Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canada Post Corporation v. Annette Fillipetto, Gurdev Gill & Renata Welker, 2011 OHSTC 18

Date: 2011-08-09
Case No.: 2009-31
Rendered at: Ottawa

Between:

Canada Post Corporation, Appellant

and

Gurdev Gill, Annette Filipetto and Renate Welker, as represented by the Canadian Union of Postal Workers (CUPW), Respondents

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of three directions issued by a health and safety officer
Decision:	The directions are confirmed
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Stephen Bird, Counsel, Bird Richard
For the respondents:	Ms. Sheilagh Turkington, Counsel, Cavalluzo Hayes Shilton Mcintyre & Cornish

REASONS

[1] This decision concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) of three directions issued pursuant to paragraph 145(1)(a) of the Code, and not pursuant to paragraph 145(2)(a) as stated by counsel for the appellant in the notice of appeal, by Health and Safety Officer (HSO) Bobbi Anderson on October 22, 2009.

Background

[2] The three directions concerned by this appeal followed an investigation by the HSO into the individual situations of and complaints formulated by the three respondents to their employer in relation to events that occurred in their individual work place and concerned them personally. In all three cases, the direction issued by the HSO is to the same effect and although it is formulated to address the situation of each individual respondent, the wording is essentially identical. The two paragraphs that are most important as the conclusion of the HSO and essentially at the heart of the issue raised by this appeal, concern subsection 127.1(3) of the Code and read as follows:

> The employee or the supervisor may refer an unresolved complaint to the chairperson of the work place committee or the health and safety representative to be investigated jointly (a) by an employee member and an employer member of the work place committee; or (b) the health and safety representative and a person designated by the employer.
> The internal complaint resolution process as defined in Section 127.1 of the Canada Labour Code, Part II has not been followed to investigate Ms (Gill, Filipetto, Welker)'s allegation that Canada Post has contravened the prescribed steps to prevent and protect against violence in the work place.

It needs to be pointed out at this time that in all these three cases, the investigation report completed by the HSO which was filed in evidence at the hearing held in this matter states that the investigation had been initiated "to determine if there was thorough investigation, including consultation and participation of the joint health and safety committee of the said requested (section) 127 (sic) investigation by employee(s) Gill,(Filipetto and Welker) as prescribed by the Canada labour (sic) Code, Part II." It also stands to reason when one reads the operative wording of the directions above that the conclusion of the HSO was that the internal complaint resolution process provided for at section 127.1 of the Code had not been adhered to or followed in the case of all three respondents who had sought to have their complaint handled through this statutory process. In brief then, the directions under appeal are in answer to complaints formulated by the respondents that the initial complaints formulated by the same individuals pursuant to subsection 127.1(1) of the Code had not been examined in the manner prescribed by section 127.1 of the legislation which statutorily establishes an internal complaint resolution process. To further clarify the situation, as it applies to all three cases, it must be noted that prior to formulating what I have described as their initial or original complaints pursuant to subsection 127.1(1) of the Code, all three respondents had

unsuccessfully sought redress from the employer through another avenue.

[3] While the individual factual circumstances of the three cases are obviously particular to each individual respondent, they have at the same time a great deal of similarity, particularly where Ms. Gill and Ms. Filipetto are concerned, and thus I do not propose to describe them individually in great detail, having in mind also that those are described in detail in the investigation report of the HSO which is part of the evidence, and have also been described fully by the three respondents who testified at the hearing. However, to facilitate comprehension of the case and also to make it possible to precisely define the real issue raised by this appeal, I will describe briefly the germane elements of each individual case.

[4] All three cases originate in similar if not identical fashion, which can be described in brief terms as disparaging, taunting or malicious comments, remarks or words about the family situation, physical appearance or even work place situation of the three respondents, made repeatedly in the work place by a co-worker or co-workers in the presence of or reported to the individual respondent concerned, and continuing even after the target of such comments had asked the worker or a supervisor that such conduct cease or be made to cease, thus resulting in complaints brought to the attention of the employer, and perceived if not stated as complaints of harassment. At the time of any and all of these events or occurrences, the employer had in place a "No Harassment Policy" which stated that "harassment of employees, customers or prospective employees is unacceptable workplace conduct and will not be tolerated. Any employee found to be engaging in any type of harassment is subject to corrective or disciplinary measures, up to and including dismissal." This policy provides for investigating all such complaints that relate to the 11 prohibited grounds of discrimination under the *Canadian Human Rights Act*. While I have referred to the great similarity of these three cases, it is useful nonetheless to briefly state some specifics about each case, those being derived from the HSO investigation report as well as the individual testimony of each, those actually not detracting from the information gathered by HSO Anderson.

[5] The first respondent, Ms. Gurdev Gill, is a mail clerk employed in the oversize section of the Stoney Creek mail processing plant. What caused her to file a human rights harassment complaint against a co-worker were the comments made by that person about a family matter to wit, an accident that occurred where the respondent's husband was seriously injured in a car accident where it would appear Ms Gill backed the family car over her husband. The comments made, which appear from her testimony to have been the last of a series of such comments made over time, were to the effect that she "ran over her husband and she got lots of money from the insurance and got a big house, that the plan had been such in order to get money from the insurance." In her testimony, which was very emotional at times, Ms. Gill recounted also that other comments had been made by the same co-worker regarding her family, actually her sons, to the effect that "they were too close and maybe they are gays", or with words I would see as an oblique reference to her ethnic origin, that she "liked to lick white people's ass." Over time, those comments and others mentioned in testimony, resulted in Ms Gill becoming increasingly frustrated and, wanting this conduct to stop, she eventually complained to her supervisor

(Steve Garrett). He received and treated her action as an harassment complaint, conducted some investigation into the matter, considered that Ms. Gill had clearly not expressed a concern for her safety or a concern of violence towards herself, which, had it been the case, to use his own words in his testimony, "would have caused him to handle the matter differently, escalate the matter to the co-chair, presumably employer co-chair, of the health and safety committee for the latter's investigation". According to Mr. Garrett, as a rule the health and safety committee would have been involved directly, had there been a claim that safety was involved which, according to the latter, had not occurred. Having had the opportunity to hear Mr. Garrett testify at the hearing concerning all three respondents and the investigations that were conducted by him or others regarding those three respondents and the complaints that were formulated, I was struck by the very porous quality of his memory.

