Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Foreign Affairs and International Trade - Passport Canada and Public Service Alliance of Canada, 2013 OHSTC 17

Date: 2013-05-06
Case No.: 2012-65
Rendered at: Ottawa

Between:

Foreign Affairs and International Trade Canada - Passport Canada, Appellant

and

Public Service Alliance of Canada, Respondent

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer
Decision:	The direction is confirmed
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Language of decision:	English
For the appellant:	Ms Lesa Brown, Counsel, Treasury Board Secretariat Legal Services
For the respondent:	Mr Todd Woytiuk, Regional Representative, Public Service Alliance of Canada

REASONS

[1] This decision concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) against a direction issued by Ms Michelle Sterling, Health and Safety Officer (HSO), Human Resources and Skills Development Canada, Labour Program, on September 24, 2012, pursuant to subsection 145(1) of the Code, to the employer, Foreign Affairs and International Trade Canada (Foreign Affairs). The appeal was joined by an application for a stay of the direction pursuant to subsection 146(2) of the Code.

Background

[2] On August 17, 2012, two HSOs, one being HSO Sterling, conducted a work place investigation at the Foreign Affairs' Passport Office in London, Ontario.

[3] During the inspection, HSO Sterling was made aware that an ergonomic assessment had been conducted at the same work place on June 18, 2012, following a Hazardous Occurrence Investigation Report filed on April 2, 2012, by an employee at the Passport Office. The employee suffered disabling injuries which were subsequently determined to be work related. The ergonomic assessment was conducted by Workplace Safety and Prevention Services, a private consulting firm hired by the employer.

[4] The finalized ergonomic assessment, containing recommendations to prevent a recurrence of the injuries, was received by the employer on June 26, 2012. However, it was revealed during the investigation that the employer did not disseminate the ergonomic assessment to the work place health and safety committee due to privacy concerns.

[5] On September 24, 2012, HSO Sterling issued a direction under subsection 145(1) of the Code citing a contravention to paragraph 125(1)(z.11) of the Code. The direction reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)
>
> 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 failed 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 & safety committee.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(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 to reoccur.

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

[Signed in original]
Michelle Sterling
Health and Safety Officer

[6] A teleconference to hear the application for a stay of the direction was held on October 10, 2012, before Appeals Officer Pierre Guénette. A stay of the direction was granted on October 11, 2012, with the reasons issued on November 2, 2012. The stay was granted under the condition that the employer provide a redacted version of the ergonomic assessment that excludes any reference to the personal information related to the medical history of any employee.

Issue

[7] The issue I need to address in this case is whether HSO Sterling erred in issuing a direction under 125(1)(z.11) in the circumstances described in the direction.

Submissions of the parties

Appellant's submissions

[8] The appellant submitted that pursuant to paragraph 125(1)(z.11) of the Code, an employer must provide the Work Place Health and Safety Committee (the work place committee) with a copy of any report on hazards in the work place, including any assessment of those hazards. It is submitted that the employee's ergonomic assessment is not a report or an assessment for the purposes of paragraph 125(1)(z.11) or for the purposes of subsection 135(9) of the Code.

[9] It is the appellant's position that the Code does not define what constitutes an "employer report". It points to *Air Canada and Canadian Union of Public Employees, Air Canada Component*[1] (*Air Canada*) as the leading case addressing whether or not a document is an employer report for the purposes of subsection 135(9) of the Code. It was determined in that case that an "Air Safety Report" (ASR), a document voluntarily completed by a pilot after a safety related incident or occurrence, was an employer report for the purposes of subsection 135(9). The Appeals Officer in *Air Canada* considered the following factors:

a) ASRs were an integral part of Air Canada's reporting policy;
b) the ASR form was provided by Air Canada and bore the company logo;
c) Air Canada determined the content of the form and therefore the content of the ASR;
d) the ASRs, though voluntary, existed primarily for the benefit of Air Canada; and
e) Air Canada's Air Safety Reports Immunity Policy explicitly included ASRs.

[10] The appellant maintained that the Appeals Officer in that case also found that the information contained in the ASR "could prove to be very useful" for the work place safety committee in fulfilling its mandate to ensure employees are informed of "known or foreseeable hazards and to participate in identifying and correcting occupational health and safety concerns."

