Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Nina Tryggvason v. Transport Canada, 2012 OHSTC 10

Date: 2012-03-29
Case No.: 2010-28
Rendered at: Ottawa

Between:

Nina Tryggvason, Appellant

and

Transport Canada, Respondent

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by a health and safety officer
Decision:	The decision is confirmed
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Language of decision:	English
For the Appellant:	Ms Karin Tryggvason, Representative
For the Respondent:	Mr Pierre Marc Champagne, Counsel, Legal Services, Treasury Board

REASONS

[1] This concerns an appeal brought under subsection 129(7) of the *Canada Labour Code* (the Code) of a decision of no danger rendered by Ms Betty Ryan, Health and Safety Officer (HSO), on July 2, 2010.

Background

[2] On June 9, 2010, the appellant, an employee of Transport Canada, Pacific Property and Divestiture Branch (the Branch), was working at a work place located in Vancouver, British Columbia. She occupied a PM-02 level position within the Branch and remained in that position until the time of the hearing.

[3] During the period around the work refusal, the appellant was performing a combination of PM-02 and AS-01 level work related to the Branch. Most of the PM-02 work involved reporting to an acting PM-04 level position. The appellant stated that a number of changes in the work place occurred during the past year relating to staffing actions and the distribution of work which resulted, in her opinion, as a form of work place harassment and violence. In the appellant's view, her pre-existing medical condition, as well as maintenance issues pertaining to it, placed her at greater risk.

[4] On June 9, 2010, the appellant invoked her right to refuse dangerous work through an email sent to her unit manager and to the employer and employee work place health and safety committee co-chairpersons. That email stated:

> I am refusing to work under the Canada Labour Code Part 2 – under the Health and Safety provisions and using the danger provisions to apply to emotional/physiological danger – including future danger to myself and others, and for the longer term negative impact on my health from the extreme workplace stressors.

[5] The appellant provided additional information along with the above statement regarding her medical condition and, she claimed to have suicidal urges and thoughts of harming a colleague at the work place due to those work place stressors.

[6] On June 11, 2010, management called the Vancouver Police Department's non-emergency line in order to seek guidance about the situation. Consequently, two police officers came to the work place to meet with the appellant and, following discussions, the police officers decided to escort her to a hospital for an evaluation. Medical staff at the hospital made a psychological evaluation and subsequently released her. The appellant believed that this represented more bullying and harassment on the part of the employer and that the situation had escalated following her initial refusal to work.

[7] On June 16, 2010, Ms Gill, the appellant's unit manager, informed the appellant that she would be investigating the complaint and allegations. On June 24, 2010, Ms Gill provided the results of her investigation which was, according to her, that a danger did not exist within the meaning of danger as set out in the Code.

[8] On June 30, 2010, the Labour Program of Human Resources and Skills Development Canada (HRSDC) was notified of the appellant's continued work refusal and at this point HSO Ryan started her investigation. As part of the HSO's investigation, the appellant completed a HRSDC Labour Program departmental form "Refusal to Work Registration Form" that stated the following as the reasons for her refusal:

> 1. Chronic stress as a result of workplace harassment, bullying by co-workers and bully + retribution by management for filing grievance + CLC complaint which impacts Diabetes management.
>
> 2. Depression related to stress results in passive suicide thoughts.

[9] As well, documents providing information on the appellant's medical condition and circumstances related to the refusal were provided to the HSO, namely:

> 1) Details of Toxic Workplace (Harassment and Bullying); 2) Articles regarding stress, diabetes and bully impact; 3) Grievance and CLC first complaint documents and background.

[10] On July 2, 2010, HSO Ryan made a determination of no danger which she delivered to the appellant and the employer. The following is the reasoning the HSO provided in support of her decision:

> […] This was based on the assessment that the danger would have been Ms. Tryggvason herself once the statement of suicidal thoughts and harming other colleagues were expressed in her original work refusal on June 9, 2010. The employer received medical confirmation that Ms. Tryggvason was not at risk of either action, prior to allowing her to return to the workplace. HSO Ryan does not believe that the frustrations regarding interpersonal relationships and work distribution amount to a condition of danger in this workplace. HSO Ryan does not believe that the situation described by Ms. Tryggvason amount to a form of harassment, bullying or violence that could reasonably be expected to cause injury or illness to a person exposed to those situations. The refusal to work provisions of the Code are not well suited to deal with an individual's pre-existing health issues. Other avenues such as Canadian Human Rights Act and duty to accommodate may be more suitable.

