Date: 20090220

Docket: A-52-08

Citation: 2009 FCA 51

CORAM: **NADON J.A.**
BLAIS J.A.
PELLETIER J.A.

BETWEEN:

CARMEN SAUMIER

Applicant

and

ATTORNEY GNERAL OF CANADA

Respondent

Heard at Montréal, Quebec, on November 18, 2008.

Judgment delivered at Ottawa, Ontario, on February 20, 2009.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: PELLETIER J.A.
BLAIS J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an application for judicial review of a decision dated January 3, 2008, by Léo-Paul Guindon, Board Member of the Public Service Labour Relations Board (the "Board"), dismissing the applicant's complaint against her employer, the Royal Canadian Mounted Police (the "RCMP"), filed under sections 133 and 147 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the "Code"), stating that the RCMP took or threatened to take disciplinary action against her for the legitimate exercise of her rights under section 128.

[2] The application for judicial review raises, *inter alia*, the question of whether the applicant's complaint was admissible. More specifically, we must decide whether, in the circumstances of this case, the applicant could exercise the rights set out at subsection 128(1) of the Code and, consequently, file a complaint against her employer under sections 133 and 147 of the Code.

Facts

[3] The following summary of facts is necessary in order to place the issue raised by the appeal in its proper context.

[4] The applicant has been a member of the RCMP since 1987 and holds the rank of constable. On December 14, 1993, she had a work-related accident while working as an anti-smuggling investigator in the Customs and Excise Section when the unmarked car in which she was a passenger was struck by a van driven by smugglers attempting to escape. The applicant was thrown against the windshield, suffering a concussion.

[5] As a result of this accident, the plaintiff suffered from a number of medical problems. More particularly, besides fatigue and generalized chronic pain, owing to which a rheumatologist diagnosed her with fibromyalgia in November 1997, the applicant suffered from headaches and memory and vision problems. In addition, following an examination by an ophthalmologist on February 9, 1994, she was diagnosed with post-traumatic fibrillar degeneration of the vitreous body of the eye. Various specialists have performed many medical exams for the applicant's past and ongoing medical problems.

[6] Since her accident in 1993, the applicant has been off work on many occasions. She did not work from December 14, 1993, to May 1994. As of March 1998, she was limited to light duty and in August 2004, her employer amended her medical profile and decided that she was incapable of performing an RCMP constable's main tasks, but that she could carry out sedentary administrative tasks.

[7] On September 23, 2004, the applicant agreed to return to work based on a schedule that set her return for October 4, 2004, at which time she would work a five-day workweek of four-hour days. The schedule provided for an increase of one hour per day for every subsequent week, ending with eight-hour workdays at the end of a five-week period. The applicant's assigned duties were sedentary administrative tasks.

[8] From October 26 to November 8, 2004, the applicant was on sick leave for pharyngitis. As of November 20, 2004, her treating physician, Dr. Subak, removed the applicant from her work duties for depression and fibromyalgia.

[9] Furthermore, on November 5, 2004, the applicant asked Dr. Mitchell S. Pantel, Medical Officer, Occupational Health and Safety, "C" Division, RCMP, for an opinion that would allow her to not follow the gradual schedule she had accepted in September.

[10] On November 29, 2004, the applicant took note of a memorandum from Chief Superintendent Roger L. Brown, Officer in Charge, Human Resources, Central Region, notifying her that she had to follow the schedule she had accepted on September 23, 2004.

[11] Accordingly, the applicant returned to work on November 30, 2004 for a seven-hour workday. She worked the same on December 1 and 2, 2004, took annual leave on December 3 and 6, 2004, and worked eight-hour days on December 7 and 8, 2004.

[12] On December 9, 2004, the applicant consulted Dr. Subak about pharyngitis. Noting that the applicant's health had deteriorated after her return to full-time work, Dr. Subak declared her unfit to work from November 10 to 20, 2004, and recommended that her work schedule be changed to four half-days per week.

[13] The applicant therefore returned to work for four-hour days starting on December 13, 2004.

