

Canada Labour Code,
Part II



Before the Public Service
Staff Relations Board

BETWEEN

**SHEILA O'NEIL, KATHLEEN SCOTT, AARON FARRELL,
DEBBIE DUQUETTE, INGRID H. TEICHERT, CRYSTAL THOMPSON**

Complainants

and

**TREASURY BOARD
(Solicitor General Canada - Correctional Service)**

Employer

RE: Complaint under section 133 of the Canada Labour Code

Before: [J. Barry Turner, Board Member](#)

For the Complainants: [Art Curtis, Public Service Alliance of Canada](#)

For the Employer: [Ronald Snyder, Counsel](#)

Heard at Hamilton, Ontario,
June 23, 1998.

DECISION

The complainants, all Correctional Officers employed by the Correctional Service of Canada at the Grand Valley Institution correctional facility, Kitchener, Ontario, have complained under section 133 of Part II of the *Canada Labour Code* (hereinafter called the *Code*), that the employer contravened paragraph 147(a) of the *Code* in denying them overtime (O/T) payments for the time they have spent assisting a Human Resources Development Canada (HRDC), Labour Program, Safety Officer, in his investigation of two work refusals.

Complainants Kathleen Scott and Ingrid Teichert also alleged contraventions to sections 126, 129, 142 and 143 of the *Code*. On February 25, 1998, the employer requested further particulars in relation to these alleged contraventions. On March 23, 1998, the complainants' representative responded, without providing the requested further particulars. The complainants' representative did not pursue these alleged violations at the hearing, restricting his case to the issue of a violation of paragraph 147(a) of the *Code*. For these reasons, this decision deals with this issue only.

Sections 133 and 147 of the *Code* read:

133. (1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

(2) A complaint made pursuant to subsection (1) shall be made to the Board not later than ninety days from the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128(6) or 129(1) in relation to the matter that is the subject-matter of the complaint.

(4) Notwithstanding any law or agreement to the contrary, a complaint referred to in subsection (1) may not be referred by an employee to arbitration.

(5) On receipt of a complaint made under subsection (1), the Board may assist the parties to the complaint to settle the complaint and shall, where it decides not to so assist the

parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.

(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party.

147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,

(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; or

(b) fail or neglect to provide

(i) a safety and health committee with any information requested by it pursuant to paragraph 135(6)(j), or

(ii) a safety and health representative with any information requested by the representative pursuant to paragraph 136(4)(e).

Two of the complainants, Sheila O'Neil, who was a member of the Safety and Health Committee, and Crystal Thompson, who was the safety and health representative, were called in to participate in the investigation on the work refusals of the four other complainants, Kathleen Scott, Aaron Farrell, Debbie Duquette, and Ingrid Teichert, who had exercised their right to refuse work under Part II of the *Code* at the beginning of their shift 2300-0700 on October 16, 1997. Complainants Scott, Farrell, Duquette, and Teichert did not carry out their duties on the 2300-0700 shift but were paid in full for the shift.

All six complainants were subsequently compelled by the Safety Officer to attend meetings he held as part of the investigation into the work refusals. The parties entered, on consent, overtime reports for all six complainants, for time they spent assisting the Safety Officer in his investigation (Exhibit E-1, 8 pages). All overtime requests were denied, with one exception, a period of eight hours at time and one-half awarded to Sheila O'Neil for the period 0150-0830 hours on October 17, 1997 (Exhibit E-1, page 8).

The parties also entered, on consent, copies of the Grand Valley Institution Roll Call (or attendance shift records), for the complainants for the period October 16, 1997 to October 25, 1997 (Exhibit E-2, 30 pages). The parties also agreed that, for all periods of O/T claims, the complainants were not scheduled to work and in fact never carried out any regular duties during the periods of O/T claims. All complainants showed up at the work site at the request of the Safety Officer, solely for the purpose of assisting him in his investigation. I was also advised that complainants Thompson and O'Neil partook in the investigation of the work refusals only in their role of safety and health representative and member of the Safety and Health Committee respectively, but were not scheduled to work on any of the periods in question, nor did they perform any regular duties relating to their O/T claims while the investigation was going on.

1. Rod Noel, a ten-year Safety Officer, HRDC, Labour Program, was asked to investigate the refusals to work at the Grand Valley Institution around 0500 hours on October 17, 1997. He testified that initially, one employee had refused to work, followed by another three. He categorized the second work refusal as a "group refusal". His investigation continued all day on October 17, and afterwards. He had to wait until 0700 hours on the 17th to speak to an employer representative. For Mr. Noel, this was the first time he had investigated a work refusal in a prison. He therefore felt he needed the proper time to make an informed, thorough decision.

Mr. Noel agreed it was an employee's duty under the *Code* to cooperate with a Safety Officer. He categorized the employer's refusal to pay O/T as a breach of paragraph 147(a) of the *Code*.

During cross-examination, Mr. Noel agreed that employees can have representation by a member of the Safety and Health Committee and the safety and

health representative during an investigation and identified complainants O'Neil and Thompson as such. He agreed the investigation would have taken some time, but he was not sure how long when he started. He spoke to the complainants throughout the week following the work refusals. Mr. Noel felt they were entitled to compensation for the time they spent assisting him in his investigation, and assumed they would be paid. He met with the complainants two or three times in a boardroom in the prison.

Argument for the Complainants

Mr. Curtis argued the issue before the Board is quite clear since the facts are not in dispute. He said I am simply being asked to decide if the employer is required to compensate the complainants for the time they spent in the investigation at the request of the Safety Officer. Mr. Curtis referred me to the duty of the employer described in section 124 and subsection 125(w) of the *Code*, that read:

124. Every employer shall ensure that the safety and health at work of every person employed by the employer is protected.

