Canada Appeal Office
on Occupational Health
and Safety

Canada

Bureau canadien d'appel
en santé et sécurité
au travail

Case No.: 2005-37

Interlocutory decision
Interlocutory Decision No.: CAO-07-046 (A)

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

K. Bartakovic and Public Service Alliance
of Canada
appellants

and

Canada Border Services Agency
respondent

December 21, 2007

This interlocutory decision has been rendered by Appeals Officer Pierre Guénette.

For the appellants
Andrew Raven, Counsel

For the respondent
Richard E. Fader, Counsel, Treasury Board, Legal Services

[1] The following decision is in response to a request made by the appellants to be authorized to present additional evidence relative to the preliminary issue of institutional independence on the above mentioned appeal of which I am seized.

[2] According to the appellants, this evidence in question had not been available at the time of the hearing on the preliminary issue and had just recently come into their possession.

[3] In view of the appellants' request, I decided to convene a hearing for the purpose of determining whether it would be necessary to reconvene the hearing on the preliminary issue mentioned in paragraph 1 to receive said additional evidence. This hearing proceeded on December 5, 2007.

[4] Before dealing with this issue at hand, a review of the history of the case shows the following.

[5] This case concerns an appeal filed by Ms. Katie Bartakovic against a decision of absence of danger by health and safety officer Rod Noel on September 1, 2005. This appeal was filed on September 16, 2005.

[6] The preliminary objection concerning the institutional independence of the Canada Appeals Office on Occupational Health and Safety (CAO) was first filed with the CAO on March 6, 2006.

[7] On March 20, 2006, the CAO was informed that both parties were ready to proceed on the preliminary issue on May 9, 2006 and proceeding indeed started.

[8] The hearing on this issue however had to be re-initiated before the undersigned Appeals Officer following withdrawal of the initially – assigned Appeals Officer for reasons that need not be discussed here.

[9] On December 14, 2006, both parties agreed to proceed with the hearing on January 15, 2007. The appellants' final submissions were received by the Appeals Officer on March 22, 2007 following with the respondent's submissions on March 29, 2007. Finally the Appeals Officer received the appellants' rebuttal on April 5, 2007. Oral arguments by all parties were completed on April 12, 2007.

[10] On November 8, 2007 when counsel for the appellants made the request to file additional evidence, the undersigned Appeals Officer was in the process of completing the writing of his decision on the preliminary objection relative to institutional independence.

[11] At the outset of the hearing, and indeed repeatedly throughout, counsel for the appellants sought to file in evidence, purportedly for identification purposes, the document that he describes as newly uncovered evidence important enough to warrant reconvening the hearing on the preliminary objection relative to institutional independence. Counsel for the respondent did not object to this.

[12] For the same reason that saw this Appeals Officer refuse to receive the document in question that accompanied counsel for the appellants notice to the CAO its discovery and request for filing in evidence and order its return to counsel, I again refused to actually receive and be put in possession of the document at this hearing. I indicated to counsel that I would require and be satisfied with a sufficiently detailed description of its contents and nature to establish the importance and necessity of receiving it as evidence at a reconvened hearing.

[13] It was initially and remains my opinion that such a description would be enough for the purpose at hand and would avoid the possibility of improperly affecting my decision on the central issue, should I decide not to reconvene the central hearing and not to receive the said document in evidence.

[14] Counsel for the appellants described the evidence he is seeking to file at a reconvened hearing as a memorandum authored by Mr. Pierre Rousseau, Director, Canada Appeals Office on Occupational Health and Safety, dated December 10, 2004, and addressed to then Assistant Deputy Minister (Labour) Mr. John McKennirey and bearing title "Summary of our meeting of December 7th, 2004." According to counsel, this document contains notes or minutes of the meeting of December 7 bearing on subjects directly related to the workings of the CAO and is directly related to statements made by Mr. Rousseau in his testimony at the hearing in the preliminary objection relative to institutional independence.

[15] Counsel for the appellants also point out that although Mr. Rousseau had been summoned to disclose documents relative to "the nature and content of the reporting relationship between the Appeals Office and the Assistant Deputy Minister – Labour Program, HRSDC", the recently obtained document would establish that such disclosure had not been fully obtained and furthermore, this contents would serve to contradict the testimony given by Mr. Rousseau on the subject.

[16] Mr. Raven also argued that the authority given to Appeals Officers to receive evidence by the Code, more specifically section 146.2, is sufficient to receive the evidence in question.

[17] According to counsel for the appellants, his description of the evidence he seeks to file serves to establish that it is completely relevant to the issue raised by the preliminary objection on institutional independence.