[11] The hearing into the appeal was held in Vancouver, BC, on July 20 and 21, 2011.

Issue

[12] The issue in this case is whether the appellant was exposed to a danger as defined in the Code when she exercised her right to refuse to work.

Submissions of the parties

[13] The final submissions of the parties were received on August 26, 2011.

Appellant's submissions

[14] The appellant's case consisted of evidence from Ms. N. Tryggvason and five other witnesses; Dr Harris, PhD, MSW, RSW, Private Practice Counsellor and Consultant; Mr Crawford, Union Representative; Mr D'Sa, Health and Safety Representative and employee co-chairperson; Ms Fung, Senior Programs Officer; Ms Chang, Manager Human Resources.

[15] The appellant submitted that the work refusal originated from a conflict at the work place that was based on the work assigned to her. The conflict involved two colleagues who were at the PM-03 level and it subsequently escalated into a situation where the appellant felt harassed, bullied and demeaned in front of others by the two PM-03s resulting in her alleged chronic stress.

[16] The appellant requested that Dr Harris be introduced as an expert witness. Dr Harris was questioned by the respondent's counsel regarding her *curriculum vitae*. Dr Harris answered that she is qualified as a registered social worker in British Columbia which entitles her to work as a private practitioner and that she does not conduct assessments because she does not have a clinical registration and therefore cannot provide a medical diagnosis. Dr Harris explained that she possesses a registration which allows her to speak about symptoms and/or the screening of symptoms and to conduct psycho-social assessments as opposed to a medical assessment.

[17] Dr Harris testified about the appellant's symptoms that she observed during visits as well as the results from screening tests relating to post-traumatic stress disorder (PTSD) and depression. She provided information about the effects of PTSD and she expressed that the appellant exhibited extreme symptoms of PTSD as indicated in her report dated May 31, 2011. Dr Harris testified that she communicated with a third party medical specialist, with the consent of the appellant, and she discussed the appellant's condition which was then reported back to Health Canada.

[18] It is maintained by the appellant that Ms Fung, Ms Chang, Mr D'Sa, Mr Crawford, and Ms Gordon all testified to seeing her in distress in the work place. The appellant submitted that the distress was elevated to trauma by the events of June 11, 2010.

[19] The appellant submitted that it was the inability of her supervisors and managers to effectively manage the work place conflict that in effect perpetuated the conflict. It is

argued that as the conflict between the appellant and her co-workers escalated a condition of alleged danger was created by Ms Gill, her unit manager, which allegedly caused her psychological harm.

[20] It is submitted that Ms Gill's mere presence aggravated the appellant's alleged medical condition of chronic stress in the work place to chronic distress in such a way that she felt unsafe and unprotected. As a result, it is submitted that the appellant felt unsafe to the extent that union representation was requested at every face to face meeting between Ms Gill and her.

[21] Additionally, it is argued that Ms Gill's inability or unwillingness to identify that the appellant was in severe distress was a danger to all employees in the work unit. The appellant testified that she reported an incident of being intimidated by a colleague that nearly resulted in a fight or flight response where she could have physically knocked down the colleague in order to flee.

[22] The appellant argued further that the HSO erred by considering that the alleged danger could be the appellant herself. It is submitted by the appellant that the condition that is alleged to be dangerous in the work place was that she was being bullied, demeaned and humiliated to the extent that suicidal thoughts were contemplated by her. It is submitted that had the appellant followed through on those thoughts, she would be carrying out the alleged danger that was started by colleagues and management. Furthermore, it is argued that the appellant's suicidal thoughts and the thoughts of harming other co-workers would not occur if she was not in the proposed hostile work place conditions.

[23] The appellant argued that until the policy on violence in the work place combined with relevant training exits, an alleged danger is present for her and all workers. The HSO's decision allowed the conditions to continue by leaving the appellant in the alleged dangerous work place with no policy in place to protect her and no competent person to assess employees in crisis. The appellant submitted that in order for the alleged dangerous condition to end, she must be removed from the work unit.

[24] The appellant submitted that she advised Ms Chang, Manager Human Resources, on March 4, 2010, of a change in her condition; that Ms Chang testified that the appellant communicated a detailed suicidal ideation within the context of the work place and that they talked about her mental health and about whether or not the appellant was alright because she was very emotional and; that Ms Chang testified it was very seldom that discussions took place without the appellant breaking down so they were of course very concerned about her.

