

**CANADA LABOUR CODE  
PART II  
OCCUPATIONAL HEALTH AND SAFETY**

CUPE

*applicant*

*and*

Air Canada

*employer*

*and*

Jacques Servant and  
Diane Holmes

*health and safety officers*

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Decision No. 02-004  
April 18, 2002

This case was heard by Doug Malanka, appeals officer, in Toronto, Ontario on October 16, 2001.

Appearances

Ms. Beth Symes, Counsel, CUPE

Mr. Timothy Lawson, Counsel, Air Canada

- [1] On January 2, 2001, Ms. Pamela Sachs, President Air Canada Component and Member of Toronto occupational health and safety committee, CUPE-Airline Division, wrote to Mr. Jacques D. Servant, Chief, Aviation-OSH at Transport Canada. Her letter complained that Air Canada was in violation of the *Canada Labour Code*, Part II (hereto referred to as the Code or Part II) and pursuant *occupational health and safety regulations* in respect of their cabin personnel manual.
- [2] Mr. Servant wrote back to Ms. Sachs the same day and referred her to section 127.1 (internal compliant resolution process) of the Code. He told her that she had to complain to Air Canada before a health and safety officer at Transport Canada would investigate her complaint. Ms. Sachs replied immediately that they had already complained to Air Canada and that the parties were unable to agree. She held that the numerous contraventions cited in her initial correspondence to him constituted a danger and asked Mr. Servant to direct Air Canada pursuant to subsection 145.(2) of the Code to immediately cease implementing their new cabin personnel manual until all cabin personnel were trained.
- [3] Mr. Servant wrote back to Ms. Sachs later that same day in response to her complaint of danger. He replied that he had reviewed the amended flight attendant manual with the Airline Inspection Division of Transport Canada and determined with them that a danger under the Code did not exist for flight attendants at Air Canada. He subsequently wrote to Ms. Sachs on January 19, 2001 and advised her that Transport Canada was investigating the contraventions that she alleged in her January 2, 2001 letter. He indicated that he would inform her of Transport Canada's findings as soon as results were available.
- [4] On May 7, 2001, Mr. Servant wrote to Ms. Sachs with the findings. The report, in the form of a table, listed the Part II contraventions alleged by Ms. Sachs and the finding of health and safety officer Diane Holmes in respect of each complaint. In all but 2 cases, health and safety officer Holmes found that Air Canada was in compliance with the legislation. In respect of two cases of non-compliance with the Code, health and safety officer Holmes accepted an Assurance of Voluntary Compliance<sup>1</sup> (AVC) from Air Canada.
- [5] On June 5, 2001, Ms. Symes wrote to the Canada Appeals Office on Occupational Health and Safety (CAO-OHS) on behalf of CUPE. She appealed Mr. Servant's May 7, 2001 report pursuant to sections 146 and 146.1 of the Code. She characterized Mr. Servant's May 7, 2001 letter as a "decision/direction", and provided the following as grounds for the appeal:
- "There was a reasonable apprehension of bias of the safety officer assigned, Diane Holmes.
  - The safety officer failed to investigate and/or to address the issues in the complaint.
  - The safety officer failed to meet with the Complainant, Pamela Sachs, during the investigation.
  - The safety officer failed to meet with France Pelletier, the Health and Safety Chair of the Airline Division of CUPE despite repeated requests by Ms. Pelletier for such a meeting.
  - The "decision/direction" is based on findings of fact that are clearly wrong.

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<sup>1</sup> Assurance of Voluntary Compliance is essentially a written document where an employer or employee, as the case may be, promises to correct a contravention of Part II and pursuant regulations by a certain date or within an agreed period of time.

- The “decision /direction” contains serious errors of law in the interpretation of the Code and *the Occupational Health and Safety Regulations*.
- Such further and other grounds that may arise from the safety inspector’s report.”