[6] Be that as it may, on the conclusion of the investigation into the situation of Ms. Gill, Mr. Garrett's response to the investigation was passed on to Superintendent Eydt for her response. In such response, reference was made to the Garrett investigation narrative, and the second paragraph of the response stated, as recounted in the HSO report:

> I have reviewed all the materials related to this investigation and can find no evidence to support the allegations that were made in the complaint that was filed. All co-workers that were named as witnesses in the O/S Shift 3 area were interviewed by Supervisor Steve Garrett and no information or evidence came out that could substantiate your allegations.

It is stated in the HSO report and was repeated by Ms. Gill at the hearing into this matter that upon receiving such response, she was adamant that all co-workers that had been named as potential witnesses to the actions affecting her had not been interviewed, which caused her to formally bring a complaint pursuant to section 127.1 of the Code seeking under the Internal Complaint Resolution Process established by the legislation that an internal investigation take place that would in the course of said investigation come to involve the joint Health and Safety Committee. That request was hand delivered to the same supervisor Steve Garrett and twenty days later, no written response to the request had been received and the employee was informed that the two plant managers (Wai Chan and Kraft Chine) had decided not to do anything about the requested investigation, which I take to mean that the decision had been made not to proceed further with the investigative process provided under that provision of the Code.

[7] This conclusion, which eventually brought about the intervention of the HSO and the direction or directions, as the two other cases developed in a very similar manner, presently under appeal, caused the positions taken by the two opposing parties both before the HSO and eventually the undersigned Appeals Officer, to become clearly enunciated in HSO Anderson's investigation report. With reference to the applicable collective agreement, and in particular Article 56, titled *Protection against Harassment*, the employer took the position that they had completed their requirements to investigate and that the outcome of this investigation was that "nothing in the realm of an article 56 violation was substantiated." Referring to a meeting with the two plant managers, the report states that "both verbally indicated that there was no need to investigate the matter

any further as the employee had filed under Article 56 of the Collective Agreement and not under the Canada Labour Code." On the opposite, the position of the employee that was presented to the HSO was that the employer failed to conduct a proper and complete investigation into the alleged complaint. According to that position, there was never any involvement by the health and safety committee following the request for a section 127.1 investigation, such step in the complaint review process was simply ignored and dismissed by management in direct violation of the Code.

[8] The case of Annette Filipetto, also a mail clerk employed in the oversize section at the Stoney Creek mail processing plant, offers great similarity to that of Gurdev Gill. The substance of her complaint to her supervisor concerned comments, remarks and actions mostly by two co-workers that related in most instances to her physical appearance and also to interaction with another co-worker. Ms. Filipetto's weight was the subject of derogatory commentary and as these comments, remarks and actions occurred usually when she was the only employee in the presence or immediate vicinity of those co-workers, she felt that they were directed at her and after a time, she considered this to be harassment and asked for the intervention of her supervisor in order that this be stopped. Prior to making a formal complaint to supervisor Mike Lico, Ms. Filipetto testified having spoken to Superintendent Michelle Eydt and supervisor Steve Garrett about the behaviour of those co-workers and the fact it was ongoing, that it caused her emotional stress and anxiety about coming to work, that she considered this to be inappropriate and wanted this to stop. It is not necessary here to give details as to the nature of those comments and actions as it is not disputed that they occurred and that the employer was made aware of those. As will be seen later, the contention is that those did not relate to occupational health and safety, but were simply in the nature of hurt feelings. What needs to be remembered and is germane to the issue to be resolved is that in most respects, those comments, remarks and actions or gestures were of a personal nature, as in the case of Ms Gill, were eventually the object of a similar formal complaint to and investigation by a supervisor (Mike Lico) and received the exact same response from Superintendent Michelle Eydt, including the statement that "all co-workers that were named as witnesses in the O/S Shift 3 area were interviewed by Supervisor Mike Lico and no information or evidence came out that could substantiate your allegations". This response elicited the same reaction from Ms. Filipetto, as she considered the investigation into her complaint to have been incomplete, not all of the potential witnesses that she had named having been interviewed.

[9] What followed can also be said to be a repeat of what occurred in the case of Ms. Gill. Ms. Filipetto formally filed a complaint under section 127.1 of the Code requesting that an internal investigation take place that would end up involving the health and safety committee. Her actual request, as cited in the HSO investigation report, stated:

> as discussed on May 7th, 08, regarding the investigation of my complaint, I requested that our conversation act as a formal complaint under section 127 (127.1) of the Canada Labour Code-Part 2. Further we discussed my concerns regarding this investigation. If this matter cannot be resolved, I request that the joint health and safety committee review my investigation and the investigation process.

On May 29, 2008, Supervisor Steve Garrett informed Union representative Joette Waddell that plant managers Kraft Chine and Wai Chan had decided "not to do anything" about the complaint(s)", thus clearly indicating that there would be no involvement of the health and safety committee. As in the preceding case of Ms. Gill, this brought about the involvement and investigation by HSO Anderson.

