Federal Court  Cour fédérale

Date: 20171129

Docket: T-2043-16

Citation: 2017 FC 1077

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 29, 2017

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

CAROLE PRONOVOST

Applicant

and

CANADA REVENUE AGENCY

Respondent

JUDGMENT AND REASONS

[1] The applicant, Ms. Carole Pronovost, has worked at the Canada Revenue Agency [the CRA or the employer] since 1993. She is contesting the legality and/or reasonableness of a decision made by the Assistant Commissioner for the Quebec Region of the CRA on October 28, 2016, dismissing her work place violence complaint.

[2] The purpose of Part II of the *Canada Labour Code*, RSC, 1985, c. L-2 [Code], is to prevent accidents and injury to health arising out of, linked with, or occurring in the course of employment, and it applies to, among others, CRA employees. Part XX of the *Canada Occupational Health and Safety Regulations*, SOR/86-304 [Regulations], establishes preventative and investigative controls to deal with work place violence. According to section 20.2 of the Regulations, work place violence constitutes any action, conduct, threat, or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury, or illness to that person. It is not disputed that, depending on the context, bullying, teasing, and abusive and other aggressive behaviour in the work place, as well as psychological harassment, may fall into this category (see in particular *Canada (Attorney General) v Public Service Alliance of Canada*, 2015 FCA 273 at para 22; see also Employment and Social Development Canada, *Guide to violence prevention in the workplace*, 943-1-IPG-081, Ottawa, Employment and Social Development Canada – Labour Program, 2016 at para 3.3). It should be noted in passing that harassment "comprises objectionable act(s), comment(s) or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat" (see Treasury Board of Canada, *Policy on Prevention and Resolution of Harassment in the Workplace*, Ottawa, Treasury Board, 2012 [Harassment Policy]).

[3] The Regulations impose on the employer the obligation to develop a violence prevention policy in the work place setting out, among other things, the obligation to provide a safe, healthy and violence-free work place (paragraph 20.3(a) of the Regulations). As soon as it is aware of such violence, the employer must try to resolve the matter amicably with the employee and, if unable to do so, appoint a competent person to investigate the matter (subsections 20.9(2) and

20.9(3) of the Regulations). This person must be seen by the parties to be impartial (paragraph 20.9(1)(a) of the Regulations). At the completion of the investigation, the competent person provides to the employer a written report with conclusions and recommendations (subsection 20.9(4) of the Regulations). On completion of the investigation, the employer shall, among other things, provide the work place committee or the health and safety representative, as the case may be, with the report, and implement controls to prevent a recurrence of the violence (paragraphs 20.9(5)(b) and 20.9(5)(c) of the Regulations). Once these controls are implemented, the employer shall establish appropriate follow-up maintenance and corrective measures (subsection 20.6(3) of the Regulations).

[4] The applicant, who says that she has also experienced ongoing psychological harassment in the work place from the autumn of 2009 to date, made the violence complaint pursuant to section 20.9 of the Regulations. For the purposes of this case, it is not necessary to recount each and each and every incidence of violence and/or harassment set out in Appendix A of her complaint dated March 30, 2016. Although the complaint refers in particular to managerial decisions affecting the applicant's work conditions, this must be read in light of the additional details provided by the applicant in several relevant documents that were sent to the employer — including the harassment complaint dated June 2, 2015, and an addendum dated May 5, 2016 — submitted by the applicant in the context of the investigation that was conducted following the violence complaint. Specifically, the applicant says that she was humiliated in front of her co-workers, while the managers took the opportunity to turn her colleagues against her. This wrongful conduct affected the applicant's physical and mental health: extended sick leave, psychological stress, damage to her reputation and integrity, interruption of her career, lost

wages, expenses for various treatments, moral damages, impact on her family and romantic relationships, weight gain, etc.

[5] In May and June 2016, there were various exchanges between the employer and the applicant regarding the appointment of a competent person to investigate the work place violence incidents alleged by the applicant. The employer proposed two candidates: Ms. Kathryn Langon-Burton and Mr. Daniel Labrie. The applicant raised no particular concern about Mr. Labrie's impartiality. She did however raise concerns about Ms. Langon-Burton's impartiality. On June 16, 2016, the employer appointed Mr. Labrie [the investigator] as competent person.

[6] On July 6, 2016, the investigator met with the applicant and her union representative. Documents were submitted to the investigator. However, the investigator only accepted the documents that the applicant had already been sent to the employer. This Court understands that the applicant was able to provide the investigator with the names of several employees to contact. After the meeting of July 6, 2016, the investigator did indeed meet with the managers who were the subject of the harassment and violence allegations, and with a female employee named in the violence complaint. However, the content of this testimony was never disclosed to the applicant, and the investigator's notes and/or tapes of this testimony were not filed with the Court.

[7] On September 26, 2016, the investigator submitted his report, which was endorsed by the Assistant Commissioner, to the employer. The report was disclosed to the applicant and to the

health and safety committee on October 28, 2016. At no time before the Assistant Commissioner's final decision was rendered was the applicant invited to make submissions on the investigation report.

