Federal Court Cour fédérale

Date: 20210824

Docket: T-1791-19

Citation: 2021 FC 864

Toronto, Ontario, August 24, 2021

PRESENT: Mr. Justice Andrew D. Little

BETWEEN:

ALEXANDRU-IOAN BURLACU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, Mr Burlacu, applied to this Court for judicial review of a decision dated October 5, 2019, made by a delegate of the Minister of Labour under s. 145 of the *Canada Labour Code*, RSC, 1985, c L-2.

[2] For the reasons that follow, I conclude that the application must be dismissed. After careful consideration of the submissions of the parties and the evidence in the record, I have concluded that the decision at issue was reasonable.

I. **Events Leading to this Application**

[3] Mr Burlacu is employed by Canada Border Services Agency (the "employer"). He is engaged in litigation in the Federal Court that is not directly related to this present application. He requested paid or unpaid leave from his employment to attend Court. His employer denied his request for leave.

[4] On February 19, 2019, Mr Burlacu filed a complaint concerning alleged work place violence against him in relation to the employer's denial of leave. His complaint expressly named as respondents two persons with whom he worked, as well as unidentified "Labour Relations Advisor(s)". Mr Burlacu did not believe he could name any individual Labour Relations Advisor(s) as respondents because he did not have enough evidence of their involvement in the alleged work place violence. He asked his employer for information to be able to identify those persons.

[5] The complaint could not be resolved amicably. The employer therefore wrote to Mr Burlacu, by letter dated May 1, 2019, to advise that "a competent person, as defined in Part XX of the Canada Occupational Health and Safety Regulations, will be appointed to investigate this matter". However, the employer also advised in that letter:

> Having considered the role of the Labour Relations Advisor(s), we will not be including them in the formal investigation as it is plain and obvious that their actions, as advisors to management, do not meet the definition of violence as it pertains to your situation.

[6] The employer did not provide Mr Burlacu with the information he requested that would enable him to decide whether to name any specific individual Labour Relations Advisor.

[7] On May 7, 2019, in response to the employer's letter, Mr Burlacu filed a complaint under Part II of the *Canada Labour Code* to the Labour Program of Employment and Social Development Canada. I will refer to this complaint as the "Complaint".

[8] The Complaint stated that in his work place violence complaint, Mr Burlacu asked that his employer provide him "with information to be able to identify some of the alleged aggressors" but that the employer "responded that some of the alleged aggressors will not be investigated". The Complaint advised that the employer "will appoint a competent person, but will advise him/her that there are only 2 respondents (instead of 3 as I alleged)". The Complaint continued to state Mr Burlacu's view that the employer's decision violated subss. 20.9(1) and (3) of the *Canada Occupational Health and Safety Regulations*, SOR/86-304 (as amended), which, according to the Complaint, required the employer to provide the competent person with "any relevant information". (These provisions have since been repealed: see *Work Place Harassment and Violence Prevention Regulations*, SOR/2020-130, s. 41.)

[9] The Complaint took the position that by refusing to investigate some of the alleged aggressors (i.e., the Labour Relations Advisor(s)), the employer was not complying with the requirement to provide relevant information. The Complaint claimed that the employer was attempting to appear to comply with the letter of subs. 20.9(3) but was in fact contravening the

"spirit" of subs. 20.9(3) by not permitting the competent person to investigate the work place violence allegation and by directing how the competent person would conduct the investigation.

[10] I will note here that subs. 20.9(3) provided that if the work place violence allegation was 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".

[11] By letter dated May 10, 2019, an Official Delegated by the Minister of Labour (the "ODM") advised that she had been assigned to investigate the matter.

[12] The ODM spoke to Mr Burlacu by telephone a few days later and then sent him an email on May 30, 2019. By email on June 13, 2019, the ODM requested additional information from Mr Burlacu. He responded by email on June 14, 2019. I return to the contents of these emails below.

[13] Mr Burlacu was then on leave for approximately three months, until September 2019. He followed up with the ODM by email on September 14, 2019 and they exchanged additional emails in September.

