Occupational Health and Safety Tribunal Canada

Date: 2016-09-15
Case No.: 2015-17
2015-18

Between:

Maritime Employers Association, Appellant

and

Longshoremen's Union, Canadian Union of Public Employees (CUPE), Local 375, Respondent

Indexed as: *Maritime Employers Association* v. *Longshoremen's Union, CUPE, Local 375*

Matter:	Appeals filed under subsection 146(1) of the *Canada Labour Code* against two directions issued by an official delegated by the Minister of Labour.
Decision:	The directions are confirmed.
Decision rendered by:	Mr. Pierre Hamel, Appeals Officer
Language of decision:	French
For the appellant:	Ms. Mélanie Sauriol and Ms. Laurence Bourgeois-Hatto, Counsel, Langlois Lawyers LLP
For the respondent:	Mr. Daniel Tremblay, Health and Safety Representative, Longshoremen's Union, CUPE, Local 375
Citation:	2016 OHSTC 14

REASONS

[1] This decision concerns two appeals filed by the Maritime Employers Association ("MEA" or "the employer") under subsection 146(1) of the *Canada Labour Code* ("the Code") with the Occupational Health and Safety Tribunal Canada ("the Tribunal") on August 17, 2015. The appeals are against two directions issued by Manon Perreault, in her capacity as the official delegated by the Minister of Labour ("the ministerial delegate").

[2] The two appeals were consolidated for a common hearing, because of the similarity of the question they raise. This decision disposes of the two appeals.

[3] The directions were issued on the same day and are similar in all respects, except for the reference made therein to the complaints that led to the action of the ministerial delegate. The text of one of the directions under these appeals reads as follows:

> [TRANSLATION]
> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II - OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO EMPLOYER PURSUANT TO
> SUBSECTION 145(1)
>
> On July 21, 2015, the undersigned official delegated by the Minister of Labour conducted an investigation in the work place operated by the Maritime Employers Association, an employer subject to Part II of the *Canada Labour Code*, at 2100 Pierre-Dupuy Avenue, Wing 2, Cité du Havre, Suite 1040, Montréal, Quebec, H3C 3R5, the said work place sometimes known as the Maritime Employers Association.
>
> The official delegated by the Minister of Labour is of the opinion that the following provision of Part II of the *Canada Labour Code* was breached.
>
> **No. / No: 1**
>
> 125 (1)(z.16) - Part II of the Canada Labour Code, 20.9(3) - Canada Occupational Health and Safety Regulations.
>
> The employer, the Maritime Employers Association, represented by Nicola Dolbec, did not appoint a competent person as defined in subsection 20.9 (1) of the Canada Occupational Health and Safety Regulations ("the Regulations") to investigate Paul Chartrand's allegations of violence against Mr. [J].
>
> *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.*
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*a*) of Part II of the *Canada Labour Code*, to terminate any contravention no later than August 18, 2015.
>
> Furthermore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*b*) of Part II of the *Canada Labour Code* within the time specified by the official delegated by the Minister of Labour, to take the steps specified by the official to ensure that such contravention does not continue or reoccur.
>
> Issued at Montréal, this 21st day of July, 2015.
>
> (s) Manon Perreault
> Official delegated by the Minister of Labour
> […]

[4] The other direction, dated the same day, is the same, except that it refers to a complaint by Mr. [A] alleging violence and harassment by Mr. Chartrand.

[5] The statements made in these two internal complaints were submitted as evidence at the hearing and identified as Exhibits 3 and 4, respectively. The appellant requested that the complaints remain confidential in light of the fact that they referred to sensitive allegations and that the key individuals were not party to the current appeals, nor present at the hearing. The respondent raised no objection to the request.

