Federal Court  Cour fédérale

Date: 20141113

Docket: T-484-14

Citation: 2014 FC 1066

Ottawa, Ontario, November 13, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision dated January 27, 2014, of an Appeals Officer of the Occupational Health and Safety Tribunal of Canada [the Tribunal], rescinding a Direction issued by a Health and Safety Officer [HSO] finding that the employer was under an obligation to appoint a competent person to investigate a complaint alleging contravention of paragraph 125(1)(z.16) of the *Canada Labour Code*, RSC, 1985, c L-2) [the Code] and subsection 20.9(3) of the *Canada Occupational Health and Safety Regulations*, (SOR/86-304) [Regulations].

I. Background

[2] On November 28, 2011, an employee of the Canadian Food Inspection Agency [CFIA] made a verbal complaint to his supervisor relating to their working relationship.

[3] On December 2, 2011, the employee followed up with a written complaint, raising allegations of miscommunication, favouritism, humiliation, unfair treatment and a lack of respect on the part of his supervisor.

[4] On January 2012, Mr. Schmidt, the Regional Director of the CFIA for Saskatchewan [the Regional Director] was asked to undertake a fact-finding review of the concerns raised by the employee in his complaint.

[5] On February 2, 2012, the Regional Director made a summary after conducting internal investigations and concluded that there were communication issues and unresolved tension between the employee and his supervisor, but that there was no evidence of harassment, and therefore no further investigation was warranted. These findings were communicated to the employee on February 6, 2012.

[6] On February 9, 2012, Health and Safety Officer Joanne Penner [HSO Penner] was contacted by the employee requesting an investigation into his complaint, in accordance with subsection 20.9(3) of Part XX of the Regulations. The employee felt that the Regional Director had conducted an investigation under section 20.9(3) of the Regulations, and he was not a

“competent person”, as defined by the Regulations under section 20.9(1), in that he was not sufficiently impartial.

[7] On February 13, 2012, HSO Penner emailed the parties, advising the CFIA that they must follow the process set out in Part XX of the Regulations.

[8] On March 16, 2012, CFIA management responded that they did not believe the complaint fit under Part XX of the Regulations and that an investigation was not warranted.

[9] The employee and his Certified Bargaining Agent, the Public Service Alliance of Canada [PSAC], communicated numerous times with HSO Penner, informing her they did not believe the CFIA was taking her suggested actions.

[10] On September 6, 2012, HSO Penner issued a Direction requiring the CFIA to appoint an impartial competent person to investigate the complaint, pursuant to the Code and Part XX of the Regulations.

[11] On September 6, 2012, CFIA filed an appeal with the Tribunal.

[12] On January 27, 2014, the Appeals Officer of the Tribunal (Michael Wiwchar) [Appeals Officer] issued a decision allowing the appeal and rescinding HSO Penner’s Direction.

[13] On February 26, 2014, the Applicant filed a notice of application for judicial review of the Appeals Officer's decision.

[14] The Appeals Officer based his decision on a finding that the employee's allegation of harassing conduct on the part of his supervisor did not meet the definition of "work place violence" included in the Regulations, and therefore the employer was not obligated to appoint a "competent investigator". He overturned the Direction from HSO Penner requiring the CFIA to conduct an investigation into the matter, in compliance with Part XX of the Regulations.

[15] This is apparently the first instance of the Tribunal interpreting the definition of "work place violence" and the process to be followed under section 20.9 of the Regulations.

II. Issue

[16] Was the Appeals Officer's decision unreasonable?

III. Standard of Review

[17] The appropriate standard of review in this case is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 48, 51).

IV. Analysis

[18] The Applicant argues that the Appeals Officer accepted an unfettered authority on the part of the employer to conduct their own investigations into alleged word place violence, before

deciding whether to appoint a "competent person". The Applicant's position is that this result has no support in the Regulations and effectively operates to circumvent their very purpose, by fundamentally undermining the right of an employee to an impartial investigation into a complaint of work place violence.

