Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: CSL Group Inc. and V. Ships Canada Inc., 2013 OHSTC 2

Date: 2013-01-15
Case No.: 2012-78
Rendered at: Ottawa

Between:

CSL Group Inc. and V. Ships Canada Inc., Applicant

Matter:	An application under subsection 146(2) of the *Canada Labour Code* for a stay of a direction issued by a health and safety officer
Decision:	The stay of the direction is denied
Decision rendered by:	Mr. Michael McDermott, Appeals Officer
Language of decision:	English
For the Applicant:	Mr. Michael C. Smith, Counsel, Borden Ladner Gervais

REASONS

[1] This decision concerns an application brought under subsection 146(2) of the *Canada Labour Code* (the Code) for a stay of a direction issued by Health and Safety Officer Capt. Peter Mihalus on October 11, 2012, pursuant to subsection 145(1) of the Code. The applicants are CSL Group Inc. and V. Ships Canada Inc. There is no respondent.

Background

[2] The subject direction is the second of two issued by the Health and Safety Officer (HSO) following investigation of a hazardous occurrence that resulted in serious injury to Mechanical Assistant Gerald Neil on March 22, 2012, aboard the M/V English River, the workplace operated by the applicants, located at the time in the Port Weller Dry Dock, Port Weller, Ontario. The investigation included the HSO's visits to the workplace during the period March 23 to 30, 2012, when he was accompanied at various times by employee and employer representatives.

[3] On March 23, 2012, the HSO issued a verbal direction to the employer's representative concerning the performance of an activity that he considered to constitute a danger to an employee while at work. The HSO confirmed the direction in writing on March 25, 2012, and hand delivered it the following day. The nature of the condition found to constitute a danger is described in the written direction as follows:

> On March 22, 2012, Gerald Neil, Mechanical Assistant and employee of V. Ships Canada Inc. suffered serious injuries after falling to the engine room lower deck while attempting to attach a KITO Corp. electric chain fall to a newly welded lifting bracket above the hatch in the fiddley.

The employer was directed pursuant to paragraph 145(2)(a) of the Code to protect any person from the danger immediately and, pursuant to paragraph 145(2)(b), not to perform the activity to which a notice of danger had been fixed, pursuant to subsection 145(3), until the direction had been complied with. The employer responded to the direction on March 30, 2012. The direction was not appealed and is not the subject of this application for a stay.

[4] The HSO continued his investigation seeking the production of information and documents and arranging interviews. On October 11, 2012, he issued the direction that is the subject of the employer's appeal and of the stay application. The HSO found that the employer failed to appoint a health and safety representative as required by subsection 136(1) of the Code and to establish a policy health and safety committee pursuant to subsection 134.1(1). The direction, the full text of which is attached as an appendix, identifies several contraventions pursuant to specific paragraphs of subsection 125(1) of the Code as well as of certain provisions of the Maritime Occupational Health and Safety Regulations, covering such matters as: a failure to provide management and supervisory staff with adequate information and training in their health and safety responsibilities; a failure to investigate the hazardous occurrence; a failure to ensure instruction and training

for Mr. Neil with respect to lifting a load in excess of 10 kg; failures to provide him with shipboard familiarization training and to ensure that he used protection equipment for the task at hand; and, a failure to develop and implement a hazard protection program.

[5] The direction required the employer pursuant to paragraph 145(1)(a) of the Code to terminate the contraventions no later than November 30, 2012, and pursuant to paragraph 145(1)(b) to take steps that the contraventions do not continue or reoccur. The applicants seek a stay of the direction such that they be relieved of the requirement to respond to it while the appeal is pending and for sixty days thereafter if the direction is not rescinded.

[6] On receipt of the notice of appeal and application for a stay from Counsel for the applicants on November 13, 2012, the Tribunal Acting Registrar replied the same day drawing Counsel's attention to the criteria used by appeals officers in the exercise of their discretion to grant a stay of a direction issued by an HSO. The three criteria 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 it would suffer significant harm if the direction is not stayed.

3) The applicant must demonstrate that in the event that a stay is granted, measures will be put in place to protect the health and safety of employees or any person granted access to the work place.

