Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Case No.: 2008-20
Decision No.: OHSTC-09-004

CANADA LABOUR CODE
Part II
Occupational Health and Safety

Dominique Tremblay

Appellant

and

Air Canada

Respondent

Decision No.: OHSTC-09-004
Date: February 3, 2009

The appeal was decided by Appeals Officer Jean-Pierre Aubre.

For the appellant
Dominique Tremblay

For the respondent
Michael McCrory

[1] This is the decision in the February 13, 2007 appeal by the appellant Dominique Tremblay of the February 7, 2007 decision by Health and Safety Officer Laurent Gallant, assisted by Health and Safety Officer Philippe Nantel. Only Officer Gallant testified at the hearing of the appeal. Officer Gallant's decision concluded the investigation into Mr. Tremblay's refusal to work under section 128 of Part II of the *Canada Labour Code* ("the *Code*"); pursuant to subsection 129(7) of the *Code* the decision found that, in the circumstances and according to the facts presented by the appellant to justify his refusal to work, there was no danger.

[2] On May 29, 2007, the date the hearing of the appeal began, counsel for Air Canada informed the undersigned Appeals Officer that at the time Mr. Tremblay was the subject of disciplinary action: he was, to quote Team Leader Benoît Parisien who assisted counsel for Air Canada at the hearing, [translation] "suspended pending dismissal" or, to quote the May 9, 2007 written disciplinary notice (Exhibit E-3), [translation] "the subject of a disciplinary layoff pending [his] dismissal" because, in the employer's opinion, Mr. Tremblay had been absent from work without justification or authorization since April 4, 2007 and thus had abandoned his position at Air Canada. No indication was sent to the Appeals Officer at that or any other time during the hearing that the disciplinary dismissal had been changed to a final dismissal. What is clear, however, is that when the hearing of the appeal resumed on February 26, 2008 the appellant's employment relationship with Air Canada was effectively terminated. The Appeals Officer was also informed that a grievance against the disciplinary action was had been lodged on May 9, 2007 (Exhibit E-4) and was to be dealt with according to the expedited grievance settlement procedure set out in a letter of agreement between the employer and the union representing Mr. Tremblay (CAW-Canada) (Exhibit E-5) and forming part of the collective agreement. This grievance settlement procedure provides for grievances to be considered in two stages: first ongoing mediation and then, in case of failure, adjudication by an adjudicator designated in accordance with the letter of agreement.

[3] The hearing, which began on May 29, 2007, was interrupted on May 30 in order to allow the Appeals Officer to reach a decision on the jurisdictional objection raised by the respondent. That interlocutory decision, rendered on October 18, 2007, found that the Appeals Officer has jurisdiction to hear Mr. Tremblay's appeal and to decide it on its merits.

[4] In order to facilitate understanding of the findings set out below, the Appeals Officer considers it helpful to recall certain statements contained in that interlocutory decision (Decision No. CAO-07-038(A)).

Thus, relying on the comments on the *Code* definition of "danger" expressed by Gauthier J. of the Federal Court in *Verville v. Canada (Correctional Service)* (2004 FC 767) at paragraph 32, that "[w]ith 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", the Appeals Officer wrote as follows at paragraph 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."*

[5] With regard to the nature of the right to refuse to work, the Appeals Officer wrote as follows at paragraph 32 of the same decision:

"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."*

[6] Lastly, since from the outset in the report by the Health and Safety Officers who investigated the present case (Exhibit E-1) Mr. Tremblay's refusal to work was presented as invoking a situation lasting for several years in the appellant's workplace and work environment and possibly causing stress in him and affecting his psychological health, the Appeals Officer considered it necessary to comment on the meaning to be given to "hazard" found in the definition of "danger" in section 122:

"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 ..."*

[7] The hearing of Mr. Tremblay's appeal resumed on February 26, 2008. At the very beginning of the hearing, counsel for the respondent followed up on the respondent's February 19 notice to the Appeals Officer and the appellant, indicating that the respondent would file an application for indeterminate suspension of the hearing of the appeal on the ground that [translation] "the Appellant [was] no longer employed by Air Canada". According to the notice, [translation] "after the appellant's appeal was brought he was dismissed by Air Canada, and his dismissal was upheld in adjudication".

