellant referred to the standards of correctness and reasonableness, but focused on the ability of appellate courts to interfere with findings of fact on palpable and overriding error. The respondents submitted that the standard of review is palpable and overriding error on the issue of whether the termination was a disguised disciplinary action or a *bona fide* rejection for cause, and correctness on questions of law alone.

[52] With respect, these submissions reflect the principles of appellate review rather than judicial review. As the Supreme Court of Canada explained in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, the concept of deference distinguishes judicial review from appellate review. The concept of deference will often "shield administrative decision makers from excessive judicial intervention" on both questions of law and fact. As long as a decision is based on relevant factors and falls within a range of reasonable outcomes, it is not for a reviewing court to make new or independent findings of fact.

[53] Therefore, it is my view that the chambers judge did not identify the correct standard of review, nor did he apply it correctly. The role of this court then, is to focus on the Deputy Minister's decision and assess whether it falls within a range of reasonable outcomes with respect to both the facts and the law. Given the evidence in the record, as reviewed by my colleague, I agree that the decision was reasonable.

[54] Accordingly, despite my concerns about the approach taken by the chambers judge, I, too, would not interfere with his decision to dismiss the petition and would dismiss the appeal.

"The Honourable Madam Justice Fisher"

Reasons for Judgment of the Honourable Mr. Justice Savage:

[55] I concur with the reasons for judgment of both Madam Justice Smallwood and Madam Justice Fisher.

"The Honourable Mr. Justice Savage"