Federal Court  Cour fédérale

Date: 20230519

Docket: T-685-22

Citation: 2023 FC 701

Ottawa, Ontario, May 19, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

MATTHEW DUIKER,
TIM COTTON
AND
TRISTIN KEREKES

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Matthew Duiker, Tim Cotton, and Tristin Kerekes [Applicants] seek judicial review of a March 3, 2022 decision [Decision] of the Regional Director [RD] of the Labour Program of Employment and Social Development Canada [ESDC] declining to investigate their work refusal pursuant to subsection 129 of the *Canada Labour Code*, RSC, 1985, c L-2 [*CLC*].

[2] The application for judicial review is dismissed. The Applicants have not met their burden of demonstrating that the Decision was unreasonable or rendered in a procedurally unfair manner.

II. Background

[3] Due to the sensitive nature of some materials in the Certified Tribunal Record [CTR] and the records of the parties, this Court issued several Confidentiality Orders. As a result, this judgment and reasons will deal with the general nature of the facts and issues, consistent with the various Orders.

[4] The Applicants are three Correctional Officers [COs] in the Edmonton Institution [EI] maximum-security prison. In this capacity, they are represented by the Union of Canadian Correctional Officers [Union or UCCO].

[5] On February 8, 2022, prompted by an incident discussed in detail below, Correctional Services Canada [CSC or Employer] removed C8 Carbine rifles [C8 Carbine] from certain sub-control posts in the EI. The Applicants were of the view that the removal of the C8 Carbines created a danger because the COs would have no way of immediately stopping an attack by an inmate. After unsuccessful discussions between the COs and the Employer to address the matter, the Applicants and other COs instituted a work refusal pursuant to section 128 of the *CLC*. As will be set forth below, this work refusal was the Third Work Refusal.

[6] An Investigator concluded that the work refusal was made in bad faith and recommended that the RD refuse to investigate the matter [Recommendation]. On March 3, 2022, the RD accepted the Recommendation. The Applicants seek to judicially review the RD's Decision. To do so, I must also review the events and work refusals prior to the RD's Decision.

A. *Previous Events*

[7] On December 21, 2021, 16 COs in the EI initiated a work refusal relating to the Employer's decision to revert to pre-COVID measures with respect to the inmate movement routine, namely, by having 12 inmates out in the upper tier and 12 inmates out in the lower tier of the living units [First Work Refusal]. On January 21, 2022, the Labour Program issued a finding of "no danger". This decision was not appealed and is not directly the subject of this application for judicial review.

[8] On January 11, 2022, during the above investigation, Applicant Cotton initiated a work refusal arising from a January 8, 2022 incident where a C8 Carbine was discharged and penetrated a fire door [Second Work Refusal]. He and other COs claimed that the use of a C8 Carbine within the "internal" living units presented a danger.

[9] Prior to the Second Work Refusal, COs were working a "normal routine", as described above, where the full mixing of inmates within a living unit would occur at certain times and COs would conduct walkthroughs of the units during these times. After the Second Work Refusal, COs began working a "modified routine", where the full mixing of inmates within a living unit generally did not occur. Instead, inmate movement was limited to "one up and one

down", meaning only one inmate from both the upper and lower tiers of a living unit could leave their cells and access that living unit's amenities. An exception to this routine occurred when correctional managers would oversee the mixing of inmates in a living unit and all inmates were permitted out of their cells.

[10] During the investigation of the Second Work Refusal, the Employer maintained that C8 Carbines, when used appropriately by a CO, did not present danger or serious risk.

[11] The Second Work Refusal was initially investigated by Jeremy Butterworth, the Acting Assistant Warden of Operations [A/AWO]. A/AWO Butterworth's report found no danger. In response, the COs continued to refuse work. Accordingly, the matter was referred to a joint Employer/Employee committee for further investigation. The committee's report was provided to EI management, who again made a finding of no danger. As the COs persisted with their work refusal, the matter was then referred to ESDC.

