Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canada Post Corporation v. George Stout, 2013 OHSTC 39

Date: 2013-12-19
Case No.: 2013-05
Rendered at: Ottawa

Between:

Canada Post Corporation, Appellant

and

George Stout, 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Decision:	The direction is rescinded
Decision rendered by:	Pierre Hamel, Appeals Officer
Language of decision:	English
For the Appellant:	Mr. Stephen Bird, Counsel, Bird, Richard
For the Respondent:	Mr. Gerry Deveau, National Director, Ontario Region, Canadian Union of Postal Workers

REASONS

[1] These reasons concern an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) by the Canada Post Corporation ("Canada Post" or "the employer") against a direction issued by Health and Safety Officer (HSO) Ms. Marjorie Roelofsen, on December 21, 2012. The direction was issued as a result of a finding of danger further to a work refusal made by Mr. George Stout, an employee of Canada Post employed as a postal clerk. Mr. Stout is represented by his union, the Canadian Union of Postal Workers (CUPW or "the union"), in these proceedings.

[2] The direction under appeal 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
> […]

[3] At the time of filing its appeal on January 10, 2013, the employer had also applied for a stay of execution of the direction. That application was dismissed by the undersigned, for the reasons set out in *Canada Post Corporation and George Stout*, 2013 OHSTC 10.

[4] The parties agreed to proceed with the merits of the appeal on the basis of the Tribunal's record and their written submissions. The Tribunal's factual record is essentially comprised of HSO Roelofsen's report and the documentation to which she

referred in the course of her investigation, all of which had been forwarded to the parties' representatives shortly after the appeal was filed. The parties indicated their general agreement on the material facts set out in the record, with the exception of one area relating to the extent to which Mr. Stout was capable or not, because of his medical condition, to perform the duties of his position. I will deal with this area of disagreement later in these reasons.

The Facts

[5] The circumstances that were brought to light by HSO Roelofsen's investigation and that led to the issuance of the direction may be outlined as follows. The direction was issued further to a work refusal made by Mr. Stout on the evening of October 14, 2012, at the commencement of his scheduled shift. At the material time, Mr. Stout was an employee of Canada Post employed in the position of Postal Clerk, Code Sweeper, at the London (ON) Mail Processing Plant. Mr. Stout had been undergoing for some time severe back problems that caused him to absent himself from work on several occasions prior to his refusal to work. The record shows that Mr. Stout's condition is not due to a work-related injury. Mr. Stout's medical condition had been generally manageable until he was required to stand for a period of six hours in "oversize sortation inward", on April 4, 2011. The following morning, he maintains that he was unable to walk and sought medical attention. He was then absent from work, on paid sick leave, for the following three weeks.

[6] On April 27, 2011, Mr. Stout returned to work and provided a medical certificate from his physiotherapist recommending restrictions and accommodations, e.g. that he be given a work position that would allow him to change his spinal posture/position from standing to sitting on a regular basis. Mr. Stout states that, in spite of those recommendations, he was placed at a machine for four hours, and attempted to speak to a union representative on several occasions, but was unsuccessful. He apparently worked the remainder of his 8-hour shift and stated that he again felt intense pain and experienced trouble walking the next morning, his pain being debilitating at that point. The investigation report does not provide much information as to what happened subsequently, but it is common ground that Mr. Stout remained absent from work, on disability insurance, from that date on to October 14, 2012, the evening of the refusal to work that led to the present appeal.

[7] During this period of absence, various medical certificates were provided by Mr. Stout to the insuring company. Mr. Stout's family physician, Dr. Luton, provided medical certificates which stated that he was unfit for work. These medical certificates had been provided periodically throughout his absence from April 2011 until October 2012. The most recent of Dr. Luton's medical certificates is dated October 15, 2012 and provides that Mr. Stout's back pain is "now described as chronic". As HSO Roelofsen points out in her report, there were differing conclusions reached by other medical practitioners involved during that same period in Mr. Stout's medical file. A Functional Abilities Evaluation (FAE) was conducted in April of 2012 by Mr. Sam

Desroches, Registered Physiotherapist and Mr. David Schlotzhauer, Certified Kinesiologist. Their conclusion may be summarized as follows:

> Based on the results of the evaluation and the physical demands analysis provided by Canada Post Corporation, Mr. Stout does not meet all of the required demands of his position as a postal clerk. Specifically, Mr. Stout, does not meet the lifting, carrying, push/pulling, and any of the postural tolerances including sit, stand, and stooping. He demonstrated the ability to fall under the sedentary category as defined by the Dictionary of Occupational Titles (lifting and handling up to 10 lbs. occasionally and negligible amounts on a frequent basis). Mr. Stout demonstrated poor overall endurance and muscular support for both lower extremities and core muscles.
>
> It is the opinion of the assessment team that Mr. Stout's performance was self-limited by reports of pain and he may be able to perform at higher levels. With the amount of inconsistencies with effort observed and demonstrated by Mr. Stout, it is clear that he was not positively invested in the testing procedures