[18] Furthermore, it is counsel's position that the requirement for a fair hearing conducted according to rules of natural justice dictates that this newly discovered evidence be received at a reconvened hearing.

[19] Finally, Mr. Raven stated that he acted forthwith in bringing this latest development to the attention of the CAO by seeking to inform the Appeals Officer and obtain a hearing just days after learning of the existence of the document.

[20] Mr. Richard Fader, for the respondent, generally agreed with the position set forth by the appellants. According to counsel, fairness dictates that the hearing be reconvened to receive the said evidence and refusing to do so would prejudice the appellants' case.

[21] Mr. Fader added that he is satisfied that the proposed evidence is directly related to the testimony previously given by Mr. Rousseau, but that the proper manner in which to have this document filed as evidence should be through its author at a reconvened hearing where the latter would be called to testify. It was the position of counsel that whether failure to disclose has been deliberated or accidental, Mr. Rousseau should at least be afforded the opportunity to respond to the allegations and the evidence.

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Determination

[22] The issue is whether it is necessary to accede to the request by appellants to reconvene the hearing on the preliminary questioned regarding institutional independence to hear new evidence that was not available to them at the actual hearing. In this regard, I will consider the submissions by the parties, the *Canada Labour Code* (Code) and the cases cited by Counsel Raven.

[23] As noted by Mr. Raven, paragraph 146.2(c), an appeals officer is authorized to receive and accept any evidence that the officer sees fit, whether or not admissible in a court of law. Therefore, if I decide that it would be appropriate to receive the evidence, I am authorized by the Code to do so. Paragraph 146.2(c) reads:

> 146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
> (*c*) receive and accept any evidence and information on oath, affidavit or otherwise that the officer sees fit, whether or not admissible in a court of law;...

[24] In an English case in 1961[1] it was established the following four conditions had to be met before new evidence would be accepted;

> [1] it must be evidence which was not available at the trial;
> [2] it must be relevant to the issue;
> [3] it must be credible evidence in the sense that it is well capable of belief, and,
> [4] it would, if believed, have a very important effect on the mind of the tribunal.

[25] A problem with the above test is that it requires the trier to determine the relevancy of any evidence before it is actually heard.

[26] I was reluctant at the recent hearing to receive the evidence, and preferred to initially hear a detailed description of its nature and contents of the document for deciding if its relevance and importance. After the submissions from both parties, I was satisfied that I had sufficient information to make my decision.

[27] In a decision of the Federal Court of Canada in *Haydon v Canada*[2] it is stated in paragraph 26 that:

> "It is an elementary principle of natural justice in the conduct of a fair hearing that if a party is found to have hidden or failed to disclose an important relevant document, the adverse party has the right to adjourn the hearing to adequately respond to that document either with witnesses, other documents, or cross-examination. The purpose of the rules for disclosure of documents prior to the hearing is to avoid a trial by ambush and surprise."

[28] Without prejudice as to whether the evidence had been deliberately hidden or failed to be disclosed, I am satisfied by the submissions of parties of the importance and necessity of receiving the memorandum of Mr. Pierre Rousseau that was sent to Mr. John McKennirey, ADM of the Labour Program, dated December 10, 2004. This was evidence which was not available to appellants during the oral hearings on the question of institutional independence which closed on April 12, 2007.

[29] Mr. Fader's submission was that the proper manner in which to have this document filed as evidence should be through its author at a reconvened hearing where the latter would be called to testify. It was the position of counsel that whether failure to disclose has been deliberated or accidental, Mr. Rousseau should at least be afforded the opportunity to respond to the allegations and the evidence. Mr. Raven agreed that the document should be submitted through Mr. Rousseau.

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[1] *R. v. Parks* 1961 1 W. L. R. 1484 (C.C.A.)
[2] *Haydon v Canada* (Attorney General) 2003 F.C.J. No. 957

[30] For these reasons I am reconvening the hearing on the question of institutional independence to receive additional evidence in respect of this memorandum, including related submissions from both parties. I agree that this evidence should be introduced through Mr. Pierre Rousseau's testimony. Therefore, Mr. Pierre Rousseau will be summoned to testify on this specific piece of evidence when the hearing on the question of institutional independence is reconvened.

[31] It is important to reiterate that the purpose of reconvening this hearing is only to receive the memorandum of Mr. Pierre Rousseau that was sent to Mr. John McKennirey, ADM of the Labour Program, dated December 10, 2004.

Pierre Guénette
Appeals Officer