Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Theresa Gallant and Canada Border Services Agency, 2012 OHSTC 37

Date: 2012-10-19
Case No.: 2012-53
Rendered at: Ottawa

Between:

Theresa Gallant, Appellant

and

Canada Border Services Agency, Respondent

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision of no danger issued by a Health and Safety Officer
Decision:	The appeal is dismissed
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Language of decision:	English
For the appellant:	Ms Theresa Gallant
For the respondent:	Mr Joshua Alcock, Department of Justice, Labour and Employment Law Group

REASONS

[1] This matter concerns a request for an extension to file an appeal of a decision of no danger, pursuant to subsection 129(7) of the Canada Labour Code (the Code). The decision, which was given verbally and in writing, was rendered on October 24, 2010, by Mr Lindsay Harrower, Health and Safety Officer (HSO) with Human Resources and Development Canada (HRSDC), Labour Program.

Background

[2] On October 23, 2010, the appellant, a Border Security Officer (BSO), exercised her right to refuse dangerous work, pursuant to subsection 128(1) of the Code. This refusal took place at Windsor, Ontario at the Detroit-Windsor Tunnel.

[3] The appellant exercised her refusal upon being faced with a situation where another BSO had discovered a person hiding in the back of a vehicle which was occupied by individuals that she determined posed a possible danger. As an unarmed BSO, the appellant felt that she could not assist or defend herself in the situation.

[4] HSO Harrower was called to the site of the refusal and conducted an investigation in the presence of the appellant and Mr P. Susko, who was present on behalf of the employer, and who at the time was Chief of Border Operations at the Windsor Tunnel.

[5] On October 24, 2010, HSO Harrower verbally informed the appellant and Mr Susko that he found no danger and that the appellant would not be allowed to continue to refuse. The same day, HSO Harrower's oral ruling was confirmed in writing and received by both the appellant and Mr Susko.

[6] On July 26, 2011, HSO Harrower emailed to Mr Susko the letters he had sent to the appellant and the employer. Also in the email was HSO Harrower's report of the October 23, 2010 work refusal. The former was dated November 5, 2010, the latter, December 2, 2010. Upon receipt of this email, Mr Susko posted the HSO report on a bulletin board at the work place.

[7] The appellant sent an email dated March 25, 2011, to Mr M Fummerton, her health and safety and union representative, asking if he had received any updates from the Labour Program concerning her work refusal. Mr Fummerton responded on February 7, 2012, informing her that a copy of the decision could be found on the health and safety bulletin board.

[8] The appellant emailed HSO Harrower on February 27, 2012, for the principal purpose of requesting a copy of the HSO's report. The request is explicitly stated in the email.

[9] On August 9, 2012, the appellant sent a letter to this Tribunal filing an appeal of HSO Harrower's decision of no danger issued on October 23, 2010. In the letter, the appellant acknowledged her receipt on the night of the refusal the HSO's decision of no

danger, and also indicated that she did not file an appeal earlier because she was never sent the report of the HSO's decision.

[10] On August 19, 2012, the appellant submitted to this Tribunal a request for an extension of time to file an appeal of the October 2010 no danger decision by HSO Harrower. In the letter making the request for a time extension, the appellant explained the timing of her request by noting that she had only then received HSO Harrower's report.

Issue

[11] The question that I must address is whether I should, in the present matter, exercise my discretion to extend the legislated time limit of ten days for appealing a decision of no danger, pursuant to subsection 129(7) of the Code.

Submissions

Appellant's submissions

[12] In her request for an extension for the filing of her appeal, the appellant suggested that an extension should be granted because, despite previously making several requests in person and via telephone, she had not received a written report of the HSO's investigation into her October 2010 work refusal until sometime between August 10 and 19, 2012.

[13] In her request for an extension, the appellant indicated that before August 19, 2012, she had made numerous unsuccessful requests for the HSO's report to her union representative at the time, to the HSO himself, as well as to the London offices of HRSDC.

[14] The appellant argued that she made numerous attempts to obtain a copy of the HSO's report of the October 2010 work refusal, but only succeeded in doing so around mid-August, 2012.

[15] On this basis, the appellant requested that I extend the deadline for filing her appeal under subsection 129(7) of the Code.

Respondent's submissions

[16] The respondent argued that the time limit for filing an appeal under subsection 129(7) of the Code begins once the employee receives the decision of no danger from the HSO, not when the employee receives the HSO report. In light of this point, the respondent asserted that the appellant should not be granted an extension of time for filing an appeal because the extension request is based on the appellant's reception of the HSO report, not the HSO's decision.