[8] Mr. McCrory, counsel for the employer, explained the respondent's application for indeterminate suspension. He noted that, even if when the present hearing resumed all the conditions were present to allow the Appeals Officer to find that Mr. Tremblay's appeal is moot since he is no longer employed by Air Canada, that as a result there is no further dispute between the parties, and that given the situation at that time the Appeals Officer may not order any corrective action in the appeal, the mootness of the appeal might not be final given that, after Mr. Tremblay's dismissal grievance was dismissed, he had initiated proceedings in another forum, the Canada Industrial Relations Board ("the Board"), and given that those proceedings had not been concluded at the time the present hearing resumed.

[9] Mr. McCrory noted that, following the May 9, 2007 letter from the employer to Mr. Tremblay notifying him that he was laid off [translation] "pending [his] dismissal" (Exhibit E-3), his union lodged a grievance on his behalf, citing excessive disciplinary action and asking that the grievance (Exhibit E-4) be heard under the expedited grievance settlement procedure included in the collective agreement (Exhibit E-5) that provides for grievances to be considered in two stages: first ongoing mediation and then, in case of failure, adjudication by an adjudicator designated by the chief adjudicator appointed in accordance with the procedure.

[10] On September 24, 2007, in a decision on a grievance by Mr. Tremblay contesting his dismissal and on a second grievance by Mr. Tremblay

contesting action taken against him by the employer with regard to a 2003 harassment complaint filed against him by a woman co-worker, which is related to the appellant's subsequent refusal to work on February 7, 2007, chief adjudicator Martin Teplitsky dismissed both grievances, writing as follows (Exhibit E-6):

"The grievor seeks $20,000.00 for being segregated in the workplace. He also grieves his discharge. In my opinion, the Employer acted reasonably in segregating the grievor from the employee who claimed harassment. Indeed, the grievor agreed to this solution. His co-employee's negative reaction to being segregated motivates his grievance. There is no medical evidence to support his allegations that the segregation has caused him emotional harm nor is there any evidence to justify his absences from work. In the result, both grievances are dismissed."

[11] Following that decision, on December 20, 2007, Mr. Tremblay filed with the Board (Exhibit E-7) a complaint against his union, alleging that the union had breached its duty of fair representation (unfair labour practice) in processing the above-mentioned grievances. The Board scheduled the hearing of that complaint for June 18, 19 and 20, 2008 (Exhibit E-9). According to Mr. McCrory, if the Board were to rule in favour of Mr. Tremblay on that complaint, possible corrective action could include an order referring his dismissal grievance to adjudication anew, with the possibility of a different outcome such as an order reinstating him in his position at Air Canada. This is how counsel for the respondent explained his position that, since the appeal is not necessarily moot, for the moment the respondent can apply for only indeterminate suspension of the hearing of the appeal.

[12] Mr. McCrory pointed out that pursuant to paragraph 146.2 (*e*) of the *Code*, which authorizes an Appeals Officer to "adjourn or postpone the proceeding from time to time", the Appeals Officer has full discretion to allow the application. He nevertheless recognized that the Appeals Officer may proceed to hear the appeal on its merits, given the uncertainty of the outcome of the appellant's complaint before the Board, for reasons of effective and efficient use of the present tribunal's resources, given that the parties are assembled, the Appeals Officer present and the hearing facilities arranged, and given the fact that the Appeals Officer may reserve the decision on the mootness of the appeal. Mr. McCrory cited the Supreme Court of Canada decision in *Joseph Borowski v. Canada (Attorney General)*, (1989) 1 S.C.R. 342, the landmark precedent on the mootness of a reference, which reads as follows at page 344:

"A serious issue existed at the commencement of the appeal as to

whether the appeal was moot. Questions also existed as to whether the appellant had lost his standing and, indeed, whether the matter was justiciable. These issues were addressed as a preliminary matter and decision on them was reserved. The Court then heard argument on the merits of the appeal ***so that the whole appeal could be decided without recalling the parties for argument should it decide that the appeal should proceed notwithstanding the preliminary issues****."* (emphasis added)

[13] In response to the application for suspension, Mr. Tremblay objected to the hearing being suspended. According to him, a first reason for not allowing the application has to do with the delays already incurred in the present case; he emphasized that more than one year had passed since his refusal to work, while the right to refuse to work under the *Code* is an emergency measure, as was affirmed even by counsel for the employer at the first session of the hearing of the appeal. According to Mr. Tremblay, the employer has raised procedural issues that have had the effect of delaying the hearing of the appeal on its merits, with the result that over one year has elapsed since the refusal to work and that further delay, once again for procedural reasons, would violate his rights in terms of natural justice. He also emphasized that the parties are assembled and the witnesses and the Appeals Officer present and that, as a result, there is no need to delay further the hearing of the appeal on its merits, particularly since the appeal is not at all moot and is intended to disclose the longstanding Air Canada action toward him that led him to refuse to work because his health was threatened. According to him, the appeal must be heard on its merits and the Air Canada action toward him considered immediately. Mr. Tremblay added that awaiting the outcome of a possible adjudication of the complaint before the Board could delay the processing of the appeal for years.