[14] By letter dated October 5, 2019, the ODM rendered her decision (the "Decision"). The letter confirmed that the ODM had investigated the Complaint and that, in her opinion, the employer had complied with the requirements of the *Canada Labour Code*. The Decision stated:

> It is plain and obvious that the unknown / un-named Labour Relations Advisor(s) did not expose the complainant to work place

> violence (WPV), by virtue of any advice they provided to the employer representatives in this case.
>
> In the absence of evidence of the LR advisors' involvement, [the ODM] is of the opinion that the employer is in compliance.
>
> As such, the employer's refusal to appoint a CP [competent person] to investigate alleged WPV perpetrated by the Labour Relations Advisor(s) against the complainant does not violate CHOSR 20.9(3).

[15] Mr Burlacu commenced this application for judicial review of the Decision. At the hearing, I confirmed with both parties that the ODM made the Decision under s. 145 of the *Canada Labour Code*. Both parties advised that the appeal mechanism in subs. 146(1) did not apply because the ODM found the employer to be in compliance and had not issued a direction. Therefore, the application did not run afoul of the principles of exhaustion of internal remedies described in *CBSA v CB Powell*, 2010 FCA 61, [2011] 2 FCR 332, at paras 4, 29 and 30-33. The hearing of this application proceeded on that basis.

II. **Standards of Review**

[16] The applicant submitted that the Decision was made without providing him procedural fairness and was unreasonable.

[17] Issues of procedural fairness are reviewed on a correctness basis, without a margin of appreciation or deference by the reviewing court. The ultimate question is whether the party affected knew the case to meet and had a full and fair, or meaningful, opportunity to respond: see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121, esp. at paras 49, 54 and 56; *Baker v. Canada (Minister of Citizenship and*

Immigration),[1999] 2 SCR 817, at para 28. “What matters, at the end of the day, is whether or not procedural fairness has been met”: *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, at para 35.

[18] The parties both made submissions about the ODM’s Decision based on a reasonableness standard of review as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. I agree with the parties that the standard of review for the substance of the ODM’s Decision is reasonableness, as described in *Vavilov*.

[19] In conducting a reasonableness review, a court considers the outcome of the administrative decision in light of its underlying rationale, in order to ensure that the decision as a whole is transparent, intelligible and justified: *Vavilov*, at para 15. The focus of reasonableness review is on the decision made by the decision maker, including both the reasoning process (i.e. the rationale) that led to the decision and the outcome: *Vavilov*, at paras 83, 86; *Delta Air Lines Inc v Lukács*, 2018 SCC 2, [2018] 1 SCR 6, at para 12.

[20] The starting point is the reasons provided by the decision maker: *Vavilov*, at para 84. The reviewing court must read the reasons holistically and contextually to understand the basis on which the decision was made, and in conjunction with the record that was before the decision maker: *Vavilov*, at paras 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at para 31.

[21] The reviewing court does not determine how it would have resolved an issue on the evidence, nor does it reassess or reweigh the evidence on the merits: *Vavilov*, at paras 75, 83 and 125-126; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paras 59, 61 and 64. The task of the reviewing court is to assess whether the decision maker reviewed and drew conclusions from the evidence and submissions in a manner that conforms to *Vavilov* principles.

[22] The onus to demonstrate that the decision is unreasonable is on the applicant: *Vavilov*, at paras 75 and 100; *Canada Post*, at para 33.

III. **Analysis**

[23] The applicant made several multilayered submissions, which I will describe and analyze in turn. I will first address the applicant's submissions on procedural fairness, and then consider the reasonableness of the Decision.

Was the Applicant Provided with Procedural Fairness?

[24] The applicant submitted that the duty of procedural fairness in the context of an investigation into alleged work place violence is, like an investigation into harassment allegations, a "heavy" one (relying on *Pronovost v Canada (Revenue Agency)*, 2017 FC 1077, at para 13). The applicant then specified three ways in which the ODM allegedly failed to observe the principles of natural justice and procedural fairness: first, by failing to disclose to him a key internal record that the ODM relied on in reaching its decision, and failing to explain her reversal of position in

that record; second, by failing to advise the applicant that the ODM would rely exclusively on information provided by the applicant, without seeking any information from the employer; and third, the applicant raised an allegation of a reasonable apprehension of bias because the ODM provided advice and counselling to the employer after the Decision was made.

