Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for Decision

Martine Roy,

complainant,

and

TELUS Communications Inc.,

respondent.

Board File: 30224-C
Neutral Citation: 2016 CIRB **822**
April 7, 2016

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 156(1) of the *Canada Labour Code (Part II–Occupational Health and Safety)* (the *Code*).

Parties' Representatives of Record

Ms. Martine Roy, on her own behalf; and
Mr. Jean-François Dolbec, for TELUS Communications Inc.

I. Introduction

[1] On November 22, 2013, Ms. Martine Roy filed a complaint pursuant to section 133(1) of the *Code* in which she alleged that her former employer, TELUS Communications Inc. (TELUS), had terminated her employment in contravention of section 147 of the *Code*.

[2] Ms. Roy alleged that TELUS had terminated her employment two days after she had filed a harassment complaint. She provided additional information in her letter of December 3, 2013.

[3] In its response of December 20, 2013, TELUS raised the issue of the timeliness of Ms. Roy's complaint, contending that Ms. Roy had failed to comply with the 90-day time limit for filing a complaint under section 133(2) of the *Code*. With regard to the merits of the complaint, TELUS

submitted that it had terminated Ms. Roy's employment for just and sufficient cause, in accordance with the collective agreement. TELUS argued that its decision had not been connected with Part II of the *Code*.

[4] In *Roy*, 2014 CIRB LD 3254 (*Roy 3254*), given that an arbitration process involving three grievances filed by Ms. Roy was already underway, the Board decided to defer hearing the matter, pursuant to section 16(l.1) of the *Code*:

> Given that an arbitration process involving the parties is already well underway, the Board exercises its discretion to defer deciding Ms. Roy's complaint. Indeed, as stated by the Board in *Bell Mobility Inc.*, 2012 CIRB 626, section 16(l.1) of Part I of the *Code* incorporates the concept of "judicial economy" into the *Code*.
>
> (page 2)

[5] In June and July 2015, the parties provided an update on their dispute, as requested by the Board in *Roy 3254*.

[6] This matter once again raises the issue of the circumstances under which a harassment complaint meets the test for a process under Part II of the *Code*, *infra*. An employee may file a complaint with the Board if that employee alleges having been the victim of disciplinary action or other retaliation as a result of his or her participation in a Part II process.

[7] Having considered all the written submissions of the parties, the Board has decided to dismiss Ms. Roy's complaint for the reasons set out below.

II. Facts

[8] TELUS hired Ms. Roy on October 5, 1998. On June 2, 2013, Ms. Roy's doctor declared Ms. Roy unfit to work. On June 5, 2013, Ms. Roy filed a harassment complaint with TELUS. Two days later, on June 7, 2013, TELUS terminated Ms. Roy's employment.

[9] In her complaint filed with the Board on November 22, 2013, Ms. Roy described the facts in support of her position. She also explained why she had been unable to file her complaint within 90 days following the termination of her employment on June 7, 2013:

> I had worked for TELUS since **October 5, 1998**, and had always performed very well. I was the victim of harassment, intimidation and discrimination on the part of my last manager, Mr. Jacques Amiot.

> My doctor declared me unfit to work on **June 2, 2013**. I fought for my occupational health and safety rights, filing a harassment complaint on **June 5, 2013**, with Mr. Daniel Faucher, Senior HR Advisor, the person responsible for the internal Respectful Workplace Policy in Human Resources.
>
> **In order to sidestep the complaint and prevent the requisite investigation from taking place, my manager terminated my employment on June 7, 2013. I collected employment insurance sickness benefits until October 4, 2013. My health and the treatments I was undergoing prevented me from making this complaint. My employer's attitude toward me had triggered psychological distress. I suffered from an anxiety disorder, insomnia, concentration problems and memory problems, and I felt completely defeated.** Added to that was the enormous financial stress I was under as a single mother. I was not even able to drive my car during this time. I was on medication and I sought out psychological help.
>
> (translation; emphasis added)

[10] Ms. Roy appended a TELUS in-house complaint form to her complaint. That form, titled "Respectful Workplace Complaint Form" (translation) describes its purpose as follows:

> At TELUS, a respectful workplace is everyone's responsibility. TELUS makes every effort to enquire into complaints of unacceptable conduct and take the necessary steps to fix the problem and prevent any recurrence. To make a complaint, this form must be used in accordance with procedure, as indicated in the Respectful Workplace Policy.
>
> (translation)

[11] Ms. Roy also appended a grievance form dated July 8, 2013, to her complaint. The grievance was against her termination. In addition, the grievance indicated that her harassment complaint had been filed following discussions with her union representative and a TELUS representative. Ms. Roy also appended two other grievances to her complaint, the first against a two-day suspension (January 14, 2013) and the second against a five-day suspension (March 4, 2013).

[12] On December 3, 2013, Ms. Roy filed "further information" (translation) with the Board, providing more detail regarding her allegations that her termination had been connected with her participation in a process under Part II of the *Code*:

> (1) **I filed this complaint pursuant to section 133 because I was subjected to unwarranted disciplinary action culminating in wrongful termination this past June 7, all because I tried to exercise my rights by preparing and filing a harassment complaint in early June 2013.** The following provisions of section 147 were violated:
>
> > (c) **has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.**

(2) The employer failed to abide by the provisions of Part II of the Labour *Code*:

> **Section 125(1)(z.08) of the *Canada Labour Code***
>
> (z.08) cooperate with the policy and work place committees or the health and safety representative in the execution of their duties under this Part;

The employer in no way cooperated when informed of the harassment complaint I had made on June 5, 2013, to Mr. Daniel Faucher, Senior HR Advisor. The employer's representative, Ms. Guylaine Soucy, told him that he did not have to take any action, that his role was merely as an HR advisor, and that she was the one with a decision-making role with the employer. She had a close-minded attitude and warned him not to interfere. She then lost no time in terminating my employment, on June 7, 2013.

