Occupational Health and Safety Tribunal Canada

Date: 2016-08-04
Case No.: 2013-79

Between:

Pierre Gauthier, Appellant

and

Correctional Service of Canada, Respondent

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

Matter:	Motion to have the appeal dismissed on mootness
Decision:	Motion granted and the appeal is dismissed on mootness
Decision rendered by:	Mr. Pierre Hamel, Appeals Officer
Language of decision:	French
For the applicant-respondent:	Ms. Kétia Calix, Counsel, Department of Justice Canada, Labour and Employment Law Group
For the appellant:	Himself
Citation:	2016 OHSTC 12

REASONS

[1] These reasons relate to my decision rendered May 11, 2016 on an appeal filed under subsection 129(7) of the *Canada Labour Code* (Code) by Mr. Pierre Gauthier of a no danger decision rendered by Mr. Régis Tremblay, Health and Safety Officer (HSO). The notice of appeal was filed with the Occupational Health and Safety Tribunal Canada (Tribunal) on December 20, 2013. The no danger decision followed a refusal to work by Mr. Gauthier on November 15, 2013, and was rendered subsequent to the investigation carried out by its author under the terms of section 129 of the Code.

[2] Mr. Tremblay gave the appellant his written decision on December 16, 2013. He then completed his investigation report and sent it to the parties on January 8, 2014, as appropriate. Receipt of the report resulted in Mr. Gauthier filing a second application to appeal with the Tribunal on January 31, 2014 based on the same circumstances that led to the no danger decision now being appealed. This application sets out additional explanations to establish that he was in fact in danger on November 15, 2013, and thus support his application to have HSO Tremblay's decision cancelled.

[3] The Tribunal initially set a first series of dates for hearing the appeal, i.e. August 4 to 6, 2015. These dates were subsequently cancelled at the request of Correctional Service Canada (the employer), and the hearing was then set for May 9 to 13, 2016, by means of a letter dated January 22, 2016.

[4] On February 26, 2016, the employer filed a preliminary objection to having the appeal heard on the grounds that it was now moot. Mr. Gauthier set out his response to the employer's arguments in an email dated March 21, 2016.

[5] After reviewing the parties' representations, I concluded that the appeal had become moot, and my decision in favour of the employer's objection was communicated to the parties in a letter dated May 11, 2016, with the reasons to follow. The reasons for my decision are set out below.

Background

[6] The facts relevant to an understanding of the issues analyzed in these reasons can be found in the report by the HSO and the documentation produced by the parties in the Tribunal's record.

[7] On November 18, 2013, HSO Tremblay went to 200 Montée St-François in Laval with respect to a refusal to work exercised by the appellant, Mr. Gauthier. He is employed as a plumber by Correctional Service Canada at the Montée St-François Institution. The danger invoked by the employee pertained to the high-pressure steam network that the employee considered to be obsolete and unreliable and, that, in his view, shutting the valves upstream and downstream from

the system was not enough for him to be able to do the job in complete safety. His method would be to shut off the system completely at the source to make it fully safe; this would, however, affect the entire building.

[8] In his report, HSO Tremblay wrote that Mr. Gauthier also said that closing these valves would not guarantee his safety, because they were old valves and he did not trust them. He refused to shut the high-pressure steam valves, however, as it was no longer in his job description, which had been modified.

[9] To support his statement, Mr. Gauthier added that the atmospheric vent on the condensate tank, which had been changed at his request, was non-compliant. HSO Tremblay went to the pumping room to observe this fact. The new pipe installed was 2.5 inches in diameter; Mr. Gauthier argued that it was too small and too much pressure could build up in the tank. According to the appellant, a vent hose six (6) inches in diameter, which he said is what the manufacturer prescribes, was needed to make the pumping station safe.

[10] Given Mr. Gauthier's refusal to work, the employer apparently had the work done by an outside contractor. HSO Tremblay contacted that person, who explained that he isolated the portion of the pipe he had to work on, in this case, where the trap was. He said he closed the valves to do so and released the excess pressure. In his view, the job in question was routine and did not call for any special safety measures.

