Federal Court Cour fédérale

Date: 20200217

Docket: T-10-19

Citation: 2020 FC 259

Ottawa, Ontario, February 17, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

BRIAN DOYLE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

I. Overview

[1] On October 11, 2017, while employed by the National Energy Board ("the NEB") the Applicant, ("Mr. Doyle"), made a complaint of workplace violence ("the Complaint") to Employment and Social Development Canada. Mr. Doyle requested an investigation under Part XX, section 20.9 of the *Canada Occupational Health and Safety Regulations*, SOR/86-304 ("the *Regulations*").

[2] In the Complaint, Mr. Doyle described it as an "Appeal of findings from a Respectful Workplace Complaint which did not address violence in the workplace." Mr. Doyle indicated that the Respectful Workplace Complaint had been filed under the NEB Respectful Workplace Policy on December 24, 2016 and the final outcome was made on September 11, 2017.

[3] On December 20, 2017 the Occupational Health & Safety Coordinator for the NEB wrote to Mr. Doyle acknowledging receipt of the Complaint. The letter indicated that the next step under Part XX of the *Regulations* was to appoint a competent person ("CP") to investigate the matter.

[4] The CP was contracted on March 13, 2018 to investigate the Complaint pursuant to subsection 20.9(3) of the *Regulations*. The CP sent a preliminary report to Mr. Doyle on September 18, 2018.

[5] On October 9, 2018 the Final Report of the CP ("Report") was issued. Mr. Doyle received the Report on October 22, 2018.

[6] In the Report the CP indicated that she had examined all the documents that had been considered by another firm in a prior investigation based on the Respectful Workplace Policy of the NEB. That investigation had resulted in a report dated May 26, 2017.

[7] The CP understood that she was to review the prior investigation documents and conclusions from the perspective of violence in the workplace under Part XX of the *Regulations*. The CP was then to provide conclusions and recommendations and determine whether there were any violations under Part XX.

[8] In the Report the CP examined thirteen allegations made by Mr. Doyle. The CP concluded that although Mr. Doyle had experienced disrespectful behaviour, which may have been discriminatory or harassing, it did not meet the definition of workplace violence.

II. **Positions of the Parties**

[9] Mr. Doyle, who is self-represented, seeks judicial review of the Report. He was not satisfied with either the quality of the investigation or with the resulting Report. He says the process leading to the Report was procedurally unfair in several ways.

[10] The Respondent acknowledges that contrary to subsection 20.9(4) of the *Regulations*, the CP did not fully investigate or resolve Mr. Doyle's complaint. The Respondent concedes that procedural fairness was breached. For example, Mr. Doyle was not interviewed.

[11] Mr. Doyle does not want the Report set aside and returned for a fresh investigation. He asks the Court to make a decision on the Complaint based on the existing evidence. He says that he cannot withstand another investigation should the Report be set aside. He adds that in his experience the investigation itself was a form of workplace violence.

[12] The Respondent submits that the matter must be returned to be dealt with in accordance with subsection 20.9(2) of the *Regulations* whereby the employer tries to resolve the complaint with the employee. To that end, the Respondent asks that the Report be set aside and the complaint be dealt with afresh in accordance with subsections 20.9(2) - (5) of the *Regulations*.

[13] The following discussion regarding the style of cause may help to more fully understand Mr. Doyle's position on the remedy he seeks.

III. **Preliminary Issue – Style of Cause**

[14] Following the hearing of this matter but prior to releasing this judgment, the parties were invited to make submissions concerning a proposal by the Court to amend the style of cause to remove the NEB as a respondent in light of rule 303(1)(a) of the *Federal Courts Rules*, SOR/98-106.

[15] The Respondent agreed with the proposed amendment.

[16] Mr. Doyle expressed the following concern about removing the NEB as a respondent:

> Within its function as a Court of Record, a tribunal, the National Energy Board's (Canada Energy Regulator's) responsibilities do not include the application and interpretation the [sic] Canada Labour Code in an adjudicative manner. This is a responsibility of the administrative branch of the National Energy Board (Canada Energy Regulator) and these responsibilities are related to adherence within the organization, while the operational branch has responsibilities to ensure compliance within the companies it regulates. […] Neither the Report of the Competent Person, nor the NEB's Letter of Determination can be said to be the findings of the NEB "tribunal" and therefore the application for Judicial Review is not in respect of an order from 'a tribunal in respect of which the application is brought'.

[17] In terms of returning the matter for a fresh investigation Mr. Doyle also expresses the belief that the CP is not a tribunal, therefore there is no tribunal to which the matter may be returned.

[18] Mr. Doyle expanded upon his concern by saying that if the NEB (now the Canadian Energy Regulator (CER)) is a tribunal then his "argument that there is no established tribunal to which the decision may be returned is lost and the Honourable Court would abdicate any responsibility of Judicial Review".

[19] Mr. Doyle's concern of whether there is a tribunal to which the Complaint may be returned is linked with his belief that the standard of review of the Report is correctness. As I understand Mr. Doyle's analysis, if there is no established tribunal - as he argues is the case - and the standard of review is correctness, then it is within the power of the Court to make the determination that the CP should have made based on the evidence that was before the CP.

