**Date:** 20220622

**File:** 560-02-40395

**Citation: 2022 FPSLREB 51**

*Federal Public Sector Labour Relations and Employment Board Act* and *Canada Labour Code*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

**ALEX BURLACU**

Complainant

and

**TREASURY BOARD**
**(Canada Border Services Agency)**

Respondent

Indexed as
*Burlacu v. Treasury Board (Canada Border Services Agency)*

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

**Before:** David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Complainant:** Himself

**For the Respondent:** Patrick Turcot, counsel

Heard by videoconference,
January 5 to 7, 2022.

**REASONS FOR DECISION**

[1] This decision is issued at the same time as its companion decision *White v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 52. Together, they offer a reformulation and simplification of the principles set out in *Vallée v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 52, for determining whether an employer has violated a prohibition contained in section 147 of the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*").

## I. Complaint before the Board

[2] In this matter, Alex Burlacu ("the complainant") made what is generally called a "reprisal complaint" under s. 133 of the *Code*. Mr. Burlacu is a senior program officer with the Canada Border Services Agency ("CBSA"). He alleged that Andrew LeFrank, then a director general for the CBSA, threatened to discipline him for actions he took in relation to a health and safety issue in his workplace, in contravention of s. 147 of the *Code*. These provisions fall within Part II of the *Code*, which governs health and safety in the federal public service and federally regulated workplaces.

[3] On February 19, 2019, Mr. Burlacu provided the CBSA with a violence-in-the-workplace notice, pursuant to the *Canada Occupational Health and Safety Regulations* (SOR/86-304). Related to that notice, on March 4, 2019, he exercised his right to refuse unsafe work, pursuant to s. 128(1) of the *Code*.

[4] In response to these actions, the CBSA arranged for Mr. Burlacu to report to a different manager on an interim and temporary basis. During several discussions that followed, most of which took place via email, the complainant questioned and challenged management's decision to require the change in reporting relationship.

[5] Eventually, on March 19, 2019, Mr. LeFrank ordered Mr. Burlacu to report to the new supervisor or face possible disciplinary action.

[6] On April 30, 2019, Mr. Burlacu made this complaint, alleging that the March 19, 2019, order violated s. 147 of the *Code*. As corrective action, the complainant requested that Mr. LeFrank's order be set aside so that he could return to the duties of his substantive position.

[7] The Treasury Board is the complainant's legal employer: see s. 240(c), and the definition of "employer" in s. 2(1), of the *Federal Public Sector Labour Relations Act*

(S.C. 2003, c. 22, s. 2; "the *Act*"). As s. 147 of the *Code* imposes a prohibition on an employer, the Treasury Board is the respondent to the complaint.

[8] In this decision, "the Board" refers to the Federal Public Sector Labour Relations and Employment Board and its predecessors.

[9] I will quote more extensively from the relevant provisions of the *Code* in the reasons that follow, but for introductory purposes, I want to highlight the following portions of s. 147:

| | |
|---|---|
| ***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*** | ***147*** *Il est interdit à l'employeur de congédier, suspendre, mettre à pied ou rétrograder un employé ou de lui imposer une sanction pécuniaire ou autre ou de refuser de lui verser la rémunération afférente à la période au cours de laquelle il aurait travaillé s'il ne s'était pas prévalu des droits prévus par la présente partie,* ***ou de prendre — ou menacer de prendre — des mesures disciplinaires contre lui parce que :*** |
| … | […] |
| ***(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*** | ***c) soit il a observé les dispositions de la présente partie ou cherché à les faire appliquer.*** |

[Emphasis added]

[10] The complainant argued that there was a direct link between the exercise of his rights under the *Code* and the threat of discipline, in violation of s. 147, and that the complaint be allowed.

[11] The respondent argued that no threat of discipline was made. All Mr. LeFrank did was caution Mr. Burlacu about the implications if he did not report to the new manager. Alternatively, if the March 19, 2019, direction amounted to a threat of discipline, then it was not linked to the complainant's exercise of rights under the *Code* but to his refusal to cooperate with a change in reporting relationship, a change that the employer was authorized to make. Either way, the respondent did not violate s. 147, it argued.

[12] The underlying events of this case have led to multiple administrative and legal actions on the part of the complainant, which are proceeding or have proceeded in front of several decision makers. After the passage of three years, the workplace-violence notice is still awaiting investigation by a competent person. Some related grievances presented to the CBSA are now the subjects of judicial reviews in front of the Federal Court or the Federal Court of Appeal. A finding that there was "no danger" with respect to the complainant's March 4, 2019, work refusal was the subject of a decision rendered by the Occupational Health and Safety Tribunal of Canada (*Burlacu v. Canada Border Services Agency*, 2021 OHSTC 4; "*Burlacu 2021 (OHSTC)*").

[13] While these other proceedings are not before the Board, much of the evidence in this matter is intertwined with evidence that may be related to these other proceedings. For example, in *Burlacu 2021 (OHSTC)*, the seven-page summary of evidence at paragraphs 3 to 16 overlaps entirely with the evidence put before the Board in this matter. The emails exchanged between the complainant and his manager in February and March 2019 contain extensive arguments about the employer's rights and responsibilities under the *Code*, several of which relate directly to the complainant's arguments before me.

[14] Therefore, while the essential facts of this case are relatively simple, reporting them and the parties' arguments in this case is more complex and multilayered. I have endeavoured to accurately report the scope of the parties' evidence and arguments while respecting the limits of the Board's mandate.

[15] The challenge before me is to consider the broader context of the events while limiting my decision to one issue: Did the respondent violate s. 147 of the *Code*?

[16] As will be detailed in the reasons that follow, when an employee makes a work refusal under the *Code* and subsequently makes a complaint under s. 133 in relation to that work refusal, the respondent bears the burden of proving that there was no violation of s. 147.

[17] I find that the respondent has met that burden. While I agree with Mr. Burlacu that he was threatened with discipline, the respondent has satisfied me, on a balance of probabilities, that this threat was **not** because of Mr. Burlacu's work refusal under the *Code*. The CBSA sought to put into place a change in reporting relationship that would temporarily provide a safe work environment for the complainant. The evidence

shows that Mr. Burlacu was seeking a different interim solution, such as being granted leave with pay for other reasons. He went to considerable effort to question and challenge the employer's authority to direct the change in reporting relationship. The threat of discipline was based on a perception by Mr. LeFrank of possible insubordination on the part of Mr. Burlacu, not to his work refusal under the *Code*.

## II. Summary of the evidence

[18] The respondent called Mr. LeFrank as its witness. At the time of the events in question, Mr. LeFrank was Director General of Enforcement and Intelligence Operations at the CBSA. He testified that in that position, he had some 150 direct and 2000 indirect reports across the country. Mr. Burlacu was an indirect report.

[19] In February and March 2019, Mr. LeFrank had the lead role in responding to Mr. Burlacu's workplace-violence notice and work refusal. Most of the correspondence referenced in the chronology that follows involved email exchanges between the two of them.

[20] Mr. LeFrank retired from the CBSA in May of 2019; he testified that his last actual day of work was March 28, 2019, just shortly after the events in question.

[21] The complainant testified for himself.

[22] I will make two procedural notes before summarizing the evidence.

[23] At one point during the hearing, the complainant began to testify about the meaning of certain email exchanges between him and Mr. LeFrank. The respondent objected to this testimony on the basis that the complainant was not following the rule in *Browne v. Dunn*, 1893 CanLII 65 (FOREP), which requires that a party intending to challenge the credibility of a witness by putting forward contradictory evidence must put that contradictory evidence to that witness. The complainant had not questioned Mr. LeFrank about those emails when he was cross-examining Mr. LeFrank. After the rule was explained to Mr. Burlacu, I allowed the complainant to continue his testimony, provided that the respondent be allowed to recall Mr. LeFrank to testify further about the document in question. The respondent did recall Mr. LeFrank, and the complainant was also given the right to cross-examine further Mr. LeFrank during that recall testimony.

[24] I will also note that in the case management process before the hearing, the complainant took the position that the content of his workplace-violence notice was not relevant to the issues before the Board. Alternatively, if the respondent were to claim that the threat of discipline was related to the workplace-violence notice, then all documents related to that notice should be produced to him, he argued, and the Board should order their pre-hearing production. I ruled that the content of the notice was arguably relevant and ordered the respondent to produce to the complainant all documents related to it. At the hearing, the complainant included the workplace-violence notice in his book of documents and testified about it, and it was accepted as evidence. I note that in other parts of the documentary evidence, the complainant took the position that his workplace-violence notice and work refusal were inextricably linked.

[25] Although they did not appear as witnesses, three other CBSA employees were referenced frequently in the testimony and documentary evidence before me. The three employees and their work relationships to the complainant and Mr. LeFrank at the time of the events in question were as follows:

- Mehdi Ghaani, Acting Manager of the Operations Branch, and Mr. Burlacu's direct supervisor;
- Sharon Spicer, Director of Inland Enforcement Operations and Case Management, Mr. Ghaani's manager, and a direct report to Mr. LeFrank; and
- Brett Bush, Director of Inland Enforcement Program, an alternate work unit, and a direct report to Mr. LeFrank.