[19] HSO Penner's basis for finding non-compliance with the Regulations is set out in her summary of file, which states:

> Upon review, the following factors were considered in concluding non-compliance:
>
> **1. The Initial Fact Finding Report/Mediation**
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> CFIA have stated (September 28, 2012 letter in response to Direction) that this Fact Finding report falls under 20.9(2) of the Canada Labour Code. They also state that consistent with 20.9, the mediator was retained to facilitate discussions between the employee and supervisor. Both these statements on the surface appear to comply with the legislation.
>
> But, the non-compliance factor comes to light when the employer, during this "Fact Finding", determines arbitrarily what…work place violence is and what it is not. Section 20.9(2) states that once the employer becomes aware of work place violence or alleged work place violence, the employer shall try to resolve the matter with the employee. It does not state anywhere in the legislation that the employer shall arbitrarily decide on their own if the employee should consider the event that occurred workplace violence or not. If this was the case then employers would be allowed to arbitrarily decide…if an employee should be allowed to refuse work for Danger or not.
>
> […]
>
> **2. Competent Person/Impartial Person:**
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> In CFIA's Assurance of Voluntary compliance response (May 31, 2012) to HSO Penner, they state that Ken Schmidt's Fact Finding complied with 20.9(3) and that he was considered their competent person investigating this conflict.

> CFIA states that they made the OHS Co-Chair and union know that the investigation was going to take place and submitted a photocopy of an email they refer to for the HSO's review. This email dated December 18, 2011 states that "should the fact-finding warrant an investigation under Part XX of the COSH Regs, it may take time for the co-chairs to locate and **agree** to an investigation". This email response shows that at the time of the initial complaint, CFIA employers/management did not consider this fact finding investigation as being in compliance with 20.9(3) as they state it will take time to "agree to an investigator" later. This implies they were aware that an investigation process was normally involved but chose not to take it and "agree" implies they are well aware of the need for an impartial investigator.

[20] In allowing the CFIA's appeal of HSO Penner's decision, the Appeals Officer found that the obligation to appoint a competent person is triggered by:

i. first, the awareness of work place violence or alleged work place violence; and
ii. second, the unsuccessful attempts to resolve the situation by the employer.

[21] The Appeals Officer held that the employee's allegations of favouritism, humiliation and disrespectful behaviour fall short of constituting work place violence, as the allegations could not reasonably be expected to cause harm, injury or illness to the employee. Consequently, he found that the employer was under no obligation to appoint a competent person to investigate the employee's allegations.

[22] The Appeals Officer further found that a reasonable interpretation of the Regulations supports the employer making the initial determination of deciding whether an employee's allegation of work place violence has been established. Otherwise, any allegation of work place violence could lead to the mandatory appointment of a competent person to investigate complaints even if those complaints clearly don't fall within the definition of work place violence, pursuant to the Regulations.

[23] The underlying questions that must be decided are (i) what constitutes “work place violence” and does a reasonable interpretation of work place violence exclude harassment; and (ii) does an employer have the authority to investigate complaints of work place violence as a “competent person”; (iii) if not, at what stage of the complaint process must a competent person be involved, once an allegation of work place violence is made by an employee to the employer?

[24] Section 20.9 sets out the procedural obligations of an employer if that employer becomes aware of work place violence or alleged work place violence:

Notification and Investigation	**Notification et enquête**
20.9 (1) In this section, “competent person” means a person who	20.9 (1) Au présent article, « personne compétente » s’entend de toute personne qui, à la fois :
(a) is impartial and is seen by the parties to be impartial;	a) est impartiale et est considérée comme telle par les parties;
(b) has knowledge, training and experience in issues relating to work place violence; and	b) a des connaissances, une formation et de l’expérience dans le domaine de la violence dans le lieu de travail;
(c) has knowledge of relevant legislation.	c) connaît les textes législatifs applicables.
(2) If an employer becomes aware of work place violence or alleged work place violence, the employer shall try to resolve the matter with the employee as soon as possible.	(2) Dès qu’il a connaissance de violence dans le lieu de travail ou de toute allégation d’une telle violence, l’employeur tente avec l’employé de régler la situation à l’amiable dans les meilleurs délais.
(3) If the matter is unresolved, the employer shall appoint a competent person to investigate the work place violence and provide that person with any relevant information whose disclosure is not prohibited by law and	(3) Si la situation n’est pas ainsi réglée, l’employeur nomme une personne compétente pour faire enquête sur la situation et lui fournit tout renseignement pertinent qui ne fait pas l’objet d’une interdiction légale de

that would not reveal the identity of persons involved without their consent.

(4) The competent person shall investigate the work place violence and at the completion of the investigation provide to the employer a written report with conclusions and recommendations.

(5) The employer shall, on completion of the investigation into the work place violence,

(a) keep a record of the report from the competent person;

(b) provide the work place committee or the health and safety representative, as the case may be, with the report of the competent person, providing information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent; and

(c) adapt or implement, as the case may be, controls referred to in subsection 20.6(1) to prevent a recurrence of the work place violence.

