Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Case No.: 2006-64
Decision No.: OHSTC-09-001

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

Ian David Tench
appellant

and

National Defence – Maritime Forces Atlantic, Nova Scotia
respondent

Decision No.: OHSTC-09-001
January 27, 2009

This matter is decided by Appeals Officer Katia Néron

For the appellant
Ian David Tench

For the respondent
Major D.A. Orr, Executive Officer, Formation Construction Engineering, National Defence – Maritimes Forces Atlantic, Halifax, Nova Scotia

[1] This case concerns an appeal filed on December 12, 2006, pursuant to subsection 129(7) of the *Canada Labour Code*, Part II (*Code*), by Ian David Tench, an employee with Maritime Forces Atlantic – Department of National Defence (DND), Halifax, Nova Scotia.

[2] The appeal was filed against the decision of absence of danger rendered on December 11, 2006, by health and safety officer (HSO) Glen L. Grandy, following his investigation of I.D. Tench's refusal to return to work at his work place on November 28, 2006.

[3] This case proceeded by way of written submissions.

The facts as taken from all the documents submitted

[4] On November 16, 2006, I.D. Tench reported to work. A security guard requested him to produce his identification card (ID) in order to ensure he was authorized to enter the base. Mr. Tench, on the basis of a series of previous incidents beginning around September 3, 2006, and involving the same security guard, viewed this request as racially motivated and a discriminatory act. Consequently, he refused to produce his ID and continued on to his work site. He then left his work place and went home.

[5] On November 17, 2006, Mr Tench's supervisor, Captain Chris Quillam, sent Mr. Tench an e-mail advising him of the following:

> In accordance with the Defence Controlled Access Area Regulations para 8 and 9 all personnel are required to produce ID on the demand of a security guard, and are required to comply with the direction of security personnel. A "security guard" means a member of the Corps of Commissionaires.
>
> The consequences of persons failing to do so include refusal of entry and arrest/charges under the DCAARs. If you are concerned that the request to do so constitutes harassment you are advised to pursue that separately.
>
> You are required to provide info on the nature of your refusal under 128 Labour Code no later than Monday, November 20th 2006 so it can be investigated and get you back as soon as possible. If your refusal is based on being asked/required to show your ID that would not appear to substantiate a refusal to work and you are therefore expected to report to work or be on approved leave.

[6] On November 20, 2006, I.D. Tench replied to Captain Quillam as follows:

> Further to our discussion today, you are now in receipt of the issues that pertains to the nature of my s. 128 refusal to work [...].
>
> Regarding your inference, my refusal is not based upon being asked/required to show my ID, but rather the discrimination, harassment, assaults and failures of the MND, his agents and assigns and/or their agents and assigns, the particulars for which are clearly denoted in the e-mails noted in the letters

> and through conversations. The grounds for the refusal are clearly denoted in the letter provided to you today. [...]

[7] I.D. Tench explained the grounds for his refusal to work at his work place as follows:

> I have truthfully stated that I am refusing to work because I truly and seriously believe that a condition exists in my workplace that presents itself on a continuous basis from the moment I report to work until the moment I depart from work such that when taken in concert with my present mental condition in totality it presents a very real and serious danger to my health as evidenced by my past history.

[8] As well, I.D. Tench described a series of events that he alleged to be acts of harassment and racial discrimination. This information remains part of the case file but will not be mentioned here for the reasons stated later in this decision. However, it is to be noted that no medical document from a competent medical authority was provided at the time by I.D. Tench or asked to be provided by him to confirm his alleged mental condition and in particular in what manner the alleged acts of harassment and racial discrimination could affect his alleged illness.

[9] As a condition to his returning to work, I.D. Tench requested from his employer that the security guard who was the subject of his allegations be removed from providing security services at his work place. The said guard was temporarily reassigned to another work location. Mr. Tench then agreed to return to work.

[10] The work place health and safety committee investigated Mr. Tench's refusal to work. They concluded that at the time, and pursuant to the Code, there existed no safety concern for I.D. Tench. The employer subsequently decided to return the security guard to his normal work location.

[11] Following notification of this decision, I.D. Tench re-invoked his right to refuse to work on November 28, 2006. As a result, he refused for a second time to return to work at his work place.

[12] On November 28, 2006, HSO Grandy investigated into Mr. Tench's continued refusal to report to work.

[13] During this investigation, I.D. Tench informed HSO Grandy – *via* an e-mail dated November 29, 2006 – that he had been transferred from CSC to DND over 6 years ago due to a disability priority. He also said that he experienced depression, was on medication, was unable to deal with stressful or racial discrimination situations and would easily get agitated and his judgment would be affected. He added that his department had a responsibility to accommodate him by making sure that he did not have to

deal with either acts of harassment or racial discrimination or other abuses and by ensuring that his special needs resulting from his ongoing disability be addressed. No medical report was submitted to confirm any of the above.

