Date: 20081121

File: 560-34-43

Citation: 2008 PSLRB 96

Canada Labour Code

Before the Public Service Labour Relations Board

BETWEEN

DWIGHT W. GASKIN

Complainant

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Gaskin v. Canada Revenue Agency

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

REASONS FOR DECISION

Before: Dan Butler, Board Member

For the Applicant: Himself

For the Respondent: Peter Cenne, Canada Revenue Agency

Decided on the basis of written submissions
filed July 31, August 18 and 28, September 2, 9 and 26, and October 2, 2008.

I. Complaint before the Board

[1] This decision addresses preliminary matters raised by the parties regarding a complaint filed with the Public Service Labour Relations Board ("the Board") on July 10, 2008, by Dwight W. Gaskin ("the complainant") under section 133 of the *Canada Labour Code*, R.S.C., 1985, c. L-2 ("the *Code*"). In his complaint, he alleges that his employer, the Canada Revenue Agency ("the respondent"), violated section 147 of the *Code* as well as "other applicable sections."

[2] The complainant described the "act, omission or other matters complained of" under section 133 of the *Code* as follows:

> *BILL C-45 ADDRESSES VIOLATIONS OF OCCUPATIONAL HEALTH AND SAFETY. THE OHS VIOLATIONS ARE AMENDMENTS OF THE CRIMINAL CODE OF CANADA. THE WORK VIOLATIONS AND UNFAIR LABOUR PRACTICE OF THE EMPLOYER REFLECT VIOLENCE IN THE WORKPLACE, DANGER, AND VIOLATIONS OF THE CANADA LABOUR CODE. THE EMPLOYER DID NOT CONDUCT THE REQUIRED OHS INVESTIGATION OR FOLLOW THE REQUIRED PROCEDURES UNDER THE CANADA LABOUR CODE PART II. THE EMPLOYER IS DISCRIMINATING ON THE APPLICATION OF THE EMPLOYER RESPONSIBILITIES AND OBLIGATIONS UNDER AGENCY SECURITY POLICY CHAPTER 26, THREATS, ABUSE STALKING AND ASSAULT. ALL OMISSIONS REPRESENT OBSTRUCTION OF OBLIGATIONS UNDER BILL C-45, OHS, AND CANADA LABOUR CODE LEGISLATION. THE REPORTED MATTERS INCLUDING FRAUD, KIDNAPPING, PERJURY AND OBSTRUCTION. AGENCY INFORMATION ON REPORTING UNDER SECTION 133 FOR VIOLATIONS UNDER SECTION 147 WAS NOT AVAILABLE TO ME IN THE WORKPLACE. I WAS INFORMED OF THIS BY HRSDC LABOUR PROGRAM AND CIRD OFFICIALS ON JULY 7-9, 2008. THE EMPLOYER HAS NOT RESPONDED TO ORAL AND WRITTEN COMPLAINTS AND HAS NOT REGISTERED GRIEVANCES AND HARASSMENT COMPLAINTS AND HARASSMENT GRIEVANCES. THERE HAVE BEEN NO HEARINGS SINCE 2005 FOR ALL REPORTED MATTERS TO ALL SUPERVISORS AND LABOUR RELATIONS ADVISORS. THE EMPLOYER FAILED TO REPORT AND HAS OBSTRUCTED REQUIRED DUTY UNDER FEDERAL LEGISLATION FOR ALL REPORTED VIOLATIONS OF FEDERALS ACTS AND UNDERTAKINGS OF CRIMINAL HARASSMENT AND VIOLATIONS OF BILL C-45. I HAVE REPORTED THIS INFORMATION IN DETAIL TO SUPERVISORS THROUGHOUT 2005 AND 2008. I HAVE PRESENTED THIS INFORMATION BEFORE THE MANITOBA SUPERIOR COURT THROUGH COUNSEL IN JANUARY 2007 SINCE THE EMPLOYER HAS BEEN OBSTRUCTING MATTERS INCLUDING CHILD*

> *ENDANGERMENT MATTERS AND AN AGENCY LAWSUIT. IT IS A FURTHER VIOLATION TO RETALIATE AND ATTEMPT DISCIPLINE FOR REPORTING MATTERS INTERNALLY AND TO THE COURT RESULTING IN UNFAIR LABOUR PRACTICE UNDER SECTIONS 185-186 AND SECTION 98 FOR DISCRIMINATING ACTS/OMISSIONS.*
>
> [*Sic* throughout]

[3] Elsewhere on the form used to file his complaint, the complainant alleges "structured dismissal, application of discipline," "danger, interference and obstruction . . . in a private prosecution," "constructive dismissal, withholding information," "failures under Part I, II and II," "reported child endangerment while in travel status," a violation of the "duty to accommodate for members of visible minority groups," and "unlawful impersonation of national authority on human rights," among other accusations.

[4] In a letter separately filed with the Board on July 11, 2008, the complainant stated as follows:

> . . .
>
> *As matters are criminal and are violations of work violence and present danger in the workplace I have notified the employer of the danger [sic] and refusal to work effective October 22, 2007 and have been absent from the office since October 5, 2007* . . . .
>
> . . .

Among other charges outlined in the letter, the complainant makes the following allegation:

> . . .
>
> . . . ***There are blatant breaches of provincial, federal and international statutes presently before the superior court of Manitoba including labour guarantees under NAFTA (NAALC policies on violence, OHS and labour standards matters). All of which are the employer responsibility.***
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

The complainant states in the letter that he has been subject to constructive dismissal efforts since presenting "the matter" before the Superior Court of Manitoba. He depicts those efforts as ". . . violations under sections 98, 185-8, and 187 of the Canada Labour Code, amongst other provisions and statutes." The complainant also refers to correspondence that he received from the employer, dated May 13, 2008, and June 27, 2008, that he alleges violate section 147 of the *Code*.

