Date: 20130412

File: 560-02-78

Citation: 2013 PSLRB 40

Canada Labour Code

Before a panel of the Public Service Labour Relations Board

BETWEEN

EUGENIA MARTIN-IVIE

Complainant

and

TREASURY BOARD
(Canada Border Services Agency)

Respondent

Indexed as
Martin-Ivie v. Treasury Board (Canada Border Services Agency)

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

REASONS FOR DECISION

Before: Margaret T.A. Shannon, a panel of the Public Service Labour Relations Board

For the Complainant: Michael Fisher, counsel

For the Respondent: Martin Desmeules, counsel

Heard at Ottawa, Ontario,
February 6 and 7, 2013.

I. Complaint before the Board

[1] The complainant, Eugenia Martin-Ivie, alleges that the respondent, the Canada Border Services Agency (CBSA) threatened to take disciplinary action against her for exercising her rights under Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("the *Code"),* in violation of sections 133 and 147 of the *Code* by undertaking a professional standards investigation ("the investigation") into the production of protected CBSA documents at a hearing before the Occupation Health and Safety Tribunal (OHST) in support of her argument that her refusal to work was justified.

II. Summary of the evidence

[2] At the outset of the hearing, the parties submitted the following agreed statement of facts that sets out the foundation of this complaint:

> 1. *The Complainant, Eugenia Martin-Ivie, is a Border Services Officer ("BSO") at Canada Border Services Agency ("CBSA"). After working as a student and then on a BSO assignment, she was appointed to an indeterminate BSO position in April 1997 at the Port of Coutts land border crossing, in Coutts, Alberta. (In March 2011, Ms. Martin-Ivie began an assignment in Ottawa, in a position at the FB-04 group and level in the eManifest Passage Team, and, since November 2012, has been acting in an FB-06 position in Ottawa, but her substantive position is still in the Prairie Region.)*
>
> 2. *On November 10, 2005, Ms. Martin-Ivie and seven co-workers at the Port of Coutts refused to work, pursuant to section 128 of the* Canada Labour Code.
>
> 3. *On November 11, 2005, a health and safety officer,. . ., investigated the matter, pursuant to section 129 of the* Canada Labour Code.
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> 4. *The Refusal To Work Registration form indicated that Ms. Martin-Ivie and her co-workers had three areas of concern: the need for an enhanced armed presence at the border, armed and dangerous 'lookouts' were not being flagged locally and nationally, and lack of training to deal with armed and dangerous subjects.*
>
> 5. *On November 11, 2005, after his investigation,. . ., the assigned health and safety officer, concluded that there was no danger.*
>
> 6. *On November 21, 2005, Ms. Martin-Ivie appealed the health and safety officer's decision to an appeals officer of the Occupational Health and Safety Tribunal Canada.*
>
> 7. *On October 12, 2010, the Tribunal ordered that the hearing would be held* in camera *and that any evidence adduced at the hearing would be expressly prohibited from disclosure. . . .*

8. *On November 2, 2010, Ms. Martin-Ivie provided her legal counsel, Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l., with "Protected B" CBSA information, by email, for use in her appeal. She hand delivered additional CBSA "Protected B" information to her counsel before the hearing.*

9. *These documents were tendered as exhibits, either on consent or through oral testimony, at the Tribunal hearing, held over a period of two weeks in November 2010.*

10. *On November 24, 2010, while the hearing was in progress, a CBSA employee in Coutts, Alberta, faxed a document containing "Protected B" CBSA information to Ms. Martin-Ivie's legal counsel. That same day, counsel put this document to a CBSA witness, Dan Badour, then Director of Intelligence Development and Field Support, in cross-examination.*

11. *Afterward, Mr. Badour raised concerns with the Professional Standards Unit on how certain "Protected B" documents were shared. An investigation was initiated into the disclosure of CBSA documents, including the fax, emails and other exhibits tendered as evidence at the hearing.*

12. *At the close of the last day of hearing on November 26, 2010, the Tribunal reserved its decision.*

13. *On February 17, 2011, Kevin Hewson, Director, Southern Alberta District, interviewed Ms. Martin-Ivie, on behalf of the Professional Standards Unit, about the emails she sent to her legal counsel on November 2, 2010, and advised Ms. Martin-Ivie that she may be contacted by the Professional Standards Unit.*

14. *On April 13, 2011, Franca Passannante, Senior Investigator, Personnel Security and Professional Standards Division, informed Ms. Martin-Ivie, by email, that she was subject to a professional standards investigation "for unlawful disclosure of CBSA information to Raven, Cameron, Ballantyne & Yazbeck law firm," an alleged violation of CBSA policy and section 107 of the* Customs Act*. . . .*

15. *On April 14, 2011, Mr. S. Cadieux the Appeals Officer rendered his decision to confirm Mr. Gould's decision of no danger and dismissed Ms. Martin-Ivie's appeal, although a redacted version was not publicly released until about a month later. . . .*

16. *On April 19, 2011, Ms. Martin-Ivie attended an investigative hearing, presided by Ms. Passannante. At this hearing, Ms. Martin-Ivie submitted a letter to the investigator outlining her position on the matter . . . .*

17. *On January 18, 2012, Ms. Martin-Ivie received a vetted copy of the Professional Standards Investigation Report . . . The investigator concluded that, by the way that the "Protected B" CBSA information*

> *was provided to her legal counsel, Ms. Martin-Ivie breached CBSA Security Policy.*
>
> *18. On January 24, 2012, in response to the report, Ms. Martin-Ivie was reminded of CBSA expectations for use of encryption when sharing information, by teleconference Gary Selk, Chief of Operations, Southern Alberta District, and Kevin Hewson, Director, Southern Alberta District. Jason McMichael, a BSO and the current First National Vice-President of the Customs and Immigration Union, was also present on the call.*
>
> [*Sic* throughout]

[3] Many exhibits were also submitted by consent, one of which was the complete investigation report. The parties jointly requested that it (Exhibit 3) be sealed as it outlines the allegations, evidence, and conclusions related to the similar allegations, made against three other CBSA employees who were also involved in the production of documents used before the OHST.