This termination of employment was a breach on the part of the employer of the **Internal Complaint Resolution Process (clause 127.1)** as it prevented Mr. Daniel Faucher from fulfilling the investigative duty created by the complaint.

(3) I was in touch with Health and Safety Committee Representative Gilles Giguère a few times. After we shared some information, Mr. Giguère provided me with the "TELUS Respectful Workplace Process", appended. He recommended that I make notes about everything, insisting on the importance of facts. He believed that a complaint made sense in my situation, but indicated that it was up to me to decide whether or not to lodge a complaint. He never insisted or pressured me, saying that he knew it was not an easy thing, but that he was there to lend support in the process. I held a managerial position, as Supervisor, Contact Centre, and managed a team of 25 employees. I had to deal with the complaint process on my own time. I had four formal meetings with Mr. Gilles Giguère. We had to find a private location to meet outside TELUS offices, to maintain the anonymity of the process. In making the complaint, I was haunted by a fear of retaliation, as the complaint involved my immediate superior. I had no confidence in my manager; having seen his conniving in the past, I knew he would abuse his power to get rid of me. Being a single mother, I am very vulnerable; I need my job to meet my personal obligations. I have not had a job since last June, and I have been very sick. I had to apply for employment insurance sickness benefits, though I should have been entitled to my employer's group insurance. I had 15 years of seniority and had always been held in high regard by my other managers.

(4) **I had the Syndicat des agents de maîtrise de TELUS file a grievance (appended), as I was incapacitated. I had filed two other grievances (appended) early in the year, which are also pending.** The employer agreed to arbitration only in February 2015. I find the delay unacceptable under the circumstances, as the two-year wait to go to arbitration is, in my view, a tactic to discourage me and make me drop the grievances.

When I felt better, I contacted the CIRB to find out whether there was anything I could do to speed matters up. I was told that I could file a complaint pursuant to section 133, as the grievance was bogged down in red tape and not producing any results.

(translation; emphasis added)

[13] In its response of December 20, 2013, TELUS raised the issue of the timeliness of the complaint; alternatively, it submitted that Ms. Roy had been terminated for no other reason than just and sufficient cause.

[14] With respect to the 90-day time limit, *infra*, TELUS pointed out that Ms. Roy had been able to file a grievance against her termination:

> With all due respect for the contrary opinion, it is ironic that the complainant alleges that she was unable to file a complaint with the Board because of her incapacity, established by means of the doctor's note of June 2, 2013, yet she subsequently took a number of steps to challenge TELUS's decision to terminate her employment. For instance, the complainant filed a grievance on July 8, 2013, through her Union. And even considering the date of that grievance, the complaint was filed beyond the time limit set out in the relevant provision of the *Code*.
>
> Consequently, in our view, the complaint filed on November 22, 2013, is untimely and should be dismissed. …
>
> (page 2; translation)

[15] In regard to its argument that it had had just and sufficient cause to terminate Ms. Roy's employment, TELUS submitted a timeline setting out its many actions in relation to Ms. Roy, especially in the months preceding her termination:

> On January 17, 2013, a meeting was held with the complainant to remind her that she had to comply with the work schedule and be available to support her work team. It had been noted that the complainant often arrived late, and for a person in a supervisory position, constant lateness had a negative influence on staff in the SQET union.
>
> On January 25, 2013, Mr. Amiot had to remind the complainant about her lateness in getting to work in the morning. At that meeting, the complainant allegedly stated that she would take the necessary steps to correct the situation.
>
> On February 4, 2013, Mr. Amiot obtained an undertaking from the complainant that she would send him emails "in real time showing arrival/departure times," in an attempt to monitor her punctuality and get her to abide by her variable work schedule. Of note is that this was the first time that such a requirement had ever been placed on a supervisor.
>
> In the meantime, a special meeting was held on January 31, 2013, attended by the complainant's manager, TELUS staff relations representatives, and representatives of the union to once again clarify the Employer's expectations with respect to the objectives associated with the complainant's role as Supervisor and her regular attendance and punctuality at work. The complainant was given a clear warning that, failing significant improvement, disciplinary action would be taken, up to and including termination. Of note is that the complainant was also suspended, for two and then five days, also a first for a supervisor since supervisors became unionized pursuant to a Board order in November 1996.
>
> When no improvement was seen in terms of the complainant's failings at work, her lack of respect of work schedules, and her lack of transparency toward her supervisor, Mr. Amiot and Mr. Clément Audet, Vice-President, Consumer Market and Client Care Centres, met with the complainant on May 31, 2013, to inform her of her permanent removal from the supervisory position. Of significance is that, on that date, the complainant was at work and had never filed a complaint against TELUS or Mr. Amiot that was defamatory. Aside from

> their potentially defamatory nature, the complainant's statements in the complaint she filed with the Board were in reaction to her finding out that her employment as a supervisor had come to an end.
>
> In the absence of any agreement, the complainant's employment was terminated on June 7, 2013. TELUS did not terminate the complainant for having exercised a supposed right under the *Code* but rather as the next step in progressive discipline, based on her history.
>
> (pages 3–4; translation)

[16] In her reply dated January 7, 2014, Ms. Roy stressed that she had not been fit to work again until October 6, 2013. Ms. Roy suggested that the 90-day time limit should accordingly start to run as of that date:

> With regard to the first part of the employer's response, related to timeliness, **my doctor did not declare me fit to work until October 6, 2013. My complaint was filed the following month, on November 21, within the 90-day time limit.**
>
> …
>
> **With regard to the grievance filed on July 8, 2013, my union handled the drafting and filing of that grievance on my behalf, without any need for me to be involved in any way in its production.** I did, however, give my consent to that step. The President of the Syndicat des agents de maîtrise, Mr. Jean-Paul Laviolette, demonstrated a great deal of professionalism by handling the matter without there being any need for an investment in the process on my part, not even requiring me to go out to sign it, as he was aware of my poor health.
>
> It is therefore untrue to say that I took several steps during my period of incapacity, as my health did not allow such. I even got help from a family member to apply online for Employment Insurance sickness benefits.
>
> (pages 1–2; translation; emphasis added)

