Tribunal de santé et sécurité au travail Canada

Occupational Health and Safety Tribunal Canada

Ottawa, Canada K1A 0J2

Citation: VIA Rail Canada Inc. v. Cecile Mulhern and Unifor, 2014 OHSTC 3

Date: 2014-04-14
Case No.: 2012-51 and 72
Rendered at: Ottawa

Between:

VIA Rail Canada Inc., Appellant

and

Cecile Mulhern and Unifor, Respondents

Matter:	Appeals under subsection 146(1) of the *Canada Labour Code* of three directions issued by health and safety officers
Decision:	The two directions in File No. 2012-51 are rescinded; the appeal in File No. 2012-72 is dismissed for lack of jurisdiction
Decision rendered by:	Pierre Hamel, Appeals Officer
Language of decision:	English
For the Applicant:	Mr. Jacques Rousse, Counsel, McCarthy Tétrault
For the Respondent:	Mr. Jim Woods, National Representative, Unifor

Canada

[1] This decision concerns two appeals filed by VIA Rail Canada Inc. ("VIA Rail" or "the employer") pursuant to subsection 146(1) of the *Canada Labour Code* ("the Code") against directions issued by two Health and Safety Officers (HSO) with the Labour Program of Employment and Social Development Canada (ESDC). The first appeal (OHSTC File No. 2012-51) relates to two directions issued on June 29, 2012, by HSO William (Bill) D. Gallant further to his investigation into a work refusal made by Ms. Cecile Mulhern, an employee of VIA Rail, on June 14, 2012. The first direction (Direction #1) reads as follows:

IN THE MATTER OF THE *CANADA LABOUR CODE*
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(*a*)

On June 14, 2012, the undersigned health and safety officer conducted an investigation following a refusal to work made by Cecile Mulhern in the work place operated by Via Rail Canada Inc., being an employer subject to the *Canada Labour Code*, Part II, at 1161 Hollis Street, Halifax, Nova Scotia, B3H 2P6, the said work place being sometimes known as VIA Rail, Halifax.

The said health and safety officer considers that a condition in a place constitutes a danger to an employee while at work:

Exposure to continued harassment on trains being serviced at the VIA RAIL Canada, Halifax train station is a danger to Ms. Mulhern.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*a*) of the *Canada Labour Code*, Part II, to protect any person from the danger immediately.

Issued at Dartmouth, this 29th day of June, 2012.

(signed)
William (Bill) D. Gallant
Health and Safety Officer
Certificate Number:

To: Via Rail Canada Inc.
1161 Hollis Street
Halifax, Nova Scotia
B3H 2P6

[2] The second direction issued by Mr. Gallant on the same day (Direction # 2) reads as follows:

IN THE MATTER OF THE *CANADA LABOUR CODE*
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On June 14, 2012, the undersigned health and safety officer conducted an investigation in the work place operated by Via Rail Canada Inc., being an employer subject to the *Canada Labour Code*, Part II, at 1161 Hollis Street, Halifax, Nova Scotia, B3H 2P6, the said work place being sometimes known as VIA Rail, Halifax.

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)(z.16) – Canada Labour Code Part II, 20.9(3) – Canada Occupational Health and Safety Regulations

> **Via Rail Canada has not appointed a competent person to investigate the matter of unresolved work place violence on board trains being prepared for passenger service at the Via Rail station in Halifax Nova Scotia.**

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 July 14, 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 Dartmouth, this 29th day of June, 2012.

(signed)
William (Bill) D Gallant
Health and Safety Officer
Certificate Number:

To Via Rail Canada Inc.
1161 Hollis Street
Halifax, Nova Scotia
B3H 2P6

[3] The second appeal (OHSTC File No. 2012-72) flows from the same set of circumstances and relates to what the employer considered to be a series of directions issued by HSO Matthew D. Tingley on October 2nd, 2012, further to his investigation into a work refusal made by Ms. Mulhern on September 12, 2012. In an exchange of email with the Tribunal's registry, HSO Tingley indicated that he had not issued any direction to the employer further to his attending the work site, but rather that he responded to a request from the employer to attend the work site, at which time he counselled the parties, "without taking any enforcement action". The relevant portion of HSO Tingley's "Investigation Report", which the employer considers to amount to directions, reads as follows, at pages 4 and 5 of the report:

> (…)
>
> **II. Intervention by the Health and Safety Officer**
>
> I attended the work site and initially met with Ms Mulhern and her union representative, Carolyn Ayoub as Sheila Duffy and Sandy Hache-Lawlor were on a conference call. When Ms Duffy and Ms Hache-Lawlor were available, I met with them to obtain an overview of the circumstances from their perspective.

> Subsequently, I met with Cecile Mulhern, Carolyn Ayoub, Sheila Duffy and Sandy Hache-Lawlor. I advised the parties that although the circumstances today were related to the previous refusal, this was a new refusal and required investigation in accordance with section 128 of the Canada Labour Code. I clarified for the parties that there appeared to be some confusion on the part of everyone regarding how the investigation of August 1st should have proceeded.
>
> I advised the parties of the following:
>
> Because the employer did not order Ms Mulhern to participate in the investigation despite her objection, and caution her regarding potential disciplinary action if she continued to refuse to participate, that it was not possible to consider her actions uncooperative. This is further supported by Mr Cyrs investigation notes.
>
> the investigation must be conducted in accordance with Health & Safety Officer Gallant's Direction
>
> when the investigation commences, that all parties must cooperate with the investigation as referenced by several provisions of the Canada Labour Code
>
> the investigation is necessary regardless of pending reductions in the work force because the complaint alleged that a behaviour exists in the work place which could affect another worker
>
> the investigation should occur while the parties are still employed to avoid additional costs in obtaining testimony after employment ceases
>
> Dated at Dartmouth, this 2nd day of October, 2012.
>
> (signed)
> Mathew D Tingley
> Health and Safety Officer Id. No.
> 126 Cromarty Drive
> P.O. Box 1350
> Dartmouth, NS B2Y 4B9
> (…)

[4] Whether the above excerpts from HSO Tingley's report ought to be characterized as a direction, is a threshold issue to my jurisdiction in dealing with the second appeal, as section 146 of the Code provides that an appeals officer may only be seized with an appeal of a "direction" issued by a health and safety officer under subsections 145(1) or (2) of the Code. I raised that question in the course of a pre-hearing teleconference with the parties' representatives and while I decided to proceed to hear the evidence regarding the circumstances that led to HSO Tingley's intervention and report, I asked the parties' representatives to present submissions on that point, which they did.

[5] Further to a pre-hearing teleconference, I had advised the parties that the two appeals would be joined for a common hearing, as it appeared that some aspects of the evidence was common to both appeals, and that an understanding of the circumstances that gave rise to the first appeal was required to better understand the context of the second appeal. The hearing of the appeals took place on October 21 to 24, 2014, in Halifax, Nova Scotia.

[6] I will provide an overview of the evidence presented at the hearing and the parties' submissions regarding both appeals, and I will deal with each appeal successively in my reasons.

The Facts

Historical Context

[7] Before recounting the immediate circumstances that gave rise to Ms. Mulhern's work refusal of June 14, 2012, it is useful to refer to the historical perspective of Ms. Mulhern's employment with VIA Rail that was presented at the hearing. The chronology of events that follows, some of which may seem remote to the directions and appeals, provide the overall perspective within which to understand the events that caused Ms. Mulhern to exercise, on two occasions, her right to refuse to work under the Code.

[8] Ms. Mulhern has worked for VIA Rail since November 2, 1998. In 2008, she took the position of Service Attendant ("Stand-by") in VIA Rail's train cars. This position requires employees to prepare the train to leave the station and normally involves bed making, set-up of rooms, storage of supplies and setting up the economy cars by ensuring Destination magazines and Emergency pamphlets are in each seatback pouch. Ms. Mulhern is a unionized employee represented by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (now Unifor) (the "Union") and is covered by a collective agreement.

[9] Since October 2008, Ms. Mulhern's work is subject to an accommodation agreement, which has been approved by the Canadian Human Rights Commission in resolution of a complaint that Ms. Mulher had filed in 2006. The complaint related to the Ms. Mulhern's need for accommodation by the employer, as a result of her disability (physical limitations) caused by a work place injury that she suffered in 2001. Ms. Mulhern is able to fulfill the majority of the tasks of her job, but cannot make beds in the sleeper rooms nor work on a moving train. Ms. Mulhern's accommodation agreement comprises of working four hours a day preparing the trains and two hours a day in the VIA Rail office in Halifax performing various clerical duties after the train departs.

[10] The evidence presented at the hearing has shown that, over the years, Ms. Mulhern's work colleagues have occasionally expressed some concern or voiced their discontent regarding the effect of Ms. Mulhern's accommodation agreement on their own workload. The duties that she was incapable of performing due to her injury, such as making beds in particular, had to be performed by her co-workers perhaps at a higher frequency than normal. Ms. Mulhern had brought some incidents to the attention of VIA Rail's management as they occurred. All incidents reported to VIA Rail were in relation to Ms. Mulhern's negative perception of comments made by employees regarding the extra workload they were facing (following work "bundling" under the accommodation agreement) when they were assigned to work with her.

[11] The first incident was reported to management in January 2009 shortly after Ms. Mulhern's return to work following the accommodation agreement. In a handwritten letter delivered to Mr. Jose Pastor, Labour Relations Advisor, Ms. Mulhern informed VIA Rail management that on January 10, 2009 fellow employees Mr. Pascal Poirier and Ms. Jessica

LeBlanc began a conversation with Ms. Mulhern and another employee. In the course of this conversation, Mr. Poirier said to Ms. Mulhern that because she did not make beds, she should not be counted as a Stand-by. Mr. Poirier also stated that Ms. Mulhern only performed the duties already assigned to Porters, a different VIA Rail employee classification. Ms. Mulhern stated that she lost her composure upon hearing this comment by Mr. Poirier and Ms. LeBlanc agreeing. She stated that her reaction was very poor. Ms. Mulhern considered these comments "cruel and unproductive". Mr. Poirier does not recall the incident but does not dispute the fact that he made a similar comment at a union meeting.

[12] In response to that incident, VIA Rail held a conference call with representatives of the Union, on January 16, 2009, to discuss the matter. The employer and the Union agreed to introduce a process which would enable employees assigned to work with Ms. Mulhern to advise the manager on duty when he or she considers that the workload has increased due to an unanticipated operational requirement. The manager would take the necessary steps to obtain assistance from the outgoing Stand-by employee on the train to prepare the sleeper cars. The employer followed up with two other teleconference calls on January 23 and February 3, 2009 and it was concluded that no other complaints were made by Ms. Mulhern or her work colleagues.

[13] No further incident was raised by Ms. Mulhern in 2009. In February 2010, she complained of comments made by Ms. Sandy Pelzmann. Ms. Pelzmann allegedly made comments to the effect that Ms. Mulhern should not be qualified as a Stand-by as she did not make beds. She also stated to Ms. Mulhern that "we", which Ms. Mulhern understood to mean the other employees, had been trying to "get rid of her" for years. Ms. Mulhern brought this incident to Ms. Sheila Duffy's attention. Ms. Duffy, who testified at the hearing, is VIA Rail's Senior Manager, Client Experience and was, at the time of these events, Ms. Mulhern's supervisor. Ms. Pelzmann was met and the issue was resolved. Ms. Mulhern testified that Ms. Pelzmann had also been aggressive, grabbing the sheets from Ms. Mulhern's hands, displaying her discomfort when scheduled to work with Ms. Mulhern, and not speaking directly to her for months. Ms. Duffy testified that she heard about the latter part of the complaint for the first time in June 2012, when Ms. Mulhern made her work refusal. Ms. Pelzman recalls having made a comment regarding her extra workload resulting from Ms. Mulhern's accommodation, but denies having said that "they were trying to get rid of her" and denied having had an aggressive conduct. The comment that she did make was not directed at Ms. Mulhern, but at the employer.

[14] Another such event was raised some nine months later, in November 2010, involving Mr. Francois Dufour, who complained about all the beds he had to make. Ms. Mulhern considered the comment to be directed at her. She related her concern to a manager, who met with Mr. Dufour. The next day, Mr. Dufour apologized to Ms. Mulhern, indicating that he had no intention of hurting her and that he was simply expressing a view that there was a lot of work to be done that day. Another instance was brought to the attention of management in December 2010 in relation to comments that Mr. Sam Theriault and Mr. Daniel Grenon had made in relation to their workload and the sufficiency of Stand-bys on duty on that day, in the presence of Ms. Mulhern. Again, Ms. Mulhern considered the comment to be directed at her. The employees in question were met and there was no reoccurrence on their part.

[15] On December 22, 2010, VIA Rail issued a bulletin formally reminding all employees that all comments or concerns regarding an employee's ability, or inability to perform certain tasks or duties must not be addressed to the individual employee but should be brought to the attention of the manager or Union representative. Ms. Mulhern herself participated in the drafting of this bulletin and was satisfied with its content.

[16] There was also a meeting held on January 26, 2011 between Ms. Mulhern, Mr. Walsh, a Union representative, and Ms. Duffy to address "ongoing concerns expressed by Cecile regarding her accommodation and employee interactions relating same". The matters that were discussed at the meeting are summarized in a memo to file (Exhibit A-12) followed by a letter dated February 28, 2011 to Ms. Mulhern (Exhibit A-13). The letter reads in part as follows:

> All parties met on January 26. From this meeting, we discussed:
>
> - Your concerns about comments that you perceive as being negative that continue to be expressed by fellow employees regarding accommodation;
> - Since your December 2008 accommodation, the Corporation has met with employees that you have had encounters you perceived as negative. <u>You confirmed that you have had no further encounters with these employees after the Corporation has met with them;</u>
> - We discussed VIA behaviour standards and how enforcement of these standards will help towards a more professional and respectful work environment;
> - We discussed your work ethic and that neither the Corporation nor your fellow employees have concerns with your execution of duties; you are a valued and productive employee;
> - You confirmed that <u>you had no complaint with the Corporation or the Union regarding the steps these parties have taken to date (i.e. since the December 2008 accommodation) to address your concerns;</u>
>
> We also discussed:
>
> - You have not sought the assistance of EAP in the past several months to aid you in coping with the interactions you're having with your fellow employees;
> - You stated that EAP has always been helpful in the past, and that you would consider seeking their guidance again;
>
> Action Plan:
>
> - You requested to have information available to all employees regarding accommodation (e.g. CAW training manual, "*Understanding the duty to accommodate*". Sheila Duffy and Lou Walsh agreed to work with you to make such information available to employees;
> - You requested your desire to see published information available to employees (i.e. self-help books dealing with stress, divorce, finances, etc.) that employees can borrow. Sheila Duffy agreed to consider this request;
> - Sheila Duffy suggested you meet with the Union co-chair of the Health and Safety Committee and discuss how the committee might assist by increasing awareness of accommodations in the workplace.
>
> (Underlining added)

[17] While Ms. Mulhern indicated at the January 26, 2011 meeting with Mr. Walsh and Ms. Duffy that she had not had any further negative interactions with those colleagues following the

one-on-one sessions that management held with them, Ms. Mulhern testified that she is never sure when or where a comment could come from next, which creates a very stressful situation for her.

[18] In February 2011, Ms. Mulhern reacted aggressively to a comment from one of her co-workers, Mr. Zachary Wells, regarding his workload and Ms. Mulhern's inability to make beds. In her report to management written on February 20, 2011, Ms. Mulhern stated as follows: "I came to work with a lots [*sic*] of pain today and seriously lost my composure. He tried to tell me that I was freeking [*sic*] for nothing and he didn't know because he had not been here since Xmas. I was so worked up that I stepped off the train and came in the office because I was shaking with frustration, my vision went blury [*sic*] and some tingling in my tongue. Plus losts [*sic*] of tears." Ms. Duffy met with Ms. Mulhern and the other employee involved, and the matter ended there. In fact, Ms. Mulhern is the one who apologized to Mr. Wells for having over-reacted in the circumstances. Ms. Duffy encouraged Ms. Mulhern to seek help from friends and family and to consult the employee assistance program.

[19] The evidence presented at the hearing has also established that it is common for employees to discuss among themselves their concerns regarding workloads and work practices of the employer. The question of the sufficient number of Stand-bys on duty, particularly in situations where an employee is performing accommodated duties, such as Ms. Mulhern, came up in discussions at union meetings.

The June 14, 2012 Work Refusal

[20] On June 13, 2012, approximately 16 months after the last reported incident, Ms. Mulhern met with Ms. Duffy and Mr. Karl Dias, Manager, Customer Experience, to report a situation in which one of her colleagues, Ms. Natasha Boudreau apparently asked her "why there were only two Stand-bys on that day when the week before, she noted there were three". Ms. Mulhern informed Ms. Boudreau that this was a sensitive subject and that she should speak to management if there was a problem. Ms. Mulhern was upset because of Ms. Boudreau's question and wanted to know what VIA Rail would do to fix the problem immediately. Ms. Duffy discussed actions that VIA Rail had undertaken and will continue to take, such as workshops on professionalism, safety talks, corporate policies, etc. Ms. Mulhern testified at the hearing that she felt she might have a heart attack if she worked. She did not feel as if anyone was addressing her concerns. Ms. Duffy made the decision to give Ms. Mulhern a rest period and Ms. Mulhern was thus allowed to return home.

[21] Mr. Dias met with Ms. Boudreau who confirmed having asked Ms. Mulhern the said question. Ms. Boudreau said she had asked the question simply to know why there were three employees working the previous week and only two on that day. Mr. Dias advised Ms. Boudreau that having a car transfer and other duties over and above the regular duties was the reason why they had an extra employee to assist on the previous week. That was not the case on June 13. The same explanation had been provided to Ms. Boudreau by Ms. Mulhern herself. VIA Rail's management assesses the number of Service Attendants required on any specific day depending on the number of passengers, sleepers, car transfers and other such factors. Thus, the number varies frequently.

[22] On June 14, 2012, when she returned to work, Ms. Mulhern informed Ms. Duffy that she was refusing to work on the ground that she did not feel safe at work. She provided an incident report and a handwritten note dated June 13, 2012. I reproduce the note in its entirety:

> Around 9h45 Natasha Boudreau approached me and asked why there were only 2 standby's when last week she noted there were 3. I replied that last week there was other work to be done in the park car and furthermore that next time she had such questions to direct it to the office or management as the subject was very sensitive to me.
> I then continued working and my frustration and mood changed, so I went to talk to Mr. Dias and Ms. Duffy. By the time I was done my frustration grew worse and had to go see Heather Grant at the Union building.
> There have been many harassing comments aimed at me for years. The dates and times have been written and passed on to Union and management. Some of the comments were:
>
> 1. You shouldn't qualify as standby because you don't make beds.
> 2. You shouldn't be counted as a standby because you don't make beds.
> 3. You should be called something else then standby.
> 4. I have been told that she was too old to work alone with me because she had to make all the beds.
> 5. Another co-worker's comment about the office workers. "It's like a hospital ward in there. I guess that's how you get an office job.
> 6. That "you are lazy and we have been trying to get rid of you for years".
> 7. You have a cushie job, there is more ...
>
> Some people have been told more than once and behaviours are continuing.
> I'm told by management to come to talk to them and report my frustrations, I do so and people come back for round two and still nothing happen to them!
> Everytime this issue comes up it takes all my energy, it's affecting my home life as well.
> On a daily basis, I have to deal with pain. I have headaches when it rains. My hip is always sore until I warm-up, sitting down for a maximum of an hour. My heal is throbbing most of the time. My pain also affects my sleep. My leg feels like an icicle when there is fog. Etc…
> Those are only a few of the physical side effects of my injury.
> Now the mental limitation; I am unable to take vacation like my co-workers. I have to work hard on my own time to try to keep working. I never get overtime, 2 weeks vacation after 14 years.
> This issue is detrimental to me and my husband, who just suffered a heart attack.
> Everytime this issue comes up I have re-visit all my files:
>
> - The doctor's reports
> - The accommodation's struggle
> - The 150 pages of compensation claims and Great-West Life
> - The pain management program, work hardening, the chiropractors reports
> - The Human Rights complaint
>
> At the end of all that you still want me to report to you, and I ask for what reasons? No result are evident after six years of constant harassment.

> This injury and subsequent accommodation has disrupted my work life, and my home life and I feel that the employer is unwilling to correct the harassing behaviour's of my co-workers.
>
> ([*sic*] throughout*)*

[23] Ms. Duffy testified that the alleged comments referred to in points four to seven had never been brought to VIA Rail's attention, a statement that was confirmed by Ms. Mulhern in her testimony. Neither had any allegations of aggressiveness, of grabbing supplies from her hands, of non-verbal messages or of name calling been reported to management as confirmed by Ms. Mulhern's and Ms. Duffy's testimony.

[24] A work refusal form was then initiated by Ms. Duffy. Ms. Boudreau was not scheduled to work on June 14, 2012 as it appears from the June 13 and 14, 2012 staffing document. In that sense, there was no risk of further remarks being made by Ms. Boudreau to Ms. Mulhern on that day. When asked by Ms. Duffy what she felt was the immediate danger, Ms. Mulhern explained that she never knows when an employee is going to make a comment that she considers harassment, such as the statement made by Ms. Boudreau on June 13, 2012, and therefore she does not feel safe at work anymore.

[25] Ms. Duffy arranged a meeting with the Health and Safety Committee to discuss the work refusal. No resolution was reached and Ms. Mulhern maintained her refusal. Ms. Duffy then contacted a health and safety officer from Human Resources and Skills Development Canada (HRSDC) (now Employment and Social Development Canada (ESDC), as mandated by subsection 128(13) of the Code.

[26] Health and Safety Officer ("HSO") Gallant was appointed to the case and at 1:00 PM on June 14, 2012. He met with Ms. Mulhern, Lou Walsh, Regional Representative for the Union and Caroline Ayoub, chair of the Health and Safety Committee. Ms. Duffy and Mr. Dias joined the meeting approximately forty minutes later. The meeting lasted for approximately three hours in totality. During the meeting which Ms. Duffy and Mr. Dias attended, HSO Gallant mentioned that VIA Rail needed to appoint a "competent person" within the meaning of subsection 20.9 (3) of the *Canada Occupational Health and Safety Regulations* (COHSR) as the situation was not resolved.

[27] HSO Gallant describes the facts and sets out his analysis in his report, as follows:

> - Ms. Mulhern described enduring harassment from co-workers. She believed it was caused by co-workers questioning her ability to carry out her duties since her employer has made accommodations to address her physical condition.
> - The employer was aware that Ms. Mulhern had reported numerous incidents of harassment over several years. A manager had described the frequency of reported incidents as "a few a year."
> - The nature of the incidents of harassment reported to the employer was physiological [*sic*] harassment; verbal and non-verbal messages from co-workers.
> - VIA Rail Canada had measures to address work place violence. These included:
>   - a Work Place Violence Policy
>   - Behavior standards for front line employees.

    - Employees receive training in anti-harassment
    - Employees are trained in a code of conduct
    - Employees are proved safety talks on bullying
- VIA Rail Canada has not followed the prescribed procedure in response to workplace violence set out in Section 20.9 of the Canada Occupational Health and Safety Regulations. An investigation of the workplace violence, by a competent person, has not been conducted.

[28] HSO Gallant's decision that he found a danger to exist in the circumstances described above reads as follows:

> Ms. Mulhern has experienced psychological harassment in the workplace. The harassment continued despite measures taken by her employer.
>
> I believe that the harassment is likely to continue unless measures are taken to address the circumstances in the workplace. I further believe that Ms. Mulhern will suffer further injury with continued harassment. Therefore I find that there is a danger.

[29] HSO Gallant issued two directions, quoted earlier in these reasons, and communicated them in writing to Ms. Duffy on June 29, 2012. VIA Rail contested the two directions by way of the present appeal, but nevertheless complied with them, as mandated by the Code. It appointed Mr. Georges Cyr as a "competent person" to conduct an investigation in accordance with subsection 20.9 (3) of the COHSR. On July 13, 2012, VIA Rail advised Ms. Mulhern in writing that an investigation would be conducted.

Investigation by Mr. Georges Cyr

[30] On July 24, 2012, Ms. Duffy called Ms. Mulhern to advise her that the meeting regarding her work refusal was scheduled on August 1, 2012 at 9:00 AM with Mr. Georges Cyr appointed as the "competent person". On July 26, 2012, a letter was sent to Ms. Mulhern confirming the interview.

[31] On July 30, 2012, Ms. Mulhern called Ms. Duffy and asked questions about Mr. Cyr concerning his qualifications, his knowledge of relevant legislation, how many investigations he had done, where he received his training and why she wasn't given a choice as to the competent person. Ms. Duffy advised her that VIA Rail appoints the "competent person" and that Mr. Cyr is considered to be a "competent person" based on his background and experience. As Ms. Mulhern was looking for specifics, Ms. Duffy replied that she would try to get this information for her.

[32] On July 31, 2012, while Mr. Cyr was already travelling on the train from Montreal to Halifax, Ms. Mulhern came to the station looking for Ms. Duffy regarding her request of the previous day. Ms. Duffy, who had by then obtained some information related to Mr. Cyr's credentials, advised her that Mr. Cyr was considered a "competent person", had labour relations background, worked as a manager at the Montreal Maintenance Center ("MMC") of VIA Rail and has handled numerous investigations and complaints in the past.

[33] I was informed that an agreement had apparently been reached between Mr. Marc Beaulieu, VIA Rail's Regional General Manager (East) and Ms. Heather Grant, Secretary Treasurer for National Counsel CAW National 4000, concerning the appointment of Mr. Cyr. This was confirmed by Ms. Grant to Ms. Duffy, on July 31, 2012. However, Mr. Ken Cameron, CAW National Health & Safety Coordinator, called Ms. Duffy and said that Ms. Mulhern had called him. He advised Ms. Duffy that VIA Rail must provide Ms. Mulhern with specific credentials as to Mr. Cyr's competency, more specifically where and when he received his training, etc. Mr. Cameron insisted that Ms. Mulhern was entitled to this information according to the Code. Mr. Cameron also indicated that without this information, he would advise Ms. Mulhern not to participate in the interview process. When asked by Ms. Duffy if what he was looking for was in writing, he specified that VIA Rail was required to provide documentation in writing. Finally, he also said that he knew of Mr. Cyr and that he was a great guy who had a lot of experience.

