Federal Court  Cour fédérale

Date: 20170817

Docket: T-748-16

Citation: 2017 FC 772

Ottawa, Ontario, August 17, 2017

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

WARD CHICKOSKI

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ward Chickoski [Mr. Chickoski], seeks judicial review of a decision [Decision] made by Anne Lamar, Assistant Deputy Minister, Regulatory Operations and Regions Branch, Health Canada [the ADM]. The Decision rejected Mr. Chickoski's grievance against the decision of his then supervisor, Peter Brander [Mr. Brander], to impose a Performance Action Improvement Plan [the Action Plan] on Mr. Chickoski. Mr. Chickoski's grievance also constituted a complaint of work place violence under Part XX of the *Canada Occupational*

Health and Safety Regulations, SOR/86-304 [*OHS Regs*], made under the *Canada Labour Code*, RSC 1985, c L-2, as Mr. Chickoski alleged that the Action Plan was part of a continuing campaign of harassment by Mr. Brander against him.

[2] Mr. Chickoski's grievance was denied because the ADM determined that she did not have jurisdiction over the grievance under subsection 208(2) of the *Federal Public Service Labour Relations Act*, SC 2003, c 22, s 2 [*PSLRA*], which provides that "[a]n employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*."

[3] Mr. Chickoski alleges that the Decision was procedurally unfair because the ADM did not give him the opportunity to be formerly heard before she made the Decision. To him, it was also unfair because the ADM was provided with a briefing note that was not given to Mr. Chickoski and the Decision mirrored the draft reply attached to the briefing note.

[4] Mr. Chickoski also alleges that the Decision was unreasonable. The ADM determined that the work place violence complaints procedure set out in the *OHS Regs* constituted an "administrative procedure for redress" as set out in subsection 208(2) of the *PSLRA*, thereby precluding an employee from filing an individual grievance under subsection 208(1). Mr. Chickoski states that the *OHS Regs* provide no personal remedies: the relief he sought, which included rescission of the Action Plan, cannot be awarded under the *OHS Regs*. Therefore, there was no procedure for redress available to him.

[5] Mr. Chickoski asks that the Decision be quashed or, in the alternative, that it be set aside and returned to the same decision-maker with such directions as the Court considers appropriate.

[6] For the reasons that follow, Mr. Chickoski's application is allowed. The Decision is bereft of analysis or reasons which would allow Mr. Chickoski or this Court to understand why it was determined that subsection 208(2) of the *PSLRA* applies.

II. **Background**

[7] Mr. Chickoski was employed as the Regional Director General, Prairie Region for Health Canada at all material times. He was a public servant for more than 25 years, during which time he received a number of awards and positive assessments.

[8] In 2014, Mr. Brander became Mr. Chickoski's supervisor. During the course of that relationship, Mr. Chickoski received various criticisms from Mr. Brander for which Mr. Chickoski sought clarification and explanation. In his grievance, Mr. Chickoski stated that he had been subjected to work place harassment and violence by Mr. Brander in the form of psychological bullying that included, but was not limited to, belittling and humiliating him in front of others. Mr. Chickoski indicated that he was concerned that he was not provided with constructive comments about how he could improve his performance.

[9] Eventually, Mr. Chickoski sought the assistance of the Internal Conflict Management Office (ICMO) to assist him to understand both the feedback he received and Mr. Brander's expectations of him. When that did not lead to an appropriate resolution, Mr. Chickoski initiated a "facilitated discussion" on November 23, 2015. That discussion was not successful. According to Mr. Chickoski, the discussion broke down at Mr. Brander's insistence. On December 16, 2015, just before leaving for vacation, Mr. Chickoski received the Action Plan, dated November 23, 2015, from Mr. Brander.

[10] Mr. Chickoski's view is that the Action Plan is both unreasonable and incongruous with his actual performance. He says it is part of an ongoing pattern of harassment and submits that it is disciplinary in nature. Mr. Chickoski also objects to the Action Plan because it is inconsistent with a recent "360 leadership assessment", which cast Mr. Chickoski in a very positive light. He was shown to be respected by his peers, as well as honoured and valued by his employees, who viewed him as inclusive, supportive, and possessing high integrity.

[11] On January 5, 2016, Mr. Chickoski filed an individual grievance alleging that the imposition of the Action Plan constituted discipline or disguised discipline, citing the ongoing pattern of work place violence and harassment directed toward him by Mr. Brander. Pointing to the impact of Mr. Brander's conduct on his psychological health and safety, Mr. Chickoski further alleged work place violence under Part XX of the *OHS Regs*.

[12] Mr. Chickoski sought corrective actions which included:

- the appointment of a competent person under section 20.9 of the *OHS Regs* to investigate his allegations of work place violence;
- rescission of the Action Plan, together with an acknowledgement that it was unreasonable;
- an acknowledgement that Mr. Brander's actions constituted harassment, were disciplinary in nature, and contravened the *Values and Ethics Code of the Public Service* and the employer's obligations regarding the health and safety of employees;
- full redress, including monetary redress to remedy the mental distress suffered by Mr. Chickoski (Mr. Chickoski withdrew his initial claim for payment of the financial penalty that he believed he had sustained).

