Tribunal de santé et sécurité au travail Canada

Occupational Health and Safety Tribunal Canada

Ottawa, Canada K1A 0J2

Date: 2014-06-10
Case No.: 2014-11

Between:

441861 Ontario Limited c.o.b. Ivan Armstrong Trucking, Applicant

Indexed as: *441861 Ontario Limited c.o.b. Ivan Armstrong Trucking*

Matter:	Application for a partial stay of a direction
Decision:	The partial stay of the direction is denied
Decision rendered by:	Mr. Douglas Malanka, Appeals Officer
Language of decision:	English
For the Applicant:	Mr. Albert G. Formosa and Mr. Macdonald R.I. Allen, Counsel, Weir Foulds LLP
Citation:	2014 OHSTC 10

Canada

REASONS

[1] These reasons concern an application for a partial stay of a direction issued by Health and Safety Officer (HSO) Rob Noel that was filed with the Occupational Health and Safety Tribunal Canada (Tribunal) on April 7, 2014, by Mr. Albert Formosa, counsel for 441861 Ontario Limited c.o.b. Ivan Armstrong Trucking (Armstrong).

[2] An appeal of the direction was filed on the same date and was accompanied by the written request for a partial stay pursuant to subsection 146(2) of the *Canada Labour Code* (the Code). Subsection 146(2) of the Code reads:

> 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 object of the present application for a partial stay is to redact finding No. 7 from HSO Noel's direction until a final determination of that issue is made on appeal.

Background

[4] On March 7, 2014, HSO Noel, accompanied by Jeff Lambier and Amy Van Ankum, conducted an investigation in the work place operated by Armstrong at 8035 2nd Line West, Arthur, Ontario. HSO Noel subsequently issued a direction to Armstrong on March 13, 2014, identifying seven contraventions to the Code.

[5] In finding No. 7, which is the only finding under appeal, HSO Noel cited subsection 128(13) of the Code and held that the employer failed to investigate and notify Employment and Social Development Canada, Labour Program of a continued refusal to work. Subsection 128(13) reads:

> 128(13) If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer.

[6] Upon receipt of Mr. Formosa's letter of April 7, 2014, containing the notice of appeal of and application for a partial stay of the direction, the Tribunal advised Mr. Formosa that the hearing regarding the stay application was scheduled for April 10, 2014. There is no respondent in this appeal.

[7] A teleconference was held on April 10, 2014, to hear the application for a partial stay during which Mr. Formosa and Mr. Allen, counsel for the applicant, put forward their arguments. I subsequently asked Mr. Formosa and Mr. Allen to make written submissions before I rendered my decision and they did so on April 14, 2014.

Submissions for the applicant

[8] Counsel for the applicant held that an appeals officer has the authority on application for a stay to redact certain portions of a direction prior to it being required to be posted in the work place, forwarded to any committee or responded to in writing to the HSO. In this regard, counsel cited the decision in *Canadian National Railway* v. *Teamsters Canada Railways Conference*, 2013 OHSTC 5. In that case, Appeals Officer Pierre Hamel exercised his authority to grant a partial stay of direction by temporarily modifying the contested conclusion and redacting the wording considered prejudicial by the employer.

[9] Counsel for the applicant held that the correct interpretation and application of subsection 128(13) of the Code represents a significant issue to be tried that is neither frivolous nor vexatious. Counsel added that the employee identified in finding No. 7 intends to rely on the HSO's finding in No. 7 as a basis for a wrongful dismissal claim.

[10] Counsel further held that the significant harm Armstrong would suffer if the partial stay is not granted is comprised of three components as follows:

Reputational Harm

[11] Counsel for the applicant argued that it is reasonable to assert that a direction which concludes the employer's failure to investigate and report a continued refusal to work is likely to cause harm to Armstrong's reputation. Counsel held that the requirement to post the direction in the work place and to provide a copy of the direction to the work place health and safety committee effectively makes the direction generally accessible to the public, to Armstrong employees and the media. Counsel held that the contested conclusion in finding No. 7 improperly suggests that Armstrong is unconcerned with the health and safety of its employees and taints the good will Armstrong has established with them.

Encourage Prejudicial Proceedings

[12] Counsel for the applicant argued that the conclusion in finding No. 7 by HSO Noel, an expert in occupational health and safety with important statutory powers, carries weight in the perception of employees and the public. Counsel further alleged that the employee identified in finding No. 7 intends to rely on the HSO's finding in No. 7 of the direction as a basis for a wrongful dismissal claim. Counsel for the applicant held that Armstrong will likely have to defend an unwarranted civil proceeding that further tarnishes its reputation if the finding in No. 7 is not redacted.

