Occupational Health and Safety Tribunal Canada

Citation: Via Rail Canada Inc. v. Unifor, 2014 OHSTC 5

Date: 2014-05-21
Case No.: 2014-09
Rendered at: Ottawa

Between:

Via Rail Canada Inc., Applicant

-and-

Unifor, Respondent

Matter:	Application for a stay of a direction issued by a health and safety officer, in accordance with subsection 146(2) of the *Canada Labour Code.*
Decision:	The application is dismissed.
Decision rendered by:	Mr. Jean Arteau, Appeals Officer
Decision language:	French
For the Applicant:	Mr. Jacques Rousse, Counsel - McCarthy Tétrault
For the Respondent:	Ms. Sibel Ataogul, Counsel - Melançon, Marceau, Grenier and Sciortino

REASONS

[1] On March 18, 2014, on behalf of Via Rail Canada Inc. (Via Rail), Ms. Audrey Lévesque filed an appeal of a direction issued by a health and safety officer (HSO) under subsection 146(1) of the *Canada Labour Code* (the Code). The appeal was joined by this application for a stay of the direction pursuant to subsection 146(2) of the Code.

Background

[2] The following is a brief summary of the facts that subsequently led to the direction under appeal; a detailed statement of the situation is not required for the purposes of this stay application.

[3] On March 13, 2014, HSO Marie-Ève Fortier issued a direction enjoining employer Via Rail to appoint a competent person to conduct an investigation pursuant to subsection 20.9(3) of the *Canada Occupational Health and Safety Regulations* (the Regulations).

[4] The direction was issued following a complaint filed by employee Sylvain Gendron, a Unifor Union member, on October 28, 2013, with the Labour Program of Employment and Social Development Canada, alleging that he had been subjected to violence in the work place.

[5] Between October 29 and November 12, 2013, the HSO contacted Mr. Marc Beaulieu, Via Rail's Regional General Manager (East) and Chief of Transportation, to advise him of the complaint and to discuss how to resolve the problem as set out in subsection 20.9(2) of the Regulations.

[6] On November 12, 2013, the employer informed the HSO that a competent person would be appointed; it should be noted that, on that date, the employer had yet to receive a copy of the complaint because Mr. Gendron had not yet given his consent as he was on vacation until early December.

[7] The competent person appointed by Via Rail began an investigation that was interrupted at the employer's request after two meetings with the employee. The employer alleged that it had still not received a copy of the complaint.

[8] On January 15, 2014, Mr. Gendron consented to allow the HSO to send the complaint to Via Rail. This was done on January 23, 2014, in the presence of Mr. Gendron, Via Rail representative Mr. Beaulieu, Mr. Marc Laframboise, Union co-chair of the Health and Safety Committee and HSO Marie-Ève Fortier. After January 23, it seems that Via Rail's legal department, represented by Mr. Morello, became involved in this case.

[9] It should be noted that Via Rail Ombudsman Mr. Heack was involved in this case since early 2013. According to the records, the ombudsman confirmed that his intervention was separate from the process set out in subsection 20.9(2) of the Regulations.

[10] On March 5, 2014, Via Rail informed the HSO that the complaint was closed. On March 13, 2014, the HSO therefore issued the following direction:

> [Translation]
>
> […]
>
> 125.(1)(*z.16*) – *Canada Labour Code* Part II, 20.9(3) - *Canada Occupational Health and Safety Regulations*.
>
> Employer Via Rail Canada Inc., represented by Mr. Marc Beaulieu, failed to appoint a competent person pursuant to section 20.9 of the *Canada Occupational Health and Safety Regulations*, to conduct an investigation into Mr. Sylvain Gendron's allegations of work place violence.
>
> On January 23, 2014, Via Rail employee Mr. Gendron, accompanied by Mr. Laframboise, Union co-chair of the Health and Safety Committee, and HSO Marie-Ève Fortier, submitted his written complaint to Mr. Beaulieu, Via Rail's Regional General Manager. In his complaint, Mr. Gendron alleged he was the victim of violence in the work place.
>
> At the time of writing, a competent person had yet to be appointed to investigate the situation of violence in the work place.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)*(a*) of the *Canada Labour Code*, Part II, to terminate the contravention no later than March 27, 2014.
>
> Furthermore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)*(b)* of the *Canada Labour Code*, Part II, within the time period indicated by the health and safety officer, to take steps to ensure that the contravention does not continue or re-occur.
>
> Issued at Montreal this 13th day of March 2014.
>
> Marie-Ève Fortier
> Health and Safety Officer
>
> […]

[11] On March 18, 2014, Via Rail filed an appeal accompanied by an application for a stay of the direction.

[12] The hearing for the stay of the direction was held on March 26, 2014, by teleconference attended by Mr. Jacques Rousse, Ms. Audrey Lévesque and Mr. John Nicolas Morello for the applicant, Via Rail and Ms. Sibel Ataogul, representative of Mr. Gendron and Unifor. The written submissions of Mr. Rousse and Ms. Ataogul were also sent to me.