[13] A number of emails concerning the grievance and redress options available to Mr. Chickoski were exchanged between Mr. Chickoski and representatives of Health Canada in January and February of 2016.

[14] On January 22, 2016, Delroy Lawrence, Executive Director of Human Resources for Health Canada [Mr. Lawrence], advised Mr. Chickoski that his grievance could not be accepted due to the operation of subsection 208(2) of the *PSLRA*. Mr. Lawrence provided Mr. Chickoski three options: (1) submit a work place violence complaint under Part XX of the *OHS Regs*; (2) submit a harassment complaint under the Treasury Board Secretariat's "Policy on Harassment Prevention and Resolution"; or (3) submit an individual grievance pursuant to section 208 of the *PSLRA*. Mr. Chickoski was also advised that if he did not choose one of the three redress mechanisms, his grievance file would be closed and his complaint would proceed as an allegation of work place violence.

[15] In response, Mr. Chickoski disagreed with the conclusion that he could not pursue both a grievance and a complaint of work place violence; through the latter, he could not obtain the same redress that he was seeking in his grievance. Mr. Chickoski reiterated his request that Health Canada process his grievance in accordance with the relevant timelines.

[16] On February 26, 2016, Mr. Lawrence replied to Mr. Chickoski and confirmed that the grievance was being treated as a work place violence complaint, and had not yet been heard.

[17] Citing the efforts of Health Canada representatives to resolve Mr. Chickoski's concerns through alternatives, on April 12, 2016, the ADM denied Mr. Chickoski's grievance. Mr. Chickoski received the ADM's Decision on April 15, 2016, and applies to this Court for judicial review of the Decision.

[18] On June 24, 2016, the Attorney General moved to strike Mr. Chickoski's application on the basis that he had not exhausted his remedies under Part XX of the *OHS Regs*. For reasons

reported at 2016 FC 1043, Mr. Justice LeBlanc dismissed that motion with costs against the Attorney General.

III. **The Decision under Review**

[19] The January 22, 2016 email refusing to accept Mr. Chickoski's grievance is not materially different than the statements made and reasons given in the Decision. The relevant parts of Mr. Lawrence's email read as follows:

> …
>
> You have submitted an individual grievance pursuant to Section 208 of the *Public Service Labour Relations Act* (PSLRA). In your grievance you allege that your manager harassed you, and that this harassment constitutes violence in the workplace [*sic*], pursuant to the *Canada Labour Code Part II*, more specifically, under Part XX of the *Canada Occupational Health and Safety Regulations*.
>
> Section 208 (2) of the PSLRA provides the following limitation on the right of an employee to file an individual grievance:
>
> > Limitation
> >
> > (2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*.
>
> In light of this, the grievance you submitted on January 5, 2016 cannot be accepted by the employer. However, there are other options available to you….
>
> [The three other suggested redress options are then set out.]

[20] The Decision is in the form of a letter, dated April 12, 2016, the relevant parts of which read:

> This is in response to your grievance presented on January 5, 2016, in which you grieved that the actions of your manager constitute work place violence pursuant to Part XX of the *Canada Occupational Health and Safety Regulations*.

> In an effort to assist you in the resolution of the concerns raised in your grievance, officials within Human Resources have, both through verbal and written communications, discussed all of the redress options available to you, as well as other options to resolve your concerns. Given your choice to pursue a complaint regarding work place violence, your concerns are being addressed through that process.
>
> …
>
> In light of the provisions of Section 208 (2) of the *Public Service Labour Relations Act* (PSLRA), I have no choice but to deny your grievance. Your request for corrective measures will not be forthcoming and the merits of your grievance, as presented, will not be addressed through the grievance procedure, as they will be addressed through the Violence in the Work place complaint process pursuant to Part XX of the *Canada Occupational Health and Safety Regulations*.

A. *The briefing note*

[21] Prior to issuing the Decision, the ADM received a briefing note. It summarized the issue, including the specific allegations and the corrective measures sought by Mr. Chickoski. It also set out, in point form, the chronological background events starting with an incident that occurred in June 2015 at a town hall meeting at which Mr. Brander made an inappropriate remark. It culminated by noting the receipt on March 18, 2016 of an email from Mr. Chickoski to the Deputy Minister presenting his grievance directly to the final authority, which email was forwarded to the ADM as the delegated authority.

[22] The briefing note also indicated that Mr. Chickoski was waiting to meet with the ADM to discuss his grievance and that the work place violence complaint process was ongoing. Various considerations were then laid out, including a brief synopsis of subsection 208(2) of the *PSLRA* and a section entitled "Important distinctions with the Violence Procedure".

[23] Attached to the briefing note were speaking points for the next step in the process — a meeting with Mr. Chickoski — as well as a draft reply denying the grievance should the ADM concur with that recommendation.

[24] The briefing note stated that:

> [T]he Employer's position is that the grievance is statute barred. The grievance must be denied, and the merits are not to be addressed.

[25] According to the chronological overview, that position appears to have come from the Treasury Board Secretariat. The briefing note entry for January 20, 2016 is:

> January 20, 2016: Employer Representation in Recourse, TBS, was consulted regarding the grievance. TBS' position is that a grievance and a work place violence complaint on the same matters would be statute barred pursuant to Section 208 (2) of the Public Service Labour Relations Act, and must be denied. A grievance may not be presented when another redress mechanism is provided under another Act of Parliament.

