Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Neutral Citation: 2010 OHSTC 004(I)

Date: 20100316
Case No.: 2006-43
Rendered at: Ottawa

Between:

David Babb, Appellant

and

Canada Revenue Agency, Respondent

Matter:	Preliminary objection to have the appeal dismissed on the basis of mootness
Decision:	The objection is dismissed
Decision rendered by:	Mr. Michael Wiwchar, Appeals Officer
Decision language:	English
For the applicant:	M[e] Martin Charron, Counsel, Justice Canada
For the respondent:	Ms. Mary Mackinnon, Counsel, Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l

REASONS

[1] This decision deals with a preliminary objection raised by M^{e} Charron that this appeal is moot and should be dismissed.

[2] The appeal was brought under ss. 129.(7) of the *Canada Labour Code*, (the Code), by Mr. David Babb, an employee with Revenue Canada Agency, the employer, regarding a decision that a danger did not exist rendered on June 21, 2006, by Mr. Serge Marion, health and safety officer (HSO), pursuant to ss. 129.(4) of the Code.

BACKGROUND

[3] On the morning of June 19, 2006, Mr. Babb arrived at his work place located at 875 Heron Road, Ottawa, Ontario. He was made aware that a power failure had occurred, the reason employees were waiting outside the building. The power was eventually restored and he was advised that air testing had been performed and that employees were being requested to enter the building.

[4] Mr. Babb returned to his work station on the fifth floor and noticed that the air was hot and stuffy and that there was an odour present. Mr. Babb was a health and safety representative for the work place and he was informed by a co-worker that other employees were not coping well with the environment and that one employee had fainted and another was ill. He requested that the employer evacuate the building and take immediate action about the situation. The employer again evacuated the building and more tests were performed.

[5] All employees including Mr. Babb were requested to come back into the building and return to their work stations. Mr. Babb informed the employer that because the problem was not identified he was refusing to return to work. The employer sent Mr. Babb to another location. Afterwards, the employer informed Mr. Babb that the work place health and safety committee had investigated the issue and they were satisfied that the work place was, in their terminology, not dangerous. Mr. Babb maintained his work refusal because he believed a hazard may still exist since the source had not been identified and in addition, he had an issue concerning the fact he did not participate in the investigation.

[6] On June 20, 2006, the employer concluded their investigation and HSO Marion was requested to attend the work place to conduct an investigation into Mr. Babb's work refusal. The HSO was informed by Mr. Babb that there was something in the air and there was a reference to an odour in the air. The HSO was informed that the refusal was also prompted because an employee fainted and another employee was removed from the fifth floor due to illness.

[7] HSO Marion's investigation consisted of the following:

- meetings with Mr. Babb and employer representatives;

- interviews with employees;
- an inspection of the fifth floor and other areas of the work place in the company of Mr. Babb;
- a review of air quality and other related reports and data;
- air testing performed with a measuring device and;
- a consultation with the HSO's own departmental industrial engineer.

[8] HSO Marion explained in the reasons section of his decision report that the purpose of his investigation was to determine if the situation (i.e. the air being stuffy and hot and the presence of an odour in the air) that was described to him by Mr. Babb fell within the definition of danger. The officer investigated and concluded that there was no evidence of any contaminants within the work place and there was no present or potential exposure to a hazardous environment.

[9] Furthermore, HSO Marion explained that he determined through interviews with employees on the fifth floor that the signs and symptoms described to him reflected an environment that lacked air circulation and this was possibly due to an elevated level of carbon dioxide. He determined that the issues were corrected by removing the employees from the floor thus allowing the air handling units to make air exchanges. The HSO stated that since there was a power outage and because of the dimensions of the building the units needed time to get air circulation, temperature and relative humidity back to normal.

[10] On June 21, 2006, HSO Marion decided that Mr. Babb was not exposed to a danger.

[11] On June 28, 2006, Mr. Babb submitted an appeal of HSO Marion's decision to the Occupational Health and Safety Tribunal Canada (the Tribunal). Afterwards, the Tribunal granted a request made by Mr. Babb's representative to keep the appeal in abeyance pending the appeals officer decision on a preliminary objection in an appeal before the Canada Appeals Office[1] in the case of *Bartakovic* and *Canada Border Services Agency*[2].

