Occupational Health and Safety Tribunal Canada

Date: 2015-01-23
Case Nos.: 2013-19
2013-20
2013-21

Between:

Canadian Food Inspection Agency, Appellant

and

Public Service Alliance of Canada, Respondent

Indexed as: *Canadian Food Inspection Agency* v. *Public Service Alliance of Canada*

Matter:	Application to rescind the directions under appeal under subsection 146(1) of the *Canada Labour Code*
Decision:	Files 2013-19 and 2013-20 ordered closed Application dismissed in file 2013-21
Decision rendered by:	Mr. Pierre Hamel, Appeals Officer
Language of decision:	English
For the appellant:	Ms. Christine Langill, Counsel, Department of Justice Canada
For the respondent:	Mr. Jean-Rodrigue Yoboua, Representation Officer, Public Service Alliance of Canada
Citation:	2015 OHSTC 1

REASONS

[1] This decision relates to an application presented by the appellant regarding three appeals filed on April 8, 2013, by the Canadian Food Inspection Agency (CFIA or "the employer"), with the Occupational Health and Safety Tribunal Canada (OHSTC), pursuant to subsection 146(1) of the *Canada Labour Code* (the Code). The appeals concern three directions issued on March 8, 2013 by Ms. Bobbi Anderson, Health and Safety Officer (HSO), with the Labour Program of Employment and Social Development Canada (Human Resources and Skills Development Canada as it was named then).

[2] All three directions are identical with the exception that each one refers to a specific employee (i.e. Employee #1, #2 and #3). The direction pertaining to Employee #1 (OHSTC File No. 2013-19) reads as follows:

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On November 27th, 2012, the undersigned health and safety officer conducted an investigation in the work place operated by CANADIAN FOOD INSPECTION AGENCY, being an employer subject to the *Canada Labour Code*, Part II, at 5921 Frank St., Mitchell, Ontario, N0K 1N0, the said work place being sometimes known as CFIA – Great Lakes Specialty Meats of Canada Inc..

The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:

No. / No : 1

Paragraph 125.(1)(x) – Canada Labour Code Part II, -

The employer shall comply with every oral or written direction given to the employer by an appeals officer or a health and safety officer concerning the health and safety of employees.

The employer failed to comply with the original direction issued on December 14th, 2012 to appoint a competent person to investigate the allegations of violence that remain unresolved as reported by Employee #1 in February 2012.

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 28, 2013.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*b*) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

Issued at London, this 8th day of March, 2013

[signed]
BOBBI ANDERSON
Health and Safety Officer
[…]

To: CANADIAN FOOD INSPECTION AGENCY
5921 Frank Street P.O. Box 610
Mitchell, Ontario
N0K 1N0

[3] The employer's Notice of Appeal also included an application for a stay of the directions under appeal. On May 30, 2013, the parties were informed by Appeals Officer Michael Wiwchar that the application was denied. Written reasons for that decision were issued on June 20, 2013 (*Canadian Food Inspection Agency* v. *Public Service Alliance of Canada*, 2013 OHSTC 18).

Background

[4] The background information that is necessary to understand the present decision can be summarized as follows.

[5] After receiving a written complaint from an employee of CFIA alleging that the employer had failed to acknowledge or investigate allegations of violence in the work place as prescribed by Part XX of the *Canada Occupational Health and Safety Regulations* (the *Regulations*), HSO Anderson conducted an investigation at the work place operated by the CFIA, at 5921 Frank Street, Mitchell, Ontario. HSO Anderson had several email and telephone correspondences with the author of the complaint, referred to as Employee #1, whom she considered to be designated as the spokesperson for the other two employees involved.

[6] On December 14, 2012, following her investigation, HSO Anderson issued three directions to the employer, each one relating to one of the three complaining employees, as a result of her finding a contravention of subsection 20.9(3) of the *Regulations*, with a January 31, 2013, compliance date. After being apprised that the employer had not complied with her directions, a second direction was issued in each of the three files on March 8, 2013, under paragraph 125.(1)(*x*) of the Code. It is those three directions which are the subject of the present appeals.