[7] A telephone conference hearing on the stay application was held on November 28, 2012, with Counsel for the applicants during which arguments in favour of granting a stay were put forward. Following the telephone hearing I requested written submissions with particular reference to Counsel's claim alleging that responding to the direction before a hearing on the merits could cause harm to the employer's reputation. In view of the short time left before the employer was due to respond to the direction and inform the HSO of measures taken to comply with the direction, Counsel for the applicant sought a delay to facilitate preparation of the written submissions. On November 29, 2012, I granted an interim stay on the understanding that the submissions would not be unduly delayed. The written submissions were received on December 6, 2012. After carefully considering the applicants' submissions and arguments, on December 18, 2012, I denied the application for a stay of the direction issued on October 11, 2012, and informed the applicants' Counsel in writing accordingly. Reasons were to follow.

Applicants' Submissions

[8] On the first criterion, the applicants note that they have appealed the direction on the basis that they did not contravene the Code and are challenging each of the contraventions identified by the HSO. In effect, they maintain that this difference is

neither frivolous nor vexatious and they intend to pursue their position when the appeal is heard on its merits.

[9] On the significant harm criterion, the applicants' arguments are submitted under two main headings: "Procedural Fairness and Due Process" and "Reputational Harm". With respect to procedural fairness and due process, the applicants refer to the comprehensive investigation undertaken by the HSO and the possibility is raised that quasi-criminal charges could be laid at any time pursuant to section 148 of the Code against CSL and V. Ships or their employees. It is argued that "CSL or V. Ships could be irreparably prejudiced in subsequent quasi-criminal proceedings if they are compelled to respond to the Direction while the appeal of the merits of that Direction is still pending."

[10] Elaborating on their argument, the applicants submit that, even if they were to respond to the direction with a denial of the contraventions identified, "they will have been compelled to commit to that position *before* any quasi-criminal charges are even laid". It is argued that, if in subsequent proceedings guilt were to be found, CSL and V. Ships "may be prejudiced in sentencing for having maintained a denial of the charges rather than acknowledging guilt or expressing remorse." It is submitted further that a defendant must have flexibility to conduct its defence after gaining an appreciation of the case against it and that compelling a response to the direction while the appeal is pending and before they know what charges they might face, would take away that flexibility. With respect to the possibility of individual employees of CSL and V. Ships being charged, the applicants cite paragraph 11(c) of the *Canadian Charter of Rights and Freedoms* and their right not to be compelled to be a witness in proceedings against them in respect of the offence. Without a stay of the direction, it is argued, employees of CSL and V.Ships will be compelled "to make a formal statement concerning an offence that they may be charged with."

[11] Turning to reputational harm, the applicants argue that compelling CSL and V. Ships to respond to the direction "runs completely contrary to the safety programs and reputation they have worked so hard to build, and may be exploited by competitors of CSL and V. Ships." Concern is also expressed that responding to the direction now could jeopardize the contract pursuant to which CSL and V. Ships manage the M/V English River for its owner. A summary list from the corporate web-site of policies and practices is quoted to illustrate CSL's and V. Ship's commitment to safety, security and the environment. The applicants also point to the investment they are making by having six new Canadian flagged vessels built. They point to their recruitment drive to hire some 150 officers in the face of what described as an alarming scarcity of qualified persons in Canada. It is argued that candidates will learn that CSL and V. Ships are being compelled to respond to the direction and that it expected that such knowledge will cause them to reject job offers. It is submitted that the ability of CSL and V. Ships to staff their fleet will be significantly harmed if the stay is not granted.

[12] In support of their submissions the applicants cite three cases. Noting that the significant harm test for the second of the three criteria considered by appeals officers when addressing stay applications is less demanding than in private or constitutional law,

it is argued that in *RJR MacDonald* v. *Canada*[1] the Supreme Court "has recognized that damage to business reputation is something that can satisfy the more onerous irreparable harm requirement." Similarly, the applicants point to *Church & Dwight Ltd.* v *Sifto Canada Inc.*[2] where loss of actual or potential customers and potential loss of goodwill and diminution of a plaintiff's reputation are recognized as elements of irreparable harm. Lastly, *Hill* v. *Church of Scientology*[3] is cited with reference to a requirement for balancing freedom of expression and protection of an individual's reputation.