[26] The summary of evidence that follows is based on witness testimony and documents entered into evidence. Facts not in dispute are summarized without referencing the source. For any conflict in the evidence, I make specific reference to what I heard from different witnesses.

[27] In the following sections, I will first summarize the chronology of events, followed by a few additional points of evidence that do not fit easily into the chronology.

## A. Chronology of events

[28] On February 7, 2019, Mr. Burlacu made a request to Mr. Ghaani for the approval of leave with pay to attend a Federal Court proceeding that he was involved in with the CBSA. He made the request under article 52 of his collective agreement, "… leave with

or without pay for other reasons". On February 11, 2019, Mr. Ghaani denied the leave request. In the course of the next two days, an exchange of more than a dozen emails took place. During this exchange, Mr. Ghaani maintained his position that the leave requested would not be approved under article 52 and that Mr. Burlacu would have to take some other form of leave (vacation, compensatory leave, etc.). During this exchange, Mr. Ghaani also told Mr. Burlacu that any unauthorized absence, without approved leave, could result in disciplinary action.

[29] I will note that the respondent objected to this exchange of emails being entered in evidence, on the basis that it preceded any exercise of rights under the *Code* by the complainant. I allowed the exchange to be entered as I found it provided context for the events that followed. I also note that in the exchange, Mr. Burlacu indicated to Mr. Ghaani that he was considering exercising his rights under the *Code*.

[30] On Tuesday, February 19, 2019, at 1:51 p.m., Mr. Burlacu provided a violence-in-the-workplace notice, pursuant to the *Canada Occupational Health and Safety Regulations*. It was given to Mr. Ghaani. The notice alleged workplace violence due to a "pattern of behaviour" by management with respect to leave requests. The notice alleged that management consulted Labour Relations on "every request" made by Mr. Burlacu and alleged that the CBSA was failing to "… treat [him] in accordance with the values of the public sector …."

[31] Mr. Ghaani's response, at 3:41 p.m., indicated that he and the complainant had met to discuss leave approval issues. He explained that most of the complainant's leave requests had been addressed but that he needed more time to respond to his request for leave with income averaging. He also indicated that since the violence-in-the-workplace notice related to him, he was referring the notice to Ms. Spicer.

[32] Ms. Spicer responded at 4:27 p.m. She acknowledged receipt of the violence-in-the-workplace notice and indicated that she took Mr. Burlacu's allegations as very serious. She authorized him to take leave with pay for the rest of February 19 and for the following day, Wednesday, February 20. The complainant replied at 4:37 p.m., agreeing to the short-term plan. He also indicated that his email to Mr. Ghaani should not be taken as a complete list of the issues that had led to his allegation of workplace violence.

[33] Mr. Burlacu returned to work on Thursday, February 21. He met with Mr. LeFrank that morning and again the next day. They began a discussion of interim measures. Following these meetings, at 11:14 a.m. on February 22, Mr. Burlacu sent an email to Mr. LeFrank, asking to be informed about what steps would be taken in the interim to protect him from the workplace violence. He also stated that he was prepared to fully participate in the investigation into his workplace-violence notice.

[34] On Monday February 25, the complainant had a compressed day off work. At 9:20 a.m. that morning, he sent Mr. Ghaani an email indicating that on the advice of his doctor, he would be away from the office until March 4, 2019. He testified that he was compelled to make this request to Mr. Ghaani because Mr. LeFrank had not accepted his proposal to report directly to him. Mr. LeFrank testified that it would have been acceptable for this leave request to have been made directly to him.

[35] Also on Monday, February 25, at 9:23 a.m., Mr. LeFrank wrote a follow-up email to Mr. Burlacu's summary of their meeting on February 22. In it, he said, "In order to arrive at an interim solution I may need to identify another person to whom you can report temporarily and who is not included in the scope of the investigation. That may require a list of names from you. I hope to have an answer for you today."

[36] The complainant testified that he did not see Mr. LeFrank's February 25 email until he returned to work on March 4, 2019. He sent an email that morning at 9:29 a.m., stating this:

> …
>
> *… I cannot see how I can continue to perform employment-related activities (especially requesting leave) absent some measures being taken by the Employer, even on an interim basis, to limit my exposure to the circumstances that gave raise to my work place violence complaint.*
>
> …

[37] He also indicated that he was about to have a conversation with an advisor from the Informal Conflict Management System program.

[38] On Monday, March 4, 2019, at 10:35 a.m., Mr. Burlacu exercised his right to refuse work pursuant to s. 128(1) of the *Code*, based on the following perceived danger:

…

- *the imminent threat to my mental health arising out of the requirement to continue to perform my employment-related activities (especially requesting leave) in the absence of any measures being taken by the Employer, even on an interim basis, to limit my exposure to the circumstances that gave raise to my work place violence complaint.*

…

[39] The work refusal was made to Mr. Ghaani, who then forwarded it to Ms. Spicer. He asked her if Mr. Burlacu could be removed from the team as soon as possible.

[40] On March 4, at 11:18 a.m., Mr. LeFrank wrote to Mr. Burlacu and explained that to identify an appropriate interim reporting relationship, he needed a list of the individuals related to the workplace-violence notice.

[41] On March 4, at 12:09 p.m., Mr. Burlacu identified Mr. Ghaani, Ms. Spicer, and any labour relations advisor or advisors assisting them in providing responses to his requests as the individuals related to the workplace-violence notice.

[42] On Tuesday, March 5, at 3:47 p.m., Mr. LeFrank wrote an email to Mr. Burlacu in response to the workplace-violence notice and his subsequent work refusal. In this email, he

- communicated his responsibility for ensuring that employees have a safe and healthy work environment;
- acknowledged that Mr. Burlacu's immediate supervisor and director were related to the workplace-violence notice (i.e., Mr. Ghaani and Ms. Spicer);
- explained that an interim and temporary solution had been identified, which was reporting to the director of inland enforcement programs (i.e., Mr. Bush), and in determining the assignment, he took into consideration Mr. Burlacu's safety and mental health and the need to provide meaningful work until a formal investigation was completed;
- explained why it would not be appropriate for Mr. Burlacu to report directly to him, given his schedule and volume of emails, and said that given their mutual agreement to engage in informal conflict management he did not think a direct reporting relationship appropriate, as it might jeopardize the success of that process;
- acknowledged Mr. Burlacu's concerns about being "pushed out" of the Case Review section and explained that a temporary change in reporting relationship was necessary, given the workplace-violence notice and the subsequent work refusal and alleged threats to his mental health; and
- with respect to Mr. Burlacu's proposal to be placed on leave with pay, said that he could not approve it as "… there is no precedent or authority to provide …

> leave with pay pending an informal-conflict-management process or investigations of violence."

[43] On Tuesday, March 5, at 7:01 p.m., Mr. Burlacu responded. In this email, he

- argued that Mr. LeFrank had authority to grant leave with pay under s. 11.1(1)(c) of the *Financial Administration Act* (R.S.C., 1985, c. F-11);
- reiterated his belief that management's actions or inactions toward him and his legitimate requests were taken with the goal of pushing him out of the unit;
- emphasized that his workplace-violence notice related to psychological violence "… in the course of exercising managerial authority …";
- described the temporary reporting relationship as a "temporary solution" rather than an "assignment";
- requested to remain in his current cubicle and attend weekly meetings of the Case Review Unit; and
- took the position that any further delay in answering his request for leave with income averaging was a continuation of workplace violence.

[44] On Wednesday, March 6, at 2:16 p.m., Mr. LeFrank promised to respond the next day with respect to the request for leave with income averaging and the requests about the interim change in reporting.

[45] On Thursday, March 7, at 5:21 p.m., Mr. LeFrank wrote to explain that:

- Mr. Burlacu's request to remain in his current cubicle was approved;
- his request to attend weekly meetings of the Case Review Unit was not approved, given the need to separate him from the manager of that unit (i.e., Mr. Ghaani), to protect him from the alleged workplace violence;
- the effective date of the change in reporting relationship would be Monday, March 11, 2019.

[46] On Thursday, March 7, at 7:46 p.m., Mr. Burlacu responded by email. Unlike the previous emails in this chain, in which the subject line was blank, this reply included a subject, "Continued refusal – subsection 128(9) of the Canada Labour Code". In this email, he

- questioned whether Mr. LeFrank's emails represented the immediate action that the employer was taking pursuant to s. 128(8) of the *Code* (i.e., if the employer agrees there is a danger, to take action to protect the employee from the danger), and if so, requested a copy of the written report setting out the results of the investigation conducted pursuant to s. 128(7.1);
- stated that he was continuing his work refusal pursuant to s. 128(9), given management's refusal to allow him to attend team meetings and not to grant him leave with pay; and

- questioned the legal authority of the employer to remove him from his position, pursuant to s. 49 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*").

