File: 160-2-52

Canada Labour Code,
Part II

Before the Public Service
Staff Relations Board

BETWEEN

CHARLOTTE HUTCHINSON

Complainant

and

TREASURY BOARD
(Environment Canada)

Employer

RE: Complaint under section 133 of the Canada Labour Code

Before: J. Barry Turner, Board Member

For the Complainant: Gary Bannister, Public Service Alliance of Canada

For the Employer: Harvey Newman, Counsel

Heard at Dartmouth, Nova Scotia,
November 25 and 26, 1997.

Charlotte Hutchinson, an Environmental Engineering Technician, Water Pollution Control Section, Environment Canada, Dartmouth, Nova Scotia, has made a complaint against Environment Canada under subsection 133(1) of the Canada Labour Code (the Code), Part II.

Her complaint, dated April 29, 1997 reads as follows:

> *I hereby make a complaint against Environment Canada under section 133 of the Canada Labour Code Part II subsequent to my refusal to work on Apr. 21, 1997.*
>
> *There is a great deal of history to this situation, but I believe the following should be sufficient to at least initiate the complaint:*
>
> *-Dr. MacDonald's letter to John Clarke dated 21 June 1996*
> *-a decision rendered by the RSO on Apr. 14, 1997*
> *-Garth Bangay's letter to me dated Apr. 17, 1997*
> *-Garth Bangay's letter to me dated Apr. 21, 1997*
> *-my letter to Garth Bangay dated Apr. 22, 1997*
> *-my letter to Glenn Grandy dated Apr. 22, 1997*
> *-Garth Bangay's letter to me dated Apr. 22, 1997*
> *-my letter to Garth Bangay dated Apr. 23, 1997*
>
> *Local HRDC-Labour tried to get Environment Canada to withhold my termination at least until my latest work refusal at Queen Square played out, but EC was not willing to do this. They have a particular "spin" on their actions, and are not relating my termination to my work refusal.*
>
> *There is broad and consistent evidence that Queen Square makes me (and other employees) sick, despite the fact that it hasn't been proven to the satisfaction of the CLC yet. It is irresponsible and reprehensible for Garth Bangay to say "the workplace does not constitute a danger to employees", as he did in his letter to me of Apr. 17, 1997.*
>
> *His letter of Apr. 21 to me is also a creative distortion of the truth. What a person who is not knowledgeable of the situation would readily infer from his presentation of the "facts", would be quite erroneous. I hope that in any dealings you have with managers and/or human resources personnel of EC, you will be aware that the information they give you is likely selective and slanted. Please ensure you get my side of the story (which is lavishly documented!), prior to making any decision.*
>
> *It is interesting to note that the last report from Health Canada in June of 1996 is that I'm fit for work except for the*

> *limitation that I can't work at sick buildings like Queen Square. I'm not sure where the medical expertise came from amongst my managers that led them to conclude I'm unfit now, and for the foreseeable future.*
>
> *At any rate, regardless of the Departmental "spin", it is clear that if I had not gotten sick at Queen Square on Apr. 21, 1997, and withdrawn my services as I have a right to do under the CLC, I would not have been terminated on Apr. 22, 1997. In order for my employment to have continued, I would have had to stay in a building that makes me sick, that my Department knows makes me sick, becoming sicker and sicker, until I got so sick that I couldn't function. Sounds like a catch 22 to me.*
>
> *I look forward to hearing from you.*

Ms. Hutchinson suffers from environmental health problems.

Subsection 133(1) of the Code reads:

> *133. (1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*

Paragraph 147(a) of the Code reads:

> *147. No employer shall*
>
> *(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee*
>
> *(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,*
>
> *(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or*
>
> *(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; or*

...

Subsection 128(1) of the Code reads:

> *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.*

Mr. Newman accepted that the burden of proof is on the employer under subsection 133(6) since he will prove that a contravention did not occur based on the balance of probabilities.

Subsection 133(6) reads:

> *133. ...*
>
> *(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party.*

Mr. Newman argued the complaint was made subsequent to Ms. Hutchinson's termination due to incapacity on April 21, 1997 by the Regional Director General under the *Financial Administration Act*. He will show that her termination was not a disguised retaliation for her refusal to work under the Code as is her right. He added she had earlier refused to work on two separate occasions.

