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Public Service Labour Relations and Employment Board Act and *Canada Labour Code*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

PEDRO SOUSA-DIAS

Complainant

and

TREASURY BOARD
(Canada Border Services Agency)

Respondent

Indexed as
Sousa-Dias v. Treasury Board (Canada Border Services Agency)

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

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

For the Complainant: Jean-Rodrigue Yoboua, Public Service Alliance of Canada

For the Respondent: Joel Stelpstra, counsel

Heard at Kingston, Ontario,
August 3 to 5, 2016, and February 2 and 3, 2017.

I. Complaints before the Board

[1] In his complaints, Pedro Sousa-Dias ("the complainant") alleged that he was threatened with disciplinary action for refusing to attend a meeting without being accompanied by his occupational health and safety (OHS) representative. He also alleged that he was disciplined by the respondent, the Canada Border Services Agency (CBSA), as a result of exercising his right to refuse unsafe work under s. 128 of the *Canada Labour Code* (R.S.C., 1985, c. L-2; *CLC*). The complainant alleged that the respondent's actions violated ss. 147 and 147.1 of the *CLC*.

II. Summary of the evidence

[2] According to the respondent, the complainant has the right to refuse unsafe work but does not have the right to be disrespectful when doing so. The complainant did not understand the work-refusal process and lashed out at the respondent's representatives when he exercised his rights under the *CLC*. The respondent was justified in disciplining him for his insubordinate, aggressive, and confrontational behaviour. The respondent cannot allow employees to exercise their *CLC* rights and expect them to be shielded by the *CLC* for inappropriate behaviour. The inappropriate behaviour that the complainant demonstrated was not part of his work refusal.

[3] According to the complainant, on March 10, 2015, he exercised his right to refuse unsafe work under s. 128 of the *CLC*. On March 11, 2015, he was called to a meeting with the respondent. The *CLC* entitled him to representation, but no union or OHS representatives were available. Despite this, the respondent insisted that the meeting proceed. When the complainant refused to attend, the respondent sent him home. On June 23, he was disciplined again for those events.

[4] Steven MacLean was the traffic superintendent at the CBSA's Lansdowne, Ontario, port of entry (POE) in March 2015. He was responsible for supervising the border services officers (BSOs), including the complainant. When he arrived at work on March 11, 2015, the superintendent going off-shift briefed him that the complainant had refused to work alone in the long room (an open room where commercial imports are processed by the BSOs) the previous night. Mr. MacLean was asked to advise the complainant when he reported to work that he was to attend a meeting in the long room to discuss the respondent's findings with respect to the safety of the work refused on the previous shift.

[5] Mr. MacLean approached the complainant at approximately 14:00 on the afternoon of March 11, 2015, and in a conversational tone informed him of the meeting. When the complainant refused to attend, Mr. MacLean told him that his presence was required to relay the results of the respondent's investigation. It was not a disciplinary or fact-finding meeting. Randy Leach was present during this conversation, as were other BSOs, due to a shift change. The complainant was clearly told that it was not a disciplinary or fact-finding meeting.

[6] Mr. MacLean described his demeanour as having been cool and composed. He was merely relaying information to the complainant from Tammy Kendrew, the chief of operations at the POE. Mr. MacLean could not understand why the complainant refused to attend. According to Mr. MacLean, the complainant eventually relented and agreed to attend but stated that he would attend only if he was accompanied by a union representative.

[7] Mr. MacLean reported this to Ms. Kendrew, who responded that the complainant was not entitled to bring a union representative because the meeting was not disciplinary. When Mr. MacLean relayed this information to the complainant, he advised Mr. MacLean that he would not attend without a representative. Further exchanges on the matter went back and forth until Ms. Kendrew directed Mr. MacLean to tell the complainant that he was ordered to attend. Again, he refused to attend without a representative.

[8] After the complainant was advised that the meeting request had become an order, and after again refusing to attend without a representative, he and Mr. Leach crossed the tarmac to Ms. Kendrew's office. Mr. MacLean called ahead to advise her that the complainant and Mr. Leech were on their way. She acknowledged this and directed Mr. MacLean to prepare a written report of his interactions with the complainant (Exhibit 9). Some time passed, and the complainant returned to the long room and advised Mr. MacLean that he had been sent home.

[9] The union-management relationship at the POE was strained at the time of these events. It was often adversarial, depending on the union representative involved. There were ongoing interpersonal conflicts at all ranks. The complainant was known to be involved in these conflicts, including in one situation, when he got into an argument with another BSO outside the traffic office.

[10] Ms. Kendrew learned about the complainant's work refusal via email on the evening of March 10. She then advised her boss, District Director Lance Markell, that the matter was being handled by the superintendent on duty. The next day, that superintendent's report was delivered to her, and she scheduled a meeting to deliver the results of the respondent's inquiries into the alleged risk posed by working alone in the long room. She intended to deliver the respondent's report to the complainant in person.

[11] Ms. Kendrew consulted with the respondent's labour relations section and its corporate OHS office because a new process had recently been implemented for dealing with work refusals. She was advised that the respondent was legally obligated only to deliver the results of its investigation; the manner in which it was to be done was not stipulated. Ms. Kendrew arranged for a representative from the corporate OHS office to be on the phone during her proposed meeting with the complainant.

[12] Ms. Kendrew asked Mr. MacLean to advise the complainant that she wanted to see him to discuss the results of the respondent's inquiries and to advise him that Jeff Wood, the superintendent of the long room and the corporate OHS representative, would also attend. Mr. MacLean advised her that the complainant would not attend without a union representative, which he was not entitled to do. When he continued to refuse to attend, she told Mr. MacLean to advise him that he was ordered to attend the meeting scheduled for approximately 14:15 that day. In the meantime, she had again consulted her labour relations advisor, who had confirmed that the complainant was not entitled to a union representative since the meeting was not disciplinary.

[13] At approximately 14:20 that afternoon, the complainant arrived, accompanied by Mr. Leech. Ms. Kendrew was in a small office with Mr. Wood; there were four people in that small space. Ms. Kendrew tried to explain that she was delivering the results of the respondent's stage 1 inquiries, as required by the *CLC*, but she could not get it out because the complainant continued to interrupt her. She felt that he intended to intimidate her with his confrontational demeanour.

[14] The complainant continued to insist that he was entitled to the presence of his union representative. Ms. Kendrew tried to explain the purpose of the meeting and that the union's OHS representative becomes involved only if the complainant does not accept the results of the stage 1 inquiry. He was confrontational, argumentative, and

intimidating, while continuously insisting that he was entitled to an observer. He would not sit down; he stood above Ms. Kendrew, some three to four feet from her. The meeting was to occur in a boardroom, but the group never got there because of the complainant's behaviour.

