Federal Court  Cour fédérale

Date: 20141022

Docket: T-955-13

Citation: 2014 FC 931

BETWEEN:

UNION OF CANADIAN CORRECTIONAL OFFICERS - SYNDICAL DES AGENTS CORRECTIONNELS DU CANADA – CSN AND KERRI LUDLOW

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

PUBLIC REASONS FOR JUDGMENT

(Confidential Reasons for Judgment Issued September 30, 2014)

HENEGHAN J.

I. INTRODUCTION

[1] The Union of Canadian Correctional Officers-Syndical Des Agents Correctionnels Du Canada - CSN and Kerri Ludlow (the "Applicants") seek judicial review, pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of a decision of Appeals Officer Jean-Pierre Aubre of the Occupational Health and Safety Tribunal Canada (the "Appeals Officer") dated

May 2nd, 2013. In that decision, the Appeals Officer reversed the Direction of Health and Safety Officer Bob Tomlin, issued September 15th, 2010. Pursuant to subsection 303(2) of the *Federal Courts Rules*, SOR/98-106, the Attorney General of Canada is the Respondent (the "Respondent") to this application.

II. FACTS

[2] This application arises from a complaint filed with Human Resources and Skills Development Canada by Kerri Ludlow on August 25th, 2010. Ms. Ludlow is a Correctional Officer employed by Correctional Services Canada ("CSC") at Fenbrook Medium Institution (the "Institution").

[3] The Institution is a federal prison located in Gravenhurst, Ontario. It is designed to house medium security inmates with an institutional adjustment rating of "low", meaning that the inmates present a low to moderate risk of escape and a low to moderate risk to public safety.

[4] The Institution is known as a "free egress" institution. In several of the units, the inmates are not confined to their cells. The housing units are open in concept and allow the inmates to have free movement within the units at all times. The open nature of the Institution is what allows lower risk inmates to be housed there.

[5] Ms. Ludlow's complaint arose from her concerns about the adequacy of staffing levels on the overnight shifts. According to her complaint, the number of Correctional Officers working the overnight shift is significantly lower than the number working during the day.

[6] During the day, Correctional Officers patrol the range, where prisoners are located, in pairs. During the overnight shift, due to the reduced number of staff, Correctional Officers must patrol the range alone. There are blind spots on the range and the Correctional Officer on patrol is not visible at all times to his or her colleagues in the control centre.

[7] According to Ms. Ludlow, the inmate population is the same at night as it is during the day. She claims that the reduced staff at night increases the danger posed to Correctional Officers working that shift. The inmate population has increasingly come to include inmates with a higher risk rating and with gang affiliations. The reduced number of staff on the overnight shift is not adequate to allow them to respond to more than one emergency at a time. These factors combined to pose a danger to Correctional Officers working the overnight shift.

[8] Ms. Ludlow initially brought her concerns to the attention of her superiors at the Institution. The Health and Safety Committee at the Institution investigated her complaint and the investigation was completed on August 19th, 2010. The Health and Safety Committee recommended a number of steps be taken to resolve Ms. Ludlow's concerns.

[9] Ms. Ludlow was not satisfied with the outcome of the investigation and filed a complaint with Human Resources and Skills Development Canada pursuant to subsection 127.1 of the *Canada Labour Code*, R.S.C. 1985, c L-2 (the Code) on August 25th, 2010. Human Resources and Skills Development Canada-Labour Program commenced an investigation.

[10] On August 30th, 2010, Health and Safety Officer Bob Tomlin and Health and Safety Officer Domenico Iacobellis visited the Institution in the course of the investigation. They met with Ms. Ludlow, Correctional Officer and employee representative Jeff West, Deputy Warden Launa Smith and Anette Allen, an employer member of the Health and Safety Committee at the Institution. The Health and Safety Officers also inspected two of the inmate living units.

[11] Health and Safety Officer Bob Tomlin released a report on the investigation on October 4th, 2010. In it, he identified three concerns raised by Ms. Ludlow in her complaint:

1. the offender profile of the Institution had changed and higher security inmates were now being housed there;
2. the reduced number of staff working the night shift was insufficient to properly respond to emergencies, and
3. the free egress design of the Institution required more staff on site to protect the safety of staff, inmates and the public.

