Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2020-02-24
Case No.: 2018-04

Between:

Canada Border Services Agency, Appellant

and

Public Service Alliance of Canada, Respondent

Indexed as: *CBSA* v. *PSAC*

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by an official delegated by the Minister of Labour
Decision:	The direction is confirmed.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Spencer Shaw, Treasury Board Legal Services, Department of Justice
For the respondent:	Ms. Raphaëlle Laframboise-Carignan, Ravenlaw
Citation:	2020 OHSTC 2

REASONS

[1] These reasons concern an appeal brought by the appellant, the Canada Border Services Agency (CBSA), under subsection 146(1) of the *Canada Labour Code*, (*Code*), challenging a direction issued to the appellant on December 29, 2017, by Ms. Fancy AM Smith in her capacity as the official delegated by the Minister of Labour (ministerial delegate). That direction was issued by the ministerial delegate at the conclusion of the latter's investigation into a complaint of violence in the work place made by one Stanley Decayette represented in this case by the Public Service Alliance of Canada (PSAC) and respondent in this matter.

[2] The direction reads as follows:

> On October 30, 2017, the undersigned Official Delegated by the Minister of Labour conducted an investigation in the work place operated by Canada Border Services Agency, being an employer subject to the *Canada Labour Code*, Part II, at 1000 Airport Parkway, Ottawa, Ontario, K1V 9B4, the said work place being sometimes known as Canada Border Services Agency.
>
> The said Official Delegated by the Minister of Labour is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:
>
> Paragraph 125(1)(z.16) – Canada Labour Code Part II, Subsection 20.9(3) – Canada Occupational Health and Safety Regulations
>
> The employer did not appoint a competent person, who is impartial and seen to be impartial by the parties involved to investigate an incident of workplace violence that was reported to the employer on August 23, 2016.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than January 12, 2018.
>
> Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the Official Delegated by the Minister of Labour, to take steps to ensure that the contravention does continue or reoccur.
>
> Issued at Sudbury, this 29th day of December, 2017.
>
> (s) Fancy AM Smith
>
> […]

[3] On the occasion of the pre-hearing conference held with the parties, they were of the same mind and agreed that the issue at hand to be determined concerned the appointment of a competent person to investigate the claimed work place violence and not whether or not the suggested violence in the work place underlying this matter had actually occurred.

Background

[4] This case, a direction to the appellant dated December 29, 2017, concerning a work place violence complaint filed on October 30, 2017, wherein the complainant (Stanley Decayette) has expressed the opinion that the person appointed as a competent person by the appellant to investigate an allegation of violence in the work place was not impartial, finds its origin in a first complaint of the same nature regarding an allegation of violence in the work place that concerned a work place incident that occurred on August 26, 2016, this one filed on March 20, 2017, and wherein it had been put forth and found by another ministerial delegate (Lefort) that the employer had failed to appoint a competent person to investigate the allegation of violence in the work place in violation of paragraph 125(1)(z.16) of the *Code* and subsection 20.9 (3) of the *Canada Occupational Health and Safety Regulations* (*Regulations*).

[5] On May 31, 2017, the employer provided to the ministerial delegate investigating this first complaint an Agreement of Voluntary Compliance (AVC) relative to the appointment of a competent person. According to the investigation report that is part of the evidence in this case, it was reported to Ministerial Delegate Smith by the ministerial delegate involved in this first complaint that the employer (now appellant in the present case) held the view that it had complied with the AVC by appointing as competent person to investigate the complaint one of the three persons it had proposed to complainant Decayette.

[6] On October 30, 2017, a second work place violence complaint was brought forth by Mr. Decayette, this latest complaint being the subject of the present appeal. In that complaint, Mr. Decayette indicated as ground for the complaint that he did not consider impartial the person whom the employer had appointed as competent person to investigate the allegation of work place violence.

[7] Ministerial Delegate Smith's investigation report as well as the evidence provided at the hearing establish that, following the provision by the appellant of the AVC mentioned above, the appellant proposed to the complainant two CBSA Regional Security Managers (RSM) from different regions as competent persons, this in accordance with CBSA's policy on prevention of violence in the work place, which defined RSMs as competent person. Those were objected to by Mr. Decayette on the basis of lack of impartiality due to being directly employed as RSMs by CBSA and further, in one case also not being bilingual. A third person, this time from outside CBSA's organization, was also proposed by the appellant, with that candidate also being objected to by Mr. Decayette as "not impartial". The name of one person who would have met the approval of Mr. Decayette as an impartial competent person was proposed by the latter to the employer, albeit one week after issuance of the direction, to no avail, with Mr. Decayette also indicating his willingness to propose to the employer additional persons who could act as competent persons.

[8] Having proposed three candidates as competent persons, all of whom having been objected to by Mr. Decayette, the appellant went ahead, nonetheless, and selected and appointed as competent person one of the rejected candidates, Ms. Sylvie Ouellette, whom the appellant considered as meeting the definition of "competent person" as per subsection 20.9(3) of the

Regulations, and proceeded with the investigation of the work place violence complaint initially filed.

[9] According to Ministerial Delegate Smith, the appellant proceeded in this manner with the understanding that the Labour Program, through Ms. Smith, could ultimately deem such employer action to be "invalid", and following a suggestion by the ministerial delegate with regard to this potential violation, refused to provide another AVC to the effect that it would appoint a competent person who would be seen to be impartial by both parties. The employer justified that position by its belief that such was in line with the previous guidance received from the Labour Program (Lefort). The report by Ministerial Delegate Smith indicates that, in taking this position, the appellant was aware that this could result in the issuance of a formal direction. That direction was issued on December 29, 2017 and forms the subject of the present appeal.

[10] The investigation report also provides an outlook of what followed the direction from the standpoint of compliance to such by the appellant. As such, the employer's response was that they were of the opinion that they had complied with the direction, since a competent person satisfying the criteria established by the *Regulations* had been selected and appointed. The employer also put forth that, although they did not believe that the objections previously formulated by Mr. Decayette were reasonable, CBSA had tried to accommodate the complainant by selecting a competent person from outside their organization, opining along that line that the employer does not consider as rational objections based on the fact that a proposed competent person is employed within the Federal Public Service, as it implies a bias in every public servant that would prevent such a person from investigating a complaint of violence between two employees.

[11] Given the position taken by the employer, the ministerial delegate took steps to determine whether the employer had made reasonable efforts to comply with the December 29, 2017 direction, and for that purpose reviewed the number of proposed competent persons, how many were not employed by the employer, the reasons provided by the objecting party and any other affiliations between the proposed competent persons and the other party. This demonstrated that only one Regional Security Manager (RSM) from within CBSA and with the appropriate language requirements (an additional proposed RSM did not satisfy the language requirements) had been proposed as a qualified competent person. A second qualified competent person, objected to by Mr. Decayette on the basis of impartiality was, nonetheless, subsequently appointed (Ouellette).

[12] Additionally, the ministerial delegate found that the employer gave little to no consideration to the appointment of a competent person whom the complainant had identified as impartial and little to no consideration to other competent persons that could have been suggested by the complainant. The employer thus remained of the view that the person selected as competent person prior to the issuance of the direction satisfied the requirements of the *Regulations*.

[13] Ministerial Delegate Smith thus came to the conclusion in a letter of final determination dated March 13, 2018, after the actual issuance of the direction on

December 29, 2017, that the limited number of competent persons that had been proposed by the employer, in addition to the rejection or non-consideration of competent persons proposed and acceptable by the complainant, could not bring a finding that the employer had taken all reasonable measures ("reasonable efforts") to comply with the direction issued on December 29, 2017 and thus remained in contravention of paragraph 125(1)(z.16) of the *Code* and subsection 20.9(3) of the *Regulations*. This being said, it is worth noting that, in informing the parties of this conclusion, Ministerial Delegate Smith also stated that as ministerial delegate, she could not rule on the impartiality of a competent person, nor question the objection of a party that a competent person would or would not be impartial in the context of the application of Part XX of the *Regulations* dealing with *Violence Prevention in the Work Place*.

