Occupational Health and Safety Tribunal Canada

Date: 2015-04-13
File No.: 2015-04

Between:

Termont Montréal Inc., Applicant

and

Syndicat des Débardeurs, SCFP, section locale 375 and Syndicat des Vérificateurs, ILA Local 1657, Respondents

Indexed under: *Termont Montréal Inc.* v. *Syndicat des Débardeurs, SCFP, section locale 375 and Syndicat des Vérificateurs, ILA Local 1657*

Matter:	Application for a stay of a direction issued by an official delegated by the Minister of Labour.
Decision:	The application is granted.
Decision rendered by:	Mr. Pierre Hamel, Appeals Officer
Language of decision:	French
For the Applicant:	Mr. Nicola Di Iorio, Legal Counsel, Langlois Kronström Desjardins
For the Respondents:	Mr. Daniel Tremblay, Representative, Syndicat des Débardeurs, SCFP, section locale 375 Mr. Christian Parent, Representative, Syndicat des Vérificateurs, ILA Local 1657
Reference:	2015 OHSTC 7

REASONS

[1] The matter before me is an application filed by Termont Montréal Inc. (hereinafter "Termont" or "the Applicant") for the stay of a direction issued on January 20, 2015 under subsection 145(1) of the *Canada Labour Code* (the Code) by Labour Affairs Officer Mario Thibault, in the capacity of an official delegated by the Minister of Labour. Termont filed said application along with its notice of appeal on February 19, 2015.

[2] The direction to which this application pertains reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE* PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> INSTRUCTION TO THE EMPLOYER PURSUANT TO SUBSECTION 145(1)
>
> On April 10, 2014, the undersigned Labour Affairs Officer, Occupational Health and Safety, in the capacity of an official delegated by the Minister of Labour, carried out an inspection in the workplace operated by Termont Montréal Inc., an employer subject to Part II of the *Canada Labour Code*. Said workplace is located at Section 68, Port of Montreal, P.O. Box 36, Section K, Montreal, Quebec, H1N 3K9, and is sometimes referred to by the name of Termont Montréal Inc.
>
> The official delegated by the Minister of Labour considers that the following provisions of Part II of the *Canada Labour Code* are being contravened.
>
> **No. / No : 1**
>
> 125.(1)(n) - Part II of the Canada Labour Code, 6.5 - Canada Occupational Health and Safety Regulations.
> The average level of lighting observed between rows C and D of the terminal is below the value of 30 lx, as is required for areas in which goods are stored in bulk or where goods in storage are all of one kind.
>
> **No. / No : 2**
>
> 125.(1)(n) - Part II of the Canada Labour Code, 6.11(1) - Canada Occupational Health and Safety Regulations.
>
> Fifty-three (53) readings that were taken between rows C and D of the terminal indicated levels of lighting that were less than one third of that prescribed.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)*a*) of Part II of the *Canada Labour Code*, to cease all contravention no later than February 3, 2014.
>
> Furthermore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)*b*) of Part II of the *Canada Labour Code*, to take

> the steps prescribed by the Labour Affairs Officer, Occupational Health and Safety, acting in the capacity of an official delegated by the Minister of Labour, to ensure that the contravention does not continue or reoccur, within the time limits specified by him.
>
> Issued at Montreal this 20th day of January, 2015.
>
> [signed]
> Mario Thibault
> Labour Affairs Officer,
> Occupational Health and Safety,
> Official delegated by the Minister of Labour
> […]
>
> To: Mr. Julien Dubreuil, Terminal Director
> Termont Montréal Inc.
> Section 68, Port of Montreal, P.O. Box 36, Section K,
> Montreal, Quebec, H1N 3K9

[3] The application was heard via conference call on March 12, 2015. The call's participants were the counsel for the Applicant, Mr. Nicola Di Iorio, and the representatives of the Respondents, Messrs. Daniel Tremblay (Longshoremen) and Christian Parent (Checkers). I also invited Mr. Thibault to participate in this conference call in the capacity of resource person for consultation by the Appeals Officer, as needed.

