

Canada Labour Code
Part II
Occupational Health and Safety

George Smith
applicant

Decision No. 05-058
December 22, 2005

This case was decided by appeals officer Pierre Rousseau.

[1] This case concerns an appeal pursuant to subsection 146(1) of the *Canada Labour Code*, Part II, (*Code*) by George Smith of George Smith Trucking LTD., against a direction issued by health and safety officer (HSO) Alex Kozubal, in Winnipeg, on April 19, 2004, following an inspection conducted on April 6, 2004.

[2] On November 27, 2005, G. Smith sent a letter to the Canada Appeals Office, requesting an appeal. His letter reads as follow.

We would like to get appeal opened on danger tag 2088 that was issued April 19, 2004 we missed the appeal date and waited till it was heard in court in Winnipeg.

This danger tag was issued on the assumption that Mr. Wes Dick knew what he was talking about.

Mr. Wes Dick under oath in a court of law came out with the following statements and they are on court records.

“I did not measure the chain and he mentioned two chains when questioned about two chains he claimed it was so long ago and he forgot if it was one or two chains, he also claimed the chain was rusted and kinked and as such had to be stretched. He could not answer why it was measured. Enclosed are pictures taken by your inspectors and the chain looks very straight. One picture was taken allegedly on April 1, 2004.

The chain was measured by another contractor and found to be with limits. And there are no pictures of a bent mast tail and MT Dyck under oath claimed he did not test for bent rails.

Enclosed is a copy of Hyster instructions re chain replacement.

Respectfully

George Smith

- [3] What I have to decide here is if I should accept or refuse G. Smith's appeal and under what grounds.
- [4] Section 146(1) of the *Code* stipulates that an appeal of a direction should be done in writing and within thirty days after the date of the direction being issued. In the present case the thirty day period has been exceeded by more than eighteen months.
- [5] For the benefit of the reader, section 146(1) of the *Code* reads as follow:
- 146(1)** An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.
- [6] Paragraph 146.2(f) of the *Code* gives the Appeals Officer, for the purposes of a proceeding under subsection 146.1(1), the power to abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence.
- [7] Paragraph 146.2(f) of the *Code* reads as follow:
- 146.2** For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
- (...)
- (f) abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence;
- [8] Here we have a situation where G. Smith received a direction under paragraphs 145(2)(a) and (b) of the *Code* more than 18 months ago. I don't know if he complied, but G. Smith ended up in court and following the testimony of the expert witness Wes Dyck of Wajax Industries Limited (expert brought in by HSO Kozubal to assist him in his inquiry) G. Smith would like to appeal the danger "tag" (notice of danger) 2088 which "may have been" posted on the Hyster fork lift.

- [9] If G. Smith is sending this request because he has decided to comply with the direction and wants to have the notice of danger removed, the present request should have been sent to HSO Kozubal as specified under subsection 145(3) of the *Code* and not to an Appeals Officer.
- [10] However, if G. Smith wishes to appeal the direction or the posting of the notice of danger and have it rescinded by an Appeals Officer, the request should be based on sufficient grounds to be justified.
- [11] One of these grounds could be that if he or she doesn't accept to extend the period to receive the appeal of a direction, for example, the direction could create a situation or condition that would endanger the health or safety of an employee or any person granted access to the work place.
- [12] In the present request, G. Smith bases his request on the fact that W. Dyck did not recall some events when he appeared in court and the fact that he did not measure the chain of the lift and he did not test for bent rails.
- [13] The direction issued by HSO Kozubal directed George Smith Trucking Ltd., to take out of service the Hyster fork lift until it has been repaired or modified by a qualified person.
- [14] The direction reads as follow:

(...) The said health and safety officer considers that the use or operation of a thing poses a danger to an employee while at work.

- 1) The HYSTER fork lift MAST RAILS are bent and;
- 2) The HYSTER fork lift MAST CHAIN exhibits signs of wear

Contrary to the *Canada Labour Code* 125.(1)(k) and *Canada Occupational Health and Safety Regulation* 14.29(1) and shall be taken out of service until it has been repaired or modified by a qualified person.

You are HEREBY FUTHER DIRECTED, pursuant to paragraph 145(2)(b) of the *Canada Labour Code*, Part II not to use or operate the machine, or conduct the activity, in respect of which the Notice of Danger No. 2088 has been affixed pursuant to subsection 145(3), until this direction has been complied with.

Issued at Winnipeg, this 19th day of April, 2004.

(...)

- [15] If the qualified person hired by G. Smith is of the opinion that the chain is within limits and there are no bent rails as noted in the HSO's direction, and this was proven in a court of law before a judge, it is the judge, if he was convinced that there was no infraction, who had the power and responsibility to render a decision on the matter.

- [16] Following the decision of the judge, if it is the case, the HSO should authorise G. Smith to remove the notice or the “tag” as requested under subsection 145(3) of the *Code*. G. Smith doesn’t need to appeal to an Appeals Officer to have that notice “tag” removed.
- [17] This being said, in my opinion, I find the reasons submitted by G. Smith of no valuable to extend the time period to grant the appeal requested.
- [18] Consequently as an Appeals Officer authorised by the *Canada Labour Code* Part II, I refuse to extend the time for instituting the proceeding as there is no reasonable grounds to justify it and I dismiss the appeal.

Pierre Rousseau
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 05-058

Applicant: George Smith

Employer: George Smith Trucking Ltd.

Keywords: Notice of danger, extend, direction

Provisions: *Code: 146.(1), 146.2 – Canadian Occupational Health and Regulations: N/A*

Summary:

An employer requested an appeal more than 18 months after he received a written direction and a court of justice heard the case. As there was no sufficient grounds to justify the delay to extend the time for instituting the proceeding, the appeal is dismissed.