Issue

[14] The issue to be determined in the present case is whether there were valid reasons to issue the direction and, consequently, whether the appellant appointed or not a competent person, one who is and is seen by those persons involved to be impartial, to investigate the complaint of violence in the work place brought by Mr. Decayette on October 30, 2017.

Submissions

Submissions of the Appellant

[15] The appellant's submissions are initiated by counsel referring to the first complaint presented to the Labour Program by Mr. Decayette, this one not subject of the present appeal, and the argument that what resulted or led the appellant in this case to appoint as competent person someone (Ouellette) that did not meet with the approval of Mr. Decayette, after the latter had objected to two other proposed competent persons, could be linked to certain observations formulated by the ministerial delegate investigating this initial complaint (Lefort). While RSMs, under the employer's policy on Violence Prevention in the Work Place, as it was at that time, were identified as competent persons, such a competent person could "be an employee of the work place or an outside contractor employer", and that impartiality or impartial party could mean "someone who (...) is not directly involved in a particular situation, and is therefore able to give a fair opinion or decision about it."

[16] Ministerial Delegate Lefort further commented that "a reasonable objection to a suggested CP (competent person) would have to be based on proximity and familiarity with (a complainant) or the alleged aggressor", and that it was necessary for the complainant to "ensure during the selection process that approval or rejection (with reasons) (be) captured in writing." Those comments seem to have founded the employer's position that rejection of a candidate for "competent person" by a complainant should be for reasons or be reasonable, an opinion not shared by complainant Decayette, who tempered in testimony his initial reaction that "approval and rejection need not be within reason" to simply that reasons need not be provided for the rejection.

[17] The appellant thus notes that where its initial appointment of Ms. Ouellette as competent person in the absence of approval by Mr. Decayette represented a unilateral effort to comply with the AVC it had provided, because of the arbitrary rejection of every candidate without valid or any reason by the latter, the complaint of October 30, 2017 that is the subject of the present appeal questioned the impartiality and qualifications of the same person and was determined by Ministerial Delegate Smith without taking into account the reasonableness or unreasonableness of Mr. Decayette's objections on impartiality due to the ministerial delegate's position that any objection by a party, whether reasonable or not, is sufficient to disqualify a proposed competent person, a position she claimed was based on this Tribunal's decision in *Maritime Employers Association* v. *Longshoremen's Union (CUPE), Local 375*, 2016 OHSTC 14 (*Maritime Employers Association*).

[18] It is the opinion of the appellant that this position by Ministerial Delegate Smith and her decision to issue the direction without having been informed of Mr. Decayette's specific reasons for the latter's repeated rejections ran contrary to that expressed by Ministerial Delegate Lefort, who dealt with the complaint in its original form, and would have coloured the conclusion arrived at by Ministerial Delegate Smith that the appellant had not made reasonable effort to satisfy its obligation spelled out in the direction.

[19] Given what precedes, the appellant has thus built its case on three general arguments, those being first, that the employer has demonstrated continued good faith in attempting to select a person that would meet the requirements of a "competent person" defined in the *Regulations* but that its efforts have been systematically thwarted by the actions of Mr. Decayette who, by acting in this manner, abused his rights; second, that where a party objects to the appointment of a "competent person" on the basis of impartiality, specific and logical reasons need be given, failing which a party should be seen as having waived one's right to object on that ground; and third, that in issuing the direction Ministerial Delegate Smith reached unreasonable conclusions and based such on a misinterpretation of the *Regulations*.

Employer’s continued good efforts to appoint a competent person

[20] With regard to the first argument, the appellant sought at the hearing to call evidence of actions taken after the issuance of the Smith direction. The undersigned accepted to receive that evidence under reserve of the parties’ submissions as to whether such evidence should be considered admissible or not by the Tribunal. In short, that evidence was to the effect that in April 2018, therefore after the issuance of the direction and following the final determination letter issued by Ministerial Delegate Smith on March 13, 2018, that found the employer to have not complied with the direction, the employer's efforts to find a suitable competent person were taken over by a different person (Lance Markell) who, over a period of some months, suggested a number (8) of candidates from outside the government (employment investigators).

[21] Such change to external CP candidates corresponded to an agreement from within the employer's Policy Health and Safety Committee to modify its violence prevention policy and no longer use RSMs as CPs. As a result, between April and November 2018, external

investigators were offered by the employer as candidates for CP. All those candidates were rejected by Mr. Decayette for a variety of reasons:

- a CP could not be someone from the same region or a CBSA employee or a manager;
- a CP must be bilingual and must not require assistance from another bilingual investigator;
- a CP cannot be a public servant, someone employed by Treasury Board, a former public servant in a place with a history of harassment or be providing consulting services to government;
- a CP could not be someone who had not been first interviewed by Mr. Decayette to confirm the contents of that person's CV, or about whom the employer had not first provided statistics concerning that person's investigations and how many had ended in favour of the employer and the employee.

[22] Finally, the appellant also suggested as part of this *ex post facto* evidence that the undersigned should admit the fact that Mr. Decayette himself had proposed three CP candidates (Cantin, Douville and Hamelin), although Mr. Decayette admitted at the hearing not knowing whether some of those candidates even offered work place violence investigations, and in one case that one candidate, contrary to Mr. Decayette's own criteria, was a former manager in the public service where there was a history of work place violence and harassment, in short, not even adhering to the criteria he had used to reject the appellant's candidates.

[23] As part of the documentary evidence jointly filed by the parties, the appellant has drawn the attention of the undersigned to a letter from the employer to Ministerial Delegate Smith, dated November 8, 2018, wherein Mr. Markell expresses his frustration at the repeated refusals, seemingly without cogent reasons, by Mr. Decayette. As a final element on this particular issue, the appellant informed the undersigned that on the eve of this hearing in June 2019, Mr. Decayette had finally agreed on the impartiality of one candidate submitted by the appellant, that candidate having originally been rejected by Mr. Decayette in 2018.

[24] The submissions by the appellant on the admissibility of this *ex post facto* evidence are based on three reasons, those being that this Tribunal, and therefore the undersigned, is master of its own procedure, that the evidence is relevant and finally that an appeal such as the present one is *de novo* by its very nature. On the first, based on the words by authors Macaulay, Sprague and Sossin in *Practice and Procedure Before Administrative Tribunals*[1], counsel submits that Parliament has seen fit to give administrative tribunals very wide latitude when called on to hear and admit evidence, so they will not be paralyzed by objections and procedural manoeuvres, thus making it possible to hold a less formal hearing in which all the relevant points may be put to the tribunal for expeditious review.

[25] The appellant further submits that, based on the same authors, tribunals are thus entitled to act on any material which is logically probative, even though it is not evidence in a court of law. It is the opinion of the appellant in this regard that it is clear that the undersigned can receive any

[1] Robert W. Macaulay, Q.C., James L.H. Sprague & Lorne Sossin, *Practice and Procedure before Administrative Tribunals*, Toronto: Carswell, 2018, loose-leaf, Chp 17.1

evidence that will be logically probative of the questions raised in the appeal, questions that the appellant formulates as whether the employer made reasonable efforts and whether Mr. Decayette's systematic rejections of the proposed CPs amounted to a waiver of his rights.

[26] Regarding the second reason argued by the appellant as supportive of admissibility, the latter defines evidence before a tribunal as any information that is relevant and material. As such, to be relevant, information must make a material fact more or less likely to be true, and in order to be material, information must be directed at a matter that is at issue in a case and may establish facts directly or indirectly. It is counsel's submission in this regard that the behaviour of the employer and of Mr. Decayette after the direction is logically probative of their behaviour before the direction.

[27] The third reason by the appellant relates to the *de novo* nature of the hearing and counsel finds support in the words of the appeals officer in *Securitas Transport Aviation Security Ltd.* v. *Doyle,* 2018 OHSTC 10 (*Doyle*) to the effect that an appeals officer is "not bound by the findings of fact or conclusions of a ministerial delegate and "(...) may consider all relevant evidence relating to the circumstances that prevailed at the time of the direction, including evidence that may not have been available or considered by the ministerial delegate".

