Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Air Canada and Canadian Union of Public Employees (CUPE), 2012 OHSTC 22

Date: 2012-06-28
Case No.: 2012-36 and 2012-41
Rendered at: Ottawa

Between:

Air Canada, Appellant

and

Canadian Union of Public Employees (CUPE), Respondent

Matter:	An application for stays of two directions
Decision:	The stays of the directions are granted
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Ms. Rhonda R. Shirreff, Counsel, Heenan Blaikie LLP
For the respondent:	Mr. James Robbins, Counsel, Cavalluzzo Hayes Shilton McIntyre & Cornish LLP

REASONS

[1] The following is in confirmation of a decision conveyed verbally to both parties in the course of a telephone conference held at the request of the said parties on June 27, 2012, to deal with the two applications for a stay made by the appellant with respect to the two directions under appeal.

Background

[2] On June 8 and 26, 2012, the appellant Air Canada filed two appeals against two directions issued by Health and Safety Officer (HSO) Michael O'Donnell on June 5 and 22, 2012, and at the same time filed in each case an application to stay the application of those directions pending hearing of said appeals on the merits. These two directions are very closely interrelated, with the second direction being issued by the HSO relative to the conclusion or finding by the officer that appellant Air Canada had failed, in the case of the first direction, to properly comply with the "posting" and "transmission to the work place and policy committees" requirements of directions pursuant to subsection 145(5) of the *Canada Labour Code*, Part II (the Code).

[3] For ease of understanding, it is necessary to explain that the first direction, issued to employer Air Canada on June 5, 2012, pursuant to subsection 145(1) of the Code, therefore what is colloquially referred to as a "contravention direction", followed a refusal to work exercised by two Air Canada employees who were scheduled to work on board Air Canada flight AC139 from Ottawa to Vancouver as flight attendants. While not directly relevant to the determination of the present applications, the refusals to work were the result of the employees not being satisfied with the assurances received from the flight captain and the first officer that the "dirty sock smell" perceived in the cabin by the refusing employees was not abnormal and would soon disappear after take-off. Within the course of the procedure for dealing with continued refusals to work established by the Code, a health and safety officer, in this case HSO O'Donnell, was called to investigate the matter. It would appear that a little more than three hours after the initial refusals to work were registered, a senior representative of the appellant Air Canada authorized the departure of flight AC139 from Ottawa without obtaining authorization from the HSO and while the HSO's investigation was ongoing. This caused the HSO to conclude that the employer had thus obstructed and/or hindered his investigation into the said refusals to work, thereby contravening section 143 of the Code and the latter consequently issued the said "contravention direction" to employer Air Canada, ordering that the contravention cease immediately. What is directly relevant to this decision on the stay application is that while the direction was issued to Air Canada as the employer, the body of the direction, which had to be posted and transmitted, as pointed out above, specifically identified by name and title the employer's representative of Air Canada who had authorized the departure of the aircraft.

[4] It would appear then that in attempting to comply with the posting and transmittal obligations of the first direction, as required by the Code, and possibly somewhat belatedly (6 days) if one goes by the text of the second direction by HSO O'Donnell, Air Canada posted and transmitted a redacted version of said direction, one where the name and title of its representative no longer appeared, thus reading that "the employer's representative gave approval for departure (...)." HSO O'Donnell has objected to both the delay as well as the redaction to the text of the initial direction and thus issued a second "contravention direction" to the employer to terminate said contravention immediately and ensure that it not continue or reoccur.

[5] As stated above, the appellant has filed an application for a stay in the case of both directions, and has indicated on the occasion of a teleconference convened by the undersigned Appeals Officer on June 27, 2012, and attended by both parties, that its main concern relative to both directions is the inclusion of the name and title of its representative. Of primary importance is the fact that following the appeal and application for stay relative to the first direction, the undersigned Appeals Officer had, on June 12, 2012, convened a first teleconference with the same parties for the purpose of examining various possibilities for dealing with that appeal in a manner that would be more expeditious and could allow dealing rapidly with the merits of the matter. On that occasion, both parties sought a brief delay to consult one another and also their principals to seek mandate and also to potentially agree on a joint approach to resolving this matter. In that short interim, the matter of the first stay application would await the result of these consultations. Prior to the parties getting back to the undersigned Appeals Officer, HSO O'Donnell issued his second direction.

[6] Air Canada and CUPE, on the occasion of the second teleconference which occurred in this matter on June 27, 2012, have indicated to this Appeals Officer that they have agreed on a means to resolve, pending hearing and final determination of both appeals on the merits, the issue raised by the specific identification of Air Canada's representative and thus the posting and transmittal to the committees of that specific identification, said means allowing the undersigned to partially stay both directions without affecting the basic purpose of both. It is the joint opinion of the parties that as a form of interim relief that would thus translate into no more than a partial stay of the directions, both directions make no mention of the specific name and title of Air Canada's representative, thus essentially only staying the specific identification of Air Canada's representative while not staying the application of the first direction as regards the obligation not to obstruct or hinder an HSO's investigation and not staying the application of the second direction as regards the posting and transmitting without delay of directions issued by a health and safety officer.

