Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canadian Food Inspection Agency v. Public Service Alliance of Canada, 2014 OHSTC 1

Date: 2014-01-27
Case No.: 2012-63
Rendered at: Ottawa

Between:

Canadian Food Inspection Agency, Appellant

and

Public Service Alliance of Canada, Respondent

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer
Decision:	The direction is rescinded
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Language of decision:	English
For the Appellant:	Mr Michel Girard, Counsel, Treasury Board Legal Services, Justice Canada
For the Respondent:	Ms Lisa Addario, Legal Counsel, Legal Services - PSAC

REASONS

[1] This decision concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) by the Canadian Food Inspection Agency (CFIA), of a direction issued by Ms Joanne Penner, health and safety officer (HSO), Human Resources and Skills Development Canada (HRSDC - now Employment and Social Development Canada - ESDC), Labour Program, on September 6, 2012.

Background

[2] On November 28, 2011, an employee occupying an MPIP poultry inspector position with CFIA met with his supervisor who was the veterinarian in charge. In the course of that meeting, a number of concerns were raised relating to their work relationship. On December 2, 2011, the employee provided the supervisor with a written complaint summarizing the discussion that took place at that meeting in which, the employee alleged issues relating to miscommunication, favouritism, humiliation, unfair treatment, and lack of respect on the part of the supervisor.

[3] Subsequently, the employer mandated a regional director, to conduct a "fact finding" review into the employee's complaint. Two rounds of fact finding face to face interviews were conducted. The role of the regional director was to determine whether the allegations, if believed to be true, constituted harassment and/or violence in the work place.

[4] On February 2, 2012, the investigator issued a report entitled "Fact Finding Summary Re: Complaint of Harassment", in which it was concluded that there was no evidence to indicate that the employee's complaint constituted neither harassment nor violence and, consequently concluded that no further investigation was warranted. Although it was determined that the allegations of harassment made by the employee were not founded, the investigator found that there was an unresolved tension between the employee and the supervisor that needed to be addressed. To that end, the investigator recommended that an independent third party facilitator be contracted to assist the employee and the supervisor in resolving the tension between them. As a result, the employer closed the complaint.

[5] Both the employee and his union, the Public Service Alliance of Canada (PSAC), took issue with the process that led to the employer's fact finding and the content of its report. They submitted that from their understanding, the complaint was an occupational health and safety issue and that it should have been handled as such following the process provided in the *Canada Occupational Health and Safety Regulations*, under Part XX, Violence Prevention in the Work Place, henceforth referred to as (the Regulations).

[6] The employee and the union took exception to the employer using the fact finding way through the HR process rather than the process stated in the Regulations, which in their view, would have led to the appointment of a competent person to investigate the alleged work place violence. They believed there was a clear contravention of the

applicable provisions of the Regulations and they requested an investigation by a "competent person" as defined in subsection 20.9(1) of the Regulations.

[7] On February 10, 2012, HSO Penner received a written complaint from the employee that CFIA was not in compliance with subsection 20.9(3) of the Regulations. The employee's complaint concerned the appointment of the investigator because the latter did not meet the requirements of a competent person as defined in subsection 20.9(1). The employee believed that the investigator's goal was to arbitrarily determine whether there was harassment or not, which, from the complainant's standpoint, was an obvious contravention of the Regulations which does not allow an employer to dismiss a violence complaint just because the employer believes that harassment did not occur.

[8] After reviewing the complaint, HSO Penner determined that steps under the Code's internal complaint resolution process under section 127.1 of the Code had not been followed and as a result, she declined to investigate the matter further. As well, she outlined to the parties the applicable legislation which in this case pertained to Part XX of the Regulations.

