Federal Court Cour fédérale

Date: 20220824

Docket: T-1957-19

Citation: 2022 FC 1223

Ottawa, Ontario, August 24, 2022

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ALEXANDRU-IOAN BURLACU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Alexandru-Ioan Burlacu is employed as a Senior Program Officer by the Canada Border Services Agency [CBSA]. He is seeking judicial review of the November 26, 2019 decision of a delegate of the Minister of Labour declining to investigate his refusal to work under the *Canada Labour Code*, RSC 1985 c L-2 [Code].

[2] The Application is granted for the reasons that follow.

II. Background

[3] In February 2019, Mr. Burlacu filed a workplace violence complaint, naming his Director and his manager as two of several aggressors. In March 2019, upon returning to work after a period of sick leave, Mr. Burlacu initiated a refusal to work pursuant to section 128 of the Code asserting CBSA had not taken measures to protect him from those he had named as aggressors in the workplace violence complaint.

[4] CBSA investigated the refusal to work (the stage I investigation, subsection 128(7.1) of the Code), finding Mr. Burlacu's circumstances presented "no danger." Mr. Burlacu then recommenced work under the authority of a new manager, there being no reporting relationship between himself and the Director named in the complaint. A stage II investigation by the Workplace Health and Safety Committee followed, upholding the stage I conclusion of "no danger" (subsection 128(10) of the Code).

[5] The matter was then referred to the Labour Program. On April 16, 2019, a delegate of the Minister of Labour affirmed the "no danger" conclusion. Mr. Burlacu asserts the complaint was improperly referred to the Labour Program as he had, at that point, returned to work. His appeal to the Occupational Health and Safety Tribunal was successful (*Burlacu v Canada Border Services Agency,* 2021 OHSTC 4).

[6] In June 2019, the Director named in the workplace violence complaint was assigned to a new position. In the new role, the Director supervised Mr. Burlacu's temporary manager and therefore was again part of Mr. Burlacu's management chain. This was the reporting relationship that had existed at the time the workplace violence complaint was made and the refusal to work initiated.

[7] Mr. Burlacu reports that steps were initially taken to ensure that supervision of his work was not undertaken by the Director. However, these measures were subsequently reversed resulting in some of his work being submitted to the Director for approval.

[8] In September 2019, following a leave of absence, Mr. Burlacu filed a second refusal to work under the Code. The refusal alleged that having to report to a manager who was under the supervision of the Director named in his prior workplace violence complaint, and where the Employer did not implement measures to eliminate Mr. Burlacu's exposure to the Director, posed an imminent threat to his mental health.

[9] Following the filing of the second refusal, Mr. Burlacu reports that he was assured the Director would not have any decision making authority over him and that any senior management approval of his work would be undertaken by the Vice-President. Stage I and II investigations of the second refusal followed. It was again found Mr. Burlacu was in "no danger" due to his work conditions.

[10] In November 2019, it was announced that the Director would take on the role of Acting Vice-President for a short period. Mr. Burlacu was not informed that measures would be taken to address his concerns during the period of the acting appointment.

[11] The second work refusal was referred to the Minister of Labour and on November 26, 2019, the Minister's Delegate [MD] declined to investigate the refusal. It is that decision that is the subject of this Application for judicial review.

III. Decision under Review

[12] The MD declined to investigate the second work refusal, finding the issue had been previously determined in the April 16, 2019 decision and that the refusal to work was "persistent" and "based on the same issue." The MD concluded that previous measures remained in place with the result that Mr. Burlacu did not have any direct contact with the Director and that he was no longer entitled to refuse work. The relevant portion of the decision states:

> Please be advised that pursuant to paragraph 129(1)(b) of the *Canada Labour Code*, Part II (Code), it is my decision that the issue has already been determined by the Labour Program and is a persistent refusal based on the same issue. The previous measures remain in place; therefore, the employee continues not to have any direct contact with the Director.
>
> Therefore, please be advised pursuant to subsection 129(1.2) of the Code, the aforementioned employee is no longer entitled under subsection 128(15) of the Code to continue to refuse to perform tasks associated with this position.

IV. Issues and Standard of Review

[13] The Respondent does not dispute the issues to be decided. Mr. Burlacu submits the MD: (1) breached the principles of procedural fairness; and (2) rendered a decision that is unreasonable. Mr. Burlacu further submits that in the circumstances a directed result is warranted and asks the Court to order an investigation be undertaken pursuant to section 129 of the Code.