[34] On August 1, 2012, Ms. Mulhern appeared for the interview but refused to participate in it. As Mr. Cyr (who testified in the present proceedings via teleconference) recounted, she gave Mr. Cyr a hand-written letter dated August 1, 2012 indicating that she wanted proof that Mr. Cyr had knowledge, experience and training in work place violence and harassment in writing. This letter makes no reference to a concern regarding Mr. Cyr's impartiality. Mr. Cyr told her and Mr. Patrick Murray, her union delegate, that he did not have any written document of that nature to show her but explained to her his background and experience. He stated that he had 30 years of experience in dealing with employees, 18 years as a labour relations officer at the MMC and about 12 years as a supervisor in Montreal. He also told Ms. Mulhern that he had a lot of experience in leading disciplinary investigations and that he recently had handled two cases of harassment at the MMC in application of the COHSR. Mr. Cyr reiterated his credentials in his testimony. He confirmed having carried out 2,000 investigations in his career. Finally, he added that to his knowledge, everybody, including the Union, was satisfied with him handling her case before he left Montreal to come to Halifax.

[35] Following this discussion, Ms. Mulhern asked for a break to have a discussion with Mr. Murray. They reconvened twenty minutes later and at that time, she provided a second hand-written letter to Mr. Cyr stating that from her point of view, Mr. Cyr was not a "competent person" to proceed with the investigation and that she was maintaining her initial position. I point out that in both documents, Ms. Mulhern raises concerns about Mr. Cyr's "training, experience and knowledge in conducting an investigation in work place violence". She did not raise concern regarding Mr. Cyr's impartiality or fairness. In fact, she explicitly says so in the transcript of the "Questions and Answers" of a meeting held on August 29, 2012, filed in evidence by the employer. This was also confirmed by Ms. Mulhern during her testimony.

[36] Mr. Cyr tried to interview other VIA Rail employees but, except for one, was prevented from doing so further to an intervention by the Union which recommended that its members not participate in the investigation without a Union representative present and none was available. Mr. Cyr issued a report in which he concluded as follows:

> Under the circumstances, no evidence of workplace violence or harassment concerning Ms. Mulhern was presented to me and therefore I cannot conclude

> that Ms. Mulhern suffered from workplace violence or harassment. This puts an end to my investigation.

[37] On August 24, 2012, Ms. Mulhern submitted an internal complaint form requesting Ms. Duffy to make her work place safe and to appoint a "competent person" to investigate her case. Ms. Haché-Lawlor, Manager, Customer Experience, responded in writing that a "competent person" was appointed but that she refused to participate without cause or reason and that her work place was safe.

[38] Upon her return to work on September 12, 2012, Ms. Mulhern was provided with Mr. Cyr's credentials in writing.

The September12, 2012 Work Refusal

[39] Following Ms. Mulhern's refusal to participate in the investigation, VIA Rail gave her a letter stating that it was closing her complaint file and requesting that she report to work on the same day.

[40] On September 12, 2012, Ms. Mulhern reported to work and did not attend any of her duties. When Ms. Haché-Lawlor arrived at work at approximately 7:45 AM, Ms. Mulhern was already in her office and advised her that she was invoking her right to refuse to work. According to Ms. Haché-Lawlor, Ms. Mulhern did not appear emotional that morning. Ms. Mulhern filed a work refusal form and as a result, HRSDC was notified and HSO Tingley proceeded to attend the work site.

[41] HSO Tingley met with Ms. Mulhern and Ms. Ayoub, Health and Safety Committee Union Chair. He then met privately with Ms. Duffy and Ms. Haché-Lawlor and finally with Ms. Mulhern, Ms. Ayoub, Ms. Duffy and Ms. Haché-Lawlor altogether. He advised Ms. Mulhern that she had a duty to cooperate and participate in the investigation. He also advised her that she had the right to ask for the credentials of the appointed investigator, but that VIA Rail was under no obligation to provide her with this information. HSO Tingley was on VIA Rail's premises for approximately two hours.

[42] In his report dated October 2, 2012, HSO Tingley concluded as follows:

> I attended the work site and initially met with Ms Mulhern and her union representative, Carolyn Ayoub as Sheila Duffy and Sandy Hache-Lawlor were on a conference call. When Ms Duffy and Ms Hache-Lawlor were available, I met with them to obtain an overview of the circumstances from their perspective.
>
> Subsequently, I met with Cecile Mulhern, Carolyn Ayoub, Sheila Duffy and Sandy Hache-Lawlor. I advised the parties that although the circumstances today related to the previous refusal, this was a new refusal and required investigation in accordance with section 128 of the Canada Labour Code. I clarified for the parties that there appeared to be some confusion on the part of everyone regarding how the investigation of August 1st should have proceeded.

[43] HSO Tingley then left the VIA Rail work place. Mr. Tingley testified at the hearing of this appeal, at my request. He was adamant that he had not issued any direction to the employer in the circumstances. He considered his intervention to be one of counselling and assisting the parties in resolving their differences and determining appropriate next steps in light of all the circumstances. He considered that the refusal that caused him to attend the work place on September 12, 2012 was "a continuation of the June 14 refusal", which his colleague HSO Gallant had handled. He concluded that the direction issued by his colleague on that occasion was still alive and the matter was still outstanding. In the same breath however, HSO Tingley mentioned that the September 12 refusal was a "new" refusal that the employer had to investigate before a health and safety officer could be called in pursuant to subsection 128(13) of the Code. In his view, the employer had not adequately investigated that work refusal and he had no "jurisdiction" to investigate it under section 129 of the Code. He nevertheless offered his assistance to the parties and made a few observations and recommendations for their consideration. He left the premises on the understanding that the parties had resolved their issues and would proceed with the investigation by a "competent person", as ordered by HSO Gallant. He referred to the title of his report, which is "Intervention Report" as opposed to "Investigation Report and Decision", a title that HSOs use when they investigate a work refusal and issue a decision on the presence or absence of a danger. This shows, in HSO Tingley's view, that he had not conducted any investigation, nor made any decision on a refusal nor issued any direction to the parties. Furthermore, he added that he had no intention of issuing a written document, until Ms. Duffy called him a few weeks later and asked him to provide her with a written report of his intervention, which he did on October 2, 2012.

[44] In an email dated September 12, 2012, Ms. Haché-Lawlor summarizes the meeting with HSO Tingley as follows:

> The following is a summary of what transpired and the recommendations put forth:
>
> - Sheila and I met privately with Mr. Tingley to review the events leading up to today's work refusal as he was interested in obtaining an understanding of the file. He had brought the case documents initially completed by Mr. Gallant and demonstrated that he had reviewed all of the information contained therein.
> - He advised that this would not be considered a "new" work refusal as he felt that we had not finalized the previous one. As such he has advised that we must conduct the investigation we attempted to conduct on August 1, 2012.
> - He advised Ms. Mulhern that she had a duty to cooperate and participate, however, if she chooses not to, the Corporation must proceed in doing so.
> - He also advised Ms. Mulhern that she has the right to ask for the credentials of the appointed investigator, however, the Corporation is under no obligation to provide her with his.
> - In the interim of reaching a finalized investigation and series of recommendations, he advised that it is our right to have Ms. Mulhern perform other duties which remove her from the immediate "dangerous" work environment. As such, we have proposed that she return to work with her regular schedule, with the proviso that she work in the office setting **only** as opposed to working standby duties on the train. This was agreeable to all and Cecile will begin her time in the office tomorrow morning.
> - Mr. Tingley seemed concerned that the Union was made aware of Mr. Cyr being appointed and seemed to have no issue with this until the hearing began on August 1st, It was his opinion that there appeared to be some disparity between

the National Union representation and the local Union representation in that one appeared to be fine with Mr. Cyr, the other was not.

- The meeting ended very well and we advised Mr. Tingley that we would be proceeding with looking into setting up the investigation process so that we may satisfy HRSDC Officer Gallant's initial direction.

(Underlining added)

Ms. Isabelle Cantin's Investigation

[45] VIA Rail followed up on the discussions with HSO Tingley and contacted Mr. Cyr for the purpose of resuming the investigation. Not surprisingly, Mr. Cyr informed Ms. Duffy that he was no longer interested in this assignment following the unfolding of events on August 1, 2012, and declined the mandate. VIA Rail eventually appointed Ms. Isabelle Cantin as the "competent person" to conduct an investigation in accordance with subsection 20.9 (3) of the COHSR, as originally directed by HSO Gallant.

[46] Ms. Cantin conducted her investigation between November 1 and 13, 2012, during which she interviewed 19 individuals. On November 27, 2012, she issued her final Investigation Report. That Report was entered in evidence in its entirety at the hearing. I note that counsel for the employer had acceded to the request of the respondents' representative to obtain a copy of the unredacted version of the Report ahead of the hearing. That communication was made on the undertaking that the said report would not be made available to anyone else, given that a number of persons who were interviewed by Ms. Cantin had been assured that their statement would remain confidential. I am sensitive to the importance of honouring this commitment in the circumstances, and I am of the view that it would likely cause prejudice to future investigation processes were I not to make an order restraining public access to the report, which is now an Exhibit before the Tribunal. Accordingly, I order that Exhibit A-17, which comprises Ms. Cantin's final Report as well as the declarations of witnesses contained in the "Schedules Binder" in support of her Report, shall be sealed to remain confidential and not publicly accessible.

[47] Ms. Cantin concludes as follows in her Report:

> [...] I do not find that the evidence, even considered as a whole, is sufficient to demonstrate that the Complainant was subjected to harassment-violence within the meaning of the definition of "workplace violence" contained in the *Regulations* (Schedule 2, Documents 2.1 and 2.2.); the evidence did not reveal physical violence and I do no find that her colleagues or Via, through its representatives, "bullied" her, intimidated her, teased her, threatened her or adopted an aggressive behaviour towards her to cause harm, injury or illness.

[48] On October 22, 2013, in the course of the hearing, the parties signed an Agreement pursuant to which they agreed as follows:

1. Ms. Cantin's report and schedules as submitted on October 21, 2013, its content and conclusions, is not contested by Ms. Mulhern and the union representatives.

2. Except for Ms. Sheila Duffy, Mr. Karl Dias, Ms. Sandy Hache-Lawlor and Ms. Cecile Mulhern, the declarations in Ms. Cantin's report are considered truthful evidence before the OHSTC without the need for these individuals to testify and confirm before the OHSTC.

3. Besides the declarations considered as truthful evidence according to paragraph 2, the other schedules in Ms. Cantin's report are not part of this Agreement.

[49] The evidence presented at the hearing also touched on Ms. Mulhern's state of health and medical condition. Her treating physician, Dr. Deanna Swinamer, was called by the Union and testified that Ms. Mulhern has been her patient since 1999. Dr. Swinamer testified that she diagnosed that Ms. Mulhern was suffering from depression in October 2002. She prescribed medication for depression and Ms. Mulhern has continued to take the medication over the years, including up to the date of the hearing of the present appeals. She could not affirm that her depression was solely related to work-related stress. She observed that Ms. Mulhern was affected by family-related issues as well as the consequences of a work place injury that caused her significant back pain. Those observations are reflected in Dr. Swinamer's consultation notes between 2008 and 2013, filed as Exhibit R-1. Dr. Swinamer pointed out that chronic pain is a contributing factor to depression.

[50] The detailed information contained in Exhibit R-1 regarding Ms. Mulhern's state of health and personal situation reflect personal confidences between her and her treating physician. The respondent requested that Exhibit R-1 remain confidential, with no objection from counsel for the appellant. I must balance the need for transparency in the administrative justice process with the prejudice that Ms. Mulhern might suffer if the document was to be publicly accessible in the Tribunal record. I am of the view that the importance of the "open court" principle regarding the appeals process is outweighed by Ms. Mulhern's right to privacy in the circumstances and that not ordering that Exhibit R-1 remain confidential would cause undue prejudice to Ms. Mulhern. Accordingly, I order that Exhibit R-1 be sealed and not made publicly accessible.

The issue

[51] The two appeals raise several issues. Firstly, whether the employee, Ms. Cecile Mulhern, was exposed to a danger as defined in the Code when she exercised her right to refuse to work on June 14, 2012. If so, is Direction # 1 issued by HSO Gallant pursuant to subsection 145(2) appropriate and specific enough to satisfy the requirements of the Code? Secondly, is the Direction # 2 issued by HSO Gallant pursuant to 145(1), directing the employer to cease a contravention of paragraphs 125(1)(z.16) and subsection 20.9(3) of the COHSR, by appointing a "competent person", well founded? Thirdly, does the report prepared by HSO Tingley following the September 12, 2012 refusal to work by Ms. Mulhern, contain "directions" that can properly be the subject of an appeal under 146(1)? If so, was Ms. Mulhern exposed to a danger as defined in the Code when she exercised her right to refuse to work and are the directions issued as a result, justifiable?

Submissions of the Parties

[52] The final submissions of the parties were received on January 17, 2014. On March 5, 2014, I requested additional submissions from the parties regarding the decision rendered in *Canadian Food Inspection Agency v. Public Service Alliance of Canada* (2014 OHSTC 1), which I considered in the course of drafting my reasons, and which was posted on the OHSTC's website after the parties had filed their submissions with the Tribunal. Those submissions were filed with the Tribunal by the appellant and the respondents on March 19 and March 21, 2014, respectively.

For the Appellant

(i) HSO Gallant's Directions #1 and #2

[53] After summarizing what he considered to be the salient facts of the case, Counsel for the appellant argues that in the present case, there is no proof that on June 14, 2012, Ms. Boudreau's conduct caused harm or illness to Ms. Mulhern. No medical certificate was presented to the employer nor to HSO Gallant. Moreover, Ms. Mulhern did not even consult her doctor on June 14, 2012 or around that time. Her last appointment before June 14, 2012 with her family doctor, Dr. Swinamer, was on April 10, 2012 and the next one on July 3, 2012.