[9] On February 21, 2012, HSO Penner requested an update on the status of the employee's complaint and she received an email from the newly appointed executive director of western operations for CFIA on February 24, 2012. The executive director reiterated the position of the employer; that the results of the fact finding revealed that the concerns raised by the employee did not constitute harassment, rather, that there was strained interpersonal relationship between the employee and the supervisor. It was concluded that CFIA had taken the necessary steps to address the employee's concerns and that the involvement of HRSDC Labour Program was not warranted. HSO Penner was also informed that an internal CFIA mediator was involved in the matter.

[10] During the period between March 5 and May 10, 2012, HSO Penner sent several emails to the parties, some of them to answer questions, others to reiterate the responsibilities of the parties under the Code and the Regulations. On May 10, 2012, she suggested that the employer submit an assurance of voluntary compliance (AVC) to terminate a contravention of the Code, since, from the HSO's perspective, there seemed to be no progress in the mediation process. Subsequent to the HSO's suggestion, she received a phone call from an employer representative regarding the AVC on May 31, 2012, and the HSO was informed that the employer would not submit an AVC because the latter was in compliance with the Code and the Regulations.

[11] Following the employer's response and being of the view that the employer failed to appoint a competent person to investigate the employee's complaint, HSO Penner issued a direction to CFIA on September 6, 2012, for a contravention of paragraph 125(1)(*z.16*) and subsection 20.9(3) of the Regulations, an excerpt of which reads as follows:

> […]
>
> The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:
>
> No / No : 1
>
> 125. (1)(z16) – Canada Labour Code Part II
> 20.9 (3) – Canada Occupational Health and Safety Regulations
>
> If the matter is unresolved, the employer shall appoint a competent person to investigate the work place violence and provide that person with any relevant information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent.
>
> As stated in 20.9 (1) (a) "competent person" means a person who is impartial and is seen by the employer and employee to be impartial, has knowledge, training and experience in issues relating to work place violence and has knowledge of relevant legislation.
>
> The employer failed to appoint a competent person, who is seen by one of the parties (employee) as impartial.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*a*) of the *Canada Labour Code*, Part II, to terminate the contravention no later than October 1, 2012.
>
> Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*b*) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.
>
> Issued at Calgary, this 6th day of September, 2012.
>
> […]

[12] CFIA filed an appeal of the direction on October 2, 2012. Further to my revision of this file and given the nature of the question at issue in this appeal, I decided to proceed on the basis of the HSO's investigation report and written submissions from the parties.

Issue

[13] The issue in this matter is to determine whether HSO Penner was justified to issue a direction to the employer finding a contravention of paragraph 125(1)(*z.16*) of the Code and subsection 20.9(3) of the Regulations.

Submissions of the parties

A) Appellant's submissions

[14] The appellant maintained that the interpretation of section 20.9 of the Regulations is the issue in the present appeal. The primary position put forth is that there was no obligation for the appellant to appoint a competent person pursuant to subsection 20.9(3).

[15] The appellant submitted that a fact finding exercise was conducted by the investigator, pursuant to subsection 20.9(2) of the Regulations, requiring the employer to try to resolve the work place violence or alleged work place violence as soon as it becomes aware of it. The investigator concluded that there was no evidence indicating that the employee's complaint constituted harassment or violence, or that there were findings that would warrant further investigation under the Regulations. As such, the complaint was closed.

[16] According to the appellant, if there had been any evidence suggesting that there may have been violence in the work place and that the matter could not have been resolved, then the requirement to appoint a competent person pursuant to subsection 20.9(3) would have applied.

[17] Furthermore, the appellant is of the opinion that if the respondent does not agree with the fact finding assessment, the correct recourse would be to seek judicial review of the decision and not to proceed with the complaint. The appellant maintained that the legislation intended to provide a way to screen a complaint because it would be a waste of resources to go through the process of appointing a competent person to perform an investigation when there is clearly no evidence of alleged violence in the work place. It is argued that the ultimate result of the absence of a screening mechanism would lead to the obligation to appoint a competent person to investigate vexatious, unfounded complaints.

