Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Air Georgian Limited, 2013 OHSTC 30

Date: 2013-10-16
Case No.: 2013-47
Rendered at: Ottawa

Between:

Air Georgian Limited, Applicant

Matter:	An application for a stay of a direction under subsection 146(2) of the *Canada Labour Code*
Decision:	The stay of the direction is granted
Decision rendered by:	Mr. Peter Strahlendorf, Appeals Officer
Language of decision:	English
For the applicant:	Mr. Robbie Booth, Corporate Safety Officer, Air Georgian Limited

REASONS

[1] On August 27, 2013, the applicant submitted an appeal of a direction issued pursuant to subsection 145(1) of the *Canada Labour Code* (the Code) on August 20, 2013, by Ms. Kim Mordaunt, Health and Safety Officer (HSO).On August 29, 2013, Mr. Robbie Booth contacted the Occupational Health and Safety Tribunal Canada requesting a stay of the direction.

[2] The application for stay of the direction is made pursuant to 146(2) of the Code which 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.

[3] The application was heard October 9, 2013 by teleconference with Mr. Booth in attendance. At my request the HSO attended as well. The application was not opposed by a work place party.

Background

[4] The HSO visited the premises of Air Georgian Limited (Air Georgian) at 2450 Derry Road, Mississauga which is at the Toronto Pearson airport on three occasions, from October 2012 to July 2013. In conjunction with Janice Berling, another HSO, HSO Mordaunt had been working with Air Georgian on a number of issues, one of them being sound levels that Air Georgian employees are exposed to at Pearson airport when working in proximity to aircraft with their engines in operation. HSO Mordaunt had a number of concerns regarding the measurement of sound levels and the adequacy of protective measures that were being taken. There were a number of communications between Mr. Booth and the HSO in the following weeks. One issue was the relevance of a sound level study done at the Montreal airport on similar operations which was done at some time in the past. The HSO formed the opinion that a sound level assessment, done by a qualified person, was necessary at the Pearson airport.

[5] Air Georgian's disagreement with the necessity of this led to the issuance of the direction in question on August 20, 2013. Specifically, the direction, addressed to the employer, refers to a contravention of paragraph 125(1)(n) of the Code and subsection 7.3(1) of the *Canada Occupational Health and Safety Regulations*, which state:

> 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,

> (n) ensure that the levels of ventilation, lighting, temperature, humidity, sound and vibration are in accordance with prescribed standards;
>
> 7.3 (1) Where an employee in a work place may be exposed to an A-weighted sound pressure level equal to or greater than 84 dBA for a duration that is likely to endanger the employee's hearing, the employer shall, without delay,
>
> (a) appoint a qualified person to carry out an investigation of the degree of exposure; and
>
> (b) notify the work place committee or the health and safety representative of the investigation and the name of the person appointed to carry out the investigation.

[6] The contravention is identified in the direction as follows:

> The employer has failed to appoint a qualified person to carry out an investigation of the degree of exposure to A-weighted sound pressure levels for a duration that is likely to endanger employees hearing,

[7] The employer was directed to terminate the contravention no later than September 30, 2013, and to take steps to ensure that it does not continue or reoccur.

[8] Taking into consideration Mr. Booth's submissions and some points of clarification provided by HSO Mordaunt, I ordered on October 9, 2013 that the request for a stay of the direction be granted, until a decision on the merits of the appeal is rendered by an appeals officer. The following are my reasons for granting the request.

Analysis

[9] Subsection 146(2) of the Code, noted above, provides the authority for an appeals officer to grant a stay. The discretion to grant a stay must be consistent with the purpose of the Code as found in section 122.1, which states:

> 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.

[10] Appeals officers have developed a three step 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.

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

[11] The first question is whether the issue raised in this application is sufficiently serious such that a stay of the direction is warranted. It is the applicant's position that the issue is indeed a serious one.

[12] The applicant stated that a sound level study has been done at Air Georgian's base at the Montreal airport, which has operations nearly identical to the operations at the Toronto airport. Informed by the Montreal study, the applicant says that it "has the data" for the same operations at the Toronto airport – the same type of aircraft, the same tasks, and the same distances from sources. On the basis of the results of the Montreal study, the applicant says that measures were taken to protect employees from noise exposure at the Toronto airport.

[13] The applicant's main concern with both the direction and the underlying subsection 7.3(1) is the lack of specificity as to who is a qualified person and what the scope of the investigation should be. The applicant and the HSO are in disagreement as to whether a qualified person has been appointed. The applicant argued that if the use of data from near identical operations cannot be considered as having done an investigation, then it becomes unclear what has to be investigated. The applicant has the same operations in a number of locations and argues that it is being put in the position of repeating investigations for no purpose.

[14] Without fully setting out all the concerns the applicant may have with the direction. I am satisfied that the appeal is not frivolous or vexatious and that it does raise a serious issue.

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

[15] The applicant submitted that complying with the direction would impose a burden on Air Georgian financially as the employer would be paying for an unnecessary sound level investigation .The employer would have to consider undertaking investigations at all its locations which are similar to the Pearson location if it were to be in compliance with subsection 7.3(1). The applicant indicated that an investigation would cost between $10,000 and $15,000, but that the total cost would be multiples of the base cost depending on how many locations might be subject to a noise investigation. The applicant also indicated that Air Georgian is currently going through a process of corporate merger and many procedures are changing. The confusion about the location, number and extent of sound level investigations would be compounded by the strain the uncertainty of the merger is posing at this time for people in the organization.

[16] In my view neither of these arguments on their own would amount to a significant harm for the employer, but taken together I am persuaded that the applicant has met the second criterion of the test.

What measures will be put in place to protect the health and safety of employees or any persons granted access to the work place should the stay be granted?

[17] The applicant submitted that employees would be protected from harm from noise exposure because measures have been taken at the Pearson airport as a result of data from the study at the Montreal airport and that further steps have been taken since the direction was issued. The applicant pointed to an adequate provision of hearing protection equipment and the inclusion of hearing protection issues in employee training. There has been a review by the workplace health and safety committee of the personal protection equipment (PPE) requirements for noise, and the requirements for the wearing of PPE have been recently re-sent to employees in a manner in which there is a "forced read" (in the words of the applicant) when an employee logs on to his or her computer. The requirements for hearing protection have recently been included as a line item on the monthly inspection document. While acknowledging that noise has not been the subject of a hazard report recently, the applicant indicated that communication of hazard reports has been improved with reports now being sent to all employees.

[18] The measures set out above by the applicant are largely of the nature of administrative controls rather than engineering or physical controls. Section 7.3(1) is not directly about physical controls. Many kinds of measures might emerge from an investigation and many of them would likely be similar in nature to the measures taken by the applicant. The applicant's position is that it possesses the data that a sound level investigation would produce and that it has implemented measures as a result of such information. Whether or not what the applicant has done amounts to compliance with subsection 7.3(1) is a question to be addressed on the merits.

[19] HSO Mordaunt was asked to comment on the adequacy of the applicant's current measures to protect the employees from harm from noise exposure and she gave her opinion that they were adequate on a temporary basis only.

[20] Based on the applicant's submission and HSO Mordaunt's assessment of the measures that the applicant has taken, I am satisfied that the employees in questions will be adequately protected.

Decision

[21] For these reasons, Air Georgian's application for a stay of the direction issued by HSO Mordaunt on August 20, 2013, is granted.

Peter Strahlendorf
Appeals Officer