[14] In January 2005, the RCMP requested that Dr. Jocelyn Aubut, a psychiatrist, meet with the applicant to perform a psychiatric assessment. On January 27, 2005, Dr. Aubut submitted his expert report, with the following conclusions:

[TRANSLATION]

– diagnosis of pain disorder with a strong psychological component, with no evidence of major depression or post-traumatic stress; possibility of fibromyalgia, hypercholesterolemia;

- the limitations reported by the complainant are related to fatigue, sleep problems and chronic pain; without some adjustment in the patient's case management, no significant change can be hoped for;
- a suggested gradual return starting with four half days per week, which could be raised by a half day every two weeks, with some adjustment in treatment; without such an adjustment, the patient will encounter highs and lows and is very unlikely to be able to achieve a full-time schedule;
- the return to administrative work excludes overnight shift work or overtime;
- no plausible date can be determined for a return to full-time work; and
- treatment based on post-traumatic stress disorder should be adjusted to one based on pain disorder with a strong psychological component.

[15] Relying on Dr. Aubut's conclusions, Dr. Pantel gave his opinion that the applicant's treatment plan should be geared to a gradual return to work, given that the applicant's health problems were somatic in origin.

[16] As of February 22, 2005, the applicant did not report for work. On August 17, 2005, Dr. Baltzan declared the applicant unfit to work for an indefinite period as a result of diurnal hypersomnolence.

[17] During this time, Dr. Subak recommended a disability period from June 22 to July 20, 2005, for depression and sleep problems, which she extended to September 1, 2005, and then to September 21, 2005.

[18] Pursuant to an order by Inspector Moreau, the applicant was monitored in August and September 2005 by means of video recordings. Two surveillance reports were filed with the RCMP and, after viewing the video recordings, Dr. Pantel found that the applicant's activities were incompatible with a recommendation of total disability. Dr. Pantel notified Inspector Moreau in the following terms:

[TRANSLATION]

> This is to inform you that based on a thorough review of the member's medical file, I am of the opinion that this member is able to resume a modified work assignment (administrative tasks) on a full-time basis effective immediately. This opinion takes into consideration the information provided by the member herself at a meeting and the opinion of her treating physician.

[19] Following Dr. Pantel's conclusions, the RCMP refused the applicant's request for sick leave. On September 22, 2005, she was served with a return-to-work order, informing her that her request for sick leave had been refused and that she had to report to work.

[20] Following the service of the return-to-work order on September 22, 2005, the applicant notified her employer that she refused to obey that order. More particularly, on September 23, 2005, S/Sgt Delisle, representative of the Association of Members of the RCMP, informed Inspector

Lemyre, the officer in charge of border integrity, “C” Division, that the applicant’s refusal to return to work was based on section 128 of the Code.

[21] On September 27, 2005, the applicant reported to S/Sgt. Vaillancourt at the Airport Federal Investigation Section (the “AFIS”) offices in Dorval, and notified S/Sgt. Vaillancourt that she refused to work to avoid aggravating her health. Replying to S/Sgt. Vaillancourt’s question asking her to specify the tasks in respect of which she refused to work, the applicant had no reply other than the statement she had already made, namely that she refused to work [TRANSLATION] “because of her health”.

[22] On September 30, 2005, S/Sgt Vaillancourt gave the applicant a return-to-work order issued by Inspector Lemyre. This order reads, in part, as follows:

> [TRANSLATION]
>
> **WHEREAS** you are no longer on sick leave and are deemed fit to carry out duties, with limitations;
>
> **WHEREAS** on September 22, 2005 you were served with my return-to-work order for Friday, September 23, 2005 at 08:00 at the Airport Federal Investigation Section at 700 Leigh Capreol, Dorval;
>
> **WHEREAS** on September 27, 2005 you reported to the Airport Federal Investigation Section at 700 Leigh Capreol, Dorval and verbally indicated to S/Sgt. Luc Vaillancourt your refusal to work for health reasons, without even knowing the tasks that would be assigned to you;
>
> **AND WHEREAS** it was therefore premature to submit a refusal to work under sections 127.1 and 128 of Part II of the *Canada Labour Code*,
>
> **I HEREBY NOTIFY YOU that my return-to-work order, with which you were served on September 23, 2005 at 08:00 at the**

> **Airport Federal Investigation Section at 700 Leigh Capreol, Dorval, Quebec still stands.**
>
> Failure to comply with the order issued to you on September 22, 2005 shall be considered a contravention of section 40 and/or 49 of the *Code of Ethics* and could lead to disciplinary action under the *RCMP Act*. You could also be subject to administrative discharge under section 19 of the *RCMP Regulations* for abandonment of post.
>
> **KINDLY ACT ACCORDINGLY**

[23] The applicant immediately notified S/Sgt. Vaillancourt that she would continue her refusal to work. The applicant then provided her employer with Dr. Subak's clinical report, dated September 20, 2005, according to which the applicant was to be considered unfit for work from September 20 to November 9, 2005.

