Occupational Health and Safety Tribunal Canada

Date: 2015-10-22
Case No.: 2012-57

Between:

Nadine Rendina and Joseph Yu, Appellants

and

Air Canada, Respondent

Indexed as: *Rendina et al.* v. *Air Canada*

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by a health and safety officer.
Decision:	The decision that a danger does not exist is rescinded.
Decision rendered by:	Mr. Peter Strahlendorf, Appeals Officer
Language of decision:	English
For the appellants:	Mr. James Robbins, Counsel, Cavalluzzo Shilton McIntyre & Cornish LLP
For the respondents:	Ms. Pamela Tabry, Counsel, Air Canada Centre, Law Branch
Citation:	2015 OHSTC 20

REASONS

[1] This case concerns an appeal brought under subsection 129(7) of the *Canada Labour Code* (the Code) of a decision rendered by Health and Safety Officer (HSO) Jacques D. Servant on August 13, 2012.

Background

[2] The following is based on my review of HSO Servant's report of August 13, 2012, which included reports by the employee representative Ms. Tamara DiMaddalena and the employer representative Mr. Joe Donato.

[3] On August 10, 2012, three employees on an Air Canada aircraft at the Winnipeg airport noticed a strong odour on board the aircraft. The aircraft was an Embraer 190 and the flight was AC 1104 from Winnipeg to Montreal. The three employees were Ms. Nadine Rendina, Mr. Joseph Yu and Mr. Jeffrey Guay.

[4] On the same day, HSO Servant received notice of a work refusal by the three Air Canada employees. He commenced his investigation immediately via telephone. In his report, the HSO stated that "The investigation was conducted by telephone with all parties". He referred to the employer representative and the employee representative as being present for the telephone conversation, not the employees who were engaging in the work refusal.

[5] The refusal to work was in regard to a strong odour coming from the aft lavatory on the aircraft. The source of the problem was determined to be a crack in the pipe from the toilet to the waste storage tank on the aircraft.

[6] In the telephone conversation, the employer representative, Mr. Donato, explained how the lavatory had been flushed twice, a crack had been found in the pipe between the toilet and the storage tank. The lavatory was to be closed during the flight. An "airpack", which could only be used while the aircraft was under its own power, would then be used to clear the air of the odour while the aircraft was in flight.

[7] The aircraft was then to be flown to Montreal where it could be fixed, with a confirmation in writing to that effect by the employer, to be sent to the HSO. A part to fix the aircraft was not available in Winnipeg.

[8] The HSO concluded from Mr. Donato's explanation that the employer had taken reasonable steps to resolve the situation. The HSO issued a verbal decision of "no danger". He communicated his decision by telephone to the three employees who had engaged in the work refusal.

[9] Up until the point where the HSO communicated his decision of "no danger" to the three employees, they had not been part of the telephone-based

investigation. The HSO had not consulted directly with the employees during his investigation.

[10] The decision of HSO Servant was appealed by Nadine Rendina and Joseph Yu.

[11] A pre-hearing teleconference took place on September 11, 2014. I was the attending appeals officer. The appellants were represented by Mr. James Robbins, counsel. The respondent was represented by Ms. Pamela Tabry, counsel.

[12] The parties informed me that they did not wish to proceed with the hearing and that they were requesting that I rescind the decision of "no danger" on the basis that HSO Servant had not consulted directly with the refusing employees during his investigation.

Issue

[13] I will need to determine whether HSO Servant's decision should be rescinded on the basis that it was rendered without a proper investigation in the presence of the refusing employees.

Analysis

[14] My authority is found in subsection 146.1(1) of the Code:

> Inquiry
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> 146.1 (1) If an appeal is brought under subsection 129(7) or section 146, 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
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> (a) vary, rescind or confirm the decision or direction; and
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> (*b*) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

[15] In the case of *Howard Page and Correctional Service Canada*, Decision No. CAO-07-018 (May 25, 2007), Mr. Howard Page, a Correctional Officer at Millhaven Institution, had appealed a decision of "no danger" made by HSO Bob Tomlin. Appeals Officer R. Lafrance rescinded the decision on the basis that the HSO did not attend at the work place and so did not render a decision based on a properly conducted investigation.

[16] Appeals Officer Lafrance referred to subsection 129(1) of the Code:

> 129. (1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform

> an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to investigate the matter in the presence of the employer, the employee and one other person who is
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> (a) an employee member of the work place committee;
> (b) the health and safety representative; or
> (c) if a person mentioned in paragraph (a) or (b) is not available, another employee from the work place who is designated by the employee.

[17] Appeals Officer Lafrance viewed subsection 129(1) to mean that once an HSO is seized with the investigation of a work refusal "he has no choice but to investigate the work refusal in the 'presence' of the employee and the other persons required by the Code, […]".

[18] Appeals Officer Lafrance relied on the decision of the Federal Court of Appeal in *Dragseth* v. *Canada (Treasury Board)*, [1991] FCJ No. 1074 where Mr. Justice Mahoney held that the requirements of subsection 129(1) are mandatory.

[19] Appeals Officer Lafrance determined, therefore, that it was mandatory for an HSO to attend at the work place and conduct an investigation in the presence of the persons mentioned in subsection 129(1).

