Date: 20031020

File: 160-34-79

Citation: 2003 PSSRB 94

Canada Labour Code,
Part II

Before the Public Service
Staff Relations Board

BETWEEN

ROBERT BOIVIN

Complainant

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

RE: Complaint under Section 133 of the Canada Labour Code

Before: Joseph W. Potter, Vice-Chairperson

For the Complainant: Himself

For the Employer: Caroline Engmann, Counsel
Joseph K. Cheng, Counsel

Heard at Hamilton, Ontario,
November 5 to 7, 2002,
June 26 and July 2 to 4, 2003.
(Written submissions August 6, September 4 and September 23, 2003)

DECISION

[1] This decision deals with a complaint filed by Robert Boivin on April 30, 2002, pursuant to subsection 133(1) of the *Canada Labour Code* (the *Code*). More specifically, the complainant alleges that the employer took action against him due to the fact he withdrew his services from work for safety reasons. If proven, such action would be contrary to section 147 of the *Code*. At the outset of the hearing, the employer objected to my jurisdiction to deal with the matter due to the untimely submission of the complaint. I dealt with this objection by way of a preliminary decision dated March 13, 2003 (2003 PSSRB 23). In that decision, I determined that the complaint, while filed outside the 90-day period referred to in the *Code*, was of a continuing nature and therefore I had jurisdiction to deal with the substantive issue. This decision relates thereto.

[2] I heard from 11 witnesses and received one "will say" statement. The employer filed 31 exhibits and Mr. Boivin filed 50 exhibits. A request was made, and granted, for the exclusion of witnesses.

[3] In Mr. Boivin's complaint, he asked for punitive damages. At the hearing in November 2002, the employer's counsel stated that the Board's remedial authority to deal with that issue was restricted pursuant to section 134 of the *Code* and, as such, there was no authority to award the relief that was being sought by Mr. Boivin. At that time, Mr. Boivin stated he was withdrawing that issue.

[4] On June 30, 2003, Mr. Boivin sent a letter to the Board asking that his complaint be amended to include compensatory damages. I ruled that this matter would be dealt with following my ruling on the complaint itself. A decision in favour of the employer would render the issue moot, whereas a decision in favour the complainant would necessitate further submissions.

[5] In cases of this type, the employer bears the onus of showing that it has not violated the stated provision of the *Code* (as per subsection 133(6) of the Code). The hearing proceeded in that light.

[6] Attached to this decision is Appendix "A", which details sections 127, 128, 133 and 147 of the *Code*.

Background

[7] Mr. Boivin testified on his own behalf and stated he began his employment with the Canadian Customs and Revenue Agency (CCRA), as it is now called, in 1987, as a CR-02 in the London Tax Service office. He was relocated to Hamilton in 1993 and commenced his current substantive position in 1996, as an information technology clerk classified as a CR-04.

[8] In his CR-04 position, Mr. Boivin reported to a team leader and a variety of individuals occupied that position up until 1997, at which time Tom Dixon became Mr. Boivin's supervisor.

[9] A number of workplace issues arose concerning Mr. Boivin that were dealt with by Mr. Dixon and, for the purposes of this decision, I do not believe it is relevant to reiterate all of them. I will begin with an issue that arose in 1998.

[10] A complaint was filed against Mr. Boivin in 1998, the subject of which was not delved into at this hearing. The matter was investigated in September 1999, and Mr. Boivin was exonerated. However, according to Mr. Boivin's testimony at this hearing, he felt the investigation was malicious and he filed a complaint about the investigation with the Assistant Commissioner at CCRA, on February 14, 2000. A reply in March 2000 stated nothing improper had occurred. Mr. Boivin did not agree with this finding and escalated his complaint to the Security Directorate in Ottawa.

[11] The matter was investigated by a third party outside CCRA and a report issued in September 2000. Mr. Boivin was unhappy with this report and testified that he felt CCRA had bought the third party off. Consequently, in May 2001, Mr. Boivin filed a grievance on this issue and also sent a letter to the Royal Canadian Mounted Police (RCMP) and the Prime Minister outlining some concerns he had.

[12] Prior to filing the grievance, Mr. Boivin approached Mr. Dixon and told him he had no meaningful work to do. This discussion took place in November 2000, and Mr. Dixon stated he agreed with this and consequently he raised the issue with the assistant director to see if more meaningful work could be assigned to Mr. Boivin.

[13] The work description for the information technology position (Exhibit E-6, located at tab 32 of the employer's book of documents) lists a number of key activities that Mr. Boivin was doing and, as early as 1999, Messrs. Dixon and Boivin met to

discuss them. At that time, Mr. Boivin was working on the "web server" but this project ceased sometime late in the year 2000. From February to October 2001, Mr. Boivin stated he had trouble getting work assigned to him, and what little work he did get was, in his view, not meaningful.

[14] In or about June 2001, Mr. Boivin filed a grievance saying he felt he was not getting enough work. Upon being made aware of this, Mr. Dixon wrote to the director outlining the efforts that had been made to date to address this issue (Exhibit E-27).

[15] In August 2001, Mr. Dixon and his supervisor, Steve Cartier, met Mr. Boivin and his union representative to discuss an interim work plan. For the most part, the parties agreed on a work plan for Mr. Boivin (Exhibit E-15).

[16] On or about August 10, 2001, while Mr. Dixon was absent, Sandra Hamann was the acting team leader. Mr. Boivin went to see Ms. Hamann and stated that he wanted out of IT (information technology) that day. Ms. Hamann testified that Mr. Boivin appeared quite upset; therefore, she suggested they continue the discussion in a more private location.

[17] The two proceeded to another office and Mr. Boivin made a reference to "going postal". Ms. Hamann testified that Mr. Boivin stated he "was ready to go postal". She confirmed this in a memorandum she wrote about one week later when she was asked to summarize these events (Exhibit E-6).

[18] Mr. Boivin's recollection of the events of August 10 is somewhat different from Ms. Hamann's. Mr. Boivin recalled being quite upset that day, as the work he was being assigned was not in accordance with his work plan. He met Ms. Hamann and told her he "wanted out of IT by sundown", as he had had enough. He told her workplace issues were causing him to have a nervous breakdown. Following this, according to Mr. Boivin's own testimony, he then said it was his opinion that if management did to others what they were doing to him, it was just a matter of time before someone went postal.