[26] On April 8, 2016, prior to the Decision being sent to Mr. Chickoski, there was a telephone conversation between Mr. Chickoski and the ADM. When he was asked to expand upon his grievance, Mr. Chickoski declined to do so as he did not have a representative present — Mr. Chickoski had understood it was to be an informal discussion.

IV. **Issues and Standard of Review**

A. *Issues*

[27] There is no disagreement that the issues to be determined are as follows:

i. Was the Decision arrived at in a procedurally unfair manner?

ii. If the Decision was procedurally fair, was it reasonable?

[28] Mr. Chickoski submits the process employed in arriving at the Decision was procedurally unfair to him. He has two grounds for this allegation: (1) he was not given an opportunity to be heard before the Decision was made; and (2) prior to the Decision, he was not given the briefing note relied upon by the ADM in arriving at the Decision. He argues that he was thus denied an opportunity to make submissions addressing matters raised in the briefing note.

[29] Mr. Chickoski claims the Decision is unreasonable because the remedies he sought in his grievance could not be awarded under Part XX of the *OHS Regs* and therefore there was no "administrative procedure for redress" provided to him as stipulated in subsection 208(2) of the *PSLRA*.

B. *Standard of review*

[30] There is no dispute that the standard of review of the merits of the Decision, which is a final level determination of an individual grievance, is reasonableness: *Spencer v Canada (AG)*, 2010 FC 33, at paras 23–32, 360 FTR 251, cited in *Price v Canada (AG)*, 2015 FC 696 at para 31 [*Price*].

[31] Similarly, there is no dispute that the applicable standard of review for issues of procedural unfairness is correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339; *Price* at para 31. The Attorney General, citing *Bergeron v Canada (AG)*, 2015 FCA 160, 474 NR 366 [*Bergeron*], adds that the Federal Court of Appeal has recently indicated that the standard of review for procedural fairness is unsettled and some deference may be warranted.

V. **Applicable Legislation**

[32] Extracts of the relevant provisions of the *PSLRA* and Part XX of the *OHS Regs* are set out below for ease of reference.

[33] Section 208 of the *PSLRA* addresses individual grievances that may be made by an employee. For the purposes of this application, the most relevant part of section 208 is subsection 208(2). For context, the relevant parts of subsection 208(1) and all of subsection 208(2) are set out:

Individual Grievances	Griefs individuels
Presentation	**Présentation**
Right of employee	Droit du fonctionnaire
208 (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	**208 (1)** Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(a) by the interpretation or application, in respect of the employee, of	**a)** par l'interprétation ou l'application à son égard :
(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or	(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,
…	…
(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	**b)** par suite de tout fait portant atteinte à ses conditions d'emploi.
Limitation	**Réserve**
(2) An employee may not present an individual grievance	**(2)** Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la *Loi*

in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*.	*canadienne sur les droits de la personne*.

[34] Part XX of the *OHS Regs* contains extensive provisions to address the prevention of work place violence. This application is primarily concerned with the definition of work place violence in section 20.2; however, section 20.9, which outlines the role of the competent person charged with investigating complaints of work place violence is also set out as both parties referenced the appointment of a competent person and the role of such person:

PART XX	**PARTIE XX**
Violence Prevention in the Work Place	**Prévention de la violence dans le lieu de travail**
Interpretation	Interprétation
20.1 The employer shall carry out its obligations under this Part in consultation with and the participation of the policy committee or, if there is no policy committee, the work place committee or the health and safety representative.	**20.1** L'employeur qui s'acquitte des obligations qui lui sont imposées par la présente partie consulte le comité d'orientation ou, à défaut, le comité local ou le représentant, avec la participation du comité ou du représentant en cause.
20.2 In this Part, "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 employee.	**20.2** Dans la présente partie, constitue de la violence dans le lieu de travail tout agissement, comportement, menace ou geste d'une personne à l'égard d'un employé à son lieu de travail et qui pourrait vraisemblablement lui causer un dommage, un préjudice ou une maladie.
…	…
Notification and Investigation	**Notification et enquête**
20.9 (1) In this section, ***competent person*** means a person who	**20.9 (1)** Au présent article,

(a) is impartial and is seen by the parties to be impartial;

(b) has knowledge, training and experience in issues relating to work place violence; and

(c) has knowledge of relevant legislation.

(2) If an employer becomes aware of work place violence or alleged work place violence, the employer shall try to resolve the matter with the employee as soon as possible.

(3) If the matter is unresolved, the employer shall appoint a competent person to investigate the work place violence and provide that person with any relevant information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent.

(4) The competent person shall investigate the work place violence and at the completion of the investigation provide to the employer a written report with conclusions and recommendations.

(5) The employer shall, on completion of the investigation into the work place violence,

(a) keep a record of the report from the competent person;

(b) provide the work place committee or the health and safety representative, as the case may be, with the report

personne compétente s'entend de toute personne qui, à la fois:

a) est impartiale et est considérée comme telle par les parties;

b) a des connaissances, une formation et de l'expérience dans le domaine de la violence dans le lieu de travail;

c) connaît les textes législatifs applicables.

