Occupational Health and Safety Tribunal Canada

Date: 2015-02-04
Case Nos.: 2013-70
2013-71
2013-72

Between:

Brink's Canada Limited, Appellant (Respondent to Motion)

and

Neil La Croix, Colin Stewart and Ryan Faulds, Respondents (Applicants to Motion)

Indexed as: *Brink's Canada Limited* v. *La Croix, Stewart and Faulds*

Matter:	Motion to dismiss the appeals.
Decision:	The preliminary motion is dismissed.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Mr. James D. Henderson, Kuretzky Vassos Henderson LLP Ms. Trisha E. Gallant, Cox & Palmer
For the respondents:	Mr. Ronald E. Pizzo, Pink Larkin
Citation:	2015 OHSTC 2

REASONS

[1] The present decision concerns a preliminary motion by the respondents to dismiss the appeals brought by Brink's Canada Limited (Brink's) against three directions issued by Health and Safety Officer (HSO) Daniel J. Roy at the conclusion of the latter's investigation into the work refusal action by three Brink's employees (respondents) that led to a finding of danger that reads as follows:

> The employer failed to provide a safe workplace by removing the guard in the proposed ***one off process***. This would require the messenger to act alone during the loading and unloading of money cassettes at different ATM locations.

[2] The said appeals were brought by the appellant pursuant to subsection 146(1) of the *Canada Labour Code* (the Code) which allows a party that feels aggrieved by a direction to appeal such to an appeals officer who, in turn, is authorized by subsection 146.1(1) of the Code to inquire into the circumstances of the direction and the reasons for it. It bears noting that according to subsection 145(2) of the Code, an appeals officer proceeding to hear an appeal "has all the powers, duties and immunity of a health and safety officer".

Background

[3] On December 22, 2014, following a somewhat truncated initial attempt at proceeding to hear these appeals on the merits, counsel for the respondents filed with the Occupational Health and Safety Tribunal Canada, and thus the undersigned, a notice of preliminary motion to the effect that given the alleged failure by the appellant to comply with a number of mandatory/regulatory obligations prior to initiating changes to its ATM machines servicing process and going from a three-person crew, two-man off model to a two-person crew, one-man off model, the danger ruling and thus the directions that it gave rise to, should be upheld for that reason alone without proceeding on the merits regarding the actual ruling of danger basing the directions.

[4] Those statutory/regulatory obligations that counsel for the respondents contended should have been complied with prior to the appellant initiating the changes mentioned above were the establishment of a policy health and safety committee (section 134.1 of the Code), the implementation of a prescribed hazard prevention program (paragraph 125(1)(*z.03*) of the Code) and consultation with the work place committee and/or the policy committee over the implementation of the said changes and matters related to such (paragraphs 125(1)(*z.03*) to (*z.13*).

[5] On December 23, 2014, the appellant reacted to said motion by questioning its relevance, drawing attention to the fact that the issue raised by the appeals and thus before the undersigned, solely relates to employees exercising their right to refuse to work because a condition exists in the work place that constitutes a danger to the employee(s), or the performance of an activity is to the same effect for the refusing

employee(s) or to another employee, not whether there was compliance with the obligations noted above.

[6] On the occasion of a telephone conference held on December 29, 2014, with the undersigned, the parties agreed to provide the undersigned with written submissions in short order so as not to prevent proceeding to hear the appeals on the merits on the already scheduled dates.

Submissions of the parties

A) Respondents' submissions

[7] The written submissions provided by counsel for the respondents in support of its motion attest to a somewhat different stance in that counsel now seeks a determination as to whether the undersigned may consider Brink's alleged, and as yet unproven, failure to comply with the statutory obligations mentioned above as part of his decision making process on the instant appeals, in other words when deciding on the actual merits of the appeals relative to "danger" directions. As regards the three sets of obligations mentioned at paragraph 4 above, counsel alleges that Brink's failed to do any of those things before attempting to implement the one-off process in various locations across the country and notes that those obligations were not considered in the course of the "danger" ruling by HSO Roy concerning the three respondents. According to counsel for the respondents, such failure to satisfy the above-noted obligations constitutes non-compliance with the Code. Further, counsel claims that Brink's cannot attempt to use the current appeals as a means of determining whether or not the one-off model can be implemented across Canada as this would be contrary to the clear intention of the Code, noting as well that the refusal to work by one of the respondents (La Croix) is but one of a number of such refusal actions by other employees caused by Brink's policy change.