[19] Ms. Hamann testified that when she heard this statement from Mr. Boivin, she was concerned for her safety; consequently, she reported this event to Mr. Cartier.

[20] Upon hearing this, Mr. Cartier decided to ask that a personal risk assessment be done. This is akin to an internal investigation, and Gary Lockhart, a CCRA security officer in Ottawa, was asked to conduct this review. Mr. Lockhart explained that the purpose of the assessment was to determine if a risk to CCRA personnel existed.

[21] Mr. Lockhart went to the Hamilton tax office on August 15 and 16 and gathered the background information he felt was required. Mr. Lockhart spoke to Ms. Hamann about the August 10 incident, but he was not able to speak to Mr. Boivin about it due to the fact Mr. Boivin left the office on August 15 for the remainder of the week.

[22] A report was finalized by Mr. Lockhart on August 17 and presented to management (Exhibit E-14). The report found that the "postal" statement "… could be construed as threatening and worrisome".

[23] While this investigation was underway, Mr. Dixon was away on annual leave. He was, however, discussing the situation with Mr. Cartier and both agreed that Mr. Boivin should be spoken to about this, and other, workplace incidents.

[24] Upon Mr. Dixon's return to the workplace, the tragic and world-famous events of September 11, 2001, unfolded. This kept Mr. Dixon occupied with urgent work-related issues until late September 2001, and consequently he was not able to speak to Mr. Boivin about the above-referenced issues.

[25] On October 1, Mr. Boivin met Mr. Dixon and told him that unless changes were made to the workload issues, he would file a Part II *Canada Labour Code* complaint. Mr. Boivin was aware that both Messrs. Dixon and Cartier were soon leaving the organization and he hoped that if he made the complaint, a resolution would be quickly at hand.

[26] On October 2, 2001, Mr. Boivin handed Mr. Dixon a letter (Exhibit E-2) stating:

> *Please accept this as my complaint pursuant to subsection 127.1(1) of the Canada Labour Code that a condition exists that is injurious to my health, and I am seeking investigation and corrective action to remove the condition presenting a danger to my health.*
>
> *Specifically, the danger to my health is described as activities by Agency officials involved with the handling of grievance # .01-1214-26401, as well as those who are the subject of the grievance, where the failure to take appropriate action, the*

> *failure to address the outstanding issues, the past activities of suppressing information, the conscious acts of circumventing CCRA policies and procedures have been, and continue to be injurious to my health by causing me considerable stress, and erosion of my mental and emotional faculties.*
>
> *Despite all attempts to have this addressed, it remains outstanding and no reasonable attempts to address this subject with integrity have occurred. It also appears that it will be a considerably long time before formal processes will address this. I hereby request that this be investigated completely and fully and corrective action taken in accordance with the Canada Labour Code, and that no future actions injurious to my health be taken.*

[27] After Mr. Boivin handed the letter to Mr. Dixon, according to Mr. Dixon's evidence, Mr. Boivin said: "the end of the world is near, bring it on". When Mr. Dixon inquired as to why Mr. Boivin would want the world to suffer, Mr. Boivin replied: "No one in North America understands why the suicide bombers did it. They died because they wanted to do it as part of the jihad. If you die trying then you live, which is similar to my faith".

[28] Upon hearing these statements, Mr. Dixon testified he told Mr. Boivin he should seek help. Also, Mr. Dixon felt he had to show due diligence and take some action concerning this latest statement by Mr. Boivin. Accordingly, Mr. Dixon sat down and composed a letter to Mr. Boivin outlining the above event, together with a number of other workplace incidents that had taken place over the previous six months that caused Mr. Dixon concern.

[29] In addition to writing out his concerns, Mr. Dixon replied to the October 2 complaint later that same day, stating that the grievance would be answered in due course. Also, an ergonomic assessment would be done (Exhibit E-3).

[30] On October 9, 2001, Messrs. Dixon and Cartier asked that Mr. Boivin meet with them. Mr. Boivin agreed and, at the meeting, Mr. Dixon gave Mr. Boivin the letter he had prepared (Exhibit E-4). In it, Mr. Dixon outlined some 13 workplace concerns that had arisen over the previous months, including the "postal" incident. The letter specified five conditions of work that were to apply to Mr. Boivin and were "… being implemented in order to correct your inappropriate comments and actions in the workplace".

[31] Mr. Boivin said the production and content of the letter took him by surprise and he told Mr. Dixon he had not said the things that he was being accused of saying.

[32] After receiving the letter, Mr. Boivin stated he was invoking his right to withdraw his services pursuant to provisions of the *Code*. He told Messrs. Dixon and Cartier that the specific danger to his health was the stress caused by the failure of senior management to respond to his grievance in a timely manner with integrity (Exhibit E-20 found at tab 29).

[33] Mr. Boivin was not required to return to his work area and was told he could remain at home until 9:00 a.m. the following day (Exhibit E-12).

[34] Mr. Cartier met with the co-chairperson of the local occupational health and safety committee and it was agreed that contact would be made with Human Resources and Development Canada (HRDC) and a request made that a health and safety officer visit the work unit to investigate.

[35] Mr. Cartier telephoned Paul Curle, a health and safety officer with HRDC, and requested he attend the Hamilton tax office to investigate Mr. Boivin's withdrawal of service. Mr. Curle agreed to attend the next day, namely October 10.

[36] At 9:00 a.m. on October 10, Mr. Boivin completed the necessary refusal to work registration form (Exhibit E-20). Following that, Mr. Curle arrived to investigate the situation.

[37] While awaiting Mr. Curle's report, Mr. Cartier called the CCRA staff relations unit and asked what else could be done with Mr. Boivin and the workplace issues that had arisen. He was informed that Health Canada could be contacted in order to conduct an assessment of Mr. Boivin's fitness for work. Mr. Cartier spoke to Dr. Jeffrey Chernin about the workplace events surrounding Mr. Boivin and was told to await Mr. Curle's report.

[38] The results of Mr. Curle's investigation were communicated to Mr. Boivin on October 15, 2001 (Exhibit E-17). Mr. Curle determined that there was an "…absence of danger in respect to your Refusal to Work…"

[39] Upon receipt of Mr. Curle's report, Mr. Cartier spoke to Dr. Chernin again and Dr. Chernin agreed to see Mr. Boivin and then refer him to a psychiatrist,

Dr. Robert Weinstein. Accordingly, a meeting was scheduled for October 15 with Mr. Boivin, his union representative, Mr. Cartier and a representative from Human Resources. At the meeting, Mr. Boivin was given a letter requesting his consent to be assessed by Health Canada (Exhibit E-10). He agreed to this request (Exhibit E-30).