(2) Dès qu'il a connaissance de violence dans le lieu de travail ou de toute allégation d'une telle violence, l'employeur tente avec l'employé de régler la situation à l'amiable dans les meilleurs délais.

(3) Si la situation n'est pas ainsi réglée, l'employeur nomme une personne compétente pour faire enquête sur la situation et lui fournit tout renseignement pertinent qui ne fait pas l'objet d'une interdiction légale de communication ni n'est susceptible de révéler l'identité de personnes sans leur consentement.

(4) Au terme de son enquête, la personne compétente fournit à l'employeur un rapport écrit contenant ses conclusions et recommandations.

(5) Sur réception du rapport

of the competent person, providing information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent; and	d'enquête, l'employeur :
(c) adapt or implement, as the case may be, controls referred to in subsection 20.6(1) to prevent a recurrence of the work place violence.	**a)** conserve un dossier de celui-ci; **b)** transmet le dossier au comité local ou au représentant, pourvu que les renseignements y figurant ne fassent pas l'objet d'une interdiction légale de communication ni ne soient susceptibles de révéler l'identité de personnes sans leur consentement; **c)** met en place ou adapte, selon le cas, les mécanismes de contrôle visés au paragraphe 20.6(1) pour éviter que la violence dans le lieu de travail ne se répète.

VI. **Was the Decision Arrived at in a Procedurally Unfair Manner?**

A. *Was there no opportunity to be heard?*

[35] Mr. Chickoski acknowledges that he participated in what he says was an informal telephone conversation with the ADM before the Decision was issued. He says he was told that the informal discussion was not part of the grievance process. He states that he indicated at that time that he was not comfortable expanding on his grievance because he did not have a representative present, given the informal nature of the conversation. He submits that he never received a chance to make submissions regarding the interpretation of subsection 208(2).

[36] Mr. Chickoski says that, because the Decision was made immediately after the informal discussion, he had no opportunity to be heard and in any event the Decision had already been made given the content of the briefing note that the grievance must be denied.

[37] The Attorney General says that Mr. Chickoski had an opportunity to be heard and availed himself of those opportunities. The record is replete with a number of submissions and written exchanges in emails which were before the ADM.

[38] Regarding an in-person hearing, the Attorney General relies on *Hagel v Canada (AG)*, 2009 FC 329 at para 35, 352 FTR 22 [*Hagel*], for the proposition that there is no duty to conduct an in-person hearing and that the intensity of the procedural fairness obligation that attaches to an administrative decision of this kind falls at the low end of the spectrum.

B. *Was it procedurally unfair not to disclose the briefing note prior to the Decision?*

[39] Relying on *Price*, Mr. Chickoski submits that, when a decision is made on the basis of documents and materials not disclosed to the person who is the subject of the decision, there is a breach of procedural fairness. Mr. Chickoski did not know the case he had to meet because the briefing note was never put before him.

[40] Mr. Chickoski also protests that the Decision was made before the informal telephone conversation was held. In addition, the Decision is taken verbatim from the briefing note, which deemed the grievance statute-barred and instructed it to be denied.

[41] The Attorney General says that *Hagel* establishes that, when reviewing a final level grievance, the duty of procedural fairness falls at the low end of the spectrum. As a result, Mr. Chickoski did not have any procedural right to comment upon or review the briefing note prepared for the ADM. The Attorney General also relies on several cases, including *Agnaou v Canada (AG)*, 2015 FCA 29, [2016] 1 FCR 322, to say that an analyst's report that does not raise

any new factual issues does not give rise to a right to comment by an applicant. In any event, if the ADM had disagreed with the report, it was open to her to make a different decision.

C. *Analysis*

[42] Mr. Justice Stratas of the Federal Court of Appeal has described the state of the standard of review for issues of procedural fairness as "unsettled" and "a jurisdictional muddle": *Bergeron* at paras 67, 71. It is my view that, given the existing jurisprudence referred to below, the procedure followed by the ADM was fair to Mr. Chickoski. As a result, it is not necessary to address the "muddle".

[43] In essence, Mr. Chickoski says he did not know the case he had to meet and he was not heard. If he had been given the opportunity, he would have made additional arguments.

[44] A review of the record confirms the Attorney General's position that the considerations put forward in the briefing note and the reason given for recommending denial of the grievance were made known to Mr. Chickoski more than once prior to the Decision being made. In fact, he had responded with his position more than once. At the hearing, counsel for Mr. Chickoski said he had not made submissions with respect to the applicability of subsection 208(2) of the *OHS Regs*, but it is clear that he was first aware of this position when he received the January 22, 2016 email rejecting the acceptance of his grievance. He was so advised again on February 26, 2016, when it was reconfirmed that the grievance had not been heard "because it relates to allegations for which another administrative procedure for redress is provided under the *Canada Labour Code Part II*".