Analysis

[13] With respect to the first criterion, I accept the applicants' submission and find their stay application to be neither frivolous nor vexatious. As indicated above, their appeal takes issue in detail with each of the contraventions identified in the direction. As such, the matter can only be resolved in the context of a full hearing on the merits.

[14] In considering the second criterion and the prospect of significant harm, I look first to an appeals officer's authority with respect to granting a stay of a direction that is found in subsection 146(2) of the Code as follows:

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

The subsection provides an appeals officer with quite wide discretionary authority and is phrased such that the ordering of a stay represents a departure from the norm. Given that the purpose of the Code envisages the prevention of accidents and injury in the workplace, I am of the view that such a departure must be based on firmly convincing grounds.

[15] During the telephone conference hearing it was agreed that the content and requirements of the direction do not stop, delay or even require a change to CSL's and V. Ships' regular operations. Rather the applicants submit that failure to obtain a stay and having to respond to the direction before its merits are heard, will compromise flexibility of response in the event quasi-criminal charges are laid against them or their employees and give rise to reputational harm and its consequences.

[16] On the possibility of quasi-criminal proceedings, the applicants refer to section 148 of the Code that provides for offences to be prosecuted and for significant penalties to be applied upon conviction. Subsections 148 (2) and (3) respectively address instances where death, serious illness or serious injury is found to be a direct result of contraventions of the Code or where persons contravene the Code knowing that such is likely to be the outcome. Proceedings require Ministerial consent pursuant to subsection

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[1] *RJR MacDonald v. Canada (Attorney General),* [1994] 1 SCR 311.

[2] *Church & Dwight Ltd. v Sifto Canada Inc.*, 20 OR (3d) 483, 58 CPR (3d) 316.

[3] *Hill v. Church of Scientology,* [1995] 2 S.C.R. 1130.

149(1) and, pursuant to subsection 149(4), they must be instituted no later than one year after the time when the subject matter of the proceedings arose.

[17] I have carefully considered the applicants' arguments concerning the prospect and effects of quasi-criminal proceedings. An investigation has led to the HSO issuing a direction; the affected employer has exercised the right to appeal that direction, a right that does not require qualifying criteria to be met; and, an application for a stay of the direction has been made based in part on the possibility that quasi-criminal charges may be laid. While the underlying facts are specific to this case the arguments made by the applicants in support of their position are general in nature and could pretty well be applied to any case where contraventions of the Code have been found. I can find no support for these arguments in the language of the Code. The appeal process provided for in this case or in any other case is independent of quasi-criminal proceedings that may be instituted pursuant to the Code. Appeals officers have no part in the formulation of charges or in making recommendations that proceedings be instituted. At the extreme, granting a stay based on the prospect of quasi-criminal proceedings could be interpreted as justifying a stay of a direction in virtually all appeals at least until the statutory time limit is exhausted since the Code holds potential for such proceedings in each and every case where contraventions have been found. I do not believe that is what the legislation intends. In any event, I do not accept the applicants' submission that the prospect and possible effects of quasi-criminal proceedings could cause them to suffer significant harm such as to warrant my granting a stay of the direction in this case.

[18] With respect to arguments on reputational harm, I turn first to the jurisprudence cited by the applicants. I did find a passing reference to damage to business reputation in the *RJR MacDonald* v. *Canada* injunction decision but it deals in much greater detail with the plaintiff's arguments on potential financial loss and loss of market share. *Church & Dwight ltd.* v. *Sifto Canada Inc.* does address potential loss of customers and comes down firmly in favour of the plaintiff's claim on reputational damage. The case was after all much about the quality and origin of the plaintiff's product versus that of the emerging competitor and the injunction held the *status quo* while the merits were tried. *Hill* v. *Church of Scientology* again emphasizes the importance of reputation but I find the quote emphasized by the applicants, that "[A] reputation tarnished by libel can seldom regain its former lustre", to be somewhat beyond the circumstances of the present application. What I take from the three cases is that damage to a reputation may, according to the facts of its nature, meet the irreparable harm criterion in private and constitutional law and that it can also be relevant to the less demanding significant harm criterion in the case of stay applications under the Code. That still leaves the issue of whether or not the applicants have met the latter criterion.