[14] Based on the fact that it was part of the duties of the commissionaires to ask for identification of any individual entering the base and having reviewed the information that had been received at the time, HSO Grandy concluded that the *Code* does not cover a hazard related to a situation while at work linked to an employee's personal medical condition. As a consequence, he concluded that no danger existed for I.D. Tench.

[15] In a letter sent on May 2, 2007, to the Tribunal[1], I.D. Tench requested that his appeal be held in abeyance until a decision had been rendered concerning his 3rd level grievance related to the alleged acts of adverse discrimination in his work place. The decision was due May 14, 2007. I granted an adjournment of the proceedings until May 14, 2007.

[16] On May 15, 2007, I.D. Tench wrote to the Tribunal and stated that he had not received a response to the above mentioned grievance. He reiterated that a positive ruling on this grievance would provide some of the elements to prove his assertion of the presence of adverse discrimination and would be one less issue for me to deal with. He advised that since his grievance had not been addressed at the 3rd level, it would be adjudicated by the Public Service Labour Relations Board (PSLRB). He stated that he would advise me of when the application would be made to the PSLRB, of the date set for the hearing and when their decision would be rendered.

[17] In a letter sent on September 25, 2007 to the Tribunal, I.D. Tench stated that he had filed two complaints on September 21, 2007, one to the Public Service Labour Relations Board (PSLRB), and the other to the Canada Industrial Relations Board (CIRB). However, it is clear from the information provided by Mr. Tench in his letter that there will be no evidence forthcoming from the aforementioned complaints on the issues of the alleged acts of harassment and racial discrimination since the PSLRB will not hear the case but rather complaints on representation issues.

[18] Notwithstanding the above, on March 5, 2008, a letter was sent by the Tribunal to both parties requesting the following information:

- whether or not Mr. Tench wished to maintain his appeal in abeyance until the outcome of the hearing scheduled for May 2008 with the PSLRB;

- to provide me with their arguments and reply arguments on this issue.

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[19] On March 28, 2008, since no answer had been received from I.D. Tench in regard to the above mentioned request and having considered all the information received, I decided that the proceedings would no longer be held in abeyance since no further information had been provided on how and when another body would deal with the issues of alleged acts of harassment and racial discrimination.

[20] On October 30, 2008, further to receipt of the submissions from both parties on the present appeal, I required additional information from I.D. Tench in order to clarify the nature of his illness and in particular in what manner his illness, as alleged by him, was linked to his work place. Another option was also given to both parties to have I.D. Tench's physician summoned to meet with the parties at his office or any other mutually agreeable location to allow me to receive the requested information orally. No response to this request has been received.

Procedure

[21] Two issues need to be addressed in this case. The first issue is whether or not the danger alleged by I.D. Tench is covered by the *Code*. This is because HSO Grandy based his decision of absence of danger on his conclusion that the *Code* does not cover a hazard linked to a personal medical condition.

[22] If I find that the *Code* covers a danger such as alleged by I.D. Tench, then I must decide on the second issue which is whether or not a danger existed at the time for him.

[23] To decide these matters, I have to consider the factual evidence, the relevant jurisprudence and legislation.

Appellant's arguments

[24] I retain the following from I.D. Tench's written submissions.

[25] I.D. Tench submitted a request that the hearing of this appeal be temporarily postponed. He alleged that a determination on this instance requires a determination of discrimination. He stated that I am *ultra vires* at this time because I am not empowered to render decisions based upon determinations of racial discrimination. This is the reason why he sought a postponement of these proceedings until the approved authority, the PSRLB, had an opportunity to render its ruling. He added that, in his opinion, HSO Grandy failed to examine all of the evidence, to conduct a thorough investigation and/or did not apply the correct legal tests for a determination on the issue of *prima facie* discrimination. He also stated

that he had little faith that I would render a favourable ruling on these issues because he does not believe that I have the experience, ability or authority to properly apply the law.

[26] He also alleged that there are two questions that I am required to answer with respect to his appeal. In his opinion, those are:

- whether or not HSO Grandy erred by failing to apply the correct test for discrimination in light of the existing jurisprudence;
- whether or not he was subjected to adverse discrimination in his work place.

[27] He further commented on the events that he alleges constitute acts of harassment and racial discrimination.

[28] I.D. Tench submitted the decision rendered on January 8, 2007, following the investigation carried out by DND, on his first level grievance concerning the acts of harassment and racial discrimination that he was alleging having been subjected to. I.D. Tench's grievance was denied based on absence of evidence that he had been "*...treated differently, negatively or adversely as a result of his race...during the incidents in question...*".

Respondent's arguments

[29] In his reply to I.D. Tench's submissions, Major D.A. Orr, on behalf of DND, stated that racism would never be condoned.

[30] He stated that the actions of requesting valid identification were neither violent nor racist acts and were in accordance with DND regulations. As a result, he argued that DND did not contravene the *Code* through these actions.

