

Canada Labour Code
Part II
Occupational Health and Safety

Scott McDonald
and International Association of
Machinists and Aerospace Workers
applicants

and

Aeroguard Company Ltd.
respondent

Decision No.: 06-028
September 19, 2006

This matter was decided by Appeals Officer Michael McDermott on the basis of documents submitted by the parties and the health and safety officer.

For the applicants

Scott McDonald and International Association of Machinists and Aerospace Workers (IAMAW)

For the Respondent

Ralph Moat, Operations Manager at Vancouver International Airport

Health and Safety Officers

Michael O'Byrne, Human Resources and Social Development Canada (HRSDC),
Labour Program

Craig Ollenberger, HRSDC, Labour Program

- [1] This case concerns an appeal pursuant to subsection 129(7) of the *Canada Labour Code*, Part II (the *Code*), made by Scott McDonald, on June 10, 2005, against a decision of no danger issued on June 7, 2005, by health and safety officer (HSO) Michael O'Byrne pursuant to subsection 129(4) of the *Code*.
- [2] HSO O'Byrne's decision addressed refusals to work invoked pursuant to subsection 128(1) of the *Code* by employees of the Aeroguard Company Ltd. engaged in passenger and carry-on baggage screening at the South Terminal of Vancouver International Airport. At the

South Terminal, this work is assigned to a five-person crew. The duties involve attending the X-ray search equipment, personal wand searches, physical searches of carry-on bags, explosive detection searches and boarding pass checks. These functions are normally rotated among the five crew members every fifteen minutes, a time frame that respects the safe limits for operating the X-ray equipment.

- [3] Physical baggage searches and the procedures established for avoiding injury from sharp objects or other hazards while the employee delves into a passenger's bags were the focus of the refusals. Directed searches are those undertaken when the X-ray search has detected a problem or failed to determine conclusively that a bag is free of banned materials. Random bag searches are also conducted.
- [4] During the morning shift on June 7, 2005, three of the five Aeroguard employees then engaged in passenger screening duties at the South Terminal refused to continue searching passengers' bags. The three employees, Scott McDonald, Garry Powar and Rajinder Rai, claimed that a risk to their personal health and safety existed, arising from searching the bags in accordance with the Canadian Air Transport Security Authority's standard operating procedures and not being provided by the employer with the proper tools to protect themselves. Rajinder Rai had cut his hand while performing a directed baggage search. He bandaged his hand, conducted one more baggage search and then refused to do further searches. Garry Powar had refused to conduct physical baggage searches during previous shifts and continued to do so.
- [5] The three employees informed the Acting Point Leader (APL) that they would not be carrying out further searches of passengers' bags, leaving two of the crew members to perform physical search functions. According to the HSO's Investigation Report, Scott McDonald felt that the APL had not realized the full extent of the refusals and he contacted Ralph Moat, the Operations Manager.
- [6] Ralph Moat recognized the situation as a refusal to work on the grounds of danger pursuant to subsection 128(1) of the *Code*. He contacted Cody Kennedy, the employee co-chair of the health and safety committee, and, accompanied by him, took steps to investigate the refusals. Mr. Moat did not believe that a danger existed and considered that the procedures in place mitigated the risk of injury from sharp objects. He and Mr. Kennedy were unable to resolve the matter. Replacements were assigned and the refusals were reported to the Labour Program at HRSDC. HSO O'Byrne responded to the call, accompanied by HSO Craig Ollenberger.
- [7] HSO O'Byrne notes and the file confirms that Rajinder Rai and Garry Powar agreed that Scott McDonald's refusal should be representative of all three refusals, in effect leaving him to elaborate on the circumstances relating to their exercise of the right to refuse. During the HSOs' investigation, Scott McDonald claimed that, while offering protection against some contaminants, the latex gloves supplied could tear and offer insufficient protection against sharp objects. He further observed that "blind" searches, where hands

are placed inside a bag without its contents first being established visually, were sometimes unavoidable. He sought to demonstrate this point using the HSO's brief case. He believed that Kevlar type leather gloves were required for "blind" searches if cuts and risks of contamination and infection were to be avoided.