[25] The respondent submitted that the duty of procedural fairness owed to the applicant was low because the ODM was performing an inspectorate function, rather than a quasi-judicial or adjudicative function (citing *Canadian Food Inspection Agency v Public Service Alliance of Canada*, 2020 OHSTC 4, at para 61 and *MK Engineering Inc v The Association of Professional Engineers and Geoscientists of Alberta Appeal Board*, 2014 ABCA 58, at para 18). The respondent also characterized the applicant's arguments as a line-by-line treasure hunt for error, something the Supreme Court cautioned against in *Vavilov* (at para 102), and reminded the Court that its role is not to reweigh or reassess the evidence considered by the decision maker. The respondent also challenged each of the three specific arguments made by the applicant about procedural fairness.

[26] In my view, and having regard to the factors in *Baker* (at paras 23-27), the ODM's investigation into the Complaint did not give rise to the kinds of participatory and other procedural rights afforded to individuals whose vital interests are affected by an adjudicative process. While the applicant was entitled to procedural fairness, I find that the obligations owed to the applicant in the circumstances were not onerous. The ODM's investigation was an investigation into his Complaint about the employer's May 1 letter, not a full investigation into harassment generally (as in *Pronovost*) or an investigation by a "competent person" into his

allegations of work place violence under the *Canada Occupational Health and Safety Regulations*.

[27] In any event of the standard or contents of the duty to provide procedural fairness (short of the right to an oral hearing, which the applicant did not claim), I believe the process used by the ODM during the investigation into the Complaint was procedurally fair to the applicant. I will address the applicant's three arguments in turn.

Alleged Non-Disclosure of a Key Record

[28] The applicant urged that the ODM should have disclosed the Program Advisor Guidance Request Form dated September 27, 2019, in which the ODM summarized the facts and sought input from a Program Advisor. Referring to *Vavilov*, at para 95, the applicant claimed that the Program Advisor Guidance Request Form was the basis for the ODM's decision, and that it reversed the ODM's "findings" stated to him in an email on May 30, 2019, therefore breaching his legitimate expectations that the employer would provide information to the ODM about the Labour Relations Advisor(s)' communications with the other respondents before she made the Decision.

[29] In my view, the ODM was not required to disclose the Program Advisor Guidance Request Form to the applicant before making the Decision. First, on its face, that document was, in effect, a request for a second opinion or input from a colleague in relation to the Complaint. In that Form, the ODM set out the facts gathered (mostly a long excerpt from the applicant's email on June 14, 2019), some analysis and a proposed overall conclusion. The Program Advisor then responded to

the ODM's analysis, in this case by agreeing fully with her assessment and proposed decision. The document did not contain new evidence and did not add any additional facts. Any new information in it was the ODM's proposed conclusion and her thinking on certain issues, and the Program Advisor's comments. At its highest, it is of note because it contained an advance draft of the Decision – I say that because the ODM subsequently incorporated the comments from the Program Advisor into the Decision. However, in my view, procedural fairness did not require the ODM to disclose an advance copy of the Decision, in draft, to the applicant for comment and reaction. I note that the applicant was aware from the ODM's email to him dated September 17, 2019, that the ODM was seeking advice from a Program Advisor. Th applicant made no request at the time for disclosure of that advice. I note further, for completeness, that there was nothing factually new in it from a source other than the applicant, which might trigger a right to respond by providing additional evidence.

[30] Second, the applicant's position was that the Program Advisor Guidance Request Form revised the ODM's earlier "findings", contrary to his legitimate expectations. The applicant's characterization of the ODM's statements in the May 30, 2019 email as "findings" is incorrect. When the ODM sent her email, she had not yet asked for or received the applicant's position on the facts (later set out in his June 14, 2019 email), and was long away from her Decision (released on October 5, 2019). Her statements were not findings.