[47] Mr. LeFrank testified that on March 8, 2019, he provided Mr. Burlacu with what he called the "stage one investigation report" with respect to the work refusal (i.e., the report required by s. 128(7.1)). The decision listed in the report was one of "No Danger". He recalled that Mr. Burlacu did not understand how the employer could conclude that there was no danger but still proceed with a change in reporting relationship. He testified that while he had found no danger, he did not dismiss Mr. Burlacu's view that there was a danger, and that he wanted an investigation by a competent person to proceed so that Mr. Burlacu could return to his position in a situation in which he did not feel threatened. He testified that he had difficulty understanding Mr. Burlacu's allegations of violence, which is why he wrote these comments in his investigation report: "The nature of these allegations do not align with work refusals normally investigated at the Agency. Further, the alleged workplace violence is not experienced by other persons in the unit even though they are operating in the same environment."

[48] On Friday, March 8, at 5:38 p.m., Mr. Burlacu wrote again to Mr. LeFrank, following their meeting. In this email, he

- thanked Mr. LeFrank for emphasizing to Mr. Bush the importance of the complainant remaining in his current cubicle;
- wrote that he did not view Mr. Ghaani's presence at team meetings as an exercise of his managerial authority but that he was willing to accept the solution of attending those Case Review meetings that Mr. Ghaani would not attend; and
- accepted the interim and temporary solution and abandoned his refusal to work, effective immediately.

[49] Mr. Burlacu testified that as of March 11, 2019, he began reporting to Mr. Bush.

[50] On Tuesday, March 12, at 10:42 a.m., Mr. LeFrank wrote to Mr. Burlacu. In this email, he wrote as follows:

> …
>
> *As a point of clarification, having received my work refusal stage one investigation report are you agreeing with my findings that there is no danger in which case there would be no need for an interim temporary reporting arrangement or do you disagree with my findings, continue to require an interim temporary*

> *arrangement, and the work refusal continues for the regular reporting relationship of your substantive position? This is important for me to know in order to refer your work refusal to a labour investigator that will likely conclude more quickly than the violence in the workplace complaint.*
>
> …

[51] On Wednesday, March 13, at 10:37 a.m., Mr. Burlacu wrote back to Mr. LeFrank, responding to the email of March 12 and referencing a discussion they had that day. In this email, he

- stated that he no longer believed the matter to be resolved and that pursuant to s. 128(9) of the *Code*, he was continuing his right to refuse work;
- restated his view that a danger existed and that his agreement to the interim solution was predicated on that;
- questioned how Mr. LeFrank could determine that no danger existed while maintaining the need for a temporary assignment;
- said,

  > *With respect, I cannot see how the work refusal can be regarded as separate from the work place violence complaint, when the work refusal was specifically premised on the failure of the Employer to take any measure to "limit my exposure to the circumstances that gave raise to my work place violence complaint."*;

- questioned the authority of the employer to unilaterally assign other duties and said that he had been refusing since summer of 2017 to be pushed out of his unit through harassment and now psychological violence; and
- rejected the temporary work arrangement and said that "… if you are ordering me to report to Mr. Bush, please do so explicitly [and] indicate what the legal basis is for such an order …."

[52] On Friday, March 15, at 4:15 p.m., Mr. LeFrank wrote to Mr. Burlacu. In this email, he

- indicated that the temporary interim reporting relationship was initiated and put in effect as a result of the workplace-violence notice;
- explaining why he had asked for clarification, said that he had expected a rejection of the stage one investigation finding of no danger, and therefore expected it to go to a "labour investigator" due to confidentiality concerns, but that he was subsequently informed that the Work Place Health and Safety Committee needed to investigate;
- indicated that his authority to assign other work was under s. 129(5) of the *Code*; and
- confirmed his direction that Mr. Burlacu report to Mr. Bush until the workplace-violence notice was resolved.

[53] On Tuesday, March 19, at 9:45 a.m., Mr. Burlacu wrote back to Mr. LeFrank. In this email, he challenged the authority of the employer to assign other work under s.

129(5) of the *Code* because that section is triggered by the employee's exercise of rights under s. 129(1.3), which he had not done. He also reiterated his interest in using the informal-conflict-management process to resolve the matters in dispute.

[54] Later that day, at 3:41 p.m., Mr. LeFrank wrote that in addition to s. 129(5), he had the authority to assign other work under the "general duty clause" of the *Code*, at s. 124 (which states that the "… employer shall ensure that the health and safety at work of every person employed by the employer is protected") and under s. 128.1(3) ("An employer may assign reasonable alternative work to employees who are deemed under subsection (1) of (2) to be at work.").

[55] Two hours later, at 5:41 p.m., Mr. Burlacu wrote to Mr. LeFrank. In this email, he

- disagreed with Mr. LeFrank's assertion that s. 124 provides the employer with the "… unilateral *authority* to remove me from a position to which I have been appointed by the Public Service Commission …", particularly after finding that there was no danger;
- challenged Mr. LeFrank's reliance on s. 128.1(3) because that fell under the section dealing with employees on shift during a work stoppage; and
- requested a meeting the following day.

[56] Mr. LeFrank's response to that email is the subject of this complaint. Dated March 19, 2019, at 5:54 p.m., he wrote the following to Mr. Burlacu:

> *Alex -*
>
> *I will not be meeting with you tomorrow.*
>
> *The situation is clear.*
>
> *You will report immediately to Mr. Bush.*
>
> *Failure to comply with this direction may result in disciplinary action as I find it to be insubordination.*
>
> …

[57] On March 21, 2019, the Work Place Health and Safety Committee completed its stage II investigation report into Mr. Burlacu's work refusal. The committee concluded that there was "No Danger" but also noted, "Although this investigation has ruled that there is no reasonable danger to employees, the conclusion has been made that the complainant believes his mental well-being is in danger."

[58] On March 22, 2019, Mr. Burlacu and Mr. LeFrank participated in an informal-conflict-management session in an effort to resolve the issues in dispute.

[59] On March 24 and 25, 2019, Mr. Burlacu and Mr. LeFrank exchanged several more emails, in which they discussed the relationship between the workplace-violence notice and the work-refusal process, the employer's response to the stage II report, and the alternate reporting relationship to Mr. Bush. Mr. Burlacu testified that in these emails, he gave Mr. LeFrank two opportunities to deny that his email of March 19, 2019, was a threat made because the complainant had exercised the right that the *Code* gave him to refuse to work, and that Mr. LeFrank did not deny that.

[60] On March 25, at 1:59 p.m., Mr. LeFrank wrote this: "I have agreed to continue to keep the temporary interim reporting arrangement in place until the conclusion of the complaint investigation or should you choose, you consider the matter resolved."

[61] In reply, on March 25, 2019, at 5:13 p.m., Mr. Burlacu stated that he had complied with the order of March 19 to report to Mr. Bush but added, "I am now of the view that this threat was made so as to prevent me from fully exercising my rights under s. 128." He stated his belief that this rendered any further proceedings under s. 128 moot and concluded with the following:

> …
>
> *… Therefore, I cannot see how I have any choice other than to comply with your order, regardless of the fact that I absolutely disagree with the finding of 'no danger,' the manner in which the investigations were conducted, both at stage I and II, and your reliance on section 124 to explain your order that I report to Mr. Bush.*
>
> …

[62] Following the results of the stage II investigation by the Work Place Health and Safety Committee, Mr. Burlacu's work refusal was referred to "the Labour Program" on March 26, 2019. The official conducting that review is called the "ministerial delegate". Her report was completed on April 3, 2019, and confirmed the finding of "no danger". This report was the subject of Mr. Burlacu's appeal to the Occupational Health and Safety Tribunal of Canada in *Burlacu 2021 (OHSTC)*.

[63] As already noted, Mr. LeFrank's last day of work at the CBSA, before his retirement, was March 28, 2019.

[64] Mr. Burlacu made his complaint under s. 133 of the *Code* to the Board on April 30, 2019, directly in relation to the content of Mr. LeFrank's email of March 19, 2019.

**B. Additional points of evidence**

[65] I want to summarize five additional points of evidence that do not fit easily into the chronology of events.

[66] First, Mr. Burlacu testified about what he saw as a pattern in which managers were alleging insubordination on his part, leading up to the use of that word in Mr. LeFrank's March 19, 2019, email. He cited content from a harassment complaint he made against Ms. Spicer on March 27, 2019. He took me to that complaint, which lists more than 25 incidents between September 2017 and the date of that complaint. He testified about two of these incidents in particular. The first was in September of 2017, when Ms. Spicer is alleged to have commented that he was "bordering on insubordination" for continuing to request written confirmation of who his manager was. The second was in April of 2018, in which the Director General of Labour Relations, following a review of multiple grievances filed by Mr. Burlacu, is alleged to have harassed him by writing in an email that the complainant "… 'often question[s] management decisions to the point of near insubordination.' "

[67] Mr. Burlacu testified that he also made these same allegations in a January 31, 2019, harassment complaint against two labour relations officers. That complaint also alleged harassment by Labour Relations staff for having concluded that he "… 'often question[s] management decisions to the point of near insubordination' " and for sharing that information with his managers.

