Federal Court  Cour fédérale

Date: 20220606

Docket: T-436-20

Citation: 2022 FC 832

Ottawa, Ontario, June 6, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

BRUCE SCOTT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Bruce Scott, seeks judicial review of a decision made by a delegate of the Minister of Labour (the "Minister's Delegate") on November 13, 2019 to decline to investigate the Applicant's complaint (the "Decision"). The Applicant's complaint stated that his employer, the Canada Border Services Agency ("CBSA"), had contravened the *Canada Labour Code* RSC

1985, c L-2 (the "*Code*"), by failing to initiate an investigation into an alleged incident of work place violence.

[2] The Minister's Delegate found that the Labour Program of Employment and Social Development Canada (the "Labour Program") did not have jurisdiction to investigate the Applicant's complaint and that the complaint instead fell within the mandate of the Canadian Human Rights Commission (the "CHRC") under the *Canadian Human Rights Act* ("*CHRA*").

[3] The Applicant submits that the Decision is unreasonable because a) the Minister's Delegate did not have the discretion to refuse to address the Applicant's complaint by redirecting the Applicant's concerns to another administrative process, and b) the Minister's Delegate failed to provide a rationale to support the conclusion that the Applicant's complaint fell within the CHRC's mandate. The Applicant further submits that the Minister's Delegate's attempt to bolster her Decision through post-decision comments consists of a breach of procedural fairness.

[4] For the reasons set out below, I find that the Decision is unreasonable. Accordingly, this application for judicial review is allowed.

II. Facts

A. *Factual Background*

[5] The Applicant is an employee of the CBSA. At the relevant time, the Applicant worked at the Rainbow Bridge Port of Entry as a Border Services Officer.

[6] On July 15, 2019, the Applicant drove to the Rainbow Bridge Port of Entry while he was off-duty. The Applicant intended to cross the border from Canada into the United States and was accompanied by his girlfriend and two of her family members. The Applicant, his girlfriend and family members had purchased duty-free items, including alcohol.

[7] Upon their arrival at the Port of Entry, the Applicant discovered that he would need to return home to retrieve his identification required to cross the border. Before returning home, the Applicant asked one of his co-workers if he could leave the duty-free items on hold until he returned. The co-worker sought confirmation from the Applicant's supervisor, Acting Superintendent Weston (Mr. "Weston"), who agreed that the duty-free items could be left at the office for pick-up upon the Applicant's return. As instructed, the Applicant brought the duty-free items to the main office.

[8] At the main office, the Applicant asked Mr. Weston if he could use the bus lane to return to Canada as traffic was backed up in the primary inspection lane. Mr. Weston agreed to open the bus lane, yet when the Applicant returned to his vehicle and pulled into the bus lane, the gate had not been opened.

[9] The Applicant states that Mr. Weston then approached his vehicle and asked him to exit, accusing him of drinking and driving and repeatedly asking him in an aggressive tone whether he had been drinking. The Applicant responded that he had not been drinking, but that others in the vehicle had shared a bottle of wine, and that this treatment by Mr. Weston was embarrassing

him. Mr. Weston then asked the Applicant's girlfriend to give him the car keys and required that the Applicant return to the main office to undergo a breathalyser test.

[10] The breathalyser test returned a reading of "0" confirming that the Applicant had not been drinking and was not impaired to drive. Mr. Weston then returned the Applicant's keys and allowed him to continue his trip.

[11] The Applicant states that this harassing behaviour from his supervisor caused him significant humiliation, as it took place in front of his girlfriend, her family, and his coworkers. The incident required him to take two weeks of sick leave and to seek counselling, and led him to continue experiencing distress when he returned to work.

B. *The Workplace Violence Complaint*

[12] On September 18, 2019, the Applicant wrote to the Acting Chief of Rainbow Bridge Operations to file a work place violence complaint regarding the July 15, 2019 incident. The Applicant's complaint outlined his concerns that the interaction with his supervisor constituted harassment and work place violence, as defined in the *Code* and the *Canada Occupational Health and Safety Regulations* SOR/86-304 (the "*COHS Regulations*"). The Acting Chief of Rainbow Bridge Operations responded that he would consult with the Regional Occupational Health and Safety Representative.

[13] On October 3, 2019, the Applicant received a letter advising him that the CBSA would not be addressing his complaint and would not be appointing a competent person to investigate

the complaint under the *Policy on Violence Prevention in the Work Place* because it was "plain and obvious that the allegations fall outside the definition of work place violence."

[14] On October 23, 2019, the Applicant filed a complaint with the Minister of Labour through the Labour Program, alleging that his employer, the CBSA, had contravened the *Code* by refusing to appoint a competent person as prescribed by subsection 20.9(3) of the *COHS Regulations*.

[15] On October 30, 2019, the Minister's Delegate emailed the Applicant to set up a discussion regarding his complaint. The following day, the Applicant spoke to the Minister's Delegate over the phone and gave her an overview of the incident. The Minister's Delegate described this discussion in an activity log (the "Activity Log").

