Occupational Health and Safety Tribunal Canada


Tribunal de santé et sécurité au travail Canada

**Date:** 2018-09-26
**Case No.:** 2017-05

**Between:**

Employment and Social Development Canada, Appellant

and

Canada Employment and Immigration Union, Respondent

**Indexed as:** *Employment and Social Development Canada v. Canada Employment and Immigration Union*

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| **Matter:** | Appeal filed under subsection 146(1) of the *Canada Labour Code* against a direction issued by an official delegated by the Minister of Labour. |
| **Decision:** | The direction is confirmed. |
| **Decision rendered by:** | Ms. Katia Néron, Appeals Officer |
| **Language of decision:** | French |
| **For the appellant:** | Mr. Marc Séguin, Counsel, Department of Justice Canada, Labour and Employment Law Group |
| **For the respondent:** | Mr. Jean-Rodrigue Yoboua, Representation Officer, Public Service Alliance of Canada |
| **Citation:** | 2018 OHSTC 11 |

## REASONS

[1] This decision concerns an appeal filed on March 30, 2017 by Employment and Social Development Canada (ESDC, employer) under subsection 146(1) of the *Canada Labour Code*, R.S.C., 1985, c. L-2 (the *Code*). The appeal is against a direction issued on March 2, 2017 by Mr. Daniel Boulanger, official delegated by the Minister of Labour (the ministerial delegate).

[2] The contested direction reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II - OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER PURSUANT TO
> PARAGRAPH 141(1) (a)
>
> On March 2, 2017, the undersigned official delegated by the Minister of Labour conducted an investigation of a situation that occurred in the work place operated by Employment and Social Development Canada, an employer subject to Part II of the *Canada Labour Code*. Said work place is located at 200 Montcalm Street, P.O. Box. 2090, Gatineau, Quebec K1A 0J9, and is sometimes known as Certification of Educational Institutions.
>
> During this investigation, the official delegated by the Minister established that the complainant refused to recognize as a competent person, in accordance with subsection 20.9(1) of the Canada Occupational Health and Safety Regulations, any person who is an employee of the Government of Canada because she does not consider said person impartial.
>
> Considering that the appointment of a competent person, that is, among other things, a person who is impartial and considered as such by the parties, is essential to resolving the situation of violence that Ms. […] alleges she experienced;
>
> And
>
> Considering that to date the employer has proposed to her, as a competent person for the purposes of this investigation, only persons employed by the Government of Canada or a team composed in part of at least one person employed by the Government of Canada;
>
> You are HEREBY DIRECTED, pursuant to paragraph 141(1) (a) of Part II of the *Canada Labour Code*, to ensure an investigation of the situation of work place violence alleged by Ms. […] by proposing to her persons who are not employees of the Government of Canada in order that a competent person who is not an employee of the Government of Canada may be appointed, and to do so no later than April 3, 2017. The competent person appointed by the employer must respect the criteria set forth in paragraphs 20.9(1) (a), (b) and (c) of the Canada Occupational Health and Safety Regulations.
>
> Issued at Montréal this 2nd day of March 2017.

(s) Daniel Boulanger
Official delegated by the Minister of Labour
[…]

[3] At the end of the hearing, the representatives of the two parties asked that the details of the situation of violence alleged by the employee, whom I will here refer to as Ms. A, as well as the names of the persons indicated therein, not be given in my decision. I informed the parties that I agreed to this request.

[4] In the case at hand, the persons against whom Ms. A made her allegations of work place violence are not party to the proceedings and therefore were unable to make submissions.

[5] In addition, while the situation of violence alleged by Ms. A is at the origin of her complaint to the Labour Program,[1] the present dispute does not concern the validity of these allegations.

[6] The appellant is also not contesting that Ms. A alleges in her complaint that she experienced a situation of work place violence, nor that a competent person must be appointed to conduct an investigation of this situation in accordance with subsection 20.9(3) of the *Canada Occupational Health and Safety Regulations* (the *Regulations*).

[7] The issue raised in this case can therefore, in my opinion, be examined without referring to the details of the alleged situation of violence and to the names of the persons specified therein.

**Background**

[8] The investigation report prepared by the ministerial delegate for the Tribunal was submitted as evidence during the hearing as "Exhibit 1". In his testimony, Mr. Boulanger explained the reasons for his direction. I retain the following from his investigation report and his testimony.

[9] On February 24, 2014, Ms. A, an employee of ESDC, met with her director general to complain about a situation that she alleged to be experiencing with her immediate manager and her immediate director. She explained to her director general that this situation was causing her stress and that she was afraid to continue working with these persons to the point that it was creating a work environment that she described as unhealthy and toxic. She also asked her director general for assistance in obtaining a deployment. She said, among other things, that this was the first time in her professional life that she had taken such steps.

[1] The Labour Program is the Government of Canada service responsible for applying the *Canada Labour Code*, R.S.C. (1985), c. L-2, and its regulations in federal departments and businesses under federal jurisdiction.

[10] On March 14, 2014, Ms. A met again with her director general. She was informed that she would not receive assistance for her deployment request. From July 2014 to March 2015, Ms. A was on sick leave.

[11] In September 2014, Ms. A filed a grievance against her employer. She also filed a claim with the CSST.[2]

[12] In March 2015, upon returning from her sick leave, Ms. A was reassigned so she would no longer report to the persons about whom she had complained in February 2014.

[13] On March 2, 2015, Ms. A sent a letter to her general director in which she reminded the director general of their discussion on February 24, 2014, as well as the response obtained for her deployment request. In this letter, she asked that an investigation be conducted in accordance with Part XX of the *Regulations*. She also asked that all arrangements for her participation in said investigation be made through Mr. Éric Boileau. Mr. Boileau was National Union Representative for the Canada Employment and Immigration Union. A copy of this letter was sent to Mr. Marc Béland. Mr. Béland was Health and Safety Representative for the Public Service Alliance of Canada, National Capital Region.

[14] On May 8, 2015, ESDC proposed that Ms. A and Mr. Boileau try to resolve Ms. A's complaint and grievances through mediation using the informal conflict management system available internally. After the mediation was cancelled, Ms. A sent a complaint of work place violence to her employer on June 12, 2015. Ms. A stated that she wanted an independent and competent investigator to investigate her complaint.

[15] On July 28, 2015, the Labour Program received a complaint from Ms. A alleging that her employer was refusing to conduct an investigation into her complaint in accordance with Part XX of the *Regulations*. In this complaint, she asked for an independent investigator to investigate her case.

[16] On August 20, 2015, the Labour Program received a second complaint from Ms. A. In this complaint, she briefly described the situation of violence that she alleged to have experienced, and enclosed her letter dated March 2, 2015 and her email dated June 12, 2015. Mr. Boulanger was assigned to the case.

[17] On August 28, 2015, Mr. Boulanger contacted Ms. A to obtain more information. During their discussion, Ms. A informed him that the mediation aimed at trying to resolve her complaint and grievances had been cancelled. He concluded from this discussion that Ms. A was alleging that her employer was not following the required process for handling her complaint as set forth in Part XX of the *Regulations*. That same day, Mr. Boulanger tried to obtain, from ESDC, an action plan for resolving Ms. A's complaint or an investigation into the complaint.

[2] Now called the CNESST (Commission des normes, de l'équité et de la santé et sécurité du travail) [labour standards, pay equity and workplace health and safety board].