[45] With respect to the briefing note, Mr. Chickoski relies on *Price* to say the Decision should be set aside because it was not disclosed to him. However, in *Price*, the grievance decision was set aside because it was based on evidence never previously disclosed to the grievor which, if it had been disclosed, could have changed the approach to the grievance. In this case, the briefing note summarized the existing allegations, set out the corrective measures requested by Mr. Chickoski, and listed the chronological history of events, including correspondence. The briefing note contained no new information, position, or reasoning unknown to Mr. Chickoski.

[46] Several email exchanges show that Mr. Chickoski knew the reason his grievance was not being accepted and why it was ultimately denied. Mr. Chickoski filed his grievance on January 5, 2016. On January 22, 2016, he received an email from Mr. Lawrence, as the first level decision-maker, stating his grievance could not be accepted and outlining the existence of three other options of redress available to him. In response, by email dated February 1, 2016, Mr. Chickoski made the following submission:

> I disagree with the conclusion that I cannot pursue both my grievance and my complaint of work place violence under Part XX of the Canada Occupational Health and Safety Regulations, as, under the work place violence complaint, I cannot obtain the same redress as I am seeking in my grievance, or any redress for that matter.

[47] On March 7, 2016, after receipt of the February 26, 2016 email confirming that the grievance was not proceeding, Mr. Chickoski made further submissions by email:

> The essence of my grievance includes the remedies sought to address the disguised, if not explicit, disciplinary action resulting in a financial penalty. These remedies are an essential part of the grievance. The complaint of workplace [*sic*] violence will not grant me real and beneficial remedies to redress this essential part of the grievance, or any remedies for that matter. Health Canada's reliance on section 208(2) of the Public Service Labour Relations

> Act I believe is ill founded and the decision communicated to me on February 26th is not satisfactory.
>
> It is for these reasons that I am hereby presenting my grievance at the next level in the grievance process.

[48] The March 7, 2016 email was part of an email string sent on March 9, 2016 to the Deputy Minister. According to the briefing note, the March 7th email was then forwarded by the Deputy to the ADM as the delegated authority. Although Mr. Chickoski's submissions were not specifically set out in the briefing note, they were clearly before the ADM in that email string at Exhibit 6 to Mr. Chickoski's affidavit of May 19, 2016.

[49] Based on the foregoing, it is my view that Mr. Chickoski knew the case he had to meet as early as January 22, 2016. He made submissions with respect to subsection 208(2) on at least two occasions. Those submissions were known to the ADM. In that respect, the process was procedurally fair to him. This is particularly so as he is not entitled to an in-person hearing: *Hagel* at para 35.

[50] Attached to the briefing note was a suggested reply. The ADM adopted the suggested reply without change and issued it as the Decision.

[51] Mr. Chickoski did not identify any argument that he would have made if he had received the briefing note before the Decision was rendered. Nor did he identify anything in the briefing note that was not already known to him. As was the case in *Hagel*, the briefing note given to the ADM accurately summarized the history of the dispute. The arguments put forward by Mr. Chickoski were before the ADM, as noted above. His primary submission was that he did not have the opportunity to make submissions with respect to subsection 208(2). However, Mr. Chickoski set out his reasons for disagreeing with the department's interpretation of

subsection 208(2) of the *PSLRA* and gave his opinion that the *OHS Regs* do not provide "real and beneficial remedies to address his workplace violence claim".

[52] For the same reasons as set out above — regarding whether Mr. Chickoski had the opportunity to be heard and knew the case he had to meet — I am unable to find that there was anything in the briefing note that caused the Decision to be rendered in a procedurally unfair manner to Mr. Chickoski.

[53] I will now turn to the question of whether the Decision was reasonable.

VII. **Was the Decision Reasonable?**

[54] The qualities of a reasonable decision are well known: a decision is reasonable if the decision-making process is justified, transparent, and intelligible, resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*].

[55] When conducting a reasonableness review, the reasons provided by the decision-maker are to be read together with the outcome. Although not all arguments or details need to be recorded, the reasons should show whether the result falls within the range of possible outcomes. Essentially, the reasons should allow a reviewing court to understand why the decision was made and to determine whether the outcome is within the range of acceptable outcomes. If the reasons permit this analysis, the *Dunsmuir* criteria have been met: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 12–13, [2011] 3 SCR 708 [*Nfld. Nurses*].

A. *Submissions of Mr. Chickoski*

[56] Mr. Chickoski submits that the Decision includes an implicit finding that the *OHS Regs* provide him with redress. He states that it is an unreasonable finding because the *OHS Regs* provide no personal remedies; they are designed to prevent similar episodes of work place violence occurring in the future.

[57] The *OHS Regs* only address institutional concerns about the work place. There are no remedial rights provided to a complainant. Once the employer receives the report and recommendations of the competent person assigned to investigate the work place violence complaint, the employer must adopt or implement systematic controls to eliminate and prevent recurrence of the violence. Counsel for Mr. Chickoski likens the *OHS Regs* to a toothless tiger, in that the process does not even require the complainant, the respondent, or any witnesses to participate.

[58] The principal remedies sought by Mr. Chickoski under his grievance were rescission of the Action Plan and monetary redress for mental suffering. Those remedies cannot be awarded under Part XX of the *OHS Regs*. This fact was set out in the briefing note which identified the following differences between the grievance procedure and the procedure under Part XX of the *OHS Regs*:

> Important distinctions with the Violence Procedure:
>
> - The complainant is not entitled to a copy of the investigation report;
> - In order to participate, all parties must consent to their identity being shared with the Investigator and identified within the report;
> - There is no provision for a remedy to the complainant.