[24] On October 3, 2005, after having taken Dr. Subak's report into consideration, Dr. Pantel notified Chief Superintendant Brown that, in his opinion, the applicant was fit to return to work. Chief Superintendant Brown accepted that recommendation.

[25] The applicant submitted a new clinical report from Dr. Subak stating that she was unfit to work from November 9 to December 7, 2005.

[26] On November 25, 2005, on Dr. Pantel's recommendation, Chief Superintendant Brown refused to grant the applicant sick leave.

[27] In early December 2005, Inspector Lemyre issued a new return-to-work order, which Sergeant Ehlebracht handed to the applicant. By means of this return-to-work order, Inspector Lemyre reiterated the return-to-work order that had been served on the applicant on September 22, 2005, and notified her of the action that could result from her refusal to comply with the return-to-work order.

[28] On December 20, 2005, the applicant reported to her employer's office and notified Corporal Léo Mombourquette that she refused to work to avoid aggravating her medical condition.

[29] On December 20, 2005, the applicant filed with the Board the complaint that Board Member Guindon dismissed and that is now the subject of this appeal.

Decision of the Board

[30] First, the Board member concluded that the applicant exercised her right of refusal under section 128 of the Code "while at work". More particularly, according to the Board member, the applicant met the requirement of subsection 128(1) when she appeared with S/Sgt. Bélisle at her employer's office on September 27, 2005 to inform S/Sgt. Vaillancourt of her refusal to work.

[31] Second, the Board member concluded that the applicant had met the requirements of subsection 128(6)—that she inform her employer without delay of the reason for her refusal to work—by stating to her employer on September 22, 2005, that she was unfit to work due to illness

and reiterating that information during a telephone conversation and meeting with S/Sgt. Vaillancourt on September 27, 2005.

[32] According to the Board member, the employee's obligation under subsection 128(6) to inform her employer was met, even though the information given to the employer was only in general terms. In this case, the RCMP fully understood that the applicant refused to work "based on the recommendations of her doctors, who had declared her unfit to work" (paragraph 114 of the Board member's reasons).

[33] Third, the Board member dismissed the applicant's complaint on the grounds that she had not demonstrated that she had reasonable cause to believe that her return to work posed a risk to her health or safety within the meaning of section 128 of the Code. As a result of that conclusion, the Board member found that there was no need to determine whether the RCMP had taken disciplinary action against the applicant owing to her trying to exercise her rights under section 128 of the Code.

[34] Finally, the Board member stated that in his opinion, the evidence did not allow him to conclude that the applicant had acted in bad faith by relying on section 128 of the Code.

Submissions of the parties

A. Applicant's submissions

[35] The applicant is first challenging the Board member's decision on the ground that he issued an unreasonable decision by imposing an excessive burden of proof on her. According to the

applicant, both burdens of proof imposed by Parliament in a complaint arising from the exercise of the right of refusal to work are on the employer, to the benefit of the employee. However, according to the applicant, the Board member placed the onus on her to prove that her concern was well founded, instead of considering whether the refusal was based on genuine safety concerns. The applicant alleges that it was clear in this case that she was following her physicians' recommendations when she exercised her right of refusal to work.

[36] The applicant further contends that the Board member issued an unreasonable decision in not taking into account the fact that the RCMP acted in contravention of sections 128 and 129 of the Code in its refusal to hold an internal investigation, allow an investigation by a health and safety officer regarding the applicant's refusals to work and allow her to exercise her right of appeal. The applicant alleges that the RCMP's actions are in clear violation of section 147 of the Code. She submits that in neglecting to take the employer's conduct into account, the Board member deprived her of the Code's protection.

[37] Lastly, the applicant also submits that the Board member issued an unfavourable decision by dismissing the reasons for her exercising the right of refusal to work. The applicant reiterates that her physicians recommended that she not return to work, given the risk to her health, and alleges that the RCMP physician, Dr. Pantel, who did not agree with the findings of the applicant's physicians, did not inform her of his opinion in a timely manner.