[5] By email dated July 11, 2008, the complainant forwarded "additional information" to the Board. The email contains allegations similar to those made in his other filings but also includes further references, such as the following:

> . . .
>
> *This escalated Attempted Structured Dismissal (Termination).*
>
> . . .
>
> *. . . violations concerning federal undertakings and activities, the constitution, harassment and discrimination, and child protection from kidnapping to halt a promotion.*
>
> *Harassment from the Edmonton work location . . .*
>
> . . .
>
> *Attempted coercion and intimidation (harassment) to accept position and duties below the EC1 Level requiring mobility to Ontario to accept the promotion . . . It is a constitutional violation . . .*
>
> *Violations of employer Duty to Accommodate for Under-Represented group member.*
>
> *Attempted Forced staffing and failure to accommodate.*
>
> . . .
>
> *. . . a breach of the administration of the Policy on Discipline . . . abuse of authority and harassment . . .*
>
> *. . . Timeliness violated by employer.*
>
> *. . . threats, intimidation, and coercion against my colleagues . . .*
>
> . . .
>
> [*Sic* throughout]

[6] A further extract from the complainant's email of July 11, 2008, suggests some elements of context for the timing of his complaint and appears to summarize its themes, as follows:

> . . .
>
> *. . . In May and June 2007 the employer issued correspondence stating sick leave credits were to expire and threatening termination effective Aug. 7, 2008 given an advance of one month sick leave credits. They have ignored OHS reports, reports of criminal harassment and violence at work, and refusal to work for the danger experienced and denied constitutional guarantees under employer legislation.*
>
> *There has been no correspondence issued since my announced refusal to work effective October 2005. This retaliation, reprisal, and attempted discipline and termination is due to the fact that I will be testifying in the matters reported to all quasi-judicial and judicial proceedings where the entire matter is well-defined under the NAALC, the domestic and the international human rights law and the labour law to be the employer responsibility and obligation [sic]. The OHS violations are disclosed in each process. The matters have been denied internal hearings by grievance and harassment complaints.*
>
> . . .

[7] The respondent filed its reply to the complaint on July 31, 2008. The respondent submitted that there has been no breach of section 147, or any other section, of the *Code*. As such, the respondent argued that the Board has no jurisdiction to consider the matter. According to the respondent, the employer did not dismiss, suspend, layoff, or impose a financial penalty, or take disciplinary action, or threaten to take disciplinary action against the complainant. The respondent also submitted that the complainant has failed to provide specific and relevant information that sets out the acts, omissions or other matters complained of in his filing.

[8] With respect to the alleged refusal to work, the respondent contended that the complainant did not give it notice of an existing danger in the workplace as required by the *Code* and that the complainant did not exercise the right of refusal provided under the *Code* at the time the alleged danger or violence existed. The respondent further maintained that the complaint is untimely and does not meet the procedural requirements established by the *Code*: see *Alexander v. Treasury Board (Department of Health)*, 2007 PSLRB 110.

[9] The respondent also took the position that the allegations of violations of the complainant's rights under the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), the *Criminal Code*, R.S.C., c. C-46 ("*Criminal Code*"), the North American Free Trade Agreement (NAFTA), and the North American Agreement on Labour Cooperation (NAALC), as well as "matters under separate jurisdictions," do not fall within the Board's jurisdiction. The respondent asked that the Board dismiss the complaint without a hearing.

[10] The complainant responded to the objections about the Board's jurisdiction and the timeliness of his complaint in a facsimile and in an email to the Board, both dated August 17, 2008.

[11] On August 18, 2008, the complainant sent an email to the Board informing it that the respondent had ceased paying his salary on that date. He also referred to a response received from his employer to a grievance that he filed on July 11, 2008. The complainant's email repeats a number of statements that he had previously made. Among the points made by the complainant are the following:

. . .

> *. . . I believe that my complaint submitted to your office contained the employer letters dated May 13, 2008 and June 27, 2008. I believe each of these letters outlines intended constructive work environment harassment and threat for dismissal. These are matters within the jurisdiction of the Board and my complaint in relation to these matters was submitted in a timely manner. The Board is responsible for oversight of the public interest. This is a matter of the public interest that includes violations of occupational health and safety legislation and/or provincial and federal safety and health legislation by public officials and agents of government. The allegation and findings are relevant to the conduct of Agency officials and the applicable violations to be addressed within the jurisdiction of the Public Service Labour Relations Board.*

. . .

> *. . . all reports of violence in the workplace and an unsafe work environment have been ignored and followed by letters of May and June 2008 reflecting constructive dismissal. This prompted a timely complaint to the Board under section 133. . . .*

. . .

> *. . . I consider the respondent allegations surrounding jurisdiction and timeliness to be an attempt to deny access to the PSLRB . . . .*
>
> . . .
>
> *Constructive dismissal and work environment harassment is the jurisdiction of the Board. . . .*
>
> . . .
>
> *. . . By law, the burden is upon the employer and the reverse onus of proof is upon the organization.*
>
> . . .
>
> *The occupational health and safety legislation is very clear and is enshrined within the Canada Labour Code. I have reported many matters to the employer that have either been ignored or condoned. Those matters are now before another jurisdiction . . . Perhaps the employer's assertion of timeliness may only refer to the two-year statute barred [sic] date regarding the responsibility and obligation to address reported occupational health and safety violations, harassment and criminal harassment, amongst other matters. The reported harassment, including unsafe and hostile work environment, is ongoing and condoned, and therefore my complaint may be considered timely.*
>
> . . .
>
> *. . . The Public Service Labour Relations Act may address matters relevant to this complaint and may refer other matters to other appropriate jurisdictions. These situations may occur where the Board finds violations of the Criminal Code, the Canadian Human Rights Act, etc. Nevertheless, the Board has jurisdiction over constructive methods of termination particularly where there are clear violations of worker protection and security policies and legislation that ought to have been addressed by the employer. . . .*
>
> . . .

[12] On August 28, 2008, the respondent stated in rebuttal that its position remains as outlined in its original submissions. The respondent added that the complainant had not yet presented the grievance, to which he referred on August 18, 2008, at the final level of the grievance procedure. That grievance, according to the respondent, is not properly before the Board.

[13] The complainant chose to file further comments about the respondent's rebuttal on September 2, 2008. Among other statements, the complainant contended that "[i]t is unlawful to cease my regular salary during OHS violations and applicable reviews by appropriate and relevant authorities."

[14] On September 9, 2008, the complainant submitted ". . . a request for immediate and retroactive remedy by order of the Board to complement my report of discriminatory conduct and cessation of my regular pay in further violation of labour protection provision and considerations under Section 147." The complainant also offered further background information about his complaint.

[15] The Registry of the Board asked the respondent for its reply to the complainant's request regarding reinstatement of pay. On September 26, 2008, the respondent submitted that it ". . . will not reinstate the Complainant's regular pay in relation to this complaint, which is untimely and without merit."

[16] The Registry of the Board provided the complainant with an opportunity to rebut the respondent's position on the salary reinstatement issue. On October 2, 2008, the complainant submitted additional arguments, accompanied by 13 documents. The submission was not a rebuttal to the respondent's position on salary reinstatement but, rather, was composed of further arguments on the timeliness and merits of his complaint.

[17] The Chairperson of the Board has appointed me to hear and determine these matters.

[18] Given the volume and nature of the complainant's submissions, I have departed from the usual format for the Board's decisions and will not offer a separate section summarizing his arguments. Instead, I will describe and address the principal arguments in support of his complaint in my reasons. I take the same approach regarding the respondent's arguments, which are brief and that, in effect, have been stated in the preceding section.

[19] The complete submissions of the parties are on file with the Board.

II. Decision on preliminary matters

[20] There are three preliminary issues before the Board: (1) the respondent's objection to the jurisdiction of a Board member to hear the complaint under section 133 of the *Code*; (2) the respondent's objection to the timeliness of the complaint; and (3) the complainant's application for an order providing an immediate remedy.

[21] I have reviewed all the submissions and documents on file and concluded that it is possible to determine the preliminary issues based on the record without convening an oral hearing. The Board's authority to do so is stated in section 41 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2, ("the *Act*") as follows:

> ***41.*** *The Board may decide any matter before it without holding an oral hearing.*

[22] The Board's task in this decision has been complicated by the number of different allegations that the complainant makes and the way in which he sometimes expresses those allegations. He has identified concerns about what has transpired in his workplace that potentially involve diverse elements of law and multiple jurisdictions. He is apparently involved in legal actions against his employer and/or government officials on multiple fronts. I note, in particular, that the complainant has indicated that he is currently before the Superior Court of Manitoba with an action or actions the details of which are unclear. The record also suggests that he is actively pursuing at least two harassment complaints or grievances against his employer, that he has had ongoing contacts with Labour Program officials at Human Resources and Social Development Canada (HRSDC) with respect to health and safety issues, and that he has made charges of discrimination and failure to accommodate that could potentially involve proceedings under the *Canadian Human Rights Act* (*CHRA*), R.S.C. 1985, c. H-6.

[23] Many of the allegations made by the complainant appear to overlap and intertwine. It is not always clear that he appreciates that different redress mechanisms are appropriate for different subject matters, and usually only for those subject matters. In this complaint, he draws in the full panorama of his concerns about what he has experienced and maintains that the Board has a responsibility to address many of those concerns. He states that it is in the "public interest" that the Board do so.

[24] It is my responsibility to ensure that this decision focuses directly and only on the allegations and submissions that pertain to the complaint under section 133 of the *Code* for which I am seized. That section reads as follows:

> *Complaint to Board*
>
> ***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.*
>
> *Time for making complaint*
>
> *(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*
>
> *Restriction*
>
> *(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.*
>
> *Exclusion of arbitration*
>
> *(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.*
>
> *Duty and power of Board*
>
> *(5) On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.*
>
> *Burden of proof*
>
> *(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.*

[25] The Board's jurisdiction to consider a complaint under section 133 of the *Code* is established by section 240 of the *Act* as follows:

> ***240.*** *Part II of the Canada Labour Code applies to and in respect of the public service and persons employed in it as if the public service were a federal work, undertaking or business referred to in that Part except that, for the purpose of that application,*
>
> (a) *any reference in that Part to*
>
> . . .
>
> *(ii) the "Board" is to be read as a reference to the Public Service Labour Relations Board,*
>
> . . .

[26] The complainant alleges that the respondent has violated section 147 of the *Code*, which reads as follows:

> ***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.*

[27] At various points in his submissions, the complainant states that he refused to work for safety reasons within the meaning of the *Code*. The principal applicable provisions of the *Code* are found in section 128, as follows:

> ***128.*** *(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to*

perform an activity, if the employee while at work has reasonable cause to believe that

(a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;

(b) a condition exists in the place that constitutes a danger to the employee; or

(c) the performance of the activity constitutes a danger to the employee or to another employee.

(2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if

(a) the refusal puts the life, health or safety of another person directly in danger; or

(b) the danger referred to in subsection (1) is a normal condition of employment.

. . .

(6) An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1), or who is prevented from acting in accordance with that subsection by subsection (4), 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.

(8) If the employer agrees that a danger exists, the employer shall take immediate action to protect employees from the danger. The employer shall inform the work place committee or the health and safety representative of the matter and the action taken to resolve it.

(9) If the matter is not resolved under subsection (8), the employee 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 and to the work place committee or the health and safety representative.

> *(10) An employer shall, immediately after being informed of the continued refusal under subsection (9), investigate the matter in the presence of the employee who reported it and of*
>
> *(a) at least one member of the work place committee who does not exercise managerial functions;*
>
> *(b) the health and safety representative; or*
>
> *(c) if no person is available under paragraph (a) or (b), at least one person from the work place who is selected by the employee.*
>
> . . .
>
> *(13) If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer.*
>
> . . .

A. Sequence of events

[28] To address the preliminary matters, it is useful as a first step to try to reconstruct the relevant sequence of events preceding the filing of the complaint. In his several submissions, the complainant purports to outline what happened to him, although there are gaps and some inconsistencies in what he reports. I note that the employer's submissions provide little assistance in that regard. The employer has chosen to focus its submissions, in the greatest part, directly on the core reasons for its objections. It has not commented on most of the facts alleged by the complainant nor offered its own chronology of events. At this stage, I can only proceed by assuming that the facts stated by the complainant are true unless there is an obvious reason to find to the contrary. Some of the supporting documents tendered by the complainant provide assistance. Should I find that there is a basis to proceed to a hearing on the merits of the complaint, the relevant facts as well as the documents submitted to date may have to be formally proven. I must stress that their acceptance here is solely for addressing the preliminary matters and that it cannot be taken as a conclusive finding of fact or of admissibility for purposes of later proceedings, should they occur.

[29] Based on all the information on file, I believe that the following chronology of events recounts what occurred, in very "broad brush."

[30] In October 2005, the employer assigned the complainant to work on a Government of Canada lawsuit that remains ongoing. The complainant describes that assignment as having a "discriminatory" effect, pointing to the impact of the resulting increased workload. He states that he had to work "excessive hours" performing "double duty" on the legal proceedings and on the management of the "Agency Regional Essential Business Program."

