Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Date: 2014-09-04
Case No.: 2014-35

Between:

Canada Revenue Agency, Appellant

and

Public Service Alliance of Canada, Respondent

Indexed as: *Canada Revenue Agency* v. *Public Service Alliance of Canada*

Matter:	Request for an extension of time to file an appeal under subsection 146(1) of the *Canada Labour Code*
Decision:	The request is granted
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the Appellant:	Mr. Martin Desmeules, Counsel, Department of Justice Canada, Labour and Employment Law Group
For the Respondent:	Mr. Jean-Rodrigue Yoboua, Representation Officer, Legal Services, PSAC
Citation:	2014 OHSTC 16

REASONS

[1] This concerns a request, made under subsection 146(1) of the *Canada Labour Code* (the Code), for an extension of time to file an appeal against a direction issued by Health and Safety Officer (HSO) Michelle Sterling.

Background

[2] On June 10, 2014, HSO Michelle Sterling issued a direction to the appellant, Canada Revenue Agency (CRA), a major tenant, with some 285 employees, of a building in Windsor, Ontario known as the Paul Martin Sr. Building and also sometimes identified as Canada Revenue Agency - Windsor. The direction ordered the appellant CRA not to use the place, and more specifically two doors (Ouellette Avenue entrance and northeast Pitt street emergency exit) of the said building due to the danger arising from the state of disrepair of the building's stone façade or envelope as well as the insufficient protection that the scaffolding in place provided from the hazards of falling stones and mortars.

[3] On June 20, 2014, the same HSO issued an identical direction to Public Works and Government Services Canada (PWGSC) as custodian/landlord and owner of the said building. PWGSC appealed that direction within the time limit provided in the Code and the undersigned has partially stayed the application of the said direction to PWGSC as employer of its own employee(s) and in its capacity as custodian/landlord and owner of the building. This partial stay allows, for a limited period of time, PWGSC to use the two doors solely as emergency exits, in the event that an emergency evacuation of the building were required.

[4] Nonetheless, the present appellant has failed to appeal the direction issued to it in its capacity as employer/tenant within the 30-day time limit afforded by the Code. The appellant is thus requesting that the undersigned extend the time limit to file an appeal via the authority conferred on an appeals officer by paragraph 146.2(*f*) of the Code.

Submissions of the parties

A) Appellant's submissions

[5] It is the appellant's submissions that its request should be granted in order to avoid creating a situation or condition that would endanger the health and safety of an employee or any person granted access to the work place. More specifically, that danger would be caused by limiting the number of exits that could be used in the event of an emergency evacuation situation. According to the appellant, the existing situation of two identical directions concerning the same work place, with only one being stayed, albeit only partially, represents out of the ordinary circumstances that are sufficient to warrant the undersigned to exercise his discretion pursuant to paragraph 146.2(*f*) of the Code.

[6] The appellant explains its failure to appeal the direction by the fact that the exact same matter had already been put in front of an appeals officer by PWGSC, the owner of

the building in which the appellant is a tenant. In its view, at least at the time, a decision of the appeal by PWGSC would equally dispose of the issue concerning CRA and thus if a danger was found not to exist in regards to PWGSC, one could derive the same conclusion in regards to the appellant.

[7] Furthermore, the appellant argues that as a result of certain comments made by the various participants at the hearing of the PWGSC stay application, it dawned on CRA that it may have been in error in taking the position not to appeal the direction. Thus it acted diligently the following day and filed a notice of appeal with its request to extend the time limit.

[8] It is argued by the appellant that it should be allowed to proceed with its appeal to prevent a potential conflicting situation, where, in the same work place and same circumstances, a challenged direction could lead to a conclusion of no danger, whereas a distinct and unchallenged direction based on a finding of danger by the HSO would be upheld and require compliance.

[9] Finally, should the present extension be granted and the appellant be allowed to proceed with its appeal, it seeks that its appeal be joined with that of PWGSC for the purposes of the hearing and a consistent decision.

B) Respondent's submissions

[10] The respondent is of the view that the request should be denied for a number of reasons. First, noting that for the purpose of occupational health and safety under the Code, PWGSC and CRA are to be taken as distinct employers with their own set of responsibilities. As such, the appellant's health and safety responsibilities vis-à-vis its employees are not supplanted by any position enunciated by PWGSC. Therefore the respondent argues that the appellant was in error in considering that since the direction affecting it and the one issued to PWGSC were identical, the outcome in the appealed PWGSC direction would essentially dispose of its own direction.

[11] According to the respondent, CRA is a "sophisticated employer who frequently appears before administrative tribunals (and) as such, it should have known that a direction given to one employer does not affect a direction given to another employer", even more so when one considers that the two directions were issued on different dates and that the actual letter from the HSO accompanying the direction clearly indicated that any appeal should be filed within 30 days. Furthermore, while the directions may be identical, the underlying facts of each case are different since PWGSC has one employee and CRA has approximately 285 in the said workplace. This difference is relevant when considering the likelihood of injury and consequently it indicates that a decision in the PWGSC case would not automatically be applicable to the CRA situation.

[12] In addition, the respondent noted that since being issued the direction on June 10, 2014, the appellant has been aware of the need to amend its Fire Safety Plan to avoid having to displace and relocate some 70 of its employees, and that it is really the

appellant's actions or inaction in responding to the direction that is a source of danger in the circumstances, rather than the actual direction itself. The respondent submits that for the appellant to submit that it was the actual direction that created a potential danger rather than its unwillingness to comply with the direction, it demonstrates that the appellant is relying on its own failures and attributing them to the HSO in order to request the extension. According to the respondent this constitutes a failure to act diligently or in good faith, something that is essential in seeking an extension.

Decision

[13] I have considered the submissions made by both parties and want to address first the claim by the respondent that the appellant has not acted in good faith or diligently. It is my opinion that counsel for the appellant's belief that the matter would be resolved through a decision regarding the appeal filed of another direction issued to PWGSC in the same work place, was a belief made in error. Thus I share the opinion expressed by the respondent that the appellant should have known that separate or distinct directions, even those affecting parties acting in or sharing the same work place, have to be treated separately under the legislation. While at best, this may represent a misreading or a lacking comprehension of the legislation on the part of the appellant, this does not constitute bad faith in my opinion. I have no indication that by not appealing the direction in time, the appellant knowingly acted in agreement with the said direction by HSO Sterling.

[14] Furthermore, I am not inclined to conclude that the appellant did not act diligently since the latter immediately sought to correct its error upon hearing the comments of the health and safety officer as well as the undersigned concerning the distinct nature of both directions that were made at the time of the hearing on the stay application filed by PWGSC.

[15] While I may agree with the respondent that the direction issued to CRA, does not in and of itself create a danger, I have to take into account the entirety of the prevailing situation in that work place which entails two identical directions issued to two parties in the same work place with the potential for distinct outcomes, should one remain uncontested and one be challenged successfully at appeal. In my opinion, while I agree that the directions need to be viewed as distinct, there is in the present situation a potential for an inconsistent application of the Code which, in and of itself, may be conducive to danger. Although I share in great part the opinion expressed by the respondent regarding the shortcomings of the appellant, it is really the health and safety of employees that I must be concerned with and as a consequence, the consistent application of the legislation is essential.

[16] The request for extension of time to file an appeal made by the appellant CRA is thus granted. Since a notice of appeal was appended to the said request, the appeal *per se* is considered to be properly filed. Finally, I see no reason why these two appeals should not be heard jointly on the merits. That being said, I would be remiss if I did not draw attention to the wording of subsection 146(2) of the Code to the effect that "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."

Jean-Pierre Aubre
Appeals Officer