Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Breen Ouellette v. SaskTel, 2010 OHSTC 13

Date: 2010-09-27
Case No.: 2008-14
Rendered at: Ottawa

Between:

Breen Ouellette, Appellant

and

SaskTel, Respondent

Matter:	Preliminary issue - mootness
Decision:	The appeal is dismissed based on mootness
Decision rendered by:	Mr. Michael Wiwchar, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Breen Ouellette
For the respondent:	Mr. Will Egan, Corporate Counsel, SaskTel

REASONS

[1] This is an appeal brought under ss. 129(7) of the *Canada Labour Code* (the Code) by Mr. Breen Ouellette, an employee with SaskTel, regarding a decision of no danger rendered by Mr. Curtis Pidhorney, health and safety officer (HSO), on March 28, 2008, pursuant to ss. 129(4) of the Code.

Background

[2] Mr. Ouellette occupied the position of Service Technician Internet Support and he invoked his right to refuse dangerous work on March 24, 2008. The grounds for his refusal at the time related to the job design for employees in the Customer Support Centre and, while performing this work activity, he experienced pain despite ergonomic changes to his work station. The job required continuous sitting for periods longer than fifty minutes without a break that prevented him from performing heart rate increasing activities to alleviate his medical condition.

[3] A hearing was scheduled for November 2008, which was subsequently postponed due to an illness incurred by the appellant's counsel at the time, and a hearing was rescheduled for February 17, 2009.

[4] On February 12, 2009, counsel for Mr. Ouellette advised me that the employer had proposed a number of solutions which, when implemented, will likely address the concerns underlying the appellant's complaint. The appeal was adjourned *sine die* and the parties were asked to provide regular written updates.

[5] On October 7, 2009, the parties were informed that a final extension for adjournment was being granted and they were to advise me how they wished to proceed with the appeal by January 15, 2010.

[6] On January 15, 2010, the appellant's counsel advised me that Mr. Ouellette wanted to proceed with the appeal. However, the union and counsel were discontinuing their assistance. As a result, a hearing was scheduled for June 22, 2010.

[7] The hearing on June 22, 2010, began with the testimony of HSO Pidhorney followed by the appellant's first witness. On June 23, 2010, Mr. Ouellette began his testimony by stating that, since January 2009, he has been occupying the position of Director of IT for the Métis Nation of Saskatchewan. His testimony continued for the remainder of the morning. When the hearing reconvened after the lunch break I inquired further as to his status with the employer and Mr. Ouellette stated that since January 2009, his relationship with SaskTel had been completely severed.

[8] At this point I advised the parties that it was my belief that a dispute between an employee and employer with respect to the Code no longer exists and that based on the case law as established by the Supreme Court of Canada in *Borowski* v. *Canada (Attorney*

General)[1] it appeared that the matter is moot. The hearing was suspended and the parties were requested to provide arguments on the issue of mootness.

[9] On July 14, 2010, prior to the receipt of the appellant's arguments, the Tribunal received an application from Mr. Geoff Dalsin an employee of SaskTel. He stated that Mr. Ouellette informed him that the hearing into the appeal was suspended because Mr. Ouellette was no longer an employee of SaskTel. Mr. Dalsin stated that he performs the same work the appellant performed at the time of his refusal and he believes that they both have the same interests concerning the issues raised in this matter.

[10] Mr. Dalsin made an application to be added to the list of appellants for this hearing. He stated that he is currently on extended sick leave however; he still occupies the same position and remains employed by SaskTel. He informed the Tribunal that Mr. Ouellette would be his representative from that point forward.

Issue

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

Arguments of the parties

[12] By July 16, 2010, final arguments from the parties on the mootness issue were received. On August 25, 2010, the respondent provided arguments regarding the application made by Mr. Dalsin.

Appellant's arguments

[13] The appellant disagrees with the premise based on the *Borowski* decision that the appeal must end because it is moot.

[14] Mr. Ouellette argued that there are many more affected parties that have not identified themselves to the Tribunal, yet they clearly exist as affected parties when the available facts are examined. Therefore, he argued that a live controversy exits because these parties have been involved at all stages of the work refusal and appeal either directly or as part of a body represented by him.