B. Respondent's submissions:

[38] First, the respondent alleges that the applicant's complaint was inadmissible. It submits that an employee can only refuse to work under section 128 of the Code while at work, and that in the case at bar, the applicant was not at work when she alleged exercising her right of refusal. The respondent submits that the applicant's reliance on section 128 of the Code is merely a sham designed to challenge her employer's decision to refuse her sick leave and, therefore, that this remedy cannot provide the legal effects sought in her complaint under section 133 of the Code. Accordingly, the respondent submits that the applicant could not receive the protection provided by section 147 of the Code, because she was not "at work" as required by subsection 128(1).

[39] Second, the respondent submits that that the standard of review is reasonableness and that, in this case, the Board member's decision dismissing the applicant's complaint is not unreasonable. More particularly, the respondent submits that the Board member did not err in finding that the reasons given by the applicant in support of her refusal to work do not constitute reasonable cause to believe that there was a danger to her health within the meaning of section 128 of the Code.

[40] Lastly, the respondent submits that the Board member did not place an excessive burden of proof on the applicant. The respondent acknowledges that subsection 133(6) of the Code provides for a reversal of the burden of proof in favour of the employee, but only if the employee's complaint is made in respect of the exercise of a right under section 128 or 129 of the Code. The respondent submits that the applicant did not discharge her burden of establishing that she had exercised a refusal to work under section 128 of the Code.

Issue

[41] The appeal raises two issues.

1) was the applicant's complaint admissible?

2) if the answer to the first question is yes, it is then up to this Court to determine whether the Board's decision is reasonable.

Analysis

A. Legislative provisions

[42] Before proceeding, I reproduce the relevant sections of the Code, as follows:

128. (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that (a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee; (b) a condition exists in the place that constitutes a danger to the employee; or (c) the performance of the activity constitutes a danger to the employee or to another employee.	**128.** (1) Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas : a) l'utilisation ou le fonctionnement de la machine ou de la chose constitue un danger pour lui-même ou un autre employé; b) il est dangereux pour lui de travailler dans le lieu; c) l'accomplissement de la tâche constitue un danger pour lui-même ou un autre employé.
(2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if (a) the refusal puts the life, health or safety of another person directly in danger; or (b) the danger referred to in subsection (1) is a normal condition of employment.	(2) L'employé ne peut invoquer le présent article pour refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche lorsque, selon le cas : a) son refus met directement en danger la vie, la santé ou la sécurité d'une autre personne; b) le danger visé au paragraphe (1)

…

constitue une condition normale de son emploi.

[…]

(13) If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer.

(13) L'employé peut maintenir son refus s'il a des motifs raisonnables de croire que le danger continue d'exister malgré les mesures prises par l'employeur pour protéger les employés ou si ce dernier conteste son rapport. Dès qu'il est informé du maintien du refus, l'employeur en avise l'agent de santé et de sécurité.

[…]

…

129. (1)On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to investigate the matter in the presence of the employer, the employee and one other person who is
(a) an employee member of the work place committee;
(b) the health and safety representative; or
(c) if a person mentioned in paragraph (a) or (b) is not available, another employee from the work place who is designated by the employee.

129. (1) Une fois informé, conformément au paragraphe 128(13), du maintien du refus, l'agent de santé et de sécurité effectue sans délai une enquête sur la question en présence de l'employeur, de l'employé et d'un membre du comité local ayant été choisi par les employés ou du représentant, selon le cas, ou, à défaut, de tout employé du même lieu de travail que désigne l'employé intéressé, ou fait effectuer cette enquête par un autre agent de santé et de sécurité.

[…]

…

(6) If a health and safety officer decides that the danger exists, the officer shall issue the directions under subsection 145(2) that the officer considers appropriate, and an

(6) S'il conclut à l'existence du danger, l'agent donne, en vertu du paragraphe 145(2), les instructions qu'il juge indiquées. L'employé peut maintenir son

employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under this Part.

refus jusqu'à l'exécution des instructions ou leur modification ou annulation dans le cadre de la présente partie.

(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.

(7) Si l'agent conclut à l'absence de danger, l'employé ne peut se prévaloir de l'article 128 ou du présent article pour maintenir son refus; il peut toutefois — personnellement ou par l'entremise de la personne qu'il désigne à cette fin — appeler par écrit de la décision à un agent d'appel dans un délai de dix jours à compter de la réception de celle-ci.

…

[…]

…

133. (1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

133. (1) L'employé — ou la personne qu'il désigne à cette fin — peut, sous réserve du paragraphe (3), présenter une plainte écrite au Conseil au motif que son employeur a pris, à son endroit, des mesures contraires à l'article 147.