[28] The appellant's position is thus that it is clear that the undersigned can consider evidence that occurred after the direction, so long as it is relevant to the circumstances at the time of the direction and only used for that purpose. Once more, the appellant states that what is required of this appeals officer is to decide whether the employer made reasonable efforts to appoint a CP and whether or not Mr. Decayette was systematically or arbitrarily rejecting the proposed candidate's impartiality in a manner that constituted a waiver of the latter's rights, and thus, the evidence on what the parties did following the issuance of the direction under appeal can be used to evaluate the behaviour and credibility of the parties before and leading to the direction.

[29] Applied to the situation, the appellant submits that the evidence after March 2018 (letter of final determination confirming failure to comply with the direction), showed that the employer continued in good faith to offer more candidates that were suitable to Mr. Decayette's shifting criteria; that saw the latter change his criteria every time a CP was proposed by the employer. It is counsel's submission that arguably, the post direction evidence makes it more likely that the same behaviour was exhibited by the Mr. Decayette in 2017 when rejecting the employer's candidates, and more likely that the employer was making reasonable efforts to propose CPs in 2017. It is counsel's view that the evidence in 2018 and 2019 can be used to evaluate the parties' efforts and credibility in 2017. It is the opinion of the appellant that not allowing evidence simply because it happened after the event does not accord with the *de novo* nature of the hearing and the wide latitude tribunals are given to carry out their fact finding mission.

[30] On the law that governs the appointment of a competent person, the appellant notes that, while the Federal Court of Appeal in *Canada (Attorney General)* v. *PSAC,* 2015 FCA 273, commented that section 20.9 of the *Regulations* is "not a model of legislative drafting", it did

characterize that provision as remedial and "meant to offer an avenue of redress for employees who have experienced work place violence, with a view to having the situation dealt with appropriately by their employer."

[31] This being said, the appellant argues that a proper interpretation of the provision needs to apply the principle put forth by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.* [1998], 1 S.C.R. 27 (*Rizzo & Rizzo Shoes Ltd.*)to the effect that the words of an Act can only "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament", even when poorly drafted. It is the submission of the appellant that, given the intention and the scheme of the *Regulations*, described by the Federal Court of Appeal, as requiring employers to dedicate sufficient attention, resources and time to address factors that contribute to work place violence including, but not limited to, bullying, teasing and abusive and other aggressive behaviour and to prevent and protect against it, one should reconcile that legislative intention when deciding what limits should be placed on a party stonewalling the start of an investigation.

[32] Pursuing the same thought, the appellant referred to the previously cited decision of this Tribunal in *Maritime Employers Association* where the appeals officer noted relative to paragraph 20.9(1)(a) of the *Regulations* that it is the employer's responsibility to assess the knowledge and experience of the proposed CP (remaining silent, however, regarding assessment of a proposed CP's impartiality) and that in case of an objection by a party, it is for the ministerial delegate or appeals officer to assess (noting at the same time the words of the appeals officer, in *obiter*, to the effect that a literal application of the provision translating into not being required to provide reasons could lead to systematic, arbitrary or capricious refusal of any proposed CP that could be viewed as abusive or discriminatory), thus opening the door to proper punishment through disciplinary action or a conclusion of waiver of rights.

[33] On this particular point of its submissions, the appellant argues that it is important that there be limits on the ability of a party to frustrate the start of an investigation into an incident of work place violence. It is the opinion of the appellant that Parliament could not have intended for a party to be able to delay an investigation for years over a refusal to acknowledge anyone but their handpicked candidate as impartial.

A party should provide logical reasons for an objection on impartiality

[34] The appellant reiterates that it considers work place violence to be a serious issue and what the *Regulations* are trying to prevent to be important. However, the appellant considers that the case at hand illustrates a flaw in the manner the *Regulations* were drafted in that it does not prescribe an outcome in the event that the parties do not agree on the impartiality of the person proposed to investigate a complaint. Its opinion is that the position formulated by Ministerial Delegate Smith, that any one of the parties can object to the impartiality of a potential CP without having to provide reasons, is simply unworkable and ought to be disregarded, as should what has occurred in the present case, to wit, an incident that took place in 2016 should not be investigated in 2019 and is surely not what the legislator intended with the present legislative scheme.

[35] It is the opinion of the appellant that employers need guidance on what should occur when a party is systematically and arbitrarily rejecting candidates if delays such as in the present case are to be prevented. The appellant notes that although Mr. Decayette has now agreed on the impartiality of a CP, the process could still drag on, since parties under *Part XX* of the *Regulations* include the complainant, the respondent and employer and the respondent to the complaint has yet to agree.

[36] It is thus the position of the appellant that, in order to ensure that the appointment of a CP is expeditious, paragraph 20.9(1)(a) of the *Regulations* needs to be seen as requiring an objecting party to provide specific and logical reasons to the employer as to why a proposed CP is not seen as impartial, with failure to do so resulting in a waiver of the right to object to impartiality. Such interpretation is stated to be in line with that put forth by the initial ministerial delegate (Lefort), who received an AVC from the employer prior to Ministerial Delegate Smith issuing the direction under appeal, and who had advised that "approval or rejection (with reasons)" be captured in writing and that "the employer must address all reasonable objections raised by the parties", where Ministerial Delegate Smith ultimately opted for a different opinion as to the provision of reasons on objections.

[37] According to the appellant, the wording of paragraph 20.9(1)(a) imparts both an objective and a subjective element. If one goes by the wording of the provision, a competent person is one who first <u>is</u> impartial and then <u>is seen</u> as impartial, all other requirements of a CP in the provision being objective. The appellant contends that the objective part can be measured objectively and that the evidence demonstrates that there was no reason to believe the three initial persons proposed by the employer (Spence, Macdonald, Ouellette) were not objectively impartial, as it was made clear that the three did not know the parties, were removed from the situation, had no interest in the outcome, and Mr. Decayette's concerns were speculative.

[38] As to the subjective aspect of the notion, the appellant refers to the words of Appeals Officer Hamel in *Maritime Employers Association*, to the effect that "the test of impartiality set out in paragraph (a) evokes a subjective notion of impartiality and relies on the perception of the parties involved. The legislator clearly preferred a consensual approach to the issue of impartiality", an unavoidable conclusion, to draw the assumption that the legislator intended the scheme to work, produce a CP, and result in a timely investigation, thus basing an added assumption that there must be good faith in the parties' sincerity in objecting to someone's impartiality and that logical reasons for such objection need be communicated by and to the parties, failing which a suitable candidate seen to be impartial can never be found and the regulatory scheme cannot work.

[39] As for the remaining two requirements for a CP, the appellant sees them as objective criteria that are measurable and within the employer's responsibility to assess, with objections to be evaluated by a ministerial delegate or an appeals officer. The appellant contends that the evidence shows that the qualifications of the three initial proposed candidates demonstrated they had knowledge, training and experience in issues relating to work place violence as well as knowledge of the relevant legislation, making Mr. Decayette's objections on qualifications completely unfounded. As a whole, the submissions of the

appellant on this point are that, regardless of the lack of clarity of the applicable provision of the *Regulations*, the scheme created through those must be read in a way that does not frustrate its purpose; a three year delay in starting the investigation doing exactly that.

[40] When a complaint was filed with the Labour Program by Mr. Decayette, the employer provided an AVC to appoint a CP and attempted to do so under the CBSA Policy on Violence Prevention in the Workplace that defined CPs as RSMs. As the evidence has shown, all three proposed CPs at that time were objected to by Mr. Decayette, causing the employer to conclude that the employee was systematically objecting to all those proposed candidates and abusing his rights, thus deciding then to appoint a CP (Ouellette) that met the original criteria formulated by the employee (not from same region as employee).

[41] The subsequent complaint to Labour that saw Ministerial Delegate Smith assigned to the case resulted in the latter finding that the employer had not made all reasonable efforts to appoint a CP, and rejected the notion that a party needed to provide reasonable objections to impartiality. The rest of 2018 saw the employer proposing CP candidates and the employee objecting to them based on what the appellant describes as shifting criteria, while suggesting his own candidates who did not meet his own stated criteria, this cumulating in June 2019 in Mr. Decayette accepting a candidate that he had originally rejected in 2018. It is the appellant's view that the words of Mr. Decayette himself, as drawn from the ministerial delegate's report, confirm that the former has always been of the view that rejection of a CP candidate need be within reason or based on valid or logical reason, demonstrate the arbitrariness of his conduct and constitute an abuse of rights.

