Federal Court  Cour fédérale

Date: 20170131

Docket: T-1317-15

Citation: 2017 FC 123

Ottawa, Ontario, January 31, 2017

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

LIKEZO KARN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Likezo Karn, is employed as a Senior Development Officer at the Department of Foreign Affairs, Trade and Development [DFATD].

[2] In February 2015, Ms. Karn notified her employer that she was exercising her right to refuse dangerous work under Part II of the *Canada Labour Code*, RSC 1985, c L-2 [CLC], on the basis that the repeated exposure to her supervisor constituted a dangerous situation.

[3] Relying on paragraph 129(1)(*a*) of the CLC, the Regional Director of the Labour Program, Quebec Region, Employment and Social Development Canada [Regional Director] concluded in a decision dated July 13, 2015 that the concerns of Ms. Karn would be more appropriately dealt with under the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [PSLRA].

[4] Ms. Karn seeks judicial review of the Regional Director's decision declining to investigate her complaint.

[5] For the reasons that follow, the application for judicial review is granted.

II. Background

A. *The Legislative Framework*

[6] The standards and procedures of occupational health and safety in the federal public service are governed by Part II of the CLC. Pursuant to subsection 128(1) of the CLC, an employee may refuse to work in a place, or to perform an activity, if the employee reasonably believes that a condition in the work place or the performance of an activity constitutes a danger

to themselves or to others. An employee must report such circumstances to the employer without delay (ss 128(6) of the CLC).

[7] Once an employee reports a refusal to work, the employer must immediately investigate the danger in the presence of the employee who reported it and prepare a written report setting out the results of the investigation (ss 128(7.1) of the CLC). Following the investigation, if the employer agrees that there is a danger, the employer must take immediate action to protect employees from the danger (ss 128(8) of the CLC).

[8] However, if the employer finds that there is no danger, the employee may continue the refusal to work and must report the circumstances to the employer and to the work place committee or the health and safety representative (ss 128(9) of the CLC). The work place committee or the health and safety representative must then investigate and provide a written report to the employer that sets out the results of their investigation and their recommendations, if any (ss 128(10) and (10.1) of the CLC). Afterwards, the employer must issue a decision finding either that a danger exists, that a danger exists but falls within a list of statutorily defined special circumstances, or that a danger does not exist (ss 128(13) of the CLC). If a danger that does not fall under one of the defined circumstances is found to exist, the employer is to take immediate action (ss 128(14) of the CLC).

[9] If the employee disagrees with the decision, the employee may continue the refusal to work. The employer must then immediately inform the Minister of Labour [Minister] and the

work place committee or the health and safety representative and provide the Minister with a copy of all investigation reports (ss 128(15) and (16) of the CLC).

[10] If the Minister is informed of the employer's decision and the continued refusal to work, the Minister (or the Minister's delegate) must investigate the matter pursuant to subsection 129(1) of the CLC, unless the Minister is of the opinion that:

> a) the matter is one that could more appropriately be dealt with, initially or completely, by means of a procedure provided for under Part I or III or under another Act of Parliament;
>
> b) the matter is trivial, frivolous or vexatious; or
>
> c) the continued refusal by the employee under subsection 128(15) of the CLC is in bad faith.

[11] If the Minister decides not to proceed with an investigation, the Minister informs the employer and the employee, who must then return to work (ss 129(1.1) and (1.2) of the CLC). However, if the Minister proceeds with an investigation, the employee may continue to refuse to work (ss 129(1.3) of the CLC).

[12] Upon completion of the investigation, the Minister can either: 1) agree that a danger exists; 2) agree that a danger exists but consider that the employee may not refuse to work because the refusal puts the life, health or safety of another person directly in danger or the danger in question is a normal condition of employment; or 3) determine that a danger does not exist. The Minister shall immediately give written notification of the decision to the employer and the employee (ss 129(4) of the CLC).

[13] If the Minister agrees that there is a danger, the Minister shall issue the appropriate directions to the employer. The Minister may direct the employer to take measures to correct the situation that constitutes a danger or protect any person from the danger (ss 129(6) and 145(2) of the CLC). If the Minister decides that no danger exists or that it is a normal condition of work, the employee may no longer continue to refuse to work but may appeal the Minister's decision to an Appeals Officer within ten (10) days of notice of the decision (ss 129(7) of the CLC).