[11] It is the appellant's view that following this reasoning, the ergonomic assessment of the employee does not meet the criteria set out in *Air Canada*:

a) An ergonomic assessment is not an integral part of Passport Canada's reporting policies dealing with hazardous occurrences in the work place;
b) the ergonomic assessment was not conducted by Passport Canada. Passport Canada hired a consultant, Workplace Safety Prevention Services, to conduct the assessment;
c) Passport Canada did not participate in designing the assessment of determining the content of the assessment; and

[1] *Air Canada and the Canadian Union of Public Employees, Air Canada Component*, OHSTC-09-23

d) the ergonomic assessment existed primarily for the benefit of the employee.

[12] Moreover, the appellant submitted that section 125 of the Code does not require the production of all reports but limits the requirement to reports on "hazards in the work place". The purpose of the employee's ergonomic assessment was not to assess a hazard in the work place, instead, its purpose was to assess the employee in light of the job tasks and any physical limitations the employee may have had at that time.

[13] The appellant argued that in reviewing paragraph 125(1)(z.11) of the Code, it is important to note that it requires an employer to share "any reports on hazards in the work place" with, not only the work place committee, but also with the policy committee, if one exists. It added that section 134 of the Code clearly states that a policy committee has the overarching responsibility to coordinate the activity of the work place committee. In the appellant's view, it would be difficult to imagine that the legislator intended that every ergonomic assessment conducted for an employee in a particular organization would be disseminated to that organization's policy committee.

[14] The appellant submitted that the employee's ergonomic assessment is not a "report" as contemplated by paragraph 125(1)(z.11) of the Code and, as such, there was no requirement on the appellant to disclose the assessment to the work place committee. But on the other hand, it maintained that even if the Tribunal should find that the ergonomic assessment itself meets the definition of a report "on hazards in the work place" as per paragraph 125(1)(z.11) of the Code, one must look to what portions of that report meet the definition.

[15] Pursuant to section 125 of the Code, the purpose of the provision of reports to the work place committee is to ensure that work place committees are kept informed of hazards that may exist in their work place.

[16] The appellant argued that the ergonomic assessment for the employee contained her personal information including information relating to her physical appearance, her absenteeism record, her medical history and information concerning accommodation measures related to her return to work. This does not constitute an "assessment of hazards" or "information related to hazards in the work place" or a "report on hazards in the work place".

[17] The employee's personal information does not shed light on the existence of any hazards in the work place or provide any information capable of assisting the work place committee in making an assessment of any hazard. As such, the appellant submitted that the work place committee does not need the portions of the report containing the employee's personal information in order for it to fulfill its mandate under section 135 of the Code.

[18] Subsection 135(9) of the Code delineates the boundaries of the work place committee's right of access to information, including employer reports, studies, and tests:

> 135(9) A work place committee, in respect of the work place for which it is established, shall have full access to all of the government and employer reports, studies and tests relating to the health and safety of the employees, or to the parts of those reports, studies and tests that relate to the health and safety of employees, but shall not have access to the medical records of any person except with the person's consent.

[19] This subsection provides, according to the appellant, that a work place committee shall have access to government and employer reports, studies and tests relating to the health and safety of employees. However, if only a portion of the report, study or test relates to the health and safety of employees, then, pursuant to this provision, the work place committee would only have access to those portions.

[20] The appellant argued that the employer can only be required to provide the work place committee with portions of a report that the committee would be entitled to access under subsection 135(9). It cannot have been the legislator's intention to require the employer to provide the work place committee with reports to which it had no right to access under subsection 135(9).

[21] In the appellant's view, if the work place committee is not entitled to access the portions of the report that do not relate to the health and safety of employees, then the employer cannot be required to provide such information. Moreover, the report which must be provided by the employer under paragraph 125(1)(z.11) of the Code must be a "report on hazards in the work place, including an assessment of those hazards".

[22] The appellant submitted that the employee's personal information does not relate to the health and safety of the employees in the work place. The information that does relate to the safety of employees, specifically, the information on the identified hazards and recommendations to address these hazards, has been provided to the work place committee. For these reasons, the appellant requests that this Appeals Officer declare that there has been no contravention of paragraph 125(1)(z.11) of the Code.