IV. **What is the meaning of the word "tribunal" in this case?**

[20] The *Federal Courts Act*, RSC 1985, c F-7 ("the *FC Act*") defines a tribunal in subsection 2(1) as part of the phrase "federal board, commission or other tribunal" which states:

federal board, commission or other tribunal means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under	**office fédéral** Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la Loi

section 96 of the Constitution Act, 1867; (office fédéral)	constitutionnelle de 1867. (federal board, commission or other tribunal)

[21] As can be seen in the opening lines, a tribunal includes both a person and a body exercising powers conferred under an Act of Parliament. The NEB was a federal board exercising powers conferred on it under an Act of Parliament. The CER is the successor to the NEB, it was also created by an Act of Parliament, the *Canadian Energy Regulator Act*, SC 2019, c 28, s 10.

[22] The Complaint was submitted to the Occupational Health & Safety Coordinator at the NEB, and the ensuing investigation by the CP involved the exercise of powers conferred under an Act of Parliament and its regulations.

[23] The Complaint was filed under Part II of the *Canada Labour Code*, RSC 1985, c L-2 ("the *Code*"), the purpose of 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. Under subsection 125(1)(z.16) of the *Code*, every employer shall take the prescribed steps to prevent and protect against violence in the work place. The appointment of the CP, the conduct of her investigation and the delivery of the Report all occurred under the *Regulations* which were authorized by the subsection 157(1) of the *Code*.

[24] There is also a significant body of jurisprudence to help determine in any individual situation whether the facts of that situation fall within the definition of a "federal board, commission or other tribunal". The broad scope of this definition is set out by the Supreme Court of *Canada in Canada (Attorney General) v TeleZone Inc*., 2010 SCC 62 at paragraph 3:

> [3] The definition of "federal board, commission or other tribunal" in the Act is sweeping. It means "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" (s. 2), with certain exceptions, not relevant here, e.g., decisions of Tax Court judges. The federal decision makers that are included run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between. (my emphasis)

[25] Based on all of the foregoing, I have no hesitation in finding that the NEB, Mr. Doyle's employer at the relevant time, is a tribunal within the meaning of the *FC Act*. Therefore, by virtue of Rule 303(1)(a) the NEB is not a proper respondent.

[26] The style of cause is amended to remove the National Energy Board as a respondent, with immediate effect: *Federal Courts Rules*, SOR/98-106 rule 303(1)(a).

V. **Standard of Review**

[27] A matter involving procedural unfairness is generally considered to be reviewable on a standard of correctness.

[28] More recently a distinction has emerged that concluding whether there has been procedural fairness does not require a standard of review analysis. The ultimate question is whether Mr. Doyle knew the case to be met and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at s 49-50, 56.

[29] The parties each submit that the process followed in arriving at the recommendations made in the Report was procedurally unfair to Mr. Doyle. Although the Court is not bound by

the agreement of the parties, the underlying record independently supports the submissions of each party that the process was unfair to Mr. Doyle.

[30] A determination arrived at in a manner that is procedurally unfair means it is unlawful and it is not necessary to determine whether or not it was otherwise reasonable: *Mission Institution v Khela*, 2014 SCC 24 at para 80.

VI. **Issue**

[31] The only issue to be determined is whether the Court can accede to Mr. Doyle's request to make a determination on the merits of the Complaint based on the evidence before the CP.

VII. **Analysis**

[32] Mr. Doyle has asked the Court to review the evidence in the record and resolve the Complaint. Unfortunately, he seeks relief that the Court cannot grant for two reasons.

[33] The first reason is that the Court does not have the authority to decide whether Mr. Doyle has been the victim of workplace violence. Under the *Code* and the *Regulations*, Parliament has vested that authority in his employer, the NEB.

[34] Specifically, the employer is required under section 20.9 of the *Regulations* to do the following:

Canada Occupational Health and Safety Regulations, SOR/86-304	Règlement canadien sur la santé et la sécurité au travail, DORS/86-304

PART XX

Violence Prevention in the Work Place

Notification and Investigation

[. . .]

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.

(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,

PARTIE XX

Prévention de la violence dans le lieu de travail

Notification et enquête

[. . .]

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) 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.

(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;

(a) keep a record of the report from the competent person;	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;
(b) provide the work place committee or the health and safety representative, as the case may be, and 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) 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.
(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.	

[35] The second reason is that the Federal Court is a statutory Court. As a judge of this Court, when considering an application for judicial review I can only exercise the powers set out in subsection 18.1(3) of the *FC Act*:

Powers of Federal Court	**Pouvoirs de la Cour fédérale**
(3) On an application for judicial review, the Federal Court may	(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision,	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance,

order, act or proceeding of a federal board, commission or other tribunal.	procédure ou tout autre acte de l'office fédéral.

[36] In Mr. Doyle's case, the relevant portion of the *FC Act* is paragraph 18.1(3)(b). It provides the Court with the discretion to "quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate" the matter under review.