[8] Counsel for the respondents submits that where a health and safety officer has, pursuant to section 145 of the Code, the authority to issue what is commonly referred to as "contravention" directions (subsection 145(1) of the Code) and "danger" directions (subsection 145(2) of the Code) with a view to obtain termination and/or correction of such, an appeals officer, whose jurisdiction and authority are set by section 146.1(1) of the legislation and who, in proceeding *de novo*, thus may receive any evidence that the parties may submit, whether such would have been available to the health and safety officer whose conclusions are under appeal, can vary a health and safety officer direction to provide for what the health and safety officer should have directed. It is counsel's view therefore that at case law, it has been established that an appeals officer has the power to vary a direction to "include other contraventions" of the Code and is also not precluded from making a determination under subsection 145(1) of the Code which is the authority to issue "contravention" directions.

[9] Finally, on the basis that the present appeals by Brink's may be viewed as an attempt at gaining approval that the "one-off" model, that counsel describes as approval of a new health and safety policy, can be implemented across Canada, or as an end run around the

consultative process, the latter argues that this has been held as an abuse of process and refers to comments made *in obiter* in Brazeau and Securicor Canada Ltd. Decision No.04-049 by Appeals Officer Rousseau on the last paragraph of a 227 paragraph decision, this preceded by comments to the effect that the right to refuse to work provisions in the Code are not to be used in the work place to resolve long standing labour disagreements and alluding to:

> […] poor judgment on the part of employees for not proactively and effectively raising their health and safety concerns with Securicor through other means prior to refusing to work, […]. Instead of consulting with their employees through their health and safety committee to resolve employee concerns and avoid a refusal to work, Securicor opted to choose the sites where the refusals to work would have the least impact on their operations and their customers. In effect, Securicor prematurely, and potentially needlessly, involved HSOs and this Office in their disagreement with their employees and, in so doing, potentially put the health and safety of employees at risk in the interim. This I consider to have been an abuse of the Code.

B) Appellant's submissions

[10] At the outset, the appellant draws attention to the fact that the latest submissions by the respondents do not address the issue originally raised in their request for preliminary motion. More specifically, those submissions entirely fail to address the legal question as to whether a contravention of certain provisions of the Code is sufficient, in and of itself, to cause dismissal of the appeal relative to a "danger' direction, or stated otherwise as a pure question of law, whether a failure to comply with certain provisions set out in the Code, in other words a contravention, in and of itself equals danger. According to the appellant, the respondents have instead reframed the issue to one focused on the jurisdiction of the appeals officer and whether he may consider Brink's alleged failure to comply with subsection 125(1)(*z.03*) to (*z.13*) and s.134.1 of the Code as part of his overall decision making process in the appeals by Brink's. Additionally, it is the view of the appellant that in making mention of other work refusals by employees other than the three involved in the present appeals, the respondents have sought to expand the scope of the decision to be rendered by the undersigned as a whole, and this, notwithstanding the fact of the undersigned having made it clear that he is seized only with the specific directions being appealed and that the national implications that may be derived from such is *ultra vires* his jurisdiction. It is thus the appellant's position that in choosing to reframe the nature and extent of its preliminary motion, the respondents have acted frivolously and in bad faith and that such action constitutes an abuse of process.

[11] Notwithstanding the above, the appellant has addressed the original request for preliminary motion made by the respondents, pointing out that the latter have provided absolutely no authority or argument, nor outlined any procedure that would allow the appeals officer to conclude that contravention of certain provisions of the Code, in and of itself, could result in the dismissal of the appeals against directions of "danger". According to the appellant, compliance with the provisions set out in the respondents' motion request is not a mandatory precondition to its avoiding a "danger" conclusion. It

is the appellant's position that the provisions of the code are clear and unequivocal and that strict compliance with all provisions in Part II of the Code is not a precondition to the appeals officer rescinding a direction made pursuant to paragraph 145(2)(*a*), or stated differently, failure to comply with statutory directions, mandatory or otherwise, does not in and of itself amount to "danger".