Mr. Bannister objected since what is before me is only one incident that has led to this complaint; that is, the complainant's refusal to work on April 21, 1997.

Mr. Newman argued there is a need to establish the employer's motivation and rationale for its decision to terminate her since it was not taken on the spur of the moment. He referred to the complaint itself that reads in part in paragraph two, "... *There is a great deal of history to this situation. ....*" I note paragraph six that reads in

part, "*... my side of the story (which is lavishly documented!)"* lends to Mr. Newman's argument that the history must be looked at.

Mr. Newman also argued that what is before me is not a valid complaint under subsection 133(1) since the employer does not admit Ms. Hutchinson acted in accordance with sections 128 or 129 of the Code since this is her third refusal to work at the same location allegedly for the same reasons. He said according to section 128, the complainant had to have had reasonable cause to believe while at work that a danger existed, in order to not work on April 21, 1997. He argued my decision dated September 23, 1996 in *Hutchinson* (Board file 165-2-113) applied when the complainant first refused to work. At the request of the employer with respect to Ms. Hutchinson's second refusal to work, a review by the Regional Safety Officer (RSO), Douglas Malanka overruled on April 14, 1997 (Exhibit E-33) Safety Officer Ron Thibault's decision of November 1996 that found Ms. Hutchinson had reason to not work. Mr. Malanka found no evidence that a danger existed under the Code in November 1996. Within hours of returning to her seasonal work on April 21, 1997 at Queen Square, the complainant used the Code to refuse to work again for the third time, but no danger existed. As of April 1, 1997, the complainant was due to report for work, but did not until the RSO's report was released. She was told on April 17 she had to return. She was paid from April 1.

Mr. Newman does not allege that Ms. Hutchinson is not ill, but that there is no danger to her in her workplace, and therefore she did not meet the condition precedent to file a complaint. He argued that even if her complaint is valid, there is no reason to conclude the employer's decision was in retaliation to her right to invoke the Code.

Mr. Newman pointed out that I am not being asked to decide if the employer's decision to terminate was correct, but whether or not it was done as a retaliation under paragraph 147(a) of the Code.

Mr. Bannister argued that all I have to decide is whether or not the grievor had the right to invoke a work refusal and not to be dismissed as paragraph 147(a) says. She refused to work on April 21, 1997 and was terminated that same day.

1. Garth Bangay, Director General, Atlantic Region, Environment Canada, since April 1, 1995, is responsible for about three hundred and fifty employees. He advised the complainant to report back to work on April 21, 1997 in a letter dated April 17, 1997 (Exhibit E-1). She returned but withdrew her services for health reasons around noon on the 21st and was terminated the same day (Exhibit E-2). The witness knew something of her previous work circumstances but did not know her personally. A scent-free policy had been initiated at Queen Square in 1996 to assist Ms. Hutchinson at a time when the employer was also doing renovations to Queen Square.

Mr. Bannister objected by saying that Ms. Hutchinson's employment history is not relevant to the issue before me. I partly agreed, but added without some history to the employer's decision, I had a dilemma in deciding whether or not its decision was retaliatory. He appreciated this dilemma. I referred to the complainant's references herself to the history in her complaint.

When the complainant returned to work in May 1996 she wrote her supervisor John Clarke a letter (Exhibit E-3) that Mr. Bangay found instructive and helpful regarding her health. He also identified a follow-up letter in June (Exhibit E-4) that speaks of the Bedford Institute of Oceanography (BIO) and a "safe" office for her there. There was a suggestion Ms. Hutchinson try to work in the Bedford warehouse (Exhibit E-5). She was deemed fit to work with limitations by Doctor K. MacDonald, Health Canada, Health Services Clinic, in June 1996 (Exhibits E-6 and E-7). Mr. John Clarke wrote the complainant on July 4, 1996 indicating the BIO location was unsuitable and also offered to advance sick leave credits if necessary (Exhibit E-8). An additional work site on Akerley Boulevard in Dartmouth was also not suitable for her (Exhibit E-9). The grievor moved temporarily across the street from Queen Square to Belmont House shared by the Department of Veterans Affairs in July 1996. She indicated she would not apply for telework, that is work from home, in Exhibit E-10.

Mr. Bannister objected to this work place history as irrelevant and admitted the employer did try to accommodate her.

