Occupational Health and Safety Tribunal Canada | Tribunal de santé et sécurité au travail Canada

275 rue Slater Street, Ottawa, Ontario, K1P 5H9 – Fax : (613) 953-3326

Case No.: 2007-03

Interlocutory decision
Decision No.: CAO-07-038 (A)

Canada Labour Code
Part II
Occupational Health and Safety

Dominique Tremblay
appellant

and

Air Canada
respondent

October 18, 2007

This case was decided by Appeals Officer Jean-Pierre Aubre.

For the appellant
Dominique Tremblay

For the respondent
Christianna Scott, Counsel, Labour and Employment, Air Canada

[1] The present appeal was filed by the appellant Dominique Tremblay on February 13, 2007, following the oral decision made by Health and Safety Officer (HSO) Laurent Gallant on February 7, 2007 and confirmed in writing by HSO Gallant and HSO Philippe Nantel on February 12, 2007 in the report written at the conclusion of their investigation into the refusal to work by the appellant on February 5, 2007. This investigation report was adduced by HSO Gallant during his testimony in the present appeal.

[2] The notice of appeal filed by Mr. Tremblay pursuant to subsection 128(7) of the *Canada Labour Code, Part II* (the *Code*) and forwarded to the Canada Appeals Office on Occupational Health and Safety by HSO Gallant reads as follows:

> [Translation]
> Following our meeting last Wednesday, February 7, 2007, I continue to refuse to work at Air Canada. As well, I want to remind you that my employer has not acknowledged the existence of the danger and has done nothing to remedy the situation, which continues to be prejudicial to me and detrimental to my

> mental health and my psychological equilibrium, and has the full potential to compromise very seriously my integrity and my future. Apparently the law requires me to return to work, but *I wish to appeal* your decision (at our meeting, as section 128 of the *Canada Labour Code* allows you to do, you decided that there was no danger). I therefore appeal....

[3] The present appeal arises from the appellant's exercise of the right conferred on him by section 128 of the *Code* to refuse to work in case of danger. As is shown in the investigation report, Mr. Tremblay expressed his refusal as follows:

> [Translation]
> Deteriorated and dangerous (prejudicial) work place and working conditions, in continuity with the arguments and points of dispute cited when the grievance with Aeroplan was lodged on September 19, 2003. At the time of writing this letter, that grievance has still not been settled ...

[4] In preparation for hearing the present appeal, the undersigned Appeals Officer held a preliminary conference call with the parties in order to specify the hearing procedure to be used and explain the various stages of this procedure, particularly for the benefit of the appellant, who quite obviously had no knowledge or experience of the workings of adversarial proceedings, while the employer, Air Canada, was represented by counsel. That said, on that occasion, the parties agreed to present to the Appeals Officer before the beginning of the hearing, and to have adduced in evidence, a *statement of uncontested facts*, in order to accelerate the hearing procedure. This statement, duly signed by both parties, was received at the Canada Appeals Office on Occupational Health and Safety (the Office) on May 23, 2007, and forms part of the case before the undersigned Appeals Officer. The statement reads as follows:

> ### General background
>
> [Translation]
> 1. The appellant began working at Air Canada with Aeroplan on September 15, 1997 in a Customer Service Representative position.
> 2. Customer Service Representative positions are unionized positions; incumbents in these positions are represented by the National Automobile, Aerosopace, Transportation and General Workers Union of Canada (CAW).
> 3. On September 10, 2003, the appellant took advantage of a voluntary layoff program that started on December 1, 2003. In November 2004, he was called back to work at the Air Canada reservation centre, in the same position he occupied with Aeroplan, that is, a Customer Service Representative position.
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> ### Exercise of right to refuse to work
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> 4. On February 5, 2007, at about 12:00 noon, Mr. Tremblay exercised his right to refuse to work in case of danger (pursuant to section 128 of the

Code), in a letter he presented to his employer, Gabriel Mancini, Chief of the Call Centre, Manpower and Operations; the appellant then notified Benoît Lapointe, president of his union local.

5. The reason given in the letter is the following:

   "... deteriorated work place and working conditions, in continuity with the arguments and points of dispute cited when the grievance with Aeroplan was lodged on September 19, 2003, in the presence of Stephen Lussier, then union president. At the time of writing this letter, that grievance has still not been settled ..."

6. On February 6, 2007, the appellant met with Benoît Parisien, Mr. Mancini and Brigitte Catellier (of CAW). Mr. Parisien then asked the appellant to report to work again at the Air Canada reservations centre the following day at 9:45 a.m., because the Human Resources and Social Development Canada (HRSDC) officers were to come with regard to his right to refuse to work.
7. On February 7, 2007, at about 12:00 noon, Mr. Tremblay reiterated his right to refuse to work.
8. The HRSDC Labour Program was called. HSO Rolland (*sic*) Gallant and HSO Philippe Nantel reported for the meeting on February 7, 2007 at 11:15 a.m..
9. At the meeting chaired by these two HSOs, the following persons were present:
   - Mr. Tremblay, the appellant, Customer Service Representative;
   - Mr. Parisien, Chief of Customer Service, and the appellant's supervisor;
   - Mr. Mancini, Director of Personnel, Manpower and Operations, and joint chair (for the employer) of the Local Health And Safety Committee (LHSC);
   - Ana Chiasson, LHSC employee representative, CAW;
   - Ms. Catellier, Vice-President, CAW;
   - Theresa Newlin, representative, CAW.
10. At the conclusion of the meeting, the HSOs rendered an oral decision of no danger.
11. On February 12, 2007, the HSOs prepared an investigation report confirming their February 7, 2007 oral decision.

[5] According to the investigation report, the full text of which was adduced as noted above, the appellant exercised his right to refuse to work because he was allegedly subjected to psychological harassment in his work place that could have been detrimental to psychological health. That situation allegedly began in 2003 after Mr. Tremblay was the subject of an unjust internal inquiry; since that time rumours about him had circulated, spread and persisted among some of his co-workers, with the result that he was required

to work in working conditions that had deteriorated and become dangerous to his psychological health.

