Date: 20230403

Files: 560-02-43840 and 44576

Citation: 2023 FPSLREB 33

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

RYAN LETNES

Complainant

and

TREASURY BOARD (Royal Canadian Mounted Police)

Respondent

Indexed as
Letnes v. Treasury Board (Royal Canadian Mounted Police)

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

Before: James R. Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Alexandre Toso, counsel

Decided on the basis of written submissions,
filed December 16, 2022, and January 6 and 12, 2023.

REASONS FOR DECISION

I. Overview and background

[1] Ryan Letnes (“the complainant”) is a regular member of the Royal Canadian Mounted Police (“RCMP” or “the respondent”) at the rank of Sergeant.

[2] The complainant was absent on sick leave from December 18, 2018, until he was cleared to return to work on June 19, 2020, with medical limitations and restrictions set out in a medical profile document. While on sick leave, his security clearance lapsed, and he was required to take the necessary steps to renew it before returning to work. A valid security clearance is a condition of employment, and he could not return to work without it. He completed those requirements in May 2021, and his security clearance was reactivated in June 2021.

[3] The complainant was invited, in June of 2021, to attend the workplace to discuss his return to work. For several reasons, he stated he was unable to attend. In a series of teleconference and videoconference discussions, the respondent advised him that he also needed to complete 15 mandatory online training courses before returning to work. It was agreed that he could complete them from home, but he needed to attend the workplace to obtain the necessary tools to complete the courses online.

[4] The complainant attended the workplace on August 25, 2021, to reactivate his security pass and administrative accounts and to obtain a laptop computer to be used to complete the online courses. He also met with the unit commander, Superintendent Anick Pasqua.

[5] The complainant completed all the online courses by October 2, 2021.

[6] The complainant and the respondent then had more discussions about his return. The respondent directed him to report to work on November 10, 2021. He did not report on that date. In a telephone discussion on November 16, 2021, he was offered two work options. One was to work at the Green Timbers workplace, and the other was to work at the Port Kells workplace. During that discussion, the respondent directed him to attend the workplace on November 18, 2021, to discuss these options and to make the necessary arrangements to return to work.

[7] The complainant wrote an email dated November 17, 2021, in which he claimed that the Green Timbers workplace was an unsafe work environment, and he refused to attend it. He did not attend the workplace on November 18, 2021.

[8] On November 18, 2021, by email, the respondent directed the complainant to attend the Port Kells workplace on November 22, 2021.

[9] In an email to the respondent dated November 19, 2021, the complainant refused to attend the Port Kells workplace and did not attend on November 22, 2021.

[10] In fact, after August 25, 2021, the complainant has apparently never attended the workplace. In an email dated January 7, 2022, the respondent advised him that 272 hours of his annual leave would be deducted from his leave bank to account for his unauthorized absences between November 17, 2021, and January 7, 2022, as he had been paid despite not working and not being on approved sick leave.

[11] In his complaint made under the *Canada Labour Code* (R.S.C., 1985, c. L-2; *CLC*) and dated November 29, 2021, the complainant acknowledged his involvement in "… significant litigation dating back to 2018" with the respondent. He also referred to, among many other things, proceedings before the Canadian Human Rights Tribunal, "… an ongoing civil suit against the RCMP, multiple internal appeals and grievances as well as a constitutional challenge …"

[12] This *CLC* complaint carries Federal Public Sector Labour Relations and Employment Board ("the Board") file number 560-02-43840. (Note that in this decision, "the Board" refers to its current incarnation and any of its predecessors.)

[13] After the first complaint was made, the complainant and the respondent resumed their return-to-work discussions. The complainant continued to refuse to work, and on April 22, 2022, he made a second complaint under the *CLC*, which carries Board file number 560-02-44576.