[18] On September 4, 2015, Mr. Boulanger was informed that Mr. Steven Risseeuw was the new director general assigned to Ms. A's case. Mr. Risseeuw was Director General, In-Person Operations and Strategies, Citizen Service Branch at Service Canada, a branch of ESDC.

[19] On September 17 and 29, 2015, Mr. Boulanger again asked ESDC for an action plan aimed at resolving Ms. A's complaint or proceeding with an investigation of it.

[20] On December 14 and 15, 2015, Mr. Boulanger was informed by Mr. Michel Gaudreau that ESDC was proposing, to Ms. A, that they resolve her complaint. Mr. Gaudreau had been assigned to work with Mr. Risseeuw as advisor on Ms. A's case. He was Regional Occupational Health and Safety Advisor at the Operations Directorate, Human Resources Services Branch of ESDC. In an email sent on December 15, 2015 to Mr. Boulanger, Mr. Gaudreau indicated that he had recently received, following the hearing for the grievance filed by Ms. A, the statement of her allegations of work place violence, and that nothing in these allegations would allow him to conclude that work place violence had occurred. Mr. Gaudreau also indicated that he was going to meet with Ms. A's union representatives in an attempt to resolve the situation.

[21] On December 16, 2015, Mr. Gaudreau informed Mr. Boulanger that Ms. Denise Camus, Ms. A's union representative, had indicated during her meeting with him that she did not think it was possible to settle the matter with the employer.

[22] That same day, Mr. Risseeuw submitted to Ms. A a list of potential external investigators to investigate her complaint. All of these persons were investigators from external firms with experience in the field of work place violence. In the email providing this information, Mr. Risseeuw stated that ESDC would give, to the investigator chosen by Ms. A, the mandate to receive and examine the details of the allegations in order to confirm that Part XX applied in the circumstances. Following an email on December 23, 2015 from Ms. Camus, information on the knowledge and experience of the potential external investigators was sent to Ms. A for her examination.

[23] On January 29, 2016, Ms. A, accompanied by her union representatives, Mr. Boileau and Ms. Camus, met with Mr. Risseeuw and his advisor, Mr. Gaudreau, to inform them of her choice. The person chosen was Ms. Jelly from the external firm Glencastle Security Inc. At this meeting, Mr. Risseeuw reiterated to Ms. A that Ms. Jelly was mandated to gather details on her allegations and that he would wait for her report in this regard. He told her that she would have to appear only once for the investigation process.

[24] In February 2016, Ms. Jelly sent her report to the employer. This report presented a detailed description of the situation of violence that Ms. A alleged to have experienced at her work place between 2012 and 2014. At the end of her report, Ms. Jelly concluded that on the basis of her *prima facie* investigation, the behaviour of which Ms. A alleged she was the victim corresponded to the definition of work place violence within the meaning of Part XX of the *Regulations*, and she recommended that an investigation of the complaint filed by Ms. A be conducted.

[25] On May 31, 2016, Mr. Risseeuw informed Ms. A that ESDC intended to appoint Ms. Francine Morse to investigate her complaint. Ms. Morse was a professional in the field of occupational health and safety, and worked for the Canada Revenue Agency.

[26] On June 2, 2016, Mr. Boileau informed Mr. Risseeuw that he did not believe Ms. Morse was competent and impartial for the purposes of investigating Ms. A's complaint. Mr. Boileau also asked Mr. Risseeuw to enclose the person's résumé in his next proposal of a potential investigator. Mr. Boileau's email also stated that, if Mr. Risseeuw was in agreement, they consented to Ms. Jelly conducting the investigation.

[27] On June 14, 2016, Mr. Risseeuw asked Ms. A to provide reasons for why she believed Ms. Morse would not be impartial when investigating her complaint. Mr. Risseeuw indicated that if she could not provide her reasons, he would appoint Ms. Morse to investigate her complaint. On September 6, 2016, following a request by Mr. Boileau, Ms. A received a summary of Ms. Morse's professional experience and training.

[28] On September 7, 2016, Mr. Risseeuw informed Mr. Boulanger by email of his intention to appoint Ms. Morse. In his email to Mr. Boulanger, Mr. Risseeuw stated that the practice in Government of Canada departments for investigating complaints of violence in their work places was to rely on human resources staff in other partner departments, thereby avoiding the risk of bias and enabling an optimal use of internal experience and expertise.

[29] On September 16, 2016, Ms. A sent a complaint to the Labour Program alleging that her employer wished to proceed with the investigation of her complaint without her participation and that her employer was appointing Ms. Morse whereas she did not consider this person impartial.

[30] On September 20, 2016, Mr. Boulanger was informed that henceforth Mr. Gilles Hubert would be in charge of Ms. A's case. Mr. Hubert was a manager in the Human Resources Services Branch of ESDC.

[31] On September 22, 2016, Mr. Boulanger asked Ms. A to provide, in writing and with copy to Mr. Hubert, the reasons why she did not consider Ms. Morse to be an impartial person.

[32] That same day, Ms. A replied that she did not think Ms. Morse could be an impartial third party for conducting the investigation of her complaint because this person represented her employer in her daily work activities and had internal relationships with people in the department. Ms. A also indicated that she had been anxious and distressed by the investigation process for her complaint, in particular the long wait for it to start, but that when the investigation had finally started and after having met Ms. Jelly, she had believed in both her competence and impartiality because she was an independent contractor. She also indicated that she did not understand why her employer had decided to replace this person with someone else.

[33] On September 26, 2016, Mr. Boulanger sent an email to Mr. Hubert concerning his interpretation of the decision in the matter *Maritime Employers Association v. Longshoreman's Union, CUPE, Local 375*, 2016 OHSTC 14 (*Maritime Employers Association*). In this email, he indicated that, based on the conclusions of Appeals Officer Pierre Hamel in this matter, he was of the opinion that Ms. A was within her rights to refuse the appointment of Ms. Morse to investigate her complaint for the reasons she stated, reasons that he did not deem abusive. Mr. Boulanger also asked Mr. Hubert to send him, by October 14, 2016, his action plan for appointing a competent person within the meaning of section 20.9 et seq. of the *Regulations* to investigate the complaint.

[34] On November 14, 2016, Mr. Hubert proposed, to Ms. A, two other potential investigators who did not work for ESDC: Mr. Serge Marion and Mr. Luc Charron. Mr. Marion worked for the National Security Branch of the Department of National Defence, providing expert advice on violence and harassment prevention. Mr. Charron was Senior Occupational Health and Safety Advisor for the Occupational Health and Safety Division, Canada Border Services Agency.

[35] On November 15, 2016, Mr. Boileau informed Mr. Hubert that he did not think a person employed by the Government of Canada could be impartial when investigating Ms. A's complaint. Mr. Boileau also reiterated that Ms. A considered Ms. Jelly to be an impartial third party and that she remained, in their opinion, an acceptable choice for conducting the investigation into the complaint.

[36] On December 20, 2016, Ms. A sent an email to Mr. Boulanger. In this email, she indicated that since the beginning she had asked that an impartial, competent person who did not work for the Government of Canada to investigate her complaint because she had seen, heard about, and known witnesses who were reluctant to confide in government investigators due to the possibility of reprisals in their work place. Ms. A further indicated that she would have more trust in the process knowing that the witnesses involved in her complaint would feel comfortable confiding in an external impartial investigator who did not work for the Government of Canada. In her opinion, this would not only decrease the real fear of reprisals, but also the considerable anxiety that she had been experiencing due to the ordeal of waiting almost four years and still not having her complaint investigated.