[18] In addition, the appellant maintained that even if subsection 20.9(3) was applicable to it, it was exonerated from the requirement, pursuant to paragraph 20.9(6)(*c*) which states that subsection 20.9(3) does not apply if "the employer has effective procedures and controls in place, involving employees to address work place violence".

[19] It is argued that subsection 20.9(6) lists three situations for which subsection 20.9(3) does not apply. It is the appellant's position that these three situations are not cumulative, that they must be read separately, despite the existence of an ambiguity due to the word "and" between the second and the third situation in the English version of that provision (that word does not exist in the French version). According to the appellant, the ambiguity derives from the fact that it is not clear whether paragraph 20.9(6)(*b*) and paragraph 20.9(6)(*c*) are to be read together as forming one exception to the requirement of having a competent person investigate given the presence of the word "and" at the end of paragraph 20.9(6)(*b*).

[20] Moreover, in the event that those two paragraphs were to be read together, the exoneration of an employer to appoint a "competent person to investigate" would be dependent on the existence of the reasonableness to consider that engaging in the violent situation is a normal condition of employment, and the existence of effective procedures and controls in place, involving employees to address work place violence. The appellant does not subscribe to this interpretation. Rather, it argued that the ambiguity is eliminated when looking at the French wording of subsection 20.9(6). In that version, there is no equivalent for the word "and" between paragraph 20.9(6)(*b*) and paragraph 20.9(6)(*c*),

which leads the appellant to conclude that the three exceptions stated in subsection 20.9(6) are separate standalone ones.

[21] In support of its interpretation, the appellant maintained that both the English and French versions of a statute or regulation are equally authoritative statements; that neither version has the status of a copy or translation and neither enjoys priority nor is paramount over the other. The appellant pointed that where a bilingual enactment appears to say different things, the courts have provided a procedure for interpreting the differences. It refers to *Schreiber* v. *Canada (Attorney General)*, 2002 SCC 62; *R* v. *Daoust*, 2004 SCC 6 and *Hope Air* v. *Canada*, 2011 TCC 248.

[22] The appellant submitted that the Supreme Court's approach with regard to the interpretation of bilingual enactment was summarized in *The Law of Bilingual Interpretation*, by The Honourable Mr Justice Michel Bastarache, 1st ed. (Markham: Lexix Nexis, 2008, at p. 47 – 48.). as the following:

> 1. The first step consists of examining the two versions to determine whether there is a discordance between the two versions. "Discordance" here has the same meaning as "conflict" does in many of the earlier cases: the important notion here is simply that the two versions are different. If the two versions are the same, there really is no issue. If there is discordance, the interpreter must proceed to the next step.
>
> 2. The second step consists in determining the nature of the discordance, and determining the shared meaning. There are three possibilities here:
>
> a. The versions are in "absolute conflict". Each is clear and no shared meaning can be found.
> b. One version is ambiguous and the other clear. The clear version provides the shared meaning.
> c. One version is broad and the other narrow. The narrow version provides the shared meaning.
>
> 3. The third step consists of an appeal to extrinsic methods of determining the intention of the legislator with respect to the provision.

[23] The appellant suggested that there is a conflict between the French version and the English one if paragraph 20.9(6)(*b*) and paragraph 20.9(6)(*c*) were to be read as one exception to the requirement of having a competent person investigate. It argued that given the ambiguity of the English version, the French version reflects the true intent of the legislator; it eliminates the English version's ambiguity by providing the shared meaning, according to the rules of statutory interpretation. In support of its position, it referred to *Canada (Attorney General)* v. *Trochimchuk*, 2011 FCA 268 at paragraph 1 and maintained that applying the English version would lead to an absurd result because it could not have been the intent of the legislator that in cases where the employer and the union do not agree on who is a competent person, that no investigation could proceed and that the employer would receive a direction from a HSO for contravening subsection 20.9(3).

[24] The appellant concluded that the employer appointed an individual to conduct a fact finding assessment which established that there was no violence in the work place, and that the employer followed their effective procedures and controls to address the alleged work place violence incident and as such, fully respected subsection 20.9(6) of the Regulations. According to the appellant, there was no need to appoint a competent person to investigate the matter pursuant to subsection 20.9(3).

