Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2020-04-16
Case No.: 2017-36

Between:

Canadian Food Inspection Agency, Appellant

and

Public Service Alliance of Canada, Respondent

Indexed as: *Canadian Food Inspection Agency v. Public Service Alliance of Canada*

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* against a direction issued by an official delegated by the Minister of Labour
Decision:	The direction is confirmed
Decision rendered by:	Pierre Hamel, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Spencer Shaw, Counsel, Labour and Employment Law Group, Justice Canada
For the respondent:	Ms. Jessica Greenwood, Counsel, Ravenlaw
Citation:	2020 OHSTC 4

REASONS FOR DECISION

[1] These reasons concern an appeal brought under subsection 146(1) of the *Canada Labour Code* (*Code*) by the Canadian Food Inspection Agency (CFIA or "the employer") against a direction issued on October 18, 2017 by Ms. Karina Sacco, in her capacity as an official delegated by the Minister of Labour (ministerial delegate).

[2] The direction was issued under paragraph 145(1)*(a)* of the *Code* and states that the employer has contravened paragraph 125(1)(z.16) of the *Code* and subsection 20.9(3) of the *Canada Occupational Health and Safety Regulations* (*Regulations*). More specifically, the ministerial delegate concluded that the employer had failed to appoint a "competent person" as mandated by subsection 20.9(3) of the *Regulations* to investigate a workplace violence complaint filed by an employee, Mr. Jagdip Virdee.

[3] The operative part of the direction reads as follows:

> The employer has failed to appoint a competent person to investigate the unresolved work place violence complaint submitted by employee Jagdip Virdee

[4] The employer appealed the direction on November 16, 2017 and also requested a stay of the direction. The application for a stay was withdrawn on December 17, 2017. The appeal was heard on June 24 through 27, 2019, in Toronto, ON.

Background

[5] Mr. Jagdip Virdee is employed with the CFIA since March 2002. At the material, he was an import specialist with the appellant, operating from its Mississauga office. In 2014, Mr. Virdee was injured in a car accident which caused him lasting health issues. Consequently, his health situation required a number of measures of accommodation in relation to his work environment and working conditions.

[6] It came out of the evidence adduced at the hearing of the appeal that Mr. Virdee was generally dissatisfied with the extent of the measures agreed upon by the employer, which caused Mr. Virdee to present grievances and complaints to seek redress. Briefly put, the accommodation sought by Mr. Virdee related to obtaining a stand-up desk that would be adjusted at an appropriate height in order to minimize the back pain he experienced when he sat for prolonged periods of time, working a morning shift (6am-2pm), the ability to telework, or be allowed to work at a different work location closer to his home. Those measures all purported to address Mr. Virdee's limitations regarding sitting down for long periods of time, which was at

the source of his back pain. In addition, Mr. Virdee had to take several periods of time off during the accommodation process. The employer allowed Mr. Virdee's to use a special leave code 699 for those absences until such time as his desk was properly adjusted, so that he did not have to use his sick leave or vacation credits to make up for the time lost. His ability to use 699 was eventually taken away, without the adjustments to the height of his desk being finalized.

[7] It is clear that the issue relating to the adjustment of his work desk was an ongoing irritant for Mr. Virdee. Discussions on the measures of accommodations requested by Mr. Virdee and the ones the employer was prepared to accept stretched over a few years and the alleged instances of violence have arisen in that particular context. As the parties acknowledge, it is not within the purview of this appeal to make any determination of the merits of these measures and the extent to which the employer may or may not have met its obligations to accommodate Mr. Virdee. The parties also agree that the dispute regarding accommodation measures cannot, on its own, form the basis of a work place violence complaint. What is at issue here is the alleged conduct of the employer's representatives in dealing with such matters.

[8] On June 7, 2017, Mr. Virdee submitted a workplace violence complaint to his employer. The allegations set out in his complaint refer to a number of actions and statements of the employer's representatives which led Mr. Virdee to allege that he was subjected to acts of violence in his workplace, as defined in the *Code* and *Regulations*. I will set out more specifically the alleged facts supporting Mr. Virdee's claim later in the Analysis part of the present decision.

[9] The employer reviewed Mr. Virdee's complaint and determined that on its face, his allegations had not met the definition of violence set out in the *Regulations.* In a letter dated June 23, 2017, the employer informed Mr. Virdee that his complaint was rejected on that basis and encouraged Mr. Virdee to use the Informal Conflict Management System to resolve the issues raised in his complaint. There was no attempt to resolve the complaint informally with Mr. Virdee.