[68] In relation to the harassment complaint of January 31, 2019, I take note that it was the subject of a decision of the Federal Court in *Burlacu v. Canada (Attorney General)*, 2021 FC 339. The emails with respect to insubordination are summarized at paragraphs 13 and 15 of that decision. The Federal Court heard that matter on judicial review of the CBSA's rejection of a grievance that Mr. Burlacu filed after the CBSA determined the harassment complaint unfounded. The Federal Court upheld the employer's decision. Mr. Burlacu has appealed that decision to the Federal Court of Appeal (file no. A-140-21).

[69] Second, Mr. LeFrank testified at length about his intentions behind putting the alternate reporting relationship into place. He said that a solution was needed to remove Mr. Burlacu from potential harm but to still allow him to perform meaningful work. He testified that in the end, he concluded that "it was time to go to work" and

that no further discussion on the alternate reporting relationship was needed. In cross-examination, he testified about the content of the March 19, 2019, email, and he said to Mr. Burlacu: "I was trying to caution you. I was trying to encourage you to comply with my direction. In no way was I trying to dissuade you to refuse work." He also testified that he supports any individual's right to redress, particularly when it comes to health and well-being, and that throughout, he was trying to make sure that he had done everything he could to protect Mr. Burlacu's health and safety.

[70] Third, the complainant testified that at the time of the hearing, his workplace-violence notice remained outstanding as it had still not been investigated by a competent person. The CBSA had made proposals for appointing a competent person, but he still disagreed with some aspects of the appointment.

[71] Fourth, the complainant testified that he was not actually disciplined for insubordination with respect to the order to report to Mr. Bush, and he has not been disciplined at any time by the CBSA for insubordination.

[72] Fifth, the complainant acknowledged that he has several proceedings before the Federal Court and the Federal Court of Appeal that relate directly or indirectly to the events in this matter.

## III. Reasons

### A. The legal framework that applies to this complaint

[73] The prohibition against reprisals is found at s. 147 of the *Code*, which reads as follows:

| | |
|---|---|
| ***147*** *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked,* ***or take any disciplinary action against or threaten to take any such action against an employee because the employee*** | ***147*** *Il est interdit à l'employeur de congédier, suspendre, mettre à pied ou rétrograder un employé ou de lui imposer une sanction pécuniaire ou autre ou de refuser de lui verser la rémunération afférente à la période au cours de laquelle il aurait travaillé s'il ne s'était pas prévalu des droits prévus par la présente partie,* ***ou de prendre — ou menacer de prendre — des mesures disciplinaires contre lui parce que :*** |
| … | […] |

| | |
|---|---|
| ***(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*** | ***c) soit il a observé les dispositions de la présente partie ou cherché à les faire appliquer.*** |

[Emphasis added]

[74] The provision that allows an employee to make a reprisal complaint is found at s. 133, which reads in part 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.* | ***133 (1)*** *L'employé — ou la personne qu'il désigne à cette fin — peut, sous réserve du paragraphe (3), présenter une plainte écrite* [à la Commission] *au motif que son employeur a pris, à son endroit, des mesures contraires à l'article 147.* |
| … | […] |
| ***(3)*** *A complaint in respect of the exercise of a right under section 128 … may not be made unless the employee has complied with subsection 128(6) ….* | ***(3)*** *Dans les cas où la plainte découle de l'exercice par l'employé des droits prévus aux articles 128* […], *sa présentation est subordonnée, selon le cas, à l'observation du paragraphe 128(6) par l'employé* […] |
| … | […] |
| ***(5)*** *On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.* | ***(5)*** *Sur réception de la plainte,* [la Commission] *peut aider les parties à régler le point en litige;* [si elle] *décide de ne pas le faire ou si les parties ne sont pas parvenues à régler l'affaire dans le délai* [qu'elle] *juge raisonnable dans les circonstances,* [elle] *l'instruit* [elle-même]. |
| ***(6)*** *A complaint made under this section in respect of the exercise of a right under section 128 … 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.* | ***(6)*** *Dans les cas où la plainte découle de l'exercice par l'employé des droits prévus aux articles 128* […], *sa seule présentation constitue une preuve de la contravention; il incombe dès lors à la partie qui nie celle-ci de prouver le contraire.* |

[75] The provision at s. 133(6) is important because it reverses the burden of proof onto the respondent, in a situation where a complainant exercised their right to refuse to perform an activity reasonably perceived as dangerous. That right is found at s. 128, which reads in part as follows:

| | |
|---|---|
| ***128 (1)*** *Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that* | ***128 (1)*** *Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas :* |
| … | […] |
| ***(c)*** *the performance of the activity constitutes a danger to the employee or to another employee.* | ***c)*** *l'accomplissement de la tâche constitue un danger pour lui-même ou un autre employé.* |
| … | […] |
| ***(6)*** *An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1) … shall report the circumstances of the matter to the employer without delay.* | ***(6)*** *L'employé qui se prévaut des dispositions du paragraphe (1)* […] *fait sans délai rapport sur la question à son employeur.* |
| … | […] |
| ***(7.1)*** *The employer shall, immediately after being informed of a refusal under subsection (6), investigate the matter in the presence of the employee who reported it. Immediately after concluding the investigation, the employer shall prepare a written report setting out the results of the investigation.* | ***(7.1)*** *Saisi du rapport fait en application du paragraphe (6), l'employeur fait enquête sans délai en présence de l'employé. Dès qu'il l'a terminée, il rédige un rapport dans lequel figurent les résultats de son enquête.* |
| … | […] |

[76] This Board's mandate to hear complaints made under s. 133 of the *Code* is set out in s. 240 of the *Act*, which provides that the Board deals with complaints made under s. 133 of the *Code* in respect of the federal public service and may order an employer to remedy the situation pursuant to s. 134 of the *Code*.

[77] Other disputes that can arise under Part II of the *Code* in respect of the federal public service are not within the Board's mandate. For example, if an employee refuses to do work that the employee believes to be dangerous, and his or her employer determines that there is no danger, the employee's appeal process (under ss. 128 and 129) does not end up before this Board.

[78] While the distinction is legally clear, in practice, this can present some challenges.

[79] In some cases, the same underlying set of events and facts could give rise to two or more different complaint processes, raising distinct legal questions and ending up before different decision makers.

[80] As already noted, in this particular case, the question of whether Mr. Burlacu was subjected to workplace violence is the issue of his workplace-violence notice of February 19, 2019, which is to be investigated by a competent person. The question of whether there was a danger in the workplace justifying Mr. Burlacu's refusal of work on March 5, 2019, went through three stages of investigation, ultimately ending up before the Occupational Health and Safety Tribunal of Canada in *Burlacu 2021 (OHSTC)*. Mr. Burlacu's complaints of harassment have been the subjects of grievances denied by the CBSA. He has sought judicial review of at least one of those grievance decisions before the Federal Court, and that matter is now being appealed before the Federal Court of Appeal.

[81] When there are distinctive processes emerging from the same set of events, the Board must sort out which events relate to the provisions set out at s. 147 of the *Code* from those that are not relevant to it. At the same time, it must avoid reaching conclusions on matters that must be decided by other decision makers.

[82] The respondent argued that the standard test applied by the Board in complaints involving s. 133 of the *Code* was established in *Vallée* at para. 64, which reads as follows:

> *64 Thus, the complainant would have to demonstrate that:*
>
> *1. he exercised his rights under Part II of the* [*Code*] *(section 147);*
>
> *2. he suffered reprisals (sections 133 and 147 of the* [*Code*]*);*

> *3. these reprisals are of a disciplinary nature, as defined in the* [*Code*] *(section 147); and*
>
> *4. there is a direct link between his exercising of his rights and the actions taken against him.*

[83] The respondent noted that the complainant in *Vallée* had not exercised his right to refuse unsafe work, and therefore, the reverse burden of proof did not apply in that matter. It argued that in the context of a complaint made under s. 133 of the *Code* in relation with a s. 128 work refusal, the test set out in *White v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 63 "*White 2013*", would apply. That test, at paragraph 142, reads as follows:

> *142 The burden established by subsection 133(6) of the* Code*, which is proving that a contravention of section 147 did not occur, will be satisfied by the respondent if it can establish any one of the following:*
>
> *1. The complainant did not act in accordance with section 128.*
>
> *2. The respondent neither disciplined nor financially penalized the complainant.*
>
> *3. If the respondent either disciplined or financially penalized the complainant, it was not in any way related to the complainant exercising his rights under section 128 of the* Code*.*

[84] The complainant argued that *Vallée* should not be applied because of the issue of the reserve burden of proof. He did not dispute the use of *White 2013* as the test for his complaint, except that he argued that steps 2 and 3 would need to be broadened to include the threat of discipline and not limited to situations involving a financial penalty. He agreed with the third criterion in *White 2013* and said that in this case, the respondent must demonstrate that the threat of discipline is "not in any way related" to the exercising of his rights under the *Code*.

