

Federal Court of Appeal



Cour d'appel fédérale

Date: 20210611

Docket: A-133-20

Citation: 2021 FCA 117

**CORAM: NEAR J.A.
WOODS J.A.
MACTAVISH J.A.**

BETWEEN:

REGAN DOW

Appellant

and

**CANADIAN NUCLEAR SAFETY
COMMISSION**

Respondent

Heard by online video conference hosted by the Registry on May 19, 2021.

Judgment delivered at Ottawa, Ontario, on June 11, 2021.

REASONS FOR JUDGMENT BY:

MACTAVISH J.A.

CONCURRED IN BY:

**NEAR J.A.
WOODS J.A.**

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] The *Nuclear Safety and Control Act*, S.C. 1997, c. 9 [NSCA] makes it an offence to take disciplinary action against a person who provides information to an official of the Canadian Nuclear Safety Commission (CNSC). The appellant, Regan Dow, alleges that she was subjected to retaliation by her employer, Canadian Nuclear Laboratories (CNL), because she had filed

complaints with the CNSC alleging that CNL had provided the CNSC with information it knew to be untrue.

[2] Following an investigation, the CNSC concluded that there was no evidence that CNL had taken disciplinary action against Ms. Dow for providing the CNSC with information, and that the issues that led to the termination of her employment with CNL were not related to her initial complaint.

[3] In a judgment reported at 2020 FC 376, Ms. Dow's application for judicial review of the CNSC's decision was dismissed by the Federal Court. The Court found that she was not "directly affected" by the CNSC's decision in a way that gave rise to a right on her part to seek judicial review of that decision. It followed from this that the CNSC did not have a duty to provide Ms. Dow with procedural fairness in the investigation process.

[4] Ms. Dow asserts that the Federal Court erred in finding that she did not have standing to challenge the CNSC's decision. She further asserts that the CNSC's investigation breached the duty of procedural fairness owed to her by failing to make her aware of the case that she had to meet, and by denying her a full and fair opportunity to respond to the evidence against her.

[5] Ms. Dow has not persuaded me that the Federal Court erred in finding that she did not have standing to challenge the CNSC's decision. Consequently, I would dismiss the appeal.

I. Background

[6] Ms. Dow is a chemical engineer and a person living with a disability. She worked as a Senior Quality Specialist at CNL from 2012 until the termination of her employment in April of 2017. In this role, she was required to ensure that CNL met all standards, codes, regulations and agreements in the work that it performs.

[7] Ms. Dow was provided with flexibility in her schedule, and was allowed to work from home on occasion. This arrangement evidently worked well, and Ms. Dow initially received very positive performance reviews.

[8] In or around 2014, Ms. Dow developed concerns with a remediation project in which CNL was involved. After she tried to raise her concerns internally, Ms. Dow says that her superiors suddenly began complaining about her job performance. Management also became less flexible with her accommodation requests, which Ms. Dow alleges caused her health condition to worsen. This resulted in Ms. Dow going on sick leave in April of 2016.

[9] On October 19, 2016, Ms. Dow filed her first complaint with CNSC, alleging that CNL had provided CNSC with information that it knew to be untrue, and that she had been harassed by CNL management after she raised her concerns within the company. CNSC took no action with respect to Ms. Dow's complaint at this point, as its analysts evidently believed that the complaint fell outside the regulator's purview. CNL became aware of the fact that Ms. Dow had filed a complaint with CNSC in November of 2016.

[10] In the meantime, CNL was pressing Ms. Dow for additional medical information to support her claim for sick leave. Although Ms. Dow provided CNL with reports from her doctor supporting her continued leave, CNL was not satisfied with the information provided, and on April 28, 2017, it terminated Ms. Dow's employment for abandoning her position and for failing to provide adequate documentation to support her claim for sick leave.

[11] On May 3, 2017, Ms. Dow filed a second complaint with the CNSC, alleging, among other things, that CNL had terminated her employment because she had complained to the CNSC in October of 2016.

[12] The CNSC did not initially fully investigate Ms. Dow's May 2017 complaint, which led Ms. Dow to bring the issue to the attention to the President of the CNSC. The CNSC subsequently agreed to re-open its investigation into whether CNL had committed a prosecutable offence. It did so having concluded that paragraph 48(g) did not specify that the information being provided to the CNSC had to relate to matters falling within the CNSC's purview.

[13] CNSC investigators then interviewed Ms. Dow and several other individuals and reviewed numerous documents. The investigation culminated in an eighty-four page report in June of 2018, which stated that the investigators had not found evidence of an offence under paragraph 48(g) of the *NSCA*. That is, there was no evidence that CNL had taken disciplinary action against Ms. Dow for assisting or giving information to the CNSC. Ms. Dow was not given a copy of this report prior to its finalization, nor was she afforded the opportunity to comment on the investigators' findings.