[10] On July 24, Mr. Virdee filed a workplace violence complaint to the Labour Program of Employment and Social Development Canada (ESDC). The narrative is along the same lines as his June internal complaint, albeit with slightly more details on the words and actions of employer representatives which Mr. Virdee considered to be acts of violence, as defined in Part XX of the *Regulations*. There is some debate on whether the two complaints are indeed similar and I will discuss this point further in the Analysis section of the decision. In essence, in both complaints, Mr. Virdee makes reference to the employer's failure to accommodate him, during which he felt demeaned, belittled, intimidated, and harassed as a result of various interactions with management representatives.

[11] The matter was assigned to Ms. Karina Sacco, acting as ministerial delegate under the *Code* to investigate the complaint. While she informed Mr. Virdee that the issues related to accommodation did not fall under the purview of the *Code per se*, his allegations of psychological harm, bullying, harassment and intimidation could be considered to determine if there was a violation of Part XX of the *Regulations*.

[12] Ms. Sacco coordinated a teleconference with Mr. Virdee and employer representatives to determine whether the appointment of a competent person was required. The teleconference was held on October 11, 2017, during which the parties had discussions regarding behaviours and conduct that were perceived by Mr. Virdee to constitute harassment. Further to the teleconference, based on Mr. Virdee's allegations and more specifically in relation to alleged incidents involving Ms. Campbell and Ms. Pinsent, Ms. Sacco formed the opinion that the employer was in violation of subsection 20.9(3) of the *Regulations* for not appointing a competent person as required by that subsection.

[13] It must also be noted that Ms. Sacco denied the employer's request to be provided with a copy of the complaint submitted to ESDC, on the grounds that the document was confidential under the *Code* and protected "B" under the Government's security of documents policies. The employer eventually obtained a copy of the complaint, which was part of the documentation filed by Ms. Sacco with the Tribunal further to the employer's appeal.

The Issue

[14] The issue raised by this appeal is whether the employer was required by subsection 20.9(3) of the *Regulations* to appoint a competent person to investigate Mr. Virdee's allegations of violence in the workplace in the circumstances of the present case. More precisely, the present appeal raises the question of whether it is "plain and obvious" – a test referred to in *Canada (Attorney General) v. Public Service Alliance of Canada,* 2015 FCA 273(*PSAC 2*) and *Public Service Alliance of Canada v. Canada (Attorney General),* 2014 FC 1066 (*PSAC 1*) – that the complaint does not relate to violence in the workplace, in which case no such obligation to appoint would arise.

Submissions of the parties

Appellant's submissions

[15] The appellant first stresses that the appeal process is a *de novo* process. The appeals officer is not bound the findings of fact or conclusions of the ministerial delegate and 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.

[16] The appellant refers to Part XX of the *Regulations* and to the rationale behind that Part of the *Regulations* as stated by the Federal Court of Appeal (FCA) in its judgement in *PSAC 2*, and set out in the Regulatory Impact Analysis Statement published in the Canada Gazette when Part XX was enacted.

[17] The appellant submits that the FCA's decision, when read as a whole, makes it clear that the scheme of the *Regulations* is to have employers 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. This scheme was developed through a working group appointed by the Canadian Labour Congress in 1999 shortly after a shooting in a Federal workplace. It is in this context the scheme and purpose of Part XX becomes apparent, as the legislators and stakeholders were responding to an extreme act of work place violence. However, the legislators realized that not every act would amount to work place violence, and only those acts that could reasonably be expected to cause harm, injury or illness to an employee would be work place violence.

[18] The appellant then summarizes the test set out by the FCA when dealing with Part XX of the *Regulations.* The FCA, held the following important principles that should guide an employer when filtering workplace violence complaints. First, the FCA recognized that :

> "it could not have been the intent of the Regulations to require employers to appoint a competent person to investigate each and every complaint, so long as the employee characterizes them as being work place violence. This would no doubt trivialize the important rights and obligations enshrined in Part XX of the Regulations."

The FCA acknowledges that there must be some filtering and some analysis of the employee's work place violence complaint. The FCA held that employers "can certainly review a complaint with a view to determine whether, on its face, it falls within the definition of work place violence as found in section 20.2 of the *Regulations*.

