Federal Court of Appeal | Cour d'appel fédérale

Date: 20151130

Docket: A-544-14

Citation: 2015 FCA 273

CORAM: **PELLETIER J.A.**
NEAR J.A.
DE MONTIGNY J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 23, 2015.

Judgment delivered at Ottawa, Ontario, on November 30, 2015.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: PELLETIER J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal of a judgment rendered by Justice Manson of the Federal Court on November 13, 2014 granting an application for judicial review brought by the Public Service Alliance of Canada (PSAC, the Respondent) against a decision of an appeals officer of the Occupational Health and Safety Tribunal of Canada (the Appeals Officer) regarding a work

place violence complaint made by Mr. Abel Akon, an employee of the Canadian Food Inspection Agency (the CFIA or the employer).

[2] The present appeal relates to the interpretation and application of Part XX of the *Canada Occupational Health and Safety Regulations*, SOR/86-304 [the *Regulations*], enacted in 2008 and entitled *Violence Prevention in the Work Place*. More particularly, the core issue is whether an employer is entitled to unilaterally determine whether the conduct complained of constitutes work place violence before being required to appoint a "competent person" to investigate the matter pursuant to section 20.9 of the *Regulations*, and if so under what circumstances. For the reasons that follow, I would dismiss the appeal.

I. Facts

[3] Mr. Abel Akon is a poultry inspector at the CFIA. On November 28, 2011, he met with his supervisor to discuss some concerns relating to their working relationship, which he reiterated in a written complaint submitted on December 2, 2011. In that complaint, Mr. Akon raised issues relating to favouritism and unfair treatment with respect to his leave requests that were contrary to his collective agreement, and humiliating and disrespectful treatment in the work place (dismissive hand gestures, eye rolling, verbally demeaning behaviour, disregarding complaints regarding other employees yelling at him in front of plant personnel, lack of transparency and unfair marking of a certification exam). The written complaint did not specifically refer to "work place violence" or identify itself as a work place violence complaint under the *Regulations*.

[4] When the CFIA cancelled a meeting scheduled for December 7, 2011 to discuss possible resolution of the complaint, the employee notified the CFIA that his concerns had not been addressed and, in the circumstances, he planned to file an official complaint pursuant to Part XX of the *Regulations*.

[5] In January 2012, Mr. Ken Schmidt, Regional Director for the Saskatchewan Region, was appointed by the Area Occupational Health and Safety Co-Chairs at the CFIA to undertake a "fact-finding" process to review the concerns raised by the employee and to determine whether an investigation was warranted. Mr. Akon and his union representative agreed to participate, and Mr. Schmidt conducted interviews with those involved. In his "Fact Finding Summary Re: Complaint of Harassment" dated February 2, 2012, he concluded that the allegations in the complaint did not constitute harassment and did not warrant an investigation, but recommended that an independent third party facilitator be hired to assist Mr. Akon and his supervisor to find a resolution to the issues in their interpersonal dealings.

[6] When the fact-finding report was presented to Mr. Akon and PSAC in early February 2012, they contacted a health and safety officer, Ms. Joanne Penner, raising their concern that the employer had not simply conducted a preliminary fact-finding process, but had in fact conducted an investigation without selecting an impartial, competent person within the meaning of the *Regulations*. In their opinion, the CFIA treated the fact-finding process as an investigation of a harassment complaint under its old harassment policy, rather than following the required process under the *Regulations*. They requested that an investigation be initiated by a competent person within the meaning of subsection 20.9(1) of the *Regulations*. Following a number of exchanges,

the CFIA responded that they had complied with their obligation to have a competent and impartial person investigate the conflict, since Mr. Schmidt was selected for the task by the Area Occupational Health and Safety Co-chairs, according to the CFIA's Prevention of Harassment in the Workplace Policy.

[7] On September 6, 2012, Ms. Penner issued a direction pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 [the *Code*] indicating that the CFIA had failed to appoint a competent person as required by subsection 20.9(3) of the *Regulations* since the employee did not consider Mr. Schmidt to be impartial. She directed that the CFIA terminate the contravention no later than October 1, 2012.

[8] In response to that direction, the CFIA explained that the fact-finding mission undertaken by Mr. Schmidt was "to determine whether or not the allegations, if believed to be true, constituted harassment and/or violence in the workplace". In the CFIA's opinion, it was only once it was determined that the allegations suggesting work place violence had in fact occurred and could not be resolved by the employer and the employee, that the matter would be referred for investigation by a competent person pursuant to subsection 20.9(3) of the *Regulations*. Ms. Penner maintained her position and noted in her summary of the file that the employer was not entitled to arbitrarily decide what does and does not constitute work place violence, in order to screen out complaints; in her view, any alleged work place violence needed to be resolved informally or proceed to investigation by a competent person. The CFIA subsequently filed an appeal of the direction to the Appeals Officer under subsection 146(1) of the *Code*.

[9] The Appeals Officer allowed the appeal and set aside the direction. In the Appeals Officer's opinion, an employer is only obliged to appoint a competent person once they have been made aware of work place violence or an allegation of work place violence, and have tried to resolve it unsuccessfully. Referring to the definition of "work place violence" at section 20.2 of the *Regulations*, the Appeals Officer found that the allegations in the complaint did not raise work place violence because the alleged conduct could not reasonably be expected to cause harm, injury or illness. Therefore, the employer had not been made "aware of … alleged work place violence" within the meaning of subsection 20.9(2) of the *Regulations*, and there was no obligation to appoint a competent person to investigate. In the Appeals Officer's view, the employer was entitled to determine whether the complaint related to work place violence; it cannot have been the legislator's intent that an investigator be appointed for every complaint characterized by an employee as work place violence, regardless of the facts alleged.

II. The decision of the Federal Court

[10] The application judge first considered whether a reasonable interpretation of "work place violence" could exclude allegations of harassment. In the application judge's opinion, the language at section 20.2 of the *Regulations* was broad enough to cover harassment that may cause mental or psychological harm or illness; in his view, the contrary opinion unduly restricts the scope of the legislation in a manner contrary to its purpose. He found that harassment of the kind alleged by Mr. Akon may constitute work place violence, commenting that "psychological bullying can be one of the worst forms of harm that can be inflicted on a person over time" (*Public Service Alliance of Canada v. Attorney General of Canada*, 2014 FC 1066 at para. 29, [2014] F.C.J. No. 1273).

[11] Second, the application judge considered whether the employer had the authority to conduct investigations to screen out complaints which it determined did not relate to work place violence. He found that any pre-screening of a complaint must be limited to fact-finding for the purposes of resolving the dispute with the employee, possibly through mediation.

[12] The application judge went on to find that if the attempts at informal resolution were unsuccessful and it was not "plain and obvious" that the complaint was not related to work place violence, there was a mandatory duty to appoint a competent person that was seen by both parties as being impartial. The application judge concluded that Mr. Schmidt had effectively conducted an investigation within the initial fact-finding process, which he did not have the authority to do as the parties had not agreed that he was an impartial, competent person within the meaning of subsection 20.9(1) of the *Regulations*. The application judge found that the Appeals Officer could not rely on an unauthorized investigation by a person who was not seen as impartial to conclude that the allegations did not support a finding of work place violence. The application judge concluded that the decision was unreasonable.

III. Issue

[13] The issue to be determined in this appeal is whether the Appeals Officer could find that an employer is entitled to assess a complaint of work place violence before being required to appoint a "competent person" to investigate the matter. To the extent that the employer is allowed to "screen" complaints to ensure that they fall within the definition of work place violence, the further question is whether the Appeals Officer could conclude, on the facts that

were before him, that the employer was not under the obligation to appoint a competent person to investigate the employee's allegation.

IV. Standard of review

[14] It is well established that when reviewing a decision of a subordinate court dealing with the judicial review of a decision made by an administrative tribunal, an appellate court must determine whether the application judge selected the correct standard of review and applied it correctly. In other words, the appellate court "steps into the shoes of the subordinate court in reviewing a tribunal's decision": *Prairie Acid Rain Coalition v. Canada (Fisheries and Oceans)*, 2006 FCA 31 at para. 14, [2006] 3 F.C.R. 610 (see also: *Canada (Revenue Agency) v. Telfer*, 2009 FCA 23 at paras. 18-19, [2009] F.C.J. No. 71; *Canada (Revenue Agency) v. Slau Ltd.*, 2009 FCA 270 at para. 26, [2009] F.C.J. No. 1194; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-46, [2013] 2 S.C.R. 559; *Wilson v. Atomic Energy of Canada Ltd.*, 2015 FCA 17 at para. 42, [2015] F.C.J. No. 44). As a result, no deference is owed to the application judge's decision; if any deference is warranted, it is to the administrative decision-maker or tribunal.

[15] The parties agree, as do I, that the application judge correctly identified the standard of review as reasonableness. The issues raised concern the proper interpretation of Part XX of the *Regulations* regarding the procedure applicable to work place violence complaints, and, incidentally, the meaning of "work place violence" and its application to the facts. These are questions of mixed fact and law, and questions of interpretation of the Appeals Officer's home statute. The Appeals Officer has expertise working within the complex, comprehensive statutory

scheme created by the *Code* and the *Regulations*, and his decision is protected by strong privative clauses at sections 146.3 and 146.4 of the *Code*. Moreover, the relevant provisions of the *Regulations* are not of central importance to the legal system as a whole. Accordingly, the standard of reasonableness was aptly selected, as this Court previously found in *Canadian Union of Postal Workers v. Canada Post Corporation*, 2011 FCA 24 at para. 18, 330 D.L.R. (4th) 729.

[16] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 F.C.R. 190 [*Dunsmuir*], the Supreme Court held that the reasonableness of an administrative tribunal's decision is determined by reference to its reasons and its outcome. Therefore, the issue is whether the Appeals Officer's decision is justifiable, transparent and intelligible and whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47).

V. Analysis

[17] Before assessing the various arguments put forward by the parties, it is helpful to first describe the legislative framework applicable to health and safety matters in federally-regulated work places and the various key actors in the system. The *Code* is divided into three parts, dealing respectively with collective bargaining, occupational health and safety, and labour standards. The purpose of Part II of the *Code*, as stated at section 122.1, 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". In order to achieve this purpose, section 124 imposes a general duty on the employer to "ensure that the health and safety at work of every person employed by the employer is protected". Without limiting the generality of that duty, specific duties are listed at

subsection 125(1), including the duty to "take the prescribed steps to prevent and protect against violence in the work place" (s. 125(1)(*z.16*)).

[18] Employees have a number of remedies available under the *Code* to deal with occupational health and safety issues. Section 127.1 provides for an "Internal Complaint Resolution Process" for employee complaints related to a contravention of Part II of the *Code* or where they believe on reasonable grounds that there is likely to be an accident or injury to health in the work place (s. 127.1). The employee also has the right to refuse to work if they have reasonable cause to believe that a condition or activity in the work place constitutes a "danger" to them (s. 128).

[19] The *Regulations* prescribe many obligations for the employer with respect to "work place violence", which is defined as "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" (s. 20.2). The *Regulations* impose an obligation on the employer to develop a "work place violence prevention policy" setting out, amongst others, the obligation to provide a safe, healthy and violence-free work place and to "dedicate sufficient attention, resources and time to address factors that contribute to work place violence including, but not limited to, bullying, teasing, and abusive and other aggressive behaviour and to prevent and protect against it" (s. 20.3). No such policy was in place at the time the employee filed his complaint. The scheme of Part XX also requires the employer to identify the factors that contribute to work place violence (s. 20.4), to assess the potential for work place violence using these factors (s. 20.5), to develop and implement systematic controls to eliminate or minimize work place

violence (s. 20.6), to review periodically the effectiveness of these measures (s. 20.7), and to develop an emergency notification procedure in response to work place violence and to communicate it to employees (s. 20.8).

[20] While these various provisions are aimed at prevention, section 20.9 is remedial. It is meant to offer an avenue of redress for employees who have experienced work place violence, with a view to having the situation dealt with appropriately by their employer. That section of the *Regulations* reads as follows:

Notification and Investigation	Notification et enquête
20.9 (1) In this section, "competent person" means a person who	20.9 (1) Au présent article, « personne compétente » s'entend de toute personne qui, à la fois :
(*a*) is impartial and is seen by the parties to be impartial;	*a*) est impartiale et est considérée comme telle par les parties;
(*b*) has knowledge, training and experience in issues relating to work place violence; and	*b*) a des connaissances, une formation et de l'expérience dans le domaine de la violence dans le lieu de travail;
(*c*) has knowledge of relevant legislation.	*c*) connaît les textes législatifs applicables.
(2) If an employer becomes aware of work place violence or alleged work place violence, the employer shall try to resolve the matter with the employee as soon as possible.	(2) Dès qu'il a connaissance de violence dans le lieu de travail ou de toute allégation d'une telle violence, l'employeur tente avec l'employé de régler la situation à l'amiable dans les meilleurs délais.
(3) If the matter is unresolved, the employer shall appoint a competent person to investigate the work place violence and provide that person with any relevant information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent.	(3) Si la situation n'est pas ainsi réglée, l'employeur nomme une personne compétente pour faire enquête sur la situation et lui fournit tout renseignement pertinent qui ne fait pas l'objet d'une interdiction légale de communication ni n'est susceptible de révéler l'identité de personnes sans leur consentement.
(4) The competent person shall	(4) Au terme de son enquête, la

investigate the work place violence and at the completion of the investigation provide to the employer a written report with conclusions and recommendations.	personne compétente fournit à l'employeur un rapport écrit contenant ses conclusions et recommandations.
(5) The employer shall, on completion of the investigation into the work place violence,	(5) Sur réception du rapport d'enquête, l'employeur :
(*a*) keep a record of the report from the competent person;	*a*) conserve un dossier de celui-ci;
(*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	*b*) transmet le dossier au comité local ou au représentant, pourvu que les renseignements y figurant ne fassent pas l'objet d'une interdiction légale de communication ni ne soient susceptibles de révéler l'identité de personnes sans leur consentement;
(*c*) 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.	*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) Subsections (3) to (5) do not apply if	(6) Les paragraphes (3) à (5) ne s'appliquent pas dans les cas suivants :
(*a*) the work place violence was caused by a person other than an employee;	*a*) la violence dans le lieu de travail est attribuable à une personne autre qu'un employé;
(*b*) it is reasonable to consider that engaging in the violent situation is a normal condition of employment; and	*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*) the employer has effective procedures and controls in place, involving employees to address work place violence.	*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.

[21] Until 2013, compliance with the various requirements of the *Code* and the *Regulations* was monitored by "health and safety officers", whose role was to investigate and decide on a

continuing refusal to work (s. 129 of the *Code*), conduct inspections of work places (s. 141, 141.1 of the *Code*), and issue directions to employers or employees in order to correct a contravention to Part II of the *Code* (s. 145). Health and safety officers' decisions and directions could be appealed by either party to an "appeals officer" (s. 146), who would conduct an inquiry and would have the power to vary, rescind or confirm the direction and to issue any direction he or she would consider appropriate (s. 146.1). An appeals officer's decision was "final and shall not be questioned or reviewed in any court" (s. 146.3) and no order in *certiorari* or any other of the extraordinary remedies may be made against it (s. 146.4).

[22] As previously mentioned, the crucial issue in the case at bar is whether the Appeals Officer's conclusion that employers may screen out complaints they consider unrelated to work place violence is reasonable. Indeed, there was no dispute before this Court and the Court below that work place violence may encompass harassment, and that psychological harassment can reasonably be expected to cause harm or illness in some circumstances. On the other hand, counsel for the Respondent conceded at the hearing that a competent person could reasonably have concluded that the actions, conduct or gestures complained of by the employee were not serious enough to fall within the definition of work place violence used in section 20.2 of the *Regulations*. The limited question to be decided, therefore, is whether the employer could take it upon itself to conclude that the employee's complaint did not trigger the obligation to have it investigated by a competent person.

[23] The Appellant takes the position that an employer only has an obligation to appoint a "competent person" to investigate work place violence or alleged work place violence once two

conditions are met, namely the employer becomes aware of the work place violence or alleged work place violence, and the employer tried to resolve the matter and it remains unresolved. This is in line with the Appeals Officer's reasoning that the employer's authority to determine whether an employee's complaint engages the process provided in Part XX of the *Regulations* must be recognized:

> Based on reasonable interpretation of the Regulations, I find that upon an allegation of work place violence being made by an employee such as in the present case, an employer is entitled to review the allegations to determine whether they meet the definition of work place violence as per the Regulations, in which case, the process provided in Part XX of the Regulations ought to be followed.
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> Canada (Canadian Food Inspection Agency) v. Public Service Alliance of Canada, 2014 OHSTC 1 at para. 64, 2014 LNOHSTC 1 (Q.L.).

[24] Some of the confusion in the present case may have originated from the fact that the employee did not explicitly characterize his allegations as being work place violence in his initial written complaint. This may well explain why the employer tasked one of his regional directors to undertake a "fact-finding" process with respect to the "harassment complaint". As noted by the Appeals Officer, however, such a characterization by the employee is not conclusive and cannot be taken to rule out the possibility that the alleged conduct qualifies as work place violence. This is especially true where the employee, as was the case here, subsequently notifies his employer (following the cancellation of a meeting to discuss possible resolution of his complaint) that he will be filing a complaint under Part XX of the *Regulations*, which he did on February 9, 2012.

[25] In his written and oral submissions, counsel for the Appellant put much emphasis on a decision rendered by Appeals Officer Pierre Hamel in *VIA Rail Canada Inc. v. Cecile Mulhern*

and Unifor, 2014 OHSTC 3, 2014 LNOHSTC 3 (Q.L.) [*VIA Rail*], who shared the views expressed by the Appeals Officer in the case at bar that the "matter" to be referred to the competent person is an actual situation of work place violence, and not just an allegation of work place violence. As he stated:

> In my view, it is consistent with the scheme described above to interpret "the matter" to refer to the situation of actual work place violence. In my view, it does not refer to a dispute or debate as to whether a particular situation constitutes work place violence or not. It is revealing and worth noting that the legislator does not use the words "alleged work place violence" in subsection 20.9(3). This leads me to understand that the purpose of the investigation is not to determine whether or not work place violence has occurred, but to review the situation that constitutes work place violence and make recommendations to the employer, in instances where an employee is not satisfied that the measures taken by the employer to deal with the work place violence that he/she has been subjected to, are adequate. I also emphasize that the duty of the "competent person" as set out in subsection 20.9(4) is to investigate "the work place violence", a wording used throughout the section and consistent with my interpretation that a finding of work place violence is required before the application of subsection 20.9(3) is engaged.
>
> *VIA Rail* at para. 137 (emphasis in original).

[26] While I wholeheartedly agree with Appeals Officer Hamel that these provisions are not a model of legislative drafting, I am unable to read into subsection 20.9(3) what effectively amounts to an unfettered discretion given to employers to determine whether a complaint warrants an investigation by a competent person. In my view, such an interpretation is at odds both with the scheme of Part XX of the *Regulations* and with the wording of its relevant provisions.

[27] I do not think that much turns on the absence of the words "alleged work place violence" in subsections 20.9(3) and (4). The French version of these subsections does not distinguish between work place violence and an allegation of work place violence, and uses the more neutral

word “situation” in subsection 20.9(3) (“…l’employeur nomme une personne compétente pour faire enquête sur la situation …”).

[28] More importantly, I fail to see why an employer would be required to appoint a competent person to “investigate” the work place violence, if the only purpose of the exercise was to formulate recommendations. The very notion of an investigation calls for an inquiry allowing for an assessment of disputed facts. Indeed, the first definition of the word “investigate” in the online Oxford Dictionary is “carry out a systematic or formal inquiry to discover and examine the facts of (an incident, allegation, etc.) so as to establish the truth”. This is precisely what the investigator appeared to have done in the *VIA Rail* case, where Investigator Cantin interviewed a number of individuals before concluding in her report that the evidence was insufficient to demonstrate that the complainant was subjected to harassment or violence within the meaning of work place violence.

[29] If the only task of the competent person was to formulate recommendations to ensure that the work place violence of the kind experienced by a complainant does not occur again in the future, without investigating disputed facts, there would be no need to protect the confidentiality of the persons involved at every step of the process. Yet this is precisely what the *Regulations* do: not only is the employer prevented from passing on to the competent person any information that would reveal the identity of persons involved without their consent, but the employer is also required not to disclose such information when providing the report of the competent person to the work place committee or the health and safety representative (s. 20.9(5)). The purpose behind these provisions is no doubt to encourage the persons involved to speak to the employer or to the

competent person, secure in the knowledge that if they choose to talk, their identity will not be revealed.

[30] It is to be noted, moreover, that the competent person is to provide the employer with a written report containing not only recommendations but also conclusions, upon completion of the investigation. This is further indicia that the competent person's role is to determine if an incident of work place violence did in fact occur before spelling out his or her recommendations. How could it be otherwise? The nature of the recommendations will necessarily be premised upon the circumstances and extent of the work place violence. Similarly, the controls to be adapted or implemented by the employer to prevent a recurrence of the work place violence ought to be correlated to the actual findings of the competent person as to what actually took place. While the inquiry by the competent person is not conducted for disciplinary purposes and is not primarily meant to provide the person aggrieved with a personal remedy, it must nevertheless address the alleged work place violence incident if it is to identify why the existing violence prevention policies failed to prevent it.

[31] The *Regulations* are clearly meant to prevent accidents and injury to health occurring in work places and to protect employees who have been victims of work place violence, whatever form it may take. The appointment of a competent person, that is, a person who is impartial and is seen by both parties to be impartial, is an important safeguard to ensure the fulfillment of that objective. I agree with the Respondent that allowing the employers to conduct their own investigations into complaints of work place violence and to reach their own determination as to whether such complaints deserve to be investigated by a competent person would make a

mockery of the regulatory scheme and effectively nullify the employees' right to an impartial investigation of their complaints with a view to preventing further instances of violence.

[32] In arriving at this interpretation of the *Regulations*, I find some comfort in the *Guide to Violence Prevention in the Work Place* released by Human Resources and Skills Development Canada following the adoption of Part XX of the *Regulations* (Appeal Book, p. 238). While not binding on the Court, it is nevertheless helpful as it is designed to assist employers in applying the *Regulations*. It clearly states (at p. 258) that "a formal investigation by a 'competent person' must take place if the employer cannot resolve the matter to the satisfaction of the employees involved".

[33] That being said, I agree with the Appeals Officer that it could not have been the intent of the *Regulations* to require employers to appoint a competent person to investigate each and every complaint, so long as the employee characterizes them as being work place violence. This would no doubt trivialize the important rights and obligations enshrined in Part XX of the *Regulations*. In fact, I do not understand counsel for the Respondent to go that far. Even if there is no express authority under the *Regulations* for employers to undertake their own investigations before appointing a "competent person", they can certainly review a complaint with a view to determine whether, on its face, it falls within the definition of work place violence as found in section 20.2 of the *Regulations*.

[34] I agree with the application judge that the threshold should be quite low, and that an employer has a duty to appoint a competent person to investigate the complaint if the matter is

unresolved, unless it is plain and obvious that the allegations do not relate to work place violence even if accepted as true. The employer has very little discretion in this respect. If the employer chooses to conduct a preliminary review of a complaint (or a so-called fact-finding process), it will therefore have to be within these strict confines and with a view to resolving the matter informally with the complainant. Any full-fledged investigation must be left to a competent person agreed to by the parties and with knowledge, training and experience in these matters.

[35] In the present case, it was not plain and obvious that the facts as alleged did not amount to work place violence. The complaint was not clearly vexatious or frivolous, and it was not the employer's role to decide at that early stage, without even meeting with the employee, whether the particular conduct alleged was serious enough in the circumstances so as to constitute work place violence. That determination should only be made by a competent person with a full understanding of the circumstances following an investigation under subsection 20.9(3).

[36] Counsel for the Appellant tried to bolster his claim that the employer should be left with a wide discretion by arguing that an employee or his union always has access to a health and safety officer who can issue a direction to the employer to appoint a competent person. In supplementary submissions in response to a direction of the Court, counsel submitted that section 145 of the *Code* confers on the Minister's delegates wide authority to issue directions where there is a breach of the *Code*, and that the internal complaint resolution process set out at section 127.1 does not limit that discretion.

[37] Assuming this to be true, I fail to see how this option leaves the employee better off. Indeed, this is precisely what took place in the case at bar. When the Health and Safety Officer failed to receive an Assurance of Voluntary Compliance from the employer, she issued a direction requiring the employer to appoint a competent person to investigate the complaint. The employer challenged that direction, arguing that it was under no obligation to appoint a competent person since there was no evidence suggesting that there may have been violence in the work place. Forging ahead and resorting to a health and safety officer in case of disagreement, therefore, does not appear to be the solution; quite to the contrary, conferring a wide discretion on the employer to determine unilaterally whether an investigation by a competent person is warranted is not only inimical to the letter and spirit of the *Regulations*, but also leads to protracted and unnecessary litigation.

[38] Having concluded that the Appeals Officer erred in finding that the employer had not been made aware of an allegation of work place violence and was therefore under no obligation to appoint a competent person to investigate pursuant to subsection 20.9(3) of the *Regulations*, there is no need to determine whether he could reasonably conclude that the complaint did not raise issues of work place violence. It is no answer to argue, as does the Appellant, that the Appeals Officer conducted a *de novo* hearing and was not bound by the employer's initial investigation. The Appeals Officer cannot sidestep the process put in place by the *Regulations* and determine for himself whether work place violence occurred; such a finding is best left to a competent person, as defined by the *Regulations*, as it ought to be made on the basis of an inquiry uncovering all the relevant evidence.

VI. Conclusion

[39] For all of the foregoing reasons, I am of the view that this appeal ought to be dismissed with costs. The application judge did not err in finding that the Appeals Officer's decision fell outside the scope of possible, acceptable outcomes. The Appeals Officer's conclusion that an employer is entitled to review a complaint to determine whether it meets the definition of work place violence was unreasonable. Absent a situation where it is plain and obvious that the allegations fall outside the scope of the definition of work place violence, the employer must appoint a "competent person" to investigate when the matter cannot be resolved with the employee.

[40] Accordingly, I would dismiss the appeal with costs.

"Yves de Montigny"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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