Ministerial Delegate Smith reached unreasonable conclusions and misinterpreted the *Regulations*

[42] The third argument from the appellant's submissions contends that the ministerial delegate reached unreasonable conclusions and misinterpreted the *Regulations*. On the claim of unreasonable conclusions, it is submitted by the appellant that Ministerial Delegate Smith could not have based her direction on the factual basis she claimed to have done so, since while stating in her report that she assessed the employer's efforts on a number of elements and on "the reasons provided by the objecting party and any other affiliations between the proposed CPs (and) the other party", the timeline of emails in the ministerial delegate's report make it clear that she never considered those final criteria.

[43] According to the appellant, an email from the ministerial delegate to Mr. Decayette, dated December 22, 2017, informed the latter that she would find against the employer and issue a direction, thus showing she had reached a conclusion on the employer's good faith efforts, while on December 28, 2017, she further emailed the employee, asking specifically, as a part of her investigation, for Mr. Decayette's specific reasons for his objections as to impartiality as well as whether there were "any social, professional or cultural affiliations between the latter and the proposed CPs", an email that was answered only on January 5, 2018, while the direction itself had been issued on December 29, 2017.

[44] It is thus the appellant's contention that Ministerial Delegate Smith reached her conclusion before reviewing the evidence she claims to have relied on, and that state of affairs should be attributed to her erroneous understanding of the *Regulations* to the effect that a party can object to impartiality without a reason, this in itself constituting a reason to set the direction aside. This also highlights the ministerial delegate's flawed understanding of the *Regulations*. According to the appellant, the position taken by the minister's delegate that a party's approval or rejection of a CP on impartiality needn't be reasonable makes the regulatory scheme unworkable and can lead to a party abusing its rights.

[45] The appellant contends that such a position by the ministerial delegate appears to have been based on comments made *in obiter* by Appeals Officer Hamel in *Maritime Employers Association* and read as the state of the law. The appellant argues that the evidence led at the appeal demonstrated such a flaw, as Mr. Decayette continuously altered his criteria to justify his repeated objections to candidates who were not his handpicked choice while simultaneously arguing that he need not provide any criteria, an illogical approach that was shared by Ministerial Delegate Smith, yet confusingly not by the previous ministerial delegate (Lefort) who felt reasons were required.

[46] In summary, therefore, it is the appellant's submissions that, since work place violence is a serious issue and that the legislator has put in place a scheme of regulations to deal with this issue, it must be read in a way that does not frustrate its purpose. In order to be a CP, a person must be impartial and be seen to be impartial. While there is a subjective component to such an appointment, it must not be abused in a manner that can frustrate an investigation into work place violence, and the *Regulations* need to be interpreted consistently.

[47] As such, the appellant is of the opinion that this appeal should be allowed, as the conclusion arrived at by the ministerial delegate is not supported by the evidence and is based on a misreading of the *Regulations* and the jurisprudence. The *de novo* capacity of this Tribunal should allow for arriving at the conclusion that the employer made good faith efforts to appoint a CP and the complainant, Decayette, abused his rights by arbitrarily rejecting all candidates proposed by the employer without logical or coherent reasons.

Submissions by the respondent

[48] The respondent's submissions are premised on a description of the facts underlying the present case which, from a general standpoint, does not greatly differ from that on which the submissions by the appellant are premised. However, while both descriptions generally cover the events that preceded the first complaint, the first complaint itself and its treatment by then Ministerial Delegate Lefort (including the AVC that was provided, the 3 proposed competent persons and the second complaint that eventually gave rise to the direction by Ministerial Delegate Smith that is under appeal, as well as what has been described as a letter of final determination by the ministerial delegate, dated March 13, 2018, and thus some three months after the direction that gave as a deadline for compliance January 12, 2018), there is a noticeable difference in the accent given by each party to their description.

[49] In its description of the facts the appellant emphasized the circumstances that followed the issuance of the direction that related to the second complaint, the employer's numerous proposals of competent persons and the various reasons invoked by Mr. Decayette in refusing them, no doubt to buttress the appellant's claim of systematic obstruction amounting to abuse and waiver of rights and the latter's alignment with what it claimed was a differing perception of the law by the initial ministerial delegate (Lefort). The respondent differed as to whether the matter of the initial incident between Mr. Decayette and another employee had been resolved prior to the initial complaint, underlining the eventually agreed-upon change to the employer's policy on work place violence prevention that would see removed from the definition of competent person therein the restrictive designation of Regional Security Manager due to its position within the CBSA hierarchy, and emphasized the reasons invoked by Mr. Decayette to refuse the first three persons proposed as competent persons following the AVC to Ministerial Delegate Lefort, the lack of consideration of person(s) proposed as possible CP by the Mr. Decayette and the rationale by Ministerial Delegate Smith in arriving at the conclusion she did in issuing the direction.

Proposed Competent Person—Ms. Mélanie Bussière

[50] As such, regarding the first CP (Mélanie Bussière) proposed some nine months after Mr. Decayette initially raised the incident and ended up making the complaint, Mr. Decayette explained at the hearing that, given the roles and responsibilities of a Regional Security Manager such as Ms. Bussière, who was attached to the same administrative region as him, he had advised Director Steve MacNaughton, who at the time was responsible for the conduct of the complaint process, that it was reasonable to presume that the decision initially taken by the employer not to investigate his complaint had been made in consultation with other CBSA officials with defined roles and responsibilities under the CBSA policy and that he believed that Regional Security Managers, especially the one (Bussière) assigned to his Northern Ontario region, could have been consulted on the decision not to investigate, thus causing Mr. Decayette to see Ms. Bussière as not being impartial.

Proposed competent person—Ms. Kimberley Spence MacDonald

[51] The second candidate (Ms. Kimberley Spence MacDonald), proposed as competent person by Director MacNaughton and whose resume was provided to Mr. Decayette, was also an RSM, albeit from another region. In addition, the candidate's lack of proficiency in French, the preferred language of Mr. Decayette, and Mr. Decayette’s request that a bilingual competent person be selected to investigate the matter, caused the Director to look for another candidate.

Appointment of competent person—Ms. Sylvie Ouellette

[52] The third candidate for competent person was brought to the attention of Mr. Decayette on September 25, 2017, when the latter was provided with the competent person profile of Ms. Sylvie Ouellette. Ms. Ouellette was Manager of Corporate Occupational Health and Safety at Indigenous and Northern Affairs Canada and, therefore, not employed at CBSA. It is the submission of the respondent that, in rejecting the candidate because he did "not consider the

proposed investigator impartial", Mr. Decayette did not simply reject the latter without explanation, but then provided one on October 21, 2017, after being informed on October 19, 2017 that the employer would proceed with the appointment "in the absence of any explanation as to your objection to impartiality".

[53] In this regard, at the hearing Mr. Decayette explained that managers in occupational health and safety across the federal public service meet annually to discuss and share information on ongoing complaints and that he was of the belief that his case would have been discussed during these meetings, thus affecting Ms. Ouellette's impartiality. He also amplified in his testimony that, given his role as a union representative, and the acrimonious relationship between the employer and the union on matters of work place violence, a manager within the federal government may have preconceived biases when investigating the complaint of a union representative.

[54] While in its submissions the respondent drew a distinction between rejecting candidates based on criteria such as being an employee in the public service or part of management and the fact that Mr. Decayette had rejected specific candidates based on their specific work experience and involvement within the CBSA and the public service, The respondent noted in submissions that it is on October 30, 2017, thus after having provided the above explanations, that Mr. Decayette was advised by Director MacNaughton that the investigation would nonetheless proceed with Ms. Ouellette, regardless of Mr. Decayette's rejection, this leading to the second complaint by Mr. Decayette, and the subsequent direction by Ministerial Delegate Smith that is at the centre of the present appeal.