B) Respondent's submissions

[25] The respondent's primary position is that the appellant has contravened subsection 20.9(3) by not appointing a competent person to conduct an investigation, following the allegations of its employee, and that the employee in this case was the victim of violence in the work place. The respondent argued that the appellant is creating ambiguity, in reference to subsection 20.9(6) of the Regulations, to avoid its clear and mandatory language requiring the appointment of a competent person. In support of its position, it refers to a citation of Chief Justice Lamer in the Supreme Court of Canada judgement of *R.* v. *Multiform Mfg. Co.* [1990] 79 CR (3d) 390 which reads as follows:

> "Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise."

[26] The respondent's grounds for argument are based on four points.

[27] First, the respondent argued that the employer wilfully ignored its obligation to appoint a competent person pursuant to subsection 20.9(3), to investigate the employee's unresolved allegations of work place violence. Instead, the appellant conducted an employer dominated fact finding investigation as a pretext to dismiss the employee's allegations. In support of its argument, it referred to the Supreme Court of Canada decision of *National Trust Co.* v. *Mead*, [1990] 5 W.W.R. 459 (SCR), paragraphs 468 – 469. As an interpretative help to the provisions of Part XX of the Regulations, the respondent pointed to the Liaison Bulletin No. 74 (June 2008) published by the Program Development and Guidance Directorate (HRSDC – Labour Program) regarding violence prevention in the work place, and the speech of The Honourable Jean-Pierre Blackburn, Minister of Labour and Minister of the Economic Agency of Canada for the regions of Quebec, regarding the announcement of The Violence Prevention in the Work Place Regulations of June 17, 2008.

[28] From these two documents, the respondent drew the conclusion that the provisions for hazard identification and hazard prevention were not sufficient to address work place violence, since the standard approach to dealing with situations of work place violence, such as harassment investigation, was not seen to be adequate to respond to situations of work place violence. It contended that more was required and that is why the Regulations were adopted. The respondent asserted that conducting a harassment investigation, as the appellant did in this case, might satisfy the employer's obligation to "try to resolve the matter as soon as possible with the employee" as required by subsection 20.9(2), but it

does not suffice to respond to an unresolved allegation of violence in the work place as it was in this case.

[29] Contrary to the position of the appellant that paragraphs 20.9(6)(*a*), (*b*) and (*c*) should be read as creating standalone exemptions exonerating it from the obligation of appointing a competent person, the respondent argued that the word "and" is conjunctive, it binds together two phrases and is one of the least ambiguous words in the English language, in terms of meaning. Counsel argued that the contention of the appellant would be relevant if, instead of the word "and", it is the word "or" that was used at the end of paragraph 20.9(6)(*b*), as it would mean that only one of the conditions set out in these three paragraphs would need to be fulfilled for an employer to be exonerated from the obligation to appoint a competent person. In the present case, the respondent affirmed that the conjunctive locution "and" is used to ensure that the conditions set forth in all three subparagraphs must be fulfilled for an employer to be exonerated from the obligation to appoint a competent person to investigate allegations of work place violence.

[30] Moreover, the respondent argued that the inclusion of the "normal condition of employment" and "work place violence caused by a person other than an employee" as preconditions for not performing an investigation explains why, according to it, is a better and more sensible interpretation of subsection 20.9(6). The respondent claimed that the obligation for an investigation by a competent person is not intended to be available to employees who work in professions for which violence is a normal condition of employment such as law enforcement or correctional personnel. The respondent is convinced that for such categories of personnel, third party investigations are not relevant since violence is part of the job description. Had it been otherwise, as the appellant contended, the respondent is of the opinion that any employer at any time would be able to assert that it had effective procedures and controls in place to address work place violence.

