



Occupational Health and Safety Tribunal Canada

Date: 2016-04-18
Case No.: 2016-06

Between:

Brian Zimmerman, Appellant

And

Correctional Service of Canada, Respondent

Indexed as: *Zimmerman v. Correctional Service of Canada*

Matter: Request for an extension of time to file an appeal under subsection 129(7) of the *Canada Labour Code*

Decision: The request is granted

Decision rendered by: Mr. Michael Wiwchar, Appeals Officer

Language of decision: English

For the Appellant: Ms. Corinne Blanchette, Union Advisor, CSN

For the Respondent: Mr. Richard Fader, Senior Counsel, Department of Justice Canada, Labour and Employment Law Group

Citation: 2016 OHSTC 5

REASONS

[1] This matter concerns a request for an extension of time to file an appeal pursuant to subsection 129(7) of the *Canada Labour Code* (the Code). The appellant, Mr. Brian Zimmerman, is requesting to be relieved of his failure to file an appeal of a decision that a danger does not exist rendered by Ms. Harmony Hemmelgarn, an Official Delegated by the Minister of Labour (ODML) on February 12, 2016, within the 10-day statutory time limit set out in the Code.

Background

[2] On February 10, 2016, Mr. Zimmerman, a correctional officer employed by the Correctional Service of Canada, exercised his right under section 128 of the Code to refuse to work by reason of his belief that a condition in his work place constituted a danger to him. It is Mr. Zimmerman's contention that the alarm system used to summon assistance at the Kent Institution (located in Agassiz, British Columbia) is not fully functional and that his safety is compromised due to the potential delayed response time from responding staff during assistance incidences. The work refusal is based on an incident that occurred on February 8, 2016.

[3] On February 11, 2016, ODML Hemmelgarn attended the work place to conduct her investigation into the work refusal. ODML Hemmelgarn issued her decision that no danger existed on the following day and notified the employer by a letter dated February 12, 2016, that was sent via e-mail. However, ODML Hemmelgarn did not concurrently provide a copy of the decision letter to Mr. Zimmerman. The employer then forwarded a copy of the decision to Mr. Zimmerman via e-mail, but only on February 15, 2016. Having received the ODML's decision on February 15, 2016, Mr. Zimmerman had until February 25, 2016, to file his appeal with an appeals officer of the Occupational Health and Safety Tribunal Canada (Tribunal) pursuant to subsection 129(7) of the Code.

[4] The Tribunal received Mr. Zimmerman's notice of appeal (which is dated Friday, February 26, 2016) on Monday, February 29, 2016, four days after the expiry of the 10-day time limit set out in the Code. On March 1, 2016, the Tribunal informed Mr. Zimmerman's representative that his application to appeal was received beyond the 10-day statutory time-limit set out in subsection 129(7) of the Code. Mr. Zimmerman's representative was also informed of his right to request an extension of time for instituting the appeal to an appeals officer and was given until March 11, 2016, to provide his written submissions. On March 3, 2016, Mr. Zimmerman's representative provided his written submissions in support of his request to extend the time limit for instituting the appeal.

Issue

[5] The question that I must address is whether I should, in the present matter, exercise the discretion conferred upon me by paragraph 146.2(f) of the Code, to extend the time limit of 10 days set out in subsection 129(7) of the Code.

Submissions of the parties

[6] The appellant provided short submissions in support of its request to be relieved from its failure to file the appeal in the prescribed time limit. The appellant essentially argues that the extension should be granted based on the fact that, while the Tribunal received the appeal form on February 29, 2016, which is technically four days late, Mr. Zimmerman and/or his designated union representative notified the ODML, the employer and the Tribunal of his intention to appeal the decision through e-mail correspondence that was sent within the 10-day statutory deadline. According to the appellant, the application to appeal could not be sent within the time limit set out in the Code due to circumstances that were beyond the control of Mr. Zimmerman (i.e., the designated union representative's inexperience with the appeal process and the verifications that he had to make before filing the appeal).

[7] The respondent, through its counsel, informed the Tribunal by an e-mail dated April 8, 2016, that it does not oppose the appellant's request for an extension of time.

Analysis

[8] The question that I must address is whether I should exercise my discretion in favour of extending the time limit for filing the appeal and relieve Mr. Zimmerman of his failure to present the appeal within the prescribed time limit. Pursuant to paragraph 146.2(f) of the Code, an appeals officer is empowered to extend the prescribed time limit for initiating an appeal. This paragraph reads as follows :

146.2 For the purposes of a proceeding under subsection 146.1(1),
an appeals officer may

[...]

(f) abridge or extend the time for instituting the proceeding or for
doing any act, filing any document or presenting any evidence;

[9] The Code does not prescribe the factors that an appeals officer ought to consider when exercising his discretionary powers to extend time limits. Appeals officers have, as well as other administrative tribunals, typically considered the following factors in the exercise of their discretion: the length of the delay in relation to the appeal period, the explanations given by the party to explain the delay, the due diligence shown through that party's actions, and the prejudice suffered by the other parties to the proceedings.

[10] In the present case, I find that the appellant clearly manifested an intention to file the appeal within the time limit of 10 days. In particular, the appellant submitted e-mail correspondence, dated February 15, 2016, between him and the employer indicating that he intended to appeal the decision. He also submitted e-mail correspondence between his designated union representative and ODML Hemmelgarn demonstrating that he had every intention to file his appeal. Indeed, on February 24, 2016, Mr. Zimmerman's designated union representative sent an e-mail to ODML Hemmelgarn advising her of Mr. Zimmerman's intention to appeal her decision to which she replied that he should contact the Tribunal in order to file an appeal.

[11] Upon being informed by the ODML that he should file his appeal directly with the Tribunal, the appellant's designated representative contacted the Tribunal's registrar on February 24, 2016, via e-mail, to gather information on the appeal process. It warrants noting that while incomplete, this e-mail sent before the expiry of the 10-day time limit set out in the Code contained some information about the appeal that Mr. Zimmerman intended to file (i.e., name of appellant and employer, the Labour Program's assignment number of the work refusal). On the following day (February 25, 2016, the last day to file the appeal), the registrar provided Mr. Zimmerman's designated representative with a copy of the Tribunal's appeal form via e-mail attachment and indicated that he should provide all the required information.

[12] The person designated by Mr. Zimmerman formally filed an appeal of the decision with the Tribunal on Monday, February 29, 2016, four days after the prescribed 10-day time limit had elapsed. However, it is clear from the information provided by the appellant that the delay cannot be attributed to Mr. Zimmerman's actions. To the contrary, Mr. Zimmerman has shown diligence in order to properly initiate the appeal. The appeal was filed late primarily due to the fact that Mr. Zimmerman and his designated representative do not work the same schedule and had to organise the signing of the appeal form, which they obtained on February 25, 2016. In fact, the application to appeal was filed by the person designated by the appellant on his first day back to work after it was signed by Mr. Zimmerman on Friday, February 26, 2016.

[13] Therefore, taking into consideration the short delay involved, Mr. Zimmerman's manifest and continued intention to appeal the decision at issue, as well as the absence of prejudice to the employer, I find that the circumstances of this case justify that I grant the appellant's request to be relieved of his failure to have filed the appeal within the time limit prescribed by the Code.

[14] For these reasons, I have decided to exercise the discretion conferred upon me by paragraph 146.2(f) to grant the appellant's request for an extension of time to file the appeal.

Decision

[15] The request for an extension of time to file the appeal is granted.

Michael Wiwchar
Appeals Officer