Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: DP World (Canada) Inc. v. International Longshore and Warehouse Union, Local 500 et al., 2011 OHSTC 17

Date: 2011-08-09
Case No.: 2010-43 and 2010-45
Rendered at: Ottawa

Between:

DP World (Canada) Inc, Appellant, Respondent

and

International Longshore and Warehouse Union, Local 500, Appellant, Respondent
John Sullivan and Gino Guzzo, Respondents

Matter:	Appeal and cross-appeal under subsection 146(1) of the *Canada Labour Code* of two directions issued by a health and safety officer
Decision:	The objection to jurisdiction is dismissed
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant/respondent:	Mr. Alan D. Winter, Counsel, - Harris & Company LLP
For the respondents/appellants:	Ms. Stephanie Drake, Counsel, - Victory Square Law Office LLP

REASONS

[1] This concerns an appeal and a cross-appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) of two directions issued by a Health and Safety Officer (HSO) on October 25, 2010.

Background

[2] This case involves appeals filed by two parties against directions issued by HSO P. Wong on the date mentioned above. On that date, two directions were issued to DP World (Canada) Inc. (DP World), a stevedoring undertaking. These directions relate to a particular grain loading operation on-board ships, said operation concerning the loading of grain during inclement weather through cement loading holes in the cargo hatch cover of a vessel. The investigation by HSO Wong that resulted in the issuance of the two directions was caused by the refusal to work registered by respondents John Sullivan and Gino Guzzo regarding such an operation being conducted aboard a ship at the James Richardson International Grain Terminal, in Vancouver, British Columbia.

[3] The first direction issued by the HSO to DP World, designated for ease of comprehension as PW Oct. 25, 2010, is being appealed by both DP World and the International Longshore and Warehouse Union, Local 500 (ILWU). It is directly related to a direction previously issued to DP World in 2007 by another HSO concerning the same grain loading operation, and following which DP World had retained the services of an expert, Genesis Engineering Inc. (Genesis) to investigate, conduct testing and provide a report on the safety of loading grain through cement loading holes in cargo hatch covers and to approve safe working procedures for undertaking such loading operations. This investigation by Genesis eventually led to a final report which included an attachment entitled "Manual Opacity Probe" that described the design and operation of an opacity probe for use in satisfying one of the safety precautions stipulated in the Genesis report conclusions.

[4] This report led to the development of a draft safe work procedure, entitled "Pouring Grain through Feeder Holes-Draft Procedure, January 19th, 2010", that set out detailed procedures for loading grain through cement loading holes in cargo hatch covers. That procedure included a mechanism and process for monitoring dust levels through visual opacity testing using a Manual Opacity Probe, as recommended in the Genesis final report. Once this had been submitted to the originating HSO, the latter found and confirmed in writing that the requirements of his direction had been complied with. That communication by the HSO also indicated that the employer was required to consult with the work place health and safety committee prior to finalising said safety procedures.

[5] As a result of the above conclusion by the HSO, the employer DP World abandoned the appeal it had launched against that direction.

[6] As stated above, this first direction issued by HSO Wong, is being appealed by both DP World and ILWU. The direction requires from DP World that it have a competent

person evaluate "the findings of Genesis Engineering Inc. Report and address the concerns raised by ILWU, local 500, about the opacity probe used for grain loading". In the case of DP World, its appeal raises three grounds which are stated in the alternative. For the purpose of this decision, only the first ground of appeal will be dealt with. As a primary ground of appeal, it is DP World's contention that the HSO erred in law and exceeded his jurisdiction in issuing the direction. According to the appellant, this direction addresses matters that have already been addressed in the 2007 direction issued to the employer that led to the Genesis report. That report had been followed by a finding of compliance by the HSO who had originated the 2007 direction. According to the appellant DP World, HSO Wong, originator of the present direction, does not have the statutory authority or jurisdiction to overturn or contradict an earlier direction and compliance ruling made by another Health and Safety Officer and accordingly, the direction should be rescinded.

[7] The grounds of appeal formulated by appellant ILWU against this direction are of a different substance and will be enunciated and dealt with in a subsequent decision, should there be need of one following my decision on this first ground raised by DP World.

[8] The second direction, that which is addressed to the two refusing employees Sullivan and Guzzo (PW Oct 25, 2010 A) and directed that they not use or operate the opacity probe used for grain loading until the direction addressed to DP World had been complied with is being appealed solely by DP World.

