

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canada Post Corporation v. Canadian Union of Postal Workers, 2012 OHSTC 7

Date: 2012-02-08
Case No.: 2011-44
Rendered at: Ottawa

Between:

Canada Post Corporation, Appellant

and

Canadian Union of Postal Workers, Respondent

Matter: Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer

Decision: The direction is varied

Decision rendered by: Mr. Michael McDermott, Appeals Officer

Language of decision: English

For the appellant: Mr. Dean Hammond, Officer, Safety & Health and Mr. Ray Schindler, Team Leader, Safety & Health, Central Region

For the respondent: Mr. Gerry Deveau, National Director, Ontario Region

Canada

REASONS

[1] This decision concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) against a direction issued by Health and Safety Officer (HSO) Lindsay S. Harrower on August 3, 2011, pursuant to paragraph 145(2)(a) of the Code. The appellant is the Canada Post Corporation (the Corporation) and the respondent is the Canadian Union of Postal Workers (CUPW).

Background

[2] The direction was issued by the HSO following investigation of a work refusal exercised on July 26, 2011, pursuant to subsection 128(1) of the Code by Letter Carrier Remegius Cheeke and a finding of danger. The substance of the refusal and of the HSO's decision relates to road, shoulder and traffic conditions on certain parts of Eramosa Road, Guelph, Ontario. The direction issued to the Corporation states as follows:

IN THE MATTER OF THE *CANADA LABOUR CODE*
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)

On July 28, 2011, the undersigned health and safety officer conducted an investigation following a refusal to work made by **Mr. Remegius Cheeke** in the work place operated by CANADA POST CORPORATION, being an employer subject to the *Canada Labour Code*, Part II, at 250 Woodlawn Road West, Guelph, Ontario, N1H 6B0, the said work place being sometimes known as Canada Post Corp. – Guelph.

The said health and safety officer considers that the performance of an activity constitutes a danger to an employee while at work:

Specifically, foot delivery to the points of call located from 705 - 671 Eramosa Road, Guelph, Ontario, is in the opinion of the Health and Safety Officer a danger to Letter Carrier Remegius Cheeke and any other persons asked to service these points of foot delivery, due to the hazard of being struck by a vehicle.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to take measures to correct the hazard or condition that constitutes the danger immediately.

Issued at London, Ontario, this 3rd day of August, 2011.

[HSO Harrower signed here]

Lindsay S Harrower
Health and Safety Officer
Certificate Number: GL9494

To: CANADA POST CORPORATION
250 Woodlawn Road West

Guelph, Ontario
N1H 6B0

[3] When filing the appeal the appellant also applied for a stay of the direction. A decision granting a stay was issued by me on September 16, 2011. In part, the stay facilitated continuing consultations between the parties aimed at finding a jointly acceptable solution that would address the hazards identified and remove the danger to the Letter Carrier when delivering mail to the points of call in question.

[4] As detailed in the stay decision, the appellant initially based the appeal on grounds that the HSO erred when finding that foot delivery to specific points of call 705 to 671 on the south side of Eramosa Road constituted a danger within the meaning of the Code. Instead, the Corporation claimed that the area of danger related to points of call 741 to 705 on the same side of Eramosa Road and that the danger concerned access to those points of call rather than the points of call as such. The respondent, on the other hand, maintained that the finding of danger with respect to points of call 705 to 671 was justified.

[5] I have held three telephone conference calls with the parties' representatives since the stay was issued. The first, on December 7, 2011, was intended mainly to discuss logistics for an anticipated hearing. In the course of that call, the parties representatives indicated that they were close to agreement on steps that they expected would address the danger identified by the HSO with respect to the Letter Carrier's route. They undertook to propose wording for an amended direction that would reflect their agreement. I did not find the wording sent to the Tribunal on December 9, 2011, to be acceptable. It covered measures that appeared to respond to the direction at a number of points of call, a matter not strictly speaking for the Appeals Officer to consider, but also left two of the listed points of call subject to foot delivery contrary to the HSO's direction. The proposed amended direction also included wording that effectively would have allowed the parties to vary its future terms by agreement, a carte blanche that I was not prepared to grant. I pointed these considerations out to the parties during a second conference call on December 20, 2011.

[6] A hearing had been scheduled to commence in Toronto on January 10, 2012, with provision for a third pre-hearing telephone conference call on January 9, 2012. The Corporation informed the Tribunal Registrar on January 4, 2012, that it would not be available to attend the hearing but did want to maintain the conference call. On January 9, 2012, Mr. Dean Hammond of the Corporation sent an e-mail to the Registrar indicating that both parties sought to have points of call 671 and 673 struck from the direction on the grounds they had been erroneously included and foot delivery to these points of call is not subject to the danger identified by the HSO. In support of this position photographic evidence was attached showing that access to the two points of call is afforded via a full and public sidewalk set back from the pavement of Eramosa Road by what, although snow covered in the two photographs provided, looks to be a grass verge. During the conference call on January 9, 2012, Mr. Gerry Deveau for CUPW confirmed that the respondent was in agreement with the position put forward. He also indicated that the parties' agreement provided for the Letter Carrier to be transported by vehicle to the point where the sidewalk resumes at the two points of call in question. I concluded the conference call indicating that the parties' representations would be considered and confirmed that the Toronto hearing date would be re-scheduled.