[59] Mr. Chickoski submits that to accept the interpretation of subsection 208(2) of the *PSLRA* put forward in the Decision would mean that public servants who suffer violence and who give notice under Part XX would be even more vulnerable because they would lose their right to grieve under the *PSLRA*. In other words, if an employee who has been wronged files a grievance and the grievance is upheld, then the employer may be required to compensate that employee for the wrongdoing. But, if the same employee is the subject of the same wrongdoing but it constitutes work place violence, then by employing the present interpretation of subsection 208(2), the employee would have no recourse to seek compensation for what occurred if they also provided notice under Part XX of the *OHS Regs*.

B. *Submissions of the Attorney General*

[60] The Attorney General answers that the type of redress available under Part XX of the *OHS Regs* flows from the conclusions and recommendations made by the competent person. Counsel says that one possible recommendation may be to rescind the Action Plan. Recommendations would also be addressed through the policy or work place committee or health and safety representative as set out in section 20.1 and paragraph 20.9(5)(b) of the *OHS Regs*.

[61] In addition, once the investigation is completed, the employer shall adapt or implement controls to prevent a recurrence of the work place violence. These controls must be implemented as soon as practicable and no later than ninety days after the day on which the risk of work place violence was assessed. After controls are implemented the employer shall establish procedures for follow-up maintenance and corrective measures. The *Canada Labour Code* and the *OHS*

Regs provide a tailored response to allegations of work place violence, including an administrative process that protects the confidentiality of the identity of persons involved.

[62] The Attorney General notes that in *Canada (AG) v Public Service Alliance of Canada*, 2015 FCA 273, [2016] 3 FCR 33 [*PSAC*], Mr. Justice de Montigny reviewed section 20.9 of the *OHS Regs* and found that Part XX is remedial and is meant to offer an avenue of redress for employees who have experienced work place violence with a view to having the situation dealt with appropriately by their employer. Therefore, there is an administrative procedure for redress that is provided under an Act of Parliament and allowing the grievance to proceed on the merits would be contrary to subsection 208(2) of the *PSLRA*.

[63] As to the adequacy of the remedy provided, the Attorney General submits that the Federal Court of Appeal has determined that, if an administrative procedure for redress is available to a grievor, that process must be used as long as it is a real remedy. It need not be an equivalent or better remedy as long as it deals meaningfully and effectively with the substance of the employee's grievance: *Mohammed v Canada (Treasury Board)*; *Canada (AG) v Boutilier*; *O'Hagan v Canada (AG)*, [2000] 3 FC 27 at para 23, 181 DLR (4th) 590 (CA) [*Boutilier*].

[64] Similarly, the Attorney General refers to a decision of the Public Service Labour Relations Board [the Board], in which the issue involved a health and safety complaint by a group of call centre employees who, amongst other remedies, sought compensation by way of reimbursement of sick leave. The Board had to consider whether the redress provided under the *Canada Labour Code* was "real and beneficial" to the grievors given that it did not provide for the possibility of damages. Following *Boutilier*, it found that the redress process could deal meaningfully and effectively with the substance of the grievance. The Board relied upon the

passage which stated that "[d]ifferences in the administrative remedy, even if it is a "lesser remedy", do not change it into a non-remedy": *Public Service Alliance of Canada v Treasury Board (Department of Human Resources and Skills Development)*, 2012 PSLRB 84 at paras 35, 38.

[65] The Attorney General's argument is summarized as follows:

> [T]he issues raised in Mr. Chickoski's grievance fall under a legislative scheme that is specifically designed to respond to allegations of work place violence. That is his administrative recourse. Otherwise, the same questions risk being decided in different forums, risking inconsistent decisions and being contrary to the principle of finality.

[66] The Attorney General says it is clear. The grievance included a work place violence claim arising from the imposition of the Action Plan. The *OHS Regs* prescribe the administrative procedure for redress which is provided for in the *Canada Labour Code*. Therefore, as stipulated in subsection 208(2) of the *PSLRA*, an administrative procedure for redress is provided under another Act of Parliament, other than the *Canadian Human Rights Act*. The result is that Mr. Chickoski may not present an individual grievance.

C. *Analysis*

[67] The definition of work place violence is found at section 20.2 of the *OHS Regs*:

20.2 In this Part, "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 employee.	**20.2** Dans la présente partie, constitue de la violence dans le lieu de travail tout agissement, comportement, menace ou geste d'une personne à l'égard d'un employé à son lieu de travail et qui pourrait vraisemblablement lui causer un dommage, un préjudice ou une maladie.

(1) There was no review of whether the allegations could constitute work place violence

[68] The way in which an employer ought to process an allegation of work place violence was examined by Mr. Justice de Montigny in *PSAC* when he considered whether an employer may screen out complaints they considered to be unrelated to work place violence. Justice de Montigny noted that a characterization by the employee of work place violence is not conclusive. An employer can review a complaint to determine whether, on its face, the alleged acts fall within the definition of work place violence. To do so, an employer should determine whether it was plain and obvious that the facts alleged did not amount to work place violence or that the complaint was clearly vexatious or frivolous: *PSAC* at paras 33, 35.