[31] Second, the respondent submitted that there is no ambiguity, no conflict between the English and French versions of subsection 20.9(6). It submitted that a list of conditions is provided by that provision, all of which must be fulfilled for the employer to be exonerated from its obligations to appoint a competent person. In the respondent's interpretation of subsection 20.9(6), it referred to the Drafting Conventions of the Uniform Law Conference of Canada found in the seminal aid to statutory interpretation "Driedger on the Construction of Statutes" 3rd edition, 1994 of which subsection 23(4) states that:

> "(4) a series of clauses or further subdivisions should usually be linked by one "and" or "or", placed at the end of the second last item in the series…
>
> *Note that the French version of this subsection is different.*
>
> In French drafting, the fact that a series is conjunctive or disjunctive is indicated by appropriate introductory words, not the literal equivalents of "and" or "or". "

[32] In addition, the respondent asserted that at page 20 of the "Guide to Violence Prevention in the Work Place", a publication of Labour Program, one can read that:

> "Whenever the employer becomes aware of an incident of WPV (work place violence), the employer must try and resolve the situation between the parties involved. However, a formal investigation by a "competent person" must take place if the employer cannot resolve the matter to the satisfaction of the employees involved…
>
> However, the employer can address the situation without a competent person if **all three** of the following criteria are met:
>
> 1. A non-employee, such as a client, caused the work place violence, AND
> 2. It is reasonable to consider that the possibility of intervening in violent situations is a normal condition of employment, AND
> 3. The employer has effective procedures and controls in place, involving employees to address work place violence". [Emphasis within the document]

[33] The respondent argued that this interpretation is confirmed in the French version of the Guide.

[34] Third, the respondent argued that the employer chose to handle the allegation of work place violence by using its harassment policy rather than the Regulations. In support of its position, it is claimed that the appellant's position is inconsistent with the stance of Treasury Board, in its April 2013 documentary update of the Regulations which affirms that:

> "In cases where behaviour meets the definition of harassment, the employee should be encouraged to use the process found in the *Policy* on *Harassment Prevention and Resolution and the Directive on the Harassment Complaint Process*.
>
> If an employee insists on resolving an allegation of harassment through the Violence Prevention Regulation, the manager will have to proceed as required in the Regulations.

[35] In the same Treasury Board document it noted that "Nothing in Part XX prevents an employee from alleging that harassment constitutes violence".

[36] The respondent submitted that from Treasury Board's standpoint, the appointment of a competent person to investigate allegations is mandatory when an employee views his or her allegations of violence as unresolved. The respondent acknowledged that Treasury Board's approach is consistent with the intent of the Regulations, that is, to put investigations into the hands of an impartial knowledgeable party, whether the employer believes the employee is of good faith or not.

[37] Therefore, the respondent contended that the appellant's position that the employer's views regarding whether the employee's allegations were *bona fide* can be relevant to prevent an investigation by a competent person, is inconsistent with the context around the adoption of the Regulations, that is, that more than a typical harassment investigation is required in cases where work place violence is alleged.

[38] Last, in response to the appellant's submission that the fact finding, if contested, should be judicially reviewed, the respondent argued that that allegation had no legal foundation. Counsel submitted that the fact finding was at best, an interim step requiring an employer to try to resolve matters pursuant to subsection 20.9(2). Reasons were presented why the employer's position was not sustainable.

[39] Notably, the respondent argued that insofar as the employer's investigator was not considered by both parties as a competent person pursuant to subsection 20.9(3), its fact finding decision was an interim one and as such, would not qualify for a judicial review. Moreover, to judicially review the fact finding would usurp the statutory authority of the HSO under sections 129 and 145 of the Code, to investigate such issues. Finally, the respondent submitted that the argument raised by the employer regarding the definition of a competent person is irrelevant in the context of this appeal. According to the respondent, the appellant declined to appoint a competent person which is the crux of the issue in this appeal; a dispute regarding the qualifications of such a person never arose.

[40] The respondent requested that the appeal be dismissed.

