Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Maria Antonia Jaime,

complainant,

and

CanJet Airlines, a division of I.M.P. Group Limited,

respondent.

Board File: 30483-C
Neutral Citation: 2017 CIRB **864**
December 6, 2017

The Canada Industrial Relations Board (the Board) was composed of Ms. Annie G. Berthiaume, Vice-Chairperson, sitting alone pursuant to section 156(1) of the *Canada Labour Code (Part II–Occupational Health and Safety)* (the *Code*). Hearings were held on August 9, 10 and 11, 2016, November 15, 16 and 17, 2016, and December 14, 2016.

Appearances

Ms. Dagmar Yaasi Sampayo Jaime, for Ms. Maria Antonia Jaime;
Ms. Cristina E. Firmini, for CanJet Airlines, a division of I.M.P. Group Limited.

I. Overview and Proceedings Before the Board

[1] The Board was seized of a complaint alleging violation of section 147 of the *Code*, initially filed on June 3, 2014, by Ms. Maria Antonia Jaime (the complainant or Ms. Jaime) pursuant to section 133 of the *Code*.

[2] In essence, the complainant alleges that her employer, CanJet Airlines, a division of I.M.P. Group Limited (CanJet or the employer), took reprisals against her in various ways, to the extent of dismissing her, because she filed two complaints of workplace violence and harassment with her employer.

[3] The Board heard five witnesses during the hearings. At the beginning of the hearings, the complainant asked the Board to be represented by her daughter, Ms. Dagmar Yaasi Sampayo Jaime, who was initially supposed to testify. This request was granted. Thus, the complainant and her son, Mr. Dugal Nahuel Sampayo Jaime, testified in support of the complaint. Ms. Kate Laing, Manager of Human Resources and Health and Safety at CanJet, along with Ms. Kate Hopfner, Legal Counsel with the parent company, I.M.P. Group Limited (I.M.P.), and Mr. Rob Burns, Vice-President of Human Resources, I.M.P., testified for CanJet.

[4] Before the hearing, the Board and the parties communicated several times to clarify the nature of the complainant's allegations. On June 5, 2014, the Board's Regional Director (Registrar) for the Eastern Canada Region asked the complainant in writing to provide additional information in support of her allegations, namely, a description of the alleged reprisals taken against her in relation to her exercising a right under Part II of the *Code*, and the steps taken by CanJet's occupational health and safety committee or her union to have Part II of the *Code* enforced.

[5] On June 16, 2014, the complainant filed a much more comprehensive amended complaint, but did not provide the details requested by the Board. Thus, on July 4, 2014, CanJet filed a motion for particulars in order to determine what disciplinary action had been taken against the complainant and which rights pursuant to section 147 of the *Code* she considered she had exercised at the time this action was taken. CanJet also asked to have the file held in abeyance given the related active files before other tribunals, namely, the Commission de la santé et de la sécurité au travail (CSST) (now part of the Commission des normes, de l'équité, de la santé et de la sécurité du travail) and the Canadian Human Rights Commission. The complainant consented to the request to place her file in abeyance. On that basis, the present file was placed in abeyance until March 2015.

[6] In the interim, on January 15, 2015, the complainant nonetheless filed some additional explanations with the Board concerning the merits of her complaint. On March 5, 2015, the Board acknowledged the complainant's wish to reactivate the file and established new time limits for filing the missing pleadings. CanJet's response was filed on April 10, 2015, and the complainant's reply, on April 24, 2015.

[7] In light of the parties' submissions mentioning the related active files, the Board requested more information on June 18, 2015, regarding the status of the matters before the other administrative tribunals. To this end, a case management teleconference (CMT) was held with

the parties on July 16, 2015. At this CMT, the parties were asked to provide information and documents confirming the status of several other pending proceedings concerning some of the same circumstances as in this complaint. Moreover, the Board asked the parties to file submissions as to whether or not the Board should exercise its discretion under section 16(l.1) of the *Canada Labour Code (Part I–Industrial Relations)* (Part I of the *Code*) to defer its decision in this complaint. The Board also asked the parties to file submissions on the impact the other proceedings would have on how to proceed in this complaint or on its merits.

[8] The complainant filed the requested documents on July 30, 2015, while CanJet filed its submissions on August 12, 2015.

[9] On September 25, 2015, the Board issued a letter decision (*Jaime*, 2015 CIRB LD 3500) in which it refused to exercise its discretion to defer deciding this matter pursuant to section 16(l.1) of Part I of the *Code*. Continuing its consideration of the complaint, and before requesting more information, the Board provided the following explanation:

> At the time of the CMT, the parties had already filed their submissions on the merits of the complaint, with the complainant's reply having been filed on April 14, 2015. CanJet Airlines, a division of I.M.P. Group Limited (the employer) noted, however, in correspondence to the Board dated May 4, 2015, that it disputed the facts set out in the reply but was awaiting directions from the Board as to whether or not further submissions may be requested.
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> The Board must now determine, in light of that correspondence indicating that there are still factual issues in dispute, whether it should permit additional written submissions from the parties at this time, to address some of those facts in dispute, or whether an oral hearing may be required. The Board is also mindful of the fact that oral hearings require an additional expenditure of resources and wishes to find the most efficient and expedient manner of proceeding with this matter. Moreover, because of the other proceedings that remain outstanding, the Board wishes to limit the nature and extent of the issues to be determined by this Board to those appropriately covered by this complaint under sections 133 and 147 of Part II of the *Code*, so as to avoid any unnecessary overlap in evidence and findings to be made by the adjudicators on the matters filed in other fora.
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> (page 2)

[10] The Board decided to ask the parties to file additional submissions, limiting their scope to CanJet's conduct that is alleged to constitute reprisals, and submissions on the link between any alleged conduct by CanJet and the fact that the complainant raised safety concerns, such that CanJet's conduct constitutes reprisals. On October 14, 2015, CanJet responded to the Board's two requests, and the complainant responded on November 18, 2015. In a letter dated December 11, 2015, having considered the parties' written submissions, the Board determined that a hearing was necessary to decide the complaint.

[11] The Board has reviewed the extensive documentation filed in support of the complaint and wishes to emphasize that it will not summarize all of the allegations against CanJet, as they are not all relevant to the analysis it must perform in the instant case. Although the evidence filed by the parties and all of the testimony given have been considered in their entirety, the Board will not deal with each document produced at the hearings; it will simply summarize the essential facts of the relevant allegations for the purpose of its analysis by referring to the testimony.

[12] After having considered all of the evidence on file, the testimony heard, and the parties' final submissions, the Board concludes that no reprisals were taken against Ms. Jaime as a result of her raising concerns under Part II of the *Code*. Consequently, the Board dismisses Ms. Jaime's complaint. These are the reasons for the Board's decision.

II. Facts and Testimonies

A. The Parties

[13] The complainant began working for CanJet as a seasonal flight attendant on October 9, 2012.

[14] CanJet was an airline company and subsidiary of I.M.P., which carried on some of its business in Montréal. At the time, CanJet operated a fleet of aircraft that was used for chartered flights to the Caribbean and other popular vacation destinations. To serve these routes during the peak travel season (November/December to April/May), CanJet employed seasonal flight attendants. These seasonal flight attendants were systematically laid off at the end of the winter travel season. The Canadian Union of Public Employees represented the flight attendants under a certification order issued by the Board (Board Order no. 9067-U). CanJet's operations ceased in January 2016.

B. The Incident Giving Rise to the Complaint

[15] After working her first season for CanJet, the complainant was called back to work for a season beginning October 27, 2013, and ending April 30, 2014. She started that season by taking the recurring mandatory training.

[16] On the training days of October 29 and 30, 2013, the complainant was hugged tightly by a colleague. Qualifying the incident as painful, unwanted and inappropriate, the complainant sent an email to CanJet's Human Resources (HR) on November 2, 2013, informing it of an injury that occurred at work in the context of an assault. She added that she might be unable to work for

the duration of an entire flight. This email followed a failed attempt to report the incident on the company's intranet site on October 30, 2013.