Direction issued by Ministerial Delegate Smith

[55] Regarding the said direction, based on the testimony of the ministerial delegate as well as that of Lance Merkel, who would eventually replace Director MacNaughton in dealing with Decayette, and the efforts to appoint a competent person post-direction, the respondent submits that Ministerial Delegate Smith stated she relied on the information provided by the parties prior to issuing her direction, this including the competent persons proposed to Mr. Decayette, his thoughts regarding those candidates and her discussions with the CBSA regarding said candidates, concluding that although three candidates had been proposed by Mr. Decayette, actually only two had been true candidates because one (Ms. MacDonald) did not meet the language requirements to complete the bilingual investigation.

[56] The respondent submits that Ministerial Delegate Smith testified that as part of her investigation, she had turned her mind to whether Mr. Decayette had abused his rights by rejecting all three candidates, concluding to the contrary, as the employer had only proposed three candidates with one failing to meet the language requirements, and Mr. Decayette had provided reasons for declining all three. She explained that, in her opinion, it is the individual involved in the complaint who makes the determination on impartiality and it is not for others to decide whether a proposed candidate satisfies the criteria of impartiality.

[57] Referring to the period between the issuance of the direction on December 29, 2017, and the issuance of the ministerial delegate's final letter of determination on March 13, 2018,

the respondent notes that Ministerial Delegate Smith had justified the issuance of that letter by the fact that the appellant had taken no steps since the issuance of the direction to propose other candidates than the three objected to prior to the direction and had given no consideration to a candidate proposed by Mr. Decayette (although that same candidate had been proposed by CBSA and appointed as CP in a number of other cases some months later), leading Ministerial Delegate Smith to conclude that the employer had not taken all reasonable measures to comply with the direction that had been issued, which the submissions distinguish from failure to observe the requirement of the *Code* and *Regulations* to appoint a person seen as impartial that would lead to the issuance of a direction.

[58] As stated above, the appellant has sought to have retained in evidence situational facts relating to a number of proposed CPs that it proposed for approval after the direction had been issued and after the ministerial delegate had found in a final letter of determination that the appellant had failed to comply with the direction. The details of the responses by Mr. Decayette to those proposals is part of the summary of the appellant's submissions and need not be repeated here, although in its submissions, the respondent notes that Mr. Decayette had been informed that a candidate he had proposed would not be considered as a CP since the selection of the competent person was the employer's responsibility and that where Mr. Decayette was raising questions regarding the impartiality of a proposed CP, reasons for doing so would need to be provided.

The post-direction facts

[59] With respect to the preliminary issue raised by the appellant regarding the admissibility of post-direction evidence, the respondent has objected to any evidence post the aforementioned March 13, 2018 letter of final determination being admitted, positing that any evidence acquired after the said letter of determination relating to the direction under appeal is not relevant for purposes of determining the appeal, which deals with the direction issued by Ministerial Delegate Smith on December 29, 2017, surprisingly not making the point that the said direction had imposed a date of required compliance of January 12, 2018. The respondent submits on this preliminary issue that it is clear, based on the Tribunal's case law, that post-direction evidence cannot be considered by the Tribunal for purposes of the present appeal as the matter before the Tribunal is not whether the employer complied with the direction after the fact but whether or not the direction was correctly issued in the first place.

[60] The respondent contends that the Tribunal has always recognized that any evidence admitted must have been presented for the purpose of making determinations on the issue(s) that are central to the appeal, that being in the present case whether the appellant was indeed in contravention of paragraph 125(1)(z.16) of the *Code* and subsection 20.9(3) of the *Regulations* at the time of the issuance of the direction and, consequently, whether the direction is well founded in the circumstances that led to its issuance. As stated above, the respondent finds support for its position in the case law of the Tribunal, particularly in *City of Ottawa (OC Transpo)* v. *MacDuff*, 2016 OHSTC 2 (*Macduff*), which stands for the principle that the appeal procedure established by the *Code* provides for an inquiry that must relate necessarily to the circumstances that existed at the time of the decision (direction) being appealed, and that, while an appeals officer may consider fresh evidence that may not

have been gathered by a ministerial delegate, that so-called fresh evidence, whether it is contemporaneous or subsequent to the decision (direction), must relate to the circumstances that were investigated by the originator of the decision (direction).

[61] As to the purpose of the appellant in having the Tribunal consider post-direction evidence, that being to demonstrate that the employer had made reasonable efforts to appoint a competent person post-direction, in other words efforts to comply with the direction, the respondent submits that such evidence was not before the ministerial delegate when she decided to issue the direction under appeal and, as such, cannot be considered by the Tribunal for purposes of determining the appeal. Once again, the respondent finds support for this conclusion in the *Macduff* decision.

[62] Additionally, the respondent does not disagree with the argument made by the appellant that the Tribunal acts in a *de novo* capacity and thus is entitled to hear all relevant and material evidence. The respondent, however, submits, in accord with the words of the appeals officer in *Doyle*, that this means consideration of "all relevant evidence relating to the circumstances that prevailed at the time of the direction (underline added), including evidence which may not have been available or considered by the ministerial delegate", and, thus, that this would entail as a consequence that facts that arise after a direction is issued cannot have been relevant at the time of the direction and are, therefore, as in the present case, beyond the scope of the Tribunal's jurisdiction as they are not under appeal.

The direction issued by Ministerial Delegate Smith was well founded

[63] Resorting to the words used by the Delegate in formulating her direction, the respondent thus reduces the issue to be determined to simply whether the appellant contravened the *Code* and its *Regulations* by failing to appoint a competent person who was impartial, and was seen to be impartial by the parties involved, to investigate an incident of work place violence, and thus whether the direction issued by Ministerial Delegate Smith on December 29, 2017 is well-founded.

[64] The wording of the applicable *Regulations* regarding the requirement to appoint a "competent person" to investigate the allegations of work place violence not being at issue, the respondent submits that, where the employer's attempt to resolve the incident proved unsatisfactory to Mr. Decayette, this brought into play the employer's obligation under subsection 20.9 (3) of said *Regulations* to appoint a competent person satisfying the criteria enunciated at subsection 20.9(1) of the same *Regulations*, and that, consequently, where one considers the wording of the direction at issue, circumscribing the debate to the condition of impartiality imposed in paragraph 20.9(1)(a) of the *Regulations*, this being the impartiality of the people selected by the employer to investigate the violence alleged by Mr. Decayette.

[65] It is submitted by the respondent that the wording used in the *Regulations* to define "competent person", to wit, *is impartial and is seen to be impartial*, imports into the definition a dual criteria, one objective (*is)* and one subjective *(is seen*), that has been recognized by the Tribunal in its case law, which has also confirmed that both dimensions of the criteria need be satisfied for a person to be considered a "competent person" in the following words in *Natural Resources Canada and PIPSC*, 2018 OHSTC 1 (*Natural Resources Canada*):

> [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.
>
> [underline added]

[66] The respondent submits in regards to impartiality that in the present case, it is not the objective impartiality of the candidates proposed by the employer that is at issue, but rather that the appeal turns on Mr. Decayette's subjective view that the proposed candidates lacked impartiality, and that it has been stated by the Tribunal that the legislation is clear and unequivocal that both parties must agree that the person proposed by the employer is impartial in order for that person to be appointed. Failure to attain agreement thus signifies that the proposed person cannot be appointed. As such, the respondent submits that the pronouncement by the Tribunal in *Maritime Employers Association* could not be clearer regarding the subjective aspect of the criteria:

> [54][...] It seems to me undisputable that the test of impartiality set out in paragraph (a) evokes a subjective notion of impartiality and relies on the perception of the parties involved. The text is clear and is not open to interpretation, especially when compared to the wording of the requirements for experience, training and knowledge.
>
> [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 impartiale 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 designated to conduct the investigation whose objectives are described in subsection 20.9(3) and 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 the parties involved.
>
> [underline added]

[67] Given the legal requirement that there be agreement between both parties on the impartiality of the person designated to conduct the investigation, the respondent also argues,

based on the decision of this Tribunal in *Employment and Social Development Canada* v. *Canada Employment and Immigration Union*, 2018 OHSTC 11 (*Employment and Social Development Canada)*, that given the importance of this feature, without agreement the person proposed to act as competent person cannot be considered as such under the *Regulations*, and that, as per the decision in *Canada post Corporation* v. *Canadian Union of Postal Workers*, 2019 OHSTC 5 such acceptance/agreement must "be clear, unequivocal, informed and without reserve to attain the objective sought by the legislator", this leading clearly to the conclusion, as found in *Maritime Employers Association* that it is sufficient that a party does not consider the proposed investigator impartial for the person to be unable to proceed as a competent person, and additionally that the reason invoked to refuse a candidate on the basis of impartiality does not need to be substantiated or justified.

