

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Shaw Satellite Services Inc. and Shaw Satellite G.P., c.o.b. as Shaw Direct ® -
2011 OHSTC 23

Date: 2011-09-20
Case No.: 2011-22
Rendered at: Ottawa

Between:

Shaw Satellite Services Inc. and Shaw Satellite G.P., c.o.b. as Shaw Direct ®, Appellants

Matter: Appeal under subsection 146(1) of the *Canada Labour Code* of a
direction issued by a health and safety officer

Decision: The direction is confirmed

Decision rendered by: Mr Michael Wiwchar, Appeals Officer

Language of decision: English

For the appellants: Mr Benjamin Gabriel, Legal Counsel

REASONS

[1] This is an appeal brought pursuant to ss. 146(1) of the *Canada Labour Code* (the Code) of a direction issued by Ms Amy Ferguson, Health and Safety Officer (HSO), on March 25, 2011.

Background

[2] Shaw Satellite Services Inc. and Shaw Satellite G.P. carrying on business under the style of Shaw Direct, hereafter referred to as “Shaw Direct” is a major provider of digital satellite television in Canada. It falls within the telecommunications industry, a federally regulated business to which Part II of the Code applies.

[3] LB Communications, an independent contractor hired by Shaw Direct, is an Ontario based business that performs satellite dish installations and repairs. Shaw Direct is LB Communication’s lone client with the exception of a few satellite dish installations for one other client.

[4] On February 18, 2011, Mr Parry, an employee of LB Communications, fell from a ladder, a height of approximately 18 to 20 feet, while repairing a satellite dish at a residence in Pelham, Ontario. He was injured and was brought to the hospital for medical treatment.

[5] HSO Ferguson attended the accident scene on the same day of the incident. In the preliminary stage of her investigation she had discussions with several implicated parties namely, Mr Bettencourt, owner of LB Communication Inc. and Mr Sider, a service and installation supervisor for Shaw Direct. She determined that there was insufficient information pertaining to the employment relationship between Mr Parry, LB Communication and Shaw Direct in order to conduct her investigation effectively. In fact, HSO Ferguson noticed that there appeared to be a close employment relationship between LB Communication and Shaw Direct. According to her, being able to understand the nature of this relationship was essential to the investigation that is; to determine if LB Communication could be considered a federal employer and if Shaw Direct has health and safety responsibilities for certain LB Communication employees.

[6] On March 21, 2011, the HSO requested a number of documents and records from Shaw Direct in order to broaden her understanding on the subject of their employment relationship with LB Communication, the work activity and the hazardous occurrence itself. Shaw Direct responded that they did not believe that they should be the subject of the investigation given that Mr Parry was not their employee.

[7] On March 25, 2011, the HSO issued a direction to Shaw Direct to produce several specific documents, information and records. The direction reads as follows:

IN THE MATTER OF THE CANADA LABOUR CODE
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 141.(1)(h)

On March 4, 2011, the undersigned health and safety officer conducted an investigation regarding a hazardous occurrence which occurred at 1636 Heist St Pelham Ontario on February 18, 2011 in the work place operated by SHAW SATELLITE SERVICES INC. and Shaw Direct carrying on business under the name and style of SHAW SATELLITE G.P., being an employer subject to the *Canada Labour Code*, Part II, at 2055 Flavelle Rd Mississauga, ON L5K 1Z8, the said work place being sometimes know as Shaw Satellite G.P.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 141.(1)(h) of the *Canada Labour Code*, Part II, to produce, no later than Wednesday, March 30, 2011, the documents and information relating to the health and safety of your employees or to the safety of the work place which are identified below, and to permit the said health and safety officer to examine and make copies or take extracts of such documents and information:

- Records of all training provided to all 6 Satellite Technicians currently employed by Shaw (Sand Dicarlo, Dino Battista, Brent Collins, Ken Williamson, John Davis and Jasbir Singh)
- Electronic copy of Safety Module/Code of Conduct & Safety Module and any Refresher Installer's Training
- All Work Orders (1636 Heist St, Pelham Ontario)
- Names of persons/contractors performing Satellite operations
- 2009 signed Health Safety Committee meeting minutes (2055 Flavelle Committee)
- All e-mail communication between LB Communications and Shaw and its representatives
- All e-mail communication between Luis Bettencourt and Shaw and its representatives
- Job Hazard Analysis and Risk Assessment documentation for Satellite operations
- All Field Inspection documentation/records for LB Communications
- Job Description for Troy Sider and Dave Dubois
- Original signed Installers Number Request Form for LB Communications

Issued at Mississauga, this 25th day of March, 2011.