[31] According to a medical note provided by the complainant's physician to the employer on October 22, 2007, the complainant came under his care starting in July 2006. The note reports that the complainant had been under stress due to ". . . an ongoing legal battle involving his children." In that regard, the note refers to ". . . an ongoing investigation . . . made by the Provincial Ombudsman, the Attorney General and the Minister of Justice, into possible criminal conduct affecting Mr. Gaskin and his children." Elsewhere, the complainant appears to indicate that his ongoing "double duty" contributed to the health issues that he experienced.

[32] In April 2007, the employer offered the complainant a lateral transfer to an excluded management position in "TI Client Services" in the Individual Client Services and Benefits Division. In his July 11, 2008, email, the complainant, perhaps in reference to that offer, accuses the employer of "[a]ttempted coercion and intimidation (harassment) to accept position and duties below the EC1 Level requiring mobility to Ontario to accept the promotion . . . It is a constitutional violation . . . ."

[33] On June 19, 2007, the complainant's assistant director wrote to him in response to previous correspondence from the complainant, dated May 1, 2007, in which the Assistant Director referred to ". . . criminal matters in which you feel that the CRA as your employer, has some obligation to take action." The Assistant Director asked the complainant for a written statement of specifics to assist management to address the complainant's situation.

[34] The complainant reports that he provided the information requested by management on August 31 and September 4, 2007. He states that the information provided included material ". . . concerning occupational health and safety violations discussed with Justice Canada and multiple counsel." The complainant characterizes

the information as denoting ". . . government acts and omissions and violations of [his] Charter rights matters . . . ."

[35] The complainant also outlined that he met over that summer with an employer labour relations advisor and ". . . disclosed all matters violating worker rights and labour protection contracts." He refers to the fact that management was aware at that time that the matters included a complaint to the Court of Queen's Bench.

[36] The complainant reports that he was invited by management on September 14, 2007, "without prior notice" to attend a disciplinary meeting. When the complainant requested a third-party observer, his supervisor terminated the "surprise disciplinary meeting."

[37] On September 18, 2007, the complainant received an email from his supervisor about the application of the employer's discipline policy. The complainant states his belief that the email ". . . confirms the threat of discipline and retaliation and threat of reprisal for matters that I have reported under CLC-II section 147 a, b, c."

[38] On September 20, 2007, the complainant filed a harassment complaint against his immediate supervisor.

[39] On October 1, 2007, the complainant ". . . advanced [his] complaint of workplace violence (harassment, discrimination, bullying, attempted discipline, etc.) up the chain of command . . . ."

[40] On October 5, 2007, the complainant began two weeks' of sick leave, as certified by his physician. The complainant states that the physician's letter, mentioned above, is the only medical note "concerning sick leave" that he provided to the employer. The physician's note mentions that the complainant ". . . feels that he has been the victim of violence in the workplace and feels his workplace is hostile and unsafe." Due to a series of medical conditions described by the physician, he concludes that he does ". . . not feel it appropriate for this patient to return to work at this time." He recommends that the complainant ". . . be off until these issues are resolved."

[41] The complainant maintains that the note ". . . in no way suggested that [he] was taking sick leave until the health and safety issues were resolved." He also states that he sent a "violence at work" and "unsafe work" notice to the employer on October 23, 2007, which reads as follows:

> *. . . a report from my medical practitioner, advising the Employer of* [my] *OHS workplace violence, harm and safety concerns, and also that* [I] *would not be returning to the premises until the issues were wholly corrected. This was a refusal to re-enter the premises to be harassed, threatened, and to be further subject to threats of retaliation, discipline or reprisal (not limited to Section 128(1)(b) and (c) during the parallel Agency investigations of formal complaints of harassment and discrimination . . .*
>
> . . .

[42] The complainant's director contacted him by telephone in "October 2007" asking the complainant to return to work. The complainant states that this request demonstrates that the Director knew that the complainant was not on sick leave.

[43] The complainant remained off work.

[44] In February 2008, the employer responded to the complainant's "harassment complaints" and "harassment grievances." The response, according to the complainant, was untimely and removed from consideration many of his allegations, thus violating ". . . principles of natural justice and judicial fairness."

[45] In late February or early March 2008, the complainant reported to the Canadian Human Rights Commission (CHRC) that an investigator appointed by the employer had unlawfully misrepresented herself as a CHRC investigator.

[46] On March 27, 2008, the Superior Court of Manitoba issued an order for ". . . replacement counsel to deal with the action before the court." The complainant states that the court action was initiated by a third party, but that ". . . [the complainant's] response and complaint to the court of Queen's bench [*sic*] resulted in interference under section 147 of CLC . . . ." He characterizes the court case as addressing ". . . misconduct of public officials, agents of government, and participants of the judicial system regarding the circumstances leading up to OHS complaint."

[47] On April 2, 2008, the complainant filed a complaint against the Prairie Regional Assistant Commissioner claiming that he censored allegations in the complainant's first harassment complaint.

[48] On May 12, 2008, the Agency's assistant commissioner of Human Resources acknowledged the complaint filed on April 2, 2008, and accepted it "as a formal grievance . . . ."

[49] On May 13, 2008, the complainant's assistant director sent him a letter in which he states that the Agency's records ". . . indicate that [the complainant has] been on certified sick leave since October 5, 2007. . . ." The letter informed the complainant that his sick leave credits would be exhausted on July 3, 2008. The letter further states the following:

. . .

> *Should your situation continue that you are not able to return to the workplace prior to July 3, 2008 then you could continue with sick leave without pay. You may wish to apply for disability insurance for further income support.*

. . .

The complainant characterizes the letter as ". . . continued harassment and a threat to impact me financially, in retaliation to [his] harassment complaint and workplace violence complaints under the CLC Part II."

[50] The complainant reports that he then sent a letter informing the Assistant Commissioner, Prairie Region, that he was not on sick leave and that ". . . [his] was a refusal to report to premises pending resolution of OHS complaints and outcome of investigations."

[51] On June 11, 2008, according to the complainant, he received a telephone call from a "CCSC agent" who requested that the complainant confirm his sick leave status. The complainant states that the caller had received direction to ". . . amend his status to sick leave . . . and that [she did] . . . not have any information indicating that [the complainant is] on sick leave." The complainant told the caller that he was not on sick leave.

[52] On June 27, 2008, the Assistant Director, Prairie Region, wrote to the complainant. The following extracts reveal her views regarding what had occurred up to that time:

. . .