[25] The appellant testified being traumatized by the events of June 11, 2010, when she was removed from the work place by police officers and escorted to the hospital. This was substantiated by a test score of 37 out of 40 following a PTSD symptoms assessment as presented in the evidence of Dr Harris. The appellant submitted that the PTSD symptoms remained up to and including the duration of the appeal hearing.

[26] The appellant submitted that on June 25, 2010, she repeated her refusal to work which was expressed in an email that was entered into evidence. The appellant maintained that the employer continued in the failure to provide a safe and healthy environment and that the alleged emotional and psychological danger of the work place increased as a direct result of the events of June 11, 2010.

[27] It is submitted by the appellant that the employer is aware of her diabetes that was diagnosed two years ago and that the effects of alleged chronic distress poses a serious danger to her health. It is submitted that stressful situations cause spikes or drops in the appellant's blood sugar that lead to the following: Light-headedness; nausea; the need to inject additional insulin; and the inability to manage consistent blood sugar levels which negatively impacts the blood vessels that carry blood to internal organs mitigating kidney damage which is critical to a diabetic's longevity.

[28] Furthermore, the appellant submitted that being in an alleged state of chronic stress has impaired her ability for self-care such as: Sleeplessness; decreased physical activity directly related to her depression; decreased nutritional vigilance; depression and anxiety related behaviours. The appellant alleged that she is also unable to efficiently absorb iron as a result of the chronic diarrhea caused by work place stress and possible medicinal interactions. It is submitted that these alleged physical health conditions resulted in chronic absenteeism from the work place which is detailed in emails entered into evidence.

[29] The appellant's coping skills and functionality, it is submitted, have been so severely damaged that she cannot bear anything perceived as hostile, aggressive or untrue. The appellant submitted that she has no control over when or where trauma flashbacks will occur. She has been in more alleged danger of hurting herself or others in the work place following the trauma she suffered on June 11, 2010, than she was at the time of her original refusal to work on June 9, 2010.

[30] The appellant submitted that, contrary to the provisions of section 147 of the Code, she has endured disguised discipline form Ms Gill in the form of having to utilize all of her paid sick and leave days in addition to numerous unpaid leave days as a direct result of the hostile conditions in the work place. This has placed financial penalty on the appellant in addition to out-of-pocket costs for medications and therapy to cope with the distress in the work place. The appellant believes that her forcible removal from the work place on June 11, 2010, was an act of reprisal.

[31] The appellant submitted jurisprudence from this Tribunal in *Tench* v. *Canada (National Defence)*[1], paragraphs 37 to 42 and in *Tremblay* v. *Air Canada*[2], paragraphs 25 to 36 in support of arguments regarding the situation surrounding harassment, discrimination, stress and bullying in the work place as being conditions that are covered by the Code.

[1] OHSTC 2009-01.
[2] CAO 2007-38.

[32] Also, the appellant submitted arguments referencing jurisprudence from the Public Service Labour Relations Board (PSLRB) in *Alexander* v. *Treasury Board (Department of Health)*[3], paragraphs 33 to 44. The appellant submitted that where Mr Alexander failed to meet the test criteria expressed by the Board regarding issues of harassment and psychological danger from his supervisor, in this case, the criteria was met. The appellant's distress in the work place was visible to other employees as reported at the hearing in the course of the testimonies of the appellant's and respondent's witnesses. Furthermore, the appellant consented to a health assessment by Health Canada at the request of the employer however it is argued that psychological health was not assessed, only physical capabilities and functionality. No assessment for psychological damage or for trauma specifically because the assessment took place following the appellant's removal from the work place on June 11, 2010.

[33] In concluding its submission, the appellant requested that I carry out the following:

i. Order the employer to have a competent person conduct an investigation pursuant to subsection 20.9(1) of the Canada Occupational Health and Safety Regulations into the allegations contained in the appellant's original refusal to work complaint;
ii. allow the appellant's complaint;
iii. order the employer to cease contravening the Code;
iv. order the employer to not take any disciplinary action or any other reprisal against the appellant; and
v. issue any other order that I deem appropriate under the circumstances.

Respondent's submissions

[34] The respondent's case consisted of evidence from two witnesses; Ms Gordon, Occupational Health and Safety Advisor, Transport Canada and Ms Gill, Regional Manager, Property and Divestiture, Transport Canada.