[14] Both complaints were properly referred to the Board for adjudication and were scheduled to be heard from February 22 to 24, 2023, in Vancouver, British Columbia. In a case management conference held on Friday, December 2, 2022, the respondent signalled its intention to argue a preliminary motion to the effect that the complainant was not at work within the meaning of the *CLC* and therefore did not properly exercise a right to refuse to work under its s. 128.

[15] The complainant expected such a motion to be filed and was not surprised by it. He was prepared to respond to it. Owing to the nature of the motion and the nature of the pleadings both parties anticipated preparing, the Board ordered that the motion be heard by way of written submissions.

[16] Under s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Board is empowered to decide any matter before it without holding an oral hearing.

[17] Written submissions on the respondent's motion were received on December 16, 2022. The complainant supplied his written submissions on January 6, 2023. The respondent provided a brief rebuttal on January 12, 2023.

[18] For the reasons that follow, I find that the complainant was not at work when his complaints were made. Thus, he did not properly exercise his right to refuse to work under s. 128 of the *CLC*. Therefore, both complaints are dismissed.

II. Written submissions

A. For the respondent, December 16, 2022

[19] Section 133(1) of the *CLC* states 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 au Conseil au motif que son employeur a pris, à son endroit, des mesures contraires à l'article 147.*

[20] Section 147 of the *CLC* states as follows:

147 *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee*	***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 :*
(a) *has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*	***a)*** *soit il a témoigné — ou est sur le point de le faire — dans une poursuite intentée ou une enquête tenue sous le régime de la présente partie;*
(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*	***b)*** *soit il a fourni à une personne agissant dans l'exercice de fonctions attribuées par la présente partie un renseignement relatif aux conditions de travail touchant sa santé ou sa sécurité ou celles de ses compagnons de travail;*
(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.*

[21] The complaints were made under s. 128(1) of the *CLC*, which states 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:*
(a) *the use or operation of the machine or thing constitutes a danger to the employee or to another employee;*	***a)*** *l'utilisation ou le fonctionnement de la machine ou de la chose constitue un*

	danger pour lui-même ou un autre employé;
***(b)** a condition exists in the place that constitutes a danger to the employee; or*	***b)** il est dangereux pour lui de travailler dans le lieu;*
***(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.*

[22] The point of the respondent's preliminary motion lies in the first sentence, which states, "… if the employee **while at work** has reasonable cause to believe … [emphasis added]". The respondent submitted that the complainant was not at work when he made his complaints. It also submitted that by the complainant's own admission, he was engaged in activities that would eventually enable him to return to work, such as completing his security clearance documentation, completing 15 online training sessions, and attending the workplace to obtain access cards and a laptop computer for the purposes of completing those online courses. Only when he was instructed to attend the workplace to actually return to work did he initiate his claims of an unsafe workplace. The respondent repeated is assertion that one must actually **be** at work to engage s. 128 of the *CLC*, and the complainant was not.

[23] The respondent submitted *Green v. Deputy Head (Department of Indian Affairs and Northern Development)*, 2017 PSLREB 17 (*Green*), which states as follows at paragraph 446: "The grievor was clearly not at work when she refused to work, which is unquestionably a requirement set out in s. 128(1) of the *Code* as a precondition for a work refusal." (Note that "Code" in this and in all quotes in this decision means the *CLC*.)

[24] The respondent turned to *Saumier v. Canada (Attorney General)*, 2009 FCA 51 ("*Saumier FCA*"), in which the Federal Court of Appeal (FCA) dealt with a matter which the respondent argued was similar to this case. *Saumier FCA* involved an RCMP officer who was absent from work for medical reasons but was eventually cleared to return to work and was directed to do so. She refused based on s. 128 of the *CLC*, ostensibly to avoid aggravating her health. *Saumier FCA* reads as follows at paragraphs 6 and 7:

> *[6] Since her accident in 1993, the applicant has been off work on many occasions. She did not work from December 14, 1993, to*

May 1994. As of March 1998, she was limited to light duty and in August 2004, her employer amended her medical profile and decided that she was incapable of performing an RCMP constable's main tasks, but that she could carry out sedentary administrative tasks.