> *It is my understanding that you have discussed your view on numerous occasions as to CRA's responsibilities in your various legal issues. You were repeatedly asked to provide specifics . . . . After reviewing all information submitted, it is the Employer's position that these issues result from activities outside the workplace. Therefore, the Employer has no responsibility in relation to these private matters.*
>
> . . .
>
> *. . . I understand that you feel that you and your children are victims of economic kidnapping, harassment and violence. However, as previously communicated to you, the Employer has no responsibility in these private matters. As to the workplace, you were offered work options in early October to separate you from* [the complainant's supervisor] *and regularize your work situation once your harassment complaint was received. To date, it is my understanding that you have not pursued these options. I also understand that you have been away from the workplace on sick leave since October 5, 2007 and continue to be away, as supported by your medical practitioner in the medical note you submitted on October 23, 2007.*
>
> *As you know, you will be exhausting your earned sick leave credits soon. As per my authority, I have decided to advance sick leave credits to you under the collective agreement. Therefore, you will continue on paid sick leave until the close of business August 7, 2008. As of August 8, 2008, you will be temporarily struck off strength. I have enclosed a package prepared by the Compensation Client Service Centre that outlines your options in relation to disability insurance.*
>
> . . .

[53] The complainant filed his complaint under section 133 of the *Code* on July 10, 2008.

B. <u>Objections to jurisdiction and timeliness</u>

[54] The respondent's objection to jurisdiction cites three bases:

(1) the employer did not dismiss, suspend, layoff, or impose a financial penalty, or take disciplinary action or threaten to take disciplinary action against the complainant. In that regard, the complainant has failed to provide specific and

relevant information that sets out the acts, omissions or other matters complained of;

(2) the complainant's alleged refusal to work did not meet the procedural requirements established by the *Code*; and

(3) the allegations of violations under the *Charter*, the *Criminal Code*, the NAFTA and the NAALC, as well as "matters under separate jurisdictions," do not fall within the jurisdiction of the Board.

[55] The respondent directs its objection to timeliness to the complainant's statement that he refused to work in October 2007. On the presumption that the subject matter of the complaint is an alleged reprisal by the employer in reaction to the complainant's exercise of his right to refuse work under the *Code*, the complaint filed in July 2008, according to the employer, did not respect the 90-day filing period prescribed by subsection 133(2) of the *Code*.

[56] I approach the question of jurisdiction and timeliness by posing the following questions that I believe are at the heart of the jurisdictional issue:

1. Do the submissions reveal that the respondent has taken an action against the complainant that is of the type listed under section 147 of the *Code*? That is, did the respondent dismiss, suspend, layoff or demote the complainant, impose a financial or other penalty on him, refuse to pay him, or take or threaten to take disciplinary action against him.

2. If the respondent has taken an action of the type listed under section 147, was the action taken for one of the reasons identified under section 147? That is, did the respondent act because the complainant:

(a) testified or is about to testify in a proceeding taken or an inquiry held under Part II of the *Code*?

(b) provided information to a person engaged in the performance of duties under Part II of the *Code* regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or

(c) acted in accordance with Part II of the *Code* or sought the enforcement of any of the provisions of Part II of the *Code*?

3. If the respondent took an action that is of the type listed under section 147 for one of the reasons listed in the paragraphs of that section, did the complainant submit his complaint not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint, as required by subsection 133(2)?

1. Question 1 - respondent action of the type listed under section 147 of the *Code*

[57] It is quite possible to lose sight of the essential subject of the complaint when reviewing the many allegations that the complainant makes against the employer and against public officials. As a self-represented party in this proceeding, the complainant need not be expected to frame the cause of his complaint in unequivocal and precise terms. On the other hand, he does have a responsibility to make the basis of his complaint sufficiently clear to the Board so that it can understand the nature of his case and so that the respondent can know the allegations against which it must defend.

[58] The original complaint of July 10, 2008, and the supplementary information submitted by the complainant on July 11, 2008, are replete with accusations. They suggest that the complainant had in mind many different actions by the respondent that, in his view, offend the provisions of the *Code* and justify his complaint. Many of those actions, however, occurred well before the date of his complaint; some occurred as many as three years previously. The Board must first determine whether there was an event proximate to the July 10, 2008, filing date of the complaint that led the complainant to submit his concerns to the Board under subsection 133(2) of the *Code* in a timely fashion.

[59] Assessing all the submissions and documents on file, I believe that it is appropriate to rely on, and to hold the complainant to, the summary depiction of the complaint that he offered in his main submission on jurisdiction and timeliness. He states as follows:

. . .

> *I believe that my complaint submitted to your office contained the employer letters dated May 13, 2008 and June 27, 2008. I believe each of these letters outlines intended constructive work environment harassment and threat for dismissal. These are matters within the jurisdiction of the Board and my complaint in relation to these matters was submitted in a timely manner.*
>
> . . .
>
> *. . . the employer . . . ought to have known, as it became apparent to me, that the letters threaten constructive dismissal. I immediately filed my complaint. The complaint is timely. . . .*
>
> . . .

[60] Those passages demonstrate that the event that triggered the complaint, according to the complainant, were the respondent's letters of May 13 and June 27, 2008. According to his submissions, the comments in those letters on the subject of the impending exhaustion of the complainant's sick leave credits constitute a threat of dismissal or constructive dismissal.

[61] The complainant's email dated September 2, 2008, reinforces that point. He argues as follows:

. . .

> *My complaint is firmly and properly before the PSLRB on a timely basis. It is unlawful to cease my regular salary during OHS violations and applicable reviews by appropriate and relevant authorities. This violation of the Canada Labour Code Part II concerning regular salary must be addressed promptly as it is purely illegal and perceived as retaliation, discrimination, and causes the discriminatory effect of emotional, psychological, and financial harm. . . .*
>
> . . .

The record is clear that the complainant continued to receive his regular salary in the form of sick leave with pay until the filing date of his complaint, and for a period after that. The "unlawful" ceasing of regular salary, which the complainant identifies as retaliatory action and the trigger for his complaint, can only be the impending

exhaustion of sick leave credits and the consequences of it that the respondent discusses in the letters of May 13 and June 27, 2008. The complainant states that the problem must be addressed "promptly." In context, were the subject matter of his complaint some other, earlier event — for example, a retaliatory action taken sometime immediately following the complainant's purported "refusal to work" in October 2007 — a complaint filed in July 2008 could hardly be characterized as seeking "prompt" action.

[62] In his submission of October 2, 2008, the complainant states that he ". . . filed Section 133 Complaint to the Board. Timely, as complaint was filed within 90 days from threat of retaliation to discontinue pay . . . ." That statement once more supports the conclusion that the actions that triggered the complaint, according to the complainant, were the respondent's comments about paid sick leave in its letters of May 13 and June 27, 2008.