[19] The appellant further argues that the FCA characterized this weighing as being limited, and found that the "threshold should be low" and the employer should appoint a competent person "unless it is plain and obvious that the allegations do not relate to work place violence even if accepted as true." In the case considered by the FCA, it was not plain and obvious that the facts as alleged did not amount to work place violence. The complaint was not clearly vexatious or frivolous, and it was not the employer's role to decide at that early stage, without even meeting with the employee, whether the particular conduct alleged was serious enough in the circumstances so as to constitute work place violence.

[20] The test then can be summarized as (1) employers must review the allegations to determine if it they meet the definition of work place violence, (2) employers should meet with

the complainant, (3) the employer must appoint a "competent person", unless it is plain and obvious that the allegations do not relate to work place violence even if accepted as true.

[21] The appellant further submits that the ministerial delegate breached the rules of procedural fairness by not providing a copy of the complaint to the employer. The employer stresses that the complaint filed with ESDC is very different from the one filed internally within CFIA. CFIA was disadvantaged at the teleconference having not fully understood the nature of the allegations against it and therefore unable to fully respond. That made it impossible for the employer to apply section 20.9(2) of the *Regulations*, as that section only applies when the employer becomes aware of alleged work place violence.

[22] The employer argues that Mr. Virdee's misconception of the law, his motivations, and his reliability materially and negatively affected his perception of the incidents raised in his allegations. This Tribunal should only consider the allegations that are reliably described in the application of the "plain and obvious test". Mr. Virdee was looking for very specific accommodation and was upset that the employer had not acquiesced to his requests. His state of mind tainted his perception of the facts and rendered his perception unreliable. The Tribunal should assess Mr. Virdee's credibility when applying the plain and obvious test.

[23] The appellant submits that the "plain and obvious test" requires that employers accept the allegations as true, and then decide whether they meet the definition of work place violence. The appellant stresses the importance of the word "reasonably" in the definition of "work place violence", which qualifies the impact of the "actions, conduct, threat or gesture" on the expectation of harm, injury or illness. However, to avoid absurdity and abuse, "accepted as true" must logically only include the parts of the allegations that are reliable. To assume otherwise would frustrate the purpose of the *Regulations*. Mr. Virdee's allegations need only be believed as true to the extent they are reliable. Virdee's speculation on other's motivation or displeasure with accommodation issues need not be accepted as true. In addition, an assessment of the reliability of Mr. Virdee's allegations must account for the perception issues outlined by his psychologist, and by Mr. Virdee's being out of options for his accommodations to be met.

[24] The appellant stresses that none of the three "incidents" referred to in the compliant satisfy the definition of violence. Whether it is a manager using a "firm voice", or a manager questioning a doctor's note as "sounding fishy" or raising her voice using a high tone in a conversation about accommodations and leave without pay, are all exercise of managerial rights and cannot reasonably be expected cause harm. Those allegations plainly and obviously did not relate to work place violence and to consider them as such would frustrate the purpose of the *Regulations*.

Respondent's Submissions

[25] Counsel for the respondent first summarizes the facts leading to Mr. Virdee's complaints. Counsel stresses that what is at issue in this appeal is the conduct of the employer throughout the process of identifying and applying accommodation measures for Mr. Virdee as a result of his limitations due to a car accident. While the fullness of the accommodation measures is not at

issue in the present proceedings, the evidence shows that his requests became contentious and led to confrontational interactions with management.

[26] Counsel for the respondent also relies on *PSAC 2* as providing the framework within which the application of Part XX of the *Regulations* must be made. She points out that the primary fact-finding role in relation to work place violence complaints falls on the "competent person" to be appointed for that purpose under subsection 20.9(3) of the *Regulations*. That "competent person" should therefore be appointed unless it is "plain and obvious that the allegations do not relate to work place violence even if accepted as true".

[27] The respondent submits that the appellant is attempting to reintroduce fact-finding functions and assessments of credibility through the back-door, by submitting that his account of the situation was unreliable. Allowing employers to make such determination would defeat the purpose and intent of the *Regulations*.

[28] Applying the "plain and obvious" standard to the present case, counsel for the respondent submits that Mr. Virdee's allegations could potentially relate to work place violence. Harassment, bullying, threats and intimidation was the core of Mr. Virdee's complaint, accommodation was the context. The question of whether forcing Mr. Virdee to work at the desk that was causing him harm and pain constituted workplace violence is a question of fact and substance that is best left to the expert analysis and fact-finding abilities of a "competent person".