[12] On February 1, 2022, the senior investigator [Investigator] from ESDC made a finding of danger. The Investigator explained that "firing a round from the C8 Rifle inside the living units A-H exposes COs performing work on the other side of the full metal fire door to a serious threat of injury or even death by a bullet."

[13] On February 8, 2022, the Employer removed the C8 Carbine from the sub-control posts on living units A-H.

[14] On February 8 and 9, 2022, the COs and the Employer held two meetings to discuss the removal of the C8 Carbines. There are differing views as to what occurred during these meetings. The COs maintain that CO Mayer, who is not an Applicant in this proceeding, brought a complaint under section 127.1 of the *CLC* regarding the removal of the C8 Carbines in order to allow for ongoing dialogue between the COs and the Employer to arrive at a solution. The Employer claims that no such complaint was made.

[15] On February 10, 2022, the Employer informed the COs in Unit F that they would be returning to a normal routine within half an hour. In response, the Applicants and other COs made a third work refusal on the grounds that the absence of C8 Carbines in the sub-control posts created a danger [Third Work Refusal]. Under this routine, the COs would have no ability to immediately stop an attack by an inmate in the Unit. Applicant Kerekes stated that alternatives to the C8 Carbine would not have the lethal force to prevent inmates from attacking them. Applicant Cotton later explained during his interview with the Committee that inmates were known to defeat the alternative to the C8 Carbine with handmade body armour and blankets. Applicant Duiker also explained during his interview that the C8 Carbine was more effective in administering an immediate incapacitation of an inmate to stop any violent behavior.

[16] In accordance with the *CLC* regime, the Third Work Refusal proceeded through several stages. Applicant Duiker, as an Employee representative, first met with A/AWO Butterworth to discuss the Third Work Refusal. A/AWO Butterworth issued a written response, again finding no danger. Applicant Duiker maintained his work refusal following the response. The parties then implemented another joint Employer/Employee committee [Committee] to look into the Third

Work Refusal and determine the existence of danger. AWO Mallett, the Employer representative, and Kelly Monson, the Employee representative, conducted interviews with the COs on February 16, 2022.

[17] On February 22, 2022, the Committee released its written report. AWO Mallett found no danger, while CO Monson found the opposite. The matter was then referred to Warden Gary Sears. On February 24, 2022, Warden Sears made a finding of no danger. The next day, the matter was referred to ESDC.

[18] It appears that ESDC again appointed the Investigator to look into the work refusal and the Investigator sought details about the work refusal from the Employer. The scope of these communications are not clear. The Investigator does not appear to have contacted any of the Applicants, CO Mayer, or any Union representatives to discuss the Employer's allegations.

[19] The Investigator subsequently released a report with the aforementioned Recommendation. The Investigator attached two documents to the Recommendation: a Rationale on Vexatious Refusal to Work at CSC EI [Rationale] and a draft decision to not investigate the refusal [Draft Decision]. The Investigator noted at the outset of the Rationale that, "this Senior Investigator takes the position that the COs and their union are using the refusal to work process with ill will, malice and hostility in an attempt to frustrate and annoy the employer" (emphasis added). The Applicants assert that the Investigator based his views on the following:

- The Union "bypassing" a collaborative approach to work with the Employer regarding the removal of the C8 Carbines and instead "using the refusal process to bring immediately a [*sic*] head an item suited to the ICRP [internal complaint resolution process]". Doing so was "vexatious, as it shows no respect for working things through together";

- Emails from Correctional Manager [CM] Lautermilch and A/AWO Butterworth relaying statements allegedly made by CO Mayer, including CO Mayer allegedly "threaten[ing] illegal action should the C8 carbines be removed" by stating "if the C8s get pulled, I'll make sure no inmates are let out of their cells for months." According to the Investigator, this statement "showed intent on behalf of the [U]nion to take means into their own hands if they do not agree with the [E]mployer's decision/direction";

- That, according to EI management, "UCCO, had engaged in "bullying" or other intimidation tactics towards the Officers who did not agree with this s.128" and that there were allegedly planned work refusals that would be occurring. This information was supposedly given to the Employer by COs, but the COs refused to document it for fear of reprisal. According to the Investigator, this information indicated that "the actions of the union in this case and the other planned are a misuse/abuse of the [CLC]."

