

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canada Post Corporation v. Heather Manuel, 2011 OHSTC 9

Date: 2011-05-03
Case No.: 2011-12 &
2011-26
Rendered at: Ottawa

Between:

Canada Post Corporation, Applicant

and

Heather Manuel, Respondent

Matter: This concerns an application for a stay of two directions

Decision: The application for a stay of the directions is denied

Decision rendered by: Mr. Richard Lafrance, Appeals Officer

Language of decision: English

For the applicant: Mr. Peter MacTavish, counsel - Bird Richard

For the respondent: Ms. Heather Manuel, employee representative - RSMC

Canada

REASONS

[1] This concern two applications for a stay of directions filed on February 17, 2011 and April 6, 2011 respectively by Canada Post pursuant to subsection 146(2) of the Code. The directions were issued by Health and Safety Officer (HSO) Daniel Roy on January 20, 2011 and March 9, 2011.

Background

[2] The directions under appeal were issued by the HSO following his investigation of work refusals by Rural and Suburban Mail Carriers (RSMCs).

[3] In its application for appeal of April 6, 2011, Canada Post requested both appeals (2011-12 and 2011-26) be heard simultaneously since they both dealt with the same issues and had been investigated by the same HSO. As well, Mr. MacTavish, counsel for Canada Post, requested a stay of the directions until the cases could be heard and a decision rendered by an appeals officer.

[4] At a hearing held by teleconference on April 12, 2011 to receive arguments on the stay application, I decided to join both appeals for the purpose of the stay application. However, I indicated that a decision to hear both cases simultaneously on their merits would be dealt with at another teleconference which would be held later on with all the involved parties.

[5] As there are two directions under appeal in both cases and as Canada Post is requesting a stay for all four directions, I will divide my decision in two parts. First, I will look at the directions issued under subsection 145(2) in both appeals and then I will deal with the directions issued under paragraph 145(1)(b) of the *Canada Labour Code* (the Code).

Analysis

[6] Subsection 146(2) of the Code states that:

Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.

[7] I derive my authority from the Code, and must therefore exercise my discretion in a way that furthers the objective of the legislation *i.e.* the protection of the health and safety of employees.

[8] In the exercise of my discretion to grant a stay, I have applied the following criteria:

- 1) The applicant must satisfy the Appeals Officer that there is a serious question to be tried as opposed to a frivolous or vexatious claim.
- 2) The applicant must demonstrate that he would suffer significant harm if the direction is not stayed.
- 3) The applicant must demonstrate that should a stay be granted, measures will be put in place to protect the health and safety of employees or any person granted access to the work place.

Directions issued under paragraph 145(2)(a) in both appeals

[9] A direction was issued under subsection 145(2) of the Code for each appeal. These directions are exactly the same in both appeals except for the rate of delivery and the time spent delivering the mail, through the passenger side window.

[10] Below, I will reproduce the two directions with an indication of the appropriate distinctions:

The said health and safety officer considers that the performance of an activity constitute a danger to the employee while at work;

The employees cannot move safely from the driver's seat to the passenger seat of their vehicles to deliver mail to rural mail boxes without engaging in repetitive and awkward bending/twisting positions.

[Case No. 2011-12] This activity is performed on average for the seven employees, at a rate of more than 12.5 RMB/hr.

[Case No. 2011-26] This activity is to be performed 105 times during a three hour period.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to alter the activity that constitute a danger immediately.

Is the question to be tried serious as opposed to frivolous or vexatious?

[11] I agree with the arguments put forward by Mr. MacTavish, counsel for the appellant, that this is a question dealing with health and safety ramifications and as such is neither frivolous nor vexatious. I believe that the consequences of the decision may in any event affect the manner in which the assessments of ergonomic issues regarding mail deliveries to RMBs by RSMCs will be conducted in the future. Consequently, I find that there is a serious issue to be tried.

Will the applicant suffer significant harm if the directions are not stayed?

[12] On this, Mr. MacTavish argued that Canada Post would suffer significant harm should the directions not be stayed because it would affect the integrity of the process put in place to deal with complaints on ergonomic issues. He further explained that a special joint committee was put in place more than two years ago to deal with complaints on ergonomic issues and asserted that this was functioning very well.

[13] In addition, Mr. MacTavish stated that although monetary harm should not be part of the equation in determining if a stay is warranted, the cost of providing ergonomic assistants to RSMCs could become substantial as past experience have demonstrated. Canada Post could suffer substantial harm if a stay is not granted as this issue could extend to other work refusals in other areas of the country.

[14] On this I disagree with Mr. MacTavish; granting a stay does not remove the right to refuse for other employees who have reasonable cause to believe that they are exposed to a danger.

[15] Mr. MacTavish affirmed that on the balance of inconvenience, the RSMCs are well protected with the present assessment process and would not suffer any harm

[16] On this I disagree as well with Mr. MacTavish because, as told by the employee representative, the RSMCs regularly disagree with committee on their assessments, as they believe that having to deliver mail through the passenger side window expose them to a danger. The fact that there are now two work refusals, and that Canada Post anticipates that this may expand to other areas of the country, indicates to me that there might be something amiss with the assessment process.

[17] I believe that if I order a stay the directions, the employees may be the ones to suffer the greater harm by having to distribute mail through the passenger side window of their vehicle and be exposed to a potential hazard that has been so far identified and described as a danger by the HSO.