[31] Regardless of how one may characterize the contents in the May 30 email, in my view the ODM was fully entitled before reaching her Decision to reconsider and revise her initial impressions, views or assessment of the issues and to refocus her investigation. The ODM could

do so during her investigation of the Complaint because of communications with Mr Burlacu or the employer, because of other information obtained, or as a result of her own thinking and analysis. Doing so is part of the core business of an investigation – to gather and consider the facts and evidence as they emerge and develop over time, consider the positions of the affected parties and, in the end, to work out the right answer and make a decision.

[32] Did the ODM's email give rise to a legitimate expectation by the applicant that the ODM would not reverse her position or change the focus of her investigation? I do not believe so. On this issue, the applicant's specific submission was that the ODM advised him by email on May 30, 2019 that she had advised the employer that the competent person "is to be provided any relevant information" under subs. 20.9(3), including the names of all alleged respondents. He submitted that the employer could not limit the respondents to the competent person's investigation, whereas in the Program Advisor Guidance Request Form, the ODM stated that it was plain and obvious that the allegations against the LRAs do not relate to work place violence even if accepted as true.

[33] A legitimate expectation must be based on a clear, unambiguous and unqualified representation to the applicant about the administrative process (i.e., the procedures) that the decision maker would follow: see *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504, at para 68; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559, at para 95. Legitimate expectations may also arise from similarly clear, unambiguous and unqualified representations that a certain result will be reached, in which case more onerous procedures must be followed before backtracking or coming to a contrary result:

Baker at para 26; *Agraira*, at para 94. Representations that could ground legitimate expectations must also be within the scope of the government official's scope of authority, and cannot conflict with the person's statutory duty: *Mavi*, at para 68. In *Agraira*, the Supreme Court has also confirmed the doctrine of legitimate expectations cannot give rise to substantive rights: *Agraira*, at para 97.

[34] In the present case, the paragraphs identified by the applicant in the ODM's May 30 email did not make a clear, unambiguous and unqualified representation to the applicant about the procedures the ODM would follow in the investigation, nor that she would not change her position or the focus of her investigation (assuming that in fact occurred). In addition, the ODM's May 30 email concerned the employer's obligations to the "competent person" during a work place violence investigation, not the process to be followed or the outcome of the ODM's investigation of the Complaint.

[35] During oral argument, the applicant further refined his submission, arguing that the employer's obligations to disclose information to the ODM about the Complaint were the same as the obligations of the employer to the competent person under subs. 20.9(3) because they were performing the same function. I do not agree. The ODM's function was not the same as the competent person's will be in the work place violence investigation, nor are the two investigations the same. Subsection 20.9(3) did not apply to the ODM's decision. The ODM was not acting as a "competent person" under that provision during her investigation of the Complaint.

[36] I am also inclined to conclude, if it were necessary, that the applicant could not have a legitimate expectation that, in effect, the employer would provide information to the ODM about the Labour Relations Advisor(s)' communications with the other respondents, before the ODM made the Decision. If recognized in this case, it would amount to a substantive right to receive specific information, not a right to be provided procedural protections. If recognized, that substantive right would also have been created through an email by a person who, at the time of the email, was not acting in a capacity that had a right to receive that information for the purposes of the investigation of the Complaint. I do not believe the applicant could have a legitimate expectation on that basis.

[37] I therefore do not accept the applicant's submission that the ODM should have disclosed the Program Advisor Guidance Request Form to him.

Alleged Requirement to Rely Only on Information from the Applicant

[38] There are two aspects to the applicant's position on procedural fairness under this heading. First, the applicant made a submission based on the allegedly imperfect contents of the ODM's email to him dated June 13, 2019, in which the ODM requested that he provide information for the investigation. Specifically, the ODM asked the applicant: "Could you please provide me with information as to how the Labour Relations advisors have contributed to the incidence of alleged Work Place Violence and if you were psychologically harmed as a result of their actions? Any information that you could provide would be greatly appreciated". She also asked the applicant to elaborate on his request for information from the employer so that he could identify and name the Labour Relations Advisor(s). She asked him to identify what specific information he was seeking and whether he was looking for the Labour Relations Advisor(s) that assisted the two named respondents. She closed her email with "any additional information that you could provide would be greatly appreciated".

