Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Correctional Service of Canada v. Mike Deslauriers, 2013 OHSTC 41

Date: 2013-12-20
Case No.: 2012-20
Rendered at: Ottawa

Between:

Correctional Service of Canada, Applicant

and

Mike Deslauriers, Respondent

Matter:	Application to have the matter dismissed based on mootness
Decision:	The appeal is moot.
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Language of decision:	English
For the applicant:	Ms Magdalena Persoiu, Counsel, Department of Justice Canada, Labour and Employment Law Group
For the respondent:	Ms Sheryl Ferguson, Union Advisor, UCCO-SACC-CSN

Canada

REASONS

[1] This matter concerns an appeal brought forward by Mr Mike Deslauriers, a correctional officer (CO), employed at Kingston Penitentiary, Correctional Service of Canada (CSC), filed pursuant to subsection 129(7) of the *Canada Labour Code* (the Code). CO Deslauriers appealed the decision that a danger did not exist rendered by Mr Bob Tomlin, health and safety officer (HSO), Human Resources and Skills Development Canada (HRSDC – now Employment and Social Development Canada), Labour Program.

Background

[2] On February 8, 2012, CO Deslauriers refused to work pursuant to subsection 128(1) of the Code. CO Deslauriers held that the smoke resulting from Native offenders' smudging practice (a ritual consisting of burning various herbs including sweet grass, cedar, sage and tobacco) in the living units caused a risk to the health and safety of COs. CO Deslauriers alleged that the smoke contains harmful chemicals that could cause, among other things, asthma, chronic bronchitis or cancer.

[3] On February 8, 2012, HSO Tomlin met with the parties at Kingston Penitentiary to investigate the work refusal. Between February 8 and March 23, 2012, HSO Tomlin conducted his investigation. On March 23, 2012, HSO Tomlin issued the decision that the smoke related to the smudging practice did not constitute a danger for CO Deslauriers.

[4] On March 29, 2012, CO Deslauriers filed an appeal with the Occupational Health and Safety Tribunal Canada (the Tribunal).

[5] In September 2013, Kingston Penitentiary closed its doors and CO Deslauriers is now employed at Joyceville Institution. As Kingston Penitentiary is no longer operating, CSC filed a motion to dismiss the appeal based on mootness on October 16, 2013.

[6] On November 6, 2013, I received the final written submissions from the parties. On November 13, 2013, I provided the parties with my decision to dismiss the appeal based on mootness with reasons to follow. The following are the reasons in support of my decision.

Issue

[7] The motion before me concerns the following question:

- Whether the appeal is moot due to Kingston Institution closing its doors and since CO Deslauriers is now employed at a different work place.

Submissions of the Parties

A) Applicant's submissions

[8] The applicant centered its arguments around the wording used in section 128 of the Code related to the refusal to work in a "work place" and on the Supreme Court of Canada (SCC) decision in *Borowski* v. *Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[9] Subsection 128(1) of the Code states:

> 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.
>
> [Emphasis added by applicant]

[10] The same wording, referring to "work in a place" is also used at subsection 128(13) and 129(7) of the Code. Counsel for the applicant argued that the ordinary meaning of those subsections confirm that the intention is clearly to protect employees from a danger associated to the work place in question.

[11] It is also argued that the right to refuse to work is an individual right, applying only to the employee invoking it. In support of that argument, the applicant cited the Tribunal's decision in *Harper* v. *CFIA*, 2011 OHSTC 19.

[12] Counsel also held that the issue of mootness is of particular relevance given the appeals officers' powers to order correctional measures pursuant to section 146.2 and subsection 145.1(2) (with reference to section 141 of the Code).

[13] Lastly, counsel for the applicant argued that the criteria set forth in *Borowski* (cited previously) are being met as there is no longer a live issue between the parties. To that effect, Justice Sopinka, speaking for the unanimous court, explained the following:

> An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the right of the parties. Such a live controversy must be present not only when the action or proceeding is commenced, but also when the court is called upon to reach a decision.

[14] In its submissions, the applicant explained that in *Borowski*, the SCC adopted a two-step analysis to the issue of mootness. First, the SCC has to determine whether the matter is moot. In

the affirmative, the SCC must determine whether it should nevertheless exercise its discretion to decide on the merits of the case by considering the following three factors:

i. the presence of an adversarial context;
ii. the concern for judicial economy;
iii. the need for the Court to be sensitive to its role as an adjudicative branch in our political framework.

[15] Counsel for the applicant argued that as set out in *Borowski*, the issue of CO Deslauriers' refusal to work and whether danger exists pursuant to the Code are moot because the action is founded entirely upon CO Deslauriers being required to work at Kingston Penitentiary. Now that the work place has been closed, the unique conditions of the work place no longer exist, thus rendering the issue moot.

[16] The applicant explained that the configuration of cell doors at Kingston Penitentiary were unique because the security cells had open grilles. Counsel stated that this was due to Kingston Penitentiary being a very old building, the only maximum security facility with this kind of open grille cell before its closure.