The Belmont House location also failed (Exhibit E-11). The complainant was advised on July 31, 1996 that Queen Square testing met the required health and safety standards for her to work and that she may have to look at disability insurance or

teleworking (Exhibit E-12). Ms. Hutchinson first withdrew her services on July 31, 1996 (Exhibit E-13). John Clarke wrote M. Guilcher, Manager, Pollution Reduction Division expressing concerns about the complainant's health requirements on August 6, 1996 (Exhibit E-14). Mr. Bangay became concerned for her safety, especially at industrial sites.

The witness was also aware that safety officer R. Muzzerall concluded no danger existed when the complainant first withdrew her services (Exhibit E-15). Ms. Hutchinson wrote Safety Officer, Michael S. de la Ronde on August 11, 1996 wishing to withdraw her services from Queen Square completely, as well from the Burnside warehouse and from Environment Canada labs (Exhibit E-16). Mr. Bangay saw this as an escalation of the whole issue since it now looked like all work places for her were off limits. Ms. Hutchinson suggested setting up a satellite office for her on September 9, 1996 (Exhibit E-17), and offered to pay the rental cost, a suggestion that was not acceptable to the employer.

Mr. Newman reminded Mr. Bangay of my *Hutchinson* decision (supra) that upheld Safety Officer Muzzerall's earlier decision that no danger to the complainant did exist.

The complainant was asked to report back to work on October 1, 1996 by Mr. Kozak, Associate Director, Atlantic Region (Exhibit E-19).

Ms. Hutchinson wrote the Hull, Quebec, office of the department on September 29, 1996 asking if she was being punished and why she could not do telework from another office location (Exhibit E-20). Mr. Bangay said she was not being punished and that telework was from a home location. She was not asking for that. Ms. Hutchinson withdrew her services again on October 1, 1996 (Exhibit E-21). Mr. de la Ronde wrote her on October 2, 1996 (Exhibit E-22) indicating she is to request teleworking. The complainant responded on October 3, 1996 (Exhibit E-23) with a reference to the Westray mine inquiry, a disastrous situation in Nova Scotia that Mr. Bangay found disturbing. She also referred to an employee survey that he did not know much about, as well as making additional comments in Exhibit E-23 that he found irrational.

Mr. Bangay identified a letter dated October 25, 1996 written by Ms. Hutchinson to André Gauthier, Acting Supervisor (Exhibit E-24) that indicated she was not prepared to come to Queen Square, had not applied for telework and now appeared not prepared to do field work either.

The witness identified a number of exhibits as Exhibit E-25, in particular a letter attached to Exhibit E-25 from a Dr. Kirkbride, Occupational and Environmental Health Services, Health Canada, dated October 18, 1996 that reads in part:

> ...
>
> *It is my opinion that for medical reasons, Ms. Hutchinson is not able to work efficiently and effectively in the Queen's Square workplace, and I believe that it is reasonable for her to refuse to work there unless and until her medical condition improves. Having said this, I have no reason to suggest that this workplace is in any way unsatisfactory or unsafe for other employees, and I have no recommendations to make regarding further environmental investigations or regarding modifications to Ms. Hutchinson's specific workplace or to Queen's Square in general.*

A second Dr. Kirkbride letter dated October 25, 1996 also attached to Exhibit E-25 reads:

> *I would like to make a clarification to my letter to you of October 18, 1996.*
>
> *The cause of Ms. Hutchinson's illness is not at all clear. I did not wish to suggest in my letter that the Queen's Square workplace was responsible for initiating her illness. Exposure to that workplace aggravates her existing medical condition, and this is the basis for my opinion that it is reasonable for her to refuse to work there until her medical condition improves.*

Mr. Bangay said the complainant refused to telework and the employer could not refit Queen Square. Also, Safety Officer R. Thibault concluded on November 12, 1996 that a condition existed at Queen Square that did constitute a danger to her (Exhibit E-25) even though Robert Reid, an Industrial Hygiene Technologist concluded after conducting tests on October 4, 7, 8, 29, 1996, there was no danger, Mr. Reid's overall conclusion reads:

> *Overall*
>
> *In review of the survey in total I would conclude that no contaminant or condition examined herein would indicate that for the segments of the building that were included, on the days that they were examined there is nothing in the building's environment that would normally be expected to constitute a danger to employees.*

Mr. Bangay requested a review of Mr. Thibault's decision on November 18 in Exhibit E-26.