[8] In addition, an Independent Medical Examination (IME), Orthopedics, was conducted by a Dr. Lexier in June of 2012. Dr. Lexier concluded that Mr. Stout was fit to return to work. Following confirmation from the insurer, the employer therefore asked Mr. Stout to return to work on October 15th, 2012 in order to assist in preparing a return to work plan. The October 15th shift began at 22:00 hours on October 14th. When Mr. Stout reported at the plant that evening, he, a union representative and a superintendent met to discuss and prepare a return to work plan. Upon being informed that he was expected to carry out all the duties of his position, albeit for short but progressively longer periods of time over the course of the following five weeks, Mr. Stout responded that he could not go out on the floor to try any job, and stated that he was exercising his right of refusal under section 128 of the Code. Mr. Stout also advised that he would pursue his refusal through the grievance procedure.

[9] Mr. Stout thus never attended at the actual work floor, and was sent home on the date of his work refusal. The Department of Human Resources and Skills Development (as it was named at the time) was notified of the refusal on October 17th, 2012 at 09:49 hours. As part of the Canada Post investigation, a meeting was held on November 5th, 2012, at the Plant, which was intended to clarify Mr. Stout's selected avenue to address his work refusal, as he could not proceed concurrently with a grievance and a refusal under the Code. Mr. Stout presented a statement of his refusal to work, confirming that he refused under the Code. HSO Roelofsen received the notification and began her investigation on November 7th, 2012 at 13:00 hours.

[10] It is instructive to cite Mr. Stout’s written justification for his refusal. That justification was attached to his Refusal to Work Registration Form on November 7, 2012.

> Firstly, standing erect or sitting in an erect position causes me debilitating pain. I have complained loudly about being summoned to the work place

> for this reason. My condition seems to be inflammatory and responds negatively to this.
>
> This pain and inflammation precludes any prolonged action and there is no guarantee that the pain will not involve failure of muscle and nerve structures (See FAE) which likely will complicate my physical condition.
>
> Specifically to work even at modified levels in sorting short and long or oversized mail causes extreme lower back pain and in April of 2011 was the cause of my ensuing inflammation. Sitting, reaching and twisting are all painful.
>
> Working on a machine (i.e. BCS, MLOCR) is beyond my ability. I couldn't possibly maintain the physical, pace that the mechanization demands. Reaching, twisting, lifting, bending, sweeping, all of these actions are painful and inflammatory.
>
> Working in F.T.O. (flattainer opening) involves lifting and bending from the waist which would be beyond my ability to endure and again standing.

[11] Mr. Stout also provided HSO Roelofsen the following statement, which he had provided to the employer on November 5, 2012:

> On the advice of my G.P. (Bob Luten) I am unable to attend work in my normal job.
>
> I have a condition of chronic and debilitating back pain which is of an inflammatory nature. Any attempt at standing erect, walking or sitting for a prolonged time causes me great pain and the consequences of such actions serve to further inflame my condition.
>
> This was made apparent on different occasions i.e. my most recent FAE conducted by agents of Morneau Shepell in which I was asked to mount a treadmill at a very low rate of speed. In their assessment of the test they indicated that I lasted under 2 mins. What actually happened was that I took approximately 10 stops before my back succumbed, my legs gave way and I narrowly avoided knocking my head into the console into the machine.
>
> It is this pain and mechanical failure which renders the simplest mechanical tasks beyond my ability to execute within a margin of safety. Even restricted tasking or a few hours seems to exacerbate the pain and cause a further lack of mobility in consequence so in addition to initial endurance of pain the likelihood exists that further activity will result in further damage to my back, hips, neck, legs, etc. Most significantly because my action (sic) are dictated by response to pain I cannot control my movements.

[12] On the basis of the facts that she gathered during her investigation, HSO Roelofsen concluded that the refusal of Mr. Stout was based exclusively on his personal medical condition (HSO report, page 10). Not only did Mr. Stout believe that performing the work he was asked to perform would cause injury, Mr. Stout did not feel he was physically capable of performing any of the tasks presented to him for any period of time. She notes that it is

Mr. Stout's position that a previously manageable medical condition was made worse when he reported for work on April 4, 2011 and the safe work procedures did not appear to have been followed in rotating his work tasks. That resulted in three weeks of certified sick leave. She notes that the employer has responded to Mr. Stout's situation based on the Functional Abilities Evaluation and the Independent Medical Examination which conclude that Mr. Stout is fit to return to regular duties. The employer has acknowledged their duty to accommodate, and is agreeable to a gradual return to work process. In the final analysis, HSO Roelofsen finds that Mr. Stout feels he is not capable of performing any of his duties as a postal clerk due to his physical limitations, and that he is supported in his conclusion by his family doctor. Based on those facts, she concluded that a danger existed for Mr. Stout.

[13] HSO Roelofsen also strongly relied on the decision rendered in *Pearce* v. *Jazz Air Limited Partnership,* 2011 OHSTC 14, to support her decision that a danger existed for Mr. Stout. In that case, the appeals officer found that a danger existed in a situation where the employee's own specific medical condition created the hazardous situation. She concluded, in a similar fashion, that a danger existed for Mr. Stout on October 14, 2012 and issued her direction to the employer to immediately protect Mr. Stout from the danger, as mandated by subsection 145(2) the Code.

The Issue

[14] The question before me is whether, at the time of his refusal, there existed for Mr. Stout a danger as defined by the Code caused by a condition in the work place. But more specifically, this appeal raises the question of whether personal circumstances, in this case a severe medical condition, can, in and of themselves, constitute a danger or be considered in determining whether a danger covered by the Code existed, that would justify the issuance of a direction under subsection 145(2) of the Code.

Submissions of the Parties

A) Appellant's submissions

[15] After setting out the material facts of this case, counsel for the employer first referred to a number of decisions rendered by appeals officers that stand for the proposition that the protection of the Code does not extend to employees who may be in danger because of their own medical conditions. The hazard or condition in question must be one that can be corrected or the activity altered, such as where the source of the problem is the employee's medical condition, this is not a "danger" covered by the Code: *Dawson* v. *Canada Post Corporation,* Decision No.02-023; *Leblanc* v. *NAV Canada,* Decision No. 06-023 (July 14, 2006); *Tench* v. *Canada (National Defence, Maritime Forces Atlantic),* Decision No. OHSTC-09-001.

[16] The employer also distinguished the *Pearce (supra)* decision on the grounds that the appeals officer merely found in that case that the employee's medical condition is an element that can enter into consideration in determining whether there exists a condition

in the work place that constitutes a danger, but could not, in and of itself, constitute a danger under the Code.

[17] Counsel for the employer then referred to the judgment of the Federal Court of Appeal rendered in *Saumier* v. *Canada (Attorney General*), 2009 FCA 51 (leave to appeal to the Supreme Court of Canada denied), which in his view, support the employer's position on the following two grounds: first, that the work refusal was flawed because of the fact that Mr. Stout was not "at work" when he purported to exercise that right. In that case, the employee Saumier had not reported to her work place and only reported a few minutes to her employer's office after several months of absence to give notice that she refused to work for health reasons, regardless of the tasks to be assigned to her. Counsel for the employer submits that Mr. Stout is in the same position as Saumier when he invoked the right to refuse to work, and the ruling in *Saumier* should apply in this case. As a result, counsel submits that Mr. Stout was not "at work" when he refused to work, and that section 128 was simply not available to him.

[18] Secondly, counsel for the employer submits that *Saumier* also stands for the principle that a situation such as the one in the present case cannot give rise to the application of section 128. The remedy sought by the employee has "no basis in law" because the danger in question is not a danger covered by the Code. The true dispute between the parties is with respect to Mr. Stout's medical condition and accommodation. Accordingly, the danger of concern to Mr. Stout – his medical condition – is not a danger which section 128 of the Code aims to protect. Counsel for the employer notes that although the *Saumier* decision was rendered before the *Pearce* decision, it was not brought to the attention of the appeals officer, let alone considered by him. Counsel for the employer concludes further that to the extent that the rulings in *Tench* and *Pearce* are read as accepting the proposition that a personal medical condition can constitute a danger under the Code, those decisions are incompatible with *Saumier* and should not be followed. The employer concludes that the direction should be rescinded.

B) Respondent's submissions

[19] The union's representative first generally agreed with the overview of the facts as presented by counsel for the employer. He highlighted the fact that while it is clear that Mr. Stout has a pre-existing medical condition, such condition was worsened in early April 2011 when he was required to stand for a period of six hours. His condition further deteriorated later that month when the employer ignored recommendations from his physiotherapist.

[20] The union's representative refers to the Functional Abilities Evaluation report and points out that the proper conclusion to draw from that report is that Mr. Stout does not meet all of the required demands of his position as a postal clerk. Mr. Stout was required by letter of October 11, 2012, to report for work on October 14, under a gradual return to work plan laid out as follows: 2 weeks – 4 hours regular duties; 1 week - 5 hours regular duties; 1 week - 6 hours regular duties; 1 week - 7 hours regular duties; and then full duties. It is important to note that while the hours of work have been adjusted for the

corporation's return to work plan, it is also very clear that the corporation expected Mr. Stout to perform his "regular duties" with no modification to the actual work assigned to him, contrary to his treating physician's assertion.