[35] The respondent submitted that in March 2010, an opportunity for an acting PM-04 level position arose and four candidates applied, including the appellant. Only two candidates were offered to act for a period of approximately two months each, the appellant was not one of the two successful applicants. It was contended that the appellant took offence to these appointments and that one candidate was a younger and newer colleague and that she would have to report directly to him. The appellant filed a grievance based on allegations of discrimination however, it is the respondent's position that the witness, Ms Gill, explained her decision was in no way discriminatory.

[36] According to the respondent, the incidents that arose between the appellant and the two PM-03 colleagues were properly managed and resolved by the supervisors and management. It is argued that the appellant complained about the work distribution however, there was clear evidence introduced by the respondent that demonstrated that

[3] 2007 PSLRB 110.

despite the appellant's opinion, she always received work assignments that were considered normal for her PM-02 level.

[37] The respondent argued that on June 3, 2010, an incident took place between the appellant and her acting supervisor during which she considered using her superior height and weight to knock him down. The respondent submitted that on June 9, 2010, the appellant consulted with Ms Gordon in order to obtain details and information about the refusal to work procedure under the Code and later that day the she filed her first refusal to work.

[38] The respondent submitted that on June 11, 2010, discussions took place between the work place management, human resources and headquarters during which a decision was taken to contact the Vancouver Police Department's non-emergency line in order to seek guidance with regards to the situation. As a result, two police officers arrived at the work place in order to meet with the appellant. It is submitted that after discussions, a decision was taken by the police officers to escort the appellant to a hospital's emergency department for an assessment. Subsequently, following the assessment performed by medical staff, the appellant was released.

[39] The respondent argued that in paragraphs 37 to 42 in *Tench*, which is similar to the present case, Appeals Officer Néron reviewed the definition of danger and determined that allegations of harassment and discrimination in causing aggravating mental illness could fall into the danger definition covered by the Code. However, it is argued that a very specific test should be applied. Appeals Officer Néron concluded that a danger did not exist for Mr Tench due to insufficient medical evidence in support of the allegations concerning his existing or potential mental illness.

[40] The respondent submitted that I should conclude, as did Appeals Officer Néron, that there was no persuasive evidence of illness presented by the appellant. Consequently, the factual situation in this case does not constitute a danger as defined in the Code.

[41] It is argued that the appellant's expert witness, Dr Harris, was well outside of the sphere in which she could be considered a medical expert because she was neither a physician, nor a psychologist, nor a psychiatrist. It is argued that in cross examination, Dr Harris recognized that she did not have the certification that would allow her to conduct a formal assessment or to make a diagnosis with regard to depression and that her conclusions were reached on the basis of the sole subjective version from the appellant without having a real objective knowledge of the work place or its management.

[42] In regards to the appellant's evidence, the respondent argued that she repeatedly insisted on the fact that she was not ill or injured but rather she was traumatized, without having a clear and persuasive scientific explanation of what that exactly meant. It is submitted that the appellant confirmed that she was not under the care of psychiatrist or a psychologist and that her personal physician confirmed more than once that she was, at all material times, fit to work without restriction.

[43] Furthermore, the respondent submitted that, following the medical assessment performed by Health Canada, it was concluded that the appellant was medically fit to work without restriction. This conclusion was discussed further with the appellant and Dr Harris. In addition, Dr Harris admitted to have transmitted to Health Canada all information that could be of benefit to the appellant. Health Canada concluded that the appellant's symptoms were mild in severity and that her psychological and emotional disturbances were not of disabling proportions. In addition, it is submitted, Health Canada was categorical when it concluded that the appellant's interpersonal difficulties at her work place cannot and should not be attributed to a medical illness that would require any accommodation. It is argued that this evidence was not contradicted by the appellant at the hearing. The evidence was introduced after the appellant's witness, Dr Harris, testified about Health Canada's assessment. Finally, the respondent submitted that this evidence was not contradicted in written submissions.

[44] In regards to when the appellant was asked to provide details about any sickness that she encountered during the period of time relevant to this case, the respondent submitted that the only objective element that was brought forward by the appellant was a copy of a test result dated November 26, 2010. However, it is argued that the appellant admitted that these results did not mention any actual illness nor could it be determined if the results had any link with the alleged condition in the work place.

[45] In regards to the appellant's diabetic condition, the respondent argued that there is no objective medical evidence of its existence, its severity, its cause or its fluctuation.

[46] According to the respondent, all other information with regard to the appellant's alleged illness were based on her personal and subjective analysis of her medical condition. It is argued that appeals officers have already determined in other cases that this is not sufficient in terms of evidence, for example, as it is stated by Appeals Officer Beauchamp in paragraph 33 in *Forster* v. *Canada (Customs and Revenue Agency)*[4].

[47] Alternatively, it is submitted that if the Appeals Officer finds that sufficient medical evidence has been made in this case to meet the first part of the test for persuasive medical evidence as suggested by Appeals Officer Néron, then the respondent will make arguments regarding the second part of the test involving the need to analyze the allegations of harassment and discrimination made by the appellant.

[48] Since Appeals Officer Néron did not proceed to the second part of the analysis in her decision, the respondent submitted jurisprudence from other appeals officers and Boards including the Supreme Court of Canada that have established over a long period, the proper tests to apply when it comes to determining if the case at hand involved discrimination or harassment.

[49] The respondent argued that during the hearing, the appellant did not present any evidence or demonstration of alleged discrimination. It is submitted that only vague

[4] CAO 2002-14.

statements were made during the appellant's testimony when she affirmed being part of certain groups traditionally covered under discrimination. However, if the appeals officer was not of that opinion, the respondent submitted that any reproaches made by the appellant against the management team were addressed and explained by the proper witness during their examination in chief or their cross-examination.

[50] The respondent argued that no evidence of actual harassment was presented by the appellant at the hearing. Only a few references were made about harassment and they were linked to some of the work place tensions and disagreements that the appellant was having about the way management was conducting its operations or resolving issues within the work unit. It is submitted that such elements are not sufficient to demonstrate harassment.

[51] It is submitted that, from the beginning, all the issues raised by the appellant at the hearing underlying the refusal to work were issues pertaining to labour relations and therefore should not be in front of an appeals officer. It is argued that in *Tremblay*, Appeals Officer Aubre accepted to look at situations involving labour relations issues however, he clearly circumscribed the boundaries of his jurisdiction in paragraph 38.

[52] According to the respondent, the HSO's conclusion and the reasons for it, that a danger does not exist, was in complete alignment with the jurisprudence cited in the submissions and should be confirmed by the appeals officer. Not only was the conclusion in accordance with the relevant provisions of the Code, but even in a hearing that is considered *de novo*, the respondent argued that no new evidence was presented by the appellant to the appeals officer. The respondent submitted that, if anything, even less evidence was presented by the appellant during the hearing than what was presented to the HSO in the course of that investigation.

Appellant's reply

[53] In reply to the respondent's submissions, the appellant presented several rebuttal arguments regarding the third part of the submissions which related to facts surrounding the situations involving the work place conflict.

[54] In regards to the respondent's legal arguments, the appellant replied that the test criteria in *Tench*, paragraph 44, established by Appeals Officer Néron, were met. The appellant submitted that persuasive evidence proving her alleged mental illness was presented. It is argued that the appellant self-disclosed her depression and the building anxiety she was experiencing to the employer at the time of the incidents were occurring. As well, the appellant was witnessed in emotional distress in the work place on numerous occasions by supervisors, managers, co-workers and her union representative. The appellant argued that there is sufficient evidence to support the conditions set out by Appeals Officer Néron and that the test does not require expert evidence.

[55] The appellant argued that Health Canada did not conduct an objective assessment of the work place and therefore cannot be relied upon. The appellant stated that the only work

place review was conducted by a mediator who was hired by Ms Gill and that interviews were conducted from September to December 2009.

[56] The appellant argued that the Health Canada doctor had no real objective knowledge of her, the work place or its management which is similar to what the respondent stated about Dr Harris. The appellant questioned the impartiality of the assessment because it was financed and informed by the managers at Transport Canada Pacific Region who had a vested interest in the outcome. The appellant submitted that a single afternoon of interviews is not enough for the Health Canada assessor to make the determinations made in the report when held to an objective evidence test.

[57] In regards to the respondent's challenges to the appellant's diabetic condition, it is submitted that the employer confirmed knowledge of the condition through the evidence of Ms Fung who stated she was aware of it and that it was hard not to know of it when she has a medic alert bracelet tattooed with the word diabetic on her wrist. The HSO also confirmed that this fact was established.

[58] The appellant submitted that her case is substantially different from the previous cases before appeals officers in that she has endured alleged on-going work place harassment and discrimination for more than two years. It is submitted that unlike Mr Tench, the appellant sought medical support through her own physician and an EAP counsellor, Dr Harris, and by consenting to the requests from the employer for a fitness to work assessment and the Health Canada assessment. Furthermore, several notes from the appellant's doctor, some of which were entered into evidence, were provided to the employer.

[59] Regarding the alleged harassment issue, the appellant stated that she has argued from the outset that her allegations of harassment have not been completely investigated and the lack of investigation and resolution is one of the key factors which led to the escalation of her alleged mental distress. The appellant testified that she has been both personally and professionally harassed and that no other person was questioned and no objective evidence was provided to disprove her allegations.

Analysis

[60] I will begin my analysis by examining a request made by the appellant that I order the employer, Transport Canada, not to take any disciplinary action or any other reprisal against her. First, this issue is not related to whether or not a danger existed for the employee at the time of the refusal and goes beyond the scope of the appeal. Second, it falls under the jurisdiction of the Public Service Staff Relations Board (PSSRB), as stipulated under section 133 of the Code, to inquire into the circumstances of an alleged violation of this nature. As a result, I will not entertain the appellant's request.

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

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

[62] In this case, as is stated in the HSO's investigation report, the appellant exercised her right conferred in section 128 of the Code to refuse work in case of danger based on the following grounds :

> Chronic stress as a result of workplace harassment, bullying by co-workers and bully + retribution by management for filing grievance+ CLC complaint which impacts diabetes management.
>
> Depression related to stress results in passive suicide thoughts.

[63] The term "condition", found in the definition of danger as quoted above, prior to the Tribunal's decisions in *Tremblay* and in *Tench*, has been interpreted as relating to situations linked solely to the material or physical work place[5], which as a result excluded all situations linked to interpersonal relationships, such as those presented in this case.

[64] In *Tremblay*, Appeals Officer Aubre concluded that the meaning of the term condition was broad enough to include interpersonal and conflict situations when such situations would likely cause injury or illness to an employee. Appeals Officer Aubre based his conclusions primarily on the significant amendments made to Part II of the Code in 2000 which, in his opinion, expanded the application of the Code as well as the protection afforded to employees.[6]

[65] In *Tench*, Appeals Officer Néron adopted a similar interpretation of the danger provisions. She considered harassment and discrimination as situations within the scope of the above definition of danger, when such harassment or discrimination has repercussions on the employee's mental health. In her view, the English term "condition" within the Code's definition of danger can be interpreted so as to include all situations that, while at work, could affect an employee's functioning or existence, when the consequences of these acts could affect the employee's mental health.

[66] I share the views adopted by both of my colleagues in both decisions and therefore consider that the alleged danger raised by the appellant in this case, that is, the alleged harassment, discrimination, bullying by co-workers, in her work place, are

[5] CLC, subsection 122(1): "work place" means any place where an employee is engaged in work for the employee's employer.
[6] CAO 2007-38, paragraphs 27, 28 and 33 to 35.

situations contemplated by the danger definition under subsection 122(1), when such acts have repercussions on the employee's psychological health.

[67] Accordingly, in order to determine whether or not a danger, as defined in subsection 128(1) of the Code, to the appellant's mental health existed or has potential to exist, at the time she exercised her right to refuse dangerous work, I will have to ask myself whether there is a reasonable possibility that the condition alleged by the appellant could reasonably be expected to cause her injury or illness.

Reasonable possibility of injury or illness

[68] Before assessing the evidence that was adduced in this case regarding the alleged illness, I need to address the type of evidence required in cases involving psychological health issues, such as the one at hand, where the alleged danger is personal and is based solely on the subjective experience of one individual.

[69] In *Alexander*, which concerns allegations made by an employee of Health Canada to have been exposed to racist and discriminatory treatment that put, among other things, his mental health in danger, the Board Vice-Chairperson stated the following at paragraphs 33 and 35:

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

[70] I take this to mean that to find the existence of danger in circumstances concerning an individual experience such as acts of harassment, discrimination or intimidation when it is alleged that such experience has had or could have repercussions on the employee's psychological health, solid evidence, for instance a medical certificate from a physician confirming the employee's existing or potential mental health as well as any link between the medical condition and the situation at the work place is required.

