

***Canada Labour Code***  
**Part II**  
**Occupational Health and Safety**

Kim Forster  
*applicant*

and

Canada Customs and Revenue Agency  
*employer*

and

Betty Ryan  
*health and safety officer*

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Decision No. 02-014

July 4, 2002

This case was heard by Michèle Beauchamp, appeals officer, in Sussex, British Columbia, on March 11, 2002

**Appearances**

Kim Forster, applicant

Rita Barill, Director, Surrey Tax Centre, Canada Customs and Revenue Agency

Betty Ryan, Health and Safety Officer, Labour Program, Human Resources Development Canada

- [1] This case concerns an appeal made by Kim Forster on October 14, 2001 under subsection 129(7) of the *Canada Labour Code*, Part II, following a decision of no-danger issued by health and safety officer Betty Ryan on October 5, 2001.
- [2] Kim Forster, Complex Reassessments Officer at the Surrey Tax Centre, refused to work on September 27, 2001. Debbie Dubeau, Manager, GST Returns Processing, Surrey Tax Centre, investigated Ms. Forster's refusal to work and concluded that there was no danger for Ms. Forster.
- [3] Health and safety officer Betty Ryan was notified that Ms. Forster continued to refuse to work on October 3, 2001. She investigated the refusal on the same day with health and safety officer Anna Richter and in the presence of the employee, Kim Forster; Debbie Dubeau, representing the employer; Sigrid Hagglund, local union representative; and Sandie McLaughlin, employee member of the work place health and safety committee.

[4] Ms. Forster statement of refusal was the following:

Poisonous work environment due to unresolved conflict and outstanding serious, disturbing, false allegations have created a "condition" which exists (until measures are taken to resolve) which presents a real danger to my psychological health. Since receiving the letter in question I have been traumatized and symptoms of my psychological disability have been so enhanced I find difficult to cope at all.

[5] At the hearing and in her investigation report, health and safety officer Ryan declared that Ms. Forster played an audio tape of her initial interview with Debbie Dubeau that described events and situations that Ms. Forster felt created a situation of danger for her. She listed summarily the following points in the employee's description of events part of her investigation report:

- A. Mrs. Forster suffers from a disability, clinical depression, since 1998, and an anxiety disorder that was aggravated by the events leading to her refusal;
- B. As shop steward of the union local, she deals largely with complaints concerning people with disabilities, work place equity and duty to accommodate issues;
- C. She was away from work on long-term disability from March 2000 to January 2001. She resumed her union activities during the last six months of that period and would return to the work place to do so. Access restrictions were placed on her at that time and reinforced on May 9, 2001;
- D. Mrs. Forster felt that these access restrictions contributed to a climate of "psycho phobia" in the work place;
- E. On September 25 and 26, three incidents occurred with Jacquie Hepner, Regional Employment Equity Administrator and member of the Customs Excise Union Local 20040 at the Burnaby-Fraser Tax Services Office, concerning discussions around Ms. Forster's attendance at the Regional Persons with Disabilities (PWD) Advisory meeting. Ms. Forster felt that Ms. Hepner had misinterpreted her quest for information regarding this meeting.
- F. On September 25 and 26 also, Ms. Forster had two unpleasant events with Rita Barill, Director of the Surrey Tax Centre, regarding her attendance at the regional PWD Advisory meeting. On the 26<sup>th</sup>, Ms. Barill advised Ms. Forster by voicemail that she would not be permitted to attend the meeting.
- G. On September 27, Ms. Hepner provided to Ms. Forster, through the local president, a letter detailing her concerns, where she concluded: "As a union member and an employee of CCRA I hereby advise you that your behaviour and attitude is unacceptable and harassing... Some of your behaviour is of a stalking nature that is very troublesome, it is wrong to use your physical size and demeanour in an attempt to intimidate people..."

[6] Health and safety officer Ryan enquired about the background to these events, including the access restrictions previously put to Ms. Forster, to understand if they were associated to her health or behaviour, because Ms. Forster thought that the "poisonous environment" was related to her psychological health.