[6] I informed the parties that I was granting the request for confidentiality for the two documents (Exhibits 3 and 4). Proceedings before an appeals officer of the Tribunal are in the public domain, as is the Tribunal record. Nonetheless, the appeals officer can issue a sealing or confidentiality order and, in so doing, make an exception to this principle in cases where it is deemed appropriate that certain information not be disclosed. The test applicable in this matter is the one established by the Supreme Court and known as the *Dagenais/Mentuck* test. The applicable principles are set out notably in *Toronto Star Newspapers Ltd.* v. *Ontario*, 2005 SCC 41:

> [26] The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck* , where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. [para. 32]

[7] This principle was reaffirmed more recently in *Canadian Broadcasting Corp.* v. *The Queen*, 2011 SCC 3, and applies to any restriction that could be imposed by a tribunal to the open court principle applying to judicial or quasi-judicial proceedings, including confidentiality orders regarding exhibits tendered in evidence. Confidentiality orders are therefore not automatic, even when the parties agree to them, and reasons must be given with reference to the above test.

[8] In adapting this test to administrative appeals under the Code, I must determine whether the appropriateness of treating certain information as confidential outweighs the open court principle and the rule regarding the public nature of the Tribunal record.

[9] In this case, the documents contain accusations of violence and harassment against a work colleague and provide details. These individuals did not attend the hearing, they did not take part in the appeal process and they were unable to make submissions on these allegations. The allegations contained in the complaints may therefore adversely affect them.

[10] Moreover, although their complaints led to the action of the ministerial delegate, the dispute does not concern their validity. Therefore, the issue raised by these appeals may well be debated without referring to the details of the complaints. It is not disputed that these complaints allege violence in the work place, and this fact alone is sufficient to address the question at issue. Furthermore, the employer did not call into question its obligation under subsection 20.9(3) of the *Canada Occupational Health and Safety Regulations* (the Regulations) to appoint a "competent person" to investigate, in circumstances that will be briefly described below.

[11] I therefore order that Exhibits 3 and 4 be sealed as confidential, and not be disclosed or available to the public.

Background

[12] The facts giving rise to the directions are not in dispute. The report, prepared by Ms. Perreault and submitted to the Tribunal describes her action and her reasons for issuing the directions at issue. She was initially responsible for

investigating a complaint registered with the Labour Program on March 30, 2015 by Paul Chartrand.

[13] That complaint made reference to another complaint, filed by Mr. Chartrand on February 20, 2015 with his employer alleging that he had been abused and harassed at work by Mr. J. The complaint was reviewed by Jonathan Pratt, OHS Consultant for MEA. Mr. Pratt concluded that Mr. Chartrand's complaint was inadmissible and that it was impossible for him to confirm the action Mr. J. apparently took against him.

[14] In Mr. Chartrand's view, the investigation was not conducted properly, since Mr. Pratt did not meet with the witnesses Mr. Chartrand had referred to him. To begin with, Mr. Chartrand allegedly expressed disagreement with the impartiality of the person investigating the matter. He believes that MEA could not deal with his complaint impartially, because he had some previous problems with MEA (disciplinary action). He asked that his complaint be handled by an outside person deemed impartial.

[15] Ms. Perreault also referred to a second complaint registered with the Labour Program by Mr. Chartrand on May 14, 2015. This complaint related to an investigation by Marie-Ève Charbonneau, Manager of Occupational Health and Safety at MEA into a work place harassment/violence complaint filed with the employer by Mr. A against Mr. Chartrand. At the beginning of the meeting with Ms. Charbonneau, Mr. Chartrand indicated that he believed she was not impartial, the standing required under paragraph 20.9(1)(*a*) of the Regulations.

[16] At the end of the investigation, Ms. Charbonneau concluded that the complaint against Mr. Chartrand was justified and informed him that she was going to forward her findings to the labour relations team, with her recommendations that disciplinary action be taken against Mr. Chartrand.

[17] The evidence also indicates that Ms. Perreault met twice with the MEA representatives, namely Nicola Dolbec, Director of Labour Relations, and Ms. Charbonneau. During those meetings, the proper application of the concept of impartiality and the reasonableness of Mr. Chartrand's objection in that regard were the subject of lively debate. Ultimately, Ms. Perreault determined that paragraph 20.9(1)(*a*) was clear and essentially required a mutual agreement between the parties in regard to the test of impartiality of the "competent person" to investigate complaints falling under Part XX of the Regulations.

