

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146 of the Canada Labour Code,
Part II, of a direction given by a safety officer

Applicant: LeBlanc & Royle Telcom Inc.
Oakville, Ontario
Represented by: R. M. Skelly, Counsel

Respondent: None

Mis-en-cause: Peggy A. Wright
Safety Officer
Human Resources Development Canada

Before: Douglas Malanka
Regional Safety Officer
Human Resources Development Canada

Background:

An 1800 foot communications tower near Jackson, Mississippi, United States of America (USA), collapsed on October 23, 1997, resulting in the deaths of three Canadian workers. On December 5, 1997, a safety officer employed at Human Resources Development Canada (HRDC) was assigned to investigate the accident. As part of her investigation, she requested the employer to provide specific information and documents, and to make three employees available for interview concerning the accident.

According to the safety officer, the employer delayed in providing some of the information and documents she had requested, but finally agreed on April 2, 1998, to provide all outstanding material and to make the three employees available for interview. Shortly after the meeting, the Director, Corporate Administration, LeBlanc & Royle Telcom Inc. (LeBlanc & Royle) contacted the safety officer regarding interview dates for two of the three employees. She also reported that there was a medical problem with the third employee who I will refer to in my decision as Mr. X.

On April 17, 1998, the Director confirmed to the safety officer that Mr. X was declining to be interviewed because he had difficulty recalling events related to the accident. A note to this effect, signed by the employee, was forwarded to the safety officer. Notwithstanding this, the safety officer insisted that the employer make the employee available for interview, and suggested strategies to persuade him to cooperate, including the option of disciplining him. The safety officer required a response from the employer by April 22, 1998. On April 23, 1998, the safety

officer had not heard from the employer, and issued a written direction to the employer pursuant to subsection 145.(1) of the Canada Labour Code, Part II, (herein referred to as the Code or Part II). The direction ordered the employer to terminate the contravention of sections 142 and 143 of the Code for failing to make Mr. X available for interview by the safety officer. A copy of the Direction is attached in the Appendix.

The employer subsequently requested a review of the direction which was carried out via written submissions.

Safety Officer:

The documentation submitted to the Regional Safety Officer by safety officer Wright included a copy of her Interim Report, and copies of documents related to her investigation. The material is included in the file and will not be repeated here. Much of the material submitted relates to her investigation of the accident and her efforts to obtain information and documents from LeBlanc & Royle. Since her direction pertains only to the alleged failure by the employer to make an employee available for her interview, I have limited my attention to the portion of her documentation relating to the direction under review. In this regard, I retain the following facts.

On March 19, 1998, safety officer Wright faxed a letter to Mr. DeBelser, LeBlanc & Royle. Among other things, she requested confirmation, by March 23, 1998, that the 3 employees she had identified would be available for interview the week of March 30, 1998. On March 27, 1998, Mr. Skelly, Legal Counsel for LeBlanc & Royle, phoned safety officer Wright to confirm that he was aware Labour Canada was exchanging information with American officials at the Occupational Safety and Health Administration (OSHA), and he did not feel that the Company should have to provide duplicate information to Labour Canada that they had already provided to OSHA. He stated that the three employees identified by the safety officer had already been interviewed by the insurance company involved, and by OSHA officials. He requested a meeting with safety officer Wright to discuss, among things, whether the employees would be made available to her for interview. The meeting was held on April 2, 1998, at the Oakville Head Office of LeBlanc & Royle.

At the end of this meeting, the employer agreed to provide the safety officer with all outstanding information and documents, and to make the three witnesses available to her over the next three weeks. Ms. Rose-Marie Few, Director, Corporate Administration, subsequently contacted safety officer Wright to establish interview dates for two of the employees. She also advised the safety officer that there was a medical problem with Mr. X. On April 20, 1998, Ms. Few provided safety officer Wright with a letter, signed by Mr. X, confirming that he did not wish to be interviewed because he has difficulty remembering what happened during the accident.

On the same day, April 20, 1998, safety officer Wright interviewed the two other employees that she had identified. At the end of the interviews, she reiterated to the employer that she still wanted to interview Mr. X, as soon as possible, and suggested strategies that the employer could use to persuade him to cooperate, including the option of discipline. She gave the employer until April 22, 1998, to advise her when Mr. X could be interviewed. Safety officer Wright issued her direction on April 23, 1998, after not hearing from the employer by the April 22 deadline.

When Mr. X was finally interviewed by a safety officer on June 4, 1998, he told the safety officer that “he had gone down there once already and he didn’t want to do that again.” He confirmed to the safety officer that the employer had not dissuaded him from submitting to an interview.

Applicant:

Mr. R. M. Skelly, Counsel, to LeBlanc & Royle submitted documents to the Regional Safety Officer. The documents dealt with the safety officer’s investigation of the accident, and provided written comments on the documents proffered by safety officer Wright and on her account of the events that led to the direction dated April 23, 1998. These are included in the file and will not be repeated here. As with the documentation provided by safety officer Wright, I have limited my attention only to that portion of the employer’s documents and comment that relate to the direction under review. In this regard, the following is retained.