[6] In their report, the investigating HSOs set out the situation that was described to them as being the cause of Mr. Tremblay's refusal to work as follows:

> [Translation]
> In 2003, Mr. Tremblay was the subject of an internal inquiry following a harassment grievance lodged against him. According to him, that inquiry was unjust: he was allegedly not given an opportunity to defend himself, and the manner in which the results were disclosed was questionable. Mr. Tremblay no longer has a subordinate relation to the supervisor who conducted the inquiry in 2003 ...
>
> Following the inquiry, Mr. Tremblay lodged a harassment grievance, which was withdrawn in 2005. Mr. Parisien (the supervisor) explained that the harassment grievance lodged by Mr. Tremblay was withdrawn because Mr. Tremblay was dealing with counsel to represent him in that matter. The union then allegedly stopped representing Mr. Tremblay, which would explain why Mr. Tremblay's grievance was not addressed by the mediator who intervened when Air Canada was placed under bankruptcy protection.
>
> After withdrawing that grievance, Mr. Tremblay filed a complaint against his union because he considered that he had been poorly represented in that matter. The complaint is being assessed by the Canada Industrial Relations Board at present.
>
> Mr. Tremblay then alleged that, while he took action to seek justice, his working conditions continued to deteriorate. Since 2003, he has allegedly been the subject of increasing rumours spread by his co-workers. The work atmosphere has apparently affected his psychological health. According to him, his psychiatrist diagnosed decompensation. His medical record has been referred to Quebec's Commission de la santé et de la sécurité du travail (CSST) for compensation, and that matter is being appealed at present.
>
> Mr. Tremblay then stated that at that time he took two lengthy periods of leave and received unemployment insurance benefits. Eventually he returned to work, only to find that the rumours about him continued to circulate and spread. Since then, he has allegedly taken sick leave regularly, approximately 1.5 days per week. He stated that the problem was never solved and that the rumours continue to be prejudicial to him.
>
> As well, according to Mr. Tremblay, a few persons were still attempting to produce, create or generate new forms of harm to his reputation. However, he added that he had no tangible evidence but instead had perceptions supporting that allegation.

[7] In the decision rendered following their investigation, the HSOs found that Mr. Tremblay exercised his right to refuse to work [translation] "because some of his relations with his co-workers constitute a danger to him", thus linking his exercise of this right with paragraph 128(1)(*b*) of the *Code*, which gives an employee the right to refuse to work in a place if there is reasonable cause to believe that "a condition exists in the place that constitutes a danger to the employee". That said, in their report the HSOs include numerous considerations supporting a finding that, essentially, the reason for Mr. Tremblay's refusal to work was the fact that his grievance had not been settled to his satisfaction, and that the situation, which had lasted since 2003, did not constitute a danger within the meaning of the *Code*. In the opinion of the undersigned Appeals Officer, some of these considerations are especially important in understanding the finding of the investigating HSOs. These considerations read as follows:

> [Translation]
> - The events, as cited by Mr. Tremblay, are allegedly affecting his psychological health.
> - At present there are no regulatory provisions to prevent and put a stop to psychological violence in the work place.
> - Mr. Tremblay is now experiencing the side effects of the internal investigation conducted by his employer in 2003: he was marked in the past and is having difficulty coping with the present situation.
> - Mr. Tremblay states that he has no evidence establishing the psychological violence he alleges he is experiencing at present.
> - The grievance lodged by Mr. Tremblay was not pursued or settled to his satisfaction.
> - The grievances and the complaint before the Canada Industrial Relations Board have to do with labour relations issues.

[8] At the outset of the hearing, Ms. Scott, counsel for the respondent, informed the Appeals Officer that she intended to contest his jurisdiction to hear the present appeal by means of a jurisdictional objection, in order to obtain a summary dismissal of Mr. Tremblay's appeal. However, with the agreement of both parties, the undersigned Appeals Officer decided that, before hearing the arguments of the parties on the jurisdictional objection, he would question HSO Gallant, the senior HSO conducting the investigation into Mr. Tremblay's refusal to work, in order to obtain a fuller understanding of Mr. Tremblay's refusal and the circumstances surrounding it.

[9] At the request of the Appeals Officer, HSO Gallant read the investigation report, adding that all the information it contained was gathered in the presence of all the persons identified in the introduction. When asked by the Appeals Officer with which provision of the *Code* he linked the circumstances of the refusal in deciding whether the refusal was admissible for investigation, HSO Gallant stated that he linked the circumstances of the refusal with paragraph 128(1)(*b*) of the *Code*. In response to a question from the appellant on this point, HSO Gallant stated that he linked the alleged psychological harassment with the words "condition ... in the place" of the English version and the

words “dangereux ... dans le lieu” of the French version of this paragraph, as the basis for his decision to investigate Mr. Tremblay’s refusal to work.

[10] In response to questions from Ms. Scott, HSO Gallant stated that he has 35 years’ experience and that the present appeal is the first case he has dealt with that has been appealed. According HSO Gallant, his meetings with all the stakeholders during his investigation lasted for a total of between one and one-half and two hours; during that period, except for a question by Mr. Tremblay about whether his wages would be paid for the period when he was absent from work because of his refusal, and an explanation by HSO Gallant of the employer’s rights in case of an employee’s refusal to work, HSO Gallant did not recall Mr. Tremblay’s noting any specific fact or event occurring at that time that would have led him to refuse to work. More specifically, Mr. Tremblay allegedly mentioned nothing particular or specific occurring on February 6 or 7, 2007, the dates on which in fact he refused to work because of danger. According to HSO Gallant, Mr. Tremblay alluded only to the events occurring in 2003 in justifying his refusal to work, and provided no concrete aspects justifying his refusal, noting instead his perception of a particular atmosphere surrounding him in the work place. In fact, at HSO Gallant’s meeting with Mr. Tremblay, with regard to what made Mr. Tremblay perceive a situation of psychological violence, Mr. Tremblay noted no particular situation, merely mentioning that he relied on his perceptions, on what he [translation] “sensed”.

[11] HSO Gallant added that the *Code* sets out, as a basic requirement for an employee’s right to refuse to work, that the employee must have “reasonable cause to believe” that a situation constitutes a danger. Although HSO Gallant’s investigation established that the situation cited by the appellant involved aspects that were of concern to the appellant, it did not involve “danger” within the meaning of the *Code*. HSO Gallant completed his investigation specifically in order to confirm his conviction that the situation cited by Mr. Tremblay was not one that could be linked with the concept of “danger” set out in the *Code*. When asked whether the legislation provides for protection from psychological violence or stress, HSO Gallant responded in the negative, emphasizing that, although paragraph 128(1)(*z.16*) of the *Code* imposes on the employer the duty to “take the prescribed steps to prevent and protect against violence in the work place” and that this provision could be interpreted as applying to psychological as well as physical violence, at present there are no relevant regulations that would allow for the implementation of this provision.

[12] In concluding his testimony, HSO Gallant noted the general duty imposed on the employer by section 124 of the *Code* to ensure “that the health and safety at work of every person employed by the employer is protected”, which forms the basis for employer’s duty to investigate Mr. Tremblay’s allegations of harassment. However, HSO Gallant added that, if this duty is taken in correlation with the requirements set out in section 128 of the *Code* on the right to refuse to work, there is still a need to find that danger exists at the time of a refusal to work, which is not the case here since at the time of the refusal to work the issue was one of labour relations, as the employer rightly found after assessing all the circumstances since 2003 in fulfilling its statutory duty to investigate. With regard to the appellant’s dissatisfaction with the employer’s inquiry into

the harassment complaint made against him in 2003, HSO Gallant added that, although according to his investigation the inquiry into that harassment complaint had found no harassment on either side, Mr. Tremblay was dissatisfied with that finding, and that the only employer action Mr. Tremblay would have considered appropriate would have been informing all the employees in that work place that he had not been found guilty of harassment.

Jurisdictional objection

[13] As a preliminary point, Ms. Scott, counsel for the respondent, argued that pursuant to the *Code* an Appeals Officer does not have jurisdiction to hear the present appeal since the appellant's allegations of danger correspond to one or more situations of interpersonal conflict, not contemplated by Part II of the *Code*. As a subsidiary point, counsel for the respondent argued that, if the undersigned Appeals Officer found that he did have jurisdiction to hear the present appeal, sufficient evidence would be presented or adduced to obtain a summary dismissal of the appeal. Ms. Scott referred in particular to paragraph 5 of the above-noted statement of uncontested facts, which gives as Mr. Tremblay's reason for refusing to work a [translation] "deteriorated work place and working conditions, in continuity with the arguments and points of dispute cited when the grievance with Aeroplan was lodged on September 19, 2003 ...", thus establishing a lack of immediate contiguity between the exercise of the right to refuse to work and the facts alleged in support of that action by the appellant. Since Ms. Scott adduced the text of her arguments on this point, this text is quoted in full below:

> [Translation]
> "Air Canada respectfully submits that the present appeal raises an issue that does not fall under the jurisdiction of the Appeals Officer.
>
> Subsidiarily, Air Canada argues that, even if the Appeals Officer exercises jurisdiction in the present appeal, there is sufficient evidence in the file to obtain a summary dismissal of the appeal (without hearing the witnesses for the parties).
>
> Specifically, Air Canada argues that the facts cited in the present appeal represent a situation in which the appellant alleges danger based on psychological harassment and conflict in the work place. This type of situation is not contemplated by Part II of the *Canada Labour Code*.
>
> We refer you to the statement of uncontested facts, in the section entitled "Exercise of right to refuse to work". In this section, the parties recapitulate the reasons given by Mr. Tremblay for exercising his right to refuse to work.
>
> According to point (5), the reasons given are "... deteriorated work place and working conditions, in continuity with the arguments and points of dispute cited when the grievance with Aeroplan was lodged on September 19, 2003, in the presence of Stephane Lussier, then union president. At the time of writing this letter, that grievance has still not been settled ...".

With regard to the reason for the appellant's appeal, without hearing testimony by the appellant or the other witnesses he wishes to call, the evidence indicates:

- circumstances that have persisted for some time, and not a specific event occurring on February 5, 6 or 7, 2007;
- working conditions that have deteriorated, and not danger resulting from the performance of a specific activity or the use of a specific machine, thing or place;
- a situation resulting from circumstances already raised in the context of a grievance and addressed in the context of a labour relations dispute settlement procedure.

Circumstances existing for some time

The exercise of the right to refuse to work in case of danger pursuant to section 128 of the *Code* is an emergency measure. It contemplates situations in which individual employees perceive that they are faced with immediate danger, and in which the danger is impending, that is, likely to arise at that particular time.

See the decision in *Gualtieri*, at page 33.

In summary, the *Code* contemplates situations (danger within the meaning of the Code) in which significant injury or illness is likely to occur if the situation is not resolved.

In other words, the *Code* does not contemplate situations like the one in the present appeal, in which the reasons for exercising the right to refuse to work have existed for some time.

Circumstances and conflict in the work place not constituting danger within the meaning of the *Code*

As well, the *Code* contemplates situations in which the danger perceived by an employee must result from the use of a ***physical*** machine, thing or place, not a situation of interpersonal conflict such as the one cited by the appellant.

On this point, I refer you to the decision in *Bliss and Treasury Board (Public Works Canada)*, in which the appellant exercised his right to refuse to work because of psychological stress and interpersonal conflict. The Board considered the provisions of the *Code* on the exercise of the right to refuse to work and found that danger contemplated by the provisions of the *Code* does not include either stress or conflict arising out of human relationships **(at page 14 of 18, from the paragraph beginning "In my view ..." to the end of the page)**.

The term “situation” in the *Code* refers to a situation in the physical work place, not to interpersonal relations.

