Occupational Health and Safety Tribunal Canada

Date: 2015-04-21
Case No.: 2009-26

Between:

Marie-Eve Plamondon and Geneviève Pagé, Appellants

and

Air Canada, Respondent

Indexed as: *Plamondon and Pagé* v. *Air Canada*

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code*.
Decision:	Appeal dismissed
Decision rendered by:	Mr. Michael McDermott, Appeals Officer
Language of decision:	English
For the appellants:	Mr. James Robbins, Counsel, Cavalluzzo Shilton McIntyre & Cornish LLP
For the respondent:	Ms. Rachelle Henderson, Counsel, Labour & Employment Law, Air Canada
Citation:	2015 OHSTC 8

REASONS

[1] This decision concerns an appeal brought under subsection 129(7) of the *Canada Labour Code* (the Code). The appellants are Ms. Marie-Eve Plamondon and Ms. Geneviève Pagé and the respondent is Air Canada.

Background

[2] The appellants are flight attendants employed by Air Canada. On September 28, 2009, they had flown on duty from Toronto Pearson to Montreal Trudeau on flight number AC412, an Airbus A320 (Fin No. 219). They were scheduled to return to Toronto on the same aircraft. However, having experienced indications of mechanical problems during the decent into Montreal and not being satisfied with the explanations offered, they, together with colleague Mylène Fortier, exercised the right to refuse dangerous work pursuant to section 128 of the Code. The file includes the Air Canada Flight Incident Report form completed jointly by Ms. Fortier and Ms. Plamondon and containing their narrative statement of the events leading to the refusals. The report form, written in French, is dated October 1, 2009. At its conclusion, the report refers to the manager, Ms. Elisabeth Plourde, contacting Transport Canada and to there having been a conference call in which it would appear the flight attendants participated.

[3] The mechanical problems experienced included a smell of smoke in the rear of the aircraft and concerns about the left side over wing exit that a passenger had reported as emitting a loud noise and for which the "slide on" indicator light was on. After landing in Montreal the flight attendants were told that one possible cause for the smell might have been oil leaking into an engine. Alternatives suggested were heating of seat arm rests due to problems with the in-flight entertainment system (IFE) or glue from the cabin carpet heating up. Ms. Plourde, Air Canada's Manager Cabin Crew Performance at Montreal, notes that Mr. Michel Barrette, whom she refers to as the airport director, had endeavoured to reassure the employees that all was well, observing that it was the aircraft's third flight after an overhaul and no mechanical issues had been found after arrival at Montreal.

[4] According to an e-mail report written on September 28, 2009, by Ms. Plourde, she received a call to meet flight 417 at the gate because some flight attendants had exercised their right to refuse. Fight 417 is identified as the return flight to Toronto. Ms. Plourde met the flight attendants there and at around 3:00 p.m. contacted the Canadian Union of Public Employees (CUPE) health and safety representative. A replacement cabin crew was found and the flight departed at approximately 3:25 p.m. The two Toronto based employees were subsequently deadheaded back to Pearson International; the Montreal based employee was placed on standby before being sent home.

[5] Ms. Plourde's e-mail report indicates that she contacted Human Resources and Skills Development Canada (HRSDC, now Employment and Social Development Canada). Eventually, she was in touch with Health and Safety Officer (HSO) Jessica Tran who took some information and then passed the matter to HSO Luc Mayne from Transport

Canada who called Ms. Plourde at approximately 3:50 p.m. Ms. Plourde states in her e-mail report that she "went over the steps" with Mr. Mayne and that "[T]he case was resolved." She makes no mention of other persons taking part in or being present during the call.

[6] In accord with the Occupational Health and Safety Tribunal Canada's (Tribunal) practice, HSO Mayne was advised by the registrar of receipt of the appeal and requested to provide a copy of his report and all other documents relevant to this case. The HSO responded by e-mail on October 9, 2009, saying that he was surprised to receive the request suggesting it was a case of mistaken identity (une erreur de la personne) since he had spoken only with Ms. Plourde on September 28, 2009, at about 3:48 p.m. He stated that she had simply advised him three crew members of flight AC 417 had exercised their right to refuse and had explained the steps taken and that the crew had been replaced with the refusing flight attendants having been reassigned. The HSO said that he had thanked Ms. Plourde for her call and asked that she confirm the conversation by e-mail. The e-mail report from Ms. Plourde cited above was copied to the HSO.

