Occupational Health and Safety Tribunal Canada

Date: 2015-02-17
Case No.: 2013-08

Between:

Nancy Manderville, Appellant (Respondent to Motion)

and

Correctional Service Canada, Respondent (Applicant to Motion)

Indexed as: *Manderville* v. *Correctional Service Canada*

Matter:	Motion to dismiss on the grounds of mootness.
Decision:	The appeal is moot.
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Language of decision:	English
For the appellant:	Mr André Lagault, Union Advisor, CSN
For the respondent:	Mr Richard Fader, Senior Counsel, Treasury Board of Canada Secretariat, Legal Services
Citation:	2015 OHSTC 3

REASONS

[1] This matter concerns an appeal brought forward by Ms Nancy Manderville, a correctional officer at the Atlantic Institution, Correctional Service of Canada (CSC), filed pursuant to subsection 129(7) of the *Canada Labour Code* (the Code). On January 28, 2013, Mr Daniel Roy, Health and Safety Officer (HSO), rendered a decision that a danger due to specific and lewd behaviours of an inmate did not exist. Following Ms Manderville's notice of appeal, CSC filed a motion for dismissal based on mootness.

Background

[2] On January 23, 2013, a female correctional officer (not Ms Manderville) witnessed an inmate perform a lewd act. The warden placed the inmate in segregation until the completion of a Threat Risk Assessment. The assessment report stated that there was no intelligence on the basis of which continued segregation of the inmate was justifiable. While the inmate in question had a history of exposing himself at other institutions, he was not found to be a likely threat if returned to the open population of the prison.

[3] Ms Manderville, though not the female correctional officer who observed the offensive behaviour, filed a work refusal pursuant to section 128 of the Code because of her belief that managing this inmate in the open population of inmates posed a danger to all female guards. Security intelligence personnel, institutional parole officer, and the institutional psychologist supported the appellant's complaint.

[4] Following his investigation, HSO Roy made the following determination on January 28, 2013:

> I can find no evidence that the inmate's activity which is the subject of this employee's refusal presents greater risk to her safety than her regular duties, the mere presence, although distasteful of an inmate exposing himself or even masturbating in front of a guard who is in a protected controlled location does not in my opinion signify an increase an increase [*sic*] to regular job hazards which may be faced by a Correctional Officer as part of her or his normal work day.
>
> The employer has various policies in place that deal with abuse, threats, stalking and assaults against employee [*sic*] which discuss precursors to incidence and what to do when you are in a threat situation.
>
> Therefore for the reasons listed above, I do not believe that a danger exists pursuant to the Canada Labour Code Part II.

[5] On January 29, 2013, Ms Manderville filed her notice of appeal with the Occupational Health and Safety Tribunal Canada (Tribunal). Following many scheduling challenges, on October 16, 2014, the respondent raised the issue that the case is now moot because the inmate exhibiting the offensive conduct had been moved to a different institution indefinitely. Following the October 23rd pre-hearing teleconference, it was determined that the parties would deliver submissions on the question of mootness. After receiving submissions from both parties, on November 13, 2014, I notified the parties of my decision that the matter on appeal was indeed moot. The following are the reasons for my decision.

Submissions of the parties

A) Respondent's (Applicant to motion) submissions

[6] The respondent based its submissions on *Borowski* v. *Canada (Attorney General)*, [1989] 1 SCR 342. The first part of the mootness test asks whether there remains a tangible and concrete issue at the time of hearing when the Tribunal is called upon to make a decision, or whether the concrete issue disappeared to the extent that the appeal would be merely academic. The second part of the test asks if the Tribunal should nonetheless exercise its discretion and still hear the case.

[7] Given that the inmate in question is now at a different institution, the respondent submitted that there is no longer a live controversy. Furthermore, the respondent requested the Tribunal not exercise its discretion to hear the appeal because it would have no concrete impact on the rights of the parties, or subsequent employees of the respondent who find the need to refuse due to the lewd actions of this inmate or another.

[8] In particular, the respondent cited examples of cases where the Tribunal had found cases to be moot because the appealing employee was no longer exposed to the risk in question, i.e. (Tanya Thiel v. Correctional Service Canada, 2012 OHSTC 39); the end of their employment, i.e. (Maureen Harper v. Canadian Food Inspection Agency, 2011 OHSTC 19); and the closure of a facility, i.e. (Correctional Service of Canada v. Mike Deslauriers, 2013 OHSTC 41). In each of these cases, the respondent submitted that there was no impact on the rights of the parties if the appeal was heard, especially the employees. In this case, the appellant is no longer exposed to the danger that was arguably posed by the offensive inmate and the case is moot.