[69] In my view, before relying on the provisions of subsection 208(2) of the *PSLRA* to find that there was "no choice but to deny [the] grievance" and have the complaint proceed under Part XX of the *OHS Regs*, the ADM ought to have reviewed the nature of the grievance made by Mr. Chickoski to determine whether it could give rise to a finding of work place violence. The threshold to cross in order to make such a finding is quite low: *PSAC* at para 34.

[70] There is no evidence in the record that anyone at Health Canada conducted a review of Mr. Chickoski's allegations to consider whether or not the actions of Mr. Brander could qualify as work place violence under Part XX of the *OHS Regs*. There is no evidence that a review was conducted to determine whether the allegations were frivolous or whether it was plain and obvious that the allegations amounted to work place violence. This omission is important. Without first conducting such a preliminary review, it is not possible to conclude that the provisions of subsection 208(2) of the *PSLRA* apply in this situation. If the allegations were reviewed and found not to pass the threshold set out in *PSAC*, then there would be no

administrative procedure for redress provided under any Act of Parliament, as there was no work place violence. In that event, the grievance could proceed.

[71] Such a review need not have been extensive, but the ADM ought to have turned her mind to the question. In his grievance, Mr. Chickoski provided specific examples of Mr. Brander's actions that he alleged constituted work place violence and harassment. For example, does calling someone an idiot in front of their staff *prima facie* appear to be psychological bullying? Does suggesting that a person change their long-term executive coach appear to be harassment? Would either of these events individually or, when taken together, be expected to cause harm, injury or illness to the employee? If not, were there other events, such as the creation and implementation of the Action Plan or the critical words used in bilateral meetings, that were sufficient to cumulatively require an investigation by a competent person to determine whether the acts constituted work place violence?

[72] I am not suggesting that the allegations before me do or do not meet the threshold. What I am saying is that there were serious consequences to Mr. Chickoski in denying his grievance. He pointed out to his employer that no remedy was personally available to him and the briefing note itemized the distinctions. Under those circumstances, the ADM was required to consider whether the allegations could amount to work place violence.

[73] The failure of the ADM to review whether the allegations could reasonably be expected to cause harm, injury or illness to Mr. Chickoski is but one part of the analysis of whether the decision is reasonable. There are similar issues with the analysis in the Decision of what redress, if any, was available to Mr. Chickoski.

(2) Does Part XX of the *OHS Regs* provide an administrative procedure for redress?

[74] At the heart of the dispute between the parties is whether the work place violence complaint process set out in Part XX of the *OHS Regs* is capable of providing redress to Mr. Chickoski.

[75] Mr. Chickoski argues that none of the remedies he seeks can be provided under the Part XX procedure as no one is required to participate in the process and the employer is only required to implement systematic changes that will prevent a recurrence of violence. In particular, Mr. Chickoski stresses that no personal remedies are available to him under such a process. The Attorney General argues that the available remedies can address the underlying issue of violence in the work place. The Attorney General also argues that a result of the investigation can be a recommendation that the Action Plan be rescinded.

(a) *The jurisprudence*

[76] In *Byers Transport Ltd v Kosanovich*, [1995] 3 FC 354, 126 DLR (4th) 679 (CA) [*Byers Transport*], Mr. Justice Strayer considered paragraph 242(3.1)(b) of the *Canada Labour Code*, which limits the jurisdiction of an adjudicator where "a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament". As stated by the Attorney General, Justice Strayer found that the procedure for redress elsewhere does not have to yield exactly the same remedies nor do they have to be as good or better to oust the jurisdiction of, in that case, the adjudicator. Importantly, Justice Strayer added that "no doubt that procedure must be capable of producing some real redress which could be of personal benefit to the same complainant" (at para 39; emphasis added). This emphasis was not present in Byers Transport, but it was added by the Federal Court of Appeal in *Boutilier* (see *Boutilier* at para. 4).

[77] Ten years after *Boutilier* was released, the Federal Court of Appeal in *Johal v Canada Revenue Agency*, 2009 FCA 276, 312 DLR (4th) 663 [*Johal*], examined subsection 208(2) of the *PSLRA*. The issue there was whether two employees of the Canada Revenue Agency were barred by subsection 208(2) from presenting individual grievances because section 54 of the *Canada Revenue Agency Act*, SC 1999, c 17 [*CRA Act*], provided recourse that precluded them from presenting grievances under subsection 208(1).

[78] Speaking for a unanimous Court, Mr. Justice Evans found that the English text of subsection 208(2) was ambiguous but the French text made it clear that "a specific administrative recourse only bars an employee from presenting a grievance under subsection 208(1) if it is available to the employee presenting the grievance": *Johal* at para 34.

[79] The Court of Appeal in both *Byers Transport* and *Johal* emphasized that, before subsection 208(2) can apply to oust an individual grievance from being presented under subsection 208(1), the administrative redress in question must provide "real redress" that could be of "personal benefit" to the grievor.