[7] In his response to the registrar HSO Mayne confirms his understanding of the matter as follows:

[my translation]

1. I am not implicated in this investigation, therefore no document to provide to you;
2. I have never spoken to Eve Plamondon (or) Mylène Fortier;
3. In no case did I mention the word "no danger" since I did not make an investigation;
4. As far as I am concerned, the incident was settled between the two parties, CUPE and Air Canada;
5. The law firm's requests are in error and unfounded.

[8] While the above paragraphs summarize the basic factual circumstances of the case, a number of steps were subsequently taken or proposed that need to be recorded here, if only to account for the more than five years that have elapsed since the appeal was first lodged. Initially, plans were made to hold a hearing with possible dates being explored, potential witness lists exchanged, subpoenas requested and the like. Hearing dates were set for November 26 to 29, 2010, in Montreal. On November 15, 2010, counsel for the appellants' wrote to the Tribunal registrar expressing their understanding that there may have been an HSO other than Ms. Tran or Mr. Mayne to whom Ms. Plourde spoke on the telephone on the day of the refusals. Further, that the third HSO may have been the male included in the telephone call participated in by the appellants via speaker phone. Counsel requested "the Tribunal to arrange to have all HSOs who spoke with either Ms. Plourde or the refusing flight attendants available to testify at the hearing of the preliminary issue next week." The Tribunal's response was to issue a subpoena for HSO Tran adding to that previously issued to HSO Mayne but pointing out that a name would be needed before a third summons could be prepared.

[9] On November 16, 2010, the Tribunal registrar was informed that counsel from an outside law firm would be representing Air Canada. On November 17, 2010, an e-mail from counsel for the appellants confirmed his telephone conversation with the registrar's office to the effect that he and counsel for the respondent believed there was "a reasonable chance of resolving it without litigation" and requesting "that the matter be adjourned pending discussions between the parties." The assistant registrar replied to both counsel the same day advising that the scheduled hearing had been adjourned and asking for an update as to the status of their discussions by December 7, 2010.

[10] The parties evidently failed to resolve the matter since the next correspondence on file is a joint letter to Mr. Robbins and Ms. Henderson, respectively for the appellants and the respondent, from the assistant registrar and dated April 19, 2012, some sixteen to seventeen months after notice of the adjournment. That letter refers to hearing dates being offered for October 9 to 12, 2012, with subsequent correspondence settling on three days, October 10 to 12. On October 5, 2012, the registrar received an e-mail from Ms. Henderson, copied to Mr. Robbins, advising that the parties had reached a settlement in this case and requesting a telephone conference call with Appeals Officer McDermott "to discuss the disposition of the appeal."

[11] A telephone conference call with the appeals officer was held on October 9, 2012, resulting in the parties undertaking to prepare submissions and a joint statement of facts. Having received no further correspondence from the parties by the end of the year, I asked the registrar to request an update which was sent on January 7, 2013. The registrar's office sought updates over the next while and on November 17, 2014, received by facsimile a letter from Mr. Robbins, copied to Ms. Henderson, to which was attached a joint statement of facts and submissions seeking to have proposed Minutes of Settlement issued by me as a consent order.

[12] The statement of facts is mainly consonant with the background information outlined above. It clarifies that the return flight to Toronto involved the same aircraft. Ms. Plourde's e-mail of September 28, 2009, had mistakenly indicated that the Airbus A320 leaving Montreal was a downgrade from an Airbus A321. More significantly, with respect to Ms. Plourde's initial telephone call to report the work refusal, the statement describes her contacting HRSDC and speaking "with a man who took the information and advised that he would dispatch the call to the appropriate person. She put her phone on 'speaker phone' and the refusing flight attendants described what happened to the man. He then advised Ms. Plourde that someone would call her back. Neither Ms. Plourde nor the flight attendants know the name of the man".

[13] The statement continues, referring to the telephone call to Ms. Plourde from HSO Tran and to the subsequent call she received from HSO Mayne of Transport Canada. With regard to the latter call it states, "[T]hey had a brief conversation described as follows in the email Ms. Plourde wrote that evening […] 'I received a call from Luc Mayne with who I went over the steps with. The case was resolved.' " The statement draws to an end with a summary of HSO Mayne's e-mail to the registrar of October 9, 2009, emphasizing the brevity of his conversation with Ms. Plourde, questioning his

reference to the flight attendants having been reassigned rather than deadheaded or placed on standby, and contradicting his conclusion that the matter had been settled between the parties. It concludes with: "[I]n fact, there was no settlement between CUPE and Air Canada. There was no subsequent investigation."