- [8] Ralph Moat maintained that procedures were adequate when followed to prevent or mitigate the types of risk described by Scott McDonald. They include such measures as avoiding "blind" searches by repeating X-ray examinations at different angles of the bags, questioning passengers about the contents of their bags, using latex gloves to protect against contaminants and removing objects from bags methodically, examining one layer at a time.
- [9] Mr. Moat confirmed that these procedures and other elements of the Standard Operating Procedures (SOPs) were explained in the initial training program for screening officers. A copy of the SOPs was appended to HSO O'Byrne's report.
- [10] Scott McDonald agreed that training is given which emphasizes searching cautiously and taking the time required to do so but he maintained that there was pressure to complete screenings on a timely basis. Mr. Moat countered that he had never cautioned a screening officer for taking too much time to complete a search.
- [11] Cody Kennedy, the employee co-chair of the health and safety committee, recalled a visit by HSO Lyn Peters to a committee meeting held in April 2005, where discussion with respect to "blind" searches and the use of a tool to probe obscured areas proved inconclusive.
- [12] The two HSOs accompanied Scott McDonald and Ralph Moat to the screening area, where they observed two screening officers performing a number of relevant procedures. It was noted that neither officer made use of latex gloves and one of them failed to question a passenger about the presence of sharp objects. While the need for an officer to delve by hand into a "blind" spot did not arise during the visit, the HSOs did witness contents of a bag being removed carefully and by layers in conformity with the SOPs.
- [13] Following the on-site observation, the parties were given an opportunity to provide further comment. They were joined by the union local vice-president, Rajib Roy, whose participation, it was noted, was limited to observing the process.
- [14] After careful consideration of all the information gathered, HSO O'Byrne determined "that no danger exists as there are sufficient work processes in place that, if properly followed by the screening officers, would prevent or seriously limit the risk of the types of injuries causing concern. Further no danger existed at the time of our investigation." The ruling concluded by stating that the "activity considered by the employees who refused to work, is a normal condition of their employment."

[15] Notification of the decision was delivered by hand, on June 7, 2005, to all relevant parties at the South Terminal. While a list of the parties is not included in the file, it is assumed that those receiving the notification included Mr. Kennedy and Mr. Roy, as well as Mr. McDonald and Mr. Moat.

[16] Notification of a decision pursuant to subsection 129(4) of the *Code* includes information respecting the right to appeal the decision pursuant to subsection 129(7).

[17] Scott McDonald filed an appeal dated June 10, 2005, which was received by the Appeals Office on June 13, 2005. He gave his address and his telephone number. A simple acknowledgement dated June 20, 2005, was sent by the Appeals Office to Mr. McDonald and copied to Ralph Moat. A pamphlet describing the role of an Appeals Officer and the appeals process was included with the acknowledgement.

[18] A second letter, dated the same day, was sent to Scott McDonald by Priority Post. This letter requested Mr. McDonald to provide the Appeals Office with all documentation that he intended to submit in support of his appeal by July 4, 2005, and to provide the other party with the same documentation. A similar letter was sent to Mr. Moat, also by Priority Post, addressed to him as Operations Manager, Vancouver International Airport, Domestic Terminal 1, and informing him that he would have ten days to respond once he received documentation from Scott McDonald. Both Priority Post letters provided copies of all documents then on file in the Appeals Office, including the eighteen-page Investigation Report and Decision filed by HSO O'Byrne.

[19] There is no record of either Scott McDonald or Ralph Moat responding to the June 20, 2005, letters. In Mr. Moat's case, this is understandable since, in the absence of receiving a copy of Mr. McDonald's reply, there was nothing that required his response.