[10] This brings us to the case of Renata Welker who, like the two other respondents, was at that time employed as a postal clerk in the oversize section at the Stoney Creek mail processing plant. That case offers a somewhat different picture in that comments that were made by a co-worker concerning Ms. Welker were not of a personal nature, were not made directly to her or in her presence but rather were reported to Ms. Welker by other co-workers. Those comments by a co-worker questioned her advancement on the seniority list of the work unit or group that she belonged to, such advancement effectively allowing her to step ahead of the said co-worker, and alleged that it had been achieved through fraudulent means to wit, intervention of a friend of Ms Welker in management who, it was claimed, may have tampered with the said seniority list. When initially informed of such, Ms. Welker, who worked under the supervision of Mr. Steve Garrett, complained of being slandered to her supervisor who showed surprise and was upset at learning this and undertook to speak to the responsible employee, who was well known to him. Ms. Welker testified at the hearing that even after she complained and Mr. Garrett spoke to the co-worker involved, she was informed by a number of co-workers that those comments by the same co-worker were still being made. This caused Ms. Welker to complain to the employer of being slandered by a co-worker, supporting said complaint with signed declarations by a number of co-workers.

[11] There followed an investigation by Acting Superintendent Mike Lico who, while giving credence to the complaint by Ms. Welker, responded in part that "after reviewing all materials submitted by your fellow co-workers, there is some evidence that states Salema's behaviour was not in line with the Canada Post Corporate Values. However, anything beyond this investigation will remain strictly confidential. The investigation is now closed." Ms. Welker was not satisfied with this outcome, which she felt would not be sufficient to deter repeat of the so-called slander. She therefore presented a written request to Superintendent Lico pursuant to the Internal Complaint Resolution Process at section 127.1 of the Code. Her request however can be said to be somewhat different than the case of the two other respondents, in that she was seeking that "as per Canada Post Workplace Violence and Protection Policy" she be informed by either the offending employee's supervisor or a human resources representative "of the findings of the investigation and remedies taken...". Not having received an answer to her request, Ms. Welker submitted to Superintendent Lico a further request as part of the complaint resolution process, this time for a joint health and safety committee review and investigation. Mr. Lico's reply to said request was to instruct Ms. Welker to address her request directly to the health and safety committee, which she did in the following terms: "I would like the committee to review not only my complaint but also the entire investigative process when dealing with work place violence". The response she received was from Wai Chan, employer co-chair of the health and safety committee and stated in conclusion that "as far as the Health and Safety Committee is concern we are satisfy wit

the investigation process; the stated outcome of the investigation; and the Health and Safety committee need not be involved with the investigation review", thus causing Ms.Welker to seek to have this examined by a health and safety officer, resulting in the direction by the HSO and the present appeal.

Issue(s)

[12] The three directions that were issued in this case and the subject of the present appeal are worded in identical fashion. They were preceded by an investigation by HSO Anderson which itself started as a result of a complaint(s) by the three respondents. Their complaint(s) stemmed from their dissatisfaction with the results and answers obtained following work place internal complaints relative to co-workers actions that they had subsequently sought to have reviewed through the internal complaint resolution process of the Code (section 127.1) after , it would appear, initially seeking redress through the *Protection against Harassment* provisions (Article 56) of their collective agreement. Their dissatisfaction stemmed from the answers and results obtained at a certain level or step of the internal complaint resolution process where they were denied access to the next step of that process and therefore sought the intervention of a health and safety officer regarding that particular situation. As stated earlier, all three directions are worded in the same manner, and the defining words in the directions, from the standpoint of the issue to be determined at appeal, are the following: "The internal complaint resolution process as defined in section 127.1 of the Canada Labour Code has not been followed to investigate ...". Simply put then, the issue to be determined is whether HSO Anderson erred in finding that the process established by section 127.1 of the Code had not been followed or adhered to in examining the complaints made to their employer by the three respondents, thus causing the issuance of the three directions.

Submissions of the parties

[13] The submissions of both parties were presented in writing and are therefore part of the record.

Submissions of the Appellant

[14] By way of introduction to its more detailed submissions, the appellant stated briefly its position. It recognizes that all three appeals relate to complaints of inappropriate verbal comments having been made by co-workers and that as such, all three complaints made by the respondents raise potential issues of work place harassment, contrary to Canada Post's "No Harassment Policy". The appellant however disputes that the allegations by the respondents raise issues covered by the Code, such that an unresolved matter must be referred to the work place health and safety committee pursuant to subsection 127.1(3) of the Code.

[15] It is the opinion of the appellant that the approach taken by the HSO to investigate these complaints and the interpretation that she made of the legislation were flawed. Along that line, the appellant claims that the HSO made four critical errors. First, it

claims that it is difficult to ascertain from the testimony given by HSO Anderson whether she fully appreciated that at least in the cases of respondents Gill and Filipetto, the events that caused their complaints pre-dated the coming into force of Regulation XX (Violence Prevention in the Work Place) that served as basis, with paragraph 125(1) (z.16) of the Code, for the issuance to the appellant of an Assurance of Voluntary Compliance (AVC), with the HSO appearing to be wrongly of the view that it was the date of the filing of the complaint, as opposed to the date of the actual making of the complaint that would govern the applicability of such regulatory provisions. According to the appellant, such an interpretation, which would translate into retroactive application of the legislation, with such retroactivity not prescribed by the legislation, would mean that Canada Post could be retroactively found to be in breach of its violence prevention obligations under Regulation XX simply because a complainant chose to delay filing a complaint until such time as the legislation came into force. It needs to be pointed out here that while Regulation XX came into force on May 8, 2008, in the case of respondents Gill and Filipetto, their complaints, that eventually resulted in the present appeal, were initially formulated to the employer prior to that date although the formal complaint pursuant to section 127.1 of the Code was filed on May 9, 2008. According to the appellant, it is also noteworthy that the HSO attempted somewhat to correct that wrong interpretation by testifying that they were merely attempting to apply the "spirit" or intent of such Regulation XX, if not the regulation itself which would be an application outside the scope of the legislation and clearly outside the HSO's jurisdiction. It was also put forth by the appellant that the claim by the HSO that work place harassment could be linked to the general protection obligations of the employer under section 124 of the Code constituted an incorrect interpretation of the legislation given the restricted definition of "safety" in the Code and the obvious understanding of the Code by Parliament where three attempts at incorporating the concept of "work place harassment" in the legislation had come to naught. Counsel pointed out also that said Regulation XX, introduced to address work place violence, does not include a specific reference to work place harassment.