[18] The question raised by these two appeals therefore involves the application of paragraph 20.9(1)(*a*) of the Regulations. The provisions relevant to the current dispute read as follows:

> **20.9 (1)** In this section, *competent person* means a person who

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

Issue

[19] Did the employer, in this matter, breach subsection 20.9(3) of the Regulations by failing to appoint a "competent person" to investigate two alleged situations of work place violence and were the directions issued by Ms. Perreault to that effect well founded?

Appellant's argument

[20] Counsel for the appellant, Mélanie Sauriol, submitted that the directions must be rescinded because Mr. Chartrand, the complainant, did not act reasonably in refusing to justify his position with respect to the alleged impartiality of the investigator appointed by MEA following the complaints of work place violence.

[21] In addition, the ministerial delegate erred in ruling that the complainant did not have to justify his allegation of bias. Thus, according to Ms. Sauriol, the central issue in this matter is to determine whether a party that considers the person appointed to investigate a violence situation biased has a duty to justify such a claim and provide reasons to support his or her refusal.

[22] Counsel for the appellant reviewed the documents filed in the Tribunal record as well as the documentary evidence provided at the hearing. She referred at length to the testimony given by Ms. Charbonneau, AEM's Manager of Occupational Health and Safety.

[23] Ms. Charbonneau testified first about her academic training: she earned a Bachelor of Criminology in 2008, as well as a specialized advanced studies diploma (DESS) in Industrial Relations in 2013 and a Master's in Industrial Relations in 2014. Ms. Charbonneau is an affiliate member of the Ordre des conseillers en ressources humaines agréés.

[24] In terms of her work experience, Ms. Charbonneau worked for the Canada Border Services Agency from 2011 to 2012, the Service de police de la Ville de Montréal (SPVM) from 2012 to 2013 and Norampac Cascades in 2013. She was a human resources advisor responsible for handling staffing issues, and managing health and safety and disability files. Within the scope of her work, she also conducted investigations pertaining to work place harassment and violence and helped to develop policies in this area.

[25] On the subject of MEA's structure, Ms. Charbonneau explained that the occupational health and safety (OHS) department is independent from other departments (information technology, labour relations, administration, finance, training, staffing). The OHS department consists of herself, Mr. Pratt (OHS Consultant) and France Chaput (Administrative Assistant). Their duties consist of managing all of the OHS procedures at all of the employers served by MEA, coordinating the policies of the various companies and managing work place violence complaints. The OHS department reports directly to MEA's president.

[26] As for her knowledge and training in work place violence, Ms. Charbonneau explained that she gained experience in managing situations of violence and conflict while earning her Bachelor of Criminology. She also acquired extensive knowledge of the laws relating to psychological harassment and work place violence while earning her Master's specialized in OHS. In addition, as an affiliate member of the Ordre des conseillers en ressources humaines agréés, she has attended a variety of training sessions in this area. Within the scope of her professional duties, she has managed harassment investigations, including with the SPVM and Norampac Cascades. Lastly, she was involved in the development of various harassment policies.

[27] Ms. Charbonneau mentioned during her testimony that Mr. Pratt, the OHS Consultant, also has knowledge and training in work place harassment and violence. He completed a Bachelor of Industrial Relations as well as some OHS courses. He is also a member of the Ordre des conseillers en ressources humaines agréés and has participated in training on investigations. Mr. Pratt helped to develop the work place violence policy at MEA and delivered staff training sessions on the policy.

[28] In regard to their knowledge of the legislation relevant to work place violence, Ms. Charbonneau stated that Part II of the *Canada Labour Code* is a tool they use daily and they know it inside out, because they have to advise the various companies on OHS issues. When asked about her role in work place violence

investigations, Ms. Charbonneau indicated that she has no biases or prejudices. During an investigation, she applies the internal policy and the laws. Her primary goal is to provide a work place free from harassment and violence.
Ms. Charbonneau stated that Mr. Pratt takes a similar approach.