[29] The respondent disagrees with the employer's role as being one of "screening" the complaint to ensure that it falls within the confines of Part XX. Rather, the role of the employer is to do whatever is necessary to resolve the complaint. Counsel refers to the *Seaspan Marine v. International Longshore and Warehouse Union Local 400*, 2017 OHSTC 10 (*Seaspan Marine*), where the appeals officer specified that the employer's preliminary review should be conducted "with a view to resolve the matter". The purpose of limiting employer discretion in section 20.9 is to assure rapid and effective resolution or policy change where there is an allegation of work place violence.

[30] Regarding the appellant's argument relating to procedural fairness, counsel for the respondent submits that the employer had adequate notice of the allegations against it. The Labour Program operates under policies that do not authorize the disclosure of the Complaint Registration Form. The nature of the complaint was outlined over the course of the teleconference and specifics were provided. Section 20.9(2) operates when the employer becomes aware of work place violence or alleged work place violence and nowhere in that section is there any mention of specifics or factual particulars, which makes sense because the scheme leaves it up to the "competent person" to be appointed to make factual determinations.

[31] Finally, counsel for the respondent disputes the appellant's position that the allegations in Mr. Virdee's complaint cannot reasonably be expected to cause harm. She submits that it should be up to the "competent person" to make such a determination. That person is better suited to make such a determination, which depends on the individual making the complaint, the context of the work place and the nature of the alleged incidents. The complexity of a determination like the reasonable likelihood of harm is precisely the reason section 20.9 requires the "competent person" to have "knowledge, training and experience in issues relating to work place violence".

Appellant's Reply Submissions

[32] The appellant disagrees with the respondent's characterization of the evidence that the employer's representatives had made up their minds prior to the June meeting with Mr. Virdee. The witnesses testified that Mr. Virdee did not raise anything at the meeting that upset their initial preliminary review. Unlike the employer in *PSAC 2* paragraph 35, the employer met with the employee before coming to its ultimate determination that the complaint was plainly and obviously not related to work place violence.

[33] Counsel for the appellant further takes issue with the respondent's assertion that the two complaints are similar. Two of the alleged three incidents are missing from the complaint submitted to the employer. The appellant reiterates the important gatekeeping role played by the employer under the scheme, supported in its view by the words of the FCA in *PSAC 2* at para 33 that :

> "it could not have been the intent of the Regulations to require employers to appoint a competent person to investigate each and every complaint, so long as the employee characterizes them as being work place violence. This would no doubt trivialize the important rights and obligations enshrined in Part XX of the *Regulations*".

[34] Finally, the appellant reiterates the fact that the internal complaint and the complaint subsequently filed with the Labour Program bear very different language. Two of the alleged incidents relied on by Ms. Sacco in her decision did not appear in the first complaint.
The employer was therefore frustrated in his "gatekeeping role" and would have been in a better position to determine whether a "competent person" needed to be appointed if they were apprised of the full set of allegations beforehand.

Analysis

[35] The sections of the *Code* and *Regulations* that are relevant to the present appeal are as follows:

122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

125 (1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

(…)

(z.16) take the prescribed steps to prevent and protect against violence in the work place;

20.2 In this Part, "work place violence" constitutes any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee

20.3 The employer shall develop and post at a place accessible to all employees a work place violence prevention policy setting out, among other things, the following obligations of the employer:

a. to provide a safe, healthy and violence-free work place

b. 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

c. to communicate to its employees information in its possession about factors contributing to work place violence

d. to assist employees who have been exposed to work place violence

20.9 (1) In this section, ***competent person*** means a person who

(a) is impartial and is seen by the parties to be impartial;

(b) has knowledge, training and experience in issues relating to work place violence; and

(c) has knowledge of relevant legislation.

(2) If an employer <u>becomes aware</u> of work place violence <u>or alleged</u> work place violence, the employer shall try to resolve the matter with the employee as soon as possible.

(3) If the matter is unresolved, the employer <u>shall appoint</u> a competent person to investigate the work place violence and provide that person with any relevant information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent.

(Underlining added)

[36] The appellant appealed the direction pursuant to subsection 146(1) of the *Code*:

> **146.** (1) An employer, employee or trade union that feels aggrieved by a direction issued by the Minister under this Part may appeal the direction in writing to an appeals officer within 30 days after the date of the direction being issued or confirmed in writing.

[37] For the reasons that follow, I conclude that the direction is well-founded and the appeal is dismissed.

