Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Wade Unger v. Canada (Correctional Service), 2011 OHSTC 8

Date: 2011-05-02
Case No.: 2010-06
Rendered at: Ottawa

Between:

Wade Unger, Appellant

and

Correctional Service of 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 that a danger does not exist is confirmed
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Language of decision:	English
For the appellant:	Ms Marie-Pier Dupuis-Langis, Union Advisor, UCCO-SACC-CSN (Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – Confédération des syndicats nationaux)
For the respondent:	Mr John Jaworski, Counsel, Legal Services, Treasury Board

REASONS

[1] This concerns an appeal brought under ss. 129(7) of the *Canada Labour Code* (the Code) by Mr Wade Unger, employee with Correctional Service of Canada (CSC), regarding a decision that a danger does not exist rendered by Mr Martin Davey, Health and Safety Officer (HSO), on March 1, 2010.

Background

[2] On January 19, 2010, Mr Unger occupied the position of Correctional Officer, CX-02 (CO), at the Pacific Institution/Regional Treatment Centre (PI/RTC), Abbotsford, BC. Mr Unger was specifically designated as an "escort officer". He was assigned to escort an inmate, henceforth identified as "Inmate A", to a medical appointment at around noon that day.

[3] At that time, Mr Unger refused to escort Inmate A to his medical appointment and in so doing invoked his right to refuse dangerous work. His refusal was based on the belief that one of the two escort officers for Inmate A's appointment should be armed. An investigation by the employer ensued over the next several days which culminated in support of the original conclusion made at the time of the refusal that the escort be conducted unarmed.

[4] The employer notified Human Resources and Skills Development Canada (HRSDC), Labour Program, of the work refusal on February 9, 2010, and HSO Davey conducted an investigation into the work refusal the same day.

[5] On March 1, 2010, HSO Davey rendered his decision that a danger for Mr Unger did not exist. The following is a summary of the reasons for HSO Davey's decision which is based on his testimony and report:

- CSC is aware of the risks that inmates represent;
- CSC has a Threat Risk Assessment process (TRA) that is used to determine risk under specific circumstances, and to determine the circumstances required for the escort to be performed;
- the employer has assessed and addressed Mr Unger's concerns;
- the TRA process was followed and preventive measures were put in place;
- the risk presented would not fall outside the normal range of Mr Unger's duties and therefore does not constitute a danger within the meaning of the Code.

[6] Mr Unger filed his appeal on March 3, 2010. The appeal was heard October 13, 14 and 15, 2010, in Abbotsford, BC.

Issues

[7] I must determine the following issues:

1. Whether the appellant was exposed to a danger as defined under the Code when he exercised his right to refuse to work?

2. If the appellant was exposed to danger as defined under the Code when he exercised his right to refuse work, is this danger a normal condition of employment?

Submissions of the parties

[8] The parties' final submissions were received on December 17, 2010.

Appellant's submissions

[9] The appellant's case consisted of evidence from the appellant and two other witnesses; Mr S. Sidhu, CO, CX-01/Union Representative and Ms A. Philbey, CO, CX-01.

[10] According to the appellant, HSO Davey erred in deciding that Mr Unger was not exposed to danger. Ms Dupuis-Langis argued three main issues:

1. That HSO Davey was incorrect in the reasoning of his decision;
2. that the unarmed escort of Inmate A constituted a danger within the meaning of s. 128(1) of the Code; and
3. that this danger was not a normal condition of employment within the meaning of paragraph 128(2)(b) of the Code.

[11] The appellant argued that HSO Davey did not use proper reasoning to render his decision because he first determined that an unarmed escort was a normal condition of employment, and then determined that there was no danger. The appellant submitted that the existence of danger under s. 128(1) should be determined first, and that the determination of whether the danger constituted a normal condition of employment under paragraph 128(2)(b) should only be made subsequent to finding that danger exists. In support of this position the appellant referred to the Tribunal's decision in *Vandal et al.* and *Correctional Service of Canada*[1].