[14] The investigators determined that, apart from the termination of her employment, most, if not all of the examples of mistreatment cited by Ms. Dow occurred before she filed her first complaint with the CNSC in October of 2016, with the result that the complaint could not have been a motivating factor in any such mistreatment. The investigators further found that the employment-related issues raised by Ms. Dow were unrelated to her original complaint.

[15] In July of 2018, Ms. Dow received a letter from the Vice President of the CNSC informing her that the investigation into her complaint had been completed. Included with the letter was a two-page summary of the investigation's conclusions. Although not stated explicitly, it was clear from the letter and the summary of conclusions that, having found no evidence that CNL had committed an offence under the *NCSA*, the CNSC would not be taking any further action with respect to Ms. Dow's complaint.

[16] Dissatisfied with the findings of the investigation, Ms. Dow commenced an application for judicial review of the disposition of her complaint under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Ms. Dow's primary argument before the Federal Court was that she had been denied procedural fairness in the investigation process.

[17] The Federal Court concluded that it was not open to Ms. Dow to seek judicial review of CNSC's disposition of her complaint because she was not "directly affected by the matter in respect of which relief is sought". As a result, her application for judicial review was dismissed.

II. Standard of Review

[18] On appeal from a Federal Court decision sitting in judicial review of an administrative decision the role of this Court is usually to “step into the shoes” of the Federal Court, and determine whether it selected and applied the appropriate standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47). However, the decision regarding Ms. Dow’s standing to bring her application for judicial review was made by the Federal Court, and not by the CNSC. Consequently, the appellate standards set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 apply: *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, at para. 30 [CARL].

[19] A decision with respect to standing involves a question of mixed fact and law, with the result that it is to be reviewed on the standard of palpable and overriding error: *CARL*, above at para. 31.

III. The Legislative Regime

[20] Before addressing the standing issue, it is helpful to have an understanding of the legislative regime in which Ms. Dow’s complaints arose. Section 3 of the *NSCA* provides that the one of the purposes of the Act is to limit “the risks to national security, the health and safety of persons and the environment that are associated with the development, production and use of nuclear energy and the production, possession and use of nuclear substances”. The CNSC is a

regulatory body whose mandate is, amongst other things, to regulate the development, production and use of nuclear energy and the production, possession and use of nuclear substances, prescribed equipment and prescribed information, in order to prevent unreasonable risk to the environment, the health and safety of persons, or national security: *NSCA*, section 9.

[21] In furtherance of these objectives, sections 48 to 50 of the *NSCA* create a number of offences. For example, it is an offence to possess certain nuclear substances without the necessary authorization (section 50), or to fail to comply with a licence condition (paragraph 48(c)). Other offences address conduct that has the potential to frustrate the ability of the CNSC to regulate those involved in the nuclear industry by criminalizing conduct that obstructs the CNSC's ability to learn of potential violations of the *NSCA*.

[22] One such offence is found in paragraph 48(g), which provides that:

48. Every person commits an offence who	48. Commet une infraction quiconque:
[...]	[...]
(g) takes disciplinary action against a person who assists or gives information to an inspector, a designated officer or the Commission in the performance of the person's functions or duties under this Act [...]	g) prend des mesures disciplinaires contre une personne qui aide la Commission, un inspecteur ou un fonctionnaire désigné ou qui leur donne des renseignements dans le cadre de ses fonctions sous le régime de la présente loi [...]

[23] Also relevant to the issues in this appeal is subsection 51(3) of the *NSCA*, which provides that persons guilty of an offence under paragraph 48(g) of the Act are guilty of an indictable

offence and are liable to a fine not exceeding \$1,000,000 or to imprisonment for a term not exceeding five years, or both. The offence may also be prosecuted as a summary conviction offence, in which case persons convicted of such an offence are liable to a fine not exceeding \$500,000 or to a term of imprisonment not exceeding eighteen months, or both. All the provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, apply to the prosecution of offences under paragraph 48(g), except to the extent that the *NSCA* provides otherwise: *Interpretation Act*, R.S.C. 1985, c. I-21, subsection 34(2).

[24] Nothing in the *NSCA* creates rights on the part of whistleblowers, nor does it provide for any form of remedy or recourse to persons in Ms. Dow's position.

IV. Ms. Dow's Argument on the Standing Issue

[25] While Ms. Dow initially asserted that she satisfied the test for public interest standing, that claim was subsequently abandoned, and she proceeded before the Federal Court and in this Court on the basis that she had personal standing to seek judicial review of the CNSC's decision with respect to her complaints.

