

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Date: 2014-08-21
Case No.: 2014-22

Between:

Edward Bruce, Appellant

and

South Coast Crewing Limited, Respondent

Indexed as: *Bruce v. South Coast Crewing Limited*

Matter: Request for extension of time to file an appeal under subsection 129(7) of the *Canada Labour Code*

Decision: The request is denied

Decision rendered by: Mr Michael Wiwchar, Appeals Officer

Language of decision: English

For the Appellant: Mr V. Randell J. Earle, Q.C., O’Dea Earle

For the Respondent: Mr Darren C. Stratton, McInnes Cooper

Citation: 2014 OHSTC 14

REASONS

[1] This decision concerns a request for an extension of time to file an appeal of a decision that a danger does not exist, pursuant to subsection 129(7) of the *Canada Labour Code* (the Code). The decision was rendered by Mr Clement Murphy, Health and Safety Officer (HSO) of Transport Canada, on May 16, 2014.

Background

[2] The appellant, Mr Edward Bruce is an employee of South Coast Crewing Limited (SCCL), and operates the pilot launch vessels, in Placentia Bay, Newfoundland and Labrador.

[3] On October 16, 2013, Mr Bruce exercised his right to refuse dangerous work pursuant to subsection 128(1) of the Code, on the ground that the removal of the autopilot system onboard the Aviation Pilot and Atlantic Pilot vessels exposed him to a “danger” as defined by the Code. Mr Bruce claimed that as a result of the removal, the vessels could only be operated manually and each vessel’s master would have to release control of the wheel of the vessel to attend other operations.

[4] The employer, SCCL, communicated with Transport Canada on April 30, 2014 to discuss the matter and filed a refusal to work registration on May 8, 2014. The work refusal was investigated by Mr Murphy, the HSO of Transport Canada, by telephone, from May 5, 2014, to May 9, 2014. The HSO found that the removal of the autopilot system from the vessels in question did not present a danger to the employee, and rendered a decision on May 16, 2014.

[5] Mr Bruce received the decision that a danger does not exist on May 22, 2014, and forwarded it to his bargaining unit representative, who forwarded it to the union’s counsel.

[6] Counsel for the appellant filed a notice of appeal with the Occupational Health and Safety Tribunal Canada (the Tribunal) on June 16, 2014, which was 14 days after the expiry of the 10 day time limit to file an appeal pursuant to subsection 129(7) of the Code.

[7] Counsel for the appellant joined a request for an extension of time with the notice of appeal.

Issue

[8] The question that I must address is whether I should, in the present matter, exercise the discretion conferred upon me under paragraph 146.2(f) of the Code, to extend the legislated time limit of 10 days as set out in subsection 129(7) of the Code.

Submissions of the parties

A) Appellant’s submissions

[9] Counsel for the appellant referred to *Alex Hoffman v. Canada (Border Services Agency)*, 2013 OHSTC 19 which denoted the issues that should be considered by the Tribunal in exercising its discretion to grant an extension of the time limit for filing an appeal. The factors

include: the length of the delay in relation to the appeal period, the explanations to account for the delay, the due diligence shown through the party's actions, and the prejudice suffered by the other party to the proceedings.

[10] First, the appellant submitted that the length of the delay was short given the circumstances. Specifically, counsel claimed that Mr Bruce received the HSO's decision that a danger does not exist on May 22, 2014, and filed a notice of appeal on June 16, 2014. Counsel for the appellant submitted that this was only 14 days after the 10-day deadline to appeal, which fell on June 2, 2014.

[11] Counsel for the appellant claimed that Mr Bruce was unable to appeal the decision within the required 10-day time limit because his spouse became ill and required hospitalization. As a result, it is submitted that Mr Bruce was unable to meet with his bargaining unit and their legal counsel in order to file an appeal within the 10-day time limit and was unable to access his e-mail regularly.

[12] It is the appellant's position that a delay in filing an appeal does not pose a prejudice to the employer because the employer delayed referring the matter pertaining to the employee's concerns to a HSO for investigation.

[13] The appellant submitted that he demonstrated a continued intention to appeal the decision. The appellant points to the fact that he did not return to work, and he did not give the employer any indication that he intended to accept the finding that a danger does not exist.

[14] Furthermore, in the appellant's submissions, counsel alleged that Mr Bruce made his intention to appeal the decision clear through correspondence and communication with government departments including the Employment and Social Development Canada - Labour Program.

[15] The appellant further submitted that the employer acknowledged the possibility of an appeal in correspondence to the employee's union representative and therefore was not taken by surprise by the filing of an appeal.

