Occupational Health
and Safety Tribunal Canada

Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canada Post Corporation and George Stout, 2013 OHSTC 10

Date: 2013-02-14
Case No.: 2013-05
Rendered at: Ottawa

Between:

Canada Post Corporation, Applicant

and

George Stout, Respondent

Matter: An Application for a stay of a direction

Decision: The stay of the direction is denied

Decision rendered by: Mr. Pierre Hamel, Appeals Officer

Language of decision: English

For the Applicant: Mr. Stephen Bird, Counsel, Bird, Richard

For the Respondent: Mr. Gerry Deveau, National Director, Ontario Region, CUPW

Canada

REASONS

[1] These reasons concern an application for a stay of a direction issued on December 21, 2012 by Health and Safety Officer (HSO) Ms. Marjorie Roelofsen. By letter filed with the Tribunal on January 10, 2013 by its counsel, Mr. Stephen Bird, the Canada Post Corporation ("the employer") is appealing the direction and also requesting a stay of execution of the direction pending the outcome of the appeal.

[2] The application for a stay of a direction is contemplated by subsection 146(2) of the *Canada Labour Code* (the 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

[3] This matter arises out of circumstances related to the exercise of the right to refuse to perform dangerous work under section 128 of the Code exercised by Mr. George Stout, an employee of the Canada Post Corporation, on October 14, 2012. On that day, Mr. Stout had reported to work, on his employer's request, after a long period of absence due to a debilitating back condition. On his arrival at the workplace and upon being apprised of his return-to-work plan, he informed the employer that he was refusing to work and invoked the protection of section 128 of the Code. Mr. Stout was eventually sent home later that day and the employer proceeded to conduct its investigation, as required by the Code, over the course of the days that followed. At the conclusion of its investigation, the employer was of the opinion that Mr. Stout could perform some of the work that was to be assigned and that his refusal to work was unfounded, a conclusion with which the employee did not agree. Accordingly, Mr. Stout maintained his refusal.

[4] Health and Safety Officers Roelofsen, Danton and Sterling eventually visited the workplace on several occasions, on November 7 and 27, and December 5 and 12, 2012, for the purpose of conducting an investigation into the circumstances leading up to Mr. Stout's continued refusal to work. HSO Marjorie Roelofsen found that a condition existed in the workplace that constituted a danger for Mr. Stout and accordingly issued a direction to the employer on December 21, 2012. The direction reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)
>
> On November 7, 27, December 5 and 12, 2012, the undersigned health and safety officer conducted an investigation following a refusal to work made by George Stout in the work place operated by CANADA POST CORPORATION, being an employer subject to the *Canada Labour Code*, Part II, at 951 Highbury Avenue, Processing Plant, London, Ontario, N5Y 1B0, the said work place being sometimes known as Canada Post Corp. – London (MPP).

> *The performance of the job duties of a postal clerk is dangerous to George Stout, as he maintains, with the support of his family doctor, that he is unable to perform any tasks of the job for any period of time. This investigation has shown that there have been contributing factors that led to the work refusal that were taken into consideration in making this determination.*
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to protect this employee from the danger immediately.
>
> Issued at London, this 21st day of December, 2012.
>
> Marjorie Roelofsen
> Health and Safety Officer

[5] A teleconference hearing was held on January 23, 2013, to hear submissions from the parties' representatives on the application for the stay of the direction.

Submissions of the Parties

For the Applicant

[6] Mr. Bird, counsel for the Applicant, first referred to the three elements of the test applied by appeals officers to determine whether a stay of execution should be granted, and referred me to the decision rendered by the Federal Court of Appeal in *Saumier v. Canada (Attorney General),* 2009 FCA 51. That decision is, in counsel's view, based on circumstances that are identical to the ones at hand, and stands for the principle that the provisions of section 128 simply do not apply where an employee's personal health condition is in question. That decision was not considered by HSO Roelofsen when she issued her direction. Yet, according to counsel, this case was binding on her and is binding on the Appeals Officer, and as such shows not only that the question to be tried is serious, but that the employer is incurring significant harm should it be required to comply with such a legally flawed direction.