[8] In the first place, it should be noted that the report contains no analysis of the evidence gathered by the investigator (documents and testimony). With respect to the specific incidents of violence and/or harassment referred to in the complaint, the investigator does not discuss the content of the meeting with the applicant and her union representative on July 6, 2016, or the investigator's subsequent meetings with the managers referred to in the violence complaint and with the other female employee. In general terms, the investigator notes that the CRA — like all government organizations under federal jurisdiction — is already equipped with numerous policies and procedures on the prevention of violence in the work place and its various components, which the investigator briefly overviewed in his report.

[9] Essentially, the investigator considers that this was not a case of "work place violence" within the meaning of section 20.2 of the Regulations. According to the investigator, the alleged acts of the persons referred to in the complaint — mainly managers or executives — are matters that fall instead under the employer's exercise of its [TRANSLATION] "management rights". As for the harm suffered by the applicant, the investigator believed that the applicant was instead vulnerable because of her family situation and that she had a personal emotional health condition, independent of work, which likely affected her behaviour and interpersonal relationships. The investigator, noting that grievances had been lodged and that the harassment

complaint was still pending, was of the opinion that there was no need for new procedures or prevention measures other than those already available.

[10] The applicant submits that the impugned decision is reviewable on three distinct grounds:

(a) The investigator had no authority because the employer did not comply with subsection 20.9(1) of the Regulations;

(b) The investigator breached his duty of procedural fairness in the investigation; and

(c) The impugned decision is unreasonable.

[11] The respondent counters that this Court should not consider the first ground because the applicant did not use the administrative appeal procedures that were available to her to contest the competent person's appointment. That said, the investigator respected the principles of procedural fairness in the course of the investigation, and the findings in his report are also reasonable. In this regard, the employer fulfilled its obligations to implement work place violence prevention measures through policies and procedures already in effect.

[12] I will not say much about the applicant's first ground. It is not necessary to decide right now whether the applicant should have exhausted all available administrative remedies to contest Mr. Labrie's appointment as competent person. In fact, the applicant does not challenge his impartiality in this application for judicial review. Nevertheless, I am satisfied that the principles

of procedural fairness were not respected and that the impugned decision — which is based on the investigation report — is unreasonable.

[13] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at pages 838–840, 174 DLR (4th) 193, the Supreme Court teaches us that five factors must be considered to determine the content of the duty of procedural fairness: the nature of the decision made and the process followed in making it, the nature of the statutory scheme, the importance of the decision to the individual or individuals affected, the legitimate expectations of the person, and the choices of procedure made by the agency itself. Although the Regulations do not provide a specific procedure, it should be noted that the investigation has significant consequences on staff relations in the work environment in question, as well as on the professional career and the psychological condition of the alleged victim and any person referred to in the work place violence or harassment complaint. These considerations are determinative in this case. In fact, the duty of procedural fairness in the context of harassment allegations is a particularly heavy one (see in particular *Renaud v Canada (Attorney General)*, 2013 FC 18, aff'd *Renaud v Canada (Attorney General)*, 2013 FCA 266). Even though *Renaud* involved a harassment complaint under the Treasury Board's Harassment Policy, the same stringency applies here, since harassment can constitute violence for the purposes of Part XX of the Regulations.

[14] In this case, the applicant criticizes the investigator for, among other things, only meeting with her once, at the very beginning of the investigation, and for failing to allow her to counter any unfavourable testimony and/or make her submissions before the final investigation report was sent to the employer. The respondent claims that the initial meeting was sufficient: the

applicant spent three hours on that occasion explaining her version of the facts to the investigator. The respondent states that the witnesses interviewed were not proposed by the employer, but rather were identified by the investigator when he reviewed the file. Moreover, the respondent submits that the confidential nature of the investigation and the investigator's obligation to conduct it in an expeditious manner justify the failure to send the applicant the testimony and/or a preliminary version of the report that the investigator intends to send to the employer.

[15] Procedural fairness was breached. It was impossible for the applicant to anticipate the testimony of the executives and/or employees interviewed after the meeting on July 6, 2016. The investigator should have given her a reasonable opportunity to rebut any unfavourable evidence that was gathered in her absence and to respond to any of the managers' allegations that their behaviour in the work place did not constitute violence or harassment. Even though the investigator had to act quickly, and his investigation had to be confidential, he had to ensure that every person who could be affected by the findings in his report was heard and was able to make submissions to him.

[16] Moreover, the applicant also disputes the reasonableness of the investigator's findings, given the complete lack of analysis of the evidence in the file. In fact, on reading his report, there is no way to understand how the investigator arrived at the conclusion that the managers' alleged acts did not constitute violence within the meaning of the Regulations. The investigator could not simply state that this was a matter of the employer legitimately exercising its management rights.

In short, the Court cannot find, based on the reasons provided, that the investigator conducted a thorough and serious analysis of the file.