[40] A letter was written to Dr. Chernin providing documentation on the workplace concerns the employer had, together with Mr. Boivin's job description (Exhibit E-6).

[41] Dr. Chernin testified that he is an occupational health medical officer with Health Canada in Toronto. He provided his curriculum vitae (Exhibit E-23) and stated his expertise was in preventive medicine and occupational health. Included therein are assessments for fitness to work.

[42] Upon reading the October 15 letter and accompanying documentation, Dr. Chernin felt an assessment of Mr. Boivin was justified and warranted.

[43] Shortly after the commencement of Dr. Chernin's evidence at the hearing, Mr. Boivin gave Dr. Chernin his full consent to speak freely and completely about his medical referral.

[44] Dr. Chernin testified he wrote to Dr. Weinstein on October 15 and forwarded the documents that he had received from CCRA with respect to the workplace issues.

[45] Mr. Boivin visited Dr. Weinstein at his office on October 16, following which Dr. Weinstein prepared a report for Dr. Chernin (Exhibit G-8). On page 5 of the report, Dr. Weinstein wrote:

> […]
>
> *Therefore, I would recommend that Mr. Boivin not return to work at the present time. It would be important for him to undergo some sort of anger management training, such as the 10-week program available through your office. After he has completed the program, Mr. Boivin should return to work, and come back and see me for a reassessment a few weeks into his return. It would be helpful at that time to have some reports from his supervisors and possibly coworkers to help me with the reassessment.*
>
> […]

[46] Dr. Chernin reviewed the report, then wrote to the CCRA on October 17 recommending that "Mr. Boivin is not fit for work at this time …"

[47] Following receipt of this recommendation, the CCRA placed Mr. Boivin on sick leave with pay. Upon the expiry of Mr. Boivin's sick leave credits, the leave changed to sick leave without pay.

[48] Dr. Chernin also recommended that Mr. Boivin complete an anger and stress management course that would be set up and tailored to his specific needs. This program is not covered by the provincial medical plan; therefore, CCRA was asked to support the employee by paying for the program. They agreed to do so.

[49] Mr. Boivin initially agreed to undertake the course, which was to last 10 weeks, but he called Dr. Chernin's office and cancelled before the program could begin. Mr. Boivin explained that he had an aversion to travelling in automobiles and the course was to be in Toronto, a drive of over one hour for him. He would consent to a similar course if it were offered locally.

[50] In November 2001, Dr. Chernin spoke to Mr. Boivin's family physician and was told that a local psychologist, Dr. Robert Kaplan, might be able to put the appropriate program together for Mr. Boivin. Dr. Chernin investigated this and determined that, indeed, he could. Dr. Kaplan then agreed to see Mr. Boivin and put together a program to meet Mr. Boivin's needs (Exhibit G-14).

[51] Dr. Chernin wrote to CCRA requesting they agree to fund this program (Exhibit G-15). Dr. Chernin was told CCRA would agree to this.

[52] The session with Dr. Kaplan began in December 2001 and Mr. Boivin remained off work. On February 23, 2002, Dr. Chernin received a letter from Dr. Kaplan stating that Mr. Boivin had attended three sessions, and then the treatment had to be discontinued. The letter states: "… (Mr. Boivin) could not see any psychological or interpersonal problem of his own that would be a focus of treatment. We have determined that since he did not have any psychotherapeutic goals, treatment should be terminated."

[53] Upon receipt of this letter, Dr. Chernin sent a copy to Dr. Weinstein and asked for his views. Dr. Weinstein replied on March 14, 2002, stating: "… it does not look like there will be suitable amelioration in his situation to allow for a return to work in the near future."

[54] Shortly after receiving Dr. Weinstein's reply, Dr. Chernin was told that Mr. Boivin had filed a complaint against him with the College of Physicians and Surgeons and, consequently, Dr. Chernin withdrew from any further assessment of the case.

[55] Mr. Boivin filed a similar complaint against Dr. Weinstein and both were investigated by the College of Physicians and Surgeons of Ontario. The College found no fault with the actions of Drs. Chernin and Weinstein (Exhibit E-31).

[56] Following the termination of treatment by Dr. Kaplan, Mr. Boivin began another healing process and was pronounced fit to return to work on November 15, 2002, by Health Canada (Exhibit G-44).

Written Submission of the Employer

[57] The following condenses the written submission of the employer and the below extracts from the employer's submission are reproduced *verbatim*. The full submission is on file at the Board.

[58] There are three issues to be decided here:

(a) the complainant had no reasonable basis for exercising his right to refuse work under Part II of the *Canada Labour Code* and as a result, cannot seek the protection of the *Code*;

(b) none of the employer's actions come within the mischief prohibited by section 147 of the *Code*;

(c) even if the employer's actions could constitute a penalty under section 147 of the *Code*, the employer has discharged the onus of demonstrating that its actions were not connected to the complainant's exercise of his rights under the *Code*.

The First Issue

[59] An important consideration under section 147 of the *Code* is whether the employee who has exercised the work refusal had reasonable cause to believe that danger existed. If the employee did not have a reasonable basis for exercising his or her right to refuse work, the employee cannot seek the protection of section 147 of the *Code.* The concept of a "reasonable basis" has been given a very broad interpretation. (*Re Chaney*, [2000] CIRB No. 47; *Jolly v. Canada Post Corporation* (1992), 87 di 202, 87 di 218; *Kucher v. Canadian National Railway* Company, [1996] 102 di 121, CLRB Decision No. 1180).

[60] The alleged "danger" complained of in the present case relates strictly to allegations of stress and anxiety resulting from the complainant's relationship with his supervisor and management. As these issues are ones of interpersonal conflict, the present case is indistinguishable from cases such as *Gualtieri* (Board file 160-2-203), *Bliss* (Board file 165-2-18) and *Kucher* (*supra*).

[61] Furthermore, each instance of the exercise of Mr. Boivin's rights under the *Code* was a result of a deliberate and pre-meditated consideration. These were directed at resolving his ongoing conflicts with management, and not at resolving any legitimate health and safety issue under Part II of the *Code*.