[17] With regard to TELUS's position that her employment had been terminated for just and sufficient cause, Ms. Roy disputed her manager's imposition of a "micromanagement plan" (translation):

> My manager introduced a micromanagement plan to measure every aspect of my work. He even had coworkers and my own staff supervise me. My work team was highly productive. Indeed, the number of people under my supervision had even been increased, most likely because my manager had figured that I wouldn't be able to coach them. He often asked me to take on last-minute assignments, for which I was always commended by those with whom I worked and even sometimes by the manager himself.
>
> (page 3; translation)

[18] As described above, in July 2014, in *Roy 3254*, the Board decided to defer dealing with Ms. Roy's complaint given that an arbitration process was already underway. Ms. Roy's three grievances, including her termination grievance, were to be dealt with in that arbitration process.

[19] On May 8, 2015, the grievance arbitrator, Mr. Jean-Claude Bernatchez, issued his arbitral award in respect of Ms. Roy's three grievances, upholding the two grievances against the suspensions but dismissing the termination grievance, though he did order that Ms. Roy receive severance pay.

[20] The arbitrator's findings are set out at page 36 of the arbitral award:

> **The Arbitrator**
>
> **• Upholds the grievance of January 14, 2013, bearing number 13.01, pertaining to a suspension of two (2) working days, and orders the employer to pay the complainant the equivalent of the wages lost at the applicable rate of pay at the time of the said suspension;**
>
> **• Upholds the grievance of March 4, 2013, bearing number 13.02, pertaining to a suspension of five (5) working days, and orders the employer to pay the complainant the equivalent of the wages lost at the applicable rate of pay at the time of the said suspension;**
>
> **• Dismisses the grievance of July 8, 2013, bearing number 13-03, pertaining to the termination of the complainant's employment;**
>
> • Awards no moral damages;
>
> **• Orders the employer to pay the complainant severance equal to two (2) weeks of pay per year of service from April 10, 2000, when she acquired regular, full-time status, to the termination of her employment on June 7, 2013, at the annual rate of pay that the complainant was earning at the time of her termination, according to the scale set out in the applicable collective agreement;**
>
> • In pursuance of this arbitral award, orders the employer to pay the amounts due to the complainant within 90 days of the date of the signing of this award;
>
> • Retains jurisdiction to deal with any matter in connection with the enforcement of this arbitral award, in particular the payment of the severance and the amounts related to the two (2) grievances that were upheld out of the three (3) brought to our attention.
>
> (translation; emphasis added)

[21] In her letter of June 29, 2015, Ms. Roy asked the Board to hold her complaint in abeyance given that on June 8, 2015, her union had filed an application for judicial review of the arbitral award in regard to the termination.

[22] In its letter of July 9, 2015, TELUS again asked the Board to dismiss Ms. Roy's complaint.

III. Precedential Developments

[23] In *Roy*, 2015 CIRB LD 3535, issued on December 8, 2015, the Board asked the parties for any further comments they might wish to make following the recent judgments of the Federal Court (FC) and Federal Court of Appeal (FCA) that were relevant to this matter. The Board stated the following:

> While dealing with the complaint in this matter, the Board sent the parties a copy of its decision in *Perron-Martin*, 2014 CIRB 719 (*Perron-Martin*), for information. In that decision, the Board had set out the three questions it must ask itself in considering complaints made pursuant to section 133(1) of the *Canada Labour Code (Part II–Occupational Health and Safety)* (the *Code*).
>
> In the instant matter, the second question is this: Was Ms. Roy participating in a process under Part II of the *Code*?
>
> Since the release of the Board's decision in *Perron-Martin*, the Federal Court of Canada and the Federal Court of Appeal have issued judgments dealing with the concept of harassment related to Part II of the *Code*. Enclosed are the two judgments in question: (i) *Public Service Alliance of Canada v. Canada (Attorney General)*, 2014 FC 1066; and (ii) *Canada (Attorney General) v. Public Service Alliance of Canada*, 2015 FCA 273.
>
> The judgment of the Federal Court of Appeal was issued while the Board was deliberating in the instant matter. Since the parties produced their last submissions in June and July 2015, the Board would like to give them the opportunity to add comments, if they wish, upon reading the judgments.
>
> (pages 1–2)

[24] The judgment of the FCA, *infra*, was issued on November 30, 2015. The Board gave the parties until January 15, 2016, to file any further comments.

[25] On January 15, 2016, Ms. Roy filed a short letter in which she advised the Board that a judicial review of the arbitral award was scheduled for January 29, 2016. Ms. Roy also set out her position that TELUS should have investigated as soon as it received her harassment complaint. She contended that TELUS had sidestepped the process by terminating her employment.

[26] The Board did not receive any submissions from TELUS. In its letter of February 1, 2016, the Board agreed to a TELUS request that it be given a second opportunity to provide comments. The Board also gave Ms. Roy an opportunity to add any other comments she might wish to make after reading TELUS's further comments.

[27] In its submissions dated February 19, 2016, TELUS rebutted some of Ms. Roy's allegations. TELUS argues that Ms. Roy had been well aware of her problems at work. On May 31, 2013, TELUS had asked her to choose between a demotion to a technician position or separation from TELUS.

[28] If Ms. Roy refused to choose between the two, TELUS would terminate her employment.

[29] TELUS contends that, in January 2013, Ms. Roy was also offered a severance package to leave the company. That offer was in connection with alleged difficulties in performing her job as a supervisor.

[30] TELUS submits that Ms. Roy had been aware at the relevant times that her employment might be terminated long before she filed her harassment complaint. TELUS accordingly maintains that the termination was in no way retaliation for the said harassment complaint.

[31] Ms. Roy did not respond to TELUS's further submissions.