III. The Decision

[20] The RD had before her the Recommendation, Rationale, and Draft Decision. On March 3, 2022, the RD issued the Decision, concluding that the Third Work Refusal was made in bad faith pursuant to paragraph 129(1)(c) of the *CLC*.

[21] The Decision confirmed the Investigator's view that the COs acted in bad faith by bypassing the ICRP to work in a collaborative manner with the established health and safety committee. The RD also found that, because the COs were working a modified routine, there was no imminent threat of serious harm to the refusing COs at the time.

[22] The RD concluded that, pursuant to subsection 129(1.2) of the *CLC*, the refusing COs were no longer entitled under subsection 128(15) of the *CLC* to continue to refuse to work and were to return to their normally scheduled work routine in the EI as directed by the Employer.

IV. Issues and Standard of Review

[23] After considering the parties' submissions, the issues are as follows:

1. Was the Decision reasonable?

2. Was the Decision rendered in a procedurally fair manner?

[24] The parties agree that the standard of review to be applied to the first issue is that of reasonableness, as the presumption is not rebutted (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 [*Vavilov*]). A reasonableness review requires a court to consider both the outcome of the decision and the underlying rationale to assess whether the decision, as a whole, bears the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at paras 15, 99). For a decision to be reasonable, a decision-maker must adequately account for the evidence before it and be responsive to the Applicants' submissions (*Vavilov* at paras 125-128). The Court will not interfere with a decision unless there are sufficiently serious flaws or shortcomings such that the decision "cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). The burden to demonstrate such unreasonableness rests with the party challenging the decision (*Vavilov* at para 100).

[25] The parties also agree that the standard of review for the issue of procedural fairness is essentially correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 49, 54 [*CP Railway*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). The Court has no margin of appreciation or deference on questions of procedural fairness. Rather, when evaluating whether there has been a breach of procedural fairness, a reviewing court must determine if the procedure followed by the decision-maker was fair, having regard to all the circumstances, and whether the Applicants "knew the case to meet and had a full and fair chance to respond" (*CP Railway* at para 54; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 837-841 [*Baker*]; *Burlacu v Canada (Attorney General)*, 2022 FC 1223 at para 15 [*Burlacu*]).

V. Analysis

A. *Was the Decision reasonable?*

(1) Applicants' Position

[26] The Applicants are not asking the Court to assess whether the Decision to remove the C8 Carbines was reasonable or whether the removal of the C8 Carbines constituted a danger. Rather, the focus of the application is whether the RD's Decision to dismiss the Third Work Refusal on the basis of bad faith was reasonable or made in a procedurally fair manner.

[27] The RD's finding of bad faith is not supported by law or fact. The *CLC* and the relevant jurisprudence permit an employee to refuse work without taking any steps prior to doing so (*CLC*, s 128). This provision simply enables an employee to refuse work if they have "reasonable cause to believe" that the work would constitute a danger. The right is only limited where the refusal could pose a danger to others or is a normal condition of employment (*CLC*, s 128(2)).

[28] Further, a refusal to work is an emergency back-up mechanism (*Correctional Service of Canada v Ketcheson*, 2016 OHSTC 19 [*Ketcheson*]):

> [144] It is important to note that the right to refuse to work is not contingent on an employee having attempted to deal with OHS issues through means other than a work refusal. An employee can choose to refuse to work when he has reasonable cause to believe that there is a danger, regardless of what else has gone on before. It is a powerful and important right. Yet it is very clear from the

> design of the Code that it is intended to be used as an emergency measure and that the bulk of the effort to reduce risk and protect COs lies elsewhere.
>
> [Emphasis added.]