[16] According to the Activity Log, the Minister's Delegate attempted to contact the Applicant on November 6, 2019 to provide him with an update on the Decision, and again on November 13, 2019 to no avail.

C. *Decision Under Review*

[17] On November 13, 2019, the Minister's Delegate issued the Decision. The Decision letter states:

> This letter is further to your complaint dated October 23, 2019, which was received in this office on Oct 23, 2019, against Canada Border Services Agency. We have reviewed your complaint, and

> have determined that the Labour Program does not have jurisdiction to investigate your complaint, as the subject matter of your complaint falls within the mandate of the Canadian Human Rights Commission.
>
> We suggest that you forward your complaint to the Canadian Human Rights Commission, which has the power to investigate your complaint […]
>
> The Labour Program of Employment and Social Development Canada can, therefore, take no further action on your behalf.

[18] The Minister's Delegate updated the Activity Log and prepared an Assignment Narrative Report in which she detailed the grounds for the Decision. The Activity Log from November 6, 2019 notes:

> Based on the information provided, a Border Services Officer identified that the complainant may be under the influence of alcohol and operating a motor vehicle and was obligated to ensure that the driver was not intoxicated.
>
> Although the incident may have embarrassed the complainant, it does not meet the definition of workplace violence. The complainant was a traveller at the time and was attempting to cross the border, although he did not have identification.
>
> Furthermore, the superintendent that was involved in the incident was in an acting position and is no longer the complainants' direct supervisor.
>
> Incidents involving perceived unfair or discriminatory treatment would generally not be considered WPV. Complaints involving human rights issues are generally more appropriately addressed by other legislation such as the Canadian Human Rights Act.

[19] On November 19, 2019, the Applicant contacted the Minister's Delegate to obtain further clarification on the Decision, and asked how his complaint falls under the jurisdiction of the *CHRA*. The Minister's Delegate responded on the same day stating that the Applicant was "a

traveller at the time of the event and not an employee" and reiterated that the Labour Program could not take any further action. The Minister's Delegate again advised the Applicant that he could contact the CHRC and offered the Applicant an opportunity to discuss the Decision, which the Applicant declined.

III. Legislative Framework

[20] Excerpts of the relevant provisions of the *Code* and the *COHS Regulations* have been set out in **Appendix A** to these reasons.

[21] Section 122.1 of the *Code* sets out the purpose of Part II of the *Code*, which regulates occupational health and safety matters. Sections 124 and 125 of the *Code* outline the duties of an employer with respect to health and safety at work, including the specific duty of an employer to prevent and protect against work place violence pursuant to paragraph 125(1)(z.16) of the *Code*. Section 127.1 of the *Code* outlines the internal complaint resolution process for employees. Section 145 of the *Code* grants authority to the Minister of Labour to issue a variety of directions with respect to contraventions of the *Code;* these directions are subject to a right of appeal pursuant to section 146 of the *Code.*

[22] Furthermore, Section 20.2 of the *COHS Regulations* provides a definition of "work place violence" and section 20.9 defines a "competent person". [Sections 20.2 and 20.9 of the *COHS* were repealed in 2020. However, this does not affect the current matter since the Decision was issued in 2019].

IV. Issues and Standard of Review

[23] This application for judicial review raises the following two issues:

A. *Whether there was a breach of procedural fairness; and*

B. *Whether the Decision is reasonable.*

[24] I find that the issue of procedural fairness is to be reviewed upon what is best reflected in the correctness standard (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). The central question for issues of procedural fairness is whether the procedure was fair, having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 ("*Baker*") at paras 21-28; (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[25] The parties both submit that the standard of reasonableness applies to the Minister's Delegate's Decision to decline to investigate the Applicant's work place violence complaint. I agree that the standard of review for an administrative decision is reasonableness, pursuant to the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paragraphs 16-17.

[26] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its

rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[27] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100).

V. Analysis

A. *Whether there was a breach of procedural fairness.*

[28] In the letter containing the Decision of November 13, 2019, the Minister's Delegate informed the Applicant that the Labour Program lacks jurisdiction to investigate his complaint and suggested that the Applicant forward his complaint to the CHRC for investigation. On November 19, 2019, the Applicant wrote to the Minister's Delegate requesting clarification. The Minister's Delegate responded by stating that the Applicant was a traveller at the time of the

incident and not an employee and reiterated that the Labour Program did not have jurisdiction over the complaint.

[29] The Applicant submits that a reliance on comments made by the Minister's Delegate after the Decision was already rendered raises significant procedural fairness concerns. The Applicant argues that he had no notice of the Minister's Delegate's comments and therefore had no opportunity to address them by way of submissions. The Applicant contends that the duty to give notice was particularly important in this case, since it involved the preliminary decision of whether or not to deal with his complaint. Without notice, an employee has no means of knowing the case to be met or which issues to address in their submissions to the investigator. Specifically, the Applicant argues that he was not provided with notice of the Minister's Delegate's considerations regarding whether work place violence can occur when an employee is off-duty and was deprived of the opportunity to make submissions on this point.