[62] It is submitted that the employer's position in this respect is consistent with a purposive and contextual interpretation of the scheme of section 147 of the *Code*. While section 147 provides a general protection to employees against arbitrary and unjustified retaliatory actions by the employer, subsection 147.1 maintains an employer's right to discipline abuses of the statutory protections. By adding subsection 147.1 in, Parliament clearly intended to constrict abusive use of the statutory protections afforded in section 147.

[63] As a result, the employer submits that Mr. Boivin did not have a reasonable basis for refusing to work on October 9, 2001. Accordingly, Mr. Boivin has no recourse to the protection of section 147 of the *Code*.

The Second Issue

[64] Mr. Boivin was placed on sick leave as a result of his being declared not "fit for work" by Health Canada on October 18, 2001. Health Canada's report indicated that as of October 17, 2001, Mr. Boivin was not "fit to work", and prescribed a course of treatment for Mr. Boivin.

[65] Health Canada's recommendation was based on the report of a third party physician, who conducted an assessment of Mr. Boivin. None of these were the actions of Employer. To be clear, the Employer played no part in the making of decisions or recommendations by Health Canada or the third party physician.

[66] The only action that was taken on the part of the Employer culminating in Mr. Boivin being placed on leave without pay was its requirement that Mr. Boivin be assessed by Health Canada.

[67] The employer submits that the act of referring Mr. Boivin for a "fitness to work" evaluation cannot constitute a penalty within the meaning of section 147. The purpose of a Health Canada evaluation is to determine an employee's capacity to work. This assessment is conducted in order to identify any health-related problems and determine what solutions for the employee can be made.

[68] There has been no evidence to suggest that any of management's actions towards Mr. Boivin were punitive. The fact that Mr. Boivin was placed on leave without pay was a result of Health Canada's finding that he was not "fit to work" in October 2001. Again, this finding was a finding of Health Canada, and not the employer.

The Third Issue

[69] Finally, the employer submits that even if the employer's actions could constitute a penalty within the meaning of section 147 of the *Code*, the employer has demonstrated on a balance of probabilities that its actions were not connected to the complainant's exercise of his rights under the *Code*.

[70] All of management's actions in the case at bar were in response to Mr. Boivin's inappropriate behaviour in the workplace. This behaviour was documented extensively by Mr. Boivin's immediate manager, Mr. Dixon. Ms. Hamann and other CCRA staff also recorded specific examples of Mr. Boivin's inappropriate behaviour.

[71] Even should the Board disagree with management's approach in its dealings with Mr. Boivin, the employer has, in any event, discharged its onus of demonstrating that none of the employer's actions were, in any way, connected with Mr. Boivin's complaints under Part II of the *Code*. All of the employer's actions were directed at problems with Mr. Boivin's behaviour in the workplace.

[72] The employer requests that the complaint filed by Robert Boivin pursuant to Part II of the *Code* be dismissed

Written Submission of the Complainant

[73] The following condenses the complainant's written submission and the below extracts from the complainant's submission are reproduced *verbatim*. The full submission is on file at the Board.

Part I – Overview

[74] The Complainant submits that the intent of Parliament, and the provincial legislatures, when drafting occupational health and safety legislation, that they are doing it for the workers, not for the lawyers. Deference must always go to the worker instead of the machinations of lawyers hung up on semantics, and interpretive reading into that legislation. Occupational health and safety legislation should always be taken at face value.

[75] At paragraph 47 of their submission, the Employer cites section 12 of the *Interpretation Act*, which is wholly in support of this concept.

[76] But then at paragraph 69 in their submission, the Employer states: "By adding s.147.1 in, Parliament clearly intended to constrict abusive use of the statutory protections afforded in s.147." Then at paragraph 70 they further state: "As a result, the Employer submits that Mr. Boivin did not have a reasonable basis for refusing to work on October 9, 2001. Accordingly, Mr. Boivin has no recourse to the protection of s. 147 of the *Code*.

[77] The Complainant submits that this interpretation of sub-section 147(1) of the *Code* is borne more out of imagination than any basis in law, however, still it does not apply in this case. Specifically, it states:

> *147.1 (1) An employer may, after all the investigations and appeals have been exhausted by the employee who has exercised rights under sections 128 and 129, take disciplinary action against the employee who the employer can demonstrate has wilfully abused those rights.*
>
> *(2) The employer must provide the employee with written reasons for any disciplinary action within fifteen working days after receiving a request from the employee to do so.*
>
> *2000, c. 20, s. 14.*

[78] Nowhere in that provision does the Code allow for the removal of the protections afforded by the Code, except in cases where it is demonstrated that the employee has wilfully abused those rights. The disciplinary action contemplated in this subsection is a mens rea offence.

[79] The complainant submits that counsel for the Employer clearly stated to the Board at the hearing that the Employer did not intend to discipline the Complainant under this subsection. Therefore, the Complainant cannot be denied of the protections of section 147 of the *Code.*

[80] As has been submitted by the Complainant, by arguing that the Complainant is not protected by the *Code*, the Employer has opened some doors to questions that must be answered. In response to the expected argument from the Employer, by attempting to distract the Board from the real issues in this case, it is they who have opened this "Pandora's Box" and as such, the Complainant must be allowed to fully present his case in response to their argument.

[81] Subsection 21(1) of the Public Service Staff Relations Act states:

> *21. (1) The Board shall administer this Act and exercise such powers and perform such duties as are conferred or imposed on it by, or as may be incidental to the attainment of the objects of, this Act including, without restricting the generality of the foregoing, the making of orders requiring compliance with this Act, with any regulation made hereunder or with any decision made in respect of a matter coming before it.*

[82] The Complainant submits that Board has within its powers the ability to revisit the Safety Officer's decision [E-18], and it is necessary to do so to determine this case.

[83] The Complainant submits the following questions to be answered:

- Does section 127.1 allow for the making of complaints related to workplace stress and/or mental health, and under what circumstances?
- Does Section 128 allow for invoking the right to refuse to work for situations related to workplace stress and/or mental health, and under what circumstances?
- Did the actions of the employer on 9 October, 2001 constitute a reprisal pursuant to section 147 of the *Code*?
- Do the remedies provided for in section 147 of the *Code* relate only to acts of reprisal (retaliation), or are they to be liberally interpreted?
- Does this case warrant prosecution pursuant to section 148 of the *Code?*

[84] Part II of the complainant's written submission details a review of the oral evidence. I do not feel it necessary to reproduce the complainant's submission in this decision, however, I have read it thoroughly and, as stated earlier, it is available at the Board.

