Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Alex Hoffman v. Canada (Border Services Agency), 2013 OHSTC 19

Date: 2013-07-09
Case No.: 2013-14
Rendered at: Ottawa

Between:

Alex Hoffman, Appellant

and

Canada Border Services Agency, Respondent

Matter:	Request for an extension of time to file an appeal under subsection 129(7) of the *Canada Labour Code*
Decision:	The request is denied
Decision rendered by:	Mr. Pierre Hamel, Appeals Officer
Language of decision:	English
For the appellant:	Himself
For the respondent:	Ms. Christine Langill, Counsel, Treasury Board Secretariat Legal Services

Canada

REASONS

[1] This matter concerns an application for an extension of time to file an appeal pursuant to subsection 129(7) of the *Canada Labour Code* (the Code). The applicant, Mr. Alex Hoffman, seeks to be relieved of his failure to file his appeal of a decision that a danger does not exist rendered by Health and Safety Officer (HSO) Chris Wells on December 13, 2012, within the 10-day statutory time limits to do so.

Background

[2] On December 11, 2012, Mr. Hoffman, along with 25 other Border Services Officers, invoked the protection of section 128 of the Code and notified his employer of his refusal to work by reason of his belief that a situation in his workplace constituted a danger to his health and safety. It appears that the employer's decision to implement its new "Name Tag Policy" and to hand out name tags to Border Services Officers working at the Ambassador Bridge, Traveller and Commercial Operations on that day, is the event that triggered the refusals. Mr. Hoffman and his colleagues refused to work on that day, for fear that such personal identification increased the risk of danger to their personal safety and the safety of their families. Mr. Hoffman presented himself as the representative of that group of employees.

[3] On December 12, 2012, HSO Wells attended the workplace in order to conduct his investigation into the work refusal. On the following day, he rendered his decision that no danger existed and so informed Mr. Hoffman, the employer and all employees concerned. His decision was communicated in writing. It is useful to quote the letter that HSO Wells sent to Mr. Hoffman in its entirety:

> December 12, 2012
>
> Assignment No.: M003C00250
> Site No.: M0144
>
> Canada Border Services Agency
> P.O. BOX 1641
> Windsor, Ontario
> N9A 7K3
>
> Mr. Alex Hoffman
> 780 Huron Church Road
> Windsor, Ontario
> N9C 2K1
>
> Attention: Mr. Alex Hoffman, Border Services Officer
>
> Dear Sir:
>
> On December 12, 2012, I conducted an investigation following the refusal to work made by Alex Hoffman as part of a group refusal to work.

> Please be advised that pursuant to subsection 129(4) of the *Canada Labour Code*, Part II, the undersigned health and safety officer considers that a danger does not exist.
>
> Also, please be advised that, pursuant to subsection 129(7) of the *Canada Labour Code*, Part II, the aforementioned employees are not entitled under section 128 or section 129 to continue to refuse to (*sic*) the performance of an activity.
>
> Finally, be also informed that, pursuant to subsection 129(7), the aforementioned employees, or a person designated by the employee(s) for the purpose, may appeal the said health and safety officer's decision in writing to an appeals officer of the Occupational Health and Safety Tribunal of Canada (OHSTC) within ten (10) days after receiving this notice. The OHSTC may be contacted at www.ohstc-tsstc.gc.ca.
>
> A full report of the undersigned health and safety officer's decision will be provided to the employer and employee(s) forthwith.
>
> Yours truly,
>
> Chris Wells
> Health and Safety Officer
> 4900 Yonge Street, Penthouse
> Toronto, ON
> M2N 6A4
> (…)

[4] Having been notified of the HSO's decision on December 13, 2012, Mr. Hoffman had until December 24, 2012 inclusive, December 23 falling on a Sunday, to file his appeal with the Tribunal, pursuant to subsection 129(7) of the Code.

