Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2019-03-29
Case No.: 2018-11

Between:

Abdulkadir Hassan, Appellant

and

City of Ottawa (OC Transpo), Respondent

Indexed as: *Hassan v. City of Ottawa (OC Transpo)*

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered an official delegated by the Minister of Labour
Decision:	The decision that a danger does not exist is confirmed.
Decision rendered by:	Pierre Hamel, Appeals Officer
Language of decision:	English
For the appellant	Himself
For the respondent:	Ms. Alexandra Miculan, Counsel, City of Ottawa Legal Services
Citation:	2019 OHSTC 8

REASONS

[1] These reasons concern an appeal brought under subsection 129(7) of the *Canada Labour Code* (*Code*) of a decision of absence of danger rendered by Ms. Jennifer Stathis, in her capacity as an official delegated by the Minister of Labour (ministerial delegate), on March 27, 2018. The decision was issued further to the appellant's work refusal on the grounds that he was exposed to a condition in his workplace presented a danger to him. The appeal was filed with the Tribunal on April 5, 2018.

[2] The Notice of Appeal reads as follows:

> I have not received Investigation Report and Decision (10 days since decision date March 27) as promised by Miss Jennifer Stathis. Since I have 10 days to appeal her decision and yet I have not received her full report as of today April 5 2018, i am appealing based on her negligence of her duties to provide me full report of her decision.
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> Since I do not have full report of her decision (as of today April 5 2018), I am assuming she failed to take into account previous similar incidents of imminent danger to life, I have submitted.
>
> Miss Jennifer Stathis also got my name wrong, as attachments show. So if she got my name wrong, and has not provided me her full report of her decision within reasonable time, i am assuming her investigation flawed.
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> Also the decision report drafted by Miss Stathis gave me wrong email attachment shows; i emailed to that address earlier today and finally i had to google and find right email, another negligence of duty by Miss Stathis.

[3] The appeal was heard in Ottawa on December 3 and 5, 2018. The appellant filed his final submissions on January 11, 2019; the employer filed its final submissions on February 11, 2019; the appellant did not present reply submissions.

Background

[4] The appellant is employed as a bus operator by the respondent (the employer). He made a work refusal on February 5, 2018, in circumstances that may be summarized as follows.

[5] Further to an incident that occurred on October 14, 2017, where the appellant alleged that he was assaulted by Mr. Gurb Chahal, a mobile supervisor employed by the employer, and further to a recommendation by his physician that he be placed on accommodated duties following that incident, Mr. Hassan was assigned to non-driving work at OC Transpo's Pinecrest garage, as a garage attendant assisting others and cleaning buses. This accommodated assignment commenced on January 31, 2018, on a four-hour shift, and was to end on February 4, 2018. Mr. Hassan had been on leave for medical reasons since the incident of October 14, 2017, and in receipt of psychological counselling.

[6] On his first shift at the Pinecrest garage, as he was exiting the washroom, Mr. Hassan crossed paths with Mr. Chahal, against whom he had made a workplace violence complaint stemming from the incident of October 14, 2017. The appellant described the interaction during his testimony at the hearing as follows: When they came face to face with each other, as

Mr. Chahal was entering the washroom, Mr. Chahal "sneered" at him and "stared him down". He described that Mr. Chahal looked at him and "uttered a sound". Mr. Hassan stated that the encounter lasted a few seconds. No words were exchanged. There was no physical contact between the two and no gesture of any kind was made. The washroom is located in a public area of the workplace, accessible to all employees.

[7] Mr. Hassan did not immediately report this "interaction". He emailed his supervisor, Mr. Greg Burnette, on the following day, February 1, 2018, to inform him that he did not feel safe working in the same location as his alleged aggressor. Mr. Burnette suspended the appellant's modified work so that he could review the incident. On February 2, 2018, Mr. Burnette determined that there was no safety issue and informed Mr. Hassan by email that he was expected to return to work for his shift on February 2, 2018.

[8] Mr. Burnette incorrectly stated in his email that Mr. Chahal was not booked out of the Pinecrest garage. He became aware of this error and called the appellant later that day or on the following day to advise him of this error, but confirmed that he still saw no safety issue for Mr. Hassan. Mr. Burnette noted that even if Mr. Chahal were based out of the Pinecrest garage, 95 to 98% of his working time would be spent on the road dealing with service issues. There is no reporting relationship between Mr. Hassan and Mr. Chahal.

[9] Mr. Hassan returned to his physician on February 2, 2018, and was cleared to return to his regular duties as of February 4, 2018. As he was not scheduled to work on February 3 or 4, 2018, his next shift was February 5, 2018. Mr. Hassan invoked his right to refuse to work on the afternoon of that day. His refusal refers to the interaction with Mr. Chahal on January 31, 2018, to the incident of October 14, 2017, and to other incidents where radio communications had failed and where special constables had not been dispatched to an incident scene when requested by an employee, as he himself had experienced in the past.