[17] The complainant's email was quickly addressed by CanJet following the procedures set out in I.M.P.'s policy on the prevention of harassment and discrimination (the policy). At the hearings, Mr. Burns and Ms. Hopfner explained that there were two procedures possible when a complaint was likely to lead to the application of the policy. A complaint filed with the HR of an I.M.P. subsidiary would lead to informal proceedings and would be dealt with locally. Conversely, the formal procedure would be followed if the complaint was filed with I.M.P.'s corporate HR, if an official investigation was explicitly requested, if it was a second complaint concerning the same incident, or if there was a possible conflict of interest. The formal procedure implied the appointment of investigators, interviews with witnesses and persons involved entitled to the presence of a union representative, signed depositions and the preparation of a report. Ms. Hopfner confirmed that the policy was consistent with the applicable regulations and legislation. The relevant sections of the policy state as follows:

> *Informal Complaint Procedure*
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> Individuals who experience workplace harassment or discrimination and who have been unsuccessful in dealing directly with the harasser, or who feel that a direct approach in dealing with the issue is inappropriate, may choose to have the matter dealt with on an informal basis with the assistance of others. Proceeding informally may readily identify the issue and produce a quick and simple solution without having to engage in a full investigation.
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> No written complaint is required to commence the informal procedure. Complaints may be brought to the attention of your supervisor, to human resources, or to any other member of management. Once notified, a representative of IMP will commence an investigation. The options available to resolve the matter under this informal procedure are numerous and will vary depending on the nature of the complaint. Examples of informal actions may include, but are not limited to, advice to the complainant, investigation, letter to the alleged harasser, meeting with the alleged harasser, etc.
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> *Filing a Formal Complaint*
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> All complaints requesting or requiring formal investigation must be forwarded in writing to local human resources. Details of the incident(s), together with any supporting evidence, should be included. Upon receipt of a complaint, an interview will be scheduled with the individual to discuss and clarify the incident(s). The alleged harasser and Corporate Human Resources will be notified in writing by local Human Resources of the complaint.
>
> The investigation will be conducted as confidentially as possible. The investigation will usually include a review of the written complaint, interviewing the complainant, the harasser and any witnesses or other relevant individuals. The employee who made the complaint and the person accused of harassment will be advised of the outcome of the investigation.

[18] Between November 5 and 13, 2013, Ms. Laura Armes, Manager of HR at CanJet at the time, and Mr. Brian Gill, Cabin Services Supervisor at CanJet, took charge of the complaint and dealt with it through the informal procedure. The complainant and her colleague were thereby able to give their side of the story, and five potential witnesses were also interviewed.

C. Process Followed to Investigate the Complaint of November 2, 2013, and for the Complainant's Return to Work

[19] On November 5, 2013, a few days after the incident, the complainant saw a physician for a health assessment. Following this appointment, Ms. Jaime was declared partially disabled for two weeks as a result of functional limitations. The next day, CanJet established a return-to-work plan with modified duties from November 8 to 18, 2013. During her testimony, Ms. Laing, who sat on CanJet's occupational health and safety committee, explained that a position greeting passengers at the airport had already been created to allow flight attendants with functional limitations to perform modified duties. She explained that flight attendants who have functional limitations cannot perform their usual duties for safety reasons and that the greeter position had been created as a result. That said, the complainant saw a physician again on November 7, 2013, before her return to work, and she was declared totally disabled until November 13, 2013.

[20] On November 11, 2013, the complainant saw a physiotherapist at her employer's request. Ms. Laing testified that CanJet systematically asks employees with a disability to meet with an independent physician and physiotherapist to assess functional limitations and determine whether it is possible to return to work safely. The complainant explained she felt that CanJet should have respected her period of complete rest, given her total disability. She stated that she aggravated her injuries by doing the recommended exercises. She added that she was not reimbursed for the costs incurred and that an employee of the clinic threatened her with dismissal if she failed to comply with the treatment requirements; this employee allegedly stated that she was acting on CanJet's instructions.

[21] On November 17, 2013, Ms. Paige Howell, HR Coordinator at CanJet, completed the complainant's application for benefits and submitted it to the CSST. The application was initially denied on the basis that the complainant did not have a work-related injury. At the same time, Ms. Laing sought the services of Manulife. She explained that Manulife is the subcontractor that provides absence and disability case management services to I.M.P. Ms. Laing stated that all disability files were submitted to Manulife. She specified that the files of all employees absent

for more than seven days had to go through Manulife and that CanJet was not involved in processing the file, nor did it have the power to give instructions on how to decide claims. Ms. Laing explained that the complainant's situation was particular: because the claim for CSST benefits had been denied, the complainant's absence could not be covered under any of CanJet's usual categories. Thus, Manulife made it possible to obtain the approval needed to justify the absence.

[22] The complainant testified that Manulife was not at all involved in her compensation and that its role was rather to monitor her, in particular, to check whether she had another job. She stated that a Manulife employee threatened that she would be dismissed if she had another job or if she did not complete the procedure-related requirements. In this regard, she lists the obligations to periodically see a physician, to have medical forms completed, and to do physiotherapy. The complainant specified that she essentially needed to rest, a need she alleges was not respected. She also said that she had to pay fees for physiotherapy and medical forms.

[23] On November 14, 2013, the complainant returned to work in a greeter capacity at passenger services. The complainant worked from 5:30 a.m. to 8:00 a.m., in keeping with the schedule set out in the initial return-to-work plan. She explained that she did not feel safe going to work, because it was still night time when she arrived there. She also submitted that the duties were not adapted to her physical condition, particularly because she had to stand, which caused her intense pain. The evidence heard demonstrates that she was uneasy about this schedule because of the very early morning hours and that she had difficulty putting on her uniform. Ms. Laing said that she was informed of the complainant's issues. She explained that the schedules for that position were established based on flight traffic, essentially early in the morning, and that the position was only available on an *ad hoc* basis, according to operational needs. In parallel, the complainant testified that an administrative assistant position had been posted for the Montréal offices. She stated that this work should have been assigned to her to respect her functional limitations. Ms. Laing explained that the position was, in fact, a non-unionized position and that the positions posted were not filled by employees with modified duties, even though these employees were obviously free to apply. The complainant did not submit an application for this position.

[24] In a letter dated November 14, 2013, Ms. Jaime was notified that CanJet's investigation into her complaint of November 2, 2013, had not concluded that the actions alleged against her

colleague were inappropriate or constituted harassment, given that these allegations were not corroborated.

[25] On November 15, 2013, the complainant was declared totally disabled until December 2, 2013. On November 28, 2013, CanJet established a new return-to-work plan with modified duties which included hours of work on December 2, 3 and 5, 2013.

[26] The complainant complied with this return-to-work plan by performing the planned greeter duties. As such, she worked early in the mornings of December 2, from 6:00 a.m. to 9:00 a.m., December 3, from 3:45 a.m. to 6:45 a.m., and December 5, from 5:35 a.m. to 8:35 a.m. No other work period was assigned to her afterward, even though her physician renewed her period of partial disability with functional limitations on December 6 and 18, 2013. Ms. Jaime testified that she was able to work. Ms. Laing indicated, on the contrary, that no work was assigned to the complainant during this period because she said that she was unable to work. She also stated that the complainant did not always complete her hours and that she said at certain times that she no longer felt able to continue because the duties were not adapted to her functional limitations. Moreover, the complainant expressed her fear of encountering her colleague after seeing him at the airport. Ms. Laing explained that the complainant never requested other hours and that CanJet had simply acknowledged the fact that she claimed she was unable to work. This situation allegedly ended on January 7, 2014, when the complainant's physician again declared her on total disability from January 6 to February 26, 2014.

[27] The complainant explained that she received flowers on December 8, 2013, accompanied by a receipt with initials corresponding to either those of her colleague or those of her place of residence. Previously, she had also received a message from her colleague, asking about her health and apologizing if he had caused her an injury. Fearing another incident, the complainant decided to notify her employer of these communications before returning to work. Subsequently, Ms. Laing called the colleague in question on February 3, 2014, to discuss the flowers sent. Ms. Laing was unable to conclude that the colleague had sent them or that the message was consistent with harassment.

[28] On January 24, 2014, the complainant filed an application for review with the CSST challenging the initial refusal of December 5, 2013. On February 28, 2014, as part of the review proceedings, Ms. Laing provided some information to the CSST on CanJet's behalf. She indicated that CanJet had concerns particularly stemming from the fact that the complainant had had two traffic accidents in the spring of 2013. She pointed out the probability that these

accidents had been contributing factors, capable of diminishing CanJet's liability for the complainant's injuries if the application for review was allowed. Ms. Laing told the Board that, given the complainant's allegations, it was CanJet's usual practice to provide such information in the CSST files.