C) Appellant's reply

[41] The appellant replied that the employee brought a series of concerns to the attention of the employer that were subsequently characterized as complaints of work place violence. Initially, these concerns were qualified as harassment, and were relating to favouritism, humiliating and disrespectful behaviour stemming from the supervisor. Counsel argued that nowhere in the employee's written submissions, from the meeting with the supervisor, was there ever any mention of work place violence or an allegation of work place violence.

[42] As a result of not mentioning any work place violence, the appellant affirmed that it considered the employee's concerns to be related to harassment and as such, initiated a fact finding process which concluded that there was no evidence of harassment.

[43] The appellant disagreed with the allegations made by the respondent that it wilfully ignored subsection 20.9(3) of the Regulations by not appointing a competent person to investigate what it considered unresolved allegations of violence in the work place.

[44] The appellant's position is that the employee never complained about work place violence, given that there has not been any imminent danger or anything else that could be construed to cause harm in the form of injury or illness. It submitted that an employee

must do more than just allege work place violence to trigger the requirement of appointing a competent person to investigate.

[45] The appellant maintained that even though the CFIA *Workplace Violence Prevention Policy* had not yet come into effect at the time the employee filed the complaint, the policy speaks of a screening process to deal with complaints of harassment and/or work place violence; it specifically states that:

> While there are some similarities between the two definitions [that of workplace violence and harassment], the appropriate process to address a complaint shall be determined by the Employer during the Screening Process.
>
> Complaints determined through the Screening Process to relate to, or to constitute allegations of harassment shall be governed by *the Policy on the Prevention and Resolution of Harassment in the Work place* and will be dealt with accordingly.

[46] It is the appellant's position that CFIA's policy approach is consistent with Treasury Board's. It argued that the Regulations are to be read in conjunction with the directive on the harassment complaint process, which defined harassment as follows:

> Improper conduct by an individual, that is directed at and offensive to another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known, would cause offense or harm. It comprises objectionable acts(s), comments(s), or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the *Canadian Human Rights Act* (i.e. based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and pardoned conviction).
>
> Harassment is normally a series of incidents but can be one severe incident which has a lasting impact on the individual.

[47] The appellant is of the opinion that the issue to be determined in the present appeal is whether a HSO can decide that as long as the Regulations are referred to and the complaint is framed as one of work place violence, a competent person must be appointed to investigate. Counsel submitted that the employer should be able to undertake an initial screening review of an employee's complaint in order to decide if it concerns incidents of work place violence or whether it is more appropriate to treat the matter under a more appropriate policy or recourse mechanism such as the Prevention and Resolution of Harassment in the Workplace policy.

[48] Ultimately, the appellant contended that the core issue for the employee was about how leave was treated and how a test was graded. Counsel asserted that there are other mechanisms outlined under the collective agreement and CFIA's staffing recourse policy

that would be more appropriate in dealing with these issues instead of trying to characterize them as work place violence.

Analysis

[49] As I stated earlier, the issue to be determined in this matter is whether HSO Penner was justified to issue a direction to the employer for contravening paragraph 125(1)(*z.16*) of the Code and subsection 20.9(3) of the Regulations for the reason that the employer failed to appoint a competent person to investigate the employee's complaint.

[50] Paragraph 125(1)(*z.16*) of the Code reads as follows:

> 125.(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,
>
> […]
>
> (*z.16*) take the prescribe steps to prevent and protect against violence in the work place;

[51] Section 20.9 of the Regulations outlines the process that an employer must follow after having being made aware of work place violence or alleged work place violence as follows:

> 20.9 (1) In this section, "competent person" means a person who
>
> (*a*) is impartial and is seen by the parties to be impartial;
>
> (*b*) has knowledge, training and experience in issues relating to work place violence; and
>
> (*c*) has knowledge of relevant legislation.
>
> (2) If an employer becomes aware of work place violence or alleged work place violence, the employer shall try to resolve the matter with the employee as soon as possible.
>
> (3) If the matter is unresolved, the employer shall appoint a competent person to investigate the work place violence and provide that person with any relevant information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent.
>
> (4) The competent person shall investigate the work place violence and at the completion of the investigation provide to the employer a written report with conclusions and recommendations.
>
> (5) The employer shall, on completion of the investigation into the work place violence,
>
> (*a*) keep a record of the report from the competent person;