[15] The entire interaction between the complainant and Ms. Kendrew took less than 15 minutes, during which he became more and more animated, confrontational, and aggressive. The meeting was not productive; Ms. Kendrew testified that she had not experienced such an aggressive and confrontational interaction with anyone else at the POE. The complainant had been disrespectful of her and had attempted to intimidate her. She concluded that he had been insubordinate, so she sent him home. In her opinion, it was inappropriate for someone carrying a gun to become so animated.

[16] Ms. Kendrew admitted she raised her voice at the complainant in an attempt to recover control of the situation. His behaviour surprised her; she had always had cordial conversations with him. She was unaccustomed to a BSO at her POE demonstrating such unprofessional and disrespectful behaviour. She advised him that he was being sent home with pay because of his insubordination; he insisted that she put it in writing. Despite the order to leave, he continued to argue with her about his entitlement to a union representative in such meetings. He would not leave the office. She agreed that she would put her order in writing, as he had demanded. She also told him that she would call him at his home when it was time for him to return to the POE, which she did the next day.

[17] After the incident, Ms. Kendrew advised Mr. MacLean of what had happened. She then called her director. During the call, she broke down; she was upset and anxious. The complainant's behaviour had been disproportionate to the circumstances.

[18] This was not the first time that the complainant had raised the issue of working alone in the long room. He had done so on January 31, 2015, in emails to Superintendent Jennifer Grouin (Exhibit 12). On March 9, 2015, Ms. Kendrew responded to that email, confirming that his concerns had been discussed. She forwarded these emails to her director and to the CBSA's human resources section in Ottawa, Ontario, after he exercised his right to refuse unsafe work the night of March 10, 2015. That is not to say that she forwarded them in contemplation of disciplining him; she did it to ensure that the CBSA's headquarters had all the

relevant correspondence.

[19] Ms. Kendrew never contemplated disciplining the complainant for exercising his rights under the *CLC*. However, she did contemplate engaging in fact-finding into how he had treated Ms. Grouin. Despite having been given all the necessary information and results of the respondent's assessment of his concerns, he called Ms. Grouin. She reported being very upset as a result of the call and felt that he was trying to intimidate her. Ms. Kendrew was not annoyed that he had sought to exercise his right to refuse unsafe work; she was upset with how he had treated Superintendent Grouin.

[20] This caused Ms. Kendrew to question whether the complainant had acted in good faith when exercising his right to refuse unsafe work. She suspected that he had acted in bad faith because the respondent had already addressed his concerns with working alone in the long room. It had been explained to him that the policies on working alone and doubling up did not apply at the POE. He was provided with copies of the relevant policies. In Ms. Kendrew's opinion, an employee acts in good faith when he or she exercises his or her rights under the *CLC* if policies are not followed but not when he or she knows that the policies he or she seeks to enforce do not apply.

[21] Regardless of these concerns, Ms. Kendrew insisted that the discipline imposed upon the complainant was related to how he treated her on March 11, 2015. She testified that the human resources section had advised her that she was legally obligated to deliver the results of the first-level investigation into the complainant's allegations that working alone in the long room was unsafe. She was also advised that since this meeting was not disciplinary, he was not entitled to union representation. Unions become involved if the stage 1 results are not accepted, and then the process continues to a stage 2 investigation.

[22] Ms. Kendrew called the complainant to discuss the stage 1 results, not to conduct a disciplinary inquiry. After he refused three times to attend unless he was allowed to bring his union representative, she conceded and allowed it. In an attempt to balance the numbers, she sought a member of the management team to attend with her. Her intention was to explain the results and then to call Dawn Lambert from the headquarters OHS office to answer any questions. The call never happened because of the complainant's behaviour. Ms. Kendrew knew that he had problems dealing with female managers, and because of this, she felt that he was testing her.

[23] The complainant did not use offensive language during the meeting but rather was raving, according to Ms. Kendrew's description of him. He loomed over her and pointed at her. She did not fear that he would use his firearm but was concerned with this type of overreaction by someone carrying one. It was unprofessional, and she was concerned by how quickly he escalated to anger. She admitted that she could have said something at the time about his tone and actions but that instead she sent him home because he was insubordinate. He was sent home with pay, which was intended as time for him to cool off and was not discipline.

[24] At no time was the complainant disciplined for exercising his rights under the *CLC* or for refusing to meet to discuss the stage 1 results. He was disciplined by Ms. Kendrew's boss for his behaviour towards Ms. Kendrew during the meeting. Ms. Kendrew did not have the authority or the intention to discipline the complainant.

[25] The district director at the time of the incident was Mr. Markell. He testified that historically, labour relations at the POE had been difficult and confrontational, so he advised Ms. Kendrew to keep him apprised of the events related to the long-room issue when he was made aware of the complainant's work refusal. He was aware that Ms. Kendrew planned to meet with the complainant on March 11 to share the respondent's findings.

[26] On March 11, Mr. Markell received a call from Ms. Kendrew. She was very upset, and she explained to him that she had tried to arrange the meeting with the complainant as planned but that he had refused to attend unless he could bring a union representative. Mr. Markell stated that Ms. Kendrew was crying when she described her interaction with the complainant and why she had sent him home.

[27] This was the first time a manager had called Mr. Markell in such a state, which caused him great concern. When he heard from Ms. Kendrew and learned how she felt, he was offended. The complainant's behaviour of standing in the doorway and his agitated and raised voice were unprofessional. Mr. Markell considered removing the complainant's firearm until he could be certain that the behaviour demonstrated towards Ms. Kendrew would not recur.

[28] According to Mr. Markell, the complainant's inappropriate behaviour had to be addressed, so he notified the complainant via email that fact-finding would take place, with which the complainant declined to participate (Exhibit 15). The fact-finding into

his conduct was put on hold when he filed a harassment complaint against Chiefs Pergunas and Kendrew (Exhibit 11, tab 1). In the meantime, Mr. Markell obtained statements from Ms. Kendrew and Messrs. Woods, Leach, and MacLean. Mr. Markell considered the contents of these statements (Exhibits 9 and 16) in his deliberations. He also considered the content of the complainant's personnel file.

[29] Mr. Markell concluded that based on the information before him, the complainant had been unprofessional and insubordinate in his interactions with Ms. Kendrew. An employee who is directed by a superior to do something is expected to carry out the directions and only afterward to file a grievance. The rule is "work now, grieve later".

[30] In a law-enforcement environment such as the POE, management does not want its employees to demonstrate the level of escalation the complainant showed in his dealings with Ms. Grouin and Ms. Kendrew. Mr. Markell took time to consider all the factors and consulted with his labour relations contact, who recommended imposing a three-day suspension without pay. However, Mr. Markell felt that a one-day suspension was more appropriate, which is what he imposed, because regardless of the fact that Ms. Kendrew could have delivered the results of the stage 1 inquiry in a different format than she chose to, the complainant's behaviour was not excused.