[12] Health and Safety Officer Tomlin found that the evidence demonstrated that inmates in the Institution had become more aggressive and unpredictable. The most recent Security Risk Assessment carried out by the Institution did not comment on the conditions of the night shift. CSC, as the employer, had not satisfied the Health and Safety Officer that it considered the effectiveness of its Hazard Prevention Program for the night shift as required. This constituted a violation of the Code.

[13] The Health and Safety Officer also determined that the current level of staff present on the night shift was only sufficient to respond to one emergency. In the case of a second emergency, off-duty Correctional Officers would have to be called in, resulting in a delayed response. During patrols, the Health and Safety Officer determined that the patrolling Correctional Officer passes through blind spots and the current method of patrol requires the control panel to be left unattended. An increase in the number of inmates was resulting in double bunking in the Institution. The Health and Safety Officer determined that these factors constituted a "danger" as defined in the Code.

[14] The Health and Safety Officer issued a Direction to CSC pursuant to paragraph 145(2)(a) of the Code. The Direction, dated September 15, 2010, required that the employer correct the danger identified in the report.

[15] The Health and Safety Officer issued another Direction to CSC, dated October 4, 2010, pursuant to paragraph 145(2)(a) of the Code requiring that the employer evaluate the effectiveness of its hazard prevention program as identified in the report.

[16] On September 21st, 2010, CSC filed an appeal of the September 15th, 2010 Direction to the Employer issued by Health and Safety Officer Bob Tomlin with the Occupational Health and Safety Tribunal Canada.

III. DECISION UNDER REVIEW

[17] The Appeals Officer reviewed the evidence and submissions of the parties. He identified that the key issue in the appeal was whether the current staffing levels at the Institution were sufficient to allow the staff to safely carry out a number of tasks on the night shift, including patrols, and to respond to more than one emergency. Determining this issue required an assessment of the facts and circumstances present at the Institution, including the policies and practices in place.

[18] The Appeals Officer noted that it was his duty on the appeal to determine, on a balance of probabilities, whether the danger identified by Health and Safety Officer Bob Tomlin existed. The appeal was to proceed on a *de novo* basis. The Appeals Officer concluded that he had the jurisdiction to require the employer to correct the hazard or danger, if necessary. The Appeals Officer's jurisdiction was not to question the employer's prerogative to enact policies, but rather whether those policies in their application gave rise to a danger.

[19] The Appeals Officer noted that both parties to the appeal agreed that it was impossible to completely eliminate hazards arising from the exposure to inmates in a correctional environment. Determining the danger posed to employees in the Institution required an assessment of the particular circumstances of that work environment and the normal conditions of employment. Notions of danger were not to be based on speculation.

[20] The Appeals Officer noted the four part test applied by Justice Dawson of the Federal Court (as she then was) in *Canada Post Corp. et al. v. Pollard* (2007), 321 F.T.R. 284 at paragraph 66, affirmed by the Federal Court of Appeal in *Canada Post Corp. v. Pollard et al.* (2008), 382 N.R. 173 (F.C.A.), for the determination of danger in the workplace.

[21] The Appeals Officer recognized that there had been a change in the profile of inmates at the Institution that may make the job of the Correctional Officers more difficult. However, he was ultimately persuaded by the evidence that the change in inmate profile was more of an administrative nature and did not impact the daily functioning of the workplace. He was not satisfied that "something is bound to happen" at the Institution.

[22] The Appeals Officer concluded that there was no evidence that a scenario involving a second emergency to which staff could not adequately respond was anything more than hypothetical. He concluded that having considered all of the evidence presented, a determination of danger was not warranted on a balance of probabilities. The appeal was granted and the Direction to the Employer rescinded.

IV. RELEVANT LEGISLATION

[23] The following provisions of the Code are relevant:

Definitions	Définitions
122. (1) In this Part, "danger" … « danger » "danger" means any existing or potential hazard or	122. (1) Les définitions qui suivent s'appliquent à la présente partie. … « danger » "danger"

condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;

…

Refusal to work if danger

128. (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that

…

(b) a condition exists in the place that constitutes a danger to the employee; or

(c) the performance of the activity constitutes a danger to the employee or to another employee.

