Date: 20071113

File: 560-02-35

Citation: **2007 PSLRB 110**

Canada Labour Code

Before the Public Service
Labour Relations Board

BETWEEN

PAUL ALEXANDER

Complainant

and

TREASURY BOARD
(Department of Health)

Respondent

Indexed as
Alexander v. Treasury Board (Department of Health)

In the matter of a complaint made under section 133 of the *Canada Labour Code*

REASONS FOR DECISION

Before: Michele A. Pineau, Vice-Chairperson

For the Complainant: Himself

For the Respondent: Jennifer Lewis, counsel

Decided on the basis of written submissions
dated between March 20 and July 11, 2007.

I. Complaint before the Board

[1] The complainant, Paul Alexander, is a drug inspector for Health Canada ("the respondent") in the Ontario Region Health Products and Food Program.

[2] On March 23, 2007, the complainant filed a complaint with the Public Service Labour Relations Board ("the Board") alleging discriminatory practices, disciplinary action and unfair labour practices founded on a violation of sections 128, 133, 134 and 147 of Part II of the *Canada Labour Code* ("the *Code*"). The complainant alleges that reprisals occurred against him because he exercised his rights "relating to workplace health and safety".

[3] On April 16, 2007, the complainant sent an email to the Board requesting that it issue an interim order reinstating his salary until his case is decided. The complainant cites serious financial consequences from his case, his inability to provide for his children and the desperation with which he turns to the Board over his situation.

[4] The respondent objected to the request for salary, given that the complainant has refused previous work assignments. The respondent states that on November 11, 2006, the complainant refused an assignment at the ES-04 level as Regional Planning Coordinator because he had to "deal with some issues regarding [his] current position". On December 7, 2006, he declined an acting SG-04 in the Establishment License Unit Health Products and Food Branch in Ottawa because he could not arrange for child-care for his children during his trips to Ottawa. On April 24, 2007, he declined a three-month assignment in an ES-04 position in the Ontario Regional Office for medical reasons.

[5] The respondent further argues that the complainant never invoked the right to refuse dangerous work under section 128 of the *Code* and that, therefore, he cannot allege that a reprisal took place and cannot request salary during a work stoppage. The respondent has therefore requested the dismissal of the complaint and the request for salary on this basis.

II. Written submissions

[6] It is unclear how long the complainant has served in his current position, but it seems that he has had problems with his manager for quite some time. The apparent basis for his complaint concerns allegations of racist and discriminatory treatment by his manager. The complainant has repeatedly refused to provide details to the

respondent about the specifics of the alleged mistreatment. He claims that the respondent's mistreatment results in an "unsafe" and "toxic" work environment, adding that his career has been maligned and his reputation damaged as a result. In his submissions, the complainant states that on December 22, 2006, he provided a medical certificate to the respondent that supports his position that remaining at work would compromise his health and safety. In its submissions, the respondent did not object to the complainant's characterization of this letter.

[7] The complainant has not reported to work since that date. Between December 22, 2006, and March 12, 2007, the complainant was on some form of paid leave.

[8] On January 19, 2007, the complainant wrote an email to the respondent's regional director, Karolyn Lui, stating that he felt "unsafe":

> *I simply cannot work in a reporting relationship given the information I have re the A/operational manager. It is very distressing the efforts made to damage me. I feel very unsafe at times given the pre-occupation and obsession with me and I need some relief that at least, my daily work and efforts will not be targeted. My doctor advised that I should not return until my matters are resolved satisfactorily, and all matters. Yet I am trying today for I really felt that given the December communication, that you would have looked at this, and I am very troubled, mentally anguished, and demoralized. . . .*

[9] When the respondent asked for clarification, the complainant replied by email on January 29, 2007, as follows:

> *. . . Unsafe means just that . . . I have been targeted, my career maligned, my reputation damaged, racist remarks spoken to me, discriminatory actions undertaken by several, and information I have demonstrates it clearly. As I wrote to you several times, and discussed with the prior A/RD when you were off, I felt unsafe, uneasy, watched, and I cannot at this time, given the sensitivities, and possible legal implications, go further. It is my sense and I do fear at times, for my safety, given all the information I have.*
>
> *Furthermore, I only wrote to you with my request to be placed elsewhere given my safety and ill-health since you were the RD and I have been subjected to terrible acts for 19 months now . . . .*
>
> . . .