[7] Mr. Bird also argued that the employer is facing significant harm in that the direction is ambiguous and virtually unintelligible, and is such that it is not possible for the employer to know what measures it must take to protect the employee from the danger that Ms. Roelofsen found to exist, other than simply placing the employee on indefinite leave of absence. Counsel further argued that the direction as written causes the employer to be stymied in its ability to carry out obligations arising under several statutes, namely the *Government Employees Compensation Act* (*GECA*), the *Workplace Safety and Insurance Act, 1997* (*WSIA*) and the *Canadian Human Rights Act* (*CHRA*), as well as the applicable collective agreement between the employer and the CUPW. The direction has the effect of allowing Mr. Stout not to work for an indefinite period of time, regardless of whether his condition may well evolve for the better in the future. As such, the direction is at odds with the definition of "danger" in the Code, and prevents the

possibility for the employer to consider a modified work plan or the bundling of specific tasks that could be assigned to the employee as measures aimed at facilitating his reintegration in the workplace.

[8] In relation to the third element of the test, which is the protection of the health and safety of the employee while the direction is under appeal, counsel specified that, while Mr. Stout's medical condition would continue to be monitored as things evolve, the employer would not impose on him any task that he does not feel capable of performing at this time.

For the Respondent

[9] The union's representative, Mr. Deveau, first pointed to many distinctions between the facts in *Saumier* (supra) and the case at hand. In his view, *Saumier* does not apply and the HSO was right in looking at the decision rendered in *Pearce v. Jazz Air*, 2011 OHSTC 14, as the appropriate precedent to apply in this case.

[10] He added that, in his view, the employer reads the direction too restrictively and nothing in its wording prevents the employer from giving effect to its obligations under either the *GECA* or the *WSIA*. The direction in no way impedes the consideration of modified tasks or measures that would be consistent with conclusive medical evidence regarding Mr. Stout's condition, as it may evolve, and his capacity to reintegrate the work place. The letter sent to the employee on October 11, 2012 did not contemplate a modified work plan or modified tasks that could have suited Mr. Stout's condition: it simply modified Mr. Stout's hours of work, and not his tasks as a postal clerk, and those measures were inadequate and unreasonable in the circumstances.

[11] Mr. Deveau argues further that it is Mr. Stout who would suffer the greater prejudice if the direction was to be stayed, a situation that would cause him to lose the protection of the Code. He drew my attention to the "Independent Medical Examination - Two Day Functional Abilities Evaluation" report prepared by Canassess Assessment Specialits retained by the employer to assess the extent of Mr. Stout's limitations, where it is stated as follows, at page 12:

> Based on the results of today's Functional Abilities Evaluation, Physical Demands Analysis, medical information provided, and the claimant's subjective reports, it is the opinion of the assessment team that Mr. Stout demonstrated physical abilities are not sufficient to meet the demands of a Postal Clerk, specifically a Short and Long Forward Sorter. Mr. Stout was unable to demonstrate any of the essential job demands during the two days of testing and declined to participate in some of the tasks laid out in a work simulation on the second day of testing reporting being in too much pain.

This statement supports the conclusion that Mr. Stout cannot perform the duties of a postal clerk at the present time and that the direction should be allowed to stand pending the appeal.

Analysis

[12] Subsection 146(2) of the Code gives an Appeals Officer the authority to stay the effect of a direction. The Code does not specify the conditions or factors that an Appeals Officer must consider in the exercise of such authority. It is trite to state that the Appeals Officer's discretion must not be arbitrarily exercised and must be consistent with the purpose of the Code as found in section 122.1. It is clear that Parliament intended that directions issued under the Code would be effective upon their issuance, notwithstanding an appeal, unless an Appeals Officer has compelling reasons to decide otherwise. This is particularly true in a situation such as this one where a direction was issued after an HSO made a finding that a condition in the workplace constituted a danger for an employee.

[13] Appeals Officers have developed a three-pronged test as the framework within which to exercise their discretion under subsection 146(2). The elements of this 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 he or she would suffer significant harm if the direction is not stayed.

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

[14] On January 25, 2013, I rendered my decision to deny the application and the parties were so informed in writing on that day. The following are the reasons supporting my decision.