IV. Part II of the *Code*

[32] As indicated in section 147 of the *Code*, no employer may retaliate against an employee who exercises rights protected under Part II of the *Code*:

> **147** No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee
>
> **a)** has testified or is about to testify in a proceeding taken or an inquiry held under this Part;
>
> b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or
>
> **c)** has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

[33] The terms and conditions for filing a complaint of retaliation by the employer are set out in section 133 of the *Code*. Section 133(2) provides for a 90-day time limit for filing the complaint:

> **133 (1)** An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

> **(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.**
>
> **(3)** A complaint in respect of the exercise of a right under section 128 or 129 may not be made unless the employee has complied with subsection 128(6) or the Minister has received the reports referred to in subsection 128(16), as the case may be, in relation to the matter that is the subject-matter of the complaint.
>
> **(4)** Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.
>
> **(5)** On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.
>
> **(6)** A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.
>
> (emphasis added)

[34] Section 133 refers to section 128 of the *Code*. Section 128 establishes the right to refuse to perform work in the event of danger. Section 133(6) reverses the burden of proof onto the employer if an employee has exercised his or her right to refuse unsafe work under section 128.

[35] Ms. Roy's complaint does not involve the exercise of her right to refuse to work. Consequently, the burden of proof in this complaint is on Ms. Roy.

[36] Sections 133 and 147 show that the Board has a limited role under Part II of the *Code*. Upon receipt of a complaint, the Board must consider whether an employer has retaliated against an employee because of the employee's participation in a process under Part II of the *Code*.

[37] In *Paquet*, 2013 CIRB 691 (*Paquet 691*), the Board explained its jurisdiction in relation to a complaint such as that of Ms. Roy:

> [54] Essentially, an employer cannot retaliate against an employee for participating in a Part II process. This participation could involve giving testimony in a proceeding or providing information related to a Part II matter. Similarly, it could encompass acting in accordance with, or seeking the enforcement of, Part II. For ease of reference, we will refer to these various section 147 participatory actions as a "Part II Process".

[38] In *Paquet 691*, the Board also described the issues over which it lacks jurisdiction and set out a three-step analysis for dealing with complaints such as that of Ms. Roy:

> [59] **In summary, the Board is not tasked with the enforcement or interpretation of most of the provisions of Part II.** Allegations of non-compliance or contraventions fall to a Health and Safety Officer (HSO), if the parties themselves are unable to resolve them. **Similarly, the Board does not resolve collective agreement disputes, even if they relate to Part II health and safety issues.** The *Code* instead mandates the Board to consider if an employer imposed or threatened discipline, including a dismissal, because an employee participated in a Part II Process, as defined earlier.
>
> [60] This interplay of sections 147 and 133 gives rise to a three-step analysis. Each step must be passed successfully in order for the Board to find a *Code* violation.
>
> 1. Did Air Canada impose, or threaten to impose, discipline?
> 2. Were the employees participating in a Part II Process?
> 3. Did a nexus exist between the Part II Process and Air Canada's discipline?
>
> (emphasis added)

[39] In the case of Ms. Roy's complaint, that analysis brings the Board to consider three questions:

1. Did TELUS impose discipline on Ms. Roy?
2. Was Ms. Roy participating in a Part II process?
3. Does a nexus exist between a Part II process and Ms. Roy's termination?

V. Analysis and Decision

A. Timeliness

[40] The Board is satisfied that it may deal with the merits of Ms. Roy's complaint.

[41] While section 133(2) of the *Code* sets a 90-day limit, the Board has the discretion to extend that time limit under section 16(m.1):

> **16** The Board has, in relation to any proceeding before it, power:
>
> …
>
> **(m.1)** to extend the time limits set out in this Part for instituting a proceeding.

[42] Section 156(2) of Part II of the *Code* confers on the Board the same powers for disposing of a matter as under Part I of the *Code* (*Perron-Martin*, 2014 CIRB 719 (*Perron-Martin 719*)):

> **156 (2)** The provisions of Part I respecting orders and decisions of and proceedings before the Board under that Part apply in respect of all orders and decisions of and proceedings before the Board or any member thereof under this Part.

[43] The Board accepts Ms. Roy's explanations that, for health reasons, she was unable to file her complaint immediately following her termination. Ms. Roy was unfit to work from June 2 to October 4, 2013. Additionally, she explained how her union had acted on her behalf during that period of incapacity.

[44] In this matter, the Board would have exercised its discretion to extend the time limits pursuant to section 16(m.1) had it been necessary to do so. Ms. Roy established that she had always intended to exercise her rights (*Perron-Martin 719*).

B. Harassment Complaints and Part II of the *Code*

[45] Legislation in Canada that deals with the handling of harassment complaints is uneven. Human rights legislation prohibits harassment on prohibited grounds of discrimination. However, other legislation, in particular occupational health and safety legislation, also prohibits harassment.

[46] For example, section 14 of the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6) (CHRA) prohibits harassment:

> **14. (1) It is a discriminatory practice,**
>
> **a)** in the provision of goods, services, facilities or accommodation customarily available to the general public,
>
> **b)** in the provision of commercial premises or residential accommodation, or
>
> **c) in matters related to employment,**
>
> **to harass an individual on a prohibited ground of discrimination.**
>
> **(2)** Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.
>
> (emphasis added)

[47] Section 3 of the CHRA sets out the prohibited grounds of discrimination:

> **3. (1)** For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status,

disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.

[48] The CHRA also prohibits retaliation:

14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

[49] The Board's jurisdiction over retaliation issues is linked to the participation of the employee in a process under Part II of the *Code*. A process covered by legislation such as the CHRA, an employer policy against harassment, or a collective agreement can consequently raise difficult questions in regard to the extent of the Board's jurisdiction.

[50] Before considering the situation at the federal level, it is useful to consider how harassment and retaliation are handled elsewhere.

i. Quebec

[51] The National Assembly of Quebec has expressly dealt with harassment, including psychological harassment, and retaliation.