[6] Following receipt of Ms. Symes letter, I placed a telephone call to her office and left a message on her voice mail recorder. I pointed out that section 146.1 of the Code does not refer to AVCs or to the decision of a health and safety officer not to issue a direction in respect of a contravention. The next day, June 7, 2001, I sent a facsimile message to Ms. Symes to confirm the information I had left in her voice mail recorder on June 6. The letter read:

June 7, 2001

Eberts, Symes, Street and Corbett  
Barristers and Solicitors  
133 Lowther Avenue  
Toronto, Ontario  
M5R 1E4

Dear Ms. Symes:

**Subject: Appeal of Decision and Direction of Jacques D. Servant  
dated May 7, 2001**

Yesterday, June 6, 2001, you forwarded a letter via facsimile message to Ms. Jocelynn Paris on the above noted subject. Later in the day, I reviewed your letter and documents and telephoned you to discuss the matter. In your absence, I left a message. This will amplify and confirm the information that I communicated.

The Minister of Labour Health(sic) appoints health and safety officers pursuant to subsection 140.(1) of the *Canada Labour Code*, Part II (Code or Part II). This includes employees of Transport Canada appointed as health and safety officers. Subsection 140.(1) of the Code reads:

“140.(1) The Minister may designate as a regional health and safety officer or as a health and safety officer for the purposes of this Part any person who is qualified to perform the duties of such an officer.” [My underline.]

Under the authority of subsection 145.(1) of the Code, a health and safety officer has the discretion to issue a direction where the officer is of the opinion that a contravention of Part II is occurring or has recently occurred. The provision includes the discretion not to issue a direction. In this case, the health and safety officer agreed to accept an assurance of voluntary compliance (AVC), a departmental non-legislated instrument, from Air Canada instead of issuing a direction. Subsection 145.(1) reads:

“145.(1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both to ...” [My underline.]

The legislative authority for the review by an appeals officer of a health and safety officer’s decision or direction is found under subsections 129.(7) and 146.(1) of the Code. Subsections 129.(7) and 146.(1) read respectively as follows:

“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.” [My underline.]

“146.(1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.”

The Code does not authorize an appeals officer to review an AVC accepted by a health and safety officer. In connection with this, I include for your information a copy of an unreported decision of appeals officer Michele Beauchamp in the case of Canadian Union of Public Employees, Airline Division, represented by Xavier Janssens and France Pelletier, and Canadian Airlines International Limited, represented by Christine Holliday. The decision is number 01-007 and dated March 21, 2001.

In 1989, the Federal Court deemed the review of a direction by an appeals officer to be quasi-judicial in nature. By necessity, this Office operates independently of the occupational health and safety program at HRDC and Transport Canada. Therefore, this office cannot investigate into or comment on the appropriateness of a decision by a health and safety officer to accept an AVC instead of issuing a direction in a given situation.

If you require further information or wish to discuss this, I can be reached by telephone at (819) 997-8977.

Douglas Malanka  
Appeals Officer

Att.

- [7] Ms. Symes left a message in my telephone voice mail shortly thereafter. She insisted that the authority of an appeals officer to review Mr. Servant’s “decision/direction” was the very issue that she wished to argue and demanded that a hearing be held. With that clarification, I confirmed for Ms. Symes that I would indeed hear the case.
- [8] On October 10, 2001, I convened a pre-hearing telephone conference call with Ms. Symes and Mr. Timothy Lawson, Counsel, Air Canada, to set a date for the hearing. Ms. Symes complained that my letter to her on June 7, 2001 constituted a bias and indicated concern with my hearing the case. I agreed to consider her objection and to report back the next day.
- [9] The next day, October 11, 2001, I convened another prehearing telephone conference call with Ms. Symes and Mr. Lawson and informed them that I intended to proceed with an oral hearing. I reiterated that my letter of June 7, 2001 was for information only and did not constitute a decision. I further indicated that the issue for the oral hearing would be limited to my jurisdiction under the Code to review the decision by a health and safety officer not to issue a direction following the officer’s investigation of a complaint made pursuant to section 127.1 of the Code. For the hearing, I agreed to assume that the health and safety officer investigation was biased and flawed as alleged by Ms. Symes.