[37] It has already been established that as the Report was made in a manner that was procedurally unfair it is unlawful and must be set aside. Applying paragraph 18.1(3)(b) of the *FC Act*, I may refer the Complaint back for redetermination in accordance with directions I consider to be appropriate. Litigants often ask Courts to issue instructions to the tribunal to which a matter is to be returned to direct the tribunal to arrive at a particular outcome. See for example *Garshowitz v Canada (Attorney General)*, 2017 FCA 251 at paragraph 5.

[38] Under paragraph 18(1)(a) of the FC Act, when considering an application for judicial review, I may order a person or tribunal to arrive at a particular outcome by using the power to order both certiorari and mandamus against any "federal board, commission or other tribunal":

Extraordinary remedies, federal tribunals	**Recours extraordinaires : offices fédéraux**
18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission	a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement

or other tribunal; and	déclaratoire contre tout office fédéral;
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

[39] Such relief is referred to as an "extraordinary remedy". The Federal Court of Appeal, has recently confirmed that mandating a tribunal or person to arrive at a particular decision is available only "where on the facts and the law there is only one lawful response, or one reasonable conclusion, open to the administrative decision-maker, so that no useful purpose would be served if the decision-maker were to redetermine the matter:": *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206 at para 72.

[40] I am persuaded that in this matter there is not only one lawful response or one reasonable conclusion open on the facts and law. For one reason, the facts that are set out in the Report which he wishes me to review are disputed by Mr. Doyle.

[41] In his submissions, Mr. Doyle itemized 17 problems with the Report. Amongst them he states that the CP altered evidence, failed to address the potential deletion and destruction of documents, relied on contested and incorrect statements made in the previous report and either was unable to apply relevant legislation or refused to do so.

[42] Most importantly, Mr. Doyle alleges that the CP reached an erroneous conclusion "through the concealment of evidence, the alteration and editing of evidence and the re-crafting of a false narrative, a summary, of the [other] investigation report."

[43] Without a reliable factual record, the evidence Mr. Doyle asks me to consider cannot be taken at face value in order to determine whether there is only one reasonable outcome.

[44] Given as well that between the Certified Tribunal Record and the Applicant's Record there are over 2000 pages of materials filed in this application it is likely that any redetermination will require additional evidence either to reconcile conflicting positions or add missing evidence. That is simply not the task of this Court on judicial review. As stated before, Parliament has assigned that responsibility to the CP appointed under the *Regulations*.

VIII. **Conclusion**

[45] Section 20.9 of the *Regulations* is meant to offer an avenue of redress for employees who have experienced workplace violence: *Canada (Attorney General) v Public Service Alliance of Canada*, 2015 FCA 273 at para 20. Despite lodging his initial complaint on December 26, 2016 Mr. Doyle has yet to receive such redress as the result of two deficient investigations.

[46] Mr. Doyle has made it clear that ultimately what he seeks is finality and clarity regarding his workplace violence complaint. He has been adamant that he does not wish to have another investigation. He believes he cannot withstand the stress of another investigation.

[47] While I sympathize with Mr. Doyle's position, for the reasons I have set out in this judgment I find that the only avenue available to Mr. Doyle through judicial review is to set aside the Report and refer the Complaint back for redetermination.

[48] If the resolution process stipulated by subsection 20.9(2) is used and it is unsuccessful a new CP is required to be appointed under subsection 20.9(3). That person is then required under subsection 20.9 (4) to complete a new investigation and report.

[49] However, if he so chooses, Mr. Doyle is not required to participate in any part of the process under Section 20.9 of the *Regulations*. He may choose to participate in some parts but not others. That is entirely up to Mr. Doyle. For clarity, this does not mean that Mr. Doyle can require a process that is contrary to the *Regulations*.

[50] Finally, during the hearing of this application, Mr. Doyle asked whether he could simply withdraw the Complaint. I am not aware that there is any impediment to withdrawing the complaint if Mr. Doyle determines that it is in his best interest. I expect that if the Complaint is withdrawn then that may be the end of the process. If so, it is within Mr. Doyle's control.

[51] In the circumstances of this application no costs are awarded to either party.

JUDGMENT in T-10-19

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to remove the National Energy Board as a Respondent, with immediate effect: *Federal Courts Rules*, SOR/98-106 rule 303(1)(a) and *Hicks v Canada (Attorney General)*, 2019 FCA 311 at paragraph 8.

2. The Report is set aside and the Complaint is to be processed by a different Competent Person.

3. Mr. Doyle retains the right at any time to withdraw his complaint.

4. Mr. Doyle also has the right to participate or not in all or any part of any investigation or process concerning the Complaint which may take place under the *Regulations.*

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-10-19
STYLE OF CAUSE:	BRIAN DOYLE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 8, 2019
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	FEBRUARY 17, 2020

APPEARANCES:

Brian Doyle	FOR THE APPLICANT (ON HIS OWN BEHALF)
Raymond Lee	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT