Federal Court of Appeal | Cour d'appel fédérale

Date: 20241121

Docket: A-154-23

Citation: 2024 FCA 195

CORAM: **STRATAS J.A.**
MACTAVISH J.A.
BIRINGER J.A.

BETWEEN:

MATTHEW DUIKER, TIM COTTON and TRISTIN KEREKES

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Edmonton, Alberta, on November 21, 2024.

Judgment delivered from the Bench at Edmonton, Alberta, on November 21, 2024.

REASONS FOR JUDGMENT OF THE COURT BY: BIRINGER J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20241121

Docket: A-154-23

Citation: 2024 FCA 195

CORAM: **STRATAS J.A.**
MACTAVISH J.A.
BIRINGER J.A.

BETWEEN:

MATTHEW DUIKER, TIM COTTON and TRISTIN KEREKES

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Edmonton, Alberta, on November 21, 2024).

BIRINGER J.A.

[1] The appellants are correctional officers in the Edmonton Institution, a maximum-security prison. They appeal from a Federal Court judgment (*per* Favel J.) dismissing their application for

judicial review of a decision of the Regional Director of the Labour Program of Employment and Social Development Canada (ESDC): 2023 FC 701.

[2] On December 21, 2021, a group of correctional officers initiated a work refusal pursuant to section 128 of the *Canada Labour Code*, R.S.C., 1985, c. L-2, responding to the employer's decision to revert to a pre-COVID (*i.e.*, "normal") inmate movement routine. ESDC issued a finding of "no danger" and the decision was not appealed. On January 11, 2022, a work refusal was initiated in connection with an incident of inmate violence where a C8 Carbine rifle was discharged and a shot penetrated a fire door. An ESDC investigator found that the use of C8 Carbines presented a danger and, in response, C8 Carbines were removed from inmate living units on February 8, 2022.

[3] On February 10, 2022, the correctional officers in Unit F were informed that their unit would be transitioning from a "modified" inmate movement routine to a "normal" routine. This prompted the appellants and other correctional officers to refuse work claiming that a lack of access to firearms to respond to inmate violence created a danger, and that the available alternative non-lethal weaponry was inadequate. On March 3, 2022, after a recommendation by an ESDC investigator, the Regional Director decided not to investigate the work refusal on the basis that it had been made "in bad faith" pursuant to paragraph 129(1)(*c*) of the *Canada Labour Code*. The employees were no longer entitled to refuse work.

[4] The Federal Court dismissed the application for judicial review, finding the Regional Director's Decision to be reasonable and rendered in a procedurally fair manner.

[5] In an appeal from a judicial review decision of the Federal Court, this Court must determine whether the Federal Court correctly selected and applied the standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 47; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at para. 12. In practice, this Court must "step into the shoes" of the Federal Court and review the administrative decision afresh: *Horrocks* at para. 10. In our view, the Federal Court correctly selected reasonableness as the standard of review and correctly applied it: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 16.

[6] The appellants submit that the Decision is unreasonable because the finding of "bad faith" turned on a conclusion that they did not seek to resolve the issue collaboratively, which they say is unfounded. They point to meetings on February 8 and 9, 2022 with the employer, to discuss the withdrawal of C8 Carbines from the inmate living units. In our view, these limited collaborative attempts over a brief period did not render unreasonable the Regional Director's conclusion that the Internal Complaint Resolution Process to work in a collaborative manner had been "bypassed".

[7] The appellants also submit, and we agree, that employees are not required to initiate a complaint under section 127.1 of the *Canada Labour Code* (the Internal Complaint Resolution Process) before refusing work. Nonetheless, and whether or not such a complaint had in fact been initiated, the Regional Director was entitled to consider a failure to meaningfully pursue an internal collaborative process in reaching a conclusion of bad faith. The Regional Director's conclusion was further supported with the observations that the C8 Carbines' withdrawal was

noted as an interim measure and that other options would be examined. Also, as noted in the Decision, the work refusal came shortly after the decision to withdraw the C8 Carbines, and it came on the heels of a second work refusal.

[8] It was not unreasonable for the Regional Director to conclude that these facts supported a failure to pursue a collaborative resolution and a finding of "bad faith", consistent with the ESDC Occupational Health and Safety Interpretations, Policies and Guidelines (Complaint is Trivial, Frivolous, Vexatious, or Made in Bad Faith – 905-1-IPG-083) and the law. As the Federal Court observed, a work refusal is not limitless. It is a "back up mechanism", to be exercised in emergency situations, when the main elements of an internal review process have not been effective: *Correctional Service of Canada v. Ketcheson*, 2016 OHSTC 19 at para. 140.

[9] The appellants also submit that the Decision is unreasonable because the conclusion on no imminent threat of serious harm rested on the premise of a modified inmate movement routine at the time of the work refusal, and that was about to change. Accepting the appellants' distinction that Unit F was returning to a normal routine, this does not render the Decision unreasonable. The work refusal was initiated in other living units and the statement in the Decision holds true concerning those.

[10] We accept the appellants' concern that the Federal Court provided supplementary reasons for the Decision when it identified contradictory positions taken by correctional officer Cotton on the danger associated with C8 Carbines. While this information was before the Regional

Director, it is not obviously part of the Decision, and it was not for the Federal Court to add further justification for the Decision: *Vavilov* at para. 96.

[11] In the circumstances, it was not unreasonable for the Regional Director to conclude that the work refusal was made in bad faith and, thus, an investigation was not required.

[12] The appellants also submit that the Decision was rendered in a procedurally unfair manner. The procedural fairness owed in these circumstances is informed by the statutory scheme for the Regional Director's discretion to investigate: *Gupta v. Canada (Attorney General)*, 2017 FCA 211 at para. 31. Subsection 129(1) of the *Canada Labour Code* provides that the Minister's designate shall investigate a work refusal unless it is of the opinion that it falls within any of the exceptions in paragraphs (*a*)-(*c*). This engages "broad discretion, in the context of a prescribed process that is neither judicial in nature nor adversarial": *Burlacu v. Canada (Attorney General)*, 2022 FC 1223 at para. 21.

[13] The appellants allege that the Decision was procedurally unfair because the ESDC investigator's recommendation, rationale and draft decision were based only on communications with management. We disagree. The Regional Director's record included findings from earlier investigative stages and, importantly, a joint employer/employee committee report regarding the work refusal that reflected employee input. Procedural fairness did not require the Regional Director to seek further information or submissions from the appellants.

[14] The appellants also submit that they did not know the case to meet, as they were uninformed of “bad faith” allegations until the Decision was made. While true, we accept the Federal Court’s observations that the appellants were on notice that their work refusal was considered illegal and were aware of the material facts underpinning the determination of bad faith. The Federal Court concluded, and we agree, that a failure to explicitly mention “bad faith” prior to the Decision did not result in procedural unfairness.

[15] We substantially agree with the reasons and conclusions of the Federal Court. The appellants have not demonstrated that the Decision is unreasonable or that there was a breach of procedural fairness warranting this Court’s intervention. Accordingly, the appeal will be dismissed with costs.

“Monica Biringer”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-154-23
STYLE OF CAUSE:	MATTHEW DUIKER, TIM COTTON AND TRISTIN KEREKES v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	NOVEMBER 21, 2024
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. MACTAVISH J.A. BIRINGER J.A.
DELIVERED FROM THE BENCH BY:	BIRINGER J.A.

APPEARANCES:

Adam Cembrowski Holly McEwan	FOR THE APPELLANTS
Alexandre Toso	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nugent Law Office Edmonton, Alberta	FOR THE APPELLANTS
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT