Date: 20080103

File: 560-02-20

Citation: 2008 PSLRB 1

Canada Labour Code

Before the Public Service Labour Relations Board

BETWEEN

CARMEN SAUMIER

Complainant

and

TREASURY BOARD
(Royal Canadian Mounted Police)

Respondent

Indexed as
Saumier v. Treasury Board (Royal Canadian Mounted Police)

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

REASONS FOR DECISION

Before: Léo-Paul Guindon, Board Member

For the Complainant: James R.K. Duggan, counsel

For the Respondent: Raymond Piché, counsel and Nadia Hudon, counsel

Heard at Montréal, Quebec,
October 16 to 20, 2006 and February 20 to 23 and March 19 to 23 and 28, 2007.
(P.S.L.R.B. Translation)

I. Complaint before the Board

[1] Carmen Saumier ("the complainant") was a constable in the Airport Federal Investigation Section (AFIS), C Division, Royal Canadian Mounted Police (RCMP), when she filed a complaint dated December 20, 2005 with the Public Service Labour Relations Board ("the Board") under section 133 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("the *Code*"), alleging the following:

> [Translation]
>
> . . .
>
> *The employer violated section 147 of the* Code *by threatening to take disciplinary action when the complainant exercised her right of refusal under section 128, as set out in the attached appendix.*
>
> . . .

[2] The complainant describes the circumstances of her complaint as follows:

> [Translation]
>
> ***Ms. Carmen SAUMIER***
>
> *Complaint filed under section 133 of the* Canada Labour Code
> *APPENDIX 1*
>
> 1. *The complainant is a regular member of the Royal Canadian Mounted Police, with the rank of constable.*
>
> 2. *On September 22, 2005, the complainant, who is on sick leave, received an order to report to work, and she exercised her right to refuse under section 128 of the* Canada Labour Code *("the* Code*"), claiming that returning to work would present a danger to her health.*
>
> 3. *On September 23, 2005, S/Sgt. Gaétan Delisle, who is the complainant's divisional representative, contacted her immediate supervisor, Inspector J.R.A. Lemyre, and requested that the complainant's forced return to work be "put on hold until her complaint was resolved" and offered to meet with him on September 26 to attempt to resolve the situation.*
>
> 4. *On September 26, 2005, Inspector Lemyre sent an email S/Sgt. Delisle in which he stated that the complainant had to report to work to exercise her right to refuse to work.*

5. *On September 27, 2005, the complainant, accompanied by S/Sgt. Delisle, reported to work and once again exercised her right to refuse.*

6. *On September 29, 2005, Inspector Lemyre sent a memo to the complainant in which he reiterated his return-to-work order and threatened disciplinary action if the complainant continued to refuse.*

7. *On October 14, 2005, S/Sgt. Delisle sent an email about the complainant to Superintendent Roger Brown, Director of Human Resources, Central Region, Royal Canadian Mounted Police; on November 1, 2005, S/Sgt. Delisle sent him a reminder, which remained unanswered.*

8. *On November 1, 2005, S/Sgt. Delisle asked Inspector Lemyre to send him the results of the investigation that the local Health and Safety Committee was to do.*

9. *On December 6, 2005, Inspector Lemyre sent a memo to S/Sgt. Delisle contesting the complainant's right to refuse to work. In his note, Inspector Lemyre alleges that the complainant "among other things contravened subsection 128.1(3)" and also:*

   "However, the facts and Constable Saumier's condition indicate that this is a medical issue and that it would be premature to consider the provisions of the Canada Labour Code*."*

10. *Nonetheless, on December 14, 2005, Inspector Lemyre issued another return-to-work order, threatening disciplinary action against the complainant if she did not report to work.*

11. *The complainant clearly indicated that she based her refusal to return to work on the danger to her health that reporting to work while sick would entail, because it would aggravate her condition.*

12. *For its part, the employer did not wish to suspend its return-to-work order nor to attempt to resolve the situation in any other way; instead, it chose to repeatedly threaten disciplinary action against the complainant if she failed to obey the return-to-work order.*

***THEREFORE**, the complainant requests that the Board:*

***ORDER** an investigation into her complaint;*

***ALLOW** her complaint;*

> ***ORDER*** *the employer to cease contravening the* Canada Labour Code*;*
>
> ***ORDER*** *the employer not to take any disciplinary action or any other reprisal against the complainant; and*
>
> ***ISSUE*** *any other order that is appropriate under the circumstances.*
>
> . . .

[3] The Treasury Board ("the respondent"), in its May 25, 2006 correspondence to the Board, submitted that this complaint is inadmissible:

> [Translation]
>
> . . .
>
> *We wish to inform the Board that the employer intends to contest the admissibility of the complaint that Ms. Saumier filed with the Board under section 133 of Part II of the* Canada Labour Code *("the* Code*").*
>
> *The employer deems that this complaint is inadmissible because Ms. Saumier did not follow the procedure for refusing to work under subsection 128(6) and under the subsections that follow of the* Code.
>
> *In that regard, Ms. Saumier did not provide her employer with reasons that would explain why she believed that performing her tasks constituted a danger to her.*
>
> *When Ms. Saumier invoked subsection 128(1) of the* Code*, she was not performing her tasks and, furthermore, she had never done so because she had been absent from her work on sick leave for several months.*
>
> *Moreover, Ms. Saumier did not maintain her refusal to work because she left her workplace before her employer could begin its investigation into the existence or otherwise of a danger to her. She did not remain at her employer's disposal and left her workplace without authorization.*
>
> *Finally, Ms. Saumier never presented to her employer the detailed report required under subsection 128(9) of the* Code*, which meant that the occupational health and safety officer of the Department of Labour was unable to play the role required under section 129 of the* Code.
>
> *From the moment Ms. Saumier — who, incidentally, has not worked for several years — reported to work merely to*

> *submit a refusal to work and then decided to return home without providing any further explanation to her employer, her employer is entitled to assert that her refusal to work is nothing more than a mockery that has not provided and cannot provide the legal results that she seeks with her complaint.*
>
> *Moreover, the employer intends to demonstrate that Ms. Saumier did not have any reasonable cause for believing that the situations indicated in subsection 128(1) of the* Code *presented a danger to her.*
>
> *Consequently, the employer deems that in this case, the reversal of the burden of proof stipulated in subsection 133(3) of the* Code *does not apply and that it is up to Ms. Saumier to establish, from the start of the hearing, that her refusal to work complies with the* Code.
>
> . . .

[4] The Board notified the parties that the objection to the complaint's admissibility would have to be raised before the Board Member at the start of the hearing. The hearing started on October 16, 2006, because the parties were not available before that date.

[5] At the start of the hearing, the respondent once again raised its objection to the admissibility of the complaint. In addition to the reasons provided in its correspondence of May 25, 2006, the respondent indicated that the complainant had not formulated her refusal to work in accordance with Part II of the *Code*. The return-to-work order cannot constitute a threat of disciplinary action under the *Code* because it precedes the complainant's refusal to return to work. Consequently, the respondent cannot have committed reprisals further to the complainant's refusal to work. Under section 147 of the *Code*, the complainant must demonstrate that further to her refusal to work, the respondent threatened her with disciplinary action.

[6] The respondent added that for the reversal of the burden of proof under subsection 133(6) of the *Code* to apply, the complainant had to first demonstrate that she exercised her right to refuse to work in accordance with the procedure provided under Part II of the *Code*. To support its arguments, the respondent submitted the following decisions, which state that it is up to the complainant to demonstrate that he or she exercised the right to refuse to work in accordance with section 128 of the *Code*: *Brisson v. Via Rail Canada Inc.*, [2004] CIRB No. 273; *Buchholz v. Canadian Pacific*

Railway Company, [2005] CIRB No. 331; *Chaves v. Treasury Board (Correctional Service Canada),* 2005 PSLRB 45; and *Boivin v. Canada Customs and Revenue Agency*, 2003 PSSRB 94.

[7] The complainant requested that the respondent's objection be taken under reserve and indicated that she agreed to present her evidence first. She maintained that she had exercised her right to refuse to work in accordance with the *Code*.

[8] According to the complainant, the RCMP was informed of her state of health when it attempted to force her to return to work against the instructions of her treating physician. According to the allegations outlined in the appendix to the complaint, the RCMP apparently threatened the complainant with disciplinary action following her refusal to return to work. The complainant had indicated her refusal to return to work under the provisions of subsection 128(6) of the *Code*, and it was up to the respondent to then proceed with an investigation. *Chaves* and *Kinhnicki and Dupuis v. Canada Customs and Revenue Agency*, 2003 PSSRB 52, support that argument.

[9] In response, the respondent argued that the complainant cannot contest the decision to refuse her medical leave by refusing to work based on section 128 of the *Code*.

[10] The objection was taken under reserve, and the parties submitted their evidence.

II. Summary of the evidence

[11] The complainant has worked for the RCMP since 1987. She was working as an anti-smuggling investigator in the Customs and Excise Section of C Division in Valleyfield when she had a work-related accident on December 14, 1993. The unmarked car in which she was a passenger was struck head-on by a van driven by smugglers attempting to escape (Exhibit P-3). The complainant was thrown against the windshield and suffered a concussion. She was off work until May 1994 due to memory and vision problems and headaches. The memory problems persisted for at least one year after she returned to work. Because of problems with fatigue and generalized chronic pain, Dr. Jiri Krasny, a rheumatologist, diagnosed her with fibromyalgia in November 1997 (Exhibit E-11). According to the complainant, the fibromyalgia resulted from the trauma suffered in the 1993 accident.

[12] On March 27, 1998, the complainant notified her supervisor that she had medical limitations; she could not work more than eight hours per day from Monday to Friday. From that point, the complainant was restricted to light work (Exhibit E-13). She underwent physiotherapy two to three times per week in 1998. At that time, she complained that she was always tired, and she underwent therapy with Dr. Luisa Cameli, a psychologist, for anxiety and depression. The complainant was assigned to an investigation position at Pierre Elliott Trudeau Airport in December 1999, and her duties often required her to work many consecutive hours. In January 2003, the complainant was receiving two massage therapy treatments and two physiotherapy treatments per week (Exhibit E-16).

[13] Following the December 14, 1993 accident, the complainant was diagnosed with a post-traumatic fibrillar degeneration of the vitreous body of her left eye after an examination on February 9, 1994 by Dr. H. Hammami, an ophthalmologist. On February 26, 2001, Dr. Jean-Paul Demers, also an ophthalmologist, found that the complainant's ophthalmologic assessment was within normal limits (Exhibit P-39). In October 2001, Dr. Catherine Dumont, a neuropsychologist, attributed the complainant's mild cognitive disabilities to a mild cranial trauma suffered in December 1993 (Exhibit E-27). On February 20, 2002, Dr. Hammami indicated that he disagreed with Ms. Dumont's finding. He determined that the complainant had suffered a fracture at the base of the skull in December 1993, which resulted in the fibrillar degeneration, headaches, loss of memory and concentration and accounted for the appearance of fibromyalgia (Exhibit P-37).

[14] In his testimony, Dr. Mitchell S. Pantel, Medical Officer, Occupational Health and Safety, C Division, RCMP, indicated that he disagreed with Dr. Hammami's findings, which appear to be based on photographs taken following the December 1993 accident (Exhibit P-4). According to Dr. Pantel, the magnetic resonance imaging and cerebral tomography tests do not show a fracture at the base of the skull. Moreover, Dr. Pantel indicates that the rheumatologists and psychologists who examined the complainant do not conclude that the fibromyalgia is of post-traumatic origin.

[15] At the RCMP's request, Dr. Sylvain Louis Lafontaine, a psychiatrist, examined the complainant on July 8, 2003. Dr. Lafontaine found that the complainant suffered from an adjustment disorder with anxiety, from fibromyalgia and from chronic fatigue. Dr. Lafontaine specified that the complainant did not present post-traumatic stress

disorder syndrome. On that point, his opinion conflicted with that of Dr. Maria E. Subak, the complainant's treating psychiatrist.

[16] Following an examination on November 6, 2003, Dr. Mary-Ann Fitzcharles, a rheumatologist, provided a diagnosis of generalized chronic pain because the complainant did not meet the fibromyalgia criteria. Dr. Fitzcharles noted that the multiple symptoms afflicting the complainant could be somatic in nature. According to Dr. Fitzcharles, the complainant is abusing the health care system. The prescription of ongoing physiotherapy and massage therapy treatments could have made the complainant dependent and could have been a significant negative factor causing her to constantly complain about health problems.

[17] A new assessment on February 27, 2004 by Dr. Marc Favreau, a rheumatologist, at Dr. Subak's request, confirmed the fibromyalgia diagnosis (Exhibit E-21). The frequency of physiotherapy treatments had been gradually reduced over a three-month period, finally ending in early 2004.

[18] On October 21, 1998, the Société de l'assurance automobile du Québec declared that there was no connection between the complainant's fibromyalgia and the December 14, 1993 accident (Exhibit E-10). However, on April 12, 1999, the Review Panel of the Veterans Review and Appeal Board accepted that the complainant's fibromyalgia was a result of or was directly connected to the work done for the RCMP and granted her a 5% disability (Exhibit E-11). According to the complainant, her disability rate had risen to 20%, which entitled her to an annual non-taxable benefit of approximately $4800.

[19] The complainant underwent two independent assessments at the RCMP's request. On June 23, 2004, Dr. Pantel issued the opinion that the complainant was incapable of performing a constable's main tasks because of a physical disability. Following Dr. Cameli's August 2, 2004 assessment report recommending a gradual return to work (Exhibit E-20), the RCMP amended the complainant's medical profile on August 25, 2004. The complainant would thus perform sedentary administrative tasks and would no longer take part in police operations, be identified as a police officer to the public, carry a service weapon or drive an emergency vehicle (Exhibits P-8 and E-18).

[20] On August 24, 2004, Dr. Subak recommended a gradual return to work starting October 4, 2004 (Exhibits P-5, P-6 and P-7). The gradual return was to start with two half days per week for three weeks, with an increase of one half day every three weeks until she reached a full five-day work week (Exhibits P-5, P-6 and P-7). On September 15, 2004, Dr. Subak recommended that rehabilitation therapy be undertaken before the gradual return to work with limitations and that the complainant be considered unfit to work until October 4, 2004 (Exhibit P-9).

[21] At a meeting on September 23, 2004 at the RCMP's medical clinic attended by Dr. Pantel, Sergeant Ralph Paul Ehlebracht and Corporals Martin St-Laurent, Jodie Blais and Nicole Gingras, the complainant accepted a more accelerated return-to-work schedule than the one that Dr. Subak recommended on August 24, 2004 (Exhibit E-14). That agreement on a gradual return to work involved a start date of October 4, 2004 for a five-day workweek of four-hour days. An increase of one hour per day was planned for every subsequent week, ending with eight-hour workdays at the end of a five-week period (Exhibits P-12 and E-14). She was assigned very light tasks. At that time, the complainant agreed with the amendments made to the schedule for her gradual return to work.

[22] On November 5, 2004, the complainant asked Dr. Pantel for reasons not to apply the gradual return to work schedule that Dr. Subak had suggested (Exhibit P-12). From October 26 to November 8, 2004, the complainant was on sick leave with pharyngitis (Exhibits P-10 and E-14). Dr. Subak deemed that the situation occurred because the return-to-work conditions that she had suggested on August 24, 2004 had not been followed. Dr. Subak removed the complainant from her work duties starting on November 20, 2004 for depression and fibromyalgia.

[23] The complainant asked to follow Dr Subak's suggested return-to-work program. Chief Superintendent Roger L. Brown, Officer in Charge, Human Resources, Central Region, denied that request. C/Supt. Brown's November 22, 2004 memo informed the complainant that she had to follow the return-to-work schedule set out in the September 23, 2004 agreement (Exhibit P-11). The complainant took note of the memo on November 29, 2004, while at work.

[24] The complainant followed C/Supt. Brown's instructions and returned to work on November 30, 2004 for seven-hour workdays. Thus, she worked seven-hour days on

December 1 and 2, 2004. She took annual leave on December 3 and 6, 2004. She worked eight-hour days on December 7 and 8, 2004 (Exhibit P-20).

[25] The complainant consulted Dr. Subak on December 9, 2004 about pharyngitis. Dr. Subak noted that the complainant's health deteriorated after her return to full-time work and declared her unfit to work from November 10 to 20, 2004 (Exhibit E-4). Dr. Subak recommended that she return to the gradual work schedule of four half days per week (Exhibit P-14). The complainant returned to work for four-hour days starting on December 13, 2004 (Exhibit P-20). Dr. Subak pointed out that the complainant was suffering from drowsiness and referred her to Dr. Marc A. Baltzan, a sleep specialist.

[26] Dr. Jocelyn Aubut, a psychiatrist, performed a psychiatric assessment at the RCMP's request to assess the complainant's diagnosis, treatment and ability to work. Dr. Aubut's preliminary report, dated January 27, 2005, was tabled with the parties' consent (Exhibit P-26), and its contents were certified. In her report, Dr. Aubut states that despite the presence of underlying physical problems (fibromyalgia), there is a clearly associated psychological component. Dr. Aubut preferred to await the results of a polysomnography and the results of the sleep disorder study before stating her findings.

[27] The parties agreed to have Dr. Aubut testify on the findings of her expert report dated January 27, 2005 (Exhibit P-26) and agreed that the report's contents were accurate.

[28] On January 27, 2005, Dr. Aubut provided the following conclusions (Exhibit P-26) :

> [Translation]
>
> . . .
>
> - *diagnosis of pain disorder with a strong psychological component, with no evidence of major depression or post-traumatic stress; possibility of fibromyalgia, hypercholesterolemia;*
>
> - *the limitations reported by the complainant are related to fatigue, sleep problems and chronic pain; without some adjustment in the patient's case management, no significant change can be hoped for;*

> *- a suggested gradual return starting with four half days per week, which could be raised by a half day every two weeks, with some adjustment in treatment; without such an adjustment, the patient will encounter highs and lows and is very unlikely to be able to achieve a full-time schedule;*
>
> *- the return to administrative work excludes overnight shift work or overtime;*
>
> *- no plausible date can be determined for a return to full-time work; and*
>
> *- treatment based on post-traumatic stress disorder should be adjusted to one based on pain disorder with a strong psychological component.*
>
> . . .

[29] Dr. Pantel agrees with Dr. Aubut's recommendation to adjust the complainant's treatment plan. According to Dr. Pantel, the complainant's health problems are somatic in origin, and the treatment plan should be geared to a gradual return to work. According to Dr. Pantel, it is inadvisable to maintain a long disability period for the patient, because it will only increase her somatic problems.

[30] On January 12, 2005, Dr. Baltzan provided a diagnosis of diurnal hypersomnolence (Exhibit E-40). According to S/Sgt. Luc Vaillancourt, the complainant's supervisor, she did not come to work after February 22, 2005. The complainant underwent wake-up tests on July 20, 2005 (Exhibit E-3). At that time, Dr. Baltzan raised the medication (Alertec) from 100 mg to 200 mg. Dr. Baltzan declared the complainant unfit to work for an indefinite period on August 17, 2005 (Exhibit E-5). Dr. Baltzan requested that the complainant not drive her vehicle as long as the medication dose remained the same. Officials from the Assistance Service for the RCMP drove the complainant to her medical appointments and for her personal needs. At times, the complainant relied on family members to drive her around. According to the complainant, taking 200 mg of Alertec in the morning enabled her to stay awake for as long as six hours. The length of time of her alertness varied, lasting only one or two hours on some days.

[31] Dr. Subak recommended a disability period from June 22 to July 20, 2005 for depression and sleep problems (Exhibit E-48). For the same reasons, Dr. Subak

extended the disability period to September 1, 2005 and then to September 21, 2005 (Exhibit E-48).

[32] On August 25, 2005, the complainant requested permission to go to Winnipeg during a disability period to visit a sick friend. Dr. Pantel made an appointment for the complainant at the RCMP's medical offices on August 31, 2005 to check whether her state of health would allow for such a trip. During that appointment, the complainant reported that she had very limited capacities (could walk no more than 1 km, could clean the house and wash dishes) and that she was always tired. Dr. Subak informed Dr. Pantel, in a phone conversation on September 1, 2005, that the complainant had chronic fatigue, that she was going through a mourning period because of her functional limitations and the death of a friend, and that she was displaying symptoms of depression and deep sadness (Exhibit E-41). On September 2, 2005, Dr. Pantel concluded, based on his observations of the complainant at the August 31, 2005 meeting, that she was neither depressed nor anxious (Exhibit E-36). Inspector Gilles Moreau, Officer in Charge, Occupational Health and Safety, Central Region, informed C/Supt. Brown of Dr. Pantel's recommendation as follows (Exhibit E-57):

> [Translation]
>
> . . .
>
> *Dr. Pantel recommends that this member could leave her work territory during the current sick leave for a period of 14 days to go to Winnipeg to visit a dying friend.*
>
> *This recommendation is prompted by the fact that there would be no interference with her treatments and no detrimental impact on her current state of health.*
>
> . . .

[33] Inspector Moreau ordered that the complainant be monitored to gather information about her physical abilities and limitations and her degree of autonomy in her daily movements. Reports were prepared by Chartrand Laframboise Investigation on September 8, 2005 (for surveillance from August 30 to September 2, 2005) (Exhibit E-44a) and on September 15, 2005 (for surveillance from September 9 to 14, 2005) (Exhibit E-44b). Oliver, Yaskiw & Associates Inc. produced a report on September 15, 2005 (for surveillance from August 31 to September 9, 2005) (Exhibit E-44d). Dr. Pantel found that the video recordings demonstrated that the complainant engaged in

activities that were incompatible with a recommendation of total disability. The videos contradicted the complainant's statements that she was unable to do anything because she was depressed, overly tired during the day, sad and in mourning. Instead, she appeared to engage in normal social activities (for example, moving with ease, even carrying heavy items, and shopping). The complainant's activities demonstrated that she could carry out sedentary administrative tasks, which was compatible with the diagnosis of fibromyalgia, chronic fatigue and chronic pain.

[34] On September 21, 2005, Dr. Pantel notified Inspector Moreau that the complainant was fit to return to work (Exhibit E-45):

> [Translation]
>
> . . .
>
> *Recommendation of the Chief Medical Officer/OHSS:*
>
> *This is to inform you that based on a thorough review of the member's medical file, I am of the opinion that this member is able to resume a modified work assignment (administrative tasks) on a full-time basis effective immediately. This opinion takes into consideration the information provided by the member herself at a meeting and the opinion of her treating physician.*
>
> . . .

[35] On September 21, 2005, C/Supt. Brown was informed of Dr. Pantel's recommendation and indicated that he agreed with it (Exhibit E-45). Despite a request on October 14, 2005 by S/Sgt. Gaétan Delisle, Division Staff Relations Representative, C Division (Exhibit P-30), C/Supt. Brown did not indicate the reasons for refusing the sick leave. No response was received to the request on the matter submitted November 1, 2005 to Inspector J.R. André Lemyre, Officer in charge of border integrity, C Division (Exhibit P-31). Inspector Moreau noted C/Supt. Brown's decision and asked Inspector Lemyre to draft a return-to-work order on September 22, 2005 (Exhibit E-45). In his testimony, Inspector Lemyre indicated that a member of the RCMP could grieve a decision to refuse sick leave, in accordance with the *RCMP Administration Manual* (chapter II.38, Exhibit E-67).

[36] A return-to-work order was issued to Corporal Valérie-Marie Ouellette and delivered to her home on September 22, 2005 at 13:36 by Sergeants John Génier and

Claude Bissonnette. Corporal Ouellette refused the order under the *Canada Health and Safety Act*. While they were there, Sergeants Génier and Bissonnette learned that the complainant was on the premises. After obtaining a return-to-work order from the AFIS offices addressed to the complainant by Inspector Lemyre, Sergeants Génier and Bissonnette returned to Corporal Ouellette's home. The sergeants then served the complainant with the return-to-work order at 14:15 (Exhibits E-52, E-53 and P-17).

[37] The memo (Exhibit P-16) specifies that on September 21, 2005, C/Supt. Brown refused the complainant's request for sick leave for full and indefinite disability that was based on a clinical report dated August 17, 2005 and signed by Dr. Baltzan. The memo orders the complainant to return to work as follows:

> [Translation]
>
> . . .
>
> ***WHEREAS*** *you are no longer on sick leave and are deemed fit to carry out duties, with limitations,*
>
> ***I order you to return to work and to report in person to the Airport Federal Investigation Section for this purpose at the following date, time and place:***
>
> ***DATE:*** ***Friday, September 23, 2005***
> ***TIME:*** ***08:00***
> ***PLACE:*** ***700 Leigh Capreol, Dorval, Quebec***
> ***Tel: 514-420-5701***
>
> *Failure to comply with this order shall be considered a contravention of section 40 and/or 49 of the* Code of Ethics *and could lead to disciplinary action under the* RCMP Act. *You could also be subject to administrative discharge under section 19 of the* RCMP Regulations *for abandonment of post.*
>
> ***KINDLY ACT ACCORDINGLY***
>
> . . .

[38] The complainant replied to Sergeants Génier and Bissonnette that she was unable to report to work because she was taking medication and could not drive. She told them that she was refusing to work under the *Canada Health and Safety Act* (Exhibit P-17). Sergeant Bissonnette states the following in his September 26, 2005 report (Exhibit E-51):

[Translation]

. . .

> *. . . I personally served Constable Saumier with the return-to-work order. She took the time to completely read the document and stated that she understood it. Constable Saumier did not accept the return-to-work order based on Corporal Ouellette's advice. It should be noted that Corporal Ouellette returned from another room with the telephone in her hands and told Corporal Saumier; "Gaetan says that you should refuse, just like me, under the Canada Health and Safety Act."*. . .

. . .

[39] On September 22, 2005, the complainant had not yet received the results of the tests that Dr. Baltzan ran on September 21, 2005. On September 20, 2005, Dr. Subak had also extended the complainant's disability period to November 9, 2005 (Exhibits E-46 and E-50). Dr. Pantel did not perform or order any medical examinations to assess the complainant's health after she was served with the return-to-work order.

[40] S/Sgt. Delisle served as the representative of the Royal Canadian Mounted Police Members Association. The complainant had consulted him a few weeks before September 22, 2005 to inquire about her rights in case the RCMP ordered her to return to work against Dr. Subak's recommendation. S/Sgt. Delisle had recommended that she refuse to return to work and that she tell the RCMP that it was a refusal to work. In his testimony, S/Sgt. Delisle specified that it was possible to grieve a decision by the RCMP rejecting a treating physician's sick leave recommendation.

[41] On September 23, 2005, S/Sgt. Delisle indicated to Inspector Lemyre that the complainant was refusing to work under section 128 of the *Code* (Exhibit P-27).

[42] On September 26, 2005, Inspector Lemyre asked S/Sgt. Vaillancourt to contact the complainant to inform her that she had to report to work to properly exercise her right to refuse to work under the *Code* (Exhibit E-70). On September 27, 2005, S/Sgt. Vaillancourt contacted the complainant to inform her that her refusal to work had not been accepted because she had not reported to work to present it. In his report (Exhibit E-54), he indicates the following:

[Translation]

. . .

> *She told me that she could not drive. I told her that the RCMP physician had found that she was fit to work.*
>
> *She told me that her doctor had told her not to return to work. She said that she wanted to listen to her doctor and that she was not able to drive and had no licence.*
>
> *I explained to her the procedure for refusal to work under the labour code. She then told me that she wanted to be sure that she understood perfectly and said "under the labour code I have to report to work to refuse under the labour code. Okay, I understand."*

. . .

[43] In his notes (Exhibit E-55), S/Sgt. Vaillancourt indicates that he informed the complainant of the refusal-to-work procedure under the *Code* as follows:

> [Translation]
>
> . . .
>
> *I read her the text of Inspector Moreau's email:*
>
> *The employee may exercise her right to refuse to work, but to do so, she must report to work. The employer must respond with an investigation in the presence of the employee or her representative. If the employer determines that there is no danger, the employee can still contest by notifying the supervisor and members of the local Occupational Health and Safety Committee. Then the employer conducts an investigation with a member of the Committee. If the employee still refuses, then the issue is referred to Labour Canada (HRSDC) and to the occupational health and safety officers, who will decide.*
>
> *She tells me that she wants to be certain that she understood perfectly and says "under the labour code I have to report to work to refuse under the labour code. Okay, I understand."*
>
> . . .

[44] In the afternoon of September 27, 2005, the complainant reported to S/Sgt. Vaillancourt at the AFIS offices in Dorval, accompanied by S/Sgt. Delisle. According to the complainant, she told S/Sgt. Vaillancourt that she refused to work to avoid aggravating her health. S/Sgt. Delisle noted that the complainant refused to work

under the *Code* to avoid aggravating her health (Exhibit P-29). Replying to S/Sgt. Vaillancourt's question asking her to specify the tasks, she repeated her first statement. S/Sgt. Vaillancourt noted the meeting events as follows (Exhibit E-55):

> [Translation]
>
> . . .
>
> *3:43 Carmen Saumier and Gaétan Delisle arrive in my office.*
>
> *Gaétan tells me that Carmen Saumier has something to tell me under the labour code because she has to do it in person.*
>
> *Carmen Saumier tells me that she refuses to work because of her health.*
>
> *I ask her which tasks are dangerous to her health. Gaétan Delisle tells me that it is about her health and they leave.*
>
> . . .

[45] In her testimony, the complainant declared that she did not specify the tasks that could be harmful to her health to S/Sgt. Vaillancourt. She explained that every task aggravated her health because Dr. Subak had put her on disability. The complainant did not return to work after her refusal to work on September 27, 2005. The complainant and S/Sgt. Delisle did not request the local Health and Safety Committee to get involved. S/Sgt. Vaillancourt did not inform the local Health and Safety Committee of the complainant's refusal to work. According to S/Sgt. Vaillancourt, the local Health and Safety Committee was only informed in 2006.

[46] On September 28, 2005, S/Sgt. Vaillancourt noted the following (Exhibit E-55):

> [Translation]
>
> . . .
>
> *Call to Carmen Saumier . . .*
>
> *I notify her that I talked to Inspector Lemyre, that her refusal to return to work is not accepted, that the return-to-work order still stands and that she has to report for work. I ask her whether she understands; she tells me that it is not accepted, okay, bye.*

. . .

[47] On September 28, 2005, Grégoire Guillemette, Occupational Safety Officer, C Division, informs Inspector Moreau that in his opinion, the complainant's refusal to work is premature (Exhibit E-56).

[48] On September 30, 2005, in the street close to her home, S/Sgt. Vaillancourt gave the complainant a return-to-work order that Inspector Lemyre issued (Exhibit P-22). The memo, dated September 29, 2005, states the circumstances that followed the serving of the September 22, 2005 return-to-work order. The memo specifies that the return-to-work order still stands , as follows:

> [Translation]
>
> . . .
>
> ***WHEREAS*** *you are no longer on sick leave and are deemed fit to carry out duties, with limitations;*
>
> ***WHEREAS*** *on September 22, 2005 you were served with my return-to-work order for Friday, September 23, 2005 at 08:00 at the Airport Federal Investigation Section at 700 Leigh Capreol, Dorval;*
>
> ***WHEREAS*** *on September 27, 2005 you reported to the Airport Federal Investigation Section at 700 Leigh Capreol, Dorval and verbally indicated to S/Sgt. Luc Vaillancourt your refusal to work for health reasons, without even knowing the tasks that would be assigned to you;*
>
> ***AND WHEREAS*** *it was therefore premature to submit a refusal to work under sections 127.1 and 128 of Part II of the* Canada Labour Code,
>
> ***I HEREBY NOTIFY YOU that my return-to-work order, with which you were served on September 23, 2005 at 08:00 at the Airport Federal Investigation Section at 700 Leigh Capreol, Dorval, Quebec still stands.***
>
> *Failure to comply with the order issued to you on September 22, 2005 shall be considered a contravention of section 40 and/or 49 of the* Code of Ethics *and could lead to disciplinary action under the* RCMP Act. *You could also be subject to administrative discharge under section 19 of the* RCMP Regulations *for abandonment of post.*
>
> ***KINDLY ACT ACCORDINGLY***
>
> . . .

[49] On receiving the September 29, 2005 memo the complainant informed S/Sgt. Vaillancourt that she would continue her refusal and that she had authorized S/Sgt. Delisle to represent her (Exhibit P-23).

[50] Between September 20 and 30, 2005 the complainant submitted Dr. Subak's clinical report, dated September 20, 2005, to the RCMP. Dr. Subak recommended that the complainant be considered unfit for work from September 20 to November 9, 2005 (Exhibit E-50). On October 3, 2005, after reviewing Dr. Subak's recommendation, Dr. Pantel maintained that the complainant was fit to return to work, as follows (Exhibit E-47):

> [Translation]
>
> . . .
>
> ***Recommendation of the Chief Medical Officer/OHSS:***
> *Further to the analysis of her medical records and as previously recommended, Constable Saumier is* ***fit*** *to perform the* ***modified duties on a full-time basis.***
>
> *The modified duties were specified in a prior email (including the administrative tasks and excluding participation in police operations, carrying a weapon, wearing a uniform, driving an emergency vehicle for an emergency and arresting suspects.)*
>
> . . .

[51] C/Supt. Brown accepted Dr. Pantel's recommendation (Exhibit E-72) on October 3, 2005.

[52] The complainant submitted Dr. Subak's clinical report recommending that she was unfit to work from November 9 to December 7, 2005 (Exhibit E-49). C/Supt. Brown refused that sick leave on November 25, 2005 based on Dr. Pantel's recommendation.

[53] Sergeant Ehlebracht handed the complainant a memo from Inspector Lemyre dated December 2, 2005. The order reiterates the considerations contained in the September 29, 2005 memo, and it concludes as follows (Exhibit P-24):

> [Translation]
>
> . . .

> ***WHEREAS*** *your request for sick leave for the period from November 9 to December 7, 2005 was not approved by the officer in charge of human resources for the Central Region;*
>
> ***I HEREBY NOTIFY YOU that my return-to-work order, with which you were served on September 23, 2005 at 08:00 at the Airport Federal Investigation Section at 700 Leigh Capreol, Dorval, Quebec still stands.***
>
> *Failure to comply with the order with which you were served on September 22, 2005 shall be considered a contravention of section 40 and/or 49 of the* Code of Ethics *and could lead to disciplinary action under the* RCMP Act. *You could also be subject to administrative discharge under section 19 of the* RCMP Regulations *for abandonment of post.*
>
> ***KINDLY ACT ACCORDINGLY***

. . .

[54] On December 5, 2005, Inspector Lemyre told S/Sgt. Delisle that the complainant's refusal to work did not meet the requirements of the *Code*. Inspector Lemyre specified that the situation is not within the jurisdiction of occupational safety officers and that it is up to physicians to determine whether the complainant is fit to perform administrative tasks (Exhibit P-32). In his testimony, S/Sgt. Delisle declared that the local Health and Safety Committee should have checked whether the complainant really was unfit to work. He added that the local Committee should have communicated with the physician treating the complainant and with Dr. Pantel to investigate the situation and to make recommendations.

[55] On December 20, 2005, at 10:30, Corporal Léo Mombourquette, Group Supervisor, met with the complainant and S/Sgt. Delisle. According to S/Sgt. Delisle, the complainant refused to work to avoid aggravating her medical condition (Exhibit P-33). Corporal Mombourquette noted the following (Exhibit E-64):

> [Translation]
>
> . . .
>
> *Carmen Saumier and Gaetan Delisle came to the office. I recorded Ms. Saumier's refusal to comply with the return-to-work order under section 128 of the* Canada Labour Code.
>
> *S/Sgt. Vaillancourt was notified by email.*

. . .

[56] The complainant filed her complaint with the Board on December 20, 2005. The items that were filed as evidence and those that followed the filing of the complaint were accepted, subject to an objection raised by the respondent regarding their relevance.

[57] On August 16, 2006, Inspector Lemyre told Jean-Pierre Laporte, Regional Director, Labour Operations, Quebec Region, Human Resources and Social Development Canada (HRSDC), that he believes that the best person to determine in the shortest time if the tasks that the RCMP wants to assign to the complainant represent a danger to her health under paragraph 128(1)(*c*) of the *Code* is an HRSDC health and safety officer (Exhibit E-75). On October 13, 2006, Claude Léger, an HRSDC health and safety officer, replied that he had decided to await the Board's decision on whether the complainant had exercised a refusal to work under the *Code*.

III. Summary of the arguments

A. For the complainant

[58] *Clarke's Canada Industrial Relations Board* (2007), regarding subsection 128(1) of the *Code,* notes that the existence of the right to refuse to work is based on reasonable cause. An employee may exercise the right to refuse to work even if it is demonstrated after the fact that there was no danger. In general, the employee should be given the benefit of the doubt that a reasonable cause exists.

[59] In cases involving contradictory medical opinions, it is important to look at the most recent assessments by the treating physicians. The evidence in this case shows that Dr. Subak and Dr. Baltzan, the complainant's treating physicians, consider her unfit to work.

[60] Dr. Pantel met with the complainant on August 31, 2005 regarding her request for authorization to go to Winnipeg while on sick leave. Dr. Pantel testified that he had determined that the complainant was fit to work based on observations made at the meeting. He did not inform the complainant of his conclusion. The RCMP was responsible for informing the complainant of that conclusion. The RCMP used contradictory reasoning, authorizing the complainant to travel during her sick leave while deeming her fit to work.

[61] The next day, the RCMP started surveillance on the complainant to catch her in action. That attitude is unreasonable since the RCMP had in its possession Dr. Subak's opinion recommending that the complainant be allowed to travel from August 31 to September 14, 2005. Following the meeting of August 31, 2005, Dr. Pantel did not contact Dr. Subak or Dr. Baltzan. The complainant was served with a return-to-work order on September 22, 2005. On January 27, 2005, Dr. Aubut had recommended that the complainant undergo a new medical assessment in the event of her absence (Exhibit P-26). Based on that recommendation, the complainant believed that returning to work presented a danger of aggravating her state of health.

[62] The RCMP's approach in its December 5, 2005 correspondence (Exhibit P-32) is contradictory in that Inspector Lemyre indicates that it is physicians who can determine whether the complainant is fit to perform her duties, but he orders that she resume her administrative tasks full-time. The respondent thus indicated to the complainant that she had to expose herself to the risk to her health and that the consequences would have to be subsequently assessed. That is contrary to the *Code*'s objective of prevention.

[63] The respondent's argument that the complainant did not identify the tasks that presented a danger is wrong. S/Sgt. Vaillancourt specifies in his September 27, 2005 report that the complainant indicated to him that her treating physician told her not to return to work (Exhibit E-54). Dr. Pantel had identified the modified duties that the complainant could perform (Exhibit E-47). Thus, despite the fact that the respondent was aware of the complainant's disability, the RCMP ordered her to return to work against Dr. Subak's recommendation and against the objective of prevention specified in Part II of the *Code.*

[64] *Ferrusi and Giornofelice v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 1, states the following:

. . .

> *[54] It seems clear that the procedure governing work refusals set out in the* Code *is intended to provide protection for an employee whose assessment of his or her working circumstances is that they pose a risk of injury or illness. That employee is entitled to refuse to work — and is protected from the disciplinary consequences that would ordinarily attend such a withdrawal of services — until there*

> *is an opportunity for the alleged threat to health and safety to be investigated. In some cases, the employer may agree that the risk described by the employee is present and may make a commitment to ameliorate the risk. In other cases, the employer and the employee may disagree concerning the existence of a risk, and an external party — a health and safety officer employed by HRSDC — may be asked to conduct an assessment of the risk. During all of this investigation process, the employee is entitled to refrain from returning to work.*
>
> *[55] Once the health and safety officer has given a definitive pronouncement that there is no danger, the employee is required to return to work. The recourse available then, in the event the employee is still convinced there is a risk, is through the appeal process. It is only when this whole process has been exhausted that the employer is permitted to contemplate discipline of an employee for wilfully abusing the process.*
>
> *[56] Though this process is intended to provide recourse to employees who wish to have a health or safety issue addressed, it also recognizes the operational interests of the employer. The system contemplates that the investigatory stages of the procedure will be carried out with dispatch. Once the health and safety officer has communicated the view that there is no danger, the employee is required to return to work and await the outcome of the appeal, if there is one.*
>
> . . .

[65] *Letter Carriers' Union of Canada v. Canada Post Corporation* (1989), 76 di 188 (C.L.R.B.R.), indicates that where the employer refuses to proceed with an investigation following a refusal to work and takes disciplinary action against the employee, the employer will be deemed to have taken a disciplinary action against the employee for having exercised a right under the *Code*. *Butler v. Verspeeten Cartage Ltd.* (1991), 86 di 107 (C.L.R.B.D.), *Baker v. Polymer Distribution Inc.*, [2000] CIRB No. 75, and *Navratil v. Canadian Stevedoring Co. Ltd.* (1996), 101 di 112 (C.L.R.B.D.), are similar. Even if an employee is slow in notifying the employer of the reasons for his or her fear, it will be deemed that he or she assumed the obligation imposed on him or her by section 128 of the *Code* (see *Kinhnicki and Dupuis*).