[39] The applicant responded to these requests by email dated June 14, 2019. He advised the ODM that there was a "long history of harassment surrounding the incidents that lead to the violence complaint, but I will provide a little context and an example of how the Labour Relations Advisor(s) is/are probably involved". He provided the names of the two already-identified respondents and then described, at some considerable length, "in terms of examples of possible involvement", the facts related to his request for leave to attend Court. The applicant advised at the end that it was one example of what (in his view) "represents a form of psychological violence that should be investigated". In the course of his longer description, the applicant stated that one

respondent advised that his position on the leave request was based on advice received "from Labour Relations". Near the end of the applicant's email on June 14, 2019, the applicant stated: "Please let me know if you require further information".

[40] The applicant submitted to this Court that the ODM should have requested additional information from him before making the Decision (as offered at the end of his email). He contended that the ODM should not have made the Decision only on the basis of his information, (which he maintained was a partial answer) and not without warning him that she would be doing so.

[41] These submissions cannot succeed. The ODM's request for information was broad, open-ended and focused on issues raised in the Complaint. The applicant's response referred to a "long history", without elaboration, and chose to provide an "example" of the alleged work place violence and how the Labour Relations Advisor(s) were said to be involved. If the ODM did not have a complete picture of the relevant facts from the applicant's perspective, it was not because the ODM restricted the applicant or narrowed the scope of the Complaint through her email – it was because the applicant decided to provide only an example in his responding email rather than all the information he apparently could have provided. I note that at the oral hearing, the applicant stated that he had additional "background" facts to provide to the ODM. He did not elaborate.

[42] As is clear from the analysis in the previous section of these Reasons, I also do not agree with the applicant's second submission under this heading, that procedural fairness required the ODM to obtain the specific information desired by the applicant from the employer, in addition to

information from the applicant, prior to making the Decision. The question before the ODM was whether or not the employer was in compliance with the Act or Regulations when the ODM decided that it was plain and obvious that the allegations against the unnamed Labour Relations Advisor(s) did not constitute work place violence. In my view, answering that question did not require the ODM to conduct an investigation into work place violence, nor did it require her to inquire into the content of the communications between the unnamed Labour Relations Advisor(s) and the named respondents and in doing so, to obtain that content or communications (and then disclose it to the applicant).

Alleged Reasonable Apprehension of Bias

[43] The applicant submitted that there was a reasonable apprehension of bias by the ODM because she had engaged in inappropriate counselling communications with the employer (without his knowledge or participation). The ODM's activity log stated that she had communications with the employer about two weeks after the Decision and provided "advice and counselling" to the employer on October 31, 2019, over three weeks after the Decision.

[44] However, as the respondent pointed out, the ODM's activity log also stated that on June 4, 2019, the applicant himself asked the ODM for advice, and received it. That occurred during the investigation of his Complaint and well before the Decision.

[45] In oral reply, the applicant admitted that he also received counselling from the ODM and that providing advice was perhaps not evidence of bias.

[46] The allegation of a reasonable apprehension of bias therefore does not succeed.

Conclusion on Procedural Fairness

[47] Overall, I conclude that the applicant has not demonstrated that the process used by the ODM was unfair.

Was the ODM's Decision Reasonable?

[48] The applicant made three submissions to support his position that the decision was unreasonable.

[49] First, the applicant submitted that the ODM's reasoning was not rational or logical . He argued that the ODM advised him in two emails in September 2019, that the delay in rendering a decision was due to the "complexities" of the Complaint, whereas in the Decision, the ODM concluded that it was "plain and obvious" that the Labour Relations Advisor(s) did not expose the applicant to work place violence. He also noted that the day after the ODM characterized his complaint as complex, she prepared the Program Advisor Guidance Request Form in which she stated that it appeared to be "plain and obvious" that the allegations did not relate to work place violence. The applicant maintains that the Complaint cannot be complex and, at the same time, be dismissed as having no merit on a "plain and obvious" standard.

[50] I do not agree with this submission. The applicant has picked out a word (complexities) from two emails in which the ODM explained why she needed additional time for the investigation into the Complaint. The ODM was transparent at the time that she was seeking "additional guidance" from a Program Advisor. As I read the emails, the ODM appeared to be using complexity as a reason for some additional time, so that she could consider the Complaint and seek some advice from a colleague. It also appears that both the applicant and the ODM had been away from the file for some time.