Application before the appeals officer

For the appellant

[7] On July 21, 2013, counsel for the employer informed the OHSTC that the complaining employees were no longer employed with the CFIA. She filed with the OHSTC correspondence from Employee #1 and Employee #2 confirming that they have been out of the work place since February 2013, when they effectively resigned. In a letter dated June 19, 2014 addressed to the OHSTC and attached to the employer's correspondence, Employee #1 states as follows:

> I formally request that no further action be taken with respect to the Direction that had been issued by HRSDC in this matter (File #2013-19) and that it be rescinded. I confirm that I have been out of the workplace since February 2013. Moreover, all matters relating to my past employment with the CFIA have been resolved to my full satisfaction, this includes but is not limited to the complaint which led to the Directions issued under tribunal File No 2013-19. I do not wish to pursue any complaints, actions, or otherwise against my former employer.
>
> Please consider this to be my formal and voluntary request to the Tribunal to close the file relating to my complaint in this matter. I understand that the Employer concurs with this request as well.

[8] Employee #2's letter dated May 27, 2014 to the Tribunal has identical wording, regarding the appeal in File No. 2013-20.

[9] Both employees had also informed their former employer, on the same date as they wrote to the Tribunal, that they withdrew their work place violence complaints and confirmed that they did not require that the employer, or HRSDC Labour Program, take any further actions with respect to these matters.

[10] With respect to Employee #3 (OHSTC File No. 2013-21), Ms. Langill points out that he had resigned from the CFIA on April 29, 2013. He has not since returned to the work place and there is no indication that he wishes or intends to proceed with this matter. Counsel for the employer noted that a proceeding relating to this matter is pending before the Public Service Labour Relations Board (PSLRB) (since November 1, 2014, the Public Service Labour Relations and Employment Board (PSLREB)), but submits that the Board is without jurisdiction to deal with such a matter, as it relates to a resignation, not to disciplinary action against the employee.

[11] In light of the fact that, in the employer's submissions, there are no longer any outstanding matters between the parties, the employer seeks an order for the Tribunal that the directions be rescinded and all three files be closed.

For the respondent

[12] The representative for the respondent the Public Service Alliance of Canada, representing the employees' interests in these matters, responded to the employer's application by letter dated October 10, 2014. Mr. Yoboua confirmed that Employees #1 and #2 (OHSTC Files No. 2013-19 and 2013-20) no longer wished to pursue the appeals and the related directions, and agreed that those files could be closed.

[13] With respect to Employee #3, the respondent's representative opposes the request to have the direction rescinded and the file closed. Mr. Yoboua submits that appeal 2013-21 and the related direction are still live issues. Although he is no longer in the work place, Mr. Yoboua confirms that Employee #3 has filed a "section 133 complaint" before the PSLRB "in respect of the way in which he was forced out of the work place after exercising his rights under the Canada Labour Code". He submits that as the employee has not relinquished his right to seek redress with respect to his employment, there is still a live issue which needs to be addressed.

Appellant's reply

[14] On October 21, 2014, counsel for the appellant confirmed her understanding that by the Bargaining Agent's letter of October 10, 2014, both parties consented to Files No. 2013-19 and 20 being closed and no longer being pursued, and that an Order that those two files have been resolved to the full satisfaction of the parties and therefore should be closed, ought to be issued.

[15] With respect to the appeal concerning Employee #3 (2013-21), Ms. Langill disputes that there is still a genuine live issue in spite of the related proceedings pending before the PSLREB. She submits that the case law supports that the Board normally will not take jurisdiction over resignations and cites the adjudication decision rendered in *Byfield* v. *CRA*, 2013 PSLRB 52.

Analysis

[16] The present application raises an important question about the interests that are at play in the context of an appeal against a direction issued by a health and safety officer under the Code.

[17] An investigation by a health and safety officer usually begins, as it was the case here, by a request for intervention or complaint made by an employee. The role of the health and safety officer is not to resolve a dispute between the two parties, but as in this case, to determine whether there has been a contravention to the Code or its *Regulations*. The HSO thus conducts an investigation to gather the facts that will enable him or her to make an informed judgement on the question.