[10] Mr. Burnette inquired into the refusal and again determined that there was no danger for Mr. Hassan to attend his work shift. In an email to Mr. Burnette dated February 2, 2018, Mr. Hassan states as follows:

> […] My entire requirement of modified accommodation and medical attention is based on assault Mr. Gurbakshish Chahal has done to me. The matter is not if Mr. Gurbakshish Chahal is a threat to me but my medical requirement for accommodation is based on been [sic] placed in a situation away from Mr. Gurbakshish Chahal and radio transmission on bus or Control, during the period of medical requirement for modified duties.
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> [Emphasis added in original]

[11] Mr. Hassan continued his refusal, which resulted in the investigation by the Work Place Health and Safety Committee (WHSC), as prescribed by the *Code*. After reviewing the circumstances of the refusal, including the facts and statements relating to the incident of October 14, 2017, the WHSC concluded on March 1, 2018, that there was no danger. However, the WHSC made recommendations regarding "internal processes in regards to employee relations and immediate response and resolution of issues", measures to ensure that employees better understand the protocols of the Transit Operations Control Centre (TOCC) when

responding to calls for assistance, and bi-annual reports to the WHSC of all requests for assistance to the Special Constables Unit (SCU) and how they are dealt with.

[12] Mr. Hassan continued his refusal and the Labour Program of Employment and Social Development Canada was contacted. The ministerial delegate conducted her investigation into the refusal over the course of the month of March 2018. She found that the refusal "may have been resolved internally had the employer properly dealt with the October 14, 2017 incident" in accordance with the requirements of subsection 20.9(3) of the *Canada Occupational Health and Safety Regulations* (*Regulations*). She notes in her report that further to discussions during her investigation, the employer had agreed to appoint a "competent person" to investigate the employee's violence complaint arising out of the incident of October 14, 2017. At the time of writing her report, the parties had agreed on the selection of a competent person. I was informed at the hearing that a formal investigation had taken place by a "competent person" acceptable to all parties and that Mr. Hassan's complaint was found to be unsubstantiated.

[13] The ministerial delegate also addressed in her report some of the broader issues that arose from the incident of October 14, 2017, namely, that the employer had provided extensive policies that detail various procedures associated with operator distress calls. She confirmed that the employer would provide the WHSC with bi-annual reports that summarize employee request for assistance to the SCU that have been denied. The employer has also counselled and will continue to monitor TOCC to ensure that a special constable is dispatched when requested by an operator and to ensure that any future concerns are handled appropriately.

[14] Finally, the ministerial delegate noted in her report that the employee had been cleared by his physician to return to his regular duties as of February 4, 2018, and there was no indication that the employee should avoid contact with Mr. Chahal. On March 27, 2018, the ministerial delegate verbally issued her decision that Mr. Hassan was not exposed to a danger at the time of his refusal, which she confirmed in writing on April 5, 2018.

[15] Although I am not seized of the incident of October 14, 2017, *per se*, a significant portion of the documentation on the Tribunal's record (ministerial delegate's investigation report and attachments) and of the evidence presented at the hearing refer to that incident. The incident has contextual significance for the present appeal and a brief description of what happened, based on Mr. Hassan's testimony and the documentation on file, will be helpful in better understanding the grounds for Mr. Hassan's refusal and his state of mind at that time.

[16] Mr. Hassan testified that on October 14, 2017, as he was parked at the Greenboro station, Mr. Chahal advised him that the Control Centre had been trying to contact him to assign him a route. He stated that Mr. Chahal requested that he "deadhead" to Barrhaven to start the route. Mr. Hassan had boarded his bus and asked Mr. Chahal to come to his bus to answer a question. Mr. Chahal came and stood outside the doors of the bus. The alleged assault occurred as Mr. Hassan had stood up from his driver seat and was about to walk off the bus in Mr. Chahal's direction. As he was walking to exit the bus, Mr. Chahal put his hand up, making physical contact with the appellant, first holding him then pushing him back. At that same moment, Mr. Chahal apparently said something like, "Go and do your run." When the appellant asked him why he had touched and pushed him, the supervisor apparently stated that he did not mean to touch him and apologized.

[17] The documentation on record also shows that Mr. Hassan sought the assistance of the TOCC to deal with the incident. He requested that special constables be dispatched to deal with the incident with Mr. Chahal. After hearing the description of the alleged assault by the appellant, the TOCC attendant coached Mr. Hassan to try to resolve the issue by dialogue with Mr. Chahal.

[18] Mr. Hassan stated that, following the alleged assault, he spoke to Mr. Chahal outside of his bus for 30-40 minutes and that the conversation was not confrontational. Mr. Chahal consistently maintained that the interaction was a misunderstanding and that he had inadvertently made physical contact with Mr. Hassan while making a hand gesture as the employee was walking towards him. Mr. Hassan continued to feel humiliated and aggrieved by Mr. Chahal's gesture and called TOCC again to request the assistance of a special constable. Eventually, another TOCC attendant instructed him to go to the Billings Bridge station and wait for someone from the Special Constables Unit, who would be dispatched to take statements. In an email to management dated October 16, 2017, the appellant stated that he did not feel hurt because of the initial shoving but because he felt like the TOCC attendant was covering up Mr. Chahal. The appellant also wrote in that email that he felt belittled and helpless.

[19] During the investigation by the WHSC, by the ministerial delegate and at the hearing as well, Mr. Hassan strongly expressed his views that the employer had failed to properly respond to his calls for assistance by not immediately dispatching special constables when requested to do so. He referred to several other instances in previous years (2010, 2011, 2016 and 2017) where the employer had allegedly failed to act on threats reported by him, which caused him to feel unsafe and led him to make his work refusal. This explains the WHSC's recommendations to the employer and some of the measures that the employer had agreed to undertake further to the ministerial delegate's investigation and as reflected in her investigation report.