[31] In the disciplinary letter (Exhibit 8), Mr. Markell listed what he deemed were the mitigating and aggravating factors. The day that the complainant was sent home, he was paid; the act of sending him home was intended to defuse the situation and was not disciplinary. He was told to go home and to wait for a call the next day to tell him when he should return to work. It took several attempts to reach him, as he had made himself unavailable by leaving his home despite directions to wait for the respondent's call.

[32] The complainant had a different view of the events of March 10 and 11, 2015. He had expressed his concerns as early as January 31, 2015, about working alone in the long room, since the closest BSOs who could come to his aid if he needed help were in the commercial warehouse, approximately 60 feet away in a separate room and behind a locked door. The only way to alert them was by radio. The response time in the event of a call for help was 60 seconds. He raised these concerns with Ms. Grouin on January 31, 2015 (Exhibit 12).

[33] The complainant received an email from Superintendent Craig Kennedy advising him that Ms. Kendrew had asked him to look into the complainant's concerns with working in the long room. During the attempt to set up the meeting, the complainant asked if he could bring a union representative. Mr. Kennedy refused because he felt uncomfortable meeting with two union representatives (the complainant was the second vice president of his union local). After a series of emails were exchanged, the meeting did not occur on March 5, 2015. The complainant summarized his version of the attempts to schedule the meeting in an email to Mr. Kennedy on March 10, 2015 (Exhibit 18).

[34] At the POE, misconduct allegations arose easily, which was why the complainant was reluctant to meet with management without a union representative. There was no reason to meet with Ms. Kendrew on March 11, 2015; she could have emailed the stage 1 inquiry results as she eventually did (Exhibit 13). It was clear to the complainant that the respondent was not interested in discussing his concerns further. On March 9, he received an email from Ms. Kendrew indicating to him that there would be no further discussions on the subject. His only option was to invoke his right to refuse unsafe work under Part II of the *CLC*.

[35] The complainant did not wait at the end of his shift on March 10 to receive the respondent's report of its stage 1 inquiry. He elected to receive it the next day when he reported for his shift. He testified that his understanding was that the report would be handed to him by the superintendent on duty on the next shift or that Ms. Grouin would email it to him. There was no agreement that he would meet with Ms. Kendrew the next day. According to him, his interactions with Ms. Grouin were professional, cordial, and friendly. There was no animosity between them.

[36] When the complainant arrived at 14:00 for his shift on March 11, 2015, he noted that the job assignment board at the POE indicated that he had a meeting to attend. When he asked about it, he was told that it concerned the situation from the night before. He talked to Mr. Leach about it and asked him to also attend the meeting with Mr. MacLean. When the complainant discovered the reason for the meeting, he told Mr. MacLean that there was no requirement for it and that he would not attend. According to the complainant, at that point, he was waiting to receive a written copy of Ms. Grouin's report. Mr. MacLean explained to him that the meeting was to discuss that report and that he was to attend.

[37] In the complainant's opinion, scheduling a meeting with two managers to discuss the stage 1 report was an attempt to intimidate him into agreeing with the report. He refused to attend and told Mr. MacLean that the respondent could email him the report. Mr. MacLean assured him that the meeting was not disciplinary, so he agreed to attend if Mr. Leach could also come. Mr. Leach suggested that it would make more sense if Eric Robidoux, the union's representative on the OHS committee, attended, so the respondent asked him to attend.

[38] Mr. MacLean posed the complainant's request to Ms. Kendrew, who denied it. As a result, the complainant refused to attend. Later that afternoon, Mr. MacLean informed him the he was ordered to attend the meeting with Ms. Kendrew and Ms. Lambert, who would attend via teleconference. He insisted that he would attend only with a representative. Again, he was advised that according to Ms. Kendrew, this was not an option.

[39] According to the complainant's evidence, sometime later he was talking to Mr. Leach at the counter when Mr. MacLean approached them. Mr. MacLean told the complainant that he was ordered to attend a meeting with Ms. Kendrew to discuss his insubordination. The matter had become disciplinary, so the complainant had the right to a union representative. The meeting was no longer about his work refusal of the previous evening. Ironically, Ms. Kendrew continued to say that he was not entitled to be accompanied by a union representative.

[40] Contrary to what Ms. Kendrew described as the distance between her and the complainant during the March 11 meeting, he testified that he stood in the doorway of the office approximately 10 feet from her. At one point, it increased to approximately 12 feet when Ms. Kendrew pushed her chair back. The complainant described his posture as standing in the doorway with his hands down and gripped in front of him. He testified that he has a habit of speaking with his hands. He wanted to ensure that he would behave professionally, so he clasped his hands in front of his body.

[41] According to the complainant, Ms. Kendrew was nervous when he arrived. She appeared to him irritated and frustrated with the situation. She was flushed and was breathing rapidly. She did not offer the complainant a chair when he arrived or exchange pleasantries. On the other hand, to the complainant, Mr. Wood appeared relaxed. He was leaning back in his chair. Mr. Leach stood on the complainant's left

and was very relaxed.

[42] Ms. Kendrew spoke first. She indicated that the meeting had been called to discuss the stage 1 inquiry results related to the previous night's work refusal. Ms. Lambert would join them via phone. The complainant then calmly advised Ms. Kendrew that he was not required to attend but that he had agreed to if he could be accompanied by his OHS representative. Ms. Kendrew then interrupted him and said that he had asked for a union representative and not an OHS representative.

[43] According to the complainant's testimony, Ms. Kendrew was correct in her recall of his request. He had initially asked to be accompanied by Mr. Leach, but when that was denied, he eventually asked for Mr. Robidoux, his OHS representative. The complainant also pointed out to Ms. Kendrew that Mr. MacLean had told him that the meeting was to be with Ms. Kendrew and Mr. Wood; there had been no mention of Ms. Lambert. Ms. Kendrew did not see the significance of Ms. Lambert's presence, but Mr. Leach told her it was very relevant since this was how the whole situation had been started. There were now three respondent representatives at the meeting, to which Ms. Kendrew replied that Ms. Lambert was not a respondent representative; she was an OHS representative.

[44] The complainant recollected that Ms. Kendrew told him that the she was not an OHS expert and that CBSA headquarters had told her that he had no right to be accompanied by a representative. He testified that based on his experience, he was entitled to have a representative with him throughout the process. When he requested that Mr. Robidoux accompany him, Mr. McLean told him that Ms. Kendrew had denied it, as Mr. Robidoux was to be involved in stage 2, and she stated that she did not want to "infect him" with knowledge of what had occurred at stage 1.

[45] The complainant testified that throughout the meeting, he maintained the same calm, cool demeanour. He was frustrated and unhappy with how the situation was developing, but he did not yell. In fact, neither he nor Ms. Kendrew yelled at the other. The conversation went back and forth several times until the complainant essentially said, according to his testimony, "no rep no meeting", following which Ms. Kendrew ordered him to go home.