[38] The nub of the issue raised by the present appeal is whether it is plain and obvious that the complaint filed by Mr. Virdee do not relate to workplace violence as that term is defined in subsection 20.2 of the *Regulations.*

[39] This formulation of that question, which the parties refer as the "plain and obvious test", originates, as previously mentioned, from a judgement of the Federal Court (FC) in *PSAC 1*. In that case, a complainant filed a work place violence complaint that raised allegations of miscommunication, favouritism, humiliation, unfair treatment and lack of respect on the part of his supervisor, not unlike Mr. Virdee's allegations in the present case. The complaint filed by the employee in that case did not specifically refer to "work place violence" or identify itself as a work place violence complaint under the *Regulations.* The employer, CFIA, conducted an initial review of the allegations and concluded that while there were communications issues and unresolved tension between the complainant and his supervisor, there was no evidence of harassment and therefore no further investigation was warranted. A Health and Safety Officer saw otherwise and issued a direction to the employer to appoint a "competent person" as mandated by subsection 20.9(3) of the *Regulations*. The employer appealed the direction and the appeals officer rescinded the direction, on the grounds that the employee's allegation of harassing conduct on the part of his supervisor did not meet the definition of "work place violence" and as a result, the employer was under no obligation to appoint a "competent person".

[40] The appeals officer drew two fundamental conclusions in his analysis. First, he held that the employee's allegations of favouritism, humiliation and disrespectful behaviour fell short of constituting work place violence, as he considered that the allegations could not reasonably be expected to cause harm, injury or illness to the employee. Second, he found that a reasonable interpretation of the *Regulations* supports the employer making the initial determination of deciding whether an employee's allegation of work place violence has been established, as the employer did in that case, so as to prevent situations of abuse where any and every allegation of work place violence would require the appointment of a "competent person".

[41] The FC disagreed with the appeals officer regarding both conclusions and expressed the view that harassment may constitute work place violence, depending on the circumstances present in a given case. At paragraphs 28 and 29, the FC states as follows:

> [28] […] The use of "any action, conduct … or gesture" of a person towards an employee "that can reasonably be expected to cause harm … or illness" to that employee is broad enough on its plain and ordinary meaning to include harassing activities of a person that cause mental or psychological harm or illness. […]
>
> [29] Therefore harassment of the kind inflicted upon the employee in this case may constitute work place violence, if after a proper investigation by a competent person it is determined that the harassment includes actions, conduct or gestures that can reasonably be expected to cause harm or illness to the employee. In my opinion, psychological bullying can be one of the worst forms of harm that can be inflicted on a person over time.
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> (Underlining added)

[42] The FC goes on to stress the significance of the 'triggering point" of the employer's obligations under section 20.9. An employer needs to become aware of the work place violence or alleged work place violence for the investigation process to be triggered. The FC then states as follows the genesis of the "plain and obvious test":

> [36] However, while an employer cannot assume that all complaints it receives that allege work place violence should be investigated pursuant to Part XX of the Regulations, and it would be impractical for every complaint to be treated as one alleging work place violence, it is apparent that any pre-screening by the employer is limited to fact finding, in an attempt to resolve the dispute with the employee and facilitate mediation, if possible, pursuant to section 20.9(2) of Part XX of the Regulations.
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> [37] Once such initial fact finding is unsuccessful in resolving the dispute, and the allegation of work place violence remains a live issue between the employer and employee, unless it is plain and obvious that the complaint was not related to work place violence, there is a mandatory duty for the employer to proceed under section 20.9(3) to appoint a competent person to investigate the complaint, under section 20.9(1) of Part XX of the Regulations.
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> (Underlining added)

[43] After having so stated, the FC went on to conclude at paragraph 39 that the employer did more than pre-screening and a fact-finding exercise "to determine the nature of the complaint and attempt to facilitate mediation", but conducted a full-fledge investigation of the compliant, acting as a "competent person" under subsection 20.9(3).

[44] The words “plain and obvious” are not found in the *Regulations* and as such my task is not to interpret those words as one would do using accepted canons of legal interpretation. My task is rather to attempt to elucidate what the FC had in mind when it made such statement. I believe that in attempting to do so, I must fall back on the wording of the *Code* and *Regulations*, as well as their purpose and objective.

[45] I take it from the above analysis that any substantive inquiry into the facts alleged in the complaint should be left to a “competent person” whose appointment is mandated by subsection 20.9(3) of the *Regulations* if the allegation of work place violence remains unresolved at the pre-screening stage and still a live issue between the parties. Such substantive inquiry includes in my view an assessment of the context within which the facts occurred, whether the facts actually occurred, an assessment of the credibility of the individuals involved as may be required in order to make findings of fact, etc., in other words, this is the kind of inquiry that the appellant contends can appropriately be conducted by the employer at the preliminary stage and urges me to do in the present appeal. In my view this approach is not supported by the caselaw and is not a correct interpretation of the scheme set out in Part XX of the *Regulations*.