[HSO Ferguson signed here]

Amy Ferguson, Health and Safety Officer
Certificate Number: ON3052

To: SHAW SATELLITE SERVICES INC. and Shaw Direct carrying
on business under the name and style of SHAW SATELLITE
G.P. 2055 Flavelle Rd
Mississauga, ON L5K 1Z8

[8] On March 29, 2011, a teleconference was held following an application by Shaw Direct for a stay of the direction following which I ordered a stay of the direction until a decision on the merits of the appeal is rendered.

Issue

[9] I must determine whether HSO Ferguson erred in issuing a direction to Shaw Direct pursuant to para. 141(1)(h) of the Code.

Appellants' submissions

[10] The appellants provided final submissions on April 18, 2011. Shaw Direct's appeal is based on the following three arguments:

- i) the HSO's jurisdiction;
- ii) the HSO's conclusion regarding the employer/employee relationship between Shaw Direct and Mr Parry; and
- iii) the HSO's failure to satisfy the duty of procedural fairness owed to the appellants.

i) Jurisdiction

[11] The appellants submitted that HSO Ferguson should not have undertaken an investigation or issued the direction for the reason that she lacks the necessary and proper jurisdiction under Part II of the Code. Essentially, according to the appellants, the HSO's powers under Part II of the Code are limited solely to those employment relationships that fall within the ambit of federal jurisdiction.

[12] The appellants argued that the mere act of facilitating a service pursuant to a contractual relationship does not make a provincially regulated party, such as LB Communication subject to federal jurisdiction, unless the provincially regulated party forms an integral or essential part of the federal work or undertaking in question.

[13] The appellants contended that LB Communications does not form an integral or essential part of Shaw Direct, a federal work and undertaking, and as such is a provincial work and undertaking that falls solely within the jurisdiction of the appropriate provincial legislation. Furthermore, the appellants submitted numerous factual elements, the objective being to prove that LB Communication is not a federal business.

[14] As a result, the appellants maintained that the HSO exceeded her jurisdiction by undertaking an investigation and issuing a direction in regards to an accident concerning a business under provincial jurisdiction.

ii) Employer/employee relationship

[15] In the alternative, in the event that it is held that the HSO had the necessary and proper jurisdiction, the appellants argued that the HSO committed an error by concluding that Shaw Direct is the “employer” being the subject of the investigation and the direction.

[16] According to the appellants, the Code is aimed at employees employed within the federal jurisdiction. As such, in order for an employee to be protected, an employer/employee relationship must exist between a federally regulated employer and an individual worker. Thus, in the present case, Mr Parry, the individual being considered as the employee, was employed by LB Communication.

[17] In their submissions, the appellants provided plenty of information in regards to its relationship with Mr Parry and attempted to demonstrate that he is effectively an employee of LB Communication and not Shaw Direct.

[18] Finally, the appellants submitted that there was no employer/employee relationship between the appellants and the injured worker and for this reason the HSO committed an error when she concluded that the appellants would be subject to the investigation and direction.

iii) Duty of procedural fairness

[19] In the event the two arguments made above by the appellants are not accepted, it is submitted that the HSO failed to satisfy the duty of procedural fairness owed to Shaw Direct prior to making them subject to the investigation and the direction. This third argument is divided into two sub-points.

[20] The first sub-point is based on a Human Resources and Skills Development Canada (HRSDC), Labour Program departmental policy named - Interpretations, Policies and Guidelines - (IPG), specifically; *IPG 069: Determining the Employer/Employee Relationship – Canada Labour Code*, (IPG 069). Appendix C in IPG 069 provides a questionnaire that must be sent to the employer at the outset of an investigation where the determination of employment relationship is necessary. The appellants submitted that it did not receive the questionnaire.

[21] The appellants argued that the fact that the IPG 069, Appendix C, questionnaire was not received goes against a reasonable and legitimate right to expect that the HSO would first take a comprehensive approach to personally consider the facts that would have been available had the questionnaire been completed prior to the issuance of the direction.

[22] The second sub-point that is raised by Shaw Direct on procedural fairness is based on an email originating from the HSO that mentioned that it was Ms Salmon, District Manager, HRSDC, Labour Program, who made the decision to investigate the incident.

[23] Shaw Direct maintained that, since ss. 140(1) and 141(1) confer the discretion, to exercise the enumerated powers and duties, personally to HSOs, Ms Salmon did not have the authority to decide that an investigation be initiated. The appellants attested that the fact that Ms Salmon made the decision rather than HSO Ferguson constituted an illegal delegation. As such, the appellants submitted that Ms Salmon made the final decision to subject them to an investigation without reasonable basis for doing so.

[24] In conclusion, if Shaw Direct's allegation is accepted, the decision making process goes against the principle of procedural fairness.