This same reasoning on the existence of danger within the meaning of the *Code* was followed in the decision in *Boivin v. Canada Customs and Revenue Agency*. In that case, pursuant to Part II of the *Code* the appellant filed a complaint that the employer had failed to respond to a grievance alleging that the complaint’s workload was too great. The complaint was dismissed because the situation was not the type of health or safety issue contemplated by Part II of the *Code*. The meaning of the word “danger” in the context of the *Code* is not so broad as to cover internal dispute or stress.

Purpose of Part II of the *Code* and labour relations issues

The reasons given by the appellant in his February 5, 2007 letter for exercising his right to refuse to work clearly indicate that these circumstances were already raised in a grievance he lodged on September 19, 2003.

In other words, these reasons are similar if not identical to the circumstances already raised in the context of a grievance and addressed in the context of a labour relations dispute settlement procedure.

It is not the purpose of Part II of the *Code* to resolve personal conflict or to bring existing conflict to a critical point.

As well, according to the decision in *Zafar* (at page 5 of 6, paragraphs 23 and 24), the provisions of the *Code* cannot be used as a vehicle for resolving labour issues or for promoting other agendas.

For these reasons, Air Canada argues that the present appeal must be dismissed since the Appeals Officer does not have jurisdiction to hear it. If the Appeals Officer does not accept this initial argument and decides to exercise jurisdiction, Air Canada argues that there must be a summary dismissal of the present appeal since, on a balance of evidence, there is not a situation of danger within the meaning of the *Code*.

[14] At the conclusion of Ms. Scott’s arguments on the preliminary objection, the Appeals Officer gave the appellant some time to prepare his rebuttal, making allowance for the fact that he alone was representing himself and obviously had little or no experience with adversarial proceedings or with the type of arguments and evidence to be presented on a jurisdictional issue. When the hearing was resumed, the appellant made the following arguments.

[15] Firstly, Mr. Tremblay noted HSO Gallant’s statements that he did not want to dismiss psychological harassment peremptorily as a possible justification for the refusal to work and that, with regard to the admissibility for investigation of the refusal to work, certain situations of psychological harassment could be taken into consideration. According to Mr. Tremblay, a reading of section 124 of the *Code* in correlation with

paragraph 128(1)(*b*) supports this statement. He added that the legislation illustrates the intent to protect employees against violence, since paragraph 125(1)(*z.16*) of the *Code* imposes on the employer the duty to take the prescribed steps to prevent and protect against violence in the work place. On this point, Mr. Tremblay noted that it had been adduced in evidence, by means of HSO Gallant's testimony, that regulations on preventing violence in the work place are being developed. Mr. Tremblay added that Quebec's occupational health and safety legislation acknowledges psychological harassment as a form of violence in the work place.

[16] Mr. Tremblay continued, noting that HSO Gallant had acknowledged the [translation] "relevance" of Mr. Tremblay's refusal to work by stating in his testimony that he had noted [translation] "aspects of perception of danger" in Mr. Tremblay's situation and that he [translation] "was convinced that Mr. Tremblay sensed" a situation that was causing stress. On this basis, Mr. Tremblay argued that expert studies exist acknowledging that the perceptions of alleged victims of harassment are fundamental aspects in deciding issues of psychological harassment, and that both HSO Gallant and counsel for the respondent had acknowledged the duration of the situation over time as an aspect of psychological harassment.

[17] With regard to the grievance lodged by Mr. Tremblay in 2003, to which Ms. Scott referred in stating that this entire matter is a labour relations issue and is therefore outside the jurisdiction of the Appeals Officer, Mr. Tremblay noted that his refusal to work is worded in terms of [translation] "deteriorated work place and working conditions deteriorated, *in continuity* ..." with the situation raised in the grievance in 2003, and arguing that the present appeal therefore goes beyond that grievance since it presents new aspects arising in 2004 and 2005. Mr. Tremblay even mentioned death threats and steps taken without his knowledge by the employer, using or on his computer; in summary, he referred to new facts that constituted an alteration and an aggravation of the initial situation raised in the 2003 grievance and that would eventually be established by the appearance of witnesses (Mr. Tremblay having indicated that he wished to call more than 35 persons to testify) and the production of documents. This eventual evidence would establish that the 2003 inquiry into the allegations against Mr. Tremblay was faulty, unfair and untruthful. Instead of leading to a solution, that inquiry led to a problem that the employer subsequently failed to remedy; as a result, in 2007 a crisis arose that in the appellant's opinion was the employer's responsibility.

[18] In summary, then, while Ms. Scott argued that a refusal to work must be an emergency measure in a situation of impending danger, Mr. Tremblay, while acknowledging that what is involved is the situation that existed in 2003, argued that since that time the situation was not remedied by the employer and has in fact been aggravated by new malicious and illicit aspects, to be established at the hearing, that have arisen even since the HSO's decision on the refusal to work and that are affecting Mr. Tremblay's health and safety.

[19] In rebuttal, Ms. Scott pointed out that, regardless of HSO Gallant's opinion on the admissibility for investigation of the refusal to work, the Appeals Officer proceeds "de novo", which means that the Appeals Officer is authorized to make a decision, on the

basis of the circumstances and the situation, as they existed at the time of the refusal to work and not at the time of the appeal hearing. In this regard, there must be concomitance between the refusal to work and the alleged situation of danger, not a situation in which the same facts have continued since 2003. Ms. Scott noted that, although at the time of the 2000 legislative amendments a new provision was included in the *Code* imposing on the employer the duty to take the prescribed steps to prevent and protect against violence in the work place, Mr. Tremblay did not raise the issue of the absence of regulations required to implement this provision. She added that, regardless of the amendments made to the definition of "danger" set out in section 122 of the *Code*, the case law still recognizes the concepts of the impending nature of the danger and concomitance between the danger and the possible effects on the individual. In this regard, she referred to the Federal Court decision in *Douglas Martin and PSAC et al.* (Tremblay-Lamer), 2003 FC 158, at paragraphs 53 and 59:

> Therefore, the safety officer can look beyond the immediate circumstances that exist at the time of his investigation to determine whether "danger" exists as defined in the *Code*. However, although the new definition of "danger" allows for a future activity to be taken into consideration, this is not an open-ended expression. The doctrine of reasonable expectation still applies.... Nevertheless, in my opinion, the new definition still requires an *impending element* because the injury or illness has to occur "before the hazard or condition can be corrected, or the activity altered".