[10] On February 2, 2007, the complainant's psychiatrist wrote to the respondent stating that while the complainant could continue working, the respondent should accommodate him with a temporary transfer. The respondent sought clarification on the accommodation measures and was referred back to the complainant. The respondent tried unsuccessfully through various means to obtain the information it felt was required to properly accommodate the complainant.

[11] On February 26, 2007, the respondent met with the complainant to discuss his return to work. The complainant was unwilling to provide any further information about feeling "unsafe." He referred to general conflicts in the workplace without further detail and without specifying any other circumstances.

[12] On March 7, 2007, Anthony Sangster, Regional Director General, Health Canada, emailed the complainant informing him that all of his leave credits would be exhausted on March 12, 2007, and that he would be considered as being on leave without pay after that date. As a consequence, his building access was suspended. The complainant describes these actions as a "lock out." He has been on administrative leave without pay since March 12, 2007.

[13] The complainant has informed the respondent numerous times that he would not consent to a medical assessment of his health, allegedly because of "Treasury Board rules" and instructions from his bargaining agent.

[14] The complainant claims to have received advice from a Public Service Staffing Tribunal representative that he may have a claim under the *Code* for refusing to work in unsafe conditions as a result of his alleged mistreatment by the respondent's manager and that the Board has jurisdiction to hear such a complaint. As a result of this advice, the complainant filed the present complaint.

[15] On June 4, 2007, I held a pre-hearing teleconference with the complainant and the respondent's representatives to hear their submissions on my jurisdiction to decide the complainant's request for an interim order for reinstatement of his salary until the Board disposes of his complaint. After hearing the parties' submissions, I requested that they present written submissions on the merits of the interim order request as well as on the merits of the complaint. More specifically, I asked the parties to address the issue of whether the complainant had invoked section 128 of the *Code* at the time he began his leave of absence.

[16] The complainant has since then sent emails almost daily to the Board's Registrar and Case Management Officer in an attempt to bolster his complaint. With respect to the request for written submissions, the complainant made formal submissions on June 5, 6, 15 and 21, twice on June 19 and twice on July 9, 2007. On July 9, 2007, the complainant was instructed to cease corresponding with the Board until a decision had been rendered with respect to his complaint. Nevertheless, since July 9, 2007, the complainant has relentlessly continued to send emails to the Board and has copied it on emails relating to complaints in proceedings not before this Board.

[17] On June 22, 2007, the complainant's psychiatrist advised Mr. Sangster, the respondent's regional director general, that the complainant was fit to return to work on July 12, 2007, "as part of his rehabilitation plan", without reservations. On July 12, 2007, the psychiatrist revised his position about the complainant's fitness for work and reiterated two recommendations made in two previous letters, that is, that there be a change of current reporting relationship either directly or indirectly and that the complainant not be required to work in the current stressful environment.

[18] Following an exchange of emails with the complainant, Mr. Sangster stated that in view of the psychiatrist's revised assessment, a full review of the complainant's needs and concerns had to be addressed by the respondent's medical officers, and should the complainant decline an assessment, he would remain on leave without pay until the required information was provided and considered. The complainant has apparently chosen not to undergo a medical assessment.

III. Summary of the arguments

[19] As the merits of the complaint have been considered along with the respondent's objection with respect to the Board's jurisdiction to make an interim order for salary, the arguments are summarized in the order they were received.

A. Complainant's arguments

[20] The complainant argues that he has been the target of racist and discriminatory treatment by his manager and that the respondent has received many similar complaints, citing a statistic that 40% of employees in his region fear reprisals if they report a safety hazard. He assures the Board that he can back up all of his claims with "paper work." He believes this mistreatment constituted a danger to his health and/or

safety. The complainant states that he has declined making accusations in his correspondence with the Board, based on what he considers to be confidentiality and privacy concerns.