[46] According to his testimony, Ms. Kendrew told the complainant that refusing to attend a meeting with management without a representative would result in a charge

of insubordination against him. When she sent him home, Ms. Kendrew's voice was raised, and she looked very upset, according to him. He admitted that he had also been unhappy with the progress of the meeting and that sending him home had been unfair. He explained that he had carpooled to work, so he needed time to figure out how he would get home. He stated that Ms. Kendrew "blurted" out that it was not her problem, according to the complainant. Before he left the meeting, he asked to be provided with confirmation in writing that he was being sent home, as required whenever an employee is suspended under clause 17.01 of the relevant collective agreement.

[47] After he was ordered home, Ms. Kendrew tried to continue the discussion about whether the complainant was entitled to be accompanied by a union representative. He testified that he told her that she had given him an order to leave and that the matter of a union representative was no longer open for discussion. He did not refuse to leave the office; Ms. Kendrew insisted on continuing the discussions.

[48] The complainant testified he did not point at anyone. He is very aware of body language and gestures and is very careful about them. He did not want to do anything that would compromise his case.

[49] At approximately 14:50 that afternoon, while waiting for a cab to arrive to take him home, the complainant emailed Ms. Kendrew to inquire about his written suspension notice (Exhibit 7). She replied at approximately 15:11 but made no mention of the suspension. In her email, she attached a copy of the stage 1 report and asked for his comments.

[50] The next day, March 12, 2015, the complainant was scheduled to report to work at 14:00. Since Ms. Kendrew told him that he would be contacted by phone to let him know if he was to return to work as his schedule indicated, he waited at home until approximately 10:30. He testified that he was surprised that he had not heard from anyone by then. He went to the union office and returned home only between 17:00 and 18:00. Around 20:30, his wife told him that he had voicemail.

[51] According to the voicemail, Superintendent Wood had called him around 12:00 that day and had left two messages indicating that the complainant was to report to work as scheduled on March 12. He did return to work on his next scheduled day. The following days were his normal rest days. While he was on rest, he emailed Mr. Markell and asked him to ensure that when he returned to the POE, he would not be treated as

he had been on March 11. When he returned on March 15, he found an email from Mr. Markell advising him of a meeting on March 27 at 14:00 to discuss the events of March 11 (Exhibit 14).

[52] According to his evidence, at no time was the complainant told which behaviours he had demonstrated that were unacceptable. The March 27 meeting did not occur as scheduled because in the interim, he had alleged that Chiefs Pegunas and Kendrew (Exhibit 11, tab 1) had harassed him. The complainant testified that he never formally filed a harassment complaint about violence in the workplace; rather, he sent an email. He met with Regional Director General Lisa Janes to discuss his concerns. With respect to the harassment allegations, she agreed to look into them. She acknowledged that errors had been made in the work-refusal process, and she put the fact-finding initiated by Mr. Markell on hold, according to the complainant.

[53] On May 1, Mr. Markell again tried to schedule the meeting that had been intended for March 27 to May 5. The complainant responded by refusing to participate (Exhibit 15). The discipline imposed, as outlined in the discipline letter (Exhibit 8), had caused him to lose faith in the OHS process, according to his testimony. He believed that he was protected by the *CLC* but had been mistaken. He was disciplined for expressing his point of view. He did not become agitated or argumentative. He perceived that he had been professional and respectful throughout the meeting with Ms. Kendrew and that he had avoided any physical gestures. She had been unprofessional during the meeting; her tone had changed.

[54] The complainant recognized that the *CLC* requires dialogue between the respondent and its employees, which is entrenched in that Act. It is reasonable and necessary for both sides to discuss health and safety issues. However, on March 11, 2015, when Mr. MacLean made it clear to the complainant that if he refused to attend a meeting, that was in the complainant's opinion not required, because he was told not to bring a union representative, he would be disciplined for insubordination, he did not follow the order.

[55] In his testimony, the complainant recognized that orders are important in the workplace and that as a union representative, he was familiar with the concept "work now, grieve later". He stated that he simply does not agree with that concept. His opinion is that sometimes, an order must be challenged.

[56] Over the course of the discussions leading up to the March 11 meeting, the complainant testified that he first asked to have Mr. Leach attend. When his request was denied because Mr. Leach was a union representative, the complainant asked to have Mr. Robidoux attend because he was the union's representative on the local OHS committee. When that request was also denied, the complainant attended the meeting with Mr. Leach.

[57] However, the meeting he attended was no longer about the work refusal and the stage 1 results. It was clearly a disciplinary meeting for his insubordination. (On cross-examination, he contradicted these statements. He testified that he expected the meeting to discuss his insubordination but that it focused on the stage 1 report and on the right to be represented.)

[58] As it had become a disciplinary meeting, in the complainant's mind, he was entitled to union representation. Management had three representatives at the meeting, which was unfair, in his opinion. He disagreed with including Ms. Lambert. He was aware that she was an OHS subject-matter expert but did not think she was qualified as he had previously worked with her in a situation on Wolfe Island.

[59] The complainant testified that he was surprised when he was ordered home. He agreed that at the meeting he had been frustrated with the directions from Mr. MacLean and Ms. Kendrew but that Ms. Kendrew had been upset by the events. According to his testimony, the complainant made it clear to Ms. Kendrew that she was wasting their time because he had no intention of meeting with her without a union representative. He did not recall telling her that she might as well send him home as is documented in Mr. Wood's notes of the event (Exhibit 16). He also did not recall any comment or discussion about disciplinary action in the future.

[60] In the complainant's assessment, the situation was not dangerous at the point when he requested a union representative. Ms. Kendrew breached the *CLC* by not following the rules, which did not require him to meet with her to be provided with a copy of the stage 1 report. He expected that she would provide him with a copy of the written report and with time to digest it and to comment. Once a work refusal has been filed, the process is no longer "participatory", according to the complainant. Processes and rules are in place that must be strictly followed.

[61] The complainant did not think it reasonable or appropriate that he had to be intimidated and forced to sit in a roomful of respondent representatives unescorted because he had filed a work refusal. He testified that he is willing to stand up for his rights and that he is not easily intimidated if he thinks he is right, which does not make him careless. In his opinion, it would have been careless to meet with Ms. Kendrew and Ms. Lambert without a union representative.

[62] As a union representative, he knows to never meet alone with management for labour relations issues, particularly in the hostile and antagonistic labour relations atmosphere at the POE. When standing up for principles rooted in a collective agreement, it is alright to refuse an order, according to the complainant.