No refusal permitted in certain dangerous circumstances

(2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if

(a) the refusal puts the life, health or safety of another person directly in danger; or

(b) the danger referred to in

« danger » Situation, tâche ou risque — existant ou éventuel — susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade — même si ses effets sur l'intégrité physique ou la santé ne sont pas immédiats —, avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d'avoir des effets à long terme sur la santé ou le système reproducteur.

…

Refus de travailler en cas de danger

128. (1) Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas :

…

b) il est dangereux pour lui de travailler dans le lieu;

c) l'accomplissement de la tâche constitue un danger pour lui-même ou un autre employé.

Exception

(2) L'employé ne peut invoquer le présent article pour refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche lorsque, selon le cas :

a) son refus met directement en danger la vie, la santé ou la

subsection (1) is a normal condition of employment. …	sécurité d'une autre personne; b) le danger visé au paragraphe (1) constitue une condition normale de son emploi. …

V. ISSUES

[24] The Applicants frame the issues as first, an error of law by the Appeals Officer in "failing to follow the methodology prescribed in the Code and the legal jurisprudence of the Federal Court related to the finding of danger", and second, the failure to "observe a principle of natural justice, in particular, a failure to provide a meaningful analysis of all the evidence relevant to the finding of danger."

[25] The Respondent raises an issue as to the admissibility of the affidavits filed by the Applicants, that is, the affidavits of Correctional Officers Kerri Ludlow, Robert Finucan, Jean-Luc Chamaillard, Michael Scott Dafoe, Tim Foster, David Saponara, and Mike Ainger. These individuals purport to offer summaries of the evidence that was before the Appeals Officer.

[26] The Respondent objects to the consideration of these affidavits.

[27] As such, this application for judicial review raises the following issues:

What is the appropriate standard of review?

Are the affidavits submitted by the Applicant admissible?

1. Was the Appeals Officer's decision unreasonable for failing to apply the appropriate analysis of danger?

2. Was the Appeals Officer's decision unreasonable for failing to undertake a meaningful analysis of the evidence?

VI. ARGUMENTS

Issue 1: What is the appropriate standard of review?

A. *Applicants' Argument*

[28] The Applicants submit that the applicable standard of review is reasonableness, relying on the decision in *Martin v. Canada (Attorney General)*, [2005] 4 F.C.R. 637 (F.C.A).

B. *Respondent's Argument*

[29] The Respondent argues that the applicable standard of review in this case is reasonableness and that the decision of the Appeals Officer is owed significant deference.

C. *Analysis*

[30] The Applicants frame the issues as an error of law and breach of procedural fairness. Such issues would usually be subject to review on the standard of correctness; see the decisions in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 51; and *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at paragraph 43.

[31] However, having regard to the nature of the decision here, it seems to me that the Appeals Officer was engaged in the assessment of evidence about working conditions and the consideration of that evidence against the requirements of the statutory regime. Essentially, the

issues raised are of mixed fact and law. Such questions are reviewable on the standard of reasonableness; see the decision in *Dunsmuir, supra* at paragraph 51.

Issue 2: Are the affidavits submitted by the Applicants admissible?

A. *Applicants' Argument*

[32] The Applicant makes no submissions as to the admissibility of the affidavits.

B. *Respondent's Argument*

[33] The Respondent takes issue with several affidavits purportedly setting out portions of the affiants' testimony before the Appeals Officer. He submits that these affidavits are prejudicial**,** unreliable and self-serving, and should not be considered.

[34] The general rule is that only evidence that was before the decision-maker should be the basis of judicial review. None of the exceptions to that general rule apply in this case; see the decision in *Mazhero v. Industrial Relations Board (Can.) et al.* (2002), 292 N.R. 187 at paragraph 5.

[35] The Respondent argues that consideration of these affidavits would transform the judicial review into a trial *de novo*, contrary to the purpose of judicial review applications; see the decision in *Ochapowace First Nation v. Canada (Attorney General)*, [2008] 3 F.C.R. 571 at paragraphs 9-10.