[17] The respondent argued there is clear evidence indicating that the appellant received the decision as early as October 24, 2010, the day the no danger decision was rendered. In support of this argument, the respondent cited an affidavit of Mr Susko who is Chief of Border Operations at the Windsor Tunnel, and who was present at the meeting that followed HSO Harrower's investigation into the appellant's refusal in October 2010. This affidavit was submitted in evidence as part of the respondent's submissions.

[18] The respondent also argued that not only does the above affidavit indicate that the appellant received the HSO's decision in both oral and hand-written form on October 24, 2010, but that support for the respondent's assertion to this effect can be found in the HSO's Assignment Narrative Report, a copy of which was also submitted as a "Tab" of the respondent's submissions.

[19] A copy of the HSO's written decision is also included in the respondent's submissions to support the argument that the appellant received the decision in October 2010. The respondent made particular note of the fact that the second page of this document indicated the ten day time limit for filing an appeal.

[20] The respondent also pointed to an email dated February 27, 2012, sent from the appellant to the HSO which acknowledged the former's October 2010 reception of the no danger decision through the following words: "[t]he decision on the evening in question was no danger..."

[21] Also cited to support this point was a letter, dated August 9, 2012, from the appellant that was sent to the Tribunal, part of which reads, "Lindsay Harrower was the officer who attended the hearing and rendered no danger".

[22] The respondent contested that the appellant has provided no indication that she was either unaware of the HSO's no danger decision as of October 24, 2010, or that she was in some way prevented from filing her appeal on time due to extenuating circumstances.

[23] It is also argued by the respondent that the appellant's explanation that she did not file an appeal earlier because she was waiting on the HSO's report is an insufficient one.

[24] In supporting the assertion that the appellant's explanation is insufficient, the respondent noted that the HSO report is not the decision and points out that the handwritten version of the HSO's decision included in it a clear and specific indication that the employee had ten days upon receiving the decision to appeal. The respondent also highlighted that the handwritten decision also included a notice that the HSO's report would be provided at a later date, further indicating that the time for filing an appeal starts counting down before the parties receive the HSO report.

[25] A lack of due diligence is also argued by the respondent as a reason for which the appellant should not be granted an extension to appeal. In particular, the respondent argued that though the appellant's union representative, Mr Fummerton, informed the appellant via an email dated February 27, 2012, that the HSO report was hanging on a

bulletin board at the work place, the appellant waited another 5 months to have the report sent to her directly from HSO Harrower before filing her appeal.

[26] Finally, the respondent cited three decisions in which the party submitted that the Federal Court confirmed the principle that where prescribed time limits within the Canada Labour Code are not respected, an appeals officer lacks jurisdiction to hear an appeal. These decisions are *Brink's Canada Ltd. v. Canada (Labour, Regional Safety Officer)*, [1994] F.C.J. No. 1328, at paras 5 & 8; *Canadian National and United Transportation Union,* [2001] C.L.C.R.S.O.D. No. 18, at paras 12-14, and; *Thater and Canadian National Railway,* [2002] C.L.C.A.O.D. No. 10, at para 5.

[27] For these reasons the respondent contended that the appellant has failed to demonstrate that there was a reasonable justification for her to delay the filing of her appeal by almost two years, and thereby asserts that I am without a legitimate basis to find that I should hear the appellant's case.

Analysis

[28] This request for an extension comes before me in light of the appellant's interest in filing an appeal pursuant to subject 129(7) of the Code, which indicated that upon receiving a decision of no danger, employees have ten days to file an appeal on their own behalf or through having a designated person do this for them. This section of the Code reads as follows:

> **129.(7)** If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision. [emphasis added]

[29] Pursuant to subsection 146.2(*f*) of the Code, an appeals officer, may, at their discretion, extend the prescribed timeframe for initiating an appeal before an appeals officer. This section reads as follows:

> **146.2** For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
>
> (*f*) abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence;

[30] The extension of the period for filing an appeal, pursuant to subsection 146.2 (*f*), gives an appeals officer the discretionary power to restore a right of appeal that is extinguished by the time the employee seeks to initiate the appeal process. This is not a guaranteed nor absolute right enjoyed by the employee, but rather a procedural right that permits an appeals officer to work with a degree of flexibility when presented with particular circumstances that are out of the ordinary and within which a strict application of the fixed time for filing an appeal can cause prejudice to a party.