[63] When asked why he did not respond to the respondent's calls on March 12, the complainant stated that he went to the union offices at approximately 11:00 to avoid messages from the POE. He had his cellphone with him but did not call at any time. He did not speak to his union representative, Mr. Leach, to determine if the respondent had contacted him about the complainant returning to the workplace. The complainant admitted that he made no efforts to determine whether he was to return to work. He testified that he assumed that someone would review what happened and the *CLC* and would determine that Ms. Kendrew was wrong and that that someone would call him the night before he was to return. When that did not happen, he made himself inaccessible and made no efforts to contact his work.

[64] Mr. Leach was a witness to the conversations between the complainant and Mr. MacLean when the complainant was told that he was to meet with Ms. Kendrew to discuss his work refusal. The conversations started out amicably. Mr. Leach heard Mr. MacLean tell the complainant who was insisting that he wanted to bring a union representative that he was just the messenger and that he would relay the complainant's request to Ms. Kendrew.

[65] A while later Mr. Leach overheard Mr. MacLean tell the complainant that he was ordered to attend the meeting and that if he did not attend as directed, he would be subject to disciplinary action. The complainant was firm that he would attend only with a union representative. Mr. Leach did not participate in the conversations with Mr. MacLean; he was there to be a witness, at the complainant's request.

[66] Mr. Leach suggested that Mr. Robidoux should attend the meeting with the complainant. Mr. MacLean did not respond to that suggestion; he persisted with insisting that the complainant must attend alone. The complainant was clear in his position that he would not.

[67] Eventually, the complainant and Mr. Leach went to Ms. Kendrew's office, which was approximately 10 feet by 10 feet with the door open. Ms. Kendrew and Mr. Wood were seated inside. Mr. Leach and the complainant took positions approximately two feet inside, near the doorway. Ms. Kendrew moved closer to them, according to Mr. Leach. The conversation that ensued was exclusively between the complainant and Ms. Kendrew.

[68] The complainant was animated and engaged in the conversation, but at all times, his demeanour was professional. He did not advance or retreat from his position inside the doorway. His hands were moving but were close to his body and open. No fists were clenched, and no fingers were pointed. In general, there was no indication of anger.

[69] Ms. Kendrew remained seated throughout the discussion. The conversation was important to her, and she used a professional and conversational tone at all times. At points, both she and the complainant had slightly raised their voices. Her neck increasingly reddened.

[70] Their conversation was circular. The complainant insisted that he had the right under the *CLC* to his own representative and that Ms. Lambert was a respondent representative. He was resolute that there would be no meeting unless he were allowed a union representative, which was at odds with Ms. Kendrew's equally resolute opinion that he was not entitled to representation.

[71] The conversation went back and forth several times until the complainant said that they were wasting their time. When he asked Ms. Kendrew to resolve the matter once and for all, she sent him home and told him he would receive a call when it was time for him to return. He asked that that direction be put in writing.

[72] Mr. Robidoux testified for the complainant. Since he was not part of the events of March 11 or 12, he could shed no light on the events of that day and could provide no insight into these complaints.

III. Summary of the arguments

A. For the respondent

[73] Both the respondent and the complainant understood the work-refusal process. The respondent was trying to follow a script, with which the complainant refused to cooperate. In so doing, he lashed out at Ms. Kendrew. Employees have the right to refuse unsafe work, but when so doing, they must be professional and respectful. Part II of the *CLC* is not a shield for unrelated misconduct during the work-refusal process.

[74] The complainant's behaviour was over the top. He was wrong about his rights, but this is inconsequential. By his aggressive and unprofessional behaviour, he broke the chain of proximity between his exercise of his rights under the CLC and any discipline imposed, and there is no nexus between his work refusal and the reason he was disciplined. He did not have to act out as he did to exercise his rights. There is a difference between the vigorous pursuit of one's rights and inappropriate behaviour.

[75] The OHS system is based on the parties participating and cooperating. The complainant was insubordinate and aggressive. His behaviour reduced a senior supervisor to tears. Neither Ms. Kendrew nor Mr. Markell had experienced this level of hostility in the workplace before. The complainant's actions were the polar opposite of what is expected in the OHS system.

[76] To determine whether there is a nexus between the discipline and the work refusal, this question must be answered in the affirmative: Was the exercise of the complainant's rights under s. 128 of the *CLC* the proximate cause of the discipline? The adjudicator's role is not to rule on the appropriateness of the quantum of the discipline or on the validity of the work refusal.

[77] Mr. Markell's testimony should be conclusive that the discipline was not related to the work refusal. The Public Service Labour Relations and Employment Board ("the Board") must determine Mr. Markell's motivation when he imposed the discipline. It is clear from the evidence that the complainant's actions were completely independent of the work refusal, even though the work refusal forms part of the narrative that led to the incident.

[78] Mr. MacLean gave the complainant a direct order and an explanation. The direction given was consistent; there was no reason for the presence of a union representative as the meeting was not for disciplinary purposes. The meeting was to discuss the stage 1 investigation conducted as a result of the complainant's work refusal. The conversations should not have been hostile even though they were frustrating to the complainant.

[79] The complainant initially refused to meet with Ms. Kendrew. Then he agreed to but only if Mr. Leach could accompany him. When his demand was denied, the complainant continued to refuse to attend without a union representative. In the face of a direct order to attend the meeting without one, he went to Ms. Kendrew's office accompanied by Mr. Leach. Ms. Kendrew tried to explain the reason for meeting in the face of behaviour that was intimidating from the outset. Threat cues in the complainant's behaviour were obvious to her. She was concerned about escalating his anger in an armed environment, so to defuse the situation, she sent him home with pay.

[80] Ms. Kendrew had never experienced this type of behaviour in all her years as a manager. She was rattled by the experience. Even when she tried to disengage, the complainant would not leave her office. Once the meeting was over, Ms. Kendrew called her boss and was in tears. Her evidence is consistent with the contemporaneous report she provided to Mr. Markell (Exhibit 10).

[81] Mr. Markell shared Ms. Kendrew's concern with this type of behaviour in an armed environment where professional behaviour is expected. When he spoke to Ms. Kendrew, she was very emotional. Employees have a right to opposing views in the workplace, but they do not have the right to be disrespectful.

[82] Mr. Markell did not involve Ms. Kendrew in the disciplinary process. When determining the appropriate penalty, he considered that the better ways in which the situation could have been resolved were mitigating factors, but they did not excuse the complainant's behaviour. Mr. Markell was best able to judge whether Ms. Kendrew was an emotional person, since he was her supervisor. Even so, the complainant's unprofessional behaviour had been unacceptable.

[83] This case is about insubordination and unprofessional behaviour not about a work refusal, which is clear from the disciplinary letter (Exhibit 8). The complainant

was insubordinate, and he deliberately refused direct instructions from his superintendent and the chief of operations (Ms. Kendrew).

