Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canadian National Railway Company, 2012 OHSTC 17

Date: 2012-06-13
Case No.: 2011-45
Rendered at: Ottawa

Between:

Canadian National Railway Company, Appellant

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 appellant:	Mr Andy Pushalik, Counsel, Fraser Milner Casgrain LLP

REASONS

[1] This concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) of a direction issued by Mr Chris Wells, Health and Safety Officer (HSO) on August 9, 2011.

Background

[2] At approximately 1:15 pm on July 14, 2011, Mr Rick McColl, a Track Foreman employed by Canadian National Railway Company (CN), was struck and fatally injured by a train while working on the railway tracks near Durham, Ontario.

[3] Soon after the incident, HSO Wells was assigned by Human Resources and Skills Development Canada's Labour Program to conduct an investigation of the incident surrounding Mr McColl's death. In order to conduct his investigation, HSO Wells sent a direction to CN, dated August 9, 2011, requesting the production of all the documents and information relating to Mr McColl's medical history which CN has on file. The direction reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION THE EMPLOYER UNDER SUBSECTION 141(1)(h)
>
> On August 9, 2011, the undersigned health and safety officer conducted an investigation regarding documents in the work place operated by Canadian National Railway Company, being an employer subject to the *Canada Labour Code*, Part II, at OSHAWA MECHANICAL DEPARTMENT 874 THORNTON RD. SOUTH, Oshawa, Ontario, L1J 8M6, the said work place being sometimes known as Canadian National Railway Company.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 141(1)(h) of the *Canada Labour Code*, Part II, to produce, no later than August 19, 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:
>
> **Provide all of Mr. Rick McColl's medical information that Canadian National Railway has on file, for the purpose of conducting a fatality investigation.**
>
> Issued at Toronto, this 9th day of August, 2011.
>
> Chris Wells
> Health and Safety Officer
> Certificate Number: ON4452

To: Canadian National Railway Company
CN
Oshawa, Ontario
L1J 8M6

[4] On August 26, 2011, CN filed an application before this Tribunal to appeal and stay HSO Wells' direction. On October 6, 2011, the stay of the direction was granted by Appeals Officer Douglas Malanka.

Issue

[5] I must determine whether HSO Wells erred in issuing the August 9, 2011, direction, pursuant to paragraph 141(1)(h) of the Code, ordering CN to provide all of Mr McColl's medical information that the company has on file for the purpose of conducting his investigation.

Appellant's submissions

[6] Firstly, the appellant argued that the records sought by HSO Wells were not within CN's power or control. These records resided exclusively with a separate department within the company known as CN–Health. The appellant mentioned that in order to protect the privacy of its employees, CN does not make employee medical records available across the organization. Only individuals who are directly employed by CN–Health have access to employee medical records.

[7] The appellant mentioned that the direction was issued to CN's Senior Risk Manager. Since this person was not employed by CN–Health, he did not have access to the requested records, and by extension, CN was unable to comply with the direction in its original form.

[8] Secondly, the appellant argued that the disclosure of employee medical records without consent constituted a breach of privacy under the *Personal Information Protection and Electronic Documents Act* (PIPEDA). According to it, unless an exception applies, the knowledge and consent of the individual are required for the disclosure of personal information. The appellant argued, citing case law on the matter, that this requirement is especially important in the case of sensitive information such as a medical record.

[9] Furthermore, in accordance with paragraph 7(3)(c) of PIPEDA, CN–Health will only disclose an employee's personal medical information to a third party if the employee has provided his consent or if CN's Chief Medical Officer has been ordered to make such a disclosure by a body with the jurisdiction to compel the production of the requested information. According to the appellant, neither condition has been satisfied in the case at hand.

[10] Also, the appellant argued that the disclosure by CN–Health of the requested medical information in the current circumstances would be in breach of CN's obligations toward its employees. As a unionized employer, this breach of trust could have a significant impact on the nature of CN's relationship with its employees and their bargaining agent.

[11] Finally, the appellant proposed that HSO Wells should seek to obtain consent and authorization from Mr McColl's estate to release the records sought or to issue a direction to Mr McColl's personal physician, arguing that these records would be much more extensive than those that are in CN–Health's possession. According to the appellant, these options would be a less intrusive method of obtaining the information.

Analysis

[12] In order to determine if HSO Well's August 9, 2011, direction to CN was well-founded, I will first define the nature of the powers and jurisdiction vested in the HSO by Part II of the Code, specifically; the power to order the employer to produce documents and information relating to the health and safety of the employer's employees. In addition, I will interpret these powers in light of the provisions found within PIPEDA regarding the disclosure by an organization of personal information concerning an individual to a third party.

[13] On the first point, HSO Wells issued a direction to CN, pursuant to paragraph 141(1)(h) of the Code, to produce the employee's medical records that are within the employer's possession in order to conduct his investigation of the incident that occurred on July 14, 2011. Paragraph 141(1)(h) reads as follows:

> 141(1) Subject to section 143.2, a health and safety officer may, in carrying out the officer's duties and 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 and information relating to the health and safety of the employer's employees or the safety of the work place and to permit the officer to examine and make copies of or take extracts from those documents and that information;

[14] I will first address the appellant's argument that CN cannot comply with the direction because the records sought by HSO Wells are not in CN's possession but reside in a different department called "CN–Health". As mentioned above, the appellant claimed that CN's Senior Risk Manager does not have access to the requested documents because he is not employed by CN–Health.