[4] Counsel for the Applicant had sent a summary of his argument in support of this Application to the Occupational Health and Safety Tribunal Canada (Tribunal) and to the other parties a few minutes prior to the start of the conference call.

[5] On March 13, 2015, the Tribunal informed the parties of the operative part of my decision to grant a stay, subject to certain conditions. Hereinafter I present the reasons for my decision.

Background

[6] It is useful to briefly present certain facts that are deemed pertinent, as they emerge from Mr. Thibault's report and from the Applicant's presentation in support of this Application for a stay.

[7] Termont is a company located at the Port of Montreal, offering the services of stevedoring and terminal handling of containers. The total square metrage of the terminal is two hundred thousand (200,000) square metres, and that of the storage area is one hundred sixty thousand (160,000) square metres. The square metrage of the area to which the direction specifically pertains (block C-D) is fifty-three thousand (53,000) square metres.

[8] Termont uses the services of longshoremen, who are responsible for loading and unloading the ships. These longshoremen are members of the Syndicat des Débardeurs, SCFP, section locale 375. Termont also uses the services of checkers;

their main function is to control the inventory of the containers and to coordinate the activities of the longshoremen assigned to moving the containers. These checkers move about the terminal using Toyota Echo or Yaris cars which are adapted to their job requirements. It was mentioned that the checkers are generally expected to move through the terminal by car, although they may be called upon to get out of the car to locate the number of a container if it is not visible from within the car. They belong to the Syndicat des Vérificateurs, ILA Local 1657.

[9] The first documented intervention by a health and safety officer, as the Code referred to them at the time, dates back to October 2013. Mr. Thibault visited Termont after a complaint was filed regarding the visibility of the Echo cars used by the checkers. There had been a few instances of checkers' cars being bumped into by container top loaders. At that time, Mr. Thibault issued a direction dated October 7, 2013, after which Termont undertook to modify nine (9) checker vehicles by replacing the cars' emergency rotating light with a different type.

[10] Around six months later, on April 10, 2014, Mr. Thibault visited Termont again to carry out a technical survey, accompanied by Mrs. France de Repentigny, Industrial Hygiene Technologist. More specifically, the survey was intended to assess the lighting levels of the in-transit containers terminal, apart from the docking area, and to verify the compliance thereof with lighting regulations.

[11] After that visit, Mrs. De Repentigny completed her analysis report on September 17, 2014. In that report, she concluded that the lighting levels of terminal sectors C and D, where containers are stored, was below the prescribed standards. It was mainly on the basis of that report that Mr. Thibault issued the direction to which an appeal and this Application pertain, on January 20, 2015. Mrs. De Repentigny believes that the lighting system does not provide sufficient light to ensure that employees who might be called upon to inspect the in-transit containers in the Termont Montréal Inc. terminal, on foot, would be able to do so safely.

[12] It appears that tests were carried out after the direction was issued, with a view to complying with it within the prescribed time limit. Termont apparently conducted tests intended to improve the lighting in the area concerned by the direction, but it was mentioned that adding more sources of light created glare, so instead of solving the problem, it posed a greater risk of accidents. This statement is not being contested.

Analysis

[13] The power that an appeals officer has to grant a stay of a direction stems from subsection 146(2) of the Code, which reads as follows:

> **146. (2)** 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.

[14] This provision confers discretionary power upon the appeals officer to stay a direction, without specifying the criteria on which such discretion must be based. It goes without saying that this discretionary power must be exercised in a reasonable and non-arbitrary manner, taking into account all the circumstances of the case, the goal of prevention that is embodied by the Code, and the legislator's intention that directions be implemented within the prescribed timeframes, even though they may be challenged by appeal. The appeals officers have therefore developed a set of three criteria to serve as a framework for exercising this discretion, which must be done in a manner consistent with the general purpose of the Code, i.e. "to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies" (section 122.1 of the Code) and to ensure compliance with its obligations.

[15] This set of criteria is as follows:

> 1. The applicant must satisfy the appeals officer that there is a serious question to be tried as opposed to a frivolous or vexatious claim.
>
> 2. The applicant must demonstrate that he or she would suffer significant harm if the direction is not stayed by the appeals officer.
>
> 3. The applicant must demonstrate that should a stay be granted, measures will be put in place to protect the health and safety of employees or any person granted access to the work place.