[21] The complainant claims that by staying out of the workplace, he has invoked his rights under subsection 128(1) of the *Code*, which allows an employee to refuse to work if the employee has reasonable cause to believe that a condition exists in the workplace that constitutes a danger to him or her. The complainant also claims that the employer has been well aware of that fact.

[22] The complainant argues that there is no requirement in the *Code* that the employee inform the employer using the exact words of section 128. He further argues that his "lock out" constitutes a reprisal for reporting the manager's racist treatment. He alleges that the respondent wishes to silence the voice of workers who are subjected to such mistreatment. The complainant sets out these arguments as follows:

> *Now, with respect to me informing the employer that I was invoking Section 128 of the Canada Labour Code, I have read this Code and do not see it written anywhere that the employee must inform the employer that he/she is invoking section 128 in these exact words or in writing. To state to the employer "I am invoking Section 128" presupposes an assumption that the employer will do something wrong and that there will be violations to the Code. In reality, what happens is that once an employee has extreme punitive actions taken against him/her, in my case this was the lock out and pay cut off on March 12, 2007, it is then that the employee starts researching the rules/laws/regulations in place and discovers all the violations that the employer has conducted. There was no way for me to know in advance which section(s) of the Labour Code or other Acts to invoke prior to even knowing that management* [*sic*] *actions were wrong and illegal. Only after the actions were carried out by the employer and my researching of applicable laws did I realize the contents of the Canada Labour Code and the violations that took place.*
>
> [Emphasis added]

[23] He further states that:

> *While I did invoke section 128, and conveyed this in my terminology, while not knowing that these managers were violating the Code. They knew they were doing something wrong but they did not know the extent of their violation as it*

> *pertained to the Labour law and the illegal abuse of the medical assessment. . .*
>
> [*Sic* throughout]
>
> [Emphasis added]

[24] Finally, the complainant argues that he should be protected from reprisal for invoking subsection 128(1) of the *Code*, by virtue of section 147, which prohibits an employer from penalizing an employee for acting in accordance with any provision of Part II of the *Code*.

B. Respondent's arguments

[25] The respondent submits that the complainant never exercised a right under section 128 of the *Code* nor demonstrated that the work environment is dangerous. The respondent submits that the complainant has not been disciplined but continues to be unable to perform the duties of his position for medical reasons. He has exhausted all of his leave credits and is in a "no work, no pay" situation. Section 133 of the *Code* applies only following a determination by the Board that an employer has contravened section 147.

[26] As a goodwill gesture, the respondent agreed to temporarily move the complainant to another position if he accepted a fitness-to-work assessment. The complainant has refused to cooperate with the respondent's requests for a medical assessment.

[27] The respondent further argues that even if the complainant's manager treated him in a discriminatory manner, and even if this treatment resulted in a danger under section 128 of the *Code*, an employee is required to bring the danger to his employer's attention at the earliest possible moment so that it can be properly investigated, which the complainant omitted to do.

[28] The respondent submits that the complainant's refusal to return to work and his emails regarding the alleged discriminatory treatment were insufficient to alert management to the "danger" at his workplace and argues that more information is required. The respondent argues that the complainant has failed to meet the standard set in *Sheila Green* (1992), 90 di 186, and *Bruno Paquin* (1991), 86 di 82, whereby an

employee must make it sufficiently clear that he or she is refusing to work based on a perceived danger in order to complain of reprisal under the *Code*.

[29] The respondent further points out that the complainant has not provided any specific example of racist or discriminatory treatment to support his claim but has only referred to general conflicts in the workplace.