[84] In addition, the complainant's demeanour in speaking with Ms. Kendrew was aggressive and disrespectful in that he was argumentative, spoke in a raised voice, and made provocative physical gestures. His behaviour caused such concern that Mr. Markell had discussions up his chain of command, including with the Regional Director General, as to whether they should remove the complainant's duty firearm.

[85] The complainant is not afraid to stand his ground. He is a seasoned union representative who felt that the meeting with Ms. Kendrew was an intimidation tactic by management at the POE. He had no qualms about invoking his rights under Part II of the *CLC* or about going over the head of local management. He is an activist who is principled, and he knew what he was doing. He testified that he was being set up when he was called to discuss his work refusal because he had not been told in advance that a meeting would be held to discuss the stage 1 report.

[86] He asked Mr. Leach to attend the meeting with Mr. MacLean, at which he was told about the meeting with Ms. Kendrew. Mr. Leach testified that he was not involved in the conversation.

[87] It is clear from his testimony that the complainant was insubordinate. He would not attend a meeting in the circumstances set out by management. There was no safety issue with the meeting; he knew its purpose and that it was not disciplinary. He consciously refused to cooperate with management and ultimately refused to obey a direct order because he felt that he was being set up. He knew going into the meeting that there would be expectations about his behaviour. He testified that he was careful not to compromise himself and that he was restrained in his behaviour. According to him, the evidence of the others in attendance contradicting this is false.

[88] Mr. Leach described the complainant's demeanour in the meeting as animated and stated that the complainant talked with his hands, as he always did. He recognized indicators of stress emanating from Ms. Kendrew, such as a reddening neck, which according to his testimony, started within 30 seconds of the complainant's arrival in her office. The complainant's description of his behaviour was inconsistent with that of his own witness.

[89] There is also the fact that when told that the meeting had concluded and that he was to leave the workplace, the complainant re-engaged Ms. Kendrew for several minutes about his rights. He has demonstrated a rigidity and unwillingness to participate with the respondent, which was evidenced by his ongoing refusal to meet with the management of the POE, including Mr. Markell. His animosity towards Ms. Kendrew is evident from his request for an investigation into bullying and harassment at the POE, which he sent to the respondent shortly after the incident (Exhibit 11, tab 1).

[90] The complainant's testimony about why he did not report to work on March 12 was not credible. Again, he was given an order to stay by the phone and to wait for the respondent to call and tell him when to report to work. Instead, according to his evidence, he deliberately made himself unavailable.

[91] The adjudicator's role is to make a factual determination as to what actually happened in the room (see *Faryna v. Chorney*, [1952] 2 D.L.R. 354). Preference should be given to Ms. Kendrew's evidence, which was unwavering and consistent with contemporaneous accounts and documents and the labour relations environment at the POE. The complainant's evidence was full of contradictions. Mr. Leach cannot be considered unbiased.

[92] The test to establish a violation of the *CLC* is set out in *Vallée v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 52. Complainants must demonstrate that they exercised their rights under Part II of the *CLC*, that they suffered reprisals, that the reprisals were disciplinary, and that there was a direct link between the exercise of their rights and the actions taken against them. In this case, there was no link between the disciplinary action and the exercise of the complainant's rights under Part II of the *CLC*.

[93] The respondent bears the burden of proof that a contravention of s. 147 of the *CLC* did not occur. The burden of proof is discharged if the respondent can establish one of three criteria, which are that the complainant did not act in accordance with s. 128 of the *CLC*, that the complainant was not disciplined, or that if the complainant was disciplined, it was not in any way related to the exercise of his or her rights under s. 128 of the *CLC* (see *White v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 63). The respondent in this case contested the existence of the link

between the discipline imposed and the exercise of the complainant's rights under s. 128 of the *CLC*.

[94] The complainant was disciplined for his unprofessional and aggressive behaviour towards a senior manager following the exercise of his right to refuse unsafe work under s. 128 of the *CLC*. The mere contemporaneousness of safety issues with alleged inappropriate conduct does not prevent a respondent from evaluating an employee's behaviour and imposing discipline when required (see *Aker v. United Parcel Service Canada Ltd.*, 2009 CIRB 474).

[95] The exercise of one's rights under the *CLC* is not a shield against inappropriate behaviour in the same context. The protection against reprisal does not cover unrelated misconduct. The question is whether there is a nexus between the discipline and the exercise of rights under Part II of the *CLC*. The exercise of rights under s. 128 of the *CLC* must be the proximate cause of the discipline imposed (see *Martin-Ivie v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 40). It is not enough to show that discipline occurred; the complainant must also show that a nexus exists between the discipline and the exercise of rights under s. 128 (see *Paquet v. Air Canada*, 2013 CIRB 691).

[96] The purpose of the respondent's actions was to correct bad behaviour. It needed to address insubordination and unprofessional behaviour in the exercise of the complainant's rights under the *CLC*. Whether he was subject to discipline or penalties within the meaning of s. 147 of the *CLC* and if so whether there was a nexus between them and the exercise of his rights under the *CLC* is a pure question of fact (see *Nash v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 4). The question is whether Mr. Markell's reasoning when imposing discipline was based on the exercise of *CLC* rights or on something else.

[97] The definition of "proximate cause" states that it is one that directly produces an event, without which the event would not have occurred (see *Black's Law Dictionary*, Ninth Edition). Proximate cause requires sufficient cause to result in liability. The complainant could have exercised his rights in a professional, non-confrontational manner. The question is whether what happened on March 11 was related to his rights or to his frustration with the process. It is not a retrospective debate about whether he was entitled to a representative; that question is outside the Board's jurisdiction. This

is not about the complainant's rights under the *CLC*.

[98] It is also not within the Board's jurisdiction to look at the financial consequences of events outside the discipline process because they are not disciplinary. The cooling-off period was administrative. The complainant was not paid for one day because he did not report for work.

[99] The evidence of all the witnesses established that the discipline imposed was unrelated to the complainant exercising his rights under Part II of the *CLC*. The conduct for which he was disciplined was unrelated to exercising his rights; therefore, s. 147.1 of the *CLC* does not apply.

[100] The test for insubordination was set out in *Nowoselsky v. Treasury Board (Solicitor General Canada)*, PSSRB File No. 166-02-14291 (19840724), [1984] C.P.S.S.R.B. No. 120 (QL). The respondent must prove that an order was given, that it was clearly communicated to the employee, that the person giving it had the proper authority to give it, and that the employee refused to comply with it. The employee has the right to refuse the order if it would endanger his or her health or require him or her to perform an illegal act or if the employee is a union official and obeying the order would result in irreparable harm to the interests of other employees.