[16] Counsel for the appellant submitted that the matter at issue is a serious one that was not given sufficient consideration by the HSO. The appellant claimed that he was not consulted during the investigation and the HSO report neglected to consider key safety concerns associated with removing the autopilot system.

[17] The appellant submitted that he was neither informed of the HSO's investigation until after the matter was decided nor was he given the opportunity to make submissions during the investigation. As a result, he claimed that he was denied his right to procedural fairness and should therefore be allowed an appeal.

[18] Counsel for the appellant concluded by saying that, in the absence of an adequate investigation, there is likely to be further work refusals of the same nature as that of the appellant.

B) Respondent's submissions

[19] Counsel for the respondent took the position that an extension should not be granted in this case. The respondent believed that the appellant's personal circumstances did not impede his ability to file an appeal within the deadline or make his intention to file an appeal known.

[20] The respondent pointed out that in previous instances when the appellant's spouse required hospitalization, the appellant's ability to communicate with his employer was not impacted. Moreover, the respondent submitted that, at all times relevant to the appeal, the appellant was represented by his union. The respondent argued that neither the union representative nor the appellant showed an intention to file an appeal within the time limit despite the fact that both were aware of the right to do so as well as the time limit associated with the right.

[21] Counsel for the respondent further submitted that granting an extension would result in prejudice for the employer. Specifically, the respondent has an interest in the finality of administrative decisions and is concerned about financial consequences given the fact that the appellant continues to refuse to work and has refused to communicate with the respondent. According to the respondent, given these refusals, should an appeal be granted, the employer would be exposed to potential monetary damages.

[22] The respondent concluded by stating that clear and convincing reasons must be brought forward to justify the present delay and it is submitted that the appellant has failed to do so. The respondent argued that clear and convincing reasons require a foundation and must be established. It is not appropriate to grant an extension based on compassionate grounds without such foundation.

C) Reply

[23] In reply to the respondent's submissions, counsel for the appellant submitted that, given the appellant's wife's serious health condition, the appeal should be based on compassionate grounds. The appellant cited *Alex Hoffman* where Appeals Officer Hamel stated that he could not grant the appellant's appeal on compassionate grounds without foundation. Counsel for the appellant distinguished the present request for extension of time from *Alex Hoffman* stating that in that appeal, the appellant could not provide any reasonable explanation for his failures, whereas in this case Mr Bruce has done so in the form of an affidavit.

[24] In response to the respondent's assertion that the employee's union was representing the appellant during the appeal period, counsel for the appellant submitted that Mr Bruce did not expressly authorize the union to file an appeal on his behalf, nor did the union ever undertake to do so. The appellant therefore submitted that the fact that he was represented by a union is irrelevant in determining whether to grant the extension of time.

[25] With respect to the prejudice suffered, the appellant submitted that the respondent only alleged potential financial prejudice whereas the requirement is actual prejudice. The appellant further submitted that a prejudice of general nature does not defeat the appeal. Additionally, it is

the appellant's position that if his appeal is successful, the respondent would not suffer financial prejudice of hardship but rather the financial consequences resulting from its own actions.

[26] Counsel for the appellant reiterated Mr Bruce's continued intention to appeal and referred again to the correspondence in its submissions and the fact that he continued to refuse to work. The appellant also submitted that contact was made on his behalf with the Labour Program.

Analysis

[27] My authority to extend the time limit for filing an appeal is found under paragraph 146.2(f) of the Code. This provision gives an appeals officer the discretionary power to restore a right of appeal that has been extinguished by the expiration of the statutory time limit. My role as an appeals officer is to determine whether I should exercise my discretion and extend the 10-day time limit to file an appeal of a decision that a danger does not exist. In this regard, in the *Alex Hoffman* decision cited previously, Appeals Officer Hamel reiterated the guiding factors when considering if an appeals officer should exercise their discretion under paragraph 146.2(f):

[25] The Code does not prescribe factors that an appeals officer ought to consider in exercising the power to extend time limits. Such discretion must be exercised judicially, in a non-arbitrary or discriminatory manner, must be based on relevant legal principles, and be anchored in considerations that support the interest of fairness and serve the purpose and objectives of the Code. [...] Administrative tribunals and appeals officers alike, have typically considered and weighed the following factors in the exercise of their discretion: the length of the delay in relation to the appeal period, the explanations of the party to account for the delay, the due diligence shown through that party's actions, and the prejudice suffered by the other party(ies) to the proceedings.

[28] I will therefore consider each factor outlined above.