[54] As it appears from Dr. Swinamer's and Ms. Mulhern's testimonies and from the medical consultation notes, Ms. Mulhern's psychological condition had existed for 10 years during which she was under treatment. It cannot be related to work place harassment as this was not invoked when the initial diagnosis was made in 2002. As the chart shows, Ms. Mulhern's depression follows reported problems with her husband, notably from October 2007 until March 2012. Moreover, the comments Ms. Boudreau made to Ms. Mulhern on June 13, 2012 cannot reasonably be expected to cause harm or illness. A reasonable person placed in similar circumstances would have perceived these comments as a normal discussion between employees regarding workload. Ms. Haché-Lawlor has testified that such items of conversation between Service Attendants is very common on trains as employees normally discuss workloads, work organization, who does what, how the workload is shared, if there is adequate staffing on a particular day, and so on.

[55] Turning to sections 20.8 and 20.9 of the COHSR, counsel for the appellant points out that section 20.8 of the COHSR provides for an emergency notification procedure where assistance is required in response to work place violence. The purpose of the emergency notification procedures is to minimize the impact of incidents and ensure the health and safety of employees is protected. Moreover, depending on the nature of the violent incident, police may be notified of its occurrence. Pursuant to subsection 20.9(2) of the COHSR, in response to occurrences of work place violence or alleged work place violence that are not so urgent as to require a police intervention and of which the employer becomes aware, the employer must try to resolve the matter with the employee as soon as possible. By analogy with subsection 20.6(2) of the COHSR, the employer must try to resolve the matter with the employee as soon as possible but that it has up to 90 days to do so.

[56] If the matter is unresolved, and only then, the employer must appoint a “competent person” to investigate the work place violence. However, there are situations outlined in section 20.9(6) of the COHSR where even if the matter is unresolved, the employer does not need to appoint a competent person. The fact that the employer has effective procedures and controls in place, involving employees to address work place violence, which is the case of VIA Rail, is one of these situations.

[57] As to the comments referred to as items four, five, six, and seven of Ms. Mulhern's letter of June 13, 2012, they were only brought to VIA Rail's attention for the first time on June 14, 2012. It follows that it was clearly premature for HSO Gallant to conclude that VIA Rail had failed to appoint a “competent person” to carry out an investigation further to his visit on that same day. VIA Rail had not yet had the opportunity to resolve any such issue pursuant to section 20.9 (2) of the COHSR. In that respect, HSO Gallant unjustifiably deprived VIA Rail of the opportunity to act in a timely manner and allow the alleged harassers an opportunity to respond to the allegations.

[58] Turning to the applicable rules with regards to the right to refuse to work, counsel for the appellant argues that if harassment could at one point in time be deemed to constitute a danger under the Code, it can no longer be the case since Part XX of the COHSR came into effect on May 28, 2008. That Part provides specific mechanisms to resolve and investigate such situations. He submits that the specific provisions of the COHSR override the general provisions of the Code. He stresses that HRSDC’s bulletin on work place violence does not at any time provide for work refusal as a mechanism to deal with work place violence.

[59] In counsel’s view, psychological harassment cannot form the basis of a declaration that a danger exists. First, to interpret danger as to include psychological harassment flies in the face of what Parliament intended Part II of the Code to achieve, and necessarily and inevitably does violence to the investigation and review process set out in Part II. It is clear, when taken in the context of Part II as a whole, that Parliament intended to address the mischief caused by a defect in the work place itself, be it structural, mechanical, electrical, related to air quality, etc. Part II is simply not intended to, or capable of being used to, remedy the mischief of harassment.

[60] Second, the right to refuse is designed and intended to be used in situations where employees are faced with imminent danger. Its purpose is not to settle longstanding disputes, harassment being by definition a repetition of comments or behaviours over time. Third, the investigation process set out under the Code is intended to be an expedited and summary one, and is incompatible with the procedural safe-guards necessary in a harassment investigation. Fourth, HSOs are not required to have any expertise in the areas of harassment investigation or the medical consequences of harassment.

[61] Fifth, and of significant importance, an accused harasser would be denied fundamental procedural fairness in that she or he has no standing to defend him or herself in the Part II processes. Harassment allegations are extremely serious charges. It is a fundamental precept of our legal system, and of procedural fairness, that anyone subject to such serious accusations has the right to defend himself or herself. This right, a fortiori, requires at a minimum that she or he be made aware of the substance of the allegations, and be afforded the opportunity to respond to

them. Sixth, there is a risk of contradiction between the HSO's decision and the competent person's decision (*Gualtieri and Treasury Board (Foreign Affairs and International Trade),* [1998] C.P.S.S.R.B. No. 88)

[62] As a result, counsel for the appellant submits that HSO Gallant had no authority to investigate Ms. Mulhern's harassment based allegations in the context of her work refusal investigation. When an employee complains of alleged harassment, the only mechanisms to resolve the issue are found in Part XX of the COHSR. A HSO has no jurisdiction to carry-out an investigation and reach a conclusion of harassment. It follows that under appeal, neither does this Tribunal have such jurisdiction. This interpretation of the law appears to be the only reasonable one considering the nature and scope of a proper investigation leading to a determination of possible harassment. It simply cannot be carried-out in a few hours during a HSO intervention.

[63] Counsel for the appellant also stresses the fact that the “danger” under the Code must be evaluated under an objective test and not on the subjective perception of the employee nor from hearsay. In the circumstances of this case, it is submitted that using an objective standard, the comments made by Ms. Boudreau to Ms. Mulhern on June 13, 2012 could in no way be considered harassment. It was an innocent remark in no way directed specifically at Ms. Mulhern and in line with the normal comments made by Service Attendants in their day-to-day conversations with colleagues. The same can be said of previous remarks from other colleagues from 2009 to 2011. It is also the conclusion reached by Ms. Cantin in her investigation report.

[64] Counsel for the appellant argues further that the expectation of injury or illness must be supported by medical evidence (*Tryggvason* v. *Transport Canada,* 2012 OHSTC 10). A reasonable possibility of injury or illness must be demonstrated by solid evidence, such as a medical certificate from a physician confirming the employee's existing or potential mental health. In addition, a causal link between the medical condition and the situation at the work place is required in order to establish the existence of a danger in circumstances where an individual alleges harassment. Counsel submits that at the time of the work refusal of June 14, 2012, Ms. Mulhern presented no medical evidence of potential injury or illness resulting from the alleged harassment and furthermore that no such medical evidence confirming such potential injury or illness was presented before this Tribunal.

[65] Counsel for the appellant also raised the vagueness of HSO Gallant’s Direction #1. In *1260269 Ontario Inc. (Sky Harbour Aircraft Refinishing)* v. *Tracy Chambers,* Decision No. 06-32, the OHSTC established that a direction should be specific enough for the employer to understand how it did not comply with the Code or its regulations and what results need to be attained in order to comply. In counsel’s view, from the Directions or the Investigation Report and Decision, it is impossible for VIA Rail to identify what are the facts that have supported its conclusion. In a case involving psychological harassment, such factual elements are essential in order to correctly assess the situation, identify the danger if such danger exists and to be able to take the necessary measures to put an end to it.

(ii) HSO Tingley's Intervention

[66] Counsel for the appellant reviewed the document titled "Intervention report" produced by HSO Tingley and argued that it clearly constitutes a decision that there was presence of danger in the work place and a set of directions to the employer. He points to the contradictions in his report and the evidence presented at the hearing as to whether the refusal of September 14 constitutes a "new" refusal, or a continuation of the first one that his colleague HSO Gallant had dealt with. Based solely on the meeting held on September 12, 2012, HSO Tingley concluded that Ms. Mulhern exercised a new right of refusal which required an investigation in accordance with section 128 of the Code.

[67] Counsel for the appellant points out that HSO Tingley did not complete an investigation pursuant to section 129 of the Code. During the two hour meeting held on September 12, 2012, HSO Tingley met no employee who has allegedly harassed Ms. Mulhern to allow them an opportunity to respond. VIA Rail had no opportunity to investigate Ms. Mulhern's new allegations. Such a finding results in direct injury to both VIA Rail and its employees whose rights to respond to serious allegations of harassment have been completely short-circuited and denied by HSO Tingley. Without investigating a work refusal situation despite the legal provisions of the Code and therefore without evidence of a danger, HSO Tingley's intervention was arbitrary and has caused and continues to cause great prejudice to VIA Rail and its employees. By such a flawed investigation, HSO Tingley failed to abide by the basic rules of natural justice and procedural fairness, thus causing serious prejudice and irreparable harm to VIA Rail and its employees.

[68] VIA Rail also submits that the Second Work Refusal cannot constitute a continued refusal to work because the initial refusal to work is invalid. However, if the Tribunal concludes that the initial refusal to work is valid, VIA Rail respectfully submits that Ms. Mulhern has not met the requirements to continue her refusal to work. The employer took steps to appoint a competent person, namely Mr. Cyr, to conduct the investigation into the alleged harassment. Mr. Cyr is impartial, has knowledge, training and experience in issues relating to work place violence and has knowledge of relevant legislation in accordance with the definition of a "competent person" in subsection 20.9 (1) of the COHSR. In 2012 alone, Mr. Cyr investigated two cases of alleged harassment at the MMC whose employees are certified with the same Union as the one involved in the present case. Counsel continues by stressing that Ms. Mulhern never contested Mr. Cyr's impartiality. VIA Rail cannot be held responsible for Ms. Mulhern's refusal to participate in the investigation related to her own allegations of violence or harassment in the work place. HSO Gallant's directions were complied with and Mr. Cyr concluded that he had no evidence that Ms. Mulhern suffered from work place violence or harassment.

[69] Finally, Counsel for the appellant argued that Ms. Mulhern could not legally invoke section 128 of the Code as she was not "at work" when she exercised her refusal (*Saumier* v. *Canada (Conseil du Tresor - Gendarmerie royale du Canada),* 2009 FCA 51. VIA Rail submits that Ms. Mulhern never had a reasonable cause to believe that a danger existed and to exercise her first work refusal. However, if the Tribunal concludes that the initial work refusal is valid, Ms. Mulhern had no reasonable cause to believe that VIA Rail's request that she return to work after three months would pose a risk to her health and safety and her refusal is unjustifiable.

[70] In closing, counsel for the appellant challenged HSO Tingley's statement that blamed VIA Rail for not ordering Ms. Mulhern to participate in the investigation despite her objection. HSO Gallant considered that Ms. Mulhern has legitimately exercised a right pursuant to Part II of the Code. As a consequence, should VIA Rail take disciplinary action against Ms. Mulhern or threaten to take any such action against her, it would likely have had to face a complaint based on the prohibition against reprisals set out in sections 133 and 147 of the Code. In his report, HSO Tingley provided no indication of the legal basis to support such a position.

[71] For those reasons, counsel for the appellant urged me to quash all three directions under appeal.

[72] Regarding the decision issued in the recent *Canadian Food Inspection Agency* case, counsel for the appellant argues that the decision confirms many points contained in his submissions. First, there was no allegation of work place violence that the employer was aware of in this case. Therefore, VIA Rail could not have been obliged to appoint a "competent person" to investigate Ms. Mulhern's allegations of work place violence because it was not aware of unresolved allegations of work place violence. Furthermore, the incidents reported could not reasonably be expected to cause harm, injury or illness within the meaning of the COHSR. He agreed with the appeals officer that the employer is entitled to review an employee's allegations before appointing a "competent person" and to validate an employee's arguments with respect to the threshold for the application of subsection 20.9(3) of the COHSR. That provision clearly favours the timely internal resolution of conflicts in a work place by the employer, in application of its internal policies.

For the Respondents

(i) HSO Gallant's Directions # 1 and #2

[73] The respondents' representative first sets out an overview of the respondents' legal position regarding the two appeals. He points out that the appellant VIA Rail appeals the Directions of two separate federal Health and Safety Officers who were appointed to assess whether its employee, Ms. Cecile Mulhern, had reasonable cause to believe that a condition existed in her work place constituting a danger. Ms. Mulhern has experienced continuous harassing comments from other VIA Rail employees over a number of years due to her need for an accommodated position. These comments have resulted in psychological harm amounting to a danger to Ms. Mulhern. As a result, she no longer felt safe at her work place and invoked her right to refuse to work. The HSOs found that a condition existed at VIA Rail that constituted a danger to Ms. Mulhern.

[74] After reviewing the events since 2008 that led to the work refusal of June 14, 2012, the respondents' representative points out that the facts in this case should not be looked at as a single situation where an employee or a few employees make comments that offend Ms. Mulhern. Rather, it is one of widespread harassing comments and behaviour surrounding Ms. Mulhern's physical inability to perform a certain task that has led to psychological harm and created the conditions that constitute danger. The employer was aware that this behaviour was

going on and in spite of its attempts to address it through various processes and measures, no evidence was offered on their effectiveness. In fact, the behaviour continued.

[75] The respondents' representative referred to the purpose of the Code set out in section 122.1 and because of its remedial nature, invited me to have a broad interpretation of the COHSR when looking at the relation between harassment and violence in the work place. Applying the purpose section above, the relation between harassment and violence is that they are both part of the spectrum of issues that employers must take action to prevent, since both harassment and violence can cause accidents or injury to health arising out of, linked with or occurring in the course of employment, as per section 122.1 of the Code (*Canadian Freightways Ltd.* (November 27, 2001), Decision No. 01-025 (Appeals Officer); *St. Lawrence Seaway Management Authority* (October 10, 2002), Decision No. 02-020 (Appeals Officer)).