[15] On this issue, I disagree with the appellant's argument for the reasons that follow. First, as its wording clearly indicated, the direction issued by HSO Wells on August 9, 2011, was not intended to be issued to a specific individual or department

within the company rather, it was issued to the employer known as CN. Paragraph 141(1)(h) of the Code states that the HSO may "direct the employer to produce documents" [my underlining]. In the case at hand, even if the letter containing the enclosed direction was forwarded to a specific individual within the company, the employer to whom the direction was issued is not CN's Senior Risk Manager, nor is it CN's Chief Medical Officer, the employer is Canadian National Railway Company as a whole.

[16] As well, nothing has been provided by the appellant to indicate that CN–Health is a different company in itself acting separately from CN, the employer. All that is mentioned in the appellant's submissions is that CN–Health is merely a department within the company that serves, among other things, in limiting the transfer of employees' medical records across the organization by only granting access to such documents to individuals directly employed by CN–Health.

[17] While it is completely reasonable for an organization such as CN to implement a system designed to limit the transfer of employees' personal information as much as possible between departments within the company, I have not been provided with evidence that CN–Health constitutes a distinct employer to whom a different direction under Part II of the Code should be issued. Therefore, it is CN's responsibility to determine the proper logistics needed to comply with HSO Wells' direction to produce the sought documents.

[18] Second, the appellant argued that PIPEDA, the federal law regulating the collection, use and disclosure of personal information of individuals by organizations within the private sector, includes provisions that prevent CN from complying with the direction.

[19] One of the main provisions found within PIPEDA is the necessity for an organization to obtain an individual's consent before disclosing his personal information to a third party. This provision can be found under clause 4.3 of Schedule 1 of the Act, which reads as follows:

> 4.3 Principle 3 — Consent
>
> The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

Schedule 1 of the Act is given full statutory effect by subsection 5(1) of PIPEDA, which reads as follows:

> 5(1) Subject to sections 6 to 9, every organization shall comply with the obligations set out in Schedule 1.

[20] However, the Act also includes a series of exceptions addressing situations where consent from the individual is not mandatory for the disclosure of his personal

information. Paragraph 7(3)(c) establishes such an exception for cases where the disclosure is required to comply with an order made by a court or a body with jurisdiction to order the disclosure:

> 7(3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is
> […]
> (*c*) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records; [My underlining]

[21] The appellant submitted that the conditions described in paragraph 7(3)(c) of PIPEDA regarding the disclosure of information without the consent of the individual have not been satisfied. However, the provisions found in PIPEDA on this issue indicate the opposite.

[22] Paragraph 7(3)(c) of PIPEDA explicitly states that an organization may disclose personal information without the consent of the individual if the disclosure is required to comply with an order made by a person or body with the jurisdiction to compel the production of information. In the present case, there is no doubt that the direction issued by HSO Wells on August 9, 2011, does in fact qualify as an order to produce information. Therefore, no consent is needed from the individual, in this case Mr McColl's estate, for the employer to be allowed to disclose the medical records, provided that the individual or body ordering their disclosure, in this case the HSO, has jurisdiction to do so.

[23] On the question of jurisdiction, there is no debate as to whether CN is a federally regulated employer subject to the *Canada Labour Code*. The jurisdiction of the HSO and his power to issue directions to an employer of federal undertaking stem from Part II of the Code, and paragraph 141(1)(h) of the Code clearly gives the HSO the authority to direct an employer to produce documents and information relating to the health and safety of an employee. Consequently, I must also reject the appellant's argument that HSO Wells did not have the jurisdiction to order the production of the medical records.

[24] The appellant also raised the issue of the sensitivity of the personal medical records stating that medical information should not receive broader distribution than is reasonably necessary. While I do agree that medical records are sensitive information that create a special privacy interest, I do not believe that this principle overrides the exception found under paragraph 7(3)(c) of PIPEDA. Subsection 7(3) of PIPEDA enumerates the circumstances where the disclosure of personal information does not require the individual's consent, regardless of the sensitivity of the information. Also, none of the case law cited by the appellant on this issue has to do with circumstances where an employer is instructed to comply with an order to produce personal information by a person with the jurisdiction to do so.

[25] As for the concerns raised by the appellant in regards to the risk that the disclosure of personal information would create a breach of trust that could impact the nature of CN's relationship with its employees and their bargaining agent, I must conclude that this issue falls outside the purview of my powers under the Code. Therefore, I will refrain from making any determination on this issue.

[26] In light of all these facts, I conclude that HSO Wells was well founded and he did not err in issuing the August 9, 2011 direction ordering CN to produce Mr McColl's medical records the employer has on file. The direction was issued to CN, the company as a whole, as a federally regulated employer subject to the Code, and it is CN's responsibility to determine the proper internal logistics needed for the production of the information sought by the HSO. In addition, pursuant to paragraph 7(3)(c) of PIPEDA, I find that HSO Wells did have the jurisdiction to order CN to produce the sought medical records without the knowledge or consent of Mr McColl's estate.

Decision

[27] For these reasons, I confirm the direction issued on August 9, 2011, by HSO Wells.

Michael Wiwchar
Appeals Officer