[30] The Applicant further submits that the post-decision comments are *functus officio* and cannot be relied upon to shore up a deficient set of reasons for the Decision. The Applicant argues that once an administrative decision-maker renders their final decision, that decision cannot be revisited unless there has been an error in expressing its intention. To support his position, the Applicant relies on *Jacobs Catalytic Ltd. v International Brotherhood of Electrical Workers, Local 353*, 2009 ONCA 749 ("*Jacobs Catalytic*"), in which the Ontario Court of Appeal notes at paragraph 52:

> When an adjudicator purports to issue the final reasons for a decision and later issues supplementary reasons, without explaining why the supplementary reasons did not form part of the

> initial reasons, a reasonable person may apprehend that the adjudicator engaged in results-based reasoning in order to shore up the decision. If the adjudicator had relied on the content of […] the supplementary reasons in arriving at the decision, those reasons should have formed part of the first set of reasons.

[31] The Applicant maintains that the Minister's Delegate chose not to include any additional comments within the Decision itself and it would be procedurally unfair to allow the Minister's Delegate to engage in after-the-fact justification for the Decision when it had already been issued.

[32] The Respondent contends that the Decision was rendered in a procedurally fair manner. First, the Respondent submits that the level of procedural fairness owed to the Applicant was at the low end of the spectrum since the Decision was rendered in a non-adjudicative context (*Baker* at paras 21-28). The Respondent notes that when an employee challenges an employer's screening-out decision by making a complaint to the Labour Program, neither the employer nor the Minister's Delegate are performing an adjudicative or quasi-judicial role. Rather, the decision consists of a cursory review of the circumstances to determine if the complaint falls within the definition of "work place violence" pursuant to section 20.2 of the *COHS Regulations*.

[33] Second, the Respondent maintains that the Applicant was afforded ample participatory rights. Given the nature of the statutory framework, the Respondent notes that the Applicant's allegations were taken as true, with no other person responding or intervening, and the Applicant provided all of the evidence to be considered by the Minister's Delegate. The Respondent argues that it is misleading of the Applicant to claim that he was unaware of the case to be met, particularly since the ground for which the Minister's Delegate declined to investigate his

complaint was essentially the same ground relied on by the CBSA: because he was off-duty at the time of the incident. The Respondent submits that the fact that the Applicant was a traveller at the time of the incident was also specifically discussed with the Minister's Delegate during a phone conversation on October 31, 2019, as is reflected in the Activity Log.

[34] Furthermore, the Respondent submits that the Applicant was not denied an opportunity to make additional submissions, nor did the Applicant identify any material relied on by the Minister's Delegate of which he was not aware. In fact, the Respondent notes that the Minister's Delegate's Activity Log indicates that she emailed the Applicant on November 6, 2019 and attempted to contact him by phone on November 13, 2019 with no success.

[35] Third, the Respondent maintains that the Minister's Delegate's notes and her comments from November 19, 2019 form part of the reasons for the Decision. The Respondent notes that pursuant to *Vavilov,* "[…] the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body." (at para 94).

[36] In this case, the Respondent submits that the relevant publicly available policy is *Violence prevention in the work place* – 943-1-IPG-081 (the "IPG"). The IPG notes that incidents involving perceived unfair or discriminatory treatment would generally not be considered work place violence, and lists alternative to pursue redress, such as through the *CHRA* or grievance provisions under a collective agreement. Given this policy, the Respondent maintains that the Minister's Delegate's suggestion that the Applicant contact the CHRC is not

the reason why the Minister's Delegate declined to investigate. Rather, contacting the CHRC is an alternative listed in the IPG that was provided *because* the Minister's Delegate determined that the Labour Program lacked jurisdiction. The Respondent argues that when the letter containing the Decision is read in conjunction with the Activity Log and the Assignment Narrative Report – both of which were completed on the day the Decision was issued – the reasons for the Decision are adequately set out and satisfy the requirements of natural justice.

[37] The Respondent argues that the Minister's Delegate's email response from November 19, 2019 cannot be characterized as "post-decision comments" since the Minister's Delegate was simply reproducing part of her Decision, which was contained in the Activity Log and Assignment Narrative Report, and explaining her conclusion to the Applicant. The Respondent maintains that the doctrine of *functus officio* does not apply because the Minister's Delegate did not change or add any grounds or purport to make a new decision.

[38] Lastly, the Respondent contends that the Minister's Delegate met the requisite criteria of transparency by attempting to contact the Applicant prior to issuing the Decision and by offering the Applicant an opportunity to discuss the Decision, which the Applicant declined.

[39] I agree with the Respondent. I do not find that the Applicant's rights to procedural fairness were breached. I find that the Applicant was well aware of the case to be met and was fully enabled to address the issues raised in the reasons for the Decision. I also do not find that the Minister's Delegate introduced new issues or elements in the Decision which would have

necessitated that the Applicant be notified or given an opportunity to make additional submissions.