[76] The purpose of Part II, as stated above, is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment. If the violence Ms. Mulhern experienced did not directly arise out of her employment, it at least occurred in the course of it, which is consistent with the purpose of the Code and the COHSR. VIA Rail argues that because Ms. Mulhern cannot show that the work place harassment was the direct cause of her psychological illness that the resulting harm cannot be attributed to her employment. However, the protection against danger in the work place aims protect against injury to health arising in the course of employment, not necessarily as a direct cause of employment.

[77] The respondents' representative asserts that the Tribunal has been given proof of Ms. Mulhern's psychological illness. It has heard the testimony of both Ms. Mulhern and her doctor, Dr. Swinamer, of Ms. Mulhern's depression and anxiety, which was aggravated by the stressors at work and the continued exposure to harassing comments. She has seen her doctor regularly and has been taking medication for depression and anxiety. She has also used the services of the EAP three times.

[78] The respondents' representative disagrees with the appellant's position that it has, by analogy to subsection 20.6(2) of the COHSR, a period of 90 days to resolve cases of harassment-violence. He submits that subsection 20.9(3) is clear and requires the employer to try to resolve the matter as soon as possible, and if unsuccessful, to appoint a "competent person" as soon as possible. In his view, the employer should have appointed a "competent person" as early as February 2011, further to the Zachary Wells incident.

[79] The respondents' representative also disagrees with the appellant's argument that Part XX of the COHSR has removed the possibility of invoking the right to refuse in situations where the alleged danger is caused by harassment or violence. Work refusal is an avenue open to employees to raise issues of that nature where they consider that they represent a danger to their health. HSO Gallant was well within his jurisdiction to make the orders that he did. He found that Ms. Mulhern experienced psychological harassment despite measures taken by the employer; that exposure to harassment would likely happen again; and Ms. Mulhern would suffer further injury with continued harassment (*Canada Post Corp. (Re)* [2011] C.I.R.B.D. No. 48; 2011 CIRB 592 (Clarke); *Tench v. National Defence – Maritime Forces Atlantic, Nova Scotia* (January 2009), Decision No. OHSTC-09-001 (Appeals Officer); *Tremblay and Air*

Canada (October 18, 2007) Decision No. CAO-07-038 (Appeals Officer)**;** *Tryggvason v. Canada (Transport)* (March 29, 2012), Case No. 2010-28 (Appeals Officer).

[80] The respondents' representative submits that the expectation of injury or illness is supported by medical evidence. As the appeal process is a *de novo* process, he invites me to consider the evidence of Dr. Swinamer as to the health condition of Ms. Mulhern and the fact that her health is affected, at least in part, by stressors at work.

[81] The respondents' representative disagrees that the direction is too vague, contrary to the appellant's view. While HSO Gallant does not prescribe a measure to remedy the danger, his direction is specific enough to be understood and provides flexibility for the employer to correct the situation (*St. Lawrence Seaway Management Authority*, supra).

[82] The respondents' representative submits that HSO Gallant correctly found that exposure to continued harassment on trains being serviced at the VIA Rail Halifax train station constituted a danger to Ms. Mulhern and directed the company to protect any person from the danger immediately. Psychological harm is now well established as a danger under paragraph 128(1)(*b*) of the Code in the applicable jurisprudence. Psychological violence also is firmly included in the definition of work place violence in policy documents published by HRSDC. Ms. Mulhern has shown evidence in the hearing of her psychological health issues, which have been substantiated by the testimony of her doctor. The evidence offered by both Ms. Mulhern and her doctor establish that psychological harm has arisen due to the harassment Ms. Mulhern experienced at work.

[83] The respondents' representative further argues that HSO Gallant also correctly found that VIA Rail had contravened sections 125(1)(*z*.16) of the Code and 20.9(3) of the COHSR, which both deal with the prevention and protection against violence in the work place.

(ii) HSO Tingley's Intervention

[84] Regarding the facts leading up to HSO Tingley's intervention, the respondents' representative points out that VIA Rail did not appoint a "competent person" to investigate in compliance with section 20.9(1) of the COHSR due to its refusal to provide Ms. Mulhern with a written document outlining the knowledge, training, and experience of the individual the company selected, in issues relating to work place violence. Without this pertinent information, Ms. Mulhern was unable to assess whether the appointed "competent person" could be considered impartial. Ms. Mulhern refused to participate in the investigation because she was unsure whether she could trust Mr. Cyr's impartiality due to the lack of information given.

[85] In the alternative, the respondents' representative submits that if VIA Rail did appoint a "competent person" after her first work refusal, this individual did not complete his investigation and was not able to provide the employer with a written report with conclusions and recommendations, as mandated by subsection 20.9(4) of the COHSR. VIA Rail should have appointed a different individual seen by the parties as impartial who would have completed the required investigation per HSO Gallant's Direction and in compliance with the COHSR. Instead,

VIA Rail instructed Ms. Mulhern to return to work without the proper completion of an investigation by a "competent person" as was ordered by HSO Gallant. Ms. Mulhern exercised her right to refuse unsafe work for a second time because the investigation of the previous incident had not been carried out. She felt that the conditions still existed that could constitute a danger to her and she was also still exposed to a risk of work place violence. Accordingly, HSO Tingley correctly found that the investigation into the continued work place violence ordered by HSO Gallant must be conducted in accordance with HSO Gallant's direction.

[86] The respondents' representative submits that HSO Tingley did not issue directions, and simply advised that the order by HSO Gallant that an investigation under subsection 20.9(3) had to be conducted ought to be followed. HSO Tingley's report is, therefore, not subject to appeal. In the alternative, he argues that Ms. Mulhern had the same reasonable cause to refuse to work as she had in June of 2012, as she considered that a danger was still present in her work place. HSO Tingley conducted a proper investigation by using the findings of HSO Gallant and concluding that the danger had not been remedied, and correctly ordered the appellant to conduct the investigation (*Air Canada* (January 9, 2003) Decision No. 03-002 (Appeals Officer).

[87] The respondents' representative points out that Ms. Cantin eventually conducted a detailed investigation of the work place violence alleged by Ms. Mulhern. While the respondents supports many of the recommendations of Ms. Cantin's Report, the respondents disagrees with Ms. Cantin's conclusion with respect to whether Ms. Mulhern was subjected to harassment-violence within the meaning of work place violence contained in the COHSR.

[88] In conclusion, the respondents' representative submits that the directions made by HSO Gallant and supported by HSO Tingley were correctly made in full compliance with the Code and COSHR and within the jurisdiction of HSOs generally. However, since an appeal before the Occupational Health and Safety Tribunal is a hearing *de novo*, the respondents' representative further submits that the Tribunal should find Ms. Mulhern experienced psychological harassment at her place of work which constituted a danger to her, justifying her work refusal. Further, VIA Rail did not take the appropriate steps as ordered by HSO Gallant by appointing a "competent person" to investigate the work place violence that occurred as a result of the psychological harassment. The Tribunal should also accept the directions of HSO Gallant and HSO Tingley that a "competent person" should have investigated the work place violence and provided the employer with a written report with conclusions and recommendations.

[89] Regarding the decision issued in the recent *Canadian Food Inspection Agency* case, the respondents' representative submits that the decision has little bearing on Ms. Mulhern's dispute with her employer and should be distinguished. The facts are of a different magnitude: while the employee in that decision complained of a single incident, Ms. Mulhern has endured a toxic work environment with several of her colleagues since 2008, which included vocal resentment, aggressive behaviour and intimidation. Furthermore, the medical evidence in the present case supports the conclusion that such conduct can reasonably be expected to aggravate Ms. Mulhern's pre-existing depressive state. Finally, the employer was well aware of the work place violence in the present case. The employee should not be deprived of her right to have a "competent person" review her situation because she failed to report every single incident of work place violence. Part XX is aimed at prevention and HSO Gallant's direction is consistent

with that purpose, since ongoing harassment, bullying, teasing and abuse has taken place here. Clearly, the internal resolution processes of the employer have not been effective in stopping the unacceptable conduct that Ms. Mulhern complained of on several occasions.

Appellant's reply

[90] In reply, counsel for the appellant stresses the fact that competence and impartiality of a "competent person" under the COHSR are two distinct concepts. In his view, Ms. Mulhern has never referred to Mr. Cyr's partiality as a reason for not participating in the investigation, contrary to the contention of the respondent.

[91] He takes objection to the frequent references by the respondents' representative to the fact that the employer had admitted that "harassing comments" or "continued harassing comments" had been made to Ms. Mulhern. In counsel's view, it is obvious that some comments were perceived negatively by Ms. Mulhern, but VIA Rail never admitted that those comments in fact constituted harassment.

[92] Counsel for the appellant also takes objection to the respondents' statement that it disagreed with Ms. Cantin's conclusions with respect to whether Ms. Mulhern was subjected to harassment-violence, after having signed the Agreement of October 23, 2013 introduced during the hearing of the appeals, by which the parties agreed that that "Ms. Cantin's report and schedules as submitted on October 21, 2013, its content and conclusions, is not contested by Ms. Mulhern and the union representatives". The Tribunal must therefore accept as evidence that Ms. Mulhern was not subject to harassment in the work place.

[93] Finally, counsel for the appellant considers the respondents' argument that VIA Rail allowed Ms. Mulhern not to participate in Mr. Cyr's investigation to be inaccurate and without any evidentiary basis.

Analysis

A) Appeal of HSO Gallant's two Directions dated June 29, 2012 - (OHSTC File No. 2012-51, "the first appeal"))

[1] Direction # 1 issued under subsection 145(2) to "protect any person from the danger".

[94] The first direction under appeal was issued further to Ms. Mulhern invoking the right to refuse to work in a situation of danger, pursuant to section 128 of the Code. Upon coming to a finding of danger, a health and safety officer is required by subsection 129(6) to issue a direction pursuant to subsection 145(2) enjoining the employer to take measures to "correct the (…) condition (…) or protect any person from the danger".

[95] Subsection 128(1) sets out the circumstances under which an employee may exercise the right to refuse to work as follows:

> **128. (1)** Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity if the employee while at work has reasonable cause to believe that
>
> *(a)* the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
> *(b)* a condition exists in the place that constitutes a danger to the employee; or
> *(c)* the performance of the activity constitutes a danger to the employee or to another employee.
>
> (Undelining added)

[96] The issue put before me in this appeal is whether at the time of the refusal to work, the appellant was exposed to a danger as that term is defined in subsection 122(1) of the Code, which reads :

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

[97] Should I find that no danger existed at the time of the refusal, the direction becomes without foundation and must fall. If I find that a danger existed, then I must address the question of whether it is sufficiently precise in terms of actions or result, so as to be capable of being implemented by the employer.

[98] The circumstances that have led to Ms. Mulhern's work refusal on June 14, 2012 raise the question of whether the behaviour of work colleagues can be a "condition" in work place that constitutes a danger. The evidence has related to several incidents that are characterized by the respondent as "harassing comments" towards her as a result of her employer's accommodation, resulting from her inability to perform certain tasks, following a work place injury she suffered in August of 2001. The respondents' representative in fact referred to "on-going psychological harassment/violence" over a period of several years. Before reviewing the evidence presented in that respect in order to determine whether such characterization of the events is well-founded, I must first address the question of whether, generally speaking, this type of situation is contemplated by subsection 128 and can form a "condition… that can reasonably be expected to cause injury or illness". The appellant submits that the mischief Parliament intended to address by enacting section 128 was those dangers caused a defect in the work place itself, be it structural, mechanical, electrical, related to air quality, etc. but not alleged harassment.

[99] Earlier jurisprudence tended to consider the term "condition", found in both paragraph 128(1)(*b)* and in the definition of "danger", as relating to situations linked solely to the material or physical work place, which as a result excluded all situations linked to interpersonal relationships, such as those alleged to be present in this case (see: *Gualtieri v. Treasury Board (Foreign Affairs and International Trade)*).

[100] However, in the *Tremblay* decision, the appeals officer in that case concluded that the meaning of the term “condition” was broad enough to include interpersonal and conflict situations when such situations would likely cause injury or illness to an employee. He based his conclusions primarily on the amendments made to Part II of the Code in 2000 which, in his opinion, expanded the application of the Code as well as the protection afforded to employees.

[101] Likewise in the *Tench* decision, the appeals officer adopted a similar interpretation. She considered alleged harassment and discrimination as situations that could fall within the scope of the above definition of danger, when it is established that such harassment or discrimination has repercussions on the employee's mental health. In her view, the term "condition" within the Code's definition of danger can be interpreted to include all situations that, while at work, could affect an employee's functioning or existence, when the consequences of these acts could affect the employee's mental health.

[102] In the *Tryggvason* case, the appeals officer concluded in the same way and accepted the notion advanced in the two cases referred above that situations involving alleged harassment or discrimination may be a “condition” that presents a danger to an employee. At paragraph 66 of his decision, the appeals officer states as follows:

> [66] I share the views adopted by both of my colleagues in both decisions and therefore consider that the alleged danger raised by the appellant in this case, that is, the alleged harassment, discrimination, bullying by co-workers, in her work place, are situations contemplated by the danger definition under subsection 122(1), when such acts have repercussions on the employee's psychological health.

[103] The appeals officers then go on and discuss the need to satisfy the other requirements of the definition of “danger”, which I will come to later.