[85] The complainant argued the Board could also use an alternative test, similar to *White 2013*, set out as follows by the Canada Industrial Relations Board (CIRB) in *Bah v. Royal Bank of Canada*, 2018 CIRB 867 at para. 33:

> *[33] Thus, the* [CIRB] *must determine whether the employer took retaliatory action, which is prohibited under section 147 of the* Code*. In* Paquet*, 2013 CIRB 691, the* [CIRB] *established a three-step analysis to determine whether a violation of section 147 of*

> *the* Code *has occurred. If we apply these steps to this matter, the following questions arise:*
>
> - *Did the employer impose, or threaten to impose, discipline on the complainant?*
> - *Was the complainant participating in a process under Part II of the* Code*?*
> - *Did a nexus exist between the Part II process and the disciplinary action?*

[86] I disagree with the complainant that *Vallée* is to be dispensed with as a test simply because that case did not involve a reverse onus on the respondent. *Vallée* has been applied by this Board in many cases in which the reverse onus did apply. See, for example, *Martin-Ivie v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 40 at para. 75, *Nash v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 4 at para. 77, *Vanegas v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 60 at para. 65, and *Pezze v. Treasury Board (Department of Natural Resources)*, 2020 FPSLREB 37 at para. 7.

[87] At the same time, I agree that *Vallée* has some limitations. The wording of the first and fourth criteria in *Vallée* are too narrowly focused on the "exercising of … rights" under Part II of the *Code*. While the first part of s. 147 does speak about the exercising of rights, the latter part of s. 147 prohibits reprisals when an employee "… **has acted in accordance with this Part** or has sought the enforcement of any of the provisions of this Part" [emphasis added] (see s. 147(c)). The enquiry with regards to the first and fourth criteria of *Vallée* must therefore encompass **any actions** taken in accordance with, or in furtherance of, Part II of the *Code*, not just those that involve the exercising of rights.

[88] I note that the third criterion in *Vallée* is also narrower than the wording of s. 147, which speaks not only of reprisals, but of **threat** of reprisals. As argued by the complainant, this is also a limitation of the second criterion set out in *White 2013*. In that regard, it is also important to note that not all reprisals are financial in nature. I agree with the principle articulated in *Chaves v. Treasury Board (Correctional Service Canada)*, 2005 PSLRB 45, in which the Board concluded, at paragraph 72, as follows:

> *[72] … The intent and goal of the* [*Code* provisions] *are to ensure a safe workplace for employees and the "whistle blowing" provisions of the* [*Code*] *would be rendered meaningless if the employer were*

> *allowed to take action against an employee, as long as that action did not result in a financial penalty for the employee.*

[89] However, when it comes to the critical fourth criterion in *Vallée*, I think that the preponderance of the case law favours the careful consideration of whether a **direct** link exists between the exercise of rights or taking of action under the *Code* and a respondent's alleged reprisal action. In other words, as stated in section 147 of the *Code*, the question is whether an employer has taken the alleged retaliatory action because an employee has acted in accordance with, or in furtherance of, Part II of the *Code*. Thus, I find that the fourth criterion in *Vallée* is more appropriate than the third criterion in *White 2013*, which requires the respondent to demonstrate that the discipline "… was **not in any way related** to the complainant exercising his rights under section 128 of the *Code*" [emphasis added] (at paragraph 142).

[90] It is worth noting that the Board in *White 2013* did not actually apply that criterion to the matter before it. The Board rejected the complaint at step 1 of its three-part test on the basis that Mr. White had no reasonable cause to refuse work (see paragraph 179). Therefore, no one actually knows if the Board would have applied the third criterion in *White 2013* differently than the fourth criterion in *Vallée*.

[91] For similar reasons, I think the third criterion in *Bah* ("Did a nexus exist between the Part II process and the disciplinary action?"; at paragraph 33) must be considered in light of the actual wording of s. 147. More is required than simply "a nexus". Section 147 states that an employer is prohibited from making a reprisal "… **because** the employee … (c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part" [emphasis added]. This is more than simply establishing a relationship between the two events. What is required is a careful weighing of the facts to see whether there is a **causal** link between the discipline made or threatened and the employee's exercise of rights under the *Code*, or his or her other actions taken under the *Code*.

[92] This approach is reflected in the preponderance of the case law I have considered. For example, in *Vanegas*, at para. 67, the Board applied *Vallée* and stated, "Retaliatory action must however be **inextricably linked** to the complainant's exercise of her rights under section 128 of the [*Code*] …" [emphasis added]. In that case, a correctional officer who participated in a work refusal was required to stay on site for a period of 45 minutes, cutting into her scheduled vacation time. The Board concluded

that this action was neither retaliatory in nature nor an act of reprisal (see paragraph 75).

[93] In *Pezze* (at paragraph 43), the Board confirmed that close proximity in time between the exercise of a right under the *Code* and the administration of discipline is not, in and of itself, proof of a violation of s. 147. That complaint was about a letter of discipline issued at the time of a work refusal under the *Code*. However, as the Board determined, the letter was not linked to the work refusal but was issued for unprofessional and disrespectful comments.

[94] The Board in *Pezze* followed an earlier decision, *Sousa-Dias v. Treasury Board (Canada Border Services Agency)*, 2017 PSLREB 62, in which Mr. Sousa-Dias had received a one-day suspension for refusing to attend a meeting to discuss a work refusal. In that decision, the Board concluded that the discipline was for insubordination and that it was linked to a poor labour-management environment, and it stated, "This lack of respect carried over into the work-refusal process but was not linked to that process" (at paragraph 131).

[95] In *Martin-Ivie*, the Board allowed the complaint made under s. 133 of the *Code*. Nevertheless, in the reasoning, the Board distinguished a reprisal prohibited under s. 147 from discipline administered when an employee violates an employer's code of conduct, at paragraph 59, as follows:

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

[96] Having considered the parties' arguments, the wording of s. 147 of the *Code*, and the case law, I find it more useful to reformulate and simplify the principles in *Vallée* as follows:

1. Has the complainant acted in accordance with Part II of the Code or sought the enforcement of any of the provisions of that Part (section 147)?
2. Has the respondent taken against the complainant an action prohibited by section 147 of the Code (sections 133 and 147)? and

3. Is there a direct link between (a) the action taken against the complainant and (b) the complainant acting in accordance with Part II of the Code or seeking the enforcement of any of the provisions of that Part?

**B. Burden of proof**

[97] In this matter, there is no dispute between the parties that the complainant has properly invoked, pursuant to s. 128(1)(c) of the *Code*, his right to refuse work that he believed to be a danger and that he has notified his employer of that, pursuant to s. 128(6). Further, there is no dispute between the parties that the burden of proof in this matter lies with the respondent, pursuant to s. 133(6). Procedurally, the case proceeded on that basis, with the respondent leading in both evidence and argument.

**C. Mr. Burlacu's actions in accordance with, or in furtherance of, Part II of the *Code***

[98] As discussed, there is no dispute between the parties that Mr. Burlacu exercised his rights under the *Code*, meeting criterion #1. On February 19, 2019, he reported workplace violence, which at the time was provided for in Part XX of the *Canada Occupational Health and Safety Regulations*. (The *Code* has since been amended to provide for a right to complain about workplace violence).

[99] Furthermore, on March 4, 2019, Mr. Burlacu exercised his right to refuse work he considered a danger to his health and safety.

[100] On March 8, 2019, after several email exchanges between Mr. Burlacu and Mr. LeFrank, the complainant accepted as an interim and temporary solution the change in reporting relationship to Mr. Bush and abandoned his work refusal. However, on March 13, 2019, after a further exchange of emails about the status of his work refusal, the complainant reiterated his right to refuse dangerous work. That work refusal was still in place on March 19, when Mr. LeFrank ordered Mr. Burlacu to report to Mr. Bush or face possible disciplinary action.

[101] As I have already concluded, given that a work refusal was in place, the reverse burden of proof as outlined in s. 133(6) applies. There is no dispute between the parties on that point.

**D. Mr. LeFrank's threat of discipline**

[102] The respondent argued that Mr. LeFrank's email of March 19, 2019, was not a threat of discipline but merely a "caution" of the consequences Mr. Burlacu would face

if he continued to challenge the change in reporting relationship to Mr. Bush. This argument was related directly to Mr. LeFrank's testimony about the intention of his email. He testified that he wanted to caution Mr. Burlacu about the importance of following the directions he was providing, as his supervisor. It cited *Nash*, at paras. 79 to 81, for authority that an employer can caution an employee for refusing to perform duties and for the principle that the Board can distinguish between a threat and a caution.

[103] The complainant argued that after receiving Mr. LeFrank's email, he had no choice but to comply with it. He perceived the email as a threat, and in email communications to Mr. LeFrank on March 24 and 25, 2019, he described it as a threat. Mr. LeFrank never corrected his characterization of the email as a threat; at the time of the events, Mr. LeFrank could have clarified his statement as a caution but did not.