[14] The MD's decision is reviewable using the presumptive standard of review of reasonableness, a deferential but robust form of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 12-13, 75 and 85 [*Vavilov*]). In conducting a reasonableness review, the Court does not ask what decision it would have made but instead focuses on the decision actually made and considers whether the decision, as a whole, is transparent, intelligible and justified (*Vavilov* at paras 15 and 83).

[15] In considering questions of fairness, the Court is required to consider whether the procedure was fair having regard to all of the circumstances. While this is best reflected in the correctness standard of review, strictly speaking no standard of review is being applied (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]).

V. Analysis

A. *No breach of procedural fairness*

[16] Mr. Burlacu submits the process was unfair because: (1) he was not provided an opportunity to make full submissions in advance of the decision being rendered; (2) the Labour Affairs Officer assisting the MD had been involved in the initial refusal investigation and decision, which raised a conflict of interest; and (3) he was not provided an opportunity to review and respond to certain documents prepared for and provided to the MD. He further argues that, because he had no right of appeal from the final decision that the work refusal was frivolous pursuant to paragraph 129(1)(b) of the Code, he was owed a high degree of procedural fairness. He points to the imminent or serious threat to health that underpins a refusal to work as reinforcing this view.

[17] The Respondent argues the degree of fairness owed is at the lower end of the scale. The Respondent submits that in analogous processes courts have held that the decision to investigate engages a degree of fairness that falls at the lower end of the spectrum – which is limited to a right to submit information and supporting documents (*Gordillo v Canada (Attorney General)*, 2019 FC 950 at para 59 citing *Gupta v Canada (Attorney General)* 2017 FCA 211 at para 31 involving a decision to investigate under the *Public Servants Disclosure Protection Act*, SC 2005 c 46, aff’d by *Gordillo v Canada (Attorney General)*, 2022 FCA 23).

[18] I am of the view that the degree of procedural fairness owed in this matter is at the lower end of the fairness spectrum.

[19] The suggestion that health and safety concerns warrant different or special consideration where the decision not to investigate is based upon paragraph 129(1)(b) of the Code is not persuasive. A decision not to investigate taken for any reason set out at subsection 129(1) terminates an employee's right to refuse work (subsection 129(1.2) of the Code). While I am prepared to accept, without deciding, that the legislative scheme may exclude an appeal in certain instances, the immediate effect of any decision not investigate is, from a health and safety perspective, the same in all circumstances – an employee can no longer refuse work.

[20] The Code also identifies the information and reporting to be provided to an MD after a refusal to work is referred to the Labour Program. Again, the requirements of the legislative scheme are not different or unique where an MD concludes a work refusal is trivial, frivolous or vexatious.

[21] I have considered the five non-exhaustive factors that the Supreme Court of Canada identified as relevant to determining the content of the duty of procedural fairness in *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 [*Baker*]. The decision to investigate involves the exercise of a broad discretion in the context of a prescribed process that is neither judicial in nature nor adversarial. The Labour Program decision maker is external to the employer and has the benefit of reporting generated at earlier investigative stages. These factors lead me to conclude that a decision to investigate pursuant to paragraph 129(1) of the Code engages a low degree of fairness. The absence of an appeal where a refusal is found to be trivial, frivolous or vexatious does not change my view.

[22] I am also convinced that this degree of fairness was satisfied in this case. Mr. Burlacu was contacted and provided the opportunity to make brief submissions. Although those submissions do not form part of the Certified Tribunal Record [CTR], the basis for the refusal is summarized in the background information provided to the MD. This information includes a brief quote from an email attached to Mr. Burlacu's submissions.

[23] Mr. Burlacu's view that the duty of fairness required that he be provided the opportunity to review and comment on the documents prepared for the DM is not without merit. There may well be circumstances where fairness will require all documents placed before a Labour Program decision maker first be disclosed to the employee for review and comment. However, in this instance, the documents that Mr. Burlacu submits he was entitled to review and comment on summarized the information and circumstances surrounding the refusal and did not contain information unknown to Mr. Burlacu. No unfairness arises on these facts.

[24] Mr. Burlacu's right to submit information and supporting documents together with the opportunity to provide a statement satisfied the duty of fairness in this circumstance.