[52] Section 10 of Quebec's *Charter of Human Rights and Freedoms*, CQLR, c. C-12 (the *Charter*), prohibits discrimination:

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

[53] Section 10.1 of the *Charter* prohibits harassment:

10.1. No one may harass a person on the basis of any ground mentioned in section 10.

[54] Section 82 of the *Charter* prohibits retaliation:

82. The commission may also apply to a tribunal for any appropriate measure against any person who attempts to take or takes reprisals against a person, group or organization

having an interest in the handling of a case of discrimination or exploitation or having participated therein either as the victim, the complainant, a witness or otherwise.

[55] The National Assembly has expressly dealt with "psychological harassment," in sections 81.18 and 81.19 of *An Act Respecting Labour Standards*, CQLR, c. N-1.1 (LSA):

> **81.18. For the purposes of this Act, "psychological harassment" means any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee.**
>
> A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.
>
> **81.19.** Every employee has a right to a work environment free from psychological harassment.
>
> **Employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it.**
>
> (emphasis added)

[56] Section 122 of the LSA prohibits retaliation:

> **122.** No employer or his agent may dismiss, suspend or transfer an employee, practise discrimination or take reprisals against him, or impose any other sanction upon him
>
> **(1)** on the ground that such employee has exercised one of his rights, other than the right contemplated in section 84.1, under this Act or a regulation;
>
> …
>
> **(2)** on the ground that such employee has given information to the Commission or one of its representatives on the application of the labour standards or that he has given evidence in a proceeding related thereto;
>
> ...
>
> (5) for the purpose of evading the application of this Act or a regulation.

ii. Ontario

[57] Ontario's Legislative Assembly has expressly addressed the concept of harassment, including workplace harassment, and retaliation.

[58] Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19 (HRC), prohibits several forms of harassment, including harassment in employment:

Harassment in employment

5.(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 5 (2); 1999, c. 6, s. 28 (6); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (6); 2012, c. 7, s. 4 (2).

...

Harassment because of sex in workplaces

7.(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee. R.S.O. 1990, c. H.19, s. 7 (2); 2012, c. 7, s. 6 (2).

[59] Section 8 of the HRC prohibits reprisal:

Reprisals

8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing. R.S.O. 1990, c. H.19, s. 8.

[60] Ontario's Legislative Assembly adopted other specific provisions respecting "workplace harassment" and "workplace violence" in the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (OHSA).

[61] Section 1(1) of the OHSA sets out definitions of "workplace harassment" and "workplace violence":

1. (1) In this Act,

…

"workplace harassment" means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome; ("harcèlement au travail")

"workplace violence" means,

(a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,

(b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,

> (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker. ("violence au travail") R.S.O. 1990, c. O.1, s. 1 (1); 1993, c. 27, Sched.; 1994, c. 24, s. 35; 1994, c. 25, s. 83 (1); 1997, c. 16, s. 2 (1-3); 1998, c. 8, s. 49; 2009, c. 23, s. 1; 2009, c. 33, Sched. 20, s. 3 (1); 2011, c. 11, s. 1; 2014, c. 10, Sched. 4, s. 1.

[62] In *Ljuboja* v. *Aim Group Inc*, 2013 CanLII 76529 (ON LRB), the Ontario Labour Relations Board (ON LRB) had to determine whether it had jurisdiction to deal with a complaint in which an employee alleged being the victim of retaliation for having filed a harassment complaint.

[63] The legal issue was not a simple one as the OHSA did not deal with the concept of "workplace violence" in the same way that it dealt with that of "workplace harassment." It imposed substantial obligations on Ontario employers in regard to workplace violence, yet imposed only procedural obligations in regard to workplace harassment:

> 34. I agree with reasoning in *Investia*, *supra*, that the Board must find its jurisdiction in the Act and that there are three grounds upon which the Board can take jurisdiction under section 50 of the Act: when a worker has "acted in compliance with the Act"; when a worker has "given evidence"; or, when a worker "has sought the enforcement" of the Act or the regulations and as a consequence of doing so has been subject to a reprisal.
>
> 35. **I also agree that the Act does not provide workers with a right to a harassment free workplace. With the passage of Part III.0.1 the Legislature imposed substantial obligations on employers with respect to the prevention of workplace violence that do not exist with respect to workplace harassment.** These include implementing measures and procedures to control the risk of workplace violence and summoning immediate assistance if workplace violence is even likely to occur (subsection 32.0.2(2)(a) and (b)); conducting a workplace violence risk assessment and subsequent reassessments (subsection 32.0.3); taking steps with respect to preventing domestic violence in the workplace (subsection 32.0.4); and, expressly clarifying that the employer duties in section 25 (including subsection 25(2)(h)), the supervisor duties in section 27 and the worker duties in section 28 all apply as appropriate with respect to workplace violence (subsection 32.0.5).
>
> 36. **None of these obligations appear with respect to workplace harassment and nowhere in Part III.0.1 or elsewhere in the Act are employers explicitly obligated to provide a harassment free workplace, at least with respect to how broadly that term is defined in section 1 of the Act.** Given the clear obligations the Legislature placed on employers with respect to workplace violence at the same time that the workplace harassment provisions were enacted, the omission of these obligations with respect to workplace harassment cannot be attributed to legislative oversight. Rather, the Legislature's omission of these obligations must have been deliberate.
>
> 37. What then are the obligations placed on employers with respect to workplace harassment? An employer must:
>
> a. Prepare a policy about workplace harassment (section 32.0.1(b));

b. Review the policy annually (section 32.0.1(3));

c. Post a written copy of the policy in the workplace (section 32.0.1(2));

d. Develop and maintain a program to implement the policy (section 32.0.6(1)) that must:

i. Ensure that the program includes measures and procedures for reporting incidents of workplace harassment to the employer or supervisor (section 32.0.6(2)(*a*));

ii. Ensure that the program sets out how the employer will investigate and deal with incidents and complaints of workplace harassment (section 32.0.6(2)(*b*)); and,

e. Provide workers with information on the contents of the policy and the program (section 32.0.7(*a*) and (*b*)).

