Federal Court Cour fédérale

Date: 20240703

Docket: T-516-23

Citation: 2024 FC 1046

Ottawa, Ontario, July 3, 2024

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

CARMELLE GOLDBERG

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of a decision of the Ontario Regional Director [RD] of the Labour Program of Employment and Social Development Canada [ESDC] declining, pursuant to paragraph 129(1)(a) of the *Canada Labour Code*, RSC 1985, c L-2 [Code], to investigate her work refusal. He opined that the matter is one that could more appropriately be

dealt with by means of a procedure provided for under another Act of Parliament, namely, the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA].

[2] For the reasons that follow, I will dismiss this application. The decision was reasonable given the RD's broad discretion under the Code to decline to investigate work refusals where he finds that a more appropriate alternative avenue for relief exists.

II. Background

[3] The Applicant was a Senior Policy Advisor at Innovation, Science, and Economic Development Canada [ISED], an agency of the Government of Canada. She began working at ISED on October 13, 2022.

[4] The Applicant has physical disabilities affecting her sight, hearing, balance, and spacial orientation. Before starting at ISED, she requested several workplace accommodations, which the Respondent accepted and implemented. These included providing her with a high-performance computer and installing specific accessibility programs on it. While working, she made several additional accommodation requests. ISED implemented most, but not all, of these requests, including purchasing various equipment for her and allowing her to temporarily work from home.

[5] On November 30, 2022, the Applicant experienced temporary blindness while an IT support worker helped her test her accessibility computer programs. Following this incident, on December 1, 2022, she wrote to the Director General of Financial Analysis and Oversight,

Celine Menard, via Microsoft Teams, that she was refusing to work. Ms. Menard advised the Applicant to complete a Refusal to Work Registration Form [Statement of Refusal] pursuant to the Code, providing particulars of the alleged dangers. The Director of Health and Workplace Culture at ISED also advised the Applicant of the applicable procedure for work refusals under the Code on December 8, 2022.

[6] On December 23, 2022, the Applicant sent her Statement of Refusal to the ISED Occupational Health and Safety [OHS] office, claiming that she did not feel safe working on her ISED computer. She alleged danger to her health arising from her disabilities on four grounds:

> I do not feel safe working on my ISED computer (machine) because my employer has failed to accommodate me due to my disabilities as a person hired through a Disability Pool.
>
> 1. I have not been provided with a customized computer set-up for my vision limitations that protects me from known workplace hazards that cause vision and vestibular stress that cause temporary blindness that could lead to permanent vision injuries.
>
> 2. I have not been provided with the customized training I need to perform ISED job responsibilities safely with adaptive computer technologies in an accessible work environment.
>
> 3. I am being instructed by my Manager to test the set-up of accessibility applications (Real Aloud and lmmersive Reader) in Microsoft Suite by ISED lT Support who do not know how to use the applications or keep me safe during testing and set-up.
>
> 4. I am being exposed to workplace violence and retaliation for requesting accommodations for my disabilities that is seriously impacting my health.

[7] Upon being forwarded the Statement of Refusal, Ms. Menard initiated the employer's investigation under subsection 128(7.1) of the Code. She found that there was no danger; her report dated January 5, 2023 states that the Applicant advanced no basis for the first three grounds of danger in her Statement of Refusal and that the fourth ground did not meet the definition of danger under subsection 122(1) of the Code.

[8] The Applicant continued her work refusal. Pursuant to subsection 128(9) of the Code, it was referred for investigation by the joint OHS Committee, consisting of both union and management representatives. The OHS Committee investigators found that the Applicant's first three reasons for refusing work did not meet the standard of danger under Part II of the Code. They further found that workplace violence complaints, the Applicant's fourth ground of refusal, could not be referred to the OHS Committee pursuant to subsection 127.1(3) of the Code.

[9] On February 7, 2023, given the Applicant's continued work refusal, the matter was referred to the ESDC Labour Program under subsection 128(16) of the Code. A Health and Safety Officer, Tara Withers, undertook a preliminary review finding that the Applicant's work refusal arose from alleged failures to accommodate her physical disabilities, which would be more appropriately dealt with under the CHRA. The RD agreed with the preliminary review, declining to investigate the Applicant's work refusal under paragraph 129(1)(a) of the Code in the decision under review. He concluded that the Applicant was no longer entitled to refuse to work pursuant to subsection 129(1.2) of the Code.

III. Issues

[10] The sole substantive issue for determination is whether the RD's decision is reasonable.

[11] As a preliminary issue, the style of clause names the Respondents as ESDC and ISED. The Attorney General of Canada submits that it is the proper responding party under Rule 303(2) of the *Federal Courts Rules*, SOR/98-106. I agree, and will order an amendment to the style of cause with immediate effect.

IV. Standard of Review

[12] The parties submit, and I agree, that the standard of review is reasonableness, as articulated by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12–13. Absent exceptional circumstances, reviewing courts must not interfere with the decision-maker's factual findings and cannot reweigh and reassess evidence considered by the decision-maker: *Vavilov* at para 125.