[104] I find it difficult to disagree with the interpretation of the provisions of the Code placed by the appeals officers in the cases referred above. The appellant’s argument places, in my view, an unduly narrow interpretation on those provisions. The respondents’ representative pointed to the stated purpose of Part II of the Code and the need to interpret its provisions in a fair and liberal manner, consistent with the remedial nature of the statute, which is aimed at preventing work place accidents, injuries and illnesses before they occur. I agree with that statement. I find no valid reason in the broad wording of subsection 128(1) or the definition of “danger”, that should lead me to simply exclude situations of harassment from being a possible source of danger to an employee.

[105] But the appellant goes further and argues that since the enactment of Part XX of the COHSR (Violence Prevention In The Work Place) in 2008, the right to exercise a work refusal pursuant to section 128 is no longer available to employees. The procedure of appointment of a “competent person” under section 20.9(3) of the COHSR to look into allegations of harassment/violence has become, it is argued, the only recourse available to employees in those circumstances as a result of such enactment. The relevant provisions of Part XX of the COHSR read as follows:

> **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.
>
> **20.9 (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.
>
> **20.9 (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.

[106] In the appellant's submissions, that procedure is not only better suited but stands as the exclusive remedy when the alleged danger/hazardous situation is one caused by harassment or violence in the work place.

[107] I do not subscribe to that argument. I will analyze section 20.9 in greater depth when I deal with HSO Gallant's second direction, but I will simply state at this point that I would have to find a very clearly expressed intention of Parliament to persuade me that the enactment of Part XX effectively ousted the application of section 128 when the subject matter covered by Part XX comes into play. There are indeed some striking similarities in the definition of "danger" in section 122 of the Code and "work place violence" at section 20.2 of the COHSR. It is trite to state that the right provided by section 128 to employees to withdraw their services in case of apprehended danger is, and has been, one of the pillars supporting the structure of protection of employees set out under the Code. The proposition of the appellant would mean that in a situation of violence in the work place, employees would be deprived of such a fundamental protection, at a time where it might perhaps be most needed. This interpretation leads us to an unacceptable outcome, which is not consistent with the objective of the Code.

[108] In my view, the right set out in section 128 and the procedure set out in 20.9(3) are not mutually exclusive but are concurrent processes. In *Canada Post Corp. (Re)*, 2011 CIRB 592, the CIRB was called upon to determine whether the complainant employee had in fact exercised a right under the Code, namely the right to refuse to work under section 128, in order to be protected from reprisals under sections 133 and 147 of the Code. The CIRB made the following comments, at paragraphs 76 and 86-87:

> [76] The overall context in this case satisfies the Board that, while Mr. Grolla clearly had safety concerns resulting from the alleged comments of fellow employees, he knowingly pursued several statutory remedies other than a work refusal under section 128 of the *Code*. These remedies included a *WSIA* application and a reference to section 33 of the collective agreement dealing with workplace violence.
>
> (…)
>
> [86] The Board is not saying that an employee who pursues a violence in the workplace complaint and a *WSIA* claim cannot also make a valid section 128 work refusal. However, when all the participants focus as they did in the case on a *WSIA* claim, as well as on the violence in the workplace policy governed by the

> *COHS Regulations* Part XX, that does not automatically mean the requirements of the *Code* for a section 128 work refusal have also been met.
>
> [87] This is not a criticism of the parties. In situations like alleged workplace violence, it may be that the process under Part XX of the *COHS Regulations* provides a more focussed process than a general work refusal under section 128 of the *Code*.
>
> (Underlining added)

[109] The CIRB expressed the view that there are several avenues of redress to deal with alleged violence in the work place, including a work refusal. While the CIRB suggests that Part XX of the COHSR may provide a more focussed process, it does not go so far as stating that it is an exclusive process. I agree with that conclusion. Counsel for the appellant enumerates several reasons that make the application of section 128 fraught with difficulty in those types of circumstances. In my view, those concerns must be addressed and resolved on a case by case basis. But they do not convince me to exclude alleged psychological harassment or violence from the protection of section 128 altogether, given the broad wording of both section 128 of the Code and the definition of "danger".

[110] This brings me back to the circumstances of this case, which led to Ms. Mulhern's work refusal under subsection 128(1) of the Code. The definition of "danger" comprises what I consider to be two elements to satisfy before a finding of danger can be made: (i) there must be a condition in a place and (ii) that condition must reasonably be expected to cause injury or illness to a person exposed to it.

[111] In this case, the "condition" is the alleged harassing comments from her fellow workers which Ms. Mulhern says she was subjected to. I note at this point that my task is not to determine whether the respondent had reasonable cause to believe that the situation in her work place exposed her to a danger and whether she was reasonably justified in refusing to work. The sole question for me to decide is whether there was in fact and on the basis of objective evidence, a danger to the respondent on June 13, 2012, a finding that would inevitably result in the issuance of a direction to the employer under 145(2) of the Code. Furthermore, an appeals officer's task is to make such a determination in a *de novo* manner, i.e. on the basis of the evidence presented at the hearing, whether or not that evidence was presented or available to the health and safety officer in the course of his investigation.

[112] For the reasons set out below, I find that the evidence presented has not established that Ms. Mulhern was exposed to a danger at the time of her refusal on June 14, 2012.

[113] I have recited with a fair amount of detail earlier in this decision, the evidence presented at the hearing on the circumstances of the refusal, and I will refer to the salient features of that evidence in order to support my conclusions. I will first examine the incident immediately leading to the work refusal. On June 13, Natasha Boudreau, a work colleague of Ms. Mulhern, asked her "why there were three Stand-bys last week and today only two"? The respondent was annoyed by this comment, that she understood as a suggestion that Ms. Boudreau did not like to work with her because of her physical limitations. She told Ms. Boudreau that the subject was sensitive to her and she should speak to management about it. Ms. Mulhern explained that she

felt upset and "couldn't deal with this anymore". She reported the exchange to Mr. Dias and Ms. Duffy. Ms. Duffy allowed her to leave. Mr. Dias spoke to Ms. Boudreau, who stated that she had no intention of hurting Ms. Mulhern, she was simply asking a question and felt sorry that Ms. Mulhern became upset. The next day, Ms. Mulhern came to work and informed Ms. Duffy that she refused to work because she felt unsafe. She handed in a written note (quoted earlier in this decision) and completed the work refusal registration form, alleging "ongoing physiological [*sic*] harassment from co-workers is a danger to my health". Ms. Boudreau was not scheduled to work on June 14, 2012.

[114] This description of what occurred on June 13 does not establish, in my opinion, that Ms. Boudreau had an inappropriate conduct towards Ms. Mulhern. She simply asked was seems to me to be an innocent question, which caused the respondent to become upset. The matter was taken care of by management. I am of the view that this incident cannot be reasonably expected to cause injury or illness to Ms. Mulhern.

[115] I understand of course that the respondents' case does not rest solely on that single incident. The representative argues that the June 13 incident is to be viewed as a culminating incident, so to speak, in a pattern of harassing comments made towards Ms. Mulhern over the course of several years. Ms. Mulhern indeed refers in her note of June 13, 2012, to other comments made previously, that she perceived to relate to the resentment felt by her fellow workers about her accommodated work duties. The danger to her health related to the fear that at any time, a co-worker could make such a comment, and she felt she could no longer cope with this situation. Evidence was presented at the hearing on a series of incidents that, according to Ms. Mulhern, constitute a pattern of harassment.

[116] I have recited at length the evidence related to each of these incidents, which consists of witnesses' testimony at the hearing in addition to the declarations appended to Ms. Cantin's report, which the parties agreed I could consider as truthful evidence. Those incidents occurred in January 2009 (Poirier, Leblanc), February 2010 (Pelzmann, Daigle) November 2010 (Dufour), December 2010 (Thériault, Grenon), and February 2011 (Wells). I have carefully reviewed the declarations of Ms. Mulhern's co-workers. It is not disputed that some comments were made to Ms. Mulhern at work, or in her presence during union meetings, and that those comments have in common some reference to the number of Stand-bys, their normal duties and the impact of Ms. Mulhern's accommodation on their workload. The comments were not always directed at Ms. Mulhern personally, but were the expression of certain frustration that the employer was not taking Ms. Mulhern's situation into account in their staffing practices. A number of those comments were reported to management and Ms. Duffy took what I consider to be appropriate action, proportionate with the nature and seriousness of the comments. While some of those comments could be seen as lacking sensitivity towards Ms. Mulhern' situation, they cannot be characterized as harassment or bullying. In other instances, such as the "Dufour" or the "Boudreau" incidents, Ms. Mulhern clearly overreacted, in my view.

[117] In each reported instance, the employer met with the employee(s) involved and there was no recurrence. Some employees apologized to Ms. Mulhern and felt sorry that she reacted strongly to what they believed was, in its worse light, a comment made out of frustration with no intention to harm Ms. Mulhern. I find that in all cases that were reported to the employer by Ms.

Mulhern where she felt that the comments were inappropriate, the employer followed up by a one-on-one meeting with the co-worker and/or another action. For example, on December 22, 2010, VIA Rail issued a bulletin formally reminding all employees that all comments or concerns regarding an employee's ability, or inability to perform certain tasks or duties must not be addressed to the individual employee but should be brought to the attention of the manager or Union representative. Ms Mulhern herself participated in the drafting of this bulletin and was satisfied with its content. Ms. Duffy followed up (January 2011) with Ms. Mulhern and her union representative, Mr. Walsh, to review the situation and Ms. Mulhern agreed that she had no complaint about the actions taken by management and the union since the December 2008 accommodation, to address her concerns. She encouraged Ms. Mulhern to seek help from friends and family and to use the resources of the employee assistance program.

[118] The evidence has shown that the employer has provided training to all employees on the subject matters of harassment, bullying, violence in the work place and on the duty to accommodate. Finally, as HSO Gallant observed in his report, the employer has in place internal policies regarding work place harassment, standards of behaviour and work place violence, which include complaint mechanisms, and has communicated these policies to its employees. I find on the whole that the employer has taken reasonable measures to deal with Ms. Mulhern's concerns as they were brought to its attention. Of course, the employer cannot act when it is not informed of incidents or conversations that may occur between employees. I was presented with very few of such occurrences and they go back to 2010.

[119] After a careful review of the evidence, I conclude that it was not established that the events, considered individually or taken together, can be characterized as harassment or violence towards Ms. Mulhern, so as to constitute a condition that can reasonably be expected to cause harm or illness to the respondent. The comments are scattered in time over a period of three and a half years and the latest incident in the series of incidents that were presented in evidence occurred in February 2011, some 18 months before the refusal. While there is little doubt that Ms. Mulhern perceived the comments to be a form of harassment, and was upset and affected by them, they were not meant to intimidate, tease or otherwise harm Ms. Mulhern. The determination of danger must be based on an objective analysis of the circumstances and of the condition that is alleged to be the source of the problem. In the *Tryggvason* decision, the appeals officer stated as follows, at paragraphs 67 to 69:

> [**67**] Accordingly, in order to determine whether or not a danger, as defined in subsection 128(1) of the Code, to the appellant's mental health existed or has potential to exist, at the time she exercised her right to refuse dangerous work, I will have to ask myself whether there is a reasonable possibility that the condition alleged by the appellant could reasonably be expected to cause her injury or illness.
>
> **[68]** Before assessing the evidence that was adduced in this case regarding the alleged illness, I need to address the type of evidence required in cases involving psychological health issues, such as the one at hand, where the alleged danger is personal and is based solely on the subjective experience of one individual.
>
> **[69]** In *Alexander*, which concerns allegations made by an employee of Health Canada to have been exposed to racist and discriminatory treatment that put, among other things, his mental health in danger, the Board Vice-Chairperson stated the following at paragraph 33 and 35:

> **[33]** When others can observe the alleged danger in the workplace, there is no great difficulty in demonstrating that a danger may exist. However, if the danger is an individual experience, arbitrators have insisted that the employee must have solid evidence that can lead other reasonable individuals, examining the same circumstances, to conclude that the danger is indeed real. This is called an objective test. (See Palmer and Palmer in *Collective Agreement Arbitration in Canada*, 3rd Edition, at para. 7.17). [My emphasis]
>
> **[35]** Furthermore, where an employee refuses to perform work on medical grounds, which is the case here, it is incumbent upon that employee to satisfy his or her employer with documentary evidence from a physician that the work is a health hazard (see *United Automobile Workers, Local 636 v. F.M.C. of Canada Ltd., Link-Belt Speeder Division* (1971), 23 L.A.C. 234). In other words, the employee has the onus of producing the medical evidence that supports his or her claim that there is indeed a danger. [My emphasis]

[120] This takes me to the medical evidence related to Ms. Mulhern's state of health presented at the hearing. Dr. Swinamer's testified that she diagnosed Ms. Mulhern to suffer from depression since 2002, for which she is treated by the administration of an anti-depressor medication. Ms. Mulhern also suffers from chronic pain apparently resulting from her work place injury that occurred in 2001. Dr. Swinamer's records also make reference to family-related issues which, in her opinion, have contributed to Ms. Mulhern's depressive state, along with her chronic pain symptoms. I note that Ms. Mulhern herself, in her June 13 note to Ms. Duffy, describes her health problems and how they affect her well-being generally. I note that Ms. Mulhern did not consult Dr. Swinamer on or about June 14, the date of her refusal, but a few weeks later, on July 3, 2012.