[14] Referring to the remedy provided for under section 133 of the *Code*, that is, an employee's right to file with the Board a complaint of disciplinary action taken against the employee by the employer in violation of the provisions of the *Code* prohibiting such action following the employee's exercise of rights under the *Code* (article 147 of the *Code*), Mr. Tremblay argued that the Appeals Officer should consider the complaint of unfair labour practice before the Board, resulting from the grievance against excessive disciplinary action lodged by his union and from the representation provided by the union, to be a complaint under section 133. In the same breath, however, Mr. Tremblay acknowledged that he did not file that complaint as a complaint under section 133. According to him, his suspension occurred three weeks before he exercised his right under the *Code* to appeal the decision by the Health and Safety Officer following his

refusal to work, but clearly occurred after he exercised the right to refuse to work and the right to appeal the no-danger decision by the Health and Safety Officer.

[15] Lastly, the appellant pointed out what he considered to be an indication that adjudicator Teplitsky's decision did not address the same grievances by Mr. Tremblay as those cited by Mr. McCrory. For example, although the document including adjudicator Teplitsky's decision and adduced as Exhibit E-6 is entitled "(Seq. 23) Grievance No. A01-400-07/G07-44-03-Dominique Tremblay", the document adduced by Mr. Tremblay as Exhibit E-8 and apparently to the same effect as the previous document is entitled "(Seq. 23) Grievance No. A01-400-07-Dominique Tremblay".

[16] Given that both documents bear the same date, September 24, 2007, that the text of both decisions is preceded by a title that identifies Mr. Tremblay personally and, furthermore, that both texts are in fact the same, in that the wording of the two decisions presented in evidence is identical, word-for-word, as quoted at paragraph 9 above, the Appeals Officer attaches no importance to the above-mentioned difference in titles and thus draws no conclusion or inference from that difference.

[17] In rebuttal, Mr. McCrory pointed out that the complaint filed by Mr. Tremblay with the Board could not be considered to be a complaint under section 133 of the *Code*, simply because the complaint has to do with the actions of the union representing Mr. Tremblay (the duty of representation), not the action taken by the employer with regard to Mr. Tremblay including the dismissal, and also because Mr. Tremblay never alleged that his complaint was a complaint under section 133. With regard to the undue delay that suspension of the hearing would cause, counsel for the respondent emphasized that the Board had scheduled the hearing of Mr. Tremblay's complaint for June 2008 and that, if the complaint were allowed and the appeal referred to adjudication anew, that could take place promptly. With regard to the emergency alleged by Mr. Tremblay, Mr. McCrory noted that Mr. Tremblay's refusal to work involves no emergency since he is no longer employed by the respondent. Lastly, Mr. McCrory pointed out that granting the indeterminate suspension requested in his application would not have the effect of preventing judicial consideration of Mr. Tremblay's appeal and the issues it allegedly raises since, if Mr. Tremblay's complaint before the Board were successful, the appeal could still be heard.

Decision on the application for suspension of the hearing

[18] After considering the arguments by both the appellant and counsel for the respondent, the Appeals Officer rendered an oral decision at the hearing, dismissing the application for indeterminate suspension of the hearing and reserving a decision on the mootness of the appeal. The Appeals Officer decided to proceed to hear the appeal on its merits. Although at the time of that decision, given the particular circumstances of the case at the time, the Appeals Officer considered the alleged mootness of the appeal as possibly having merit, at the same time the Appeals Officer considered the admission by counsel for the respondent that the appellant's status at Air Canada was perhaps not final to be determinative, since the issue of the employment relationship between Air Canada and Mr. Tremblay—or rather the reconstitution of that relationship—was central to the issue of the mootness of the appeal; as a result the Appeals Officer found it impossible to render a decision on that issue at that time.