[37] On January 26, 2017, Mr. Hubert informed Ms. A that the other party involved in her complaint did not consider Ms. Jelly to be impartial. Mr. Hubert proposed a fourth potential investigator for her complaint: Mr. David Zanetti. Mr. Zanetti worked as Senior Project Officer at ESDC's National OHS Office and possessed recent training on seeking a competent person to apply Part XX of the *Regulations*.

[38] On January 31, 2017, Ms. A informed Mr. Hubert that, unfortunately, she could not accept Mr. Zanetti as the investigator for her complaint because they had previously worked together on a health and safety project and therefore, in her opinion, he could not be impartial with respect to either her or the other party when investigating her complaint.

[39] On February 2, 2017, Mr. Hubert proposed, to Ms. A, that the investigation of her complaint be conducted jointly by himself and Mr. Marc Béland.

[40] On February 7, 2017, Ms. A informed Mr. Hubert that she had discussed the matter with Mr. Béland and that she could not agree to his proposal for a joint investigation. She stated that this process would not, in her opinion, constitute an impartial examination of her complaint.

[41] On February 13, 2017, Mr. Hubert wrote to Mr. Boulanger in response to an assurance of voluntary compliance (AVC) issued two weeks earlier. In this AVC, Mr. Boulanger asked ESDC to ensure the appointment of a competent person in accordance with subsection 20.9(3) of the *Regulations* to investigate Ms. A's complaint. In his response, Mr. Hubert said:

> […] We have fulfilled the assurance of voluntary compliance signed last January 30th; to date, the employer has proposed six competent persons.
>
> We submit that Ms. […] is abusing her rights by systematically refusing all persons proposed by her employer, and is doing so in a capricious and arbitrary manner (2016 OHSTC 14). […]
>
> As stated in the decision of the OHS Tribunal of Canada, such systematic refusal should be interpreted as a waiver of the rights conferred on her by subsection 20.9(3) of the *Regulations*.
>
> The employer therefore intends to proceed with the appointment of the following competent person: Mr. Luc Charron of the Canada Border Services Agency. Mr. Charron has no link to the employer […].
>
> Mr. Charron will begin the investigation on February 27, 2017.

[42] That same day, Mr. Boulanger asked Ms. A if she would agree to have Mr. Charron investigate her complaint. Ms. A responded that while she agreed that Mr. Charron could be a competent investigator, she did not think that he could be impartial when investigating her complaint because he worked for the Canada Border Services Agency.

[43] After his investigation, Mr. Boulanger concluded that in response to the employer proposing Ms. Morse as the investigator for her complaint, Ms. A considered this person not impartial for this purpose because she was a federal government employee. Mr. Boulanger also concluded that, in general, Ms. A believed that a person employed by the Government of Canada, or a team composed of at least one person who was an employee of the Government of Canada, could not be impartial when investigating her complaint.

[44] On this basis, Mr. Boulanger concluded that the proposed persons were basically rejected based on the test of impartiality, not that of professional competence.

[45] Referring to the position of his headquarters, Mr. Boulanger concluded, among other things, that for a person to be considered a competent person within the meaning of the

*Regulations*, the parties concerned must consider that person impartial and, therefore, when Ms. A gave her reasons for refusing the proposed investigators for her complaint, these reasons must be taken into consideration by the employer when appointing a competent person.

[46] For these reasons, Mr. Boulanger determined that the employer had proposed persons without consulting one of the parties involved, and that he did not have the agreement of the parties on the impartiality of the person who would be conducting the investigation. In his opinion, it was not a question of deciding whether the reasons for refusal by the parties involved based on the test of impartiality were valid or not. Rather, it was a matter of the parties coming to an agreement in accordance with the *Regulations*.

[47] Finally, Mr. Boulanger stated that the objective of his direction was to break the deadlock between the parties and to ensure that the employer acted in accordance with the *Regulations*.

**Issue**

[48] This appeal requires a ruling on the validity of the direction issued by the ministerial delegate under paragraph 141(1)(a), which requires the employer to propose persons who are not employees of the Government of Canada to investigate the situation of violence alleged by the employee.

**Submissions of the parties**

**A) Appellant's submissions**

[49] Counsel for the appellant, Mr. Marc Séguin, called Mr. Risseeuw and Mr. Hubert to testify. During the testimony of Mr. Risseeuw and Mr. Hubert, Mr. Séguin submitted the résumés of Ms. Morse and Mr. Charron as evidence. He also submitted summaries of the professional competence of Mr. Zanetti and Mr. Hubert. I retain the following from the testimony of Mr. Risseeuw and Mr. Hubert, as well as from the documents submitted.

[50] Mr. Risseeuw stated that Ms. A sent her complaint to the employer before he was her director general. He added that he was put in charge of this case when Ms. A was reassigned to his organization. After Ms. A filed her complaint, he met with Ms. A and human resources staff in an attempt to resolve the complaint. They then tried to resolve the complaint through the informal conflict management system. Unfortunately, Ms. A's former director general cancelled the mediation and so this attempt at resolution failed.

[51] After this failure, the employer decided to hire an external investigator to conduct a preliminary investigation in order to document the details of Ms. A's allegations in a formal and detailed manner, to determine if they corresponded to the definition of a situation of violence under the *Regulations*, and to determine if they should proceed with an investigation of the allegations. Mr. Risseeuw added that the employer had decided to proceed in this manner

because they did not see anything in Ms. A's allegations, which had been made verbally and then put in writing, that would indicate work place violence.

[52] Mr. Risseeuw stated that following the conclusions of Ms. Jelly's report, they proposed, to Ms. A, that they again try to resolve the complaint but without success. The employer then decided to search for a competent person to conduct the investigation of her complaint, but they could not agree on the choice of this person. The employer decided to not proceed with an investigation conducted by Ms. Jelly because, while they acknowledged that she had fulfilled the contractual obligations they had given her, they were disappointed with her report. They were of the opinion that Ms. Jelly should have validated her conclusions by gathering submissions from the persons against whom the allegations of violence had been made.

[53] Furthermore, while he admitted that he could have returned to the list of potential external investigators that had been provided to Ms. A at an earlier date, Mr. Risseeuw said that management was attempting to compile a list of potential internal investigators in order to develop internal expertise. Although he had never raised this argument in the presence of Ms. A or her union advisors, Mr. Risseeuw added that the cost of an external investigation had been calculated at $47,000. Expenses being a manager's prime concern, he wanted to save government money by providing Ms. A with an investigation of the same quality, but conducted internally.

[54] Mr. Hubert is Senior Occupational Health and Safety Advisor at the Treasury Board Secretariat. At the time that Mr. Risseeuw asked him to handle Ms. A's complaint, Mr. Hubert was human resources program manager for the ESDC departmental health and safety administration.

[55] In January 2016, the other party involved agreed to Ms. Jelly conducting the *prima facie* investigation. After receiving Ms. Jelly's report in February 2016, Mr. Hubert refused to appoint Ms. Jelly as a competent person to investigate Ms. A's complaint without having consulted the other party involved because she represented the employer. According to Mr. Hubert, Ms. Jelly could not arrive at her conclusions without also examining the facts of the other party involved. He acknowledged, however, that the purpose of the *prima facie* investigation was to determine if Ms. A's allegations were verified and if the alleged situation could relate to Part XX of the *Regulations,* so that a settlement could be reached.

[56] As the subsequent attempt to reach a settlement had failed, Mr. Hubert stated that they decided to appoint a person to conduct the investigation into the complaint as required by the *Regulations* and that he was tasked with finding this person.