D. Process Followed to Investigate the Complaint of February 4, 2014, and for the Complainant's Return to Work

[29] On February 4, 2014, the complainant filed a second complaint with CanJet against her colleague—a complaint she allegedly first tried to file on January 24 or 26, 2014. This complaint was allegedly made from a computer in the crew room. The complainant testified that the computer system did not work from her home, because it was immediately blocked by CanJet after she reported the incident in November 2013, which Ms. Laing denied. The complaint essentially reiterated the same allegations as those in the initial complaint, but added certain facts and explicitly mentioned sexual harassment. The complainant testified that she amended the complaint slightly, knowing that the same complaint could not be investigated twice. After Ms. Laing received the complaint, it was treated as a formal complaint by I.M.P.'s HR department.

[30] Ms. Hopfner and Ms. Alyson Fromm, Manager of HR at I.M.P.'s Aerostructures Division, were assigned to investigate. Mr. Burns explained during his testimony that the appointments of the investigators had been based on the usual criteria: training, expertise, availability and, to avoid any conflicts of interest, the fact of not working for the I.M.P. subsidiary involved in the complaint. On March 5, 2014, the complainant had the opportunity to give her side of the story during a meeting that lasted about seven hours. Ms. Jaime allegedly refused to be represented by her union at this meeting. After making certain changes to the typed notes of her statement, the complainant signed the statement. She testified that she was only permitted to take one ten-minute break during the meeting, which she felt was unusual. Ms. Hopfner pointed out, however, that the complainant had not requested a break, and on the contrary, had wanted to end the meeting as quickly as possible. She also indicated that several witnesses had to be interviewed over a short period, given that the investigators had traveled from Halifax to Montréal. Ms. Hopfner added that the complainant had not made any comments on or expressed any discomfort with the proceedings at the time.

[31] Other meetings were held with the colleague named in the complaint and 14 witnesses on March 5, 6, 7, 10 and 11, 2014. The witnesses included, among others, those identified by

the complainant. The complainant also submitted additional comments and documents several times to provide more information about her allegations until the investigation was completed. Ms. Hopfner explained in detail that she had followed and respected the procedure for investigating and assessing allegations in harassment complaints.

[32] The Board notes that in the end, Manulife validated the disability periods from November 4, 2013, to February 25, 2014, concluding that a return to work with modified duties was possible beginning on February 26, 2014. The complainant's treating physician had also confirmed the complainant's ability to return to work on February 26, 2014, with modified duties and certain limitations.

[33] Thus, the complainant returned to work on February 28, 2014, performing the modified duties that had been assigned to her. In anticipation of her imminent return, Ms. Jaime asked her employer, on February 17, 2014, to give her a written guarantee indicating that her colleague had been advised not to be in contact with her other than in the course of their duties. Ms. Laing responded to her that communications between management and an employee were confidential.

[34] Nonetheless, the complainant worked on February 28, March 3 and March 7, 2014, from 10:00 a.m. to 1:00 p.m. Another return-to-work plan dated March 10, 2014, also provided for days of work on March 13 and 14, 2014, also from 10:00 a.m. to 1:00 p.m. For these days, the modified duties consisted of office work, in particular, distributing information bulletins and filing documents. Ms. Laing explained that this work was normally performed by an administrative employee, but that in exceptional circumstances, additional work of this nature could be assigned as modified duties. Ms. Laing explained during her testimony that the complainant had expressed concerns about standing for too long while greeting passengers, which had given her pain. The hours of office work therefore seemed more appropriate and consistent with the limitations imposed by the complainant's physician. The complainant stated during her testimony that she did not understand why she was not assigned more hours doing office work, and Ms. Laing explained that, in general, a unionized employee cannot perform office work, owing to the confidential nature of some activities that this work entailed.

[35] Further, the complainant suggests that she would not have been properly remunerated for the hours worked.

E. The Complainant's Email of March 13, 2014

[36] The complainant explained that on March 7, 2014, she was notified of her colleague's presence during her work hours by a union representative; she therefore hid in the room she was in to avoid any contact. She testified that she was afraid of encountering her colleague again. Thus, on March 13, 2014, the complainant sent an email to CanJet expressing her fear for her safety, particularly since she had also learned that pay stubs containing her address were accessible to everyone in the crew room:

> [O]n Friday, March 7th, my aggressor went to the office and to the crew room.
>
> There was somebody from the Union who asked me to remain with the doors closed where I was working until he left but if this person was not there I would have probably crossed paths with him.
>
> I fear another assault and I am sure the company could do more to ensure my safety.
>
> All the assaults I suffered in the hands of this individual were not preventable, as he never had any excuse or any reason for physical contact. The same can happen in the future if no measures to ensure my safety are taken.
>
> ...
>
> I also noticed that the pay stubs with our addresses are in the crew room and any other flight attendant has access to that very private information. This is a breach of security. No wonder this person was able to have my address and send me flowers to my own home.
>
> Therefore, I would like the company to remove this information from all pay stubs or, at least, from my daughter's (as we share the same home) and my own pay stub.

[37] The complainant worked the next day, completing the return-to-work plan in effect. On March 17, 2014, Mr. Gill responded to her email:

> The Company would like you to know that all employee comments and concerns are acknowledged and reviewed accordingly.
>
> At this present time, there are no modification arrangements that will be made for either of your respective and or particular schedules. You will be notified of any changes should they come about. You may wish to contact HR Health and Safety Manager, Kate Laing should you feel at any time unsafe.
>
> Also, with your pay stub concern, you can always sign up for electronic notice/copy of your pay stub using the secure online system. ...

[38] On March 18, 2014, Ms. Howell wrote to Mr. Gill to determine whether any work was available for the complainant until March 31, 2014. Three or four days of work greeting

passengers were available, but there was no more office work. Ms. Laing explained that requirements necessarily decreased with the end of the season and that there were no more hours to offer afterward.

[39] On March 19, 2014, the complainant sent a medical form to CanJet renewing her work period with modified duties following a request from Ms. Laing. The physician specified, however, that she could only perform office duties, for a period of six weeks.

[40] Afterward, the complainant was not assigned any more hours of work until the end of her contract on April 30, 2014. The union did not file any grievances against the work schedule on the complainant's behalf. On April 1, 2014, the complainant and Ms. Howell exchanged emails about the lack of office work hours, as follows:

> Hi Maria,
>
> I hope you are doing well!
>
> I just wanted to let you know that I realize your doctor has indicated that you can only work 'office duties' and unfortunately we do not have any office work at this time.
>
> Is your next follow up appointment in 6 weeks or do you have an appointment sooner?
>
> Thank you,
>
> …
>
> Hi Paige,
>
> I do not have any appointment sooner. There is no more office work like the ones I was doing?
>
> …
>
> Hi Maria,
>
> Not at this moment. I will keep in touch with the base and let you know when they have hours.

[41] On April 25, 2014, the complainant was notified of the outcome of the second investigation, which concerned her complaint of February 4, 2014, at a meeting with Mr. Burns, Ms. Kim Maguiness, CanJet's Director of HR at the time, and Ms. Mélissa-Anne Archambault, Union Representative. The meeting was held outside of the workplace, at a hotel. It was at that time that Ms. Jaime was informed that the investigation had been inconclusive and that CanJet therefore found that there had been no harassment. The complainant testified that Mr. Burns

tried to intimidate her, in particular, by advising her to withdraw the complaints or risk losing everything. Mr. Burns denied the comments attributed to him by the complainant and described her as having been upset by the result, which he found understandable. He added that the complainant had made certain personal attacks, questioning his moral values. Mr. Burns explained that he had informed the complainant, and later her colleague, that they could be required to work together again and that CanJet expected them to have a professional relationship. No grievances or complaints concerning the conduct of one or more employer representatives or the outcome of the investigation were filed. CanJet did not take any disciplinary action as a result of the investigation's findings. Given the findings, Ms. Hopfner indicated that she did not have any particular concerns about the fact that the complainant's colleague continues to work for CanJet and that it is up to CanJet's HR to manage the situation.

[42] Ms. Jaime explained in her testimony that she had requested her union's intervention, specifying that the union's refusal to help her had been the subject of a complaint before the Board (*Jaime*, 2015 CIRB LD 3417). She also confirmed, on cross-examination, that she was familiar with the grievance procedure because she had used it in the past.

[43] At the hearing, Ms. Jaime insisted on the importance of a record of employment issued on May 9, 2014. Ms. Jaime considers this document to be incorrect, because it indicates that the first day worked was Monday, February 24, 2014, and the last day worked was March 14, 2014. According to the complainant, this information is incorrect and is what made her realize that her employer was taking reprisals against her.