- [10] Mr. Lawson then proposed to Ms. Symes that he would not argue that my June 6 and 7, 2001, communications to her constituted a decision if she agreed not to argue that my letter of June 7, 2001 constituted a bias. Ms. Symes agreed and the oral hearing was scheduled to be held in Toronto on October 16, 2001.
- [11] Notwithstanding their agreement, Ms. Symes argued at the hearing that my voice mail message to her on June 6, 2001 and follow up letter of June 7, 2001 constituted, at the least, an apprehension of bias. She said she had to raise this “for the record”.
- [12] Mr. Lawson expressed surprise that Ms. Symes had raised the matter of bias. He held that her decision compelled him to argue Air Canada’s position that my June communications constituted a decision. In this regard, Mr. Lawson referred me to an excerpt from Brown and Beatty Canadian Labour Arbitration, Third Edition, dealing with the exhaustion of jurisdiction. According to Mr. Lawson, the common law doctrine of *functus officio* essentially establishes that, when you make a decision, it is final and binding unless you have statutory authority for doing otherwise. He maintained that there is no authority in the Code for appeals officers to reconsider or expand on their decision. In this regard, Mr. Lawson also referred me to the case of *MacDonald v. Federal Express Canada Limited* before Canada Labour Arbitration T. Jolliffe, Adjudicator, [2001] C.L.A.D. No. 259
- [13] Mr. Lawson further argued that Ms. Symes could not have it both ways. He held that, if she maintains that my voice communication to her on June 6 and follow up letter of June 7, 2001 constitute a bias, then she is confirming his argument that the communications constituted a decision. That being the case, I cannot hear the case because I am *functus officio*.
- [14] Ms. Symes challenged that the decision in the case of *MacDonald v. Federal Express Canada Limited* established that an arbitrator is *functus* if the issue is the very issue that is in dispute. She held that the issue at this hearing was very different from the issue I dealt with in my communications. She added that my communications to her office on June 6 and 7 could not be said to constitute a decision because I had not received any submissions from parties on the issue prior to making my opinion known. She held that I must proceed with the hearing.
- [15] Since the preliminary matter raised by Ms. Symes dealt with my jurisdiction to continue with the case, I will address that matter first.
- [16] Generally speaking, Part II applies in respect of employee health and safety at the work place level and the appeal process in the Code is open to unrepresented employers and employees. It is therefore not unusual at hearings for employees or employers to represent themselves. Situations also arise at hearings where only one party is represented, or where counsel, or a union member (in the case of employees), is/are inexperienced with regard to the appeals officers review process and sometimes the Code itself. In the interest of fairness, and keeping the review process accessible to workers, it is sometimes necessary, in my opinion, for an appeals officer to point out sections of the Code and suggest possible interpretations on which parties or their representatives may wish to present argument. Every effort is made to provide such comments as information and without bias.

- [17] On June 7, 2001 Ms. Symes filed an appeal with the Canada Appeals Office on Occupational Health and Safety on behalf of CUPE. The appeal referred to an AVC that the health and safety officer had accepted from Air Canada. In my communication to her office, I referred her to sections in the Code and pointed out that there is no provision for reviewing an AVC. The communication was in the form of a letter and not in the form of a decision normal to this office. It did not comment on submissions by any parties, because none had been received at that point. The following extracts from my letter are reiterated:

*"Yesterday, June 6, 2001, you forwarded a letter via facsimile message to Ms. Jocelynnne Paris on the above noted subject. Later in the day, I reviewed your letter and documents and telephoned you to discuss the matter. In your absence, I left a message. This will amplify and confirm the information that I communicated." [underlined for emphasis]*

*"If you require further information or wish to discuss this, I can be reached by telephone at (819) 997-8977." [underlined for emphasis]*

- [18] Finally, during the pre-hearing telephone conference call on October 11, 2001, both counsel agreed to continue with the review and further agreed with each other not to raise the issue of bias or functus officio at the hearing.
- [19] For all of these reasons, I do not regard my communications to the office of Ms. Symes on June 6 and 7, 2001 to constitute a decision or a bias and conclude that I have jurisdiction to proceed.
- [20] I will now address myself to the issue for the hearing which was:

*Does the Code authorize an appeals officer to review a decision by a health and safety officer not to issue a direction following the officer's investigation of a complaint made under section 127.1 of the Code, where the officer's investigation is biased or flawed?*

- [21] To make a determination, there are at least 2 questions that I must address with regard to the issue. They are:
- Does the Code provide explicit authority for this?
  - If not, do I agree with Ms. Symes that the authority is implicit from a purposeful reading of the Code?
- [22] With regard to the first question, Mr. Lawson argued that the authority for appeals officers to conduct reviews is derived from subsection 129.(7), section 146.1 and subsection 146.(1) of the Code which read as follows:

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. [Underlined for emphasis.]