[16] The appellant also argues that since the Code is silent on the subject of harassment, it cannot come within the jurisdiction of the HSO, in the exercise of the latter's discretion in assessing coverage of the legislation, to create new Code obligations. It is the appellant's position however that even if one were to accept that Regulation XX (violence in the work place) applied to all three complaints or that section 124 of the Code (general duty of employer) presented an enforceable employer obligation in respect of work place harassment, the HSO had failed to properly interpret and apply section 127.1 invoked by all three complainants. Along this line, counsel argues that the HSO inverted more or less the order of steps to be followed under section 127.1 to conduct the investigation. In the opinion of the appellant, while HSO Anderson did allude to Canada Post's position that the complaints did not raise a Code violation, and also to the fact that in the case of the Gill and Filipetto complaints, Regulation XX was not in force, she offered no supporting rationale for her directions. Counsel's explanation of this was that from the outset, the HSO had entered into the wrong inquiry by only investigating whether or not the matter (3 complaints) had been referred to the work place health and safety committee, rather than ascertaining first whether said complaints were raising, to

refer to the language of the introductory part of section 127.1 of the Code, reasonable grounds that there had been a contravention of Part II of the Code or that there was likely to be an accident or injury to health of an employee , or whether the subject matter of the complaints were covered under the Code at all. It is thus the appellant's opinion that the HSO demonstrated a "cart before the horse" approach when she testified that she would address these matters solely when her turn to enter the process established by section 127.1 would properly arrive to wit, once the work place health and safety committee had failed to satisfactorily resolve the complaint or complaints, thus making no attempt to validate the original complaints made by the three complainants, in part because of what counsel qualified as poor advice provided by the HSO's technical advisor in this matter.

[17] The appellant recognizes however that this appeal is a *de novo* proceeding and, that being the case, I am entitled to "step into the shoes" of the HSO, and issue a ruling that the HSO ought to have made. While agreeing with this opinion of the appellant, it is obviously conditional upon my finding that the ruling by the HSO under review needs to be overturned. That being so, the appellant refers to specific elements of the individual cases of the three respondents in advancing the position that I can consider the merits or foundation of their individual initial complaints.

[18] In the case of Ms. Gill, counsel summarizes her complaint as concerning (1) inappropriate comments made regarding her personal circumstances regarding the car accident with her husband and children; (2) inappropriate comments made regarding whites and her interactions with co-workers; and (3) work place work performance/job duties criticisms. According to counsel, while it is accepted that a referral of a matter to the work place health and safety committee must of necessity raise a health and safety concern, simply stated none was present or even contemplated in the case of Ms.Gill. Furthermore, Regulation XX was not in effect at the time and no indication surfaced from the Gill complaint, her testimony or that of supervisor Garrett's that there was likely to be an accident or injury to health. As such, while Ms. Gill may have been rightly concerned that the allegations were of inappropriate conduct and that she was dissatisfied that the complaint was ultimately determined to be unsubstantiated, nothing in her case speaks even remotely to a health and safety concern or violation of any provision of the Code.

[19] The comments of appellant's counsel regarding the case of Ms, Filipetto are essentially in the same vein. Her original complaint referred to inappropriate comments and actions of a personal nature in her presence and directed at her. She claimed stress and anxiety but tendered no corroborative medical evidence. Furthermore, Regulation XX was not in effect on the date of her complaint, and there was no indication in the actual complaint, her testimony or Mr. Lico's evidence of his investigation that Ms. Filipetto entertained any reasonable fear that these would likely result in an accident or in injury to her health. While rightly concerned that the allegations were of inappropriate conduct and being dissatisfied as to the ultimate determination, counsel's position is that nothing in this case remotely speaks to a health and safety concern or a violation of a provision of the Code. It is a fact that Ms. Filipetto claimed that the continued name-calling was distracting and thus could result in injury "by not paying attention", however this would not, according to counsel, constitute a risk or health hazard within the meaning

of the Code, and an uncorroborated allegation of stress and anxiety alone would be insufficient to raise a health and safety concern for the purposes of the legislation.

[20] The situation of Ms. Welker was presented by counsel as being the same as that of the other two respondents. She was not present when inappropriate comments were made that concerned the respondent. There was no indication from her statement, the investigation conducted by supervisor Lico or her own testimony that she held a legitimate concern for her personal health and safety. Counsel reduced the situation to one of "hurt feelings" resulting from inappropriate comments from a co-worker. As for the other respondents, counsel presented the reasons of Ms. Welker for seeking to refer the matter to the health and safety committee as dissatisfaction with the investigative process and its conclusions and not as a result of a Code violation, a health and safety concern or a fear of work place violence.

[21] In conclusion then, and referring to the fact that counsel for the respondents spent considerable time cross-examining Canada Post's supervisors on the quality of the investigation, Mr. Bird summarized the appellant's position by stating that the issue is not whether a proper investigation was done, whether the appropriate conclusions were made or even whether Canada Post responded appropriately to the complaints. In his opinion, the issue is whether or not each individual employee has or had a reasonable concern that a provision of the Code was violated or a reasonable concern over their health and safety.. According to counsel, this was utterly ignored by the HSO and is completely lacking in each individual case. In the alternative, if health and safety concerns were raised related to harassment, this is not a matter properly belonging within the ambit of the Code.