[29] Section 127.1 of the *CLC*, which provides for the ICRP, clearly excludes section 128 of the *CLC*. In other words, mandating COs to go through an ICRP process prior to refusing work would run contrary to the goals of Part II of the *CLC*, which is to immediately address safety issues at work.

[30] Second, even if there was such a requirement, there is important evidence that was either overlooked or disregarded by the RD and the Investigator illustrating that the COs attempted to work collaboratively with the Employer prior to the work refusal. For instance, CO Mayer first tried to resolve the matter through a complaint under section 127.1 of the *CLC*. Such a complaint relates to a situation where an employee has a reasonable belief that there is likely to be an accident, injury, or illness arising out of the course of employment.

[31] Further to this point, the following is not in dispute:

- During the February 8, 2022 meeting, CO Mayer voiced his concerns that the removal of the C8 Carbines created a danger for the COs. No resolution was reached.

- On February 9, 2022, CO Mayer and Applicant Cotton met again with AWO Mallett, where CO Mayer presented AWO Mallett with a detailed written proposal

> to address ESDC's February 1, 2022 finding of danger while still permitting the C8 Carbines to remain in the sub-control units. There was no response to this proposal.

[32] Regardless of the formality of the section 127.1 complaint, the parties were furthering the goal of the *CLC* by working together to reduce the perceived risks prior to making a work refusal. The Committee's report also documented these efforts prior to the work refusal. At the very least, the Investigator and the RD should have contacted Applicant Cotton or CO Mayer for more information if they were uncertain about the section 127.1 complaint.

[33] Third, the Decision overlooks the fact that the work refusal was specifically made in response to the EI management's order that Unit F would be returning to its normal routine within half an hour, thereby creating a dangerous situation. They did not make the refusal when the C8 Carbines were initially removed from the sub-control units because, at that point, the units were still on a modified routine. The COs were therefore not at the same risk of harm from the inmates.

[34] Lastly, the RD erred in determining what constituted a danger. Under the *CLC*, "danger" is defined as "any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered" (emphasis added). The *CLC* does not require an "imminent threat of serious harm"; rather, it requires "an imminent or serious threat".

(2) Respondent's Position

[35] The RD reasonably declined to investigate the Third Work Refusal. As noted in *Ketcheson*, "the right of employees to refuse to work is not the normal, routine manner in which risk is to be driven down; it is an emergency "back up" mechanism when the main elements of the [internal responsibility system] have not been effective" (at para 140). The 2014 amendments to the *CLC* intended to strengthen the internal responsibility system [IRS] in order to reduce the need for Ministerial Delegates to attend and investigate a work refusal (*Ketcheson* at paras 170-173).

[36] Where the RD is of the opinion that a continued work refusal is done in bad faith, they are not obliged to investigate the matter (*CLC*, s 129(1)(c)). While it is true that the *CLC* allows an employee to exercise the right to refuse work without taking prior steps, the existence of this right does not preclude a finding that a continued refusal under subsection 128(15) of the *CLC* was exercised in bad faith. The right to a continued refusal to work is not absolute.

[37] The RD reasonably determined that the Third Work Refusal was in bad faith. The Decision, when read together with the Investigator's Rationale and Recommendation, reflects two main concerns with the work refusal. First, the RD noted concerns with respect to the short timespan and apparent contradiction between the successive work refusals. Second, the RD found that the COs demonstrated bad faith by bypassing the ICRP.

[38] The short timespan and contradiction between the work refusals suggests bad faith because the refusing COs were not working a normal routine. While the Applicants acknowledge that Applicant Duiker was informed that Unit F would return to the normal routine just prior to the work refusal, this overlooks the fact that other refusing officers were posted to different living units, none of which had returned to the normal routine. The COs even refused direct orders to run the modified routine or let any inmates out of their cells. This led to EI staff being unable to access the living units and instances where basic medical or religious services could not be provided as scheduled. In these circumstances, it was reasonable for the Investigator to find that the COs' work refusal did not constitute an imminent or serious threat.