[26] Subsection 18.1(1) of the *Federal Courts Act* provides that applications for judicial review may be brought "by anyone directly affected by the matter in respect of which relief is sought".

[27] Ms. Dow submits that the Federal Court committed palpable and overriding errors in finding that she was not “directly affected” by the CNSC’s decision. Firstly, she says that the Court ignored the personal consequences that the decision in question had for her. According to Ms. Dow, CNL’s decision to terminate her employment could be viewed by colleagues and potential employers as a valid decision, untainted by a retaliatory motive, one that would cause clear and directly foreseeable prejudice to her. Consequently, Ms. Dow claims to have a personal interest in being vindicated for her efforts in reporting wrongdoing.

[28] Ms. Dow also contends that the disclosure and investigation process under the *NSCA* would be undermined if someone in her position had no standing to challenge the conduct of CNSC investigations. It is in the public interest, she says, that complaints be fairly dealt with, and that whistleblowers such as Ms. Dow be allowed to challenge errors in CNSC investigations.

[29] In support of these contentions, Ms. Dow points to an internal CNSC document entitled “Overview for Managing External Complaints”, which provides guidance with respect to the process to be followed by CNSC staff who receive complaints from external sources. According to Ms. Dow, “Parliament did not turn its mind” to the process to be followed with respect to complaints received by the CNSC, and it endeavoured to fill the void with this manual, establishing an investigation process in furtherance of the objects of the *NSCA*.

[30] Ms. Dow notes that the Overview document states that the CNSC process for managing external complaints is built on several fundamental principles, one of which is that the management of complaints “comply with the principles of fairness and equity”.

[31] Elsewhere in the document are references to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [*CHRA*] and the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 [*PSDPA*]. Ms. Dow accepts that the complaint processes delineated in these Acts are not the same as under the *NSCA*. She submits, however, that the inclusion of references to this other legislation in the Overview document amounts to an acknowledgement that complaints under these Acts can involve whistleblowing, seemingly suggesting that whistleblowing-type complaints require investigations that meet a certain minimum standard.

[32] Ms. Dow acknowledges that there are no individual remedies available to her under the *NSCA*, recognizing that this is a factor that would tend to point towards her not having standing to pursue an application for judicial review of a CNSC decision. However, Ms. Dow also says the availability of remedial discretion is not an absolute precondition to complainants having standing to challenge decisions of the CNSC. This is especially so considering that there is no one else who could challenge negative decisions, the public interest issues that are raised by these types of complaints, and the reputational interests at stake in these proceedings. According to Ms. Dow, the Federal Court was “too narrowly focussed on legal rights alone” in this latter regard, and failed to give adequate consideration to the impact that the CNSC actions had on her.

V. Analysis

[33] As noted earlier, to be entitled to bring an application for judicial review under subsection 18.1(1) of the *Federal Courts Act*, an applicant must be “directly affected by the matter in respect of which relief is sought”.

[34] Not every administrative action will trigger a right to bring an application for judicial review. No right of review arises where the conduct in issue does not affect legal rights, impose legal obligations, or cause prejudicial effects: *Canada (Attorney General) v. Democracy Watch*, 2020 FCA 69, [2020] F.C.J. No. 498 at para. 19, leave to appeal to SCC refused, 39202 (15 October 2020) [*Democracy Watch 2020*]. See also *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92, [2020] F.C.J. No. 630 at para. 22, leave to appeal to SCC refused, 39266 (23 December 2020); *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. 3 at para. 175, leave to appeal to SCC refused 38379 (2 May 2019); *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.

[35] The CNSC's decision to take no further action with respect to Ms. Dow's complaints did not affect her legal rights. In particular, it did not deprive her of a legal remedy to which she might otherwise have been entitled.

[36] The steps that the CNSC may take in relation to an allegation that an offence has been committed under paragraph 48(g) of the *NSCA* are consistent with the object of the *NSCA*, which is to regulate the nuclear industry, and not to resolve disputes between employers and employees. The CNSC addresses non-compliance through orders, licence revocations, administrative monetary penalties, and prosecutions. The regulatory and enforcement actions contemplated in the *NSCA* affect the rights and interests of the regulated entities, and not their individual employees. The CNSC is not empowered to sit as an adjudicator to decide disputes between

private parties, nor does it have the ability to grant remedies to those who submit external complaints.

[37] The fact that the *NSCA* does not establish complaints and investigation processes or provide for personal remedies for victims of unlawful disciplinary measures stands in marked contrast to the rights of complainants under the *PSDPA* and the *CHRA*. Both of these Acts contain statutorily mandated complaints and investigation processes that confer certain participatory rights on complainants, and provide them with access to statutory remedies when their complaints are substantiated.