[51] Even if one were to accept that a complex matter cannot have a plain and obvious answer after clear-eyed analysis – a proposition I do not accept – it is not unreasonable for the ODM to have a different view in her emails in September compared with the Decision in October, given the benefit of additional time to analyze the matter and to confirm her views with the advice of a colleague. Further, the ODM's Decision dated October 5, 2019 did not characterize the matter as either simple or complex.

[52] Accordingly, the allegedly dichotomous phrases identified by the applicant do not cause me to lose confidence in the Decision under *Vavilov* principles. If anything, the applicant's argument falls under the heading of a "treasure hunt" for purported errors, albeit in the broader record rather than in the ODM's Decision.

[53] The applicant's second submission on substantive unreasonableness was that the ODM failed to grapple with the central issues and concerns he raised in the Complaint (citing *Vavilov*, at paragraph 128). The applicant submitted that the question raised by his complaint was whether

an employer, after having decided that a competent person will be appointed to investigate the alleged work place violence, can decide to exclude from the list of respondents provided by the complainant certain respondents that the employer believes have not committed work place violence. The applicant submitted that the ODM unreasonably decided that the employer can do so. At the hearing, the applicant submitted that the entire complaint had to be addressed together; it was one complaint against three respondents, including the Labour Relations Advisor(s), and the same "competent person" had to conduct that investigation. That is, the employer could not divide the complaint into two or three different complaints. The applicant also maintained that the ODM misconstrued the Complaint as one alleging that the employer refused to appoint a competent person in relation to some of the respondents, arguing that the regulatory scheme contemplated an investigation of the work place violence, not of each respondent separately. According to the applicant, it was up to the competent person, not the employer, to determine whether there had been a violation and which alleged aggressors should be investigated, based on the facts and including information provided by the employer.

[54] For the following reasons, I do not believe the Decision was unreasonable on the basis advanced by the applicant.

[55] First, one must be conscious of the applicable law – and specifically, whether the decision maker was constrained by the applicable statutory or common law: *Vavilov*, at paras 111-112.

[56] The Federal Court of Appeal held in *Public Service Alliance of Canada v Canada (Attorney General)*, 2015 FCA 273, [2016] 3 FCR 33 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: at para 33. de Montigny JA. stated that 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": *PSAC*, at para 33. The threshold is low. An employer has a duty to appoint a competent person to investigate a complaint of work place violence 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" [emphasis added] (at para 34).

[57] In assessing the Complaint and the employer's letter dated May 1, 2019, the Decision applied this judgment of the Federal Court of Appeal. It was clearly open to the ODM to find that the reasons in *PSAC* applied to the Decision. The ODM would have had to explain or justify a departure from it: *Vavilov*, at para 112.

[58] Second, the applicant has presented no convincing arguments that it was unreasonable, or wrong in law, to apply the "plain and obvious" approach in *PSAC* to one of several proposed respondents, against whom there is plainly and obviously no sustainable allegation of work place violence even accepting the facts as alleged to be true. The applicant acknowledged during the oral hearing that the "plain and obvious" test could apply to someone completely uninvolved in the

alleged work place violence, but submitted it was not the situation in this case. In my view, it was not an error of law, nor unreasonable under *Vavilov* principles, for the ODM to consider and apply the "plain and obvious" test set out in *PSAC* in the course of deciding whether the employer was in compliance by finding that the allegations related to certain respondents did not relate to work place violence even if accepted as true.

[59] Finally, it is not this Court's role to determine whether the ODM correctly applied the "plain and obvious" test to the facts. Having reviewed the record and the parties' submissions, I cannot conclude that, when applying *PSAC*, the ODM "fundamentally misapprehended or failed to account for the evidence before" her, or, in this case, the absence of evidence about the involvement of the Labour Relations Advisor(s): *Vavilov*, at para 126; *Canada Post*, at para 61.