[21] In response to the employer's arguments based on *Saumier*, the union's representative argued that while Mr. Stout did not physically attempt the work suggested to him in the letter of October 11, 2012, Mr. Stout did present himself to his work place and met with the employer's representatives. Being fully aware of the physical work required of him, it was not necessary for him to perform the work to know that it posed an immediate threat to his health. In the union's representative's view, Mr. Stout did report for work as directed in the letter of October 11, 2012, and, while he did not physically go into the work area, the corporation did not provide appropriate work or any modified duties for Mr. Stout. Mr. Stout was fully aware of what regular duties entailed given that these were the normal duties that he performed daily while at work and were the same duties that he performed on April 4, 2011 and again on April 27, 2011, when his condition worsened. Consequently he had legitimate concern that, due to his illness/injury, the work the employer required him to perform was a danger to him and would cause him harm.

[22] The union's representative then reviewed the cases submitted by the employer and distinguished their factual foundation from the instant case. He argues that unlike the situations that gave rise to those cases, the activity of performing the tasks of a postal clerk, without modifications, clearly presented a health risk to Mr. Stout.

[23] The union's representative further argued that HSO Roelofsen was correct in relying on the *Pearce* decision in support of her finding of danger. He pointed specifically to paragraph 28 of that decision, where the appeals officer found that "the personal medical condition of an employee is an element that can enter into consideration in determining whether there exists a condition in the work place that constitutes a danger as defined in the Code". He submits that the *Pearce* decision is on all fours with the present appeal and is determinative of its outcome. He concludes that the direction should be upheld and the appeal dismissed.

Analysis

[24] The question raised by the present appeal is to determine whether a danger, as defined in the Code, existed at the time of the refusal in the circumstances described above and whether the direction issued as a result of the declaration that a danger existed, is well founded. The declaration of danger was made by HSO Roelofsen as a result of Mr. Stout availing himself of the protection of section 128 of the Code, which authorizes an employee to refuse to work in certain circumstances. Section 128 reads as follows:

> **128.** (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that

> (*a*) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
> (*b*) a condition exists in the place that constitutes a danger to the employee; or
> (*c*) the performance of the activity constitutes a danger to the employee or to another employee.
>
> [Underlining added]

[25] The Code defines "danger" as follows:

> **122.** (1) In this Part,
>
> "danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;

[26] Understandably, both provisions use fairly generic language in order to capture the countless types of situations which may arise in the diverse world of the federally-regulated sector. The definition of danger, when read in isolation, makes no reference to the work place, but it is trite to say that the underlying premise of that definition is the exposure to a hazard or condition in an employment setting. Indeed, the purpose of Part II of the Code, as set out in section 122.1, is to "prevent accidents and injury to health arising out of, linked with, or occurring in the course of employment". As further elaborated by section 122.2, the "preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees". The Code then imposes a general duty on the employer to ensure that the health and safety at work of every person employed by it is protected. Section 125 further specifies a series of duties and obligations on the employer regarding work places controlled by it or, where the employer does not control the work place, regarding work activities that it controls, carried out by its employees. And section 128 allows employees to refuse to work if their work place or work activities present a danger to their health. That scheme is completed by an enforcement structure and the capacity for health and safety officers to issue binding corrective orders to ensure or restore, as the case may be, work place safety.

[27] The thread that is common to those statutory provisions and the underlying intent of Parliament, in my view, is that the Code is concerned with matters arising out of the work place and the performance of work, i.e. matters under the control of the employer and over which the employer has the capacity to bring about corrective measures to ensure the safety of those who work under its direction.

[28] As I stated earlier, this appeal raises the question of whether a danger may be found to exist under section 128 where the danger is entirely attributable to a personal medical condition. Before discussing whether section 128 is intended to substantially apply to the circumstances described earlier in these reasons, I must first address a threshold question raised by the employer, as to whether Mr. Stout's refusal satisfies the condition of being "at work" when he invoked that right. The employer's argument that he was not "at work" and the conclusion that his refusal based on section 128 is inadmissible as a result, is founded on the *Saumier* judgment, cited earlier.

[29] In that case, the Federal Court of Appeal was sitting on judicial review of a decision of the Public Service Labour Relations Board (the Board) regarding a complaint filed by Ms. Saumier that she had been subject to reprisals by reason of having exercised the right to refuse to work under section 128 of the Code.