[5] The Tribunal received the appeal on February 27, 2013, more than sixty (60) days after the expiry of the 10-day time limit to file the appeal. The record shows that the Notice of appeal had somehow been delivered at the office of HRSDC's Labour Program in Headquarters at an undisclosed date, and then sent from there as an email attachment in electronic PDF format to the Labour Program's Toronto office by a person, presumably from Headquarters, named Josée Martineau on February 27, 2013. That email and attachment were immediately forwarded to the Tribunal on that same day by a Mr. Ken Manella, Technical Advisor – Ontario Region. As a result, the Tribunal never received the envelope that contained the appeal document and there is no postmark to be referred to. The Notice of appeal is dated December 20, 2012 and bears Mr. Hoffman's signature.

[6] On February 28, 2013, Ms. Chanel Walker, Registrar with the Tribunal, wrote to Mr. Hoffman to inform him that his application was received outside the 10-day statutory time limit set out in subsection 129(7) of the Code and to ask him to provide the Tribunal with explanations as to where and when his appeal document was sent. Mr. Hoffman replied that same day that he had posted his Notice of appeal on December 20, 2012, the date that appears on the notice and within the time limit. He mentioned that he had also

informed HSO Wells, within that timeframe, of his intention to appeal his decision. As it turned out, his letter was returned to sender in January 2013 for reason of insufficient postage. He indicated that he had kept the Canada Post return label as proof of this situation. On March 4, 2013, Ms. Walker sought to obtain from Mr. Hoffman more information as to where (to what address) he had posted his Notice of appeal as well as supporting documentation confirming that he had expressed his intention to appeal to HSO Wells. In his reply, Mr. Hoffman did not address the first question, but forwarded a copy of his email of December 20, 2012 to HSO Wells in which he indeed advises him of his intention to appeal his decision of absence of danger.

[7] On March 13, 2013, shortly after HSO Wells had filed his investigation report and written decision with the Tribunal, Ms. Walker confirmed with Mr. Hoffman that the appeal "appeared to be beyond" the time limit set out in subsection 129(7) and informed him of his right to request an extension of the time for instituting the appeal to an Appeals Officer and to present submissions in support of that request. On March 19, 2013, Mr. Hoffman formally requested an extension of time to file his appeal and presented written submissions in support of his request.

Issue

[8] The question that I must address in light of the facts of this case is first whether Mr. Hoffman appealed, as he contends, within the statutory 10-day time limit set out in subsection 129(7). If he did not, I must then exercise the discretion, conferred upon me by subsection 146.2 (*f*) of the Code, to extend that time limit and consequently relieve Mr. Hoffman of his failure to have filed his appeal within that timeframe.

Submissions

For the Appellant

[9] In his submissions, the appellant stresses the fact that he had advised on two occasions HSO Wells of his intention to appeal his decision. However, he adds that he was still waiting for a copy of a 2011 newspaper article reporting on the fact that employees of CBSA had possibly been "spied on" by members of organized crime during an employee appreciation event and that he wanted included in the file (I note that a copy of that article was included in the documentation received by the Tribunal on February 27, 2013).

[10] Furthermore, he pointed to the fact that he is not a lawyer or a professional in such matters; he had asked HSO Wells for advice and guidance regarding the appeal process and received no response. Nevertheless, he affirms that he completed a notice of appeal form and mailed it within the 10-day timeframe to the Occupational Health and Safety Tribunal of Canada, along with his stated grounds for appealing the decision and a copy of the HSO's report. He reiterated the fact that the letter was returned to him by Canada Post for insufficient postage and that he immediately added postage and sent it again to the Occupational Health and Safety Tribunal Canada (OHSTC) without delay.

[11] Mr. Hoffman also expressed concern about what he perceived as favouritism from the "Labour Board" (I assume that what is meant here is the "Labour Program" of HRSDC) in allowing the employer to be late in complying with HSO Wells' direction that a Hazard Assessment be conducted relating to the implementation of the Personalized Name Tag Policy.