According to Ms. Scott, this argument rules out a situation in which the refusal to work is expressed years after the occurrence of the facts or situations cited as the reason for the exercise of this right. In conclusion, counsel for the respondent noted that, according to Mr. Tremblay, his action was based on his perceptions of the attitudes or behaviour of persons in his work place. She added that the existence of danger cannot be based solely on one person's subjective perception, relying on Appeals Officer Beauchamp's decision in *Forster and Canada (Customs and Revenue Agency)*, [2002] CLCAOD No. 14:

> I have heard ... that a very unfortunate series of events took place on September 25 and 26 and that these events had a definite bearing on Ms. Forster's pre-existing condition, i.e. stress arising out of interpersonal relations. I recognize that these events were so difficult for Ms. Forster that she truly believed that working in that environment constituted a danger for her. However, other than Ms. Forster's own testimony, which was understandably "subjective", I did not receive any evidence to that effect, including any certified medical evidence establishing a direct causal link between these particular events and Ms. Forster's health.
>
> I believe that these events were basically a "long standing" labour relations issue ...
>
> For these reasons, I confirm health and safety officer Ryan's decision of no danger.

Decision

[20] The examination and determination of the issue raised by the respondent in the jurisdictional objection require that the situation underlying the appeal itself first be clearly set out and defined. According to Ms. Scott, counsel for the respondent, what is involved is an overall situation in which the alleged danger has to do with psychological harassment and conflict in the work place arising from a harassment complaint involving the appellant that goes back to 2003. Thus, the situation involves longstanding circumstances that are causing the appellant's working conditions to deteriorate but have already been raised in the context of a grievance and addressed in the context of a labour relations dispute settlement procedure. In summary, Mr. Tremblay's refusal to work has to do with difficult interpersonal relations that cannot be linked with a specific point in time coinciding with his refusal to work and that were addressed in a grievance lodged several years earlier.

[21] The appellant, for his part, while not denying that essentially his problems at work might go back to the harassment complaint against him ([translation] "in continuity"), distinguished between the harassment complaint filed in 2003 and the situation in which that complaint—apparently not settled to his satisfaction—subsequently, in his work place and in his relations with his co-workers, led to rumours and comments being spread about him by his co-workers, to the point of constituting harassment, and thus led to working conditions and a working atmosphere that had deteriorated and were affecting his psychological health, without the employer remedying the situation. According to Mr. Tremblay, the situation had reached the point where he no longer had any choice but to refuse to work, in order to seek a remedy.

[22] It appears from the preceding arguments that, whatever the situation that led to the appellant's refusal to work, it is agreed that there were difficult interpersonal relations in the work place, which one party has described as psychological harassment justifying the exercise of the right to refuse to work since they were the cause of psychological health problems, while the other party has alleged that this situation is not covered by the protection provided by Part II of the *Code* to a person holding employment to which the *Code* applies and that, therefore, an Appeals Officer does not have jurisdiction to hear the present appeal. Before considering the issue of jurisdiction, it should be noted that, at the stage of determining jurisdiction, we examine the nature of the issue or situation cited, not whether the allegations underlying the refusal to work are established by the evidence or founded on their merits.

[23] The interpretation and application of the applicable legislation, Part II of the *Code*, is governed by its purpose. This purpose is set out in section 122.1, which reads as follows; since an understanding of this purpose necessarily takes into consideration the versions in both languages, the text of this section is provided in both English and French:

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

> 122.1 La présente partie a pour objet de **prévenir** les accidents et les maladies **liés** à l'occupation d'un emploi régi par ses provisions.
>
> [Emphasis added.]

This legislation is preventive in nature, and the emphasized words in both versions indicate that the scope to be given to this prevention is very broad. A comparison of the two versions of this section also shows that the word "liés" in the French version is rendered in the English version by three expressions; one of them, "occurring in the course of employment", broadens the scope of the terms "accidents and injury".

> This same legislation also very specifically sets out the order in which resulting preventive action is to be considered and taken:
>
> 122.2 Preventive measures should consist **first** of the elimination of hazards, then the **reduction** of hazards and **finally**, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.
>
> 122.2 La prévention devrait consister **avant tout** dans l'élimination des risques, **puis** dans leur réduction, et **enfin** dans la fourniture de matériel, d'équipement, de dispositifs ou de vêtements de protection, en vue d'assurer la santé et la sécurité des employés.
>
> [Emphasis added.]

It is significant that, with regard to the preventive action contemplated by Parliament in order to achieve the purpose of this legislation, what might be referred to as physical action comes last in order of priority. That said, the interpretation of any piece of legislation, including its interpretative provisions and definitions, is governed by a general rule set out in section 12 of the *Interpretation Act* as follows:

> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

This rule of interpretation is all the more important when it has to do with protecting individuals' health and safety.

[24] Among the points made by Ms. Scott in support of her jurisdictional objection was her opinion that Mr. Tremblay did not exercise his right to refuse to work in response to an impending danger, that is, a specific event occurring on February 5, 6 or 7, 2007, the dates on which he refused to work, but did so in response to circumstances that have lasted for some time, a situation not contemplated by the *Code*. The Appeals Officer will return to this point. That said, the Appeals Officer is of the opinion that it is already appropriate to note one point, which neither party has discussed and about which neither party has adduced evidence at the hearing, but which the Appeals Officer may take into consideration since it is set out in the statement of uncontested facts adduced by the parties. According to the evidence adduced in the HSOs' investigation report, on an

unspecified date in 2003 but apparently on or about September 19, 2003, Mr. Tremblay [translation] “was the subject of an internal inquiry following a harassment grievance lodged against him”; the respondent has argued that the inquiry was the cause of the appellant’s action and his eventual refusal to work. However, according to the statement of uncontested facts, Mr. Tremblay’s work was interrupted for nearly one year, after which he returned to work, this time at Air Canada although he was previously employed with Aeroplan:

> [Translation]
> On September 10, 2003, the appellant took advantage of a voluntary layoff program that started on December 1, 2003. In November 2004, he was called back to work at the Air Canada reservation centre, in the same position he occupied with Aeroplan, that is, a Customer Service Representative position.