[19] The applicants argue that being compelled to respond to the direction runs contrary to the reputation and the policies they have developed for safety and security. I can see that such an argument would be relevant to their appeal but I find it difficult to relate it to the granting of a stay. They have made it clear in their stay application that their response to the direction will be, at least in part, that they have been and now are in conformity with the relevant provisions of the Code. Having not accepted the applicants'

submissions with respect to the prospect of quasi-criminal proceedings as a reason for granting a stay and consequently delaying their response to the direction, I cannot see what harm will be caused by a response to the direction at this stage. If anything, a response could serve to allay the concerns that they fear members and employees of the industry may have about their reputation for and commitment to safety and security. I might add that I was not convinced that the concerns expressed by the applicants about the possible loss of a contract and the prospect of staffing difficulties had advanced much beyond conjecture. In all, I do not accept that significant reputational harm would be caused to the applicants by my not granting a stay of the October 11, 2012, direction.

[20] All three criteria must be met before the granting of a stay application may be considered. I regard the process as sequential and, since I have found the second criterion not to be met, I have no need to address the third criterion in these written reasons.

Decision

[21] The reasons given above are in support of the decision I rendered on December 18, 2012, not to grant an application of a stay of the direction issued by the HSO on October 11, 2012.

Michael McDermott
Appeals Officer

APPENDIX

Government of Canada / Gouvernement du Canada

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145 (1)

Between March 23 and March 30, 2012, the undersigned health and safety officer continued an investigation regarding a hazardous occurrence involving Gerald Neil who suffered serious injuries while working aboard the M/V English River which occurred at the Fort Weller Dry Dock on March 22, 2012 in the work place operated by CSL Group Inc. and V. Ships Canada Inc., being employers subject to the *Canada Labour Code*, Part II, at 759 Square Victoria, Montreal, Quebec, the said work place being sometimes known as the M/V English River.

This said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:

No. / No : 1

Subsection 136 (1) - Canada Labour Code Part II

Every employer shall, for each work place controlled by the employer at which fewer than twenty employees are normally employed or for which an employer is not required to establish a work place committee, appoint the person selected in accordance with subsection (2) as the health and safety representative for that work place.

The employer failed to appoint a health and a safety representative in accordance with subsection (2) for the M/V English River when crew came aboard in February 2012.

No. / No : 2

Subsection 134.1(1) - Canada Labour Code Part II

For the purposes of addressing health and safety matters that apply to the work, undertaking or business of an employer, every employer who normally employs directly three hundred or more employees shall establish a policy health and safety committee and, subject to section 135.1, select and appoint its members,

The employer failed to establish, as required, a policy health and safety committee.

No. / No : 3

Paragraph 125(1)(z) - 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, ensure that employees who have supervisory or managerial responsibilities are adequately trained in health and safety and are informed of the responsibilities they have under this Part where they act on behalf of their employer

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The employer failed to ensure that Colin Kennedy, Chief Engineer an employee with supervisory and managerial responsibilities was adequately trained in health and safety and informed of the responsibilities he has under this Part.

No. / No : 4

Paragraph 125.(1)(c) – Canada Labour Code Part II – Subsection 276(b) Maritime Occupational Health and Safety Regulations

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, investigate, record and report in the manner and to the authorities as prescribed all accidents, occupational diseases and other hazardous occurrences known to the employer

If an employer becomes aware of an accident, occupational disease or other hazardous occurrence affecting any of their employees in the course of employment, the employer must, without delay, notify the work place committee or the health and safety representative, as the case may be, of the hazardous occurrence and of the name of the person appointed to investigate it

The employer failed to investigate the hazardous occurrence on March 22, 2012 resulting in serious injuries to Mechanical Assistant Gerald Neil, as prescribed, to ensure the required participation by a Health and Safety Representative.