[38] For example, the *PSDPA* affords protection to public servants who suffer reprisals for “blowing the whistle” on employer wrongdoing. The *PSDPA* imposes obligations on the Public Sector Integrity Commissioner to “receive, review, investigate and otherwise deal with complaints made in respect of reprisals” (paragraph 22(*i*)). Under subsections 19.4(1), (2) and (3), the Commissioner “must decide whether or not to deal with a complaint”, and must provide written notice and reasons to the complainant for a decision not to deal with a complaint. This is consistent with the purpose of the *PSDPA*, which is, in part, to protect public servants who disclose wrongdoing and to provide remedies to whistleblowers who are subject to reprisal.

[39] Similarly, the *CHRA* creates a complaints-driven regime aimed at providing remedies to individuals who can establish that they have been subjected to adverse differential treatment based on a proscribed ground such as race, sex or disability. The *CHRA* provides statutory

criteria for dealing with complaints and sets out procedures addressing the participatory rights of complainants.

[40] Ms. Dow's submission that the *NSCA* should be interpreted in a purposive way so as to afford her participatory rights that are somewhat akin to those conferred on complainants under the *PSDPA* and the *CHRA* essentially asks us to create a statutory regime that is different from the one that Parliament has chosen to enact. This is something that we cannot do: *PC Ontario Fund v. Essensa*, 2012 ONCA 453, [2012] O.J. No. 2908 at para. 12. See also *Democracy Watch 2020*, above at paras. 39-40.

[41] Indeed, the CNSC's role in investigating potential violations of the *NSCA* is more analogous to that of the police investigating crimes, and their investigators share many of the same powers in investigating offences. Whether and how the CNSC decides to prosecute a regulated entity does not "directly affect" a complainant such as Ms. Dow. The only parties "directly affected" by decisions to investigate or prosecute offences are those allegedly in breach of the law, CNL in this case, and those responsible for investigating or prosecuting them: *CanWest MediaWorks Inc. v. Canada (Minister of Health)*, 2007 FC 752, [2007] F.C.J. No. 1008 at para. 15, aff'd 2008 FCA 207.

[42] The disposition of Ms. Dow's complaint by the CNSC also did not affect her legal right to pursue other kinds of legal recourse in relation to her employment with CNL. Indeed, it appears that she filed a discrimination complaint against CNL under the *CHRA*, as well as a complaint of unjust dismissal under the *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 240. She

may also have initiated a civil action against CNL as well, although the record is unclear on this point.

[43] While Ms. Dow has also not suggested that the CNSC's disposition of her complaint imposed any legal obligations on her, she does say that the CNSC's decision could have prejudicial effects on her by damaging her professional reputation. According to Ms. Dow, potential future employers and colleagues could view the termination of her employment with CNL as justified, rather than as retaliatory.

[44] Ms. Dow cites *Chapman v. Canada (Attorney General)*, 2019 FC 975, [2020] 1 F.C.R. 3 as authority for the proposition that potential reputational harm is a sufficient prejudicial effect as to confer standing to seek judicial review of an administrative decision. However, *Chapman* is of limited assistance in this case. Ms. Chapman was not a complainant, like Ms. Dow, but was the party accused of wrongdoing under the *PSDPA*, whose reputation was very much in issue in the case. Reputational harm was, moreover, considered in ascertaining the level of procedural fairness that was owed to Ms. Chapman, and not in relation to a question of standing.

[45] Ms. Dow has not directed the Court to any evidence that the disposition of her CNSC complaint ever became publicly known, or that it had in fact affected her professional reputation in any way. The Federal Court thus did not commit a palpable and overriding error in finding that Ms. Dow had not established that the CNSC's decision caused her prejudicial effects of a nature that would entitle her to challenge that decision by way of judicial review.

VI. Conclusion

[46] The Federal Court identified the correct legal test in determining whether Ms. Dow had standing to bring her application for judicial review, and she has not persuaded me that the Court committed any palpable and overriding errors in finding that she had not established that she had the standing necessary to bring her application for judicial review.

[47] In light of my conclusion on the standing issue, it is not necessary to decide whether Ms. Dow was afforded adequate procedural fairness in the investigation process.

[48] I would therefore dismiss the appeal, with costs to the respondent in the amount of \$1,500.00, inclusive of disbursements and GST.

“Anne L. Mactavish”

J.A.

“I agree.

D. G. Near J.A.”

“I agree.

Judith Woods J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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WOODS J.A.

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