The Appeals Officer has no information available that would allow him to determine whether that layoff, even if it were voluntary, and the return to work at an entity that may have been different might indicate a break in service. Nevertheless, it is an admitted fact that, from December 1, 2003 to November 2004, Mr. Tremblay did not work for his employer, whichever employer that that may have been. That said, the Appeals Officer is of the opinion that this information, this factual situation, must be taken into consideration with regard to Ms. Scott’s argument that the Appeals Officer does not have jurisdiction since the situation cited as justification for the refusal to work has lasted for some time. In addition, the investigation report notes that Mr. Tremblay told the investigators that he received unemployment insurance benefits (no explanation was provided of whether that period was different than the period referred to above) and then, on returning to work, noted that the rumours about him continued to circulate and spread.

[25] In September 2000, significant amendments were made to Part II of the *Code*: the definition of the term “danger” was amended to define danger as a *hazard, condition or activity*, as opposed to a *hazard or condition*, as set out in the former definition; it was specified that any of these three conditions could be existing or potential, as opposed to the former definition, which covered only existing conditions; and it was added that the effects—that is, injury or illness—need not be immediate, provided that the condition could cause these effects before it can be corrected or altered. The definition prior to the 2000 amendments reads as follows:

> ‘’danger’’: means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected.

The amended definition reads as follows:

> ‘’danger’’ means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any

> exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.

Since the term “danger” is omnipresent in the legislation, particularly with regard to the right to refuse to work and the related procedure, it is clear that the amendments to the definition of this term must be taken into consideration in interpreting the legislation as a whole. It should also be noted that the use of the word “includes” with regard to circumstances likely to have long-term effects on health indicates that Parliament did not want to limit or restrict these circumstances solely to exposure to a hazardous substance.

[26] Like the definition of “danger”, subsection 128(1) of the *Code*, setting out the right to refuse to work and the conditions of exercising this right, was amended by the introduction of the concept of “activity” that may constitute a danger, with the result that paragraph 128(1)(*b*) (“a condition exists in the place that constitutes a danger to the employee”) must be interpreted as being unrelated to the concept of activity or to the use or operation of a machine or thing, which are specifically dealt with in paragraphs 128(1)(*a*) and (*c*). The version of subsection 128(1) prior to the 2000 amendments reads as follows:

> 128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that
>
> (*a*) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or
>
> (*b*) a condition exists in any place that constitutes a danger to the employee,
>
> the employee may refuse to use or operate the machine or thing or to work in that place.

By comparison, the amended version of subsection 128(1) reads as follows:

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

In the opinion of the Appeals Officer, this amendment strengthens the capacity of paragraph 128(1)(*b*) to address conditions in the work place other than physical conditions.

[27] That said, the central purpose of the legislation, as set out in section 122.1, is expressed in a series of duties of the parties in the work place, the performance of which cannot be dissociated from the exercise of the right to refuse to work, and the content or wording of which is entirely relevant to an understanding of the extent of this right. Thus section 124 imposes on the employer the general duty to "ensure that the health and safety at work of every person employed by the employer is protected". Interestingly, Parliament did not consider it appropriate to place any limiting restriction on this duty, except to specify health and safety **at work**, if indeed these words can be considered limiting in the context of legislation enacted to prevent occupational injury and illness. As part of this general duty (section 125: "Without restricting the generality of section 124 ..."), the legislation sets out a certain number of specific duties of both the employer and employees, the substance of some of which, given the nature of the issues raised by Mr. Tremblay's refusal to work—that is, interpersonal relations jeopardizing his psychological health—appear more relevant in illustrating that the intent of Parliament was to ensure that the *Code* provides protection that may go beyond only the physical conditions of the work place.

[28] For example, paragraph 125(1)(*p*) requires every employer subject to the *Code* to ensure that employees have safe entry to, exit from and occupancy of the work place. Paragraph 125(1)(*y*) sets out the duty to ensure that the activities of every person granted access to the work place do not endanger the health and safety of employees. It should be noted that, unlike the definition of "danger", in which the English term "activity" is rendered in the French version by "tâche", paragraph 125(1)(*y*) uses the terms "activities" in English and "activités" in French, suggesting that this paragraph refers to more than work duties alone. Lastly, paragraph 125(1)(*z.16*) requires the employer to take the prescribed steps to prevent and protect against violence in the work place. It is true that the implementation of some of these provisions requires that regulations be made, although this is not the case for paragraph 125(1)(*z.16*); the Appeals Officer notes this point merely to indicate that Parliament envisaged an application that goes beyond only the physical conditions of the work place.

[29] In light of all the preceding arguments, Ms. Scott has based her challenge to the Appeals Officer's jurisdiction to hear the present appeal on three points.

[30] Firstly, Ms. Scott has argued that the *Code* does not provide for the exercise of the right to refuse to work in situations or circumstances that have existed for some time, since the exercise of this right is an emergency measure in a situation where an employee is in, or perceives, immediate danger and where the situation constituting the danger is impending. In the opinion of the Appeals Officer, accepting that position would be equivalent to ignoring the clear meaning of the amendments made to the definition of "danger", which, as discussed above, designates or defines "danger" as an *existing or potential hazard, condition or activity*. This approach is upheld by Gauthier J. in the Federal Court decision in *Verville v. Canada (Correctional Service)*, (2004 FC 767) at paragraphs 31 and 32 as follows:

> As was recently explained by the Federal Court of Appeal in Canada (Attorney General) v. Fletcher, 2002 FCA 424, [2003] 2 F.C. 475 (C.A.), the

> pre-amendment *Code* was intended to insure that immediate work would not expose an employee to a dangerous situation. “It is the short-term well-being of an employee which is at stake” (paragraph 18 of Fletcher, supra).
>
> With the addition of words such as “potential” or “éventuel” and future activity, the *Code* is no longer limited to specific factual situations existing at the time the employee refuses to work.