(6) Subsections (3) to (5) do not apply if

(a) the work place violence was caused by a person other than an employee;

(b) it is reasonable to consider that engaging in the violent situation is a normal condition of employment; and

(c) the employer has effective procedures and controls in place, involving employees to address work place violence.

communication ni n'est susceptible de révéler l'identité de personnes sans leur consentement.

(4) Au terme de son enquête, la personne compétente fournit à l'employeur un rapport écrit contenant ses conclusions et recommandations.

(5) Sur réception du rapport d'enquête, l'employeur :

a) conserve un dossier de celui-ci;

b) transmet le dossier au comité local ou au représentant, pourvu que les renseignements y figurant ne fassent pas l'objet d'une interdiction légale de communication ni ne soient susceptibles de révéler l'identité de personnes sans leur consentement;

c) met en place ou adapte, selon le cas, les mécanismes de contrôle visés au paragraphe 20.6(1) pour éviter que la violence dans le lieu de travail ne se répète.

(6) Les paragraphes (3) à (5) ne s'appliquent pas dans les cas suivants :

a) la violence dans le lieu de travail est attribuable à une personne autre qu'un employé;

b) il est raisonnable de considérer que, pour la victime, le fait de prendre part à la situation de violence dans le lieu de travail est une condition normale de son emploi;

c) l'employeur a mis en place

une procédure et des mécanismes de contrôle efficaces et sollicité le concours des employés pour faire face à la violence dans le lieu de travail.

A. *Can Work Place Violence Include Harassment?*

[25] In my opinion, harassment may constitute work place violence, depending on the circumstances present in a given case. The Respondent argues that the definition of work place violence set out in section 20.2 of Part XX of the Regulations is intended to address situations where an employee is in fear of being "harmed, injured or made ill", due to contact of another individual in the work place. The Respondent states that those situations do not apply to this case, where the complaint relates to the employee's harassment of being humiliated and disrespected by the behaviour of the employee's supervisor.

[26] In the Respondent's memorandum, it is argued that given a reasonable interpretation, the ordinary meaning and statutory context of the use of the words work place violence result in a narrow interpretation, covering only physical force that can cause harm, injury or illness. That definition excludes harassment, and the Applicant's attempts to argue similarities between "work place violence" under section 20.2 of Part XX of the Regulations and "danger" under section 122 of the Code is unfounded.

[27] The Respondent's position is that given "work place violence" does not include the word "condition", the Tribunal's interpretation of the word "condition" in the definition of "danger" is irrelevant to the interpretation or definition of "work place violence". However, during

argument, the Respondent conceded that regardless of the applicability of section 122, work place violence may encompass harassment, but not in the present case.

[28] One must consider the object and purpose of a statute as a whole when interpreting individual provisions of that statute (*R v Steele*, 2014 SCC 61 at para 23). Contrary to the Respondent's arguments, there is nothing in the Code or the Regulations to read down the language used in section 20.2 of Part XX of the Regulations. The use of "any action, conduct…or gesture" of a person towards an employee "…that can reasonably be expected to cause harm…or illness" to that employee, is broad enough on its plain and ordinary meaning to include harassing activities of a person that cause mental or psychological harm or illness. To find otherwise is to unduly restrict the definition of work place violence and not give a purposive construction to that definition. The Treasury Board of Canada's position in their publication "Violence and Harassment in the Workplace: Commonalities and Differences, April 30, 2013, states that "Nothing in Part XX (of the Regulations) prevents an employee from alleging that harassment constitutes violence". This is supportative of the position I take.

[29] Therefore harassment of the kind inflicted upon the employee in this case may constitute work place violence, if after a proper investigation by a competent person it is determined that the harassment includes actions, conduct or gestures that can reasonably be expected to cause harm or illness to the employee. In my opinion, psychological bullying can be one of the worst forms of harm that can be inflicted on a person over time.

B. *Does an Employer have the Authority to Investigate complaints of Work Place Violence as a "Competent" Person under Section 20.9 (1) of the Regulations? If not, at what Stage*

of the Complaint Process must an Impartial Competent Person be Involved Once an Allegation of Work Place Violence is Made by an Employee to the Employer?

[30] The Applicant argues that the Appeals Officer erred in accepting an unrestricted authority on the part of employers to conduct their own investigations into complaints of work place violence and if the allegations made are determined to meet the definition of work place violence, the process provided in Part XX of the Regulations ought to be followed.