[57] Mr. Hubert stated that there is a list of approximately 15 government employees recommended for investigating this type of complaint. He emailed these employees and received a reply from Ms. Morse. Mr. Hubert stated that he had not met Ms. Morse prior to proposing her as an investigator but that he had communicated with her solely to ascertain her availability. He stated that in his opinion, Ms. A's grounds for refusing Ms. Morse based on bias are invalid

because Ms. Morse has occupational health and safety qualifications, is bound by a values and ethics code and, as she does not work for ESDC, has no interactions with the employer in her everyday work. He stated that he knew that Ms. Morse was affiliated with Human Resources but did not expect Ms. A to be resistant to that type of profile for selecting a competent person, even though he had understood when Ms. A had indicated upon her rejection of Ms. Morse that she did not want a third party who represented the employer in said third party's daily work. According to Mr. Hubert, Ms. A should have specified what she meant by "represents the employer in her daily work" and "has internal relationships with people in the department."

[58] During the cross-examination, Mr. Hubert acknowledged that, from Ms. A's first response in which she rejected Ms. Morse, he understood that Ms. A did not want, on the basis of the test of impartiality, an investigator from the Government of Canada. In his opinion, however, these grounds for rejection are invalid because they signify, in his view, an assumption of Government of Canada employees' bias without regard to their professional competence.

[59] Regarding Mr. Hubert's two other proposed appointees to the investigator position, Mr. Marion and Mr. Charron, Mr. Hubert stated that he was familiar with Mr. Charron's professional background and knew that Mr. Charron advised human resources in the exercise of his duties and had a similar profile to that of Ms. Morse in this regard. Mr. Hubert stated that Mr. Marion had that type of profile as well. Mr. Hubert stated that, in his opinion, Ms. Morse, Mr. Marion and Mr. Charron pass the test of impartiality because they work for departments other than ESDC.

[60] Mr. Hubert stated that when he had proposed Mr. Zanetti as the third prospective investigator into the complaint, he was aware that Ms. A knew Mr. Zanetti and he thought that she would accept him and that they could agree to resolve the complaint. According to Mr. Hubert, the fact that Mr. Zanetti worked with Ms. A was insufficient to conclude that Mr. Zanetti was biased.

[61] During that time, the health and safety committee recommended a joint investigation, which was why, for his fourth proposal, Mr. Hubert suggested that he appoint himself and Mr. Béland to investigate. During the cross-examination, Mr. Hubert acknowledged that he had formed an opinion on Ms. A's complaint and that he knew that Mr. Béland was privy to the case. He thought, however, that the test of impartiality could be passed by finding a middle ground, namely having Mr. Hubert represent the employer and Mr. Béland represent Ms. A's union.

[62] Mr. Séguin submits that the direction be rescinded based on what follows. The employer did not breach subsection 20.9(3) of the *Regulations* by failing to appoint a "competent person" to conduct an investigation into Ms. A's complaint.

[63] Mr. Séguin referred first to paragraphs 60 and 61 of the *Maritime Employers Association* decision in which Appeals Officer Hamel concluded:

> [60] It was alluded that this so-called literal application of the section could lead to abuse. The refusal to agree to the appointment of a person

> without having to show cause or justify the reasons could, as properly noted by the appellant's counsel, be motivated by discriminatory, sexist or arbitrary considerations. Or an employee—I am thinking in particular of an employee who is added as an alleged abuser, for example—could systematically refuse anyone proposed by the employer, in a capricious or arbitrary manner.
>
> [61] It is a principle of law that no person can abuse his or her rights. Such an abusive or discriminatory approach certainly has no place and could, in my view, be punished through disciplinary action or interpreted as a waiver of the right conferred on the parties by subsection 20.9(3).

[64] Mr. Séguin argues that the ministerial delegate was mistaken in concluding that the grounds invoked by Ms. A to refuse the appointment of Ms. Morse as a competent person to investigate her complaint were not abusive. On the contrary, Mr. Séguin argues that these grounds were unfounded, capricious and arbitrary. As for the grounds invoked by Ms. A or her union representatives to reject the appointment of Mr. Marion or Mr. Charron as investigator, Mr. Séguin alleges that these grounds were also capricious and arbitrary, and therefore abusive.

[65] Mr. Séguin claims that Ms. A's grounds for asserting that Ms. Morse was not an impartial person are unreasonable, unfounded, capricious and arbitrary, and therefore abusive.

[66] As for the proposals of Mr. Charron and Mr. Marion as competent persons, Mr. Boileau and Ms. A rejected these persons because they were federal government employees and therefore lacked the impartiality to investigate the complaint. According to Mr. Séguin, Ms. A and her union did not therefore intend to retain a Government of Canada employee to investigate the complaint and their refusal was categorical on this point. The fact that the proposed persons were assumed to be biased without regard to their professional competence constitutes, in Mr. Séguin's view, capricious and arbitrary, and therefore abusive, grounds for refusal.

[67] For this reason, Mr. Séguin argues that ESDC was unable to resolve the matter in an appropriate fashion, as the employer was prevented from doing so by Ms. A and her union's abusive grounds for refusal, and that the employer therefore did not breach subsection 20.9(3) of the *Regulations* by failing to appoint a "competent person" to conduct the investigation into Ms. A's complaint.

[68] If, on the other hand, I decided that in this case the employer had breached subsection 20.9(3) and that a direction was therefore warranted, according to Mr. Séguin, Mr. Boulanger's direction is unreasonable and erroneous for the reasons that follow.

[69] Mr. Séguin argues that by issuing the direction as it is worded, the ministerial delegate sanctioned the employee's assumption that the competent persons were biased, thereby giving the employee the right to influence the choice of investigator despite, according to Mr. Séguin, there being nothing to this effect in the *Regulations*.

[70] In his testimony, Mr. Boulanger acknowledged that he had sought to break the deadlock between the parties. Mr. Séguin alleges that, in fact, Mr. Boulanger brought it to an end by adopting the respondent's stance. Mr. Séguin notes that the wording of the direction resembles the wording of Mr. Boileau's email addressed to Mr. Hubert on November 15, 2016. In this email, Mr. Boileau states that, in his opinion, a Government of Canada employee cannot impartially investigate Ms. A's complaint.

[71] Furthermore, Mr. Séguin submits that it seems to him, based on Mr. Boulanger's direction, that the ministerial delegate had decided that no Government of Canada employee could be impartial, even though Mr. Boulanger had clearly stated during his investigation and his testimony that it is not his role to determine the impartiality of a competent person.

[72] Mr. Séguin argues further that by proceeding in this way, Mr. Boulanger also influenced the selection of a competent person to conduct an investigation under the *Regulations* despite the fact that, according to Mr. Séguin, there is no provision to that effect in the *Code* or the *Regulations*.

[73] Lastly, Mr. Séguin argues that the wording of the ministerial delegate's direction has a deleterious effect and creates a precedent that is harmful to the employer for the following reasons.

[74] According to Mr. Séguin, the direction is worded in such a way as to suggest that every time an employer and employee disagree on the selection of a competent person, the employer will be obliged to hire and pay for an investigator from outside of the public service.

[75] Mr. Séguin alleges as well that the wording of this direction could serve as leverage to capriciously and arbitrarily refuse a competent person based on the test of impartiality.

