

Appendix I

Case No.: 2005-54
Decision No.: OHSTC-08-008

Canada Labour Code Part II Occupational Health and Safety

Officer Emerson Waugh
Canada Border Services Agency
appellant

and

Canada Border Services Agency
respondent

March 31, 2008

This case was decided by Appeals Officer Richard Lafrance.

For the appellant

Mr. John King, Branch President; Customs Excise Union Douanes Accise (CEUDA), Toronto

For the respondent

Mr. Richard Fader, Counsel, Treasury Board Legal Services

Note

- [1] The hearing on the appeal of the health and safety officer's (HSO) decision was held from November 14 to 17, 2007, in Toronto.
- [2] For reasons of sensitive information related to national security, Richard Fader, counsel for the Canada Border Services Agency (CBSA), requested that the hearing be held in camera.
- [3] On November 14, 2007, having received arguments from both parties, I ordered that the hearing be held in camera. I further directed that all participants sign a promissory oath to the effect that they would not, without due authorization, disclose or make known to any person any information acquired by them during the course of the hearing.

- [4] In the same frame of mind, I am directing that this decision is to be sealed and is not to be published or distributed in any form other than to the appellant and the respondent. If needed, I leave it to the parties to decide, on a joint accord, to distribute it as they see fit.
- [5] In order to inform other interested parties, only this brief summary of the circumstances and decision will be sent to the health and safety officer as well as kept on the Tribunal's website.

Introduction

- [6] This case concerns an appeal filed on November 20, 2005, pursuant to subsection 129(7) of the *Canada Labour Code* (the *Code*), by Officer Emerson Waugh, an employee of the Canada Border Services Agency.
- [7] Officer Waugh was appealing the decision of absence of danger rendered on November 15, 2005 by HSO Karen Malcolm further to her investigation of Officer Waugh's refusal to work under subsection 128(1) of the *Code*.
- [8] Officer Waugh is a CBSA employee working at the Gateway Postal Plant in Toronto. His work consists of inspecting incoming international mail to determine if it is legally admissible in Canada. CBSA officers implement more than 70 different legislations, dealing with such matters as agriculture, pest control, taxes, as well as safety and security and the *Criminal Code*. In brief, nothing is deemed to have entered Canada until it is released by a CBSA officer.
- [9] On November 14, 2005, a grenade was found in a package on the sorting belt and the postal plant was evacuated. The Peel Regional Police was called in to examine the grenade and determined that it was inert and safe to handle.
- [10] On November 15, 2005, Emerson Waugh and 26 other fellow officers refused to perform work that they considered to be a danger. They believed that the employer was not doing sufficient pre-screening of International mail to reduce, minimize or eliminate the dangers, real or potential, which could affect the performance of their duties as CBSA officers. As well, they believed that the conditions were the same concerning their exposure to chemical, biological, radiological, nuclear and explosive (CBRNE) substances or materials.
- [11] Health and safety officer Malcolm investigated the work refusal and determined that, based on past occurrences, there was a reasonable expectation that injury could occur. However, given the *Code* definition of danger, she decided that since there was an opportunity to implement corrective action prior to the injury occurring, there was no danger present. She noted in her investigation report, as an example of corrective action, that packages did not need to be opened if it was apparent that they could cause injury, or that the employer had the opportunity to put a pre-screening process in place.
- [12] Nonetheless, HSO Malcolm directed the CBSA to conduct a job hazard analysis to assess all risks associated with the inspection of international mail, to ensure the health and safety of its employees.

- [13] John King, spokesperson for the appellant, argued that the decision of the health and safety officer was flawed because she did not investigate the real danger associated with CBRNE related substances entering the international mail processing centre work place.
- [14] Richard Fader, counsel for the employer, assented that there were risks involved in working as a CBSA officer at a mail processing centre. However, he argued that the CBSA conducted a full job hazard analysis of the work place, following which policies and procedures were implemented to mitigate the risks to the extent reasonably practicable.
- [15] R. Fader concluded that the HSO's decision was correct and that the risk faced by the appellant was a normal condition of employment, about which the employee could not refuse to work, as outlined in subsection 128(2) of the *Canada Labour Code*.