[31] He added that HSO Grandy's decision was correct because at the time, there had been no danger to the safety and health of Mr. Tench created by a valid request for his identification.

Provisions

[32] The purpose of the *Code*, pursuant to section 122.1, is stated as follows:

> 122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies. [underline added]

[33] Pursuant to paragraph 125(1)(*z.16*), every employer has an obligation to

protect against violence in the work place. This provision reads as follows:

> 125(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,
>
> (*z.16*). take the prescribed steps to prevent and protect against violence in the work place; [underline added]

[34] Also, subsection 122(1) of the *Code* defines "danger" as follows:

> "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. [underline added]

[35] Furthermore, subsection 128(1) establishes the circumstances under which an employee is allowed to exercise his right to refuse to work as follows:

> 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 employees, or
>
> *(c)* the performance of the activity by the employee constitutes a danger to the employee or to another employee. [underline added]

[36] Pursuant to subsection 146.1(1) of the *Code*, an appeals officer has the obligation, ,when an appeal is brought under subsection 129(7), to inquire, in a summary way and without delay, into the circumstances of the decision and the reasons for it.

Analysis and decision

Is the *Code* applicable to the danger alleged by I.D. Tench ?

[37] At the time of HSO Grandy's investigation, I.D. Tench refused to report to work because he alleged that specific events – acts of harassment and racial discrimination that occurred while at work – could aggravate his alleged mental illness.

[38] First, I would like to underscore that the purpose of the *Code*, in accordance with section 122.1, is not solely to prevent accidents but also to prevent "*...injury to health arising out of, linked with or occurring in the course of employment to which this Part applies*". Also, the *Code* requires under paragraph 125 (1)(z.16) that every employer must take measures to prevent and protect employees against violence in their work place. It is therefore my opinion that the legislator considered that the application of the *Code* did not exclusively apply to circumstances relating to the material or physical work place environment[2].

[39] Furthermore, a "danger" as defined under subsection 122(1) of the *Code* means any existing condition while at work that could reasonably be expected to cause an illness to a person exposed to it before the condition can be corrected whether or not the illness occurs immediately after the exposure to the condition.

[40] According to the Canadian Oxford Dictionary, "condition" is defined as follows:

> Condition: "circumstances, especially those affecting the functioning or existence of something".

[41] In my opinion, this means that the word "condition" in the definition of "danger" at subsection 122(1) of the *Code* can be interpreted as including any situation, while at work, that can affect an employee's functioning or existence, including acts of harassment or racial discrimination directed at an employee while at work, when the consequences of these acts affect the mental health of the employee.

[42] Therefore, I am of the opinion that the *Code* is applicable to a danger as alleged by I.D. Tench.

[43] I must now decide whether or not a danger to I.D. Tench's mental health existed as he alleged was the case at his work place.

Was I.D. Tench exposed to danger at the time ?

[44] With reference to the definition of "danger" in the *Code*, I am of the view that the following two conditions must be met in order that a danger be deemed to have existed:

- persuasive evidence proving the employee's mental illness was present at the time;

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[2] The Canada Occupational Health and Safety Regulations were amended on May 8, 2008, by adding Part XIX entitled "Violence prevention in the work place"

- evidence proving that the illness was aggravated or could have been aggravated by a condition while at work namely harassment and racial discrimination.

Should the first condition not be met then the second condition alone cannot constitute a danger as defined by the *Code*.

[45] No evidence was presented to me to indicate that at the time I.D. Tench requested medical support or sought a certificate from a qualified medical practitioner to confirm that his mental illness was affected by the situation while at work or that this was a probability. As well, there was no evidence presented that the employer was required to take any specific measure to protect I.D. Tench's alleged mental illness.

[46] In addition, I received no response when I specifically requested I.D. Tench to provide me with additional information in order to clarify the nature of his alleged illness and in particular how this alleged illness was linked to his work place.

[47] Furthermore, the evidence reflects that DND responded by conducting an investigation into the allegations of acts of harassment and racial discrimination. The investigation report concluded that at the time there was no evidence that I.D. Tench was "*...treated differently, negatively or adversely as a result of his race...*" .

[48] In the absence of persuasive evidence regarding the presence of any type of existing or potential employee illness, an element that is essential to meet the above mentioned dual test for determining the existence of a danger, as defined by the *Code*, I am therefore of the opinion that there is no basis to conclude that an existing or potential hazard to I.D. Tench's mental health was present at the time. As a result, I find that it is not necessary in the present case to analyse the series of events that I.D. Tench alleged to be acts of harassment and racial discrimination or to wait indefinitely until a decision in another forum is rendered.

[49] For these reasons, I find that a danger did not exist at the time for I.D. Tench and I confirm HSO Grandy's decision to this effect.

Katia Néron
Appeals Officer