…

[…]

…

147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee (a) has testified or is about to testify in a

147. Il est interdit à l'employeur de congédier, suspendre, mettre à pied ou rétrograder un employé ou de lui imposer une sanction pécuniaire ou autre ou de refuser de lui verser la rémunération afférente à la période au cours de laquelle il aurait travaillé s'il ne s'était pas prévalu des droits prévus par la présente partie, ou de prendre — ou menacer de prendre — des mesures disciplinaires contre lui parce que :

proceeding taken or an inquiry held under this Part; (b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or (c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.	a) soit il a témoigné — ou est sur le point de le faire — dans une poursuite intentée ou une enquête tenue sous le régime de la présente partie; b) soit il a fourni à une personne agissant dans l'exercice de fonctions attribuées par la présente partie un renseignement relatif aux conditions de travail touchant sa santé ou sa sécurité ou celles de ses compagnons de travail; c) soit il a observé les dispositions de la présente partie ou cherché à les faire appliquer.
147.1 (1) An employer may, after all the investigations and appeals have been exhausted by the employee who has exercised rights under sections 128 and 129, take disciplinary action against the employee who the employer can demonstrate has wilfully abused those rights.	**147.1** (1) À l'issue des processus d'enquête et d'appel prévus aux articles 128 et 129, l'employeur peut prendre des mesures disciplinaires à l'égard de l'employé qui s'est prévalu des droits prévus à ces articles s'il peut prouver que celui-ci a délibérément exercé ces droits de façon abusive.
(2) The employer must provide the employee with written reasons for any disciplinary action within fifteen working days after receiving a request from the employee to do so.	(2) L'employeur doit fournir à l'employé, dans les quinze jours ouvrables suivant une demande à cet effet, les motifs des mesures prises à son égard.
[Emphasis added]	[Non souligné dans l'original]

[43] A close reading of these legislative provisions leads to the following conclusions:

(i) subsection 128(1) provides that an employee is entitled, *inter alia*, to refuse to work in a place or to perform certain activities "if the employee while at work has reasonable cause to believe" that there is danger for the employee in working in his or her workplace or that the employee's performance of his or her activities constitutes a danger to the employee;

(ii) the exception to that principle is found at subsection 128(2), which provides that an employee cannot invoke section 128 to refuse to work in a place or to perform certain activities if "the danger referred to in subsection (1) is a normal condition of employment";

(iii) under section 147, an employer shall not take any disciplinary action against or threaten to take any such action against an employee who is legitimately exercising his or her rights pursuant to Part II of the Code, entitled "Occupational Health and Safety", which includes section 128;

(iv) if the employer has acted in contravention of section 147, an employee may file a written complaint "of the alleged contravention" with the Board;

(v) however, after all investigations and appeals provided at sections 128 and 129 have been exhausted, section 147.1 allows an employer to take disciplinary action against an employee who has "wilfully" abused those rights.

[44] That is the legislative context of the complaint lodged by the applicant, who alleges that following the exercise of her rights under section 128, the RCMP issued her a return-to-work order, an order that it reiterated on more than one occasion, threatening her with disciplinary action if she continued her refusal.

B. Standard of review

[45] The respondent submits that the standard of review is reasonableness. Although the applicant does not explicitly address this question, considering the arguments she makes in her memorandum of fact and law, I conclude that she does not disagree with the respondent on this

point. In light of the Supreme Court's decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, I believe that the standard applicable to the Board's decision is reasonableness.

C. Is the applicant's complaint admissible?

[46] Board Member Guindon's task was to determine whether the applicant's claim was well founded. In other words, to the extent that the applicant could rely on section 128, did the RCMP take disciplinary action or threaten to take such action against her because she had sought to have said section applied?

[47] Consequently, the Board member had to decide, prior to considering the merits of the complaint, whether the applicant could rely on section 128 in support of her refusal to work. According to the respondent, the applicant could not rely on said section, since the employee must be "at work" to be able to refuse "to work in a place or to perform an activity".