[76] Mr. Séguin alleges further that, if the direction is kept as is, employees may systematically reject competent persons proposed by the employer until the employer yields and appoints the external consultant of the employee's choice, which, in Mr. Séguin's view, runs contrary to the *Regulations*, as the *Regulations* stipulate that the two parties involved must agree on the competent person's impartiality. Mr. Séguin also claims that it was not the ministerial delegate's role to interfere in the agreement between the parties.

[77] If I decided that the employer should have been issued a direction in this matter, Mr. Séguin requests on behalf of the appellant that all references "to persons who are not employees of the Government of Canada" be removed and replaced by references to "competent persons" so that the "order" section of the direction reads as follows:

> "You are HEREBY DIRECTED, pursuant to paragraph 141(1)(a) of Part II of the *Canada Labour Code*, to carry out an investigation on the matter of work place violence alleged by Ms. […] by proposing to her competent persons. The competent person appointed by the employer must respect the criteria set forth in paragraphs 20.9(1)(a), (b) and (c) of the Canada Occupational Health and Safety Regulations."

[78] Given the above, Mr. Séguin asks on behalf of the appellant that the appeal be allowed and that the direction be set aside or, alternately, that the direction be varied.

**B) Respondent's submissions**

[79] Ms. A testified at the hearing. I retain the following from her testimony.

[80] Ms. A joined the federal public service in 1995. She was hired at ESDC in 2005.

[81] In February 2014, she took a number of steps to end a situation in her work place that was causing her psychological harm. She met with someone from the Employee Assistance Program, as well as an internal informal conflict management practitioner, to receive guidance on how to improve her relationship with her manager. She also met with her director general to inform her of the situation. She explained that her work environment was growing increasingly toxic for her, causing her stress and hurt, and she asked for assistance in the form of a deployment. This was the first time that she had complained about a problem at work to a director general and she did so because she was desperate.

[82] In April 2014, she also met with her immediate manager outside of the work place to attempt to resolve the conflict, but the situation only deteriorated from then on. Though disappointed, she attempted to obtain a deployment to other positions. However, she was unsuccessful. In July 2014, the situation having become unbearable and feeling exhausted and ignored by management, she went to see her doctor, who granted her sick leave. She then filed a grievance alleging violence in the work place because she felt completely abandoned.

[83] Her sick leave ended at the end of January 2015, but she did not physically return to work until mid-March because there was no office for her until that time. She did not receive a salary between January 29 and March 16, 2015, and filed a second grievance for that reason.

[84] Upon returning to work, Ms. A was reassigned to the overall direction of Mr. Risseeuw. On March 2, 2015, she sent a letter to her director general because she felt that her director general had done nothing after their meeting in February 2014, and because she wanted an investigation pursuant to the *Regulations* to be conducted into the situation that she had allegedly experienced. She also forwarded her director general the email from June 12, 2015. In this email, she reiterated her request for an investigation into her complaint, as a number of months had gone by without her receiving a response and this delay gave her the impression that her complaint was not being taken seriously.

[85] In May 2015, she accepted Mr. Risseeuw's proposal to turn to an informal internal conflict resolution process. She met with someone from informal conflict management services to understand the process and after this meeting felt ready to meet with her former manager. She was disappointed when this meeting was cancelled, as she was seeking to resolve the situation.

As she heard no updates after that and felt that her complaint had been somewhat overlooked, she contacted the Labour Program.

[86] When Mr. Risseeuw sent her the list of external investigators to investigate her complaint, she went to her union representative, Ms. Camus, to obtain further details on their professional competence and experience. As she had never had to make such a decision before, she was not sure which investigator to choose. She thought about her witnesses and wanted to do what would be best for everyone. She added that she had consulted with her union representatives during this process, as she needed help understanding it.

[87] After examining the information provided on Ms. Jelly, she decided that Ms. Jelly had what she was seeking in an investigator for her complaint. Ms. A added that she knew from the investigation details provided to her by Mr. Risseeuw that she would only have to speak to the investigator once. This process was not easy for her, but she felt at ease with Ms. Jelly. After this investigation, she received no updates and did not know what the others had thought of Ms. Jelly's report. She was then completely taken aback when her employer sent her an email informing her that it had decided to appoint a federal government employee to investigate her complaint.

[88] In her explanation of her rejection of Ms. Morse, she explained that she was worried and had doubts about Ms. Morse's impartiality because she did not know Ms. Morse's exact government duties or professional background and wanted reassurance on this. When Ms. A examined Ms. Morse's résumé, she said that she was very concerned about the fact that Ms. Morse had worked extensively in human resources. According to Ms. A, the fact that Ms. Morse worked for the government and knew government workers meant that she could have prejudices about them. Ms. A stated that when she had emailed Mr. Boulanger on December 20, 2016, to signal her anxiety and concern about a Government of Canada employee being appointed to investigate her complaint, she wanted to explain to him that her three witnesses felt uncomfortable and even threatened by the former management, that this was routine in their work place, and that she hoped that speaking with someone from the outside would help them feel more at ease.

[89] As for the proposals of Mr. Marion and Mr. Charron, Ms. A stated that she did not know whom they had worked with and that she thought that they held positions on the employer side. According to Ms. A, members of management in the government all know one other, and she did not trust management to investigate her complaint.

[90] As for Mr. Zanetti, Ms. A stated that she had worked with him and felt that it would be unfair to her as well as to the other party, as she would not feel comfortable dealing with him on the investigation.

[91] With respect to the proposal of a joint investigation conducted by Mr. Hubert and Mr. Béland, Ms. A stated that she did not find them to be sufficiently impartial to conduct the investigation, as both of these persons were involved in and privy to her complaint.

[92] As for the last proposal, in which Mr. Charron was appointed and the start date of his investigation announced, Ms. A stated that she did not understand it at all.

[93] She stated that after the direction was issued, a third party from external firm Textus was appointed and everything was completed in three weeks' time.

[94] She added that, over the course of this very long process, she had the impression that no one in management wanted to do anything and that the situation she alleged constituted violence in the work place would never be impartially evaluated. Her confidence in management had fallen very low.

[95] Ms. A stated that she would have considered a government worker to be impartial if she had been given confidence in the process. However, she feared that the competent persons proposed thus far would not investigate her complaint impartially and that her complaint would therefore have been in vain and would be disregarded by her employer. It is for this reason that she wanted a truly neutral person to investigate her complaint and had more confidence in an impartial third party who did not work for the government.

[96] Mr. Jean-Rodrigue Yoboua argues on behalf of the respondent that the ministerial delegate's direction be confirmed for the following reasons.

[97] First, Mr. Yoboua argues that Ms. A diligently attempted to advance the investigation that her employer was to conduct into her allegations of work place violence, and that there is nothing to indicate that she abused her rights by acting as she did. He also alleges that Ms. A's reasons for rejecting the appointment of the proposed competent persons were, for the most part, based on the appellant's behaviour, which undermined Ms. A's confidence in the process.

[98] Mr. Yoboua argues that this distrust in the appellant is mainly the result of what follows.

[99] According to Mr. Yoboua, the appellant waited too long to address Ms. A's complaint as required by the *Regulations*. Furthermore, when the appellant refused to appoint Ms. Jelly as a qualified person to conduct the investigation pursuant to the *Regulations*, the appellant's reasons for doing so were erroneous. Based on Mr. Risseeuw and Mr. Hubert's testimonies, Mr. Yoboua alleges that it was invalid to reject Ms. Jelly by stating that she should have gathered facts from the other party involved during her *prima facie* investigation. Ms. Jelly conducted the investigation exactly as she was supposed to.