Respondent's submissions

[23] The respondent started by arguing that the Public Service Alliance of Canada (PSAC) cannot make full submissions regarding the substance of this appeal without having access to an unredacted version of the ergonomic report. It submitted that this Appeals Officer should exercise his power to order the appellant to provide to the respondent an unredacted copy of the report in order to assure that the respondent is properly informed in regards to the nature of the employer's arguments and the case it has to meet.

[24] Furthermore, the respondent reserves the right to make full submissions regarding the legality of redaction until the appellant discloses the unredacted assessment and the respondent has had ample time to review it.

[25] The respondent argued that the appellant's position violates a fundamental tenet of the internal responsibility system. As per subsection 135(7) of the Code, members of the work place safety committee collect information and concerns from employees relating to work place health and safety. They also perform work place inspections and investigate complaints and accidents. They are responsible for maintaining an archival record of health and safety concerns in the work place, and they have oversight responsibilities for implementing changes and carry out monthly inspections.

[26] The respondent maintained that the work of the committee is the lynchpin of an internal responsibility system because it is the forum for dispute resolution in the area of health and safety. It is a stand-alone system that is not hampered by labour relations or grievance handling. It adds that health and safety legislation is regarded by the courts as public welfare legislation and the Code has created a role for the committee to facilitate early and efficient dispute resolution.

[27] In the respondent's view, to support the work of the committee, subsections 135(8) and (9) provide virtually unfettered access to information:

> Information
>
> 135(8) A work place committee, in respect of the work place for which it is established, may request from an employer any information that the committee considers necessary to identify existing or potential hazards with respect to materials, processes, equipment or activities.
>
> Access
>
> 135(9) A work place committee, in respect of the work place for which it is established, shall have full access to all of the government and employer reports, studies and tests relating to the health and safety of the employees, or to the parts of those reports, studies and tests that relate to the health and safety of employees, but shall not have access to the medical records of any person except with the person's consent.

[28] The respondent submitted that, according to section 135 of the Code, the only restriction that applies to the right to access information is where an employee has not consented to give access to his medical records.

[29] In this regard, the respondent made two submissions. First, the employee has consented to the release of an unredacted version of her medical assessment. Such consent was provided by the respondent in a letter by the employee included in appendix to the respondent's submissions.

[30] Second, the respondent has not seen an unredacted version of the assessment. Consequently, it cannot determine whether what has been redacted constitutes a medical document. The respondent reserves the right to make further submissions regarding the content of this document once the unredacted version is provided.

[31] The respondent upheld that an ergonomic assessment is not, per se, a medical record. It asserted that the College of Physicians and Surgeons of Ontario (CPSO) has a clear description of what constitutes a medical record in its policy on the collection and retention of medical records. The CPSO policy states:

> The medical record is a powerful tool that allows the treating physician to track the patient's medical history and identify problems or patterns that may help determine the course of health care.
>
> The primary purpose of the medical record is to enable physicians to provide quality health care to their patients. It is a living document that tells the story of the patient and facilitates each encounter they have with health professionals involved in their care.
>
> […]
>
> The College expects all physicians to keep medical records that are consistent with their legal obligations and the expectations set out in this policy.

[32] In the respondent's view, it is clear that for a document to be labelled as a medical record, it has to be authored by a patient's physician or a surgeon. In the present case, the author of the ergonomic assessment was not the employee's physician or surgeon, but rather by a consultant with Workplace Safety and Prevention Services.

[33] The respondent argued that the Code contains no statutory provision for the redaction of documents provided to the work place health and safety committee. The only limitation in the statute is in respect or the production of medical records.

[34] The respondent points out that the work of the work place health and safety committee is to identify systemic hazards in the work place, to advise the employer regarding such hazards, and to make recommendations to address work place dangers. In its opinion, given that the work of the committee is of such fundamental importance, the suppression of information to the committee must be justified by clear statutory language. Simply put, it submitted, there is no such statutory entitlement. As such, the respondent maintained that the appellant's submissions regarding the opinion that the employer is entitled to suppressing any portions of the ergonomic assessment is without foundation as per the Code.