[4] As those employees were not part of the complaint before me, I have concluded that, after a review of the report, to allow it to be open to the public would cause harm to the others mentioned in it. The information, if left unsealed, could be harmful to the reputations of people who are not involved in the complaint before me and who have not agreed to the publication of the findings of the investigation into their activities or had the opportunity to defend themselves before me. Furthermore, it is not in the best interests of the Public Service Labour Relations Board ("the Board"), or those who appear before it, to publish more personal information than required for the purposes of this decision. For those reasons, and consistent with the "Dagenais/Mentuck" test, I ordered Exhibit 3 sealed. A redacted version of the report, filed as Exhibit 1, Tab E, will not be sealed. This will satisfy the need of this Board to be open, transparent and accessible in its proceedings as they relate to the complaint before me.

[5] Dan Badour, Director, Enforcement and Intelligence, Southern Ontario Region, CBSA, testified on behalf of the CBSA. He has been involved with the intelligence program since 1993 and testified as an expert witness on security matters on behalf of the CBSA before the Occupational Health and Safety Tribunal.

[6] In preparation for the hearing, Mr. Badour met with Treasury Board Secretariat (TBS) legal counsel and the CBSA headquarters labour relations advisor assigned to the matter to review material prepared for disclosure by the respondent to the complainant. He reviewed documents disclosed by the complainant's counsel related

to matters of "lookout" and intelligence procedures. Included in the complainant's package were intelligence bulletins and "lookouts" which are intelligence information intended to inform the various CBSA components of police investigations, CBSA investigations, partner investigations and officer safety bulletins to inform those involved of ongoing safety concerns. The information contained in these bulletins is classified "Protected B" as it contains names of suspects, licence plate information, vehicle descriptions and a narrative on the nature of the investigation.

[7] Mr. Badour reviewed the materials disclosed by the complainant to ensure that the "lookout bulletins" related specifically to the matters that gave rise to her refusal to work. He reviewed other documents disclosed by the complainant to ensure that there were no operational security concerns with their disclosure, which exist if the documents relate to an active CBSA or police investigation. In such cases, disclosure outside the CBSA could jeopardize the health and safety of officers engaged in the investigations, the success of the investigations, and the relationships and confidence in the security of information provided by outside agencies to the CBSA. The partner agencies consist of local law enforcement, provincial police, the Royal Canadian Mounted Police, the Canadian Security and Intelligence Service, and international agencies such as the United States Department of Homeland Security and other border agencies.

[8] "Lookout bulletins" are contained primarily within two CBSA systems. Frontline border services officers (BSOs) have access to them electronically. Sometimes they are provided on paper. If so, they may be transmitted to the local security intelligence officer and then delivered to a border crossing. When produced on paper, they may be posted in briefing rooms. Electronic versions may be accessed on the electronic notice board available to BSOs. They may also be sent by the regional superintendent. Only those with a valid enhanced reliability status (or higher) have access to lookout bulletins.

[9] The complainant emailed Protected B documents to her legal counsel without encrypting them, as is required. If a Protected B document is sent unencrypted, there is a risk of a loss of control over its distribution and how it can be received. There is no control over the extent of the transmittal of an unencrypted document into the public domain. Around the same time as Ms. Martin-Ivie's appeal to the OHST, CNN

(the television news network) broadcast a lookout bulletin in one of its reports unrelated to the complainant, which significantly embarrassed the CBSA.

[10] While being cross-examined by counsel for Ms. Martin-Ivie before the OHST, a Protected B lookout bulletin was put to Mr. Badour as an exhibit. It indicated that there was an active CBSA Vancouver Intelligence Office investigation. Using it as an example, he was questioned about how that type of document was produced.

[11] That document was not included in the package of documents disclosed by the complainant's counsel and had not been reviewed at the earlier meeting. It indicated that it had been faxed from the Coutts, Alberta, port of entry. The respondent concurred with releasing the lookouts that Mr. Badour reviewed for the purposes of the appeal hearing. There was no such agreement on the use of the lookout bulletin he was shown at the hearing. His first reaction was to wonder who approved its release and how it was transmitted.

[12] Following his testimony, Mr. Badour spoke with Tammy Edwards, Manager, Occupational Health and Safety Division, CBSA (who was at the hearing), and expressed his concerns with how the lookout in question was accessed, transmitted and disclosed. Upon his return to his office in Ottawa, he queried the National Lookout System and determined that the lookout presented to him in cross-examination had been accessed at the Port of Coutts, Alberta, shortly before his testimony. In his opinion, it constituted a breach of the CBSA's "National Lookout Policy," which is derived from the CBSA's "Information Management Security Policies" and section 107 of the *Customs Act,* R.S.C. 1985, c. 1 (2nd Supp.).

[13] Ms. Edwards was apparently unaware of the policies surrounding the use and release of lookouts. Mr. Badour briefed her on the rules of sharing and disclosing protected information. To follow up on his concerns, he sent her an email (Exhibit 6) providing an overview of Information Management Security and including excerpts from the policy and relevant legislation.

[14] In May 2011, Mr. Badour was contacted by Franca Passannante, Senior Investigator, Professional Standards and Investigations Branch, CBSA, the professional standards investigator assigned to investigate his concerns. He forwarded Exhibit 6 to her for use in her investigation into the inappropriate access, release and transmission

of Protected B information by four people who had been involved in the work stoppage and appeal, either directly or indirectly.

[15] Mr. Badour described his role in the conduct of the investigation as peripheral. He raised the concerns, wrote an email to Ms. Edwards and spoke to Kevin Hewson, District Director, Southern Alberta District, CBSA, about his concerns. He was interviewed as part of the professional standards investigation. He had no input into the report or the conclusions after he was interviewed. He was not familiar with Exhibit 14, the occurrence notification that reported the alleged breach of the "Code of Conduct Confidentiality and Disclosure of Information," which stated the following:

> *It is alleged that in late 2010, numerous employees facilitated and transmitted Protected A, B and Third Party Information, without authorization, to a private law firm which was used by the defendants in a Health and Safety Tribunal in December 2010. The information was transmitted improperly and against policy through unencrypted email and unsecure facsimile.*

[16] On cross-examination, Mr. Badour admitted that he spoke to people other than Ms. Edwards about his concerns. When he spoke to Ms. Edwards, she was accompanied by Maureen Noble, Superintendent at the Port of Coutts. He did not remember that Richard Fader, TBS legal counsel at the appeal, was also present, although he admitted that it was possible. His primary concern at that point was the access to and transmission of the lookout bulletin put to him on cross-examination and the role of the supervisor at the port who faxed the document. He advised those present that he would investigate his concerns.

[17] The next day, Mr. Badour called Mr. Fader and asked for a copy of the document entered into evidence to obtain the fax transmission information. He then queried the Integrated Customs Enforcement System to determine who had accessed the lookout in question. A week later, he sent Exhibit 6.

[18] Mr. Badour admitted that there was a concern about pursuing an investigation into the matter while the decision of the Occupational Health and Safety Tribunal was pending, as is evidenced in Exhibit 10. His role in initiating the investigation was limited to presenting the facts to Ms. Edwards. The professional standards investigation ensued after that.

[19] Mr. Badour testified that he was aware that the employees investigated could face discipline depending on the conclusions in the report but stated it was only one possibility. He would not have been surprised had the respondent been contemplating discipline.

[20] Ms. Passannante, testified that she is tasked with investigating allegations of misconduct by CBSA employees. The allegations can include any violation of CBSA policies, anything that may be criminal, and anything that could bring the CBSA's reputation into disrepute or harm its relationships with its outside partners. Based on the evidence she gathered in the course of her investigation, she concluded as follows:

> *62. The allegation that Eugenia MARTIN-IVIE breached the CBSA Security Policy, "Chapter 9: Protection of Classified and Protected Information and Assets outside the Workplace", paragraph 2, when she forwarded through unencrypted email, Protected B information to an external recipient, is founded.*

[21] A professional standards investigation is very serious. Ms. Passannante investigates all issues of misconduct, including breaches of the CBSA's security policy. However, she does not decide whether to take disciplinary action and, if so, what type. She was not aware of any disciplinary action in this case, but in most cases, professional standards investigations result in disciplinary action of some type.

[22] In cross-examination, Ms. Passannante was asked about any conversations she had with CBSA management about the scope of her investigation. She testified that the discussions were between her director general and regional management. They decide on the scope of the investigation between them. She received no specific directions from her manager about the investigation. When asked if she had any conversations with management in the Prairie region, she testified that she had not. However, when presented with Exhibits 16 and 17, she admitted having had conversations with Mr. Hewson related to the investigation, its focus and to an audit of the complainant's email account. On February 21, 2010, as seen in Exhibit 16, Hewson advised Passannante that Martin-Ivie had "… pulled a work refusal under CLC part II on Tuesday Feb. 15, 2011 …" He recommended that based on this, Passannante conduct another audit of Martin-Ivie's email account.

[23] In Exhibit 17, an email he sent on March 1, 2011, Mr. Hewson recommends a review of the complainant's systems accesses and personal hard drive space to "find

further evidence" that she was reviewing all lookouts to determine if they should be changed to "Armed and Dangerous." Mr. Hewson described her actions as her ". . . cause as a CIU representative in the workplace and is further evidenced in her OSH appeal . . . ." On March 2, 2010, Ms. Passannante replied to Mr. Hewson that the complainant ". . . should not be going through every lookout in order to identify those that she deems may have health and safety issues."

[24] The complainant testified on her own behalf. She testified that she had forwarded emails including lookouts to her legal counsel for use at her OHST hearing. They were forwarded to her unencrypted by another BSO. It is not a standard practice, according to the complainant, to encrypt emails at the Port of Coutts. It was a standard practice only for managers. She had no concerns with forwarding the emails outside the CBSA to her legal counsel as she believed that they would be covered by solicitor-client privilege. She maintained that it was her duty under the *Code* to provide her solicitor with sufficient evidence to support her appeal before the OHST.