F. Recall to Work for the 2014–15 Season

[44] In August 2014, CanJet proceeded with its usual recall of seasonal employees previously laid off in the spring. On August 25, 2014, a recall letter for the 2014–15 season was addressed to the complainant. The previous year, the recall letter was dated August 1, 2013. Ms. Hopfner testified that a letter was normally sent to laid-off employees before the recall letter was sent. However, she was unable to say whether such a letter had been sent in the summer of 2014. On September 8, 2014, FedEx issued a receipt confirming the delivery order on August 26, 2014, and that the letter had been delivered on September 4, 2014, to Ms. Jaime's last known address, but had not been received. Another receipt confirming the return of CanJet's letter was issued on October 6, 2014, following another unsuccessful delivery attempt on October 2, 2014. The complainant indicated that she was in Argentina for family reasons from August 20 to October 6, 2014, but that she had not informed CanJet of this. She

explained that she had asked her son to take care of her mail. He stated that, at that time, he received another registered letter, unrelated to the present file, for his mother, and that he told her about it. The complainant also indicated that on August 26, 2014, she had asked CanJet to contact her through her counsel, in response to an email from the employer on August 25, 2014, concerning one of the complainant's pending files before an administrative tribunal and requiring her presence for an independent medical assessment on August 29, 2014. The complainant submits that she was never informed of CanJet's correspondence and states that, at any rate, she was on disability status and could not have returned to work.

[45] CanJet's recall process is set out in the collective agreement:

> **ARTICLE 7: LAY-OFF & RECALL**
>
> …
>
> 7.03
>
> The Company shall notify Employees of recall, in order of seniority, by registered mail to the Employee's home address. Employees must respond by telephone to the contact indicated in the letter of recall with five (5) business days of receipt of the letter of recall. It is the responsibility of the Employee to notify the Company of any change of address. Employees that do not respond to the letter of recall shall be considered to have resigned, and shall lose all seniority rights.

[46] Ms. Laing explained that CanJet's employees were well aware of the recall procedure and had to ensure that their correct address was on file in case of a recall. Having failed to respond within the time limits established in the collective agreement, the complainant was considered to have resigned. Ms. Laing indicated that the union had endorsed this procedure, no grievance was filed on the complainant's behalf, and the complainant did not raise any errors in the recall procedure. Furthermore, Ms. Laing explained that the union is notified through the seniority list when an employee does not respond to the recall. Ms. Laing added that grievances had been filed in the past by the union when employees lost their jobs in connection with the recall procedure. However, the requirement to respond within five days has always been upheld.

[47] On July 28, 2016, the Tribunal administratif du travail (TAT) overturned a decision of the Commission des lésions professionnelles (now part of the TAT) in favour of the complainant, dated May 14, 2015.

III. Positions of the Parties

A. The Complainant

[48] The complainant alleges that various forms of reprisals were taken against her after she exercised her rights under Part II of the *Code*. The alleged reprisals can be divided essentially into two periods. The first wave of alleged reprisals followed the filing of the first harassment complaint on November 2, 2013. The second wave of alleged reprisals followed the second harassment complaint, filed on February 4, 2014.

1. Reprisals Following the Complaint of November 2, 2013

[49] The complainant argues that her employer retaliated against her through its procedure for evaluating return-to-work conditions. While she was on total disability from November 7 to 13, 2013, the complainant states that she was obliged to see a physiotherapist on November 11, 2013. She argues that she was not in any condition to return to work and that the evaluation to determine the conditions of her return was premature. In general, she alleges that she was not informed about the nature of the physiotherapy assessment, she injured herself while performing the prescribed exercises, she was not reimbursed for the fees and transportation costs paid, and she was threatened with dismissal by a clinic employee if she did not comply with the requirements. She considers that these factors constitute reprisals and claims that the forced consultation led to a relapse with financial consequences, without specifying their nature. According to the complainant, by ignoring the treating physician's recommendations and by not waiting for the medical document confirming that she might be able to return to work, CanJet took a punitive approach that can be equated to reprisals.

[50] The complainant also alleges that CanJet involved Manulife solely to intimidate her. In this regard, she claims that she received threats of dismissal from a Manulife employee in connection with a duty to comply with requests. She adds that Manulife's involvement delayed her recovery because physiotherapy treatments were imposed on her and because she had to have various additional medical forms and certificates completed. She explains that the costs incurred in responding to Manulife's requests were never reimbursed to her. In her view, these various factors constitute reprisals pursuant to section 147 of the *Code*.

[51] The complainant states that her employer forced her to work on November 14, 2013, in the time between the end of her full disability period on November 13, 2013, and her medical appointment of November 15, 2013. She explains that she reported to work, but was quickly

sent home because she was unable to work. According to her, the imposed return to work worsened her health.

[52] It was also on November 14, 2013, according to the complainant's allegation, that she stopped having access to CanJet's intranet, specifically, her schedules and the calendar. She considers that this loss of access confirms that she was already no longer considered an employee at the time, and she finds that this constitutes a reprisal.

[53] Similarly, the complainant alleges that she was removed from the list of employees hired for 2013–14, thus depriving her of medical insurance beginning on October 23, 2013. She is of the view that this also constitutes a reprisal for the filing of her harassment complaint. She adds that she spent some of her own money to pay for prescription medication, whereas she would normally have benefitted from insurance coverage.

[54] Lastly, the complainant also alleges that no work hours were assigned to her from December 6, 2013, to her return from total disability on January 6, 2014, even though she had indicated that she was available and able to perform modified work. In her view, the fact that she was not assigned any work hours is also related to the filing of her complaint and violates section 147 of the *Code.*

2. Reprisals Following the Complaint of February 4, 2014

[55] The second series of alleged acts of reprisals followed the second harassment complaint filed on February 4, 2014, and the complainant's return to work on February 28, 2014.

[56] The complainant alleges that unspecified monetary penalties were imposed on her because of CanJet's submissions to the CSST on February 28, 2014. She considers that CanJet hid certain details and submitted unfounded information to the CSST, such as information about her traffic accidents. She is of the view that the CSST's denial was caused by these punitive submissions which constitute reprisals.

[57] The complainant explains that she was not assigned any work hours after she sent her March 13, 2014, email. In this email, she sought CanJet's intervention to take steps to ensure her safety and informed the employer of what she called a "breach of security," namely, the presence of her pay stubs in the crew room. This is the basis on which she considers she was laid off on March 14, 2014, following her last day of paid work. The complainant argued, for the first time at the time of the submissions, that this email could constitute an "implicit" (translation)

refusal to work within the meaning of section 128 of the *Code*. In this regard, she argues that CanJet did not investigate or seek to establish appropriate safety measures. She considers that she had reasonable grounds to believe that a danger existed, given her fear of a new assault. Ms. Jaime adds that she was laid off without written notice, without notification to the union, and without receiving her two weeks' notice. She argues that there is no evidence to show that no office hours were available after April 1, 2014. With regard to the accessibility of her pay stub, the complainant argues that the situation shows that the employer never took her harassment complaint seriously, and consequently, it endangered her safety.

[58] More generally, the complainant argues that CanJet disturbed her constantly during her prescribed sick leave with frequent and lengthy telephone calls. She considers these calls to be abusive and to constitute a reprisal, and she believes that she would have healed more quickly without these interruptions.

[59] The complainant also argues that the complaint investigation process was conducted in an unusual manner. In this regard, she refers, among other things, to her questioning on March 5, 2014, conducted as part of this investigation, which allegedly lasted seven hours and was interrupted only once for a ten-minute break. She also argues that Ms. Hopfner lied to her about her role, when she informed her, in English, that she was acting as "counsel." Ms. Jaime alleges that Ms. Hopfner led her to believe that she was only acting as counsel, not as "legal counsel," and as a result, Ms. Jaime explains she spoke to her as though she was confiding in a psychologist. She alleges that the investigation outcome, provided to her on April 25, 2014, could have been sent in the usual manner, by email or mail, but CanJet decided instead to hold a meeting with Mr. Burns, CanJet's HR Director and a union representative solely to intimidate her. In this regard, she alleges that Mr. Burns threatened her, telling her she would lose her job if she continued to file complaints, and forced her to continue working with her colleague despite her fears for her safety. Moreover, she adds that she was not paid for that day.

[60] The complainant claims that she was paid incorrectly for the 18 days of modified work. She states that she should have been paid for seven hours per work day, regardless of the number of hours actually worked. According to her, this is a result of her filing her harassment complaint.