[35] The respondent maintained that even the *Privacy Act* does not justify the redaction of such information. Subsection 8(1) and paragraph 8(2)(b) states:

> 8(1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.
>
> (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

> […]
>
> (b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

[36] The respondent asserted that it is clear from this section of the *Privacy Act* that the release of this information is to be determined by the provision of the Code which generated the document in the first place. This provision can be found at paragraph 125(1)(z.11) of the Code, which reads:

> 125(1) 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,
>
> (z.11) provide to the policy committee, if any, 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;

[37] The respondent stated that this is the source of the committee's entitlement to the ergonomic assessment in question. It added that there is no restriction in this section to providing the whole ergonomic assessment to the committee. The respondent noted that though the appellant in its stay application cited violations to the *Privacy Act* as a reason to grant the stay, no specific provisions of the *Privacy Act* were cited in the decision granting the stay nor has the appellant maintained in its written submissions of December 7, 2012, that there continue to be *Privacy Act* violations in the release of this information.

Appellant's reply submissions

[38] In its reply, the appellant submitted that the respondent's assertion that it cannot make full submissions on the appeal without having access to an unredacted version of the ergonomic assessment is null and that its requests that this Appeals Officer orders production of the unredacted version of the assessment should be denied.

[39] The appellant argued that a review of the respondent's submissions indicated a fundamental misunderstanding of the nature of this appeal. This is not an appeal by PSAC alleging a violation of the Code by the employer. Moreover, the issue of the redaction of documents provided to the work place committee is not at issue in this appeal. The appellant submitted that in fact, at no time did the work place committee even request a copy of the assessment in question.

[40] Instead, the case at hand represents the appellant's appeal of the direction by HSO Sterling on the basis that the direction exceeds the scope of paragraph 125(1)(z.11) of Code. The appellant argued that pursuant to this provision, the employer's obligations are limited to providing the work place committee with copies of the "report on hazards in the work place, including an assessment of those hazards."

[41] As stated in its initial submissions, the appellant has submitted that the ergonomic assessment does not fall within the type of report contemplated by paragraph 125(1)(z.11). Alternatively, even if the assessment is found to constitute such a report, the portions of the assessment containing the medical and personal information of an employee does not meet the requirements of paragraph 125(1)(z.11). The appellant asserted that the respondent does not require the unredacted assessment to respond to these issues.

[42] It is the appellant's position that the letter of consent signed by the employee and found in appendix to the respondent's submissions has no relevance to the issues on appeal. More specifically, the letter indicates that the employee consents to the release of the ergonomic assessment to the Occupational Safety and Health Tribunal Canada. The letter contains no reference to the release of the assessment to the either the respondent or the work place committee.

[43] In light of the above, the appellant requested that the respondent's request for the production of the unredacted ergonomic assessment be denied.

[44] In response to the respondent's argument that the ergonomic assessment is not, per se, a medical record, the appellant noted that, in its initial submissions, it has not equated an ergonomic assessment with a medical record. Rather, it submitted that where an ergonomic assessment contains medical information, the portions of the assessment containing the medical and personal information of an employee does not meet the requirements paragraph 125(1)(z.11). Moreover, the appellant is of the opinion that the definition of "medical records" provided by the respondent has no relevance to the interpretation of paragraph 125(1)(z.11) of the Code.

Analysis

[45] I must first begin my analysis by determining the extent of the duty imposed on the employer under paragraph 125(1)(z.11) of the Code. As was cited above, this provision requires the employer to "provide to the policy committee, if any, and to the work place committee or the health and safety representative, a copy of <u>any report on hazards</u> in the work place, <u>including an assessment of those hazards.</u>" [Underlining added]

[46] On this issue, the appellant argued that the ergonomic assessment ordered by the employer and prepared by Workplace Safety and Prevention Services should not be considered a report as per paragraph 125(1)(z.11) of the Code. To support this view, the appellant referred to the decision in *Air Canada*, where the Appeals Officer considered a series of factors in determining whether or not a document should be considered a report.

[47] While I consider that the criteria employed by the Appeals Officer in *Air Canada* can be very useful in determining if a document should be regarded as a report as per paragraph 125(1)(z.11), I do not believe that they are meant to be exhaustive. The nature

of a document pertaining to health and safety in the work place should always be evaluated on a case by case basis and in relation to the context of its production.