(*b*) provide the work place committee or the health and safety representative, as the case may be, with the report of the competent person, providing information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent; and

(*c*) adapt or implement, as the case may be, controls referred to in subsection 20.6(1) to prevent a recurrence of the work place violence.

(6) Subsections (3) to (5) do not apply if

(*a*) the work place violence was caused by a person other than an employee;

(*b*) it is reasonable to consider that engaging in the violent situation is a normal condition of employment; and

(*c*) the employer has effective procedures and controls in place, involving employees to address work place violence.

[52] The combined reading of subsections 20.9(2) and (3) of the Regulations indicates to me that in order for the employer to be obliged to appoint a competent person to investigate work place violence or an allegation of work place violence, the employer must first have been aware of work place violence or an allegation of work place violence. Second, it must have tried to resolve the matter with the employee. In the event that such an attempt remains unsuccessful, then it must appoint a competent person to investigate, unless the employer is exempted from doing so pursuant to subsection 20.9(6) of the Regulations.

[53] Thus, the obligation to appoint a competent person is triggered by first, the awareness of work place violence or alleged work place violence and second, the unsuccessful attempt to resolve the situation by the employer. To resolve this appeal, I will therefore need to answer the following questions:

1) Was the employer made aware of work place or alleged work place violence?
2) In the affirmative, did the employer try to resolve the matter?

1) Was the employer made aware of work place violence or alleged work place violence?

[54] The appellant argued that the employee's written complaint summarizing what occurred at the meeting that took place with his supervisor, does not contain any mention whatsoever of work place violence or allegation of work place violence and that the employer considered the employee's concerns to be related to harassment. The employer also argued that on the face of the employee's complaint there is clearly no violence given that there is no imminent danger or anything else that could be construed to cause harm in the form of injury or illness.

[55] Accordingly, the employer is of the view that it was not made aware of an allegation of work place violence since it considered the employee's concerns to be related to allegations of harassment. The employer disagrees with the employee's characterization of the dispute as being one of work place violence.

[56] The question I need to ask myself then is whether the employer was justified in considering that the employee's allegation was not one of work place violence and therefore an investigation by a competent person was not warranted. In examining this question, it is necessary to look at the definition of work place violence as provided in section 20.2 of the Regulations which reads:

> 20.2 In this Part, "work place violence" constitutes any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee.

[57] In view of that definition, in order for the employer, in this case, to be under the obligation to appoint a competent person, the employer must have been made aware through the employee's complaint of "any action, conduct, threat or gesture" that could "reasonably be expected to cause harm, injury or illness" to that employee.

[58] As I previously mentioned, the basis for the employee's complaint against the supervisor was summarized in the written complaint of December 2, 2011, that the employee had provided to the supervisor in which it raised issues of miscommunication, favoritism, humiliation and unfair treatment by the supervisor regarding leave; the humiliating and disrespectful manner of the supervisor through "dismissive hand gestures, rolling of your eyes or being verbally demeaning"; and the random ranking of a poultry rejection program exam.

[59] After having reviewed the written complaint, I have noted as mentioned by the appellant, that the employee does not explicitly characterize the allegations as being work place violence. However, this does not automatically mean that the alleged conduct and acts of the supervisor do not constitute work place violence as defined in the Regulations. I have also noted that most of the employee's concerns revolve around the manner in which his requests for leave was treated and how a test was graded.