Respondent's Submissions

[22] In direct opposition to the position put forth by the appellant, as summarized at paragraph 21 above, counsel for the respondents centralized her submissions on the investigation process put in place by section 127.1 of the Code, the completeness or quality of the investigation that was conducted, and more so the adherence to the complete process established by that provision. As such, in a brief comment referring to the approach favoured by the HSO relative to the specific requests for referral to the work place health and safety committee by the three respondents, and the response received from employer representatives, she identified the question before the undersigned as follows:

> The question properly before the Appeals Officer in view of this appeal and the evidence of HSO Anderson is whether the HSO erred in adopting this approach and issuing the Directions that she did in light of this approach. If the Appeals Officer does not take issue with this approach, then the appeals fail and we respectfully submit that there is no need to address the merits of the worker complaints as this is full answer to the issue. If the Appeals Officer determines that the HSO should have conducted a review of the grounds for the employees' complaints before issuing the directions on appeal, it is respectfully submitted that this too addresses the question at issue. What the HSO should have then found if she had conducted such an investigation is beyond the scope of the appeal

before the Appeals Officer.

[23] Counsel circumscribed briefly the issue she sees as being central to dealing with this appeal. According to Ms. Turkington, quite simply the issue relates to the process established at section 127.1 of the Code, or rather adhering or failing to adhere to said process. Pointing out that the directions issued by the HSO arose out of circumstances where three different workers each raised complaints about harassment in the work place and each requested a joint health and safety committee investigation under subsection 127.1(3), counsel argues that the employer truncated the internal complaint resolution process established by section 127.1 by precluding such an investigation by the committee. There followed an investigation of that specific breach by the HSO, who concluded that it had occurred and thus issued specific directions requiring compliance with the section 127.1 process, thus not determining the validity of the original complaints of harassment to the employer by the three respondents, and mandating that there be an investigation by the work place health and safety committee, as sought by the three respondents in their complaint to the HSO.

[24] Regarding the actual investigation conducted by the HSO vis-à-vis the complaints by the three respondents concerning the employer's failure to allow the process established at section 127.1 of the Code to proceed to its statutorily determined conclusion, counsel addressed the points raised by the appellant as follows. First, regarding Regulation XX, counsel argued that while the HSO explained both in her report and in testimony that the original Gill and Filipetto harassment complaints were received after this new regulation came into effect, at no time did the HSO suggest that her directions were as a result of applying the provisions of that Regulation XX to the actual issue relative to adherence to the investigation process at subsection 127.1 (3) of the Code. While the subject of said applicability of Regulation XX may have been broached by the HSO, it was solely with respect to discussions of a potential AVC that eventually was refused by the employer. According to counsel, it is clear that the HSO recognized in her testimony that Regulation XX was not in effect at the time of the circumstances that gave rise to the original harassment complaints, and thus that it found no application to the said circumstances although by the time she investigated the complaints regarding the sought investigation by the work place health and safety committee, the said Regulation had then come into effect, although this had no impact on the directions.

[25] Ms. Turkington noted that while the HSO clearly indicated that the focus of her investigation was and had been section 127.1 of the Code and the matter of failure by the employer to fully adhere to the process established therein, she also became aware of the nature of the complaints that the three respondents were seeking to have examined by the work place committee, and as such, considered that protection of employees faced with harassment and bullying could be found in the general employer protection duty clause at section 124. It was the view of the employer, prior to Regulation XX, that nothing of the sort could be derived from any provision of the Code. Based on Tribunal case law on the definition of "danger", the broad scope of the employer protection duty clause and the preventative and remedial nature of Part II of the Code as a whole, the attainment of its objects requiring a fair, large and liberal interpretation of its provisions, counsel put forth

the opinion that the jurisprudence of the Tribunal recognized that harassment would come within the scope of the Code prior to promulgation of Regulation XX, and therefore the perspective adopted by the HSO was not flawed and could not serve as basis for disturbing the directions.

[26] On the question of the premise for the launching of a complaint under section 127.1 to wit, the requirement that the complainant "believe, on reasonable grounds" that there be cause to complain, counsel contested the position of the appellant to the effect that this question should have been considered first by the HSO prior to examining the complaint that the process had not been followed or adhered to by the employer. The gist of Ms. Turkington's position is that this would effectively undermine the role of the work place committee/parties in the internal complaint resolution process by causing the HSO to enter the process prior to the actual parties to the process, including the committee, having played out their role. Counsel essentially reiterated in her rationale that the directions being reviewed concern the complaints made by the respondents of the employer having failed to adhere to the process under section 127.1 to consider their original complaints, and not the actual original complaints made by those respondents. As such then, the "reasonableness of the grounds" would, as all other aspects of the complaints, come to be examined by an HSO only when the turn of the HSO would arrive within the said process. According to counsel, the testimony by the HSO amply describes the proper interpretation of the workings of the section 127.1 process, and this should be retained as determinative by the undersigned. In short, HSO Anderson's proper interpretation and comprehension of the complaint resolution process under section 127.1, was that where an employee goes to a supervisor with a complaint, this represents the first step of the Internal Complaint Resolution Process. This initially calls for a joint attempt by the complaining employee (s) and the latter's supervisor, to try to arrive at a resolution of the issue. Should there be failure to arrive at such resolution, either party unhappy with the result can then initiate the second step of the process by referring the unresolved issue to one or the other chairperson (employer or employee) of the work place health and safety committee or, if there is no such committee, to the health and safety representative selected by employees and who has the same function. The investigation that is required to follow needs to be a joint investigation by either an employer and an employee member of the committee or by the representative and a person designated by the employer. Once this joint investigation is concluded, the Code requires that a written response be given to the complaining employee and the employer. Should either party then be of the view that the complaint raised a contravention of the Code, one or the other can refer the matter to a health and safety officer in certain circumstances stated in the legislation.