[85] **Part III - Questions of Law**

[86] **Does section 127.1 of the Code allow for the making of complaints related to workplace stress and/or affected mental health, and under what circumstances?**

[87] When the Board examined this issue in *Gualtieri v. Treasury Board*[1] it was examining the complaint as made pursuant to a work refusal, and not a complaint under 127.1 of the *Code.* The Complainant submits that the decision in *Gualtieri* was made and based upon jurisprudence from before September 2000.

[88] The Complainant further submits that, so far, the only jurisprudence dealing with the psychological health of employees has been strictly to invoke the refusal provisions contained in section 128 of the *Code*, thus application of 127.1 of the *Code* is so far untested.

[89] At section 124 of the *Code* it states very clearly that:

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

[1] Employers Book of Authorities (August 6, 2003), Tab 5

[90] The Complainant submits that this places a general obligation on employers to protect the health and safety of employees, and certainly includes the physical, psychological, and social well-being of employees.

[91] The Complainant further submits that the internal resolution process contained in section 127.1 of the *Code* is a new provision in the *Code*, and that by including this new process into the *Code* it was the express intent of Parliament to provide a means for employees to seek redress when their health, as clearly defined in *Lever* and expanded upon in *Gualtieri,* was affected by the workplace regardless if it was the physical, psychological or social well-being of the employee.

[92] Thus, the Complainant submits that on 2 October, 2001, when he made his complaint pursuant to this section of the *Code*, he had identified an effect on his health, using the Australian scale; a type two event, and therefore could seek remedy through the *Code.*

[93] **Does Section 128 allow for invoking the right to refuse to work for situations related to workplace stress and/or affecting mental health, and under what circumstances?**

[94] The Complainant submits that there is a considerable amount of jurisprudence that answers this question in the negative. All of that jurisprudence relies on two factors that are not present in this case: in none of the cases had the employee pursued the internal resolution process contained in section 127.1, which lends support to the Complainant's submission that Parliament included this process with that jurisprudence in mind, and in all the jurisprudence, none has put forth a triggering event as the reason for invoking the right under section 128.

[95] The Complainant requests that because the Employer has raised before the Board the assertion that the Complainant erred in invoking his right, that the Board reconsider the Safety Officer's decision [E-17] in light of the evidence before the Board, and the changes to the *Code.*

[96] The Complainant submits that the intent of Parliament with respect to protecting the worker from injury does in fact include injury to mental health, particularly when that injury is deliberately caused.

[97] **Did the actions of the employer on 9 October, 2001 constitute a reprisal pursuant to section 147 of the *Code*?**

[98] The Complainant submits that part of the reason for the acute increase in the stress he was suffering from was a direct perception that the letter of October 9, 2001, [G-35] was perceived as a reprisal for having made a complaint on 2 October, 2001.[E-2]

[99] The Complainant accepts the expected objection from the Employer on this matter, and in response, submits that the answer to this question is academic in nature and has no direct bearing on the outcome in this case. The Complainant submits that his complaint before the Board is related to the actions of the Employer *after* 9 October, 2001, and not the actions of the Employer *on* 9 October, 2001.

[100] The Complainant submits that the reverse onus provisions of section 147 only apply to work refusals, and when there is merely a 127.1 complaint the onus is upon the Complainant to prove that the actions of the Employer were a reprisal.

[101] The Complainant submits that the evidence before the Board clearly demonstrates that the allegations contained in the October 9, 2001 [G-35], are either complete fabrications or embellishments, and the conditions of work placed upon the Complainant in that letter, which are conspicuously absent from the CCRA Code of Ethics and Conduct [G-5], are in fact a retaliation for having made a complaint pursuant to section 127.1 of the *Code.*

[102] The Complainant submits that the reasons for decision in *Pruyn* clearly bear this out.

[103] **Do the remedies provided for in section 147 of the *Code* relate only to acts of reprisal (retaliation), or are they to be liberally interpreted?**

[104] As mentioned previously, the Employer has submitted that the interpretation of section 147 of the *Code* relates only to acts of reprisal or retaliation. The Employer even goes so far as to define the term, yet, the words reprisal or retaliation are nowhere to be found in Part II of the *Code.* The Complainant submits that had Parliament intended that only acts of retaliation were to be protected by section 147 then Parliament would have included either of those words in section 147 and not left it up to lawyers representing employers to include those words.

[105] The Complainant submits that by including penalties explicitly within section 147 as well as other prohibited actions, Parliament is clearly showing that its intent is that a worker should not suffer in *any* way for exercising a Code right.

[106] The Complainant submits that even if the Employer had followed the established procedures for FFWE and been declared unfit for work, the Complainant should still not have been placed on leave without pay because the FFWE was requested in connection with the exercise of his rights under the *Code.*

[107] The Complainant submits that even if he is wrong on this point, he is still protected by the *Code* because he was required to submit to the FFWE because he exercised his *Code* rights, and if he declined, he would have been placed on leave without pay.[G-1]

[108] Again, the Complainant submits that even if he is still wrong, he is entitled to the protection of section 147 because in *Nucci v. Supreme Tooling Group (ONLRB 2829-01-OH)*[2] the Ontario Labour Relations Board at paragraph 64 has adopted the approach that, "if the employer was improperly motivated IN WHOLE OR IN PART its actions are illegal." (emphasis in original)

[109] The Complainant submits that by circumventing the established procedures for the FFWE process, and by requesting it under the umbrella of the Canada Labour Code then the entire process itself is an illegal act and becomes a contrary to section 147 of the Canada Labour Code.

[110] The Complainant submits that because he made a complaint under section 127.1 of the *Code*, and subsequently invoked his rights under section 128 of the *Code* the Employer has failed to pay him remuneration for the period 16 November, 2001 to 18 November, 2002, and has advanced him 25 days sick leave which must be paid back, and this period of time is a period that he would have worked but for the fact that he invoked those rights, and this is contrary to section 147 of the Canada Labour Code.

[2] Complainant's Book of Authorities – Volume II, tab 10

[111] **Does this case warrant prosecution pursuant to section 148 of the Code?**

[112] The Complainant submits that the evidence in this case clearly demonstrates that the Employer acted maliciously in contravening the Canada Labour Code, and that warrants prosecution under subsection 148(1)(b).