[40] Specifically, the record demonstrates that the Applicant was aware that his initial request to the CBSA for an investigation into his complaint was rejected because he was not on-duty at the time of the incident and that the same issue would be considered by the Minister's Delegate. I note that in the "Employee Response" section of the Applicant's complaint form, the Applicant outlined what he believed to be the basis of the CBSA's refusal to investigate his complaint:

> My understanding is that the incident was not investigated as the employer deemed it not to be workplace violence. Although it took place in my workplace and by my supervisor at the time, I was not on-duty at the time.

[41] Additionally, as was noted by the Respondent, during a call with the Minister's Delegate on October 31, 2019, the Applicant stated that his complaint was not investigated because he was a traveller at the time of the incident. This is outlined in the Minister's Delegate's Activity Log of October 31, 2019:

> He asked his ER if they investigated the reports and they said they didn't need to investigate as it was not considered workplace violence as he was a traveller at the time.

[42] I also find that the Applicant was provided ample participatory rights. The Minister's Delegate's Activity Log and the email communications between the Applicant and the Minister's Delegate demonstrate that the Applicant was contacted on several occasions and provided with

opportunities to be heard and make additional submissions. The Activity Log also reveals instances when the Minister's Delegate attempted to contact the Applicant with no response.

[43] Finally, I agree with the Respondent that the Minister's Delegate's notes contained in the Activity Log and Assignment Narrative Report form part of the reasons for the Decision. I do not find that the Minister's Delegate's November 19, 2019 email response to the Applicant constitutes post-decision comments, nor do I find that the doctrine of *functus officio* applies in these circumstances.

[44] As noted by the Applicant, the doctrine of *functus officio* brings finality to a decision-making process. The doctrine holds that once a decision-maker has made a final decision on a matter, that decision cannot be revisited because a decision-maker changed their mind, made an error of jurisdiction or because there has been a change in circumstances (*Chandler v Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 SCR 848, at p. 861). Supplementary reasons cannot be used to 'shore up' a decision (*Jacobs Catalytic* at para 52).

[45] In the case at hand, the Minister's Delegate's notes were not drafted in the aftermath of the Decision as supplementary reasons; the Minister's Delegate did not revisit the Decision or change her mind, nor were new issues considered because of a change in circumstances. Rather, in her communication with the Applicant on November 19, 2019, the Minister's Delegate simply reproduced a portion of her notes, which were drafted on the same day the Decision was issued to the Applicant. The Minister's Delegate's notes do not contradict the Decision, but provide more details of the finding made in the formal Decision letter.

[46] Moreover, as acknowledged by this Court in *KIK Custom Products Inc v Canada (Border Services Agency),* 2020 FC 462 at paragraph 67, the doctrine of *functus officio* applies less stringently when assessing the decision of a non-adjudicative administrative decision maker such as the Minister's Delegate:

> […] more flexibility may be warranted when, as is the case here, one is dealing with a non-adjudicative administrative decision maker who follows less formal procedures and to whom the principle of *functus officio* applies much less stringently, if at all (cf. *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at para 3).

[47] In this case, the decision-making procedure was overall informal. The email communications on November 19, 2019 consisted of a response to the Applicant's inquiries for further information, in which the Minister's Delegate reiterated that the Applicant was a traveller at the time of the event, and not an employee. Furthermore, I find that the notes contained in the Activity Log provide insights into the reasoning behind the Minister's Delegate's finding that the Labour Program lacked jurisdiction to review the complaint, particularly in light of the IPG. The Minister's Delegate's suggestion that the Applicant contact the CHRC must be considered in light of the alternatives listed in the IPG.

[48] Overall, I find that the decision-making process was conducted in a procedurally fair manner.

B. *Whether the Decision is reasonable.*

[49] The Applicant submits that the Decision is unreasonable because the Minister's Delegate failed to provide any justifiable reasons to support her refusal to address the Applicant's complaint.

[50] First, the Applicant submits that under section 127.1 of the *Code*, the Minister is obligated to address complaints alleging contraventions of the *Code.* The Applicant maintains that the language of section 127.1(9) is mandatory: the "Minister shall investigate the complaint." The Applicant notes that on completion of the investigation, the Minister has broad authority to render a decision that either upholds or dismisses a complaint on its merits. However, the Minister does not have the discretion under section 127.1 of the *Code* to decline to address a complaint in deference to another administrative process.