[104] For the purposes of applying the second criterion set out earlier in this decision, I find that there is little to distinguish a "caution" from a "threat". The issue that I have to determine is whether the respondent has taken against the complainant an action prohibited by section 147 of the *Code*. What Mr. LeFrank called a caution, Mr. Burlacu took as a threat. Either way, the result is the same: "If you continue with X behaviour, I may impose result Y on you."

[105] I find that the email of March 19, 2019, amounted to an action prohibited by section 147 of the *Code*, meeting the second criterion set out earlier. The respondent's argument about Mr. LeFrank's intent behind the email are best taken up during the third and final part of the analysis.

### E. Is there a direct link between the caution given by Mr. LeFrank if Mr. Burlacu continued to resist the change in reporting relationship and Mr. Burlacu's refusal to work?

[106] I turn now to the heart of this matter, which is whether there is a direct link between the threat contained in Mr. LeFrank's email and Mr. Burlacu's actions in accordance with, or furtherance of, Part II of the *Code*. As discussed, given the reverse onus that applies to the respondent, it was up to the respondent to demonstrate that, on a balance of probabilities, the threat was **not made** because Mr. Burlacu had exercised his right to refuse work that he considered dangerous.

[107] It is useful to repeat the key phrases in Mr. LeFrank's email to the complainant of March 19, 2019: "The situation is clear. You will report immediately to Mr. Bush. Failure to comply with this direction may result in disciplinary action as I find it to be insubordination."

[108] Were I to follow the third criterion set out in *White 2013* and *Bah*, as argued by the complainant, the respondent might have a harder time meeting its burden. Following Mr. Burlacu's workplace-violence notice and his subsequent work refusal, he and Mr. LeFrank engaged in extended discussions, both in person and by email, about the interim measures to be put into place to provide the complainant with a safe work environment. These discussions touched on the reasons for Mr. Burlacu's actions under the *Code* and the employer's obligations and authorities under the *Code*. The March 19 email was, effectively, the culmination of those discussions. To suggest that the email was "not in any way related" to the issues about the *Code* or that "a nexus" did not exist between the threat of discipline and Mr. Burlacu's exercise of rights would fly in the face of these basic facts.

[109] However, the issue is whether there is a **causation**, or put in the words used in s. 147 of the *Code*, whether the threat of discipline was **because** Mr. Burlacu was acting in accordance with, or in furtherance of, Part II of the *Code*.

[110] I find that the respondent has met the burden of demonstrating that there is not a causal link between the threat of discipline in this case and Mr. Burlacu's actions in accordance with, or in furtherance of, Part II of the *Code*, for the following reasons.

[111] First, I consider the context of Mr. LeFrank's email and the words he used in it. Once it became clear that Ms. Spicer and Mr. Ghaani were related to the workplace-violence notice, Mr. LeFrank sought to put into place a change in reporting relationship. In meetings and via several emails, Mr. Burlacu sought other alternatives, such as reporting directly to Mr. LeFrank or being granted leave with pay, but Mr. LeFrank did not approve of those. He decided that Mr. Burlacu should report to Mr. Bush. During the exchange of several other emails, they then discussed the terms of that reporting relationship. On March 8, the complainant agreed to the change in reporting relationship as a temporary and interim measure and abandoned his work refusal. However, after Mr. LeFrank's email of March 12, in which he sought clarification on the status of the work refusal, Mr. Burlacu reiterated his work refusal

and began to question Mr. LeFrank again on why the change in reporting relationship was required. His emails said that he would not report to Mr. Bush unless there was a direct order to do so.

[112] What the context shows is that the threat of discipline was made following a prolonged exchange of emails between the 2 men in which Mr. Burlacu continued to question or challenge the change in reporting relationship to Mr. Bush and Mr. LeFrank's managerial authority to do so. This occurred multiple times over a period of nearly 2 weeks, even after Mr. Burlacu said that he would require a direct order and after Mr. LeFrank made that direct order. The last email from Mr. Burlacu was sent on March 19, 2019, at 5:41 p.m., and Mr. LeFrank's reply came 13 minutes later. The words he used were precise. He clearly conveyed to Mr. Burlacu the unambiguous direction to report to Mr. Bush. And he said, "Failure to comply with this direction may result in disciplinary action as I find it to be insubordination."

[113] On the basis of their plain meaning, and when considered in context, what the words used to convey Mr. LeFrank's direction in the email suggest is that the threat of discipline was made because Mr. LeFrank found Mr. Burlacu's behaviour to be insubordinate.

[114] I wish to emphasize that the question in front of me is not whether Mr. Burlacu's behaviour **was** insubordinate. I need not conclude that his behaviour was insubordinate; nor do I need to assess whether Mr. LeFrank's view of the situation was justified. Rather, the issue that I must determine is whether the threat of discipline was **because** Mr. Burlacu was acting in accordance with, or in furtherance of, Part II of the *Code*. On that point, I find Mr. LeFrank's testimony to be credible with regards to his considering that Mr. Burlacu was insubordinate at the time.

[115] Second, I take account of Mr. LeFrank's testimony that he was not in any way trying to dissuade the complainant from refusing work or acting in accordance with, or in furtherance of, Part II of the *Code*. While he did not fully understand why Mr. Burlacu felt that he had been subjected to workplace violence, once he knew who was involved, he began searching for an alternative reporting relationship. Once the work refusal was made, the change was put into place as soon as possible. Mr. LeFrank testified that there were a limited number of options, as there were only four managers

to choose from, and that he wanted someone with strong management experience to supervise Mr. Burlacu, as well as a meaningful work situation for him.

[116] According to Mr. LeFrank, the reason for the change in reporting relationship was to separate Mr. Burlacu from those managers who related to the workplace-violence notice: Ms. Spicer and Mr. Ghaani. The need for the change was reinforced after Mr. Burlacu alleged that the reasons for his work refusal were inextricably linked with the workplace-violence notice.

[117] I find Mr. LeFrank's explanation of his intentions credible and plausible. He wanted Mr. Burlacu to be working and sought to temporarily separate him from his former managers. He thought that the reporting relationship to Mr. Bush would provide a safe working environment. I note that Mr. Burlacu never said that reporting to Mr. Bush represented a potential danger. Nor did he name Mr. Bush as a person related to his workplace-violence notice. Nor was Mr. Bush named as a respondent in any of the harassment complaints.

[118] Quite simply, in light of all the circumstances put in evidence before the Board, I find it more probable than not that Mr. LeFrank wanted Mr. Burlacu to comply with the direction to report to Mr. Bush, and his threat of discipline was made because of Mr. Burlacu's continued resistance to that direction. I do find that the tone of his email conveys a sense of exasperation about the ongoing nature of Mr. Burlacu's emails about the interim solution. However, I do not find that surprising, particularly looking at it in hindsight in that the exchange happened within the last 10 business days of Mr. LeFrank's career with the CBSA.

[119] I note as well that Mr. LeFrank's testimony was made as a retired person, three years after the events in question. Despite that, he testified with clarity about his intentions in the decisions he made in 2019 and nevertheless said that he fully supports Mr. Burlacu's right to seek recourse under the *Code* and before this Board. Nothing in the evidence before the Board puts that testimony into question.

[120] Third, I wish to highlight Mr. Burlacu's testimony about the issue of CBSA management viewing his behaviour as insubordinate. In his testimony, he referenced Mr. Ghaani's threat of discipline in their discussion of his leave requests in their exchange of emails from February 7 to 13, 2019. He also brought me to the content of the harassment complaint he made on March 27, 2019, against Ms. Spicer. That

complaint, which, including attachments, numbered some 45 pages in length, covered a period from September of 2017 through January of 2019. In very general terms, the complaint concerns Ms. Spicer's approach to managing Mr. Burlacu, and many conflicts with respect to management's approval or rejection of leave requests made by the complainant. Within the complaint, he alleged that some CBSA Labour Relations staff had exchanged emails that stated that he "… often questions management decisions to the point of near insubordination." He alleged that Labour Relation's perception of him was shared with Ms. Spicer. He alleged that Ms. Spicer wrote an email in September 2018, accusing him of "bordering on insubordination". He also included some of these same allegations in a harassment complaint made on January 31, 2019, against the two Labour Relations staff members involved in that exchange of emails.

[121] He argued that while Mr. LeFrank might not have seen those documents before March 19, 2019, he should have at least been aware of the fact that some managers and Labour Relations staff had seen the complainant's behaviour as insubordinate and that therefore, he would take the threat of discipline seriously.

[122] In my assessment, Mr. Burlacu's evidence and argument on this point further suggest a causal nexus between the threat of discipline and Mr. LeFrank's opinion that Mr. Burlacu was being insubordinate. Consequently, they reinforce the respondent's contention that the threat of discipline was because of perceived insubordination and not related to the complainant's actions under the *Code*.

[123] Again, I make no assessment of whether Mr. Burlacu's behaviour amounted to insubordination. As Mr. Burlacu himself testified, he was not actually disciplined by the CBSA at the time for insubordination or since. The issue in this case is only to establish the cause behind Mr. LeFrank's threat of discipline.