[12] On June 3, 2009, a pre-hearing conference was held with Ms. Mackinnon, counsel representing Mr. Babb and Mr. Pierre Marc Champagne, counsel representing the employer. Mr. Champagne objected during the teleconference to the request made by Ms. Mackinnon to schedule eight days of hearing time in order to present her evidence. I requested submissions from both parties on the objection.

[13] In a letter dated October 27, 2009, I informed the parties that a definitive ruling on issues of evidence could not be provided however, I did convey my observations as well as some guidelines on the hearing process that I intended to follow.

[14] On December 3, 2009, the Tribunal was advised that the employer changed counsel from Mr. Champagne to Mr. Bertrand.

[1] Former name of the Tribunal
[2] OHSTC-08-14(I)

[15] On January 12, 2010, the Tribunal was again advised of a change in the employer's counsel, M[e] Martin Charron was now replacing Mr. Bertrand.

[16] On January 15, 2010, M[e] Charron raised a preliminary objection based on mootness.

[17] On January 26, 2010, a hearing was held and submissions followed by written summaries were received from the parties.

ISSUE

[18] I must determine whether this appeal should be dismissed on the basis of mootness.

SUBMISSIONS

Respondent

[19] M[e] Charron submitted, in accordance with the doctrine of mootness established by the Supreme Court of Canada in *Borowski* v. *Canada (Attorney General)*[3], that if the Court will not resolve some controversy that affects the rights of the parties, the Court should decline to hear the matter. He submitted that this means the "raison d'être" of the work refusal must be considered.

[20] M[e] Charron submitted that since the specific state of the circumstances, which in this case is the power failure, has disappeared there is no point for the appeals officer to continue with the appeal because it involves the resolution of theoretical questions.

[21] M[e] Charron submitted that the role of the appeals officer is to determine if the danger still exists. That in this case, the power failure was not a systematic problem on that date nor is it today therefore there is no danger at all to assess. He continued by stating that an assessment of a danger made four years ago should not be redone without considering how the issue was originally initiated.

[22] M[e] Charron agreed that this hearing is *de novo* and the appeals officer may receive or seek evidence that may not have been available or considered by the HSO at the time of his investigation as long as the evidence is relevant to a danger analysis.

Appellant

[23] Ms. Mackinnon submitted that Mr. Babb's work refusal arose out of concerns about indoor air quality in his work place. The specific trigger for the work refusal on June 19, 2006, was a power outage in the building, which resulted in increased temperature and reduced airflow.

[24] Ms. Mackinnon argued that Mr. Babb's concerns were not confined to the proximate temperature and lack of circulation on June 19, 2006. Broader concerns about

[3] [1989] 1 S.C.R. 342

air quality were raised prior to, on that date and afterwards. The concerns existed for Mr. Babb and by him on behalf of other employees in the work place.

[25] Ms. Mackinnon submitted that Mr. Babb's broader concerns related to environmental air issues and that the problems were persisting. Mr. Babb's concerns at the time of the refusal were not merely the power outage, but the chronic systematic air quality issues, which had become exacerbated by the power outage.

[26] Ms. Mackinnon submitted that the law is clear that new factual developments can be relied upon in a de *novo* hearing before an appeals officer provided they are related to the circumstances that gave rise to the refusal to work or the issuance of the direction under appeal.

[27] Ms. Mackinnon submitted that Mr. Babb has been off work since March 2007 for health reasons which he is arguing (in another forum) are at least in part causally connected to air quality at the work place thus, the issue whether the air quality presents a danger to him is very much a "live" issue.

[28] Ms. Mackinnon argued that the issue as framed involves an ongoing live controversy and, Mr. Babb is seeking a practical go forward remedy which may be applied to him and/or to fellow federal public servants. She stated that Mr. Babb is reliant upon the *de novo* nature of the hearing, and submitted that, at this juncture, it would be premature for the appeals officer to determine that the matter is moot without having heard evidence concerning the alleged danger present in the work place.

[29] Ms. Mackinnon requested that M^{e} Charron's objection be dismissed and that the matter proceed on the merits.