[7] On September 23, 2004, the applicant agreed to return to work based on a schedule that set her return for October 4, 2004, at which time she would work a five-day workweek of four-hour days. The schedule provided for an increase of one hour per day for every subsequent week, ending with eight-hour workdays at the end of a five-week period. The applicant's assigned duties were sedentary administrative tasks.

[25] The task for the Board, according to the Court in *Saumier FCA*, was as follows (see paragraph 47):

> *… to decide, prior to considering the merits of the complaint, whether the applicant could rely on section 128 in support of her refusal to work. According to the respondent, the applicant could not rely on said section, since the employee must be "at work" to be able to refuse "to work in a place or to perform an activity".*

[26] That, argued the respondent, is precisely the nature of what is before the Board in the present matter. In *Saumier FCA*, the Federal Court of Appeal concluded that the applicant's complaint was not admissible because she was not at work when she invoked s. 128(1) of the *CLC*. The FCA stressed the importance of examining the context when making that determination. At paragraphs 49 to 52:

> *[49] At paragraph 113 of his reasons, Board Member Guindon addressed this issue as follows:*
>
> > ***113****. Paragraphs 128(1)*(b) *and* (c) *of the* Code *provide that "while at work" an employee may refuse to work in a place if he or she has reasonable cause for believing that it is dangerous to the employee to work in that place or to perform an activity if he or she has reasonable cause to believe that performing the activity constitutes a danger to the employee or to another employee. The words "while at work" necessarily imply that an employee may not exercise a right to refuse to work when that employee is not at work. Consequently, the respondent was justified in not accepting that the refusal to work expressed by the complainant to Sergeants Génier and Bissonnette on September 22, 2005 was valid under the* Code*.* ***However, the complainant met that requirement when she appeared with S/Sgt. Delisle at the AFIS office in Dorval on September 27, 2005 to express her refusal to work to S/Sgt. Vaillancourt****.*

[Emphasis added]

> *[50] In my opinion, the Board member erred in making this finding. It cannot be denied that the applicant had been absent from work for several months, on sick leave, when she invoked section 128 of the Code in support of her refusal to work. The mere fact that the applicant reported physically to her employer's office on September 27, 2005, after several months' absence did not result in her being "at work" within the meaning of subsection 128(1) of the Code. In other words, an employee is not "at work" simply by virtue of reporting to her employer's office for a few minutes to give notice that she refuses to work for health reasons, regardless of the task or tasks to be assigned to her.*
>
> *[51] In the context, it is important to note that when the applicant reported to the office of her employer on September 27, 2005, accompanied by S/Sgt. Delisle, she indicated to her employer that she refused to work because she did not want to aggravate her health problems. More particularly, she indicated to S/Sgt. Vaillancourt, who had asked her to specify which duties she refused to perform, that she refused to work [TRANSLATION] "for her health". As well, on December 20, 2005, the applicant again reported to the office of her employer and indicated to Corporal Léo Mombourquette that she refused to work to avoid aggravating her medical condition.*
>
> *[52] Accordingly, the applicant's complaint was not admissible because she was not "at work" when she invoked subsection 128(1) of the Code in support of her refusal to work.*

[27] The respondent submitted that in the present case, the complainant has been away from work for even longer than the applicant was in *Saumier FCA*. The respondent submitted that clearly, he was not "at work" because he had not yet been assigned any duties and had been completing only the prerequisite online training courses in furtherance of an eventual return to work.

