

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Darren Givoque and G4S Cash Solutions (Canada) Ltd.
2013 OHSTC 4

Date: 2013-01-24
Case No.: 2011-19
Rendered at: Ottawa

Between:

Darren Givoque, Appellant

and

G4S Cash Solutions (Canada) Ltd., Respondent

Matter: Preliminary issues

Decision:

- a) The appeal will be held *in camera*.
- b) The appeal was timely.
- c) The expert witness will be granted an exemption from the order for the exclusion of witnesses.
- d) A ruling on this issue is not necessary.

Decision rendered by: Mr Michael Wiwchar, Appeals Officer

Language of decision: English

For the appellant: Ms Niki Lundquist, Associate Counsel, CAW - Canada

For the respondent: Mr Ben Ratelband, Counsel, McCarthy Tétrault LLP

REASONS

[1] This matter concerns interim issues in an appeal brought under subsection 129(7) of the *Canada Labour Code* (the Code) of a decision of no danger rendered by Mr Dave Mac Neil, Health and Safety Officer (HSO) with Human Resources and Skills Development Canada (HRSDC), Labour Program, on March 3, 2011. The decision followed a work refusal invoked by Mr Givoque, an employee of G4S Cash Solutions (Canada) Ltd. (hereinafter, “G4S”) on February 11, 2011, at the Phoenix Pub and Eatery, Brockville, Ontario.

Background

[2] On October 15, 2012, following a site view, a brief hearing took place to address preliminary issues in this appeal concerning the production of documents and procedural matters. Four preliminary issues were raised which will be addressed below.

Issues

[3] The preliminary matters are as follows:

- a) Request for an in camera hearing;
- b) Timeliness of the appeal;
- c) Request for an exemption to the order for the exclusion of witnesses, and;
- d) Concerning an order for the production of documents.

Submissions by the parties and rulings

a) Request for an *in camera* hearing

[4] In regards to the first matter, the parties have jointly submitted a proposal for an *in camera* hearing for the purpose of protecting the confidentiality of the safety and security operations of the respondent’s company, G4S. I concur that an *in camera* hearing is warranted given the circumstances of this case. The parties have proposed specific wording for the order. For the most part, I find the proposed wording of the order to be acceptable; however, I have amended its form and content to render it consistent with this Tribunal’s manner of formatting of orders of this sort. The actual order can be found at the end of this decision.

b) Timeliness of the appeal

Respondent's submissions

[5] The respondent requested a decision on whether I may be exceeding my jurisdiction to hear this appeal because it was filed one day past the 10 day limitation period which is stipulated in the Code, pursuant to subsection 129(7). This argument is submitted because HSO Mac Neil's decision is dated March 3, 2011, while the appeal of that decision was not filed until March 14, 2011.

Appellant's submissions

[6] In response to this, the appellant submitted that the 10th day following March 3, 2011, fell on a Sunday, making it permissible to file the appeal on the following Monday, which the appellant did.

[7] Furthermore, the appellant submitted that he received the decision via email on either March 7 or 8, many days after the decision was rendered.

Decision

[8] The final day for filing the appeal of HSO Mac Neil's decision of no danger was March 13, 2011. Because this date fell on a Sunday it was filed in a timely manner on March 14, 2011. When the last day for filing an appeal falls on a holiday, the Tribunal accepts that the first working day following that deadline is the actual due date for filing the appeal. Sunday, the day of the week on which the deadline fell for filing the present appeal, is considered a "holiday", pursuant to section 35 of the *Interpretation Act* (R.S.C., 1985, c. I-21). The computation of time when faced with an appeal that has a filing deadline that falls on a "holiday" is supported by section 26 of the aforementioned *Act*.

[9] In light of the above, I retain jurisdiction to hear this case.

c) Request for an exemption to the order for the exclusion of witnesses

Respondent's submissions

[10] I have previously granted a joint request by the parties for the exclusion of specific witnesses in this appeal. However, the respondent seeks an exemption from the witness exclusion order for the purpose of allowing Mr Soave, an expert witness that G4S intends to call to testify, to be present during the hearing of the evidence of other witnesses.

[11] The respondent seeks an exemption to the witness exclusion for Mr Soave on the grounds that his presence is necessary for providing instruction to counsel for G4S on technical matters.

[12] In particular, the respondent argued that due to the technical and industry-specific nature of the evidence that will be presented in this appeal, along with his expertise in law

enforcement and security, Mr Soave should be exempt from the exclusion order because of his ability to help counsel recognize and identify subtle factual distinctions that may arise during the course of this appeal.