[124] The respondent cited *Nash* for its arguments that Mr. LeFrank's email was merely a caution and that a caution about not reporting to work should not be considered disciplinary. Although I have found Mr. LeFrank's email to be more than a caution, *Nash* is nevertheless instructive about the legitimacy of an employer directing an employee to work, even in the context of the exercising of a right to refuse dangerous work. The following passage from *Nash*, at para. 82, is analogous to the situation in this case:

> ***82*** *A disciplinary sanction must at least have the potential to prejudicially affect an employee. In this case, the grievor being cautioned that if he refused to do any work, and not just that for which he had exercised his rights under the* Code*, he would be sent home, in my opinion is not disciplinary in the context of either of the work refusals.* ***A reasonable employer can expect an employee in the workplace to perform the duties of his or her position. A failure on the employee's part to meet his or her employment obligations warrants a caution that he or she may end up without pay for that failure.*** *Such a caution is not disciplinary. Furthermore, the employer was entitled to assign legitimate work to the grievor regardless of whether or not he had previously invoked his rights under the* Code *in relation to other work.*
>
> [Emphasis added]

[125] For similar conclusions, see also *Vanegas*, at para. 77, *Nash*, at para. 86, *Sousa-Dias*, at para. 130, and *Pezze*, at para. 42.

[126] Although the employer bears the burden of disproving the complaint in this case, the complainant nevertheless made a series of arguments in response to those of the respondent to try to establish that there was indeed a direct relationship between the threat of discipline and his acting in accordance with, or in furtherance of, Part II of the *Code*. However, the issue before me is whether the threat of discipline was **because** Mr. Burlacu was acting in accordance with, or in furtherance of, Part II of the *Code*. Many of these arguments relate to the larger events surrounding the workplace conflict. I find that most of these arguments are not relevant to the issues before me; those that are relevant do not change my assessment. Rather than taking these in the order presented by Mr. Burlacu, I will try to take these roughly in chronological order.

[127] First, the complainant argued that Mr. LeFrank unnecessarily delayed putting into place temporary measures after the workplace-violence notice was made. The complaint was made on February 19, and the first time the reporting relationship to Mr. Bush was mentioned in an email was March 8. This undermines Mr. LeFrank's explanation of the reasons for the change in reporting relationship, the complainant argued. He referenced *Stiermann v. Treasury Board (Department of Industry)*, 2019 FPSLREB 52 at para. 53, for the principle that following a workplace-violence notice, an employer must act quickly. If the purpose was to keep him safe, given the workplace-violence notice, why the delay?

[128] I do not find the delay significant. After his workplace-violence notice, Mr. Burlacu was granted leave for February 19 and 20. He was in the office on February 21 and 22, during which time he met twice with Mr. LeFrank. He was on a compressed workday off on February 25 and on sick leave from February 26 to March 2. On Monday, March 4, he returned to work, and only at that time did he tell Mr. LeFrank who were the persons involved in his workplace-violence notice. He filed a work refusal the same day. The reporting relationship to Mr. Bush was detailed in Mr. LeFrank's email to Mr. Burlacu of March 5, 2019, at 3:47 p.m. Even if this were a significant delay, I do not see how this would help shed any light on the reasons for Mr. LeFrank's threat of discipline.

[129] Second, the complainant challenged Mr. LeFrank's reasons for not granting him the alternative of leave with pay, at least pending the outcome of the informal-conflict-management process. Mr. LeFrank had written and testified that he did not have authority to grant such leave. But he could not name a document that limited his authority, the complainant argued. He added that leave could have been granted under the collective agreement and argued that before Mr. LeFrank did something the law prohibited (forcing a change in reporting relationship), he should have done everything the law allowed (granting leave with pay). Instead, he imposed the reporting relationship to Mr. Bush, Mr. Burlacu argued.

[130] I do not find this argument relevant to the issue before me. Mr. Burlacu had the option of filing a grievance if he felt that the denial of his leave request was unreasonable. An employer's interpretation and application of the collective agreement can always be challenged by way of a grievance, with the employee's bargaining agent's support.

[131] Third, the complainant argued that he made a reasonable proposal to report directly to Mr. LeFrank as an interim measure. Mr. LeFrank testified that he did not agree to the direct report because he already had a large number of direct and indirect reports, he did not think that he could respond quickly enough to the volume of emails, and he did not want to jeopardize the informal-conflict-management session scheduled for late March 2019, in which he would be representing the CBSA in an effort to resolve Mr. Burlacu's disputes.

[132] In my view, Mr. LeFrank's reasons for not accepting a direct reporting relationship seem perfectly reasonable, particularly given his pending retirement. Nevertheless, I do not find this argument relevant to the issue before me. I am not seized with a grievance about Mr. Burlacu having to report to Mr. Bush. Nor am I seized with a grievance that challenges the authority of Mr. LeFrank to make a change in reporting relationship to Mr. Bush. Mr. Burlacu suggested that such a change might be in violation of his appointment under the *PSEA*, but that has no bearing on the issue before me, which is whether the threat of discipline was **because** Mr. Burlacu was acting in accordance with, or in furtherance of, Part II of the *Code*. The interpretation or application of the *PSEA* cannot help to answer that question.

[133] Fourth, the complainant argued that Mr. LeFrank failed to properly explain why the change in reporting relationship was consistent with the employer's rights and responsibilities under the *Code*. He referred to their email exchanges of March 5 to 19, 2019. In those, Mr. LeFrank first cited s. 129(5), but Mr. Burlacu pointed out that that section applies only to the exercise of rights under s. 129, not those under s. 128. Mr. LeFrank then pointed out what he called the "general duty clause" at s. 124 of the *Code*, which reads, "[the] employer shall ensure that the health and safety at work of every person employed by the employer is protected." Mr. Burlacu challenged Mr. LeFrank's assumption that the duty listed in s. 124 provided him with the authority to remove the complainant from his position. Mr. LeFrank also cited s. 128.1(3) as authority. Mr. Burlacu argued that this section applies only to workers on shift, which did not apply to his case.

[134] There is no doubt in my mind that Mr. Burlacu had closely studied the *Code* and that during his email exchanges with Mr. LeFrank, he demonstrated a better understanding of some of its details. However, whether or not the employer had the authority to make the change in reporting relationship does not help determining whether the threat of discipline was **because** Mr. Burlacu was acting in accordance with, or in furtherance of, Part II of the *Code*. Mr. Burlacu clearly was seeking alternative solutions to a change in reporting relationship, but ultimately, it is up to management to put into place a temporary solution when faced with a workplace-violence notice. The Board is not seized with either assessing Mr. LeFrank's understanding of the nuances of the *Code* or assessing whether the solution chosen was the best one under the circumstances. The complainant's argument sheds no light

on the issue before the Board. Further, Mr. Burlacu could have challenged the exercise of Mr. LeFrank's managerial authority by way of a grievance.

[135] Fifth, the complainant argued that I should consider the subject line of Mr. LeFrank's email of March 19, 2019: "Re: Continued refusal – subsection 128(9) of the Canada Labour Code". This establishes a clear link between the threat of discipline and his actions in accordance with, or in furtherance of, Part II of the *Code*, he said.

[136] I disagree. The entire email chain entered into evidence, from March 5 to 19, 2019, consisted of 12 emails, each of which was clearly linked to the one before it. When the email chain started, with an email written by Mr. LeFrank, the subject line was blank. The subject line in question was added by the complainant himself in one of his response emails. The subject line does not change my assessment that Mr. LeFrank's threat of discipline was because of perceived insubordination.

[137] Sixth, the complainant argued that in the further exchange of emails between him and Mr. LeFrank on March 24 and 25, 2019, he clearly articulated his view that he had compiled with reporting to Mr. Bush only because Mr. LeFrank had made a threat of discipline, in violation of the *Code*. He argued that if Mr. LeFrank had not intended to make a threat, he should have corrected the record then. This is evidence of a direct link between the threat of discipline and his actions in accordance with, or in furtherance of, Part II of the *Code*, he argued.

[138] I disagree. Mr. LeFrank could not recall the final one of those emails, which is not surprising given the fact that at the time, he was in his last days of work for the CBSA, and given the passage of time. Even if he had fully absorbed the content of Mr. Burlacu's emails, I place no value in his failure to try to change Mr. Burlacu's views. The actual subject being discussed by Mr. Burlacu and Mr. LeFrank in those emails was whether the work refusal was still in effect and whether it would then be referred to the Work Place Health and Safety Committee for review.