[39] As for the second concern, the COs made no meaningful attempt to resolve the perceived issues through the IRS. AWO Mallett specifically denied having ever been told that a section 127.1 complaint was made. The documentary evidence also does not support the Applicants' contention that the alleged danger leading to the February 10, 2022 work refusal was discussed with the Employer through a section 127.1 complaint.

[40] The Applicants' proposal advocates for the return of the C8 Carbine, but nowhere does it state the potential danger, hazard, accident, injury, or illness posed by the absence of the C8 Carbine.

[41] The discussions between AWO Mallett and CO Mayer were not before the RD and therefore have no relevance to the reasonableness of the Decision. Even if these discussions were admissible on judicial review and could be characterized as giving rise to a section 127.1

complaint, the ICRP does not end after making such a complaint. The *CLC* provides the possibility for both the Employee and the Employer to refer an unresolved section 127.1 complaint to the chairperson of the work place committee or to the health and safety representative for a joint investigation. The complaint can also be referred to and investigated by the Head. As none of these steps were taken in the present matter, it is clear that the refusing COs did not "give the process a chance to work" (*Correctional Service of Canada v Aldred*, 2019 OHSTC 11 at para 81). Therefore, it was reasonable for the RD to find that the work refusal was made in bad faith.

(3) Conclusion

[42] Subsection 129(1)(c) of the *CLC* enables the RD to decline to investigate a matter if an employee's continued refusal to work is in bad faith. Amendments to the *CLC* in 2014 were intended to "strengthen the IRS" process during work refusals so that the RD can use its resources more efficiently (*Ketcheson* at para 170). However, the RD must be convinced that the work refusal was in bad faith.

[43] A continued work refusal will be characterized by the RD as having been made in bad faith if it satisfies the definition set out in ESDC's Occupational Health and Safety Interpretations, Policies and Guidelines, the *Complaint is Trivial, Frivolous, Vexatious or Made in Bad Faith* – 905-1-IPG-083 [IPG]:

> …brought with an ulterior motive: for example, motivated by ill will, hostility, malice, personal animosity, lack of fairness or impartiality, lack of total honesty such as withholding information. It includes serious carelessness recklessness and intentional fault. It can be established by direct or circumstantial evidence.

> Examples: When a continued refusal is merely intended to annoy or embarrass, to bypass the ICRP, or to resolve a collective bargaining dispute, as opposed to a real health and safety issue.

[44] In my view, the RD reasonably concluded that the work refusal was made in bad faith pursuant to paragraph 129(1)(c) of the *CLC*.

[45] *Ketcheson* confirms that a work refusal is a "back up mechanism when the main elements of the [IRS] have not been effective" (at para 140). In other words, the right to refuse to work is not limitless, and must be exercised only in emergency situations. Moreover, the inherently dangerous work environment of an institution such as the EI makes it difficult to envisage a situation where a refusal to work due to violence or danger could be justified. As stated in *Schmahl v Correctional Service of* Canada, 2017 OHSTC 3, and upon which the Investigator relied on to make his finding:

> [78] …Given that the likelihood of encountering violence is a normal condition of employment of the job of correctional officers who are specifically trained to deal with these situations, it is difficult to envisage a situation, in that environment, where a refusal to work for violence could be justified in a specific and exceptional circumstance.

[46] Taking the above into consideration, it was open to the RD to determine that the Third Work Refusal in less than 50 days demonstrated bad faith.

[47] It was also open to the RD to arrive at this bad faith finding in light of the contradictory positions respecting the C8 Carbine in the Second Work Refusal and the Third Work Refusal.