[51] The Applicant argues that the obligatory language in section 127.1 of the *Code* can be contrasted with the Minister's investigatory duties under sections 128 and 129 of the *Code,* which comprise a separate and distinct complaint process for dealing with employee refusals to work due to the presence of a work place danger. Under section 129(1), the Minister *may* investigate an ongoing refusal and has the discretion to decline to address the complaint where another process would be more suitable for dealing with the complaint's subject matter. Conversely, no such discretion exists with respect to complaints under section 127.1 of the *Code,* which involve allegations that a provision of the *Code* has been violated. The Applicant submits that by declining to investigate the Applicant's complaint in deference to another administrative

procedure, the Minister's Delegate failed to fulfill her statutory obligation under section 127.1 of the *Code.*

[52] Second, the Applicant argues that even if the Minister's Delegate was permitted to defer to another administrative procedure, the Decision lacks justification, transparency, and intelligibility. Specifically, the Applicant asserts that it was unreasonable of the Minister's Delegate to conclude that the subject matter of the Applicant's complaint falls within the mandate of the CHRC. The Applicant submits that pursuant to the *CHRA*, the CHRC only has jurisdiction to investigate complaints that allege a breach of the *CHRA.* A breach of the *CHRA* can only be established where there has been discriminatory behaviour on the basis of a prohibited ground of discrimination, as defined under section 3 of the *CHRA.* The Applicant maintains that his complaint did not raise any allegation that he was harassed or subjected to work place violence due to a prohibited ground of discrimination, nor did any of the surrounding facts suggest that the alleged incident or the CBSA's refusal to appoint a competent person to investigate the complaint were linked to the Applicant's membership in a protected group. The Applicant stresses that the Minister's Delegate also failed to identify a ground of discrimination that could be at issue, or how this matter would fall under the mandate of the CHRC.

[53] The Applicant cites the Federal Court of Appeal's decision in *Lloyd v Canada (Attorney General)*, 2016 FCA 115 to submit that a decision is unreasonable if it requires the reviewing court to engage in speculation in order to support the outcome, or to trust that a decision-maker had good reasons to support its decision (at para 24, citing *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11).

[54] The Applicant further submits that his case is analogous to this Court's decision in *Karn v Canada (Attorney General)*, 2017 FC 123 ("*Karn*"), which involved a decision to decline to investigate a work refusal pursuant to sections 128 and 129 of the *Code* on the basis that the grievance process under the *Public Service Labour Relations Act,* SC 2003, c 22, s 2 (the "*PSLRA*") was more appropriate for the applicant's grievances. The Court in *Karn* found the decision to be unreasonable because it lacked an explanation for why the *PSLRA* constituted a more appropriate process for the allegations of danger, and was thus not justified, transparent or intelligible (at para 43). Similarly, the Applicant argues that the failure of the Minister's Delegate to provide an explanation to support her conclusion that the Applicant's complaint fell within the scope of the *CHRA* resulted in an unreasonable decision.

[55] Third, the Applicant submits that, should the Minister's Delegate's post-Decision comments be accepted as part of the Decision, it is also unreasonable to conclude that work place violence cannot occur when an employee is off-duty. The Applicant argues that health and safety legislation, such as the *Code* and *COHS Regulations,* must be interpreted liberally in a manner that will give effect to its purpose and objectives: to prevent work place accidents and illness, and in this case those flowing from work place violence.

[56] The Applicant maintains that the plain language of the *COHS Regulations*, when read purposively, clearly contemplates that work place violence can occur regardless of whether an employee is on-duty or off-duty, as long as the violence occurred to an employee in the work place context. The Applicant notes that the definition of "work place violence" under section 20.2 of the *COHS Regulations* is broad and 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." Additionally, under section 122(1) of the *Code,* in Part II, an "employee" is defined as "a person employed by an employer," and a "work place" is defined as "any place where an employee is engaged in work for the employee's employer". The Applicant states that nothing in this language suggests that an employee ceases to be an employee when they are off-duty, nor does their work place stop being their work place when they are off-duty.

[57] As such, the Applicant asserts that nothing in the language of the *COHS Regulations* or the *Code* supports the view that an employee must be on-duty when violence occurs in order for the violence to qualify as work place violence. Thus, the Applicant submits that an assessment of whether an incident of violence happened to an employee in their work place turns on whether the incident of violence shares a sufficient nexus with the work place. In this case, the violence occurred in the Applicant's regular, physical work place, was caused by the Applicant's supervisor at the time, took place in front of the Applicant's coworkers, and subsequently affected the Applicant's work environment. The Applicant maintains that to focus on his off-duty status at the time of the incident, to the exclusion of all other considerations, would lead to absurd results that are not in line with the purpose of the *Code* and the *COHS Regulations.*

[58] The Respondent submits that the Minister's Delegate reasonably concluded that the Labour Program had no jurisdiction over the Applicant's complaint, and that the incident did not meet the definition of "work place violence" since the Applicant was an off-duty traveller at the time. The Respondent affirms that section 20.2 of the *COHS Regulations* defines "work place violence" as an incident "towards an employee in their work place", and submits that this

definition must be interpreted with regard for the definition of "work place" in the *Code*, which shows that the intended scope of the application of the *Code* and its regulations is limited to "employees engaged in work". The Respondent states that these definitions align with the purpose of Part II of the *Code*, addressed in section 122.1, which is "to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies."