[14] The November 17, 2014, statement then turns to submissions leading to a proposal that the draft Minutes of Settlement attached to it should be issued by the appeals officer as a consent order, presumably after having been signed by both parties. In brief, it is argued that the pre-conditions for the application of section 129 of the Code had been met when the investigating manager notified an HSO of a continuing work refusal pursuant to subsection 128(13). This, it is submitted, imposed a mandate on the HSO to investigate and determine whether a danger existed. Further, the HSO's actions and his communications with the employer constituted an implicit finding of "no danger" which, since it was not based on an adequate investigation, should be rescinded. It is stated that "Air Canada does not oppose that request in the circumstances of this case." I will expand below on the submissions along with references to the jurisprudence cited in support of them.

[15] The draft Minutes of Settlement are styled as being between the Air Canada Component of the Canadian Union of Public Employees (CUPE), Appellants and Air Canada. The essence of the submissions detailed in the previous paragraph is captured in certain of the preamble clauses and need not be repeated here. The concluding clauses read as follows:

> WHEREAS Air Canada contests the Appeal on the basis that the HSO did not render a decision within the meaning of s. 129 (7) of the *Code* and that, therefore, Appeals Officer McDermott has no jurisdiction; and
>
> WHEREAS the parties wish to settle the issues giving rise to the Appeal;
>
> NOW THEREFORE the parties agree that:
>
> 1. In the unique circumstances of this case, the HSO rendered a decision within the meaning of s. 129 (7) of the *Code* that a danger did not exist for the three flight attendants involved in the work refusal (the Decision).
>
> 2. The Decision was not based on an investigation within the meaning of s. 129 (1) of the *Code*.
>
> 3. The Decision should be rescinded under s. 146.1 (1) (a) of the *Code*.
>
> [Underlining added]

Faced with the apparent contradictions in the proposal and conscious of the parties' different positions with respect to my jurisdiction, I asked the registrar to request them to provide submissions specific to my jurisdiction to hear this appeal.

Issue

[16] The issue most frequently to be decided when an appeal is brought under subsection 129(7) concerns the validity or otherwise of a finding by an HSO that a danger in the meaning of the Code did not exist. However, as is clear from the above, there is a dispute as to my jurisdiction that turns upon whether or not the HSO made such a finding. That issue must first be determined in the light of the statements and submissions before me.

Submissions of the parties

A) Appellants' submissions

[17] The appellants' submissions include those summarized in paragraph 14 above that are developed and expanded in the written submissions on jurisdiction received on January 19, 2015, in response to my request. Initially, I find it useful to review the arguments under the three categories identified in the earlier submissions, starting with the preconditions for the application of section 129 of the Code. In support of the argument that, once notified by an employer pursuant to subsection 128(13) of a continuing work refusal an HSO is mandated to investigate, the submissions cite the appeals officer's final decision in Eric V. and al. and Correctional Services Canada (OHSTC-09-009, hereinafter cited as *Vandal*) at paragraph 266 as follows:

> That mandate is both simple and clear. The HSO is obliged to investigate and to determine whether a danger exists.

The circumstances of notification of the refusal being made initially to the unnamed HRSDC person are then recapitulated. Later, emphasis is placed on HSO Mayne having referred to the refusing flight attendants being reassigned rather than, in the case of the two Toronto based employees, deadheaded home, and his understanding that there had been a settlement made between CUPE and Air Canada is challenged. Further jurisprudence on the HSO's obligation to investigate is added, this time with reference to a Federal Court of Appeal decision in *Dragseth* v. *Canada (Treasury Board*) [1991] FCJ No. 1074, where in a somewhat incidental footnote on page three the following is stated:

> In any event, s. 129(1) is mandatory. The safety officer is bound to investigate if either employer or employee serves notice under s. 128(8). [Now subsection 128(13)].