[31] The Applicant states that this approach by the Appeals Officer circumvents the legislative scheme under subsection 20.9 of the Regulations: it fails to limit the scope of this authority and provides no guidance with respect to the threshold that employers ought to apply when pre-screening complaints. It is the Applicant's view that given the Appeals Officer's reasons and decision, it would permit an unfettered authority on the part of employers to investigate complaints of work place violence and reach their own determination about the *bona fides* of those complaints. This interpretation effectively negates the impartiality of the "competent person", as defined in section 20.9(1) of the Regulations, which requires impartiality, as seen by the parties, as well as knowledge, training and experience in issues relating to work place violence and knowledge of the relevant legislation.

[32] The Applicant further submits that this Court should be guided by the authority to pre-screen human rights complaints under paragraph 41(1)(c) of the *Canadian Human Rights Act* [CHRA], which provides for investigation of a complaint by an expert, impartial investigator. It should only be when, in plain and obvious cases that the allegations of complaint, if accepted as

true, do not amount of work place violence, that an employer should decline to appoint an impartial, competent person.

[33] I do not agree that the process for investigation outlined section 20.9 of the Part XX of the Regulations is analogous to the one outlined in the CHRA. The processes outlined under Part XX of the Regulations and the CHRA are dissimilar, particularly with respect to what triggers an investigation.

[34] Under section 20.9 of Part XX of the Regulations, an employer needs to become “aware” of the work place violence or alleged work place violence for the investigation process to be triggered. If an employer does not become “aware” of work place violence or alleged work place violence, it has no obligations under Part XX of the Regulations.

[35] In contrast, under the CHRA, the Commission “shall deal with any complaint filed”, if the complaint is filed “in a form acceptable to the Commission”.

[36] However, while an employer cannot assume that all complaints it receives that allege work place violence should be investigated pursuant to Part XX of the Regulations, and it would be impractical for every complaint to be treated as one alleging work place violence, it is apparent that any pre-screening by the employer is limited to fact finding, in an attempt to resolve the dispute with the employee and facilitate mediation, if possible, pursuant to section 20.9(2) of Part XX of the Regulations.

[37] Once such initial fact finding is unsuccessful in resolving the dispute, and the allegation of work place violence remains a live issue between the employer and employee, unless it is plain and obvious that the complaint was not related to work place violence, there is a mandatory duty for the employer to proceed under section 20.9(3) to appoint a competent person to investigate the complaint, under section 20.9(1) of Part XX of the Regulations. That person must be impartial and be seen by the parties to be impartial, have knowledge, training and experience in issues relating to work place violence, and have knowledge of the relevant legislation.

[38] Unless it is agreed by the employee and employer that an employer's representative is an impartial person, with all the attributes provided under section 20.9(1), there is no reasonable basis to proceed with any investigation unless an impartial third party who is seen by the parties to be impartial to act as the competent person has been appointed.

[39] What the employer did here was have the Regional Director, Mr. Schmidt, not only institute a pre-screening and fact finding exercise to determine the nature of the complaint and attempt to facilitate mediation, but also conduct a full investigation of the complaint, acting as a competent person under section 20.9(3). In his report, Mr. Schmidt mentions "investigation" eight times and refers to his review of the evidence before him. He was not competent to do so, given there was no agreement that he was an impartial party by the employee and therefore had no authority to conduct any investigation, once the allegation of work place violence was unresolved at the pre-screening stage and still a live issue between the parties.

[40] The Appeals Officer held, at paragraphs 60 and 69 of his decision, that the actions and gestures resulting in humiliation, unfair treatment and lack of respect that may constitute harassment, fell short of amounting to work place violence, given that the allegations could not reasonably be expected to cause harm, injury or illness to the employee. This finding, if based on a proper and impartial investigation by a competent person, may have been reasonable but unfortunately was improperly and incorrectly based on an unwarranted investigation, without the benefit of such a competent person's impartial investigation and decision on whether the harassment amounted to work place violence. The Appeals Officer could not reasonably deal with Part XX of the Regulations under section 20.9(3), which was triggered by the employer's investigation, because there had been no proper investigation by a competent person. The decision of the Appeals Officer was unreasonable.

THIS COURT'S JUDGMENT is that:

1. The Application is for Judicial Review is allowed, the matter is referred back to the Appeals Officer for re-determination in accordance with the directions of this Court;

2. Costs to the Applicant under Tariff B, column III.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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