For instance, Applicant Cotton's statements indicating that the removal of C8 Carbine would cause danger to the COs are contradicted by his earlier position that the discharge of the C8 Carbine created a danger. Specifically, in his February 16, 2022 interview regarding the Third Work Refusal, Applicant Cotton explained that the removal of the C8 Carbines from Units A-H presented a serious danger as defined in the *CLC*, as the COs would not have an effective tool to immediately stop an inmate's behaviour. When asked if he believed a firearm was a danger, he answered "no". When asked whether a discharged bullet creates a danger for the COs working in the immediate area, he answered that it depends on the circumstances.

[48] While there is evidence of the parties attempting to work things out internally, those efforts were ultimately unsuccessful.

[49] As a result, when read in light of the record, the RD had a reasonable basis in which to conclude that the work refusal was made in bad faith. I see nothing to disturb this finding.

B. *Was the Decision rendered in a procedurally fair manner?*

(1) Applicants' Position

[50] The Decision is premised on false or inaccurate information. The Investigator's Recommendation, Rationale, and Draft Decision were based solely on communications with the Employer, thereby breaching the Applicants' right to procedural fairness. These undisclosed documents contained prejudicial and untrue allegations against the COs, Union, and Union representatives. The Applicants were not notified of or provided the opportunity to refute any

claims of bad faith. The COs were also denied an opportunity to inform the Investigator and the RD about their attempts to work collaboratively with EI management to address the situation.

[51] An administrative decision-maker must act fairly when exercising statutory authority. While the precise content of the duty of fairness will vary depending on the circumstances, the decision-maker's process must always be fair (*Baker* at para 22). One of the basic principles of fairness is that a party must be given a chance to be heard where a decision affects them (*A(LL) v B(A),* [1995] 4 SCR 536 at para 27, 130 DLR (4th) 422; *Lusina v Bell Canada,* 2005 FC 134 at para 30). While the right to respond to allegations against a complainant does not necessarily arise with respect to all "the material which passes through an investigator's hands in the course of the investigation", it does arise with material put before the decision-maker (*Hutchinson v Canada (Minister of the Environment),* 2003 FCA 133 at para 49).

[52] The RD adopted nearly the entirety of the Draft Decision with the exception of an allegation that CO Mayer threatened an illegal work stoppage if the C8 Carbines were removed. A second regional manager likely removed this comment due to poor optics.

(2) Respondent's Position

[53] The duty of procedural fairness owed in the circumstances was at the lower end of the spectrum (*Gupta v Canada (Attorney General),* 2017 FCA 211 at para 31 [*Gupta*]). This is even so when a decision terminates an employee's right to refuse work, in the absence of a statutory right of appeal (*Burlacu* at paras 17-25) Accordingly, the duty was limited to a right to "submit information and supporting documentation" (*Gupta* at para 31; *Burlacu* at paras 17-19).

[54] The RD has "broad discretion" in the context "of a prescribed process that is neither judicial in nature nor adversarial" (*Burlacu* at para 21). The RD benefited from a detailed Rationale outlining the findings of the Investigator, including details on the previous work refusals related to the C8 Carbine, the second of which led the Investigator to a finding of danger just a few days prior to Third Work Refusal.

[55] Permitting the RD to screen out work refusals as informally and expeditiously as possible in the appropriate circumstances also strengthens the goal of the IRS as the main tool to fulfill the goal of the *CLC* and limit work stoppages to true emergencies (*Ketcheson* at paras 131-144; *Canada (Attorney General) v Fletcher*, 2002 FCA 424 at para 20). Requiring anything more could risk "complicating and over-judicializing a process that was intended to be informal and expeditious" (*Gupta* at para 34). It could also risk extending a work stoppage unnecessarily. The Applicants' position defeats the intent of the statutory scheme to have most issues resolved by the IRS, and restrains the explicit statutory power and broad discretion granted to the RD by Parliament to decline to investigate a work refusal at a preliminary stage.