146. (1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.  
[Underlined for emphasis.]

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). [Underlined for emphasis.]

He held that there is no authority in the Code for the review of a non-direction because health and safety officers are trained professionals.

- [23] Ms. Symes did not dispute the wording in these sections or their interpretation. Instead, she argued that a purposeful reading of Part II and review of case law confirms that appeals officers are implicitly authorized to review decisions of health and safety officers not to issue a direction where the officer's investigation under section 127.1 of the Code is biased or fundamentally flawed.
- [24] Based on all of this, I conclude that there is no explicit authority in the Code for an appeals officer to review a health and safety officer decision not to issue a direction following an investigation made pursuant to section 127.1 of the Code, whether or not the investigation is biased or fundamentally flawed.
- [25] Ms. Symes agreed that section 146.1 of the Code authorizes an appeals officer to review a direction of a health and safety officer made pursuant to subsections 145.(1) and (2) of the Code or a decision of no-danger made by a health and safety officer pursuant to subsection 129.(7). However, she argued that a purposeful reading of the Code does not permit one to conclude that there is no mechanism in the Code to appeal the decision of a health and safety officer where the officer's investigation of a complaint made under subsection 127.1(9)<sup>2</sup> of the Code is biased or fundamentally flawed. She clarified that she was not arguing that there is an automatic right of appeal just because someone disagrees with the health and safety officer. Rather, the Code must authorize employees to appeal a biased or fundamentally flawed investigation to someone, and, given their broad powers under the Code, the appeals officers are it.
- [26] Ms. Symes first referred me to section 122.1, which establishes that the purpose of the Code is to prevent accidents. She argued that any reading of the Code that is consistent with the purpose clause is to be preferred. Section 122.1 of the Code reads:

122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.  
[Underlined for emphasis.]

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<sup>2</sup> Subsection 127.1(9) reads:

"The health and safety officer shall investigate, or cause another health and safety officer to investigate, the complaint referred to the officer under subsection (8)."

- [27] She then referred me to sections 124 and 125 of the Code. Section 124 obliges employers to protect the health and safety of employees and section 125 requires employers to comply with standards prescribed in regulations, standards and codes of practice. She held that these standards are critical to the very lives of employees and cannot be dismissed lightly. She further argued that section 7 of the Canadian Charter of Rights and Freedoms (Charter) places safety in the same category as liberty and security of the person. Sections 124 and 125 read:

124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

125. 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,  
(a) ensure that all permanent and temporary buildings and structures meet the prescribed standards;...

- [28] Section 7 of the Canadian Charter of Rights and Freedoms reads:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

- [29] She then pointed out that the Code provides for an internal responsibility system (IRS) or self-managed process to deal with non-compliance. She referred to section 134.1 of the Code that requires employers with work places employing 300 or more employees to establish a policy health and safety committee for the purpose of addressing health and safety matters across the company. She further referred to subsection 135.(1) which requires employers to establish a work place health and safety committee(s) for addressing matters that apply to individual work places. In the case of both committees, the trade union selects employee members for unionised workplaces. Ms. Symes argued that the Code requires whatever committee is involved to investigate and resolve health and safety issues in consultation with the employer.
- [30] Ms. Symes stated that the Code recognizes that there will be impasses when committees cannot agree on occupational health and safety issues and provides for health and safety officer involvement for resolving those differences. She referred me to section 127.1 which specifies:

(8) The employee or employer may refer a complaint that there has been a contravention of this Part to a health and safety officer in the following circumstances;

- (a) where the employer does not agree with the results of the investigation;
- (b) where the employer has failed to inform the persons who investigated the complaint of how and when the employer intends to resolve the matter or has failed to take action to resolve the matter; or
- (c) where the persons who investigated the complaint do not agree between themselves as to whether the complaint is justified.

