Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canadian Food Inspection Agency v. Public Service Alliance of Canada, 2013 OHSTC 36

Date: 2013-12-03
Case No.: 2013-49
Rendered at: Ottawa

Between:

Canadian Food Inspection Agency, Applicant

and

Public Service Alliance of Canada, Respondent

Matter:	Application under subsection 146(2) of the *Canada Labour Code* of a stay of a direction issued by a health and safety officer
Decision:	The stay of the direction is granted
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Language of decision:	English
For the Applicant:	Mr Michel Girard, Counsel, Treasury Board Legal Services, Justice Canada
For the Respondent:	Mr Jean-Rodrigue Yoboua, Representation Officer, Legal Services, Public Service Alliance of Canada

Canada

REASONS

[1] These reasons concern an application for a stay of a direction issued on August 16, 2013, by Ms Kelly Parkin, Health and Safety Officer (HSO), that was filed by the Canadian Food Inspection Agency (CFIA) on September 13, 2013. An appeal of the direction was filed on the same date and was accompanied by an application for a stay of the direction until final disposition of the appeal.

Background

[2] On July 9, 2013, HSO Parkin received a complaint filed by an employee and she began an investigation at a work place operated by CFIA located at 1115-57 Avenue NE, Calgary, Alberta. Following the investigation, a direction was issued to the employer on August 16, 2013, with a compliance date set for September 3, 2013. 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 09 July 2013, the undersigned health and safety officer began an investigation in the work place operated by CANADIAN FOOD INSPECTION AGENCY, being an employer subject to the *Canada Labour Code*, Part II, at 1115 57 Avenue N. E., Calgary, Alberta, T2E 9B2, the said work place being sometimes known as CFIA Western Region Offices Calgary.
>
> 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.16) – *Canada Labour Code Part II*, subsection 20.9(3) – *Canada Occupational Health & Safety Regulations*
>
> **The employer has failed to acknowledge allegations of violence in the work place that remain unresolved and appoint a competent person to investigate**.
>
> 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 03 September 2013.
>
> 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 or reoccur.
>
> Issued at Calgary, AB, this 16th day of August, 2013.
>
> […]

[3] A teleconference hearing was held on October 31, 2013, attended by the parties' representatives, HSO Parkin and the employee who made the complaint to the HSO. HSO Parkin participated in the hearing at my request.

[4] On November 1, 2013, I rendered my decision to grant the application for the stay of the direction and the parties were so informed in writing on that day. The following are the reasons in support of my decision.

[5] The authority of an appeals officer to grant a stay is derived from subsection 146(2) of the Code, which reads as follows:

> 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.

[6] In deciding this stay application, I applied the following three criteria which were sent to the parties prior to the hearing:

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 by the appeals officer.

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 frivolous or vexatious?

[7] Both parties agreed on the fact that the question to be tried is a serious one.

[8] The applicant pointed out the conflicting information contained in the letters from the two medical doctors treating the employee that made the complaint, as constituting a serious question. The two letters were provided by the employee to the employer, the latter on the day of the stay hearing on October, 31, 2013. The applicant argued that while the first doctor, a psychiatrist, advised that the employee was not fit enough to participate in an administrative process because she could not rightfully represent herself due to her illness, the second doctor, a general practitioner physician, conversely advised that she could. In addition to this conflicting information, the applicant raised the vagueness of the allegations of work place violence in support of the seriousness of the case at hand.

[9] The respondent agreed with the opinion of the applicant on the seriousness of the question to be tried, basing its assertion on the fact that there were work place violence allegations that were not being investigated.

[10] Being of the opinion that the question at issue is definitely serious, I therefore conclude that this first criterion has been met.

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

[11] The main argument raised by the applicant in response to this question is that, if the direction were not stayed, the employer would be caught in the middle of contradictory information given by two different physicians, putting it at a substantial risk of liability with regard to the medical condition of the employee. Specifically, the psychiatrist clearly advised that the employee in question should not participate in any administrative process whereas the other physician, a general practitioner, was of the opinion that the employee was able to. The applicant also argued that given the fact that the employee has been on sick leave, since October 2010, the employer is unable to finalize the process required by the HSO to comply with subsection 20.9(3).

[12] In addition to the aforementioned argument, the applicant put forth that the allegations of work place violence are vague, they are not specific as to what act, gesture, or threat exactly is considered as violent. In my opinion, such an argument is more relevant to the merits of the appeal than to the application for a stay

[13] The respondent submitted that the information provided by the two physicians were not conflicting. Rather, it argued that there was a dual process, on the one hand, the process being instituted by subsection 20.9(3) requiring the appointment of a competent person to investigate allegations of work place violence that remained unresolved, and on the other hand, the CFIA's internal harassment process. According to the respondent, the employee was fit to participate in the process of subsection 20.9(3) because it involved less stress for the employee, which explained the letter from the general practitioner, whereas the internal harassment process would have damaging consequences on the medical condition of the employee.

[14] I asked the respondent whether the employee was still under the care of the psychiatrist since the first letter. The respondent's representative could not provide me an answer however; the employee that made the complaint intervened and stated to me that treatment by the psychiatrist was still being received.

[15] Furthermore, I questioned HSO Parkin about the existence of the allegations of work place violence and if she could qualify the statement made in her direction. She confirmed the situation continues to exist but could not elaborate about it further and she also stated that the allegations referred to in her in direction were not included in the report she submitted to the Tribunal.

[16] After considering the letters of the medical doctors, I agree with the applicant that they provide contradictory medical opinions. I believe that if the applicant were to implement HSO Parkin's direction, pending the determination of the case on the merits, by appointing a competent person to investigate the allegations of work place violence made by the employee, this would result in having the employee participate in something that was not advised by the psychiatrist. Consequently, the employer could be found liable for not observing the medial advice of the psychiatrist should the employee's medical condition worsen as a result of the investigation process. The employee was

receiving therapy from the psychiatrist at the time of the stay hearing and therefore, I find that the psychiatrist's opinion supersedes the general practitioner's.

[17] Based on the above, I am of the view that the employer would suffer significant harm if the direction is not stayed. I am therefore satisfied that the second criterion has been met.

Should a stay be granted, will the employer put measures in place to protect the health and safety of employees or any person granted access to the work place?

[18] The applicant responded that this question is irrelevant since the employee has been out of the work place for more than three years.

[19] The respondent did not make any submission on this question.

[20] Considering that the employee involved is not currently present at the work place, I am satisfied that employee's safety will be protected pending final disposition of the appeal and I therefore conclude that this criterion is met.

Decision

[21] For all the above reasons, the application for a stay of the direction issued by HSO Parkin on August 16, 2013, is granted pending final disposition of the appeal on its merits.

Michael Wiwchar
Appeals Officer