C. *Analysis*

[36] I agree with the submissions of the Respondent. All of the documentary evidence that was before the Appeals Officer is contained in the affidavit of Fabiola Egalité, which affidavit was filed as part of the Respondent's Application Record. The affidavits do not form part of the record that was before the Appeals Officer when he rendered his decision. It is not appropriate for an affiant to summarize previous testimony; see the decision in *Chamberlain Group, Inc. v. Lynx Industries Inc.* (2010), 368 F.T.R. 319 at paragraph 15. The affidavits will not be considered.

Issue 3: Was the Appeals Officer's decision unreasonable for failing to apply the appropriate analysis of danger?

A. *Applicants' Argument*

[37] The Applicants argue that the assessment of danger under the Code involves a two step inquiry. In this regard, they rely on the Federal Court's decision in *Canada v. Vandal et al.* (2010), 366 F.T.R. 28. First, there should be a threshold determination of whether there is in fact a danger pursuant to subsection 128(1) of the Code. Once that determination is made, it must be determined whether or not that danger constitutes a normal condition of employment pursuant to paragraph 128(2)(b) of the Code.

[38] The Applicants submit that while the Appeals Officer set out the test for danger articulated by Justice Dawson in *Canada Post Corp.***,** *supra*, he did not apply that test to the facts. The decision failed to distinguish between an analysis of danger and an analysis of the normal conditions of employment.

[39] Further, the Applicants argue that the decision does not demonstrate that the Appeals Officer engaged in the weighing of evidence as required by the jurisprudence; see the decision of the Federal Court of Appeal in *Canada Post Corp., supra*.

B. *Respondent's Argument*

[40] The Respondent argues that the Appeals Officer made a specific finding that there was no danger in the workplace and applied the proper legal test in doing so. The analytical approach urged by the Applicants has been rejected by the Courts and is without foundation.

[41] The Respondent submits that the Applicants' reliance on the decision in *Vandal, supra* is misplaced. He says that decision dealt with the narrow issue of an appeals officer's decision to hear an appeal in the absence of a finding of danger by a Health and Safety Officer, and it does not address the analytical approach as to how a determination of danger is made.

[42] The Respondent argues that the Appeals Officer's analysis was consistent with the established jurisprudence. He stated the correct test for assessing whether a danger existed and applied that test to the facts and evidence. Although the Appeals Officer reached a conclusion different than the one sought by the Applicants, this does not render his decision unreasonable.

[43] The Respondent disputes the Applicants' assertion that the Appeals Officer committed an error of law by failing to apply a "low frequency, high risk" principle where the likelihood of injury is irrelevant when the potential consequences of that injury are dire or critical. He argues that that principle has no basis in the Code or the jurisprudence**,** and was rejected by the Federal Court; see the decision in *Martin-Ivie v. Canada (Attorney General)* (2013), 436 F.T.R. 107 at

paragraphs 45-46. The decision of the Appeals Officer applied the correct analytical approach and was reasonable.

C. *Analysis*

[44] Upon judicial review, the reasonableness analysis requires that the decision of the Appeals Officer be justifiable, transparent and intelligible, as discussed in *Dunsmuir v*. *supra* at paragraph 47. In my opinion, the decision of the Appeals Officer meets the standard.

[45] Having regard to the evidence before him, the conclusions of the Appeals Officer that a second emergency situation was nothing more than hypothetical, that changes to the inmate population were administrative in nature, and that the evidence did not support a conclusion of danger, meet the reasonableness standard.

[46] The Appeals Officer identified and applied the proper test, that is, as set out by Justice Dawson of the Federal Court in *Canada Post Corp., supra* at paragraph 66 for determining whether the evidence established the presence of a danger in the workplace.

[47] While the Appeals Officer may not have performed a step by step analysis of each of the factors identified by Justice Dawson in *Canada Post Corp., supra* it is clear from the reasons that he weighed the evidence before him to determine whether it was more likely than not that the circumstances giving rise to an injury would take place in the future. This is the function of the Appeals Officer performing an analysis for danger, as stated by Justice Dawson at in *Canada Post Corp. supra at* paragraph 68. That decision was upheld on appeal; see the decision of the Federal Court of Appeal in *Canada Post Corp., supra,* in particular paragraph 16.