[13] Secondly, the respondent asserted that it would be efficient to have Mr Soave presence because it would allow him to hear the issues and facts as they are articulated during the hearing.

[14] Thirdly, it is submitted by the respondent that Mr Soave's presence would serve to help bring out the salient facts for my consideration as the trier of facts.

Appellant's submissions

[15] Contrarily, the appellant argued that it has already consented to exempt from the exclusion order Messrs Honan, Johnson and Sheen so as to allow them to serve as advisors to counsel to G4S. While the appellant found the reasons submitted for exempting these people from the witness exclusion to be acceptable, the appellant opposed adding Mr Soave to the list of exempt witnesses. The appellant's opposition is partially grounded on the assertion that the respondent has not provided an explanation as to why Mr Soave's presence is necessary when there would already be three principals of G4S providing instruction to counsel for the respondent with respect to G4S' operations, vehicles and its crewing procedures.

[16] Furthermore, the appellant argued that there is a presumption in favour of an exclusion order in circumstances where it is sought by a party. To support this position, the appellant cited the following: *Weibe v. Canada* [1992] 2 F.C. (Appeal), 592 at paragraph 7 (Q.L.); The Canadian textbook, *The Law of Evidence in Canada*, 3rd ed., supra, at p.1099; as well as recent decisions of the OHSTC, namely *Johnstone v. Correctional Service Canada* OHSTC-05-020 and *Eric V. v. Service Correctionnel du Canada* OHSTC-09-009.

[17] An additional reason argued by the appellant for opposing the exclusion of Mr Soave is that the exclusion of witnesses is the norm, unless for some reasons the matter departs from that standard. Supporting this assertion, the appellant cited *R. v. Murphy*, [1994] N.J. No. 23, at paragraphs. 56-57 and *Wiebe* at paragraph 7.

[18] The appellant asserted further that an automatic exemption to an exclusion order is not granted on the basis of an expert witness' standing as an expert. This argument was supported by reference to *Re Toronto Transit Commission and A.T.U.*, supra at paragraph 7.

[19] The appellant submitted that counsel for the respondent has sufficient access to advisors/witnesses in the form of the individuals to which the appellant already consented to have exempted from the exclusion order so as to allow them to instruct counsel for G4S. For this reason, the appellant stated that the presence of Mr Soave is not essential to provide counsel for G4S with instruction.

[20] Another argument for opposing the added exemption raised by the appellant is that in view of the exemptions already granted, the appellant could be potentially prejudiced by having half of the employer's witnesses remain in the room during testimony.

[21] As an alternative position, the appellant argued that if I should allow Mr Soave to be exempt, I should require that he testify first, in consideration of Rule 52.06(2) of the *Rules of Civil Procedure*. The appellant further argued that I should require this on the basis of relevant guidelines provided in the Occupational Health and Safety Tribunal Canada's "Practice Guide for Hearing Appeals", 2007.

Respondent's reply submissions

[22] Counsel for the respondent acknowledged that the parties agree that it is within my discretionary authority, pursuant to subsection 146.2(h) of the Code, to determine whether Mr Soave can be present in the hearing during the testimony of other witnesses who will be giving evidence. The cited subsection of the Code reads as follows:

146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may

(h) determine the procedure to be followed, but the officer shall give an opportunity to the parties to present evidence and make submissions to the officer, and shall consider the information relating to the matter;

[23] The respondent further acknowledged that the parties agreed to the appropriateness of the order to exclude witnesses, and to the exemptions to this exclusion that have been granted.

[24] Addressing the submissions of the appellant, counsel for the respondent argued that, despite the appellant's citation of Rule 52.06 of the Ontario *Rules of Procedure*, as an appeals officer, I am not bound by the *Rules*, but rather have broader discretionary power as it relates to determining hearing procedures and the hearing of evidence. Furthermore, the respondent argued that even if the *Rules* did apply, the appellant is interpreting the cited provision too narrowly.

[25] Moreover, the respondent contested that I should not take into account the already-allowed exemptions in determining whether Mr Soave should also be exempted from the exclusion of witnesses order. The respondent argued that there is a difference between exempting a party from a witness exclusion order and exempting an expert from such an order.

[26] More specifically, the respondent argued that whereas the other exempt individuals were rightly exempt because they are representatives of the respondent company (G4S) and are intended to give fact evidence, Mr Soave is a witness of a different kind. The respondent argued that different considerations are in order for Mr Soave because he has no involvement in the facts that gave rise to the appellant's work refusal, but rather is an expert witness intended to give expert opinions relevant to the issues in dispute. As such, the respondent, maintains, Mr Soave should not be denied an exemption simply because

others have already been exempt. Using this reasoning to support the request for Mr Soave's exemption, the respondent cited *Kimvar Enterprises Inc. v. Simcoe (County)* [2006] O.M.B.D. No. 103 at paragraph 3.

[27] The respondent also pointed that at paragraph 7 of the *Wiebe v. Canada* decision cited by the appellant, it is noted that it is a common practice of the courts to exempt representatives of parties and experts from an order excluding witnesses. This point is raised to support the argument that if such is a common practice of the courts, it would not be problematic for me to grant such an exemption for Mr Soave given not only that the appeals process under subsection 129(7) of the Code is somewhat less formal than court proceedings, but also considering that I have broad discretionary authority as an appeals officer to determine my own procedure.

[28] In response to the appellant's alternative argument, the respondent asserted that because Mr Soave is not a witness who will speak to the facts of this case, but rather an expert witness, the respondent does not see a principled reason why I should rule on the order in which Mr Soave testifies. The respondent further affirmed that I should be reluctant to exercise my discretion to direct either party on the order which they should choose to lead evidence.

[29] Furthermore, it is also noted by the respondent that the appellant has reserved the right to raise issues of credibility when submitting arguments concerning the relative weight that should be given to the testimony of witnesses heard during the appeal. As such, the respondent submitted that in the event that a legitimate concern arises about Mr Soave "tailoring" evidence, the matter could be raised and taken into consideration in relation to the weight to be afforded such evidence when I am making a decision in this appeal.

[30] Finally, the respondent argued that allowing Mr Soave's exemption would be consistent with the duty of fairness as articulated in *Homelite v. Canada* [1987] F.C.J. No. 537.

Decision

[31] On this issue of granting Mr Soave an exemption from the exclusion of witnesses order, I am convinced by the respondent's arguments that the determination of whether Mr Soave should be exempt should be made based on considering him as an expert witness. As such I find that it is not a persuasive argument to hold that Mr Soave should not be exempted because there are already three representatives of G4S (fact witnesses), who have been exempted. As a result, considering that Mr Soave is to testify as an expert witness, the request for the exemption from the exclusion of witnesses order is granted.

[32] In addition, I find the respondent's argument compelling that the appellant is free to object or raise concerns during the hearing if Mr Soave seems to be "tailoring" his evidence. Since it is the appellant's the right to challenge Mr Soave's evidence, I will take into consideration any objection or argument in determining the weight I will put on Mr Soave's testimony in rendering my decision.

d) Concerning an order for the production of documents

[33] The appellant requested that I order the respondent to produce documents as requested in a letter to the respondent dated October 12, 2012, to provide copies of ten different documentary items.

[34] During the hearing on October 15, 2012, the respondent requested clarification from the appellant about some of the listed documents and an agreement was reached between the parties to either produce the requested documents or waive the request for almost all of the documents. Therefore, it is not necessary for me to render a ruling on this issue.

Michael Wiwchar
Appeals Officer

ORDER

WHEREAS Mr Darren Givoque appealed the decision rendered by Health and Safety Officer Dave Mac Neil on March 3, 2011, following his refusal to work on February 11, 2011, at the Phoenix Pub and Eatery in Brockville, Ontario;

AND WHEREAS the appellant and the respondent seek an order from the Appeals Officer that

1. the appeal be held completely *in camera* as it involves questions dealing with highly sensitive security and operations procedures of the respondent's company, G4S, a large national security services company;
2. any evidence adduced and submissions made *in camera* be prohibited from disclosure by the appellant's counsel or any of the recipients listed in my confidentiality order dated May 11, 2012, to anyone other than to one another for the purposes of this appeal;
3. Mr Andre Desjardins (President of CAW Local 4266) and employee, Mr Dan Marinier, be added to the list of recipients identified in my confidentiality order of May 11, 2012;
4. the scope of permissible disclosure stated in paragraph 2, above, be subject to any order that I may make regarding the exclusion of witnesses in regards to this appeal

AND WHEREAS the Appeals Officer recognizes that this case could disclose sensitive information dealing with issues of sensitive security policies, procedures and information that is not available to the public;

AND WHEREAS it is stated in subsection 146.2(h) of the *Canada Labour Code*;

146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may

(h) determine the procedure to be followed, but the officer shall give an opportunity to the parties to present evidence and make submissions to the officer, and shall consider the information relating to the matter;

the Appeals Officer hereby orders that:

each of the four measures sought, as listed above, be granted.

Michael Wiwchar
Appeals Officer