[25] The complainant was not concerned about the content of the materials that she emailed to her legal counsel because they were sent to her unencrypted, and she forwarded them assuming that solicitor-client privilege applied. She also hand-delivered documents that she did not have in electronic format. She did not ask for permission to release any of the documents. It was her responsibility and obligation to provide as much information and as many examples as possible in defence of her refusal-to-work appeal. The documents she provided to her legal counsel were intended to demonstrate that the reason for the work refusal continued to apply at the time of the OHST hearing.

[26] According to the complainant, it is negligent for BSOs not to review lookouts. She looks at every one sent to her. It is her responsibility to be aware of what lookouts she might encounter on her shift. It was not her "cause" as a union representative, as Mr. Hewson stated in the following email (Exhibit 17):

. . .

> *In a discussion with two of my superintendents yesterday, it has become apparent to me that respondent looks at every single lookout, watch-for or BOLO and reviews them to see if they should be changed to Armed and Dangerous status. This appears to be her cause as a CIU representative in the*

> *workplace and is further evidenced in her OSH appeal and the recent work refusal under* CLC *part 2 on Feb. 15, 2011.*
>
> . . .
>
> *(Sic throughout)*

[27] The complainant stated that, if she believes the work is dangerous and needs to be identified as such, she does so. She files her work refusals as an employee, not as a union representative. She goes through every lookout sent to her to ensure that there is no discrepancy between the source's information and the information in the lookout. It is a health and safety issue not to, as an unarmed officer responds differently when faced with someone identified on a lookout. She is legitimately concerned when the "Armed and Dangerous" tag is not on a lookout.

[28] When she was advised via email (Exhibit 2, Tab B) that she was the subject of a professional standards investigation, she became concerned that it would have a negative impact on her career. She was also afraid of potential disciplinary action against her as she was aware that the regional labour relations group uses such investigation reports to determine what, if any, discipline is appropriate. She was aware that a violation of section 107 of the *Customs Act* could result in termination. Ms. Martin-Ivie was advised on January 18, 2012 that she had been found culpable of the allegations against her. She expected disciplinary action at any point after that.

[29] On June 24, 2012, she met with CBSA management in the Southern Alberta District via teleconference, accompanied by Jason McMichael, current First National Vice-President of the Customs and Immigration Union. She was advised that she was there for a "learning conversation," which she had never heard of, rather than the disciplinary action she anticipated.

[30] Mr. McMichael testified that, of the more than 20 professional standards investigations he has been involved with as a union representative, all but one (this one) resulted in disciplinary action against the employee. Such investigations are very serious and involve the most serious of allegations such as anything from breaches of policies to criminal investigations. Never has he come across a "learning conversation."

III. Summary of the arguments

A. For the respondent

[31] This case deals with whether there has been a violation of sections 133 and 147 of the *Code*. Subsection 133(1) requires a violation of section 147. The test to determine whether a violation of section 147 occurred is expressed in paragraphs 62 and 64 of *Vallée v. Treasury Board (Royal Canadian Mounted Police),* 2007 PSLRB 52, as follows:

> ***62*** *The question that is to be resolved in this case is whether the complainant has been a victim of reprisals for his denunciation of the hazardous working conditions in which he found himself . . . .*
>
> *. . .*
>
> ***64*** *Thus, the complainant would have to demonstrate that:*
>
> *a) he exercised his rights under Part II of the* CLC *(section 147);*
>
> *b) he suffered reprisals (section 133 and 147 of the* CLC*);*
>
> *c) these reprisals are of a disciplinary nature, as defined in the* CLC *(section 147); and*
>
> *d) there is a direct link between his exercising of his rights and the actions taken against him.*

[32] In this case, the complainant met the first part of the test. She exercised her rights under Part II of the *Code*. She then had to establish that she suffered reprisals of a disciplinary nature. If she were unable to, the complaint must be dismissed. If it is determined that there was a disciplinary reprisal, there must be a link between the exercise of her rights under Part II of the *Code* and the disciplinary action taken by the respondent. (See: *Gaskin v. Canada Revenue Agency,* 2008 PSLRB 96, at paragraph 62, and *Tanguay v. Statistical Survey Operations,* 2005 PSLRB 43, at paragraph 14).

[33] In the case before me, the complainant was not dismissed, laid off or demoted. There was no evidence of a financial penalty. Nor was there any evidence of a threat of discipline. At paragraph 19 of the *Tanguay* decision, the Board member accepts the definition of "penalty" as a "punishment or award to ensure the performance of an action" or as a "punishment established or inflicted by a law or some authority to

prevent a prohibited act." The complainant was not punished for pursuing her rights under the *Code*. Nothing can be used by the complainant to establish that she suffered reprisals or disciplinary action as a result of her exercise of her rights under Part II of the *Code*.

[34] It is a pure question of fact whether the complainant was punished. Following an investigation, she was required to participate in a learning conversation, which was neither a penalty nor punishment.

[35] Conducting an investigation is not discipline. It is fact-finding. No conclusion was drawn in this case. It provides an opportunity for a complainant to clarify a situation. Expecting discipline as a result of the investigation is not a threat of discipline as prohibited by section 147 of the *Code*. (See *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development),* 2010 PSLRB 130, at paragraph 95). The mere fact of conducting an investigation is not tantamount to discipline or the threat of discipline.