[48] The matter of the admissibility of the applicant's complaint was raised for the first time by the respondent in a letter addressed to the Board on May 25, 2006, which reads, in part, as follows:

> [TRANSLATION]
>
> We wish to inform the Board that the employer intends to contest the admissibility of the complaint that Ms. Saumier filed with the Board under section 133 of Part II of the Canada Labour Code ("the *Code*").
>
> …
>
> When Ms. Saumier invoked subsection 128(1) of the *Code*, she was not performing her tasks and, furthermore, she had never done so because she had been absent from her work on sick leave for several months.

[49] At paragraph 113 of his reasons, Board Member Guindon addressed this issue as follows:

> **113.** Paragraphs 128(1)(*b*)and(*c*) of the *Code* provide that "while at work" an employee may refuse to work in a place if he or she has reasonable cause for believing that it is dangerous to the employee to work in that place or to perform an activity if he or she has reasonable cause to believe that performing the activity constitutes a danger to the employee or to another employee. The words "while at work" necessarily imply that an employee may not exercise a right to refuse to work when that employee is not at work. Consequently, the respondent was justified in not accepting that the refusal to work expressed by the complainant to Sergeants Génier and Bissonnette on September 22, 2005 was valid under the *Code*. However, the complainant met that requirement when she appeared with S/Sgt. Delisle at the AFIS office in Dorval on September 27, 2005 to express her refusal to work to S/Sgt. Vaillancourt.
>
> [Emphasis added]

[50] In my opinion, the Board member erred in making this finding. It cannot be denied that the applicant had been absent from work for several months, on sick leave, when she invoked section 128 of the Code in support of her refusal to work. The mere fact that the applicant reported physically to her employer's office on September 27, 2005, after several months' absence did not result in her being "at work" within the meaning of subsection 128(1) of the Code. In other words, an employee is not "at work" simply by virtue of reporting to her employer's office for a few minutes to give notice that she refuses to work for health reasons, regardless of the task or tasks to be assigned to her.

[51] In the context, it is important to note that when the applicant reported to the office of her employer on September 27, 2005, accompanied by S/Sgt. Delisle, she indicated to her employer that

she refused to work because she did not want to aggravate her health problems. More particularly, she indicated to S/Sgt. Vaillancourt, who had asked her to specify which duties she refused to perform, that she refused to work [TRANSLATION] “for her health”. As well, on December 20, 2005, the applicant again reported to the office of her employer and indicated to Corporal Léo Mombourquette that she refused to work to avoid aggravating her medical condition.

[52] Accordingly, the applicant’s complaint was not admissible because she was not “at work” when she invoked subsection 128(1) of the Code in support of her refusal to work.

[53] Notwithstanding his erroneous finding that the applicant was “at work”, the Board member nonetheless concluded that the complaint should be dismissed. In my opinion, that conclusion is not unreasonable. I will explain.

[54] The summary of facts at paragraphs 3 to 29 above clearly reveals the nature of the dispute between the applicant and her employer. The facts show unequivocally that this dispute results from Dr. Pantel’s and Dr. Subak’s divergent opinions on the applicant’s ability to perform the sedentary tasks that her employer had decided to assign to her. As I have mentioned several times, when the applicant filed her complaint on December 20, 2005, she had not worked for several months. It follows from these facts that the applicant’s real submission is that she cannot perform any sedentary administrative tasks and that performing such a task, given her state of health, would only aggravate her condition.

[55] The Board member understood clearly the true nature of the dispute between the parties. In fact, he states at paragraph 121 of his reasons that under section 133 of the Code, he cannot decide a dispute regarding the applicant's ability, owing to medical problems, to perform the sedentary administrative tasks that her employer wished to assign to her. This is the reason, according to him, that the applicant could not file a complaint under section 133 of the Code. In other words, the Board member dismissed the applicant's complaint because, in his opinion, the remedy she sought under section 128 of the Code was devoid of any legal basis, since the danger of concern to the applicant was not a danger from which section 128 aimed to protect an employee.

[56] In my opinion, there can be no doubt that the circumstances of the case cannot, in any way, give rise to a remedy under section 128 of the Code. Accordingly, I conclude that intervention is unwarranted.

Disposition

[57] For these reasons, I would dismiss the application for judicial review with costs.

"M. Nadon"

J.A.

"I agree.
Pierre Blais J.A."

"I agree.
J.D. Denis Pelletier J.A."

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 18, 2008
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	BLAIS J.A. PELLETIER J.A.
DATED:	February 20, 2009

APPEARANCES:

James R.K. Duggan	FOR THE APPLICANT
Nadia Hudon	FOR THE RESPONDENT

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