[60] The applicant's third overall submission was that the ODM's Decision was unreasonable due to its failure to explain how it reached the conclusion that the actions of the Labour Relations Advisor(s) would not be considered work place violence, based on the totality of the evidence. The applicant specifically pointed to the reasoning in the Program Advisor Guidance Request Form, which he submitted did not reflect a proper understanding of harassment and work place violence. He also criticized the ODM for "jumping" to a conclusion that disregarded the evidence and for ignoring the "long history of harassment surrounding the incidents that led to the violence complaint" mentioned in his email on June 14, 2019. He focused on the absence of information from the employer that he believes would have provided evidence to support a full investigation into the Labour Relations Advisor(s)' conduct. In other words, he contended that the competent person's investigation into work place violence could not comply with the *Canada Occupational*

Health and Safety Regulations without that information. The applicant made submissions based on the Federal Court of Appeal's decision in *PSAC* concerning how his allegations could be work place violence and how the "conduct" of an advisor's advice could harm him psychologically.

[61] The respondent submitted that the ODM's reasons were not in the Program Advisor Guidance Request Form, but were contained in the Decision dated October 5, 2019 and were reasonable under *Vavilov*. The respondent submitted that the Program Advisor Guidance Request Form was part of the record that could be considered when understanding the contents of the Decision: *Vavilov*, at paras 91-95. On unreasonableness, counsel argued that the Decision was not long, but it did not need to be. The respondent also contended that for a work place violence allegation to be made out, there must be actions – actual conduct by a person involved that may fall within the definition of work place violence that causes harm – which is more than just advice. The respondent also submitted that Labour Relations Advisor(s) require "privileged space" in which they can provide advice in relation to labour and employment matters (citing *Rodrigue v Deputy Head (Department of Veterans Affairs)*, 2016 PSLREB 9, at paras 68 and 74-75).

[62] The applicant's reply at the hearing was that the Decision in fact contained no reasons at all, and that the closest thing to any reasoning was in the Program Advisor Guidance Request Form. He submitted that it cannot be used to bolster the Decision (referring to *Vavilov* at para 95). According to the applicant, the Decision was just a conclusion and did not explain the basis for its conclusions intelligibly and transparently.

[63] In my view, the Decision is not devoid of reasons as the applicant submitted. I also believe that the Decision contains the reasons of the ODM in this particular case and it is unnecessary to refer to the Program Advisor Guidance Request Form. In substance, that form was not a source of original or independent evidence gathered during the investigation nor of submissions from the parties; it contained the ODM's summary of the evidence, her own internal analysis, her request to a Program Advisor for guidance and the Program Advisor's response. As such, it is of little assistance in assessing whether the Decision respected the factual and legal constraints that bore on it – although it may give some comfort to the applicant to know that the contents of his email of June 14, 2019 were not ignored when the ODM and the Program Advisor conducted their analyses.

[64] On the merits of the parties' submissions on unreasonableness, I am not persuaded that the Decision, when read holistically, contextually and in light of the record, contains a reviewable error based on a lack of justification: *Vavilov* at paras 97, 103 and 127-128; *Canada Post*, at para 31. In particular, the Decision contains sufficient justification given the statutory context in which it arose, the nature of the Complaint, and the evidence before the ODM.

[65] The Federal Court of Appeal provided the following principles in *Farrier v Canada (Attorney General)*, 2020 FCA 25:

> [13] In *Vavilov*, the Supreme Court clearly indicated that when an administrative decision-maker must make a reasoned decision in writing (this is the case here […]), the assessment of the reasonableness of the decision must include an assessment of its justification and transparency. As the Supreme Court pointed out, the reasons given by the administrative decision-maker must not be assessed against a standard of perfection. The administrative decision-maker cannot be expected to refer to all of the arguments

> or details the reviewing judge would have preferred. "Administrative justice" will not always look like "judicial justice" (*Vavilov* at paragraphs 91 to 98).
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> [14] The sufficiency of reasons is assessed by taking into account the context, including the record, the submissions of the parties, practices and past decisions of the decision-maker (*Vavilov* at paragraph 94). However, the Supreme Court noted the principle that the exercise of the Appeal Division's power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it (*Vavilov* at paragraph 95).

See also para 19.