[46] Reading the FC’s words in the context of the totality of its analysis, I conclude that the “plain and obvious test” is solely for the purpose of understanding the nature of the complaint and allegations, with an objective to bring about its resolution, nothing more. With respect, I do not subscribe to appellant’s submissions that the initial review may be described as a function of “screening” or “gatekeeping” to assess the sufficiency or credibility of the allegations before proceeding to an investigation by a “competent person”.

[47] I subscribe to the appeals officer’s conclusion set out in the *Seaspan Marine* case regarding the purpose and confines of the employer’s review authority in relation to work place violence complaints, at paragraphs 47 to 49 of his decision:

> [47] From my reading of this decision [*PSAC v. Canada (Attorney General (FCA)]*), I conclude that the Regulations do not permit federally regulated employers, who are made aware of allegations of work place violence, to proceed to conduct their own investigation into the matter to determine whether work place violence has occurred. This task falls exclusively to a competent person as defined in the Regulations.
>
> [48] The employer is however permitted to conduct a preliminary review of the complaint with a view to resolve the matter. If the employer fails to resolve the matter, it must appoint a competent person to investigate the allegations unless it is plain and obvious that they do not relate to work place violence.
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> [49] In the case at bar, I find that, contrarily to what was argued by the appellant, neither the employer nor the Ministerial Delegate could conduct a

> formal investigation into Mr. Hoey's complaint. I also conclude that it cannot be said it is plain and obvious that Mr. Hoey's allegations do not constitute work place violence as defined in the Regulations. Based on his testimony, it is clear that Mr. Hoey felt threated and intimidated by the conduct of his manager. In my opinion, it is plausible that a competent person investigating all the facts could conclude that the conduct of the Captain on that day amounted to work place violence.

[48] Before the FC issued its judgement, I dealt with an appeal that substantially raised the kind of questions as those discussed here. In *Via Rail Canada Inc. v. Cecile Mulhern and Unifor,* 2014OHSTC 3, I endorsed the employer's view, as did the appeals officer in the decision that was overturned by the FC, that an assessment of the facts and circumstances supporting the allegation of work place violence by the employer first, and as necessary, by the ministerial delegate, was required before the obligation to appoint a "competent person" is triggered. Such preliminary review entailed, in my opinion, a finding on the face of the complaint as to whether the alleged conduct could reasonably cause harm, injury or illness. In other words, I expressed the view that only complaints alleging work place violence that established on a *prima facie* basis the occurrence of violence triggered the obligation to be referred to a "competent person" for investigation and the preparation of recommendations to the employer that would address individual and systemic remedy. I was of course concerned with an interpretation that would require that every complaint simply alleging work place violence to be immediately investigated by a third party agreed upon by the parties and the potential for abuse and possible conflict with other remedial processes in place under federal legislation or policies.

[49] It is obvious that my analysis no longer stands in light of *PSAC 1.* Moreover, that judgement was confirmed on appeal, in *PSAC 2* and the analysis that I offered in *Via Rail Canada* was expressly discussed by the FCA and did not receive the Court's favour. I now turn to FCA's judgement.

[50] After summarizing the material facts, the FCA described at some length the scheme set out in Part XX and framed the question at issue as whether the appeals officer's conclusion that employers could screen out complaints they consider unrelated to work place violence is reasonable in light of that scheme. At paragraph 22, the FCA states as follows:

> [22][...] The limited question to be decided, therefore, is whether the employer could take it upon itself to conclude that the employee's complaint did not trigger the obligation to have it investigated by a competent person.

[51] The FCA then reiterates the purpose of Part XX of the *Regulations* as follows, at paragraph 31:

> [31] The *Regulations* are clearly meant to prevent accidents and injury to health occurring in work places and to protect employees who have been

> victims of work place violence, whatever form it may take. The appointment of a competent person, that is, a person who is impartial and is seen by both parties to be impartial, is an important safeguard to ensure the fulfillment of that objective. I agree with the Respondent that allowing the employers to conduct their own investigations into complaints of work place violence and to reach their own determination as to whether such complaints deserve to be investigated by a competent person would make a mockery of the regulatory scheme and effectively nullify the employees' right to an impartial investigation of their complaints with a view to preventing further instances of violence.