[20] The appellant testified that he reported the incident to management. Mr. Burnette, who at the time was transiting into the position of Mr. Hassan's Section Head, met with him to discuss the incident and subsequently provided a letter summarizing the employer's responsive actions to his complaint. Mr. Burnette confirmed in his testimony that he reviewed the incident thoroughly, including interviewing the appellant, verifying if there was video of the incident (there was not), reviewing the incident with a superintendent from TOCC, reviewing the incident with the program manager of the Dispatching Department, and reviewing Mr. Chahal's statement regarding the incident that he had provided to TOCC. Mr. Burnette stated, based on his review of the facts, that there had been no workplace violence. He stated that he met with the appellant to discuss the results of the review on the incident of October 27, 2017, and provided the letter to the appellant on November 2, 2017.

[21] The appellant did not object to this conclusion, which he explained by the fact that he was on leave for a "psychiatric issue" at the time.

[22] Mr. Hassan filed a claim to the Workplace Safety Insurance Board (WSIB) seeking compensation for psychological stress because of the events of October 14, 2017. His claim was denied by the WSIB.

[23] Over the course of the ministerial delegate's investigation, Mr. Hassan provided further explanation on the grounds of his refusal to work. In an email to the ministerial delegate dated March 13, 2018, the appellant states as follows:

> […] I have verbally informed management of all the previous similar incidents (Radio dispatch failure to send SCU), and I was told that scope of management investigation is limited to only Oct 14 incident. Every meeting I had with management from Oct 14 2017 – 4 Feb 2017, I have raised the previous similar incidents should be taken into account as managements notes and union notes should show.
>
> I have not made up my mind (100%) as to refusal of work until after 2 Feb; when management failed to accommodate me away from Supervisor Chahal; after I met him at remote garage I was assigned to work. When I informed management of my medical accommodation arose from assault by Mr. Chahal to me and if they can find a way during this period (ended on feb 3 2018 anyways) not to be in the same place as Mr. Chahal. Their refusal to accommodate me become the "straw that broke the camel's back meaning". I did not showed up for modified work on Feb 2 2018, as I was told for safety reasons since Mr Chahal would be there and on Feb 5 2018 I exercised my right to refuse to work for imminent danger to life.
>
> [sic throughout]

[24] The appellant was not represented by counsel or by a representative of his union. On several occasions as the hearing progressed, I explained to the appellant the nature of the appeal procedure, the legal and factual scope of the issue raised by the appeal (the presence of a danger and on what grounds) and the questions that were properly before me, as opposed to broader and more remote issues brought up by Mr. Hassan during the ministerial delegate's investigation and in the presentation of his case. I also informed Mr. Hassan of the limitations on the extent of my assistance by reason of my duty to remain impartial and not to be seen to be providing advice to the appellant on the presentation of his case.

Issue

[25] The issue in the present appeal is whether the appellant was exposed to a danger as defined under the *Code* when he exercised his right to refuse work on February 5, 2018. More precisely in the present case, the issue is whether the interaction between Mr. Hassan and Mr. Chahal on January 31, 2018 was a condition in Mr. Hassan's work place that constituted a danger.

Submissions of the Parties

A) Appellant's Submissions

[26] I find appropriate to quote the appellant's submissions *verbatim* and in their entirety as submitted to the Tribunal on January 11, 2019:

> In my final summation, my employer has put my life and health in danger by not facilitating safe work environment. My employer has not investigated properly or at all my complaint of assault, harassment and bullying. My employer failed to accommodate me away from someone whom I have launched an assault complaint against. My employer has

testified to facts contrary to evidence via emails in court and sworn testimony of witness on stand. My employer has broken federal law by not applying the Canadian labor code rules in dealing with workplace violence and harassment statue 20.9(3). Therefore, my employer has not taken proper steps to prevent further harassment.

My employer has failed to investigate properly my complaint of violence and harassment by Mr. Chahal from October 14, 2017 and January 31, 2018. As well as, the evidence brought forth in court clearly shows that Mr. Chahal was not contacted to document the incident for proper assessment as a requirement for workplace safety. In addition, my employer replied on February 1, 2018 (p. 92-428) that the matter was investigated and he was not present in Pinecrest garage. Mr. Burnette testified in court that the information he provided on Feb 1, 2017 via email (p. 92-428) was erroneous and that he discovered few days later Mr. Chahal was present in Pinecrest garage. Also, he said that "not inquiring with Mr. Chahal about the incident this could not be considered an investigation". For this reason, I felt unsafe to follow the order of my employer since the response that was sent via email came in less than 24 hours. As you can see, my employer didn't follow a proper procedure even after it was clear that Mr. Chahal was there in Pinecrest garage.

My employer has failed to accommodate me as agreed verbally to keep away from me Mr. Chahal. Since, I have launched an assault complaint against Mr. Chahal (p. 9, 425-428). ESDC Jenniffer Stathis states, "The employer has agreed that the employee and alleged harasser will continue to be dispatched out different locations pending the results of competent person investigations." Furthermore, I have informed my employer with the medical note for accommodation to keep Mr. Chahal away from me. As a result, my employer has failed to safeguard my health and safety. My employer has told me to go back to work without due investigation and disregarded my assault allegation. As you can see, my employer has put my life in danger for allowing further harassment to take place.