[27] Counsel sought to formulate in her own words that which has already been attributed to HSO Anderson, and while it is not necessary here to reprise at length the same rationale, it is useful to see how she comprehends the process at section 127.1. She points out that under the internal complaint resolution process (ICRP) established in section 127.1 of the Code, employees are entitled to <u>access</u> this process by making a complaint to a supervisor when the employee <u>believes</u>, on reasonable grounds that there has been a contravention to the Code or that there is the likelihood of an accident or

injury related to employment. According to counsel, the cornerstone of the ICRP is internal work place responsibility. The employee makes a complaint to their supervisor in an effort to have the matter resolved at that stage. Where it is not resolved, the matter remains with the work place parties for a further attempt at resolution. Pursuant to subsection 127.1(3) of the Code, either one of the employee or the supervisor may refer the matter of an unresolved complaint to a chairperson of the work place committee which is to conduct a joint investigation. This committee is a joint committee that is already established and trained to expeditiously dispose of complaints relating to the health and safety of employees (unless such a committee is not required under the statute and is replaced by a health and safety representative who fulfills the same role). Counsel draws a parallel between section 127.1 and section 128 (refusal to work) and notes that in both cases, the Code mandates a response from the employer and in both cases provides for a subsequent review step where the matter is not resolved to the satisfaction of one party. The interest of such a comparison lies in the following statement by counsel: "There is no provision in either section enabling the employer to simply refuse to allow the process to continue because it disagrees with the perspective of the employee. The employer's recourse in such an event is to involve a health and safety officer once the matter has been reviewed by the work place parties" as per subsection 127.1 (8) or 128 (13) of the legislation.

[28] The second part of counsel's submissions has to do with the possibility that the undersigned Appeals Officer may decide to examine the merits of the original complaints made by the three respondents. As such, counsel argues that the threshold question, were I to undertake such an examination, is not whether the complaints raised work place violence or general health and safety concerns, but whether the individual worker believed, on reasonable grounds, that there had been a contravention of this Part or that there was likely to be an accident or injury to health arising out, linked with or occurring in the course of employment. This, according to counsel, represents a relatively low standard and she put forth that in her opinion, a review of the original complaints and their testimony demonstrates that individually, the complainants believed on reasonable grounds that there had been a contravention of the Code or that there was likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment. Each worker, in the words of counsel, had concerns about the harassing behaviour of a co-worker in the work place and a perspective that this harassing conduct was harming or would harm them, particularly in view of the stress and anxiety that the conduct generated. Each worker had concerns that the employer had not responded in a manner that would protect them from such harm.

[29] In conclusion to her submissions, counsel reiterated that my consideration of the appeal must address first the question as to whether the employer, in all three cases, actually failed to adhere to the complaint review process established by section 127.1 of the Code and second, if necessary, examine individually the substance of the three original complaints made by the respondents. In Ms. Turkington's opinion, the employer interfered with the ICRP set out in section 127.1, in that it refused to allow the joint health and safety committee investigation to take place as is prescribed under subsection 127.1(3) of the Code. Because of the fact that the investigation was not proceeding , HSO

Anderson became involved to investigate not the substance of the initial three complaints by the three respondents, but the status of the ICRP to wit, that the said health and safety committee investigation was not proceeding. In the circumstances and in each case, the HSO directed that the joint investigation take place. Having considered the first question, counsel expressed the view that should I find it necessary to review the substance of each complaint, such review must be in keeping with the nature of the legislation, meaning that the review would not have as its focus whether the three employees were correct in their assessment of a violation of the Code or a risk to their health and safety, but rather the employees believed on reasonable grounds that there was a breach of the legislation or there was likely to be injury to them arising out of work place circumstances.

Analysis

[30] The positions taken by the parties in this case are diametrically opposed. On the one hand, the appellant has put forth the position that the complaints made by the three respondents, and by this I mean the initial complaints of harassment brought to the employer, as opposed to the "complaints" regarding the lack of involvement of the health and safety committee, were not matters that could be considered within the internal complaint resolution process established by section 127.1 of the Code, and that the HSO had erred in considering or not certain matters in arriving at her conclusion, thus deciding on a flawed approach to the legislation. In opting for this approach, the appellant appeared to give more importance to those questions in its analysis than to the proper comprehension of the process put in place by section 127.1 of the Code. On the other hand, the respondents have put the accent of their position on the actual process, claiming that the actual statutory process had been truncated and thus not followed, that HSO Anderson's comprehension of said process had been proper and that such issues of substance raised by the appellant as reasonable grounds, Regulation XX, proper health and safety nature of the complaints and coverage by the Code, could be considered by the parties to the process in the order of their intervention in the process and not as a pre-emptive preliminary condition to application of the process, more particularly at the sought referral to the health and safety committee.

[31] Before formulating the rationale for my determination, there are three items or points that need be stated as underlying the whole decision and which are not contested:

-a clear understanding of this case requires that one consider or recognize that, for lack of better words, two sets of complaints are present. Initially three complaints were presented to and examined by the employer through the process in place in the applicable collective agreement (Article 56— Protection against Harassment). Not satisfied with the results obtained through this process, all three respondents brought complaints of the same nature and based on the same sets of facts to the employer through the internal complaint resolution process established by section 127.1 of the Code. On the basis of the evidence adduced, after initial steps in the consideration of the said complaints, the complainants were not satisfied or encountered difficulties with the development of this latest investigation (denied request for reference to the joint health and safety committee) and sought the intervention of a health and safety officer to attend to these difficulties. This

request for the intervention of a health and safety officer constitutes, for a better comprehension of my rationale, a "complaint", for lack of a better word, albeit not a complaint as the word may be used through section 127.1 of the Code nor the complaints that were made to the respondents' supervisor(s) pursuant to subsection 127.1(1). This is what I refer to throughout as the second set of "complaints".

- the three directions that were issued to the appellant by HSO Anderson and are presently under appeal concerned exclusively the complaints that make up the second set of "complaints", where it was claimed that the employer was improperly refusing to proceed with the next step in the internal complaint resolution process to wit, examination of the complaints that make up the first or initial set of complaints by the health and safety committee.

- the HSO determined in her investigation and it has been established before the undersigned and in fact is actually uncontested that in all three cases, the referral of the initial complaints to the joint health and safety committee was refused by employer representatives.

