Canada Appeals Office on Occupational Health and Safety
Bureau d'appel canadien en santé et sécurité au travail

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Canada Labour Code
Part II
Occupational Health and Safety

Benoit Dulong
applicant

and

Via Rail
employer

Decision No. 03-006
March 4, 2003

Representatives

Benoit Dulong, representing himself.
James Gough, representing Via Rail, but no submission was requested or received from the employer.
Health and safety officer Jean-Pierre Joly, Montreal office, Labour Program, Human Resources Development Canada.

[1] This case concerns an "appeal" dated December 18, 2002. According to the appeal form submitted by Mr. Dulong, the appeal in question refers to a "direction[1]" issued by a health and safety officer – in this particular instance, Jean-Pierre Joly. The details relating to this matter are described in the documents submitted by Mr. Dulong to the Canada Appeals Office on Occupational Health and Safety.

[2] According to the documents submitted, a complaint concerning the lack of an emergency evacuation plan for Via Rail employees working at the Central Station in Montreal was filed with the employer on September 2, 2002, and subsequently with the company's health and safety committee on September 11, 2002. On September 30, 2002, the complaint was forwarded to HRDC's Labour Branch for investigation.

[3] The case was assigned to Jean-Pierre Joly who conducted a thorough investigation into Mr. Dulong's complaint. Throughout his investigation, Mr. Joly kept Mr. Dulong informed about the action he was taking in the case and specifically that he had established an implementation timeframe with Via Rail for developing an emergency plan and training the employees about it.

[1] Mr. Dulong also referred to a decision of no danger, as well as to a decision (direction/order) etc.

[4] The health and safety officer exchanged many e-mails and other correspondence with Mr. Dulong. In the process, Mr. Dulong expressed his dissatisfaction with the pace of progress, stressing that he was not satisfied with the timeframe the health and safety officer set for his employer, Via Rail – namely, to finish training the personnel in the emergency evacuation plan by the end of 2002 and then to perform a first trial of the plan in spring 2002.

[5] On November 22, 2002, Mr. Joly sent Mr. Dulong a letter updating him on the progress to that date. Here is the text of that letter:

> To Benoit Dulong:
>
> **Re: Emergency evacuation plan for Via Rail Canada employees at Montreal's Central Station.**
>
> Dear Mr. Dulong,
>
> This letter is to inform you of what has happened concerning your complaint about both the lack of an evacuation plan for Via Rail Canada employees at Montreal Central Station and the lack of training on emergency procedures.
>
> Yesterday, I took part in a meeting at Montreal Central Station to take stock of all aspects of the emergency evacuation plan. Also attending this meeting were: James Gough, Regional Director, Montreal Central Station; Pascal Parent, a prevention consultant with consulting firm Pyroform; Robert Gray, senior advisor on occupational health and safety at Via Rail Canada; Marc Théroux, co-chair representing the workers on the local occupational health and safety committee; and Jean-Pierre Moreau, acting co-chair representing the employer on the same OHS committee.
>
> During this meeting, we reviewed all the requirements stipulated in Part XVII of the Canada Occupational Health and Safety Regulations, paying particular attention to the emergency evacuation plan prepared by your employer with the help of the two local OHS committee co-chairs.
>
> In the process, I determined that your employer was in compliance with Part XVII of the Canada Occupational Health and Safety Regulations with respect to the evacuation plan, the location of emergency equipment and the description of the procedures to be followed in the event of a situation that could pose a health or safety risk to Via Rail Canada employees at Montreal Central Station. With regard to the names of people who would act as safety officers, assistants or advisors in the event of an emergency, a list of volunteers was submitted and nominations to make the official appointments, is expected to be done shortly. These persons will then receive specific training before the end of the year.
>
> In regards to the "travelling" on-board staff, who are based in other cities but have to appear onsite at Montreal Central Station they will also be informed about the emergency measures to use and this information will also be included in one of their operations manuals. With respect to training for Central Station employees, several sessions have already taken place and the employer has confirmed to me that everything will be finalized by the end of this year. In fact, I have personally seen the pertinent registers. Lastly, an evacuation drill in conjunction with the other Central Station employers is scheduled for next spring and I will take part in this exercise to assess the effectiveness of the emergency procedures.

> While continuing to follow up on this matter, I consider that the actions taken by your employer complies with the requirements stipulated in Part XVII of the Canada Occupational Health and Safety Regulations.
>
> Yours truly,
>
> Jean-Pierre Joly

[6] Mr. Dulong claims that this letter constitutes a "decision" by the health and safety officer. He refers to Mr. Joly's letter as a "decision (direction/order)" and on this basis he appealed it to an appeals officer. As the appeals officer assigned to this case, I wrote to Mr. Dulong on February 10, 2003, to notify him of my intention to dismiss his appeal on the grounds that I did not have the authority to hear it under the *Canada Labour Code*. I replied to Mr. Dulong as follows:

> Dear Mr. Dulong,
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> In response to your "appeal" dated December 18, 2002, this is to inform you that I intend to dismiss your appeal on the following grounds:
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> Subsection 146.1(1) The *Canada Labour Code*, Part II (hereinafter referred to as the Code) authorizes an appeals officer to intervene in a case when an appeal is brought under either of the following provisions of the Code:
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> 1) Subsection 129(7), i.e., when an employee, after a health and safety officer has rendered a decision of no danger, has appealed the decision; or
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> 2) Section 146, i.e., when a health and safety officer has issued a direction.
>
> It is clear that in this case, you have not refused to work under a provision of the Code. As a result, this situation does not apply to you. With respect to the "direction" that is being appealed, I have to inform you that the letter of November 22, 2002, to which you refer, is, at the very most, an information letter that was sent to you by health and safety officer Joly. On the other hand, a direction that has been issued under the Code is a legal instrument that is designed to rectify a contravention of the Code and its regulations. Health and safety officers can thus use certain powers under the Code, such as subsections 145(1) or (2) to correct a contravention of the Code or section 141 to direct that an employer assume certain responsibilities and so on.
>
> In your case, there was no direction issued under the Code that entitles you to make an appeal as provided for in paragraph146.1 (1) of the Code. I would also like to point out that the information contained in the documents submitted indicate that Mr. Joly's investigation is still in progress. It is therefore possible that at some time the health and safety officer will issue a direction to the employer, Via Rail, if it turns out that the employer is in a state of non-compliance with the Code. In such a situation, you would be entitled to appeal this direction to the extent that it affects you adversely.
>
> However, to be fair, I would like to give you the opportunity, regardless of the foregoing, to submit to me any argument or document showing that, in my capacity as an appeals officer, I am authorized to consider your "appeal." Consequently, you have until February 27, 2003, to send me the information requested.
>
> At that time, I will decide whether I am authorized to act in this case and will so inform you in writing.

[7] In response to my letter of February 10, Mr. Dulong wrote:

> …I consider that Jean-Pierre Joly's role has been that of a mediator and not that of an investigator. Moreover, Mr. Joly does not seem interested in producing a report and issuing directions under the Code. I find it worrying, serious and dangerous that the application of the *Canada Labour Code* is something that can be negotiated and is not being strictly and systematically implemented.
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> On Friday, February 21, 2003, nearly five months after Danielle Gélinas's letter of September 30, 2002, the health and safety committee (Marc Théroux, co-chair) had still not received Mr. Joly's investigation report. In such circumstances, I consider that the lack of an investigation report is equivalent to a decision of no danger and this is the decision that I am appealing.
>
> I am not satisfied with the way HRDC has handled my complaint. I specifically object to the lack of an investigation report…

[8] It is clear from reading the text of Mr. Dulong's letter (see above) that he is very disappointed and upset that the health and safety officer had not acted towards his employer with all the force that the Code allows. He also feels adversely affected by the fact that the health and safety officer has not written a complete investigation report on this situation and that he (Mr. Dulong) has not received such a report. In his own words, Mr. Dulong considers that "the lack of an investigation report is equivalent to a decision of no danger."

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[9] Despite what Mr. Dulong may think, the lack of an investigation report does not constitute a decision of no danger. As specified in section 128 of the Code, a decision of no danger, which would give Mr. Dulong the right to appeal it, can only exist after an employee has refused to work and, as stipulated in subsection 129(4) of the Code, a health and safety officer has made a decision concerning the absence of danger. As indicated in subsection 129(7) of the Code, this is the only type of decision that can be appealed. These provisions read 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.
>
> 129. (1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to investigate the matter in the presence of the employer, the employee and one other person who is an employee member of the work place committee; the health and safety representative; or if a person mentioned in paragraph (*a*) or (*b*) is not available, another employee from the work place who is designated by the employee
>
> (4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.

> (7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.

[10] As I stated in my letter of February 10, 2003, there was no case of a refusal to work in this case. As a result, this situation does not apply to Mr. Dulong. The same goes for any direction that can be appealed. I had in fact explained all this to Mr. Dulong in my letter to him of February 10, 2003 (see above). In reality, the health and safety officer issued no direction in this case and, as a result, Mr. Dulong is not entitled to appeal a non-existent direction.

[11] In short, an appeals officer only has the legal authority to intervene in a situation when, as stipulated in section 146.1 of the *Canada Labour Code*, the law authorizes him or her to do so:

> 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…

[12] I conclude in this particular case that I have no legal authority to hear this case. I therefore dismiss Mr. Dulong's request. This file is now closed.

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Serge Cadieux
Appeals Officer

Summary of Appeals Officer Decision

Decision No.: 03-006

Applicant: Benoit Dulong

Employer: VIA Rail

Key words: Decision of no danger, direction, information letter, the legal authority of an appeals officer.

Provisions:

Code: 128(1), 129(1), 129(4), 129(7), 146.1

Summary:

A health and safety officer received a complaint from a VIA Rail employee and then investigated it. The health and safety officer did not communicate an investigation report to this employee. The employee filed an appeal claiming that an information letter that he had received from a health and safety officer constituted a decision of no danger and that he was appealing this. The appeals officer concluded that he did not have the legal authority to hear the appeal and therefore dismissed it.