My employer has broken federal law by not applying statue 20.9(3) after the matter was still unresolved. My employer has shown ignorance of labour code of workplace violence prevention. "this refusal to work may have been resolved internally if the original Violence complained handled as stated in 20.9(3) of the COHS regulations." (p. 9-428). I felt in danger for my life and health when it was clear to me my employer has failed to apply and follow federal law and put my life and health in danger in the process. I am also requesting judicial review of my employer OCTranspo a federally regulated company owned and managed by provincially regulated Corporation of City of Ottawa.

In conclusion, my employer has put my life and health in danger by not investigating properly and not following regulation or protocol to prevent violence and harassment in the workplace environment so an employee can work safely. When the matter is serious, my employer has tried to handle the matter internally without following the Canadian Labour Code. As you can see, my life and health was put in danger.

B) Respondent's Submissions

[27] Counsel for the respondent first reviews the facts related to the October 14, 2017 incident and of Mr. Hassan's refusal of January 31, 2018. She points out that the agreement between the

appellant and the employer regarding accommodations for Mr. Chahal is irrelevant to the present appeal. Counsel stresses that such an agreement was to ensure that Mr. Hassan would not *report* to Mr. Chahal, and the evidence is clear that he did not.

[28] The appellant must establish that on February 5, 2018, there was a condition in place and that the condition could reasonably be expected to be an imminent or serious threat to his life or health before the condition could be corrected. Counsel sets out the questions that must be answered to make such a determination:

- What was the alleged condition?
- On its face, is the alleged condition one that could reasonably be expected to be a threat to the appellant's life or health?
- Has the appellant met the evidentiary threshold to establish that the alleged condition was objectively a threat to the appellant's life or health?
- Was any such threat imminent or serious?
- Was the alleged danger present on the date of the appellant's work refusal?

[29] After reviewing the facts established in the evidence with respect to what occurred on January 31, 2018, and October 14, 2017, respectively, the respondent submits that Mr. Hassan clearly exaggerated the severity of the actions towards him.

[30] The respondent notes that the appellant made several references to the employer's failure to accommodate him to be away from Mr. Chahal and to properly investigate his workplace violence complaint. The respondent submits that the issue of whether the employer failed to accommodate the appellant or contravened the provisions of the *Code* in relation to the investigation of his complaint is not properly before the appeals officer. The respondent disputes that it failed to accommodate the appellant or that it contravened the *Code*, and argues that these allegations should only be considered in the context of whether Mr. Hassan was facing a danger at the time of his refusal, i.e. whether the presence of Mr. Chahal on January 31, 2018, presented a danger to Mr. Hassan (*Correctional Service Canada v. Ketcheson,* 2016 OHSTC 19).

[31] The respondent further submits that the test to make a determination of danger is an objective test and this is particularly important where the condition alleged to present a danger is workplace violence and/or harassment (*Via Rail Canada Inc. v. Cecile Mulhern and Unifor,* 2014 OHSTC 3). There is no evidence that the appellant was objectively exposed to a condition that could reasonably be expected to be an imminent or serious threat and cause injury or illness to the appellant. The evidence shows that the interaction was mere seconds, that no words were exchanged, and that no physical contact was made. The interaction was in a public location in the workplace.

[32] The employer submits that a "sneer", on its face, cannot reasonably be expected to cause harm, injury or illness to the appellant. Counsel acknowledges that the interaction on January 31, 2018, must be examined in light of the previous interaction between the two persons on October 14, 2017, and expresses no doubt as to the sincerity of Mr. Hassan's feelings towards Mr. Chahal and how he felt on the day of the refusal. Even in light of this background, on its face, the alleged condition could not reasonably be expected to cause injury or illness to the appellant. According to the employer, the preponderance of evidence indicates that the incident of October 14, 2017, was not an assault, nor workplace violence. In particular, it is noted that

even the formal investigation into the incident found that the claim of workplace violence was unsubstantiated and the WSIB denied the appellant's claim for psychological trauma allegedly resulting from that incident. The respondent concludes that the WSIB finding that any psychological harm experienced by the appellant is *not* caused by a workplace condition is binding on the appeals officer.

[33] Regardless, the evidence shows that the employer met with the appellant and Mr. Chahal to discuss and review the incident. The evidence further shows that Mr. Burnette took steps to follow up with the other OC Transpo departments who were in involved with the incident, including TOCC and Dispatch. The evidence shows that Mr. Burnette met with the appellant to discuss these results and that the appellant did not object to the employer's response to the incident at the time, nor upon his return to work January 31, 2018. Accordingly, the employer considered the matter resolved.

[34] The respondent also submits that there is no medical evidence supporting the claim that it was dangerous for the appellant to be in the presence of Mr. Chahal, which is the foundation of the appellant's refusal. To establish that a condition was a threat to an employee's health, the jurisprudence before this Tribunal is clear that an employee must provide medical evidence supporting that there was a danger to the employee's health. This is consistent with the requirement that a finding of danger be based on objective, rather than subjective, evidence. This evidentiary requirement is particularly important in cases such as this, where the alleged threat to the employee's health appears to be based on an individual experience and relating to the employee's mental health (*Nina Tryggvason v. Transport Canada*, 2012 OHSTC 10).