[59] The Respondent maintains that the Minister's Delegate was correct in concluding that the Applicant was not in the work place because he was a traveller at the time of the incident and that the incident therefore did not constitute work place violence. Since the Applicant was off-duty, the Respondent argues that he could not have been "engaged in work" as defined in the *Code.* The Respondent affirms that the *Code* is not intended to provide protection to employees in their private dealings, but rather only to those employees who are "engaged in work". As such, an overly broad interpretation of "work place" that extends to off-duty employees would go against the over-arching purpose of the *Code* and would go beyond what was intended by the legislature (*Blue Mountain Resorts Limited v Ontario (Labour),* 2013 ONCA 75 at para 27). The Respondent relies on Supreme Court's decision in *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at paragraph 46 to submit that is not open to deviate from the definition of "work place" provided by the governing statute.

[60] The Respondent affirms that at the time of the incident, the Border Services Officers were simply fulfilling their obligation to ensure that the Applicant was not driving while intoxicated, irrespective of the fact that he was a co-worker. As such, the nexus between the

hazard and worker safety that is necessary for the application of a health and safety statute is not applicable to the Applicant's case because he was off-duty and not a worker at the time.

[61] The Respondent further submits that the facts of this case gave the Minister's Delegate no choice but to find that the Applicant's off-duty status was determinative because he did not bring forward any facts that would suggest otherwise. For instance, the Applicant did not allege that he was treated differently because he was an employee, nor did he suggest that the incident was related to a pre-existing dispute at work. The Respondent asserts that ensuring that the Applicant was not impaired to drive had no connection with his status as an employee and it was reasonable for the Minister's Delegate to conclude that it was 'plain and obvious' that the incident did not meet the definition of "work place violence" because the Applicant was a traveller at the time.

[62] I agree with the Applicant that the Decision is unreasonable. A reading of section 127.1 of the *Code* shows that the Minister is obliged to investigate complaints alleging contraventions of the *Code.* This mandatory language becomes especially evidence when compared to the regime set out in sections 128 and 129 of the *Code*. Subsection 127.1(9) of the *Code* does provide an exception that an occurrence of harassment and violence, as is the case here, will not be investigated if the Head is of the opinion that "(a) the complaint has <u>been adequately dealt with</u> according to a procedure provided for under this Act, any other Act of Parliament or a collective agreement, or (b) the matter is otherwise an abuse of process." [Emphasis my own]. However, this exception only applies if the matter has already been dealt with under another procedure under the *Code* or another Act of Parliament. In contrast, section 129 allows for a

large discretion to refuse to investigate if it is found that the matter *could more appropriately* be dealt with by means of a procedure other under Part II of the Code, including any other Act of Parliament.

[63] I therefore find that the distinction in this language is intentional and demonstrates that the Minister is not afforded the same discretion under section 127.1 of the *Code* to simply refuse to investigate a matter and refer to an alternative process to deal with the case. Given the minimal discretion under section 127.1, it is my view that the Minister's Delegate's decision to decline to investigate the Applicant's complaint renders the Decision unreasonable. By deferring to another administrative procedure, the Minister's Delegate failed to fulfill her statutory obligation to investigate and address complaints filed under section 127.1 of the *Code.*

[64] While the Decision cannot stand due to the Minister's Delegate's failure to fulfill her statutory obligation, I find it worthwhile to address the remainder of the parties' submissions on their merits.

[65] I will first address the arguments related to the Minister's Delegate's deference to the CHRC. In light of my finding that the record – including the Minister's Delegate's notes and email communications – forms part of the Decision, I find that the Minister's Delegate's deference to the CHRC is ancillary to the reasons for the Decision. A review of the record suggests that the Minister's Delegate's finding that the complaint fell under the jurisdiction of the CHRC flowed from her conclusion that the Applicant's complaint did not involve an incident of work place violence. *Karn* is useful to demonstrate that regardless of the decision not to

investigate, the Minister's Delegate was required to explain her Decision. However, in my view, the Minister's Delegate's reasoning was appropriately explained in the notes accompanying the Decision.

[66] Furthermore, with respect to the reasonableness of the Minister's Delegate's conclusion that the incident did not consist of work place violence, I agree with the Respondent's interpretation of the definition of "work place violence" in the *COHS Regulations* when it is read alongside the definition of "work place" in the *Code.* Indeed, the *Code's* definition of "work place" emphasizes an employee engaged in work, and the definition of "work place violence" in the *COHS Regulations* includes the term "work place". This demonstrates a clear intent that the *Code* and its regulations are limited in their application to employees who are "engaged in work". The purpose of Part II of the *Code* is also consistent with the interpretation that work place violence provisions cover incidents that have taken place in the course of employment.

[67] When applying this interpretation of the language in the *Code* and the *COHS Regulations* to the facts at issue in this case, I find it was reasonable of the Minister's Delegate to conclude that the incident did not constitute work place violence: The Applicant was not "engaged in work" at the time of the incident, as he was crossing the border as a traveller; and Mr. Weston administered a breathalyzer test because he suspected the Applicant had been drinking, which aligns with a Border Services Officer's duty to ensure travellers are not driving while intoxicated. It was thus reasonable for the Minister's Delegate to infer that because Mr. Weston was acting according to his duties, there is no reasonable nexus between the hazard and the worker safety.