[14] In addition to the refusal to work process set out in Part II of the CLC, a separate but complementary process which deals with work place violence complaints is outlined in Part XX of the *Canada Occupational Health and Safety Regulations,* SOR/86-304 [Regulations], adopted under the CLC. Under the Regulations, the employer is required to develop and post at a place accessible to all employees a work place violence policy setting out, among other things, the obligation to provide a safe, healthy and violence-free work place (section 20.3 of the Regulations). The Regulations also provide a redress mechanism for employees who experience work place violence. An employer who becomes aware of work place violence must try to resolve the matter with the employee as soon as possible, and if unsuccessful, shall appoint a "competent person" (as defined in ss 20.9(1) of the Regulations) to investigate the work place violence (ss 20.9(2) and (3) of the Regulations).

B. *The complaints*

[15] In May 2014, Ms. Karn filed a grievance pursuant to section 208 of the PSLRA against her supervisor, alleging abusive actions and behaviour.

[16] In January 2015, Ms. Karn filed a complaint under Part XX of the Regulations, alleging work place violence on the part of her supervisor.

[17] On February 4, 2015, Ms. Karn filed a refusal to work under section 128 of the CLC with her Director General at DFATD, alleging exposure to a dangerous situation due to her repeated exposure to her supervisor.

[18] The following week, Ms. Karn filed two (2) more grievances, one regarding a performance evaluation issued to her in January 2015 by her supervisor and another alleging a failure to accommodate her medical condition and disability.

[19] Ms. Karn's employer conducted its investigation into the refusal to work and concluded that the situation did not meet the definition of danger as defined in the CLC and that the refusal to work was not justified. Understanding that the situation was stressful for Ms. Karn, the employer nevertheless proposed a number of corrective actions, including the initiation of an independent investigation into the complaint of alleged work place violence.

[20] Given Ms. Karn's dissatisfaction with the employer's response, the Local Health and Safety Committee [Committee] at DFATD commenced an investigation into the refusal to work. On March 5, 2015, the Committee completed its investigation and provided its report to the employer, indicating that the Committee had failed to reach a consensus about the presence of danger.

[21] Following receipt of the report, the employer completed its investigation into the refusal to work and concluded that the danger did not exist. Ms. Karn was advised of the employer's determination by email on March 6, 2015 and was directed to return to work at her regular work station. Ms. Karn was also informed that an investigation by a competent and independent person had been initiated regarding her January 2015 complaint of alleged work place violence.

[22] Ms. Karn maintained her refusal to work and requested that the matter be investigated pursuant to subsection 129(1) of the CLC. The matter was referred to the Labour Program, Quebec Region, at the department of Employment and Social Development Canada [Labour Program].

[23] In or about the same time period, Ms. Karn withdrew her May 2014 grievance of abusive actions and behaviour.

[24] On May 13, 2015, Mr. Thibault, a Labour Affairs Officer, completed a memorandum to the Director of Regional Operations and Compliance Headquarters of the Labour Program, outlining his conclusions in support of a finding of danger. The memorandum also included a draft direction to the employer, pursuant to the Minister's power under paragraph 145(2)(*a*) of the CLC, advising that the Minister's delegate was of the view that the existing situation constituted a danger for the employee and ordering that the employer take immediate action to correct the situation.

[25] In a decision dated July 13, 2015, the Regional Director, on behalf of the Minister of Labour, refused to investigate Ms. Karn's refusal to work pursuant to subsection 129(1) of the CLC on the basis that Ms. Karn's concerns would be more appropriately dealt with under the PSLRA because of the grievances she had made. She informed Ms. Karn that she was no longer entitled to refuse to be in the direct or indirect presence of her supervisor.

III. Issues

[26] Although Ms. Karn raised a number of issues in her submissions, the sole determinative issue in this case is whether the Regional Director's decision refusing to investigate under paragraph 129(1)(*a*) of the CLC is reasonable.

IV. Analysis

A. *Standard of review*

[27] The first step in determining the appropriate standard of review is to establish whether the existing jurisprudence has already settled, in a satisfactory manner, the degree of deference to be afforded to a particular category of questions. If it has not, the reviewing court must proceed with an analysis to identify the proper standard of review (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 22 [*Edmonton East*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62, 64 [*Dunsmuir*]).