He testified the complainant did not work at all after October 1, 1996 but was paid until the end of December 1996. He added that his managers wanted to terminate Ms. Hutchinson in October 1996, but he wanted one more look at her situation. He spoke with Dr. MacDonald to learn more about environmental health problems. He learned the medical fraternity cannot clearly identify the causes and therefore has difficulty suggesting a solution. He could not see a way out of the situation that was then before him.

Ms. Hutchinson was told by Mr. Ken Hamilton, Regional Director, Environmental Protection Branch, Environment Canada, on December 2, 1996 not to report to work at Queen Square (Exhibit E-28). She wrote Roger Percy, an EC Acting Manager, on February 17, 1997 (Exhibit E-29) indicating she may need a trailer she could tow behind her car to use on overnight field trips, because of alleged problems with hotels/motels, and that a medical retirement may be a possibility for her. The employer did not oppose a medical retirement (Exhibit E-30) but this was not something it could initiate. (In fact, Ms. Hutchinson made such a request only once she had already been terminated (Exhibit E-35)).

Mr. Bangay identified a March 27, 1997 letter to Ms. Hutchinson from Ken Hamilton (Exhibit E-31) reminding her her due date back at work was April 1, 1997 and that the hours she would normally spend at Queen Square should be spent working at her home. Mr. Bangay noted some handwriting on Exhibit E-31 that he thought was Ms. Hutchinson's, referring to "harassment". Mr. Bangay denied this was harassment since she had a job to do and was expected to do it. Ms. Hutchinson responded to Sinc Dewis, presumably also an Acting Manager on March 29, 1997 expressing concerns about working at home (Exhibit E-32).

Mr. Bangay added: "W*e were out of options at this point since Ms. Hutchinson was not prepared to work*".

The Regional Safety Officer's report that rescinded Mr. Thibault's decision was released on April 14, 1997 (Exhibit E-33) and reads in part on pages 7 and 8:

> *... Therefore, I do not conclude that Dr. Kirkbride letters confirm that a dangerous condition exists at Queen's Square for Ms. Hutchinson or that there is a causal link between the danger and the workplace.*
>
> *Instead, what I find from the evidence presented is that the employee has a medical condition, that her symptoms are increasing over time and that they are experienced in other workplaces and in her home. The tests conducted in the Queen's Square workplace do not establish anything abnormal in the workplace or that there is a contravention of the Code and regulations. None of the medical doctors consulted, nor the safety officer, can pinpoint for the employer the specific cause of the aggravation, or the link between the aggravation Ms. Hutchinson experiences and the workplace. The only medical certainty, as indicated in Dr. MacDonald's report, is that the medical condition is real and not imaginary, that the causes are unknown and that stress can be a factor. None of the efforts by Environment Canada have resolved the situation or given any clue as to what at Queen's Square aggravates Ms. Hutchinson's medical condition. Dr. Kirkbride suggests addressing the situation by permitting Ms. Hutchinson to work at home.*
>
> *As a result, I find that the facts in this case do not confirm that a dangerous condition exists in the workplace for Ms. Hutchinson because they do not meet the requirements of section 122. (definition of danger) and paragraph 128.(1)(b), in the Code. For clarity, I am not saying that Ms. Hutchinson's medical condition is not real. However, until it can be established that an actual condition of danger exists in the workplace at the time of the safety officer's investigation and that there is a medical or scientific link pointing to a causal link between the environment and the possibility of imminent danger to the health of Ms. Hutchinson, I find the danger alleged is not one regulated under the Canada Labour Code. In my opinion, Safety officer Thibault did not fully take this into consideration when he decided that a danger exists for Ms. Hutchinson because she has a medical condition that causes the workplace at Queen's Square to be unsafe for her.*

Mr. Bangay felt this process had been helpful since it was at arm's length. He concluded the employer had done its best efforts for the complainant and that he could now never see her coming back to work. He reminded me that he advised Ms. Hutchinson on April 17, 1997 in Exhibit E-1 that if she did not return to work she may be terminated, something he had never done before.

The complainant withdrew her services for health reasons on April 21, 1997 at 1205 hours in a handwritten note to Dave Aggett (Exhibit E-34) and was terminated the same day (Exhibit E-2) for appearing not to be capable of performing the duties of her position.