[121] I find that the evidence does not support the conclusion that the health issues affecting Ms. Mulhern are caused by the incidents described in the evidence. It has not been established that the health problems experienced by Ms. Mulhern are caused by the perceived harassing comments from her co-workers. In fact, I am inclined to observe that the combined effect of the symptoms of depression and Ms. Mulhern's chronic pain as established in the medical evidence may explain, to a certain extent, Ms. Mulhern's perception, and sometimes surprisingly strong reactions to the comments of co-workers regarding her accommodated duties, in light of the rather benign nature of the comments and the context in which they were made. I can appreciate that her state of health may have influenced her perception of those comments. As Dr. Swinamer stated, it is well recognized that depression adversely affects a person's family and work life. Even if I ventured to infer from the evidence that Ms. Mulhern's perception of her co-workers' comments could detrimentally affect her health, I have great difficulty in concluding that they can reasonably be expected to cause her injury or illness, on an objective standard, as required by the Code. Any adverse effect on Ms. Mulhern's health would, in my view, be entirely subjective and caused by her personal medical condition, as described in the circumstances of this case. That situation is more appropriately dealt with under the collective agreement and the statutory framework relating to the obligation to accommodate an employee with a disability.

[122] I have no doubt regarding the sincerity of Ms. Mulhern's explanation as to how she felt on the day of the refusal, and how she felt in previous instances where comments were made

about the Stand-bys' workloads in light of her accommodated duties. Ms. Duffy and others have indeed reported that she was visibly emotionally distressed by the comments that she reported. But that is her subjective reaction to the events. Her personal and work situation is not an easy one to be in and obviously caused her some stress. I reiterate that the issue before me is not whether she had reasonable cause to believe that she was in danger. Rather, I must be satisfied that, all things considered, she was objectively exposed to a condition that could reasonably be expected to cause injury or illness. I am unable to make such a finding in the circumstances of this case.

[123] I believe the following comments made by the appeals officer in *Forster v. Canada (Customs and Revenue Agency)* (Appeals Officer Decision 02-014, July 4, 2002) to find application in the present case:

> [33] I have heard from health and safety officer Ryan's report and the testimonies given at the hearing that a very unfortunate series of events took place on September 25 and 26 and that these events had a definite bearing on Ms. Forster's pre-existing condition, i.e. stress arising out of interpersonal relations. I recognize that these events were so difficult for Ms. Forster that she truly believed that working in that environment constituted a danger for her. However, other than Ms. Forster's own testimony, which was understandably "subjective", I did not receive any evidence to that effect, including any certified medical evidence establishing a direct causal link between these particular events and Ms. Forster's health.
>
> [34] I believe that these events were basically a "long standing" labour relations issue and I strongly recommend that both parties seek all available means to resolve it as best as possible to both of them.
>
> [35] For these reasons, I confirm health and safety officer Ryan's decision of no danger.

[124] HSO Gallant reached his conclusion that Ms. Mulhern was exposed to a danger on the basis of a meeting of a few hours with her and with representatives of management. He founded his conclusion mainly on the explanations provided by Ms. Mulhern and her description of the events. He did not interview any of the persons who had made allegedly harassing comments to Ms. Mulhern, to obtain their side of the story and the proper context within which the comments were made. He made his finding in the absence of any medical evidence. He nevertheless concluded that Ms. Mulhern was subjected to psychological harassment with hardly any reasoning or serious analysis on his part. He solely considered Ms. Mulhern's subjective fear of danger, without due consideration for the need to be satisfied that there was a condition that objectively presented a danger to Ms. Mulhern in the work place. Consequently, I am of the opinion that HSO Gallant's finding of danger is unfounded. As I expressed above, my own determination, after hearing the matter *de novo,* is that Ms. Mulhern was not exposed to a danger on June 14, 2012, within the meaning of the Code. As HSO Gallant's Direction #1 is entirely based on his erroneous finding of danger, it follows that the direction must be rescinded. Given my decision, there is no need to decide the question of whether the direction was so vague or imprecise as to justify its rescission or modification.

[2] Direction # 2 issued under subsection 145(1) to remedy a contravention of paragraph 125(1)(z.16) of the Code and subsection 20.9(3) of the COHSR

[125] The issue raised by the appeal of this direction is whether HSO Gallant was correct in finding that the provisions quoted above were contravened by the employer in the circumstances of this case. For ease of reference, I will quote the sections of the Code and of Part XX of the COHSR that are directly relevant to the issue:

> **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 prescribed steps to prevent and protect against violence in the work place;
>
> **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.
>
> **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.

(Underlining added)

[126] The starting point of the analysis is the statement of refusal itself. What grounds did Ms. Mulhern invoke to justify her work refusal of June 14? The Work Refusal Registration form speaks about "on-going physiological harassment from co-workers". I read Ms. Mulhern's statement to mean "psychological" harassment. In fact, HSO Gallant uses "psychological harassment" in the decision paragraph of his report, as does the respondents' representative in his submissions. The incident report of June 13, 2012 makes reference to "harassment" in the title, then goes on to describe the incident with Ms. Boudreau. The handwritten note Ms. Mulhern handed in on June 14 refers to "harassment", "constant harassment" and "harassing behaviour". There is little analysis in HSO Gallant's decision that explains his train of thought to jump from allegations of harassment to a finding of contravention of subsection 20.9(3) of the COHSR, which deals with violence in the work place. In fact, HSO Gallant has never made a finding that Ms. Mulhern was the victim of violence or alleged violence in the work place.

[127] These introductory comments are important in that they relate directly to the conditions which trigger the application of subsections 20.9(2) and (3) of the COHSR. Part XX is concerned with violence in the work place. It is not directly concerned with harassment, although that concept does find a place in the scheme elaborated by Part XX, as I will explain further. In my view, HSO Gallant as well as both parties' representatives in their submissions erroneously used the notions of harassment and violence interchangeably in their analysis of the circumstances of this case. In my view, these are two different concepts. In the recent decision rendered in *Canadian Food Inspection Agency v. Public Service Alliance of Canada*, 2014 OHSTC 1 (I note that an application for judicial review has been filed before the Federal Court), the appeals officer had to decide a similar question, i.e. whether the alleged "hand gestures, rolling of eyes or being verbally demeaning" on the part of a manager towards an employee could support a finding that the employer was required to appoint a "competent person" pursuant to subsection 20.9(3) of the COHSR. He states as follows, at paragraphs 60-61:

> [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.

[128] I agree with the appeals officer that before the application of subsection 20.9(3) of the COHSR can be triggered, one must be in the presence of "work place violence" or alleged work place violence. Section 20.2 defines work place violence as "any action, conduct, threat or gesture that can reasonably be expected to cause harm, injury or illness (…)". The wording is very similar to the wording used by Parliament at section 122 to define "danger", and so is the analysis that must be conducted to determine whether "a condition exists in a work place that can reasonably be expected to cause injury or illness". Here again, in my view, an objective test must be satisfied before one can come to the conclusion that there is indeed a situation of work place violence as contemplated by section 20.9. What if no such situation is found to exist? Then, in my view, that is the end of the matter and the application of Part XX stops there.

[129] Has the evidence established that Ms. Mulhern was subjected to work place violence in this case? The short answer is no and accordingly, there was no obligation on the employer to appoint a "competent person" pursuant to subsection 20.9(3) of the COHSR. I explain my conclusion in the following paragraphs.

[130] First, I cannot characterize the incidents described in the evidence as "actions, conduct, threat or gestures" within the meaning of section 20.2. Without belabouring my conclusions as to the proper characterization of the incidents presented in evidence, I have already found that what we are dealing with in his case are a few instances where co-workers have made comments expressing their concerns and dissatisfaction regarding the impact of Ms. Mulhern's accommodated duties on their own workloads. The comments were sometimes directed towards Ms. Mulhern, sometimes not, and were not meant to humiliate or demean her, or otherwise cause her harm. The instances presented in evidence were spread over a period of three and a half years. Secondly, If I am mistaken that comments of that nature do not constitute "actions, conduct, threat or gestures", I am of the view that the second element of the definition, i.e. the requirement that such "actions, conduct, etc…" must "reasonably be expected to cause (…) injury or illness", has not been established, essentially for the same reasons why I found that a "danger" had not been established. I construe the wording of section 20.2 to require that the existence of the alleged work place violence must be determined on an objective standard. The analysis therefore should be conducted from the perspective of whether a reasonable person would conclude that, objectively, the "actions, conduct, etc." complained of could likely, in all

probability, "cause harm, injury or illness" to an employee. The French wording "*qui pourrait vraisemblablement lui causer un dommage*" conveys the same idea.

[131] Consequently, based on my characterization of the comments which Ms. Mulhern referred to, I find that they cannot, in my opinion, constitute violence as contemplated by section 20.2 of the COHSR. Having so found, I could stop here and rescind the direction for having no legal foundation.

[132] However, I must go one step further and deal with the respondents' argument based on the wording of subsection 20.9(2). The respondents' representative placed great emphasis on the combined effect of subsections 20.9(2) and (3) of the COHSR: subsection 20.9(2) not only speaks of actual work place violence, but also of alleged work place violence. In his submission, once an allegation of work place violence – even assuming that alleged harassment is synonymous to work place violence, an equation that I have already rejected – is made and remains unresolved after the employer has attempted to "resolve the matter with the employee", the employer has no other choice but to appoint a "competent person" under subsection 20.9(3). In other words, the respondent interprets the words "the matter remains unresolved" to include a dispute between the employee and the employer as to the occurrence of a situation of work place violence, regardless of whether or not it is in fact the case. The "competent person" would then, according to that interpretation, investigate with a view to making a finding on that matter, i.e. has there been an occurrence of work place violence or not, and draw conclusions and recommendations.

[133] I do not read subsections 20.9(2) and (3) in such a manner, for the following reasons. To better understand the purpose of those provisions, it is useful to review the scheme set out in Part XX, within which they are found. Many obligations are prescribed by Part XX on the employer. The first obligation is to develop a comprehensive policy on the prevention of work place violence (section 20.3). The policy must reflect the obligation of the employer to provide a safe, healthy and violence-free work place. It must also state the employer's obligation to dedicate sufficient attention and resources to address factors that contribute to work place violence. Those factors include – but are not limited to – bullying, teasing and abusive and other aggressive behaviour (20.3(*b*)). The employer must communicate to employees information about these factors and finally, the policy should stress that the employer must assist employees who have been exposed to work place violence. The scheme of Part XX also requires the employer to identify the factors that contribute to violence in its work place(s) (section 20.4) and do an assessment of the potential for work place violence (section 20.5). It must then develop and implement systematic controls to eliminate or minimize work place violence (section 20.6) and review periodically the effectiveness of these measures (section 20.7). Finally, it must develop an emergency notification procedure in response to work place violence and communicate it to employees.

[134] My point in reviewing these provisions is that throughout Part XX, the legislator makes a distinction between work place violence and the factors that may contribute to work place violence. While the factors that are described as contributing to violence in subsection 20.3(*b*) may be generically characterized as "harassment" as that term is generally understood, they do not *ipso facto* constitute violence under the definition set out in section 20.2. The contention that

Part XX, and paragraph 20.9(3) in particular, is concerned with "harassment/violence" and the use of those concepts interchangeably is therefore incorrect, in my opinion.

[135] What is then the relevance and purpose of section 20.9 in this overall structure? I understand the process contemplated in that section to be concerned with bringing a response to situations of actual work place violence. It is not concerned, in my view, with an examination of the factors that may contribute to the occurrence of work place violence. While the scheme set out in sections 20.1 to 20.8 is aimed at prevention, section 20.9 is remedial. It offers an avenue of redress for employees who have been subject to occurrences of work place violence, to have that situation dealt with appropriately by their employer. With that purpose in mind, subsection 20.9(2) envisages two possibilities: the employer becomes aware of work place violence or becomes aware of "alleged" work place violence. In the first scenario, the employer knows of a situation of violence, for example has witnessed it, and must resolve the matter with the employee as soon as possible. I understand "resolve" to mean: to bring a response that is aimed at ensuring that the violence to which the employee was exposed will not reoccur. Those measures likely relate to the adequacy of the controls, training, work environment, etc.

[136] In the second scenario, the employer is made aware of the violence by an allegation that work place violence has occurred. In the same fashion, the employer must resolve the matter with the employee involved. I should point out that the provision does not necessarily imply that it is the victim of the violence who brings the allegation: it can be anyone who witnessed the situation. Since the employer has no direct awareness of the occurrence of work place violence in such a scenario, the resolution process reasonably includes, in my view, the need to determine whether in fact, work place violence has occurred. This can be done in a summary way by management, if the facts are simple enough; but in more complex situations, it may require a more involved investigation, such as the types of investigations provided in policies dealing with the prevention of work place harassment, for example. If the facts establish that work place violence has occurred, the employer must then resolve it, in the manner that I have already outlined. In both scenarios, the reference to resolving "the matter" should be read to mean: resolving "the situation of work place violence", not an allegation that work place violence – let alone one of harassment – may have occurred or not.

[137] Turning now to subsection 20.9(3), what is the effect of the wording "if the matter is unresolved, the employer shall appoint a "competent person" to investigate the work place violence"? In my view, it is consistent with the scheme described above to interpret "the matter" to refer to the situation of actual work place violence. In my view, it does not refer to a dispute or debate as to whether a particular situation constitutes work place violence or not. It is revealing and worth noting that the legislator does not use the words "alleged work place violence" in subsection 20.9(3). This leads me to understand that the purpose of the investigation is not to determine whether or not work place violence has occurred, but to review the situation that constitutes work place violence and make recommendations to the employer, in instances where an employee is not satisfied that the measures taken by the employer to deal with the work place violence that he/she has been subjected to, are adequate. I also emphasize that the duty of the "competent person" as set out in subsection 20.9(4) is to investigate "the work place violence", a wording used throughout the section and consistent with my interpretation that a finding of work place violence is required before the application of subsection 20.9(3) is engaged.