[18] The submissions then move to the argument that there was an implicit finding of no danger made in this case, drawing on jurisprudence in *Vandal* and in a related Federal Court decision, *Canada* v. *Vandal* 2010 FC 87. The background to *Vandal* concerns correctional services officers who exercised work refusals when required to escort an inmate they believed to be vulnerable to violent threats to appointments outside the penitentiary without themselves being armed. The HSO conducted what he characterized as a preliminary inquiry and determined that the circumstances of the refusals constituted a normal condition of employment and, according to the record in paragraph 21 of

Vandal, entered on the department's Response to a Refusal to Work in the Case of Danger form, "[Translation] The refusal to work is not authorized under paragraph 128(2)(b).". That paragraph excludes the right to refuse where the presence of danger has been determined and that danger has been found to constitute a normal condition of employment. The HSO stopped his inquiry and withdrew from the case. In a lengthy decision, the appeals officer in *Vandal* determined that the HSO had made an implicit decision that no danger existed and that for all practical purposes he had found that the employees were not in danger. As such, he found that he had jurisdiction to hear an appeal pursuant to subsection 129(7) of the Code.

[19] The appellants argue in effect that the procedural circumstances of the present case are sufficiently similar to those in *Vandal* such that I have jurisdiction to hear their appeal. In the January 19, 2015 submissions, their description of those circumstances is as follows:

> Based on the agreed facts set out in the joint statement of facts and submissions provided by the parties, the implicit decision of no danger is evident from the following:
>
> 1. A work refusal occurred on September 28, 2009, when three flight attendants employed by Air Canada exercised their right to refuse dangerous work. This triggered the processes outlined in section 128 of the CLC.
>
> 2. The work refusal continued leading Air Canada to call HRSDC pursuant to section 128(13) of the CLC and advise of a continuing work refusal.
>
> 3. After the HSOs were called, the work refusal continued.
>
> 4. Despite the continued work refusal, the HSOs made no finding of danger. They made no directions in respect of the circumstances of the work refusal. They treated the matter as if danger did not exist.

[20] Following on from this summary of the circumstances on September 28, 2009, the appellants submit that, "[I]t is well established in case law that an HSO can make an implicit decision and finding of no danger" and that *Vandal* was confirmed in this respect by the Federal Court in *Canada* v. *Vandal* (2010). Further, where an implicit decision of no danger is made it has been held that an appeals officer has jurisdiction to review the decision. With respect to the actions of the HSOs in this case, the appellants argue that they are similar to those described at paragraph 279 of *Vandal*. Lastly, it is submitted that "CUPE's submission that the actions of the HSOs should be characterized as an implicit finding of no danger is unopposed."

[21] With respect to the third category of argument, it is submitted that an appeals officer has jurisdiction to hear an appeal where an HSO's decision is not based on an investigation pursuant to subsection 129(1) of the Code; further, an appeals officer may rescind a decision where the HSO has failed to comply with the mandatory requirement

of the subsection to investigate a work refusal. Case law cited in support of these submissions which, in addition to *Vandal*, also include *Canada* v. *Vandal* 2008 FC 1116 in the Federal Court and Howard Page and Correctional Service Canada, CAO-07-018 by the Tribunal. Paragraphs 28-30 of the former are cited with respect to the argument that an appeals officer has jurisdiction to determine whether an adequate investigation has been conducted and whether an HSO's response amounts to a decision that can be appealed. *Page* is given as an example of a decision being rescinded on the basis of an improperly conducted investigation.

[22] The appellants also argue two other points of more general application, namely that jurisprudence, notably in *Canada* v. *Vandal* (2008) at paragraph 26, provides that the Code must be interpreted liberally; and, that an appeals officer's role being a *de novo* proceeding, as commented on in the Federal Court of Appeal decision in *Martin* v. *Canada* 2005 FCA 156, at paragraph 28, my ability to hear an appeal of a decision based on an inadequate investigation is not dependent on the adequacy of lack thereof of the HSO's process.

B) Respondent's Submissions

[23] The respondent made no separate submissions. I understand that it had involvement in the drafting of the joint statement of facts and submissions provided to the Tribunal on November 17, 2014, as well as the proposed, unsigned Minutes of Settlement attached to that document. I note specific references to Air Canada not being opposed to certain points made in the joint submission. The quote included in paragraph 14 above indicates no opposition to the decision being rescinded and at a later point, with respect to CUPE's submission that "for all practical purposes, the HSOs made a determination of no danger", the document adds "Air Canada does not oppose that submission."

[24] Lastly, I note again that in the concluding clauses of the proposed Minutes of Settlement it is indicated that "Air Canada contests the appeal on the basis that the HSO did not render a decision within the meaning of s. 129(7) of the *Code*" and that I therefore have no jurisdiction. The request of December 10, 2014, seeking submission on the jurisdiction issue was sent to both parties. When no reply was received from the respondent, I asked the registrar to check with its counsel. She was informed that no other submissions would be made.