[63] Despite everything else that the complainant alleges in his original complaint on July 10, 2008, and in the supplementary submissions filed one day later, I must therefore rule that the essential subject matter of his complaint is the respondent's alleged threat to discontinue his regular pay as communicated to the complainant in the letters of May 13 and June 27, 2008. Accordingly, I exclude from consideration for determining the preliminary matters any other action that the complainant challenges, or appears to challenge, in his original filing.

[64] To be sure, I cannot readily identify any other respondent action that might arguably be considered a dismissal, suspension, layoff, financial penalty, refusal to pay, disciplinary action or threat of disciplinary action, as required by section 147 of the *Code*, within the 90-day period preceding the complaint's filing date. If the complainant intended to identify another respondent action as the triggering event for his complaint, it is likely that that action would predate the 90-day filing period and that an issue of timeliness would thus arise.

[65] Given my ruling, the respondent's objection to timeliness does not apply. I do not need to examine further the third question that I posed in paragraph 56.

[66] Does the respondent's indication that it would discontinue the complainant's regular pay, communicated to him in the letters of May 13 and June 27, 2008, comprise a dismissal, suspension, layoff, financial or other penalty, refusal to pay,

disciplinary action or threat of disciplinary action, as contemplated by section 147 of the *Code*?

[67] As of the date the complainant filed his complaint, he continued to receive his regular pay and was in the employ of the respondent. By definition, he was not dismissed on, or before, July 10, 2008.

[68] The complainant either characterizes the respondent's action as a "threat of dismissal" or, using several different terms, alleges that he was constructively dismissed by virtue of what the respondent said in the letters of May 13 and June 27, 2008. With respect to the characterization, I find that the reference to "dismissal" in section 147 of the *Code* cannot be read as including a "threat of dismissal." The legislator specifically mentions both "disciplinary action" and threatened disciplinary action in the same part of section 147. If it intended that the concept of a threat of action should apply equally regarding dismissal, section 147 would have specified so.

[69] As for the allegation of "constructive dismissal," it is clearly debatable whether the common-law doctrine of constructive dismissal can be applied in this jurisdiction, where the employer's authority to terminate the employment relationship is precisely defined and circumscribed by statute. That debate, however, need not be joined here. In my view, both the May 13 and June 27, 2008 letters, on their faces, contemplate the continuation of the employment relationship rather than its termination. The letter of May 13, 2008, points to two options available to the complainant should his sick leave credits be exhausted. First, he could proceed on leave without pay. Second, he could explore the possibility of applying for disability insurance. Under either option, the employment relationship persists, at least in the immediate term. Informing the complainant that those options are available cannot reasonably be viewed, even on a *prima facie* basis, as equivalent to a constructive dismissal.

[70] The relevant portion of the letter of June 27, 2008, reads as follows:

> . . .
>
> *As you know, you will be exhausting your earned sick leave credits soon. As per my authority, I have decided to advance sick leave credits to you under the collective agreement. Therefore, you will continue on paid sick leave until the close of business August 7, 2008. As of August 8, 2008, you will be temporarily struck off strength. I have enclosed a package*

> *prepared by the Compensation Client Service Centre that outlines your options in relation to disability insurance.*
>
> . . .

The reference to the complainant being "temporarily struck off strength," while somewhat curious, nonetheless cannot reasonably be construed as the equivalent of a constructive dismissal. "Temporarily" implies the possibility of a future return to regular on-strength status and the preservation of the employment relationship. Notably, the respondent continues in the letter to refer to other options available to the complainant, including disability insurance. As was the case with the first letter, informing the complainant that other options are available cannot reasonably be viewed as equivalent to a real or constructive dismissal. (I note the reference in the complainant's submission that he was directed by ". . . the HRSDC-Labour Program Senior Safety Officer" in Ottawa to contact the Board ". . . on the basis of Constructive Dismissal." If such direction was given by an HRSDC officer as stated, it is clear that the Board is in no way bound by any finding or advice on the subject given by the officer or need give it any weight as hearsay evidence.)

[71] The complainant does not allege that the letters of May 13 and June 27, 2008, reveal either a "suspension" or a "layoff."

[72] The complainant does refer a number of times, in his complaints, in the supplementary documents and in his submissions, to disciplinary action or the threat of disciplinary action, although it is unclear whether his allegations regarding discipline include the respondent's letters of May 13 and June 27, 2008. What is clear is that nothing in those letters reasonably conveys any sense of real or contemplated disciplinary action on the respondent's part. There is no allegation of misconduct or culpable behaviour on the part of the complainant. There is no indication of remedial intent. The letters do not warn the complainant that the possibility of a disciplinary sanction exists. Nothing in the tone of either letter strikes me as revealing an intent to punish or any other threatened response to a perceived misdeed. To the contrary, the second letter in particular expresses the hope that the complainant will participate in the ongoing investigation of his complaints or grievances. It concludes with an assurance that the respondent is ". . . willing to sit with [him] to discuss [his] concerns at any time."

[73] I find, therefore, that the letters of May 13 and June 27, 2008, do not reveal disciplinary action or the threat of disciplinary action.

[74] The next possibility is that the respondent's letters can be considered to impose a financial or other penalty on the complainant under section 133 of the *Code.* I accept as self-evident that the exhaustion of the complainant's sick leave credits discussed by the respondent in the letters carries the significant possibility, if not probability, of a serious financial impact on the complainant. Can that scenario, however, be said to involve the imposition of a "penalty," financial or otherwise?

[75] The term "penalty" in the context of labour relations is most often used in reference to discipline. Because the legislator specifically included the term "penalty" in the list of actions in section 147 of the *Code*, in addition to discipline and the threat of discipline, it must be taken that the legislator intended that the term could refer to something that is different and non-disciplinary. The plain and normal meaning of the word "penalty," according to *The New Shorter Oxford English Dictionary*, Oxford University Press (1993), is as follows:

. . .

> *A punishment imposed for a breach of a law, rule or contract; a loss or disadvantage of some kind, either prescribed by law for some offence, or agreed on in case of a breach of contract . . . A disadvantage or loss resulting from an action , quality, etc., esp. of one's own . . . .*

. . .