IV. Reasons

[30] The relevant sections of Part II of the *Code* are the following:

> ***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*
>
> . . .
>
> (b) *a condition exists in the place that constitutes a danger to the employee; or . . . .*
>
> . . .
>
> *(6) An employee who refuses to . . . work in a place or perform an activity under subsection (1) . . . shall report the circumstances of the matter to the employer without delay.*
>
> . . .
>
> *(8) If the employer agrees that a danger exists, the employer shall take immediate action to protect employees from the danger. . . .*
>
> *(9) If the matter is not resolved under subsection (8), the employer may, if otherwise entitled to under this section, continue the refusal and the employee shall without delay report the circumstances of the matter to the employer . . . .*
>
> . . .
>
> ***133.(3)*** *A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.*

> ***147.*** *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee*
>
> . . .
>
> (c) *has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*
>
> [Emphasis added]

[31] Furthermore subsection 133(6) of the *Code* provides for a reversal in the burden of proof with respect to complaints under section 128:

> ***133.(6)*** *A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.*

[32] However, before the reversal of the burden can occur, it is necessary to determine whether or not the requirements of section 133(3) were met, that is, whether the complainant can demonstrate that he complied with subsection 128(6), which is the employee's obligation to report the refusal to work to the employer. To invoke subsection 128(6), a complainant must first demonstrate that a) he had reasonable cause to believe in the existence of a danger at the time he refused to work; and b) he communicated to the employer that the workplace hazard existed.

A. <u>The existence of a danger</u>

[33] When others can observe the alleged danger in the workplace, there is no great difficulty in demonstrating that a danger may exist. However, if the danger is an individual experience, arbitrators have insisted that the employee must have solid evidence that can lead other reasonable individuals, examining the same circumstances, to conclude that the danger is indeed real. This is called an objective test. (See Palmer and Palmer in *Collective Agreement Arbitration in Canada*, 3rd Edition, at para. 7.17).

[34] While employees may be mistaken in their assessment of a danger, they must be able to satisfy the Board that they genuinely believed the danger existed at the time of their refusal to work, so that the Board may in turn be satisfied that there was indeed reasonable cause for the refusal. The right of refusal cannot be used as a roundabout way of raising other labour relations problems (see *Jocelyn Simon et al. v. Canada Post Corporation* (1993), 91 di 1).

[35] Furthermore, where an employee refuses to perform work on medical grounds, which is the case here, it is incumbent upon that employee to satisfy his or her employer with documentary evidence from a physician that the work is a health hazard (see *United Automobile Workers, Local 636 v. F.M.C. of Canada Ltd., Link-Belt Speeder Division* (1971), 23 L.A.C. 234). In other words, the employee has the onus of producing the medical evidence that supports his or her claim that there is indeed a danger.

[36] In this case, the complainant has steadfastly refused to provide medical evidence of his health and to undergo a medical exam by the respondent's physicians. Moreover, he has presented the respondent with conflicting information about his fitness to work. The only known fact about his medical condition is he is under the care of a psychiatrist.

[37] A concrete example of conflicting information is the complainant's latest decision not to return to work. His psychiatrist declared him fit to return on July 12, 2007, thus, he obtained permission to return to his former position without medical restrictions. After that he submitted another medical certificate stating that he could return to work, but only with restrictions. When the employer requested once more that his health concerns be reviewed by medical officers of the Workplace Health and Safety Program, the complainant declined to return to work. The repeated refusal to undergo an independent health assessment along with the lack of precise medical information and the complainant's refusal to accept alternate work assignments strike me as behaviour inconsistent with a claim of refusal to work based on a hazardous workplace as intended by section 128 of the *Code* and is more consistent with his disagreement with being requested to undergo independent health assessment.

B. Communicating the existence of a danger in the workplace

[38] The *Code* does not describe either a formal process or the exact words to use when communicating the existence of danger in the workplace to justify the refusal to perform unsafe work. Nonetheless, an employee must invoke the safety concern with sufficient clarity to alert the employer and to trigger the mechanism set out in the *Code* to investigate the employee's concerns and, where necessary, the steps to take to address those concerns.

