

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Passport Canada, 2012 OHSTC 41

Date: 2012-11-02

Case No.: 2012-65

Rendered at: Ottawa

Between:

Passport Canada, Applicant

Matter: An application for a stay of a direction

Decision: The stay of the direction is granted

Decision rendered by: Mr. Pierre Guénette, Appeals Officer

Decision language: English

For the appellant: Ms. Yolande Viau, Counsel for Passport Canada

REASONS

[1] On October 5, 2012, Ms. Yolande Viau, Counsel for Passport Canada, filed an appeal of a direction that was accompanied by a written application for a stay, pursuant to subsection 146(2) of the *Canada Labour Code* (Code). Subsection 146(2) reads as follows:

146(2) Unless otherwise ordered by an Appeals Officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.

Background

[2] In July 2012, Health and Safety Officer (HSO) Michelle Sterling and another HSO (identified in her report only as HSO Ammoun), conducted a work place inspection at the Department of Foreign Affairs and International Trade (Passport Office) in London Ontario.

[3] While conducting her investigation into ongoing workplace safety issues at this workplace, HSO Sterling came to learn that an ergonomic assessment had been completed following two past hazardous occurrences. The HSO also learned that the workplace committee had never received copies of this ergonomic assessment. After inquiring into why this was the case, HSO Sterling eventually decided to issue a direction to the employer, specifically to Ms. Shannon Badger, a Manager at Passport Canada. This direction is dated September 24, 2012, and was issued pursuant to paragraph 141(1)(h) of the Code. The direction reads:

On August 17, 2012, the undersigned health and safety officer conducted an investigation regarding a hazardous occurrence in the work place operated by Foreign Affairs and International Trade, being an employer subject to the Canada Labour Code, Part II, at 301 Oxford St. W. Suite 76, London, Ontario, N6H 1S6, the said work place being sometimes known as Foreign Affairs (Passport Office) - London.

The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened.

No. / No: 1

Paragraph 125(1)(z.11) – Canada Labour Code, Part II

Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, provide to the policy committee, and to the work place committee or the health and safety representative, a copy of any report on hazards in the work place, including an assessment of those hazards.

The employer has fallen to provide a copy of the full ergonomic assessment, that was completed as a result of the hazardous occurrence of

April 2, 2012 (excluding any medical record in which the applicable person's consent was not obtained), to the work place health and safety committee.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 141(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than October 10, 2012.

Further, you are, HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

Issued at London, this 24th day of September, 2012.

[4] On October 5, 2012, Passport Canada provided written submissions for the purpose of appealing this direction. Accompanying these submissions was a request for a stay of the direction and brief reasons as to why a stay should be granted.

[5] A teleconference to hear the request for a stay was held on October 10, 2012. Mr. Ron Bergsma, Union representative for PSAC informed the Tribunal that he would participate at the teleconference as an observer with respect to the stay request hearing.

[6] Taking into consideration Ms. Viau's oral submissions, I granted a stay of the direction on October 11, 2012, until a decision on the merits of the appeal is rendered by an Appeals Officer. The following outlines my reasons for granting the stay of direction.

Analysis

[7] The authority for an Appeals Officer to grant a stay is derived from the above mentioned subsection 146(2). The exercise of this discretion must be consistent with the purpose of the Code found in section 122.1 and any other applicable provisions. Section 122.1 of the Code reads as follows:

122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

[8] To help me determine whether to grant this application for a stay, I relied on the three part test that Appeals Officers have adopted to treat such requests. The requirements of the test are as follows:

- 1) The applicant must satisfy the Appeals Officer that there is a serious question to be tried as opposed to a frivolous or vexatious claim.
- 2) The applicant must demonstrate that significant harm would be suffered if the direction is not stayed.

- 3) The applicant must demonstrate that measures will be put in place to protect the health and safety of employees or any person granted access to the workplace should the stay be granted.

Is the question to be tried serious as opposed to a frivolous or vexatious?

[9] Ms. Viau held that the issue is whether or not Passport Canada has to distribute the integral version of the ergonomic assessment to the work place committee in order for the employer to satisfy the requirements of paragraph 125(1)(z.11) of the Code.

[10] Ms. Viau argued that it is a serious question to be tried because the employer has to obtain an interpretation of its obligations under paragraph 125(1)(z.11) of the Code, which concerns the protection of the health and safety of its employees.

[11] Based on Ms. Viau's arguments, I am satisfied that there is a serious question to be tried.

Would the Applicant suffer significant harm if the direction is not stayed?

[12] Ms. Viau stated that the employee named in the ergonomic assessment, the work environment and the employer will suffer significant harm if the direction is not stayed. She added that the author of the ergonomic assessment has included the medical information of the individual in the report.

[13] Ms. Viau argued that disclosing this medical information as it appears in the ergonomic assessment will seriously and irreparably harm the employee's reputation and self-esteem.

[14] Ms. Viau added that this will seriously undermine not only the management's authority in dealing with occupational health and safety issues, but also their obligations under the *Privacy Act* to protect personal information of its employees. The employee in question is a member of the work place committee and the employer considers that members on the work place committee do not need to know the employee's personal information (specifically their medical information).

[15] It was also argued that no immediate danger to employees is posed to employees if the stay is granted, and that, on the contrary, disclosure of the full ergonomic assessment would prejudice an employee and thereby harm the employer's labour relations with its employees.

[16] I find the above submissions of Ms. Viau persuasive and am therefore of the opinion that Passport Canada would suffer significant harm if the direction is not stayed.

What measures will be put in place to protect the health and safety of employees or any persons granted access to the work place should the stay be granted?

[17] Ms. Viau held that until a decision is rendered by an Appeals Officer on the merits of the appeal, the employer agrees to provide to the work place committee a redacted version of the ergonomic assessment where the employer will exclude all personal information related to the employee named in the report. I am satisfied that granting a stay of the direction, in light of the employer's willingness to take this action, will not adversely impact the health and safety of employees.

Decision

[18] Taking into consideration the above, the stay of the direction issued by HSO Michelle Sterling to Passport Canada on September 24, 2012 is granted.

[19] However, as a condition to the granting of the stay, the employer is required to provide a redacted version of the ergonomic assessment that excludes any reference to the personal information related to the medical history of any employee.

Pierre Guénette
Appeals Officer