- [7] Health and safety officer Ryan stated the following facts in part 5 of her investigation report:
- A. Based on information provided by Ms. Forster, Ms. Forster's disability, depression and anxiety disorder were pre-existing. The alleged "toxic" environment served to aggravate these conditions.
  - B. The access restrictions placed on Ms. Forster were in response to her union activities and her conduct in dealing with union matters. Information regarding her condition was not communicated with those restrictions.
  - C. Ms. Forster was not required to deal with either Ms. Hepner or Ms. Barill in the course of performing her duties.
  - D. Ms. Forster does not find the performance of her work, that of an Assessor of Business Returns, stressful.
  - E. The employer has not (and apparently cannot) restricted Ms. Forster from performing her union activities, other than attempting to control where and with whom these activities take place.
  - F. Ms. Forster stated that her psychologist has cautioned her with regard to the effect these union activities have on her health.
  - G. Ms. Forster has filed a harassment complaint and a grievance with regard to the access restrictions.
- [8] Health and safety officer Ryan believed that the work environment may have aggravated Ms. Forster's pre-existing conditions but was not the cause of it. Although workers' compensation regimes may compensate employees in these types of situations, she said that Part II of the *Canada Labour Code* is not intended to deal with emotional stress, but with physical, tangible and material conditions.
- [9] Replying to a question put by Ms. Forster at the hearing regarding the purpose of the December 1996 amendments to the *Canada Occupational Safety and Health Regulations* (COSHR) in order to help removing barriers to the employment of disabled persons, as declared in its Regulatory Impact Analysis Statement, health and safety officer Ryan reflected that they referred to physical and material conditions, not to stress experienced by employees.
- [10] On the meaning of the expression "while at work" used in paragraph 128(1) of Part II, health and safety officer Ryan declared that, based on her experience as a health and safety officer and her knowledge of the different decisions issued by the Canada Industrial Relations Board or the Public Service Staff Relations Board, this expression means that the employee has to be at work in order to exercise that right.

- [11] Health and safety officer Ryan decided that no danger existed for Ms. Forster for the following reasons:

The investigation revealed that there was no causal relationship, the subject of concern “toxic work environment” was aggravating a pre-existing condition.

The condition, in this situation (stress arising out of interpersonal relations) is not one envisaged by the Code, rather it looks at conditions which are objective, measurable, and enforceable such as noise, air contamination, or temperature.

It should be noted that if the health and safety officer were to have decided that a danger existed, that danger would be determined as arising out of Ms. Forster’s union activities, not her work. A direction would have to be issued and it would be to Ms. Forster, not her employer. That direction would require that she take measures to protect herself from the “dangerous activity” as required by 126(1)(c)

*“While at work, every employee shall take all reasonable and necessary precautions to ensure the health and safety of the employee...”*

The health and safety officer concluded that the casual relationship was not there, with a pre-existing medical condition, so no danger and no direction was issued. The health and safety officer strongly recommends that Ms. Forster consults with and follows the advice of her medical practitioners.

- [12] Ms. Kim Forster, the applicant, stated that her position was as explained in the document sent to this office by Deb Seaboyer, Acting Regional Representative, Vancouver Regional Office, Public Service Alliance of Canada. This position is summarized in the following paragraphs.
- [13] The applicant contended that what appears to be in dispute is not the sequence of events that happened on September 25 and 26 and led to Ms. Forster exercising her right to refuse. The dispute related to whether the events posed a danger to her as defined in the *Canada Labour Code*, whether the *Code* covers the work place conditions which caused her to refuse to work and whether this was "work" as defined under the *Code* (or union activities).
- [14] First, on the issue of her exercising from home her right to refuse under paragraph 128(1)(b) of the *Canada Labour Code*, Ms. Forster said that she was unaware that she had to be at work to exercise her right under the *Code*. Nonetheless, the employer knew that she was refusing from home and never questioned her right to do this.
- [15] Was Ms. Forster in a “work” activity as defined under the *Code*? Ms. Forster declared that there was no doubt in her mind that the events of September 25 and 26 were the result of a work activity, not of a union activity. She was to replace Brenda Brodland, who was appointed to the committee to represent persons with disability at the Surrey Tax Centre as an employee, not as a union representative. This was also made clear when she discussed it both with Jacquie Hepner and Rita Barill.