Denial of Procedural Fairness

[13] Counsel for the applicant held that requiring Armstrong to respond in writing to the contested finding in the direction deprives them of procedural fairness. Counsel argued that the flexibility of Armstrong's response is compromised if Armstrong is required to respond to finding No. 7 before it has been properly decided on its merits by an appeals officer.

Analysis

[14] On April 17, 2014, I rendered my decision to deny the application for a partial stay of the direction and the applicant was so informed in writing on that same day. The following are the reasons in support of my decision.

[15] An appeals officer has the authority pursuant to subsection 146(2) of the Code to grant an application for a stay of a direction but the Code does not specify the conditions or factors that an appeals officer must consider in the exercise of the authority. That said, appeals officers must be guided as a minimum by the purpose clause of the Code which states in section 122.1:

> 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.

[16] For this purpose, appeals officers have developed a three criteria test for exercising their discretion under subsection 146(2) and this will be applied in this application. 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 would suffer significant harm if the direction is not stayed.

3) The applicant must demonstrate that, in the event that a stay is 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?

[17] In this case, I agree with counsel for the applicant that the correct interpretation and application of subsection 128(13) of the Code represents a significant issue to be tried that is neither frivolous nor vexatious. The right to refuse work under section 128 of the Code is one of the most important employee rights under the Code and any uncertainty or challenge regarding the interpretation and application of that Part constitutes a serious question.

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

[18] First, I find no merits in the employer's allegation that it will suffer reputational harm by having to comply with the direction for the reason that follow. In his written submissions in support of the application for a partial stay, counsel for the applicant relies heavily on the decision of Appeals Officer Pierre Hamel in C*anadian National Railway* v. *Teamsters Canada Railways Conference* (cited previously) in which, a similar request for a partial stay was granted. Appeals Officer Hamel decided that it was reasonable in the circumstances of

that case for the employer to assert that a direction that essentially concludes the employer's responsibility for a fatal accident is likely to cause significant harm to the employer's reputation. To arrive at this conclusion, Appeals Officer Hamel took into consideration the employers allegation that the HSO involved did not have jurisdiction to draw conclusions as to the cause of and responsibility for the fatal accident.

[19] However, the facts of this case differ greatly from those in that case since the direction in question does not refer to a serious or fatal accident. Moreover, in the present case, the applicant is not asserting that HSO Noel was without jurisdiction to make the finding he made. In my opinion, the argument made by the employer in regards to a potential reputational harm due to having to comply with finding No. 7 of the direction could be raised by any employer who has been issued a direction citing a contravention to the Code by an HSO acting within its mandate.

[20] Additionally, I was not convinced by the applicant's argument that should a stay of item No. 7 of the direction not be granted, it will encourage prejudicial proceedings. Counsel for the applicant again relied on the above cited decision of Appeals Officer Hamel who concluded that the direction in that case could cause prejudice to the employer in its dealing with other competent agency or agencies if the employer was correct in its assertion that the HSO was without jurisdiction to draw conclusions regarding the cause and responsibility for the fatal accident.

[21] In the case at hand, as previously mentioned, the HSO's jurisdiction to make finding No. 7 is not being contested and the applicant has not raised any other compelling circumstances to convince me that the direction will encourage prejudicial proceedings. Moreover, subsections 133(1), (2) and (3) of the Code provide an employee with the right to complain to the Canada Industrial Relations Board if the employee alleges that an employer has taken action against the employee in respect of the exercise of a right under section 128 or 129 of the Code. In my opinion, a direction cannot be said to encourage prejudicial proceeding in respect of a time sensitive employee right under the Code.

[22] Finally, counsel for the applicant claims that Armstrong is deprived of procedural fairness if required to respond to finding No. 7 of the direction before their appeal is decided on the merits because doing so would limit Armstrong's response. However it is not uncommon for employers to comply with directions unless an appeals officer exceptionally grants a stay of the direction under appeal. Consequently, the applicant did not convince me that this amounts to a significant harm.

[23] Based on the above, I am not persuaded that the employer would suffer significant harm should the stay of item No. 7 of the direction not be granted. I am therefore not satisfied that the second criterion has been met in the circumstances of this case.

[24] All three criteria must be met for an appeals officer to grant a stay of direction pursuant to subsection 146(2) of the Code and having determined that the second criterion has not been met, I do not need to consider the third criterion.

Decision

[25] For the reasons set out above, the application for a partial stay of the direction issued by HSO Noel on March 13, 2014, is denied.

Douglas Malanka
Appeals Officer