The complainant responded on April 22, 1997 to Mr. Bangay (Exhibit E-35) and referred to a number of unresolved harassment complaints she had filed that he was aware of. She copied Exhibit E-35 to twenty-one persons. Mr. Bangay was not prepared to alter his decision to terminate her (Exhibit E-36) to which she responded again (Exhibit E-37). Ms. Hutchinson has since grieved her termination.

Mr. Bangay said he was not upset by her third refusal to work but was disappointed since Ms. Hutchinson was just not in a position to do her job. He said teleworking may have worked for her, but he was not prepared to rent and to renovate separate space for her.

During cross-examination, Mr. Bangay said he was away in Ottawa on April 21, 1997 and Ken Hamilton called him to review Ms. Hutchinson's letter of termination (Exhibit E-2). He said if she had not withdrawn her services she would not have been terminated. No one ever told him she did not do good work, or did not work at industrial sites, but she was not meeting her obligations. Mr. Bangay did not visit the work sites that were looked at for her.

Regarding a scent-free area, he said there are no written rules on this, so it is open to voluntary solutions.

He added that the employer did all it could to accommodate Ms. Hutchinson, particularly since there is no known cause for her problems. He never spoke to Ms. Hutchinson herself and felt the medical opinions he had received by April 1997 were sufficient. With respect to Dr. MacDonald's letter (Exhibit E-7), Mr. Bangay said:

he tried to find an alternate location for her but failed; asked staff to be scent free; did what he called "green renovations" at Queen Square; used a damp cloth cleaning program; relocated the photocopier; could not give her open office windows; gave her an air cleaner and a respirator; and pursued teleworking.

Witness Bangay said even when she refused to do field work, he did not take action then because he was still trying to figure a way out of the mess for both parties. He allowed time to find a solution and would not have resisted a medical retirement request.

He added on April 21, 1997 if she had been sick in bed she would not have been terminated. However, she exercised two previous work refusals, one dealt with by the PSSRB, the other by the Regional Safety Officer. Even though she still had rights for the third refusal, she had been told if she left work again without reasonable cause, she would be terminated.

Mr. Bangay was not very familiar with the Code and its regulations, nor did he know a lot about their joint Health and Safety committee. He knew they met monthly and minutes were available to all staff. Mr. Bangay said the committee only addressed the scent-free policy. He found the staff survey on health issues interesting and did not dismiss it.

Mr. Newman objected as to the relevance of these questions since he said all I have to decide is whether or not the employer's decision to terminate was or was not retaliation. Mr. Bannister said he was merely trying to offer a broad defence to all the employer's evidence. I allowed some flexibility to Mr. Bannister.

Mr. Bangay said as far as he was aware the complainant's performance reviews were good but: "*she did not report to work and carry out the terms of her employment, and was no longer willing to do her job*". He added even Ms. Hutchinson said her situation was deteriorating and she declined to do field trips on October 25, 1996 (Exhibit E-24). Mr. Bangay did not find her reasons for declining work in Exhibit E-24 very compelling. He added it is the nature of the work the grievor did to be called out in the middle of the night, and agreed that it was possible for her health to improve.

With respect to Ms. Hutchinson being told to work at home in Exhibit E-31 dated March 27, 1997, Mr. Bangay agreed it was an unusual letter, but he had been advised by departmental counsel since the RSO decision was pending, they could see no other way to have her work at the time other than at home or in the field.

Mr. Bangay believed Ms. Hutchinson did not want telework because she would be away from her fellow employees and did not want her work to intrude into her home, even though teleworkers do come into the office. He added being told to work at home in Exhibit E-31 is not telework and that if he was Ms. Hutchinson, Exhibit E-31 was an option he would have seriously considered.

2. Glenn Grandy, a Labour Affairs Officer, Human Resources Development Canada (Labour Program) works interpreting the Code on a daily basis, and was involved in the complainant's refusal to work on April 21, 1997 under section 128 of the Code. He explained an employee who has a problem should first go to his/her supervisor to try to work it out, then call in the safety representative, or call someone like himself. On April 21, Michael de la Ronde called him. Afterwards Mr. Grandy called the complainant who told him she had become congested. Tests were performed in the Queen Square on April 21 and 22 for air quality and no irregularities were found.