[11] HSO Tremblay explained that he made his no danger decision on the basis of this information. However, he added that he kept researching and, after checking standard CSA B51 M 1981, he stressed in his report that paragraph (a) of section 6.2.3.1 of the standard requires a diameter of three (3) inches for an atmospheric vent on a receptor; the standard does not specify anything for a condensate tank, however. Apparently, the condensate tank at issue is not included in the regulations because it is not under high pressure, as it is subject to normal air pressure.

[12] In his first application to appeal, the appellant is laconic, to say the least, regarding the nature and technical aspects of the work he was being asked to do at the time he refused. What is primarily at issue is the investigation process, which Mr. Gauthier thinks was not carried out properly. He was more explicit on the matter in his second application to appeal, presented to the Tribunal on January 31, 2014. In it, he states the following:

> I refused to do the work because my supervisor, G. Lefaivre, had modified the installation of a vent hose on a tank containing condensed liquids.
>
> When the company Dunor came to install the tank, they followed the manufacturer's recommendations and installed a 6-inch vent to the outside, but they did not extend the pipe above the roof as the plumbing code mentions, to keep

> people from burning themselves and having 175 degree F condensate spill on them.
>
> The same company came back about two years later at my supervisor's request to modify the vent hose and reduce it to 2 inches to extend it to the roof, because the pipe was damaging the building's structure, and 6 inches all the way to the roof was too expensive.
>
> Reducing the 6-inch pipe to 2 inches created several pounds of pressure in the liquid tank, when there is normally no pressure in the tank, but given some leaks in the network, the tank therefore has a few pounds of steam pressure even in the extremely dangerous condensate network.
>
> [*sic* for the entire quote]

[13] In the same document, Mr. Gauthier then set out his calculations for the load on a condensate tank hose, concluding that the pressure in the system (network and tank) required a 6-inch vent line to be safe. He stated that very hot steam could be ejected, not just the bit of liquid that runs out of the vent, which could lead to serious burns to the hands and face of an employee asked to do "draining" work.

[14] HSO Tremblay rendered his no danger decision based on this evidence and the grounds the appellant raised to support his claim that he was exposed to a danger, i.e. the need for a vent six (6) inches in diameter.

[15] In support of its preliminary objection, the employer introduced a new fact that had arisen since the notice of appeal was filed: the vent hose that was the subject of Mr. Gauthier's November 15, 2013 refusal no longer exists. Indeed, some renovation work has been done since then and the hose has been completely cut off. The work was done in December 2014, about a year after the facts that gave rise to the refusal to work and HSO Tremblay's decision. More specifically, the vent's function was replaced by a new condensate pumping station design that does not require an atmospheric vent. The employer introduced "before and after" pictures of the work area (pumping station) into the Tribunal's record, along with the Preston Phipps Inc. assembly drawing and the data sheet for the system's components.

[16] The appellant is not contesting these facts as reported by the employer's counsel, although he maintains that the new mechanism also creates a dangerous situation. In his opinion, the safety valve that replaces the vent, which the employer had installed to avoid having to pay for a more expensive atmospheric tank, is now creating constant pressure in the condensate tank, and is a source of danger.

Issue

[17] Is Mr. Gauthier's appeal now moot due to the changes made to the equipment on which he was to work on November 15, 2013, and should it be dismissed for that reason?

Arguments of the parties

Arguments of the respondent (applicant to motion)

[18] After relating the new facts that, in her opinion, justify dismissal of the appeal as now moot, counsel for the respondent noted that the Tribunal has already confirmed that the right to engage in a work refusal is irrefutably an individual right that is associated with a specific hazard, a condition or an activity in a workplace. Even if Mr. Gauthier's allegations are allowed (that a hazard could be associated with the vent hose), the Tribunal confirmed that a determination that the appeal has become moot in this case would not prevent another employee from engaging in a work refusal when justified by the circumstances (*Manderville* v. *Correctional Service Canada*, 2015 OHSTC 3, paras 20–21 (*Manderville*); *Maureen Harper* v. *Canadian Food Inspection Agency,* 2011 OHSTC 19, paras 29–30 (*Harper*); *Denis Leclair* v. *Correctional Service Canada,* decision no. 01-024, paras 24, 25–28; *Tremblay* v. *Air Canada*, decision no. 09-004, para. 34).