LeBlanc & Royle has a long history of being at the forefront of occupational safety and health both nationally and internationally, and has collaborated with HRDC on several occasions in the past. On December 19, 1997, safety officer Wright met with Mr. Amyotte, safety officer for LeBlanc & Royle regarding the accident. Mr. Amyotte collaborated fully with safety officer Wright and attempted to answer all questions. A statement was taken from Mr. Amyotte which he signed. With regards to the safety officer interviews, LeBlanc & Royle made all employees requested by her available for interview. In this regard, the employer freed the employees from their normal work obligations, paid their salaries and transportation expenses, and, at the request of safety officer Wright, rented and paid for separate facilities so that safety officer Wright could interview the employees at a neutral location outside of their workplace.

With regard to Mr. X, Mr. Skelly noted that Ms. Few explained to safety officer Wright on April 17, 1998, that the employee did not wish to be interviewed because he was unable, for medical reasons, to recall events related to the accident. He also noted that safety officer Wright had not communicated with Mr. X herself to explain the importance of his input or to confirm his mental status, despite the fact that the employer had provided her with his home and work telephone number

I further note that safety officer Wright wrote in her Interim Report that, when Mr. X finally met with a safety officer on June 4, 1998, he told the safety officer that he “had gone down there once already and didn’t want to do that again.” He also confirmed that LeBlanc & Royle had not dissuaded him from being interviewed by a safety officer concerning the accident.

Mr. Skelly observed that section 142 of the Code specifies that “all reasonable assistance” must be given to a safety officer. He opined that this term implies that there are limits to what the employer or employee is required to do in the circumstance. He alleged that safety officer Wright ignored this qualification when she decided that LeBlanc & Royle was in violation of sections 142 and 143 of the Code and issued her direction. Moreover, he asserted that sections 142 and 143 apply to both employers and employees, and that safety officer Wright made no effort to contact the employee prior to her direction, despite having been provided his home and work telephone numbers.

Decision:

The issue that I must decide is whether the employer contravened sections 142 and 143 of the Code for having failed to make one of its employees available to the safety officer investigating into the work place fatalities of three other employees.

For deciding this, it is useful to review the English and French versions of sections 142 and 143, and section 148.(6) of the Code. Section 142 reads:

“Section 142. The person in charge of any work place and every person employed at, or in connection with, that work place shall give a safety officer all reasonable assistance to enable the officer to carry out his duties under this Part.” [My underline]

“Article 142. Le responsable du lieu visité ainsi que tous ceux qui y sont employés ou dont l'emploi a un lien avec ce lieu sont tenus de prêter à l'agent de sécurité toute l'assistance possible dans l'exercice des fonctions que lui confère la présente.” [My underline]

For the purposes of this case, the English version of section 142 clarifies that the person in charge of the workplace must give a safety officer all “reasonable” assistance. The French version indicates that the employer must give the safety officer “toute l'assistance possible.” “Le Nouveau Petit Robert”¹ defines the word “possible” to mean “qu’ on peut faire”, which I interpret as, whatever the person is capable of doing under the circumstances. In other words, the obligation on the person in charge and employees to assist a safety officer is, in my view, not absolute or without limit. One must consider whether the person’s efforts to assist the safety officer are reasonable in the circumstances.

This view, is somewhat reinforced by subsection 148.(6) of the Code. Subsection 148.(6) specifies that, in the case of sections 142 and 143, (among other provisions), it is a defence for the person to prove that s(he) exercised due care and diligence to avoid the contravention. The English and French versions of subsection 148.(6) read as follow:

On a prosecution of a person for a contravention of subsection (4) or
(a) paragraph 125(q), (r), (s), (t), (u), (v) or (w),
(b) paragraph 126(1)(c), (d), (e), (f), (g), (h) or (i),
(c) paragraph 147(b),
(d) subsection 125.2(1), 125.2(2), 127(1), 135(1), 136(1), 144(2), 144(2.1), 144(3), 144(4) or 155(1), or
(e) section 124, 125.1, 142. or 143,
it is a defence for the person to prove that the person exercised due care and

L'accusé peut se disculper en prouvant qu'il a pris les mesures nécessaires pour éviter qu'il y ait contravention dans les cas où la poursuite est fondée sur le paragraphe (4) ou sur les dispositions suivantes :
a) les alinéas 125q), r), s), t), u), v) ou w);
b) les alinéas 126(1)c), d), e), f), g), h), ou i);
c) l'alinéa 147b);
d) les paragraphes 125.2(1), 125.2(2), 127(1), 135(1), 136(1),

¹ “Le Nouveau Petit Robert Dictionnaire De La Langue Francaise, 1996.