- [16] Were the work place conditions which caused Ms. Forster to refuse to work covered under the *Code*? Health and safety officer Ryan indicated in her report that "the condition, in this situation (stress arising out of interpersonal relations) is not one envisaged by the *Code*, rather it looks at conditions which are objective, measurable and enforceable such as noise, air contamination, or temperature". However, Ms. Forster argued that these were limitations arbitrarily set by the health and safety officer's interpretation of the *Code*. According to her, nothing in the dictionary definition of "condition" limited the meaning of the word to "objective, measurable, and enforceable" conditions, nor to being something physical, and when "condition" was used in medical terminology, it could refer to either a physical or a psychological state. Therefore, Ms. Forster maintained that unless the *Code* specifically stated that the meaning of "condition" is limited to something "objective, measurable and enforceable", the general and normal usage of the word had to apply.
- [17] Did a condition exist in the work place that gave reasonable cause to Ms. Forster to believe, as stated in subsection 128(1) of the *Code*, that it constituted a danger to her? Ms. Forster held that the sequence of events on September 25 and 26 did just that: there was, during her conversation on September 25 with Jacquie Hepner, "a decided edge of agitation, tension and frustration to Jacquie's tone"; plus, Ms. Forster was completely distressed by Ms. Barill's phone message to her supporting Ms. Hepner's negative decision and indicating that she had misrepresented the facts to her. This is where the work place condition came into play: there were unresolved issues between Mss. Barill and Forster in her position as a union steward, which caused Ms. Barill to view things done by Ms. Forster with suspicion. Consequently, Ms. Forster said, "there is more than one pre-existing condition in this situation. In addition to [my] medical condition, there is a toxic work environment where, even when [I] act in good faith, [my] actions are viewed with suspicion."
- [18] On September 26, Ms. Forster was late going in to work because she was distressed by the events of the previous day,. She phoned Johann Ackermann to obtain the union's assistance, and he read her a letter he had received from Ms. Hepner. Ms. Forster held that she became at a complete loss as how to proceed because the letter accused her of stalking, a criminal offence, in addition to the fact that several senior managers had received a copy of the letter and that Ms. Barill already viewed everything she did with suspicion. Ms. Forster then took the only action she could think of and asked Mr. Ackermann to meet with Ms. Barill on her behalf to inform her that she was exercising her right to refuse.
- [19] To Ms. Forster, the already toxic work environment, wherein senior management, particularly Ms. Barill, viewed her activities with suspicion, was rendered even more toxic by this letter making criminal accusations against her. Ms. Forster's pre-existing anxiety disorder entered the equation as well: she had been accused by the Ms. Barill of misrepresenting the facts, Ms. Hepner had accused her of stalking and harassment, and additional senior management people had been given a biased version of the events of the past two days about which they had no previous knowledge. All this led her to believe that if she reported to work, her psychological health would be in danger.

- [20] Finally, Ms. Forster argued that the work place condition cannot be limited to something physical, that her pre-existing condition did not limit the application of the *Code*, and that the fact that the issue concerned an employee's psychological well-being, although making it more difficult to investigate, did not prohibit the health and safety officer to make a determination of danger under the *Code*.
- [21] Ms. Rita Barill, Director of the Surrey Tax Centre, agreed with health and safety officer Ryan's decision of no danger, with the exception of her statement that, when Ms. Forster refused to work, "[she] had just reported to work, received the letter from Ms. Hepner through Johann Ackermann [and no] work was being accomplished at the time". She declared that Ms. Forster was not in the work place when she made her refusal to work. This, she said, was supported by both Mr. Ackermann's mention that he called Ms. Forster at home to read Ms. Hepner's letter to her and Ms. Forster's statement that she had not reported to work prior to being contacted by Mr. Ackermann and felt she could not report once hearing the content of the letter. Furthermore, formal emails detailing the refusal under paragraph 128(1)(b) were sent by Ms. Forster to her reporting supervisor, Kellie O'Reilly, and to Rita Barill, Director of the Surrey Tax Centre, from Ms. Forster's home, not her work address.
- [22] Ms. Barill knew of and recognized Ms. Forster's disability, but believed that Ms. Forster also had to be accountable for her behavior. She maintained that Ms. Forster had to obtain management's authorization in order to attend the committee meeting and that going to the committee was not part of Ms. Forster's work as an assessor.
- [23] Ms. Barill also stated that when Johann Ackermann informed her of Ms. Forster's refusal, she told him that she should come to work so that the refusal to work procedure be complied with. An investigation was carried out by Debbie Dubeau, after which Ms. Dubeau said that there was no danger. Health and safety officer Ryan's investigation took place after that, on October 3.
- [24] Ms. Barill confirmed that Ms. Forster was not paid for the two days that she did not report to work, but that she did receive pay as soon as health and safety officer Ryan started her investigation.
- [25] Ms. Barill declared that after health and safety officer Ryan's decision, she held a fact – finding investigation on Ms. Hepner's letter, after which she told Ms. Forster that it was not related to her refusal, but to her relationship with Ms. Hepner. Ms. Barill added that Ms. Forster's access limitations when she came back to work after her leave of absence did not limit her activities as a union representative, that Ms. Forster was the one who raised all the previous incidents and that Ms. Forster contributed to the "toxic environment".