Decision and Reasons

- [16] The issue to be decided is two fold. Firstly, I must determine if, during the performance of his duties, the appellant is exposed or not to a danger as defined in Part II of the *Code*. Secondly, if I find that he is exposed to a danger, I must then determine if the said danger is, as argued by the respondent, a normal condition of employment as per subsection 128(2) of the *Code*. If I decide that the alleged danger is not a normal condition of employment, I must then issue the appropriate direction under subsection 145(2) of the *Code*. In any case, I may also issue any direction I deem appropriate given the circumstances.
- [17] The Customs enforcement manual stipulates the duties of officers with regard to the various statutes that they implement. The policy guidelines explain why and when a parcel may be opened for inspection.
- [18] The policy also outlines that the officers, when conducting examinations, must take measures to protect themselves and the health and safety of those around them. To that effect, they must take the necessary protective measures, such as wearing gloves, goggles, breathing masks or whatever equipment is appropriate.
- [19] I find that the employer has developed training and procedures to assist the officers in identifying hazardous substances and protect them against being directly exposed to the said hazardous substances.
- [20] Evidence showed that the employer provides personal protective equipment, yet, in reading the incident reports submitted; I found that in many instances, employees either did not use the proper protective equipment or did not use protective equipment at all.
- [21] I believe that, at the present time, the safety measures put in place by the CBSA are an effective tool to identify the potential exposure to the hazards mentioned above.

[22] As well, I find that, as determined by Appeals Officer Malanka in the Cole and Air Canada Decision¹:

- The hazard, condition or activity cannot be eliminated;
- The hazard, condition or activity cannot as well be controlled within safe limits.
- However, the employer can ensure that the employees are personally protected from the hazard, condition or activity.
- As well I find that the circumstances in which the remaining hazard, condition or activity could reasonably be expected to cause injury or illness to any person exposed may occur in the future as a mere possibility as opposed to a reasonable or a high probability.

[23] Based on the above, I find that should the employer's procedures be adhered to and strictly implemented as they ought to be, the hazard identified above would be mitigated to a minimum and would not represent a "danger" as described in the *Code*.

[24] With regard to the use of X-ray machines; my opinion is that no one could blame an officer for taking measures to ensure his health and safety and that of others and use all the appropriate procedures, including x-raying any packages before opening them. This is after all, as the senior technical advisor mentioned the best tool available at the present time. Because, if something better existed, the CBSA would have it. Therefore, the X-ray machines are there to be used as frequently as the officers' experience dictates it. It is up to the employer to ensure that the health and safety of its employee is protected by providing and making sure that the necessary procedures and equipment is available to do so; and it is up to the employees to follow those procedures and use all the provided equipment to ensure his health and safety and that of others around him.

[25] Having decided that a danger exists, I must now determine if, as R. Fader argued, the said danger is a normal condition of employment.

[26] In her Juan Verville² decision, Madame Justice Gauthier considered, in paragraph 55, that:

The customary meaning of the words in paragraph 128(2)(b) supports the views expressed in those decisions of the Board because "normal" refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity. In that sense and for example, would one say that it is a normal condition of employment for a security guard to transport money from a banking institution if changes were made so that this had to be done without a firearm, without a partner and in an unarmoured car?

(My underline)

¹ *Charmion Cole and Lynn Coleman and Air Canada*, CAO Decision 06-004, February 28, 2006

² *Juan Verville v. Service Correctionnel du Canada, Institution Pénitentiaire de Kent*, 2004 FC 767

- [27] Accordingly, can one say that it is a normal condition of employment to be exposed to a hazardous substance without any protective equipment?
- [28] I am of the opinion that being exposed to hazardous substances such as in the present case is not a normal condition of employment. This exposure can be considered a danger because the hazard is tied in with the methodology of work and such methodology can be modified at any time or, as in this case, not adhered to on a regular basis.
- [29] For that reason, I rescind the decision of health and safety officer Karen Malcolm of absence of danger and issue a direction to the employer because a “danger” exists. Consequently, I am directing the employer to immediately take all necessary measures to make sure that the employees follow the employer’s safety procedures and use any safety material, equipment, devices and clothing intended for the employee’s protection at all time while doing inspection of packages at the Gateway Postal Plant.
- [30] For the reasons stated above, I rescind health and safety officer Karen Malcolm’s decision of absence of danger. Consequently, pursuant to paragraph 145.(2)(a) of the *Code*, I am directing the employer to immediately take all necessary measures protect any person from the danger by implementing and monitoring the employer’s safety and emergency procedures and the use by the employees of any safety material, equipment, devices and clothing intended for the employee’s protection at all time while doing inspection of packages at the Gateway Postal Plant.
- [31] Pursuant to subsection 126.(1) of the *Code*, the employees are directed as well to immediately use any safety materials, equipment, devices and clothing intended for their protection and furnished by the employer, to follow all prescribed procedures and take all reasonable and necessary precautions to ensure their health and safety as well as that of other employees and any other person likely to be affected by their acts or omission.
- [32] Since the occurrence of this work refusal, the new Part XIX of the *Canada Occupational Health and Safety Regulations*, Hazard Prevention Program, has come into effect in November 2005. I trust that the CBSA is in compliance with this new regulation and all its sections, such as: Hazard Identification and Assessment; Preventive Measures; Employee Education and last but not least; Program Evaluation. I leave this to a health and safety officer to verify compliance with this regulation.

Richard Lafrance
Appeals Officer