Length of the delay and explanation

[29] The appellant filed the appeal a total of 14 days after the expiration of the 10-day time limit. In determining whether or not this is a substantial delay, I considered the importance of respecting such relatively short time periods. As the appeals officer stated in *Alex Hoffman*:

[24] Parliament has prescribed a 10-day time limit to appeal a decision that a danger does not exist, a fairly short one at that when compared with the 30-day period within which a direction issued by an HSO may be challenged before an appeals officer. Time limits such as this exist to protect the public's interest in the finality of administrative decisions and ensure the orderly administration of the Code. It is important that these time limits be adhered to and where they have not been so, that **compelling and convincing reasons** are brought forward to justify not having complied with such statutory requirement [emphasis added].

[30] I find that the appellant's explanations for failing to file the appeal in the appropriate timeframe are neither compelling nor convincing. Counsel submitted that Mr Bruce's family circumstances during the relevant period impeded him from filing an appeal. While I can

appreciate that his spouse's health was certainly a central concern, I am not convinced that the situation prevented him from filing the appeal. The appellant's spouse became ill in the week following his receipt of the decision. At the time of the hospitalization, the appellant, his union representative and legal counsel for the union were all already aware of the decision and of the time limit to file an appeal. Given the short timeframe of 10 days, it would have been appropriate for one of these actors to start preparing the appeal promptly when they became aware.

[31] Counsel for the appellant submitted that the union was never expressly designated to file an appeal on Mr Bruce's behalf. Even so, I see no indication that the union attempted to communicate with the appellant regarding the filing of an appeal during the relevant time period and in my opinion the appellant's limited access to e-mail and temporarily residing at another location is not sufficient to prevent such communication with the union.

Due diligence

[32] In respect of the due diligence factor, a party requesting an extension of time must show, through his actions over the relevant time period, a continued intention to appeal the decision. In this regard, the appellant presented correspondence which he believed demonstrated that the respondent was aware of his intention to appeal the decision. Having reviewed the correspondence, I do not agree. The employer simply indicated in the e-mail that it was aware of the employee's right to appeal a decision, meaning only that there was a possibility to do so. Acknowledging a statutory right to appeal a decision does not mean that the employer has been made aware of the employee's intention to appeal.

[33] Furthermore, although the appellant did not personally receive the decision that a danger did not exist until May 22, 2014, the record of correspondence provided by the appellant indicated that his union representative, Mr Sparkes, was made aware of the decision via e-mail on May 16, 2014, and that Mr Bruce was made aware via e-mail the same day. I see no reason why the union representative and the appellant did not, from that date, begin discussions regarding an appeal if indeed one was intended. Regardless of whether the decision was physically in the appellant's hands, the appellant and union could have been communicating about how to proceed with the matter as of May 16th, which was well before his spouse was hospitalized. This communication, had it taken place, would no doubt have facilitated the timely filing of the appeal.

[34] The appellant also submitted that his intention to file an appeal was clear by his continued refusal to work, and communications with the Labour Program. However, having no record of these communications, I cannot ascertain who was contacted, nor the subject or the outcome of the communication. In addition, even though the appellant has not returned to work, he did not inform his employer that he intended to appeal the decision and thus I am not convinced that an intention to appeal was clearly demonstrated.

Prejudice to employer

[35] The appellant submitted that extending the time limit to file an appeal will not prejudice the employer. Although I agree that granting an extension of time will not prejudice the

employer in any substantial way, I cannot conclude that the appellant exercised sufficient due diligence in this matter to justify such an extension. In that regard I agree with my colleague's reasoning in *Alex Hoffman*: "[...] the absence of actual prejudice would bear more weight, in my opinion had the appellant justified the delay by cogent and compelling explanations and diligent actions [...]".

[36] As detailed above, I cannot conclude that Mr Bruce exercised diligent action in the matter, and thus the fact that there is no prejudice to the employer does not override the need for due diligence in order to grant the extension.

Conclusion

[37] I am therefore of the opinion that I should not exercise my discretion to grant the appellant's request for an extension to file his appeal. The appellant's family circumstances at the relevant time, while certainly stressful, did not seriously impede his ability to file an appeal within the 10-day time limit. Especially, given that the appellant was represented by his union representative and that, he, the union representative and counsel for the union were all aware of the right to appeal and the deadline to do so. Accordingly, I believe that the appellant had the means and opportunity to act diligently and ensure that the appeal was filed within the required timeframe.

Decision

[38] For these reasons, the request for an extension of time for filing the appeal is denied. As a result, the appeal is dismissed.

Michael Wiwchar
Appeals Officer