[20] On October 13, 2005, follow-up letters were sent to both persons by Priority Post. Again there is no record of Scott McDonald having replied. In the case of Ralph Moat, the letter was returned to the Appeals Office with the "unclaimed" box checked off. The file indicates that the Appeals Office contacted Scott McDonald by telephone on February 13, 2006, inquiring about possible dates for a hearing in April. Mr. McDonald indicated that he would speak to the union representative.

[21] No further response having been received, the Appeals Office sent reminder letters to Scott McDonald and Aeroguard Company, by Priority Post, on March 17, 2006. No reply was received from Mr. McDonald. The letter to the company, addressed this time simply to Respondent, Operations Manager, at the same address used previously for Ralph Moat, was returned to the Appeals Office with the notation "No such address".

[22] During May and June 2006, several more attempts were made to contact Scott McDonald by telephone. Messages were left for him on the 1st, 5th, and 30th of May and again on June 9, 2006. The latter was also followed up the same day with a fax to him at Aeroguard

Company, seeking an acknowledgement of the March 17 letter attached to the fax. The Appeals Office having learned during this period that Ralph Moat was no longer with the company, a telephone message was left on June 9, 2006, for Colin Wade, presumably Mr. Moat's successor, and a follow-up fax with the March 17 letter attached was sent to him the same day. Again, no responses are recorded from either quarter.

- [23] An exhaustive review of the steps taken to contact the appellants and respondent does not normally figure so largely in narrative appeal decisions. However, such a review is pertinent in this case. Other than Scott McDonald's Appeal Application, dated June 10 and received by the Appeals Office on June 13, 2005, there is nothing on file to support his appeal.
- [24] HSO Byrne's Investigation Report reflects a timely and orderly investigation of the circumstances giving rise to the refusals to work. In the absence of argument challenging the substance of the investigation and the decision, the only other factor to consider is whether or not reasonable efforts were made by the Appeals Office to contact the appellant such that he had every opportunity to pursue his appeal. In my view, the record shows that such efforts were made.
- [25] Before concluding, I have one observation with respect to the title of the file, which includes reference to the International Association of Machinists and Aerospace Workers. Although the IAMAW is listed by Scott McDonald in his original appeal application, I can find no indication that the union joined his appeal. Cody Kennedy, the employee co-chair of the health and safety committee, participated in the initial investigation but there is no indication that he subsequently participated in Scott McDonald's appeal. Similarly, Rajib Roy, the union local vice-president, joined the investigation meeting at a late stage but limited himself to observing the proceedings. Again, there is no record of Mr. Roy being involved in the appeal. The notation on file that Scott McDonald, when contacted by the Appeals Office on February 13, 2006, said that he would speak to the union expresses an intention but there is no record of the intention having been pursued or, if it was, what response he may have received.
- [26] I have concluded that reasonable efforts have been made to afford Scott McDonald an opportunity to support his appeal of the no danger decision issued by HSO O'Byrne on June 7, 2005. In the absence of supporting argument from him and the passage of time since he was provided with information on the appeals process and his responsibilities as an applicant, I confirm the decision of the health and safety officer.

Michael McDermott
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 06-028

Applicants: Scott McDonald and International Association of Machinists and Aerospace Workers (IAMAW)

Respondent: Aeroguard Company Ltd.

Key Words: Absence of danger, carry-on baggage, baggage search, contaminants

Provisions: *Canada Labour Code:* 128(1), 129(4), 129(7)

Summary:

This decision involves a refusal to work by employees engaged in passenger and carry-on baggage screening at the South Terminal of Vancouver International Airport, claiming a risk to their personal health and safety arising from searching the bags in accordance with the Canadian Air Transport Security Authority's standard operating procedures and not being provided with the proper tools to protect themselves. After consideration of all the information gathered, the health and safety officer determined that there was no danger as there were sufficient work processes in place if followed by the screening officers.

In the absence of supporting argument from the appellant and the passage of time since he was provided with information on the appeals process and his responsibilities as an applicant, the Appeals Officer's decision is to confirm the decision of the health and safety officer.