[61] This complaint was filed on June 3, 2014, and the complainant alleges that the exercise of her rights before the Board and her second harassment complaint filed in February 2014 led to what she describes as her dismissal in August 2014. She argues that she never received the recall letter for the 2014–15 season, even though her son was asked to pick up her mail during

her stay in Argentina. She states that not only did she comply with the recall process since her address had remained unchanged, but also the collective agreement does not state that the return of a recall letter to CanJet results in the loss of employment, which would then be an incorrect interpretation. She argues that she was still "covered" (translation) by the CSST and that CanJet had to wait for her injuries to be consolidated before she could be reinstated in her position.

[62] Concerning the timeliness issue raised by CanJet, the complainant argues that the employer created two parallel situations that prevented her from being informed of the evidence of section 147 violations before May 9, 2014. Essentially, she indicates that CanJet initiated various policies and procedures relating to harassment complaints and injuries in the workplace, suggesting that she was still employed and the employer was handling the situation. At the same time, CanJet removed her from the schedule when she could perform modified work, deprived her of her insurance, provided incorrect information to the CSST and laid her off without notice before the end of her contract. The complainant explains that she learned about the evidence of the violation of her rights after May 9, 2014, when she received her record of employment indicating a period of work from February 24 to March 14, 2014, whereas she argues that she was hired for the period from October 25, 2013, to April 30, 2014. According to her, the information on the record of employment is, therefore, incorrect. She adds that as a consequence of this, she was deprived of her right to employment insurance, because she only worked 18 days according to the information in the record of employment. Ms. Jaime argues that before May 9, 2014, she was aware of irregularities, but she was unable to identify them as reprisals at the time. Therefore, she believes that her complaint is not untimely.

[63] Lastly, the complainant qualifies as reprisals the fact that CanJet challenged her right to benefits under the *Act Respecting Industrial Accidents and Occupational Diseases* (ARIAOD).

B. CanJet

[64] CanJet first makes preliminary comments on two points of law, namely, the time limit for filing the complaint and the complainant's potential exercise of her right to refuse unsafe work.

[65] CanJet alleges that a large part of the complainant's allegations concerns facts that occurred well beyond the 90-day time limit set out in the *Code*. It argues that the complainant knew or ought to have known of the events that gave rise to the complaint before May 9, 2014, for several reasons. CanJet considers the complainant's assertion that she became aware of

the evidence of the section 147 violations upon receiving her record of employment on May 9, 2014, to be absurd, because this record of employment does not provide any context or new information. CanJet states that the complaint was filed on June 16, 2014, and suggests that only the allegations concerning factors that took place beginning on March 18, 2014, should be addressed. Yet, alternatively, CanJet chose to address the complainant's principal allegations, given the many allegations she raises in the present matter.

[66] Regarding the potential exercise of a right of refusal, CanJet argues that this never took place. It explains that it alluded to it in its submissions of October 13, 2015, solely to ensure that it would not be adversely affected, given the vagueness of the complainant's allegations. It argues that the complainant did not work because of her functional limitations, the type of work available and her request for additional accommodation, which was impossible to grant. In that regard, CanJet argues that the issue arising from the March 13, 2014, letter was specifically treated as an accommodation issue.

[67] On the merits of the complaint, CanJet's position is that there were no reprisals and that no disciplinary action was taken against the complainant. The employer insists that the burden of proof is on the complainant and that she has not discharged her burden or clearly indicated what disciplinary action was taken against her. CanJet states that the exercise of its normal management rights and the application of the usual procedures followed for all employees were simply perceived by the complainant as being of a disciplinary or punitive nature because she disagreed with the final result.

[68] CanJet argues that it took the initial complaint of November 2, 2013, seriously and acted in accordance with its procedures and policies. It explains that the complainant did not submit any evidence to suggest that it had not applied these procedures. CanJet quickly initiated an investigation process in accordance with the applicable policy, temporarily suspended the colleague identified in the complaint for violence in the workplace, and initiated the CSST claim process by completing the required form.

[69] The complainant was also invited to a physiotherapy consultation immediately after the incident, not to punish her, but rather to conduct an assessment and gain some preliminary information about the injury in order to facilitate her return to work. CanJet reminds the Board that all employees, without exception, who are injured at work are subject to the same procedure. CanJet adds that it has no control over the recommended treatment or the

assessment. Moreover, all of these steps were taken before any questions were asked as part of the investigation.

[70] Given that the CSST claim was not accepted initially, CanJet alleges that it continued to support the complainant by accepting her medical documents and getting Manulife involved to try to have the required medical leave recognized. CanJet argues that involving Manulife was an unusual procedure, initiated in this case as a result of the CSST's refusal to cover the disability. With regard to the alleged threats, CanJet explains that it does not have any authority over Manulife, an independent third party.

[71] According to CanJet, the complainant's evidence concerning the hours of work claimed after December 5, 2013, contains inconsistencies. It is unclear whether the complainant was able to work, even though her physician authorized a return to work with modified duties. In that regard, the complainant allegedly stated that she could not perform greeter work for more than 20 minutes, she had difficulty putting on her uniform, she was not comfortable with the work schedule, she had intense pain at that time and she had discussed it with CanJet. CanJet therefore suggests that the Board accept its evidence, which corroborates these factors, specifying that it did not propose any work in December, given these circumstances and the fact that no appropriate duties were available. It explains that it did not take any disciplinary action at all. For this period, CanJet argues that it respected all of the complainant's medical certificates and proposed modified work hours accordingly and further to the complainant's request.

[72] CanJet explains that the CSST is an independent commission that makes its decisions independently with its medical examiners and that it is reasonable for an employer to provide information that may seem relevant. This is a current practice which did not, in any way, seek to target the complainant. More specifically, CanJet argues that it was reasonable to submit information about the complainant's accidents in 2013, because it was not impossible that these accidents had an impact on the costs that the employer might have to assume. CanJet considers that no evidence of reprisals can be inferred from these actions.

[73] CanJet argues that the issue concerning health insurance coverage beginning on October 23, 2013, was connected to re-enrollment documents that the complainant did not submit. The employer points out that this issue dates back prior to the beginning of the 2013–14 season. Thus, there was no interruption of coverage that could constitute a reprisal.

[74] CanJet suggests that the matter of alleged privacy violations had already been submitted through a complaint by Ms. Jaime to the Office of the Privacy Commissioner of Canada and been processed by that office. CanJet explains, however, that the pay stubs for all employees who did not wish to receive payment electronically were available in the crew room. CanJet clearly communicated this option to the complainant in its March 17, 2014, email. CanJet argues that there is no link between the presence of the pay stubs in the crew room and the filing of complaints against her colleague.

[75] CanJet maintains that it also followed its investigation policy for the second complaint, filed in February 2014, and that it did not take any disciplinary action against the complainant as a result of her filing complaints against her colleague. The employer explains that the complainant's allegations that the process was unusual, that is, biased and unfair, are merely the result of a misunderstanding of the process followed. Moreover, CanJet argues that it was reasonable that the complainant's interview would be longer than the others' because she had to provide information about the overall situation. CanJet reminds the Board that it pointed out in its submissions that the complainant did not make any comment in this regard and did not request a break.

[76] With regard to the complainant's allegations that she was threatened by Mr. Burns when he communicated the results of the second investigation on April 25, 2014, CanJet states that Mr. Burns denied this fact and rather, claimed that he had been targeted by offensive comments. The employer adds that the complainant did not exercise her right to cross-examine the witness on this issue. It adds that the fact of telling the complainant that the parties involved had to carry on cannot reasonably be interpreted as a threat.

[77] With regard to the complainant's return to work beginning on February 28, 2014, CanJet considers that it made efforts to offer office work, and thus respond to requests by the complainant who considered that her health and other safety concerns—the fear of encountering her colleague—did not allow her to perform greeter work. The employer finds that it was difficult to fulfil the request for accommodation. Beginning on March 19, 2014, the complainant's medical certificate explicitly specified that office work was the only possible modified work. CanJet adds, however, that such work was no longer available because it was the end of the season. CanJet maintains that there was no layoff and that there were ongoing communications with the complainant at that time, in particular, to see whether she could meet with her physician sooner in order to update her medical certificate and possibly return to work.

Thus, the complainant did not receive any work hours solely because there was no work available to meet her needs. No disciplinary action was taken.

[78] In responding to the allegations concerning the record of employment issued in May 2014, CanJet refers the Board to Employment and Social Development Canada's rules and explains that a record of employment must be issued automatically after an interruption in remuneration of more than seven days and that it only indicates the last day of active work. As such, this cannot be considered a layoff notice, nor is the information incorrect.