[16] Accordingly, I shall apply each of the above criteria, in order, to the circumstances of the case at hand.

Is the question to be tried as part of this appeal a serious issue?

[17] The precedents set by the appeals officers tell us that the threshold for meeting this first criterion is not very high. The appeal raises the issue of the well-foundedness of the direction regarding the lighting standard that applies to the workplace in question. This is a technical matter involving the interpretation of the *Canada Occupational Health and Safety Regulations* (the "*Regulations"*) and the sampling method used.

[18] In my opinion, the question raised in this case is serious and cannot be described as frivolous or vexatious. None of the parties expressed an opinion to the contrary during the hearing. They reported that the issue of lighting levels was a concern that had existed for some time and that some corrective measures had been taken to improve the visibility of workers called upon to work in terminal areas C and D. I conclude from the parties' statements that this concern is still current, and that it raises important issues for the parties.

[19] Moreover, in her report, Mrs. de Repentigny acknowledges that the prescribed standard that applies here is subject to interpretation; witness her comment to the effect that "No specific lighting level has been clearly established in the Regulations for the activities of a container handling terminal. This situation makes it more difficult to interpret the data when assessing compliance with Part VI of the Regulations."

[20] Finally, as we shall see during the examination of the second criterion, the direction requires the Applicant to take considerable and complex measures in order to achieve compliance. In light of these facts, I find no grounds to conclude that the appeal is frivolous or a stalling tactic, or to question the seriousness of the question to be tried as part of the appeal.

[21] I therefore conclude that the first criterion is met.

Will the applicant suffer significant harm if the direction is not stayed?

[22] Counsel for the Applicant submits that Termont would suffer significant harm if the stay were not granted, and would even be unable to comply within the prescribed deadlines. He refers to the diagram shown in the Attachment to Mrs. De Repentigny's report, which depicts the arrangement of containers in the areas of the terminal that Termont uses for its operations, and the locations of the lighting towers. The lampposts are located between sections A and B and along the railroad track that borders the terminal, on the north side. However, due to the height of the stacks of containers, up to five (5) containers high in some places, the light from those sources is obstructed and does not sufficiently illuminate terminal sections C and D. Thus it is clear that steps will have to be taken to correct this problem and, counsel continues, specialists will have to be brought in to assist Termont in assessing the corrective measures.

[23] Counsel for the Applicant explains that a number of solutions designed to improve the lighting in terminal sections C and D have been considered. First, adding lampposts between sections C and D. Termont estimates that ten (10) additional towers, more or less, would be required, at an estimated minimum cost of $200,000 for each lighting tower, for a total of $2,000,000. Each tower is a major undertaking because the electrical lines must be buried, and protective bollards must be installed. Termont will therefore have to bring in specialists to advise them and to conduct preliminary feasibility studies in order to evaluate whether installing new lampposts between sections C and D would constitute an obstacle that might expose workers and visitors to a risk of accident.

[24] Mr. Di Iorio further submits that it is simply impossible to install new lampposts, since the ground is currently frozen. He also points out that Termont leases the premises where it conducts its operations, and the land is owned by the Port of Montreal. Assuming that the Port of Montreal allowed Termont to proceed with the work, Termont would have to submit plans and specifications for the Port of Montreal's review and comments. Only after that step is completed could the

work begin. If the Port of Montreal were to perform the work itself, it would be necessary to undertake negotiations to reach an agreement, before the work could start.

[25] Even if Termont were able to take all these steps right away and to incur the considerable costs involved, these efforts would be pointless if the direction were to be rescinded as a result of the appeal.

[26] A second option that Termont considered was to install portable lighting towers that run on diesel fuel. However, Mr. Di Iorio states that, after tests were carried out to determine whether this option could solve the lighting problem, it was found that the lighting from these towers produced too much glare, and thus presented an even greater danger to the workers and other people moving about the terminal. This option was therefore ruled out.