[35] The respondent reviews the concepts of "imminent" and "serious" threat as discussed by the appeals officer in *Ketcheson* and submits that the evidence did not establish that the employee was exposed to a situation that could cause him serious or imminent harm.

[36] Finally, the respondent submits that in any event, such alleged danger did not exist at the time of the work refusal, on February 5, 2018, and the appeal could be dismissed solely on that ground. Firstly, the appellant was scheduled to return to his regular duties as bus operator on that date, and not to the Pinecrest garage, where the alleged danger existed. Secondly, in the appellant's own words, he was cleared to return to full duties, including seeing Mr. Chahal, after February 3, 2018, as he acknowledged in an email dated March 15, 2018. Consequently, even if the appellant's claim of danger to his health caused by the presence of Mr. Chahal was to be accepted, any such danger no longer existed at the time of his refusal.

Analysis

[37] I am seized of an appeal under subsection 129(7) of the *Code* of a decision issued by the ministerial delegate following her investigation into the appellant's refusal to work, where she concluded that the appellant was not exposed to a danger (subsection 129(4) and paragraph 128(13)(c) of the *Code*).

[38] The appellant exercised his right to refuse to work pursuant to subsection 128(1) of the *Code,* which reads as follows:

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

[39] "Danger" is therefore the key concept in the exercise of the employee's right to refuse to work and in the exercise of the Minister's power (through a delegated official) to make a determination further to an employee exercising the right to refuse to work. Section 122 defines "danger" in the following manner:

> **122(1)** In this Part,
>
> ***"danger"*** means any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered;
>
> [My underlining]

[40] The other provisions of the *Code* that are relevant to the present appeal are as follows:

> **128(13)** After receiving a report under subsection (10.1) or (10.2) and taking into account any recommendations in it, the employer, if it does not intend to provide additional information under subsection (10.2), shall make one of the following decisions:
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> […]
>
> **(c)** determine that a danger does not exist.
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> **129(4)** The Minister shall, on completion of an investigation made under subsection (1), make one of the decisions referred to in paragraphs 128(13)(a) to (c) and shall immediately give written notification of the decision to the employer and the employee.
>
> […]
>
> **(7)** If the Minister makes a decision referred to in paragraph 128(13) (b) or (c), 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 10 days after receiving notice of the decision.
>
> [My underlining]

[41] Subsection 146.1(1) of the *Code* sets out the authority of an appeals officer when seized of an appeal:

> **146.1(1)** If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
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> **(a)** vary, rescind or confirm the decision or direction

[42] For the reasons that follow, I conclude that the decision of absence of danger rendered by the ministerial delegate is well founded and I dismiss the appeal.

[43] It has long been stated that the right to refuse to work is an important but exceptional remedy in the panoply of measures provided in the *Code* to ensure the protection of employees. In *Ketcheson,* the appeals officer summarizes this point as follows:

> [143] Taking an overview of the scheme of the Code makes it clear that the right to refuse to work is not the usual way in which hazards are to be addressed and risk is to be driven down. The right to refuse to work is a "back up" or "failsafe" mechanism.
>
> [144] It is important to note that the right to refuse to work is not contingent on an employee having attempted to deal with OHS issues through means other than a work refusal. An employee can choose to refuse to work when he has reasonable cause to believe that there is a danger, regardless of what else has gone on before. It is a powerful and important right. Yet it is very clear from the design of the Code that it is intended to be used as an emergency measure and that the bulk of the effort to reduce risk and protect employees lies elsewhere.

[44] Before applying the legal test of danger to the present situation, I will briefly address a procedural matter raised by the respondent at the hearing. At the closure of the appellant's case and before presenting her case at the hearing, counsel for the employer advised that she was prepared to make a motion for non-suit, with or without election. The purpose of the motion, as I understand it, was to dispense the employer from presenting its case on the assumption that the appellant had not met his burden of proof that he was exposed to a danger in the circumstances of his refusal. The employer would nevertheless be allowed to present its case should the motion be unsuccessful. The motion is akin to seeking an instant judgement based on the evidence adduced so far at the hearing.

[45] Motions for non-suit are common in criminal proceedings where the prosecution bears the onus of proving the material and intentional elements of an offence, failing which a Court may be called upon to rule from the bench that such an onus has not been met, thereby leading to the acquittal of an accused. That concept has also been imported into labour relations matters involving the imposition of disciplinary action by the employer, who bears the onus of proving just cause for the discipline.

[46] I ruled that such a concept is not relevant in the context of the present appeal proceedings and did not entertain the motion. I declined to rule whether Mr. Hassan's appeal had met the

prima facie threshold to be successful. The appeals officer is master of his procedure, as provided by paragraph 146.2(h) of the *Code,* which reads as follows:

> **146.2** For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
>
> […]
>
> **(h)** determine the procedure to be followed, but the officer shall give an opportunity to the parties to present evidence and make submissions to the officer, and shall consider the information relating to the matter;

[47] No particular party bears the onus of proof in an appeals procedure. This has been stated in a number of appeal decisions since *Canadian Freightways Ltd v. Canada (Attorney General),* 2003 FCT 391. Rather, the appeals officer must inquire into the circumstances of the decision and the reasons for it, as mandated by subsection 146.1(1) of the *Code,* and make findings of facts on a balance of probabilities. I informed counsel for the employer that she is free to decide whether to call or not to call evidence and present her submissions on the basis of the evidence placed on the record so far by the appellant and recorded in the ministerial delegate's investigation record. In light of my ruling and following a brief recess, counsel for the employer elected to present evidence and called Mr. Burnette to testify.