38. **Reading these provisions as a whole, the obligation on employers with respect to workplace harassment is entirely procedural. There is an obligation on an employer to develop and implement an internal process for reporting, investigating and dealing with workplace harassment issues. There is, however, no obligation on an employer to provide any substantive result and thus no ability for a worker to insist on any particular outcome.** Moreover, employers are provided with significant leeway in determining the process that they will adopt by which workers may make complaints and those complaints will be investigated and dealt with. There are in fact no specific procedural criteria set out in the Act that must be adopted by employers other than including measures and procedures for reporting incidents of harassment to the employer or supervisor and requiring the employer to set out how it will investigate and deal with incidents and complaints of workplace harassment. While the Legislature has authorized the prescription of other elements by regulation, no such regulation has yet come into being.

(emphasis added)

[64] In the end, the ON LRB held that the entirely procedural provisions respecting harassment could nonetheless enable an employee to file a complaint alleging retaliation:

49. **Accepting, as I do, that the Act requires employers to have an internal process for addressing instances and complaints of workplace harassment, it would entirely undermine that process if an employer is free to terminate a worker because he or she brought forward a complaint of workplace harassment in compliance with that process. An interpretation of the Act that finds employers are obligated to create and maintain a policy by which workers may bring forward complaints of harassment but are nevertheless free to terminate, or otherwise penalize or retaliate against, any worker for having actually made a complaint under that policy is, in my view, untenable**. To interpret the Act in this manner would be to strip the employer's obligation to have a program to implement their workplace harassment policy through which workers may make a complaint of any meaning. Surely the Legislature did not intend in subsection 32.06(2) to spell out the obligation on employers to include measures and procedures for workers to report incidents of harassment *at their own peril*? Surely the Legislature did not envision that, in requiring employers to describe how they will "deal with" complaints of workplace harassment in subsection 32.02(2)(*b*), employers would be free to

> terminate the complainant merely because he or she had the temerity to complain about a course of unwelcome and vexatious comment or conduct?
>
> (emphasis added)

[65] In Bill 132*, Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2016*, 1st Sess, 41st Legislature, Ontario, 2015 (Royal Assent March 8, 2016), Ontario lawmakers imposed further legal obligations on employers, including the obligation to conduct an investigation on receipt of allegations of harassment.

iii. Situation at the Federal Level

[66] Quebec, in its LSA, and Ontario, in its OHSA, expressly addressed the concept of harassment in situations that might not be covered by the provisions in human rights legislation.

[67] At the federal level, the term "harassment" is found nowhere in Part II of the *Code*. However, section 124 of the *Code* imposes obligations on employers with respect to the protection of their employees' health and safety at work. Section 125(1)(z.16) deals with workplace violence:

> **125 (1)** Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,
>
> …
>
> **(z.16)** take the prescribed steps to prevent and protect against violence in the work place.

[68] Parliament has also passed regulations respecting workplace violence. Part XX of the *Canada Occupational Health and Safety Regulations* (SOR/86-304) is titled "Violence Prevention in the Work Place" (hereinafter referred to as the *Regulations*).

[69] Given these provisions respecting violence at work, would a harassment complaint made pursuant to an employer's internal policy meet the test for a process under Part II of the *Code*, as required in *Paquet 691*?

C. *Perron-Martin 719*

[70] The Board dealt with the relationship between an employer's internal harassment policy and Part II of the *Code* for the first time in *Perron-Martin 719*. In that matter, Ms. Perron-Martin

had filed a complaint under Part II of the *Code* in which she had alleged that she had suffered retaliation for having filed a harassment complaint. The harassment complaint had been filed pursuant to her employer's anti-harassment policy, an internal policy.

[71] In *Perron-Martin 719*, the Board reviewed Part II of the *Code*, including Part XX of the *Regulations*. While it did not rule out the possibility that a harassment complaint could be subject to Part XX of the *Regulations*, it determined that the internal complaint in that matter did not constitute a process for purposes of Part II of the *Code*:

> [37] The process in question at Symcor was connected with its anti-harassment policy.
>
> [38] In the Board's view, complaints filed pursuant to an internal anti-harassment policy do not generally constitute an occupational health and safety process for purposes of Part II of the *Code*.
>
> [39] Most employers have introduced policies to eliminate harassment and discrimination in the work place. Such policies are put in place by federally regulated employers to promote rights set out in the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6).
>
> [40] To facilitate the introduction of such a policy, the Canadian Human Rights Commission has posted a template for developing an anti-harassment policy on its Website.
>
> [41] In the Board's view, the fact that Ms. Perron-Martin participated in a process pursuant to Symcor's anti-harassment policy does not in and of itself mean that she participated in an occupational health and safety process pursuant to Part II of the *Code*.
>
> [42] There is no reference anywhere in Part II to the concept of harassment. In previous cases, such as *Grolla*, 2011 CIRB 592, the Board had the opportunity to consider Part XX of the *Canada Occupational Health and Safety Regulations* (SOR/86-304) (the *Regulations*), titled "Violence Prevention in the Work Place" (Part XX).
>
> [43] Part XX requires employers to develop a work place violence prevention policy (section 20.3). "Work place violence" is described as follows:
>
> > 20.2. In this Part, "work place violence" constitutes 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**.
> >
> > (emphasis added)
>
> [44] The Board notes first that the word "harassment" is never used in Part XX. Part XX appears to relate more to circumstances involving violence. This fact alone suggests to the Board that a complaint of harassment filed pursuant to an employer's internal policy is not usually an occupational health and safety process.
>
> [45] It may one day be possible to argue that a harassment complaint is governed at least in part by Part XX, but that is not the case in this matter.