For the Respondent

[12] The Respondent submits that the appellant bears the onus of showing sufficient grounds for his delay in appealing. Firstly, counsel for the employer points out that Mr. Hoffman's statement that he did mail his Notice of appeal within the 10-day time limit is uncorroborated. He was aware of the time limitation and never took appropriate steps to ensure that his appeal had indeed been properly received by the Tribunal, such as using registered mail or contacting the Tribunal.

[13] The Respondent further submits that the appellant's reasons to explain the delay are unsubstantiated, contradictory and evasive and that he has failed to show diligence in following up with the Tribunal with his appeal. The fact that it was received at the wrong address is not an excuse and does not relieve Mr. Hoffman of his obligation to comply with the time limit set out in subsection 129(7) of the Code. Counsel for the respondent concludes by stating that the employer would suffer prejudice if the request was granted, as it would allow the appellant, without sufficient or substantiated grounds, to openly disregard limitation periods under the Code and would run against the principle of finality relied upon by the employer regarding matters that are deemed finalized.

[14] Counsel for the respondent referred to the following jurisprudence in support of her submissions: *Ayad* v. *Canada*, 2012 IADD No. 1140; *Emter* v. *Canada (DND)*, 2004 CLCAOD No. 39 (QL); *Cardinal* v. *Louis Bull*, 1997 FCJ 1557 (QL); *Gallant* v. *CBSA*, 2012 OHSTC 37; *Suarez* v. *Canada*, 2007 PSST 8; *Trocchia* v. *Canada*, 2007 PSST 14; *Cameron Trucking* v. *Anderson et al.*, 2009 OESAD No. 107 (OLRB) (QL); *Porter* v. *Local Union 938 and Purolator*, 2002 CIRB No. 176 (QL); *Canada (HRD)* v. *Hogervost*, 2007 FCA 41; *Len Van Roon* v. *Kinonjeoshtegon First Nation*, 2007 CLCAOD No. 47 (QL); *Lefebvre* v. *CSC*, 2012 OHSTC 45.

Analysis

[15] The first question to look into is whether Mr. Hoffman has established that the requirements of subsection 129(7) of the Code have been satisfied. That section reads as follows:

> 129(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.
>
> [Underlining added]

[16] I read subsection 129(7) to mean that an employee must bring an appeal to an appeals officer, i.e. the Occupational Health and Safety Tribunal Canada, within that period of 10 days from the date he or she is notified of the decision that a danger does not exist. This time limit, it seems to me, is a strict limit, although an appeals officer is given the power to extend such limitation for valid reasons, which will be further discussed later in these reasons (see: *Suarez v. Canada*, 2007 PSST 8; *Allard v. Canada (Public Service Commission)*, [1982] 1 F.C. 432; *Lalancette v. Canada (Public Service Commission)*, [1982] 1 F.C. 435).

[17] An appeal therefore is not brought merely by signing an appeal form and sending it to the Tribunal. It should reach the Tribunal within that 10-day limitation period. The question that arises in this case then is how to apply that concept when an appeal is sent to the Tribunal by using regular mail. The Tribunal has developed a document titled *Practice Guide for Hearing Appeals*, for the benefit of its constituency. That document is easily retrievable on the Tribunal's website. Under the headings "Time limits" and "Date of Receipt", the *Guide* states as follows:

> **Time limits**
> The *Canada Labour Code*, Part II, sets the time limits to appeal
>
> The appellant who cannot initiate the proceeding within the time limit must inform an appeals officer of the reasons that would justify extending that time limit. The appeals officer will decide the matter after giving all parties the opportunity to present their position on the issue.
>
> **Date of receipt**
> The date of receipt of a notice of appeal or of any related documents for which a time limit for filing has been set is
> a. for regular or registered mail, the postmark
> b. in any other case, the date of receipt by the Office

[18] Accordingly, if it can be shown that a Notice of appeal is mailed to the Tribunal within the 10-day limitation period, the requirement of subsection 129(7) would be satisfied, in spite of the fact that the Tribunal may receive the notice after the expiry of that deadline. However, it is incumbent on the appellant to prove, on a balance of probabilities, that the documentation was indeed mailed within the 10-day period. What does it take to prove that? The *Guide* speaks expressly to that issue and states that the determination of the "date of receipt" by the Tribunal of a notice of appeal or other document is, for regular or registered mail, the postmark.