(9) The health and safety officer shall investigate, or cause another health and safety officer to investigate, the complaint referred to the officer under subsection (8). [my underline]

- (10) On completion of the investigation, the health and safety officer
- (a) may issue directions to an employer or employee under subsection 145(1);
  - (b) may, if in the officer's opinion it is appropriate, recommend that the employee and employer resolve the matter between themselves; or
  - (c) shall, if the officer concludes that a danger exists as described in subsection 128(1), issue directions under subsection 145(2).

(11) For greater certainty, nothing in this section limits a health and safety officer's authority under section 145;

[31] She argued that, for the system of internal responsibility to function properly, health and safety officers must investigate where employee and employers fail to agree. She held that if a health and safety officer does not investigate a complaint, or the investigation is biased or fundamentally flawed, then it is as if the investigation was never carried out. Ms. Symes then referred me to previous decisions of the Federal Court and other Boards that have overturned health and safety officers directions where the officer failed to:

- attend at the work place<sup>3</sup>;
- be fair and have an open and unbiased mind in their investigation<sup>4</sup>;
- include both sides in their investigation;<sup>5</sup>
- be complete (e.g., consider all aspects of the complaint(s) lodged and all the facts in the case )<sup>6</sup>; and,
- correctly interpret the legislation<sup>7</sup>.

She held that if a health and safety officer does not meet one or more of the above fundamental requirements of an investigation, then the investigation is biased or fundamentally flawed. It's as if the investigation never took place.

[32] Ms. Symes conceded that appeals officers normally take the record presented by the health and safety officer and parties as the basis of appeal. She argued, however, that Parliament must have intended that an appeals officer could start afresh in their review given their broad powers under 141 and 146.2 of the Code. Subsection 141.(1) and section 146.2 of the Code read:

141.(1) Subject to section 143.2, a health and safety officer may, in carrying out the officer's duties and at any reasonable time, enter any work place controlled by an employer and, in respect of any work place, may

(a) conduct examinations, tests, inquiries, investigations and inspections or direct the employer to conduct them;

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<sup>3</sup> Dragseth V. Canada (Treasury Board), Re Attorney General of Canada and Dragseth et al., Federal Court of Appeal, October 30, 1991.

<sup>4</sup> Davis (RE) David W. Davis, applicant, and Alberta Wheat Pool, [2000] C.I.R.B. No. 26, C.I.R.B. Decision No. 72, Board File: 18747-C, S.E. Fitzgerald. Member dated May 25, 2000.

<sup>5</sup> Canada (Correctional Service) and Union of Solicitor General Employees, [1998] C.L.C.R.S.O.D. NO. 12, Decision no. 98-012.

<sup>6</sup> Baker V. Minister of Citizenship and Immigration; Canadian Council of Churches et al. Interveners, Court File No. 25823, Supreme Court of Canada, Judgement rendered July 9, 1999.

<sup>7</sup> Baker V. Minister of Citizenship and Immigration; Canadian Council of Churches et al. Interveners, Court File No. 25823, Supreme Court of Canada, Judgement rendered July 9, 1999.

- (b) take or remove for analysis, samples of any material or substance or any biological, chemical or physical agent;
- (c) be accompanied or assisted by any person and bring any equipment that the officer deems necessary to carry out the officer's duties;
- (d) take or remove, for testing, material or equipment if there is no reasonable alternative to doing so;
- (e) take photographs and make sketches;
- (f) direct the employer to ensure that any place or thing specified by the officer not be disturbed for a reasonable period pending an examination, test, inquiry, investigation or inspection in relation to the place or thing;
- (g) direct any person not to disturb any place or thing specified by the officer for a reasonable period pending an examination, test, inquiry, investigation or inspection in relation to the place or thing;
- (h) direct the employer to produce documents and information relating to the health and safety of the employer's employees or the safety of the work place and to permit the officer to examine and make copies of or take extracts from those documents and that information;
- (i) direct the employer or an employee to make or provide statements, in the form and manner that the officer may specify, respecting working conditions and material and equipment that affect the health or safety of employees;
- (j) direct the employer or an employee or a person designated by either of them to accompany the officer while the officer is in the work place; and
- (k) meet with any person in private, or at the request of the person, in the presence of the person's legal counsel or union representative.

(2) A health and safety officer may issue a direction under subsection (1) whether or not the officer is in the work place at the time the direction is issued.