[28] Furthermore, argued the respondent, the complainant did not report for duty at any relevant time and has consistently refused to report for duty. The respondent urged the Board to consider the context in which the *CLC* complaints were made. The complainant has many outstanding issues with his employer, including accommodation issues and human-rights complaints. The right to refuse to work under the *CLC* cannot be co-opted in furtherance of other purposes, as the Canada Labour Relations Board (CLRB) noted as follows in *Simon v. Canada Post Corp.*, 1993 CarswellNat 1766 (*Simon*) at para. 23:

> *23 In its earlier decisions … the Board established that this right must not be used as a roundabout way of or pretext for settling*

> *other labour relations problems. In this context, it said it would scrutinize the reasons for and circumstances of a refusal to work where there exist, at the same time, other employer-employee relations problems. In* William Gallivan *(1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332), the Board expressed the following opinion:*
>
> > *An employee's right to refuse under section 82.1 [now 128.1] must be used wisely and only in the true interests of safety. To abuse that right by coupling it to other interests such as to gain an advantage in collective bargaining will, in the long term, defeat the purpose and attainment of the goals of Part IV [now Part II] of the Code. Improved safety and reduction of health hazards in the work place through consultation and co-operation cannot be accomplished in an air of mistrust and adversity. Any employee refusal which coincides with other labour relations conflicts will receive very close scrutiny from the Board.*
> >
> > *(pages 189; and 248)*
>
> *(See to the same effect* Stan Butler *(1991), 86 di 107 (CLRB no. 899).) However, the existence of tensions or disagreements between employer and employees on specific issues does not preclude an employee's refusing to work and enjoying the protection of the Code if that employee personally and sincerely believes that he/she has reasonable cause to believe that a danger exists. This is a question that must be examined case by case.*

[29] The respondent again turned to *Green* to reinforce this point. At paragraph 406:

> *[406] The right to refuse work under s. 128 of the* Code *is meant to address the presence of danger at work; it is not intended to be a* carte blanche *for employees to address other workplace issues and problems. Other, more appropriate means are in place to deal with workplace difficulties, including the grievance process as outlined in the* Act *and the harassment policy.*

[30] The respondent argued that the complainant's steadfast refusals to return to work other than on his own terms point to a conclusion that he did not exercise a right to refuse to work under the *CLC* as much as he acted in furtherance of a plethora of his other workplace issues. This is not the purpose of the *CLC*, and to reinforce this point, the respondent turned to *Canada (Attorney General) v. Fletcher*, 2002 FCA 424 (*Fletcher*) at paras. 18 and 19:

> ***18*** *The mechanism is an ad hoc opportunity given employees at a specific time and place to ensure that their immediate work will not expose them to a dangerous situation. It is the short-term well-*

> *being of an employee which is at stake, not a hypothetical or speculative one.*
>
> ***19*** *The mechanism is an emergency measure. It is a tool placed in the hands of the employee when faced with a condition that could reasonably be expected to cause injury or illness to him before the hazard or condition can be corrected. See Scott C. Montani (1994),* 95 di 157*, at page 7:*
>
>> *The Board has stated that Parliament did not intend to deal with danger in the broadest sense of the word. See David Pratt (1988),* 73 di 218*; and* 1 CLRBR (2d) 310 *(CLRB no. 686). Danger within the meaning of the Code must be perceived to be immediate and real. The risk to employees must be serious to the point where the machine or thing or the condition created may not be used until the situation is corrected. Also, the danger must be one that Parliament intended to cover in Part II of the Code.*
>>
>> *The right to refuse is an emergency measure. It is to be used to deal with situations where employees perceive that they are faced with immediate danger and where injury is likely to occur right there and then. It cannot be a danger that is inherent in the work or that constitutes a normal condition of work. Nor is the possibility or injury or potential for danger sufficient to invoke the work refusal provisions; there must in fact be danger. See Stephen Brailsford (1992),* 87 di 98 *(CLRB no. 921); and David Pratt, supra. Nor is the provision meant to be used to bring labour relations issues and disputes to a head. Where such refusals coincide with other labour relations disputes, the Board will pay particular attention to the circumstances of the refusal. See Stephen Brailsford, supra; Ernest L. LaBarge (1981),* 47 di 18*; and* 82 CLLC 16, 151 *(CLRB no. 357); and William Gallivan (1981),* 45 di 180*; and* [1982] 1 Can LRBR 241 *(CLRB no. 332).*