[19] This approach is consistent with the principle set out by the Federal Court in *Ghaloghlyan* v. *M.C.I.*, 2011 FC 1252 regarding the filing of documents by mail. At paragraphs 9 and 10 of its judgement, the Court states as follows:

> […]
>
> [9] Thus, the question becomes: what does it take to prove on a balance of probabilities that a document was sent? In my opinion, to find that a

> document was "correctly sent", as that term is used in *Kaur*, it must have been sent to the address supplied by an applicant by a means capable of verifying that the document actually went on its way to the applicant.
>
> [10] For example, with respect to documents, proving that a letter went on its way is verified by sending it by registered mail and producing documentation that this was the manner of sending, or by producing an affidavit from the person who actually posted the letter. Proving that a fax went on its way is verified by producing a fax log of sent messages confirming the sending. Proving that an email went on its way is verified by producing a printout of the sender's e-mail sent box showing the message concerned was addressed to the e-mail address supplied for sending, and as no indication of non-delivery, the e-mail did not "bounce back". Other evidence that a document went on its way might suffice; the determination in each case depends on the evidence advanced.

[20] Clearly, the Court requires more than an appellant's statement that a document was sent within the time limits, or expressed an intention to appeal within those time limits, to satisfy the requirements of the statute. The Court looks for credible and preferably objective evidence to prove the fact that a document has been sent on a given date (see also *Ayad* (*supra)*).

[21] In the present case, Mr. Hoffman contends that he complied with the requirements of subsection 129(7), since he allegedly mailed his Notice of appeal and supporting documentation within the 10-day limit prescribed by that section. However, the objective fact is that the Tribunal received his Notice of appeal only on February 27, 2013, more than 60 days after the expiry of the time limit. The appellant says that he mailed the notice of appeal twice, his original mailing having been returned to him at an unspecified date in January 2013, for insufficient postage. For reasons that remain a mystery and unfortunately for the appellant, the documentation allegedly addressed to the Tribunal ended up in HRSDC's (Labour Program) Headquarter office and was eventually forwarded to the Tribunal in electronic (PDF) format only. Consequently, there is no envelope and no postmark to refer to for establishing the date of mailing, and no proof that it was correctly addressed. The Canada Post label provided by the appellant at the Tribunal's request merely confirms his explanation that the letter he originally mailed was returned for insufficient postage. The label falls short of establishing the date of the original or the second mailing, or the date on which the letter was returned to Mr. Hoffman, or even the address on the original envelope.

[22] In light of the facts set out above, I conclude that while the Tribunal did receive an appeal, ostensibly signed by Mr. Hoffman, on February 27, 2013, the appellant has not established, with satisfactory proof, that he "appealed, (…) in writing, to an appeals officer within ten days after receiving notice of the decision", for the purpose of subsection 129(7) of the Code. Mr. Hoffman's appeal is therefore clearly out of time.

[23] This takes me to the second issue raised by this matter, which is whether to exercise my discretion in favour of extending the time limit for filing the appeal and

effectively relieving Mr. Hoffman of his failure to present his appeal within the prescribed time limit. Pursuant to paragraph 146.2 (*f*) of the Code, an appeals officer is empowered to extend the prescribed time limit for initiating an appeal. This section reads as follows:

> 146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
>
> (…)
> (*f*) abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence;

[24] Parliament has prescribed a 10-day time limit to appeal a decision that a danger does not exist, a fairly short one at that when compared with the 30-day period within which a direction issued by an HSO may be challenged before an appeals officer. Time limits such as this exist to protect the public's interest in the finality of administrative decisions and ensure the orderly administration of the Code. It is important that these time limits be adhered to and where they have not been so, that compelling and convincing reasons are brought forward to justify not having complied with such statutory requirement.