Mr. Grandy had never seen anyone terminated for exercising a right to refuse work.

When Mr. Grandy was asked how many times an employee can invoke a right to refuse, Mr. Newman objected that this was asking Mr. Grandy for a legal opinion that was not his function. I agreed.

The witness did say that he has dealt with employees who have invoked a refusal to work more than once on the same issue. To his knowledge none of these persons were ever disciplined.

In other government buildings, he has investigated complaints of dry air, itchy eyes, and that these conditions change from day to day. He found out Ms. Hutchinson had been terminated late on April 21 or 22. He was surprised that someone had been disciplined under the circumstances but he was told that was not the real reason.

During cross-examination, Mr. Grandy said he spoke with some staff about Ms. Hutchinson's discipline. He told Mr. Newman if someone had been disciplined under the Code it would be wrong, and added he took the employer's action in this case to be discipline but said: "*One can be terminated for other reasons"*. He was aware of her other work refusals as well as the RSO and PSSRB decisions, but they had no effect on her latest refusal. He reiterated that no anomalies were found in the tests on April 21 and 22.

Argument for the Employer

Mr. Newman reminded me of his opening comments and argued that the issue before me is not even a proper case to make a complaint in the first place, since Ms. Hutchinson did not have reason to believe a condition existed that would affect her health or safety on April 21, 1997. He admitted however it is a low threshold to cross to file a complaint. Even so, the complainant has not gotten over the low threshold since she was not responding to a bona fide danger before her. He argued she was being obstinate by just not wanting to work, and she ought to have known her situation was not a danger under the Code on April 21, 1997.

He argued Ms. Hutchinson received the RSO decision on her second refusal that overturned Mr. Thibault's decision, and for the third time refused to work. He concluded an employee cannot invoke the Code ad infinitum to stay off work with pay. She was using the Code as a device to shield herself and cannot use it now to say her employer was retaliating.

Mr. Newman agreed that air quality can change from day to day, but it was not reasonable to assume there was a danger on April 21. He said Ms. Hutchinson was playing a game and her complaint should be dismissed. He referred me to *Kasper and Canadian National Railway Company* and *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 257,* (C.L.R.B. file 950-195), 11 December 1992, CLRB 979.

Mr. Newman accepted the burden of proof on the balance of probabilities and asked me to carefully review the facts, especially as written in the complainant's letters, since she displays a bad attitude and had not really performed any duties for

almost a year, even though she is seasonal and does not work January, February or March.

Counsel argued Mr. Bangay was very patient with Ms. Hutchinson by recognizing she had health problems. The employer brought in a voluntary scent-free policy and tried to accommodate her elsewhere but she put up road blocks at every occasion. Nothing seemed to please her. He added accommodation is a two way street, and reminded me she did not even testify and was not prepared to give an inch. Mr. Bangay even went to see Dr. MacDonald. The employer accepted Ms. Hutchinson was ill but she could not continue to stop work and get paid, since no person has the right to indefinite employment without working. He concluded the employer became increasingly desperate since she only confronted and did not cooperate. Mr. Newman reminded me that all three air quality and other tests passed, and that her final work refusal was not because of a danger in the workplace but was within herself since she just did not want to work.

Mr. Bangay was sincere and took a long time to decide what to do, but in the end, it became a futile exercise since Ms. Hutchinson no longer seemed to want to play a role in maintaining her employment.

Mr. Newman referred me to:

Bonfa (P.S.S.R.B. file 160-2-32;

Dragseth v. *Canada (Treasury Board), (F.C.A.), 1991;*

Koller (P.S.S.R.B. file 160-2-27);

Paquet (P.S.S.R.B. file 160-2-25).

Argument for the Complainant

Mr. Bannister agreed that the burden of proof rests with the employer and that paragraph 147(a) is quite explicit.

He also referred to Exhibit E-1, page 2 that could be read as a threat:

> *This is to inform you that you are expected to report for work at your assigned workplace on the 4th floor of Queen Square at 8:00 a.m. on April 21, 1997. Failure to do so may result in the termination of your employment pursuant to Section*

> *11 (2) (g) of the Financial Administration Act which provides for the termination of employment in circumstances that include the incapacity to perform the duties/requirements of an employee's position.*

Mr. Bannister reminded me that the complainant did not have any negative performance reviews, no negative field work reports, no reports that she could not do laboratory work, and alleged problems with hotels/motels were only referred to in some of Ms. Hutchinson's letters that were entered.

