



Occupational Health and Safety Tribunal Canada

Date: 2015-03-26
Case No.: 2013-47

Between:

Air Georgian Limited, Appellant

Indexed as: *Air Georgian Limited (Re)*

Matter: Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer.

Decision: The direction is varied.

Decision rendered by: Mr. Peter Strahlendorf, Appeals Officer

Language of decision: English

For the appellant: Mr. David Curry, Company Safety Officer, Air Georgian Limited

Citation: 2015 OHSTC 6

REASONS

[1] This decision concerns an appeal by the employer, Air Georgian Limited (Air Georgian), brought under subsection 146(1) of the *Canada Labour Code* (the Code) of a direction issued by Health and Safety Officer (HSO) Kim Mordaunt on August 20, 2013.

Background

[2] The HSO visited the premises of Air Georgian at 2450 Derry Road East, Mississauga, Ontario, which is at the Toronto Lester B. Pearson International Airport, on three occasions from October 2012 to July 2013. In conjunction with fellow HSO Janice Berling, HSO Mordaunt had been working with Air Georgian on a number of issues, one of them being sound levels that Air Georgian employees are exposed to at Toronto airport when working in proximity to aircraft with their engines in operation. HSO Mordaunt had a number of concerns regarding the measurement of sound levels and the adequacy of protective measures that were being taken. There were a number of communications between the employer's health and safety representative, Mr. Booth, and the HSO in the following weeks. One issue was the relevance of a sound level study done at the Montreal-Pierre Elliot Trudeau International Airport on similar operations which was done at some time in the past. The HSO formed the opinion that a sound level assessment, done by a qualified person, was necessary at the Toronto airport.

[3] Air Georgian's disagreement with the necessity of this led to the issuance of the following direction in question on August 20, 2013:

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On October 24, 2012, November 14, 2012, July 15, 2013, the undersigned health and safety officer conducted inspections in the work place operated by Air Georgian Limited, being an employer subject to the *Canada Labour Code*, Part II, at 2450 Derry Road East, Mississauga, Ontario, L5R 1Y2, the said work place being sometimes known as Air Georgian Limited.

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

Paragraph 125.(1)(n) - Canada Labour Code Part II,
Subsection 7.3(1) - Canada Occupational Health & Safety
Regulations

Where an employee in a work place may be exposed to an A- weighted sound pressure level equal to or greater than 84 dBA for a duration that is likely to endanger the employee's hearing, the employer shall, without delay,
(a) appoint a qualified person to carry out an investigation of the degree of exposure; and

(b) notify the work place committee or the health and safety representative of the investigation and the name of the person appointed to carry out the investigation.

The employer has failed to appoint a qualified person to carry out an investigation of the degree of exposure to A-weighted sound pressure levels for a duration that is likely to endanger employees hearing.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than September 30, 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 North York, this 20th day of August, 2013.

[signed]
Kim Mordaunt
Health and Safety Officer
Certificate Number: GE0137

To: Air Georgian Limited
2450 Derry Road East
Mississauga, Ontario
L5R 1Y2

[4] Paragraph 125(1)(n) of the Code and subsection 7.3(1) of the *Canada Occupational Health and Safety Regulations* state:

125. (1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

(n) ensure that the levels of ventilation, lighting, temperature, humidity, sound and vibration are in accordance with prescribed standards;

7.3 (1) Where an employee in a work place may be exposed to an A-weighted sound pressure level equal to or greater than 84 dBA for a duration that is likely to endanger the employee's hearing, the employer shall, without delay,

(a) appoint a qualified person to carry out an investigation of the degree of exposure; and

(b) notify the work place committee or the health and safety representative of the investigation and the name of the person appointed to carry out the investigation.

[5] On August 29, 2013, the appellant contacted the Occupational Health and Safety Tribunal Canada with an application for a stay until the matter is resolved on the merits. Following a teleconference hearing for a stay of the direction heard on October 9, 2013, I

granted the appellant the stay as requested until a decision on the merits of the appeal is rendered by an appeals officer (*Air Georgian Limited*, 2013 OHSTC 30).