[15] It is further argued by the appellant that should the appeals officer choose to find that there is no live controversy and determines that the appeal is moot, the appeals officer must further examine the question of whether or not there exits sufficient reasons to exercise its discretion to hear the appeal. Mr. Ouellette provided an argument that addressed the rationales of the policy with respect to mootness.

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

Respondent's arguments

[16] Mr. Egan argued that the appeals officer has no jurisdiction to deal with the appeal of Mr. Ouellette due to the concept of mootness as referred in the case of *Borowski*.

[17] The appeal becomes moot, the respondent argued, due to the fact Mr. Ouellette terminated his employment with the employer on January 16, 2009. The fact that Mr. Ouellette no longer works for SaskTel makes his appeal of a response to a refusal to work a moot point and, therefore, the appeals officer has no jurisdiction to deal with it.

[18] Furthermore, the respondent argued that the refusal to work and its appeal have no impact on other employees, as other employees are free to refuse to work if they feel their safety is in danger under the Code, which currently applies to employees at SaskTel.

[19] In regards to the request made by Mr. Dalsin, Mr. Egan argued that because the issue is presently theoretical, the matter could not be resolved by adding an interested third party since the doctrine of mootness still applies to the original action. In addition, Mr. Dalsin is on sick leave, so his addition as a third party would once again create a theoretical situation since there is no safety issue at present between him and SaskTel while he is on extended sick leave. Therefore, it is argued that his addition does not cure the original problem between the parties pursuant to the doctrine of mootness.

Analysis

[20] The Supreme Court of Canada in *Borowski* adopted 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 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;
3. the need for the Court to be sensitive to its role as an adjudicative branch in our political framework.

[21] 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 accordingly if subsequent to the initiation of the action or proceeding, events occur which affects the relationships of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot."

[22] I would like to first point out that the basis for this appeal is a decision rendered by HSO Pidhorney following his investigation that a danger, as defined by the Code, did not exist for Mr. Ouellette on March 24, 2008. Mr. Ouellette believed that working in the Customer Support Centre in circumstances that included sitting continuously for long periods without a break while trying to meet performance standards could reasonably be expected to cause him an injury.

[23] The right to refuse dangerous work is an individual right prescribed under s. 128(1) of the Code which reads:

> 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, or
> b) a condition exists in the place that constitutes a danger to the employee, or
> c) the performance of the activity by the employee constitutes a danger to the employee or another employee.

[24] Pursuant to s. 128(1) this personal right is solely granted by the Code to employees working for an employer subject to Part II of the *Canada Labour Code*.

[25] Mr. Ouellette having resigned from his position is no longer an employee of SaskTel, the employer. Consequently, the conditions precedent to the application of s. 128(1) of the Code have disappeared.

[26] Furthermore, there was no evidence that more than one employee made a report of a similar nature at the time of the refusal on March 24, 2008, and, that Mr. Ouellette was designated as the representative for other employees as prescribed under s. 128(11) of the Code.

[27] For these reasons, I find that there is no longer a live controversy or a current, tangible dispute between the parties in this case. Moreover, since there is no longer an employment relationship between Mr. Ouellette and SaskTel, I believe that rendering a decision on the merits of this appeal would have no concrete effect on the rights of the parties.

[28] In light of the above, I conclude that Mr. Ouellette's appeal is moot.

[29] Having determined that the appeal is moot I must now turn to the second step of the analysis. I have carefully considered the arguments presented by the parties on the rationales of the policy with respect to mootness and, in view of that, I choose not to exercise my discretion to hear the appeal on its merits.

[30] Before disposing of the appeal, I would like to address the request made by Mr. Dalsin to be added as a party to these proceedings in accordance with ss. 146.2(g) of the Code. Mr. Ouellette argued that I should not declare this case moot because, Mr. Dalsin, another employee of SaskTel, is also affected by the decision of the HSO and he is willing to step up and act as an appellant in this case.

[31] A conclusion of mootness on my part implies that this appeal has been moot since the day Mr. Ouellette left his employment with SaskTel, that is, on January 16, 2009. Accordingly, I believe that adding a third party to the appeal at this stage of the proceedings will not cure the mootness issue and I therefore will not consider Mr. Dalsin's request.

Decision

[32] For these reasons, the appeal is dismissed.

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Michael Wiwchar
Appeals Officer