[17] The applicant argued that the appeals officer should not exercise his discretionary power to hear the case. It is argued that there is no adversarial context in the case at hand because the CO is no longer present at the specific work place, making the remaining issue an academic dispute over employer policy. In support of that argument, the applicant cited the Federal Court of Appeals decision *Canada (Attorney General)* v. *Fletcher*, 2002 FCA 424, in which it was stated that "the mechanism provided by the Code calls for a specific fact-finding investigation to deal with a specific situation. It is not meant to provide a forum for an analysis of an employer's policy."

[18] Counsel for the applicant also brought forward the Tribunal's decision in *Harper* (cited previously) in which the appeals officer found the appeal to be moot when the appellant was no longer employed. Counsel cited the appeals officer who stated "there is no reason to continue with the appeal proceedings if Dr Harper is no longer exposed to the alleged condition while at work."

[19] The applicant also refers to *Hunter* v. *Canada (Correctional Service)*, 2013 OHSTC 12, in which it was found that the issue was not moot. Counsel explained that in *Hunter*, although the applicant was in a different correctional institution than the one where he had exercised his right to refuse to work, the employment relationship was still ongoing and there still existed live issues at the former correctional institution. Counsel for the applicant distinguished between *Harper* and the case at hand, pointing out that there is no live issue to be resolved in this case at the former institution because it is now closed.

[20] With regard to the concern for judicial economy, the applicant cited *Tremblay* v. *Air Canada*, OHSTC-09-004, in which it was determined that the issue was moot. In that case, the appeals officer stated that the need to be sensitive to scarce juridical resources "must be applied to an administrative tribunal such as the present tribunal because of the same need to be sensitive

to the effectiveness and efficiency of its intervention, given an ever-greater jurisdictional role of administrative tribunals in our political structure."

[21] The applicant also raised the decision of this Tribunal in *Wellon* v. *Canada Border Services Agency*, 2011 OHSTC 28, stating that this decision affirmed the principle that a live controversy must exist not only at the time of the work refusal but also when the appeals officer is called upon to reach a decision. The applicant sustained that in *Wellon*, the Tribunal found that the lack of tangible concrete dispute was a basis for dismissal as being moot. It is argued that the work refusal at stake in the case at hand is no longer an issue as the Kingston Penitentiary closed and the employee is no longer exposed to the alleged danger.

[22] Counsel for the applicant concluded by stating that there is no public interest in carrying forward the appeal because the right to refuse to work is an individual right.

B) Respondent's submissions

[23] The union advisor representing the respondent provided written submissions objecting on the motion to dismiss the appeal on behalf of CO Deslauriers. The respondent argued that the issue is not moot for the reasons stated below.

[24] The respondent argued that the issue related to the work refusal remains, since CO Deslauriers believed he was being exposed to a danger at the time of the work refusal and was still being exposed until the institution's closure in September 2013. In addition, it is explained that other facilities (non-maximum security facilities) where Native inmates practice smudging employ the same open grille cell configuration as Kingston Penitentiary and therefore the danger still exists in those institutions.

[25] The respondent indicated that Kingston Penitentiary no longer houses inmates but still remains a place of work for CSC.

[26] The union advisor argued that the *Hunter* decision applies in this case since the employment relationship between CO Deslauriers and CSC is still ongoing. In addition, it is argued that Kingston Penitentiary may reopen its doors or that CO Deslauriers could be transferred to an institution equipped with open grille front cells where Native inmates practice smudging in their living units.

[27] Lastly, the respondent stated the long term effects of exposure to the smoke generated by the smudging practice are yet to be determined. It is considered that these unknown effects are part of the issue at hand.

C) Reply

[28] The applicant's reply addressed two main arguments made by the respondent. The first being that the issue was a live controversy at the time of the work refusal and the second, that the danger exists in other federal institutions.

[29] Regarding the first argument, the applicant stated that there is no question that there was a live controversy at the time of the work refusal. However, that is not the question as the very essence of a mootness application stems from events faced by the Tribunal at the time of the hearing. As for the argument that the danger continues to exist in other federal institutions, the applicant is of the view that since the right to refuse to work is an individual right, the employees who may be exposed to smoke in other institutions have a right to refuse to work. The applicant stated that there is no right under the Code to advance an appeal based on concerns for other employees located in different work places.

[30] The applicant indicated that when the respondent stated that the Kingston Penitentiary still remained a place of work for CSC, the respondent was purposefully being vague. Counsel for the applicant stated that Kingston Penitentiary is closed and no longer operates. In addition, the applicant is of the view that the respondent's suggestion that Kingston Penitentiary may re-open constitutes complete speculation and that advancing an appeal on that basis is inconsistent with the basic legal principles surrounding the concept of mootness.

[31] The applicant also stated that the suggestion that CO Deslauriers may be transferred to an institution with open grille front gates is also speculative in nature. Counsel for the applicant indicated that the right to refuse to work is not aimed at providing employees with an opportunity to challenge employer policies.