[100] In addition, the employer undermined its relationship with the complainant by criticizing the involvement of Ms. A's union in her complaint to the Labour Program in an attempt to exclude the union from the process. According to the interpretation bulletin on violence prevention in the work place (943-1-IPG-081, Exhibit 3) released by the Labour Program, a complainant may be represented by their union. The appellant was familiar with this bulletin.

[101] Finally, Mr. Yoboua argues that Ms. A did not act arbitrarily or abusively by refusing the competent persons proposed to her. On the contrary, Ms. A considered each candidate seriously and the reasons that she gave for rejecting each person and the group of proposed persons as a whole were based on reasonable and non-arbitrary considerations.

[102] Mr. Yoboua submits lastly that Ms. A is not calling into question the professional qualifications of the proposed persons in this case and that her objections to each person and the group of proposed persons as a whole have to do with their impartiality alone.

[103] Mr. Yoboua argues that proving arbitrary and abusive action is a heavy burden, and that the persons proposed to Ms. A should not only have been objectively impartial but should also have been considered by the claimant to be subjectively impartial. In Mr. Yoboua's view, not only did a number of the investigators proposed by the appellant fail to meet the objective test of impartiality, but none of the investigators satisfied Ms. A's subjective impartiality criteria. Mr. Yoboua also submits that Ms. A's reasons for rejecting the proposed investigators were closely linked to the circumstances surrounding her complaint.

[104] Mr. Yoboua submits that the direction is valid as it is written, as it describes exactly the actions required from the appellant under the *Regulations*. Furthermore, the employer appointed an impartial third party from an external firm to investigate Ms. A's complaint as proposed in the direction, which, in Mr. Yoboua's opinion, proves the direction's validity.

[105] For these reasons, Mr. Yoboua asks on behalf of the respondent that the appeal be dismissed and that the direction be confirmed without being varied.

**C) Reply**

[106] On behalf of the appellant, Mr. Séguin disagrees that proving abusive or arbitrary action is subject to a heavy burden because, in paragraphs 60 and 61 of the *Maritime Employers Association* decision, Appeals Officer Hamel did not use this term but did refer to the principle according to which "no person can abuse his or her rights."

[107] Furthermore, Mr. Séguin refutes the respondent's claim that the employer attempted to exclude the union from the process. Rather, Mr. Séguin alleges that Ms. A and her union assumed that all public servants were biased.

**Analysis**

[108] This appeal requires that it be determined whether or not the direction issued by ministerial delegate Mr. Boulanger is well founded.

[109] This case differs from other cases that raise questions related to complaints alleging situations of work place violence because here, the ministerial delegate did not issue a direction

noting a breach of the *Code* pursuant to subsection 145(1), but chose rather to use his discretion under paragraph 141(1)(a) of the *Code*:

> 141(1) Subject to section 143.2, the Minister may, in carrying out the Minister's duties and at any reasonable time, enter any work place controlled by an employer and, in respect of any work place, may:
>
> (a) conduct examinations, tests, inquiries, investigations and inspections or direct the employer to conduct them;
>
> [my underlining]

[110] It was by using this discretionary power that the ministerial delegate, as permitted by the *Code*, ordered the employer to undertake an investigation, in compliance with subsection 20.9(3) of the *Regulations*, on the work place violence alleged by Ms. A. More specifically, the ministerial delegate instructed the employer to propose to Ms. A "persons who are not employees of the Government of Canada" so that a competent person who was not an employee of the Government of Canada could be designated to investigate her complaint.

[111] In his testimony at the hearing, Mr. Boulanger explained that he issued his direction in these terms because, in his opinion, Ms. A's refusal to agree to the appointment of several people proposed by the employer to investigate her complaint stemmed principally from the fact that these people were federal government employees. According to the ministerial delegate, given the wording of Part XX of the *Regulations* and the applicable jurisprudence, Ms. A had every right to reject the appointment of the people selected if she did not consider them to be impartial, and the role of the ministerial delegate is not to question a party's objections concerning the impartiality of the person chosen to conduct the investigation. Finally, the ministerial delegate explained that he took this step to break the deadlock the parties were in concerning the appointment of a competent person to carry out the investigation.

[112] To determine whether the ministerial delegate was justified in this case in ordering the employer to propose a competent person who was not a federal government employee to investigate Ms. A's situation, I must, first, establish whether the employer met its obligations under Part XX of the *Regulations.*

[113] Section 20.9 of Part XX of the *Regulations*, which deals with the prevention of violence in the work place, sets out the employer's obligations and the procedure that must be followed if the employer becomes aware of a situation of violence or alleged violence in the work place. The relevant parts of section 20.9 that apply to this situation read as follows:

| **Notification and investigation** | **Notification et enquête** |
|---|---|
| 20.9(1) In this section, "competent person" means a person who: | 20.9 (1) Au présent article, personne compétente s'entend de toute personne qui, à la fois : |

| | |
|---|---|
| (a) is impartial and is seen by the parties to be impartial; | a) est impartiale et considérée comme telle par les parties; |
| (b) has knowledge, training and experience in issues relating to work place violence; and | b) a des connaissances, une formation et de l'expérience dans le domaine de la violence dans le lieu de travail; |
| (c) has knowledge of relevant legislation. | c) connaît les textes législatifs applicables. |
| (2) If an employer becomes aware of work place violence or alleged work place violence, the employer shall try to resolve the matter with the employee as soon as possible. | (2) Dès qu'il a connaissance de violence dans le lieu de travail ou de toute allégation d'une telle violence, l'employeur tente avec l'employé de régler la situation à l'amiable dans les meilleurs délais. |
| (3) If the matter is unresolved, the employer shall appoint a competent person to investigate the work place violence and provide that person with any relevant information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent. | (3) Si la situation n'est pas ainsi réglée, l'employeur nomme une personne compétente pour faire enquête sur la situation et lui fournit tout renseignement pertinent qui ne fait pas l'objet d'une interdiction légale de communication ni n'est susceptible de révéler l'identité des personnes sans leur consentement. |
| (4) The competent person shall investigate the work place violence and at the completion of the investigation provide to the employer a written report with conclusions and recommendations. | (4) Au terme de son enquête, la personne compétente fournit à l'employeur un rapport écrit contenant ses conclusions et recommandations. |

[my underlining]

[114] It is not contested, in this case, that Ms. A's complaints leading to the ministerial delegate's intervention raised questions about violence in the work place and that, consequently, the employer was obliged, under subsection 20.9(2), to try to resolve the situation and that, if this was not done to the satisfaction of the employee in question, the employer was obliged, under subsection 20.9(3), to appoint a competent person to conduct an investigation.

[115] Subsection 20.9(1) of the *Regulations* lists certain conditions that must be met for a person to be considered competent to investigate a complaint of work place violence. Under the terms of this provision, a competent person must meet two requirements. They must, on one hand, be impartial and be seen as such by the parties (paragraph 20.9(1)(a)) and, on the other, they must have knowledge, training and experience in issues relating to work place violence and have knowledge of the relevant legislation (paragraphs 10.9(1)(b) and (c)).

[116] It should also be noted that, given the wording of the direction issued by the ministerial delegate, the debate in this case concerns only the first condition imposed in paragraph 20.9(1)(a) of the *Regulations*, that is, the impartiality of the people selected by the employer to investigate the violence alleged by Ms. A. Furthermore, the respondent did not, at any time during the hearing or in his written observations, contest the professional qualifications of the people proposed to conduct the investigation, and the proof submitted to me does not lead me to doubt this.