[56] The requisite level of procedural fairness was met in this case. As the RD has no appreciable adjudicative function when it makes a preliminary screening decision under subsection 129(1) of the *CLC*, the RD was not bound to the rules of evidence that apply to a Court or to a quasi-judicial tribunal. Moreover, the Investigator relied on information that they had previously investigated and of which the refusing COs were already aware. The Investigator's initial finding of danger was based on a full investigation.

[57] Further, the Applicants received notice of the allegations of bad faith. Pursuant to subsection 128(13) of the *CLC*, they were informed in the Employer's response that the Employer considered the refusing COs' behaviour to be an illegal labour action at the behest of the Union. The Applicants received this response on February 24, 2022, prior to their decision to continue the work refusal pursuant to subsection 128(15) of the *CLC* and its referral to the Investigator on February 25, 2022.

[58] Given the frequency with which some of the refusing COs employed the work refusal process, the onus was on the COs to gain familiarity with the relevant IPG. In this case, the relevant IPG, as set out above, exemplifies "bad faith" with continued work refusals that are pursued for an ulterior motive or an improper purpose. Bypassing the ICRP is also cited as an example. Given the statutory scheme and the IPG, the Applicants could not possibly have expected that every continued work refusal would lead to a full investigation (*Vavilov* at para 94).

[59] The absence of the exchanges between the Investigator and the refusing COs in the CTR is not fatal to the Decision. Applicant Duiker was identified as the Employee spokesperson, as reflected in the Record.

[60] There is no evidentiary foundation for the Applicants' assertion that the Investigator did not attempt to contact them or that they were not provided with the opportunity to make submissions. The present application would have been one of the few allowable purposes for an affidavit in order to demonstrate procedural unfairness (*Association of Universities and Colleges*

of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22 at para 20).

[61] The Applicants wrongly rely on inapplicable jurisprudence relating to the Canadian Human Rights Commission [CHRC]. Nevertheless, a reviewing court will only intervene where there is a "clearly deficient investigation" or where there is a failure to investigate "obviously crucial evidence" (*Demitor v Westcoast Energy Inc (Spectra Energy Transmission)*, 2017 FC 1167 at para 69, aff'd 2019 FCA 114 [*Demitor*]).

[62] The Applicants' affidavits fail to explain how any unfairness exists in this case. None of the affiants swore or affirmed that they were unaware of or denied any incidents of bullying, concerted labour action, or instances of officers being instructed not to let inmates out of their cells. The affiants also do not deny the following material facts relied on by the Investigator:

- The circumstances surrounding the previous successive work refusals;
- The Union was consulted during the Employer's threat risk assessment;
- Only Unit F returned to a normal routine as of the date of the work refusal;
- Additional ammunition was provided for the alternative to the C8 Carbine as an interim measure; and
- The Emergency Response Team was present in the EI for support.

[63] The Applicants also do not challenge the information contained in the CTR as provided by the Employer, save for clarifications regarding CO Mayer's comments.

[64] The availability of remedies on judicial review counterbalances the RD's rejection to investigate a work refusal at a preliminary, screening stage. However, the Applicants still have the burden to demonstrate procedural unfairness, which they have failed to meet.

(3) Conclusion

[65] The Applicants' right to procedural fairness was not breached.

[66] I agree with the Respondent that the duty of procedural fairness owed was at the lower end of the spectrum. Parliament chose not to provide for an adjudicative, adversarial, or judicial process in rendering a decision as to whether to investigate a work refusal under subsection 129(1) of the *CLC* (*Gupta* at para 31). Accordingly, the level of procedural fairness required in the circumstances was limited to a right to "submit information and supporting documentation" (*Gupta* at para 31; *Burlacu* at paras 17-19). I find Justice Gleeson's reasoning in *Burlacu* to be particularly relevant:

> [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 CanLII 699 (SCC), [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 RD 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.

[Emphasis added.]