[12] Given the proper analysis, the appellant argued that the unarmed escort of Inmate A presented a danger under the Code because the escort was a condition that could be reasonably expected to cause injury.

[13] Based on *Verville* v. *Canada (Correctional Service)*[2], Ms Dupuis-Langis submitted that a reasonable expectation of injury need not be established by previous occurrences, but can be established based on expert opinions or opinions of ordinary witnesses with the necessary experience. She further suggested that according to *Armstrong et al.* and *Canada (Correctional Service)*[3], opinions of witnesses with necessary experience can refer to job-experience-based opinions. Therefore, the appellant contended that his own

[1] OHSTC-09-009
[2] 2004 FC 767
[3] 2010 OHSTC 6

reasonable expectation that the unarmed escort would cause injury established that there was reasonable expectation of injury.

[14] In addition, the appellant contended that a reasonable expectation of injury can be inferred from the following facts:

- CO Philbey's observation report regarding Inmate A's previous escort, indicated that he became agitated when told that he could not have his handcuffs removed to use the washroom;
- The information contained in the TRA, indicated the following: Inmate A was a medium risk offender with a moderate risk of escape; he was unlawfully at large (UAL) for six years; his community supervision has been problematic; he has anti-social psychopathic personality disorder (PPD); he is a high-profile offender with a ten year long-term supervision order; he is convicted of sexual assault and uttering threats; and that the Correctional Manager (CM) recommended that the escort be armed;
- the Warden changed the CM's recommendation without providing any rationale as to why;
- the Offender Management System (OMS) information, which indicated that all of Inmate A's previous escorts were armed, his record of offences and other information were also contained in the TRA;
- the Security Intelligence Officer (SIO) files, which included Inmate A's criminal history, police reports and court files; and
- Mr Unger's work experience based knowledge of the following: No body-cavity search was conducted before an escort; the inmate could become aware of the time of the appointment; the escort could not see the inmate at all times when travelling in the CSC van; the inmate would wait in the same waiting room as other patients; it was not possible to search the medical office before entering; restraints were often removed from inmates during medical appointments; inmates can harm people while wearing restraints; that OC spray should not be used in hospital settings; that some inmates may be more tolerant to OC spray and that if there were a problem during the escort it would take time for the police to respond.

[15] Ms Dupuis-Langis concluded by submitting that, in addition to there being danger, that this danger is not a normal condition of employment. Based on *Armstrong*, she submitted that if the danger can be reduced or controlled, then it is not a normal condition of employment. She argued that in this situation, the danger could be controlled by the issuance of a firearm.

[16] Finally, the appellant argued the assessment of risk by Mr Unger should be given more weight than that of Warden Brown. Specifically, Mr Unger has ten years of experience working in CSC and currently his sole function is to escort inmates out of the institution. Furthermore, the worker is in a better position to assess the risk presented by

Respondent's submissions

[17] The appellant's case consisted of evidence from the following witnesses: Mr G. Brown, Warden for PI/RTC; Ms S. Goodwin, CO, CX-02 – Security Intelligence Officer (SIO); Ms K. Blakeway, Acting Regional Manager for CSC's Offender Management System (OMS).

[18] According to the respondent, HSO Davey did not err in his finding of no danger. The respondent submitted that armed and unarmed escorts are normal conditions of employment, and for a condition to become a danger, it must increase the normal risk to an abnormal level. The respondent submitted that the escort of Inmate A did not increase the risk to such a level. Furthermore, it was argued that the only evidence of danger that the appellant was able to produce is based on speculative scenarios.

[19] Mr Jaworski's contention that the unarmed escort of Inmate A constituted a normal condition of employment is based on jurisprudence from several cases. The respondent submitted that the risk in this situation is derived from the fact that Mr Unger's duties are performed in a work environment which involves working with inmates that are potentially violent. That is, his constant interaction with offenders that are potentially violent is a normal condition of employment, and therefore, the danger associated with an escort is a normal condition of employment.

