Occupational Health
and Safety Tribunal Canada

Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

BY E-MAIL

March 27, 2009

File name: Public Health Agency of Canada v. Rino De Rosa
Case No.: 2009-02

Mr. Stéphan Bertrand Justice Canada Treasury Board Secretariat - Legal Services L'Esplanade Laurier 300 Laurier Avenue West 5th Floor, West Tower Ottawa, Ontario K1A 0R5	Mr. Bijon Roy Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l. Suite 1600, 220 Laurier Ave. West Ottawa, Ontario K1P 5Z9

Subject: Request for a stay of direction issued by Health and Safety Officer McKeigan on December 17, 2008.

Mr. Bertrand and Mr. Bijon,

Further to the hearing held on March 26, 2009 on the above noted request, having taken into consideration the arguments of the parties, I am hereby ordering a stay of the direction until the case is heard on its merit and a decision is rendered by an Appeals Officer.

Please note that reasons for the order will be forthcoming.

Richard Lafrance
Appeals Officer

Appeals Officer
OHSTC 04-005
TSST
Agent d'appel

cc: HSO McKeigan

Canada

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Case No.: 2009-02

Decision No.: OHSTC-09-012(S)

CANADA LABOUR CODE

PART II

OCCUPATIONAL HEALTH AND SAFETY

Public Health Agency of Canada

appellant

and

Rino De Rosa

respondent

April 8, 2009

This matter was decided by Appeals Officer Richard Lafrance.

For the appellant

Stephane Bertrand

Counsel, Legal Services, Treasury Board Secretariat

For the respondent

Bijon Roy

Counsel, Raven, Cameron, Ballantyne & Yazbeck

[1] The following are the reasons for the decision I rendered on March 27, 2009, after a hearing that had been held on March 26, 2009. In the said decision, I ordered a stay of the direction issued on December 17, 2008 by Health and Safety Officer (HSO) Bruce McKeigan.

[2] The direction that was the subject of the stay application had been issued to the Public Health Agency of Canada under paragraph 145(2) (*a*) of the *Canada Labour Code* (Code) by HSO McKeigan.

[3] The direction was issued following an investigation by HSO McKeigan into a complaint made by respondent De Rosa about health and safety concerns at the Tunney's Pasture federal government complex in Ottawa.

[4] The direction issued to the Agency states:

> The said health and safety officer considers that a condition in the workplace constitutes a danger to an employee while at work:
>
> **The backflow preventer equipment in room 2407a is located in a contaminated area.**
>
> Therefore, you are Hereby Directed, pursuant to subsection 145(2) (*a*) of the *Canada Labour Code,* Part II, to take proper measures to correct the situation that constitutes a danger.

[5] An application for a stay of the direction had been filed concurrently with the actual notice of appeal of the direction which was filed on January 19, 2009. The Tribunal did not deal with the stay application at the time because in a teleconference with the parties, both had agreed to proceed directly to a hearing on the merits. A hearing was then scheduled for May, 19, 20 and 21, 2009.

[6] On March 25, 2009, the applicant made a new application for a stay of the direction, this time claiming urgency since the HSO was requesting compliance with the direction by March 27, failing which he was threatening to take further action. A hearing on the latest application was held on March 26, 2009. I granted the stay on March 27, 2009, with reasons to follow forthwith. Following are the reasons for my order.

[7] The applicant requested that the hearing be held *in camera*, as the substance of some information divulged at the hearing could have national security implications. As there was no objection from the respondent, I issued an order for the hearing to be held *in camera*, also expressly prohibiting the disclosure of any evidence adduced and submissions made at the hearing. This included any evidence derived from HSO McKeigan's testimony.

[8] Subsection 146.(2) of the Code states that:

> 146(2) Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.

[9] In the exercise of my discretion to grant a stay, I will apply the test developed by the Supreme Court of Canada in *Manitoba (Attorney General)* v. *Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110.

[10] In that decision, the Court adopted a three-part test applicable to either a stay or an interlocutory injunction. Those three parts are:

i. Serious issue to be tried.

ii. Irreparable harm.

iii. Balance of inconvenience.