[27] Finally, a third option was suggested, i.e. reducing the number of containers in sections C and D, in order to take advantage of the light provided by the lampposts installed along the railroad track; this would involve stacking the containers in piles of two (2) instead of five (5) as is currently the case. According to Mr. Di Iorio, not only is this option impossible, because Termont does not have space available to move the containers elsewhere, but it would cause the company great economic damage, even threatening its economic viability. Alternatively, the option of Termont suspending its operations in the evenings and at night would also cause great economic damage to it and to its customers, since ships that need to be unloaded and reloaded keep arriving at the port at all hours, and they would be left stranded.

[28] In my opinion, the arguments put forward by the Applicant convincingly demonstrate that Termont would suffer significant harm if the stay were not granted. Apart from the fact that it appears to be impossible to comply with the direction in the short term, due to weather conditions and the engineering work that would be required, the cost of such an undertaking would be considerable. Let me be clear: cost alone would not justify the stay of a direction, as appeals officers have ruled repeatedly when dealing with applications for a stay. But it seems to me that the whole set of factors invoked to substantiate the harm that Termont would suffer, i.e. the major expense to be incurred in building new towers, the complexity and scope of the work involved, the legal complexities relating to the fact that Termont is not the owner of the premises, the risks stemming from the interim lighting arrangements and the considerable economic loss that would result if Termont were to modify its operations as described above, convince me that the harm that Termont would suffer if the Application were rejected would be, in my opinion, very significant.

[29] In the ruling *City of Ottawa (OC Transpo)* v. *Norman MacDuff*, 2013 TSSTC 27, the appeals officer wrote the following in paragraphs 20 and 21:

> [20] For the second criterion, that of significant harm if a stay is not granted, I find that the applicant makes a convincing case with respect to the potential costs of compliance with the direction. Mr. MacDuff's characterisation of these costs as modest in relation to the City's overall budget might apply in strict percentage terms but I do not accept that it is a valid way to assess the apportionment of municipal expenditures. I agree with Counsel for the applicant that the costs of implementing the remedial measures discussed with the HSO would be considerable.
>
> [21] That said, I am conscious of appeals officers having held previously that financial costs or mere inconveniences do not alone satisfy the significant harm criterion. Even so, the potential financial costs in the present case are substantial and not of the same order as a mere inconvenience. In my view, the prospect of the applicant incurring considerable costs on the basis of a finding that it is contesting and that as in all appeals may or may not be sustained, deserves some consideration.
>
> [Underlining added]

[30] I note that the above comments were made in connection with an application for the stay of a direction that was issued after the health and safety officer had made a finding of danger. In the case before us, the direction was issued pursuant to subsection 145(1) of the Code, citing a violation of a prescribed standard, rather than a condition presenting danger to the workers, as defined in the Code. I am not minimizing how important it is for an employer to comply with prescribed health and safety standards; he is obliged to do so. However, the distinction that I am making strikes me as relevant when assessing the risks attached to staying a direction, versus the harm that would ensue if the stay were not granted. I also point out that the respondents are not contesting the scope and complexity of the measures that Termont would have to take to comply with the direction, nor the substantial costs, considered objectively, that those measures would entail.

[31] I have also become convinced that certain mobile lighting solutions have proven to be unsuitable, and worse, generated glare that would be likely to cause accidents for the workers. I also accept the claims relating to the third type of measure considered, that of stacking the containers in terminal areas C and D in piles of two (2) instead of five (5). Given that Termont does not have enough space to relocate the considerable number of containers that could no longer be stored if this measure were accepted, it would likely cut back the container unloading services by 3/5. In the case in point, the assertion that Termont would suffer great economic harm which would even threaten the company's economic viability strikes me, *a priori*, as neither exaggerated nor unreasonable. To my way of thinking, the same conclusion clearly applies to the option of ceasing night operations. These assertions made by counsel were not seriously contested during the hearing.

[32] I am also taking into account the fact that a significant amount of time (9 months) elapsed between Mrs. De Repentigny's inspection of the workplace relating to the terminal's lighting levels, and the issuance of the direction, and that the additional time taken up by the proceedings, along with the interim measures that will be discussed below, does not strike me as harmful. In fact, the deadline that was imposed by Mr. Thibault in his direction (i.e. February 3, 2015) has already expired, and during the hearing he stated that he would have agreed to a different implementation date, if he had been formally asked for one.