[19] That being the case, since at the time the parties were assembled, the witnesses present and ready to testify, and the Appeals Officer present, and in order to avoid, if the hearing were suspended, the possibility of, at an unforeseeable future time, the parties and persons assembled being called back before the present tribunal, the Appeals Officer decided to reserve the decision on the issue of mootness and to proceed to hear the appeal on its merits. This decision was based on the comments by the Supreme Court in *Borowski* (*supra*) quoted at paragraph 12 above.

Hearing of the appeal on its merits

[20] The hearing of the appeal on its merits continued for five days, concluding on May 29, 2008. The appellant called five witnesses and himself testified at great length. Mr. McCrory called three witnesses in support of the respondent's position. Somewhat surprisingly, these three witnesses, whose testimony was largely favourable to the respondent's position, were among the witnesses who were previously called by Mr. Tremblay and who indeed testified when he adduced his evidence.

[21] Mr. Tremblay's testimony in support of his appeal, or at least the part of his testimony that would normally have formed the examination in chief, was presented in narrative form since Mr. Tremblay was representing himself. As established by the Appeals Officer at the pre-hearing conference with the parties, and as repeatedly recalled by the Appeals Officer at the hearing, given Mr. Tremblay's lack of experience with the workings of an adversarial proceeding such as the hearing of the present appeal and particularly his obvious lack of knowledge of the usual rules for examining witnesses and presenting testimonial and documentary evidence, the Appeals Officer gave him, as is authorized by the *Code*, quite considerable latitude with regard the conduct of his case and the presentation of what he considered to be evidence.

[22] That said, the Appeals Officer was repeatedly obliged to issue reminders to Mr. Tremblay with regard to his questions to his own and the other party's witnesses, going so far as to suggest appropriate sample wording of questions at the various stages of an examination, for the purpose of making it easier for him to present his case alone and opposite experienced counsel. On this point, the Appeals Officer must emphasize the assistance provided to the present tribunal by Mr. McCrory, who agreed to limit his objections and interventions to a minimum, recognizing that the Appeals Officer would be able to assess the weight to be assigned to the evidence presented by Mr. Tremblay and recognizing that the law gives the present tribunal discretion to accept evidence that would not otherwise be admissible in a court of

justice.

[23] Similarly, at the hearing and even outside the hearing but in the presence of Mr. Tremblay and Mr. McCrory, the Appeals Officer considered it necessary to make certain interventions and clarifications in order to facilitate the progress of the hearing and the presentation of the evidence and information required to render a decision. For example, beyond a very lengthy and detailed historical statement by Mr. Tremblay of the facts and incidents occurring in the workplace from 2001-2002 until his refusal to work on February 5, 2007, and particularly incidents starting at the same time, in 2001-2002, and involving co-workers, including in particular one woman co-worker (who is no longer employed by Air Canada) who had filed a harassment complaint against Mr. Tremblay, to which he had responded by filing his own complaint (Exhibits E-39 and E-40) (both of which were dismissed), all directly related to Mr. Tremblay's eventual refusal to work on February 5, 2007, very early at the hearing it became obvious that, despite the explanations provided by the Appeals Officer at the above-mentioned pre-hearing conference, the Appeals Officer would have to intervene with regard to medical evidence that the appellant apparently wanted to present in support of his appeal. The focus of this intervention was not the content of the evidence but the way in which the Appeals Officer intended it to be presented, so that the other party would have an opportunity to examine it. In this regard, the Appeals Officer made it clear to the parties that it would not suffice for either party to present a medical report without calling the author of the report as a witness so that the Appeals Officer could assign the appropriate weight to such evidence.

[24] Despite these efforts, the only medical evidence presented was presented by Mr. Tremblay himself, by simply filing documents with no explanation and, obviously, with no author of the documents being called as a witness, thus making it impossible for the other party to examine the content of the documents. As well, the documents concerned are dated 2003, 2004 and 2005, while the appellant's refusal to work occurred in February 2007.

[25] Similarly in order to allow the appellant better to present his case, the Appeals Officer also specified that, although initially the Appeals Officer had been found to have jurisdiction to hear the appeal, if the appeal were allowed that jurisdiction would not allow the Appeals Officer to rescind Mr. Tremblay's dismissal or to order that he be reinstated at Air Canada. During this intervention, the Appeals Officer further and repeatedly explained to the appellant that since the Appeals Officer was proceeding *de novo* it was the appellant's responsibility to establish before the Appeals Officer the facts, circumstances or

situation in his workplace and work environment with a relationship or connection to his refusal to work, and that those facts and circumstances or that situation must have been brought to the employer's knowledge and must have had a cause-and-effect relationship with his present or eventual state of health.