[13] That being said, reasonableness review is not a mere "rubber-stamping" process: *Vavilov* at para 13. It is the reviewing court's task to assess whether the decision as a whole is reasonable; that is, it 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.

V. Analysis

[14] The Code defines the rights and responsibilities of workers and employers in federally regulated workplaces. As a regulator, the Labour Program at ESDC is responsible for protecting the rights and well-being of workers in those workplaces, including assessing work refusals made under section 128 of the Code. In general, employees may refuse work if they have "reasonable cause to believe" that the work would constitute a danger.

[15] Importantly, the refusal-to-work mechanism set out in the Code is an "emergency measure," intended to immediately address safety issues at work that pose to employees an "immediate and real" danger: *Canada (Attorney General) v Fletcher*, 2002 FCA 424 [*Fletcher*] at para 19. In *Duiker v Canada (Attorney General)*, 2023 FC 701 [*Duiker*], at paragraph 45, this Court held that a work refusal is indeed a "back up" mechanism when the main elements of the Code's internal responsibility system [IRS] have not been effective to address any danger: see also *Correctional Service of Canada v Ketcheson*, 2016 OHSTC 19 at para 140.

[16] The RD, as a delegate of the Head of Compliance and Enforcement [Head], has discretion to decline to investigate a work refusal pursuant to subsection 129(1) of the Code:

129 (1) If the Head is informed of the employer's decision and the continued refusal under subsection 128(16), the Head shall investigate the matter unless the Head is of the opinion that	**129 (1)** Le chef, s'il est informé de la décision de l'employeur et du maintien du refus en application du paragraphe 128(16), effectue une enquête sur la question sauf s'il est d'avis :
(a) the matter is one that could more appropriately be dealt with, initially or	**a)** soit que l'affaire pourrait avantageusement être traitée, dans un premier temps ou à

completely, by means of a procedure provided for under Part I or III or under another Act of Parliament;	toutes les étapes, dans le cadre de procédures prévues aux parties I ou III ou sous le régime d'une autre loi fédérale;
(b) the matter is trivial, frivolous or vexatious; or	**b)** soit que l'affaire est futile, frivole ou vexatoire;
(c) the continued refusal by the employee under 128(15) is in bad faith.	**c)** soit que le maintien du refus de l'employé en vertu du paragraphe 128(15) est entaché de mauvaise foi.

[17] This Court recently reviewed the scope of the RD's discretionary power under subsection 129(1) in *Duiker,* albeit in a different context. At paragraph 75, the Court wrote:

> The RD is entitled to screen out work refusals expeditiously. Of course, they must provide a rationale for their decision and rely on the investigator's work. The intent of the statutory scheme is to have most issues resolved within the internal process and not by work refusals, which should be limited to emergency cases. As stated in *Ketcheson,* the intent of the 2014 amendments were to strengthen the IRS to reduce the need for Ministerial Delegates to attend and investigate work refusal (at para 170). In fact, Parliament has granted the RD the power and discretion to decline to investigate a work refusal for that specific reason. As the reviewing Court, we must therefore show deference toward this administrative body by virtue of their expertise on all questions that come before them (*Vavilov* at para 28). The Court will only intervene where there is a "clearly deficient investigation" or where there is a failure to investigate "obviously crucial evidence" (*Demitor* at para 70).
>
> (emphasis in original)

[18] The Applicant submits that the decision is unreasonable because the ESDC took a narrow view of her refusal to work and failed to consider whether she was in danger in the workplace, a question that she alleges would be best addressed under the work refusal process. She argues

that the RD unreasonably focused on the fact that addressing the workplace danger would require accommodations. The Applicant further submits that dismissing her application will result in a precedent disentitling all employees with disabilities from relying on the work refusal process under the Code.

[19] I am not persuaded.

[20] It is evident that the RD's discretion under paragraph 129(1)(a) of the Code is considerably broad: *Duiker* at para 67; *Burlacu v Canada (Attorney General)*, 2022 FC 1223 at para 21. I agree with the Respondent that the Court owes deference to the RD's subject matter expertise in declining to investigate matters that he opines would be more appropriately dealt with elsewhere, such as by processes under the CHRA.

[21] However, the exercise of discretionary power is not without review. Even where an administrative decision-maker has considerable discretion, such as the RD, they must exercise it in a manner that ultimately complies with the rationale and purview of the statutory scheme under which such discretion was granted.

[22] I do not find that the RD acted outside the scope of his authority in declining to investigate the Applicant's work refusal. He provided reasons for his decision, which were based on and in agreement with Ms. Withers' preliminary report, as well as the Applicant's Statement of Refusal, the OHS Committee's investigation report, Ms. Menard's investigation report, and other supplemental documents and consultations. I note that the Statement of Refusal

heavily emphasizes the alleged lack of accommodations provided by the Respondent. It reads, in part:

> I do not feel safe working on my ISED computer (machine) because my employer has failed to accommodate me due to my disabilities […]
>
> With the proper accommodations, training on adaptive technologies for job specific tasks, accessible meetings and documents and workplace assessments that have been denied, I should be able to return to gradual work to ensure that the interventions have been effective and not continue to place me at risk of blindness.
>
> [emphasis added]

[23] It was therefore reasonable for the RD to conclude that the Applicant's work refusal was primarily rooted in the alleged failures to accommodate her disabilities. Such finding is consistent with the other investigators' findings and recommendations.