[12] Noting that the respondents have opted instead to focus on procedural issues such as the nature of the appeals, the jurisdiction of the appeals officer to receive evidence and issue new directions regarding other contraventions of the legislation as well as the latter's *de novo* jurisdiction to receive any evidence, the appellant submits that it does not dispute that the appeals officer is acting in a *de novo* capacity and, as per subsection 145.1(2) of the Code, is vested with all the powers of a health and safety officer, nor does the appellant dispute that the appeals officer has the authority to vary a direction to include contraventions that, based on the evidence gathered, he finds should have been included by the health and safety officer in the directions under appeal. These issues however, are not what is raised in the original request for motion by the respondents, as the fundamental issue before the appeals officer is whether the work performed in their individual capacities by the three respondents in the "one-off" model constitutes a "danger" within the meaning of the Code. What has occurred between Brink's and the Union representing the respondents is irrelevant as these are cases of individual employee refusals. According to the appellant, while contraventions of other provisions of the Code may be a relevant consideration when determining whether a danger exists, such considerations are not determinative as such a finding can only be made after considering the entirety of the appeals on the merits. The use of the word "shall" in subsection 146.1(1) of the Code, which enunciates the decisional powers of a health and safety officer, clearly requires an appeals officer to inquire into the circumstances and reasons of the direction(s) of which the latter is seized at appeal, and only once such an inquiry has been made does the appeals officer have the jurisdiction to vary, rescind or confirm the direction(s) and issue any further or other direction the latter considers appropriate.

[13] The appellant being of the view that the respondents have provided no basis upon which the undersigned could grant the relief sought in the original request for preliminary motion, it submits that the motion should be dismissed.

[14] As regards the perception by the respondents that Brink's is allegedly using the present appeals as an end run around the mandatory consultative process under the Code to seek approval of a new health and safety policy in the new "one-off" model and that such would constitute an abuse of process, the appellant offers a categorical denial of such as it recognizes that the undersigned is seized only with inquiring into the specific directions issued in these three specific appeals. Conversely, as the appellant and the Teamsters Union representing the respondent employees are currently in the bargaining process with the implementation of the "one-off" model an issue that is being negotiated, the appellant contends that rather, it is the work refusals upon which the appeals are based that have been orchestrated by the Teamsters in an attempt to bring bargaining issues to a head through the Code's processes. In focusing on the jurisdiction of the

appeals officer to hear new evidence and issue new directions rather than addressing the issue stated in the request for preliminary motion and in raising the fact of additional work refusals despite the fact of the appeals officer clearly stating his intention to deal only with the specific work refusals of La Croix, Stewart and Faulds, the appellant contends that it is the respondents who have demonstrated having another agenda that is beyond the individual appeals at hand, namely the propriety of the "one-off" model as a whole and as such are abusing the processes set out in the Code.

[15] On this basis, the appellant submits that in light of the conduct of the respondents in initially formulating an issue and then subsequently not even attempting to address the stated issue, choosing instead to raise and argue new issues that could have been dealt with in the course of the hearing on the merits, undue delay in the disposition of the appeals has been caused and needless additional expenses have been incurred by the appellant. It is thus the appellant's position that the undersigned should, for these reasons, award costs against the respondent as per sections 156, 21 and 99(2) of Part I of the Code. The appellant does acknowledge that as a matter of policy, the appeals officer may be reluctant to act in this manner but suggests that the circumstances surrounding this preliminary motion are sufficient to warrant an exception to general policy objectives. In its opinion, an award of costs in the context of this specific case is necessary to deter parties from abusing the process set out in the Code by pursuing an alternative agenda and raising issues that it has no intention of answering simply to delay proceedings, thereby straining healthy labour relations and the collaborative process envisioned under Part II of the Code.

C) Reply

[16] By way of reply to the appellant's submissions on the request for motion, counsel for the respondents raises a new element by referring to the notion of "normal condition of employment" and arguing first that the appellant has claimed in its notice of appeal of the danger directions that the danger associated with the "one-off" model constitutes such a normal condition of employment, and also pointing out that according to the Labour Program Policy 905-1-IPG-070, when conditions of work undergo a change, what may have been previously considered "normal conditions of employment" will need to be re-assessed, as "it cannot be assumed that any danger that exists as a result of the change will remain a normal condition of employment", thus validating, in his opinion, the need to abide by the obligations set out at paragraphs 125(1)(*z.03*) to (*z.13*) and section 134.1 which set out, according to counsel, a mandatory process to gather information to analyze whether a danger is a normal condition of employment. In the same breath, the respondents note anew that the undersigned, in proceeding *de novo*, is looking at the case afresh from the same perspective of the health and safety officer and can issue any ruling that the health and safety officer could have issued, including rulings to terminate a contravention of the Code.