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[26] Subsections 146(1) and 146(2) of Part II of the *Code* define the appeal officer's role when an appeal is brought against a decision of no danger issued under subsection 129(7). They read:

146.1(1). If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may:

- (a) vary, rescind or confirm the decision or direction; and
  - (b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).
- (2) The appeals officer shall provide a written decision, with reasons, and a copy of any direction to the employer, employee or trade union concerned, and the employer shall, without delay, give a copy of it to the work place committee or health and safety representative.

[27] The main issue to be decided here is if Ms. Forster was facing a danger within the meaning of the *Canada Labour Code*, when she refused to work on September 27, 2001. Here are the Part II provisions dealing with the definition of danger and refusal to work situations:

122(1) "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.

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 constitutes a danger to the employee or to another employee;
- (b) a condition exists in the place that constitutes a danger to the employee;
- (c) the performance of the activity constitutes a danger to the employee or another employee.

129(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.

- [28] Ms. Forster put three issues before the appeals officer in her position paper: whether the events posed a danger to her as defined in the *Canada Labour Code*; whether the *Code* covers the work place conditions which caused her to refuse to work ; and whether this was "work" as defined under the *Code* (or union activities).
- [29] I do not have to determine if this "work", *i.e.* Ms. Forster replacing another employee appointed to the committee to represent persons with disability at the Surrey Tax Centre, was work as understood by the *Code* or union activities. What I learned at the hearing and needed to know from the parties and the health and safety officer is that Ms. Forster is employed as an assessor of business returns at the Surrey Tax Centre, of which Ms. Barill is the Director, and that Ms. Forster did not find the performance of that work stressful, as stated in the health and safety officer's report. The issue of who does what and in what capacity, in the context of internal committees membership or participation, has no relevance here and does not fall under my purview.
- [30] Does the *Code* cover the work place conditions which caused Ms. Forster to refuse to work? Ms. Forster argued that "this is where the condition existing in the workplace comes into play. There are unresolved issues between Rita and Kim, in Kim's position as a Union Steward. This causes Rita to view things that Kim does with suspicion." For her part, health and safety officer Ryan indicated in her report that "the condition, in this situation (stress arising out of interpersonal relations) is not one envisaged by the *Code*, rather it looks at conditions which are objective, measurable and enforceable such as noise, air contamination, or temperature". I agree with health and safety officer Ryan. As far as this case is concerned, I believe, after hearing the parties, that these "unresolved issues" referred to by Ms. Forster are connected to labour relations, and, as such, labour relations are not covered by Part II of the *Canada Labour Code*.
- [31] Did the events pose a danger to Ms. Forster as defined in the *Canada Labour Code*? According to Ms. Forster, the sequence of events of September 25 and 26 did just that: the "decided edge of agitation, tension and frustration to Jacquie [Hepner]'s tone"; Ms. Barill's message to Ms. Forster in support of Ms. Hepner's negative decision and indicating that Ms. Forster had misrepresented the facts to her, and the ensuing distress for Ms. Forster's; plus the work place condition, *i.e.* the unresolved issues between Mss. Barill and Forster in her position as a union steward.
- [32] The definition of danger found in subsection 122(1) of Part II implies that, when health and safety and health Ryan investigated Ms. Forster's refusal to work, she had first to decide if, at that moment, the condition did actually exist (*existing condition*) or was to exist in the future (*potential condition*), and, second, if there was a reasonable expectation that this (*existing* or *potential*) condition was likely to cause an injury or illness before it could be corrected. This is exactly what health and safety officer Ryan did.
- [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.

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Michèle Beauchamp  
Appeals Officer

## **Summary of Appeals Officer Decision**

**Decision No.:** 02-014

**Applicant:** Kim Forster

**Employer:** Canada Customs and Revenue Agency

**Key Words:** Refusal to work, danger

**Provisions:** *Code* 122, 128(1)  
COSHR: n/a

**Summary:**

The employee refused to work under subsection 128(1) of the Code, alleging that a poisonous work environment due to unresolved conflict and outstanding serious and false allegations created a condition that represented a danger to her psychological health.

The appeals officer confirmed the health and safety officer's decision of no danger, having received no evidence other than the employee's testimony, including no certified medical evidence, establishing a direct causal link between these particular events and the employee's health.