[9] The respondent stated that the appellant is not in a position to speak for all female correctional officers because the Tribunal has confirmed that the right to refuse work is an individual right associated with a specific work place hazard, condition, or activity.

B) Appellant's (Respondent to motion) submissions

[10] The appellant first submitted that the appeals officer should, on principle, hear the entire case and submissions on mootness at the same time and render a decision on the whole case after that. It also submitted that the very fact that an appeal has been filed and not withdrawn means there remains a live controversy between the parties. It also relied on a 2003 decision of Donna Willan and Public Service Alliance of Canada and Human Resources Development Canada[1], which rejects the notion that an employee cannot appeal a case if they no longer work for the employer and the appeal is based on concern for other federal employees still occupying the work place.

[11] Finally, the appellant submitted that the very nature of the conduct that sparked the work refusal is such that it warrants consideration by an appeals officer.

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C) Reply

[12] The respondent responded that there is no principled reason to hear an entire case and submissions on mootness at the same hearing since a primary driver of a mootness motion is to save scares administrative resources associated with resolving an appeal. The respondent also submitted that there is a difference between whether an appeal is moot, as is submitted in the case in this matter, and whether an appeal is admissible at all, which would be a better application of the appellant's cited jurisprudence. The respondent submitted that the cases it cited in its submissions (and referenced above), are the most current and on point of the Tribunal's jurisprudence on mootness. Finally, the respondent submitted that "bad precedent" is not a reason for the Tribunal to exercise its discretion, and it asserted that appeals officers are not bound by the doctrine of *stare decisis*.

Analysis

[13] The test for whether a matter is moot comes from *Borowski* and must be applied in the framework of the Tribunal. The first step is to determine whether the requisite tangible and concrete dispute has disappeared, thereby rendering the issue academic. If that is the case, the second step requires an appeals officer to determine whether he/she should exercise his/her discretion to hear the case on its merits.

[14] When hearing an appeal, the appeals officer must exercise powers as granted in the Code. In the context of a work refusal, the role of the appeals officer is to determine whether the alleged danger existed *and* persists, and thus whether the refusing employee may continue the refusal absent amelioration of the situation. The appellant to an appeal of a decision that the danger does not exist seeks for an appeals officer to find a danger and issue a direction pursuant to subsection 145(2) of the Code to the employer to correct the situation; the respondent seeks for an appeals officer to confirm the HSO's original decision. A decision either way will generally have an effect on the parties and at the work place. The exercise of an appeals officer's powers must not be futile.

[15] In addressing the first step of the mootness test, I will need to determine whether a decision on my part, and the resulting remedy, could potentially have a tangible, concrete or practical effect that will impact on the rights of the parties based on the facts of the case.

[16] The Supreme Court of Canada, in *Borowski*, stated that "if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot."

[17] In the present case, there is no debate that the inmate who triggered this work refusal as a source of potential danger is no longer in the work place. The source of the alleged danger has been removed, which therefore means that the refusing employee is no longer exposed to the alleged danger.

[18] Moreover, were I to consider the merits of the present appeal and decide that a danger existed, as requested by the appellant, it is my opinion that the issuance of a danger direction

would be a futile exercise given that the situation has already been corrected by the removal of the inmate in question.

[19] Considering all the above, I find that there is no longer a live controversy that can affect the rights of the parties and the appeal has therefore become moot. Having come to this conclusion, I now need to determine whether I should nonetheless exercise my discretion to hear the case on the merits despite its academic nature. I have decided not to do so, for the following reasons.

[20] In this case, an employee engaged in a work refusal in a specific circumstance. This refusal is an individual right and subject to an independent assessment by a HSO. I have already determined that the circumstances from the time of refusal to now have changed such that the source of the alleged danger is no longer present and there would be no effect should I make a determination on the merits.

[21] In addition, given my determination that the case is moot, it does not preclude future work refusals under similar circumstances. Each work refusal is assessed on a case by case basis and an appeal is heard in light of the facts and circumstances in each case.

Decision

[22] For the reasons set out above,

-The appeal is dismissed as being moot.

-The respondent’s request to have the written submission of this application sealed is granted.

Michael Wiwchar
Appeals Officer