[48] Nevertheless, although I agree with the appellant that the ergonomic assessment is not an integral part of the employer's reporting policies for hazardous occurrences and that the employer did not participate in designing the assessment or its content, I do not find it relevant, in the present case, that the assessment was conducted by a hired consultant rather than directly by the employer. As it was clearly mentioned in HSO Sterling's narrative report, the June 18, 2012, ergonomic assessment was ordered by the employer as a direct response to the Hazard Occurrence Investigation Report (HOIR) filed by the employee on April 2, 2012. Additionally, paragraph 125(1)(z.11) of the Code does not require that a report be directly generated by the employer in order to be subject to dissemination under this provision.

[49] In my view, the nature of the ergonomic assessment conducted on June 18, 2012, should not be determined by evaluating the document in isolation. Rather, it should be viewed as a direct consequence of the HOIR filed by the employee on April 2, 2012. Since the HOIR unquestionably qualifies, in my opinion, as a report on a hazard in the work place, it stands to reason that the ergonomic assessment is an assessment of a hazard in the work place pursuant to 125(1)(z.11) of the Code because it was ordered by the employer for that very purpose.

[50] As well, having established that the ergonomic assessment does in fact constitute an assessment of a hazard in the work place as per the Code, I need to address the issue raised by the appellant in regards to which part of the assessment should be divulged to the work place committee.

[51] In establishing the scope of a particular provision of Part II of the Code, it is useful to turn to its purpose clause found at section 122.1, which reads:

> 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.

[52] In my opinion, it falls well within the spirit of Part II of the Code and its purpose clause that the provisions dealing with the sharing and dissemination of information between employers and health and safety committees be interpreted broadly to assure sufficient transparency to prevent any harm to the health and safety of employees while at the same time not infringing on the right to privacy of employees.

[53] That being said, the requirement at paragraph 125(1)(z.11) of the Code mentions no exceptions in regards to the portions of a report that an employer has to provide to the committee. All that is mentioned is the obligation to provide a "copy" of any report or assessment of a hazard in the work place, which seems to indicate that the report must be provided in whole. As mentioned by both parties, the only restriction in the Code regarding the dissemination of information to the work place committee can be found at

subsection 135(9), where it is specified that the committee shall have access to all studies and tests relating to the health and safety of the employees, with the exception of the medical records of any person, unless the person consents to its dissemination.

[54] On that issue, the Code does not offer a definition of "medical records". Consequently, in order to determine what does constitute a medical record, I must refer to the courts' interpretation of the concept. One of the leading cases on that subject is the Supreme Court of Canada's decision in *McInerney* v. *MacDonald*[2], where a patient requested access to the content of her full medical file. In defining what constitutes a medical record, the Court determined that in the absence of legislation, a patient may have access to all information in her medical record which the physician considered in administering advice or treatment, including records prepared by other physicians that the physician may have received. The Court also stated that the patient's access "does not extend to information arising outside the doctor-patient relationship." [Underlining added]

[55] The position of the Court in *McInerney* clearly indicates that the extent of an individual's control over information of a medical nature is limited to information which the physician obtains in providing treatment and excludes information obtained outside the doctor-patient relationship. While it is inevitable that any ergonomic assessment will contain information relating to the health of the concerned individual, it appears that, in light of the Supreme Court's interpretation, this information should not be considered a part of the individual's medical record unless it is collected by a physician within the confinements of a doctor-patient relationship.

[56] In the case at hand, the ergonomic assessment was performed by a consultant/ergonomist employed by Workplace Safety and Prevention Services. While this consultant may have an expertise in the field of ergonomics, this does not qualify the consultant as a physician with whom the employee would have benefited from a doctor-patient relationship. As a result, the information obtained by the consultant during the June 18, 2012, ergonomic assessment is not part of the employee's medical record and the employer is not required to obtain the employee's consent pursuant to 135(9) of the Code in order to provide the assessment to the work place committee.

[57] In conclusion, I agree with the respondent that the dissemination of the ergonomic assessment under 125(1)(z.11) of the Code is not limited by the *Privacy Act*, which unambiguously indicates at paragraph 8(2)(b) that disclosure of personal information is permitted for any purpose in accordance with any Act of Parliament that authorizes its disclosure.

[2] *McInerney* v. *MacDonald*, [1992] S.C.J. No. 57.

Decision

[58] For the reasons given above, I hereby confirm the direction issued by HSO Sterling on September 24, 2012.

Michael Wiwchar
Appeals Officer