[139] Seventh, the complainant argued that Mr. LeFrank had no reason to send the email he did on March 12, 2019, except that he was trying to force a finding that there was no danger in the workplace, and that this intention was confirmed in the events that followed their March 24 and 25, 2019, exchange. On March 8, Mr. Burlacu had abandoned his work refusal; on March 11, he started reporting to Mr. Bush. The issue should have ended there, he argued. The fact that it did not end there demonstrated

that Mr. LeFrank was trying not to protect his health and safety but to compel him into an agreement that the workplace did not represent a danger, he said. He argued that Mr. LeFrank was engaged in a deliberate attempt to achieve a finding of "no danger", because the ministerial designate at Labour Program could rule "no danger" because there had been a temporary measure put in place. It was for those reasons that he refused to agree to the temporary measure and reiterated his work refusal. Throughout the process, Mr. LeFrank did not properly follow the provisions of the *Code*, and included in these errors was the threat of discipline made on March 19, the complainant argued.

[140] The respondent argued that Mr. LeFrank was making his best effort to be compliant with the *Code*. He wanted to ensure that Mr. Burlacu agreed that the work refusal was resolved, because if not, he wanted to refer the matter to the Work Place Health and Safety Committee and later the ministerial designate at the Labour Program. Mr. Burlacu's response of March 13 made it clear that the issue was not resolved, and there was a point of urgency in ensuring a safer work environment through the change in reporting relationship.

[141] Sorting out this exchange of emails and the events that follow would involve covering much of the same events and arguments made before the Occupational Health and Safety Tribunal of Canada in *Burlacu 2021 (OHSTC)*. That decision already clarifies the appropriate distinction between the workplace-violence-notice process and the work-refusal process (see paragraph 66). That decision also contains a conclusion that Mr. Burlacu demonstrates a remarkable technical understanding of the provisions of the *Code* (see paragraph 67), a conclusion I fully concur with. His understanding prevailed before that tribunal, which determined that the ministerial designate at the Labour Program did not have jurisdiction to reach a finding of "no danger" because only Mr. Burlacu can make the proper referral to the ministerial delegate. In essence, what the decision says is that it was not up to Mr. LeFrank to move the work refusal through to that stage; doing so would have been Mr. Burlacu's decision.

[142] Does that conclusion undermine the respondent's argument that Mr. LeFrank's email of March 19, 2019, was not because of Mr. Burlacu's actions in accordance with, or in furtherance of, Part II of the *Code*? I do not find that it does. It is useful to review the first major paragraph in Mr. LeFrank's email of March 12, 2019, which reads as follows:

…

> *As a point of clarification, having received my work refusal stage one investigation report are you agreeing with my findings that there is no danger in which case there would be no need for an interim temporary reporting arrangement or do you disagree with my findings, continue to require an interim temporary arrangement, and the work refusal continues for the regular reporting relationship of your substantive position? This is important for me to know in order to refer your work refusal to a labour investigator that will likely conclude more quickly than the violence in the workplace complaint.*

…

[143] Mr. LeFrank testified that while he did not completely understand why Mr. Burlacu felt that he was subject to workplace violence, or why his work was dangerous, he accepted that that is how Mr. Burlacu felt. He wanted to have the issue resolved, and in the meantime, he wanted Mr. Burlacu to have a safe work environment. His email of March 12 reflected a motivation of obtaining a third-party conclusion more quickly. That might not have been the best choice of action, but, on a balance of probabilities, I can find no malice in it or any attempt on Mr. LeFrank's part to stop Mr. Burlacu from acting in accordance with, or in furtherance of, Part II of the *Code*. Furthermore, while Mr. Burlacu's emails of March 24 and 25 did not request the referral of the work refusal to the Labour Program, they also expressed a clear disagreement with the finding of "No Danger". Once again, I accept Mr. LeFrank's testimony that he was looking for a solution, taking into account both the workplace-violence notice and the work refusal, even though the processes were different. I find it more probable than not that he wanted the interim reporting solution in place until a resolution could be found, and he wanted to see the issue resolved as quickly as possible.

[144] Eighth, the complainant argued that subsequent changes made in reporting relationships at the CBSA reveal that the order that he report to Mr. Bush was not made in his best interests. He testified that in June of 2019, Ms. Spicer was made the acting director general for two weeks. As the director general, she oversaw Mr. Bush, which placed Mr. Burlacu back into an indirect report relationship to her. The CBSA did not proactively address this. Mr. Burlacu had to raise it as an issue, he said. Rather than granting him leave with pay for a week, it made yet another reporting change. This indicates that the CBSA was not interested in his health and safety, he argued. A similar issue happened in the fall of 2019, he said, when Ms. Spicer was placed in an

acting vice-president role at the CBSA for two weeks. No protective measures were put into place then, he argued.

[145] I am entirely unconvinced that changes in reporting relationships made by the CBSA in June and November of 2019 shed any light on whether Mr. LeFrank violated s. 147 of the *Code* in March of 2019. Mr. Burlacu clearly had concerns about being brought back into an indirect reporting relationship with Ms. Spicer, and he had opportunities to raise those concerns. Whether or not the CBSA's actions after the complaint at hand was filed on April 30, 2019, were appropriate or sufficient is not an issue before me. These events occurred entirely after the facts relevant to this case. Further, there is no evidence before me to suggest that Mr. LeFrank was aware of any CBSA's possible later actions at the time of his March 19, 2019, email.

[146] Ninth, reference was made during the course of testimony to the fact that there have been significant delays commencing an investigation of Mr. Burlacu's February 19, 2019, workplace-violence notice. At the time of the hearing, an investigation of the complaint by a competent person had still not commenced. Testimony revealed that there were delays in the selection of a competent person and that although a person has been found, at the time of the hearing, there remained outstanding issues with respect to starting the investigation.

[147] While a delay of this duration may not be ideal, the full facts and causes of that delay are not relevant to the determination of this complaint, which is about whether the threat of discipline was **because** Mr. Burlacu was acting in accordance with, or in furtherance of, Part II of the *Code*.

[148] In this matter, the respondent bore the burden of proving that its threat of discipline was not because the complainant was acting in accordance with, or in furtherance of, Part II of the *Code*. I am satisfied that on a balance of probabilities, the threat of discipline was made because Mr. LeFrank felt that Mr. Burlacu's ongoing resistance to reporting to Mr. Bush amounted to insubordination. The threat was not made because the complainant was acting in accordance with, or in furtherance of, Part II of the *Code*. None of the complainant's multiple arguments that he has been subject to several forms of injustice at the hands of the CBSA have discredited the respondent's evidence. As such, I find the respondent has established that it did not violate s. 147 of the *Code*.

[149] Because of the Board's limited mandate under the *Code*, it is not my role to get to the heart of the conflict Mr. Burlacu has with his employer. Much of it appears to be rooted in how his managers responded to his leave requests, with either denials or challenges to his requests, and to other questions of how his work was being managed. Whether this amounted to workplace violence is a question to be addressed by the competent person.

[150] What is not clear is why Mr. Burlacu so strongly resisted reporting to Mr. Bush. Mr. Burlacu never alleged that he was or would be subject to workplace violence or harassment at the hands of Mr. Bush. On March 8, 2019, Mr. Burlacu accepted reporting to Mr. Bush as an interim measure and abandoned his work refusal. He then reiterated the work refusal on March 13, 2019, not because of any allegation that Mr. Bush represented a danger but because he disagreed with the content and questions of Mr. LeFrank's email of March 12, 2019. He then strenuously resisted the change in reporting relationship multiple times over a period of several days. Mr. LeFrank felt that that resistance amounted to insubordination, which is why he stated that he would consider discipline if Mr. Burlacu continued to resist.

[151] Mr. Burlacu stated that he did not want to be "pushed out of [his] unit", but it is not clear whether he made a complaint about that. This is not such a complaint. Ultimately, the only clarity I could find is that Mr. Burlacu thought that the CBSA should have sought other alternative solutions to his complaints, such as allowing him to report to Mr. LeFrank or placing him on leave with pay pending the results of a mediation or an investigation. He also suggested before me that instead of moving him to a new manager, the CBSA could have allowed him to stay in his position and could have reassigned Mr. Ghaani and Ms. Spicer to new positions.

[152] I take note of information provided by the respondent that Ms. Spicer and Mr. Ghaani are no longer in the positions they occupied when Mr. Burlacu made his workplace-violence notice. From that point of view, it indicated that there would be no risk to Mr. Burlacu were the Board to uphold his complaint and return him to his previous position. This is also not relevant to the determination of the issue before me.

[153] Mr. Burlacu has every right to seek recourse under the *Code* and through the grievance process, but he does not get to set the terms of how the employer responds to his many complaints and actions. The underlying fact is that he remains an

employee of the CBSA, and it has the right to expect him to work. Given his multiple complaints against his former managers, Mr. Ghaani and Ms. Spicer, it is to be entirely understandable that it would separate him from them while the process is underway to investigate and rule on his complaint.

[154] As I have noted, Mr. Burlacu has initiated multiple recourse processes in the form of complaints, grievances, and judicial reviews before different decision makers, all related to the same underlying issues affecting his work for the CBSA. This decision addresses only one small aspect of those issues.

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

*(The Order appears on the next page)*

## IV. Order

[156] The complaint is dismissed.

June 22, 2022.

**David Orfald,**
**a panel of the Federal Public Sector**
**Labour Relations and Employment Board**