[20] The respondent further contended, based on decisions of the Canada Appeals Office[4] (CAO) in *Johnstone* and *Canada (Correctional Service)*[5], *Moore* and *Canada (Correctional Service)*[6] and *Jeanson* and *Canada (Correctional Service)*[7], that in order for an escort to cease being a normal condition of employment, and to become a danger, the risk must be increased to an abnormal level. Namely, it must be established that there was a real or potential danger, and not simply a hypothetical one.

[21] The respondent argued that there is, in fact, no evidence that the unarmed escort of Inmate A ceased to be a normal condition of employment and increased the risk to an abnormal level. As evidence of this, Mr Jaworski provided the following with regard to Inmate A:

- He is well adjusted, well behaved and compliant;
- he has had several medical escorts without incident;

[4] Now known as OHSTC
[5] CAO, Decision No. 05-020
[6] CAO, Decision No. 02-032
[7] CAO, Decision No. 01-023

- he has successfully completed a treatment program;
- he has had several private family visits without incident;
- he worked within the institution in a competent and efficient manner;
- he had a positive relationship with his case management team;
- he has no connections to any gang or organized crime group;
- he has not attempted any escape;
- he has no institutional charges and there was no intelligence within the institution indicating any issues;
- his escape history consists of a period where he went UAL from community supervision, not while he was in secure custody; and
- his diagnosis with PPD cannot, in and of itself, support any conclusions as to the risk posed.

[22] Mr Jaworski argued further that the only evidence of danger that the appellant was able to produce was based on speculative scenarios. Such scenarios included situations where COs suspected that the inmate had hidden escape tools and chose not to do a strip search, where the inmate knew the time and location of the escort, where the medical office was not searched by the COs, and where restraint equipment was removed. In addition, the respondent submitted that many of the appellant's scenarios were in the context of the risk that the inmate would try to assault escort officers or escape while supervised by two officers and while wearing handcuffs and leg irons. In addition, it is argued that there is no evidence that arming the COs would make the escort less dangerous or act as a deterrent.

[23] The respondent concluded by submitting that this case can be distinguished on the facts from the decision of danger in *Vandal*, which found that the unarmed escort of an inmate was a danger. This decision was based on that particular inmate being a high-profile contract killer, who was associated with a criminal organization, and who was known to have a price on his head. None of those factors were present in the unarmed escort of Inmate A.

[24] Finally, the respondent provided several reasons why Warden Brown's assessment of risk should be given more weight than that of Mr Unger. With regard to Mr Brown; he has 30 years of experience working in corrections; he has significant experience working with mental health professionals; he conducted graduate level research relating to mental health; and he followed the protocol set out in the Commissioner's Directives on Security Escorts number 566-6 (CD 566-6) in determining the security arrangements of the escort. Conversely, Mr Unger's assessment of risk was based on; conjecture; incorrectly identifying Inmate A as a "dangerous offender"; a misunderstanding of the significance of PPD; and he ignored previous Escorted Temporary Absence/Work Release Permits (ETAs), observation reports and casework records.

Appellant's reply

[25] In reply to the respondent's submissions that Mr Unger faced only normal conditions of employment, the appellant reiterated its position that the unarmed escort of Inmate A is not a normal condition of employment because the danger could have been controlled through the issuance of protective equipment, in this case a firearm.

[26] In reply to the respondent's contentions that the appellant's evidence was speculative, and that the unarmed escort was not a danger, Ms Dupuis-Langis reiterated the position that Mr Unger had reasonable grounds to believe that the unarmed escort would be a danger. To be precise, based on his experience as a CO, Mr Unger was in the best position to determine whether or not there was reasonable cause to believe there was a danger. It is further contended Mr Unger's reasonable grounds to believe there was a danger supported his reasonable expectation of danger.