[72] In *Perron-Martin 719*, the Board referred to the decision of the Occupational Health and Safety Tribunal Canada (OHSTC) in *Canadian Food Inspection Agency* v. *Public Service Alliance of Canada*, 2014 OHSTC 1 (*CFIA*). After the Board's decision in *Perron-Martin 719*, the FC overturned the decision of the OHSTC in *CFIA*.

D. Federal Court and Federal Court of Appeal Judgments

[73] In *Public Service Alliance of Canada* v. *Canada (Attorney General)*, 2014 FC 1066 (*PSAC 1*), the FC considered the scope of Part XX of the *Regulations* and determined that, depending on the circumstances, the notion of violence in the workplace might include harassment:

> [25] **In my opinion, harassment may constitute work place violence, depending on the circumstances present in a given case**…
>
> …
>
> [28] One must consider the object and purpose of a statute as a whole when interpreting individual provisions of that statute (*R v Steele*, 2014 SCC 61 at para 23). **Contrary to the Respondent's arguments, there is nothing in the Code or the Regulations to read down the language used in section 20.2 of Part XX of the Regulations. The use of "any action, conduct…or gesture" of a person towards an employee "…hat can reasonably be expected to cause harm…or illness" to that employee, is broad enough on its plain and ordinary meaning to include harassing activities of a person that cause mental or psychological harm or illness. To find otherwise is to unduly restrict the definition of work place violence and not give a purposive construction to that definition. The Treasury Board of Canada's position in their publication "Violence and Harassment in the Workplace: Commonalities and Differences, April 30, 2013, states that "Nothing in Part XX (of the Regulations) prevents an employee from alleging that harassment constitutes violence". This is supportative of the position I take.**
>
> **[29] Therefore harassment of the kind inflicted upon the employee in this case may constitute work place violence, if after a proper investigation by a competent person it is determined that the harassment includes actions, conduct or gestures that can reasonably be expected to cause harm or illness to the employee. In my opinion, psychological bullying can be one of the worst forms of harm that can be inflicted on a person over time.**
>
> (emphasis added)

[74] In Canada (Attorney General) v. Public Service Alliance of Canada, 2015 FCA 273 (PSAC 2), the FCA upheld the judgment of the FC in PSAC 1.

[75] The issue in *PSAC 2* was whether an employer may determine *prima facie* whether a complaint meets the definition of workplace violence under Part XX of the *Regulations*:

> [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.

[76] The FCA described the facts in *PSAC 2*. At the very beginning of the process, the employee in question had not made any specific reference to Part XX of the *Regulations.* However, a reference to it had been made later:

> [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*.

[77] In paragraph 13 of its judgment, the FCA again described the issue to be determined, that is, whether the employer is entitled to first "screen" complaints before appointing a "competent person" to investigate:

> [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.

[78] At paragraph 20 of its judgment, the FCA reviewed the employer's obligations in terms of taking remedial action in order to assess the employer's power on receipt of a complaint:

> [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

20.9 (1) In this section, “competent person” means a person who

(*a*) is impartial and is seen by the parties to be impartial;
(*b*) has knowledge, training and experience in issues relating to work place violence; and

(*c*) has knowledge of relevant legislation.

(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.

(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.

(4) The competent person shall investigate the work place violence and at the completion of the investigation provide to the employer a written report with conclusions and recommendations.

(5) The employer shall, on completion of the investigation into the work place violence,
(*a*) keep a record of the report from the competent person;
(*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

Notification et enquête

20.9 (1) Au présent article, « personne compétente » s’entend de toute personne qui, à la fois :
a) est impartiale et est considérée comme telle par les parties;
b) a des connaissances, une formation et de l’expérience dans le domaine de la violence dans le lieu de travail;
c) connaît les textes législatifs applicables.

(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) 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) Au terme de son enquête, la personne compétente fournit à l’employeur un rapport écrit contenant ses conclusions et recommandations.

((5) Sur réception du rapport d’enquête, l’employeur :

a) conserve un dossier de celui-ci;

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

without their consent; and (*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.	consentement; *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 (*a*) the work place violence was caused by a person other than an employee; (*b*) it is reasonable to consider that engaging in the violent situation is a normal condition of employment; and (*c*) the employer has effective procedures and controls in place, involving employees to address work place violence.	(6) Les paragraphes (3) à (5) ne s'appliquent pas dans les cas suivants : *a*) la violence dans le lieu de travail est attribuable à une personne autre qu'un employé; *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*) 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.

[79] The FCA confirmed that workplace violence may include harassment. However, that does not mean that every allegation of harassment necessarily falls within the definition of workplace violence under Part XX of the *Regulations*:

> [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.
>
> (emphasis added)

[80] The FCA also noted that confusion may arise where an employee does not at least initially explicitly cite Part XX of the *Regulations*. However, such characterization is not an essential condition:

> [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.**
>
> (emphasis added)

[81] The FCA then considered whether an employer had a duty to investigate every allegation of harassment. It found that such duty is not absolute but that the burden on the employee making an allegation of harassment should be quite low:

> [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).
>
> (emphasis added)

[82] Hence, depending on the circumstances, the absence of the term "harassment" in Part II of the *Code* and Part XX of the *Regulations* does not preclude a harassment complaint from constituting a process under Part II of the *Code*.

E. Analysis of Ms. Roy's Complaint

[83] We now turn to the three-step analysis of Ms. Roy's complaint, in accordance with *Paquet 691*.

1. Did TELUS impose discipline on Ms. Roy?

[84] TELUS terminated Ms. Roy's employment. Ms. Roy's employment was terminated on June 7, 2013, barely two days after she had filed her complaint pursuant to the Respectful Workplace Policy. There is no dispute that TELUS imposed discipline.

2. Was Ms. Roy participating in a Part II process?

[85] The Board must consider whether a harassment complaint constitutes a process under Part II of the *Code* on a case-by-case basis.