Analysis

[25] I again find it useful to address the categories of argument identified in the joint statement of facts and submissions, starting with the preconditions for the application of section 129 of the Code. Subsection 128(13) can be termed the trigger clause. It reads as follows:

> 128(13) If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing,

work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer.

[Underlining added]

The section that is triggered when the matter continues to be disputed reads in full as follows:

129(1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to investigate the matter in the presence of the employer, the employee and one other person who is

(a) an employee member of the workplace committee;
(b) the health and safety representative; or
(c) if a person in paragraph (*a*) or (*b*) is not available, another employee from the workplace who is designated by the employee.

(2) If the investigation involves more than one employee, those employees may designate one from among themselves to be present at the investigation.

(3) A health and safety officer may proceed with an investigation in the absence of any person mentioned in subsection (1) or (2) if that person chooses not to be present.

(4) A health and safety officer shall, on completion of an investigation, made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.

(5) Before the investigation and decision of a health and safety officer under this section, the employer may require that the employee concerned remain at a safe location near the place in respect of which the investigation is being made or assign the employee reasonable alternative work, and shall not assign any other employee to use or operate the machine or thing, work in that place or perform the activity referred to in subsection (1) unless

(a) the other employee is qualified for the work;
(b) the other employee has been advised of the refusal of the employee concerned and of the reasons for the refusal; and
(c) the employer is satisfied on reasonable grounds that the other employee will not be put in danger.

(6) If a health and safety officer decides that the danger exists, the officer shall issue the directions under subsection 145(2) that the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under this Part.

(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to

> refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.

Preconditions for the application of section 129

[26] I do not dispute the validity of the jurisprudence cited by the appellants with respect to the obligation placed on an HSO when notified by an employer of a continuing work refusal. This obligation is perhaps best summed up in *Vandal* at paragraph 266 where it is described as being "both simple and clear. The HSO is obliged to investigate and to determine whether a danger exists." However, in this case, the HSO contests being informed of a continuing work refusal, maintaining instead that he was given to understand "the incident was settled between the two parties, CUPE and Air Canada."

[27] I do not find it entirely unreasonable that the HSO would have reached such a conclusion given the uncertain record of steps taken following the refusals on September 28, 2009. As noted above, the refusing employees completed an Air Canada Flight Incident Report dated October 2, 2009, the same day Ms. Plamondon signed a form authorizing CUPE to act on her behalf. The employees' report refers in French to the manager contacting Transport Canada and to their having a telephone conference call, with no official being identified by name or job title.

[28] According to Ms. Plourde's e-mail of September 28, 2009, by calling the HRSDC afterhours number she "was able to speak to a representative". Quite what was said is not recorded but it appears that, as a result of this call, HSO Jessica Tran called her back to take the information "and a few minutes later, I (Ms. Plourde) received a call from Luc Mayne with who I went over the steps with. The case was resolved."

[29] Fast forward more than a year to November 15, 2010, close to the eve of scheduled hearing days and counsel for the appellants raises the possibility that it was a third HSO that was involved and that this person, an unidentified male, who may or may not have been an HSO and who may have been the person on the other end of the conference call on September 28, 2009, in which the employees were in part included. Without a name, it was not possible for the Tribunal to issue a subpoena which could have been served on the third person requiring his attendance at the hearing scheduled for November 26 to 29, 2010. In any event the hearing was cancelled and the matter adjourned at the appellants' request when the prospect arose of a settlement being reached between the parties.

[30] A brief word here on what I understand to be the procedure when work refusals are exercised "airside". When an HSO is informed of a continuing refusal pursuant to subsection 128(13), if it is an HSO from HRSDC (or ESDC as it now is) who receives the call, it is usually passed to an HSO from Transport Canada. This is permitted under subsection 129(1) which states that:

> […] the health and safety officer shall without delay investigate or cause another health and safety officer to investigate the matter […]
>
> (Underlining added).

This procedure for airside refusals should not be unfamiliar to Air Canada management or to the bargaining agent, or to their respective counsel. The point here is that the HSO who, when duly notified in the case of a continuing refusal airside, would be obliged, to pursue application of section 129 of the Code would most often be an officer from Transport Canada.