[17] On the matter of the claim by the appellant that the respondents have an agenda to broaden the issues in this hearing, counsel counters that this is not the case as the respondents are addressing the very issues before the appeals officer, namely whether the

risks with the "one-off" are a "normal condition of employment", as alleged by Brink's, and do not intend to adduce evidence or making any submissions about other refusal actions by other Brink's employees regarding the same model, although it claims that the appellant has provided no authority for its proposition that "the appeals officer is seized with inquiring into the specific directions issued in the specific appeals". In counsel for the respondents' words, in the present appeals, "the issue, quite clearly, is whether the work was safe. Was a danger ruling warranted?"

[18] Finally, on the matter of an award for costs against the respondents requested by the appellant, the respondents argues that the wording of the provisions invoked by the appellant in this regard simply does not confer such an authority to an appeals officer.

Analysis

[19] In considering the conclusion that needs to be arrived at in the present case, it is important to first refer to the actual text of the directions issued by HSO Roy. That text states first that "**there is a condition that constitutes a danger** to an employee while at work", (emphasis added) and then goes on to describe that condition as being that "the employer failed to provide a safe workplace by removing the guard in the proposed ***one off process***. This would require the messenger to act alone during the loading and unloading of money cassettes at different ATM locations". A first comment in light of that wording is that the HSO makes no mention whatsoever of the appellant failing to abide by any of the obligations raised by the respondents in their request for motion. This however does not translate into this matter not being relevant to the resolution of the question raised by the appeals or being inscribed into all of the elements being submitted to an appeals officer in his review on the merits of the matter under appeal. This being said, one cannot ignore that there exists a long established principle at case law that the mere contravention of regulatory procedures by an employer (does) not make the work place dangerous within the meaning of the Code. In 1989, the Canada Labour Relations Board stated just that in *Coulombe* v. *Empire Stevedoring Co.* (1989), 78 di 52 "A danger does not necessarily exist because an employer contravenes an occupational safety and health statute or regulation or a regulatory standard on a piece of equipment" and this was also endorsed by Appeals Officer Malanka in his October 2002 decision No. 02-022 in Don Boucher and James Stupor and Correctional Service Canada "Whether or not all of the occupational health and safety hazards cited by correctional officers Boucher and Stupor constituted a contravention to Part II and pursuant regulations, a contravention, or a number of contraventions of the Code, do not automatically equate to a danger".

[20] Proper comprehension of the jurisdiction of an appeals officer is essential to arriving at a conclusion in this instance. As appeals officer, I sit in review of a decision or direction by a health and safety officer, as the case may be, and depending on whether the conclusion arrived at by said officer is characterized as a "decision" pursuant to subsection 129(7) of the Code or a "direction" made pursuant to subsection 145(1) of the Code in the case of a finding of "contravention" or pursuant to subsection 145(2) of the Code in the case of a finding of "danger" as is the case here. Subsection 146.1(1) uses specific terminology to indicate the limits of what is submitted to an appeals officer. It

states in mandatory form ("shall") that the appeals officer is to "inquire into the circumstances of the decision or direction […] and the reasons for it." (Underlining added) On this alone, I find that it is not within the jurisdiction of an appeals officer to seize oneself or be seized for determination of a matter or issue that has not initially been the object of a determination by a health and safety officer. In my opinion, the wording of the Code alone is sufficient to validate the proposition that an appeals officer is seized with inquiring into the specific directions issued in the specific appeals of which he is seized.