[79] CanJet claims that the recall procedure set out in the collective agreement was respected on all points in August 2014. Accordingly, CanJet states that it provided evidence that the process, as accepted by the union, is such that a resignation occurs when a recall letter is unanswered. The employer adds that this letter was sent to the complainant, which clearly shows how it considered that the complainant was still an employee at that time. Moreover, CanJet argues that it is the complainant's responsibility to notify the company if she is unable to respond to the recall. She never contacted CanJet in this regard and no information about the trip was communicated. Moreover, CanJet states that no grievance was filed. CanJet claims, therefore, that it followed its procedure without voluntarily targeting the complainant.

[80] CanJet asks the Board to dismiss the complaint.

IV. Relevant Statutory Provisions

[81] The Board has often described its limited jurisdiction in matters of health and safety, such as, in *Air Canada*, 2007 CIRB 394:

> [60] The only jurisdiction the Board has under Part II of the *Code* is to hear complaints alleging that an employer has punished an employee for exercising the rights spelled out in section 147 of the *Code*. …

[82] The limited jurisdiction under this Part is essentially established in the provisions cited below.

[83] Section 133 applies to complaints arising from disciplinary action taken by an employer. The sections applicable to Ms. Jaime's complaint are the following:

> **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.
>
> …
>
> **(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.

[84] Section 147 of the *Code* prohibits an employer from taking reprisals in specific circumstances:

> **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.

[85] Section 128(1) of the *Code* sets out the conditions for refusing work for health and safety reasons:

> **128 (1)** Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
>
> > **(a)** the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
> >
> > **(b)** a condition exists in the place that constitutes a danger to the employee; or
> >
> > **(c)** the performance of the activity constitutes a danger to the employee or to another employee.

[86] As a prerequisite condition for a section 133 complaint following a refusal of unsafe work, the employee must have complied with section 128(6) of the *Code*, which requires that the employee notify the employer of the circumstances leading to the refusal, without delay:

> **128 (6)** An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1), or who is prevented from acting in accordance with that subsection by subsection (4), shall report the circumstances of the matter to the employer without delay.

V. Analysis and Decision

A. Timeliness Under Section 133(2) of the *Code*

[87] CanJet raises a preliminary objection that a considerable part of Ms. Jaime's complaint does not meet the time limit set out in section 133(2) of the *Code*.

[88] As indicated above, section 133(2) of the *Code* stipulates that a complaint that an employer has acted contrary to section 147 must be made to the Board within 90 days following the date on which the complainant knew or ought to have known of the action or circumstances that gave rise to it. As the employer points out, the Board determines the timeliness of the complaint based on the moment the complainant "knew, or … ought to have known" of the facts on which the complaint is based.

[89] The initial complaint was filed on June 3, 2014. The Board notes that the complainant's many allegations of reprisal arose from actions or circumstances that are spread out over a period beginning on or about November 11, 2013, and ending on or about August 25, 2014.

[90] However, the Board has the authority to extend established time limits for submitting an application under Part II of the *Code*, pursuant to section 156(2) of Part II of the *Code* and section 16(m.1) of Part I of the *Code*, applied jointly. Although section 16(m.1) of Part I of the *Code* confers upon the Board the power to extend the 90-day time limit, this extension is granted only in exceptional circumstances. Moreover, the onus is on the complainant to raise sufficient valid grounds to justify the late filing of her complaint after the established time limit (see *Pinel*, 1999 CIRB 19). In *Kerr*, 2012 CIRB 631, the Board explained the test for exercising this power:

> [21] The Legislator has clearly instructed the Board that labour relations complaints, including those from laypersons, but also from trade unions and employers, must be filed within relatively strict time limits. Indeed, prior to the 1999 amendments made to the *Code*, which included the addition of section 16(*m.1*), the Board had no discretion whatsoever to

extend the time limits for instituting proceedings: *Upper Lakes Shipping Ltd.* v. *Sheehan et al.*, [1979] 1 S.C.R. 902.

[22] The need for a time limit in labour relations matters is not surprising. The Legislator frequently imposes time limits for various legal procedures. Given the adage that "labour relations delayed is labour relations denied," the Legislator, while granting the Board a new discretion in 1999, still maintained the *Code*'s 90-day time limit for filing various labour relations complaints.

[23] The Board takes seriously the need to deal with labour relations complaints in a timely manner. The Board recently commented, in *Torres*, 2010 CIRB 526 (*Torres 526*), how it will examine cases which request an extension of time limits. In *Torres 526*, the complainants filed their complaint six months after the deadline:

> [19] The Board will not automatically relieve a party from compliance with the 90-day time limit for the filing of an unfair labour practice complaint. The Legislator has always emphasized that labour relations matters must be brought to the Board forthwith. Potential respondents are entitled to know whether they need to preserve evidence and otherwise prepare for a complaint under the *Code*.
>
> [20] While it may appear unfair that laypeople need to act quickly in bringing labour relations complaints forward, section 97(2) applies equally to trade unions and employers.
>
> [21] The Board will not exercise its discretion under section 16(*m.1*) so as to render illusory the Legislator's intent to oblige parties to file their labour relations complaints expeditiously.
>
> [22] Nonetheless, the Board will consider extending the time limits in compelling situations, such as if a complainant's health prevented the filing of a timely complaint: *Galarneau*, 2003 CIRB 239. Generally, the Board will consider the length of the delay and the justification for it.

[24] The Federal Court of Appeal, in *Eduardo Buenaventura Jr. et al.* v. *Telecommunications Workers Union (TWU) et al.*, 2012 FCA 69, affirmed the Board's decision not to extend the time limit in *Torres 526:* …

[25] As mentioned in *Torres 526*, besides the fact the *Code* contains a time limit for filing a complaint, opposing parties should be able to know whether they have to preserve their evidence and prepare for a possible labour relations proceeding. Once the 90-day time limit has passed, they should be able to assume that the matter has ended.

[91] To summarize very concisely, the case law establishes that this is a discretionary power used only in compelling circumstances; the Board generally requires evidence of reasons or circumstances that are beyond the complainant's control.

[92] To explain the late filing of her complaint, the complainant argues that she became aware of the evidence of a violation of her rights only after May 9, 2014, when she received a record of employment that reported only one period worked from February 24 to March 14, 2014. She

argues that this record indicates a period of employment from February 24 to March 14, 2014, only, whereas she believed that she was employed by the employer for the entire 2013–14 season. She alleges that CanJet misled her by engaging the procedures linked to her harassment complaints when it considered her to be no longer employed. The complainant acknowledges that she was aware of irregularities before this date, but she was unable at the time to identify them as reprisals pursuant to section 147 of the *Code*.

[93] In support of its position, CanJet argues that the complainant knew or ought to have known of the actions or circumstances giving rise to the complaint before May 9, 2014, for several of the alleged acts of reprisals. It adds that the record of employment does not provide any new information or context to justify the complainant's claim that receiving her record of employment allowed her to learn about the evidence of section 147 violations.

[94] The Board wishes to emphasize the fact that the time limit set out in section 133(2) begins as soon as the complainant knew or ought to have known of the action or circumstances giving rise to the complaint. The time limit does not begin when the complainant becomes aware of evidence of the action or circumstances giving rise to it, as Ms. Jaime argues (*BHP Diamonds Inc., Securecheck and Klemke Mining Corporation*, 2000 CIRB 81). In any event, the Board accepts that it is impossible to infer from the record of employment any information likely to indicate that CanJet did take or could have taken reprisals against the complainant. In this regard, the Board rejects the complainant's arguments. Moreover, the complainant did not raise any compelling reason to justify extending the time limit.

[95] Consequently, the Board is of the view that the complaint is untimely with regard to several allegations of reprisal stemming from the filing of the first harassment complaint of November 2, 2013, as these events occurred outside of the 90-day time limit set out in section 133(2) of the *Code*. In particular, the following allegations of reprisal, which all occurred before March 5, 2014, are untimely:

- All alleged reprisals concerning the procedure for evaluating the conditions for the complainant's return to work in November 2013, including all allegations of reprisals concerning physiotherapy.
- All alleged reprisals concerning Manulife's involvement.
- All alleged reprisals concerning the work assigned to the complainant on November 14, 2013, in the time between the end of her disability period and her medical appointment.

- All alleged reprisals concerning the loss of access to CanJet's intranet as of November 14, 2013.
- All alleged reprisals concerning the complainant's removal from the list of employees hired for the 2013–14 season and the consequences that resulted from this removal in terms of medical insurance and the payment of prescription medication on October 23, 2013.
- All alleged reprisals concerning the fact that the complainant was not assigned any work hours from December 6, 2013, to January 6, 2014, despite her alleged availability.
- All alleged reprisals concerning CanJet's submissions to the CSST on February 28, 2014.