[138] Of course, if the employer is mistaken in its assessment that a situation does not constitute work place violence, when in fact it does, the employer would be in contravention of subsection 20.9(3). A health and safety officer called to inspect the work site in case of such a disagreement would then be correct in directing the employer to comply with subsection 20.9(3) and appoint a "competent person" to carry out an investigation into the work place violence. The only exception would be if the employer finds itself in the exemption set out in subsection 20.9(6) of the COHSR. Turning to the application of the exemption for a moment, I point out that I do not accept the appellant's contention that subsection 20.9(6) would exempt VIA Rail in this case from appointing a "competent person" because it has in place effective procedures and controls, involving employees, to address work place violence. Subsection 20.9(6) must be read as a whole, and all three elements enunciated in that subsection, which are joined by the conjunction "and", must be met for that exemption to apply. Typically, this provision would apply to work settings such as correctional institutions or armoured car businesses, among others. In other words, I wish to be clear that had I found that Ms. Mulhern had been exposed to work place violence, VIA Rail would not have been exempted from appointing a "competent person" in the circumstances.

[139] Going back to the interpretation of subsections 20.9(2) and (3) then, I agree with the analysis of the appeals officer in *Canadian Food Inspection Agency* when he states, at paragraphs 63 to 65:

> [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.
>
> (Underlining added)

[140] In an ideal world, those provisions could certainly have been drafted with clearer language. Reference to "the matter" and "the matter being unresolved" is at best imprecise; the

purpose of the investigation is not clearly expressed, and the nature of the conclusions or recommendations that ought to result from the investigation is not specified, all of which creates some ambiguity. In my view, when looking at the scheme as a whole, the conclusions and recommendations of the "competent person" could include matters such as the adequacy of the controls, of the emergency notification procedures, of the assistance provided to the employee who was exposed to the violence, corrections to be brought to the work environment, a re-assessment of factors that may have contributed to the instance of violence, and so on. In other words, matters that the employer must in turn address in its work place violence prevention policy. Subsection 20.9(5) indeed expressly refers to the obligation for the employer to "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", as a result of the "competent person's" report.

[141] Consequently, the process envisaged in subsection 20.9(3) of the COHSR is premised on a finding of an actual situation of work place violence. In my opinion, this is "the matter" to be referred to the "competent person" for investigation, within the meaning of that subsection. I have great difficulty in accepting the proposition that an allegation of work place violence that remains unresolved, from the perspective of an employee, regardless of whether there is, objectively, violence involved, is sufficient to require that a "competent person" be appointed. This is not consistent with what I understand to be the purpose of the investigation process by an independent and impartial person, and risks trivializing the important rights and obligations enshrined in Part XX of the COHSR. I share the views expressed by the appeals officer in *Canadian Food Inspection Agency*, at paragraph 66:

> [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.

[142] In summary, I conclude that Ms. Mulhern has not raised an allegation of "work place violence" as defined in section 20.2 and as contemplated in subsection 20.9(2) of the COHSR. The allegation is one of perceived harassment by her co-workers. Furthermore, the facts of this case do not establish that Ms. Mulhern was the victim of "work place violence" as defined in Part XX. What was established in evidence is that from time to time, co-workers of Ms. Mulhern made comments regarding their workload as Stand-bys as a result of Ms. Mulhern's accommodated duties. Over all the comments were not objectively aggressive, threatening, nor constituted bullying. Each time the comments were reported, the employer did not simply dismiss them: the employees involved were met and sensitized to Ms. Mulhern's situation. The employer provided assistance to Ms. Mulhern to help her deal with her challenges and sensitivity, throughout. While I accept that Ms. Mulhern may have been at times, rightly or wrongly, profoundly disturbed and affected by her co-workers' comments, they do not objectively constitute work place violence. Consequently, there was no obligation on the employer to appoint a "competent person" to conduct an investigation under the auspices of subsection 20.9(3) of the COHSR. As a result, there cannot be a contravention of paragraph 125(1)(*z.16*) of the Code and subsection 20.9(3) of the COHSR, contrary to HSO Gallant's

conclusion. For all these reasons, I am of the view that Direction #2 issued by HSO Gallant is not well founded and should be rescinded.

B) Appeal of HSO Tingley's Report dated October 2, 2012 - (OHSTC File No. 2012-72, "the second appeal")

[143] Much evidence and argument were presented regarding the circumstances leading up to the intervention of HSO Tingley on September 12, 2012. The appellant has raised several concerns with HSO Tingley's report and the manner in which he dealt with the matter after being called in to investigate further to Ms. Mulhern refusal to work on September 12, 2012. The circumstances leading up to HSO Tingley's intervention indeed raise a number of issues, which include whether Ms. Mulhern was justified in refusing to participate in Mr. Cyr's investigation, whether an employee's challenge of the qualifications of a "competent person" appointed by the employer pursuant to subsection 20.9(3) of the COHSR can only relate to that person's impartiality, the extent to which the employer must demonstrate to the employee the "competent person's" qualifications required by subsection 20.9(3) to be appointed as a "competent person", whether Mr. Cyr objectively satisfied those qualifications, and whether Ms. Mulhern was "at work" when she invoked, on September 12, 2012, the right to refuse to work because of danger.

[144] However, before I can embark on an analysis of those questions, I must be satisfied that I am properly seized of an appeal of a direction, within the meaning of section 146 of the Code. Those questions are obviously not falling under the scope of the first appeal, as they arose after HSO Gallant issued his directions. The jurisdiction conferred on an appeals officer by subsection 146.1(1) of the Code mandates me to inquire into the circumstances of the direction and the reasons for it. It does not include a determination as to whether the employer has complied with a direction. The questions that I have outlined above thus properly relate to the second appeal.

[145] It is well established that an appeals officer can only be seized of an appeal against a direction issued under subsections 145 (1) or (2) of the Code, or an appeal by an employee of a decision of "no danger" under subsection 129(7) of the Code. See: *CUPE v. Air Canada* (Decision No. 02-004, April 18, 2002), confirmed by *Sachs et al. v. Air Canada*, 2006 FC 673; *Securicor Canada Limited v. National Automobile, Aerospace, Transportation and general Workers Union of Canada (CAW Canada) Local 114* (Appeals Officer Decision No. 04-023, July 23, 2004)*; Laroche v. Canadian Auto Workers* (Appeals Officer Decision No. 04-002, February 12, 2004); *Gouveia v. Canadian National Railways (CNR)* (Decision No. 04-003, February 23, 2004); D. *C. Noon-Ward v. Correctional Service Canada* (Decision No. 04-022, July 20, 2004).

[146] The latter situation does not arise here, since the employer is the appellant in this case. As I have already indicated earlier in these reasons, I raised the question with the parties as to whether the second appeal properly relates to a direction. If not, the matter must stop there and the appeal must be dismissed. This is a threshold issue that must be determined before I can proceed to deal with the appeal on the merits. In *CUPE v. Air Canada*, the appeals officer dismissed an appeal in a situation where he health and safety officer had decided not to issue a direction, but instead accepted an Assurance of Voluntary Compliance (AVC) from the

employer, that a contravention to the Code would be remedied. The union in that case contested that decision, arguing that the investigation was flawed and breached the fundamental principles of natural justice. The appeals officer stated as follows, at paragraph 51:

> [51] However, try as I might, I cannot persuade myself that the Code implicitly authorizes an appeals officer to review a decision by a health and safety officer not to issue a direction, whether or not the officer's investigation is biased or flawed. Regrettably, I find that I do not have jurisdiction to hear the appeal and the file is now closed.

[147] The question then is as follows: can the excerpts from HSO Tingley's report quoted at the beginning of this decision be interpreted as directions having been issued under subsection 145(1) or (2)? Counsel for the appellant argues that HSO Tingley's report presents the characteristics of binding orders, which the employer felt compelled to follow, and those properly constitute directions under the Code. He submits that we must look at the contents rather than the form of the direction.

[148] The determination of whether HSO Tingley's report constitutes a direction is a question of fact based on an appreciation of the circumstances related to HSO Tingley's intervention and the evidence presented at the hearing. HSO Tingley testified at the hearing on his actions and on how he approached the matter. I place significant weight on HSO Tingley's explanations, as he is, in my opinion, the person who is best suited to describe and characterize his own intervention on September 12, 2012.

[149] In his testimony, HSO Tingley reiterated his statement that he did not issue any direction to the employer as a result of his intervention at the work place on that day. He explained that as soon as he understood the situation to be linked to the original refusal handled by his colleague HSO Gallant a few months before, and upon realizing that the employer was still in the process of implementing HSO Gallant's direction, he had no intention to interfere with this on-going matter. He reiterated that he did not conduct an investigation under subsection 129(1) of the Code and that he did not render any decision on whether or not a danger existed for Ms. Mulhern on that day. Furthermore, he had no intention of even writing a report or confirming anything in writing, which HSO Tingley clearly understood would have been mandated had he rendered any kind of decision on the existence of a danger, or issued directions. It is only when Ms. Duffy inquired about his report and requested that one be prepared, that he followed up on that request and prepared a report summarizing his intervention, which he sent to the parties. He deliberately changed the title of the report from the template "Investigation Report and Decision" commonly used by health and safety officers (see for example HSO Gallant's report), to "Intervention Report", which is entirely consistent with the role that he said he played when he met with the parties at the work site.

[150] His report states that he "advised" the parties, as opposed to "directed" or "ordered" them, wording which would have been more typical of a legally binding direction. The formulation of the advice and recommendations in his report is markedly different from the format used by HSO Gallant, and HSOs generally, when issuing directions to the employer. While I agree that the form of the so-called direction is not in itself determinative, I believe that it is a factor to consider, along with other contextual evidence, to reach a conclusion on the

question of whether the HSO intended to issue a direction or not. Finally, Ms. Haché-Lawlor's notes of the meeting also support HSO Tingley's characterization of his intervention: she refers to the fact that HSO Tingley advised the parties and made some recommendations, which the parties seemingly considered favourably.

[151] I cannot refrain from commenting that there is indeed confusion, if not plain contradiction, in HSO Tingley's report and his testimony as to whether he considered the September 12 refusal to be a "new" as opposed to a "continued" refusal. His report refers to the fact that he was requested to attend the work site "to conduct an investigation of the continued refusal". He explained at the hearing that "continued refusal" refers to subsection 128(13), i.e. where an employee continues to refuse (see the marginal note to that subsection in the Code) after the employer has investigated the refusal pursuant to subsection 128(10). Rightly or wrongly, he testified that, in his opinion, the employer had not conducted such an investigation into the present work refusal, therefore he had no jurisdiction to act under section 129, since the employer's investigation in the presence of a representative from the health and safety committee is a prerequisite to a health and safety officer becoming involved in the matter. HSO Tingley's report is consistent with that explanation, when he writes, at page 4, that "this is a new refusal and required investigation in accordance with section 128 of the Canada Labour Code". Yet, Ms. Duffy and Haché-Lawlor both testified that HSO Tingley mentioned to them during the meeting of September 12, that this "could not be considered a new refusal, because the previous one was not yet finalized" since the "competent person investigation" ordered by his colleague HSO Gallant had not yet taken place.

[152] The references to "new", "continued" and "investigations" in the circumstances of this case obviously created some confusion. HSO Tingley explained that he considered his presence as a "counselling intervention" and acted as a facilitator to assist the parties in resolving the impasse which they were in at that point regarding the implementation of HSO Gallant's direction. He testified that when he left at the end of the meeting, he considered that the parties had indeed resolved the impasse and would carry out what they had basically agreed to do during that meeting. While I have no doubt about HSO Tingley's good intentions, I stress the importance for the health and safety officer to be very clear regarding his role and the purpose of his intervention when visiting a work place. Health and safety officers are vested with significant powers under the Code and it is critical that the capacity in which they carry out a particular assignment must be clearly explained to the parties. Not doing so is likely to be prejudicial to them, who may be unclear as to their rights and expectations as a result. Ironically, as things turned out, HSO Tingley's intervention eventually led to Ms. Cantin's investigation and report, which, as I heard at the hearing of these appeals, appeared to relieve some of the tension and bring positive elements of solution to the dispute, as Ms. Mulhern herself testified.

[153] In the final analysis and for the reasons set out above, I find that HSO Tingley did not issue a direction or directions to the employer on October 2, 2012 nor did he render any decision on whether Ms. Mulhern was exposed to a danger on September 12, 2012. Consequently, the contents of his written report cannot be the subject of an appeal under subsection 146(1) of the Code. I am therefore without jurisdiction to look into the merits of the circumstances leading up to and including Ms. Mulhern's work refusal of September 12, 2012. The appeal in OHSTC File No. 2012-72 is accordingly dismissed.

Decision

[154] For the reasons set out above,

- The appeal against HSO Gallant's Direction #1 and Direction #2 (OHSTC File No. 2012-51) is upheld and I hereby rescind both directions.

- The appeal against HSO Tingley's report (OHSTC File No. 2012-72) does not relate to a direction and is dismissed for lack of jurisdiction.

- Exhibits A-17 (Ms. Isabelle Cantin's investigation report and the witnesses declarations included in the "Schedules Binder") and R-1 entered in evidence in OHSTC File No. 2012-51, are to be sealed and not publicly accessible.

Pierre Hamel

Appeals Officer