[32] In closing, the applicant reiterated that CO Deslauriers no longer works at Kingston Penitentiary, the penitentiary has been de-commissioned and no longer houses inmates. The applicant is of the view that there is no reason to advance this appeal and that it is moot.

Analysis

[33] In *Borowski*, the SCC described the approach with respect to mootness as involving a two-step analysis. The first step is to determine whether the requisite tangible and concrete dispute has disappeared, therefore rendering the issue academic. In the affirmative, the second step is to decide whether the SCC should exercise its discretion to hear the case based on three established criteria:

i. the presence of an adversarial context;
ii. the concern for judicial economy;
iii. the need for the Court to be sensitive to its role as an adjudicative branch in our political framework.

[34] In determining whether there still exists a tangible and concrete dispute or the issue has become academic, I have considered whether the resolution of the issue could potentially have a tangible, concrete or practical effect on the rights of the parties.

[35] As stated in *Harper*, the right to refuse to work is an individual right, associated with a specific hazard, condition or activity in a work place. The potential remedial measures that could

be granted by an appeals officer further to an appeal are explained at subsection 146.1(1) of the Code:

> 146.1 (1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
> (a) vary, rescind or confirm the decision or direction; and
>
> (b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

[36] When deciding on an appeal of a decision that a danger does not exist, the appeals officer may vary, rescind or confirm the decision or direction or in the alternative, issue any direction deemed appropriate.

[37] Section 122.1 of the Code states the purpose of Part II is to prevent accidents and injury to health in the course of employment. The object of the appeals officer's decision is in line with the purpose of the Code to ensure the prevention of accidents and injury to health of employees in the course of employment. The remedial capacity of the appeals officer's decision is of particular relevance in this case.

[38] Moreover, the role of the HSO and the appeals officer under Part II of the Code, when the right to refuse unsafe work is invoked by an employee, is to determine whether the alleged danger exists and thus whether the refusing employee may continue to refuse to either use or operate the machine or thing, work in that place or perform that activity.

[39] The case at hand deals with a peculiar situation where the employee has not only been removed from the work place, but the work place in question also ceased to exist. In *Hunter*, it was decided that the appeal was not moot because the employer-employee relationship was still ongoing. Although CO Deslauriers remains employed within CSC, this case can be distinguished from *Hunter* because the work place at Kingston Penitentiary is no longer operating, therefore leaving no other employee exposed to the alleged danger.

[40] An appeal of a decision that a danger does not exist is based on the circumstances existing in the work place at the time of the work refusal. The appeals officer hearing appeals on a *de novo* basis can consider new evidence even if that evidence was not, or could not have been available to the HSO at the time of the work refusal. As stated in *Wellon*, a live controversy must exist not only at the time of the work refusal but also when the appeals officer is called upon to reach a decision. In this case, it is not debated that a live issue existed at the time of the work refusal. However, Kingston Penitentiary has now closed its doors, therefore removing CO Deslauriers from the alleged danger in the work place. Taking into consideration the arguments of both parties and the remedial powers granted to me under the Code, I see no way in which a decision would lead to any tangible, concrete or practical effect on the rights of CO Deslauriers or CSC.

[41] I am mindful of the statement from the respondent indicating that inmates in other CSC facilities may be practicing smudging. Nonetheless, as stated previously, the right to refuse to work is an individual right afforded to each employee. If an employee in another institution believes to be exposed to a danger, that employee can benefit from the same rights under the Code as CO Deslauriers. In addition, I cannot accept the respondent's argument that Kingston Penitentiary may reopen. I find this statement to be speculative at best, and I agree with the applicant that an appeal cannot be heard on that basis.

[42] Based on my review of the facts and evidence presented to me, I find that there is no live issue or controversy in this matter, the resolution of which could potentially have a tangible, concrete or practical effect on the rights of the parties. To hear an appeal related to a work place which no longer exists renders the entire appeal process purely academic. I therefore find the appeal to be moot.

[43] Having decided that the appeal is moot, I will now proceed with the second of the analysis set out in *Borowski*.

[44] I have chosen not to exercise my discretion to hear the case for the following reasons.

[45] In coming to this conclusion, I have considered whether an adversarial context remained. For the same reasons as above, I am of the view that the closure of Kingston Penitentiary is determinative in the absence of adversarial context. In this case, I have interpreted the concept of adversarial context as to include not only the issue between the parties specifically, but also the circumstances surrounding the work refusal, the work place, and the specific circumstances at the time I have to render my decision.

[46] In addition, the respondent has not provided me with any evidence which would lead me to believe CO Deslauriers is still being exposed to the alleged danger now that he is employed at Joyceville Institution. As stated previously, the argument that other employees may be exposed to smoke in an institution configured similarly to Kingston Penitentiary is not a determining factor in the present case, as the right to refuse to work is an individual one and could be exercised by the employees should they deem it appropriate.

Decision

[47] For all the above reasons, the appeal is dismissed as moot.

Michael Wiwchar
Appeals Officer