[29] In terms of the mechanisms in place at MEA, Ms. Charbonneau stated that there is no bias and that MEA takes action on prevention. The aim is to find the best possible solution for an environment free from violence and harassment. All of the documents collected under a work place violence investigation are collated in the information system, and only members of the OHS team can access the system.

[30] Counsel for the appellant also revealed some parts of the testimony given by Nicola Dolbec, Director of Labour Relations for MEA, including when Mr. Dolbec referred to discussions he had with the ministerial delegate on the scope of the wording in paragraph 20.9(1)(*a*) and their disagreement on its application, which Mr. Dolbec considered too strict and literal. He found it inconceivable that the reasonableness of the complainant's approach could not even be discussed.
Mr. Dolbec gave specific examples of improper grounds that could be invoked to refuse the appointment of an investigator as "competent person" (e.g. pregnant or black investigator, woman, MEA representative, police profile). That did not convince Ms. Perreault, who stated that she was not there to pass judgment on the reasons for the refusal of mutual consent, but to apply the Regulations as written.

[31] Mr. Dolbec pointed out his concerns about the impact of doing business with outside firms in any event. He explained that it led to vulnerability among the internal staff because they could not do the work for which they were qualified and assigned to do. The aspect of pressure tactics is also to be taken into account. Indeed, if there are 10 complaints in a year, they are certainly not easy to manage and require a significant amount of money. For example, the investigations in Mr. Chartrand's case cost approximately $13,000.

[32] Counsel went on to say that the complainant had a duty to justify his allegation of bias and the ministerial delegate had to find out the reasons supporting that allegation. In stating that she did not have to review the reasons alleged by a complainant to support an allegation of bias, the ministerial delegate erred in law.

[33] Counsel for the appellant submitted that it is well recognized by the doctrine and the courts that a party that invokes bias must present evidence. Moreover, the appropriate test to analyze bias is the closed mind test, which is one of the most stringent (*Hughes* v. *Canada (Attorney General)*, 2010 FC 837; Patrice GARANT, *Droit administratif*, 6th ed., Cowansville, Éditions Yvon Blais, 2010, pages 836–837, 841; *Newfoundland Telephone Co.* v. *Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623; *Association des policiers provinciaux du Québec* c. *Poitras*, J.E. 97-1250 (C.A.), page 23).

[34] These principles were also applied in *Renaud* v. *Canada* (*Attorney General*), 2013 FC 18, in regard to a person appointed to review work place harassment complaints.

[35] The appellant also submitted that the complainant was supposed to act prudently, diligently and in good faith when he reported the bias of "competent persons" (see the *Civil Code of Québec*, articles 6 and 1375). In carrying out an obligation, the parties must respect good faith both in their actions and their general attitude. Co-contractors must avoid damaging their contractual relationship through inappropriate or unreasonable behaviour, and good faith includes a duty of cooperation (Didier LLUELLES and Benoit MOORE, *Droit des obligations*, 2nd ed., Éditions Thémis, 2012, para. 1984; Jean-Louis BAUDOUIN and Pierre Gabriel JOBIN, *Les obligations*, 7th ed., Cowansville, Éditions Yvon Blais, 2013, para. 162; *Houle* v. *Canadian National Bank*, [1990] 3 SCR 122, page 164).

[36] Counsel stated that the evidence submitted to the Tribunal clearly demonstrated that Ms. Charbonneau and Mr. Pratt were not close minded. They have no biases or prejudices and their main objective is for the work place to be free of violence.

[37] In the end, counsel for the appellant concluded that the ministerial delegate erred by failing to apply these principles of law to the situations she investigated. She should have questioned the complainant about his reasons for refusal in order to ensure they were not discriminatory. Her application of paragraph 20.9(1)(*a*) is therefore substantively defective and the directions issued were ill founded and should be rescinded.

Respondent's argument

[38] The respondent's representative, Daniel Tremblay, did not call any witnesses or attempt to challenge the testimonies given by Ms. Charbonneau and Mr. Dolbec.

