

Canada Labour Code
Part II
Occupational Health and Safety

M. Gervais
applicant

and

Correctional Service Canada
employer

Decision No. 04-040
November 5, 2004

This case was decided by Douglas Malanka, appeals officer.

[1] On February 26, 2003, Correctional Officers M. Gervais and K. Frandsen employed at the Collins Bay Institution refused to work in the EVI¹ complex. They alleged that a danger existed there because inmates using the EVI complex as part of their daily activities had free access to the emergency egress door installed in the newly constructed section of the EVI. With the unrestricted access, inmates could no longer be confined, isolated and controlled in the smallest area during an escape or other emergency, as required by the Institution's security procedures.

[2] Health and safety officer Renée Roussel investigated into M. Gervais' refusals to work and decided that a danger did not exist for the employee. She wrote:

“...the situation did not include the concept of reasonable expectation of imminent danger therefore the situation was considered hypothetical or speculative.”

[3] In the case of the refusal to work of Correctional Officer K. Frandsen, health and safety officer Roussel decided that the employee had left the work place and was no longer part of the process. M. Gervais told health and safety officer Roussel that he would speak for K. Frandsen but health and safety officer Roussel rejected this. Health and safety officer Roussel wrote in her decision report:

“...the process clearly outlined an individual right therefore [K. Frandsen] was no longer part of the process.”

¹ The term “EVI” was not defined in the documents connected with the case.

- [4] As a result of this position, health and safety officer Roussel never ruled on the refusal to work of K. Frandsen.
- [5] Notwithstanding the above, both M. Gervais and K. Frandsen appealed the decision of the health and safety officer that a danger did not exist for M. Gervais pursuant to subsection 129.(7) of the *Canada Labour Code*, Part II (*Code*) on March 1, 2003, within the time limit specified in the *Code*.
- [6] A hearing was scheduled to take place on September 21, 2004, at Kingston, Ontario to hear the appeal, but on September 20, 2004, Mr. Marcel Bouchard, union advisor with CSN, informed the Canada Appeals Office on Occupational Health and Safety that M. Gervais and K. Frandsen wished to withdraw their appeal and to close the file.

- [7] As part of my deliberations whether or not to accept the withdrawal and request that I close the file, I considered whether it was in the public interest to do so given the fundamentally flawed statements expressed by health and safety officer Roussel in the officer's decision report. In this regard, I refer to the officer's justification for not considering the refusal to work of K. Frandsen, and for deciding that a danger did not exist for M. Gervais as there was no "imminent" danger in connection with the work situation.
- [8] In connection with her justification for not investigating and making a decision in the case of the refusal to work by K. Frandsen, and for not permitting M. Gervais to represent K. Frandsen, I would refer health and safety officer Roussel to the following sections of the *Code*.

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 health and safety officer to investigate the matter** in the presence of the employer the employee and one other person who is

(a) an employee member of the work place committee;

(b) the health and safety representative; or

(c) if a person mentioned in paragraph (a) or (b) is not available, another employee from the work place who is designated by the employee.

(2) If the investigation involves more than one employee, **those employees may designate one employee from among themselves to be present at the investigation.**

(3) A health and safety officer **may proceed with an investigation in the absence of any person mentioned in subsection (1) or (2) if that person chooses not to be present.**

(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. [My bold.]

- [9] Contrary to the above *Code* provisions, officer Roussel did not permit K. Frandsen to be represented by M. Gervais and did not render a decision in connection with the refusal to work by K. Frandsen.
- [10] With regard to the health and safety officer's statement that a danger did not exist for M. Gervais because the situation did not include the concept of reasonable expectation of imminent danger, I would refer the officer to subsection 122.1 of the *Code* (definition of danger) and to section 128 (refusal to work if danger) of the *Code*. In my opinion, there is no reference to "imminent" danger as this concept was removed from the *Code* when it was last amended in September of 2000.

122.1 "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;

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, or
- (b) a condition exists in the place that constitutes a **danger** to the employee, or
- (c) the performance of the activity by the employee constitutes a **danger** to the employee or to another employee. [My bold.]

- [11] M. Gervais did not provide reasons for withdrawing and requesting that the file be closed. Therefore, I am unable to determine whether or not health and safety officer Roussel's reference to imminent danger was a factor in the withdrawal. However, in light of the fact that health and safety officer Roussel's investigation and decision in respect of the refusal to work by Correctional Officer K. Frandsen is still outstanding and has yet to be completed by health and safety officer Roussel or another health and safety officer, in light of the evidence that the two employees essentially refused to work for the same reason, and, in light of the time that has passed since M. Gervais' refusals to work on February 26, 2003, I have accepted M. Gervais' request to withdraw and have closed the file in respect of Correctional Officer M. Gervais.

Douglas Malanka
Appeals Officer

Summary of Decision

Decision No.: 04-040

Applicant: M. Gervais

Employer: Correctional Service Canada

Key Words: refusal to work, danger, inmate, confinement, control, isolation, emergency egress door.

Provisions: *Code* 122.1, 128, 129(1),(2),(3) and (4)
Regulations

Summary:

The applicant appealed a decision of no danger issued by a health and safety officer, following a refusal to work and withdrew its appeal shortly after a hearing date was set. The appeals officer accepted the withdrawal and closed the file. However, the appeals officer reminded the health and safety officer that a co-worker of the employee had refused to work for essentially the same reason, and the officer's investigation and decision in respect of that refusal was still outstanding.