[20] Appeals Officer Lafrance allowed that there might be exceptional circumstances where it would be physically impossible for an HSO to comply with subsection 129(1), but such circumstances were not present in the case before him.

[21] Appeals Officer Lafrance was mindful of the fact that an appeal before an appeals officer is *de novo* in nature and therefore he could receive further evidence to determine if a danger had existed for the appellant even though the HSO's investigation was flawed. The appeals officer declined to proceed further as the appellant had not provided further evidence to support his contention that a danger existed.

[22] The case of *Canadian Food Inspection Agency* v. *Public Service Alliance of Canada*, 2015 OHSTC 1, involved the question of rescinding a direction rather than rescinding a decision of "no danger". Appeals Officer Pierre Hamel strongly supported the principle that an agreement of the parties should not determine the key issues before an appeals officer. He stated at para. 26:

> [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. […]

[23] In spite of his strong words opposed to rescinding a direction based on the parties' agreement, Appeals Officer Hamel concluded that the principle of judicial economy could justify the termination of proceedings when the parties no longer wish to pursue the matter. He stated at para 28:

> [28] […] 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, […]

[24] The main issue before me is whether the HSO erred in making his decision such that his decision should be rescinded. More specifically, the issue is whether the HSO's investigation was flawed because it was not done in the presence of the refusing employees. If I decide the decision should be rescinded should I decline to investigate further and close the file?

[25] For a country as big as Canada, with federal work places scattered from one end to the other, I wouldn't say it would be exceptional for the circumstances to be such that it would be impossible, or highly impracticable, for the HSO to be physically present. The refusing employee being able to hear and speak during the investigation is far more important than the HSO being physically present with the employee. The right to refuse dangerous work is a right held by an employee, who may or may not exercise that right. While the role of the employee representative is very important in a work refusal, the employee representative should not replace the employee him or herself in the process. The circumstances would have to be truly exceptional for the refusing employee to lose the opportunity to speak to the investigating HSO and lose the opportunity to hear the HSO's discussions with others. Where an investigation is done by telephone, the refusing employee should be part of the teleconference. That is what "in the presence of the employee" means for an investigation by telephone.

[26] For easy reference, I have attached a letter from the parties setting out their agreement as to the facts surrounding the nature of HSO Servant's investigation. I

find that this confirms what is evident from the HSO's report. The investigation was not done in the presence of the refusing employees because for an investigation done by telephone, the employees were not part of the teleconference.

[27] As did the appeals officers in the *Page* and *Dragseth* decisions, I believe I have the authority to rescind the decision on the grounds that HSO Servant's investigation was not conducted in the presence of the employees who exercised their right to refuse dangerous work as required by subsection 129(1) of the Code. The employees had not chosen not to be present and he only spoke to them after he had made his decision.

[28] The parties do not wish to proceed. There is no longer any relevant dispute between them in relation to this matter as revealed by the attached letter. I do not believe the purpose of the Code would be subverted by declining to investigate further. The principle of judicial economy weighs heavily. Following Appeals Officer Hamel in *CFIA*, I decline to proceed further.

Decision

[29] For these reasons, I rescind the decision rendered on August 13, 2012 by HSO Servant and close the file.

Peter Strahlendorf
Appeals Officer

APPENDIX

OHSTC File No. 2012-57

MINUTES OF SETTLEMENT

BETWEEN:

Air Canada Component of the Canadian Union of Public Employees

("CUPE", the "Union")

- and -

Air Canada

("Air Canada")

In the matter of the Appeal pursuant to subsection 129(7) of the Canada Labour Code (the "Code") of the Decisions dated August 13, 2012 of Health and Safety Officer ("HSO") Jacques Servant regarding the work refusals of Joseph Yu and Nadine Rendina on August 10, 2012; Occupational Health and Safety Tribunal of Canada File No. 2012-57

WHEREAS on August 10, 2012, Joseph Yu and Nadine Rendina were assigned to operate Air Canada Flight AC 1104 from Winnipeg to Montreal;

AND WHEREAS Mr. Yu and Ms Rendina exercised their right to refuse work pursuant to section 128 of the Canada Labour Code, Part II (the "Code");

AND WHEREAS HSO Servant rendered a decision of "no danger" without conducting an investigation in the presence of Ms Rendina or Mr. Yu, who had not chosen to not be present for an investigation;

AND WHEREAS CUPE filed the present appeal on behalf of Mr. Yu and Ms Rendina;

AND WHEREAS the circumstances leading to the work refusal were resolved so that there is no longer any live controversy on this issue between the parties, including the refusing employees;

NOW THEREFORE the parties agree as follows:

1. The above recitals are true and form a part of these Minutes of Settlement;

2. Because there was no investigation in the presence of the employees exercising their right to refuse dangerous work within the meaning of s. 129(1), and because of the other circumstances described herein the Decisions of HSO Servant dated August 13, 2012 in respect of the work refusals of Mr. Yu and Ms Rendina shall be rescinded, and there shall be no finding with respect to the presence or absence of "danger" in the circumstance of those work refusals;

3. The parties request that these Minutes be incorporated into a consent decision and order by the Appeals Officer;

4. These minutes may be signed in counterparts, a copy of which shall be as good as the original.

Dated this ___ day of October, 2014

For CUPE

For Air Canada