[28] Section 129 of the CLC (as it now reads) came into effect following the adoption of the *Economic Action Plan 2013 Act, No 2*, SC 2013, c 40 which received Royal Assent on

December 12, 2013. As there appears to be no existing jurisprudence regarding the standard of review to be applied to the Minister's decision not to investigate pursuant to subsection 129(1) of the CLC, I must determine the applicable standard of review.

[29] There is a presumption that the reasonableness standard of review applies when the issue to be decided involves the interpretation of the decision-maker's home statute or statutes closely connected to its function, with which it will have particular familiarity (*Edmonton East* at para 23; *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 46; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 21; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 30, 34 and 39).

[30] The presumption may however be rebutted when the issues relate to the four (4) categories identified in *Dunsmuir*: "constitutional questions regarding the division of powers, issues 'both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise', 'true questions of jurisdiction or vires', and issues 'regarding the jurisdictional lines between two or more competing specialized tribunals'" (*Edmonton East* at para 24; *Dunsmuir* at paras 58-61).

[31] Here, the decision of the Minister not to investigate a refusal to work pursuant to subsection 129(1) of the CLC calls for the interpretation and application of the Minister's home statute as well as statutes closely connected to its function, including the PSLRA and the Regulations adopted under the CLC. This decision involves a particular expertise regarding

issues relating to danger in the work place, refusals to work and other employment-related matters.

[32] As stated earlier, Parliament has adopted a comprehensive statutory scheme to govern health and safety issues in the federal public service, including the right of an employee to refuse to work on the basis of a dangerous situation in the work place. Its purpose is to prevent accidents and injury to health (s 122.1 of the CLC). Subsection 129(1) of the CLC is intended to ensure that a matter is dealt with and resolved in a timely manner by the decision-maker with the most suitable and specialized expertise. While the issue in *Canada (Attorney General) v Public Service Alliance of Canada*, 2015 FCA 273 [*Public Service Alliance of Canada*] related to work place violence complaints under Part XX of the Regulations, the Federal Court of Appeal found that the reasonableness standard of review applied to a decision of an Appeals Officer who had "expertise working within the complex, comprehensive statutory scheme created by the [CLC] and the *Regulations*" (*Public Service Alliance of Canada* at para 15). Even if the decision of the Minister under subsection 129(1) of the CLC in this case is not protected by a privative clause as was the case with the decision of the Appeals Officer in *Public Service Alliance of Canada*, I do not consider this to be a determinative factor (*Canada* (*Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 25 [*Khosa*]).

[33] Moreover, the courts have also held that questions of discretion and of mixed fact and law are generally reviewable on the standard of reasonableness, thereby attracting a level of deference by the reviewing court (*Dunsmuir* at para 51). In this case, the decision of the Minister refusing to investigate under subsection 129(1) of the CLC involves both questions of mixed fact

and law and a use of discretion given the expression “unless the Minister is of the opinion that” found in subsection 129(1) of the CLC.

[34] Finally, none of the factors favouring the application of the correctness standard are present. The application of subsection 129(1) does not raise a constitutional question, a “true question” of *vires* or jurisdiction or a question of general importance to the legal system as a whole. Furthermore, its interpretation is not a matter in respect to which both this Court and the Minister have concurrent original jurisdiction (*Edmonton East* at para 24; *Dunsmuir* at paras 58-61). I consider that the presumption of reasonableness has not been rebutted in this case.

[35] For all of these reasons, I will approach my review of the Minister’s decision through the lens of reasonableness.

[36] Where the standard of reasonableness applies, the role of the Court is to consider whether the decision “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* at para 47). Deference is owed to the decision-maker. While there might be more than one reasonable outcome, “as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome” (*Khosa* at para 59).

[37] In assessing reasonableness, the adequacy of reasons is not a stand-alone basis to quash a decision. A decision-maker need not make an explicit finding on each constituent element, even

if subordinate, leading to its final conclusion. Rather, the reasons must be read as a whole, with regard to the record. If they permit the reviewing court to understand why the administrative decision-maker made its decision and to determine if the conclusion is within the range of acceptable outcomes, the criteria enunciated by the Supreme Court of Canada in *Dunsmuir* are met (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 12, 14, 16 and 20).