[19] Counsel cited the *Borowski* v. *Canada (Attorney General)*, [1989] 1 S.C.R. 342, paras 15–16 and 31–42 (*Borowski*), in which the Supreme Court of Canada adopted a two-step analysis to determine whether a dispute is moot: (i) first it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic; (ii) second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.

[20] Counsel continued by referring to the following decisions in which the Tribunal applied this test and found that the appeal was moot:

- In *Harper,* paras 31, 33 and 34, the Tribunal concluded that the employee, who no longer worked for the Canadian Food Inspection Agency, was no longer exposed to the alleged dangerous condition while at work.

- In *Robert J. Wellon* v. *Canada Border Services Agency*, 2011 OHSTC 28, paras 16 and 18 (*Wellon*), the Tribunal had to determine whether an appeal based on a work refusal concerning a policy that the employer had cancelled could proceed, or whether the appeal had become moot. In finding that the appeal had become moot, the Tribunal ruled that, in the case of such a motion, the appeals officer had to consider whether a concrete legal dispute existed between the parties at the time of the work refusal and investigation, but also when the appeals officer had to make a decision. Moreover, the

Tribunal indicated that exercising discretion to hear the matter was not justified solely on the grounds that the employer could potentially reinstitute a former practice or policy.

- In *Tanya Thiel v. Correctional Service Canada*, 2012 OHSTC 39, paras 66 and 68, the Tribunal determined that the appeal was moot because the appellant was no longer exposed to the alleged dangerous condition while at work, as the required relationship of employment between the appellant and employer (respondent) had ceased and did not exist at the time the appeal was heard. The Tribunal found that rendering a decision on the merits would have no concrete effect on the rights of the parties.

- In *Correctional Service of Canada* v. *Mike Deslauriers,* 2013 OHSTC 41, paras 41–42 and 46 (*Deslauriers*), the Tribunal determined that there was no live issue or controversy in this matter, the resolution of which could potentially have a tangible, concrete or practical effect on the rights of the parties on the grounds that the employee's complaint (alleging that smoke resulting from Native offenders' smudging practice constituted a health and safety risk) had become moot since the appellant no longer worked at the penitentiary, and the penitentiary had been closed. Moreover, the decision confirmed that the right to refuse to work is an individual right afforded to each employee. If an employee in another institution believes he or she is exposed to a danger, that employee can benefit from the same rights under the Code. Lastly, the Tribunal dismissed the employee's argument that the penitentiary may reopen, stating that the statement was speculative and that an appeal cannot be heard on that basis.

- In *Manderville*, the Tribunal indicated that its role was to determine whether the alleged danger existed and persisted, so that it would not be futile to exercise its powers. The first step of the mootness test establishes whether an appeals officer's decision, 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. In this case, the Tribunal ruled that an employee who had refused to work was no longer exposed to the alleged danger because the source of the alleged danger had been removed. Lastly, the Tribunal specified that it would not exercise its discretion to hear the merits of the case on the grounds that a work refusal was an individual right that was subject to independent assessment by an appeals officer.

[21] The employer concluded that Mr. Gauthier is no longer exposed to the alleged danger. The vent has been completely cut off and its function has been replaced by a new condensate pumping station design that does not require an atmospheric vent. A decision would therefore have no tangible, concrete or practical effect on the parties' rights.