[36] Brown and Beatty, in *Canadian Labour Arbitration,* 4th edition, discuss the nature of disciplinary sanctions at section 7:4210. In deciding whether an employee has been disciplined, an arbitrator or adjudicator must consider both the purpose and the effect of the employer's actions. The essential characteristic of disciplinary action is the intention to correct bad behaviour. An employer's assurance that it did not intend its actions to be disciplinary often, but not always, settles that question. A disciplinary sanction must at least have the potential to prejudicially affect an employee.

[37] How is a learning conversation discipline, when it is not even a warning of discipline? The complainant was not punished in any way; nor did the respondent intend to punish her. The learning conversation did not have the potential to negatively affect her. There was no reprimand or warning; nor was a mention of it on her file. Nothing suggests that the respondent cautioned her that a failure to comply on her part in the future could result in discipline.

[38] The possibility of discipline as a result of an investigation is not the same as a threat. No one threatened the complainant with discipline. The respondent's primary concern was with another employee, who faxed protected information to someone outside the CBSA. The complainant might have assumed or expected that discipline

would result from her release of protected information to her legal counsel, but that is not a threat.

[39] The evidence is that, despite the investigation, the complainant has continued to act in a position above her substantive BSO level. Her career prospects were not affected. She suffered no disadvantage as a result of the investigation. The evidence in general does not establish that she was subject to a penalty; nor was any threat made of disciplinary action (implicit or explicit). For those reasons, she failed to meet the all the requirements of the test set out in *Vallée.* As the complainant is unable to meet the test, this complaint must be dismissed.

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

[40] The complainant exercised her rights under Part II of the *Code.* As a result, the respondent threatened her with disciplinary action. It was not an overt threat. The professional standards investigation could have led to discipline. Clearly, the respondent contemplates discipline when initiating a professional standards investigation (Exhibit 18). Discipline was always a possibility until the complainant was informed that, rather than being disciplined, she was to participate in a learning conversation. The professional standards investigation was precipitated by her disclosure of CBSA information to her legal counsel in advance of her hearing before the OHST. Had she not disclosed that information, there would have been no investigation. The respondent cannot say that a professional standards investigation is merely an administrative fact-finding action when, if it is determined that the employee being investigated violated one of the policies or some other policy, disciplinary action will result. Nor can the respondent be allowed to circumvent the *Code* by not disciplining the employee and substituting a new device such as a learning conversation. What is relevant is the threat of discipline.

[41] Consistent with the *Chamberlain* decision, the investigation was not disciplinary. However, was it a threat? The existence of a threat is a question of fact. Exhibit 2, Tab B, states that the complainant was subject to a professional standards investigation for ". . . unlawful disclosure of CBSA information to Raven, Cameron, Ballantyne & Yazbeck law firm . . . ." The respondent's witnesses acknowledged the seriousness of the allegations. Exhibit 6 lists the penalties that could have resulted in the event that the complainant was found guilty of the allegations against her. It is a

reasonable conclusion that she would have been subject to disciplinary action in those circumstances.

[42] The CBSA was very selective in whom it targeted. Only those involved in the work refusal complaint under Part II of the *Code* were investigated. It does not matter that discipline was not imposed on the complainant. The point is not what the CBSA did or did not do as a result of the conclusions in the investigation report. The fact that those involved in the complaint were subject to a professional standards investigation is sufficient to deter employees from exercising their rights under the *Code*. The evidence is that the complainant would now think twice before taking advantage of the protections that the *Code* offers employees. The fact that the complainant has been successful in her career despite the professional standards investigation does not detract from her willingness to exercise her rights. This is the type of reprisal that the *Code* intends to prevent.

[43] Mr. Badour's evidence was that he expressed concerns with documents submitted to him as a witness at the Occupational Health and Safety Tribunal. The professional standards investigation was based on his concerns. If his primary concern was with the fax, he certainly had other concerns with the other documents (see paragraph 11 of the agreed statement of facts). In his recounting of his concerns (Exhibit 9), he identified two other types of documents, those emailed or hand-delivered by the complainant to her legal counsel. The disclosure of those documents was the reason for launching the professional standards investigation. While it might not have been within his purview to order the investigation, he tried to influence it. Even without the fax, which he claimed was of primary concern, the investigation into the complainant's release of CBSA information would still have taken place.

[44] Exhibits 10 and 11 show that the respondent was concerned with the perception of proceeding with the professional standards investigation on the heels of the OHST hearing. Exhibits 16 and 17 indicate the respondent's negative impression of the complainant, her union activities and her exercise of her rights under the *Code*.

[45] The *Tanguay* decision outlines four general prohibitions. Subsection 133(6) of the *Code* puts the onus on the respondent to demonstrate that it has not violated the *Code's* prohibitions. The reasons for the reverse onus are set out in *Lequesne,* 2004 CIRB 276, at paragraphs 73 and 77 as follows:

> ***73*** *By placing the burden of proof on the employer, the* Code *creates an important exception to the general rule that the burden of proof is upon the complainant. The reverse onus is predicated on the principle that employees should be free to exercise their legitimate rights without being hampered by undue coercion by the employer.*
>
> . . .
>
> ***77*** *The Board's determination of a complaint is a two-step process. First, the Board must determine whether the complainant acted in accordance with Part II of the* Code *when he exercised his refusal to work. If the Board is satisfied that the right to refuse to work was in conformity with the* Code*, then the second step is to consider whether the employer's decision to discipline the complainant was motivated by considerations not related, even remotely, to the employee's right to refuse to work. . . on a balance of probabilities, the discipline was administered for reasons other than the employee's invoking his right to refuse unsafe work.*