[30] In that particular context, the Board had to determine whether Ms. Saumier had indeed satisfied all the conditions to properly exercise that right in the first place, namely whether she was "at work" at the time of the refusal. The evidence reported in the judgment indicates that Ms. Saumier experienced important health problems that had caused her to be absent from work for a significant period of time. However, after receiving video surveillance reports that, in the employer's view, showed that the employee's activities were incompatible with a recommendation of total disability, the employer required Ms. Saumier to report for work with the view to perform unspecified administrative and sedentary tasks. Ms. Saumier first refused to comply with that order through her employee representative. Upon being summoned a second time, she subsequently reported to her employer's office for the sole purpose of informing her superiors that she refused to work because she did not want to aggravate her health problems. The Board concluded that the employee had established that she was "at work" in the circumstances described above, but dismissed the complaint on its merits, as having no foundation in law.

[31] The Federal Court of Appeal found that the Board had erred on the first question, in the following terms at paragraphs 50 and 51:

> [50] In my opinion, the Board member erred in making this finding. It cannot be denied that the applicant had been absent from work for several months, on sick leave, when she invoked section 128 of the Code in support of her refusal to work. The mere fact that the applicant reported physically to her employer's office on September 27, 2005, after several months' absence did not result in her being "at work" within the meaning of subsection 128(1) of the Code. In other words, an employee is not "at work" simply by virtue of reporting to her employer's office <u>for a few minutes to give notice</u> that she refuses to work for health reasons, <u>regardless of the task or tasks to be assigned to her</u>.
>
> [51] In the context, it is important to note that when the applicant reported to the office of her employer on September 27, 2005, accompanied by S/Sgt. Delisle, she indicated to her employer that she refused to work because she did not want to aggravate her health problems. <u>More</u>

> particularly, she indicated to S/Sgt. Vaillancourt, who had asked her to specify which duties she refused to perform, that she refused to work [TRANSLATION] "for her health". As well, on December 20, 2005, the applicant again reported to the office of her employer and indicated to Corporal Léo Mombourquette that she refused to work to avoid aggravating her medical condition.
>
> [Underlining added]

[32] I am not persuaded by the employer's argument that this case applies to the present circumstances and I am of the view that the distinctions drawn by Mr. Deveau are well-founded. As the Court points out, Ms. Saumier refused to perform her duties without even knowing the nature of the modified duties the employer had envisaged in response to her medical condition. She could not explain in what way the modified administrative duties to which she would be assigned would affect her health, which made her refusal at odds with the requirements of section 128.

[33] In the present case, Mr. Stout reported for work on October 14, 2012 as requested by the employer. When he was apprised that he was expected to perform the full range of his regular duties, albeit during reduced periods of time, he informed his superintendent that he felt incapable of performing his regular tasks and invoked the right to refuse. He was fully aware of what his regular duties entailed, given that these were the normal duties that he performed daily at his work station and were the same duties that he had performed in April of 2011 when his condition allegedly worsened. While Mr. Stout did not actually step on the work floor to report to his work station and begin sorting mail, it seems to me that everyone understood very well what was at issue that evening. I am of the view that a finding that he was not "at work" in those circumstances would be an overly technical application of the requirement of section 128 in that regard. I am satisfied that Mr. Stout was "at work" when he invoked subsection 128(1) in support of his refusal to work on October 14, 2012.

[34] Turning more specifically to the application of subsection 128(1) in this case, HSO Roelofsen did not specify under which of the three paragraphs of subsection 128 she found the refusal of Mr. Stout to be well founded. Arguably, in light of the manual and mechanical sorting duties of the employee as they are set out in the job descriptions on the record and of Mr. Stout's justification for his refusal, the refusal could rest on all three of these paragraphs. This unusual situation is perhaps symptomatic of the problem raised by the present appeal, namely whether section 128 is meant to apply in the first place.

[35] It is clear from her report that HSO Roelofsen accepted Mr. Stout's statement as to his inability to perform any of his duties when asked to report to work, and that she gave significant weight to the opinion of his attending physician since 2009, Dr. Luton, that Mr. Stout's condition had become chronic and basically prevented him from performing the duties of his position on October 14, 2012. The conclusions of the Functional Abilities Evaluation, while expressing certain reserves, are certainly not inconsistent with that finding. Only Dr. Lexier concluded, in June of 2012, that Mr. Stout was fit to return

to work, and there is not much evidence on the record explaining the circumstances and the extent of the examination conducted by that physician.