[27] The appellant further submitted that *Vandal* does apply to this case with regard to the principles it states:

1. The Code takes precedence over the *Corrections and Conditional Release Act*;
2. the appeals officer has the jurisdiction to take actions needed to protect employees if the employer's policies disregard health and safety;
3. in order to be a normal condition of employment, a danger must be such that it cannot be controlled through protective measures set out in the Code; and
4. the subjective criterion of reasonable cause to believe.

[28] With regard to the above item four, the appellant again submitted that Mr Unger's evaluation of the existence of danger established a reasonable expectation of injury.

[29] In the end, the appellant argued that the respondent's submission that there was no danger was a biased assessment based on inaccurate information. Specifically, Ms Dupuis-Langis argued that the assessment of the risk was based on behaviour within a secure perimeter facility and not outside of the institution, that offences committed outside the institution were inappropriately disregarded because they occurred some time ago, and that previous successful escorts of the inmate are not pertinent because the previous escorts were armed.

Analysis

[30] I have to determine whether, at the time of the refusal, Mr Unger was exposed to a danger as that term is defined in ss. 122(1) of the Code.

[31] The term "danger" is defined under ss. 122(1) as follows:

> "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;

[32] The Federal Court and the Federal Court of Appeal in *Verville* v. *Canada*[8] and *Martin* v. *Canada (Attorney General)*[9], determined that to find that a "danger" exists:

- There has to be a hazard, condition or activity that can reasonably be expected to cause an injury or illness to an employee, which may not happen immediately upon exposure, but needs to happen before the hazard, condition or activity is altered.
- It is not necessary to establish precisely the time when the hazard, condition or activity will occur, but only to ascertain in what circumstances it could be expected to cause injury and establish that such circumstances will occur in the future, not as a mere possibility, but as a reasonable one.

[33] Moreover, Madame Justice Gauthier, in the Federal Court *Verville* decision, noted that:

- Reasonable expectation of injury cannot be based on hypothesis or conjecture, but if a hazard or condition is capable of coming into being or action, then it should be covered by the definition.
- There is more than one way to establish that one can reasonably expect a situation to cause injury. It is not necessary to have proof that someone else has been injured in exactly the same circumstances; a reasonable expectation could be based on expert opinions or even the opinion of ordinary witnesses having the necessary experience.
- A reasonable expectation of injury could even be established through an inference arising logically or reasonably from known facts.

[34] I will concentrate on key elements in the danger definition which will assist me in determining whether or not a danger existed for Mr Unger. I will ask the following two questions which must be answered in the affirmative for a danger to exist:

1. Was there an existing or potential hazard, condition or any current or future activity?

2. Was there a reasonable expectation that an exposure to the hazard, condition or activity would have caused injury or illness to a person exposed to it?

[8] 2003 FC 1158
[9] 2005 FCA 156

1) Was there an existing or potential hazard, condition or any current or future activity?

[35] The potential hazard that I must assess in this matter is the unarmed escort of Inmate A. It is important to note that the work refusal was limited to the unarmed escort of this particular inmate.

[36] Having determined that a potential hazard exists, I will now determine if there is a reasonable expectation the hazard will cause injury.

2) Was there a reasonable expectation that an exposure to the hazard would have caused injury or illness to a person exposed to it?

[37] As discussed in *Verville,* in order to establish whether a danger exists it is necessary to ascertain the circumstances in which the hazard is expected to cause injury, and to establish that there is a reasonable possibility that these circumstances will occur.

a) In what circumstances could the hazard cause injury?