[18] If the HSO concludes that a contravention of the Code has occurred, he or she may issue a direction enjoining the employer or the employee concerned, or both, to conform to the requirements of the Code. Such direction is legally binding and enforceable immediately, or within the time period specified by the HSO, unless an appeals officer directs that it be stayed pending an appeal.

[19] Once issued, a direction which is aimed at correcting a situation which the health and safety officer has found to constitute a contravention of the Code, serves a public policy dimension, which goes beyond the mere interests of the parties. It is an order of a public officer enjoining, in most instances, the employer, to comply with its obligations under the Code. Failure to comply with such an order constitutes an offence under the Code. The HSO himself is not legally authorized to modify his/her direction once it is issued and only an appeals officer may vary or rescind a direction, on appropriate legal or factual grounds going to the validity and merits of the direction in the circumstances at hand. This is the task conferred on appeals officers by section 146.1 of the Code.

[20] In the present case, the HSO first concluded that the employer had not appointed a competent person, as defined in paragraph 20.9(1) of the *Regulations* to investigate complaints by three employees alleging that they were subject to violence in their work place. The HSO concluded that the employer should have appointed such person and its failure to do so contravened the Code and subsection 20.9(3) of the *Regulations*. The HSO thus directed the

employer, as authorized by subsection 145(1), to appoint such a competent person within the period specified in her direction dated December 14, 2012.

[21] Upon being apprised that the employer had not complied with her direction, the same HSO subsequently issued a second set of directions by which she concluded to a further violation of the Code, namely the employer's failure to comply with her December 14 directions and enjoining the employer to do so. It is this latter set of directions which have been appealed. I note in passing that the original December 14 directions have not, to my knowledge, been appealed, although they may arguably be said to relate in some way to the validity of the March 8, 2013 directions that are under appeal. However, I make no finding at this point as to the scope of the appeals of which I am seized, and this question is best left for determination in relation to the merits of the appeals, after the parties have had the opportunity to present their submissions on the matter, assuming we reach that stage in the proceedings.

[22] I am not persuaded that the wording of section 146.1 of the Code authorizes me to proceed in the manner sought by the appellant. That section provides that an appeals officer may, after inquiring summarily into the circumstances of the direction and the reasons for it, may vary, rescind or amend it. The question raised by the present application is to determine whether the Code authorizes the appeals officer to rescind a direction, as the employer has originally sought in her submissions, on the sole basis that the employee whose complaint to a health and safety officer has triggered the investigation which led to the direction, is no longer employed with the employer at the time of the appeal and, in two of the three files under appeal, no longer wishes to pursue the matter. This implies rescinding a direction without regard to its merits, i.e. without making a determination as to whether or not there was a contravention of the Code in the circumstances that prevailed at the time of its issuance. In my view, the wording of section 146.1 of the Code does not enable me to consider such a course of action.

[23] I am prepared however to consider the alternative option of closing the appeal files in light of the circumstances of this case and the submissions of the parties.

[24] In order to reach a conclusion on this matter, I must consider the fundamental nature of the contravention and all of the circumstances that led to the directions being issued. The original issue which triggered HSO Anderson's investigation relates to the obligation for the employer to appoint a competent person to investigate allegations of work place violence made by three employees of CFIA. The allegations are intimately linked to the employees themselves, as the victims of the alleged violence. Unlike other types of contraventions of the Code which could relate more to the physical aspects of the work place (such as building structures, protection devices, etc.), the present directions relate to alleged conduct of employer representatives towards the complainants and thus to matters entirely personal to the employees themselves.

[25] It is with the above considerations in mind that I will address the employer's application. In light of the information provided by the parties in their submissions, I must analyze the question differently as regards to Files No. 2013-19 and 2013-20 (Employees #1 and #2) on the one hand, and File No. 2013-21 (Employee #3), on the other. I will continue referring to the employees as "Employee" without naming them at this stage, as both the parties and HSO Anderson have done so in their correspondence.