B. *Documents not before the decision-maker*

[38] Although the Respondent has not objected to this, the Court notes that the documentary evidence filed by Ms. Karn as exhibits to her affidavit in support of the present application were not part of the Certified Tribunal Record [CTR]. It is trite law that in a judicial review application, barring certain well-defined exceptions, the only material that should be considered is that which was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20). This Court has upheld this principle even in cases where neither party objected to the admissibility of the evidence (*Gadwa v Kehewin First Nation*, 2016 FC 597 at para 35).

[39] It is not necessary for me to address the question of their admissibility as there is sufficient evidence in the CTR to dispose of the application for judicial review (*Canada (Attorney General) v Emmett*, 2013 FC 610 at para 36). While I rely on certain facts from Ms. Karn's affidavit which are acknowledged by both parties for the purposes of providing background and contextual information, I do not rely, for the purposes of my decision, on any

information which was not part of the CTR and presumably not considered by the Regional Director.

C. *Whether the Regional Director's decision of July 2015 is reasonable?*

[40] Ms. Karn submits that the Minister's authority under subsection 129(1) of the CLC consists of a preliminary screening function only. Once the investigation is complete and the investigator has provided a recommendation, the Minister's decision must be consistent with subsection 129(4) of the CLC. In this case, the Regional Director, acting on behalf of the Minister, no longer had the authority to decline to investigate and redirect the matter elsewhere.

[41] Ms. Karn further submits that the decision was unreasonable as it was made in a capricious manner and it provided no analysis or foundation for its conclusion that the PSLRA was a more appropriate process than section 129 of the CLC to deal with her concerns. She argues that the PSLRA grievance procedure was not more appropriate for a number of reasons: (1) she is statutorily barred from filing a grievance pursuant to subsection 208(2) of the PSLRA; (2) refusals to work are to be resolved in a timely manner which is inconsistent with the PSLRA grievance procedure; (3) an investigation by the Minister had already been completed; and (4) the only grievances alive at the time of the decision were related to her performance evaluation and failure to accommodate her disability.

[42] The Respondent submits that the decision of the Minister to refuse to investigate Ms. Karn's refusal to work was entirely reasonable. The Respondent argues that Ms. Karn incorrectly states that an investigation was underway regarding her refusal to work and that she

has failed to point to any decision of the Minister's delegate, the Regional Director, explicitly demonstrating that the decision had been made to investigate Ms. Karn's complaint under section 129 of the CLC. The Respondent further submits that Mr. Thibault was not the decision-maker and that it was open for the Minister to reject Mr. Thibault's recommendation and conclude that the PSLRA was a more appropriate avenue to address Ms. Karn's concerns.

[43] Upon review of the CTR, I find that the Regional Director's decision was unreasonable regardless of whether or not an investigation actually took place. In either case, the Regional Director's decision was not justified, transparent or intelligible as it lacked any explanation of why the PSLRA constituted a more appropriate process to deal with Ms. Karn's allegations of danger or why she was rejecting Mr. Thibault's recommendation.

[44] On May 13, 2015, Mr. Thibault completed a memorandum to the Director of Regional Operations and Compliance Headquarters of the Labour Program, outlining his conclusions in support of a finding of danger. The memorandum included a draft direction to the employer which indicated as follows:

> Le 27 avril 2015, l'agent des affaires du travail / santé et sécurité au travail soussigné, à titre de délégué official du ministre du Travail, a procédé à une enquête sur le refus de travailler de Mme Likezo Karn dans le lieu de travail exploité par Affaires Étrangères et Commerce International, employeur assujetti à la partie II du *Code Canadien du travail* […].
>
> Le délégué officiel du ministre du Travail estime qu'une situation existante dans le lieu constitue un danger pour un employé au travail, à savoir: …
>
> [TRANSLATION]

> On April 27, 2015, the undersigned Labour Affairs / Occupational Health and Safety Officer, as the official delegate of the Minister of Labour, investigated Ms. Likezo Karn's refusal to work in the work place, operated by the Foreign Affairs and International Trade, an employer subject to Part II of the *Canada Labour Code* […].
>
> The official delegate of the Minister of Labour considers that an existing situation in the work place constitutes a danger for an employee at work, namely: …
>
> [My emphasis.]

[45] Mr. Thibault's memorandum and attached draft direction clearly support the argument that Ms. Karn's refusal to work was investigated.