[101] The complainant's rude behaviour and his disrespect toward Ms. Kendrew warranted discipline for insubordination as did his aggressive stance, him looming over her, and his body language and gestures during the meeting on March 11, 2015 (see *Singaravelu v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 178); and *Ferguson v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File No. 166-02-26970 (19961028), [1996] C.P.S.S.R.B. No. 79 (QL)). Even if he sincerely believed that he did not have to meet with Ms. Kendrew, his refusal to meet with her was insubordination (see *Bergey v. Treasury Board (Royal Canadian Mounted Police) and Deputy Head (Royal Canadian Mounted Police)*, 2013 PSLRB 80).

[102] Management is not obligated to wait to discipline an employee until after the work refusal has been resolved. Doing so would presuppose a nexus between the two. To establish a nexus in this case, the Board must find that the respondent perpetrated a sham or camouflage and that it concocted reasons to discipline the complainant, which would require that Ms. Kendrew and Mr. Markell colluded. That did not happen, and so, these complaints should be dismissed.

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

[103] A reprisal occurred on March 11, 2015. The subsequent discipline imposed was a further reprisal, which is why two complaints are before the Board.

[104] The complainant is a vice president of his union local. The relationship between that local and the management at the POE was known to be confrontational. When the complainant initially raised concerns about working in the long room alone on January 31, 2015 (Exhibit 12), he tried to set up a meeting with Messrs. Wood and Kennedy, but they were open to the idea only until the complainant wanted to bring an OHS representative. Both refused to meet after that, and the complainant was left with the impression that they were trying to intimidate him.

[105] When Ms. Kendrew notified Mr. Markell of the complainant's work refusal on March 10 at 22:55, the respondent was already considering engaging in fact-finding (Exhibit 11, tab 19). The complainant submitted that the intention to discipline him was formulated at that moment. Ms. Kendrew clearly stated in her email to Mr. Markell that the respondent had been given his answer that working alone in the long room did not constitute unsafe work and that she was considering engaging in fact-finding. The implication was that the complainant did not act in good faith when he exercised his rights under s. 128 of the *CLC*. The respondent was biased against him from the outset.

[106] Ms. Kendrew testified that the complainant was confrontational with Ms. Grouin, which is not supported by the rest of the evidence (Exhibit 7, page 3). There is no question that on March 11, 2015, he knew that the meeting had been scheduled. The problem was that all the participants other than him were from management. Since he was not required to attend any meetings to discuss his work refusal until he received the stage 1 report, he agreed to attend only if he were allowed to bring a union representative. Via Mr. MacLean, Ms. Kendrew told the complainant that he was to attend the meeting alone, or he would be considered insubordinate.

[107] Eventually, the complainant went to Ms. Kendrew's office, accompanied by Mr. Leach. Present in the office were Ms. Kendrew and Mr. Wood. The number of management representatives caused the complainant concern, as did the fact that the respondent's OHS advisor was to be present even though the complainant had no such employee representative with him. When he refused to participate without his OHS

representative, he was told to participate or he would be sent home. Two credible witnesses testified that he did not raise his voice and that he remained respectful throughout. After he was ordered to leave, he did not refuse to; he merely wanted to assure that he obtained confirmation of the suspension in writing.

[108] Ms. Kendrew's testimony was full of inconsistencies. She exaggerated the distance from her to the complainant. She exaggerated the risk by raising the fact that he was armed. There is no evidence to support that risk. There is no evidence whatsoever that he had issues with women in authority in general. Everything could have been avoided had she merely sent the report as he had wished.

[109] Section 147 of the *CLC* is a general prohibition against reprisals. The respondent could not discipline the complainant for invoking or seeking to enforce his rights (see *Tanguay v. Statistical Survey Operations*, 2005 PSLRB 43). The test for a violation of s. 147 is as the respondent's representative said in *Valleé*. The burden of proof is on the respondent to prove that the discipline was administered for reasons other than the employee invoking his or her right to refuse unsafe work (see *Lequesne v. Canadian National Railway Company*, 2004 CIRB 276). Even if the complainant's invocation of his rights was the proximate cause of the discipline, the respondent contravened s. 147 of the *CLC* (see *Chaney v. Auto Haulaway Inc.*, [2000] CIRB No. 47 (QL)). The complainant had a statutory right not to attend a meeting without a representative. He had the right to receive the stage 1 report in writing.

[110] The respondent acted in bad faith from the moment the complainant initiated the work-refusal process. He was threatened twice with discipline if he did not participate in the meeting. He was sent home with pay after the meeting, which was discipline in the form of a suspension with pay. Then, following fact-finding, he was disciplined again for the same incident in the form of a one-day suspension without pay. When Ms. Kendrew sent him home on March 11, 2015, she clearly intended to send the message that she was in charge. As early as the night of March 10, she intended to discipline him for invoking his right to refuse unsafe work.

[111] The nexus between the refusal and the discipline has been established. The complainant's true motivation behind insisting on a representative was in furtherance of his rights. The respondent was frustrated with him because he insisted on exercising his right. Contrary to what the respondent's representative argued, the

respondent was obligated to wait until the end of the work refusal (see *Court v. John Grant Haulage Ltd.*, 2010 CIRB 498).

[112] The *CLC* must be given its broadest interpretation (see *St. Lawrence Seaway Management Authority v. Canadian Auto Workers Union*, [2002] C.L.C.A.O.D. No. 18 (QL)). The nexus between the work refusal and the discipline is in the emails and the conversations that followed them. The complainant no longer seeks reimbursement for the salary lost on March 12, 2015, but a declaration from this Board and an apology from the respondent.

IV. Reasons

[113] The complainant refused to work alone in the long room at the POE where he was employed. He had previously raised concerns with this type of work, which management at the POE thought had been addressed. Despite this, he invoked s. 128(1) of the *CLC*, which provides that an employee can refuse to work or to perform an activity if it constitutes a danger to the employee.

[114] It is not my role to determine whether the work that the complainant refused was a danger, even though much of his evidence was targeted at that point. My role is to determine whether any acts of reprisal occurred and, if so, whether they occurred as a direct consequence of exercising his right to refuse unsafe work, which would have violated the *CLC*.

[115] The relevant sections of the *CLC* are 133 and 147. Subsection 133(1) 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.*

[116] Section 147 of the *CLC* 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]

[117] Subsection 133(6) of the *CLC* is also relevant because it provides that once an employee has established that he or she filed a complaint under s. 133(1) in respect of the exercise of the right to refuse to perform work under ss. 128 or 129, the burden of proof shifts to the respondent to show that s. 147 was not contravened (see *White*, at para. 141). This subsection reads as follows:

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

[118] It is uncontested that the complainant filed complaints pursuant to s. 133(1) of the *CLC* within the applicable time limits, so his initial burden has been met, and it was up to the respondent to show that s. 147 was not contravened.