125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,

...

(w) comply with every oral and written direction given to the employer by a safety officer concerning the safety and health of employees.

He reminded me the investigation continued well beyond the withdrawal of services on October 16.

Mr. Curtis also referred me to the duty of the employee, as described in paragraphs 126(1)(e) and (i) of the *Code*, that read:

126. (1) While at work, every employee shall

...

(e) cooperate with any person exercising a duty imposed by this Part or any regulations made thereunder;

...

(i) comply with every oral or written direction of a safety officer concerning the safety and health of employees.

He argued the employer knew the complainants were required to attend meetings with the Safety Officer, but never said they would not be paid. Mr. Curtis argued that, according to subsection 135(9) of the *Code*, the member of the Safety and Health Committee and the safety and health representative should get O/T for all their time spent on the investigation. Subsection 135(9) reads:

135. (9) The members of a safety and health committee are entitled to such time from their work as is necessary to attend meetings or to carry out any of the other functions of a member of the committee, and any time spent by a member while carrying out any of the functions of a member of the committee shall, for the purpose of calculating wages owing to that member, be deemed to have been spent at work.

Mr. Curtis concluded that the employer is ultimately responsible for the safety and health of employees, and should therefore bear all the costs associated therewith. He said the employer was aware of the extra hours the complainants were putting in but never said they would not be paid.

Argument for the Employer

Mr. Snyder argued the facts are clear, especially the fact that the four complainants who invoked their right to withdraw their services on October 16 were all paid for their entire shift. He also argued, according to the O/T reports (Exhibit E-1), no complainant was scheduled to work during the periods on Exhibit E-1, nor to perform any duties during these periods. He argued the complainants came to the Institution, not at the request of the employer, but at the request of Safety Officer Noel. He reminded me that the employer could not refuse to pay complainants Scott, Farrell, Duquette and Teichert for the period they would have worked on October 16/17. Since they were all paid, Mr. Snyder argued I should dismiss the complaints outright.

Mr. Snyder argued that the Board's jurisdiction is limited to section 133 and paragraph 147(a) of the *Code*, and added that, if the employer somehow has violated paragraph 147(a) of the *Code*, I would have to bastardize the wording of

paragraph 147(a) and ignore the reasonable, plain meaning of this paragraph to reach such a conclusion.

Mr. Snyder referred me to the definition of “work place” in section 122 of the *Code*, and argued it does not refer to work for the investigation. He reminded me the complainants came in to the Institution at the request of Mr. Noel. Section 122, “work place” reads:

122. (1) In this Part,

...

“work place” means any place where an employee is engaged in work for the employee’s employer.

Regarding the allegation that complainants O’Neil, being present as a member of the Safety and Health Committee, and Thompson, as the safety and health representative, are entitled to O/T pursuant to subsection 135(9) of the *Code*, Mr. Snyder argued that paragraph 147(a) denies them such entitlement, as does subsection 135(9), because of the wording “*such time from their work*” and time “*deemed to have been spent at work*”, used in subsection 135(9). Mr. Snyder argued they were not at work when they were called in to participate in the investigation of the work refusals.

Mr. Snyder referred me to the *Lund* decision (Board file 166-2-17848), that was appealed to the Federal Court of Appeal, A-50-89, 1989, and asked me to deny all the complaints as unfounded since the complainants were never at work during any periods in which they assisted the Safety Officer in his investigation.

With reference to Exhibit E-1, page 8, and Ms. O’Neil being paid for eight hours of O/T for October 17, Mr. Snyder argued she was not entitled to this, that the employer made a mistake and can recover this money under section 155 of the *Financial Administration Act* if it so desires.

Rebuttal argument for the Complainants

In rebuttal argument, Mr. Curtis said the Federal Court of Appeal decision in *Lund* (supra) actually referred to a site inspection by a health and safety committee and can therefore be differentiated from the matter before me. Regarding the complaints

before me, there was a formalized investigation by law that had to be done as expeditiously as possible by Mr. Noel. Regarding Mr. Snyder's interpretation of paragraph 147(a), Mr. Curtis disagreed since the complainants had a financial penalty imposed on them. He asked the Board, therefore, to uphold the complaints and award the requested O/T.

Decision

The facts are not in dispute. The complainants were all compelled by the *Code*, enforced by Safety Officer Noel, to participate in his investigation of the work refusals that occurred on October 16, 1997 around 2300 hours. Complainants Scott, Farrell, Duquette and Teichert were paid for their shift. The complainants claimed O/T for the time they spent assisting in the Safety Officer's investigation, none of which was during any scheduled hours of work. Their O/T requests were denied by the employer, with the exception of eight hours awarded to Ms. O'Neil for October 17, 1997.

After reviewing the evidence, the testimony, the arguments, and the *Code*, I have reached the same conclusion as in the *Lund* decision (supra), that was upheld by the Federal Court of Appeal in decision A-50-89, namely that the complainants should not be compensated for the time they spent assisting in the Safety Officer's investigation, since the periods of time complainants Scott, Farrell, Duquette and Teichert thus spent were while they were not scheduled to work. In the cases of complainants O'Neil and Thompson, subsection 135(9) of the *Code* was not breached either since they were also not scheduled to work while assisting the Safety Officer in his investigation. There is therefore, in my opinion, no breach by the employer of paragraph 147(a) of the *Code*.

These complaints are therefore denied.

**J. Barry Turner,
Board Member.**

OTTAWA, July 14, 1998.