



Occupational Health and Safety Tribunal Canada

Date: 2016-09-02
Case No.: 2015-24

Between:

Royal Canadian Mounted Police, Appellant

and

Paul Carter, Applicant

and

Mounted Police Professional Association of Canada, Intervener

Indexed as: *Royal Canadian Mounted Police and Carter*

Matter: Application for leave to participate in the proceeding as an intervener

Decision: The application is dismissed

Decision rendered by: Mr. Pierre Hamel, Appeals Officer

Language of decision: English

For the applicant: Himself

For the appellant: Mr. Michel Girard, Counsel, Department of Justice Canada, Labour and Employment Law Group

Citation: 2016 OHSTC 13

REASONS

[1] This decision concerns an application presented by Mr. Paul Carter (applicant) to obtain intervener status in the present appeal. The application was filed with the Occupational Health and Safety Tribunal Canada (“Tribunal”) on June 19, 2016.

Background

[2] The factual and procedural background leading to Mr. Carter’s application may be summarized as follows. The Royal Canadian Mounted Police (“RCMP” or “the employer”) initially filed an appeal under subsection 146(1) of the *Canada Labour Code* (Code), against a direction issued on October 21, 2015, by Mr. Bradley Tetarenko, in his capacity as an Official Delegated by the Minister of Labour (Ministerial Delegate) under the Code.

[3] Mr. Tetarenko’s direction was issued pursuant to subsection 145(1) of the Code and sets out four (4) sets of contraventions to the Code. The direction came about as a result of his investigation into a situation which resulted in the death by gunshot of RCMP constable David Wynn, and in gunshot wounds to auxiliary constable Derek Bond, in January of 2015.

[4] There is no need to go into greater details at this point on the events that led to the issuance of the direction, other than to say that the nature of the contraventions which Mr. Tetarenko identified relates for the most part to the employer’s telecommunication system used by the officers in carrying out their duties and the employer’s obligations to implement preventive measures to address hazards associated with such communication system. However, one of the contraventions found by Mr. Tetarenko is at the source of the present application and reads as follows:

[...]

No. / No: 2

Paragraph 125.(1)(y) – Canada Labour Code, Part II

The auxiliary officer’s actions on the day of the event appear to have exceeded the expected duties of an auxiliary officer. The employer shall ensure that the activities of every person granted access to the work place do not endanger the health and safety of employees.

Employer shall identify and assess the hazards associated with the activities of the auxiliary constables in consultation with the Policy Health and Safety Committee and take steps to ensure that the activities of the auxiliary officers do not create a hazard for themselves or RCMP members.

[Underlining added]

[5] After becoming aware of the direction as a result of media reports, the applicant initially filed an application to appeal the direction issued by Mr. Tetarenko, on March 16, 2016. On May 11, 2016, the Tribunal issued my ruling that Mr. Carter did not have a right of appeal under subsection 146(1) of the Code and thus, could not validly seize an appeals officer of an appeal under that subsection. As a result, I dismissed Mr. Carter's application to appeal the direction. The reasons supporting my decision are set out in a letter-decision dated May 11, 2016.

[6] On June 19, 2016, Mr. Carter sought to obtain intervener status by filing the present application. Mr. Carter resides in Revelstoke, British Columbia, and participates in the auxiliary program sponsored by the RCMP, as an auxiliary constable. The appellant was informed of the application on June 27, 2016. The RCMP opposes the application and filed its submissions in support of its position on July 21, 2016. Mr. Carter replied on July 24, 2016.

[7] In the meantime, an application filed with the Tribunal by the Mounted Police Professional Association of Canada ("MPPAC") to obtain intervener status in the appeal proceedings was granted in part. The reasons for my decision are set out in *Royal Canadian Mounted Police and Mounted Police Professional Association of Canada*, 2016 OHSTC 10 (*RCMP and MPPAC*) and were issued on July 5, 2016.

