Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Maureen Harper v. Canadian Food Inspection Agency, 2011 OHSTC 19

Date: 2011-08-15
Case No.: 2010-27
Rendered at: Ottawa

Between:

Dr Maureen Harper, Appellant

and

Canadian Food Inspection Agency, 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:	Ms Crystal Stewart, The Professional Institute of the Public Service of Canada
For the respondent	Ms Karen Clifford, Legal Services Treasury Board Secretariat

REASONS

[1] This is an appeal brought under ss. 129(7) of the *Canada Labour Code* (the Code) by Dr Maureen Harper, an employee with the Canadian Food Inspection Agency (CFIA), regarding a decision of no danger rendered by Mr Lewis Jenkins, Health and Safety Officer (HSO), on June 6, 2010, pursuant to ss. 129(4) of the Code.

Background

[2] Dr Harper was employed as a veterinarian with CFIA and her duties included administrative work as well as the inspection of fish and vegetables. The issue between Dr Harper and her employer originated from a sewer odour emanating from the disabled persons washroom that was under construction at that time. The odour's source was caused by a mishap made by a construction worker that was performing renovation work in the building, the situation was subsequently swiftly corrected.

[3] Following this incident, the appellant revealed that she had been having health problems since her arrival to this building and that, according to her, the probable cause was the alleged poor indoor air quality and/or exposure to chemicals or toxins. Her symptoms consisted of head aches, irritation of the eyes, respiratory problems, fatigue and, dizziness.

[4] According to Dr Harper, the building's indoor air quality represented a danger for her and other employees. Besides, other employees of the building also experienced similar symptoms to those of the appellant and eleven complaints were filed with employee members of the work place health and safety committee. Despite the nature of the complaints, the appellant did not exactly know the source of the building's alleged poor indoor air quality. However, she did uncover several elements that could potentially be the cause.

[5] Chronologically, this situation began on February 16, 2010, when Dr Harper submitted a Hazardous Occurrence Investigation Report (HOIR) and subsequently refused to work at the building where she worked. HSO Jenkins began his investigation on June 8, 2010, while her work refusal continued.

[6] On June 22, 2010, HSO Jenkins rendered his decision that a danger does not exist and he also issued a direction ordering that procedures be implemented to test the building's indoor air quality because, as admitted by the employer, such procedures did not exist. On June 23, 2010, Dr Harper filed her appeal of HSO Jenkins no danger decision.

[7] On May 27, 2011, Dr Harper retired from CFIA prior to the hearing of her appeal. Having been made aware of that fact I requested, during the pre-hearing teleconference held on June 7, 2011, that the parties provide submissions to determine whether this appeal was rendered moot by Dr Harper's retirement with the CFIA.

Issue

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

Arguments of the parties

[9] The final arguments of the parties on the mootness issue were received by July 11, 2011.

Appellant's arguments

[10] The appellant argued that I should conclude that the issue is not moot and, alternatively, if I determine that the issue is moot, I should exercise my discretion to hear the appeal on its merits.

The issue is not moot

[11] In support of the appellant's argument that the issue is not moot, it is affirmed that, even though the right to refuse work is a personal right, the matter in general and the circumstances surrounding it involve many employees working in the building where Dr Harper worked. Indeed, the appellant argued, for over two years, CFIA employees complained about alleged poor indoor air quality and many among them submitted HOIRs and invoked work refusals.

[12] Therefore, according to the appellant, since her work refusal is not based on a condition that is specific to her, but pertains to a problem that affects other employees, the issue is not moot. She affirmed that if the Appeals Officer concludes that air quality problems do exist in the building then a direction could be issued that is deemed appropriate in accordance with paragraphs 146.1 and 129(7) of the Code and therefore the situation for employees would be improved.

[13] In brief, the appellant believes that, since the issue related to her work refusal could help employees resolve some of their serious and urgent concerns regarding indoor air quality, the issue cannot be moot.

The Appeals Officer should use his discretionary power

[14] According to the appellant, if I conclude that the issue is moot, nevertheless, I should accept to hear the appeal by exercising my discretionary power.

[15] The first argument presented is that a dispute still exists despite the retirement of Dr Harper. In effect, she stated that she wants to continue the appeal process as does the union and there will therefore be two parties to the appeal.

[16] The second argument made by the appellant is that the Appeals Officer should not refuse to use his discretionary power for the concern of judicial economy. It is the

[17] In addition, the appellant submitted that, if the appeal is heard, this would resolve other work refusals that would have certainly been brought to appeal. As a result, according to the appellant, it is possible to resolve in one instance all work refusals related to indoor air quality at the CFIA building and thus by going forward with the present appeal it would avert others.

[18] Moreover, the appellant also argues that judicial economy should not be taken into account because an appeals officer's decision would improve working conditions for employees of the work place operated by CFIA and could, ideally, ensure that the employer better protects its employees against the potential danger.