[117] Therefore, the matter to resolve in this case is to determine whether the employer contravened paragraph 20.9(1)(a) by not appointing, to investigate the violence alleged by Ms. A, a person who meets the test of impartiality stated therein. Under the terms of paragraph 20.9(1)(a), before appointing a person to investigate allegations of violence in the work place, the employer must ensure that the person is impartial and seen as such by the parties in question. In this regard, I share the opinion of my colleague Pierre Hamel, in the *Maritime Employers Association* case, that the legislator favours a consensual approach to impartiality:

> [55] The legislator clearly preferred a consensual approach to the issue of impartiality. By including the words *and is seen by the parties to be impartial* after the word impartial, the legislator clearly requires the parties to agree on whether the person proposed by the employer is impartial. The French version of this same paragraph is equally clear: […*est impartial et est considérée comme telle par les parties*] and also requires that the parties consider the person to be impartial, without limitation or exception. If an agreement is not reached, the proposed person simply cannot be appointed.
>
> [56] From this it can be inferred that the legislator considered it vital that the parties agree on the impartiality of the person appointed to conduct the investigation whose objectives are described in subsection 20.9(3) and et seq. of the Regulations. There is no doubt that the objective sought by the legislator is to ensure the credibility of the recommendations that this person must provide at the end of the investigation and to promote their acceptance by all of the parties involved.
>
> […]
>
> [59] Therefore, I agree with Ms. Perrault's interpretation of the requirement of paragraph a): it is sufficient that a party does not consider the proposed investigator impartial for the person to be unable to proceed under this section. This does not mean that I accept the claim that Ms. Charbonneau and Mr. Pratt are not impartial: it is not up to me to rule on this issue, since the Regulations require mutual agreement by the parties on that standing.
>
> [my underlining]

[118] I agree with this interpretation that my colleague Pierre Hamel offers for paragraph 20.9(1)(a), which is that there must be agreement among the parties involved on the impartiality of the person selected for the investigation, so that this person can serve as a competent person in the meaning of the *Regulations.* I also agree with my colleague's proposal that it is sufficient for one of the parties involved to not consider the person proposed to conduct the investigation to be impartial for that person to not be able to serve under the terms of subsection 20.9(3).

[119] In a subsequent decision related to Part XX of the *Regulations* and specifically about the employer's obligation to investigate situations of violence in the work place (*Natural Resources Canada v. Professional Institute of the Public Service of Canada*, 2018 TSSTC 1), Appeals Officer Jean-Pierre Aubre, in expressing his agreement with the interpretation of Appeals Officer Hamel, added the following concerning the test of impartiality:

> [142] I agree with the fundamental importance of the subjective notion of impartiality included in paragraph 20.9(1)(a) and that this requires the parties (that is, the work place parties concerned by the allegations of work place violence) to agree on the impartiality of the person proposed by the employer. However, with respect, I am of the view that this interpretation fails to take into account the objective notion of impartiality which is also embedded in this provision.
>
> [143] It warrants noting that paragraph 20.9(1)(a) includes two components. It refers to a person who is impartial and is seen to be impartial. In my opinion, this provision therefore sets out a two-part criterion comprising an objective and a subjective component that premise the appointment. […]
>
> [144] The conjunction of "is" and "is seen" expressed in the present tense signifies, in the undersigned's opinion, that while the so-called parties to a complaint of work place violence destined to be investigated need to perceive ("is seen") as impartial the appointed person, perception being a concept entirely subjective thus meaning that different individuals may understand "impartial" in differing ways, the person or persons offered for appointment to investigate by a party (employer) that is not a party to the complaint, that party (employer) is held to a stricter criterion, that of offering for appointment a person (or persons) that effectively "is" impartial, thus objectively.
>
> [my underlining]

[120] According to this interpretation, the test of impartiality stated in paragraph 20.9(1)(a) includes an objective component and a subjective component. It follows that when the employer appoints a competent person to investigate violence in the work place, it must ensure that not only is the appointed person seen by the parties as impartial, but also that the person objectively is impartial.

[121] It is well established in the jurisprudence that the standard of impartiality required in an investigator who does not have decision-making power, such as a competent person appointed to conduct an investigation under subsection 20.9(3), is less strict than the one

that applies to an administrative decision maker, or even a judge. In its ruling *Chris Hughes v. Canada (Attorney General),* 2010 FC 837, the Federal Court stated the following:

> [23] [...] That said, because of the non-adjudicative nature of the Commission's responsibilities, it has been held that the standard of impartiality required of a Commission investigator is something less than that required of the Courts. That is, the question is not whether there exists a reasonable apprehension of bias on the part of the investigator, but rather, whether the investigator approached the case with a "closed mind": see *Zündel v. Canada (Attorney General) (1999), 175 D.L.R. (4th) 512*, at paras. 17-22.
>
> [my underlining]

[122] If the "closed mind" standard must be applied for a complaint submitted under Part XX of the *Regulations*, in my opinion, an employer subject to Part II of the *Code* must establish a minimum of objective questions to determine whether the people selected to lead an investigation have an "open mind" with regard to the alleged violence in the work place that they are being asked to examine, to ensure that the required standard of impartiality is upheld. Here is a non-exhaustive list of questions from the jurisprudence to ask with respect to this standard in order to assess the impartiality of the selected person:

- Are there indicators or reasons to believe that the person will not act in good faith to conduct an investigation into the alleged violence in the work place?

- Are there indicators or reasons to believe that the person has already made a decision even before being appointed or hearing each of the parties involved with respect to the alleged violence?

- Has the person uttered remarks that may suggest that they have made a decision even before being appointed or hearing each of the parties involved?

- Is the person willing to allow each of the parties involved in the alleged violence in the work place to make themselves heard?

- Is the person prepared to take the facts and arguments of each party into consideration to issue written conclusions and, on the basis of these, recommendations so as to prevent the situation from recurring?

[123] That said, it is not necessary here to examine the question of whether the people selected by the employer to investigate Ms. A's situation were effectively impartial by an objective standard, since it appears from the evidence submitted that the second component of the test of impartiality—that is, that the employer must ensure that the person chosen to conduct the investigation is impartial in the eyes of each of the parties involved—was not met. As these two components are cumulative, failure to meet one of them is enough to conclude that paragraph 20.9(1)(a) was breached.

[124] Indeed, the evidence presented shows that the employer proposed a total of four people and a group of two people to Ms. A and that she, each time, said that she did not consider those people or that group of people to be sufficiently impartial to investigate her complaint.

[125] In her testimony at the hearing, Ms. A explained that when she gave her reasons for rejecting the first person proposed by the employer, Ms. Morse, she was worried and had doubts about the impartiality of this person to investigate the complaint because she did not know her precise government duties or her professional background and that she wanted reassurance on this. In examining Ms. Morse's résumé, she added that she was very concerned about the fact that Ms. Morse had worked extensively in human resources. According to Ms. A, the fact that Ms. Morse worked for the government and knew government workers meant that she could have prejudices about them.

[126] According to Mr. Hubert, Ms. A's grounds for refusing Ms. Morse are invalid because Ms. Morse has occupational health and safety qualifications, is bound by a values and ethics code and, as she does not work for ESDC, has no interactions with the employer in her everyday work.

[127] He knew that Ms. Morse was affiliated with human resources but did not know Ms. A would be resistant to that type of profile for the competent person selected, even though he understood that she had indicated, in her rejection of Ms. Morse, that she did not want a third party who represented the employer in said third party's daily work. According to Mr. Hubert, Ms. A should have specified what she meant by "represents the employer in her daily work" and "has internal relationships with people in the department."