[46] The decision in *Chaney*, 2000 CIRB 47, at paragraph 28, stands for the principle that if the exercise of the employee's rights is a proximate cause for discipline and not necessarily the whole reason for discipline, a contravention of the *Act* is found:

> ***28****. . . . If the exercise of rights under the* Code *by an employee is even only a proximate cause for discipline, then the employer should be found to have contravened the* Code*. . . .*

[47] That principle was applied by the Canada Labour Relations Board in *Steve Kasper, 90 di 130,* at page 6, and was adopted by the Board in *Pruyn v. Canada Customs and Revenue Agency,* 2002 PSSRB 17, at paragraph 55.

[48] After examining the evidence, if it is more probable than not that a reason for the discipline or threat of discipline was the exercise of an employee's rights under the *Code*, it is sufficient to allow the complaint. In this case, the professional standards investigation arose out of the OHST hearing. That is enough of a proximate cause to allow the complaint.

[49] Assuming that the learning conversation was not disciplinary, as the respondent asserts, does not alter the fact that the professional standards investigation brought with it the threat of discipline, in itself a violation of section 147 of the *Code.* In *Ladouceur v. Treasury Board,* PSSRB File No. 160-02-43 (19920730), the complainant, a

corrections officer, held a meeting with members of the bargaining unit at which he informed them that bullets were found in a cell during a prison search. The meeting resulted in a refusal to work. When the safety officer arrived, the complainant was taken aside and advised that he might be disciplined for his actions. The employer in that case argued that the complainant was not being disciplined for exercising his rights under the *Code* but rather for disclosing confidential matters, that is, information about the bullets. That was held to be a threat of discipline under section 147 of the *Code.*

[50] In *Beaudoin v. Treasury Board,* PSSRB File No. 160-02-19 to 23 (19871116), a violation of the *Code* was found on the basis of a threat of discipline for insubordination that was clearly linked to the employer's attempt to have employees resume work after they exercised their right to refuse to under Part II of the *Code*.

[51] The threat of discipline need not be overt; it may be covert (see *Antonia Di Palma*, 100 di 89) or even a perception, as was the case in *Gaskin*. In such cases, the onus is on the employer to prove on the balance of probabilities that it never intended to threaten the complainant.

[52] In summary, the complainant was subjected to a professional standards investigation into her use of protected CBSA information, which carried with it the threat of discipline. The investigation was launched as a result of an appeal to the OHST, which was based on the complainant's sincere belief that unsafe working conditions existed in her workplace. She disclosed information, which was protected by solicitor-client privilege, for use in a closed hearing into the legitimacy of her concerns. Any concern about the security of the lookouts in question was protected by the process itself.

[53] The only conclusion one can reach is that the reason for the professional standards investigation was the complainant's use of lookouts to support her refusal to work under Part II of the *Code.*

[54] The complainant seeks a declaration that the respondent violated section 147 of the *Code* and an order directing it to cease and desist in such activities. She also seeks an order directing the respondent to post this decision on bulletin boards in each of its workplaces for six months.

IV. Reasons

[55] The relevant sections of the *Code* are sections 133 and 147. Section 133 provides as follows:

> ***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.*

[56] Section 147 of the *Code* states 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.***
>
> [Emphasis added]

[57] The complainant's allegation is that she was threatened with discipline as a result of the exercise of her right to refuse to perform what in her opinion amounted to unsafe work pursuant to section 128 of the *Code*.

[58] The respondent had to demonstrate that the complainant was not disciplined for legitimately exercising her right to refuse to work. The parties agreed that the complainant exercised her rights under section 128 of the *Code* in November 2005. Subsequent to her refusal to work, she appealed the Occupational Health and Safety Officer's decision to the OHST. To support her application, she provided her legal counsel with certain protected CBSA documents, via email and via hand-delivered hard copies. They were used at the OHST hearing and were put to Mr. Badour, the

respondent's security expert. His discomfort with the use of the documents was raised with legal counsel and the respondent's human resources representative present at the hearing. Based on his concerns, a professional standards investigation was launched.

[59] If the story ended there, I would have no qualms finding in favour of the respondent. Instituting an investigation to look into a possible breach of an employer policy is not, in and of itself, in my opinion a threat of discipline. An employer has every right to discipline an employee for a breach of its policies. The complainant cannot hide behind the exercise of her rights under the *Code* to avoid disciplinary action which may result from actions which are a violation of the employer's code of conduct.

[60] Mr. Badour's sights were clearly set on a security violation, which is a breach one of the respondent's policies. He had no opinion one way or the other about the forum in which the alleged security violation occurred. However, he merely expressed his concerns. He had no managerial or supervisory responsibility for the complainant. Based on that expression, an occurrence notification (Exhibit 14) was issued by the Professional Standards Investigations, Personnel Security and Professional Standards Division, at the CBSA, indicating that he reported that the infraction related to the release of protected information by "numerous employees."