[26] As has been noted, the hearing of the witnesses called by the two parties extended over several days, and an additional day was allowed for the parties to present their respective arguments. At the conclusion of the various witnesses' testimony, the Appeals Officer was obliged to conclude that, except for some inconsequential differences, the situation presented to the Appeals Officer, while much more detailed, differed very little from the essential facts described in the investigation report presented by Officer Gallant during his testimony (Exhibit E-1) and set out in the statement of uncontested facts presented at the beginning of the hearing (Exhibit E-2). Consequently, and for additional reasons that will become clear in the concluding statement of the present decision, at this stage the Appeals Officer does not consider it necessary to summarize those facts.

[27] The hearing of the appeal was adjourned on May 29, 2008 in order to allow the Appeals Officer to write the decision, taking into account that the Appeals Officer would first have to reach a decision on the issue of the mootness of the appeal, as was pointed out by counsel for the employer, and also taking into account that the Canada Industrial Relations Board hearing of the appellant's complaint, which was central to that issue, would begin on June 18, 2008.

[28] On June 23, 2008, counsel for Air Canada in the appeal sent a letter to the Appeals Officer, with a copy to the appellant, notifying the tribunal that Mr. Tremblay had withdrawn the complaints of unfair representation against his union filed with the Board and consequently would not be reinstated at Air Canada, thus confirming the mootness of the reference before the Appeals Officer. This letter reads as follows:

[Translation]

"Following the hearing of the above-cited case, we are writing in order to notify you that in a June 17,2008 letter the Canada Industrial Relations Board has allowed the appellant's application to withdraw his two complaints against the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) in which he alleges a violation of section 37 of the Canada Labour Code.

In light of the foregoing, we respectfully submit that it is now clear that the appellant will not be reinstated in his position at Air Canada and that, consequently, the issue raised in the above-cited case is entirely moot." (emphasis added)

[29] Attached to the letter from Mr. McCrory was a letter from the Senior Registrar of the Board to Mr. Tremblay, noting that the Board had allowed his June 16, 2008 application for withdrawal.

[30] Following these developments and as ordered by the Appeals Officer, a letter was sent to the appellant on June 25, 2008 (with a copy to the other party) seeking confirmation of his withdrawal. Mr. Tremblay responded to the letter on July 2, 2008, attaching the text of his application for withdrawal to the Board including the reasons for it to his letter to the present tribunal. In this letter, he first objects to the Appeals Officer's taking the withdrawal into consideration since the appeal hearing had concluded and the appeal was under consideration, and then reiterates his allegation that his dismissal, which occurred a few days before the hearing of the appeal began, constitutes a violation of section 147 of the *Code*. He further reiterates his allegation that at work he was subjected to psychological harassment for which the employer was partly responsible and that [translation] "having the psychological violence [in his case] recognized by the Occupational Health and Safety Tribunal of Canada is an integral part of the healing process".

[31] The Appeals Officer has also read the various reasons and explanations provided by Mr. Tremblay to the Board in order to justify his application for withdrawal. Although in general these reasons are not directly relevant to the decision the Appeals Officer must render in the present appeal, the Appeals Officer cannot help noting that in these reasons Mr. Tremblay reiterates many of the points expressed in his testimony before the Appeals Officer. That said, one point cannot escape the Appeals Officer's attention, since it has a direct bearing on the issue of the mootness of Mr. Tremblay's appeal of the Health and Safety Officer's decision with regard to his refusal to work. It should be noted that the complaint filed with the Board, which is directly related to this issue and indeed central to the Appeals Officer's decision to reserve the decision on the mootness of the reference, has to do with Mr. Tremblay's grievance contesting his dismissal and his allegation that his union breached its duty of fair representation. The Appeals Officer decided to reserve the decision on this issue given the possibility, however remote, that if Mr. Tremblay's complaint were allowed by the Board the possibility of his being reinstated in his position could arise, as the respondent in the present appeal has acknowledged. In his application for withdrawal, which for all practical purposes eliminates that possibility, Mr. Tremblay writes to the Board as follows:

[Translation]

"The second grievance, concerning my dismissal, doesn't matter to me, because I don't intend to go back to work in that unhealthy place."