[31] The respondent noted that the complainant did not seem to perceive any danger when he was medically cleared to return to federal policing in June 2020. Nor did he raise workplace-safety issues when his security clearance was reissued in June 2021. Nor did he note any danger when his medical profile was reviewed in July 2021 or when he completed the training remotely between late August 2021 and October 2, 2021. Instead, submitted the respondent, the complainant raised other, different objections in order to avoid returning to work.

[32] The respondent noted that the complainant waited until November 17, 2021, to signal perceived dangers in the workplace, contrary to the requirement to raise workplace-safety issues in a timely manner. In this context, argued the respondent, he is clearly using the *CLC* as another delay tactic.

[33] The respondent also submitted that the nature of the complainant's perceived dangers pertains more to the plethora of other labour-relations matters that the complainant has raised in his many other legal proceedings than to any clear and present dangers the *CLC* was designed to address.

[34] For these reasons, submitted the respondent, both complaints must be dismissed.

B. For the complainant, January 6, 2023

[35] The complainant agreed that the issue for the Board to decide with respect to this preliminary motion is whether he was "at work" when he refused to work under s. 128 of the *CLC*. He referred, as did the respondent, to the analytical framework set out in *Saumier FCA*.

[36] The complainant opened with the argument that the standard to be met for the respondent to succeed with its motion is the one articulated in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, namely, the "plain and obvious" standard. He argued that the respondent has not demonstrated that it is plain and obvious that he was not at work.

[37] The complainant submitted that he was indeed "at work"; he was working remotely, as was commonplace during the pandemic. He attended the Green Timbers workplace on August 25, 2021, to reactivate his access card and attend to the reactivation of the administrative accounts. He also met with the unit commander, Superintendent Pasqua, on that date.

[38] The complainant submitted that Inspector Ben Maure, on March 9, 2022, tacitly acknowledged his return to work when he observed, in an email, "Cpl. Letnes might be considered to have been at work between August 13 and October 2, 2021, when he was allowed to complete from home online courses required for his return to work…."

[39] The complainant submitted that the absence of a particular assignment or duty cannot be taken as definitive in a determination of whether he was at work. In his submissions, he stated that he "… performed numerous commonly accepted workplace functions including reviewing emails, updating administrative databases, and performing online training."

[40] The complainant stated that "[t]he core issue to be decided by the Board is the legality - or lack thereof - of the RCMP's unilateral capture of the Complainant's leave credits."

[41] The complainant went on at length to criticize Employment and Social Development Canada's (ESDC) determination that he was not at work within the meaning of s. 138 of the *CLC* when the complaints were made.

[42] The complainant argued that the facts in *Saumier FCA* and in the Board's decision in *Saumier v. Treasury Board (Royal Canadian Mounted Police)*, 2008 PSLRB 1 (*Saumier*), in no way resemble the present matter, for the following eight reasons (reproduced *verbatim, sic* throughout):