He referred me to *Ladouceur* (Board file 166-2-43) that speaks in the decision of a "veiled threat or intimidation" and equated this to the situation before me by the employer. He also referred me to:

> *Nolin and Gauthier* and *VIA Rail Canada Inc.*
> (C.L.R.B. file 950-96), 31 October 1989, CLRB 761;
>
> *Simon, Fontaine and Gélinas* and *Canada Post Corporation*,
> (C.L.R.B. file 950-218), 29 January 1993, CLRB 988;
>
> *Malboeuf* and *Canadian National, Montréal, Quebec,*
> (C.L.R.B. file 950-99), 28 September 1989, CLRB 757;
>
> *Bérubé* and *Canadian National,*
> (C.L.R.B. file 950-167), 12 March 1991, CLRB 858;
>
> *Finley* and *VIA Rail Canada Inc.,*
> (C.L.R.B. file 950-231), 21 July 1992, CLRB 948.

Mr. Bannister argued that a lot of the evidence before me is irrelevant to a Code 133 complaint, and that past health and safety decisions are irrelevant, since when faced with a new work refusal, the employer must respond as Mr. Grandy said.

He reminded me that Exhibit E-9 clearly shows the employer did not want any warehouses to be used to accommodate her, and that Exhibit E-1 threatened Ms. Hutchinson if she did not report to work. She did report on April 21 and her health problems began again so she had reasonable cause to believe that a danger existed for her. In the end, he argued the employer penalized her under section 147 of the Code.

Rebuttal for the Employer

In rebuttal argument, Mr. Newman said there is no suggestion the employer considered Ms. Hutchinson to be a discipline problem or insubordinate, but she certainly was obstinate. He said all the evidence was relevant to show me that it was a slow process to terminate her over a long period of time.

Counsel referred me to the *Kasper* decision (supra) that concluded Mr. Kasper was only shielding himself by invoking the magic words of the Code under section 128, as Ms. Hutchinson is trying to do before me. He also argued all the jurisprudence presented by Mr. Bannister were cases where there was discipline of some kind involved.

He concluded that Queen Square had to be shown to be dangerous and management had no reason to believe the building conditions had changed so it took action. All his evidence is inconsistent with retaliation and asked me to dismiss the complaint.

Decision

Ms. Hutchinson has complained to the Board under section 133 of the Code.

I am being asked to decide if the employer's decision to terminate the grievor for refusing to work on April 21, 1997 under section 128 of the Code, for the third time in nine months, was an act of retaliation under paragraph 147(a) of the Code. The burden of proof rests with the employer under subsection 133(6) of the Code. I believe the employer has met this burden; that is, a contravention of paragraph 147(a) of the Code has not occurred.

Mr. Bannister initially objected at the outset of the hearing that a long historical, picture of the complainant's work history going back to her first work refusal on Friday, August 2, 1996 referred to in the *Hutchinson* decision (supra) was irrelevant. I disagree. As Mr. Newman argued, in order to analyze the employer's decision, it was necessary to outline the efforts the employer made in light of the Code, and the employer's responsibilities under a refusal to work.

The complainant herself in her complaint referred to "a great deal of history to this situation" and also wrote her side of the story was "lavishly documented". In order for the employer to justify what it did when it did it, an historical summary of lavish documentation is inescapable.

In my earlier *Hutchinson* decision (supra), I concluded on page 12:

> *Furthermore, the employer did try to accommodate Ms. Hutchinson by offering her different work locations and teleworking, by renovating the Queen Square in an environmentally friendly manner, by employing her on a seasonal basis, by removing the laser printer from her desk, by having the main photocopier in a separate room and by promoting a scent free work environment with posters.*

Between the time of the above decision issued on September 23, 1996 and April 21, 1997, the complainant also refused to work on October 1, 1996 (Exhibit E-21), the day she had been ordered to return to work by Mr. Kozak, Associate Director, Atlantic Region (Exhibit E-19). This second refusal was upheld by Safety Officer Thibault on November 12, 1996 even though Industrial Hygiene Technologist Robert Reid found after doing indoor air quality tests at Queen Square on October 4, 7, 8, 29, 1996 that

> *... no contaminant or condition examined herein would indicate that for the segments of the building that were included, on the days that they were examined there is nothing in the building's environment that would normally be expected to constitute a danger to employees.*

Mr. Thibault's decision was overruled on April 14, 1997 by the RSO, Mr. Malanka (Exhibit E-33). The complainant's third refusal to work also came on the same day she reported back to work, that is, April 21, 1997.