[52] The FCA continues further and acknowledges that there may be a risk of abuse and that it could not have been the intent of the *Regulations* to require employers to appoint a "competent person" to investigate each and every complaint so long as the employee characterizes them as work place violence, as it would trivialize the important rights set out in Part XX.

> [33] […] Even if there is no express authority under the *Regulations* for employers to undertake their own investigations before appointing a "competent person", they can certainly review a complaint with a view to determine whether, **on its face**, it falls within the definition of work place violence as found in section 20.2 of the *Regulations*.
>
> [34] I agree with the application judge that the threshold should be quite low, and that an employer has a duty to appoint a competent person to investigate the complaint if the matter is unresolved, unless it is plain and obvious that the allegations do not relate to work place violence even if accepted as true. The employer has very little discretion in this respect. If the employer chooses to conduct a preliminary review of a complaint (or a so-called fact-finding process), it will therefore have to be within these strict confines **and with a view to resolving the matter informally with the complainant**. Any full-fledged investigation must be left to a competent person agreed to by the parties and with knowledge, training and experience in these matters.
>
> (Emphasis added)

[53] The FCA then concludes as follows:

> [35] In the present case, it was not plain and obvious that the facts as alleged did not amount to work place violence. The complaint was not clearly vexatious or frivolous, and it was not the employer's role to decide at that early stage, without even meeting with the employee, whether the particular conduct alleged was serious enough in the circumstances so as to constitute work place violence. That determination should only be made by a competent person with a full understanding of the circumstances following an investigation under subsection 20.9(3).

> [38] [...] It is no answer to argue, as does the Appellant, that the Appeals Officer conducted a *de novo* hearing and was not bound by the employer's initial investigation. The Appeals Officer cannot sidestep the process put in place by the *Regulations* and determine for himself whether work place violence occurred; such a finding is best left to a competent person, as defined by the *Regulations*, as it ought to be made on the basis of an inquiry uncovering all the relevant evidence.
>
> (Emphasis added)

[54] The use of such strong language provides in my view a determinative answer to the present appeal. It supports my conclusion that the words "plain and obvious" used by Manson J. for the FC and De Montigny, J. for the FCA should be given a most restrictive connotation. The use of words such as "frivolous and vexatious" by the FCA is indicative of the Court's view that the threshold for appointing a "competent person" is extremely low, akin to an abuse of the process by an employee, and marginal cases should be decided in favour of appointing such a person. The purpose of appointing a "competent person" is to have an expert in that field make the necessary factual determinations, not the employer, the ministerial delegate or the appeals officer for that matter. The process serves the objective of prevention and acceptability of outcome by the parties involved, that section 20.9 seeks to achieve. The preliminary review is solely for the purpose of better understanding the complaint and bringing about its resolution.

[55] Applying that approach to the circumstances of the present appeal, I will first refer to the internal complaint by which Mr. Virdee sought to make his employer aware of work place violence. Mr. Virdee starts off with the title: "Workplace Violence Complaint". There are some direct references to situations which relate to work place violence, such as:

> I am harassed at work and have been set out for failure. […] [page 1, in reference to his claim that he is being denied overtime opportunities and that the employer is no longer honouring the agreement that he can use leave under code 699, and related to his pattern of absences]
>
> I have experienced so much pain and suffering , anxiety and the constant fear that I'm going to be disciplined for something that I had no control on […] [page 3]
>
> I have been told in a conversation with the director that other people's accommodation is none of my business in a threatening voice […]. I am being intimidated and bullied into going on long term disability and mentally the threats are overwhelming […] [page 3]
>
> […] I will not stand to be threatened, bullied and harassed and set up to fail in the workplace especially from no wrong doing of myself [page 3]

> My employer has caused me psychological harm to a person who is already compromised both physically and mentally […] [page 4].
>
> (Underlining added)

[56] Mr. Virdee clearly sets out his allegation of workplace violence under the heading "Intentional Workplace Violence" at page 5 of his complaint. He refers to the employer intentionally causing him harm, in particular regarding the adjustment of his desk, in light of the delays in doing so over a period of three years, a situation which, in his opinion, the employer knew was causing him pain and distress. He describes an incident where Ms. Pinsent raised her voice in anger towards him. He also sets out general claims of harassment and bullying. His complaint also spoke to the effects of the bullying on his health, namely that he has experienced panic attacks, fear and stress. The medical note submitted in evidence corroborates those symptoms.