[32] In my opinion, resolution of the matter at hand is quite simple and rests quite literally on a proper comprehension and application of the internal complaint resolution process put in place at and by section 127.1 of the Code. That process was put in place through the amendments that were made to the legislation in 2000 with a view to primarily provide the work place parties with the structured means to address and resolve work place issues between themselves and avoid resorting to work refusals or other recourses under the Code, where such action would not necessarily be proper, productive or indicated. Prior to this, refusal to work was essentially the means most often resorted to under the Code by employees attempting to have work place issues examined, and where refusal may not have been resorted to, internal examination of work place issues was essentially left to the will, if not the whim, of the employer. One must have in mind the fact that these changes to the legislation were inspired by the underlying principles that govern the legislation that provide employees with three basic rights to wit, the right to be informed, to right to refuse and of particular importance in the matter at hand, the right to participate.

[33] The process, and I emphasize that Parliament saw section 127.1 as a "process" as evidenced by the actual title of the provision, is made up of three progressive stages for dealing with complaints, evolving from direct, one-on-one discussion/examination of the complaint by the two work place parties that are the employee and the employer (supervisor), to a second stage where additional work place parties to wit, members of the work place health and safety committee representing the employee and the employer, are brought into the consideration of the issue, and finally concluding with the involvement of a neutral and objective third party from outside the work place. All three stages of the process are premised by subsection 127.1(1) which states that an employee wanting to make a complaint has the obligation ("shall"), prior to exercising any recourse available under the Code, with the stated exceptions of the right to refuse dangerous work and have it investigated by a health and safety officer, and the right of withdrawal from work of a

pregnant or nursing employee, to make, thus to present, the complaint to his or her supervisor. The Code however makes the presentation of the complaint conditional upon the employee believing, on reasonable grounds, that there has been a contravention of the Code or that there is likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment. The wording of the provision makes it abundantly clear, in my opinion, that in considering a complaint, one cannot dissociate the actual facts and/or circumstances specific to the matter from the employee's required belief, on reasonable grounds, of the existence of a contravention or the likelihood of accident or injury. Said in other words, the "belief, on reasonable grounds" constitutes and continues to be through all stages of the process an element of the complaint being submitted to and examined at the three stages of the process.

[34] Much was made by counsel for the appellant relative to the "belief on reasonable grounds" aspect of complaints and the fact that the HSO one, did not find it necessary to examine that aspect in the course of her investigation concerning the present matter and two, that counsel for the respondents drew a comparison with the work process refusal at section 128 to argue that since it is not open to an employer to truncate the work place committee's investigation under section 128, the employer is similarly obliged to proceed with an investigation under section 127.1 regardless of whether the employee has "reasonable grounds to believe ...". The appellant maintains that this would be a flawed understanding of the legislation because under subsection127.1 (3) the trigger to an investigation by the health and safety committee is an "unresolved complaint" while under the work refusal provisions, the trigger to a review by the said committee is the "continued refusal to work" by an employee. First, my interpretation of what constitutes a complaint formulated above to the effect that the "belief , on reasonable grounds" aspect constitutes and continues to be an element of a complaint going through all three stages of the process should put to rest the argument that such aspect need not be present at all stages of the process. However, I find no merit in the argument made by counsel for the appellant relative to supposed differing triggers to health and safety committee interventions. In my opinion, a continued refusal by an employee following one-on-one consideration of the reasons for refusals means that the cause of the refusal remains unresolved, at least in the mind of the refusing employee, who is allowed to continue refusing on the premise that "the employee has reasonable cause to believe that the danger continues to exist". Given what I have opined above regarding the constituting elements of a complaint under section 127.1 and the fact that reference to the health and safety committee is conditional upon there being an "unresolved" complaint, I see no contradiction in terms or otherwise between those two premises.

[35] With this in mind, the first stage of the process, in the words used above, the one-on-one stage, is expressed at subsection 127.1(2) as the obligation ("shall try") for the employee and his/her supervisor to attempt without delay to resolve the complaint between themselves . In the case at hand, the undisputed fact is that all three complaints that I have referred to above as the "initial set" of complaints, were discussed in some manner by the employees with their respective supervisors. There was little evidence and testimony regarding the extent to or manner in which these exchanges could be viewed as one-on-one efforts to attempt resolution. However, there is evidence that the subject

matter of those complaints was in every case considered on a one-on-one basis in some manner and the issue at hand does not require that more consideration be given to this question as this is not where the underlying issue of the appeal lies.

[36] The second stage of the process, primarily set at subsection 127.1 (3), but also expanding in subsections (4) to (7), evidences the progressive nature of the internal complaint resolution process. While the first stage calls for an attempt by the directly concerned work place parties to resolve the complaint between themselves, the second stage can be said to escalate to require a joint investigation by two other persons acting within the health and safety committee as representatives of the work place parties or, where there is no such committee, by two persons chosen to satisfy the same representation purpose. This stage may be looked at as being made of two parts, the referral and the investigation. The first part can be said to allow ("may" being permissive as per section 11 of the *Interpretation Act*) one or the other participant in the first stage of the process to refer an unresolved complaint to any chairperson of the work place committee or to the health and safety representative in the absence of a committee. It is important to note that there is no restrictive condition attached to that step apart from the fact that the complaint remains unresolved. While not stated in so many words, it stands to reason that the "belief, on reasonable grounds" element needs to still be present. It is equally important to note here that where the statute makes it possible for either the employee or the supervisor, the two protagonists of the first stage, to refer the complaint to the second stage, it does not restrict the perception of lack of resolution to the originator of the complaint, to wit the employee, and thus either protagonist in the first stage can consider the matter unresolved and either can proceed to make the referral. It is clear from the wording of the Code in this first part that either co-chair of the committee serves only as a conduit to bring the unresolved complaint to the attention of the health and safety committee. To draw the inference that in that role, either co-chair is awarded by the statute a preliminary screening or vetting function would be wholly unsupported by the wording of the provision and would essentially transgress into the investigative function of the two members of the health and safety committee, as made evident by the second part of this stage and the four subsections that follow subsection (3) where in all instances, the introductory governing words are "persons who investigate", indicating by use of the plural that no function is reserved to a single person. This, in my opinion, would include consideration of those preliminary questions relative to admissibility of the complaint(s) to the internal resolution process.