Arguments of the appellant (respondent to motion)

[22] The appellant raised the following points in his response to the employer's arguments:

> Here are the new facts.
>
> My employer, Correctional Service Canada, decided to remove the vent on the condensate tank, which was 2 inches instead of 6 inches, as the manufacturer recommends, and replace it with a safety valve that creates pressure in the condensate tank, to avoid production costs on installing an atmospheric tank.
>
> Because of this, constant pressure is now being produced in the condensate tank, which should be (with no pressure) atmospheric pressure equivalent to 5 lbs.
> Condensate returns must not have any pressure and must be atmospheric.
>
> So, to sum up, we now have a tank that is under 5 lbs of pressure, creating danger for anyone who is doing maintenance, or replacing one of the hundreds of traps at the Canada Immigration Centre.
> Plumbers who are not vigilant are therefore at risk.
> None of the other buildings on which I do maintenance is designed in this way. Too dangerous.
>
> [*sic* for the entire quote]

Respondent's response (applicant to motion)

[23] The employer replied by reiterating its initial position, stressing that the appellant's remarks are new facts that are not part of his work refusal made on November 15, 2013. Moreover, these new facts were not put before the HSO and did not lead to his decision. Accordingly, these remarks are outside of the Tribunal's jurisdiction under subsection 146.1(1) of the Code, which states that the appeals officer must inquire into the circumstances of the decision.

[24] In this case, the new design for the condensate pumping station installed in December 2014 (which no longer requires an atmospheric vent) is not part of the circumstances that led to the decision under appeal. The grounds invoked by Mr. Gauthier in support of his refusal and appeal no longer exist.

Analysis

[25] As I mentioned earlier, I decided that the employer's objection had merit under the circumstances set out in the record, because I was convinced that the appeal had become moot and without practical purpose, and should be dismissed

for that reason. These reasons only deal with this issue and are not a judgement of the merits of the decision under appeal.

[26] Subsection 146.1(1) of the Code sets out the procedure for the appeal, and defines the appeals officer's mandate. The appeals officer must, in a summary way, inquire into the circumstances of the decision that, in this case, led to the decision that is being appealed, and decide on its merits. He can confirm, rescind or vary it as he considers appropriate.

[27] However, appeals officers have diverged from this rule in situations in which it is shown that the appeal is without practical purpose due to circumstances that arose between the appeal and the time set by the Tribunal to hear it. A motion to dismiss based on the mootness of an appeal, as presented by the employer in this case, is based on the principle that it may not be appropriate for a court to hear a case on merits when, at the hearing stage, the source of the dispute no longer exists, making the hearing moot because there is no concrete case to decide.

[28] The principles underlying the doctrine of mootness are set out in the Supreme Court of Canada decision in the *Borowski* matter, which the employer cited. In this decision, the Court states the following on page 353:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly 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. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereafter.

[29] The Court then describes the circumstances—fairly rare—which could prompt a court to hear a case even it is academic, as for example, if dismissing the case would result in rendering the making of a claim illusory due to its specificity.

[30] Appeals officers have therefore applied this approach in situations in which it was shown that the circumstances had changed to the point that the decision on the merits of the appeal would no longer have a practical effect. The Tribunal caselaw cited by the employer provides many examples. The rationale for the

findings of mootness was that the employee was simply no longer exposed to the alleged danger and that the prerequisite for applying section 128 of the Code therefore no longer existed. Regardless of the outcome of the appeal on merits, it would have no concrete effect with respect to the purpose set out in section 128 of the Code (see: *Breen Ouellette* v. *SaskTel,* 2010 OHSTC 13; *Harper*; *Wellon*; and *Thiel*). I had the opportunity to deal with this issue in *Samson* v. *Correctional Service of Canada,* 2015 OHSTC 18, and, more recently, in *Somers* v. *Canada Post Corporation*, 2016 OHSTC 4.

[31] This approach is justified by the fact that the right of refusal that employees can exercise as an extraordinary protective measure is intended to protect them from a very specific danger. Once the health and safety officer has rendered a decision, it can be appealed within ten (10) days, and the appeals officer must inquire into the circumstances that gave rise to it. The inquiry is done on a *de novo* basis, i.e. the appeals officer can hear all relevant evidence, whether or not it was brought to the attention of the health and safety officer, on the circumstances that are contemporary to the right of refusal.