[31] Thus it is clear that the new definition, which cannot be dissociated from the exercise of the right to refuse to work, does not include the concept of emergency. Furthermore, the Appeals Officer would add that it is erroneous to allege that the *Code* and its provisions governing refusal to work do not apply to cases in which the reasons given as justification of the refusal to work have existed for some time: in sum, to allege that an employee who refuses to work must do so immediately when situations or circumstances arise that may justify a refusal to work. It should be noted that the purpose of the *Code* is to prevent, not only injury, but also illness occurring in the course of employment; such illness may take some time to manifest itself or to become serious enough for the person affected to consider that it is appropriate–that is, that there is reasonable cause–to exercise the right to refuse to work. In *Verville* (*supra*), Gauthier J. is of the same opinion:

> ... As mentioned in Martin, supra, the injury or illness may not happen immediately upon exposure, **rather it needs to happen before the condition or activity is altered**.
>
> [Emphasis added.]

[32] On this point, it should also be noted that the right to refuse to work granted by the *Code* is a personal right conferred on the employee, the exercise of which is not subject to any condition in terms of point in time. Therefore, deciding when to initiate the refusal procedure is the responsibility of the employee who is of the opinion that there is reasonable cause to do so, as the *Code* provides in the words “reasonable cause to believe”, even if the effects of the reasons given for the refusal already exist at that time. The reasonableness of the reasons and the effect of delay in exercising the right to refuse to work are issues having to do with the merits of the case, not with jurisdiction to hear the appeal. The Appeals Officer would add that, in light of the purpose of the *Code*, that is, “to prevent accidents and injury arising out of, linked with or occurring in the course of employment”, and granted that illness can evolve through different stages of seriousness and effects, interpreting the provisions of the *Code* that confer the right to refuse to work as contemplating only the prevention of effects, such as illness, of the situation cited as the justification for the refusal to work, and not the aggravation or continuation of those effects, would be a far too narrow interpretation, contrary to the above-quoted provision of the *Interpretation Act*: “Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”

[33] The second point made by Ms. Scott in support of her position is that the circumstances of the present appeal and the conflict in the work place do not constitute a danger within

the meaning of the *Code*, in that the legislation contemplates situations in which the danger perceived by an employee must result from the use of a **physical** machine, thing or place in the work place, which would exclude the situation of interpersonal conflict cited by Mr. Tremblay. Ms. Scott has therefore based this position on the meaning given to the word "situation" in the French version of the definition of "danger" by the Public Service Staff Relations Board in the decision in *Bliss*, based on the legislation as it read before 2000, that is, before amendments were made to both the definition of the term "danger" and section 128 setting out the right to refuse to work.

[34] First of all, it should be noted once again that, following the significant amendments made to the legislation, it is clear that the *Code* does not contemplate only physical conditions. We need only note the duty imposed on the employer to take steps to prevent and protect against violence. Furthermore, in the Appeals Officer's opinion the general duty imposed on the employer by section 124 is broad enough to encompass the prevention of circumstances like those cited by the appellant in this matter, particularly in light of certain specific duties imposed on the employer, noted above.

[35] The definition of the term "danger" includes the word "condition" in the English version and the word "situation" in the French version. With regard to this second point, Ms. Scott has also based her arguments on the decision in *Boivin v. Canada Customs and Revenue Agency*, rendered by the same Board mentioned in the preceding paragraph in a complaint filed pursuant to section 133 of the *Code* with regard to action taken against an employee for exercising a right conferred by the *Code*, in that case the right to refuse to work. In that decision, which was rendered after the amendments were made to the *Code*, the Board writes, "I do not believe the scheme of the *Code* allows for considering stress as "an existing or potential hazard," as that term is understood in the *Code*." The Appeals Officer does not believe that the scheme of the *Code* allows us to consider stress as "an existing or potential hazard" as understood in the *Code*. The Appeals Officer does not believe that stress can be considered to be a "condition" or a "situation" within the meaning of the *Code*. Since the words "condition" and "situation" are not defined in the *Code*, it is important, first of all, to seek the meaning given to these words in dictionaries. The *Canadian Oxford Dictionary* defines "condition" as: "circumstances, especially those affecting the functioning or existence of something". The *Petit Robert* dictionary defines "situation" as [translation] "all the circumstances in which a person finds himself or herself". In the opinion of the Appeals Officer, the meaning of "condition" or "situation" is broad enough to encompass the situation cited by Mr. Tremblay. Here it should be noted that the French version of paragraph 128(1)(*b*) does not include the word "situation" (providing only that it must be "dangereux"), while the English version includes the word "condition", which is found in the definition of "danger" and must therefore be given the same meaning as in that definition. That said, in the present context, the Appeals Officer interprets the French version of this paragraph as if it included the word "situation" and as if it read "la situation prévalant dans le lieu de travail est dangereuse pour l'employé".

[36] The Appeals Officer cannot support an interpretation that would liken "stress" to "hazard", whether actual or potential, or to "situation", as does the Board in *Boivin*. In the opinion of the Appeals Officer, it is neither stress, effects or psychological illness that

may be likened to the factor of danger, but rather the circumstances in which the employee finds himself or herself that cause stress or psychological illness. The stress or the illness must be seen as the result of the situation, not as the *situation* itself. In terms of the legislation, it should be borne in mind that "danger" is not defined solely by the effects of a situation, but rather by the correlation of the hazard, condition or activity with the effects it causes or is likely to cause, an opinion shared by the Board:

> A reading of the definition of danger indicates to me that in order to consider a situation to be a danger, one must establish a link such that the danger would cause injury or illness to a person. The employer is then obliged to correct the danger before the employee returns to the worksite.

In fact, in the decision in the appeal *M. Dawson v. Positions Canada et al.* (decision 02-023), Appeals Officer Malanka is an agreement with this opinion in upholding the findings of the HSO whose decision he was reviewing, and I paraphrase: "pursuant to the *Code*, one may take into consideration the physical condition (Ms. X's autism) in determining whether there is a danger related to ... the situation in the work place".