[31] So it was HSO Mayne who, if he had been duly made aware that the work refusals were continuing, would have proceeded to apply the provisions of section 129. According to the information in the Flight Incident Report, it took about an hour after the refusals were initiated before the flight attendants were informed by maintenance personnel that the cause of the offending odour was the glue melting under the cabin carpet. They were not satisfied with this response and continued their refusal. According to the notice of appeal, steps taken by Ms. Plourde to notify HRSDC of the refusals commenced around 3:00 p.m. and HSO Mayne called her back from Transport Canada according to his record at about 3:48 p.m. By that time the aircraft that had been the work place where the refusals had originated, had departed on the return flight to Toronto at approximately 3:25 p.m. or some 25 minutes late. The Toronto based flight attendants were deadheaded back to base on the next flight at 4:00 p.m. which suggests that they were either already on board or about to board when HSO Mayne contacted Ms. Plourde. That would lend credence to his claim that during his call to Ms. Plourde he never spoke with the flight attendants who, anyway, would not have been available to meet him in accordance with subsection 129(1) if he had gone to the airport.

[32] This thinly documented and at times contradictory record concerning the steps taken following the refusals leaves me with the impression that at the airport on September 28, 2009, it was all something of a scramble. On the one hand, once Air Canada was satisfied that the aircraft was safe, there was a need to find replacement flight attendants and have the Rapidair flight airborne. On the other hand, there were requirements pursuant to the Code that had to be addressed. Quite why no record was kept of the conversation with the unidentified male representative from HRSDC remains a problem but his part in the unfolding events would seem to indicate acceptance that he was not HSO Mayne. In all I find that it was not unreasonable for HSO Mayne to conclude, in the words used by Ms. Plourde in her e-mail, that the case was resolved. He might have endeavoured to ascertain whether the refusing employees were of the same view but he did not do so. In any event, he did not apply any of the provisions of section 129, not, in my view, in willful disregard of his responsibilities but because he had genuinely understood as a result of his conversation with Ms. Plourde that the parties had settled the matter. Even if I had found otherwise, it would not have settled the issue of whether he made an implicit decision of no danger that is subject to appeal under subsection 129(7) of the Code as the appellants submit.

Did the HSO render a decision of no danger that is subject to appeal?

[33] In their submission to me on my jurisdiction to hear this appeal, the appellants state the following:

> This appeal was brought under s. 129(7) of the Code, which allows an employee to appeal the decision of a Health and Safety Officer ("HSO") that danger does not exist. S. 146.1(1) gives an Appeals Officer the power to "inquire into the circumstances of the decision … and the reasons for it" in an appeal brought under s. 129(7). It is CUPE's submission that the HSOs involved in this matter made a decision that danger did not exist and that therefore you have jurisdiction pursuant to s. 146.1. Their decision was not written but is implicit.

The extract from subsection 146.1(1) is accurate but the application of the subsection relies on an HSO having rendered a decision. That of course is the central question in this appeal at this stage. The appellants' argument speaks to an appeals officer's role being a *de novo* proceeding that elsewhere in their submissions they submit gives me an ability to hear an appeal of a decision based on an inadequate investigation. *De novo* infers starting anew a process previously undertaken. The starting point for an appeal pursuant to the clear wording of subsection 129(7) of the Code is when "a health and safety officer decides that the danger does not exist". If, after considering all the evidence and submissions, an appeals officer concludes that an HSO did not render a decision in any form within the meaning of that subsection, then, in my view, the matter ends there as far as the appeals officer is concerned. I state this up front recognizing that the central question remains to be analysed.

[34] Before going there, however, there is a further preliminary matter that the submission quoted in the previous paragraph raises. The appellants on several occasions in their submissions refer to HSOs rather than an HSO. The implication is that whichever HSO is first notified by an employer of a continuing refusal under subsection 128(13), together with any other HSO that subsequently may be informed of the notification, must remain party to the investigation. That I find conveniently ignores the words in subsection 129(1), "or cause another officer to investigate the matter" [Underlining added]. In the present case it appears that a trio of HSOs could be covered by the appellants' interpretation of the subsection. The first member of the trio would be the unidentified male who may or may not have been an HSO and who may have participated in a conference call with the refusing flights attendants. There is no documented record of this call but it would seem that he passed word on to HSO Tran at HRSDC who, in line with procedure for airside refusals, contacted HSO Mayne at Transport Canada. Assuming that the unidentified male at HRSDC was also an HSO, both he and HSO Tran would have fulfilled their responsibilities by passing the matter on to another HSO. HSO Mayne would have been the officer to proceed with an investigation had he not had reasonable cause to understand that, by the time he became involved, the parties had settled the matter. Consequently the issue centres on whether HSO Mayne rendered a decision that is subject to appeal pursuant to subsection 129(7), an issue to which in my view the actions of the other two officials are peripheral.