[39] In *David Pratt* (1988), 73 di 218, 1 CLRBR (2d) 310 (CLRB no. 686), the Canada Labour Relations Board (as it was then named), stated that Part II of the *Code* is designed to ensure that the health and safety of employees is never compromised. While an employee's apprehension of danger may at times be unfounded, to the extent that this fear leads him or her to exercise this or her right of refusal in good faith, then that right is fully protected by the *Code*. This perception, however, must at the very least be clearly conveyed at the time that right is exercised.

[40] *Green* and *Paquin* emphasize that although no formal process exists and there are no "ritualistic words" to express a work refusal, the employee must make it sufficiently clear that he or she is refusing to work on the basis of a perceived danger (see also *Simon*).

[41] In Palmer and Palmer, at para. 7.19, the authors state that the refusal to work must be communicated "in a reasonable and adequate manner:"

. . .

> *The final requirement in this area is that the grievor must, at the time of the refusal, communicate the reasons for such refusal to his employer "in a reasonable and adequate manner"* [reference omitted]. *The justification for this is, of course, that unless employers know of the reasons for the refusal they cannot examine the question of danger to determine its existence or to attempt to put the grievor's mind to rest if, in fact, there is no danger. . . .*

. . .

[42] To the requirement of clear communication of the existence of a danger in the workplace I would add that there must be some nexus between the employee's decision to refuse to work and the time the danger is communicated to the employer.

Subsection 128(6) of the *Code* states that the danger must be communicated "without delay". It is trite law that at the time an employee exercises his right to refuse to work, he must be aware that he is exercising rights under the *Code*.

[43] Therefore, to sustain this complaint, I must be convinced that the complainant gave clear notice to the respondent of an existing danger in the workplace at the time he decided to absent himself from the workplace, that he did so without delay and that he was aware that he was exercising the right of refusal as provided by the *Code*.

[44] The crux of the complainant's case is that his manager's racist and discriminatory treatment caused him to cease working. The complainant does not specify what the manager's actions were; rather, he submits that he is unwilling to provide this information because of confidentiality and privacy concerns. His claims that the employer's mistreatment results in an "unsafe" and "toxic" work environment, that his career has been maligned and that his reputation was damaged are devoid of particulars. The complainant backs up his claim with an unproven statistic that in his region, 40% of employees fear reprisals if they report a safety hazard. The statistic comes from a survey unrelated to this complaint. It is unclear how other employees' perceptions of the workplace relate to his claim that he invoked section 128 of the *Code* when he removed himself from the workplace. In any event, mere allegations do not constitute proof on a balance of probabilities that the complainant was the victim of reprisal.

[45] In *Lewchuk v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2001 PSSRB 76, the Board was quite explicit in stating that an employee must give an explanation for a refusal to work based on Part II of the *Code*. In that case, the grievor was suspended for failing to follow an order from her superior to provide treatment to an inmate. She claimed that she refused to comply because she feared for her safety; however, she did not advise the unit manager at the time of her refusal. The adjudicator reasoned that if the grievor was genuinely concerned about her safety, it would have been reasonable for her to engage in a discussion with her supervisor and to convey her concerns.

[46] In this case, there is no evidence that the complainant was concerned about his safety in the sense intended by the *Code* when he did not report to work after December 22, 2006, or that he raised such a concern with his supervisor at that time. The correspondence between the parties shows that the complainant did not raise the

issue of feeling "unsafe" until January 19, 2007. In the exchange of emails with the respondent, he makes no reference to section 128 of the *Code*, nor does he make a statement that equates with a refusal to work because of a hazardous workplace situation. The concerns voiced by the respondent on January 19, 2007, focus on an ongoing workplace situation that had, at that point, gone on for 19 months.

[47] I am more persuaded that the complainant's allegation of reprisal for having invoked a right of refusal followed the advice he received about the Board's jurisdiction to hear complaints based on the occupational health and safety provisions of the *Code*. These observations lead me to conclude that the complainant was either quite unaware that he had such rights or that such rights might apply to him in his present situation until well after he left the workplace. He only raised the issue of the *Code* with the respondent some time in March 2007, after he had left work, after the respondent asked for medical evidence and after the respondent put him on leave without pay. As well, the complainant's correspondence with the Board indicates that this complaint is but one of many recourses that he has undertaken and but another way of raising other labour relations problems relating to his frustration with the workplace.