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

[15] I am of the opinion that the question raised by the appeal is serious, as opposed to frivolous, vexatious or otherwise dilatory. The employer challenges the legal foundation and the appropriateness of the direction in circumstances where the danger to the health of Mr. Stout might arguably be attributable to a personal condition rather than caused by the workplace *per se*. This calls into question the applicability of section 128 of the Code to the situation described earlier in these reasons, and the employer has referred to congruent case law that will have to be considered in the analysis of the matter on the merits. Also, there is a question as to whether the direction may impede the exercise by the employer of legal rights flowing from other legislation. Finally, there appears to be conflicting medical evidence relating to the employee's condition and capacity that will have to be carefully assessed in the appeal. The threshold for this first criterion to be met is admittedly fairly low and I am satisfied that it has been met.

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

[16] The fact that the legal foundation of the direction in this case is a serious question to be determined does not in itself establish that it causes significant harm to the employer. Much of the employer's argument turned on the legal validity of the direction and its alleged constraining effects on the employer's legal rights and obligations. At this stage of the proceedings, the question at issue is not the validity of the direction but whether the implementation of the direction before the appeal is heard on its merits causes significant harm to the employer. The harm must be real and demonstrable. Inconvenience or difficulty in implementing the direction does not satisfy that element of the test. Even if the employer may ultimately be proven right in its legal argument, this does not establish that it would suffer significant harm should the direction be allowed to stand pending the appeal.

[17] The employer also made the point that the direction is impossible to comply with, because it is written in ambiguous terms and that, as a result, it is not clear what the employer ought to do in order to implement it. In my view, a direction should be written in sufficiently clear terms to convey what the source of the problem is – in this case the condition that constitutes a danger for the employee – and what it is that the employer should correct. It does not have to be, and in my view should not be, overly prescriptive as to the measures that the employer should be putting in place to address the problem. The employer should enjoy some degree of flexibility in determining the nature of the measures that will eliminate the danger, and satisfy the HSO that it has complied with the direction. While the direction in this case may not be a model of clarity, I am of the view that when it is read in the context of the events that gave rise to the investigation, it is intelligible and capable of being complied with. I note that HSO Roelofsen, in her letter of December 21, 2012, has required from the employer written confirmation of the measures taken to comply with the direction. If there is ambiguity, as the employer argues, I am sure that it can be resolved through dialogue between the HSO and the parties' representatives as to the sufficiency of the measures taken.

[18] The employer further argued that in addition to its ambiguous nature, the direction makes it impossible for the employer to carry out its various obligations under the *GECA*, the *WSIA*, the *CHRA* and the collective agreement relating to accommodating Mr. Stout's condition and facilitating his reintegration in the workplace. I tend to agree with Mr. Deveau that the employer's reading of the direction is overly restrictive. When the direction is read in the context of the circumstances leading to the refusal as described in the HSO report, I see no basis to conclude that the employer is forever prevented from monitoring and assessing Mr. Stout's condition, as it may evolve in the future or from considering options regarding Mr. Stout's employment that may be available and permissible under such legal and contractual framework. It seems to me that the direction addresses the situation as it existed <u>at the time of the refusal</u>, i.e. that the performance of his duties as a postal clerk presented a danger to Mr. Stout's health, in light of his back condition. Whether HSO Roelofsen was right in making such a finding is a matter going to the merits of the appeal and I make no finding on the question.

[19] That said, I will add that even if the employer is right that the practical effect of the direction is to crystallize the *status quo* indefinitely, I would still be of the view that the employer has not demonstrated in what way such a situation causes it significant harm such that the direction should be stayed pending a decision on the merits of the appeal. The fact that a direction may restrict the employer's legal rights or obligations is not an uncommon occurrence and the appropriateness and validity of the direction, in all of the circumstances, will properly be determined by the appeal on its merits.

[20] For these reasons, I am not persuaded that the employer will 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 workplace should the stay be granted?

[21] Given my finding that the employer has not established that it would suffer significant harm if the stay is not granted, I do not need to consider this third criterion.

Decision

[22] For the reasons set out above, the Application for a stay of the direction issued by HSO Marjorie Roelofsen on December 21, 2012, is denied.

Pierre Hamel
Appeals Officer