Issue

[9] On this first ground raised in the appeal by DP World, the issue, in simple terms, is whether, in investigating a refusal to work by an employee or employees, a Health and Safety Officer is bound by the conclusions and directions arrived at and issued by another Health and Safety Officer investigating a previous case presenting considerable similarities with the matter being investigated, such that the HSO would be deprived of jurisdiction to act as he did.

Submissions

Submissions by DP World

[10] As stated above, appellant DP World first questions the statutory authority or jurisdiction of a Health and Safety Officer to issue directions that effectively overturn or contradict earlier directions and compliance rulings made by another safety officer. According to DP World, by issuing the direction he did, HSO Wong was effectively overturning the earlier conclusion by another HSO that the final Genesis Report and the resulting safe work procedures met the prerequisite of being "proper documentation and procedures approved by a competent authority", and this without sufficient evidentiary basis.

[11] It is the appellant's position that these most recent directions (2010) contain no information, address no concerns and direct the appellant to do nothing that had not already been addressed in the previous direction and compliance letter By HSO D'Sa in 2007. The appellant DP World thus submits that by his directions, HSO Wong is essentially requiring the appellant to take actions it has already taken and that had been approved by the 2007 HSO. As such, this equates to the HSO reconsidering and effectively overturning or varying the previous HSO (2007) direction, something HSO Wong did not have jurisdiction to do under the Code, as only an Appeals Officer, under sections 146 and 146.1 of the Code, has the authority to reconsider, overturn or vary a direction or compliance ruling of an HSO.

Submissions by ILWU

[12] The position put forth in reply by respondent ILWU is that this case originated with a refusal to work and that the response by a HSO to a refusal, in this case directions, is based on the specific facts and circumstances of the refusal and it is not possible to have a direction that prevents a refusal of one particular type of work permanently, irrespective of the circumstances and working conditions. Health and Safety Officers have broad investigative jurisdiction and mandate in the case of work refusals and they must do a factual investigation to determine, on the specific facts of the case, whether there is danger, present or prospective.

[13] As such, a compliance letter provided by a HSO relative to a specific case, based on its own specific set of facts and circumstances, cannot restrict in perpetuity new directions regarding a similar subject matter. Rather, a HSO must have the jurisdiction on each new set of facts to make a fresh determination of whether a danger exists on the facts newly collected by the HSO. To conclude otherwise would amount to an unwarranted fettering of a HSO discretion, contrary to the Code.

Submissions in rebuttal by DP World

[14] In rebuttal, appellant DP World argues that contrary to the position set forth by the respondent, the triggering events to the 2007 and 2010 directions were essentially the same, and the same can be said of the employees' concerns that brought about the refusals and the HSO investigations in 2007 and 2010. In fact, the concerns expressed by the employees in 2010, while of the same nature, were in fact much narrower in focus, and the concern raised in 2010 about the visual opacity probe used for grain loading had already been addressed and thus the 2010 HSO Wong directions cannot be characterized as "fresh directions".

[15] In conclusion, appellant DP World's position is to the effect that the legislative scheme at Part II of the Code should not be interpreted to accept that work refusals can be repeatedly resorted to by a party until that party ends up getting the conclusion or finding it has been seeking and not getting through previous action.

Analysis

[16] The position formulated by appellant DP World relative to this first ground of appeal would essentially have the undersigned proceed to conduct a comparative exercise to determine whether in facts, circumstances and issues, there would be similarities between two cases dealt with by two separate health and safety officers at two different times such that one could conclude that the later case would be on all fours with the previous case and that for this reason, the later health and safety officer would be bound in his own investigation conclusions and findings by those arrived at by the first health and safety officer. This, I have no intention of doing, first because it is not necessary and second, because in my opinion, such an interpretation as put forth by the appellant DP World is not supported by the statute.

[17] The case at hand was initiated by the work refusals registered by respondents John Sullivan and Gino Guzzo. The process for dealing with work refusals is established by the Code at sections 128 and 129. While at section 128, one finds what one may refer to as the in-house process for dealing with work refusals by employees of an employer who raise one or more of the reasons for refusal stated by the Code, one can view section 129 as the starting point of the intervention of the health and safety officer in the process, once the in-house part of the process has failed.