[31] For example, in the case of *Len Van Roon v. Kinonjeoshtegon First Nation*, [2007] C.L.C.A.O.D. No. 47, the Appeals Officer reasons that the presence of subsection 146.2 (*f*) in the Code demonstrates that the timeframes featured in the Code for initiating an appeal are not strict time limits:

> **11** As an Appeals Officer, I recognise that I should give some latitude to a self represented party, who through lack of knowledge and inexperience in the procedures; takes some time to properly understand the process and focus his concerns and file an appeal.
>
> **12** I believe that the prescribed time limit is not a strict limit; otherwise, Parliament would not have provided Appeals Officer with the powers to abridge or extend those limits.
>
> **13** I am of the opinion that the delay was minimal, it was not intentional and the appellant was of good will in believing that he had to present a complete documented case in order to file an appeal. I also believe that the delay in filing the appeal would not cause prejudice to the employer. Consequently, as empowered under subsection 146.2(f) of the Canada Labour Code, I grant the request to extend the time to file the appeal to the date that it was officially recorded, being June 21, 2007.

[32] In this decision, the Appeals Officer attached particular importance to the demonstrated good faith of the appellant and the absence of negligence on the appellant's part, on the one hand, and the absence of prejudice suffered by the employer if the request for an extension is granted, on the other.

[33] After considering the arguments presented to me by the parties, I find it difficult to conclude that the appellant has demonstrated a satisfactory level of diligence in this matter. This being the case even though I do not find that the employer would suffer prejudice in the event that I grant the requested extension in the present matter,

[34] Based on the submissions presented to me by both parties, I am not convinced that the appellant's conduct reflected a reasonable exercise of diligence. Considering all the circumstances, I am thus left without any persuasive or justifiable reasons why she could not bring her appeal before an appeals officer within the prescribed time or within a reasonable time after that.

[35] The appellant, as far as I am convinced by the submissions presented to me, was given both oral and written notice of the decision of no danger on October 24, 2010, the day following her refusal. The written notice she was given came in the form of a printed document with the clear, capitalized title written across the top-centre of the page, "*WRITTEN NOTIFICATION OF A HEALTH AND SAFETY OFFICER'S DECISION OF NO DANGER FOLLOWING A REFUAL TO WORK*". Moreover, this same document also clearly indicated the ten day time limit for filing an appeal upon receipt of this notice.

[36] The appellant does not seem to have demonstrated a serious interest in filing an appeal of the no danger decision until March, 2011, when she emailed her union representative, Mr Fummerton. The record does not indicate that between March 2011 and February 2012 (when she finally received an email response from Mr Fummerton), that the appellant did any prudent work to follow up on her appeal.

[37] The appellant received word from Mr Fummerton in this same March 2011 email concerning where to locate the HSO's report on the appellant's work refusal, which appears to have been posted in an easily accessible space in the work place. Despite this, the appellant still decided to wait until receiving the report from HSO Harrower himself in August 2012, before finally filing an appeal.

[38] Through all of this, the record of email correspondence between the appellant and both Mr Fummerton and HSO Harrower, as well as the letters sent by the appellant to this Tribunal concerning her appeal and the request for a delay, all indicate that the appellant was aware that not only did she receive the decision of no danger in October 2010, but that the decision and the HSO's report supporting the decision are two different things.

[39] The record presented to me does not allow me to justifiably draw the conclusion that the appellant was rightfully or reasonably under the impression that she did not know of the ten day delay upon receipt of the decision, or that she could not or should not file an appeal with an appeals officer before receiving the HSO's report supporting the decision of no danger she had knowingly received in October 2010.

[40] For these reasons, I am of the opinion that I should not exercise my discretion to grant the appellant's extension request for filing an appeal. Nothing satisfactory has been presented before me proving that the appellant experienced a serious obstacle to justify the delay in filing her appeal. Furthermore, I do not find in the record anything that indicated that the appellant fell into unusual or particular circumstances that seriously impeded her ability to file her appeal within the Code-prescribed time limit. To the contrary, the record leaves me with the firm impression that between October 2010 and August 2012, the appellant had sufficient means, opportunity and ability to ensure that the filing of the appeal was done within the timeframe stipulated in the Code.

Decision

[41] I conclude that the request for an extension of time for filing this appeal is denied and as a result, the appeal of HSO Harrower's October 2010 decision of no danger is inadmissible.

Michael Wiwchar
Appeals Officer