[26] As I explained earlier, the Code does not expressly envisage the possibility for an appeals officer to rescind a direction or terminate proceedings on the sole basis that the parties have resolved the dispute that may have been the triggering point to an investigation by a HSO and the issuance of a direction. The HSO who issues a direction acts as a public officer vested with enforcement powers under the Code and exercises a public interest duty. The HSO's enforcement actions transcend, in my opinion, the immediate interests of the parties affected by such action and it is the Code that prescribes the parties' conduct in response to the direction. It is not open for the parties to agree that the direction is not necessary after all, or does not require compliance. The Code prescribes the enforceable effect of the direction. The fact that the employee whose complaint was at the source of the investigation may no longer be employed is not, in and of itself, justification to render the direction moot and bring the appeal proceedings to an end.

[27] However, I am sensitive to the fact that in the context of the present proceedings and given the nature of the contravention of the Code, the persons who stand to personally benefit from compliance with the directions have clearly expressed the wish to renounce to that benefit due to the fact that they are no longer employees, that they have resolved all their employment-related disputes with their employer to their satisfaction, including the present allegations, and that they no longer wish to pursue the matter.

[28] In light of such statements, I am sensitive to the principle of judicial economy where appropriate. It is indeed undesirable to expend considerable resources to pursue a matter when the parties who have a primary interest in the proceedings express the wish to no longer pursue the matter and mutually consent to the proceedings being terminated and the appeal files closed. I am also persuaded by the parties' statement that they have resolved all disputes related to their employment in a satisfactory manner and no longer wish to pursue the matter, thus rendering the object of the direction somewhat purposeless. I believe these exceptional factors outweigh the public interest considerations that would otherwise dictate the continuation of this matter under appeal, with the objective of ensuring the proper enforcement of the Code when a violation of one of its provisions has been found to exist by a health and safety officer. It does not seem to me to offend the prevention objective underlying the Code or contrary to the interest of administrative justice, that I acknowledge the parties' consent that the files be closed in the circumstances of those two cases.

[29] A second reason, which is linked to the particular subject matter of these appeals and to the applicable statutory framework set out in section 20.9 of the *Regulations,* also allows me to reach that conclusion. When the employer is made aware of an allegation of work place violence, subsection 20.9(2) of the *Regulations* requires the employer to first "try to resolve the matter with the employee as soon as possible". If the matter is resolved, there is no requirement to appoint a competent person to conduct an investigation and that is the end of the matter. It is clear that, as I write the present reasons, the matter related to the allegation of violence in the work place has been resolved with the two employees in question, as reflected in the parties' submissions and the letters signed by the employees to the OHSTC's attention. Consequently, giving effect to the parties' mutual agreement that their dispute in relation to alleged violence in the work place is now fully resolved, is consistent with the spirit and objective of the provision

which HSO Anderson sought to enforce by her directions. In the circumstances, I agree with the parties that it serves no useful purpose to pursue the appeal procedure any further.

[30] I note that in her reply correspondence of October 21, 2014, counsel for the appellant somewhat rephrased the rescission order that the employer was originally seeking regarding those two appeals, which now reads as follows: "As a result, the Respondent [sic] seeks an Order in those files that they have been resolved to the full satisfaction of the parties and the files are closed."

[31] Consequently, I acknowledge the fact that the matter of the appeals has been resolved to the parties' satisfaction and close the files.

File No. 2013-21

[32] The state of things regarding Employee #3 (File No. 2013-21) is somewhat different. There is no agreement between the parties that the matter has been resolved to their satisfaction. On the contrary, the employee is taking the position that his resignation is not voluntary and constitutes a form of retaliation against him for having exercised a right under the Code, which is prohibited by section 145 of the Code, and he has filed a complaint under section 133 with the PSLRB. I cannot of course presume of the outcome of that proceeding, as the employer's counsel is inviting me to do.