[68] Referring to the position of the appellant, a position that it is seeking to base on evidence relative to events or actions that are post-direction, to the effect that Mr. Decayette has systematically and abusively rejected all persons proposed to investigate his complaint, the respondent notes earlier statements by the Tribunal to the effect that, while not requiring that show cause be provided in support of a rejection, could lead to abuse by a person systematically refusing anyone proposed in a discriminatory, sexist, capricious or arbitrary manner, such abusive or discriminatory approach that can be seen as violating the well established legal principle that no person can abuse his rights, can be punished through disciplinary action or interpreted as a waiver of the rights conferred by subsection 20.9(3) of the *Regulations*. Despite such caution by the Tribunal, the respondent submits that the Tribunal has, nonetheless, clarified that even in such situations, the reasons given for rejecting a proposed candidate should not be scrutinized for validity and that it must only consider whether the conduct of the rejecting party is abusive.

[69] Returning more specifically to the facts of the case, the respondent formulates a number of conclusions. First, regarding the appointment of Ms. Sylvie Ouellette as competent person by the employer, the respondent contends that CBSA did not appoint a competent person that satisfies the determinative criteria provided in the *Regulations*, to wit, "who is seen to be impartial by the parties involved" to investigate an incident of work place violence. It is argued by the respondent in this regard that Mr. Decayette clearly and unequivocally stated that he did not accept Ms. Ouellette as he did not consider her to be impartial and clearly advised the employer of the reasons that formed the basis of that rejection which concerned the daily work activities of the candidate as well as his distrust of the employer, given its handling of his complaint. Consequently, when CBSA proceeded to appoint Ms. Ouellette nonetheless, this constituted a failure to appoint a competent person pursuant to subsection 20.9(1) and thus a contravention of subsection 20.9(3) of the *Regulations*.

[70] Secondly, the respondent submits that Mr. Decayette did not act in an arbitrary or abusive manner by refusing the three candidates who were proposed as competent person as he solicited and reviewed, when provided, their resumes, provided clear reasons for not agreeing in each case and formed the opinion that impartiality could be questioned. In each case, the rejection was based on the specific positions of the candidates within CBSA and Treasury Board, his general distrust of his employer, and was supported subsequently by the decision to cease appointing Regional Security Managers as competent persons. The conclusion of the

respondent is that Mr. Decayette's reasons for rejecting each of the proposed candidates were based on objective considerations relevant to each proposed candidate.

[71] The respondent argues additionally that the law and the case law are clear that a party's perception of a candidate's impartiality is necessarily subjective and that even if the employer considered Mr. Decayette's opinions unreasonable or invalid, there is no evidence that the latter acted in bad faith or arbitrarily. Furthermore, while there is consensus in the case law of the Tribunal that an individual's reasons for rejection do not need to be substantiated or justified, Mr. Decayette did provide clear and logical reasons, from his point of view, for rejecting the proposed candidate. As an added point on this question, the respondent submits that there was some bad faith in the CBSA refusal of the candidate (Cantin) that Mr. Decayette offered for consideration with no forthcoming response and subsequent appointments of the same candidate by CBSA in other cases, arguing that while it is the employer who appoints a competent person, there is nothing in the *Regulations* that indicates that it is solely the employer' responsibility to propose candidates for competent person.

[72] Thirdly, it is concluded by the respondent that the direction issued on December 29, 2017, by Ministerial Delegate Smith was well founded, as there is no evidence that Mr. Decayette abused his rights by rejecting the three proposed candidates or that he systematically or arbitrarily objected to the candidates to the point of waving his rights. On the contrary, he reviewed each proposed candidate diligently and provided the employer with clear reasons why he did not view them as impartial. It is the opinion put forth by the respondent that, on that basis alone, the direction is well founded, regardless of the fact that in a later letter of final determination issued some three+ months after the direction itself, the ministerial delegate reiterated the findings of the direction after having received additional information from both CBSA and Mr. Decayette.

Response to the appellant's submissions

[73] Finally, on the submission by the appellant that objection to impartiality requires providing logical reasons, the respondent first argues that there is nothing in the *Regulations* that indicates that an opposing party needs to provide reasons for objecting to the impartiality of a proposed candidate, noting instead that the Tribunal's case law in *Maritime Employers Association* confirms the contrary and indicates that such is not necessary, stating:

> [59][…] Thus, I do not agree with the appellant's contention that a refusal to consider a person impartial must be substantiated and justified: I am of the opinion that such an approach adds a substantive condition to the legislation, which I consider clear and not open to interpretation or limitation […]

[74] This conclusion is reinforced in *Employment and Social Development Canada* as follows:

> [139] […]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, 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.

[75] Furthermore, relative to the subjectivity of one's reasons, the respondent argues that in addition to the lack of obligation to provide reasons for objecting, neither the Tribunal nor the employer is in a position to assess whether a party's subjective reasons for rejecting the impartiality of a candidate are logical and thus whether the employer deems the reason(s) for rejection illogical is irrelevant to the party's determination of impartiality, given the subjective element of such a determination.

[76] Finally, the respondent notes that Mr. Decayette himself proposed three candidates of his own who were either not considered or rejected on the employer's stated opinion that the responsibility to assign was solely the employer's, who thus solely could propose candidates, giving substance to the claim that bad faith and arbitrariness could be directed at the employer instead of Mr. Decayette.

[77] For these reasons, the respondent requests that the appeal be dismissed and the direction issued by Ms. Smith on December 29, 2017 be confirmed.

Reply submissions

[78] In its brief reply submissions, the appellant brings a number of points of clarification regarding the language used to describe the two opposing border service officers at the centre of the matter (armed or unarmed) as well as that of Mr. Decayette's knowledge regarding candidate Ouellette's potential anterior knowledge of Mr. Decayette's complaint, qualifying this as speculative, and of the exactness of certain dates, timelines or comments about one candidate (Cantin) suggested by Mr. Decayette.

[79] In addition, the appellant takes objection to the respondent submitting that there is nothing in the *Regulations* indicating that it is solely the employer's responsibility to appoint a CP (which is not the term used, but rather "propose"), stating that, while it is not explicit in the *Regulations* who needs to propose CPs, the jurisprudence seems to suggest that since it is the employer's obligation to appoint a CP, and it is the employer's responsibility to assess the knowledge and experience of the CP, that practically this means the employer will propose the CPs, since it is stated in *Maritime Employers Association* that "the legislator clearly requires the parties to agree on whether the person proposed by the employer is impartial."

[80] Finally, concerning the respondent's claim that the Tribunal should not consider evidence post March 13, 2018, which represents the date of Ministerial Delegate Smith's letter of final determination finding non-compliance with the direction, the appellant reiterates that, as stated in *Natural Resources Canada*, the Tribunal can receive any "additional evidence as long as it is relevant to the issue..." arguing thus that if the Tribunal agrees with the respondent's submissions, then it should also disregard the post March 13, 2018 evidence regarding the agreement to change the employer's work place violence policy on April 20, 2018.

Analysis

The post-direction evidence

[81] Subsection 146.1(1) of the *Code* sets out the authority of an appeals officer when a direction issued by a ministerial delegate is brought to appeal. It reads:

> **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
>
> **(a)** vary, rescind or confirm the decision or direction;
>
> **(b)** issue any direction that the appeals officer considers appropriate under subection145(2) or (2.1).