> …
>
> *i. The Complainant's period of sick leave expired on June 19, 2020;*
>
> *ii The complainant participated in the reactivation of his security clearance which completed on June 20, 2021;*
>
> *iii The RCMP declines to account for its delay in the workplace reintegration of the complainant from June 20, 2021, to July 21, 2021;*
>
> *iv. The complainant attended the Green Timbers workplace for several hours on August 25, 2021, for the procurement of a remote work laptop, reactivation of administrative accounts and a personal meeting with Pasqua;*
>
> *v. Thereafter, the Complainant performed a series of workplace activities including reviewing emails, tracking HRMIS, completing mandatory online training and persistently checking for new work assignments;*
>
> *vi. In its s. 128(7.1)* CLC *investigation report, Maure confirms that the Complainant was at work during this period;*
>
> *vii. On November 17, 2021, Pasqua tacitly confirms that the Complainant was at work and prepares the Complainant for his next work assignment; and*
>
> *viii. The capturing of the complainant's annual leave credits, which the RCMP adamantly argues was a legitimate workplace function, according to NCM 3.1.1.1.1, can* ***only*** *occur if an employee is* ***at work****.*
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[43] The complainant referred to the Board's decision in *Saumier*, at para. 113 (which the Federal Court of Appeal reproduced in full at paragraph 49 of *Saumier FCA*), for his assertion that the appropriate method for an employer articulating a position that an employee was not at work within the meaning of s. 128(1) of the *CLC* is to decline jurisdiction under s. 128(7.1) when presented with a notice pursuant to s. 128(6).

[44] The complainant concluded his pleadings with the statement that "… [n]ot only did the RCMP assert jurisdiction to investigate the Complainant's work refusal notice - it did so on two (2) successive occasions."

C. The respondent's rebuttal, January 12, 2023

[45] The respondent countered the complainant's assertions on the standard of proof and the burden of proof, stating that "… [a]s the Complainant is the party making the complaint, he has the ultimate or legal burden to demonstrate its admissibility." The Board's decision to hear the preliminary motion on the basis of written submissions implies a standard of proof on the balance of probabilities.

[46] In any case, argued the respondent, the complainant has not demonstrated that he exercised a right of refusal to work while he was "at work", and it repeated some of its assertions from its initial submissions.

[47] The respondent also addressed the comments by both Inspector Maure and Superintendent Pasqua that the complainant characterized as tacit acknowledgement that he was at work. The respondent submitted that the complainant mischaracterized the comments. The respondent submitted:

> …
>
> *… To the contrary, between June 21, 2021 and November 16, 2021, RCMP management had communicated with the Complainant both in meetings and via email in attempts to return him to work. On November 9, 2021, Supt. Pasqua ordered the Complainant to report to work the next day and on November 16, 2021, she advised him that he must either report to work or be on approved leave. These are clear indications that she did not consider him to be at work. Moreover, the fact that the Complainant continued to demand the involvement of a disability management advisor in order for him to return to work demonstrates that he had not been at work during that time and*

> *suggests the refusals were tied to the accommodation process rather than to a reasonable cause to believe a danger existed.*
>
> …

[48] The respondent also submitted in rebuttal that the administrative leave capture occurred because the complainant was absent from work without authorization.

[49] In rebuttal, the respondent also observed that ESDC's assessments have no relevance to the determination that the Board must make as to whether the complainant was at work when he made his purported refusals.

[50] Finally, in rebuttal, the respondent stated that the decision to investigate the complainant's unsafe-workplace claims have no bearing on whether he was "at work". Employers are not required to decline jurisdiction to take the position that an employee who refused work was not at work when the purported refusal was made.

III. Decision and reasons

[51] The parties correctly acknowledged the parameters of this preliminary motion, despite the complainant's assertion that "[t]he core issue … is … the RCMP's unilateral capture of the Complainant's leave credits." I can understand why the capture of leave credits might be important to the complainant, but it is not the core issue before me, which is whether he was at work and thus able to properly make a workplace-safety complaint under s. 128 of the *CLC*.

[52] I have carefully considered the cases that both parties submitted, but I will refer only to those cases that support my reasoning. I find that the legislation has been cited and referred to correctly, and I will not reproduce it in my reasons.

[53] Many have espoused an opinion about whether or not the complainant was at work or not, including the complainant, the respondent, Inspector Maure, Superintendent Pasqua, and the ESDC. These opinions are not relevant; this issue is for the Board to decide.

[54] The Board's prerogative to decide a matter in the absence of an oral hearing has been correctly articulated. One of the analytical tools that can be brought to bear upon written submissions has its origins in a Supreme Court of Canada decision not referred to by the parties, namely, *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. This is the arguable-case framework.