[48] The legal test to be applied to determine whether an employee is exposed to a danger, as this concept is defined in the new definition of "danger" that came into force on October 31, 2014, was discussed extensively in the *Ketcheson* decision referred to by the employer and the factors to be analyzed around that concept may be outlined as follows:

1) What is the alleged hazard, condition or activity?

2) a) Could this hazard, condition or activity reasonably be expected to be an *imminent threat* to the life or health of a person exposed to it?

   Or

   b) Could this hazard, condition or activity reasonably be expected to be a *serious threat* to the life or health of a person exposed to it?

3) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[49] Since then, appeals officers have been consistent in applying the interpretation of the concept of danger developed in *Ketcheson* (see: *Keith Hall & Sons,* 2017 OHSTC 1 (*Keith Hall & Sons*), *Arva Flour Mills Limited,* 2017 OHSTC 2; *Brink's Canada Limited v. Dendura,* 2017 OHSTC 9; *Correctional Service of Canada v. Laycock,* 2017 OHSTC 21; *Teamsters Local Union No. 419 v. GardaWorld Cash Services Canada Corporation,* 2018 OHSTC 2; *Correctional Service of Canada v. Courtepatte,* 2018 OHSTC 9; *Madysta Télécom Ltée,* 2018 OHSTC 12; *Zimmerman v. Correctional Service of Canada,* 2018 OHSTC 14).

[50] That approach to determining the existence of a danger was also considered by the Federal Court in *Canada (Attorney General) v. Laycock*, 2018 FC 750. After outlining the legal test as I have set out above, the Court states as follows:

> [15] In this case, the Adjudicator thoroughly reviewed the evidence. He then applied that evidence to a very reasonable and well-established interpretation of the statutory provision.This was a fact-laden exercise leading to a determination of the likelihood of serious harm.
>
> [My underlining]

[51] The first question then is to identify the "condition" which is alleged to present a threat to Mr. Hassan's life or health. What is the situation that caused Mr. Hassan to refuse to work? This takes us to the need to define the scope of the appeal, as there is a sequence of events occurring over a number of months that were invoked by Mr. Hassan to justify his contention that he was exposed to a danger when he refused to work.

[52] In terms of the immediate cause, the refusal stems from an "interaction" between Mr. Hassan and Mr. Chahal that occurred on January 31, 2018, at the Pinecrest garage of the OC Transpo. I have set out a detailed description of the encounter between the two individuals earlier in the present reasons. In short, the evidence presented by Mr. Hassan — Mr. Chahal did not testify — establishes that Mr. Chahal "sneered" at him as he was exiting the washroom and Mr. Chahal was entering. Mr. Hassan described the "sneer" as a look and a humming sound uttered by Mr. Chahal. There was no physical contact, no words were exchanged, no gesture made. The interaction lasted a few seconds.

[53] I have difficulty characterizing this situation as a threat. A reasonable person observing the scene is not likely to conclude that this encounter constituted a threat to one's health. In *Ketcheson,* the appeals officer defined "threat" as follows:

> [198] In the New Shorter Oxford English Dictionary (1993) the word "threat" is defined as: "a person or thing regarded as a likely cause of harm". Thus, it can be said that based on that definition, a threat entails the probability of a certain level of harm. Some risks are threats and some are not. A very low risk, either because of low probability or because of low severity, is not a threat. Both probability and severity each have to reach a minimum threshold before the risk can be called a threat. It is clear that a low risk hazard is not a danger. A high risk hazard is a danger.

[54] I also note that Mr. Hassan did not refuse to work immediately after this encounter. He reported the situation on the following day. He consulted his physician on February 2, 2018, and was cleared to resume his normal duties as a bus operator. He was not scheduled to work until February 5, 2018, which is when he made his refusal, without any apparent relationship with the work or working conditions under which he was to resume his regular duties on that day. Therefore, looking at the circumstances prevailing between January 31 and February 5, 2018, there is simply no basis upon which to conclude that Mr. Hassan was exposed to a danger.

[55] However, it is clear that the encounter of January 31, 2018, must be viewed in its proper context and cannot be examined in isolation. Mr. Hassan explains that this apparently innocuous

interaction jeopardized his health because Mr. Chahal is the person against whom he made a work place violence complaint further to the incident of October 14, 2017.

[56] The evidence establishes that Mr. Hassan was indeed traumatized by the incident of October 14, 2017, which caused him to be absent on medical leave for an extended period of time. As a result, the employer agreed to avoid, to the extent possible, placing the two employees in situations where they would interact with each other. The incident of October 14, 2017, is not within the scope of the appeal and is only relevant for the purpose of providing context to the work refusal of February 5, 2018. It is relevant in order to determine whether the mere presence of Mr. Chahal could objectively be seen as a threat to Mr. Hassan's health, as a result of this past event.