[66] In *Chaney v. Auto Haulaway Inc.*, [2000] CIRB No. 47, the Canada Industrial Relations Board described the burden on the employee as follows:

. . .

> *[28] . . . The only onus carried by the employee should be to satisfy the Board that the refusal was based on genuine safety concerns . . .*

. . .

[67] In this case, the respondent did not proceed with the investigation after the complainant's refusal to work. In so doing, it did not allow for intervention by a third party that might have found a solution.

B. <u>For the respondent</u>

[68] *Gingras v. Canada,* [1994] 2 FC 734 (C.A.), specified that a member of the RCMP is an employee of the public service under the *Financial Administration Act*, R.S.C. 1952, c. 116, and R.S.C. 1970, c. F-10. Thus, the Board has jurisdiction over the members of the RCMP for the purposes of Part II of the *Code*. In *R. v. Royal Canadian Mounted Police,* [1999] N.S.J. No. 263 (Prov. Ct.) (QL), *R. v. Royal Canadian Mounted Police* (2000), 188 N.S.R. (2d) 1 (S.C.), and *R. v. Royal Canadian Mounted Police,* 2001 NSCA 30, it is clarified that Part II of the *Code* applies to the members of the RCMP. The complainant shares the opinion that those decisions give the Board the jurisdiction to rule on her complaint.

[69] With respect to disciplinary action, section 37 of the *Royal Canadian Mounted Police Act,* R.S.C. 1985, c. R-10, provides for an investigation performed by or under the authority of an officer or a member in command of a detachment when a member has contravened the RCMP's Code of Conduct. If serious disciplinary action is called for when the contravention is established, an adjudication board composed of three officers (one of whom has a law degree) shall proceed with the investigation and impose the appropriate penalty (section 43 and following sections of the *Royal Canadian Mounted Police Act*). Part III of the *Royal Canadian Mounted Police Act* provides for a grievance mechanism if any member is aggrieved by any action related to the administration of the RCMP's affairs (section 31).

[70] The *Royal Canadian Mounted Police Regulations,* SOR/88-361 ("the *Regulations*"), set out the grounds for an administrative discharge of a member for abandonment of post or disability. Sections 38 to 58.7 of the *Regulations* constitute the RCMP Code of Conduct, which applies to its members. Among other things, the *Regulations* state that

a member shall obey every lawful order of any member who is superior in rank or who has authority over that member; shall not, without authority, be absent from duty; and shall not knowingly breach any oath taken by the member pursuant to section 14 of the *Royal Canadian Mounted Police Act*.

[71] A member of the RCMP is entitled to wages related to his or her status as a member and not to a salary related to the performance of his or her functions. Members do not accumulate sick leave credits but continue to collect wages when they are on sick leave. The RCMP assumes all of its members' medical costs, which are not subject to provincial health care plans. A member who is disabled because of work may receive a disability pension under the *Royal Canadian Mounted Police Superannuation Act,* R.S.C. 1985, c. R-11. He or she is eligible for benefits under the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5.

[72] Part II of the *Code* requires that the employer assume costs, ensure a safe workplace and correct dangerous situations. Situations dangerous to an employee, including those having health-related circumstances, entitle that employee to refuse to work. The right to refuse to work cannot be applied to circumstances such as those in this case, because no useful outcome could be reached that would protect the complainant from imminent danger.

[73] Part II of the *Code* specifies that its purpose is to prevent work-related accidents and sicknesses and places the onus for eliminating risks on the employer.

[74] Section 126 of the *Code* places obligations on the employer towards employees while at work. Employees must report any thing or circumstance that is likely to be hazardous. The complainant did not report anything like that while at work. According to the respondent, subsection 127(1) of the *Code* requires the parties to talk in an effort to resolve the problem. In this case, the complainant did not tell the RCMP before filing her complaint that she felt threatened or that there was a breach of section 147 of the *Code*. According to the respondent, the obligation to notify the RCMP before filing a complaint is in the spirit of the *Code*.

[75] In this case, the RCMP requested expert opinions about the complainant's ability to return to work. The expert opinions describe functional limitations and the ability to perform administrative tasks in a gradual manner. Opinions diverge about the speed with which she could return to work. In fall 2004, C/Supt. Brown indicated that he

deemed the complainant fit to return for full-time work with a lighter workload (Exhibit P-11). Following the sleep problems diagnosis, the complainant consulted S/Sgt. Delisle because she was afraid that the RCMP would insist on her returning to work.

[76] An agreement on a gradual return to work was worked out with the complainant (Exhibit E-14). The complainant terminated that agreement based on Dr. Subak's recommendation. The gradual return to work continued according to Dr. Subak's recommendation until February 2005.

[77] A friend of the complainant (Corporal Ouellette) was in the same extended-absence situation and had received a return-to-work order in July 2005. S/Sgt. Delisle checked on the situation with Health Canada. S/Sgt. Delisle recommended that she refuse to work under Part II of the *Code.*

[78] Dr. Pantel authorized the complainant's trip to Winnipeg even though he considered her fit. The surveillance showed that the complainant engaged in normal activities during which she did not appear depressed or unable to resume her normal activities. On September 22, 2005, the RCMP served the complainant with a return-to-work order (Exhibit P-16). The complainant refused to return to work under the *Canada Health and Safety Act* based on S/Sgt. Delisle's recommendation. The complainant's complaint is based on that return-to-work order. The respondent submitted that the complainant did not indicate her refusal to work in accordance with the *Code*.

[79] If the complainant's refusal to return to work is considered a refusal under the *Code*, the return-to-work order cannot be considered a threat of disciplinary action under section 147 of the *Code*. The return-to-work order specifies that the complainant is no longer deemed to be on sick leave and uses the regulatory wording of the RCMP Code of Conduct applicable to the situation. In the RCMP, an adjudication board imposes a disciplinary measure, not the employer.

[80] The complainant refused to return to work after receiving the return-to-work order. Thus, the order cannot be deemed a threat of disciplinary action because it preceded the refusal to return to work, and it is not a reaction to the complainant's action. The threats of disciplinary action do not follow from the refusal to comply with the return–to-work order.

[81] Following her refusal to return to work, the complainant submitted a new medical certificate to the RCMP. The RCMP rendered a new decision based on the medical certificate and concluded that the complainant was fit to return to work, creating a new situation and an order to return to work under new circumstances. No link was established between the refusal to return to work and the RCMP's reaction to the medical certificate that recommends that the complainant is unfit to return to work. According to Dr. Pantel, the complainant does not present any neurological problems and presents a somatic reaction that reduces her capacity to return to work. According to Dr. Pantel, returning to work would enable the complainant to start her recovery and break out of her state of medical dependency.

[82] The complainant submitted that she is disabled but refuses to work. That action on her part prevents the respondent from managing the situation and is not a refusal to work under section 128 of the *Code* to protect her from a danger that threatens her health or safety. The *Code* provides for an investigation by a third party to determine if there is a danger and to apply corrective measures if required. In this case, the investigation was not possible because the complainant did not identify the danger that threatened her. She submitted that she was disabled and did not want to work, not that she was fit to work and that something at work would make her sick. The respondent cannot proceed with an investigation other than the one that Dr. Pantel conducted in this case. The *Code* does not provide for an examination of an employee's state of health but rather of verifying if working conditions constitute a danger. The verification procedure under the *Code* cannot be used to determine which medical assessment is more valid.

[83] The procedure under the *Code* allows employees to stay away from work long enough for a dangerous situation to be corrected. In this case, no dangerous situation that could be corrected was identified. Whether or not the complainant is fit to return to work must be determined through the grievance process under Part III of the *Royal Canadian Mounted Police Act*.

[84] The *Code* defines the term "danger" as follows:

. . .

> *"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person*

> *exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;*
>
> . . .

[85] In *Boivin*, the Board stated as follows:

> . . .
>
> *[124] . . . the Board must review whether the employee had a reasonable cause to believe that a dangerous condition existed before he withdrew his services. If this condition cannot be met, then the employer's action, whether disciplinary or not, is not a violation of the* Code.
>
> . . .
>
> *[147] A reading of the definition of danger indicates to me that in order to consider a situation to be a danger, one must establish a link such that the danger would cause injury or illness to a person. The employer is then obliged to correct the danger before the employee returns to the worksite. . . .*
>
> . . .