[55] The arguable-case framework has the court assume that the facts as stated in the pleadings are true. Upon that foundation, the court must then consider whether the pleadings disclose a cause of action.

[56] This Board has adopted the arguable-case framework in the analysis of preliminary motions, including the recent case of *Gabon v. Department of the Environment*, 2022 FPSLREB 6, in which the Board articulated the analytical framework as follows, in paragraphs 39 to 41:

> *[39] In* Hughes v. Department of Human Resources and Skills Development, *2012 PSLRB 2* [Hughes]*, the complainant made complaints against his employer alleging several violations of s. 186(2) of the* Act*. The former Board dealt with, among other issues, the respondent's objection that the complainant failed to demonstrate on the face of the complaints that the respondent violated the statutory provisions; in other words, the complaints, on the face, did not disclose an arguable case that the statutory provisions had been violated. Addressing this preliminary objection, the former Board framed the issue as follows at paragraph 86:*
>
>> *[86] … The parties were asked to address whether the three complaints before me* ***reveal, on their face, an arguable case of a violation of the*** **PSLRA*****. The parties were asked to specifically address whether, if the Board considered all the facts alleged in the complaints as true, there is an arguable case that the respondent contravened the unfair labour practice legislative provisions of the*** **PSLRA***.*
>>
>> [Emphasis in the original]
>
> *[40] Using this analytical framework, the former Board found that the complaints revealed an arguable case of a contravention of s. 186(2)(a) of the* Act *(see paragraphs 104 to 108). This approach requires a careful and rigorous analysis of the facts that the parties set out, to assess whether there is an arguable case.*
>
> *[41] The former Board noted as follows in* Hughes*, at para. 105:*
>
>> *[105] … if* [there is] *any doubt about what the facts, assumed to be true, reveal, then* [the Board] *must err on the side of finding that there is an arguable case … and … must preserve the complainant's opportunity to have his complaints heard….*

[57] I have taken the facts as summarized by the complainant in his pleadings and I have assumed them all to be true. I have no doubt about what those facts reveal, and I will consider them in light of the arguable-case framework.

[58] To begin with, I strongly disagree with the complainant's contention that *Saumier FCA* "in no way" resembles the present set of facts. On the contrary, in that case, the FCA dealt with unsuccessful attempts to return an RCMP regular member to work following a prolonged period of sick leave and the member's invocation of s. 128 of the *CLC* as a rationale for not re-entering the workplace. That is precisely the issue before the Board in the present matter. Leave to appeal *Saumier FCA* to the Supreme Court of Canada was denied. I therefore consider this to be a very important and persuasive case.

[59] The Federal Court of Appeal in *Saumier FCA* stressed the importance of context when making a determination about whether a complainant was "at work". Therefore, close attention must be paid to the context in which plans to return the complainant to work unfolded.

[60] It is common ground between the parties that the complainant was cleared to return to work following a lengthy period of sick leave. He was cleared to return in May of 2020. However, the complainant could not return to work because his security clearance had expired while he was absent, so he had to reactivate it. It took him close to a year, but he finally did it. I find as a matter of fact that the reactivation of the complainant's security clearance was not a return to work but a step that he was required to take in order to return to work.

[61] Once the security clearance was in place, he was still unable to return to work because he first had to complete a series of online courses. The respondent offered to supply him with a laptop computer and the necessary access tools (a "smart card" was described as a security card providing electronic access to the RCMP's administrative and human resource databases, email accounts, and online courses). It makes sense that the smart card cannot be issued until the security clearance process is complete. The issuance of the smart card was just another step in the return-to-work process.

[62] The complainant had to physically attend the Green Timbers workplace to obtain the smart card. He did so, on August 25, 2021. I do not consider this to have been a return to work. It was just another step he had to take in order to return.