[33] Ultimately, it is my conviction that the numerous obstacles to the timely implementation of the direction are serious, are being invoked in good faith, and go beyond mere inconvenience for Termont; they are also likely to cause Termont substantial harm if the direction were not stayed, in the event that it ended up being cancelled or modified once the inquiry into the merits of the case was completed.

[34] For these reasons, it is my opinion that the second criterion for obtaining a stay of the direction is met.

Should a stay be granted, will measures be put in place to protect the health and safety of employees or of any other person granted access to the workplace?

[35] I have been informed that, in the past, requests have been made by the Syndicat des Vérificateurs, ILA Local 1657, to improve the safety of the checkers, which resulted in Termont adopting measures to that end:

- adding flags to the Echo cars
- adding a second emergency rotating light to the Echo cars
- modifying the pattern of said rotating lights, to distinguish them from other rotating lights and make them more visible.

[36] Those measures did not address the lighting levels per se, but were designed to make the employees more visible when driving around the terminal. In addition to those measures which are already in place, Termont is prepared to take the following steps to ensure the health and safety of employees or of any other person granted access to the workplace:

> a) increasing the visibility of the Echo/Yaris cars by painting them a different colour
>
> b) installing an LED light at the tip of the flag that is attached to the roof of the Echo/Yaris cars
>
> c) assessing the possibility of coordinating the emergency lights of the Echo/Yaris cars with the flashing lights

d) adding lights to the safety vests or armbands worn by the checkers, to make them more visible when they have to get out of their cars

e) continuing and accelerating the installation of the detection system on the container top loaders.

[37] Like the measures already adopted, these steps do not directly address the obligation to comply with the prescribed standards governing workplace lighting levels. However, they are intended to make the employees more visible when they drive around the terminal, and when they move around the containers on foot. If memory serves, this was the issue that gave rise to the first interventions by health and safety officers in 2013. The respondents' representatives did not argue that those measures would not adequately protect the workers during the proceedings; however, they pointed out that the measures did nothing to resolve the issue of lighting levels in the workplace, which remained a persistent and unresolved problem. They also stressed the fact that those measures had already been proposed by the work place health and safety committee. As for Mr. Thibault, he did not raise any concerns regarding the claim that those measures would minimize the risk of accidents by increasing the visibility of the vehicles and of the workers when they exit the vehicles, nor did he disagree that they had the effect of protecting the health and safety of employees or of any other person granted access to the workplace, during the term of the proceedings.

[38] I share that opinion, and am prepared to grant the application for a stay of the direction provided that Termont takes action, immediately, to apply the aforementioned measures. That said, the difficulty of implementing a direction to comply with the *Regulations* will not relieve Termont of its obligation to honour it, if it is maintained. The prescribed lighting standard is designed to ensure that employees can perform their job safely, that is, in this case, while being able to see clearly and to be seen by others. However, I am satisfied that these interim measures are appropriate for protecting employees' health and safety during the proceedings, in light of the chronicle of events in this case and the representations that have been made.

[39] I consider it important that the status of the implementation of these measures be reported periodically to the work place health and safety committee at Termont, and to Mr. Thibault.

Decision

[40] For these reasons, I hereby grant the application for the stay of the direction issued on January 20, 2015 by Mr. Mario Thibault, in the capacity of an official delegated by the Minister of Labour, until such time as a final decision is rendered by an appeals officer on the grounds of the appeal, subject to the following terms and conditions, of which the parties were informed on March 13, 2015:

- I take cognizance of the interim measures that the Applicant/Appellant, through counsel, has undertaken to implement during the proceedings to protect the health and safety of the employees called upon to work in the workplace to which the direction that is currently under appeal applies, or of any other person granted access to the workplace.

- These measures must be implemented immediately.

- I hereby order the Applicant/Appellant to periodically report the status of the implementation of these measures to the work place health and safety committee at Termont Montréal Inc., and to Mr. Thibault.

Pierre Hamel
Appeals Officer