No. / No : 5

Paragraph 125(1)(q) - Canada Labour Code Part II – Subsection 242(2) Maritime Occupational Health and Safety Regulations

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, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure their health and safety at work

If an employee is required to manually lift or carry a load in excess of 10 kg, the employer must train and instruct the employee

(*a*) in a safe method of lifting and carrying the load; and (*b*) in a work procedure appropriate to the employee's physical condition and the conditions of the work place.

The employer failed to provide Gerald Neil with prescribed training and instruction in a safe method of lifting and in an appropriate work procedure for installing the electric chain fall to the newly welded bracket on the fiddley, as required.

No. / No : 6

Paragraph 125(1)(q) - Canada Labour Code Part II – Subsections 125 (1) and (2) -Maritime Occupational Health and Safety Regulations

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Without restricting the gene ility of section 124, every employer shall, in respect of every work place controlled by the employer nd, in respect of every work activity carried out by an employee in a work place that is not contr led by the employer, to the extent that the employer controls the activity, provide, in the prescribed m nner, each employee with the information, instruction, training and supervision necessary to en re their health and safety at work

The employer must provide nch employee with health and safety education, including education relating to ergonomics and i must include the following:

(*a*) the hazard prevention pr gram implemented in accordance with this Part to prevent hazards applicable to the employee, ncluding the hazard identification and assessment methodology and the preventive measures taken b the employer; (*b*) the nature of the work place and the hazards associated with it; (*c*) the em ployee's duty to report under paragraphs 126(1)(*g*) and (*h*) of the Act and under section 275; and (d) an overview of the Act and these Regulations.

The employer must provide an employee with education (*a*) when new information in respect of a hazard in the work place bec omes available to the employer; and (*b*) shortly before the employee is assigned a new activity or is exposed to a new hazard.

The employer failed to pr vide Gerald Neil with the information, instruction, training and supervision as required, by failing to provide him with Shipboard Familiarization training in accordance with the empl yer's policy, by failing to provide him with training in the Canada Labour Code and Regulat ons and by failing to provide him with information on hazards associated with working a shift while on-board the M/V English River.

No. / No : 7

Paragraph 125(1)(w) - Can da Labour Code Part II – Subparagraph 144(1)(a)(i) - Maritime Occupational Health and Sa fety Regulations

Without restricting the gene ality of section 124, every employer shall, in respect of every work place controlled by the employer nd, in respect of every work activity carried out by an employee in a work place that is not contr lled by the employer, to the extent that the employer controls the activity, ensure that every person gr nted access to the work place by the employer is familiar with and uses in the prescribed circumsta ces and manner all prescribed safety materials, equipment, devices and clothing

The employer must provide a fall-protection system to every person, other than an employee who is installing or removing a fal protection system, who is granted access to (*a*) an unguarded work area that is (i) more than 2.4 m a ove the nearest permanent safe level

The employer failed to en ure Gerald Neil used the prescribed fall-protection equipment while installing an electric chain fall in the fiddley of the M/V English River on March 22, 2012.

No. / No : 8

Paragraph 125(1)(z.03) - C nada Labour Code Part II – Section 120 - Maritime Occupational Health and Safety Regulations

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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, develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a prescribed program for the prevention of hazards in the work place appropriate to its size and the nature of the hazards in it that also provides for the education of employees in health and safety matters

The employer must, in consultation with and with the participation of the policy committee, or, if there is no policy committee, the work place committee or the health and safety representative, develop, implement and monitor a program for the prevention of hazards, including ergonomics-related hazards, in the work place that is appropriate to the size of the work place and the nature of the hazards and that includes the following components: (*a*) an implementation plan; (*b*) a hazard identification and assessment methodology; (*c*) hazard identification and assessment; (*d*) preventive measures; (*e*) employee education; and (*f*) a program evaluation.

The employer failed to develop, implement and monitor a Hazard Prevention Program with the prescribed elements as required.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*a*) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than November 30, 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 contraventions do not continue or reoccur.

Issued at Bath, this 11th day of October, 2012.

TCR-268

Canada

Capt. Peter Mihalus
Health and Safety Officer
Certificate Number: ON1066

1066

To: CSL Group Inc. and V. Ships Canada Inc.
759 Square Victoria
Montreal, Quebec H2Y 2K3

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