[25] The Code does not prescribe factors that an appeals officer ought to consider in exercising the power to extend time limits. Such discretion must be exercised judicially, in a non-arbitrary or discriminatory manner, must be based on relevant legal principles, and be anchored in considerations that support the interest of fairness and serve the purpose and objectives of the Code. A provision enabling the decision-maker to extend time limits is commonly found in statutes establishing administrative tribunals. Administrative tribunals and appeals officers alike, have typically considered and weighed the following factors in the exercise of their discretion: the length of the delay in relation to the appeal period, the explanations of the party to account for the delay, the due diligence shown through that party's actions, and the prejudice suffered by the other party(ies) to the proceedings.

[26] In my opinion, a party requesting an extension of time must show a continued intention to appeal the direction and that intention must be supported by his or her actions over the period of the delay. The onus is on that party to demonstrate that it has exercised due diligence throughout the period, to exercise his or her right of appeal. Moreover, the whole period of the delay must be accounted for, in this case more than 60 days. This is essentially a question of fact an appeals officer will assess in each case. I stress the fact that the matter here relates to the time limit prescribed by the Code to initiate an appeal before an appeals officer. It touches on the substantive right of a party to have an appeals officer review an administrative decision, in this instance that no danger exists in the workplace contrary to that party's belief. It is more than a mere procedural time limit that appeals officers may set from time to time in the course of their proceedings and that are also referenced under paragraph 146.2 (*f*). The diligence required from a party regarding a time limit to appeal a decision must, in my view, be measured against the importance of

that right on the rights of all parties concerned and the need for finality of administrative decisions.

[27] In the case at hand, the Tribunal received Mr. Hoffman's appeal on February 27, 2013 after Mr. Hoffman sent it by regular mail. In my opinion, Mr. Hoffman must bear the responsibility for possible mishaps that such a mode of transmission of his appeal may entail, and for being unable to prove, at a future point in time, the date of his mailing. I note that the letter by which HSO Wells informs Mr. Hoffman of his decision of absence of danger on December 12, 2012 also includes information on the employee's right to appeal the decision, the limits within which he must file the appeal and refers him to the OHSTC's website. The website contains easily retrievable information regarding the filing of an appeal and various ways of contacting Tribunal staff, by phone, FAX or email. Mr. Hoffman also had access to the *Guide* referred to earlier, which clearly explains the requirements of the statute and gives practical directions regarding the manner of filing and the service of documents.

> (…)
>
> **Filing and service of documents**
> The filing of a notice of appeal and the service of documents to any party, representative or interested person is made:
> a. in person;
> b. by mail (preferably registered), to the address of service; or
> c. by fax (with proof of transmission).
>
> **Address of service**
> For the purpose of filing or serving documents, the address of service means:
> a. in the case of an appeals officer, the address of the Office;
>
> (…)
>
> [Underlining added]

[28] From that point on, Mr. Hoffman had access to all relevant information relating to his right of appeal. It should have struck Mr. Hoffman that if mail was to be used to file his appeal, registered mail would have been the preferred option, precisely to avoid the kind of predicament that he now finds himself in. But there is more to it in this case. As Canada Post returned the envelope to Mr. Hoffman "sometime in January" of 2013 for insufficient postage, it seems to me that the lights should have gone on at that point in time, as this event should have brought home to Mr. Hoffman the risks of using regular mail to comply with a set statutory deadline. As a result, Mr. Hoffman should have realized at that very moment that he was out of time by several days. A reasonably diligent person, upon being given such a "second chance", would have photocopied the envelope showing the original postmark, considered the use of registered mail or courier to file his documents with the Tribunal, and would have contacted the Tribunal without delay to explain the situation and seek an extension, as mentioned in the *Guide*.