[71] Similarly, Appeals Officer Néron, in *Tench*, at paragraphs 45 and 46 stated the following in regards to the type of evidence required in cases involving harassment and/or discrimination issues:

> 45. No evidence was presented to me to indicate that at the time I.D. Tench requested medical support or sought a certificate from a qualified medical practitioner to confirm that his mental illness was affected by the situation while at work or that this was a probability. As well, there was no evidence presented that the employer was required to take any specific measure to protect I.D. Tench's alleged mental illness.
>
> 46. In addition, I received no response when I specifically requested I.D. Tench to provide me with additional information in order to clarify the nature of his alleged illness and in particular how this alleged illness was linked to his work place. [My emphasis]

[72] Appeals Officer Beauchamp was essentially of the same view in *Forster* when she stated the following at paragraph 33 :

> 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. [My emphasis]

[73] Therefore, I find that to establish a reasonable possibility of injury or illness in this case, as required by the danger definition, persuasive evidence must be provided by way of either the testimony or documentation from a physician establishing an actual or potential mental illness as well as, any link between the illness and the alleged situation at the work place.

[74] After carefully reviewing all the medical evidence that was adduced by both parties at the hearing, I was unable to find persuasive evidence of an existing or potential illness affecting the appellant due to the conditions at her work place at the time she exercised her right to refuse to work.

[75] First, even though I accepted the testimony of Dr Harris as that of an expert witness, her expertise was in the field of social work and counselling and not in medicine. Dr Harris did not possess the necessary qualifications required to provide me with a medical diagnosis nor could she establish a medical link between what is being alleged by the appellant regarding her mental health concerns and the situation at the work place.

[76] Although Dr Harris testified that the appellant scored very high results on a test she conducted to evaluate post-traumatic stress disorder (PTSD) and severe symptoms on the Beck Depression Inventory, to all intents and purposes, it is not a medical diagnosis of any specific mental health illness. Therefore, I cannot conclude based on these results that the appellant suffered any type of mental illness caused by the situation at her work place.

[77] Second, the appellant provided some medical evidence during the hearing, consisting of two short notes from different physicians. Neither physician testified at the hearing of this appeal.

[78] With respect to the first physician's note dated June 25, 2010, it comprised one sentence that stated the appellant was medically fit for all her work duties. This note, put into evidence by the appellant, did not provide proof of a diagnosed mental health illness nor did it demonstrate that her mental health was affected by the situation at her work place. To the contrary, it established that she was medically fit for all of her work duties.

[79] With respect to the second physician's note dated March 14, 2011, it also comprised one sentence stating that the appellant was able to work, but that in the interest of her health, she should be placed in a different work unit. The employer relocated the work station however, it did not transfer her to a different work unit. Again, the note is similar to the first with an additional qualification that she work in a different unit; in essence a request for an accommodation measure. Nevertheless, the note did not provide proof of a diagnosed a mental health illness.

[80] Third, the respondent provided medical evidence, in the form of a Health Canada assessment, which was contrary to the appellant's allegations that she suffered from a mental health illness caused by the alleged harassment, discrimination, bullying by co-workers stemming from her work place.

[81] The appellant accepted the employer's request to undergo a medical evaluation by an independent physician from Health Canada, Dr Kason, Medical Officer with the Public Service Occupational Health Program. This physician addressed the following question: is she fit for work? The conclusion rendered was that the current medical symptoms are mild in severity and would not impair the appellant's ability to perform essential duties of her occupation or any other occupation that is suited by her education and experience. Also, it was stated that her current psychological and emotional disturbances are not of disabling proportions and that she is fit to work at her current work place.

[82] Furthermore, the physician addressed the question; does she have a medical condition that requires accommodation? The answer to this was that the appellant does not have a medical illness that required any accommodation in the past and does not require any current work place accommodation.

[83] Finally, the physician addressed the question: does the appellant have a medical condition that affects her ability to learn, ability to multi-task, ability to interact with others and attend work consistently? The answer to this was that her mild medical condition does not prevent her from learning new materials or skills; that the appellant is involved in significant and what seems profound interpersonal conflicts at her work place which seems to have affected her ability to interact with others and to attend her work place consistentl and; that her interpersonal difficulties at her work place cannot and should not be attributed to a medical illness that would require any accommodation.