[66] In the present case, neither party pointed to any provision in the *Canada Labour Code* that required the ODM to provide written reasons for her decision under s. 145, nor to any decided cases concerning a requirement for, or the contents of, written reasons under that provision. The *Code*'s silence on reasons may be contrasted with the requirement for reasons if a decision containing a direction under s. 145 decision is appealed: see subs. 146(1) and subs. 146.1(2).

[67] Neither party pointed to any practice or past decisions of an ODM as the basis for a standard for justification by way of written reasons. I note also that the parties did not submit, or request an opportunity to present, any argument to the ODM before her Decision. The record before the ODM was slim, mainly comprising the Complaint, the employer's letter dated May 1, 2019 and email exchanges with the applicant. The ODM created other documents in the record, such as her activity log and the Program Advisor Guidance Request Form.

[68] The relatively brief contents of the Decision set out the conclusion of the ODM's investigation under s. 145, that the employer had "complied with the requirements of the Act" and

that the employer had "not violate[d] COHSR [subs.] 20.9(3)" by refusing to appoint a competent person to investigate alleged work place violence perpetrated by the Labour Relations Advisor(s).

[69] The Decision addressed the focus of the Complaint, which was whether the employer had properly excluded the Labour Relations Advisor(s) from the competent person's investigation into work place violence. Like the employer's letter dated May 1, 2019, the Decision used the "plain and obvious" language from the Federal Court of Appeal's decision in *PSAC*. The Decision stated the ODM's reasoning on the substance of the *PSAC* test, that it was plain and obvious that the "unknown / un-named" Labour Relations Advisor(s) "did not expose the complainant" to work place violence "by virtue of any advice they provided to the employer representatives in this case" [emphasis added]. It further confirmed that in the "absence of evidence" of their "involvement", the ODM was of the opinion that the employer was in compliance.

[70] In sum, the Decision was that the employer properly excluded the Labour Relations Advisor(s) because it was plain and obvious that there was no evidence that the Labour Relations Advisor(s)' advice exposed the complainant to a work place violence. In my view, the Decision sufficiently disclosed the basis for the ODM's conclusion that the employer was in compliance with the Act and Regulations.

[71] It is true that the Decision could have provided additional explanation or reasoning, which might have addressed some of the many issues the applicant has now raised on this application for judicial review. However, the Decision concluded that the facts collected showed an *absence* of evidence of conduct amounting to work place violence in respect of specific persons whose role

was as advisors and whose specific conduct was not known -- something the applicant himself admitted was the case from the outset because he did not have the information to make an allegation of work place violence against them. The applicant's June 14 email did not contain facts related to the advisors' alleged conduct that constrained the Decision or made it untenable (see *Vavilov*, at paras 101, 105, 125-126). To the contrary, the June 14 email did not provide any factual basis for a conclusion that the LRAs had perpetuated work place violence against the applicant or provided advice to that end. In my view, these circumstances did not require the ODM to justify the Decision with additional reasons that set out and explained the ODM's reasoning in more detail. The Decision also did not need to explain what kind of evidence of the advisors' involvement would have been enough to show the employer was not in compliance, nor did it have to analyze whether some kinds of advice might expose an individual to work place violence.

[72] Lastly, I note that a considerable portion of the applicant's submissions amounted to an argument about the merits of the Decision. A court on judicial review is unable to engage in that debate.

[73] Applying the principles set out by the Supreme Court in *Vavilov* and *Canada Post*, I conclude that the Decision did not contain a reviewable error. It was intelligible, transparent and contains sufficient justification.

[74] As a postscript, I note that these Reasons do not need to decide, and do not address, the broader question of whether or not an allegation about advice from a Labour Relations Advisor could be sufficient to trigger an investigation by a competent person into possible work place

violence. I make no comment on that issue, or on the existence or scope of the “privileged space” in which Labour Relations Advisors provide advice.

IV. **Conclusion**

[75] For these reasons, the application will be dismissed. As the successful party, the respondent is entitled to costs of this application, which I fix at $750.00.

JUDGMENT in T-1791-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. The applicant shall pay costs of this application to the respondent, fixed in the amount of $750.00.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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