[29] I agree with counsel for the employer that the Canada Post label provided by Mr. Hoffman at the Tribunal's request is not helpful to Mr. Hoffman in making his case. It

does not show the original date of mailing, nor the date on which it was resent, nor whether it was correctly addressed in the first place. In fact, it bears no indication of any relation to the original sending.

[30] Instead, Mr. Hoffman resent his letter, again using regular mail. As I state earlier, Mr. Hoffman must be held accountable for the consequences of his choice, given the circumstances. As it turned out, to add to his misfortune, the letter never reached the Tribunal's office. For unknown reasons, the letter ended up at HRSDC's Headquarter office, where an official presumably scanned its content and forwarded it to their Ontario Regional Office – the office from which the refusal had been dealt with -- on February 27, 2013, and from there forwarded to the Tribunal that same day. The period between the "sometime in January" second mailing and February 27, 2013, is unaccounted for. Regrettably, at no point in time during that period did the appellant make any attempt at contacting the Tribunal to find out whether his appeal was received and where things stood, in spite of his being aware that the time limits had been missed and having witnessed the risks associated with using the regular mail system. In fact, it is the Tribunal who contacted Mr. Hoffman upon receipt of the February 27 email from HRSDC. I am left to wonder as to when Mr. Hoffman would have ever followed up on his appeal with the Tribunal.

[31] In those circumstances, I am of the opinion that the appellant failed to show by his actions over the totality of the period of delay, a real interest in pursuing his appeal. In light of what he knew, or should have known given the information available to him, he neglected to take reasonable steps to ensure that his appeal was duly received by the Tribunal, and decided to simply let things go. In his submissions, Mr. Hoffman raised the fact that he is not a lawyer and is unfamiliar with this legal process. I point out that the information available to Mr. Hoffman is by no means legalese and is accessible to a layperson. Furthermore, Mr. Hoffman is represented by a union and could have sought guidance from his local union steward to assist him with his appeal, but there is no indication that he did.

[32] Looking then at the length of the delay, while 60 days may not appear inherently excessive, I am of the view that it is substantial in the context of the 10-day statutory requirement set out in subsection 129(7) of the Code. In prescribing a short limitation period within which to launch an appeal of a no-danger decision, Parliament intended to have these types of cases finalized rapidly. In that light, and considering that Mr. Hoffman's only actions during that period were limited to mailing on two occasions the envelope containing his notice of appeal, both times using regular mail, the delay appears unreasonable.

[33] Finally, with regard to the prejudice suffered by the other party, the employer invoked a prejudice of a general nature based on the importance of complying with statutory time limits, so as to avoid chaos and ensure the finality of administrative decisions. The employer did not establish that it would suffer any real prejudice if the extension was granted. However, the absence of actual prejudice would bear more weight, in my opinion, had the appellant justified the delay by cogent and compelling

explanations, and diligent actions, which, as I find, he did not. As such, that factor does not play in favour of Mr. Hoffman when weighed with the other considerations outlined above.

[34] Consequently, after considering all the circumstances of this case, I find that Mr. Hoffman has not satisfied his onus to show that he acted diligently throughout the period of delay to pursue his appeal. A delay of more than 60 days is significant in relation to subsection 129(7) of the Code. I find it difficult to conclude that the appellant faced unusual circumstances that have prevented him from filing his appeal with the Tribunal within the prescribed time limit. Mr. Hoffman has not established any personal situation which would justify that I grant his request on compassionate grounds and I would be remiss to allow his request on that basis, without such foundation.

Decision

[35] The request for an extension of time to file this appeal is denied. Consequently, the appeal received by the Tribunal on February 27, 2013 is out of time and hence inadmissible, and is hereby dismissed.

Pierre Hamel
Appeals Officer