[11] I derive my authority from the Code, and must therefore exercise my discretion in a way that furthers the objective of the legislation *i.*e. the protection of the health and safety of employees. I consequently asked the parties for submissions on a fourth criterion:

> What, in the alternative of complying with the direction, has the appellant done to protect the health and safety of the employees or any person from the perceived danger?

Summary of the evidence

[12] Dr. John A. Lynch, Acting Director, Office of Laboratory Security, testified for the Agency. Dr. Lynch gave evidence about the seriousness of the case, in that it deals with the health and safety of the laboratory's employees, as well as that of the public in the National Capital Region

[13] He testified that the Agency works with the local police force, the RCMP and other Federal and Provincial government agencies in identifying biohazard materials related to threats made against the general public or government buildings or embassies situated in the National Capital Region. In addition, the responsibilities of the laboratory extend to a large portion of eastern Ontario and western Quebec. He further indicated that the laboratory is operational 24 hours a day, seven days a week. He pointed out that considering the nature of the materials they deal with, their response time has to be exceptionally short and consequently their service standard is two hours.

[14] He recognized that while the Agency's other level 3 laboratory is located in Toronto, there are other private level 3 laboratories in the area. However, he was unsure as to their capabilities of analyzing all materials as well as to their turnaround time. He confirmed as well that there are no agreements with these laboratories to provide assistance in case they (the Agency's laboratory) would become non-operational.

[15] Dr. Lynch confirmed that the laboratory handles bio-hazardous materials that would have devastating and catastrophic health effects on the public, should they be released outside the laboratory.

[16] Dr. Lynch indicated that the laboratory is certified as a Biosafety Level 3-Laboratory and meets all laboratory safe operations guidelines.

[17] He testified that following the direction, they implemented additional safety measures to protect the employees, such as having all employees working in the laboratory wear personal protective equipments, and reinforcing all safety measures to all the employees until the situation was resolved.

[18] In addition, Dr. Lynch testified that he consulted with two experts: a professional engineer and the National Manager, Biohazard Containment & Safety, Canadian Food Inspection Agency (CFIA). He indicated that this agency has the responsibility to conduct the physical inspections of level 3 and 4 containment facilities, as well as perform annual re-certifications for containment level 3 and 4 facilities. Dr. Lynch pointed out that both confirmed that the laboratory was safe and met all laboratory safety guidelines. Following this consultation, Dr. Lynch stated that the laboratory returned to its normal, although stringent, work procedures.

[19] HSO McKeigan testified at my request. He stated that he believed that a danger existed because there was a potential for the backflow preventer valves to malfunction and suck air in from the immediate surrounding area, which could be contaminated with bio-hazard chemicals.

[20] To that effect he further testified that he issued a direction under paragraph 145(2)(*a*), and, in the accompanying letter to the Agency, requested, pursuant to subsection 145(8) of the Code, that the employer inform him in writing no later than December 23, 2008, of the measures taken to comply with the said direction.

[21] HSO McKeigan clarified his intent by stating that at the time he issued his direction, he did not want to close the laboratory, but rather wanted the appellant to provide him with a work plan of what would be done to correct the situation, and a timeline for the completion of the work.

Analysis and decision

[22] As mentioned earlier, I will apply the three part test developed by the Supreme Court of Canada, with the addition of the fourth test regarding the health and safety of employees.

[23] The first criterion is not contentious as both parties agree that this was not a frivolous or vexatious issue and was in fact a very serious issue. I agree with them, therefore the first criterion is met.

[24] The next three tests deal with: the irreparable harm that the appellant may sustain if the stay is not granted; the balance of inconvenience and finally what did the employer do to protect the employees, or any person who could be exposed pending resolution of the matter. In this case, I find it equally difficult to comprehend the extent of the harm that could affect the appellant, as well as the extent of the danger to which the employees are exposed to.