Analysis

[7] The approach advocated by both parties would see the undersigned varying, albeit minimally, the text of the first direction. As an appeals officer, I have authority under the Code to vary directions after I have inquired into the circumstances of said directions. I

also have the authority to stay the application of directions and, given the silence of the Code on the extent of that authority, I am of the view that I enjoy a great deal of discretion in the manner that this can be accomplished. Over the years, appeal officers have adopted a three part test towards that purpose. In that respect, I am of the view that the exercise of such staying authority does not necessarily need to apply to the whole of a direction, nor even to the full substance of such direction, given that such a measure is only temporary and designed to bridge the gap until a full hearing on the merits of the appeals and final determination can occur. In the case at hand, after having considered the views of both parties, while they designate the sought action from the undersigned as an interim variance of the direction, in my opinion what this means is that I would partially stay the said first direction (since only that direction carries the specific identification of the employer's representative) in that I would stay the specific identification of the employer's representative without affecting the actual substance and application of the direction *per se*. This in turn would cause a partial stay of the second direction in that it would suspend or stay pending hearing on the merits, the need for the appellant employer, in complying with that direction, to post and transmit a non-redacted text of the direction while still satisfying the requirement to post and transmit. It is my opinion that I have the authority to do just that.

[8] The three part test that finds application in cases such as this requires:

- that there be a serious issue to be tried as opposed to a frivolous or vexatious claim;
- that failure to stay a direction would bring about significant harm to the party affected by the direction;
- that pending final determination of the issues raised, measures be put in place to protect the health and safety of employees or any person granted access to the work place.

[9] On the question of the seriousness of the issue(s) to be tried, Air Canada has submitted that vis-à-vis the first direction, the appeal raises the issue of whether Air Canada's current practice of releasing an aircraft in the specific situation of "dirty sock smell" work refusals satisfies the requirements of the Code. In its simplest expression, the issue is whether the employer requires an HSO authorization to release the aircraft, a question that involves a matter of statutory interpretation of subsection 129(5) of the Code. Where the second direction is concerned, the issue formulated by the employer is whether an employer must post and distribute an HSO's direction immediately where it contains unnecessary information that if disseminated, could be detrimental to an employer and a member of its senior management team. In my opinion, those are serious issues that entail a considered interpretation of provisions of the applicable statute. At the same time, one must not forget that the only part of the direction that is requested to be stayed by my decision is the specific identification by name and title of the employer's representative. I have also been informed by counsel for the appellant that it has already informed the HSO that it would abide by the substance of the said direction as regards

obtaining authorization from the HSO.

[10] On the question of significant harm that could be suffered if the first direction is not stayed, Air Canada has argued that it would have to alter its longstanding practice of releasing an aircraft in such circumstances to resume its flight schedule, which would leave the resumption of its operations solely with the HSO to be exercised at his or her discretion, which would mean that an aircraft could be grounded for several days or even weeks while the HSO's investigation continued, notwithstanding informed opinions of pilots and maintenance personnel that an aircraft was safe to fly. While this would, in my opinion, carry the potential for significant harm to the appellant, I must look at this in light of the fact that it is no longer the total stay of the direction which is being sought and has been agreed to, but only such partial stay as concerns the specificity of identification of the employer's representative. Consequently, it is the harm to that individual, as an employee and a member of management of the employer, and by consequence harm to the employer, that needs to be considered in light of both directions. On this, Air Canada has put forth *vis-à-vis* both directions the position that the specific identification by name and title of its representative, an element of the direction that it considers unnecessary to the proper functioning of and compliance with a direction addressed to the employer, has the potential to seriously and irreparably harm that individual's reputation within the company and the industry, regardless of whether his decision to approve flight 139 for departure consistent with established company practice is eventually vindicated in the consideration of the merits of the first direction at appeal. The appellant also adds that if the stay is not granted, the (first) direction, and by extension the second direction, would seriously undermine the representative's authority and upset the balance in the parties' labour relationship. For the respondent, Mr Robbins has expressed doubts as to the potential for harm to the individual, but this must also be considered in light of the respondent's agreement that the specific identification be withdrawn, redacted, from the direction.

[11] Finally, as regards the third element of the test to wit, measures being put in place to safeguard the health and safety of employees and person granted access pending final determination, the nature of the agreement by the parties relative to both directions and as a consequence, the very partial stay being sought, do not, in my opinion, cause any or any increased risk to the health and safety of employees or person granted access. As a consequence, this does not enter into consideration in my granting such partial stay.

Decision

[12] Having considered all of the above, I have formed the conclusion that relative to both directions, the agreement arrived at by the parties should form the basis for a partial stay of both directions. Consequently, where the first direction is concerned, it is stayed to the extent that pending final determination at appeal, the said direction dated June 5, 2012, will stand as is, with the exception of the specific identification of the employer's representative by name and title, which is to be redacted from and not appear anywhere on the said direction. As a consequence, the second direction, dated June 22, 2012, is

stayed to the extent that it would cause the posting and the transmission to the work place and policy health and safety committees of the first direction in un-redacted form and thus identifying by name and title the employer's representative. In short, where in either direction it may be found necessary to refer to a decision having been made by an employer's representative, it is solely by using the words "the employer's representative" that this can be done and not by specific reference to the name and title of the individual.

ORIGINAL SIGNÉ PAR/
ORIGINAL SIGNED BY

Jean-Pierre Aubre
Appeals Officer