[57] It is not for me to make a finding on the circumstances of the incident of October 14, 2017. The evidence presented at the hearing establishes that the matter was addressed by the employer at the time and appeared to have been resolved further to Mr. Burnette's letter to the appellant dated November 2, 2017. Subsequently, the matter was investigated by a "competent person" under the process established by subsection 20.9(3) of the *Regulations*, as a result of the ministerial delegate's intervention. The competent person found Mr. Hassan's complaint against Mr. Chahal to be unsubstantiated. The WSIB did not accept Mr. Hassan's claim for injury on duty, thereby implying that there was insufficient evidence establishing a causal link between a work place event and any psychological consequences experienced by Mr. Hassan.

[58] Taking into account all of these factors, and even accepting Mr. Hassan's own description of the incident, I have great difficulty in concluding objectively that Mr. Hassan was subjected to an act of violence in the work place, let alone an act that would justify his contention that he was exposed to a danger by the mere presence of Mr. Chahal three months later in the circumstances described in the evidence. My conclusion might have been different had it been established that Mr. Hassan had been the victim of a serious and aggravated assault by Mr. Chahal and had the latter shown signs of hostility towards Mr. Hassan at the time of the refusal. This is far from being the case, as all accounts of the incident of October 14, 2017, point to an inadvertent and unfortunate physical contact between the two individuals, rather than assault or work place violence.

[59] I reiterated the need to apply an objective test to the concept of danger in *VIA Rail Canada Inc. v. Cecile Mulhern and Unifor,* 2014 OHSTC 3, as follows:

> [122] I have no doubt regarding the sincerity of Ms. Mulhern's explanation as to how she felt on the day of the refusal, and how she felt in previous instances where comments were made about the Stand-bys' workloads in light of her accommodated duties. Ms. Duffy and others have indeed reported that she was visibly emotionally distressed by the comments that she reported. But that is her subjective reaction to the events. Her personal and work situation is not an easy one to be in and obviously caused her some stress. I reiterate that the issue before me is not whether she had reasonable cause to believe that she was in danger. Rather, I must be satisfied that, all things considered, she was objectively exposed to a condition that could reasonably be expected to cause injury or illness. I am unable to make such finding in the circumstances of this case.

[60] In order to reach a conclusion of danger in those circumstances, very clear and compelling medical evidence would have been required. None was presented by the appellant. I agree with employer's submissions that, in order to establish that a condition was a threat to an employee's health, the Tribunal's jurisprudence is quite clear that an employee must provide medical evidence supporting that there was a danger to the employee's health. This is consistent with the requirement that a finding of danger be based on objective, rather than subjective, evidence. This requirement is particularly important in cases such as the present appeal, where the alleged threat is based on an individual experience and relates to the refusing employee's mental health (see: *VIA Rail Canada Inc. v. Patel*, 2015 OHSTC 4). In *Nina Tryggvason v. Transport Canada*, 2012 OHSTC 10, the appeals officer reviewed earlier decisions on that point and states as follows:

> [73] Therefore, I find that to establish a reasonable possibility of injury or illness in this case, as required by the danger definition, persuasive evidence must be provided by way of either the testimony or documentation from a physician establishing an actual or potential mental illness as well as, any link between the illness and the alleged situation at the work place.

[61] In light of all the above, I am unable to conclude that the interaction between Messrs. Hassan and Chahal on January 31, 2018, presented a threat to the appellant within the meaning of the definition of "danger". The belief held by Mr. Hassan that he felt unsafe in those circumstances and would be unsafe should he encounter Mr. Chahal again is subjective and hypothetical and does not meet the threshold required to establish the presence of a threat. It may be that the medical issues experienced by Mr. Hassan require accommodation by his employer under human rights legislation or the collective agreement, but those obligations, in my view, fall outside the parameters of the right to refuse set out in the *Code* (see: *Canada Post Corporation and George Stout*, 2013 OHSTC 10; *Tessier v. Canada Post Corporation*, 2017 OHSTC 13). The determination that a danger exists must be based on a set of objective facts leading to that conclusion. The words "reasonably be expected to be" in the definition of "danger" clearly convey the need to form an objective opinion on the presence of a danger at the time of the refusal. There was nothing in Mr. Chahal's demeanour, attitude or action from which I can draw such a conclusion.

[62] On that point, the appeals officer in *Keith Hall & Sons* stated as follows:

> [40] It also warrants noting that the concept of reasonable expectation remains included in the amended definition. While the former definition required consideration of the circumstances under which the hazard, condition, or activity could be reasonably expected to cause injury or illness, the new definition requires consideration of whether the hazard, condition, or activity could reasonably be expected to be an imminent or serious threat to the life or health of the person exposed to it. In my view, to conclude that a danger exists, there must therefore be more than a hypothetical threat. A threat is not hypothetical where it can reasonably be expected to result in harm, that is, in the context of Part II of the Code, to cause injury or illness to employees.
>
> [41] For a danger to exist, there must therefore be a reasonable possibility that the alleged threat could materialize, i.e., that the hazard, condition or activity will cause injury or illness soon (in a matter of minutes or hours) in the case of an imminent threat; or that it will cause severe injury or illness at some point in the future (in the coming days, weeks, months or perhaps even years) in the case of a serious threat. It warrants

> emphasizing that, in the case of a serious threat, one must assess not only the probability that the threat will cause harm, but also the seriousness of the possible harmful consequences from the threat. Only those threats that can reasonably be expected to cause severe or substantial injury or illness may constitute serious threats to the life or health of employees.
>
> [My underlining]

[63] In his submissions, the appellant stresses that the employer was unresponsive when he requested the assistance of the SCU after the alleged assault on October 14, 2017. He only received such assistance later that day, on his insistence. In his email exchange with the ministerial delegate, the appellant evoked a number of situations where requests for assistance to the SCU were not followed up. This, the appellant claims, caused him to feel unsafe and justified his refusal.