[46] The Minister contends that there was no investigation and relies on a document entitled "Rapport de recommandations à l'intention du directeur régional: paragraphe 129(1) de la Partie II du Code canadien du travail" [TRANSLATION] "Report of Recommendations to the Regional Director, Section 129(1) of the *Canada Labour Code*, Part II", wherein Mr. Thibault states "cette affaire doit faire l'objet d'une enquête" [TRANSLATION] "this case must be investigated".

[47] I do not find the Respondent's argument to be persuasive. The document in question is undated. It could have been drafted at any time between March 18, 2015 when the employer provided notice of Ms. Karn's continued refusal to work (see Report of Recommendations to the Regional Director, Section 129(1) of the *Canada Labour Code*, Part II) and March 26, 2015, the date when Mr. Thibault was assigned to investigate (see Mr. Thibault's May 13, 2015

memorandum to the Director of Regional Operations and Compliance Headquarters of the Labour Program). I further observe that Mr. Thibault's memorandum dated May 13, 2015 and the "Rapport de recommandations" [TRANSLATION] "Report of Recommendations" are listed separately in the Certificate filed by the Regional Director identifying the documents considered in reaching her decision, suggesting that they were not drafted at the same time.

[48] To the extent that Mr. Thibault did conduct an investigation into Ms. Karn's refusal to work as it appears from his May 13, 2015 memorandum, the Regional Director was required to render a decision in conformity with subsection 129(4) of the CLC and make one (1) of the decisions referred to in subsection 128(13) of the CLC. The Regional Director had three (3) options: 1) agree that a danger exists; 2) agree that a danger exists but consider that the refusal puts the life, health or safety of another person directly in danger or that the danger is a normal condition of employment; and 3) determine that a danger does not exist.

[49] Even if the Regional Director was of the view that the investigation was not yet completed (ss 129(4) provides that the Minister's obligation arises "on completion of an investigation") and that she was consequently not bound by subsection 129(4) of the CLC, or that she was not required to follow the recommendation of Mr. Thibault, I consider that she should nevertheless have provided reasons for her decision. While the standard of reasonableness requires that I afford deference to the Regional Director's decision and that I look to the record for the purpose of assessing the reasonableness of the outcome (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15), I am unable to understand why the Regional Director diverged from Mr. Thibault's

recommendation and findings, and even less, why the Respondent asserts that there was no investigation.

[50] Moreover, if there was no investigation into Ms. Karn's refusal to work, as the Respondent contends, the Regional Director's decision only refers to unidentified grievances made by Ms. Karn. Based on the documents listed in the CTR, Ms. Karn's grievances were not before the Regional Director. Additionally, Mr. Thibault's May 13, 2015 memorandum explicitly addressed the issue of redirecting Ms. Karn's complaint to other procedures and clearly confirmed that the CLC procedure was the most appropriate procedure to address her refusal to work. In fact, Mr. Thibault indicated that Ms. Karn could not legally be redirected elsewhere.

[51] While Mr. Thibault does not provide further detail on the legal impediment of redirecting Ms. Karn elsewhere, Ms. Karn argued that she was statutorily barred from raising her refusal to work through the grievance procedure pursuant to subsection 208(2) of the PSLRA. This provision prohibits the filing of an individual grievance where "an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*". She argued that the Regional Director's decision is unreasonable as the PSLRA expressly requires grievers to use specialized processes such as the refusal to work scheme under the CLC. She further argues that the requirement that refusals to work be resolved in a timely manner is inconsistent with the scheme of the PSLRA procedure which requires a progression through a number of internal grievance steps.

[52] I find this argument to be persuasive as it further highlights the lack of intelligibility in the Regional Director's decision. However, I need not pronounce myself on the merits of Mr. Thibault and Ms. Karn's interpretation of the PSLRA.

[53] Ultimately, the Regional Director's decision lacks justification, transparency and intelligibility and as such, it is unreasonable and does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

[54] Accordingly, the application for judicial review shall be allowed and the decision of the Regional Director is set aside. Having regard to all the circumstances of this matter, Ms. Karn shall be entitled to costs in the amount of $4,500.00, inclusive of disbursements.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The decision of the Regional Director of the Labour Program, Quebec Region, Employment and Social Development Canada, dated July 13, 2015 is set aside and the matter is remitted back to the Minister of Labour or her delegate for reconsideration in accordance to the reasons of this Court;
3. Costs are awarded to the Applicant in the amount of $4,500.00, inclusive of disbursements.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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