[61] Mr. Badour's involvement as a catalyst for the professional standards investigation ended there. Mr. Hewson, through Yvonne Bremault, Acting Regional Director General, Prairie Region, contacted Roger Lavergne, on December 16, 2010, seeking Personnel Security and Professional Standards Division assistance in investigating a breach related to the release of documents and the tone of the investigation changed as is evidenced by exhibits 16 and 17. The OHST hearing was held on November 26, 2010, three weeks before the request to proceed with the professional standards investigation was made by Prairie Region management.

[62] Exhibit 16 reflects communications between Mr. Hewson and the professional standards investigator Particularly disturbing is an email from him dated February 21, 2011, which reads as follows:

> ***From:*** *Hewson, Kevin*
>
> ***Sent:*** *February 21, 2011 1:57 PM*

> ***To:*** *Passannante, Franca*
>
> ***Subject:*** *Fw: Lookout info ….*
>
> *Hi Franca,*
>
> *Gina pulled a work refusal under CLC part II on tuesday Feb. 15, 2011 based on this lookout not being an armed and dangerous lookout.*
>
> *See next email.*
>
> *Gina did fax some into to a 613 area code, but it doesn't appear to be the PSAC law firm.*
>
> *I would recommend that her email account be re-audited to ensure she has not sent protected information without authorization.*
>
> *Kevin*
>
> *–––––––––––––––––––––––––*
>
> *Sent from my Blackberry handheld.*
>
> [*Sic* throughout]

[63] Equally disturbing is another email Mr. Hewson sent to Ms. Passannante on March 2, 2011 (Exhibit 17), which reads as follows:

> ***From:*** *Hewson, Kevin*
>
> ***Sent:*** *March 1, 2011 11:30 PM*
>
> ***To:*** *Miller, Gary; Passannante, Franca*
>
> ***Cc:*** *Badour, Dan; Bremault, Yvonne*
>
> ***Subject:*** *Mail box review PS 10-290*
>
> *Hi Franca,*
>
> *In a discussion with two of my superintendents yesterday, it has become apparent to me that respondent looks at every single lookout, watch-for or BOLO and reviews them to see if they should be changed to Armed and Dangerous status. This appears to be her cause as a CIU representative in the workplace and* ***is further evidenced in her OSH appeal*** *and the recent work refusal under CLC part 2 on Feb. 12, 2011.*
>
> *I am sure if you reviewed ICES, her H drive and email you would find further evidence to this.*

> *If you have any questions, please feel free to contact me.*
>
> *Kevin*
>
> [*Sic* throughout]
>
> [Emphasis added]

[64] It is worthy of note that "PS 10-290" refers to the professional standards investigation into four people involved, directly or indirectly, in the complainant's appeal before the OHST, including the complainant.

[65] In response to Mr. Hewson's email, Ms. Passannante wrote as follows:

> ***From:*** *Passannante, Franca*
>
> ***Sent:*** *March 2, 2011 9:50 AM*
>
> ***To:*** *Hewson, Kevin; Miller, Gary*
>
> ***Cc:*** *Bremault, Yvonne*
>
> ***Subject:*** *RE: Mail box review PS 10-290*
>
> *Hi Kevin,*
>
> *Thanks for the info. I did request a second email review following our last conversation. Our analyst has been through it and I am waiting for the return on what he found.*
>
> *She should not be going through every lookout in order to identify those that she deems may have health and safety issues. Lookouts are not issues for this purpose …. need to know only for work related purposes. She will argue that it is work related but lookouts are issued so that frontline inspectors can identify and intercept persons of risk and interest and not for any other purpose.*
>
> *What I will do is request and ICES audit which will tell me exactly what she has looked at and when.*
>
> *I am going through the court transcripts this week and trying to make sense of everything.*
>
> *…*
>
> *Thanks!*
>
> *Franca*
>
> [*Sic* throughout]

[66] Mr. Hewson did not testify on behalf of the respondent, so his emails must speak for themselves. It is clear to me from their tone and content, that he was frustrated by the complainant's exercise of her rights under section 128 of the *Code* and that he wanted her to stop pursuing her lookout issues. I find that in so doing, he hoped that, if the results of Ms. Passannante's investigation indicated a violation of the CBSA "Code of Conduct" by the complainant, discipline would cause her to curb her health and safety pursuits. Hewson clearly links the professional standards investigation with the complainant's exercise of her right to refuse under the *Code* and demonstrates an anti-union animus when he describes the complainant's ongoing review of lookouts in his email exchange with Passannante.

[67] The respondent chose not to call Hewson to address the content of his emails which were entered into evidence. I am therefore left to evaluate his actions through his email communications. Consequently, I have concluded that Hewson's activities in attempting to influence the direction of the professional standards investigation were directly related to an attempt to stop the complainant from exercising her right to refuse unsafe work under the *Code*.

[68] Ms. Passannante denied conversing with or taking instructions from anyone other than her manager with respect to the investigation, and yet, the emails indicate otherwise. In them, she links the investigation with the complainant's exercise of her rights under section 128 of the *Code* by reviewing the transcripts of the OHST hearing and by advising Mr. Hewson that the complainant was engaged in unauthorized access to and use of CBSA documents, another allegation that, if proven, could have brought disciplinary action. Passannate's mandate was limited to the allegations of improper disclosure of protected information and her comments should have been limited to this, and should not have extended to making comments on the complainant's ongoing review of lookouts to determine if they were appropriately classified. Her comment links her investigation to the complainant's exercise of her rights and is unrelated to her mandate.