[17] The respondent replies that the investigator did not have to refer to all the evidence or to any particular act of violence. The reasons are sufficient to understand the basis of decision. It must also be presumed that the investigator took into account all the evidence on file. In this case, the investigator could find that the alleged acts took place in the context of the employer exercising its managerial authority. The investigator also considered the prejudice caused to the applicant. He was entitled to consider the applicant's personal condition as a factor affecting causation.

[18] The employer's decision to dismiss the work place violence complaint is not an acceptable outcome. It is obvious that the investigator did not conduct a thorough and serious analysis of the file and that his investigation is seriously deficient. The applicant's complaint refers to several facts and incidents that — if they are taken as proved at this stage — could constitute violence within the meaning of the Regulations, in particular the following allegations (the Court has omitted the names of the individuals referred to in the complaint):

- Several managers tolerated group gripe sessions conducted by other employees against the applicant. Employees were even invited to participate;

- A manager used an angry and authoritative tone toward the applicant, in front of her co-workers. The applicant stated that two employees witnessed this incident;

- Another manager allegedly addressed the applicant in a violent and intimidating tone. This other manager allegedly encouraged her colleagues to file a complaint against her and instructed the employees not to communicate with the applicant;

- Yet another manager allegedly spoke to the employees about the other grievances that the applicant had filed, saying that if she won, employees and management would be [TRANSLATION] "in deep shit";

- The other employees were also allegedly led to believe that the applicant was in the wrong and inappropriate.

[19] It must be noted that the incidents described in the preceding paragraph — which were not isolated ones — appear to contradict the investigator's general finding that the impugned behaviour was no more than administrative measures relating to the employer's exercise of its management rights. Moreover, the unreasonable nature of the complaint's dismissal is the result of the investigator's failure to address the specific allegations of violence in the work place where the applicant and her co-workers worked. Bear in mind that the investigator relied on the fact that grievances had been lodged and that the harassment complaint was still pending, concluding that new violence prevention measures were not necessary. Certainly, the impugned administrative measures are the subject of grievances, and the harassment allegations will indeed be considered in a separate investigation. Nevertheless, the employer's obligation under Part II of the Code to provide a violence-free work place involves potentially different behaviours, even though there may be some overlap. In short, we are referring to the very atmosphere of the work

place, which should not be tainted by the insulting or aggressive behaviour of managers or employees. Intimidation of any kind is toxic to interpersonal relationships and contributes to an unhealthy work environment for both the employer and the employees. Work place violence prevention is meant to reprimand incidents that would not necessarily be contrary to the collective agreement — when they are examined in isolation in the context of a grievance, or when they would not necessarily amount to psychological harassment, but where Parliament has nonetheless deemed it necessary to ban it in general in order to provide a safe, healthy, and violence-free work place. The place, the means, and the tone used by a manager to warn or reprimand an employee are important elements to consider when an employee makes a work place violence complaint.

[20] Therefore, to summarize, the investigator had to ensure that the employer's work place was safe, healthy, and violence-free. However, nothing in his report indicates that such an investigation indeed took place. The multiple incidents alleged by the applicant, listed above, could at the very least indicate the existence of a certain atmosphere of violence, and therefore would have warranted a more thorough examination. The investigator would, of course, have been at liberty to ultimately dismiss the applicant's allegations — in the event that the investigation revealed that they were not founded and that the work place was healthy and violence-free.

[21] One last point: work place harassment and violence should never be trivialized. As this Court recognized in *Public Service Alliance of Canada v Canada (Attorney General),* 2014 FC 1066 at paragraph 29, "psychological bullying can be one of the worst forms of harm that can be

inflicted on a person over time". Naturally, the experience and qualifications of the competent persons appointed to investigate have an impact on the confidence level required from management and the employees. A sound awareness of the complex issue of harassment and its pernicious components is obviously required. Also, we can ask ourselves how the investigator — whose curriculum vitæ was never provided to the applicant — could disregard, at the end of what was in sum a very cursory investigation, the applicant's psychological harm caused by the alleged acts of violence and/or harassment, based on the applicant's emotional vulnerability, when he did not have, it appears, any medical expertise or particular qualifications to give this opinion.

[22] For these reasons, the application for judicial review is allowed. The Assistant Commissioner's decision dismissing the applicant's violence complaint is set aside, and the matter is referred back to the respondent for redetermination after a new work place investigation is conducted by another competent person considered impartial by the parties and after the applicant has had the opportunity to be heard and make submissions on all the evidence gathered in her absence and to comment on the competent person's findings before the investigation report is sent to the employer.

[23] After considering counsel's submissions, the applicant is entitled to a lump sum of $2,500 for costs.

JUDGMENT in T-2043-16

THE COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed;

2. The Assistant Commissioner's decision dismissing the applicant's violence complaint is set aside, and the matter is referred back to the respondent for redetermination after a new work place investigation is conducted by another competent person considered impartial by the parties and after the applicant has had the opportunity to be heard and make submissions on all the evidence gathered in her absence and to comment on the competent person's findings before the investigation report is sent to the employee; and

3. The applicant is entitled to a lump sum of $2,500 for costs.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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