[35] The lead up to the appellants' argument on the HSO in this case having rendered an implicit decision is expressed in the extract from their submission dated January 19, 2015, quoted in paragraph 19 above. In brief: there was a work refusal; it continued; the employer called HRSDC; and, the HSO made no finding of danger, issued no directions and "treated the matter as if danger did not exist". The appellants then submit:

> It is well established in the case law that an HSO can make an implicit decision and finding of no danger. An implicit decision of no danger is made where a HSO acts and proceeds in a manner that would indicate that danger does not exist, despite a lack of a written decision or even an express oral decision.

The principal case law canvassed is that established in *Vandal* and the related court decisions with the argument being that the circumstances in the present case are sufficiently similar to those in *Vandal* where an implicit decision was found to have been made. The factual circumstances in *Vandal* are summarized in paragraph 18 above. What needs to be considered here is how the circumstances and steps taken in that decision led the appeals officer to arrive at his conclusion that the HSO had made an implicit decision that no danger existed and whether they are indeed sufficiently similar to those in the current case as to warrant the appellants' argument being sustained.

[36] As noted in paragraph 20 above, the appellants point to paragraph 279 of *Vandal* when arguing the similarity with this case. The paragraph is a succinct distillation of the appeals officer's findings on the implicit decision issue. It reads in full as follows:

> [279] The HSO stated that he could not make a determination regarding the danger but that he had conducted an inquiry and found the circumstances of the COs' refusal were normal conditions of employment. However, as I stated earlier he went through almost every step of the investigation process required of an HSO when he investigates whether or not a danger alleged under the Code exists. He completed the inquiry and ultimately determined that he was not making a decision regarding the danger. I infer from this that the HSO made an implicit determination that the danger did not exist. I therefore find that, for all practical purposes, the HSO determined that the COs were not in danger since he
>
> - made a determination regarding the circumstances of the COs refusals to work;
> - notified the COs that they could no longer continue refusing to work because of danger and therefore had to return to work; and
> - withdrew without issuing any directions regarding danger under subsection 145(2).

[37] When the appeals officer's decision was reviewed and upheld by the Federal Court in *Canada* v. *Vandal* (2010), the Honourable Justice Beaudry included the following at paragraph 40:

> The appeals officer's inference that a formal investigation pursuant to subsection 129(1) despite the characterization of it as a "preliminary inquiry" is justified (see paragraphs 271 -273 of the decision […]).

Paragraph 271 of the appeals officer's decision details in eight subparagraphs the "almost every step of the investigation process" encapsulated in paragraph 279 quoted above. It depicts a process where, once informed of the refusals, the HSO received the employer's investigation reports and met with its representatives, met with the COs, conducted a partial analysis of the circumstances of the refusals and made a determination regarding them, took into account related documentation, received the COs' testimony regarding the alleged danger and concluded by determining that the circumstances of the refusals were normal conditions of employment.

[38] If there were any doubt as to the thoroughness of the HSO's inquiry it was laid to rest by counsel for the employer who, as cited in paragraph 272 of the appeals officer's decision in *Vandal*, appeared to contradict the HSO's claim that he had not investigated the matter under subsection 129(1) and had never rendered a decision under subsection 129(4) of the Code when she stated the following at the hearing:

> And the decision in Dragseth, I have read it, and in that case it was noted that the employees had informed a safety officer regarding the refusal to work, but he did not investigate. He did not undertake anything. I think that we are not – that this does not apply in this case. Mr. Tremblay (the HSO) intervened, he met with people, he submitted an investigation report, and he rendered a decision with reasons.