Submissions of the applicant

[8] The grounds upon which Mr. Carter is seeking intervener status are set out in an email sent to the Tribunal on June 19, 2016, as follows:

After careful review of Appeals Officer Pierre Hamel's refusal to hear my appeal of the ruling in the decision *Royal Canadian Mounted Police St. Albert*, I'm requesting Intervener status in the matter. Mr. Hamel incorrectly stated that the ruling has no direct affect on myself or my fellow auxiliary constables. The direction has directly affected our ability to perform our mandated roles, and the proposed reduction in training and equipment is going to have a direct impact on the safety of myself and fellow auxiliary constables. A direction which negatively affects the safety of those in a workplace, either as an employee or volunteer needs to be addressed. Auxiliary constables safety should not be compromised just because we are not employees. Any review or risk assessments performed up to this point have not included auxiliary constables making them invalid. The Mounted Police Association has pushed hard for the elimination of the auxiliary constable program and also for the downgrading of training and equipment carried by auxiliary constables, as such they can not speak for the safety of auxiliary constables, nor act as a respondent in the matter of auxiliary constables.

If the proposed changes to the auxiliary constable program do go forward, and our safety equipment and training is taken away it is our intentions to forward an unsafe workplace complaint to our respective Worker Compensation programs against the Royal Canadian Mounted Police. Part of that complaint will include the Royal Canadian Mounted Police St. Albert ruling, which is directly impacting the safety of my self and fellow auxiliary constables.

(sic throughout)

Submissions of the RCMP (Appellant and respondent in the application)

[9] Counsel for the RCMP submits that the real concern expressed by Mr. Carter to support his request to be allowed to participate in the appeal proceedings, is with the Auxiliary Constable Program Review process that is currently under way. Mr. Carter wishes to challenge the proposed reduction in training and equipment and the impact it may have on his safety and that of other auxiliary constables. Counsel submits that this is outside the scope of the direction and of the appeal.

[10] Counsel refers to paragraph 146.2(g) of the Code and argues that Mr. Carter has not satisfied the test set out in that paragraph to obtain the status of intervener in the present appeal proceeding. Clearly, Mr. Carter does not have the same interests as the appellant or intervener, which is a pre-condition to obtain such a status (*Canadian National Railway Company (CN Rail)* and *James Poirier and Teamsters Rail Canada Conference*, OHSTC-08-018(I) (*CN Rail*)).

[11] Counsel for the RCMP concludes that Mr. Carter does not represent the interests of RCMP members at large and is not an employee within the meaning of the Code, as already determined by the appeals officer. Finally, counsel stresses that there is nothing on record showing that Mr. Carter, who resides in Revelstoke, B.C., has authority to speak on behalf of other auxiliary constables, especially other auxiliary constables within the St. Albert Detachment in Alberta.

[12] The RCMP requests that the application be denied.

Reply submissions of the applicant

[13] Mr. Carter submits that the RCMP has used the St. Albert incident and related decision as justification to remove auxiliary constable duties. RCMP management stated both to auxiliary constables and to the public through the media, that the decision to pull auxiliary constables off the road and conduct a review of the program was due to the shooting incident that occurred in Ottawa, Ontario, and the shooting incident in St. Albert in which Auxiliary Constable Bond was injured. Mr. Carter points out that the RCMP has made numerous statements to the media indicating the review of the program is due to safety concerns.

[14] The applicant further submits that auxiliary constables have a master and servant relationship with the RCMP. All auxiliary constable duties, training and conduct on and off duty is directed by RCMP policy. He adds that the Province of British Columbia recognizes auxiliary constables as employees for worker compensation purposes and refers to a Workers Compensation Board Minute to that effect.

[15] Mr. Carter stresses that neither the RCMP nor the MPPAC are acting in the interests of auxiliary constables or the communities that they serve. The ruling in which the RCMP has used a justification to restrict the duties of auxiliary constables has had a detrimental impact on the Auxiliary Constable Program. It needs to also be noted that the MPPAC is not currently the certified representative of regular police officers and as such does not have any more standing in this matter than any auxiliary constable.

[16] The applicant states that he is acting as an individual auxiliary constable due to the fact that current RCMP policy directs that auxiliary constables are not allowed to have an association which acts to represent their interests. Unlike regular members, auxiliary constables volunteer their time for free to serve our communities, and do not have the same access to resources as the MPPAC to mount a challenge against a policy which violates a fundamental freedom, the right to associate.