[25] I find that the HSO was of the opinion that a danger existed and issued a direction to the appellant under paragraph 145.(2)(*a*), which states:

> 145(2) If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,
>
> (*a*) the officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to
>
> (i) correct the hazard or condition or alter the activity that constitutes the danger, or
>
> (ii) protect any person from the danger, (...)

[26] HSO McKeigan did not, however, indicate when he intended the measures to be taken, either immediately or within a specific date. In his testimony, the HSO in fact stated that what he was looking for was a work plan and a timeline for the completion of the work.

[27] Furthermore, in a subsequent communication with the employer on March 24, 2009, more than three months after having issued his direction, HSO McKeigan indicated that either the employer complied with the direction by March 27, 2009, or he would have to take further action. He did not elaborate as to what other measures he would take if the Agency did not comply. The appellant, however, believed that the HSO meant he would close the laboratory.

[28] The hearing did not provide me with clear and definite indication as to what measures would be taken by the HSO in such a situation. The Code, however, gives HSOs very broad powers in circumstances of this nature, as shown at section 145 of the Code and those could be understood to extend to the closing of the facility.

[29] Should the laboratory be closed, the cost of retrofitting the laboratory or of down time is not a factor in this decision. However, there is a potential for damage to the reputation of the laboratory, as well as that of the government of Canada if there was an emergency, and the situation could not be handled in a timely fashion by reason of the laboratory being closed. As well, I find that should the laboratory be closed for a period of time, the whole population in the area covered by the laboratory could be at risk as the response time to deal with such bio-hazardous materials is critical. I am, nonetheless, uncomfortable with this situation as there seems to be no contingency plan in place should the laboratory, for any given reason, be closed at any given time. This is something that the appellant should look at closely.

[30] Nonetheless, the laboratory handles scheduled events that could be rescheduled, were the laboratory be closed. However, the laboratory is open 24/7 as one never knows when an emergency issue involving bio-

chemicals or bioterrorism threat or attack may occur. I believe that irreparable harm could be suffered by the agency in terms of reliability of services to other agencies that are involved with the laboratory. As well, should a bio-chemical issue arise in the National Capital Region involving an embassy, or a dignitary from another nation, the population at large could suffer irreparable harm.

[31] Furthermore, given my authority to grant or deny the stay, one has to consider whether the health and safety of the employees could be affected where one or the other decision is arrived at.

[32] In his submission, B. Roy speaking for the respondent, stated that the burden fell on the appellant to demonstrate that no danger existed. He asserted that the respondent, in this case, did not have to provide evidence that a danger exists.

[33] The notion of danger is a central issue to the appeal that will be heard on May 19. Therefore I cannot comment further on this prior to hearing the case on the merits.

[34] However, I find that had HSO McKeigan believed that there was an urgent need to correct the situation he had identified, he would have issued a direction under both paragraphs 145.(2)(*a*) and (*b*) which state:

> 145.(2) If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,
>
> (a) the officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to
>
> (i) correct the hazard or condition or alter the activity that constitutes the danger, or
>
> (ii) protect any person from the danger; and
>
> (b) the officer may, if the officer considers that the danger or the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, issue a direction in writing to the employer directing that the place, machine, thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the officer's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction. (My underline)

[35] Instead, I find that HSO McKeigan did not specify any date for complying with the direction, contrary to what is required in the Code. In addition, I find that he patiently waited for more than three months to compel the

employer to comply with the direction. Therefore, I find that he did not treat the situation as being urgent.

[36] Consequently, considering what precedes, I am satisfied that the issue to be tried is a serious issue and that there is a reasonable possibility that the Agency would suffer irreparable harm should the facility be closed. In addition, based on the nature of the HSO intervention, I find it reasonable to believe that the health and safety of the employees would not be put at risk by a stay of this direction. Finally, based on the above, the balance of probabilities indicates that the appellant would suffer more inconvenience than the respondent.

[37] As stated in my order of March 27, 2009, a stay of the direction is ordered until the case is heard on the merits and a decision is rendered by an Appeals Officer.

Richard Lafrance

Appeals Officer