[18] The term “significant” is defined in the dictionary¹ as meaning “*noticeable, measurably large; of great importance or consequence, noteworthy, noticeable*”. This in my mind means that the significant harm should be as stated above; a harm of great importance or consequence. Thus far, the only harm that Canada Post seems to suffer is to have to provide, as an interim measure, an “ergonomic” assistant to those employees identified in these two cases. This, in my view is not a harm of great importance or consequences.

[19] As a result, I find that Canada Post has failed to meet the second criterion. Since the three criteria have to be met to warrant a stay of the directions, it is unnecessary for me to consider the last criterion.

[20] I will apply the same criteria to the directions issued under subsection 145(1) of the Code to determine whether a stay is warranted.

Directions issued under subsection 145(1) in both appeals

[21] The directions issued under subsection 145(1) state:

The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:

125(1)(u) Canada Labour Code, Part II

The employer will ensure that the work place, work space and procedures meet prescribed ergonomics standards.

Also, 19.4 Canada Occupational Health and Safety Regulations

The employer shall identify and assess the hazards in the work place, including ergonomics related hazards, in accordance with the methodology developed under section 19.3 taking into account

(a.1) in the case of ergonomic related hazards, all ergonomics related factors such as

- i) the physical demands of the work activities, the work environment, the work procedure, the organisation of the work

¹ The Dictionary of Canadian Law, Third Edition, 2004 & Concise Canadian Oxford Dictionary, 2005

and the circumstances in which the work activities are performed, and

ii) the characteristics of the materials, good, persons, animals, things and workspaces and the features of tools and equipment.

The employer has not in consultation with the Policy Committee and the Work Place Health and Safety Committee conducted a hazard assessment for each employee delivering/receiving mail through her vehicle passenger side window at rural mail boxes. This assessment should have included, but not have limited itself to, addressing potential hazards of engaging in repetitive and awkward bending/twisting positions to reach and sort mail located in the back of the vehicle, to handle mail across the passenger seat, and to reach to/from the rural mail box through the passenger window. The assessment should have examined the RSMC's anthropometry, (i.e. variation of people's size strength, endurance), and other variables such as the vehicles design, RMB design (including location and maintenance) and seasonal variations.

Therefore, you are **HEREBY DIRECTED**, pursuant to paragraph **145(1)(b)** of the *Canada Labour Code*, Part II, to immediately take steps to ensure that the contravention does not continue to reoccur.

Is the question to be tried serious as opposed to frivolous or vexatious?

[22] I agree again with the arguments put forward by Mr. MacTavish that this is a question dealing with health and safety ramifications and as such is neither frivolous nor vexatious. I also believe that the consequences of the decision may in any event affect the manner in which the assessments of ergonomic complaints may be conducted in the future. Consequently, I find that there is a serious issue to be resolved.

Will the applicant suffer significant harm if the directions are not stayed?

[23] In the opinion of the Health and Safety Officer, the employer did not properly assess the hazards in the work place, including ergonomics related hazards, and he directed the employer to do so in consultation with the Policy and work place health and safety committee.

[24] Mr. MacTavish produced two affidavits to support the stay application. One was from Mr. John Thomas, Director, Labour Relations for Canada Post Corporation. The other one was from Mr. Marnie Armstrong, Director, Rural Mail Safety Review. Both Directors stated that they had knowledge of the situation at hand.

[25] Mr. Thomas described a complaint of unfair labour practice that the Canadian Union of Postal Workers (CUPW) has made against Canada Post to the Canadian Industrial Relations Board (CIRB). This only tells me that the parties came to a mediated agreement to (temporarily) set up a joint committee to review ergonomics complaint. Other than telling me how they came to set up such a joint committee, this has no weight in my view with regard to the stay application.

[26] The affidavit from Mr. Armstrong reiterates this information, in addition he explains what the committee does with complaints about ergonomic issues from RSMCs and how they come about to implement the final decision of Canada Post on the matter.

[27] Mr. Armstrong states that should the process in place be overturned, this would result in having Canada Post having to approve all requests for an ergonomic assistant from RSMCs. This, he believes, would be an extraordinary cost to Canada Post which is already at 13 million dollars a year for the whole country. He also affirmed that a stay of the HSO's directions would prevent the significant harm that would result to the special committee process and allow the parties to continue their joint work in assessing requests for ergonomics assistants.

[28] Mr. MacTavish argued that the directions are useless as the employer is already assessing the ergonomic complaints in consultation with a national member of the policy committee. By not granting a stay of these directions; and preventing the special committee to do its work of ergonomic assessment, this will be harmful not only to Canada Post, but to the employees as well. He maintained that presently the committee is in a better position and better qualified than anyone else to make the assessments. He surmised that the employees are better protected with the work of the special committee already in place, rather than with what is requested in the direction.

[29] Taking into consideration the above, I do not believe that Canada Post will suffer significant harm should I grant a stay of the direction.

[30] The directions apply to one postal office only, situated at 203 Waggoners road in Fredericton. This does not prevent the committee from continuing their work in any other postal office of the country. Granted, this situation may eventually extend to other areas if the situation is not dealt with in haste. However, this is presently a local issue, and the harm caused is, I believe, minimal.

[31] Mr. MacTavish did not convince me that the harm that would be suffered by Canada Post would be of great importance or consequence should I not grant the stay.

[32] Having found that Canada Post has failed to meet the second criterion and given that all three criteria have to be met for a stay to be granted, it is unnecessary for me to consider the third criterion.

Decision

[33] Canada Post's application for a stay of the directions issued by health and safety officer (HSO) Daniel Roy on January 20th 2011 and March 9, 2011 is denied.

Richard Lafrance
Appeals Officer