Decision on the mootness of the reference

[32] As has been noted, the Supreme Court of Canada decision in *Borowski* (*supra*) is intended to be the landmark decision with regard to determining the mootness of a reference. In that decision, Sopinka J. clearly explains this policy and its application. The summary of the decision reads in part as follows:

"The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it.

The approach with respect to mootness involves a two-step analysis. It is

first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (In the interest of clarity, a case is moot if it does not present a concrete controversy even though a court may elect to address the moot issue.)"

[33] However, beyond the possibility for any court to find that a reference is moot and thus will not be heard or decided on its merits, the Court recognizes that a court still has discretion to hear a case on its merits. That said, the exercise of this discretion must take into account the rationales of the policy with respect to mootness. On this point, the Court describes these rationales in *Borowski*:

"The first rationale for the policy with respect to mootness in that a court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for courts to be sensitive to the effectiveness or efficacy of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of these three basic factors is present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa."

Although it is clear that this reasoning refers to the operation of the Supreme Court and may by extension be applied to the operation of any other traditional court of justice, the Appeals Officer is of the opinion that it may and indeed must be applied to an administrative tribunal such as the present tribunal because of the same need to be sensitive to the effectiveness and efficiency of its intervention, given an ever-greater jurisdictional role of administrative tribunals in our political structure.

[34] What bearing do the foregoing comments have on the present appeal? In response to this question, the following points must be noted.

- Mr. Tremblay is no longer employed by Air Canada and, after he withdrew his complaint of unfair representation before the Canada Industrial Relations Board, it was no longer possible for him to be reinstated in his position with that employer. Consequently his initial

ground for initiating proceedings has disappeared.

- The appellant did not bring before the Board a complaint under section 133 of the *Code* alleging a violation of section 147 of the *Code*. Consequently, it is no longer possible for Mr. Tremblay to be reinstated in his position at Air Canada as a result of a finding in his favour by the present tribunal. With regard to the appellant's allegation that his complaint should be treated as a complaint under section 133 of the *Code*, it is unfounded and, even if the Appeals Officer were to reach a different conclusion on this point, the wording of the *Code* gives the Appeals Officer no authority to act in place of the Board.

- When the appellant withdrew his complaint before the Board, the documents he provided clearly indicated that, regardless of the outcome of those proceedings, he had no intention of seeking to return to work at Air Canada.

- The dispute at the basis of the present appeal, and by extension at the basis of the appellant's refusal to work, is entirely specific to Mr. Tremblay and has to do with circumstances specific to him, even though in some regards he cites action taken against him by certain co-workers, particularly one woman co-worker who has herself left Air Canada. Now that the employment relationship between Air Canada and Mr. Tremblay has been terminated, a termination that may now be considered permanent, in the Appeals Officer's opinion there is no longer a current, tangible dispute between these parties, at least not a dispute in which the Appeals Officer would have jurisdiction to intervene, bearing in mind that the exercise of the right to refuse to work forming the basis of the present appeal is an individual right limited to the employees of an employer and designed as a recourse for employees who exercise it. In summary, in fact, the basis of the dispute has disappeared.

- The specific nature of the circumstances of the present case, in addition to the disappearance of the employment relationship, means that no valid or helpful corrective action is possible in the appeal. As well, because of that specific nature of the facts, no broader corrective action can be determined.

- Determining that the appeal is moot would not have the effect of preventing the issues it raises from being considered in other matters where circumstances so warrant. The Appeals Officer adds that one issue raised by the appeal, that of psychological health, fell under the Appeals Officer's jurisdiction and was the subject of the interlocutory decision.

- Lastly, given the particular circumstances of appeal, the Appeals Officer is of the opinion that rendering a decision on the merits of the appeal would have no concrete effect on the rights of the parties, even in the absence of a decision on the dispute between Mr. Tremblay and Air Canada, which has become moot since the permanent nature of the termination of the employment relationship was confirmed.

[35] In light of the foregoing, the Appeals Officer is of the opinion that the appeal is moot and that the Appeals Officer must not exercise the discretion to decide the appeal on its merits. The appellant no longer has grounds for continuing the appeal, since the circumstances on which those grounds were based have disappeared.

[36] Accordingly, the appeal is dismissed.

Jean-Pierre Aubre
Appeals Officer