[96] The Board will therefore not deal with the merits of these allegations in its decision.

B. Merits of the Complaint

[97] The Board will now consider the allegations raised in the complaint that are timely because they occurred within the 90-day time limit set out in section 133(2) of the *Code*.

[98] In *Rathgeber*, 2010 CIRB 536, the Board explains how it proceeds when an employee alleges reprisals for having exercised his or her right to refuse to work pursuant to section 128, or for having raised concerns about health and safety:

> [23] The text of section 147, and its heading "Disciplinary Action", confirm the conditions underlying the Board's regime. There must be some form of disciplinary action or retaliation.
>
> [24] In *Tony Aker*, 2009 CIRB 474, the Board described its current Part II jurisdiction and how it applies to two distinct areas. Firstly, the Board examines whether a reprisal took place as a result of a complainant's exercise of the right to refuse unsafe work under section 128 of the *Code*. Section 133(6) of the *Code* creates a reverse onus provision in this specific reprisal situation.
>
> [25] Secondly, the Board also examines alleged reprisals under Part II for other situations described in section 147 which do not involve the right to refuse unsafe work. However, there is no reverse onus provision for this general protection against reprisals.

[99] The Board will apply the approach described in *Rathgeber*, *supra*, in the instant matter.

1. Right to Refuse Unsafe Work

[100] In her submissions, the complainant argued that the email dated March 13, 2014, in which she asked CanJet to take action to ensure her safety following an incident that occurred on March 7, 2014, could constitute a right of refusal pursuant to section 128, and that, consequently, CanJet had to investigate. The Board notes that Ms. Jaime's complaint does not, however, explicitly mention the exercise of the right of refusal pursuant to section 128 of the *Code*. This new allegation was likely raised after CanJet's response to this issue. CanJet challenges the fact that Ms. Jaime validly exercised her right to refuse to work and argues that it alluded to section 128 solely to ensure that it would not be adversely affected, because the complainant's allegations were so vague as to make it difficult to identify the right exercised. The employer argues that a right of refusal was not exercised; rather, it was a request for accommodation which the employer was unable to grant in the circumstances.

[101] The Board agrees that the complainant did not allege that she had exercised her right to refuse to work in the complaint. Even if the complainant had duly alleged a right of refusal pursuant to section 128, which is not the case, the Board does not believe that she expressed or exercised her right of refusal for safety reasons pursuant to section 128 of the *Code*, for the reasons below.

[102] As mentioned above, section 133(6) shifts the burden of proof to CanJet when an employee has duly exercised his or her right to refuse to work under section 128. Therefore, the Board must first determine whether the complainant did, in fact, exercise a right of refusal pursuant to section 128 of the *Code*.

[103] In *Paquin* (1991), 86 di 82 (CLRB no. 896), the Board explains that the reason for refusing to work must first be clearly expressed:

> The Board must therefore conclude that the disciplinary action taken against the complainant was not related to the exercise of his right to refuse to work for reasons of safety and health. As the complainant did not clearly express such reasons, his supervisor believed in good faith that the refusal was not dictated by health considerations. He had therefore not penalized him for his refusal. The Board fully concurs with the views expressed by counsel for the complainant when he argued that an employee does not have to use any "ritualistic words" or magic formula to express his refusal. Our numerous past decisions on this subject are clear in this regard (see in particular *John Charters et al.* (1989), 76 di 188; and 3 CLRBR (2d) 253 (CLRB no. 727), pages 198; and 263). So long as the reason for the refusal is **sufficiently clear**, the Board remains free to interpret this right very broadly and its exercise is fully authorized. However, this rule must never be used to justify the clashes or conflicts of authority or personality that inevitably occur in the work place. As the Board stated in *David Pratt* (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686), the purpose

> of this Part of the *Code* is to ensure that safety and health are never compromised. The perception of apprehended danger may sometimes prove to be incorrect or exaggerated, but if this fear leads an employee to refuse in good faith, then this right, which is fully protected by the *Code*, is exercised legitimately. However, this perception must be expressed, either by word or action, in such a manner that it is, if not accepted (in which case the procedure set out in the *Code* is triggered), then at least clearly conveyed.
>
> (pages 90–91)

[104] The Board notes that not only does Ms. Jaime's complaint fail to mention a refusal to work pursuant to section 128 of the *Code*, but also nothing in her March 13, 2014, email makes reference to a refusal to work, which must be expressed sufficiently clearly. The Board has difficulty accepting that the complainant has implicitly exercised a right of refusal pursuant to section 128, as she suggests. Furthermore, the complainant worked the day after the email was sent. She also requested work hours after this date, and the Board notes that the fact that none were assigned to her afterward until the end of the season on April 30, 2014, constitutes one of the acts of reprisals the complainant alleges. Moreover, CanJet's evidence that the employer handled the email as a request for accommodation is not disputed. Thus, based on these factors, the Board cannot find that the complainant clearly expressed, by word or action, a right of refusal pursuant to section 128 of the *Code*.

2. Protection from Reprisals under Section 147 of the *Code*

[105] The Board must now consider the alleged reprisals under Part II of the *Code* for the other situations described in section 147, which do not involve the right to refuse unsafe work and which concern the allegations against CanJet after March 5, 2014.

[106] In *Aker*, 2009 CIRB 474 and *Paquet*, 2013 CIRB 691, the Board explains that the onus is on complainants to establish that they were penalized or that disciplinary action was taken against them while they were participating in a process under Part II of the *Code* and that a causal link exists between the process initiated and the disciplinary action taken.

[107] Moreover, the case law clearly establishes that an employer's actions that could be construed as disciplinary actions or penalties must be interpreted objectively, not from the complainant's subjective point of view (*Air Canada*, 2012 CIRB LD 2813; and *Leary* v. *Treasury Board (Department of National Defence) et al.*, 2005 PSLRB 35).

[108] In this matter, the parties do not dispute the fact that the complainant did indeed raise safety concerns and that she participated in a process under Part II of the *Code* by filing

complaints of harassment and violence in the workplace, which the employer investigated. The complainant alleges that several various forms of reprisals were taken against her beginning March 5, 2014, including the following:

- The unusual conduct of the investigation beginning March 5, 2014.
- The threats of dismissal Mr. Burns made while communicating the findings of that investigation on April 25, 2014, and the fact that she was not paid for her time during this meeting.
- The fact that CanJet did not assign any hours of work after March 13, 2014, until the end of the season on April 30, 2014, which she describes as a layoff.
- CanJet's frequent and abusive telephone calls during her convalescence.
- The pay errors on the days worked beginning March 5, 2014.
- Her alleged dismissal in August 2014.
- The fact that CanJet disputes her right to benefits under the ARIAOD.

[109] CanJet denies having taken disciplinary action or reprisals against the complainant in any of the ways alleged by the complainant.

[110] The Board must therefore determine whether the employer's conduct amounts to any form of reprisals against the complainant for having raised safety concerns. Section 147 of the *Code* provides four categories of prohibited conduct. The employer cannot:

1. dismiss, suspend, lay off or demote an employee;
2. impose a financial or other penalty on an employee;
3. 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 Part II of the *Code*, have worked; or
4. take any disciplinary action or threaten to take any such action against an employee.

[111] From the outset, the Board is of the view that some of the alleged reprisals do not fit into any of the categories listed.

[112] In *Tanguay* v. *Statistical Survey Operations*, 2005 PSLRB 43, the Public Service Labour Relations Board defined what is understood by "financial or other penalty" within the meaning of section 147 of the *Code*:

> [19] Does the employer's refusal to make the reimbursement constitute a financial or other penalty? Gérard Dion's labour relations dictionary published by Les Presses de l'Université Laval (Québec 1986, 993 pages), defines "penalty" as a [translation] "punishment or award to ensure the performance of an action" or a "punishment established or inflicted by a law or some authority to prevent a prohibited act." "Financial penalty" [peine pécuniaire] is defined in this work as a [TRANSLATION] "monetary penalty imposed on a person who has contravened a by-law or avoided an obligation."
>
> [20] The rationale of section 147 of the *Code* is to ensure compliance with the provisions of Part II without reprisals. Dion (*supra*) defines "reprisals" as follows: [TRANSLATION] "action taken…to inflict a physical, economic or other disadvantage in response to an act carried out by another". Underlying the action, therefore, there must be an intention to harm. It is in this perspective that the PSSRB and the Canada Industrial Relations Board have always exercised their power of intervention.

[113] Consequently, a "financial or other penalty" can be likened to any action taken with the intent of inflicting a disadvantage on an employee. The Board is of the view that this action must be inflicted with the intent to harm.