[39] The respondent's representative recalled that the appellant asked for the directions issued by Ms. Perreault to be rescinded on the basis that Mr. Chartrand did not act reasonably in refusing to justify his position with regard to the partiality of the investigators assigned by the employer. According to the respondent's representative, it is not accurate to say that Mr. Chartrand did not explain his reasons to the MEA representatives. On pages 2 to 4 of her background report, Ms. Perreault explains the reasons for these complaints as follows:

> [Translation] Mr. Chartrand believes that the investigation was not conducted properly. He allegedly did not meet with the witnesses he had called. At the outset, Mr. Chartrand expressed his disagreement with regard to the impartiality of the investigator, namely the OHS Consultant, Jonathan Pratt. He believes that MEA was not

> impartial in handling his complaint because he had had problems in the past with MEA (disciplinary action). He asked that his complaint be handled by an outside person who was deemed impartial.

[40] It is clear to the respondent's representative that Mr. Chartrand did not consider any of MEA's representatives to be a "competent person."

[41] After highlighting the requirement under paragraph 20.9(1)(*a*), according to which a "competent person" must be impartial and seen by the parties to be impartial, the respondent's representative concluded that the ministerial delegate's decision was the right one and correctly applied this section of Part XX of the Regulations. Mr. Chartrand had the right to request an independent investigator.

[42] The respondent's representative requested that the directions be confirmed.

Appellant's response

[43] In response, counsel for the appellant reiterated her main argument and pointed out that, although Ms. Perreault's report contains certain references to the complainant's reasons for the allegation that MEA's representatives were biased, at the time of the events in May 2015, MEA was never informed of those reasons, neither by the complainant nor the ministerial delegate. On the contrary, Ms. Perreault expressed her view that the reasons were not relevant, without elaborating any further on the matter.

Analysis

[44] It is not disputed that the complaints that led to the directions raised some work place violence issues and gave rise to the employer's obligation to try to resolve the matter, as required by subsection 20.9(2) and, if the employer is unable to do so to the satisfaction of the employee involved—or employees, as in this case—to appoint a "competent person" to investigate the alleged situation.

[45] The reason given by the appellant to support its request to rescind the directions relates instead to the application of one of the qualifications to act as a "competent person" under that section, that of being impartial and seen by the parties to be impartial.

[46] Ms. Perreault based her directions on the strict application of the first paragraph of that section, according to which the parties must agree on the impartiality of the "competent person" appointed by the employer to investigate allegations of work place violence. In the case at hand, as soon as the employee did not agree that the person designated by the employer to investigate the complaints was impartial, the employer had to appoint another person, which it failed to do.

[47] However, the appellant disagreed with this interpretation. The two witnesses called by the appellant at the hearing, Ms. Charbonneau and Mr. Dolbec, were critical, to say the least, of that approach, which they believed did not require that the employee's grounds for refusal be clearly expressed, reasonable and justifiable. Otherwise, the approach is open to abuse.

[48] The definition of "competent person" has essentially two types of requirements: impartiality on the one hand, and training, experience and knowledge in issues relating to work place violence on the other. The text is written in a way that could certainly give rise to debate on the elements of the second component of the definition: experience, training and knowledge are measurable qualifications that can be objectively assessed (years of practice, frequency of past interventions, field of study, professional or academic certification, etc.).

[49] That said, the legislator did not define the extent of the knowledge or experience required to act as a "competent person." This issue is, in a way, left to the employer to assess. It could be assessed based on the nature of the allegations to be investigated. One party could express an objection to the sufficiency of such a person's knowledge or experience in a particular case. In such cases, the issue would be decided, if applicable, by a ministerial delegate or ultimately by an appeals officer.

[50] The appellant pointed out the professional qualifications of the individuals it had tasked with investigating complaints. I understood from the respondent's position and Ms. Perreault's approach that these requirements are not at issue in this dispute. I agree. I would even say that there is no doubt in my mind, particularly with regard to the professional qualifications of Ms. Charbonneau, who testified at the hearing, that these requirements were met. I have intentionally copied in detail the professional qualifications held by Mr. Pratt and Ms. Charbonneau and that the latter outlined in her testimony. The professional competence of the employer's two representatives who investigated this case is not in dispute and, in my opinion, is clear.