[86] *Brisson* indicated that investigating a complaint based on section 147 of the *Code* is a two-step process. First, it must be determined whether in refusing to work the employee had reasonable cause to believe that a danger existed. If so, then in the second step, the employer demonstrates that the disciplinary action was motivated by legitimate considerations that are not linked in any way to the employee exercising his or her right to refuse to work. That position was used in *Lequesne v. Canadian National Railway Company,* [2004] CIRB No. 276.

[87] When the complainant refused to work, she should have reported to the RCMP and to a member of the local Health and Safety Committee in accordance with subsection 128(6) of the *Code*. In this case, the complainant identified no situation, and she was not seeking a change in the workplace. When the employee does not meet the requirements of section 128 of the *Code*, his or her complaint must be dismissed: *Buchholz*. The same principle was used in *Chaves*, *Kinhnicki and Dupuis*, *Gouger*

v. Transports Ducampro inc., [2004] CIRB No. 287, and *Kucher v. Canadian National Railway Company* (1996), 102 di 121 (C.L.R.B.D.).

[88] The *Code* requires that employees wishing to exercise their right to refuse to work specify in a reasonable and sufficient manner not only that their refusal to work is based on fears for their safety but also the nature of those fears *(Green v. Air Niagara Express Inc.* (1992), 90 di 186 (C.L.R.B.).

[89] The report required from the employee regarding the grounds for his or her refusal to work launches the process that is supposed to result in the problem's resolution and is a prerequisite to filing a complaint according to subsection 133(3) of the *Code* (*Lapointe v. Canada Post Corporation* (1992), 87 di 83 (C.L.R.B.)). Section 127 of the *Code* provides a mandatory internal resolution mechanism that must precede exercising a form of recourse specified in Part II of the *Code* (*Caponi v. Via Rail Canada Inc.,* [2002] CIRB No. 177).

[90] The evidence demonstrated that the complainant disagreed with the RCMP, which had assessed her as being fit to return to work. The complainant's exercising a refusal to work is a pretext to avoid having the RCMP take action against her. The complainant could have filed a grievance to contest the RCMP's decision. The circumstances surrounding the return-to-work order are not of the type that can form recourse under Part II of the *Code*.

[91] The respondent requested that the complaint be dismissed because no breach of section 147 of the *Code* has been demonstrated.

C. Complainant's response

[92] The complainant's refusal to work is clearly based on the fact that Dr. Subak considered her unfit to work. The respondent is aware of that fact.

[93] On August 16, 2006, the RCMP asked the HRSDC to assign one of their health and safety officers to assess whether the tasks it wanted to assign to the complainant constituted a danger under the *Code* (Exhibit E-75). The respondent should have taken that step as soon as the complainant refused to return in 2005 instead of claiming, as it did, that it did not know the grounds for the refusal. The RCMP knew the tasks that it wanted to assign to the complainant after Dr. Pantel's assessment.

[94] In this complaint, the return-to-work order constitutes reasonable grounds for believing that returning to work poses endangers the complainant's health. According to *Boivin*, a connection has to be made between a dangerous situation and the risk it could cause in terms of injury or illness to an employee. The RCMP did not allow that assessment to be effected by a third party in the complainant's case, contrary to what occurred in *Brisson*. In *Buchholz* and *Lapointe*, the complainants did not inform their employer that they were invoking their right to refuse, unlike the complainant in this case.

[95] The general principle used in case law is that the employee has to inform his or her employer in general terms of the reasons for his or her refusal to work. The employee is not required to prepare a full written and scientific report of the grounds for his or her refusal. It is up to the employer to obtain the details if it does not understand the reasons provided by the employee. The following decisions support those principles: *Letter Carriers Union of Canada; Brotherhood of Maintenance of Way Employees v. Canadian National Railways* (1986), 67 di 183 (C.L.R.B.), and *Froment v. Bell Canada* (1982), 46 di 125 (C.L.R.B.).

[96] The respondent demonstrated that it was not concerned about the complainant's health. It is not a normal condition of work to report to work against the opinion of the treating physician who considers the employee unfit to work.

[97] On November 5, 2004, the complainant indicated to the RCMP that the gradual return to work imposed on her did not correspond to what Dr. Subak recommended (Exhibit P-12). On December 10, 2004, Dr. Subak insisted that the gradual return to work follow the course that she had recommended (Exhibit P-15).

[98] The RCMP did not attempt to correct the problem between the complainant's first refusal to work on September 22, 2005 and her complaint on December 20, 2005.

[99] The RCMP reiterated its threat to take disciplinary action following the complainant's refusal to return to work. According to *Ferrusi and Giornofelice*, the employer cannot treat the situation as a continuation of previous situations without allowing the employee to invoke the provisions under the *Code* and to obtain an independent assessment of the dangers in the workplace. In this case, the RCMP had the opportunity to request an investigation by a health and safety inspector after the complainant's refusal. The RCMP's refusal to suspend the return-to-work order

constitutes a threat of disciplinary action. The *Code* provides a procedure for refusing to work and prevents disciplinary measures from being imposed while it is underway.

[100] The Board can order the respondent to cease the threats against the complainant until the investigation procedure under the *Code* has been completed. That approach would not be prejudicial to the respondent.

IV. Reasons

[101] The following provisions of the *Code* are relevant to this case:

. . .

> ***128.*** *(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that:*
>
> *(*a*) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;*
>
> *(*b*) a condition exists in the place that constitutes a danger to the employee; or*
>
> *(*c*) the performance of the activity constitutes a danger to the employee or to another employee.*
>
> . . .
>
> *(6) An employee who refuses . . . under subsection (1) . . . shall report the circumstances of the matter to the employer without delay.*
>
> *(7) Where an employee makes a report under subsection (6), the employee, if there is a collective agreement in place that provides for a redress mechanism in circumstances described in this section, shall inform the employer, in the prescribed manner and time if any is prescribed, whether the employee intends to exercise recourse under the agreement or this section. The selection of recourse is irrevocable unless the employer and employee agree otherwise.*
>
> . . .
>
> ***133.*** *(1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*

. . .

(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.

. . .

(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.

134. *If, under subsection 133(5), the Board determines that an employer has contravened section 147, the Board may, by order, require the employer to cease contravening that section and may, if applicable, by order, require the employer to*

*(*a*) permit any employee who has been affected by the contravention to return to the duties of their employment;*

*(*b*) reinstate any former employee affected by the contravention;*

*(*c*) pay to any employee or former employee affected by the contravention compensation not exceeding the sum that, in the Board's opinion, is equivalent to the remuneration that would, but for the contravention, have been paid by the employer to the employee or former employee; and*

*(*d*) rescind any disciplinary action taken in respect of, and pay compensation to any employee affected by, the contravention, not exceeding the sum that, in the Board's opinion, is equivalent to any financial or other penalty imposed on the employee by the employer.*

. . .

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*

> *(*a*) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*
>
> *(*b*) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or*
>
> *(*c*) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*
>
> . . .

[102] It is clearly established and the parties acknowledge that the complainant has pain symptoms related to fibromyalgia, that she has sleep problems and that she suffers from episodes of depression and anxiety. The parties agree that those health problems limit her ability to perform administrative and sedentary tasks. The evidence shows that there is disagreement about the complainant's ability to return to work on a full-time basis to perform those modified tasks. Dr. Subak's recommendations from summer 2005 specified that the complainant was unable to return to work. Dr. Baltzan attributed the disability to diurnal hypersomnolence for which the dose had to be adjusted. On September 1, 2005, Dr. Subak indicated to Dr. Pantel that the complainant was unable to return to work because of diurnal hypersomnolence, depression, chronic fatigue and profound sadness due to the death of a friend.

[103] Based on his observations at the August 31, 2005 meeting with the complainant and after viewing the surveillance videos, Dr. Pantel determined that the complainant did not display the appearance, attitude or activities of a depressed person suffering from fatigue and chronic pain. Dr. Pantel's conclusions also stemmed from his review of the complainant's entire medical file, which showed a somatic problem with strong psychological overtones justifying a change in therapeutic treatment, contrary to the post-traumatic approach recommended by Dr. Subak.