That said, in *Boivin* the Board continues as follows:

> This is more akin to, for example, having hazardous materials stored properly than it is to stress-related worksite issues.

In the opinion of the Appeals Officer, that statement has no basis in the legislation as a whole and as amended. It should also be noted that the hearing of an appeal by an Appeals Officer pursuant to section 146, the purpose of which is in fact to review the decision of an HSO by proceeding *de novo*, is quite different from the consideration by the Board, *supra*, of a complaint filed pursuant to section 133; thus the persuasive authority of a decision by the Board is only very limited. In this finding I am in fact supported by the Board's statements in *Boivin*: in comparing what the legislative provisions allowed it to do before and after the 2000 amendments, the Board writes:

> However, in June 2000, these provisions changed and the Board no longer retained jurisdiction to examine a decision of a safety officer. Now the jurisdiction of the Board is defined in section 133 of Part II of the *Code* and there is no jurisdiction to review a safety officer's decision, as that matter now resides with HRDC.

It should be noted that "HRDC" above means the appeal officers designated by the Minister of Labour.

[37] As a third point, Ms. Scott argued that the situation cited by Mr. Tremblay as justification for his refusal to work is more of a labour relations issue. In support of this argument she cited the wording of Mr. Tremblay's refusal, noting that [translation] "his refusal is a continuity of the reasons supporting a grievance" and thus a labour relations issue, and that these [translation] "identical" reasons for the grievance were [translation] "*addressed* in the context of a labour relations dispute settlement procedure" (emphasis added). From

that statement, the Appeals Officer understands Ms. Scott's position to be that if, on the basis of the same circumstances and the same reasons, persons avail themselves of one remedial procedure, they may not avail themselves of a different procedure on the basis of the same reasons if the first attempt does not produce the outcome they desired.

[38] Here a specific point should be made. It is not the purpose of Part II of the *Code* to resolve or address purely labour relations issues or situations. That said, an issue or situation involving labour relations problems does not by definition exclude persons from availing themselves of the rights conferred by Part II of the *Code* if the situation is likely to cause injury or illness to an employee and would at the time have been identified as a condition of danger. It is nevertheless true that, if the particular remedial procedure initially attempted does not produce the desired outcome, the same reasons may not be cited in support of a new, different remedial procedure in an attempt to produce the outcome initially desired.

[39] Still, it is not sufficient to state that this is the case and that the situation cited as justification for the refusal to work has already been addressed "in the context of a labour relations dispute settlement procedure", here a grievance. Evidence, at least minimal evidence, must be adduced. In the present matter the only information provided to the Appeals Officer, which has not been contested, is found in the investigation report adduced, which notes:

> [Translation]
> Following the inquiry, Mr. Tremblay lodged a harassment grievance, which was withdrawn in 2005. Mr. Parisien (the supervisor) explained that the harassment grievance lodged by Mr. Tremblay was withdrawn because Mr. Tremblay was dealing with counsel to represent him in that matter. The union then allegedly stopped representing Mr. Tremblay, which would explain why Mr. Tremblay's grievance was not addressed by the mediator who intervened when Air Canada was placed under bankruptcy protection.

[40] In light of the foregoing analysis, it is clear to the Appeals Officer that the situation cited by Mr. Tremblay as the basis for his grievance—assuming, since the Appeals Officer has been provided with no explanation or description, that it was the same situation cited as justification for his refusal to work—was not addressed in the context of a labour relations dispute settlement procedure. Consequently, it is difficult if not impossible for the Appeals Officer to give weight to the argument presented. With regard to the "considerations" set out in the investigators' report and quoted above, the Appeals Officer would add that he does not consider the fact that Mr. Tremblay filed a complaint of inadequate or unsatisfactory representation against his union with the Canada Industrial Relations Board as having any effect whatsoever on the nature of his appeal or as making it possible to describe the present appeal as a labour relations issue. In the opinion of the Appeals Officer, the dispute between the appellant and his union has no relevance whatsoever to the present matter since it has to do with the union member's relations with his union, not his relations with his employer with regard to the work place and the conditions prevailing there; nor did that dispute have any relevance to the present matter when the HSOs were called upon to intervene at the time of the refusal to work.

[41] In light of the foregoing analysis, the arguments made by Ms. Scott in support of her jurisdictional objection are not accepted. Furthermore, for all the reasons noted above, the Appeals Officer is of the opinion that he has jurisdiction to hear the present appeal.

[42] Anticipating such a finding, Ms. Scott also indicated her view that, if the Appeals Officer decided to exercise jurisdiction, in the respondent's opinion the appeal should be the subject of a summary dismissal since the balance of the evidence would make it possible to find that there was no danger within the meaning of the *Code*.

[43] The Appeals Officer points out that this statement leaves him somewhat perplexed since the only evidence obtained to date amounts to the investigation report adduced and the testimony of HSO Gallant with regard to his investigation and the resulting report. Here again, however, it should be noted that the Appeals Officer proceeds "de novo", that is, as if there had been no investigation, and must therefore review the matter as it was at the time of the refusal to work, the present appeal being in fact a challenge to the findings of the investigating HSOs. In this matter, accepting the respondent's position would be equivalent to basing the Appeals Officer's decision solely on the aspects uncovered by the investigating HSOs whose findings are the subject of the present appeal and thus would not give the appellant an opportunity to adduce the evidence he has indicated he wishes to present. The Appeals Officer fails to see how one could refer to a balance of evidence here when in fact neither the appellant nor the respondent have adduced or had an opportunity to adduce evidence in support of their respective positions with regard to the appeal. In summary, then, the Appeals Officer is of the opinion that rendering a decision solely on the basis of the file as constituted to date would be premature if not contrary to his duty to give the appellant an opportunity to present his case and to give all the parties an opportunity to be heard.

[44] Consequently, in light of all the foregoing, the Appeals Officer's decision is to proceed to hear the appeal on its merits.

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Jean-Pierre Aubre
Appeals Officer