[113] The Complainant submits that Parliament intended that sanctions should be imposed or else it would not have included section 128 in the *Code.*

Written reply of the Employer

[114] The following condenses the written reply of the employer and the below extracts from the employer's submission are reproduced *verbatim*. The full submission is on file at the Board.

[115] In his submissions, the Complainant suggests that the caselaw and the analytical framework relied upon by the Employer are no longer valid because of the recent changes to the *Canada Labour Code*. Other than making bald assertions to this effect, the Complainant has not pointed to any specific changes in the *Code* nor cited any authority to support his assertions.

[116] While there are a number of amendments made to various provisions under Part II, the Employer submits that most of these do not relate to the issues in this hearing. The Employer submits that there are only two changes to the *Code* that are relevant in the case at bar. The first is the addition of s. 147.1 of the *Code*, which is discussed in the Employer's Written Submissions at paragraph 69.

[117] The second is the revised definition of "danger" in s. 122 of the *Code*. Prior to the 2000 amendments, "danger" was defined as

> *"danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected.*

[118] Under the current *Code*, "danger" is now defined as:

> *"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a*

> *hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.*

[119] The Employer submits that while this new definition of "danger" is more expansive in that it provides for "existing or potential hazards", and "current or future activity", this does not change the fact that the "danger" protected by Part II of the *Code* is danger relating to occupational health and safety matters, and not to any dangers related to workplace stress as in the case at bar. The Employer submits that the authorities relied upon in its submissions remain valid, and that the Complainant had no reasonable basis for his complaint under the *Code*.

[120] Furthermore, the Employer submits that the changes to the *Labour Code* do not change the analytical framework for determining a complaint under s. 147. In determining whether there has been a violation under s. 147, the Board must determine:

(a) Whether the Employee had a reasonable basis for exercising his or her rights under the *Code*;

(b) If so, whether the Employer took any prohibited action as per the wording of s. 147 of the *Code*; and

(c) If so, whether this action was taken because of the Employee's exercise of his rights under the *Code*.

Reasons for Decision

[121] Employees who have reasonable cause to believe that a condition exists in any workplace that constitutes a danger have the right to refuse work (subsection 128(1) of the *Code*). Employers who impose a financial penalty or refuse to pay employees because they exercised this right are in violation of the *Code* (section 147). Employees have the right to complain of this violation (section 133 of the *Code*).

[122] Mr. Boivin has complained pursuant to section 133 of the *Code*, and the first step the Board must take in cases of this type is to determine whether or not the requirements of section 133 have been complied with. In accordance with subsection 133(3) the complainant must show that he has complied with subsection 128(6), which is the employee's obligation to report the refusal to the employer. There was no dispute that this has been done, therefore the complainant has met the threshold for filing a complaint.

[123] As stated at the outset, this is a reverse onus situation by virtue of subsection 133(6) of the *Code*. In other words, Mr. Boivin's allegation that the employer has violated the *Code* is itself evidence that the contravention actually occurred. In *Kucher* (*supra*), the Canada Labour Relations Board (CLRB) (as it then was), at paragraph 11 wrote:

> *11. …In order to meet this onus, the employer must establish that the disciplinary action had nothing to do with the fact that the employee exercised his right to refuse work under the Code, once the employee had satisfied the Board that he had a reasonable cause to believe that a dangerous condition existed.*

[124] As I understand this decision, it stands for the proposition that the Board must review whether the employee had a reasonable cause to believe that a dangerous condition existed before he withdrew his services. If this condition cannot be met, then the employer's action, whether disciplinary or not, is not a violation of the *Code*.

[125] In the instant case, the employer's written submission stated that the first issue to be decided was that the complainant had no reasonable basis for exercising his right to refuse work under Part II of the *Code* and, as a result, cannot seek the protection of the *Code*.

[126] In my view, this is an appropriate starting point for the analysis, and is consistent with the analysis in *Kucher* (*supra*) and with the provisions of Part II of the *Code*.

[127] The employer submitted that if the employee did not have a reasonable basis for exercising his right to refuse work, he was not entitled to the protection of section 147 of the *Code* in the first place. I agree.

[128] At paragraph 14 of *Kucher* (*supra*), the CLRB wrote:

> *14. To have the protection of the Code, the refusal must be made in circumstances where there is "reasonable cause" for such a belief (see Bermiline Jolly (1992), 87 di 202; and 16 CLRBR (2d) 300 (CLRB no. 929)). The notion of reasonable cause entails both an objective and a subjective element (Francine Tremblay et al. (1985), 59 di 163 (CLRB no. 497)), as the Code does not confer a right of refusal based merely on "genuine belief." The danger must be acute and immediate and not merely stem from anticipation of*

> *stress because of interaction with fellow employees (see Antonio Almeida (1990), 82 di 10 (CLRB no. 819)).*

[129] Mr. Boivin's refusal to work form (Exhibit E-20) states: "…the employee's assertion is that the danger to his health is the stress caused by the failure of senior management to respond to his grievance in a timely manner, with integrity." This is consistent with the content of a letter written by Mr. Boivin on October 2, 2001, (seven days prior to withdrawing his service). In that letter, Mr. Boivin wrote: "…the danger to my health is described as activities by Agency officials involved with the handling of grievance #… - have been, and continue to be injurious to my health by causing me considerable stress, and erosion of my mental and emotional facilities."

[130] The complainant submits that section 127.1 of the *Code* allows for the making of complaints related to workplace stress.

[131] Firstly, in the complainant's written submission, he makes reference to "… the effects of harassment, particularly the stress associated with it …" as well as "workplace bullying". I wish to state that I was not satisfied there was evidence that could support any claim of "workplace bullying" or "harassment". Indeed, these claims were never made in the evidentiary portion of the hearing.

[132] Secondly, the complainant, in his written submission, states in reference to section 127.1 of the *Code*:

> *Thus, the Complainant submits that on 2 October 2001, when he made his complaint pursuant to this section of the* Code*, he had identified an effect on his health, using the Australian scale; a type two event, and therefore could seek remedy through the* Code*.*

[133] As I understand the complainant's argument here, he was entitled to make his complaint because he had identified an <u>effect</u> on his health (emphasis mine). The legislation states:

> *127.1 (1) An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment shall …*

[134] It is only when there is "likely to be an accident or injury to health" that a complaint can be made. In the instant case I do not believe there was an accident or injury that was likely to occur. Therefore, I do not believe a complaint under the *Code*

can be pursued. Other avenues may be open to employees who perceive that some action has an adverse effect on their health, like taking sick leave. However, I do not believe the scheme of the *Code* allows for the filing of complaints under this guise.