[48] I agree with the Respondent that the Code does not provide for the application of a "low frequency, high risk" principle to the definition of danger; see the decision in *Martin-Ivie, supra*. The definition of "danger" in the Code requires a reasonable expectation that a future hazard or activity will cause injury. It cannot be based on speculation or hypothesis; see the decision in *Martin, supra* at paragraph 37**.**

[49] In my view, the Applicants' submissions amount to an attempt to re-weigh the evidence before the Appeals Officer. It is clear that the Appeals Officer weighed the evidence before him, and his conclusion was open to him on the record and evidence presented. It was not necessary to consider whether any danger posed was a normal condition of employment, as the Appeals Officer was of the opinion that there was no danger. His conclusion was reasonable.

Issue 4: Was the Appeals Officer's decision unreasonable for failing to undertake a meaningful analysis of the evidence?

A. *Applicants' Argument*

[50] The Applicants submit that the decision of the Appeals Officer fails to provide a meaningful analysis of the evidence and fails to comply with principles of natural justice and procedural fairness. In support of this, the Applicants argue that the sufficiency of the reasons provided by a decision-maker must be assessed in the context of the seriousness of the issues raised, the statutory context involved, and the impact of the decision; see the decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 23-28.

[51] The Applicants argue that the decision of the Appeals Officer is not subject to a right of appeal. It involves important issues of health and safety and the right to refuse work; see the

decision in *Vandal, supra*. The issues raised by Ms. Ludlow have the potential to endanger her health and she should not be left in doubt as to why the Direction to the Employer was rescinded; see the decision in *Canada (Minister of Human Resources Development) v. Quesnelle* (2003), 301 N.R. 98 (F.C.A.) at paragraphs 8-10.

[52] The Applicants further submit that the Appeals Officer does not reconcile the evidence as summarized by counsel for the employer with other evidence before him. He rejected the anecdotal evidence of inmate activity on the night shift as irrelevant. He provided no explanation for his conclusion that changes in the inmate profile were administrative in nature. The Appeals Officer failed to provide a meaningful analysis of the evidence relevant to the finding of danger and the normal conditions of work. The decision is unreasonable.

B. *Respondent's Argument*

[53] The Respondent argues that the adequacy of reasons is not a stand-alone basis for judicial review, relying on the decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708 at paragraph 16. Decisions must be read as an organic whole, relying on the decision in *Communications, Energy and Paperworkers' Union of Canada, Local 30 v. Irving Pulp and Paper, Ltd.*, [2013] 2 S.C.R. 458 at paragraph 54.

[54] The Respondent submits that the Appeals Officer clearly stated that the evidence did not support a conclusion of danger.

C. *Analysis*

[55] The Applicants frame this issue as one of procedural fairness or natural justice. That position is without merit, as the Supreme Court of Canada has repeatedly held that adequacy of reasons is not an aspect of procedural fairness; see the decision in *Newfoundland and Labrador Nurses' Union, supra*, at paragraph 20.

[56] The Supreme Court of Canada has also been clear that the adequacy or sufficiency of reasons is not an independent basis for judicial review**;** see the decision in *Newfoundland and Labrador Nurses' Union, supra*.

[57] The reasons provided by the Appeals Officer are not as clear as they could have been. However, when read as a whole and with regard to the record, the reasons show that the Appeals Officer was not satisfied that the evidence established danger. The Supreme Court of Canada has held that Courts may look to the record for the purpose of assessing reasonableness of the outcome; see *Newfoundland Nurses Union, supra* at paragraph 15. The reasons are justified, transparent and intelligible, and accordingly, the decision meets the standard of reasonableness set out in *Dunsmuir, supra*.

[58] There is no basis for disturbing the decision and this application for judicial review will be dismissed.

[59] Although no confidentiality order was sought before or during the hearing on this application, the Applicants treated some of the information filed as confidential. From an abundance of caution, these reasons will be filed as Confidential Reasons. Counsel for the parties

will advise within fourteen (14) days as to what redactions, if any, they would request prior to public release of these Reasons.

[60] In the result, this application is dismissed with costs to the Respondent.

"E. Heneghan"

Judge

Ottawa, Ontario
October 22, 2014

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	UNION OF CANADIAN CORRECTIONAL OFFICERS - SYNDICAL DES AGENTS CORRECTIONNELS DU CANADA AND KERRI LUDLOW v. ATTORNEY GENERAL OF CANADA
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