[33] The approach that I have taken regarding the other two appeals simply cannot apply here. Clearly there is no mutual consent that the current dispute has been resolved to the parties' satisfaction and both the complaining employee and the respondent have expressed the wish to pursue the matter. The fact that Employee #3 is no longer employed with the CFIA in my view has no material impact on the proceeding that I am presently seized with, i.e. the direction by HSO Anderson to the employer to cease being in contravention of the Code. In my view, nothing in section 146.1 of the Code allows me to uphold the appeal and rescind the direction on the sole basis of the complaining employee no longer being employed with the employer, without considering the merits and validity of the direction.

[34] Moreover, I am of the view that the outcome of the complaint pending before the PSLREB is immaterial. The complaining employee was employed with the CFIA at the time of the events and when the directions were issued. As I stated earlier, once a direction is issued by a health and safety officer, we enter the realm of enforcement of the legislation by a public officer. Such direction must be complied with and the contravention identified in the direction must cease, regardless of subsequent events. The stay of the direction sought by the employer was rejected. The employer therefore was legally obliged to comply with its terms, and continues to be on this day.

[35] Counsel for the employer cited the decision in *Maureen Harper* v. *Canadian Food Inspection Agency*, 2011 OHSTC 19 in support of her submission that the direction ought to be rescinded because of Employee #3's resignation. That case is distinguishable from the present appeal at least on one factor, which I find to be determinative: the appeal in that case was not against a direction of an HSO, but an appeal filed by the employee against a decision of "no danger" further to that employee's refusal to work under sections 128 and 129 of the Code. The

appeals officer held in that case that the right to refuse to work, framed as it is in section 128, is an individual right conferred on an employee while at work and belongs solely to the employee invoking it. It must be stressed that the employee was the appellant in that case. As the employee was no longer employed at the time of the appeal, the appeals officer found that the appellant-employee's initial ground for instituting the proceedings had disappeared as "she is no longer exposed to the alleged condition while at work". This is a very different statutory context than the one in the present case. In my view, the issue, and I venture to say possibly the outcome, would have been different had the safety officer found that a danger existed and issued a direction under subsection 145(2) of the Code ordering the employer to bring corrective measures, and it was that direction that was being appealed. In my view, the fact that the instant appeal is against a direction issued by a health and safety officer makes the reasoning in *Harper* inapplicable here.

[36] I am also of the view that the present matter has not become moot or academic by reason only of Employee #3 no longer being employed with the CFIA. Although the employee is ultimately the primary beneficiary of the direction, which will lead to the appointment of a competent person to investigate his claim that he was subjected to workplace violence, that situation goes beyond the mere private interests of the employee for another reason. The investigation contemplated in subsection 20.9(3) of the *Regulations* purports to have a situation of work place violence examined by a competent person, who is to prepare a report setting out that person's conclusions and recommendations on the matter. The *Regulations* do not spell out the nature of the conclusions and recommendations that may be included in the report, but it is fair to say that the report will serve a remedial purpose, in the overall context of Part XX of the *Regulations*. Thus, those conclusions and recommendations may be directed at the particular situation under investigation, they may provide some form of redress to the employee who may be found to have been the victim of violence, but they can also address questions of a more systemic nature. For example, subsection 20.9(5) of the *Regulations* provides that the employer is required, among other things, to adapt or implement, as the case may be, the systematic controls referred to in subsection 20.6(1) to prevent a recurrence of the work place violence, which the report may highlight as having been lacking or defective in the circumstances revealed by the investigation. In that respect, the outcome of the competent person's investigation may go beyond the individual circumstances of the employee and may touch on measures of general application to the work place, with an objective of prevention, a paramount consideration underlying the Code.

[37] Accordingly, for all the reasons above, I find that there is still a live issue to be determined by this appeal and I cannot accede to the appellant's request to rescind the direction or close the file, on the grounds invoked by counsel for the appellant in her submissions presented on July 21, 2014. In the absence of mutual consent or withdrawal of the appeal by the appellant, I am duty-bound to remain seized of this appeal. The application insofar as it relates to Employee #3 (File No. 2013-21) is accordingly denied.

Decision

[38] OHSTC Files No. 2013-19 and 2013-20 are hereby closed.

[39] The appellant's request that the direction in OHSTC File No. 2013-21 be rescinded and the file closed, is denied.

Pierre Hamel
Appeals Officer