[82] A simple reading of the provision makes clear what the appeal, and thus the attention/inquiry of the appeals officer, is to bear upon and concentrate on, to wit, "the circumstances of the (…) direction and the reasons for it." Those simple words consequently serve to circumscribe what the appeal and thus the evidence that is to serve to arrive at a determination must concern. This enhances the necessity to be and to remain aware of the wording of the direction itself that is brought to appeal, and even though this was noted specifically at the outset of this decision, it is important to state it anew at this time, given the emphasis placed by the parties on the evidence and the arguments they presented.

[83] That direction, or rather the terminology that is directly germane to the appeal and refers to subsection 20.9(3) of the *Regulations*, reads as follows: “The employer did not appoint a competent person, who is impartial and seen to be impartial by the parties involved to investigate an incident of workplace violence that was reported to the employer on August 23, 2016.” Noteworthy is the fact that the direction does not speak of reasonable efforts to appoint. Clearly from that text, the ministerial delegate concluded that the employer had failed to, first, appoint a competent person, second, propose one who was impartial and was seen as such by the parties involved, the use of the word "involved" thus distinguishing the parties to the complaint from the employer, and third, that such an appointment would be for the purpose of investigating an incident of work place violence reported to the employer on August 23, 2016. Clearly, therefore, impartiality is the criterion set at paragraph 20.9(3)(a) that the direction is directed at.

[84] Of equal importance in the wording of the direction is the ministerial delegate's qualification of this failure to appoint such competent person as a "contravention" to the *Code* (paragraph 125(1)(z.16)) and the *Regulations* (subsection 20.9(3)), such that the employer was directed to terminate, thus to comply, "no later than January, 12, 2018". I have taken pains to insist on these elements of the direction because through the presentation of their cases by the parties, more seems to have been debated regarding what came after the issuance of the direction than what preceded it and it is useful to reiterate here what the true issue to be determined is in the present case: whether there were valid reasons to issue the direction and whether the employer had appointed a person who was and was seen to be impartial by the parties to the complaint to investigate the said complaint of workplace violence.

[85] Derived from what precedes is the importance of the timeline of the major elements of the issue at hand. As such, the Labour Program, and eventually Ministerial Delegate Smith, were submitted a work place violence complaint on October 30, 2017, that raised the issue of the impartiality of the person appointed as competent person to investigate a previous complaint (March 20, 2017) of work place violence, this one having contended that the employer had failed to actually appoint a competent person to investigate the complaint. At the end of the investigation into the October 30, 2017 complaint by Ministerial Delegate Smith, she issued a direction on December 29, 2017 that ordered the appellant to cease, by January 12, 2018, contravening its obligation under the legislation to appoint as competent person someone who was and was seen as impartial for the purpose of investigating the original complaint.

[86] On March 13, 2018, in a letter to the parties, referred to above as a letter of final determination, Ministerial Delegate Smith concluded that, as of that date, it was her opinion that the employer had still not complied with the December 29, 2017 direction and had not appointed as competent person, someone who was and was seen to be impartial. The evidence shows that, starting in April 2018 until the time of the present hearing, the appellant proceeded to suggest a number of candidates for competent person who were all rejected by Mr. Decayette for reasons previously stated. I have put much emphasis on this matter of timeline due to the substance of the greatest part of the evidence and argumentation by the appellant, and obviously, as a result, by the respondent, in addressing the issue raised by the appeal.

[87] While, as previously stated, the appellant has built its case on a triple argument, the main or central part of this being the claim that all through the process it has demonstrated continuous effort to comply with its obligations under the *Regulations*, acting first on the basis of an official's interpretation of the legislation with which the ministerial delegate that followed in the present case appears to disagree, and then, when forewarned of the probable finding of contravention and issuance of a direction by that ministerial delegate regarding its appointment of a competent person not accepted by Mr. Decayette, maintained its selection and appointment, which, after the direction, was followed by efforts that were, in the appellant's opinion, thwarted at every turn by the systematic and abusive conduct of the Mr. Decayette that should be seen as a waiver of the latter's rights.

[88] The appellant has made much of the time span of three or more years involved in this matter, which concerns a work place incident that occurred on August 23, 2016, and came to hearing by the undersigned on June 10, 2019, this justifying, in its opinion and based on the undersigned's *de novo* capacity, my taking into consideration post-direction evidentiary facts on the basis that the legislative intention being the provision of an efficient avenue of redress for employees who have experienced work place violence, with a view to having the situation dealt with appropriately by the employer, such legislative intention was thus a necessary consideration in the decision as to the limits to place on a party stonewalling the start of an investigation.

[89] At the same time, that argument by the appellant pays little to no mind to the absence of consideration by the employer, in the course of this avenue of appropriate redress, to the candidates proposed as competent persons by Mr. Decayette, on the guise that having sole

authority to appoint the competent person extended to the authority to propose candidates, a position that, in the undersigned's opinion, has no foundation, as there is nothing in the *Regulations* that indicates that it is solely the employer's responsibility to propose candidates for competent persons, such conclusion being arrived at when all the words of the *Regulations* are read in their entire context and ordinary sense harmoniously with the intent of said *Regulations*.

[90] I will add, however, given the appellant founding its argument on the *Rizzo & Rizzo Shoes Ltd.* Supreme Court decision, that I doubt that the lofty intent of efficiency of purpose of the scheme that the appellant bases on the words of the court can serve to validate ignorance of the specificity of the terminology of the legislation and of the relevance, or lack thereof, of the factual evidence, having in mind that the issue in the present case does not concern compliance with a direction but failure to comply with the requirements of the *Regulations*.

[91] This being said, on the matter of accepting what has been referred to throughout as the post-direction evidence, one must first consider the wording of the legislation that sets out the appeal procedure and requires that there be an inquiry into the circumstances and reasons of the direction, which is seen as the consequence of those circumstances and reasons and as such would arise before and precede the direction. The appellant, as stated above, would have the undersigned adopt a different stance for the purpose of invalidating the said direction and consider for the purpose of validating its actions, facts and circumstances that followed not only the immediate issuance of the direction but also what came after it was concluded by the ministerial delegate that the employer had failed to comply with the direction itself.

[92] This Tribunal, however, has always recognized that any evidence admitted by and before the Tribunal must be presented for the purpose of making determinations on the issues central to the appeal, and this even though it may be acting in *de novo* fashion. This position of the Tribunal is well established in its case law and although I do not propose to conduct a general review of such, I believe the following excerpts from the decision of my colleague Appeals Officer Hamel in *MacDuff* describe well the state of the law on these issues, and I hasten to say that I make mine his words:

> [47] First, the plain language of 146.1 sets out an appeal procedure into the circumstances that led an HSO to form certain conclusions and issue a direction. The inquiry conducted under that section must necessarily relate to those circumstances, not to circumstances that exist at the time of the inquiry-in our case more than two years later (as in the present case). It would no longer be an appeal, but an independent inquiry into entirely new circumstances. This is not what the Code envisages in my view.
>
> [48] The principle emerging from the caselaw, as I understand it, is that the appeals officer is not bound by the evidence gathered by the HSO, or by his conclusions on the facts. Fresh evidence may be contemporaneous to the refusal or direction, or it may be subsequent to the direction. However, the purpose for which the fresh evidence may be admitted is not for making determinations on the circumstances as they exist at the time of the appeals officer's inquiry. The purpose of the "fresh" evidence must relate to the circumstances that were investigated by the HSO. Its purpose must be to shed light on the circumstances and factual context leading to the issuance of the direction.

[93] There stems from the above that evidence arising after the direction by the ministerial delegate would not relate to the circumstances that were investigated because clearly such evidence did not exist at the time the ministerial delegate issued the direction. The stated intent of the appellant as regards the said post-direction evidence is to demonstrate that it has made reasonable efforts to appoint a competent person after the direction had been issued, and, therefore, that it has been prevented from doing so by the attitude and conduct of Mr. Decayette in unreasonably thwarting its efforts, and by rebound having the undersigned consider that such conduct may have transpired pre-direction when three candidates were objected to by Mr. Decayette.