[69] Therefore, based on the exhibits and the lack of testimony by Hewson, I conclude that, on the balance of probabilities, the professional standards investigation was inextricably linked to the complainant's exercise of her rights under Part II of the *Code*. It is clear to me from Mr. Hewson's emails, that he wanted the complainant to stop claiming that her duties as a BSO at the Port of Coutts were rendered unsafe by

the misclassification of lookouts and tried his best to influence the investigation by communicating his opinions concerning the complainant's union activities to Passannante. The professional standards investigation provided a vehicle by which he hoped that message would be conveyed.

[70] While the initial complaint filed by Mr. Badour concerning the release of protected information was from his perspective a pure security issue, the investigation was not. Its nature was changed, or at least influenced by Mr. Hewson's involvement, as evidenced by his emails.

[71] Having concluded that the professional standards investigation was conducted at least in part for reasons directly related the complainant's exercise of her rights under section 128 of the *Code,* I must now decide whether it was disciplinary in nature or was a threat of disciplinary action, either of which would be a violation of section 147. I find that there is more than a proximal link as described in *Chaney* between the exercise of the complainant's section 128 rights and the nature of or the manner in which the professional standards investigation was carried out.

[72] The complainant's evidence was that she was not disciplined, at least not in the traditional sense. She was found culpable of releasing protected CBSA information without proper authorization and in an unsecure fashion. For this she was subjected to a learning conversation, in which the policies related to the release of information were reviewed. Both the complainant and Mr. McMichael testified that, in their roles as union representatives, they had never before heard of a learning conversation, let alone once a person has been found to have violated the CBSA "Code of Conduct" or some other policy. Mr. McMichael testified that, in his 13 years with the CBSA, he has been involved in more than 20 professional standards investigations assisting union members. In all but this case, a finding that the employee violated the "Code of Conduct" or some other policy resulted in disciplinary action. Before this case, he had never heard of a learning conversation in this or in any other context.

[73] In my opinion, use of the learning conversation was a carefully chosen ruse intended to skirt the connection of disciplinary action as a result of the conclusions of the professional standards investigation and the complainant's exercise of her rights under section 128 of the *Code*. I liken it to a verbal reprimand that is intended to correct an employee's behaviour without imposing more severe disciplinary action, which would be subject to the grievance process. Furthermore, Exhibit 18 makes it

perfectly clear that disciplinary action was contemplated throughout the professional standards investigation, although ultimately it was not recommended by CBSA Human Resources because of the respondent's own failure to enforce the rules concerning the release of protected CBSA information at the Port of Coutts up to the point of the OHST hearing.

[74] If it was management's intention, following the investigation, simply to address the situation at the Port of Coutts regarding the practice of not encrypting sensitive data, it could easily have done so without violating the *Code*. A memorandum to all employees at the Port, reminding them of their obligations to encrypt protected information, would have addressed the situation in a manner that satisfied management interests but did not discipline or threaten discipline upon the complainant. In singling out the complainant from all other employees at the Port and in calling her to a meeting accompanied by her union representative, and having her participate in a thinly-veiled "learning conversation", I find that management acted improperly.

[75] Having found that discipline was imposed as a result of the complainant's pursuit of her rights under section 128 of the *Code*, I find that she has successfully proven all elements of the test identified in the *Vallée* decision. Had I not concluded that the learning conversation was disciplinary in nature; my decision would have been the same. At the very least, the learning conversation was a threat of future disciplinary action intended to alter the complainant's behaviour. The conversation in which Gary Selk, Chief of Operations, Southern Alberta District, CBSA, and Mr. Hewson reminded the complainant, in the presence of her union representative, brought with it, if not actual discipline, then the perceived threat of disciplinary action. If it was purely a counselling situation, why did a union representative attend? The right to be accompanied by a union representative is included in the collective agreement applicable to BSOs under the discipline section.

[76] Mr. Hewson hoped that the professional standards investigation would put an end to the complainant's review of lookouts to determine if their subjects should have been identified as armed and dangerous. As I have indicated, had the investigation focused on Mr. Badour's security concerns and not ventured into the area identified in the email exchanges between Mr. Hewson and Ms. Passannante, my conclusion would have been different, as the motive for the investigation would have been different. The

required nexus would have been missing. As it turns out, the focus was directed at the complainant's ongoing health and safety concerns with the respondent's lookouts, that she "pulled another work refusal" and her use of lookouts to support her claims that the work was unsafe. Consequently, the nexus exists.

[77] Ultimately, the professional standards investigation was successful in persuading the complainant to rethink the exercise of her section 128 of the *Code* rights in the future. While she might have been subjected only to a learning conversation as a result of the professional standards investigation's findings, she assumed throughout the process that she would be disciplined. Living through the investigation with the perceived threat of discipline hanging over her and in fear of its impact on her employment future was a sufficient deterrent that she would now think twice before exercising her rights under the *Code,* which is exactly what section 147 is intended to prevent.

[78] Consequently, I declare that the respondent violated section 147 of Part II of the *Code* by disciplining or threatening to discipline the complainant for exercising her rights under section 128 of the *Code*.

[79] The complainant's request that I order this decision posted in all the respondent's workplaces for six months is denied. This is a public document available to everyone with an interest. It is not necessary to post a copy of it in the workplace.

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

(The Order appears on the next page)

V. Order

[81] The complaint is upheld.

[82] Exhibit 3 will be sealed.

April 12, 2013.

Margaret T.A. Shannon,
a panel of the Public Service
Labour Relations Board