*diligence to avoid the contravention.
[My underline]*

*144(2), 144(2.1), 144(3), 144(4) or
155(1);
e) aux articles 124, 125.1, 142 ou 143.
[My underline]*

The English and French version of section 143 read as follows:

*“Section 143. No person shall
obstruct or hinder, or make a false or
misleading statement either orally or
in writing to, a safety officer engaged
in carrying out his duties under this
Part.”
[My underline]*

*“Article 143. Il est interdit de gêner ou
d'entraver l'action de l'agent de
sécurité dans l'exercice des fonctions
que lui confère la présente partie ou de
lui faire, oralement ou par écrit, une
déclaration fausse ou trompeuse.
[My underline]*

For the purposes of this case, and with regard to the underlined terms, both the English and French versions of section 143 of the Code prohibit the person in charge from slowing, delaying, impeding or preventing action or its progress. However, subsection 148.(6) specifies that it is a defence for the person to prove that s(he) took due care and diligence to avoid the contravention. Therefore, in my view, for a contravention of section 143 to occur, the evidence must show that the person's actions or lack thereof, hindered or obstructed a safety officer, and that the person failed to exercise his or her best effort to avoid the contravention.

In the case at hand, the documentation shows that the employer cooperated with safety officer Wright by making employees requested by her available for interview on April 13, 14 and 20, 1998. In connection with this, the employer freed the employees from their normal work obligations, paid their salaries and transportation expenses, and, at the safety officer's request, paid for separate facilities so that safety officer Wright could interview the employees at a neutral location outside of their workplace. The employer also informed the safety officer about the status of Mr. X and their efforts to make him available for an interview.

With regards to Mr. X, there was nothing in the documents submitted by safety officer Wright to question or disprove the view that Mr. X was declining to be interviewed because he was unable, for medical reasons, to recall events related to the accident. Moreover, I am inclined to agree with Mr. Skelly that it was unreasonable in the circumstances for the employer to have pressured or threaten the employee with discipline, as suggested by the safety officer, if he did not agree to meet with her.

Based on the evidence, I am satisfied that the employer, in accordance with section 142, provided safety officer Wright with reasonable assistance that was within their ability to provide, and, in accordance with section 143, did not hinder or obstruct her, or make any false or misleading statements, either orally or in writing, related to her efforts to interview Mr. X.

For the above reasons, **I HEREBY RESCIND** the direction that safety officer Wright issued to LeBlanc & Royle Telcom Inc. pursuant to subsection 145.(1) of the Code on April 23, 1998.

Decision rendered on January 13, 1999.

D. P. Malanka
Regional Safety Officer

IN THE MATTER OF THE CANADA LABOUR Code
PART II - OCCUPATIONAL SAFETY AND HEALTH

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On various dates up to and including April 21st, 1998, the undersigned Safety Officer has been conducting an inquiry in the work place operated by LEBLANC & ROYLE TELCOM INC., being an employer subject to the Canada Labour Code, Part II, at 514 CHARTWELL ROAD, P.O. BOX 880, OAKVILLE, ONTARIO, for the purpose of exercising the powers granted by subsection 141(1) of the Canada Labour Code, Part II.

The employer has failed to make an employee of the employer, namely Jimmy Verreault, available to the Safety Officer for the purpose of conducting an investigation into the workplace fatalities of three employees of the said employer.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to take measures immediately to ensure compliance with sections 142 and 143 of the Canada Labour Code, Part II, by making any employee of the employer available forthwith to any Safety Officer designated by the Minister of Labour.

Issued at Hamilton, Ontario, this 23rd day of April, 1998.

PEGGY A. WRIGHT
Safety Officer
#1707

To: LEBLANC & ROYLE TELCOM INC.
514 CHARTWELL ROAD
P.O. BOX 880
OAKVILLE, ONTARIO
L8J 5C5

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: LeBlanc & Royle Telcom Inc.
Oakville, Ontario.

KEY WORDS

Communications tower, collapse, fatalities, safety officer investigation, duty to assist, safety officer, reasonable assistance, obstruction, false statements.

PROVISIONS

Code: 142, 143, 145.(1), 146.(3), 148.(6).

SUMMARY

A safety officer employed at Human Resources Development Canada (HRDC) investigated the collapse of an 1800 foot communications tower near Jackson, Mississippi, USA, on October 23, 1997, resulting in the deaths of three Canadian workers. As part of her investigation, she requested the employer to make three employees available for interview concerning the accident. The employer reported to the safety officer that one of the employees declined to be interviewed because it was difficult for him to recall events related to the accident for medical reasons. Notwithstanding this, the safety officer insisted that the employer make the employee available for interview. When the employer failed to establish an interview date, the safety officer directed to the employer pursuant to subsection 145.(1) of the Code to immediately cease the contravention of sections 142 and 143 of the Code.

The Regional Safety Officer **RESCINDED** the direction because, in his view, the employer had provided the safety officer with all reasonable assistance as prescribed by section 142, and had not contravened section 143 by hindering, obstructing, or making false or misleading statements relative to the safety officer's efforts to interview the employee.