[38] According to *Verville,* the definition does not require that the "danger" cause an injury every time the condition or activity occurs. The French version, "susceptible de causer" indicates that it must be capable of causing injury at any time but not necessarily every time. Therefore, I must identify circumstances in which the condition might be capable of causing injury at any time. The evidence disclosed, and the appellant argued, several possible circumstances where the hazard might be capable of causing injury. They are listed as follows:

- A situation where no body-cavity search is done, the inmate conceals escape tools in his body cavities, and is able to remove these tools, potentially in the transport van when he is not in sight of the COs, and uses them to remove his restraints, and then harms COs in efforts to escape;
- a situation where the inmate becomes aware of his ETA in advance and plans an escape, perhaps with conspirators because the inmate waits in the same waiting room as other patients;
- a situation where there are potential weapons or escape tools hidden in the doctor's office, because the COs are not able to search the doctor's office thoroughly before entering, and the inmate is able to obtain these tools and use them to harm COs, or remove his restraints and then harm COs;
- a situation where restraints are removed for the purposes of the medical examination and the inmate is able to injure the COs;
- a situation where the inmate is able to injure COs while wearing restraints;
- a situation where the inmate attempts to injure COs who do not use OC spray because it is better to not use it in a medical setting;

- a situation where the inmate attempts to injure COs and the use of OC spray is ineffective because the inmate has an unusual tolerance to OC spray; and
- various combinations of the above scenarios.

b) Is there a reasonable possibility that these circumstances will occur?

[39] The ways in which a reasonable expectation of injury may be established, as set out in *Verville*, will assist me to determine whether there is a reasonable possibility that the above circumstances could occur. Therefore, I will determine the reasonable possibility of these circumstances arising by applying the *Verville* criteria to the evidence before me.

i. It is not necessary to prove that someone else has been injured in the same circumstances

[40] Though it is not determinative of the issue that the above circumstances have not arisen and that no COs had previously been injured by Inmate A, it does remain important for me to consider. Inmate A had been taken on eight previous ETAs and there had been no attempts at violent attacks on COs during any of these escorts. The appellant has argued that the incident involving CO Philbey and Inmate A, when he became agitated during that escort because he was told he could not have his handcuffs removed to use the washroom, demonstrated the potential for these circumstances to occur and thus result in an injury.

[41] In reality, the incident with Ms Philbey demonstrated to me nothing more than Inmate A's understandable frustration in response to an injury to his dignity. In the circumstances, Inmate A's response to the situation does not support the appellant's contention. In the alternative, the appellant contended that these escorts are not comparable because they were all armed, again I disagree. No evidence was adduced that established that a firearm in these circumstances had any dissuasive effect, and thus distinguished the escorts.

[42] In addition to the evidence specific to Inmate A, the evidence from Warden Brown indicated that injuries on medical escorts are extremely rare. Mr Brown testified that between 2005 and 2008, there had been nine thousand escorts outside of institutions in the Pacific Region alone. This amounts to thousands of medical-type escorts every year that occur without incident. Though a reasonable possibility that the above circumstances could occur, and thus cause injury, can be established without the occurrence of previous incidents; this evidence remains relevant in the overall determination of this case.

ii. Reasonable expectation can be based on the opinions of ordinary witnesses having the necessary experience

[43] Whether there is reasonable possibility that the above circumstances will occur, and thus cause injury, can be based on opinions of qualified witnesses. Both the appellant and respondent argued that their witnesses are most qualified and, therefore, their assessments at the time of the work refusal should be determinative. To be clear, my determination of a reasonable expectation of injury is not based on what the parties knew at the time, but

[44] This is not to say, however, that I cannot look to the parties' assessments at the time of the refusal to consider whether they establish a reasonable expectation of injury, if I find the witnesses to be sufficiently qualified to make this assessment. This would necessarily depend on what information each party had at the time of the work refusal.

[45] The appellant argued that Mr Unger's assessment of the situation should carry weight because he has 10 years of experience working in corrections, he works everyday with prisoners exclusively conducting escorts, but he had no previous contact with Inmate A. The information known to him at the time of refusal is disputed. I do not need to make a determination on what exactly Mr Unger knew, because at best, he knew that Inmate A was diagnosed with PPD, that his previous escorts were armed, the incident on an ETA with Ms Philbey, SIO reports about a dispute around hobby crafts with another inmate, that he was UAL for six years, and the inmate's record of offences. In addition, Mr Unger did not understand the meaning of a PPD diagnosis.