[13] On March 28, 2014, following a careful examination of the written and oral observations of Mr. Rousse and Ms. Ataogul, I decided to dismiss the stay application. The reasons for my decision are presented below.

Analysis

[14] An appeals officer's power to grant a stay stems from subsection 146(2) of the Code:

> 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.

The exercise of this discretionary power must correspond to the overall intent of Part II of the Code, as stated in subsection 122.1:

> 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.

[15] To deal with this stay application, I applied the following test:

1. The applicant must satisfy the appeals officer that there is a serious question to be tried as opposed to a frivolous or vexatious claim;

2. The applicant must demonstrate that he would suffer significant harm if the direction is not stayed.

3. The applicant must demonstrate that should a stay be granted, measures will be put in place to protect the health and safety of employees or any person granted access to the work place.

Is the question to be tried serious?

[16] Both parties' submissions raised the obligation set out in subsection 20.9(3) of the Regulations. Whether we discuss, as the employer maintains, the absence of an obligation to appoint a "competent person" in this case, or again, as the Union maintains, the fact that the action taken by the employer does not fulfill the obligations set out in 20.9(3), the truth is that there is indeed a serious question to be tried in this case. The question to be tried is the scope of the legislative requirement in this provision and indeed the notification and investigation procedures set out in section 20.9.

[17] I believe the first criterion has been met.

Will the applicant suffer significant harm if the direction is not stayed?

[18] Mr. Rousse argues that the employer will suffer significant harm if this direction is not stayed. Generally speaking, he argues that it is difficult to re-start an investigation process given that a competent person was already appointed not long ago and that the obligation to comply with this direction would give rise to two complaint processes since the matter has already been brought before the ombudsman.

[19] The employer's representative then raises the issue of the employer having to mobilize human and financial resources when the appeal questions the very validity of the obligation contained in the direction. Mr. Rousse also raises the possibility of contradictory outcomes or decisions by the ombudsman and the competent person.

[20] Lastly, Mr. Rousse raises the possibility that if the stay application is dismissed, the substantive appeal could become purely theoretical and constitute a denial of my obligation to respect procedural fairness.

[21] For the respondent, Ms. Sibel Ataogul argues that the obligation to appoint a competent person causes no harm whatsoever to the employer.

[22] On the subject of potentially contradictory decisions, Ms. Ataogul argues that the employer's claim means that section 20.9 could not be applied in any case so long as other remedies are pending, which in her estimation, is simply absurd.

[23] Ms. Ataogul points out that the appointment of a competent person cannot constitute harm to a big employer such as Via Rail, which has, among other things, access to a pool of experts on the subject matter.

[24] With respect to the argument raised by the applicant concerning the theoretical nature of the appeal and procedural fairness, Ms. Ataogul submits that this cannot constitute irreparable or significant harm. To this effect, she cites *Canadian Food Inspection Agency* v. *Public Service Alliance of Canada*, 2013 OHSTC 18.

[25] I will begin by stating that I agree with my colleague's analysis in *Canadian Food Inspection Agency*. The employer will have the time to state all its claims concerning its obligations pursuant to Part XX of the Regulations during the hearing on the substantive appeal. Having to comply with a direction in no manner whatsoever deprives the appellant of its statutory recourse.

[26] To establish the presence of significant harm, generally speaking, it seems to me that arguments concerning the impact of complying with the direction on, for example, equipment, operations or human resources, must be presented.

[27] Via Rail has made no such presentation.

[28] I also understand that the direction will not have any impact on the applicant's operations.

[29] Concerning human resources, the only employee affected is Mr. Gendron, who is already on leave. There will be no displacement of workers or training to be given to other workers. All the other workers will continue to work as usual. Lastly, the competent person who will conduct the investigation is not from Via Rail.

[30] In the case of a stay application, it is up to the applicant to convince the appeals officer to stay a direction, which is actually an order, until a final decision is rendered. To do so, the applicant must, among other things, clearly and convincingly demonstrate that unless the

direction is stayed, the company or the work place will suffer material harm. This is what the second criterion seeks to prevent.

[31] In the case at hand, no such impact was demonstrated; at the very most, only varying degrees of inconvenience were raised.

[32] In my view, the arguments presented by the appellant do not serve to demonstrate that significant harm will be suffered by the employer if the direction is maintained until the substantive appeal is heard.

What measures will be put in place to protect the health and safety of employees or any persons granted access to the work place should the stay be granted?

[33] Given my conclusion concerning the second criterion, I do not have to rule on the third criterion for the purposes of this stay application.

Decision

[34] For these reasons, the application for a stay of the direction issued by HSO Marie-Ève Fortier on March 13, 2014 is dismissed.

Jean Arteau
Appeals Officer