[119] From the types of reprisals listed in s. 147 of the *CLC*, the complainant really only alleged that he had been disciplined or threatened with discipline for having exercised his right to refuse work. To determine that a disciplinary reprisal occurred, there must be a link between the exercise of the complainant's rights under Part II of the *CLC* and the disciplinary action taken by the respondent (see *Tanguay*, at para. 14; *Vallée*, at para. 64; and *Martin-Ivie*).

[120] The complainant argued that a reference to fact-finding in an email on March 10, 2015, from Ms. Kendrew to Mr. Markell (Exhibit 11, tab 19) is proof of the respondent's intent to discipline him for exercising his *CLC* rights. This email alone does not establish the nexus required between the discipline imposed and the exercise of the complainant's rights under the *CLC*, particularly in light of the uncontradicted

evidence of both Ms. Kendrew and Mr. Markell that Ms. Kendrew did not have the authority to discipline the complainant. The statement, "Work alone and doubling up do not apply at 456 and I would like to explore a fact finding [*sic*] here", made by Ms. Kendrew to her manager and a labour relations representative, is more in the nature of a request and not a statement of intent, in my opinion.

[121] No disciplinary fact-finding occurred until after the complainant refused a direct order to meet with Ms. Kendrew and then behaved in an aggressive manner towards her. Furthermore, he deliberately went to meet with her accompanied by a union representative knowing that he was not to and knowing that she would be accompanied by other members of the management team. This action was clearly intended to assert his superiority over her and to embarrass her in front of another manager and thus undermine her authority. As was said in *Martin-Ivie,* the complainant could not hide behind the exercise of his rights under the *CLC* to avoid disciplinary action that might have arisen from actions that violated the respondent's code of conduct.

[122] The complainant's representative asserted that the complainant had a statutory right not to have to attend a meeting without a representative. He also argued that the respondent had the right to receive the stage 1 report in writing. He relied on an excerpt from an unattributed document identified as "Workplace Directorate Interpretations, Policies and Guidelines" to support his position. That document states that bargaining agents, trade unions, and lawyers are not explicitly mentioned in Part XX of the *Canada Occupational Health and Safety Regulations*, SOR/86-304. However, complainants or respondents may still seek assistance from, or be represented by, their bargaining agents, unions, or lawyers. It goes on to add that if an employee chooses to be so represented, this should be documented in the complaint.

[123] Contrary to what the complainant's representative argued, this document, which I can only assume was prepared to help employees and managers manoeuvre the intricacies of a work refusal, does not create a statutory right to representation. It is meant to guide a manager in the event that an employee requests assistance in the work-refusal process. It does not state in any unequivocal way, for instance using the word "shall" instead of "may" to describe it, the right to be represented. It merely identifies the possibility so that managers will be aware that an employee involved in a work refusal may request that an OHS representative assist him or her through the

process.

[124] Mr. Sousa-Dias did not want assistance with filing or processing his work refusal; he wanted a union representative so that the number of union members would be equal to the number of managers present. He wanted a witness to the meeting as he did not trust the management of the POE to treat him fairly based on the confrontational labour-management environment in place at that time, which was not linked to the exercise of his *CLC* rights.

[125] As to the complainant's right to receive the stage 1 report in writing, in my estimation, this is a red herring. At no point was he denied that right. What evolved on March 11, 2015, in my evaluation of the evidence, was that the complainant tried to control the situation and to force his will upon the respondent representatives. He acted out of the animosity that permeated the labour-management relationship at the POE.

[126] At no point was he told that he would not receive the report in writing; he was asked to discuss it, which is not the same thing. Had he behaved in the professional and cooperative manner expected of employees and managers alike, nothing would have occurred on that day other than that he would have been provided with a copy of the report and that a discussion about its contents would have occurred. This never happened because of his aggressive and uncooperative approach to the meeting.

[127] The complainant's testimony was not credible. While on the stand, he became very agitated and consistently gesticulated when agitated, as Ms. Kendrew had described. Mr. Leach confirmed that the complainant regularly used his hands when talking. I prefer the evidence of Messrs. Leach, Wood, and Markell and the contemporaneous reports and written statements provided by those in attendance at the meeting to the complainant's version.

[128] The complainant had no legitimate reason for not attending the meeting as ordered on March 11, 2015. The order to attend was within the scope of Ms. Kendrew's authority, did not pose a risk to his safety or to the safety of other employees, and was legal. He was duty-bound as an employee to follow the order to attend without a union representative and by refusing to, he was insubordinate (see *Nowoselsky*).

[129] The complainant had one purpose that day, which was to bend the respondent to his will. That he was intimidated by the meeting and by Ms. Kendrew and therefore required a union representative to accompany him is simply not believable. The evidence clearly demonstrated a pattern in which he would refuse to meet with management and would demand everything in writing, such as when he refused to meet with management representatives following his January 31, 2015, email to Ms. Grouin and again when he refused to meet with Mr. Markell. His email to Mr. Wood about the March 5 meeting (Exhibit 18) reflects his disdain for meeting with management, which carried through to the events of March 11.

[130] Unlike the case of *Martin-Ivie*, in this case, there is no nexus between the work refusal and the conduct for which the complainant was disciplined. In my opinion, this situation resulted from a poor labour-management environment and from a union vice president who insisted that the respondent bend to his demands. His lack of respect for the management at the POE was the true cause of the disciplinary action taken against him. Even in his own evidence, the complainant stated that he was disciplined for expressing his opinion, which confirms that there was no nexus between the reason for the discipline and his exercise of his *CLC* rights.

[131] This lack of respect carried over into the work-refusal process but was not linked to that process. It was also the cause of the administrative action taken to defuse the situation by sending the complainant home to cool off. Rather than leave, he chose to further aggravate the situation by demanding that he be provided with a written suspension notice, pursuant to his collective agreement. He was not suspended and suffered no financial consequences as a result of being sent home.

[132] This was another example of the complainant arduously and vigorously protecting his collectively bargained rights in a strife-filled labour relations environment in an aggressive and unprofessional manner. Conflict in the context of labour relations is not unknown, but regardless of the climate, union representatives, employees, and managers are all required by the respondent's code of conduct to behave in a professional manner towards each other. The complainant's inability to on that day resulted in discipline; the exercise of his rights under the *CLC* did not.

[133] As the complainant stated in argument that he is no longer seeking reimbursement of the one day of pay, I need not address this issue.

[134] It is a pure question of fact whether the complainant was subject to discipline or penalties within the meaning of s. 147 of the *CLC* and, if so, whether there was a nexus between them and the exercise of his rights under the *CLC*. The respondent discharged its onus under s. 133 of the *CLC*, as described in *White*.

[135] Based on the evidence before me, I conclude that the complainant was not subject to any discipline or threat of discipline related to exercising his rights under s. 128 of the *CLC*.

[136] His complaints are dismissed.

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

(The Order appears on the next page)

V. Order

[138] The complaints are dismissed.

June 13, 2017.

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