[7] Subsequently, by e-mail, I sought and received confirmation from the parties on the two main points put forward during the January 9, 2012, conference call. First, I needed to have joint

confirmation of Mr. Deveau's oral assurances that the Letter Carrier would be transported by vehicle to the point where the public sidewalk resumes at 671 and 673 Eramosa Road. Second, since the snow covered verge in the photographs submitted more than suggested that they were not taken in July 2011, I asked for confirmation that the sidewalk depicted was in place and in the same condition, minus the snow, when the HSO made his investigation and issued the direction.

Analysis

[8] I have received confirmation from the parties on both points put forward during the telephone conference call held on January 9, 2012, in the light of which I have considered carefully the wording of the direction issued by the HSO on August 3, 2011. The photographic evidence submitted indicates that foot delivery to points of call 671 and 673 Eramosa Road is effected from a substantial public sidewalk that existed in July 2011. The Letter Carrier is not subjected at these two points of call to the conditions described in the body of the HSO's investigation report, including discernible tire tracks left in the gravel shoulder in the area where he would be expected to walk and the nature of the shoulder of the road that left no readily accessible refuge area. Prior to the parties' agreement that the Letter Carrier would be transported to the point where the public sidewalk on Eramosa Road resumes, access to the two, points of call was no doubt fraught with hazard as he proceeded down the route. However, the direction speaks to foot delivery to the listed points of call, not access to those points of call. As such, I conclude that actual foot delivery to points of call 671 and 673 Eramosa Road does not and did not on July 26, 2011, amount to the performance of an activity that constituted a danger to the employee while at work. Consequently, the direction should be varied to exclude applicability to those two points of call.

[9] Before spelling out my decision, it is perhaps useful to address another concern raised by the appellant during the conference calls. The scope of the appeal has narrowed significantly since first put forward in the context of the stay application. The appellant's initial claim was that danger did not exist at all points of call from 705 to 671 on Eramosa Road but was evident at other points of call not covered by the direction. The request now, supported by the respondent, is limited to having just two of the listed points of call removed from the scope of the direction. Along the way, it became clear that the appellant was concerned that to leave the direction in place without amendment would prohibit for all time foot delivery at all locations identified with a risk of contravening the Code if circumstances were to permit resumption of safe foot delivery at some future date. I do not agree that such is necessarily the case. An HSO's decision is not pulled out of thin air. In the case of a danger finding, it is arrived at following consideration of circumstances that his or her investigation found to exist at the time of the refusal. If the circumstances materially change such that a hazard found to constitute a danger would no longer exist, then I see no barrier to implementation of procedures that had previously been prohibited as a result of the danger finding and a remedial direction. In the present case, the configuration of the road, lack of sidewalks and traffic patterns were taken into account by the HSO. Should the municipality decide, for example, to upgrade the road configuration, extend the public sidewalk and implement related measures, as was surmised during the conference calls, then it may well be that the original direction would be redundant. However, the parties would be well advised to consult an HSO, perhaps through the auspices of their joint health and safety committee, before instituting any changes.

Decision

[10] For the reasons given in paragraph eight above, and pursuant to my authority under paragraph 146.1(1)(a) of the Code, I hereby vary the direction issued by the HSO on August 3, 2011, to exclude 671 and 673 Eramosa Road from the points of call to which foot delivery was found to be an activity that constituted a danger to the employee while at work.

Michael McDermott
Appeals Officer

APPENDIX

IN THE MATTER OF THE *CANADA LABOUR CODE* PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)

On July 28, 2011, Health and Safety Officer Lindsay S. Harrower conducted an investigation following a refusal to work made by **Mr. Remegius Cheeke** in the work place operated by CANADA POST CORPORATION, being an employer subject to the *Canada Labour Code*, Part II, at 250 Woodlawn Road West, Guelph, Ontario, N1H 6B0, the said work place being sometimes known as Canada Post Corp. – Guelph.

The said health and safety officer considers that the performance of an activity constitutes a danger to an employee while at work:

Specifically, foot delivery to the points of call located from 705 – 671 (excluding 671 and 673) Eramosa Road, Guelph, Ontario, is in the opinion of the Health and Safety Officer a danger to Letter Carrier Remegius Cheeke and any other persons asked to service these points of foot delivery, due to the hazard of being struck by a vehicle.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to take measures to correct the hazard or condition that constitutes the danger immediately.

Varied as identified in underlined text above, in Ottawa, Ontario, this 8th day of February, 2012.

Michael McDermott
Appeals Officer

To: CANADA POST CORPORATION
250 Woodlawn Road West

Guelph, Ontario
N1H 6B0