[25] I am also satisfied that no serious question of conflict of interest arises from the involvement of the Labour Affairs Officer in Mr. Burlacu's previous work refusal. A reasonable apprehension of bias arises where an informed person, viewing the matter realistically and practically, would think it more likely than not that, a matter would not be decided fairly (*Baker* at para 46). In this instance, the Labour Affairs Officer was not the decision maker. In addition, there is no practical or realistic basis upon which to conclude that prior involvement in the

related matter, where the record suggests nothing more than the performance of routine duties, would lead to an unfair decision here.

B. *The decision is unreasonable*

[26] Mr. Burlacu submits that the MD's failure to grapple with key issues raised by his refusal to work renders the decision unreasonable. Specifically, he argues the MD's finding that previous separation measures remained in place did not account for his submissions on this issue and failed to address medical evidence he provided to establish his inability to work under the authority of the Director.

[27] The Respondent takes the position that the MD's decision is owed deference. The MD was not required to address every issue raised and it was reasonable to conclude that the establishment of an indirect reporting relationship was not significant enough to justify an investigation. The Respondent submits that the failure to address Mr. Burlacu's medical evidence does not render the decision unreasonable as that evidence was not material in light of the MD's conclusion that Mr. Burlacu remained sufficiently separated from his former Director.

[28] The MD's decision is premised on the express finding that "[t]he previous measures remain in place; therefore, the employee continues not to have any direct contact with the Director." Although this statement may be technically accurate, it fails to recognize that "previous measures" not only avoided direct contact, they more relevantly, given the context of the second refusal to work, resulted in the absence of all contact. At the time of the first decision that found 'no danger', Mr. Burlacu was not in the Director's management chain.

[29] In pursuing a second refusal to work, Mr. Burlacu's concern was not direct contact with the Director. He acknowledged that it was his manager, not he, who reported to the Director. The issue was contact with the Director through his manager. Again, the issue was any contact, not direct contact. The MD did not grapple with this important distinction, which formed the very basis for the second refusal to work. It is not clear the MD truly understood Mr. Burlacu's position and this renders the decision unreasonable.

[30] The medical evidence was a handwritten note by a physician to the effect that Mr. Burlacu could not, under any circumstances, work under the authority of the Director. The medical opinion is broad and not limited to situations involving direct contact or supervision. Although the medical opinion appears to based only on Mr. Burlacu's reporting to the physician, it is evidence that is directly relevant to and supportive of Mr. Burlacu's position. The MD's failure to grapple with it reinforces my view that the decision is unreasonable.

[31] Mr. Burlacu has raised other issues that he submits render the decision unreasonable. I need not address these remaining issues in light of my conclusion above.

C. *Should there be a directed verdict*

[32] Mr. Burlacu seeks an order directing an investigation under section 129 of the Code. He indicates the outcome is inevitable and that returning the matter engages considerations identified by the Supreme Court in *Vavilov*, including delay and fairness to him (*Vavilov* at para 142).

[33] In recognizing that there may be occasions where a directed result is appropriate, the Supreme Court notes that as a general rule courts should respect Parliament's expressed intent and leave decisions with mandated administrative decision makers (*Vavilov* at para 142; *Canada (Citizenship and Immigration) v Yansané*, 2017 FCA 48). Directing a result "is an exceptional power that should be exercised only in the clearest of circumstances.... Such will rarely be the case when the issue in dispute is essentially factual in nature" *Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at para 14.

[34] The issues in dispute in this instance are factual and the evidence on the record does not conclusively indicate that there is only one possible conclusion or outcome. Nor do the surrounding circumstances suggest a directed result is necessary to address overarching concerns relating to fairness or delay. I therefore decline to order an investigation under section 129 of the Code.

VI. Conclusion

[35] For the above reasons, the Application is granted, and the matter is to be returned for redetermination by a different decision maker.

[36] Mr. Burlacu seeks and is granted costs in the fixed amount of $250, inclusive of fees and disbursements.

JUDGMENT IN T-1957-19

THIS COURT'S JUDGMENT is that:

1. The Application is granted.
2. The matter is returned for redetermination by a different decision maker
3. Costs are awarded to the Applicant in the all-inclusive amount of $250.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1957-19
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APPEARANCES:

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