[19] The last argument raised by the appellant is that hearing the appeal would not create any infringement by the Tribunal on the government's legislative authority. Finally, it should be noted that the appellant brought forth several decisions of this Tribunal and other Courts to support her allegations.

Respondent's arguments

[20] The respondent argued that the issue became moot after Dr Harper's departure upon her retirement and that I should not exercise my discretionary power to hear the appeal despite its theoretical nature. In support of its assertions, the respondent relies mostly on two decisions: *Borowski* v. *Canada (Attorney General)*[1] and *Tremblay* v. *Air Canada*[2] from this Tribunal.

[21] According to the respondent, on May 27, 2011, upon Dr Harper's retirement, the dispute between CFIA and the appellant ceased to become a live controversy and thus became theoretical. In addition, the respondent argued that the basis for Dr Harper's action was to allow her to personally return to the building where she worked. The actual basis for the refusal disappeared at the time of her retirement.

[22] In support of the respondent's argument regarding Dr Harper's individual right to refuse dangerous work, it cited articles 128 and 129 of the Code that addresses respectively "an employee" and "the employee". Acording to the respondent, the governing legislation makes it clear that the redress is specific to the employee who refuses to work and who then brings an appeal of the finding of no danger.

[23] In regards to the possibility that I exercise my discretionary power to hear the appeal despite the fact that it has become moot, the respondent argued that there is no general public interest for exercising discretion to hear the appeal notwithstanding its

[1] 1989 1 S.C.R. 342
[2] OHSTC 09-004

mootness given that work refusals are statutory limited to the employee in question and therefore cannot be extended to the public at large.

Reply

a) appellant

[24] The appellant attempted to correct certain facts in their reply. In addition, the appellant admitted that the right to refuse to work is an individual right and that other employees should not use it indirectly. However, the appellant reiterated that if I find that a danger exists, this would affect all employees of the work place where the appellant worked. According to the appellant, indoor air quality concerns all employees and a ruling on this matter on the merits would affect and help them.

b) respondent

[25] In their reply to the appellant's submissions, the respondent reiterated that the issue became moot and that the work refusal is an individual right. Furthermore, they also attempted to correct some facts presented by the appellant and replied to jurisprudence analysis. For example, the respondent cited the *Willan and PSAC* v. *HRSDC*[3] decision, where it is stated:

> *"I understand paragraph 128(1)b) to mean that when an employee's refusal to work is based upon the belief that a condition exists in the workplace that constitutes a danger, that danger can only concern the refusing employee, and the refusing employee cannot refuse to work if the dangerous condition concerns other employees"* [respondent's underline]

Analysis

[26] 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.

[3] CAO 07-003

[27] 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."

[28] I would first like to mention that the basis for the appeal is HSO Jenkin's decision that a danger does not exist rendered following his investigation into the refusal to work exercised by Dr Harper who was claiming that the indoor air quality of the building operated by CFIA constituted a danger to her.

[29] The right to refuse dangerous work is an individual right prescribed under subsection 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.
> [my underline]

[30] In subsection 128(1) reference is clearly made to "an employee" and not "to employees". As such, the refusal to work is irrefutably an individual right and applies only to the employee invoking it. Furthermore, it is paragraph 128(1)(b) that applies to a condition such as the one alleged by Dr Harper in this case. Indeed, when the alleged danger pertains to a condition that exists in the work place, an employee may refuse to work if the condition constitutes a danger to the refusing employee but cannot if the dangerous conditions concerned other employees.

[31] In view of the fact that Dr Harper is no longer employed by CFIA and given that the Code only confers the right to refuse dangerous work to employees working for an employer subject to the Code, the appellant's initial ground for instituting the proceedings has disappeared on the first day of her retirement.

[32] Moreover, the role of the HSO and the Appeals Officer under Part II of the Code, when the right to refuse unsafe work is invoked by an employee, is to determine whether

[33] In the case at hand, I see no reason to continue with the appeal proceedings if Dr Harper is no longer exposed to the alleged condition while at work. This is exactly the result that her retirement produces; it removes her from the work place and thus eliminates all risks or potential danger related to her.

[34] With regard to the appellant's contention that other employees could be affected by a decision that a danger existed, I concur with the statement of my colleague, Mr Aubre, in the *Tremblay* decision when he stated that:

> [34] … Determining that the appeal is moot would not have the effect of preventing the issues it raises from being considered in other matters where circumstances so warrant. …

[35] Having taken into consideration all the circumstances of this case, 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 Dr Harper and CFIA, I believe that rendering a decision on the merits of this appeal would have no concrete effect on the rights of the parties.

[36] Accordingly, I conclude that the appeal has become moot and I choose not to exercise my discretion to hear this appeal on its merits.

Decision

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

Michael Wiwchar
Appeals Officer