[36] On balance, it is my view that the conclusions reached by HSO Roelofsen on Mr. Stout's medical condition at the time of his refusal are reasonable and supported by the evidence on record. Accepting as I do Mr. Stout's statements as to the reasons for his refusal, which he handed over to HSO Roelofsen on November 7, 2012, I am prepared to determine this appeal on the assumption that Mr. Stout was unfit to perform the duties of his position as a postal clerk, at that time. I am satisfied that the situation is entirely attributable to his medical condition to his back, which has caused him to experience increasingly difficult problems for some time, and culminated in the work refusal of October 14, 2012. Consequently, it seems fair to conclude that performing his regular duties on his return to work could reasonably be expected to cause Mr. Stout injury, that is, the aggravation of his medical condition. But this is not the end of the matter.

[37] As stated earlier, HSO Roelofsen concluded that Mr. Stout's refusal is based exclusively on his personal medical condition. The question then is: was it intended by Parliament that section 128 would apply to situations of that type? When Mr. Stout's detailed statements of refusals are considered, it is clear that the danger that he is apprehending has little to do with his work place and his duties, *per se*. While the activity of sorting mail, whether sitting or standing up, is a factor that would admittedly cause a deterioration of his health, clearly the source of the problem is Mr. Stout's back condition, not the work in and of itself. Clearly, the sole source of the problem as established in the evidence on record, is Mr. Stout's incapacity, due to his medical condition, to carry out his normal duties as a postal clerk.

[38] Indeed, no one is claiming that the work that Mr. Stout was expected to perform on his return to work was anything than his normal duties as a postal clerk. Nor is anyone suggesting that the employer has omitted to consider measures in regard to the tasks/duties themselves to minimize the risk associated with their execution, such as ensuring an appropriate ergonomic setting for employees who perform them, or training them adequately, or not having developed safe working procedures. I am satisfied on the evidence presented that the regular duties and the work methods and activities do not, in themselves and all things being normal, present a threat to employees who perform them. Rather, the issue is, as Mr. Stout claims, the extent to which he should be given <u>different duties</u> by reason of his medical incapacity to perform "any of the duties associated to his position for any period of time", as HSO Roelofsen puts it in her direction. Mr. Stout claims that he cannot stand, nor sit for any prolonged period of time, nor bend, twist, reach, lift, all of which are attributes of the normal tasks of a postal clerk. It is difficult to imagine how the activity of sorting mail could be modified to a point where Mr. Stout, given his stated condition, would be capable of performing it, short of not performing the activity altogether. The remedy he is seeking is to have significantly modified duties or be reassigned to another position.

[39] I have great difficulty in concluding that this is a situation envisaged by section 128 of the Code. This claim is typically in the province of rights and obligations arising

under the *Canadian Human Rights Act* (CHRA), which prescribes the obligation for the employer to provide reasonable accommodation to an employee with a disability, to the point of undue hardship. In my view, the rights flowing from the Code should be construed and interpreted in the broader context of the statutory and contractual infrastructure governing employment in the federally-regulated sector, which comprises the collective agreement, Part III of the Code (specifically sections 239 and 239.1), and the CHRA, among others. The CHRA regime is concerned with "the person" and the need to accommodate a person's particular needs in his or her work place in light of that person's characteristics, attributes or personal condition, be it gender, religious belief, family status or disability. Part II of the Code is concerned with the prevention of injuries arising out of, linked with or occurring in the course of employment, i.e. the work place and the conditions and environment generally applicable to all employees in which the work is performed.

[40] The situation at hand comes at the crossroads, so to speak, of those two spheres. As the Board and the Federal Court of Appeal alluded to in *Saumier*, as will be seen shortly, we must therefore ask the question: what is the real nature of the present dispute? The union argues that the employer could very well modify the tasks of the employee or assign him to lighter or more sedentary tasks because of Mr. Stout's disability. Unquestionably, this is true. And it is common ground that the employer is legally obliged to do so under the CHRA and the collective agreement. Accordingly, the real nature of the dispute is whether Mr. Stout is fit for work and the nature and extent of the accommodations the employer must provide in response to his medical limitations. This is a question of fact that is determined on the basis of complete and compelling medical evidence. Accordingly, Mr. Stout is not without a remedy to address the situation that he is facing. However, that debate, in my opinion, falls outside the realm of the Code.

[41] Turning back to the Court's pronouncements in the *Saumier* judgment, I am persuaded that the Court's analysis applies to the present case and I accept the employer's argument that it is determinative of the issue raised by the present appeal. It is worth citing paragraphs 53 to 56 of that judgment:

> [53] Notwithstanding his erroneous finding that the applicant was "at work", the Board member nonetheless concluded that the complaint should be dismissed. In my opinion, that conclusion is not unreasonable. I will explain.
>
> [54] The summary of facts at paragraphs 3 to 29 above clearly reveals the nature of the dispute between the applicant and her employer. The facts show unequivocally that this dispute results from Dr. Pantel's and Dr. Subak's divergent opinions on the applicant's ability to perform the sedentary tasks that her employer had decided to assign to her. As I have mentioned several times, when the applicant filed her complaint on December 20, 2005, she had not worked for several months. It follows from these facts that the applicant's real submission is that she cannot perform any sedentary administrative tasks and that performing such a task, given her state of health, would only aggravate her condition.