[32] Here, Mr. Gauthier's appeal originates in the exercise of his right of refusal granted by section 128 of the Code. That section reads as follows:

> **128.(1)** Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
>
> (a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
>
> (b) a condition exists in the place that constitutes a danger to the employee; or
>
> (c) the performance of the activity constitutes a danger to the employee or to another employee.
>
> [Our underlining]

[33] Section 122 of the Code defines the word "danger" as follows:

> **122.**(1) "danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a

> hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.

[34] It is well established that the right to refuse to do work due to danger is an individual right related to a specific condition or hazard.

[35] In this case, Mr. Gauthier had to do work on the condensate tank. I retain from the evidence submitted in this case that the hazard alleged by Mr. Gauthier was related to an atmospheric vent hose with an overly small diameter which, in his opinion, generated too much pressure in the tank and represented a dangerous situation.

[36] However, the evidence in the case clearly establishes that the circumstances have changed. The system on which the employee was to work has been replaced with another system. The specific problem Mr. Gauthier invoked for refusing to work due to danger, i.e. the inadequate diameter of the "vent hose on a tank containing condensed liquids", has disappeared. The condensate pumping station system was replaced with a new system that does not have an atmospheric vent and is equipped with a safety valve. These facts have not been challenged. The photographic evidence produced by the employer clearly shows the changes to the systems, to the point that, in my opinion, the issue at the heart of this dispute no longer exists.

[37] A similar conclusion was reached in a case in which the workplace no longer existed. In *Deslauriers,* the appeals officer states the following at paragraph 42:

> [42] Based on my review of the facts and evidence presented to me, I find that there is no live issue or controversy in this matter, the resolution of which could potentially have a tangible, concrete or practical effect on the rights of the parties. To hear an appeal related to a workplace which no longer exists renders the entire appeal process purely academic. I therefore find the appeal to be moot.

[38] In this case, the workplace and system on which Mr. Gauthier had to work still exist, but have been changed substantially. The modifications affect the very source of the danger invoked, which was not the overall operation of the pumping system at the St-François establishment, but rather the presence of an overly narrow vent, which Mr. Gauthier deemed to be non-compliant with the manufacturer's directives and, because of that, dangerous. Under the circumstances, even if the appeals officer had found in Mr. Gauthier's favour, the remedy he is asking for could not be applied because the system is no longer the same. A decision that a danger existed at the time of the refusal would have no practical effect in such a context, only a preventive impact on potential future situations, with no knowledge at this time of what situations could be involved.

[39] Mr. Gauthier also argues that the new system itself creates a danger of burns due to the pressure that could build up in the pumping station. He may be right and there could no doubt be debate over this issue. However, that is a new question that differs from the circumstances that gave rise to the appeal. Any inquiry that would be carried out today on the merits of the appeal would therefore no longer focus on the circumstances that existed at the time of the events, as required by section 146.1(1) of the Code, but on facts that arose later, on which HSO Tremblay never ruled—and, of course, could not rule. This is not a matter for appeal (see: *City of Ottawa (OC Transpo)* v. *MacDuff*, 2016 OHSTC 2).

[40] I therefore find that the appeal is now without practical purpose and that any decision I could make on the appeal would only have declaratory value, as the prerequisite for application of section 128 of the Code, i.e. the existence of a danger at a specific time and in specific circumstances related to the workplace, no longer exists.

[41] Lastly, no argument has been made that I should exercise my discretion to hear the appeal on merits even though it is moot. This is not an extraordinary situation in which exercising a right would become illusory, in which it would be in the public interest to rule on a matter of importance to the parties who are subject to the Code. The question raised by this appeal is essentially a question that is based on an assessment of the facts.

[42] If the new system should pose a danger to the employee, that employee is not without recourse. The employee could once again exercise his right of refusal and benefit from all the protection the Code provides in this regard. The employer's investigation and, if applicable, that of a health and safety officer, would bear on the circumstances as they appear at the time of refusal, as it should.

[43] In support of my conclusion, I reiterate the comments of the appeals officer in *Manderville*, at paragraphs 20 and 21:

> [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.
>
> [Our underlining]

Decision

[44] For the reasons set out above, the appeal is dismissed as being moot.

Pierre Hamel
Appeals Officer