[68] Nonetheless, the Applicant raises an important point that is worth addressing. While the Applicant was in fact off-duty when the incident occurred, and Mr. Weston was acting in his capacities to ensure that the Applicant was not driving while under the influence of alcohol, it remains that the Applicant was still in his place of work and the agent of the alleged harassment and violence was the Applicant's supervisor. Therefore, it becomes difficult to disregard the employee-employer connection in this incident, and the fact that the effects of the incident are evidently different for the Applicant than for a regular traveller who is not employed by the CBSA. Since the place, the tone, and the circumstances of the incident are indicative of the existence of a nexus between the incident of violence and the work place, the issue becomes whether or not the incident itself constitutes harassment and violence. The Respondent's submissions seem to suggest that if an employee acts within the requirements of their job, as provided for by their work policy or statute, their actions against an off-duty employee while in the place of work cannot constitute harassment or work place violence. I agree with the Applicant that this could set a concerning precedent, particularly when considering the powers afforded to Border Services Officers at border crossings.

[69] Ultimately, I find the Decision to be unreasonable in light of the statutory constrains under section 127.1 of the *Code*.

VI. Costs

[70] The parties came to an agreement that the successful party shall be awarded costs in the amount of $4,500.00 inclusive of HST. I will award costs payable by the Respondent to the Applicant inclusive of HST in the lump sum amount of $4,500.00 payable forthwith.

VII. Conclusion

[71] For the reasons above, I do not find that the Applicant's procedural fairness rights were breached. I do however find the Decision to be unreasonable because the Minister's Delegate failed to adhere to the requirement under section 127.1 of the *Code* to investigate the Applicant's complaint of work place violence. Accordingly, this application for judicial review is allowed.

JUDGMENT in T-436-20

THIS COURT'S JUDGMENT is that:

1. The Minister's Delegate's decision is set aside, and the case is referred back for redetermination.

2. Costs in the amount of $4,500.00 are awarded to the Applicant, payable forthwith.

"Shirzad A."
Judge

APPENDIX A: RELEVANT LEGISLATION

Relevant provisions from the *Canada Labour Code* RSC 1985, c L-2:

PART II **Occupational Health and Safety** **Interpretation** **Definitions** **122 (1)** In this Part […] ***Employee*** means a person employed by an employer; (*employé*) ***Employer*** means a person who employs one or more employees and includes an employers' organization and any person who acts on behalf of an employer; (*employeur*) ***harassment and violence*** means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment; (*harcèlement et violence*) […] ***work place*** means any place where an employee is engaged in work for the employee's employer; (*lieu de travail*)	**PARTIE II** **Santé et sécurité au travail** **Définitions et interprétation** **Définitions** **122 (1)** Les définitions qui suivent s'appliquent à la présente partie. […] ***Employé*** Personne au service d'un employeur. (*employee*) ***Employeur*** Personne qui emploie un ou plusieurs employés — ou quiconque agissant pour son compte — ainsi que toute organisation patronale. (*employer*) ***harcèlement et violence*** Tout acte, comportement ou propos, notamment de nature sexuelle, qui pourrait vraisemblablement offenser ou humilier un employé ou lui causer toute autre blessure ou maladie, physique ou psychologique, y compris tout acte, comportement ou propos réglementaire. (*harassment and violence*) […] ***lieu de travail*** Tout lieu où l'employé exécute un travail pour le compte de son employeur. (*work place*)
Prevention of accidents, injuries and illnesses **122.1** The purpose of this Part is to prevent accidents, occurrences of harassment and violence and physical or psychological injuries and illnesses arising out of, linked with or occurring in the course of employment to which this Part applies.	**Prévention des accidents, blessures et maladies** **122.1** La présente partie a pour objet de prévenir les accidents, les incidents de harcèlement et de violence et les blessures et maladies, physiques ou psychologiques, liés à l'occupation d'un emploi régi par ses dispositions.
General duty of employer	**Obligation générale**

124 Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.	**124** L'employeur veille à la protection de ses employés en matière de santé et de sécurité au travail.
125 (1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, […] **(z.16)** take the prescribed measures to prevent and protect against harassment and violence in the work place, respond to occurrences of harassment and violence in the work place and offer support to employees affected by harassment and violence in the work place;	**125 (1)** Dans le cadre de l'obligation générale définie à l'article 124, l'employeur est tenu, en ce qui concerne tout lieu de travail placé sous son entière autorité ainsi que toute tâche accomplie par un employé dans un lieu de travail ne relevant pas de son autorité, dans la mesure où cette tâche, elle, en relève: […] **z.16)** de prendre les mesures réglementaires pour prévenir et réprimer le harcèlement et la violence dans le lieu de travail, pour donner suite aux incidents de harcèlement et de violence dans le lieu de travail et pour offrir du soutien aux employés touchés par le harcèlement et la violence dans le lieu de travail;
Complaint to supervisor **127.1 (1)** An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident, injury or illness arising out of, linked with or occurring in the course of employment shall, before exercising any other recourse available under this Part, except the rights conferred by sections 128, 129 and 132, make a complaint to the employee's supervisor. **(1.1)** However, in the case of a complaint relating to an occurrence of harassment and violence, the employee may make the complaint to the employee's supervisor or to the person designated in the employer's work place harassment and violence prevention policy. […]	**Plainte au supérieur hiérarchique** **127.1 (1)** Avant de pouvoir exercer les recours prévus par la présente partie — à l'exclusion des droits prévus aux articles 128, 129 et 132 —, l'employé qui croit, pour des motifs raisonnables, à l'existence d'une situation constituant une contravention à la présente partie ou dont sont susceptibles de résulter un accident, une blessure ou une maladie liés à l'occupation d'un emploi doit adresser une plainte à cet égard à son supérieur hiérarchique. **(1.1)** Toutefois, dans le cas d'une plainte ayant trait à un incident de harcèlement et de violence, l'employé peut adresser sa plainte à son supérieur hiérarchique ou à la personne désignée dans la politique de l'employeur concernant la prévention du harcèlement et de la violence dans le lieu de travail. […]