146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may

- (a) summon and enforce the attendance of witnesses and compel them to give oral or written evidence under oath and to produce any documents and things that the officer considers necessary to decide the matter;

- (b) administer oaths and solemn affirmations;
- (c) receive and accept any evidence and information on oath, affidavit or otherwise that the officer sees fit, whether or not admissible in a court of law;
- (d) examine records and make inquiries as the officer considers necessary;
- (e) adjourn or postpone the proceeding from time to time;
- (f) abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence;
- (g) make a party to the proceeding, at any stage of the proceeding, any person who, or any group that, in the officer's opinion has substantially the same interest as one of the parties and could be affected by the decision;
- (h) determine the procedure to be followed, but the officer shall give an opportunity to the parties to present evidence and make submissions to the officer, and shall consider the information relating to the matter;
- (i) decide any matter without holding an oral hearing; and
- (j) order the use of a means of telecommunication that permits the parties and the officer to communicate with each other simultaneously.

[33] In this regard, Ms. Symes further argued that appeals officers are better situated than the Federal Court to review situations where the investigation of the health and safety officer is biased or fundamentally flawed, and to remedy the matter. She referred to the broad investigative powers available under the Code to an appeals officer, and argued that appeals

officers have explicit powers to deal with these matters in a timely manner. She added that appeals officers have been trained in occupational health and safety and it makes sense that a complaint be reviewed by an appeals officer before it is appealed to the Federal Court.

- [34] In response, Mr. Lawson reiterated that subsection 146.1(1) of the Code only authorizes an appeals officer to review decisions of health and safety officers made pursuant to subsection 129.(7) and directions issued by health and safety officers pursuant to section 145 of the Code. He noted that there is no review process in sections 146 or 146.1 to appeal the investigation of a health and safety officer and held that the new IRS provisions do not implicitly provide appeals officers with additional powers. He maintained that the failure to conduct a proper investigation might be the subject of judicial review, but appeals officers are not authorized to review questions of fairness. He held that, to do so, would constitute an error in law.
- [35] Mr. Lawson argued that, following their investigations, health and safety officers can issue directions, decide whether or not a danger exists or, issue reports. He suggested that an AVC is essentially a report and reiterated that subsection 146.1(1) of the Code does not authorize an appeals officer to review either a report or an AVC. He added that, if I were to decide that I have the authority to review a report or a non-direction, I would have to establish criteria for determining what constituted a biased or fundamentally flawed investigation.
- [36] Finally, he dismissed the review cases cited by Ms. Symes. He held that these cases dealt with the review of directions and decisions that are mandated under the Code.
- [37] With regard to the issue of health and safety officer bias, Mr. Lawson referred me to paragraph 23 of the decision of Regional Safety Officer, Serge Cadieux, in the case of Canada (Correctional Service) and Union of Solicitor General Employees [1998] C.L.C.R.S.O.D. No. 12, Decision No. 98-012, dated October 26, 1998. Mr. Cadieux wrote:

“Before deciding this case, I am advising the parties that I am not prepared to comment on Mr. Snyder’s allegations to the effect that the safety officer’s conduct was tainted with partiality and bias towards the employer during his investigation. There are other avenues for him to raise this matter. The proceedings before the Regional Safety Officer is not such an avenue unless it is established that the alleged misconduct directly influenced the decision of the safety officer. I have not been convinced the safety officer acted in such a manner.”

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- [38] On the one hand, I would agree with Ms. Symes that the various sections that she cited confirm that the IRS operates within the Code. I would further agree that section 127.1 of the Code is pivotal to the IRS because it mandates the intervention of a health and safety officer when the employer and employee cannot agree on the existence of, or resolution of, a contravention. The only other sections in the Code that mandate the investigation of a health and safety officer are subsection 126 (fatalities) and section 129.1 (right to refuse). I have to interpret from this that Parliament considered investigations under section 127.1 to be of that level of importance and not to be taken lightly.

[39] I also have her argument that health and safety is so basic to the security of a person that fairness alone requires that employees have access to a timely review of decisions of health and safety officers where an officer's investigation under section 127.1 is biased or fundamentally flawed. Without a proper investigation, serious contraventions could go undetected or inadequately addressed.