[6] A pre-hearing teleconference took place on November 12, 2014. On December 8, 2014, the appellant, now represented by Mr. David Curry, attended in Ottawa for a hearing on the merits of the appeal.

[7] At the hearing, the appellant accepted the HSO's direction but did not withdraw the appeal. Instead, in light of a change in the employer's health and safety representative and a better understanding of how the appellant could comply with the HSO's direction, the appellant changed the ground of appeal from the contravention itself to the compliance date.

[8] Following the testimonies of the HSO and the appellant, I agreed to vary the compliance date to afford the appellant a reasonable opportunity to fully comply with the direction.

Appellant's submissions

[9] At the December 8th hearing, the appellant's representative conceded that neither he nor his predecessor is an expert in sound level exposure such that either of them could confidently rely on the study conducted at the Montreal airport and apply it to the Toronto airport. He agreed that the appellant should undertake a site-specific study in order to best assure the health and safety of its employees at the Toronto airport. In light of this changed position on the HSO's direction, the appellant requested a new compliance date.

Analysis

[10] Under paragraph 146.1(1)(a) of the Code, an appeals officer has the power to vary a direction issued by a health and safety officer. The paragraph reads:

146.1 (1) If an appeal is brought under subsection 129(7) or section 146(1), the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
(a) vary, rescind or confirm the decision or direction; [...]

[11] The appellant clearly no longer wished to challenge the HSO's direction, but requested an extension of the compliance date. At one point the appellant had every intention to appeal the contravention, and it even received a stay of the direction. Even though the appellant exercised many procedural rights under the Code and delayed compliance for over one and a half years, it changed its position and now wishes to comply and therefore seeks a variance to the HSO's direction as was done in *Handlex Inc. (Re)*, 2010 OHSTC 8. Because the appellant achieved a stay until a final determination of its appeal in this matter, varying the compliance date allows the appellant adequate time to implement the measures necessary to comply with the HSO's

direction. Otherwise, the appellant would automatically be in contravention of the direction despite having a stay in advance of its appeal.

[12] From the appellant's testimony, I am convinced that the desire to comply is genuine and that the representative seeks to work collaboratively with the HSO to ensure that sound levels at the Toronto airport are studied so as to best protect its employees.

Decision

[13] This written decision confirms my oral decision rendered on December 8, 2014, that changed the compliance date of the direction. Therefore, I vary the direction issued on August 20, 2013 by HSO Mordant. The date to terminate the contravention will be modified from September 30, 2013 to February 28, 2015. The varied direction is appended to this decision.

Peter Strahlendorf
Appeals Officer

APPENDIX

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1) **AS VARIED BY APPEALS OFFICER PETER STRAHLENDORF**

On October 24, 2012, November 14, 2012, July 15, 2013, the undersigned health and safety officer conducted inspections in the work place operated by Air Georgian Limited, being an employer subject to the *Canada Labour Code*, Part II, at 2450 Derry Road East, Mississauga, Ontario, L5R 1Y2, the said work place being sometimes known as Air Georgian Limited.

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

Paragraph 125.(1)(n) - Canada Labour Code Part II,
Subsection 7.3(1) - Canada Occupational Health & Safety Regulations

Where an employee in a work place may be exposed to an A- weighted sound pressure level equal to or greater than 84 dBA for a duration that is likely to endanger the employee's hearing, the employer shall, without delay,

*a) appoint a qualified person to carry out an investigation of the degree of exposure; and
b) notify the work place committee or the health and safety representative of the investigation and the name of the person appointed to carry out the investigation.*

The employer has failed to appoint a qualified person to carry out an investigation of the degree of exposure to A-weighted sound pressure levels for a duration that is likely to endanger employees hearing.

Therefore, you are **HEREBY DIRECTED**, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than February 28, 2015.

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 North York, this 20th day of August, 2013.

[signed]

Kim Mordaunt

Health and Safety Officer

Certificate Number: GE0137

To: Air Georgian Limited
2450 Derry Road East
Mississauga, Ontario
L5R 1Y2