[37] The second part of this stage calls for the referred unresolved complaint "to be investigated jointly…". In my opinion, this part is imperative and offers no discretion to one or the other chairperson of the committee or the representative, or for that matter any other person who may be in receipt of the referred complaint, to decide or not to investigate the said complaint or have it investigated. Regarding the mandatory nature of this part, I am aware that while the first part of this stage is clearly permissive ("may"), one cannot find the usual statutory wording in the second part that would clearly indicate an imperative intent. The word "shall" is not part of the text such that the text does not read: "may refer an unresolved complaint …and it shall be investigated jointly".

However, in my opinion, this was a simple syntax and grammatical choice by the legislator and does not alter the imperative essence of this part of the text which is supported by the context of the text. Apart from the comments I made in the previous paragraph regarding the governing introductory words at subsections (4) to (7) and the fact that the word "person" in those four provisions is used in the plural, which clearly refers to the two persons mandated at subsection (3) to do the investigation, I also find support for this conclusion in the French text of the legislation which in law is to the same effect and intent, more specifically in the phrase that reads: "elle fait alors l'objet d'une enquête tenue conjointement..." where the verb "fait" in the phrase "fait...l'objet..." is used at the present tense, which stands for an imperative meaning according to section 11 of the French version of the *Interpretation Act*. That provision of the *Loi d'interprétation* reads in part as follows: "11. L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion." I did note previously that it was uncontested fact that there has been no joint health and safety committee investigation in the three cases at hand, as in all three cases, the employer co-chair of the committee in one case and managers in the two others, opted not to refer the complaints to the committee for investigation.

[38] The third stage marks the progression to consideration of the complaint(s) by a party who is not part of the work place, the HSO (127.1(8)). The scope of the investigation by the HSO at this stage is however restricted to complaints of a contravention to the Code and can proceed only in specific circumstances. Subsection 127.1(9) however is of a mandatory or imperative nature ("shall investigate or cause another HSO to investigate") and, more important, clearly indicates that what is to be investigated is solely the complaint that has been referred to the HSO once the investigation of the health and safety committee has been conducted ("the complaint referred to the officer under subsection (8)") and one of the specific circumstances in which such referral can be made exists.

[39] In light of what precedes, I have thoroughly examined the manner in which HSO Anderson proceeded in this case and have reached the following conclusions. First, as regards the process established at section 127.1 of the Code, I find that HSO Anderson properly understood and applied the internal complaint resolution process and the role that would be the HSO's, were the three initial complaints of the respondents eventually to reach her or another HSO after having been examined at the second stage of the process by the health and safety committee. That being the case, HSO Anderson was correct in her understanding of the limits to her mandate and authority relative to the request by the three respondents that a HSO intervene to ensure that the internal complaint resolution process be respected. As such, I also find that she was correct in her understanding and her decision as well as her explanation at the hearing that the "substance" issues raised or capable of being raised vis-à-vis the original three complaints were not part of what needed to be considered relative to the complaints of refusal to refer to the health and safety committee, since those issues could be or needed to be examined at the committee investigation stage before being open to consideration

by the HSO.

[40] I note that counsel for the appellant alluded to the *de novo* nature of this appeal proceeding which would make it possible for the undersigned to "step into the shoes" of the HSO and issue the ruling that the HSO should have made. While I agree with this understanding of the appeal process, this *de novo* capacity does not allow the undersigned to alter the essence of the basic issue being considered and appealed, something I would have to do were I to align myself to the position of the appellant that would have me consider those issues of substance that the appellant is of the view need to be examined prior to actually consider whether, as per subsection 127.1(3), it was mandatory for the three initial complaints to be submitted to the health and safety committee for investigation upon the request being made to that effect. Furthermore, I would have to consider the HSO to have erred in issuing the three directions, which is not the case.

[41] In conclusion then, I share the views expressed by counsel for the respondents. First, where the internal complaint resolution process is concerned, I find that by the actions of employer representatives, be they managers or employer co-chair of the joint health and safety committee, the process was truncated and prevented from being properly conducted to its statutory end. Second, given this initial conclusion, I also share the opinion expressed by counsel for the respondents that the initial issues (regulation XX, belief on reasonable grounds, health and safety nature of complaints and Code coverage) raised by the appellant go to the substance and merit of the original three complaints and are thus outside the scope of my authority in this instance, such being restricted to considering the validity of the directions issued by HSO Anderson regarding adherence to the various steps that make up the 127.1 process. Neither the health and safety committee nor the HSO examined those issues as part of their role in the process and thus neither has formulated conclusions vis-à-vis those. It stands to reason then that those issues are not mine to consider in this case as my review authority extends only to reviewing conclusions reached by an HSO.

[42] Finally, I note that counsel for the appellant has indicated that since the filing of this appeal, the employer has seen fit to comply in the interim with the three directions, since the appeal does not operate as a stay and no such stay was sought, which he stated would render an inquiry into the reasonableness of the views held by the individual complainants moot. Noting himself that this appeal concerns therefore only whether the appellant ought to have referred the matters to the health and safety committee, he pointed out that notwithstanding that Canada Post did not agree with the directions, it complied with them, the referral to the health and safety committee was made and a determination arrived at. While I take note of those, I must simply state anew that my review concerns primarily the situation as it existed at the time of the issuance of the directions, not what may have occurred or transpired in the span of more than 18 months since then. That the situation may have drastically changed, if I am to accept counsel's statement, would only go to compliance with the directions and corrective action that could be directed to correct contraventions to the Code, something not likely to be necessary given that statement by counsel.

Decision

[43] In light of all that precedes, it is my decision that the appeal is dismissed and the three directions confirmed.

Jean-Pierre Aubre
Appeals Officer