[60] In applying the definition of work place violence provided in the Regulations to the facts of this case, I was able to conclude that the employee's allegations of favouritism, humiliating and disrespectful behaviour such as "hand gestures, rolling of your eyes or being verbally demeaning" exhibited to the employee by the supervisor fulfills the first element of the definition set out in section 20.2 as constituting "action", "conduct" and "gesture". However, in my opinion, these allegations are not any that could reasonably be expected to cause harm, injury or illness to the employee.

[61] Furthermore, I believe that the definition of work place violence is not meant to apply to situations such as the case at hand, where the employee's allegations, if believed to be true, have more to do with feeling humiliated and disrespected by the behavior of the supervisor. The definition is intended to address situations where an employee is in fear of being harmed, injured or made ill due to the conducts of another individual in the work place.

[62] Therefore, I find that the employee's allegations, if believed to be true, do not fall within the definition of work place violence as set out in paragraph 20.9(3) of the Regulations. Given that the situation is not one of work place violence, I conclude that the employer was not made aware of an allegation of work place violence as defined in the Regulations. Consequently, I find that the employer was not under the obligation to appoint a competent person to investigate the employee's allegations.

[63] Both HSO Penner and the respondent seem to agree that as long as an employee characterizes a complaint as being one of work place violence, which the employee subsequently did, and that Part XX of the Regulations is invoked, the obligation to appoint a competent person is triggered. According to the respondent's interpretation of the Regulations, the appointment of a competent person to investigate a complaint is mandatory when an employee views his complaint as being one of work place violence regardless of the employer's views around the *bona fides* of the employee's allegations.

[64] Based on reasonable interpretation of the Regulations, I find that upon an allegation of work place violence being made by an employee such as in the present case, an employer is entitled to review the allegations to determine whether they meet the definition of work place violence as per the Regulations, in which case, the process provided in Part XX of the Regulations ought to be followed.

[65] On the contrary, if the allegations of the employee do not relate to or constitute work place violence, Part XX of the Regulations does not apply. In such a case, the employer can choose to treat the matter through other mechanisms or policies better suited to address the situation. In the present case, the employer chose to apply its *Prevention and Resolution of Harassment in the Workplace Policy* to undertake an initial review of the complaint by the regional director.

[66] In addition, I agree with the appellant's argument that should an employer not be allowed to undertake an initial review of the complaint to determine whether Part XX applies, this could lead to the mandatory appointment of a competent person to investigate complaints that clearly do not meet the definition of work place violence pursuant to the Regulations. In my opinion, it simply could not have been the legislative intent to require employers to appoint a competent person to investigate each and every complaint so long as the employee characterizes them as being work place violence or by raising Part XX of the Regulations.

[67] Given my conclusion to the first question, I do not need to address the second question.

The exemption stated in subsection 20.9(6) of the Regulations

[68] Finally, most of the parties' submissions spun around the exemption to the requirement to appoint a competent person to investigate pursuant to subsection 20.9(3) of the Regulations. Although the appellant's counsel asserted in his reply submissions that this situation was one of harassment and not of work place violence and thus Part XX

of the Regulations does not apply; counsel also argued in his prior submissions that the employer was exempted from appointing a competent person, pursuant to subsection 20.9(6). Given my conclusion that Part XX of the Regulations does not apply in the present circumstances, there is no need for me to address the exemption argument.

[69] I believe that the determination of this matter rests solely on the application of the definition of work place violence set out in section 20.2. The only question I asked myself was whether the alleged conduct, gesture or manner of the supervisor met the definition of work place violence stated in the Regulations. I found that they did not, given that the actions and facts alleged could not reasonably cause harm, injury or illness to the employee. Additionally, I found that nothing precluded the employer from applying its harassment policy to address the allegations of the employee.

[70] Based on all the above, I find that the employer was not under the obligation to appoint a competent person and that HSO Penner erred in issuing a direction to the employer for contravening paragraph 125(1)(*z.16*) of the Code and subsection 20.9(3) of the Regulations.

Decision

[71] For all these reasons, I rescind the direction issued by HSO Penner on September 6, 2012.

Michael Wiwchar
Appeals Officer