[135] The evidence indicated that the refusal to work was based on Mr. Boivin's view that he was under stress due to the failure of management to reply to his grievance. However, the initial complaint to the Board, dated April 30, 2002, from Mr. Boivin, states in part:

> *On October 1, 2001 I made a complaint to the Health and Safety Committee …*
>
> *The nature of the complaint was that I believed that the employer was not assigning me a full workload deliberately so that I would experience erosion of my mental health …*
>
> *On October 9, 2001 I attended a meeting … At this meeting I was provided with an unsigned document that contained a number of allegations and restrictive conditions. I perceived this to be disciplinary action for having made my complaint. …*

It was after receiving the October 9 letter that Mr. Boivin withdrew his services.

[136] In my view, whether Mr. Boivin withdrew his services because he was under stress due to the failure of management to reply to his grievance, or because he was experiencing an erosion of his mental health due to the fact management was not assigning him a full workload, makes no difference insofar as the *Code* is concerned. Neither case is the type of health or safety issue contemplated by Part II of the *Code*.

[137] In a recent Board decision concerning a complaint under section 133 of the Code, (*Kinhnicki and Terry Dupuis and Canada Customs and Revenue Agency*, 2003 PSSRB 52 (160-34-78)), there is an excellent discussion of what constitutes "a danger" under section 128 of the *Code*. Paragraph 36 of this decision states:

> *[36] As many of the duties and obligations imposed upon employers under section 125 include adherence to national standards relating to building requirements, sanitation and fire, and one of the specified purposes of Part II is to prevent injury to health, it is my opinion that the word "danger" employed in the legislation has a broad meaning…*

[138] I agree that the word "danger" in the context of the *Code* has a broad meaning, but it is not so broad as to cover an internal dispute or stress. That is what occurred

here; Mr. Boivin felt he had no meaningful work assigned to him and grieved. Then, he withdrew his services due to a failure by management to address his grievance in a timely fashion. In my view, there was no "danger" to Mr. Boivin, as the scheme of the *Code* provides, and therefore he had no right to withdraw his services. There may have been frustration and, possibly, stress felt by Mr. Boivin but, in this situation, I do not believe the scheme of the *Code* permits an employee to withdraw his/her services for this reason.

[139] Although the collective agreement was not tendered as an exhibit, most agreements allow employees to elevate their grievance to the next level if the employer does not reply in time. If Mr. Boivin's agreement contained this provision, this action was open to him. In any event, his agreement certainly did contain a sick leave provision, as he was placed on sick leave following his medical assessment. If he was under stress and his mental and emotional faculties were eroding, as he stated in his letter of October 2, he may have been able to avail himself of the sick leave provisions of the collective agreement. Instead, he chose to withdraw his services. As former Board Member J. Barry Turner wrote in *Hutchinson* (Board file 160-2-52), at paragraph 83, "…by uttering the magic words under section 128 of the Code…has brought this section into disrepute...". In my view, by alleging a danger in this situation, and withdrawing his services, Mr. Boivin has brought this section of the *Code* into disrepute.

[140] This conclusion is also supported, I believe, by earlier decisions of this Board, which determined that issues such as stress and workplace relationships did not constitute a "danger" as that term was meant by the *Code* (see, for example, *Bliss* (*supra*) and *Gualtieri* (*supra*)).

[141] Does section 128 allow for invoking the right to refuse to work for stress-related reasons ?

[142] The complainant states that it does, and he wrote:

> *The Complainant submits that the intent of Parliament with respect to protecting the worker from injury does in fact include injury to mental health, particularly when that injury is deliberately caused.*

[143] I simply do not agree with the conclusion the complainant arrives at here. Section 128 states that an employee may refuse to work in a place where the employee

has reasonable cause to believe a condition exists in the workplace that constitutes a danger.

[144] The complainant writes that "… by examining the changes to the definition of danger in the Treasury Board's Handbook (Exhibits G-42 and G-43), and having established a direct link to the effect on his health that he has satisfied the requirement for having a reasonable basis as required by the *Code* …".

[145] The employer's definition of danger (which is the same as the *Code*) states:

> *"Danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;*

[146] I do not believe the scheme of the *Code* allows for considering stress as "an existing or potential hazard," as that term is understood in the *Code*. Nor do I believe that stress could be considered a "condition", as the term is understood in the *Code*. Finally, it is not, I believe, a "current or future activity that could reasonably be expected to cause injury or illness" as those terms are understood in the *Code*. As stated in *Kucher* (*supra*): "The danger must be acute and immediate…"

[147] A reading of the definition of danger indicates to me that in order to consider a situation to be a danger, one must establish a link such that the danger would cause injury or illness to a person. The employer is then obliged to correct the danger before the employee returns to the worksite. This is more akin to, for example, having hazardous materials stored properly than it is to stress-related worksite issues.

[148] The complainant submits that many of the cases cited as jurisprudence do not apply as they were rendered prior to the changes made to the *Code* in 2000. Simply because the *Code* changed in certain respects in the year 2000 does not, in my view, render decisions decided before the change irrelevant. Instead, one must look at the decision and determine what, if any, aspects of it apply to the current legislation. In my view, the decisions I have cited here continue to apply.

[149] Having determined that Mr. Boivin had no reasonable basis for exercising his right to refuse work under Part II of the *Code*, I therefore conclude Mr. Boivin could not avail himself of the protection of the *Code*. I would dismiss the complaint on this basis.

[150] I would also add in this case that I do not believe the employer's actions were disciplinary in nature.

[151] The evidence, I believe, clearly demonstrated that the employer had a genuine concern with respect to Mr. Boivin's fitness for work. A number of workplace incidents had occurred over several months before CCRA asked Mr. Boivin to undergo his fitness for work evaluation. One in particular raised concern, and that was Mr. Boivin's August 10 reference to "going postal". Whether the statement was "such action may cause someone to go postal", as Mr. Boivin alleges, or "I may go postal", as the employer alleges, is, in my view, not particularly significant. The fact of the matter is employers have an obligation to ensure a safe working environment and a statement of either type would cause concern.