Analysis

[25] I would first like to address the appellants' argument concerning the alleged breach of procedural fairness by HSO Ferguson. There is no doubt that a HSO is held to the requirements of procedural fairness throughout his/her investigation. However, as an appeals officer designated under the Code, I hold hearings in a *de novo* capacity and as such, I must review the matter anew and may receive any new evidence that the parties may submit even if it was not available at the time of the HSO's investigation. I am invested with the same powers as HSO Ferguson and following my inquiry into the circumstances that led to the issuance of the direction, I may substitute my views for that of the latter.

[26] The appellants' main ground for appealing the direction is that HSO Ferguson did not have jurisdiction to investigate the incident that occurred on February 18, 2011, and to subsequently issue a direction to Shaw Direct.

[27] Pursuant to para. 123(1)(a), the Code applies to any federal work or undertaking such as a telecommunications services business like Shaw Direct. The appellants do not dispute that fact, so it should be kept in mind as it forms the basis of this analysis.

[28] Moreover, Part II of the Code confers a number of broad discretionary powers to HSOs throughout the investigation process such as the one found in para. 141(1)(h) of the Code allowing a HSO to request from any employer to whom the Code applies to produce documents relating to the health and safety of its employees. That paragraph reads as follows:

141.(1) a health and safety officer may, ...at any reasonable time, enter any work place controlled by an employer and, in respect of any work place, may ...

(h) direct the employer to produce documents
[my underline]

[29] Having already determined that Shaw Direct is an employer subject to Part II of the Code, there is simply no doubt that HSO Ferguson was invested with the authority

[30] Arriving at the scene of the accident and after a brief assessment of the situation, HSO Ferguson noticed that the employment relationships among Shaw Direct, LB Communication and Mr Parry were unclear. HSO Ferguson even wondered whether or not those close relationships might give rise to some responsibilities under the Code to Shaw Direct for Mr Parry's health and safety.

[31] HSO Ferguson also wondered whether or not the accident might also affect certain Shaw Direct employees who performed the same work as the injured worker did. Indeed, Shaw Direct has six in house satellite technicians who perform the same work as Mr Parry does. In fact, one of them completed the work that Mr Parry had begun before his fall. As a federally regulated employer Shaw Direct has obligations and duties under the Code to protect the health and safety of these employees. This is why HSO Ferguson made a request to Shaw Direct to obtain the health and safety training records of these six employees.

[32] Moreover, HSO Ferguson has managed to raise a number of elements that may suggest that Shaw Direct has some responsibilities for LB Communication employees or that LB Communication could be subject to federal jurisdiction.

[33] The elements considered by HSO Ferguson that raised doubts in her mind about the responsibilities of Shaw Direct and the federal nature of LB Communication firstly include the fact that Mr Parry and the owner of LB Communication named the service and installation supervisor of Shaw Direct as their supervisor when HSO Ferguson visited the accident scene. Secondly, LB Communication was created to work with Shaw Direct, and it works almost solely for Shaw Direct.

[34] Thirdly, Shaw Direct is involved in the activities of LB Communication and the work place of LB Communication employees. For example, Shaw Direct controls access to the work place and uses its work allocation process to control what LB Communication employees are doing. As well, Shaw Direct trains LB Communication installers and inspects their work once they are in the field. Furthermore, Shaw Direct has the authority to send LB Communication employees back to a client's work site if the client is not satisfied with the services performed.

[35] It is to be noted that this case does not involve a direction requiring an employer to take action in the wake of a contravention of the Code or a finding of danger, such as a direction issued under ss. 145(1) or ss. 145(2) of the Code. The only finding HSO Ferguson seems to have made is that LB Communication is in fact Mr Parry's employer. All the other issues, such as whether or not Shaw Direct has responsibilities to Mr Parry, or whether or not LB Communication is subject to the Code remain unresolved, because HSO Ferguson appears to have insufficient information.

[36] Therefore, it is pointless at this stage to discuss findings that HSO Ferguson has not yet made. The purpose of the direction is simply to shed some light on a situation that is too foggy to assess.

[37] Since no final determination has yet been made and considering that the purpose of the direction is only to give HSO Ferguson a better understanding of the case, the appellants' arguments regarding matters that HSO Ferguson has not yet determined will not be considered in my analysis. Those arguments may be considered if a direction is issued at the end of the investigation but, for now, they are not useful in addressing the issue at hand.

[38] Consequently, based on all of the above, I find that HSO Ferguson's exercise of her discretionary power under para. 141(1)(h) to issue a direction to obtain the documents that she was missing to complete her investigation was justified.

Decision

[39] For these reasons, the direction issued to Shaw Direct by HSO Ferguson on March 25, 2011 is confirmed.

Michael Wiwchar
Appeals Officer