[24] As the Respondent notes, the type of danger contemplated under Part II of the Code "cannot be a danger that is inherent in the work or that constitutes a normal condition of work:" *Fletcher* at para 19. The Respondent submits that this excludes dangers rooted in an employee's medical conditions that could be accommodated: *Saumier v Canada (Attorney General)*, 2009 FCA 51 at paras 54–55; *Canada Post Corporation v George Stout*, 2013 OHSTC 39 at paras 36–48. Instead, the CHRA provides procedures for the accommodation of an individual's particular needs. I agree that the procedures under the CHRA may capture the Applicant's claim. I further find that she has not provided sufficient evidence to demonstrate that the RD's conclusion as to the availability of recourse under the CHRA was unreasonable, especially considering the

dangers she alleged are rooted in her physical disabilities which she claims were not accommodated.

[25] In any event, I need not assess whether a danger exists under the Code and agree with the Respondent that such determination is premature at this stage of the work refusal process. The RD's broad discretion to decline investigating a work refusal exists even if there is a danger contemplated under the Code; determining whether such danger exists is in fact the result of any investigation: *Karn v Canada (Attorney General)*, 2017 FC 123 at para 12.

[26] During the hearing, the Applicant stressed that the RD erred in failing to describe why the CHRA process is *more* appropriate to address the Applicant's case than the work refusal process under the Code. Although she concedes that the CHRA may indeed possess concurrent jurisdiction to hear her claim, she argues that the procedures under the CHRA process are "glacial," "cumbersome, time-consuming and expansive:" *Grover v Canada (Attorney General)*, 78 OR (3d) 126, [2005] OJ No 4621 at para 24; Canadian Human Rights Act Review Panel, "The Report of the Canadian Human Rights Act Review Panel," at 6. Further, the Code provides certain procedural benefits that the CHRA lacks, including pay protection during the period she is refusing work.

[27] Even if I were to accept the alleged disadvantages of pursuing a claim under the CHRA, which I note are premised on evidence not included in the Certified Tribunal Record and presumably not before the RD, I do not find that the omission of these disadvantages renders the decision unreasonable. The RD's reasons were sufficient given his broad discretion to make

such decisions in his "opinion" in the context of a non-judicial, non-adversarial process: *Gupta v Canada (Attorney General),* 2017 FCA 211 [*Gupta*] at para 31. This Court commented on the expeditious nature of the work refusal process in *Duiker* at paragraph 55:

> Permitting the RD to screen out work refusals as informally and expeditiously as possible in the appropriate circumstances also strengthens the goal of the IRS as the main tool to fulfill the goal of the *CLC* and limit work stoppages to true emergencies (*Ketcheson* at paras 131-144; *Canada (Attorney General) v Fletcher*, 2002 FCA 424 at para 20). Requiring anything more could risk "complicating and over-judicializing a process that was intended to be informal and expeditious" (*Gupta* at para 34). It could also risk extending a work stoppage unnecessarily. The Applicants' position defeats the intent of the statutory scheme to have most issues resolved by the IRS, and restrains the explicit statutory power and broad discretion granted to the RD by Parliament to decline to investigate a work refusal at a preliminary stage.

[28] Therefore, while the RD must provide transparent and intelligible justification for his decision, as defined in *Vavilov*, he need not provide extensive reasons. This is consistent with Parliament's intent that investigations under the Code be conducted "as informally and expeditiously as possible:" s 19(7.2) of the Code; see also *Gupta* at para 31. Indeed, I find that the RD's reasons, though brief, meet this standard.

[29] I also disagree with the Applicant's simplistic characterization of the decision as declining to investigate her work refusal based solely on her status as a person with disabilities. The RD undertook an evaluation of her case as a whole, particularly considering the allegations she put forward in her Statement of Refusal. There is no indication that the RD summarily declined to investigate based on her disabilities, nor that other federal employees with disabilities will be unable to exercise their rights under the Code's work refusal regime.

VI. Conclusion

[30] For the foregoing reasons, I dismiss the application. The RD exercised its broad discretion granted by Parliament under the Code in a transparent, intelligible, and justified manner not warranting judicial intervention.

[31] The parties agreed to waive costs; accordingly, no costs shall be awarded.

JUDGMENT in T-516-23

THIS COURT'S JUDGMENT is that the style of cause is amended with immediate effect to name The Attorney General of Canada as the Respondent, and the application is dismissed, without costs.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	CARMELLE GOLDBERG v THE ATTORNEY GENERAL OF CANADA
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