Mr. Bangay, whom I found to be sincere, credible, and very patient with the complainant, especially in light of his visit with Dr. MacDonald to learn more about the causes, symptoms and possible solutions for individuals with environmental sensitivities, explained the efforts the employer attempted to achieve in order to accommodate the complainant. This included looking at alternate work locations, as well as the suggestion on more than one occasion to start teleworking. The employer through Mr. Bangay was also willing to entertain a request from the complainant to

consider medical retirement. She never made such a request until after she was terminated and did so in passing and with little sincerity in my opinion in a letter dated April 22, 1997 (Exhibit E-35) that reads in part on page 2, paragraph 6: *"... If management feels termination is warranted, then I ask that the route of medical retirement be pursued. Consider this an application from me, if need be."* The employer was also very generous by fully compensating the complainant for the periods she did not work during her seasonal employment.

What we have here is a classic case of abuse of the Code to justify not working and is a frivolous use of her rights under the Code. In one of the complainant's letters in October 1996 (Exhibit E-23), her insensitive reference to the Westray mine disaster, is in my mind indicative of an employee who is out of touch with reality, who is behaving in a disturbing fashion, and who was looking for someone or something to blame for not working.

As early as October 25, 1996 when the complainant wrote André Gauthier, an A/Manager, she indicated an unwillingness to go back to Queen Square, and to even prepare for field trips when she wrote "I respectfully decline any assignments".

Even though Dr. Kirkbride said in his second letter dated October 25, 1996 (Exhibit E-25) that exposure to Queen Square aggravated her existing medical condition, the complainant was not willing to try telework until her medical condition improved. I can understand this, but her obstinacy made what should be a two way street of accommodation, very difficult for her employer to deal with. Her offer to pay the rent of an office was unacceptable to the employer. In the end, she was simply not willing to work, and used the Code as a frivolous crutch to not work. Her suggestion in February 1997 to tow a trailer behind her car while on road trips in order to avoid staying in some motels/hotels that may have affected her health, bordered on the need for exaggerated attention.

Mr. Bangay made it clear that the complainant was not terminated because of bad work, but because for the third time she refused to meet her obligations of the terms of her employment and "was no longer willing to do her job" on April 21, 1997.

It is interesting to note that no irregularities or anomalies were found after air quality tests were done at Queen Square on April 21 and 22, 1997.

In my *Hutchinson* decision (supra), I referred to *Cross and Pike* (Board file 165-2-82) and adjudicator Young's reference to the Code:

> *... Such exercise of rights under the Canada Labour Code ought to be done with care, however, and in the certainty that they are justified, not simply used as a means of job action or as an expression of discontent. Frivolous usage of these rights can only serve to dilute and weaken the effectiveness and importance of the legislation. It may well bring this hard earned protection into disrepute.*

As in the *Kasper* decision (supra), Ms. Hutchinson is simply using the Code as a shield to not work, and by uttering the magic words under section 128 of the Code to make her immune from meeting her obligations, has brought this section into disrepute. In fact, I would say under all the circumstances, her refusal amounts to an act of misconduct.

There is absolutely no evidence before me that the employer's action to terminate as a result of a work refusal was retaliatory. Unlike *Ladouceur* (supra), I do not believe the employer issued a "veiled threat or intimidation" towards the complainant. It simply wanted her to perform her duties and expected her to do this. Also, unlike in *Simon* (supra), (page 11), the employer did not "short-circuit the whole system by immediately disciplining the refusing employee". It did everything it could during many months to accommodate Ms. Hutchinson.

For all these reasons, I find that the complaint must fail since the employer did not breach paragraph 147(a) of the Code by allegedly retaliating against Ms. Hutchinson. Her abuse of subsection 128(1) of the Code simply led her employer to the inexorable, inescapable conclusion that she had no intention of meeting the requirements of her position.

J. Barry Turner,
Board Member.

OTTAWA, January 14, 1998.