[63] At paragraph 50 of *Saumier FCA*, the Federal Court of Appeal held that "… [t]he mere fact that the applicant reported physically to her employer's office on September 27, 2005, after several months' absence did not result in her being 'at work' within the

meaning of subsection 128(1) of the Code." The Federal Court of Appeal made express mention of the error the adjudicator committed in reaching the conclusion that she had returned to work by simply showing up at the office.

[64] I will not depart from the Federal Court of Appeal's reasoning in this regard. In accordance with the convincing and persuasive precedent set in *Saumier FCA*, I find that the complainant's having physically reported to an RCMP office on August 25, 2021, after several years' absence, did not result in him being "at work" within the meaning of s. 128(1) of the *CLC*.

[65] From late August to October 2, 2021, the complainant completed the prerequisite online courses. Nor do I find this was a return to work. It was just another step in the return-to-work process. He could not return to work until the courses were completed.

[66] Once the courses were complete, attempts were made to return the complainant to work, but he refused to attend the office. He cited a long list of what he claimed were workplace-safety issues. When ordered to report for work at a different location, the complainant again refused. He has apparently never reported for work.

[67] I have deliberately avoided reciting or considering the complainant's long list. The preliminary motion before me has nothing to do with the merits of his complaints. The things appearing on the complainant's list of perceived safety issues are of no significance in my determination of whether or not he was at work when he made his refusal-to-work complaints.

[68] Another important aspect of the context in which these complaints under s. 128 of the *CLC* were raised has to do with their timing. The complainant obviously perceived no safety issues in the workplace when he was declared fit to return to work in May 2020. Nor did he raise any safety issues when he was notified that he had to reactivate his security clearance. The following year, in June and July 2021, he perceived no danger when he was informed of the requirement to complete several online courses before he could return to work.

[69] Significantly, on the one and only occasion he set foot in the RCMP Green Timbers workplace, on August 25, 2021, he came away from the incident unscathed. It

was only months later, immediately after being ordered to report to work, that he suddenly feels imperiled.

[70] I found the early cases, including *Simon*, which discuss Parliamentary intent surrounding an employee's ability to refuse work for safety-related reasons, quite informative and helpful. Particularly instructive was *Fletcher*, at para. 19, which reads in part as follows:

> *… The right to refuse is an emergency measure. It is to be used to deal with situations where employees perceive that they are faced with immediate danger and where injury is likely to occur right there and then. It cannot be a danger that is inherent in the work or that constitutes a normal condition of work. Nor is the possibility or injury or potential for danger sufficient to invoke the work refusal provisions; there must in fact be danger.…*

[71] Also instructive for me was *Green*, at para. 406, which states as follows:

> *[406] The right to refuse work under s. 128 of the* Code *is meant to address the presence of danger at work; it is not intended to be a* carte blanche *for employees to address other workplace issues and problems. Other, more appropriate means are in place to deal with workplace difficulties, including the grievance process as outlined in the* Act *and the harassment policy.*

[72] The complainant's pleadings, as well as his complaints dated November 29, 2021, and April 22, 2022, are rife with references to the myriad of legal proceedings in which he and his employer are presently embroiled. The *CLC* cannot be used as a convenient launching platform for other labour-related concerns. The complainant's concerns must be dealt with in the appropriate forum, and he has apparently already initiated those processes.

[73] If I take everything the complainant has asserted in his submissions to be true, I find he has failed to distinguish his own circumstances from the circumstances set out in *Saumier FCA*. On this basis I find the complainant has no arguable case that he was at work when he made his *CLC* complaints.

[74] I find that the complainant was not at work when made his *CLC* complaints. His complaints are not admissible and must be dismissed.

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

(The Order appears on the next page)

IV. Order

[76] The complaints are not admissible and are dismissed.

April 3, 2023.

James R. Knopp,
a panel of the Federal Public Sector
Labour Relations and Employment Board