[67] As in *Burlacu,* the RD, in a non-judicial or adversarial process, had broad discretion to decide not to investigate the Applicants' work refusal. The RD benefited from a detailed Rationale outlining the findings of "earlier investigative stages", including details from the previous work refusals. The Draft Decision, Rationale, and Recommendations were based on the Committee's report that was conducted by means of interviews with the COs who refused to work. As a result, the Investigator and the RD did not have to communicate with the COs as that had already occurred.

[68] The Committee's report explains that "the employer and Union representative, while in the presence of one of the current complainants tried to negotiate a resolution regarding the removal of the C8." This illustrates the RD's awareness that there had been attempts to work collaboratively between the COs and the Employer.

[69] The Applicants fail to explain how the information provided to the RD was prejudicial. They do not seem to suggest that they were unaware that this evidence existed, nor do they challenge the information contained in the CTR save for CO Mayer's comments. As such, I find this argument has no merit.

[70] Further, the fact that CO Mayer's comment was removed from the Decision does not show that the process was unfair. Clearly, this statement was not used as a basis for the RD's bad faith finding.

[71] I agree with the Respondent that the CHRC case law is not instructive in the case at bar. The *CLC* regime, including the provisions governing work refusals, are not quasi-constitutional

laws like the *Canadian Human Rights Act*, RSC, 1985, c H-6. Accordingly, the level of procedural fairness in this case is not as high as one would expect in human rights jurisprudence (*Konesavarathan v University of Guelph Radio*, 2020 FCA 148 at para 7, leave to the SCC refused, 39714 (21 November 2021)).

[72] I also agree with the Respondent that the Applicants were made aware that their behavior was deemed illegal after February 24, 2022, when Warden Sears wrote Applicant Duiker a detailed memorandum setting out his finding of no danger and explanation that the Applicants' work refusal represents an illegal labour action and a breach of a CO's oath. While there is no explicit mention of an accusation of bad faith in Warden Sears' letter, the absence of any explicit reference has no bearing on my determination.

[73] However, I disagree with the Respondent's submission that the Applicants ought to have known that they were accused of bad faith as the onus was on them to familiarize themselves with the IPG. The Applicants learned that they were accused of bad faith on March 3, 2022 after receiving the Decision. They could not have known this information beforehand based on the IPG.

[74] Notwithstanding the lack of an explicit mention of bad faith prior to the Decision, the record demonstrates that the three work refusals were made within approximately 50 days. The record also illustrates some inconsistencies with respect to the COs concerns with the C8 Carbines, as evidenced between the Second and Third Work Refusals. These circumstances were before the RD.

[75] The RD is entitled to screen out work refusals expeditiously. Of course, they must provide a rationale for their decision and rely on the investigator's work. The intent of the statutory scheme is to have most issues resolved within the internal process and not by work refusals, which should be limited to emergency cases. As stated in *Ketcheson,* the intent of the 2014 amendments were to strengthen the IRS to reduce the need for Ministerial Delegates to attend and investigate work refusal (at para 170). In fact, Parliament has granted the RD the power and discretion to decline to investigate a work refusal for that specific reason. As the reviewing Court, we must therefore show deference toward this administrative body by virtue of their expertise on all questions that come before them (*Vavilov* at para 28). The Court will only intervene where there is a "clearly deficient investigation" or where there is a failure to investigate "obviously crucial evidence" (*Demitor* at para 70).

[76] As in the case of *Demitor,* I do not see how the investigation was "clearly deficient" based on the Applicants' evidence. The RD exercised their broad discretion to make a determination of bad faith and they did so in a procedurally fair manner. Respectfully, the Applicants have failed to meet their burden to demonstrate that this process was procedurally unfair.

VI. Conclusion

[77] The application for judicial review is dismissed. The Decision was reasonable and rendered in a procedurally fair manner.

[78] As neither party made extensive submissions on costs, the Court directs that costs submissions be filed with the Court.

JUDGMENT in T-685-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The Applicants will provide their submissions on costs, not exceeding 10 pages, by June 9, 2023. The Respondent will provide its submissions on costs, not exceeding 10 pages, by June 30, 2023.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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