[46] With respect to the assessment of Mr Brown, he has thirty years experience working in corrections; he has experience working in mental health, has done graduate level work in the field of mental health, but has no contact with inmates on a daily basis, and had no previous contact with Inmate A. His assessment on the day of refusal was based on the TRA criteria set out in CD 566-6, the inmate's security classification review, that there was no security intelligence suggesting a plan for escape, and that Inmate A was 53 years old, progressing well in his sentence, and twenty months from statutory release. Additionally, Mr Brown indicated that the reference by the CM to PPD in section (b) of the TRA was an indicator to him as to how the CM's assessment in sections (a) to (c) of the TRA was conducted, and how the CM's recommendation was made. Mr Brown testified that no conclusions as to risk can be made on the basis of a PPD diagnosis.

[47] Given Mr Unger's qualifications and the information upon which he based his assessment of danger, I cannot find that his belief of danger established a reasonable expectation that the hazard would cause injury. Mr Unger based his decision on very little information, some of which was irrelevant and some of which he seemed to misunderstand.

[48] On the other hand, the assessment of the Warden was based on more relevant information largely involving personal characteristics of Inmate A and the results of the TRA. The appellant argued that the use of the TRA is not sufficient to determine reasonable expectation of injury. I agree with the appellant in this respect, however, this does not mean that the TRA is not useful to this determination. The decision in *Vandal* indicates that the TRA is not determinative of the assessment of danger because its purpose is to evaluate the risk that an inmate represents based on institutional behaviour, not to ensure that employees are protected in performing their duties. However, the decision made in the TRA is still a significant consideration because here, unlike *Vandal*, the potential hazard is essentially based on the behaviour of the inmate.

[49] For that reason, in considering the parties assessments of danger at the time of refusal, I find that Mr Brown's assessment was based on accurate and relevant information. I am thus more inclined to give some weight to his determination.

iii. Reasonable expectation cannot be based on hypothesis or conjecture

[50] Whether there is a reasonable possibility that the above circumstances will occur, and thus a reasonable expectation of injury, cannot be based on hypothesis or conjecture. The appellant has provided many scenarios that, if they were to occur in a particular order or in a chain of unfortunate events, could potentially result in injury. Without a doubt, the circumstances in which the situation could cause injury are highly speculative and are based on the piling of hypothetical situations upon one another.

[51] The reality is that the inmate in question is a fifty-three year old man whose history of violence is limited to sexual offences. He has no record of institutional violence or violence against COs. Also, he has never attempted to escape from a secure facility and there was no intelligence to indicate that there was a threat of escape in this instance. In addition to that, he has a positive relationship with his case management team and there is no indication of substance abuse. Lastly, there appears to be no motivation for the inmate to harm the COs in order to attempt an escape, because he is approaching his statutory release date.

[52] Certainly there is some possibility that the unarmed escort of Inmate A could cause injury. The situation in which Mr Unger works involves human behaviour, a degree of which will always be unpredictable. However, this unpredictability may amount to a mere possibility that the circumstances that could be expected to cause injury may arise, but it certainly does not amount to a reasonable possibility. There is simply no reasonable possibility that the above circumstances will occur, thus no reasonable expectation that the potential hazard in this case will cause injury and as a consequence, no danger.

[53] Given that I find that the appellant was not exposed to a danger as that term is defined in ss. 122(1) of the Code, the issue regarding normal conditions of employment need not be addressed.

Decision

[54] For all the reasons above, the decision that a danger does not exist rendered by HSO Davey on March 1, 2010 is confirmed.

Michael Wiwchar
Appeals Officer