ANALYSIS

[30] The Supreme Court of Canada in *Borowski* has developed a two step analysis to the issue of mootness. First, the Court has to determine if the matter is moot, i.e. whether the tangible dispute has disappeared thus rendering the issues academic. Second, in the affirmative, the Court must then determine if it should nevertheless exercise its discretion to determine the issues. In deciding on whether or not to exercise its discretion, the Court must consider the rationales of the policy with respect to mootness;

1. the presence of an adversarial context;
2. the concern for judicial economy and;
3. the need for the Court to be sensitive to its role as an adjudicative branch in our political framework.

[31] Furthermore, the doctrine of mootness was described by Mr. Justice Sopinka at paragraph 15 of the decision as follows:

> "The doctrine of mootness is an aspect of a general policy or practice that a Court may decline to decide a case which raises merely hypothetical or abstract question. The general principle

> applies when the decision of the Court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the Court will have no practical effect on such rights, the Court will decline to decide the case…"

[32] Both counsels agreed that Mr. Babb's refusal was triggered by the power outage/failure that occurred in the morning of June 19, 2006, a condition that resulted in an increase in temperature and reduced airflow. Mr. Babb felt that there was something in the air and explained that is was "an odour in the air".

[33] I believe that, as argued by M^{e} Charron, the power outage was an isolated episode that created a specific set of circumstances that have now disappeared. However, I also agree with Ms MacKinnon's argument that, while the specific circumstances that occurred on June 19, 2006, are quite obviously past, this by no means implies that the question of whether a danger existed on that date has been resolved or is no longer relevant nor that these same circumstances will not recur in the future.

[34] Therefore, a decision on my part on the merits of this appeal will certainly affect the rights of Mr. Babbs if the conditions created by the power failure were to ever recur. Consequently, I am convinced that there is still a live controversy between the parties and conclude that the matter before me is not moot.

[35] In accordance with the test set out in *Borowski* and having concluded that the matter before me is not moot, there is no need for me to apply the second step of the test.

[36] Before disposing of the objection, I would like to address the scope of the hearing to take place in this matter.

[37] Pursuant to ss. 146.1(1) of the Code, when an appeal is brought under ss. 129.(7) as in this case, the appeals officer must inquire into the circumstances that existed at the time of the work refusal to determine whether the HSO arrived at the correct decision. The inquiry consists of a factual review of all the circumstances that existed at the time of the HSO's investigation. Therefore, I must put myself in the HSO's position at the time of his investigation to determine whether or not there was a danger as defined by the Code. This determination must take into account the power outage and the specific set of conditions that it created on the day of the refusal.

[38] Ms. Mackinnon submitted that because a hearing before an appeals officer is *de novo* new evidence that was not considered by the HSO can be introduced. I agree. However, the case law states that this new evidence must pertain to the circumstances that existed on the day of the refusal. As stated in a decision of the Canada Appeals Office in *Duplessis* and *Forest Products Terminal Corporation. Ltd.*[4]:

> Hence, the AO hearing a matter *de novo* has sufficient powers to receive any new evidence, including evidence that a HSO could or should have received, as long as it relates to the circumstances

[4] CAO-07-036, paragraph 82

> that gave rise to the refusal to work or the issuance of the direction under appeal.

[39] The circumstances that gave rise to Mr. Babb's refusal to work were the condition of the air and the odour present at the work place located at 875 Heron Road following the power failure.

[40] I therefore disagree with Ms. Mackinnon's submission that because the hearing before me is *de novo* I have a "practical responsibility to look into whether events have occurred since the original work refusal that may affect the determination of danger".

[41] Ms. Mackinnon has furthermore submitted that Mr. Babb's concerns at the time of the refusal were not merely the power outage, but the chronic systematic air quality issues, which had become exacerbated by the power outage.

[42] I find it important to reiterate that, my jurisdiction, in this appeal, is to determine whether or not the HSO's conclusion that a danger did not exist for Mr. Babb, on June 19, 2006 was well founded. To do so, I will consider the situation that existed on that day, as a consequence of the power failure. My jurisdiction does not extend to look at the issue of air quality "in general" at 875 Heron Road, Ottawa. I would like the parties to take note of this and prepare their case accordingly.

DECISION

[43] For all the above reasons, the objection is dismissed.

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Michael Wiwchar
Appeals Officer