[76] Given that it is at least arguable that suspending regular pay on the exhaustion of sick leave credits can be viewed as imposing a "disadvantage or loss" due to the complainant's action (presumably, his failure to return to work), I accept that there may be a *prima facie* basis for characterizing the respondent's letters of May 13 and June 27, 2008, as imposing a "financial or other penalty," at least prospectively.

[77] The final possibility under section 147 of the *Code* is that the respondent's actions can be viewed as a refusal to pay the complainant remuneration in respect of a period that he would have worked, but for the exercise of his rights under Part II of the *Code.* I reserve consideration of that possibility to the discussion below of his alleged "refusal to work."

[78] In summary, I find that the complaint possibly reveals an arguable case that the respondent's letters of May 13 and June 27, 2008, comprise an action against the complainant that may be of a type listed under section 147 of the *Code* — that the respondent imposed a "financial or other penalty." It is also an open question for the moment whether the respondent's letters comprise a "refusal to pay" within the meaning of section 147.

2. Question 2 - reasons identified under section 147 of the *Code*

[79] If it is possible that the respondent imposed a "financial or other penalty" through its letters of May 13 and June 27, 2008, did it do so for one of the reasons identified under section 147 of the *Code*? That is, did the respondent act because the complainant testified or was about to testify in a proceeding taken or an inquiry held under Part II of the *Code*, provided information to a person engaged in the performance of duties under Part II of the *Code* regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer, or acted in accordance with Part II of the *Code* or sought the enforcement of any of the provisions of Part II of the *Code*?

[80] I find no indication in the complainant's submissions of a linkage between the respondent's letters of May 13 and June 27, 2008, and the complainant's participation — specifically, giving testimony — in any proceeding under Part II of the *Code*. The submissions do not identify a proceeding or inquiry under the *Code* that might involve "testimony" other than the case before me, which did not exist at the time the respondent issued its letters and cannot be the reason for those letters. ("Testimony," in that sense, is normally construed as evidence given in a hearing or other formal proceeding, usually under oath.) The court proceedings to which the complainant refers — in which he might give testimony — are not ". . . proceeding[s] taken or an inquiry held under . . ." Part II of the *Code*.

[81] I also find that there is no persuasive linkage in the complainant's submissions between the respondent's letters of May 13 and June 27, 2008, and the provision by the complainant of information to a person engaged in the performance of duties under Part II of the *Code* regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer. It may well be that the complainant did at various times provide information to a person or persons engaged in the performance of duties under Part II of the *Code* — his contacts with

HRSDC personnel or his discussions with a labour relations advisor in the summer of 2007 would likely qualify — but more is required. There must be a basis for finding that the respondent wrote the letters of May 13 and June 27, 2008, because the complainant provided information to someone at some time in the context of the performance of duties under Part II of the *Code*. I do not believe that the facts stated by the complainant, if taken to be true, reasonably outline the linkage or support that proposition.

[82] As to paragraph 147(*c*) of the *Code*, the question is whether the respondent took an action because the complainant acted in accordance with Part II of the *Code* or sought the enforcement of any of the provisions of Part II of the *Code*. That question, in my view, brings us squarely to the issue of the complainant's alleged refusal to work. The complainant appears to contend that he was never on sick leave other than for two weeks in October 2007. I conclude from his statements that he believes that he was exercising his right to refuse work under section 128 after those two initial weeks of sick leave. If I am interpreting the complainant's submission correctly, he contends that the employer should have maintained his regular pay during the resulting refusal period rather than pay him for sick leave. His sick leave credits, therefore, should not have been exhausted by summer 2008. Being told in the letters of May 13 and June 27, 2008, that his pay would cease when no sick leave credits remained, the complainant's argument is that the respondent was either imposing a penalty on him, or refusing to pay him, because he was continuing to exercise the right to refuse work asserted in October 2007.

[83] The complainant's position depends in the first instance on the Board finding that, in fact, he properly exercised a right to refuse to work under the *Code* beginning in October 2007. If he did not, then the alleged penalty or refusal to pay communicated in the letters of May 13 and June 27, 2008, cannot be for the exercise of a right as contemplated under paragraph 147(*c*). (The complainant does not clearly identify any other right under Part II of the *Code* that he exercised as a reason for the respondent's actions in May and June 2008.) Since I have already found that paragraphs 147(*a*) and (*b*) do not apply, no basis would then remain to bring the complaint within the parameters of section 147. That is, even if the letters of May 13 and June 27, 2008, can be considered as either a penalty or a refusal to pay, the respondent's actions cannot be attributed to one of the reasons listed under section 147.

3. Did the complainant refuse to work under section 128 of the *Code*?

[84] The Board's decision in *Alexander*, cited by the respondent, outlines what is required to support a finding that a complainant has exercised the right to refuse to work within the meaning of section 128 of the *Code*. I find the following passages from that decision to be directly relevant:

. . .

> *[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 his 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.
>
> . . .
>
> [Emphasis in the original]

[85] I note, parenthetically, that the complainant maintains that the employer has the onus in this case to disprove his complaint. To be sure, the reverse burden of proof claimed by the complainant does operate according to subsection 133(6) of the *Code* if he exercised a right under section 128. In that situation, subsection 133(6) states that the complaint ". . . is itself evidence that the contravention actually occurred . . . ." There must nonetheless first be an arguable case that the complainant did refuse to work — that is to say, that he did exercise a right under section 128 — before the reverse burden of proof feature of subsection 133(6) comes into play: (see *Quadrini v. Canada Revenue Agency and Hillier*, 2008 PSLRB 37, at para 24 to 33, for a discussion of the requirement to establish a *prima facie* case to trigger the operation of a reverse onus provision.) If, to the contrary, I find that the complainant did not exercise a refusal to work under subsection 128, the reverse onus provision does not apply, and the burden to prove the complaint rests with the complainant.

[86] In his submissions, the complainant states that the physician's letter of October 22, 2007, was the notice of refusal to work for the purpose of section 128 of the *Code*. The letter reads in its entirety as follows:

. . .