[114] The Board considers that the allegations concerning the unusual conduct of the investigation beginning March 5, 2014, the alleged abusive telephone calls and the remedies available to the employer regarding the complainant's rights under the ARIAOD do not constitute penalties according the above definition and cannot be described as reprisals pursuant to section 147 of the *Code*. Even if the Board accepted the facts as Ms. Jaime presents them, they are not penalties as such, and the complainant has not produced any objective evidence to establish that CanJet intended to cause harm. The fact that the outcome of the investigation was unsatisfactory for the complainant, that the usual method of communicating such an outcome may not have been followed, which has not been established, and that the legitimacy of the length of questioning is disputed are not in themselves evidence of intent to harm. Regardless, the Board is of the view that CanJet followed the procedure applicable under its policies.

[115] Moreover, the alleged frequent telephone calls CanJet made, even though the evidence establishes rather extensive, legitimate correspondence between the parties, can also not be qualified as a penalty pursuant to section 147 of the *Code*.

[116] Lastly, the fact that CanJet defended its rights and interests before the various administrative bodies dealing with Ms. Jaime's application for compensation also cannot be considered to be a reprisal, because it is a legitimate right of the employer.

[117] The complainant also alleges that there are errors in her pay cheques for the days she worked beginning March 5, 2014, and adds that she was not paid for April 25, 2014. The Board

stresses that it is difficult to properly understand the complainant's allegations on the question of pay errors, given that she provided only vague and incomprehensible testimony on that issue. In general, the complainant seems to argue that she should have been paid seven hours for each day of modified duties she worked. Further, the emails from CanJet assigning work schedules with modified duties indicate that four hours of work would be paid for the three hours per day actually worked. The complainant did not present any evidence in connection with her pay of April 25, 2014. In any event, even if the Board accepts that there were errors in the pay cheques, which has not in any way been established, the Board, after considering the testimonies on this issue, is satisfied that there is no evidence to suggest that CanJet acted with intent and that this amounted to the imposition of a financial penalty.

[118] Therefore, the Board will address only the remaining three alleged reprisals.

[119] The complainant alleges that Mr. Burns threatened her with dismissal when she met with him for a briefing on the outcome of the investigation of her second harassment complaint, on April 25, 2014. She believes that the sole purpose of the meeting with Mr. Burns, the then HR Director and a union representative was to threaten her so that she would stop filing complaints. When she testified, the complainant explained that Mr. Burns advised her to withdraw her complaints or risk losing everything. In her submissions, she expressed herself a little differently, indicating that he told her she would lose her job if she continued to file complaints and that he was forcing her to continue working with her colleague, despite her fears.

[120] Mr. Burns denied uttering threats to the complainant; he explained, rather, that he informed her of the investigation outcome, recognizing that she was upset by the conclusions, and that she made personal and inappropriate attacks against him. He said that he indicated to the complainant that she would likely have to work with her colleague and that CanJet expected their relationship to be professional.

[121] The evidence in this regard is highly contradictory. The Board notes that the complainant did not exercise her right to cross-examine Mr. Burns on his testimony. The Board also notes that neither a grievance nor a complaint was filed at that time, although a union representative attended the meeting and would have witnessed how it unfolded. It is therefore difficult to believe that a threat of dismissal could have been made without any action being taken by the union or Ms. Jaime, against the employer. Given all of these factors, the Board accepts CanJet's evidence on this issue, as Mr. Burns' testimony was candid and honest. The Board

finds, therefore, that the complainant has not discharged her burden with regard to this allegation.

[122] The complainant also alleges that CanJet stopped assigning work hours to her, and that she consequently did not work after March 14, 2014. She believes that this is a direct result of the filing of her harassment complaints and her March 13, 2014, email, in which she requested tighter safety measures, particularly concerning the risk of encountering her alleged assailant. CanJet explained that it dealt with this email as if it were a request for accommodation.

[123] The evidence establishes that, after being on total disability, the complainant started working again as part of a return-to-work plan on February 28, March 3 and March 7, 2014. The return-to-work plan with modified duties was continued and completed on March 13 and 14, 2014. At that time, office duties were assigned to the complainant, even though this type of work was only assigned in exceptional circumstances as modified duties, because it normally went to an administrator. On March 18, 2014, Ms. Laing sent a request to Mr. Gill, Cabin Services Supervisor, for the hours of work available for modified duties until March 31, 2014. At the time, there were only 10 to 15 hours of work available, as a greeter. The next day, Ms. Laing received a medical form limiting the potential assignments under the return-to-work plan to office work for six weeks. CanJet argues that because of the complainant's request for accommodation and the specific limitations imposed by the treating physician, it had not been possible to assign work hours to the complainant. The Board notes that on April 1, 2014, Ms. Laing contacted the complainant again, asking whether a new medical appointment had been scheduled before the expiration of the previous medical form, which could potentially have enabled CanJet to assign work to her. The complainant responded that an appointment had not been scheduled before the expiration of the form, and no subsequent correspondence concerning the assignment of hours appears in the file.

[124] CanJet argues that it was difficult to grant the complainant's request for accommodation, because office work was only assigned for modified duties in exceptional circumstances. Moreover, the employer points out that the complainant was able to do nothing but office work after March 19, 2014, because of the limitations expressly described on her medical form. CanJet argues that there was no work available that corresponded to the complainant's needs and that the end of the season also limited the availability of work hours in specific duties.

[125] The Board is of the view that the evidence corroborates CanJet's explanation for the assignment of work hours after March 14, 2014. The medical form of March 19, 2014, the

emails exchanged concerning the assignment of hours at that time, and the evidence heard demonstrate rather that the possibilities of assigning hours for modified duties were limited by the complainant's fears and preferences, the physician's recommendations and the fact that the season was ending. The witnesses for CanJet were not cross-examined on these points. The Board is of the view that, given these facts, it is unlikely that CanJet deliberately refused assigning work hours to the complainant after March 14, 2014, thereby imposing a penalty on her because she had filed a harassment complaint. Therefore, the Board finds that the complainant was unable to establish that the lack of work hours assigned constitutes a reprisal.

[126] Lastly, the complainant argues that she was dismissed on or about August 25, 2014. At the hearing, CanJet explained the recall procedure set out in the collective agreement and endorsed by the union. In essence, article 7.03 of the collective agreement provides that seasonal employees are recalled by order of seniority through a notification sent by registered mail to their home address. Employees who fail to respond to the recall offer within five days lose their seniority rights and are considered to have resigned. CanJet believes that it complied fully with this procedure, which employees are familiar with, and notes that no grievances were filed. At any rate, the employer argues that the complainant was not personally targeted and that the recall exercise shows that the complainant was still considered to be an employee at that time. CanJet reminds the Board that it was the complainant's responsibility to inform it of a change of mailing address.

[127] The complainant testified that she was in Argentina at the time of the recall letter for the 2014–15 season. She did not notify CanJet of this trip, but she did ask her son to collect her mail and he did not receive anything. The complainant alleges, however, that she asked CanJet to contact her counsel with regard to her compensation file. She notes that, in any event, the collective agreement does not specify that she will lose her job if she does not respond to the recall letter.

[128] The Board is satisfied with CanJet's explanations concerning the application of the recall procedure. The Board finds that the request to communicate through the complainant's counsel concerned only one file pending before an administrative tribunal. Furthermore, the Board notes that Ms. Jaime did not notify CanJet of her trip to Argentina in the email exchange of August 25 and 26, 2014. CanJet obviously did not know the complainant was outside of the country, because it asked her to report for an independent medical examination on August 29, 2014. Thus, although the complainant undoubtedly expected to be recalled to work, the Board finds it

surprising that she did not at least try to notify CanJet of her extended absence or follow up with CanJet as soon as she realized that she had not received the usual recall letter. The Board also notes that a grievance was not filed to that effect. Moreover, the Board does not have the jurisdiction to interpret the collective agreement and it will not second-guess the interpretation accepted by the union and CanJet concerning article 7.03 therein. Thus, the Board is of the view that the complainant has not established that she was dismissed on August 25, 2014, because of the filing of her complaints and finds that no reprisals pursuant to section 147 were taken against her.

[129] The Board understands how the various administrative and legal proceedings instituted after the filing of the harassment complaints and in relation to Ms. Jaime's return to work may have caused feelings of resentment. However, this does not mean that CanJet took reprisals against her for filing these complaints.

[130] For the reasons above, Ms. Jaime's complaint is dismissed.

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Annie G. Berthiaume
Vice-Chairperson