Investigation **(9)** The Head shall investigate the complaint referred to in subsection (8) unless it relates to an occurrence of harassment and violence and the Head is of the opinion that **(a)** the complaint has been adequately dealt with according to a procedure provided for under this Act, any other Act of Parliament or a collective agreement; or **(b)** the matter is otherwise an abuse of process. **Notice** **(9.1)** If the Head is of the opinion that the conditions described in paragraph (9)(a) or (b) are met, the Head shall inform the employer and the employee in writing, as soon as feasible, that the Head will not investigate.	**Enquête** **(9)** Le chef fait enquête sur la plainte visée au paragraphe (8), sauf s'il est d'avis, dans le cas d'une plainte ayant trait à un incident de harcèlement et de violence : **a)** soit que la plainte a été traitée comme il se doit dans le cadre d'une procédure prévue par la présente loi ou toute autre loi fédérale ou par une convention collective ; **b)** soit que l'affaire constitue par ailleurs un abus de procédure. **Avis** **(9.1)** Si le chef est d'avis que les conditions visées aux alinéas (9)a) ou b) sont remplies, il informe l'employeur et l'employé par écrit, aussitôt que possible, qu'il ne fera pas enquête.
Direction to terminate contravention **145 (1)** If the Head is of the opinion that a provision of this Part is being contravened or has recently been contravened, the Head may direct the employer or employee concerned, or both, to **(a)** terminate the contravention within the time that the officer may specify; and **(b)** take steps, as specified by the Head and within the time that the Head may specify, to ensure that the contravention does not continue or re-occur.	**Cessation d'une contravention** **145 (1)** S'il est d'avis qu'une contravention à la présente partie vient d'être commise ou est en train de l'être, le chef peut donner à l'employeur ou à l'employé en cause l'instruction : **a)** d'y mettre fin dans le délai qu'il précise ; **b)** de prendre, dans les délais précisés, les mesures qu'il précise pour empêcher la continuation de la contravention ou sa répétition.
Appeal of direction **146 (1)** An employer, employee or trade union that feels aggrieved by a direction issued by the Head under this Part may appeal the direction to the Board, in writing,	**Procédure** **146 (1)** Tout employeur, employé ou syndicat qui se sent lésé par des instructions données par le chef sous le régime de la présente partie peut, dans les trente jours qui

within 30 days after the day on which the direction was issued or confirmed in writing.	suivent la date où les instructions sont données ou confirmées par écrit, interjeter appel de celles-ci par écrit au Conseil.

Relevant provisions from the *Canada Occupational Health and Safety Regulations* SOR/86-304*:*

PART XX **Violence Prevention in the Work Place** **Interpretation** […] **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. [*repealed*]	**PARTIE XX** **Prévention de la violence dans le lieu de travail** **Interprétation** […] **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. [*abrogée*]
Notification and Investigation **20.9 (1)** In this section, ***competent person*** means a person who **(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 feasible. **(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	**Notification et enquête** **20.9 (1)** Au présent article, ***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 dès que possible. **(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

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 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 **(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. **(6)** Subsections (3) to (5) do not apply if **(a)** the work place violence was caused by a person other than an employee; **(b)** it is reasonable to consider that engaging in the violent situation is a normal condition of employment; and **(c)** the employer has effective procedures and controls in place, involving employees to address work place violence. [*repealed*]	ne fait pas l'objet d'une interdiction légale de communication et qui ne révèle pas 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 d'enquête, l'employeur: **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 et qu'ils ne révèlent pas 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. **(6)** Les paragraphes (3) à (5) ne s'appliquent pas dans les cas suivants: **a)** la violence dans le lieu de travail est attribuable à une personne autre qu'un employé ; **b)** il est raisonnable de considérer que, pour la victime, le fait de prendre part à la situation de violence dans le lieu de travail est une condition normale de son emploi ; **c)** l'employeur a mis en place une procédure et des mécanismes de contrôle efficaces et sollicité le concours des employés pour faire face à la violence dans le lieu de travail. [*abrogée*]

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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