[152] In addition, on October 15, 2001, the employer met with Mr. Boivin and asked that he receive an assessment from Health Canada with respect to his fitness for work. In the company of his union representative, Mr. Boivin signed a consent form to undergo a "fitness for work evaluation".

[153] In my view, it was reasonable for the employer to request a fitness for work assessment in light of the workplace issues, and I do not believe this was an action taken by CCRA because Mr. Boivin withdrew his services.

[154] Having consented to the assessment, Mr. Boivin was seen by medical practitioners who came to the conclusion he was unfit for work. Health Canada informed CCRA of this finding, and CCRA acted upon it. I cannot conclude that CCRA's decision to abide by the declaration that Mr. Boivin was unfit for work was, in any way, related to his withdrawal of service. The CCRA received a letter from Dr. Chernin on October 17, 2001, stating, in part: "Mr. Boivin is not fit for work at this time." In my view, a failure by CCRA to act upon this would not be responsible.

[155] The complainant cites *Pruyn* (*supra*) in support of his position that the employer's action constituted a reprisal. I do not agree that the Board's decision in the

Pruyn case supports the complainant here. In *Pruyn*, the employer called a meeting after Mr. Pruyn had raised an issue involving his belief that the carpeting in the work area caused a tripping hazard. At paragraph 56 of the decision, Board Member Léo-Paul Guindon writes "The employer admitted that the issue of the November 9 meeting was disciplinary …" This led to a finding that the employer's actions were contrary to section 147 of the *Code*.

[156] The situation in *Pruyn* (*supra*) is very different from the instant case. Here, there is no admission that there was a disciplinary meeting, nor is there any finding of such. I have concluded that none of the actions proscribed by section 147 has taken place; therefore, there can be no violation of section 147 in the instant case.

[157] The complainant also submitted that the "Board has within its powers the ability to revisit the Safety officer's decision (Exhibit E-18), and it is necessary to do so to determine this case". I do not agree that the Board has jurisdiction under the current provisions of the *Code* to review a decision of the safety officer.

[158] Up until June 2000, subsections 129(5) and 130(1) of Part II of the *Code* read as follows:

> *129. (5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board.*
>
> *130. (1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may*
>
> *(a) confirm the decision; or*
>
> *(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2).*

[159] Under these statutory provisions, the Board could inquire into the decision of the safety officer, and indeed it did do so from time to time (see for example *Gualtieri and Guenette* Board file 165-2-203).

[160] However, in June 2000, these provisions changed and the Board no longer retained jurisdiction to examine a decision of a safety officer. Now the jurisdiction of the Board is defined in section 133 of Part II of the *Code* and there is no jurisdiction to review a safety officer's decision, as that matter now resides with HRDC.

[161] For all of the above reasons, the complaint is dismissed.

Joseph W. Potter,
Vice-Chairperson

OTTAWA, October 20, 2003.

ANNEX "A"

[1] Sections 127, 128, 133 and 147 of the *Code* read as follows:

> ***127.1 (1) [Complaint to supervisor]*** *An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment shall, before exercising any recourse available under this Part, except the rights conferred by sections 128, 129 and 132, make a complaint to the employee's supervisor.*
>
> *(2)* ***[Resolve complaint]*** *The employee and the supervisor shall try to resolve the complaint between themselves as soon as possible.*
>
> *(3)* ***[Investigation of complaint]*** *The employee or the supervisor may refer an unresolved complaint to a chairperson of the work place committee or to the health and safety representative to be investigated jointly.*
>
> *(a) by an employee member and an employer member of the work place committee; or*
>
> *(b) by the health and safety representative and a person designated by the employer.*
>
> *(4)* ***[Notice]*** *The persons who investigate the complaint shall inform the employee and the employer in writing, in the form and manner prescribed if any is prescribed, of the results of the investigation.*
>
> *(5)* ***[Recommendations]*** *The persons who investigate a complaint may make recommendations to the employer with respect to the situation that gave rise to the complaint, whether or not they conclude that the complaint is justified.*
>
> *(6)* ***[Employer's duty]*** *If the persons who investigate the complaint conclude that the complaint is justified, the employer, on being informed of the results of the investigation, shall in writing and without delay inform the persons who investigated the complaint of how and when the employer will resolve the matter, and the employer shall resolve the matter accordingly.*
>
> *(7)* ***[Stoppage of activity]*** *If the persons who investigate the complaint conclude that a danger exists as described in subsection 128(1), the employer shall, on receipt of a written notice, ensure that no employee use or operate the machine*

or thing, work in the place or perform the activity that constituted the danger until the situation is rectified.

(8) ***[Referral to health and safety officer]*** *The employee or employer may refer a complaint that there has been a contravention of this Part to a health and safety officer in the following circumstances:*

(a) where the employer does not agree with the results of the investigation;

(b) where the employer has failed to inform the persons who investigated the complaint of how and when the employer intends to resolve the matter or has failed to take action to resolve the matter; or

(c) where the person who investigated the complaint do not agree between themselves as to whether the complaint is justified.

(9) ***[Investigation by health and safety officer]*** *The health and safety officer shall investigate, or cause another health and safety officer to investigate, the complaint referred to the officer under subsection (8).*

(10) ***[Duty and power of health and safety officer]*** *On completion of the investigation, the health and safety officer*

(a) may issue directions to an employer or employee under subsection 145(1);

(b) may, if in the officer's opinion it is appropriate, recommend that the employee and employer resolve the matter between themselves; or

(c) shall, if the officer concludes that a danger exists as described in subsection 128(1), issue directions under subsection 145(2).

(11) ***[Interpretation]*** *For greater certainty, nothing in this section limits a health and safety officer's authority under section 145.*

128. (1) [Refusal to work if danger] *Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that*

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

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

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

[…]

133. (1) [Complaint to Board] *An employee, or a person designated by an 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.*

(2) [Time for making complaint] *The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*

(3) [Restriction] *A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.*

(4) [Exclusion of arbitration] *Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.*

(5) [Duty and power of Board] *On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.*

(6) [Burden of proof] *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.*

147. [General prohibition re employer] *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.*

***147.1 (1) [Abuse of rights]** An employer may, after all the investigations and appeals have been exhausted by the employee who has exercised rights under sections 128 and 129, take disciplinary action against the employee who the employer can demonstrate has wilfully abused those rights.*

***(2) [Written reasons]** The employer must provide the employee with written reasons for any disciplinary action within fifteen working days after receiving a request from the employee to do so.*