[40] She also argued that appeals officers are well positioned to provide first instance timely reviews of such complaints in that appeals officers are occupational health and safety specialists and have extensive investigative powers under the Code. I agree with her that the past decisions of arbitrators that she cited provide criteria for determining if an investigation is biased or fundamentally flawed.

[41] On the other hand, looking at the Code, I note that the Minister is authorized to designate appeals officers to perform the duties of such officers. Section 145.1 reads:

145.1 (1) The Minister may designate as an appeals officer for the purposes of this Part any person who is qualified to perform the duties of such an officer. [Underlined for emphasis.]

[42] For determining the duties of an appeals officer it is necessary to refer to section 146.(2) (stay of directions) and section 146.1 of the Code which read as follows:

146.(2) Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction

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.

(3) If the appeals officer issues a direction under paragraph (1)(b), the employer shall, without delay, affix or cause to be affixed to or near the machine, thing or place in respect of which the direction is issued a notice of the direction, in the form and containing the information that the appeals officer may specify, and no person may remove the notice unless authorized to do so by the appeals officer.

(4) If the appeals officer directs, under paragraph (1)(b), that a machine, thing or place not be used or an activity not be performed until the direction is complied with, no person may use the machine, thing or place or perform the activity until the direction is complied with, but nothing in this subsection prevents the doing of anything necessary for the proper compliance with the direction.

[43] I do not interpret from this, or any other part of the Code, that appeals officers have broad responsibilities regarding the overall administration of the Code including enforcement activities of health and safety officers. Instead, the Code appears very specific regarding appeals officer powers.

- [44] Moreover, subsection 140.(1) of the Code authorizes the Minister to designate qualified persons to perform the duties of a health and safety officer. Subsection 140.(1) reads:

The Minister may designate as a regional health and safety officer or as a health and safety officer for the purposes of this Part any person who is qualified to perform the duties of such an officer. [Underlined for emphasis.]

- [45] The term “qualified person” is defined in the Part 1 of the COHS Regulations, which reads:

“qualified person” means, in respect of a specified duty, a person, who because of his knowledge, training and experience, is qualified to perform that duty safely and properly. [Underlined for emphasis.]

- [46] While a definition in the *Canada Occupational Health and Safety Regulations* is not necessarily binding in respect of terms found in the Code, I take from subsection 140.(1) and section 122.1 (purpose clause of the Code) that health and safety officers must be capable of exercising the discretion available to them in the Code. It seems to me that if an employer or employee feels that the investigation of a health and safety officer is biased or fundamentally flawed, their recourse is to complain to the Department of Human Resources Development Canada or directly to the Minister of Labour. I expect that the employer or employee could also seek judicial review.

- [47] Paragraph 127.1(10)(a) and subsection 145.(1) of the Code explicitly provides health and safety officers with the discretion whether or not to issue a direction in the case of a contravention of Part II. Section 145.(1) has existed in some form since at least 1984, section 127.1 was added when the Code was amended in 2000. While not definitive, it seems to me that, if the absence of appeal of a decision not to issue a direction in respect of a contravention was proven over this time to constitute a serious omission, Parliament had an opportunity in 2000 to revise and include an appeal process. They did not. Paragraph 127.1(10)(a) and subsection 145.1 currently read:

127.1(10) On completion of the investigation, the health and safety officer  
(a) may issue directions to an employer or employee under subsection 145(1);  
[Underlined for emphasis.]

145.(1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to  
(a) terminate the contravention within the time that the officer may specify; and  
(b) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or reoccur. [Underlined for emphasis.]

- [48] In this regard, it makes some sense to me that Parliament provided health and safety officers with discretion to issue directions because contraventions to the Code can range from minor to serious. In the case of less serious contraventions, the discretion provided to health and safety officers in paragraph 127.1(10)(a) and subsection 145.(1) of the Code permits officers to obtain compliance via alternative enforcement strategies, such as accepting an AVC.

- [49] Finally, even if I were to conclude from this that appeals officers have the implicit authority suggested by Ms. Symes, the problem I have is that I can find no authority under the Code to remedy the situation. Specifically, section 146.1 of the Code only authorizes an appeals officer to issue a direction in the case of danger and does not address contraventions. Seemingly, Parliament would have given the appeals officer authority to issue a direction in respect of a contravention, or to return a file to the health and safety officer, if this had been Parliament's intent when the Code was amended in 2000. Subsection 146.1(1) reads:

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). [Underlined for emphasis.]