[104] Inspector Lemyre's memo, served to the complainant on September 22, 2005, indicates that he considers her fit to perform limited tasks and that she is no longer on medical leave. The memo ordered the complainant to return to work the following day. It specifies the consequences of failing to comply with the return–to-work order (Exhibit P-16).

[105] The circumstances surrounding the serving of the September 22, 2005 return-to-work order indicate to me that the core of the dispute between the parties is the complainant's ability to return to work. The conversations between the complainant and Sergeants Génier and Bissonnette, who served her with the memo, and with S/Sgt. Vaillancourt at their meeting on September 27, 2005, as well as S/Sgt. Delisle's intervention with Inspector Lemyre, confirm that assessment.

[106] The RCMP informed the complainant that her refusal to work could not be deemed to be properly based on subsection 128(1) of the *Code* because she was not "at work" when she made it.

[107] At the September 27, 2005 meeting with S/Sgt. Vaillancourt in S/Sgt. Delisle's presence, the complainant indicated that she refused to return to work "[translation] for her health." When questioned by S/Sgt. Vaillancourt, she did not specify the task that would endanger her health. According to the complainant's testimony, she considered that all tasks were harmful to her health because Dr. Subak considered her unfit to work.

[108] The RCMP did not accept the complainant's refusal to work, and it notified the complainant on September 30, 2005 that her refusal was premature because she did not know the tasks that would be assigned to her. On that basis, the RCMP upheld its September 22, 2005 order to return to work and informed the complainant that she could face disciplinary action or an administrative discharge (Exhibit P-22). When served with the memo, the complainant informed S/Sgt. Vaillancourt that she maintained her refusal (Exhibit P-23).

[109] The RCMP issued another memo, which was served to the complainant on December 2, 2005 (Exhibit P-24). That memo was drafted based on clinical reports that Dr. Subak submitted since September 20 recommending that the complainant was unfit to work until December 7, 2005. The request for sick leave for the November 9 to December 7, 2005 period was denied. The RCMP indicated that it was upholding the September 22, 2005 return-to-work order and repeated that failure to comply could lead to disciplinary action or administrative discharge (Exhibit P-24).

[110] On December 20, 2005, at her meeting with Corporal Mombourquette in the presence of S/Sgt. Delisle, the complainant indicated that she was refusing to return to

work "[translation] to avoid aggravating her medical condition" (Exhibits P-33 and E-64).

[111] Investigating a complaint based on section 147 of the *Code* is a two-step process, according to *Brisson* and *Lequesne*. First, it must be determined whether the employee had reasonable cause to believe that a danger existed when refusing to work. If so, the investigation moves on to the second step, where an employer must demonstrate that the disciplinary action taken against the employee was driven by legitimate considerations that are not related in any way to the employee's exercise of his or her right of refusal.

[112] The complainant expressed her refusal to work to the respondent on four occasions: September 22, 2005, when she was served with the memo; September 27, 2005, when she went to the AFIS office in Dorval; September 30, 2005, when she was served with the memo; and December 20, 2005, during the meeting with Corporal Mombourquette. The assessment procedure set out in *Brisson* and *Lequesne* must be applied to each of those circumstances.

[113] Paragraphs 128(1)(*b*) and (*c*) of the *Code* provide that "while at work" an employee may refuse to work in a place if he or she has reasonable cause for believing that it is dangerous to the employee to work in that place or to perform an activity if he or she has reasonable cause to believe that performing the activity constitutes a danger to the employee or to another employee. The words "while at work" necessarily imply that an employee may not exercise a right to refuse to work when that employee is not at work. Consequently, the respondent was justified in not accepting that the refusal to work expressed by the complainant to Sergeants Génier and Bissonnette on September 22, 2005 was valid under the *Code*. However, the complainant met that requirement when she appeared with S/Sgt. Delisle at the AFIS office in Dorval on September 27, 2005 to express her refusal to work to S/Sgt. Vaillancourt.

[114] When the September 22, 2005 memo was served, the complainant stated that she was unable to work due to illness. She supported her refusal to work in the same terms during her phone conversation and meeting with S/Sgt. Vaillancourt on September 27, 2005. In doing so, the complainant provided enough justification to the employer for her refusal and met the requirement of subsection 128(6) of the *Code*. I agree with the principle provided in the decisions cited by the complainant regarding an employee's obligation to inform his or her employer in general terms about the

reason for his or her refusal. The RCMP clearly understood that the complainant refused to work based on the recommendations of her doctors, who had declared her unfit to work.

[115] The complainant had to specify reasonably and sufficiently not only the fact that her refusal to work was based on fears for her safety but also the nature of those fears, as stated in *Green*. The parties agree that the purpose of the procedure involving the right to refuse to work under the *Code* is to protect employees who deem that their working conditions constitute a danger and to trigger the process that is supposed to lead the employer to a solution to the problem.

[116] From the moment that September 22, 2005 memo was served, the dispute between the parties was clearly identified and was based entirely on the opposing medical opinions about the complainant's ability to perform administrative and sedentary tasks. In this case, that connection between sedentary and administrative tasks and the risk of injury or illness had to be demonstrated by the complainant to meet the requirement that she had reasonable cause to believe that carrying out such tasks presented a danger. I agree with *Boivin,* which states as follows:

. . .

> *[147] A reading of the definition of danger indicates to me that in order to consider a situation to be a danger, one must establish a link such that the danger would cause injury or illness to a person. The employer is then obliged to correct the danger before the employee returns to the worksite. . . .*

. . .

[117] It is not sufficient merely to allege that a person who is unable to perform a specific task because of illness could become more ill if that person returned to work. For her refusal to work to come under section 128 of the *Code*, the complainant had to demonstrate the nature of the risk to her health from the tasks that the RCMP wanted to assign to her. I agree with *Chaney*, which states that employees have to convince the Board that their refusal was based on a real fear related to safety.

[118] The complainant did not demonstrate to me that after being served the September 22, 2005 memo she had reasonable cause to believe that the tasks that the RCMP wanted to assign to her presented a danger or risk to her health under the requirements of section 128 of the *Code*. Consequently, this complaint cannot be

allowed for the refusal to work expressed by the complainant on September 22 and 27, 2005.

[119] After the complainant was given the memos on September 30, 2005 and on December 2, 2005, she indicated her refusal to return to work without specifying to the respondent the nature of the risk that the tasks assigned to her could present to her health. The dispute between the parties remains the same with respect to the complainant's ability to return to work. For the same reasons as those presented above, this complaint cannot be allowed because of the complainant's refusal to work following the September 30 and December 2, 2005 memos, since no evidence was provided that she had reasonable cause to believe that returning to work would present a risk to her health or safety under section 128 of the *Code*.

[120] Because I find that the complainant did not demonstrate that she had reasonable cause to believe that there was a danger, there is no need to move to the next stage of the analysis of the complaint to assess whether the respondent demonstrated that a disciplinary action was motivated by legitimate considerations that are not in any way linked to the complainant's exercising her right to refuse.

[121] The Board cannot rule on the dispute between the parties regarding the complainant's ability to handle sedentary and administrative tasks based on a complaint under section 133 of the *Code*. Section 134 of the *Code* specifies the orders that the Board may make against an employer that has contravened the prohibition contained in section 147.

[122] The evidence that the parties presented to me does not lead me to conclude that the complainant deliberately exercised her right to refuse in an abusive way. Although the complainant followed the advice of her representative, S/Sgt. Delisle, nothing indicates that she acted in bad faith. On the contrary, she displayed prudence by seeking assistance from a representative of the Royal Canadian Mounted Police Members Association. She relied in good faith on the advice of S/Sgt. Delisle, who had acted as an advisor to the members of the RCMP for a long time. This is the first time that a complaint based on section 133 of the *Code* has been filed before the Board by a member of the RCMP, and it is not abnormal or in bad faith, under the circumstances, that the positions of the complainant, her representative and the respondent could be ambiguous.

[123] At the hearing, it was indicated that other forms of recourse exist for settling this dispute by grievance under the *Royal Canadian Mounted Police Act* and its regulations. It is generally known that a dispute about the adaptation of duties and the conditions for a gradual return to work following a disability can be addressed under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

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

(The Order appears on the next page)

V. Order

[125] The complaint is dismissed.

January 3, 2008.

P.S.L.R.B. Translation

Léo-Paul Guindon,
Board Member