> [55] The Board member understood clearly the true nature of the dispute between the parties. In fact, he states at paragraph 121 of his reasons that under section 133 of the Code, he cannot decide a dispute regarding the applicant's ability, owing to medical problems, to perform the sedentary administrative tasks that her employer wished to assign to her. This is the reason, according to him, that the applicant could not file a complaint under section 133 of the Code. In other words, the Board member dismissed the applicant's complaint because, in his opinion, the remedy she sought under section 128 of the Code was devoid of any legal basis, since the danger of concern to the applicant was not a danger from which section 128 aimed to protect an employee.
>
> [56] In my opinion, there can be no doubt that the circumstances of the case cannot, in any way, give rise to a remedy under section 128 of the Code. Accordingly, I conclude that intervention is unwarranted.
>
> [Underlining added]

[42] The essence of the dispute in the *Saumier* case is, in my view, identical to the present case. The complainant refused to work on the basis that, rightly or wrongly, the performance of any duties would endanger her health and aggravate her existing medical condition. In essence, this is what Mr. Stout is claiming in this case. I understand the analysis made by the Court to mean that when the source of a danger to an employee's health results from that employee's medical condition, the danger of concern is not a danger from which section 128 is aimed to protect an employee, in spite of that section's broad wording.

[43] By way of comparison, another provision in Part II of the Code specifically addresses a situation and provides relief where the personal condition of an employee prevents that employee from performing the regular duties for which that person is employed. Section 132 of the Code provides as follows:

> **132.** (1) In addition to the rights conferred by section 128 and subject to this section, an employee who is pregnant or nursing may cease to perform her job if she believes that, by reason of the pregnancy or nursing, continuing any of her current job functions may pose a risk to her health or to that of the foetus or child. On being informed of the cessation, the employer, with the consent of the employee, shall notify the work place committee or the health and safety representative.
>
> […]
>
> (4) For the period during which the employee does not perform her job under subsection (1), the employer may, in consultation with the employee, reassign her to another job that would not pose a risk to her health or to that of the foetus or child.
>
> [Underlining added]

[44] The right provided in that section is clearly in consideration of the fact that duties that are otherwise harmless and do not, in and of themselves, constitute a hazard, could

nevertheless constitute a danger to a pregnant or nursing employee, solely because of that employee's condition. Section 132 thus prescribes, in addition to the more general right flowing from section 128, a special regime to address that situation. The type of corrective actions that Mr. Stout is seeking is precisely of the same nature as those prescribed by section 132, i.e. reassignment to other duties. Why is such a provision needed if section 128 is to be construed as already encompassing the risks to an employee's health caused by that employee's own personal condition, and the remedies sought? The better interpretation of section 128 in that statutory context is that the notion of danger should properly be understood on the assumption that employees are otherwise fit to carry out the work for which they have been employed in the first place. The source of the problem that section 128 of the Code is aimed at correcting must, in my view, relate to a condition in the work place itself, to the work methods, the activity, or the lack of protective equipment or inadequate training, in other words circumstances over which the employer has control and which are independent of the employee.

[45] Accepting the proposition that the Code applies to Mr. Stout's circumstances would yield, in my view, rather incongruous results. It is unlikely intended by the Code to have a situation where the duties of a postal clerk, all job hazard and ergonomic assessments having been properly conducted, yet present a danger to one employee and not to anyone else working alongside him performing the exact same duties.

[46] Furthermore, I have already noted that the direction under appeal is essentially based on the HSO's finding that Mr. Stout is incapable of performing any of his duties. The corrective measure that HSO Roelofsen orders simply paraphrases the Code and stipulates that the employer is to "protect the employee from the danger immediately". That being the case, is Mr. Stout to remain under the "protection" of section 128 - and the ancillary protection to his wage and benefits afforded by subsections 128(4) and (6) - indefinitely? How do we reconcile Mr. Stout's situation with the employer's right to assign the employee making the refusal to other duties (subsection 128.1(3))? How can the danger be removed or the situation corrected by the employer if the source of the danger is the medical condition of the employee? What is the purpose of posting, as mandated by subsection 145(3) of the Code, a notice of danger "near the place" or "in the area in which the activity is performed" in the present circumstances? Clearly, the purpose of that provision is to alert other employees of the existence of the danger identified by the health and safety officer. Clearly, in the circumstances of the present appeal, the posting requirement simply has no object, precisely because it is not related to the work place, within the meaning of section 128 as properly understood. Likewise, one wonders what would be the purpose of the posting and referral to the health and safety committees pursuant to subsection 128(5), as Mr. Stout's condition does not even result from a work place accident or injury.