[39] I too have read *Dragseth*. I will not go into all the details of the case but it is important to note that the circumstances in which that HSO claimed he did not conduct an investigation under subsection 129(1) are quite different from those that led HSO Mayne not to pursue an investigation on September 28, 2009. In the first place there was no doubt that the HSO in *Dragseth* had received notification of work refusals from both the employer and the employees. Secondly, the refusals involved corrections officers and arose from management's decision not to place a guard in a particular corridor during visiting hours. It appears that the HSO accepted management's opinion that the refusals were planned job action with the Code being used by the COs to legitimize an illegal work stoppage in support of a legal work stoppage by non-custodial employees at the Institution. Management imposed disciplinary measures on the refusing employees and the employee co-chair of the work place health and safety committee. Proceedings before what was then the Public Service Staff Relations Board and the Federal Court of Appeal ensued largely with respect to the legitimacy or otherwise of the imposition of the disciplinary measures on the employees who claimed they were exercising rights under the Code. While the Court's observations on the imperative nature of the requirement under subsection 129(1) to investigate a continued refusal cited above in paragraph 17 are valid, they are somewhat incidental to the principal matters ruled on in its decision included as they are in a foot note and in any event do not address the implicit decision issue in the present case.

[40] Turning back to the appellants' submission that the circumstances in the present case are sufficiently similar to those prevailing in *Vandal* such that I should find that HSO Mayne rendered an implicit decision that danger did not exist on September 28, 2009, and take jurisdiction of the appeal, I am of the view that the similarities are minimum and insufficient to support the submission. The only common factor of substance is that in both cases refusals to work were exercised under section 128 of the Code. That for me is where the similarities end. In *Vandal*, at paragraph 24, it is clear that the employer gave notification of the continued work refusals pursuant to subsection 128(13) and that, although he waited some six days before doing so, the HSO attended the work place to investigate.

[41] In the present case an effort was made by the respondent to notify an HSO and to trigger action under subsection 129(1). However, I have found that it was not unreasonable for HSO Mayne to have understood that the parties had settled the matter which he evidently judged relieved him of a need to commence an investigation. The Tribunal does not keep records on settlements by parties reached at the HSO stage of the process but, as at the appeal stage, they likely do occur. Even though the responsibility for giving the notification provided for in subsection 128(13) falls to the employer, HSO Mayne might have checked with the refusing flight attendants or their representative to see if they agreed that a settlement had been reached. Had he done so, it appears he would have found that his understanding was mistaken and consequently would have begun to apply subsection 129(1) of the Code. Remedy for his not doing so is not within the authority of an appeals officer and lies elsewhere in administrative law. A telephone call to the HSO might even have clarified matters without a need for such formal proceedings.

[42] The appeals officer's decision in *Vandal* is replete with references to the steps taken by the HSO that were found to amount to an implicit decision that danger did not exist despite the HSO's protestations to the contrary and the absence of a formal written notification being provided to the parties as envisaged under subsection 129(4). Comparing the comprehensive list of steps taken that led to what might be described as a *de facto* decision in *Vandal*, with the total absence of any actions under the Code taken by HSO Mayne after he put his telephone down on September 28, 2009, speaks volumes as to the difference between the two cases. As claimed in his e-mail of October 9, 2009, I find that HSO Mayne did not conduct an investigation and rendered no decision that could be subject to appeal pursuant to subsection 129(7), either explicit, *de facto* or implicit, that danger did not exist. To find otherwise in my view would be to stretch a liberal interpretation of the provisions of the Code beyond reason.

[43] Having determined that a decision was not rendered by HSO Mayne, there is no real need to pursue further the appellants' argument that the *de novo* nature of an appeals officer proceeding enables me to consider rescinding a decision based on a flawed investigation or, in this case, no investigation. Nevertheless I will comment on the jurisprudence cited by the appellants in *Page* since it is also relevant to my finding. In brief, a corrections officer refused to work because he believed that a danger arose from his exposure to second hand cigarette smoke when walking the range. The HSO held a 20

or 30 minute telephone conversation on the evening of the refusal that included the refusing employee and the Institution's Assistant Warden. Two days later he issued a written decision finding that the refusal was not permitted under paragraphs 128(2)(*a*) and (*b*) of the Code (the refusal puts others in danger and the existence of a normal condition of employment, respectively). The appeals officer rescinded the decision based, in one respect, on the HSO not going to the work site to undertake a properly conducted investigation. The point relevant to the present case is that a decision was issued which gave the appeals officer jurisdiction to hear the appeal. This is quite different from the present case where I have found that no decision was rendered.

[44] For the reasons given above, I find that, in the absence of a decision that a danger does not exist within the meaning of subsection 129(7) of the Code, I do not have jurisdiction to hear an appeal arising from the work refusals exercised by the appellants in Montreal on September 28, 2009.

[45] As a result, the appeal is dismissed for lack of jurisdiction.

Michael McDermott
Appeals Officer