[51] The issue therefore exclusively pertains to the concept of impartiality set out in the first paragraph. The duty to appoint a "competent person" arises after the employer has tried, through its representatives, to resolve the alleged violence situation. It is important to note the legislator's wording of this requirement, as properly done by the ministerial delegate. Indeed, Ms. Perreault carefully emphasized the words "and is seen by the parties to be impartial" in one of the two directions she issued.

[52] If the text in paragraph (*a*) ended after the first instance of the word "impartial", or if this requirement was simply not in the wording of the section, the issue of partiality alleged by a person tasked with conducting an administrative investigation should be examined in the same way as the second component: the

issue of impartiality, as the requisite standing, could therefore be debated and, failing agreement between the parties, should ultimately be decided by a third party. And in such a case, the doctrine and jurisprudence cited by the appellant's counsel would be entirely applicable.

[53] Impartiality is a state of mind and is difficult to measure, unlike knowledge and past experience. The courts have set forth certain principles according to which the impartiality of a decision-maker may be examined. The issue in such a case would be to determine whether a situation concerning the individual affected is likely to give rise, in a person reasonably well- informed on the matter, to a reasonable apprehension of bias on the issues to be assessed (see *Committee for Justice and Liberty et al.* v. *National Energy Board et al.*, [1978] 1 SCR 369). The goal is therefore to provide an objective framework for the analysis of what constitutes reasonable fear of a decision-maker's bias.

[54] The wording of paragraph (*a*), however, leads us in a completely different direction. It seems to me indisputable that the test of impartiality set out in paragraph (*a*) evokes a subjective notion of impartiality and relies on the perception of the parties involved. The text is clear and is not open to interpretation, especially when compared to the wording of the requirements for experience, training and knowledge.

[55] The legislator clearly preferred a consensual approach to the issue of impartiality. By including the words *and is seen by the parties to be impartial* after the word *impartial*, the legislator clearly requires the parties to agree on whether the person proposed by the employer is impartial. The French version of this same paragraph is equally clear [… *est impartial et est considérée comme telle par les parties*] and also requires that the parties consider the person to be impartial, without limitation or exception. If an agreement is not reached, the proposed person simply cannot be appointed.

[56] From this it can be inferred that the legislator considered it vital that the parties agree on the impartiality of the person designated to conduct the investigation whose objectives are described in subsection 20.9(3) and et seq. of the Regulations. There is no doubt that the objective sought by the legislator is to ensure the credibility of the recommendations that this person must provide at the end of the investigation and to promote their acceptance by all of the parties involved.

[57] The Federal Court of Appeal, in *Canada* (*Attorney General)* v. *Public Service Alliance of Canada*, 2015 FCA 273, (*Attorney General of Canada* v. *PSAC)* recently expressed the opinion below regarding the purpose behind section 20.9 of the Regulations in the following terms:

> [31] The Regulations are clearly meant to prevent accidents and injury to health occurring in work places

> and to protect employees who have been victims of work place violence, whatever form it may take. The appointment of a competent person, that is, a person who is impartial and is seen by both parties to be impartial, is an important safeguard to ensure the fulfillment of that objective. I agree with the Respondent that allowing the employers to conduct their own investigations into complaints of work place violence and to reach their own determination as to whether such complaints deserve to be investigated by a competent person would make a mockery of the regulatory scheme and effectively nullify the employees' right to an impartial investigation of their complaints with a view to preventing further instances of violence.
>
> [32] In arriving at this interpretation of the *Regulations*, I find some comfort in the *Guide to Violence Prevention in the Work Place*, released by Human Resources and Skills Development Canada following the adoption of Part XX of the *Regulations* (Appeal Book, p. 238). While not binding on the Court, it is nevertheless helpful as it is designed to assist employers in applying the *Regulations*. It clearly states (at page 258 that "a formal investigation by a 'competent person' must take place if the employer cannot resolve the matter to the satisfaction of the employees involved."
>
> [Emphasis added]

[58] Although the context of the Court's statement related to the time when the employer's duty to appoint a "competent person" originated, rather than the requirements to act in that capacity, the statements by de Montigny J.A. with respect to that person's impartiality highlight the importance of this requirement as a foundation of the system. In other words, it is up to the employer to appoint a "competent person," but that person's impartiality must be genuine and seen as such by the parties involved.