[21] This, however, does not mean that in reviewing the decision or direction issued at another level, an appeals officer cannot receive evidence that would go beyond what the health and safety officer would have based its initial conclusion on, conditional upon such additional information satisfying evidentiary requirements and being relevant to the issue at hand, in the present cases whether a "danger" exists or existed. In acting *de novo*, an appeals officer gets to take a fresh look at what has been previously concluded by a health and safety officer and in doing so, may receive evidence that would not have been provided to the health and safety officer. There is actually no restriction as to what such additional information may be, short of satisfying on a balance of probabilities and, where the issue is whether "danger" exists, that such information be presented as part of the constellation of elements that would be considered generating a "danger" within the meaning of the Code and thus pertain to the merits or substance of what needs to be determined by the appeals officer.

[22] As part of his consideration of matters at appeal, the Code provides an appeals officer with the authority to vary, rescind or confirm a direction, without specifying whether such direction would be a "contravention" (145(1)) or a "danger" (145(2)) direction and to issue any "danger" direction it considers appropriate. It needs to be pointed out, as counsel for the respondents has done, that at case law, on the premise of an appeals officer being vested with the powers of a health and safety officer pursuant to subsection 145.1 (2), an appeals officer is not precluded from making a determination under subsection 145(1) of the Code, meaning issuing new "contravention" directions.

[23] What precedes essentially constitutes a repetition of what the parties have put before the undersigned, with the exception of what counsel for the respondents initially formulated in his initial request for motion of December 22, 2014, to the effect that solely on the basis of the alleged contraventions previously mentioned, which presumably would have been eventually established, the finding of danger under appeal could have been maintained without delving into the merits and substance of the said "danger" conclusion by the HSO that relates to the actual tasks of the refusing employees in "one off" mode. With that exception in mind, it is now clear to the undersigned that there is no real dispute between the parties as to what can be entertained by the undersigned in my consideration of these appeals. As such therefore, I would find the request for motion initially submitted by counsel for the respondents on December 22, 2014, to be unfounded. Furthermore, for the actual consideration of these appeals by the undersigned, the parties share the same position that in considering these appeals, and thus the

"danger" directions, in my *de novo* capacity, I have jurisdiction to receive any evidence that is relevant to the present appeals.

[24] It has become apparent in my consideration of the submissions by both sides that there exists or appears to exist a certain degree of acrimony between the parties that may be explainable by the fact that they are presently involved in a collective bargaining process and that the institution of the so-called "one-off" model may be a central issue. In the submissions by both sides, there have been insinuations of the parties having a separate "agenda", or attempting through the appeals process to bring bargaining issues to a head through the Code's processes or to conduct an "end run" around the consultative process mandated by the Code. Apart from the questionable relevancy of such affirmations as regards the actual motion in whatever form, I would point out that even though it is accepted principle that proceedings such as the present appeals cannot and should not be used in the pursuit of resolving labour relations issues, a motion such as the present is not the proper avenue, if any, to achieve resolution of such issues. Furthermore, I would forewarn the parties that in considering these appeals, I will not be drawn into nor be made a pawn in the confrontation between both sides in matters that exceed those that are relevant to the present appeals.

[25] Finally, the appellant has brought forth the matter of my awarding costs against the respondents in view of what the appellants consider an abuse of process by the respondents failing to address the originally stated issue and instead arguing "new" issues that could have been dealt with in the course of the hearing on the merits, thereby causing undue delay in the final disposition and needless expenses to the appellant. I have to admit having been somewhat disturbed by the stance taken by the respondents and I actually agree with the appellant that the issues finally raised by the respondents can be dealt with in the course of the hearing on the merits, certainly when I take into account the virtual commonality of views finally expressed by both sides. However, regardless of the actual dilatory impact on the hearing, I find that it is not necessary for the undersigned to address the matter of whether this constituted an abuse of process for two reasons. First, from the standpoint of the conduct of the hearing, this proceeding will have resulted in a clear statement of the scope of the appeal hearing which in the end should avoid incurring evidentiary objections when eventually proceeding on the merits. Secondly, on the actual awarding of costs, I share the view expressed by counsel for the respondents that the provisions of the Code, Part I and Part II, invoked by the appellant in support of such do not provide authority to the undersigned to award costs as such authority would be restricted to a member, the Chairperson or a Vice-Chairperson of the Canada Labour Relations Board, as Board is defined at subsection 122(1) of the Code and the undersigned, as appeals officer, is not a member of said Board.

Decision

[25] For the reasons mentioned above, the preliminary motion made by the respondents on December 22, 2014, is dismissed.

Jean-Pierre Aubre
Appeals Officer