- [50] For deciding the issue, I found the arguments on both sides to be compelling. I am sympathetic with the argument made by Ms. Symes that the absence of a mechanism in the Code to appeal an investigation of a health and safety officer that is biased or fundamentally flawed is somewhat contradictory to the IRS provisions and purpose clause of Part II. Untested evidence in the case, (reference paragraph [3]), suggests that the health and safety officer at Transport Canada may not have investigated CUPE's complaint of danger in the presence of employees and employers in connection with the officer's finding of no-danger. If this were the case, CUPE's motivation to pursue this is understandable.
- [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.
- [52] While not at issue in this case, I feel compelled by my decision to remind employees, employers and health and safety officers that an employee exercising the right to refuse work under section 128 of the Code need not say the words "I refuse to work" or "I'm exercising my right to refuse work under the Code." Reference is made in this regard to Tremblay v. Bell Canada (1985) 59 di 163 C.L.R.B., Paquin v CAFS Inc. (1991) 86 di 82 C.L.R.B., and Simon v. Canada Post Corporation, (1993) di 1, C.L.R.B. In the latter reference, the arbitrator wrote,
- "The Board has stated before that there is no magic word or standard formula, or obligation to refer explicitly to the provisions of the Code, in order to convey sufficiently and properly a refusal to work."
- [53] Employers and health and safety officers should not confuse a refusal to work made pursuant to section 128 with a complaint under section 127.1<sup>8</sup>, or interpret from section 127.1 that a refusal under section 128 must first be referred to the employer under

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<sup>8</sup> While, paragraphs 127.1(10)(a) and (c) indicate that the employee complaint could end in a finding of danger, it must be noted that subsection (1) specifies that the section does not preclude an employee from exercising their rights under sections 128, 129 and 132.

subsection 127.1(1) before acting on that refusal to work. Subsection 127.1(1) reads:

127.1(1) An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment shall, before exercising any recourse available under this Part, except the rights conferred by sections 128, 129 and 132, make a complaint to the employee's supervisor. [Underlined for emphasis.]

- [54] For certainty, what is confirmed by this decision is that an appeals officer is not authorized under the Code to review the decision of a health and safety officer that a danger does not exist, where a complaint is investigated by the officer pursuant to section 127.1 of the Code.

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Douglas Malanka  
Appeals Officer

## **SUMMARY OF APPEALS OFFICER DECISION**

**Decision No.:**       **02-004**

**Applicant:**           Pamela Sachs

**Employer:**           Air Canada

**KEY WORDS:**       flight attendant manual, direction, non-directions, AVC, danger, jurisdiction, appeals officers, review, appeal, explicit review authority, implicit review authority

**PROVISIONS:**

Code:                   122.1, 124, 125, 127.1, 128, 129, 132, 134.1, 135.(1), 141, 145.(1), 145.(2), 146.(1), 146.1., 146.2

**SUMMARY:**

On May 7, 2001, health and safety officer Jacques Servant wrote to Ms. Pamela Sachs, CUPE. His letter reported the findings of health and safety officer Diane Holmes regarding her complaints. Health and safety officer Holmes had concluded that Air Canada was in compliance with the Code on all but two of the infractions alleged by Ms. Sachs. Health and safety officer Holmes indicated that she had accepted an Assurance of Voluntary Compliance (AVC) from Air Canada as opposed to issuing a direction in respect of two violations that she found.

Counsel for CUPE characterized Mr. Servant's May 7, 2001 letter as a "decision/direction." She alleged that the investigation by health and safety officer Holmes was biased and fundamentally flawed and requested that a Canada Appeals Office on Occupational Health and Safety (CAO-OHS) review the "direction/decision."

A hearing was held on October 16, 2001. This was to determine if an appeals officer has jurisdiction under Part II to review the decision of a health and safety officer not to issue a direction following officers review of a complaint under section 127.1 where the officer's investigation was biased or fundamentally flawed. After considering the arguments by parties and reviewing the Code, the appeals officer concluded that he was without jurisdiction to conduct such a review whether or not the investigation was biased or flawed. The file is now closed.