[80] In *Boutilier*, Mr. Justice Linden added that the remedy in the other administrative process need not be an equivalent or better remedy as long as it deals "meaningfully and effectively with the substance of the employee's grievance": Boutilier at para 23.

[81] The Attorney General says that subsection 208(2) of the *PSLRA* is a non-discretionary bar to pursuing a grievance where another administrative procedure is available. The word "available" however stops well short of the nature of the administrative process which is required in order to supplant the right to an individual grievance. The factors identified in *Byers*

Transport, *Boutilier*, and *Johal* combine to yield the following principles that assist in determining whether an alternate administrative procedure falls within subsection 208(2) of the *PSLRA*:

> – the procedure for redress elsewhere does not have to yield exactly the same remedies;
>
> – the remedies do not have to be as good or better than the ones being ousted;
>
> – differences in the administrative remedy, even if it is a lesser remedy, do not change it into a non-remedy;
>
> – it has to:
>
> (1) deal meaningfully and effectively with
> (2) the substance of the employee's grievance;
>
> – the administrative procedure must:
>
> (1) be capable of producing some real redress which
> (2) could be of personal benefit to the same complainant.

[82] The argument Mr. Chickoski makes is that the procedure and the remedies under the *OHS Regs* do not deal meaningfully and effectively with the substance of his grievance as they are designed to provide a response at an organizational level, not a personal level. As such, they are not capable of providing real redress to him that is of personal benefit.

(b) *The ADM did not consider the redress available to Mr. Chickoski under Part XX*

[83] Mr. Chickoski clearly objected to the work place violence procedure because it provided no personal remedy to him. It is the central issue he raised. Yet, in the Decision there is no analysis of, or reference to, the redress available under Part XX. The Decision only says:

> [T]he merits of your grievance . . . will be addressed through the Violence in the Workplace complaint process pursuant to Part XX of the *Canada Occupational Health and Safety Regulations*.

[84] At best, this implies that the ADM found that there is "some real redress which could be of personal benefit" to Mr. Chickoski. Unfortunately, there is no analysis leading to this conclusion. There is no identification of the kind of real redress that the ADM considers would be available and would provide personal benefit to Mr. Chickoski. Nor does the underlying record identify such redress. To the contrary, the briefing note confirms that, under Part XX, "[t]here is no provision for a remedy to the complainant".

[85] Once the employer identified that the allegations made by Mr. Chickoski included an allegation of work place violence, it appears to have been a foregone conclusion that there was another administrative procedure, therefore subsection 208(2) applied, and the grievance was to be dismissed.

[86] It is not clear whether the ADM believed the *OHS Regs* provided real redress that was capable of personal benefit to Mr. Chickoski. It appears that the ADM just accepted the draft reply attached to the briefing note without considering whether the provisions in the *OHS Regs* could deal meaningfully and effectively with the substance of Mr. Chickoski's grievance.

[87] There is a complete absence of reasons on the merits of the nature of the redress available to Mr. Chickoski under Part XX. There is no analysis or even commentary to suggest that the ADM considered subsection 208(2) of the *PSLRA* in the context of the allegations of work place violence, the remedies requested by Mr. Chickoski, and the process employed under Part XX of the *OHS Regs*. When coupled with the fact that the outcome runs completely contrary to Mr. Chickoski's submissions and to the clear statement in the briefing note that there was no remedy available to Mr. Chickoski, the reasoning does not allow Mr. Chickoski or this Court to

understand why the conclusion was drawn that the procedure under Part XX was capable of producing some real redress to Mr. Chickoski which could be of personal benefit to him.

[88] *Byers Transport*, *Boutilier*, and *Johal* set out the nature of the administrative procedure and the redress that is required in the alternate administrative procedure in order to fall within the ambit of subsection 208(2). The failure of the ADM to explain in the Decision why she concluded that Part XX provides an effective and meaningful alternate administrative procedure means the *Dunsmuir* criteria have not been met. The Decision is not reasonable.

[89] While I have serious doubts that the remedies available under the *OHS Regs* are capable of producing some real redress which could be of personal benefit to Mr. Chickoski, it is not necessary that I make such determination. The Decision is unreasonable as it is bereft of analysis. It is preferable that the ADM conduct that analysis on a redetermination with such additional submissions by the parties as the ADM may deem to be appropriate.

[90] The application is allowed, the Decision is set aside, and the matter is returned to the ADM or to the incumbent ADM, as the case may be, to be reconsidered in accordance with these reasons.

VIII. **Costs**

[91] The parties have agreed that costs of $3,900.00 are to be paid to the successful party. They have also agreed that the Attorney General is to pay Mr. Chickoski costs of $1,246.30 for the motion heard by Mr. Justice LeBlanc.

[92] As Mr. Chickoski has been successful in this application and in his motion before Justice LeBlanc, the Attorney General shall pay both sets of costs forthwith.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed. This matter is returned for redetermination in accordance with these reasons.
2. Costs in the amount of $3,900.00 are payable forthwith to the Applicant for this application and in the amount of $1,246.30 for the motion dismissed by Mr. Justice LeBlanc.

"E. Susan Elliott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-748-16
STYLE OF CAUSE:	WARD CHICKOSKI v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 5, 2016
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	AUGUST 17, 2017

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