> *Dwight Gaskin has been under my care since July 2006. In the past year, Dwight has been under substantial stress with respect to an ongoing legal battle involving his children. I am aware of these particulars and understand that Mr. Gaskin has reported this information to you as well. For the sake of brevity, I will not discuss these particulars in detail.*
>
> *I have been told that there is an ongoing investigation being made by the Provincial Ombudsman, the Attorney General and the Minister of Justice, into possible criminal conduct affecting Mr. Gaskin and his children. In addition, Mr. Gaskin feels that he has been the victim of violence in the workplace and feels his workplace is hostile and unsafe. I understand that investigations into these issues are ongoing.*
>
> *These issues have had a negative impact on Mr. Gaskin's health. Mr. Gaskin has been experiencing worsening symptoms of anxiety, insomnia, and chronic headaches. In addition, his hypertension has been increasingly difficult to control and he reports experiencing frequent episodes of chest pain in the past several months. Mr. Gaskin reports that prior to these situational stressors, he was in excellent health.*
>
> *Subsequently [sic], I do not feel it appropriate for this patient to return to work at this time. I would recommend he be off until these issues are resolved. Please contact me should any questions arise.*

. . .

[87] I am unable to find in the foregoing text a *prima facie* basis for depicting it as a notice to the employer that the complainant was refusing to work under section 128 of the *Code*. In my view, it is what it appears to be on its face — a physician's note certifying that the complainant cannot report for duty for medical reasons. The health issues faced by the complainant are clearly outlined by the physician. While the note reports the complainant's belief that his workplace is dangerous, the nature of the "danger" is not outlined, nor is any information presented to identify the "violence" that the complainant claims to have experienced in his workplace, or when it occurred. The specific information that is given refers primarily to developments outside the workplace, in particular to the external "legal battle" and the ongoing criminal investigation involving the complainant's children and himself. The physician's description of those events makes it clear that the stressors affecting the complainant had existed for some time before the date of the note. Although, in the physician's

opinion, the health impacts of those stressors were apparently growing worse, nothing in his letter suggests a recent event or events that could serve as the nexus between a legitimate section 128 refusal to work and a dangerous situation to be reported "without delay" in October 2007.

[88] I find, in sum, that the physician's letter does not convey a specific apprehension of danger that could arguably constitute the reason for a timely notice of refusal to work on, or about, October 22, 2007: see *Alexander*. In my view, a party receiving such a letter would have ample reason to interpret it as justification for sick leave. There is no other reliable evidence that shows that the complainant notified his employer at that time that he was refusing to work under the *Code*. There also appears to be nothing that supports the complainant's contention that he requested sick leave for only two weeks. Certainly, the wording of the physician's letter is open-ended. It states that the complainant should remain off work "until these issues are resolved." "These issues," in my opinion, is a reference to the longer-standing "situational stressors" that were the cause of the health issues diagnosed by the physician. Notably, the physician also states his understanding that ". . . investigations into these [workplace] issues are ongoing." If investigations were already ongoing when the physician provided his note, what was the new trigger for a refusal to work on, or about, October 22, 2007?

[89] For the foregoing reasons, I rule that the complainant did not exercise a refusal to work in October 2007 within the meaning and requirements of section 128 of the *Code*. It may be that, at some subsequent time, the treatment by the respondent of the complainant's continuing absence from work as sick leave was problematic. However, that is not the issue that I must decide. Whatever problem the complainant later experienced regarding sick leave, in my view, it cannot be linked to a valid refusal to work in October 2007.

[90] My ruling thus eliminates the possibility that the respondent allegedly imposed a penalty or refused to pay the complainant through its letters of May 13 and June 27, 2008, because the complainant exercised a right to refuse to work under section 128 of the *Code* — the candidate reason that could bring the complaint under paragraph 147(*c*). As I have already found that paragraphs 147(*a*) and (*b*) do not apply, nothing remains that can serve as the foundation for a section 133 complaint alleging

a violation of section 147 — even were I to accept that the respondent's letters of May 13 and June 27, 2008, communicated a "penalty" or a "refusal to pay."

[91] The respondent's objection to the Board's jurisdiction to consider the complaint is founded.

4. Other authorities

[92] While not strictly necessary for the purpose of these reasons, I would like to comment briefly on the third basis suggested by the respondent for its jurisdictional objection, namely, that the allegations of violations under the *Charter*, the *Criminal Code*, the NAFTA, the NAALC as well as "matters under separate jurisdictions" do not fall within the jurisdiction of the Board.

[93] The Board does not have an inclusive mandate to inquire into all occupational health and safety issues or to enforce the *Code* generally, as the complainant appears to believe, nor is there a "public interest" imperative that would allow the Board to step outside of, or beyond, its jurisdiction as intended by Parliament. As mentioned previously, the Board's authority to address complaints under section 133 is specific and limited.

[94] The complaint refers to "OHS violations" under the *Criminal Code.* The Board does not have jurisdiction to interpret or administer any provision of the *Criminal Code.*

[95] The complainant refers to ". . . unfair labour practice under sections 185-186 and section 98 for discriminating acts/omissions." It would appear that the "sections 185-186" mentioned by the complainant may be sections 185 and 186 of the *Act.* Those sections concern unfair labour practices that may be the subject of a complaint filed under paragraph 190(1)(*g*) of the *Act.* I cannot find any justification in this case for accepting that a complaint filed under section 133 of the *Code* also has the parallel effect of filing a complaint under paragraph 190(1)(*g*) of the *Act.* The Board thus has no jurisdiction in this case to address the complainant's allegation of an unfair labour practice.

[96] The complainant's reference to section 98 may mean section 98 of the *Act.* That provision is found in the part of the *Act* dealing with revocation of certification, clearly not a matter involving section 133 of the *Code.* If the reference instead means

section 98 of the *Code*, then that provision falls under Part 1 of the *Code*, once more not a subject matter that this Board may address in the context of a complaint under section 133 of the *Code*.

[97] As to the complainant's allegations that he has been the victim of discrimination or that the respondent has failed to accommodate him, the Board's jurisdiction under section 133 of the *Code* does not encompass matters that may involve the *CHRA*. As to the *Charter*, were the Board to consider the possibility that the complaint raises *Charter* issues, those issues would have to be very clearly stated by the complainant, who would also bear the onus to establish on at least a *prima facie* basis the foundation for the allegation that a *Charter* right was breached. The complainant clearly did not meet that onus.

[98] Finally, the Board is unaware of any case law that would allow it to interpret or enforce a right alleged to belong to the complainant by virtue of the NAFTA or the NAALC.

C. Application - immediate remedy

[99] Given my ruling that the respondent's objection to the Board's jurisdiction to consider the complaint under section 133 of the *Code* is founded, the complainant's application for immediate relief is moot.

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

(The Order appears on the next page)

III. Order

[101] The respondent's objection to the jurisdiction of the Board to consider the complaint under section 133 of the *Code* is allowed.

[102] The complaint is dismissed.

November 21, 2008.

Dan Butler,
Board Member