Federal Court  Cour fédérale

Date: 20200204

Docket: T-2201-18

Citation: 2020 FC 189

Ottawa, Ontario, February 4, 2020

PRESENT: Mr. Justice James W. O'Reilly

BETWEEN:

X

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant is an experienced executive in the public service. In 2017, a number of subordinate employees made a complaint against her through their union. In 2018, an employee made a formal complaint under Part XX of the *Canada Occupational Health and Safety Regulations*, SOR/86-304 (all enactments cited are set out in an Annex). Part XX of the Regulations is entitled "Violence Prevention in the Work Place".

[2] In response to the complaints, a Director General began an informal investigation under s 20.9(2) of the Regulations in an attempt "to resolve the matter with the employee as soon as feasible". The DG recommended that the applicant agree to an informal resolution of the complaints by acknowledging them, apologizing, and committing to make changes in the future. The applicant declined. Accordingly, the DG appointed an independent "competent person" [CP] to conduct an investigation under subsection 20.9(3) of the Regulations.

[3] The CP interviewed 11 current and former employees. They described the applicant's conduct in the workplace as including threats, intimidation, and interference. Only three of the employees interviewed permitted their identities to be disclosed to the applicant.

[4] The DG invited the applicant to participate in the investigation by agreeing to be interviewed by the CP. In response, the applicant requested particulars of the complaints against her. The DG initially declined to provide further disclosure. After discussions among the DG, the CP, and the applicant, further particulars were given to the applicant in September 2018.

[5] Even though the applicant had not yet agreed to be interviewed, the CP delivered a report of her investigation in November 2018. The CP's report concluded that the applicant had exposed employees to various kinds of psychological violence. She conceded that the applicant might have been able to explain many of her actions, had the applicant been interviewed. However, the CP felt the evidence she had gathered without the applicant's participation supported her conclusions. In her report, she recommended disciplining the applicant, removing her from a managerial role, and providing her with training, counselling, and monitoring.

[6] The applicant seeks judicial review of the report. She asks me to set aside the report for a lack of procedural fairness because it was prepared without any meaningful input from her or witnesses she might have provided, and because the CP and DG did not provide her sufficient particulars. She also submits that the report was unreasonable.

[7] I cannot quash the report. It merely sets out recommendations for the applicant's employer. It is not a decision that is amenable to judicial review. This application is therefore premature. Given that conclusion, it is unnecessary for me to address the applicant's arguments relating to the unfairness and unreasonableness of the report. The sole issue is whether this application is premature.

II. Is this application for judicial review premature?

[8] The applicant argues that the report represents a final conclusion on the issue of workplace violence and that this Court is the proper forum in which to challenge the report's findings. The applicant says she has no other real alternative remedy.

[9] I disagree.

[10] The CP's report is part of an ongoing process which has not yet concluded. A few months after the report was completed and shared with the applicant, the parties — the applicant, her legal counsel, and her employer — met to discuss it. At that point, the applicant had not provided a written response to the report. In February 2019, she was asked again for a written response, or to agree to be interviewed by the CP. The applicant provided a response in March 2019.

[11] In April 2019, the employer prepared its own report based on the CP's conclusions and the applicant's response. The employer met with the applicant in June 2019 to discuss the employer's report.

[12] To date, the employer has not taken any administrative action against the applicant in response to the CP's report. The applicant states that she has experienced adverse consequences related to the report: removal to another position, a poor performance appraisal, and forced training and coaching sessions. However, those consequences did not flow from the report; they flowed from the underlying complaints. Indeed, these consequences predate the report, and the applicant had remedies available to grieve them. Setting aside the report on judicial review would have no impact on the adverse consequences that the applicant experienced.

[13] I also note that the CP's report was prepared within a regulatory regime aimed at preventing workplace violence, not disciplining those who may be responsible for it. Additionally, this regime compels an employer to implement measures to prevent recurrence of any instances of workplace violence after it receives an investigatory report containing conclusions and recommendations. Therefore, decision-making authority under the scheme falls to employers. Persons affected by those decisions may seek to set them aside by way of judicial review. This regulatory arrangement reinforces my conclusion that the applicant's application for judicial review of the CP's report is premature.

III. Conclusion and Disposition

[14] As the applicant's application for judicial review is premature, I must dismiss it with costs.

JUDGMENT IN T-2201-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, with costs.

"James W. O'Reilly"
Judge

Annex

Canada Occupational Health and Safety Regulations, SOR/86-304	Règlement canadien sur la santé et la sécurité au travail, DORS/86-304
Violence Prevention in Work Place	**Prévention de la violence dans le lieu de travail**
Notification and Investigation	**Notification et enquête**
…	…
20.9 (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 feasible.	**20.9** (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 dès que 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.	(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 et qui ne révèle pas l'identité de personnes sans leur consentement.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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