[86] In each matter, the complainant should indicate in the written pleadings how he or she was participating in a process under Part II of the *Code*. That is what Ms. Roy did in her complaint. In most cases, especially in light of the recent judgments of the FC and FCA, it will likely be obvious that the process in question is tied in with Part XX of the *Regulations*.

[87] In the matter before the Board, Ms. Roy does not cite harassment on a prohibited ground of discrimination as that notion is defined in the CHRA. The harassment of which Ms. Roy

complains, which she describes in her complaint, is more in the nature of psychological harassment as defined in Quebec's LSA, *supra*. TELUS noted in its reply that Arbitrator Bernatchez had referred to psychological harassment in his arbitral award.

[88] In view of the judgments in *PSAC 1* and *PSAC 2* and the content of Ms. Roy's complaint, the Board accepts that Ms. Roy was participating in a Part II process. Her complaint as quoted above refers to the impact of the alleged harassment on her health. For purposes of this decision, Ms. Roy meets the second test in the analysis.

[89] TELUS raises the fact that Ms. Roy never referred to Part XX of the *Regulations*.

[90] The fact that Ms. Roy made no specific reference to Part XX of the *Regulations* is not conclusive. The Board notes that both the FC and the FCA indicated that an employer had certain obligations upon receiving a complaint. A failure to investigate a complaint cannot serve to support a defence that the employee was not specific enough to benefit from protection under Part XX of the *Regulations*.

[91] The FCA specifically stated that not characterizing an allegation as violence is not conclusive and that the burden on the employee in such circumstances is quite low.

[92] The Board will in future cases have to continue considering how to identify harassment complaints that may meet the requirements of Part XX of the *Regulations*, with the assistance of the parties. Parliament has not provided the Board with the same degree of detail in this regard as has been provided in Quebec and Ontario.

3. Does a nexus exist between a Part II process and Ms. Roy's termination?

[93] At first blush, the filing of a harassment complaint followed by termination of employment two days later raises some concerns. However, the Board must consider the context in each individual matter to decide whether a complainant has discharged his or her burden of proof.

[94] In *Aker,* 2009 CIRB 474, the Board carried out such consideration of the context:

> [38] Mr. Aker has not convinced the Board that UPS' action in terminating him on December 4, 2008 was a reprisal for any attempt he made to seek the protection of Part II of the *Code*. The mere contemporaneousness of safety issues with alleged inappropriate conduct does not prevent an employer from evaluating an employee's continued employment.
>
> [39] For example, if harassment or fighting has been an issue in the workplace, an employer is not prevented from imposing discipline merely because Part II of the *Code* may be in

> issue. For federally regulated employers like UPS, however, section 240 of the *Code* allows employees who are not subject to a collective agreement to demand that the employer demonstrate just cause for any termination before an independent adjudicator.
>
> [40] Why has Mr. Aker not convinced the Board that UPS acted in violation of section 147 of the *Code*?
>
> [41] It is clear that for a significant period of time, there have been workplace issues between Mr. Aker and Mr. F. Mr. Aker's personnel file contains a significant amount of information about these incidents. There has been discipline in the past for some of these incidents.
>
> [42] UPS has demonstrated to the Board's satisfaction that for a number of years, it has been attempting to deal with workplace difficulties between Mr. Aker and Mr. F. Mr. Aker did not deny a significant amount of documentation exists. However, it is clear he is not in agreement with UPS' version of the facts about all of the past incidents.
>
> [43] UPS might have had more difficulty had the November 18, 2008 event constituted a single episode which immediately led to Mr. Aker's dismissal. However, the Board cannot ignore the significant background to the situation between Mr. Aker and Mr. F upon which UPS relies.
>
> [44] The Board does not decide whether or not UPS had just cause to terminate Mr. Aker. The adjudicator will evaluate that issue. However, the Board accepts that UPS dismissed Mr. Aker due to his history of altercations with Mr. F in the workplace. It took the identical action with Mr. F. The dismissal accordingly did not result from Mr. Aker's invoking his rights under Part II of the *Code* and thus did not violate section 147.

[95] In the instant matter, the Board is satisfied that the termination of Ms. Roy's employment was the final step in progressive discipline imposed in relation to her performance at work. On January 31, 2013, a meeting attended by Ms. Roy's manager, TELUS staff relations representatives, and Ms. Roy and her union representatives was held concerning Ms. Roy's supervisory role and her work attendance.

[96] According to the further submissions made by TELUS on February 19, 2016, Ms. Roy was offered a severance package on January 31, 2013.

[97] On May 31, 2013, TELUS met with Ms. Roy again to advise her that she was being permanently removed from the supervisory position. According to TELUS's further submissions, Ms. Roy was given two options: a demotion, or separation from the company. A refusal to choose between the two would lead to the termination of her employment.

[98] Ms. Roy went on sick leave starting on June 2. TELUS terminated her employment on June 7, 2013. An arbitral award has already been issued; the arbitrator did not uphold the grievance against Ms. Roy's termination. Ms. Roy's union is challenging the arbitrator's finding before the courts.

[99] The Board expresses no opinion as to whether or not TELUS had just and sufficient cause to terminate Ms. Roy's employment. It is not for the Board to carry out such an analysis. The issue was considered by the grievance arbitrator who dealt with Ms. Roy's three grievances.

[100] In any event, given the context, Ms. Roy did not satisfy the Board that her harassment complaint was, in whole or in part, a factor in TELUS's decision to terminate her employment on June 7, 2013.

[101] Rather, the context suggests that the termination of her employment was a *fait accompli* when Ms. Roy failed to choose one of the two options offered. Additionally, the termination of her employment was the final step in a long period of progressive discipline.

[102] The harassment complaint therefore did not affect TELUS's decision to terminate Ms. Roy's employment.

[103] For the foregoing reasons, the Board dismisses the complaint in this matter.

Translation

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Graham J. Clarke
Vice-Chairperson