[47] If one accepts the proposition that section 128 may be invoked when the danger to the employee's health results from a personal medical condition, one would have to accept that an employee suffering from a severe migraine or pneumonia or any other disabling illness or injury that could be worsened by performing his/her regular functions, could refuse to work under section 128, with all of the legal implications that I have

outlined above. This is an absurd result that surely was not contemplated by Parliament. There would be no need for sick leave protection or disability insurance coverage or other commonly found illness or injury protection schemes if that were the case.

[48] All of which leads me to the conclusion that sections 128 and 145(2), when read in their broader context of the Code and with a purposive approach, are not intended to apply to the circumstances of this case. It seems to me that based on those principles of interpretation, there cannot be a finding of danger under that statutory scheme when the hazard is caused solely by that employee's own medical condition. As I stated earlier, I am persuaded that the judgment rendered by the Federal Court of Appeal in *Saumier* and to a certain extent, the *Dawson* decision, stand for that principle.

[49] Before closing, I will briefly comment on the *Pearce* decision, relied upon by HSO Roelofsen and the union's representative to support the direction. The employer, understandably, sought to distinguish the *Pearce* case, on the basis that it was not the medical condition of the employee that created a condition in the work place which resulted in a danger, in that case. Rather, it was the fact that the employee was required to drive a vehicle as part of his duties, combined with his medical condition which risked him falling asleep "at the wheel" that, altogether, amounted to a condition in the work place constituting a danger not only for him but for his fellow employees. In the present case, HSO Roelofsen based her finding of danger solely on the determination that Mr. Stout's medical condition *in and of itself* constituted a danger, as set out in her report.

[50] I accept the suggestion that the conclusion reached in *Pearce* was likely influenced by the nature of the tasks that the employee was expected to perform, which the appeals officer describes as follows at paragraph 9:

> [9] […] his work requires him to move and operate large pieces of machinery, more specifically aircraft, and other vehicles, on the Toronto airport apron or tarmac and that as such, his medical condition (sudden sleep) could cause such operation to be dangerous. Mr. Pearce himself, in his testimony, provided an example of such a situation when he stated that as Maintenance Crew Chief, he is required to ascertain whether maintenance of aircraft engines has been satisfactorily completed and that as such, he may need to take the controls and operate the engines at a high level of power while ensuring that the aircraft remains stationary. He also pointed out that as Maintenance Crew chief and Engineer, he is the only member of his crew who can move aircraft on the apron or tarmac.
>
> [Underlining added]

[51] Clearly, those tasks inherently present real elements of danger for the person who performs them, and for his co-workers. It is therefore a small step to conclude that the combined effect of those particular responsibilities (not all the other tasks of Mr. Pearce, it should be noted) with the medical condition of sudden sleep disorder and persistent fatigue, constituted a danger under the Code. I also note that the danger identified in *Pearce* was not limited to the employee himself, but extended to other employees in the event that Mr. Pearce had driven a vehicle on his shift. I also note that, to a large extent,

the debate in that case focussed on the HSO's statement that the "condition" referred to in paragraph 128(1)(*b*) had to be a "physical" condition of the work place. The issue was thus couched in those terms and the appeals officer dismissed that approach as being too restrictive, given the circumstances of that case. All in all, *Pearce* was decided on materially different facts altogether.

[52] But having said all this, I must add that I am somewhat puzzled by the notion set out in both *Dawson* and *Pearce* that a personal medical condition "is an element that can enter into consideration" in determining whether there exists a condition in the work place that constitutes a danger as defined in the Code. What does that really mean in practical terms when one analyzes, as I did, the broader context and purpose of the protection afforded by sections 128 and 145 of the Code? While the exercise of the right to refuse is assessed under a subjective test – whether the employee has reasonable cause to believe that a danger exists –, a finding of danger under that scheme implies in my view that it is the work place, a condition (physical or other) in the work place or a work activity or method, that objectively presents a hazard. If the problem is found to derive from the employee's health or existing medical condition, then any danger resulting from that person being at work is not a work place danger *per se*, i.e. one over which the employer has the control to remedy for all employees performing the work or subjected to the condition, and in my view ought to fall outside the scope of section 128 of the Code and the stated purpose set out in section 122.1.

[53] Consequently, given my conclusion that the circumstances of this case could not give rise to a finding of danger as contemplated by section 128, it follows that HSO Roelofsen's direction resulting from such a finding must be rescinded, as having no basis in law.

Decision

[54] For all the reasons set out above, the appeal is upheld and the direction is rescinded.

Pierre Hamel
Appeals Officer