[64] The effectiveness of the employer's responsiveness to requests for assistance is not within the scope of the appeal. It is clearly too remote from the circumstances prevailing on February 5, 2018, to be seen as a contributing factor to the alleged danger complained of by the appellant. As a general observation, it is not inappropriate for the employer to assess the requests for assistance on their face value and prioritize its response based on the apparent seriousness and relative urgency of a particular situation. Suffice it to say that the incident of October 14, 2017, was unlikely to have appeared serious or urgent. In terms of the other incidents of alleged inappropriate response by the employer referred to by Mr. Hassan, I have no context against which to assess their merits. There is no apparent link between such occurrences and the situation at hand and I consider them simply too remote to support Mr. Hassan's claim of imminent danger.

[65] Be it as it may, while Mr. Hassan may have felt unsafe because of his belief that any future request for assistance would not be addressed appropriately, such a belief is entirely speculative and it does not establish that he was objectively in danger at the time of his refusal.

[66] In light of my conclusion that the evidence did not establish that Mr. Hassan was exposed to a condition that could reasonably be expected to be a threat to his health, it is not necessary to go further in the analysis of the other factors comprising the definition of danger under the *Code*, namely, whether a threat is imminent or serious.

[67] The appellant argues in his submissions that the employer was in breach of the *Code* by not having his workplace violence complaint investigated in accordance with the requirements of Section XX of the *Regulations.* He refers to the fact that, because of the ministerial delegate's intervention, the respondent agreed to comply with subsection 20.9(3) of the *Regulations* and appoint a competent person to investigate the complaint.

[68] Whether the employer contravened the *Code* in the aftermath of the incident of October 14, 2017, when it dealt with Mr. Hassan's complaint, is not within the scope of the appeal. My task under the present appeal is to determine whether the ministerial delegate's decision of absence of danger is appropriate, in the circumstances of the refusal. I am not seized of the issue of whether the employer properly addressed the workplace violence complaint at the time and this question is, in my view, immaterial to the question that is central to the appeal, i.e. whether the appellant was exposed to a danger on February 5, 2018. This proposition found support in *Ketcheson* in the following terms:

> [115] The respondent referred to the employer's breach of several sections of the Code as a basis of his work refusal. The contravention of a provision of the Code or of the Canada Occupational Health and Safety Regulations (the Regulations) is not the basis of a work refusal unless the contravention is of sufficiently high risk so as to constitute a "danger". There was no reference by the parties or the intervenor to these alleged contraventions. The response to a contravention is a "contravention direction" under subsection 145(1) of the Code not a "danger direction" under subsection 145(2).

[69] Finally, Mr. Hassan referred to the employer's failure to honour the accommodation agreement that involved "keeping Mr. Chahal away" from him. In fact, this appears to be the thrust of his reasons for refusing, as his email dated March 13, 2018, tends to illustrate. There were indeed discussions to that effect, in the presence of Mr. Hassan's union representative, namely, Mr. Norman MacDuff, following the incident of October 14, 2017. Mr. MacDuff testified that there was a verbal promise that Mr. Hassan would have "no contact" with Mr. Chahal, or something to that effect. Mr. Burnette testified that he agreed that to the extent possible, the employer would avoid assigning Mr. Chahal to situations involving Mr. Hassan. However, this may not be possible at all times, for example, if Mr. Chahal was the only supervisor on duty. There was — and still is — no medical evidence stating that the mere presence of Messrs. Hassan and Chahal in the same room constitutes a health hazard for Mr. Hassan. Overall, I find the latter description of the mitigating measures to be more plausible. In any event, nothing turns on this point, in my view, regarding the existence or not of a danger: even if the employer had committed to the former, the appellant's submission is more in the nature of a labour relations issue between the parties and does not assist him in establishing that he was exposed to a danger on February 5, 2018.

[70] Lastly, in her final submissions, counsel for the employer argues in the alternative that the danger must be assessed at the time of the refusal, i.e. on February 5, 2018. The interaction between Messrs. Hassan and Chahal occurred on January 31, 2018, at the Pinecrest garage. The justification supporting the refusal had therefore disappeared on the day of the refusal and no such refusal could be made. In my view, that contention is also well founded. The purpose of the refusal provisions is to remove an imminent or serious threat to an employee's health or life. Once that alleged condition disappears (in the present case, Mr. Hassan being in the presence of Mr. Chahal), the reason for the refusal also disappears. Even when they are examined in the most favourable light to Mr. Hassan, his concerns are entirely subjective and speculative and I cannot characterize the situation presented in the evidence as an ongoing condition or a latent threat.

Decision

[71] For the reasons set out above, I confirm the ministerial delegate's decision of absence of danger and dismiss the appeal.

Pierre Hamel
Appeals Officer