[84] Following this assessment, at the appellant's request and with her consent, a medical specialist contacted Dr Harris to obtain further information about her. The medical specialist was asked to review Dr Harris' clinical opinion and to review the consultative report in the event that it may change the previous conclusions made by Dr Kason. On June 14, 2011, Dr Kason responded to the employer that base on the added information, the medical specialist's opinion remains unchanged at the present time.

[85] The fourth and final piece of medical evidence presented to me was a discharge summary from the attending physician at the emergency department of the hospital the appellant attended on June 11, 2010. Again, this evidence does not support her position that she suffered a mental health illness that is linked to harassment, discrimination or bullying by co-workers at her work place. In summary, the physician stated the following points in her report:

i. That the appellant was being followed by a physician for depression since 2009;
ii. that she was voicing passive thoughts of suicide which was exhibited through a work email;
iii. that she was brought to the hospital by police based on section 28 of the *Mental Health Act*;
iv. she was not currently suicidal, homicidal and has a good insight into problems;
v. she will follow-up with EAP at work and contracted to safety; and
vi. she agreed to return to emergency if depression intensifies.

[86] I therefore find that no persuasive evidence was presented to me to demonstrate that the appellant suffered or could suffer from a mental illness caused by the situation while at her work. As a result, I cannot conclude that there is a reasonable possibility that the alleged condition at the appellant's work place could have or will cause injury or illness to her.

[87] I do not have any doubt in my mind by the fact the appellant was visibly emotionally distressed by what occurred in the work place. Notwithstanding the fact that many witnesses have acknowledged to have observed her in a distressed state on numerous occasions at the work place, this cannot be a substitute for a clear diagnosis that she suffered from a specific present or potential mental health illness associated to the work place.

[88] The appellant candidly demonstrated to me that she experienced much anguish. However, I cannot be swayed solely by her testimony without corroboration from a medical specialist who can put into proper perspective and context an illness resulting from a situation that is linked to the work place. The appellant stated it very well in her reply submissions that stress is a subjective experience and the effects of chronic stress can understandably be different from person to person. It is precisely for this reason that specialized medical evidence is vital because there is no other way to arrive at an objective conclusion in regards to an individual's subjective experience.

[89] Considering all of the above and since I have come to the conclusion that there was no reasonable possibility of injury or illness to the appellant's mental health due to the conditions at her work place, I find that Ms Tryggvason was not exposed to a danger as defined in the Code at the time she exercised her right to refuse dangerous work.

[90] Furthermore, in addition to suffering from depression and passive suicidal thoughts, the appellant also alleges that the stress and the chronic psychological distress suffered due to the situation she experienced at the work place also had an effect on managing her diabetes. This caused spikes or drops in her blood sugar, leading to light-headedness and nausea and the need to inject additional insulin. The appellant submitted that the inability to manage consistent blood-sugar levels negatively impact blood vessels which carry blood to internal organs and that mitigating kidney damage is critical to a diabetic's longevity. In a nutshell, the situation that she experienced at the work place is allegedly affecting not only her mental health but her physical health as well.

[91] In *Bliss* v. *Treasury Board (Public works Canada)*[7], a decision of the Public Service Staff Relations Board (PSSRB), the adjudicator determined that even though the Board may admit evidence that would otherwise not be permissible in a court of law, assertions that are based solely on hearsay or that are self serving were insufficient to prove that the angina attack suffered by the employee was caused by stress from the work place relationship between him and his supervisor. The appeals officer, in deciding a case relating to the absence of danger, has the same powers with respect to the admissibility of evidence as did the PSSRB at that time.

[92] Therefore, in order to consider the situation at the appellant's work place a danger as defined in the Code, she must demonstrate that her physical health was affected or could have been affected by presenting evidence other than hearsay or that is self serving.

[93] The evidence that was put before me was not sufficient for me to conclude that a danger existed. In fact, apart from the appellant's subjective analysis of her own medical condition, I was not presented with any relevant medical evidence specifying that her diabetes is being aggravated or in what manner her physical health is being affected by the conflicts and situation at her work place.

[7] 1987 PSLRB 131.

[94] It is thus impossible for me to conclude that the situation at the work place asserted by Ms Tryggvason constitutes a danger, as defined in the Code, for her physical health.

Decision

[95] For all the reasons above, I hereby confirm the decision that a danger does not exist rendered by HSO Ryan on July 2, 2010.

Michael Wiwchar
Appeals Officer