[57] In my view, it is far from plain and obvious that no finding of violence could ever be made upon the investigation of those allegations and it is entirely plausible that a "competent person" could make such a finding.

[58] Turning to the complaint filed with ESDC, I do not share the appellant's view that it is a completely new complaint. I have read both complaints carefully, as the appellant urged me to do. As a whole, the thrust of the allegations is the same in both complaints. There is perhaps a different choice of words used to describe the basis of his allegations of violence, but it boils down to Mr. Virdee feeling that representatives of the employer intentionally treated him unfairly in the manner in which they dealt with his accommodation issues and words used towards him in that context without regard to his vulnerability and state of health. And further, that the employer is deliberately causing him harm and distress as a result of those actions. In my view, the ESDC complaint does not materially alter the nature of Mr. Virdee's original allegations.

In summary, I consider that Mr. Virdee's complaints "relate to work place violence" as I understand the FCA's words. Read as a whole, both complaints essentially allege that, in the context of the discussions regarding accommodations required as a result of his accident, the employer singles him out for different treatment, is being negligent and dilatory in addressing accommodations needs, knowing that he is experiencing pain, and questioning his integrity regarding medical notes and absences when the employer knows him to be in a particularly vulnerable state physically and mentally.

[59] Of course, these are allegations only, and are not established. But the issue at the present stage is whether they are frivolous or vexatious, and clearly and obviously not capable of supporting a finding of violence as defined in section 20.2 of the *Regulations*. Having heard Mr. Virdee in evidence at the hearing, I have no reason to conclude that he is not genuine in his belief

that he has been subject to inappropriate treatment by his employer. Many of the emails exchanged between the parties at the time of the events complained of corroborate Mr. Virdee's description of his reaction to such events. He may be correct in his interpretation of the employer's actions, or he may be entirely wrong. The purpose of the scheme in Part XX is precisely to have a "competent person", an individual seen by the parties to be impartial and, applying his/her skills and knowledge in these matters, to assess all the evidence and make findings, under an objective standard, as to whether work place violence has in fact occurred on the merits and make recommendations as appropriate. As the FC stated in *Pronovost v. Canada (Revenue Agency),* 2017 FC 1077, at paragraph 21:

> One last point: work place harassment and violence should never be trivialized. As this Court recognized in *Public Service Alliance of Canada v Canada (Attorney General),* 2014 FC 1066 at paragraph 29, "psychological bullying can be one of the worst forms of harm that can be inflicted on a person over time". Naturally, the experience and qualifications of the competent persons appointed to investigate have an impact on the confidence level required from management and the employees. A sound awareness of the complex issue of harassment and its pernicious components is obviously required. Also, we can ask ourselves how the investigator — whose curriculum vitæ was never provided to the applicant — could disregard, at the end of what was in sum a very cursory investigation, the applicant's psychological harm caused by the alleged acts of violence and/or harassment, based on the applicant's emotional vulnerability, when he did not have, it appears, any medical expertise or particular qualifications to give this opinion.

[60] If the allegations in the case reviewed by the Courts discussed above were held not to be plainly and obviously outside the purview of section 20.9, then *a fortiori*, the allegations by Mr. Virdee are somewhat more explicit and in my view directly relate to work place violence. To the extent they could have been fleshed out in order to assist the employer in understanding them, it would be for the sole purpose of assisting the employer to find a possible resolution of the situation under subsection 20.9(2). Failing that, the appointment of a "competent person" was mandatory in the circumstances.

[61] Given my conclusion, it is not necessary to address the question of procedural fairness raised by the employer. I will simply mention that the *Code* and *Regulations* clearly impose restrictions regarding the confidentiality of complaints of that nature. The FCA indeed stresses the importance of those safeguards in its judgement. The ministerial delegate's function is to investigate and gather facts and information, and determine whether a provision of the *Code* has been contravened. Such task is an inspectorate function, not a quasi-judicial one, and is not subject to the kinds of procedural guarantees raised by the appellant. A direction issued after such investigation may be appealed. The evidence before me establishes that while the employer was not given a copy of the complaint received at ESDC, its contents was revealed and discussed

at the teleconference. Furthermore, the appeal being a *de novo* procedure, the appellant obtained a copy and was given the opportunity, over the course of a 4-day hearing, to present evidence and submissions on the matter.

Decision

[62] For the above reasons, the direction is confirmed.

Pierre Hamel
Appeals Officer