[18] The wording of subsection 129(1) makes it very clear first, that upon continuing to refuse to work and informing or having informed a health and safety officer of such a decision, the refusing employee continues to "justify" his or her refusal by invoking the same reasons, thus the same facts and circumstances as those raised at the in-house stage ("the employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13)" of the Code where, pursuant to such 128(13), the employee has so informed his or her employer because the employee "has reasonable cause to believe that the danger continues to exist"). Second, section 129 (ss. 129(1)) makes it mandatory on a health and safety officer to investigate or cause to have investigated the matter. Furthermore, that same section 129, at subsection (4), also makes it mandatory for the investigating health and safety officer, upon completing the investigation into the facts and circumstances of the matter referred to the health and safety officer under subsection 129(1), to issue a decision and to immediately notify the interested parties to wit, the employer and employee, of the decision. Clearly then, the case from which originate the investigation and decision of the HSO must stand on its own facts and circumstances and it is those facts and circumstances that must be at the root of the investigation and decision of the HSO, not those that relate to a previous one, however much they may be similar.

[19] One cannot ignore however that in considering the decision to be formulated in the case with which he is seized, a health and safety officer may come across or be informed of conclusions and decisions by other health and safety officers in cases that would present similarities of various degree, including, as in the present case, a very high degree of similarity, and that in the end, the decision formulated by the HSO may be seen as being in contradiction with or altering such preceding decision. Should then the HSO

feel restricted in the decision to be formulated by such preceding decisions to the point of being bound by such. I think not for a number of reasons. First, as stated earlier, each case must and does stand on its own facts and circumstances and the authority of the HSO is restricted to that case and not consideration of whether he or she should align his or her thinking to that which governed the preceding case which, is it necessary to state, had to also be decided on its own facts and circumstances. Second, to adhere to the reasoning put forth by appellant DP World would mean that one would need to ignore that the passage of time may colour or alter perception, comprehension and interpretation of facts and circumstances by one HSO and even more so by different health and safety officers. In this, I am in agreement with the position formulated by ILWU that a previous decision cannot restrict in perpetuity the formulation of new decisions regarding similar subject matters. Third, I disagree with the position put forth by the appellant that by issuing a decision or direction that can be seen as contradicting a previous decision by another HSO on circumstances that offer a high degree of similarity, the HSO is effectively usurping the function of an appeals officer. As stated earlier, the role of the HSO is to make a determination on the facts and circumstances of the case of which he or she is seized, not on or in relation to the facts and circumstances of previous cases, irrespective of the impact or consequence on previous conclusions and decisions that in essence have no binding effect on the HSO. This latest point serves to validate the existence of an appeals process not involving health and safety officers and where the appeals officer may, in addition to considering the facts and circumstances dealt with by an HSO to formulate his or her conclusion, also consider other conclusions and decisions in ascertaining the validity of the conclusion arrived at by the HSO. That is quite different from the role of the HSO. Finally, the point needs to be made that neither an HSO nor an appeals officer is bound by decisions made by other HSOs or appeals officers. While one may consider that those may have some persuasive authority, this in no way should be seen as having any coercive effect on a HSO or appeals officer.

[20] In this regard, I draw support from the writings of Macaulay and Sprague in *Hearings before administrative tribunals*, third edition, at p.6-6 and seq., who state as follows:

> Decisions of administrative agencies do not create precedents for anyone, including the agency. They are, at best, persuasive. While agencies should strive for consistency, they are not bound by a mechanistic application of earlier administrative decisions. Rigid adherence to consistency can discredit an agency's ability to improvise or adapt. (...)
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> The question as to the role of precedent for agencies most commonly arises in one of two situations: i. where an agency is empowered to consider an issue involving the same party on a regular or periodic basis (e.g. rate setting); ii. where an agency is required to adjudicate an issue similar to that in other cases. In either case, the prevailing rule is easy to state: an agency is not bound by its prior decisions. Stated otherwise, the notion of stare decisis is not applicable in the administrative sphere. Agencies are not only at liberty not to treat their earlier decisions as precedent, they are positively obliged not to do so. (...)

> This is clear in respect to matters where the agency has some discretionary authority which it has to decide how to exercise or a decision involves some policy element which the agency is to formulate.

[21] As a final comment regarding the concern expressed by appellant DP World that a dismissal of their position on this first ground of appeal would give credence to the underlying message by ILWU that if at first you fail in getting the conclusion you are seeking from a health and safety officer, all that needs to be done is have its members repeatedly refuse to do the same work until the outcome satisfactory to the Union is achieved, I would simply point out that members of the Union are employees of the employer and that as such, the Code provides the employer, at section 147.1, with authority to take disciplinary action against any employee who the employer can demonstrate has wilfully abused the rights associated with refusal to work.

Decision

[22] Considering all that precedes, the first ground of appeal by appellant DP World is dismissed.

Jean-Pierre Aubre
Appeals Officer