[94] While such evidence was not before the ministerial delegate before issuing the direction and thus did not enter into her consideration, this argument by the appellant also leaves aside certain elements that need to be considered. As such, as part of the development of events that led to the direction, I must take into account that the appellant had been forewarned by the ministerial delegate that the direction it was taking in maintaining its appointment of a CP who had been rejected by one party to the complaint on the latter's opinion of impartiality, could lead to the issuance of the direction. The appellant based its decision to pursue not on the opinion of the eventual issuer of the direction on the meaning to put on the wording of the *Regulations*, but rather on the opinion of another official (Ministerial Delegate Lefort) acting on the matter of the appellant's obligation to appoint a competent person, but who did not himself issue a direction on the matter and had, according to the report and the testimony of Ministerial Delegate Smith, indicated that in rejecting a proposed CP on the basis of impartiality, reasons had to be enunciated by the rejecting party, an opinion clearly not shared by Ministerial Delegate Smith in seeking an AVC from the employer that the latter refused to provide and then in issuing the direction under appeal.

[95] I must also take into account that after the issuance of the direction by the ministerial delegate, the appellant, for a number of months afterwards, took no step, if one considers the evidence put forth by the appellant, to attain compliance, although this fact, in and of itself, is not relevant to the actual determination of the appeal. I will add regarding this that, in seeking to have the Tribunal accept to consider this post-direction evidence, the employer has quite conveniently avoided mentioning that in light of the opinion expressed by the ministerial delegate and the situation that allegedly followed the issuance of the direction, it saw no need to seek a stay of the direction pending the continuation of its efforts to appoint a competent person.

[96] In this regard, the words of Appeals Officer Hamel in *MacDuff* that follow represent also the opinion of the undersigned:

> [52] Regarding the appellant's submission that my inquiry should look into the extent to which the employer has complied with the directions, I say again that it is an incorrect understanding of the appeal process. A direction, once issued, is legally binding and must be complied with in spite of an appeal being filed, unless a stay is obtained pursuant to subsection 146(2) of the Code. Stays are only granted exceptionally, in cases where the appellant satisfies a number of fairly stringent criteria. In the vast majority of cases, the employer will have complied with the direction when the appeal is heard. The argument that the appeals officer's task is to look into and assess whether the employer has complied (or as

> in this case has tried to comply) with the direction completely changes the nature of the appeal process, which is to determine whether the direction was correctly issued in the first place.
>
> [underline added]

[97] The matter before the Tribunal is whether the direction was correctly issued initially, not whether the employer has complied or attempted to comply, which could have been the starting point of an issue to consider by Ministerial Delegate Smith in examining whether there was a situation of contravention of another provision of the *Code.* This, however, is not an issue for my consideration. That the Tribunal sits *de novo* does not alter the fact that it is only entitled to hear relevant and material evidence. On this, I again make mine the words used by the appeals officer in *Doyle*:

> [63] I must carry out the review in a *de novo* manner, meaning that I am not bound by the findings of fact or conclusions of the ministerial delegate and I may consider all relevant evidence relating to the circumstances that prevailed at the time of the direction, including evidence which may not have been available or considered by the ministerial delegate, (*DP World (Canada) Inc. v. International Longshore and Warehouse Union, Local 500 et al.*, 2013 OHSTC 3).
>
> [underline added]

[98] Having considered all that precedes, I have come to the conclusion that the so-called post-direction evidence, as described previously, and intended at establishing a systematic and abusive attitude of objection by Mr. Decayette, exceeds the scope of what the undersigned can consider in determining whether the direction issued by Ministerial Delegate Smith was founded.My determination thus turns on the case of the three persons proposed as competent person prior to the issuance of the direction, and essentially on the sole case of the appointment of one, Ms. Ouellette, and the fact that Mr. Decayette objected to the said appointment on the basis of impartiality and, having been informed that the employer intended to proceed nonetheless with the appointment, formulated reasons for such a conclusion a short time after and prior to being informed that the investigation by that CP would proceed, despite the rejection.

The condition of impartiality set out in paragraph 20.9(1)(a) of the *Regulations*

[99] The facts are well described above by both parties as well as in the background summary penned by the undersigned and thus the only matter that is at issue in this case revolves around the condition of impartiality set at paragraph 20.9(1)(a) of the *Regulations*, this being the impartiality of the person(s) selected by the employer to investigate the allegation of work place violence. More precisely, given the objective and the subjective dimensions of the qualification, and the requirement that a proposed CP candidate must satisfy both dimensions, one must state that here, the objective impartiality of the (three) proposed candidates is not at issue, as the appeal turns solely on Mr. Decayette's subjective view that the candidates proposed, and essentially the candidate that was appointed as CP prior to the direction, lacked impartiality, the clear and unequivocal intent of the legislation being that both parties to the complaint agree that the person proposed by the employer is impartial in order for that person to be appointed.

[100] In *Maritime Employers Association*, the appeals officer explained the subjective dimension as follows:

> [54] […]the test of impartiality set out in paragraph (a) evokes a notion of impartiality and relies on the perception of the parties involved. The text is clear and is not open to interpretation, especially when compared to the wording of the requirements for experience, training and knowledge.

[101] This notion of subjectivity was commented upon by the appeals officer in *Natural Resources Canada*, particularly with regard to the use of the words "is seen" in the *Regulations*, which equates to "perception", a concept entirely subjective thus meaning that different individuals may understand "impartial" in differing ways, giving support to the opinion that while the employer, in proposing candidates, is held to a strict criterion of objective impartiality that it would be required to support, parties to the complaint need not satisfy the same requirement on the matter of impartiality.

[102] I find support for this interpretation of paragraph (a) of subsection 20.9(1) of the *Regulations* in the opinion expressed by the appeals officer in *Maritime Employers Association* that "it is sufficient that a party does not consider the proposed investigator impartial for the person to be unable to proceed under this section." Such negative consideration does not equate to actual lack of impartiality. Furthermore, and of primary importance for the issue at hand, the appeals officer stated that he "did not agree with" the "contention that a refusal to consider a person impartial must be substantiated and justified" and that to conclude otherwise would constitute an approach that "adds a substantive condition to the legislation, which I consider clear and not open to interpretation or limitation." I share entirely the opinion expressed by the appeals officer in that case.

[103] In the case at hand, Mr. Decayette had first objected to two other candidates before indicating his rejection of the person (Ouellette) that the employer opted to appoint nonetheless. That rejection clearly referred to paragraph (a) of the applicable *Regulations*. Given the decision of the employer to proceed as it did, this constituted a valid reason for the issuance of the direction, particularly in the circumstances of having been forewarned of what was liable to come.

[104] It is true that in the *Maritime Employers Association* case, as argued by the respondent, the appeals officer did caution that the literal application of the *Regulations* that would see a party not required to substantiate a rejection could lead to abuse where such party would systematically refuse anyone proposed by the employer in an arbitrary or capricious manner. However one needs to note here that with the exclusion of the post-direction evidence, there is no foundation in my opinion to find, based on the evidence retained, that such conduct was the case relative to the issuance of the direction under appeal.

[105] I do agree, however, with my colleague that such literal application of the *Regulations* could open the door to abuse of the type alleged by the appellant to have existed in the present case, and that such abuse, if established and relevant, could be sanctioned through disciplinary action, or interpreted as a waiver of the rights conferred by the *Regulations*. At the risk of

repetition, I find that the relevant evidence to the effect that Mr. Decayette did not consent to the appointment of Ms. Bussière, Ms. Spence MacDonald and Ms. Ouellette, all on the basis of impartiality, does not support a finding that the refusal was systematic or based on abusive considerations on the latter's part that one would consider tantamount to an abuse of his rights. This being said, I have reached the following conclusions:

- The appellant did not appoint to act as competent person one who was seen to be impartial by at least one party involved in the complaint.
- Ministerial Delegate Smith was correct in her interpretation of subsection 20.9(3) of the *Regulations* in the circumstances of the present case and more specifically, that a party involved in the complaint need not provide reasons for objecting to a candidate's impartiality;.
- The direction issued by Ministerial Delegate Smith on December 29, 2017, was well founded.

Decision

[106] For these reasons, the appeal is dismissed and I confirm the direction issued on December 29, 2017, by Fancy AM Smith, Official Delegated by the Minister of Labour.

Jean-Pierre Aubre
Appeals Officer