[128] Moreover, even having understood, from Ms. A's initial response rejecting Ms. Morse, that based on the test of impartiality, she did not want the investigator to come from the Government of Canada, this reason for refusal was not valid, in Mr. Hubert's opinion, because it meant, he felt, that Canadian government employees were presumably biased, regardless of their professional competencies.

[129] As for the proposals of Mr. Marion and Mr. Charron, Ms. A stated that she refused these selections because they have positions on the employer side and she believed they knew people in her department. According to Ms. A, members of management in the government all know one other, and she did not trust management to investigate her complaint.

[130] Mr. Hubert stated that he knew that Mr. Charron advised human resources in the exercise of his duties and had a similar profile to that of Ms. Morse in this regard. Mr. Marion had that type of profile as well.

[131] Mr. Hubert is of the opinion, however, that Ms. Morse, Mr. Marion and Mr. Charron all meet the test of impartiality because they work for departments other than ESDC.

[132] Ms. A refused to acknowledge Mr. Zanetti's impartiality because she had worked with him and felt that it would be unfair to her as well as to the other party, as she would not feel comfortable dealing with him on the investigation.

[133] Mr. Hubert stated that when he proposed Mr. Zanetti as the third prospective investigator into the complaint, he was aware that Ms. A knew Mr. Zanetti and he thought that she would accept him and that they could agree to resolve the complaint. In his opinion, the professional relationship between the two of them was insufficient to conclude that Mr. Zanetti was biased.

[134] Ms. A also rejected the employer's proposal of a joint investigation conducted by Mr. Hubert and Mr. Béland. Since these two people were aware of her complaint, she did not see how they would be sufficiently impartial to investigate it.

[135] Although he had received notification about Ms. A's complaint and knew that Mr. Béland was aware of the situation, Mr. Hubert stated that he believed a middle ground regarding impartiality could be found, with him representing the employer and Mr. Béland representing Ms. A's union.

[136] In light of the foregoing, there is no doubt that no agreement was ever reached by all the parties involved about the impartiality of any of the people selected by the employer to conduct the investigation in compliance with subsection 20.9(3) on the alleged violence affecting Ms. A.

[137] Mr. Séguin, speaking for the appellant, claims that the employer was unable to appoint a competent person for the investigation in compliance with subsection 10.9(3) because in his opinion, the reasons invoked by Ms. A to reject the people proposed to handle her complaint were unreasonable, capricious and arbitrary, and therefore abusive.

[138] In the *Maritime Employers Association* decision, Appeals Officer Hamel stated that even though a person's subjective belief regarding the impartiality of the person chosen by the employer to conduct an investigation cannot be questioned, one party cannot abuse their rights by systematically refusing to agree to the appointment of a person based on discriminatory, sexist or arbitrary considerations:

> [60] It was alluded that this so-called literal application of the section could lead to abuse. The refusal to agree to the appointment of an individual without having to show cause or justify the reasons could, as properly noted by the appellant's counsel, be motivated by discriminatory, sexist or arbitrary considerations. Or an employee—I am thinking in particular of an employee who is added as an alleged abuser, for example—could systematically refuse anyone proposed by the employer, in a capricious or arbitrary manner.
>
> [61] It is a principle of law that no one can abuse their rights. Such an abusive or discriminatory approach certainly has no place and could, in my view, be punished through disciplinary action or interpreted as a waiver of the right conferred on the parties by subsection 20.9(3).

[139] In my opinion, given the circumstances of this case, the doubts expressed above by Ms. A about the people and the group of people proposed to conduct the investigation into her complaint do not seem abusive. Like Appeals Officer Hamel, I am more of the opinion that it is not up to me to decide whether the reasons given by Ms. A to reject, based on the test of impartiality, the people proposed by her employer are valid. Under the terms of paragraph 20.9(1)(a), it is the employer's responsibility to obtain the agreement of each party involved on the impartiality of a "competent" person to conduct an investigation, under subsection 20.9(3) on allegations of violence in the work place.

[140] It is also clear here that Ms. A had lost all confidence in management and that, for this reason, she did not feel that a federal government manager could be impartial in examining her complaint. In my opinion, the slowness of the procedures and the fact that the employer initially appointed a person outside the government to lead a *prima facie* investigation into her allegations of violence contributed to Ms. A's belief that a federal government employee would not be sufficiently impartial to investigate her complaint.

[141] At the hearing, Ms. A explained that after the investigation conducted by Ms. Jelly, she received no news and was not informed what the others thought of her report. When her employer then sent her an email stating that it had decided to appoint a federal government employee to investigate her complaint, she felt completely unsettled by the process. Furthermore, when she emailed Mr. Boulanger on December 20, 2016, to signal her anxiety and concern about a Government of Canada employee being appointed to investigate her complaint, she wanted to explain to him that her three witnesses felt uncomfortable and even threatened by the former management, that this was routine in their work place, and that she hoped that speaking with someone from the outside would help them feel more at ease.

[142] Ms. A explained that, throughout this very long process, she had the impression that no one in management wanted to do anything and that the situation that she alleged was violence in the work place would never be impartially evaluated. It is for this reason that she wanted a truly neutral person to investigate her complaint and had more confidence in an impartial third party from outside the government.

[143] For all these reasons, I am of the opinion that by failing to obtain the agreement of the parties involved on the choice of the "competent" person, on the test of impartiality, to investigate Ms. A's complaint, the employer breached paragraph 20.9(1)(a) of the *Regulations* as the obligation to appoint a person considered by all parties to be sufficiently impartial to investigate was not fulfilled.

[144] I must now rule on the validity of the ministerial delegate's direction as formulated.

[145] Mr. Séguin asserts that by issuing the direction as it is formulated, the ministerial delegate sanctioned the assumption of a person's bias, simply because that person is employed by the government. The ministerial delegate therefore allows Ms. A to influence the choice of the competent person whereas, in Mr. Séguin's opinion, there is nothing to this effect in the *Regulations*. Moreover, according to Mr. Séguin, the wording of the direction creates a precedent

that is harmful to the employer, because it allows other federal public service employees, in similar situations, to demand the appointment of an investigator outside the government. I do not accept these arguments for the following reasons.

[146] Paragraph 20.9(1)(a) of the *Regulations* is clear and requires the employer to obtain the agreement of the parties in question about the impartiality of the chosen investigator. This allows each of the parties involved to influence the choice of the investigator. Furthermore, the ministerial delegate did not draw any conclusion about the impartiality of the people proposed to Ms. A for the investigation. After having determined that the employee refused to acknowledge the impartiality of anyone employed by the federal government and having noted that the employer had, to date, proposed only people or a group of people who were all Canadian government employees, the ministerial delegate was then, in my opinion, absolutely justified in directing the employer to propose to the parties that an external investigator be appointed for Ms. A's complaint.

[147] As for the appellant's claim that the wording of the direction creates a precedent that is harmful to the employer because it can allow other federal public service employees in similar situations to demand the appointment of an investigator from outside the government, the ministerial delegate's direction clearly mentions that it was Ms. A's perception that a government employee could not be impartial in examining her complaint. And that does not necessarily mean that, in other circumstances, other employees would be of the same opinion.

[148] Given all of the above, I am of the opinion that the direction is well founded.

**Decision**

[149] For these reasons, I confirm the direction issued on March 2, 2017, by Mr. Boulanger, ministerial delegate for the Minister of Labour.

Katia Néron
Appeals Officer