[48] As explained earlier, the complainant bears the onus of establishing that he invoked section 128 of the *Code* at the time he took his leave of absence. Even though he was provided with further opportunity as a result of the teleconference held on June 4, 2007, to explain the circumstances under which he invoked his right of refusal, the time, the date and the person to whom he communicated the existence of a danger in the workplace remain unknown and the foundation for a complaint under the *Code* remain obscure. The complainant's voluminous correspondence to the Board is replete with generalities, negative observations about the workplace and broad accusations directed at the respondent about being given false and misleading information, but are unfortunately short on facts that demonstrate a refusal to work as set out in the *Code*.

[49] The lack of precision in the complainant's allegations and an absence of particulars concerning the events that led to his decision not to report to work, lead me to conclude that he did not communicate or intend to communicate any concern about the workplace being dangerous, hazardous or a threat to his well-being in the sense intended by the *Code* until his complaint was filed. I do not see a nexus between the complainant's decision not to report to work on December 22, 2006, and the few

facts set out in this complaint alleging reprisal on the part of the respondent. The complainant did not convince me that he was invoking section 128 of the *Code* at the time he filed his medical certificate on December 22, 2006.

[50] There are two further reasons why I am further convinced that there was no intention to invoke section 128 of the *Code* at the time the complainant decided to leave the workplace. First of all, the complainant makes frequent reference in his correspondence to having been "locked out" by the respondent. A lock-out is a term that refers to a suspension of work or a refusal to continue to employ initiated by the employer to induce an employee to agree to terms and conditions of employment. This term does not connote the existence of a danger or a hazard related to the workplace. Moreover, the complainant's position that he was locked out contradicts his allegations of reprisal by the respondent. Reprisal in the sense intended by the *Code* refers to the employer's conduct after the employee's decision to exercise his right to refuse work because of alleged hazardous conditions, that is, the employer's decision to discipline an employee for having exercised his rights. By stating that the respondent locked him out, the complainant is alleging that the employer provoked his departure from the workplace and has taken the means to keep him out. Such a position is inconsistent with the complainant leaving the workplace as a result of a refusal to work in hazardous conditions.

[51] Secondly, the complainant states in one of his communications quoted earlier in these reasons that he initiated a complaint only after becoming aware of the provisions of the *Code* and after realizing that the respondent's actions may have violated its provisions. The complainant further states that he first wrote to the Public Service Staffing Tribunal and was told to come to the Board and: "*It was then that I started to read about the Canada Labour Code . . . .*" This discovery was after March 12, 2007. These statements leave no doubt that at the time he left work, the complainant was not invoking his right of refusal under the *Code*. Rather, this intention came after he discovered the existence of other recourses.

[52] Overall, the complainant's steadfast refusal to return to work other than on his own terms, his belief that the employer initiated his removal from the workplace and his tardiness in raising the allegation of reprisal for having exercised his right of refusal under the *Code* have served to convince me that this complaint is not about the

exercise of a right of refusal under the *Code*, but as merely another way of addressing ongoing workplace issues.

[53] Since the complainant has not convinced me that he complied with subsection 128(6) of the *Code*, his refusal to attend work cannot be described as a right of refusal as set out in the *Code*. As a consequence, the reverse burden of proof does not apply to this complaint and the complainant has not discharged his burden of demonstrating that he complied with subsection 128(6), which is the employee's obligation to report the refusal to work to his employer.

[54] Accordingly, the complaint as it relates to sections 128, 133 and 147 of the *Code* must be dismissed for lack of evidence.

C. Interim order for salary

[55] The complainant requested that I issue an interim order that his salary be reinstated until his case is decided. Given that the complaint is dismissed for lack of evidence, his request for the reinstatement of salary is moot.

[56] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[57] The complaint is dismissed.

November 13, 2007

Michele A. Pineau,
Vice-Chairperson