[59] Therefore, I agree with Ms. Perreault's interpretation of the requirement of paragraph (*a*): it is sufficient that a party does not consider the proposed investigator impartial for the person to be unable to proceed under this section. This does not mean that I accept the claim that Ms. Charbonneau and Mr. Pratt are not impartial: it is not up to me to rule on this issue, since the Regulations require mutual agreement by the parties on that standing. Thus, I do not agree with the appellant's contention that a refusal to consider a person impartial must be substantiated and justified: I am of the opinion that such an approach adds a substantive condition to the legislation, which I consider clear and not open to interpretation or limitation. There is no such agreement in this case, as the evidence shows. It follows therefore that the employer failed to appoint a "competent person" as required by subsection 20.9(3).

[60] It was alluded that this so-called literal application of the section could lead to abuse. The refusal to agree to the appointment of an individual without having to

show cause or justify the reasons could, as properly noted by the appellant's counsel, be motivated by discriminatory, sexist or arbitrary considerations. Or an employee—I am thinking in particular of an employee who is added as an alleged abuser, for example—could systematically refuse anyone proposed by the employer, in a capricious or arbitrary manner.

[61] It is a principle of law that no person can abuse his or her rights. Such an abusive or discriminatory approach certainly has no place and could, in my view, be punished through disciplinary action or interpreted as a waiver of the rights conferred on the parties by subsection 20.9(3) of the Regulations.

[62] This is a hypothetical situation, since I have not been convinced that there was abuse in this case. Ms. Perreault' report reveals that Mr. Chartrand's reasons for concluding that Ms. Charbonneau and Mr. Pratt were biased were either that they had not met the witnesses, or that they were the employer's representatives by reason of their duties. The evidence shows that Mr. Chartrand is at the centre of a number of disputes with his employer, and this could explain his distrust of the employer's representatives and his belief that the investigation would be harmful to him from the outset.

[63] In light of the wording of paragraph 20.9(1)(*a*), the issue is not whether those reasons are valid: in my opinion, they are not abusive per se. While the legislator requires that the employer first try to resolve the matter through its representatives (subsection 20.9(2) of the Regulations), the legislator prescribes a more formal approach if that fails, which must be consistent with the requirements under subsection 20.9(3) of the Regulations, as pointed out by the Federal Court of Appeal in *Attorney General of Canada* v. *PSAC*, in paragraph [34] of its decision:

> [34] I agree with the application judge that the threshold should be quite low, and that an employer has a duty to appoint a competent person to investigate the complaint if the matter is unresolved, unless it is plain and obvious that the allegations do not relate to work place violence even if accepted as true. The employer has very little discretion in this respect. If the employer chooses to conduct a preliminary review of a complaint (or a so-called fact-finding process), it will therefore have to be within these strict confines and with a view to resolving the matter informally with the complainant. Any full-fledged investigation must be left to a competent person agreed to by the parties and with knowledge, training and experience in these matters.
>
> [Emphasis added]

[64] It is established that Mr. Chartrand did not consent to the appointment of Ms. Charbonneau and Mr. Pratt as competent persons, by not seeing them as impartial—to paraphrase the legislation. The evidence does not show that there was a refusal that was systematic or based on abusive considerations on the part of the employee involved, tantamount to an abuse of his rights. Ultimately, when the

appellant took steps to comply with Ms. Perreault's directions, the appellant and respondent quickly reached an agreement on the appointment of an outside person, who carried out an investigation and submitted the findings.

[65] I am therefore of the opinion that Ms. Perreault properly applied the Regulations in the circumstances of these matters and that her directions are well founded.

Decision

[66] For these reasons, I confirm the directions issued on July 21, 2015 by Manon Perreault, official delegated by the Minister of Labour.

Pierre Hamel
Appeals Officer