[17] The applicant disagrees with the employer's position suggesting that only auxiliary constables from St. Albert can request that someone represent them, where it is clear that the ruling (the direction) has a direct impact on all auxiliary constables across Canada. It is important that auxiliary constables be directly involved in the Tribunal hearing as this ruling has had an extremely damaging impact on the RCMP Auxiliary Constable Program. This ruling has caused the RCMP to remove most duties and has rendered the program ineffective in relation to its intended purpose of crime prevention and public safety.

[18] Mr. Carter points out that in the past, RCMP management has ignored the safety concerns of auxiliary constables. He contends that they have had no involvement in the risk assessment of the program that occurred recently. He refers to the situation that occurred in 1998, when RCMP management apparently decided to remove safety training and equipment from auxiliary constables in British Columbia. The RCMP management was advised that doing so was going to put auxiliary constables at increased risk.

[19] The applicant concludes by stating that in order to ensure the interests and safety of all auxiliary constables, they need to participate in the appeal process. The ruling has had a catastrophic impact on the Auxiliary Constable Program and it should not be left to the RCMP or the MPPAC to argue as neither party represents the interests of auxiliary constables or the communities that they have been serving for 50 years.

Analysis

[20] For the reasons that follow, I am of the view that the application should be dismissed.

[21] The provision of the Code which allows a person or organization which is not a party to the appeal to participate in an appeal proceeding is found at paragraph 146.2(g) of the Code, and reads as follows:

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

[...]

(g) make a party to the proceeding, at any stage of the proceeding, any person who, or any group that, in the officer's opinion has substantially the same interest as one of the parties and could be affected by the decision;

[Underlining added]

[22] Mr. Carter has made no reference to that provision and has not presented any argument that would support granting him an intervener status pursuant to that statutory provision.

[23] Clearly, Mr. Carter's application and the grounds he has put forward to support it do not fall within the purview of paragraph 146.2(g). I accept the employer's argument that Mr. Carter's application falls short of satisfying the requirements of that provision, as he himself stresses the fact that neither the appellant nor the MPPAC share the same interests as auxiliary constables in the present proceedings. In fact, this is the very reason for his application. As a result, the present application cannot be grounded in this provision of the Code (*CN Rail*).

[24] That being said, appeals officers have some discretion to determine who should be authorized to participate in the appeal proceeding, as part of their general power to manage their inquiry and the hearing process. A right to participate, unrestricted or partial, may be granted where the appeals officer is of the opinion that the participation of a person or group will bring a useful perspective on the questions that are central to the appeal, and is likely to assist the appeals officer in his task (*RCMP* and *MPPAC*).

[25] The appeals officer in *CN Rail* canvassed some of the jurisprudence touching on the nature of the interest required for a person or entity to be allowed to intervene in a legal proceeding to which it is not a party. In *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 (F.C.T.D.), cited by the appeals officer in *CN Rail* at paragraph 45, the Federal Court states as follows:

The key considerations are the nature of the issue, and the likelihood of the applicant being able to make a useful contribution to the resolution of the action without causing injustice to the immediate parties.

[26] Applying this test, I am of the view that there is no justifiable basis in the present case to grant Mr. Carter the right to participate in the appeal proceeding, for the purpose that he is seeking. For the following reasons, I fail to see the potential useful contribution that the applicant could bring to the resolution of the central issues raised in this appeal.

[27] First, it is clear from Mr. Carter's submissions that the main reason for his participation is that he is in disagreement with the changes brought by the RCMP to its Auxiliary Constable Program. It is not disputed that such changes were implemented as a result of certain incidents, including the St. Albert incident and Mr. Tetarenko's direction presently under appeal. Although a link may be said to exist between the Auxiliary Constable Program review and the said direction, the basis on which Mr. Carter wishes to intervene and the foundation of his case falls outside the purview of the appeal under subsection 146.1(1) of the Code.

[28] Subsection 146.1(1) sets out the nature and scope of the inquiry that must be conducted in relation to an appeal:

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

(a) vary, rescind or confirm the decision or direction; and

(b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

[Underlining added]

[29] My jurisdiction under that provision of the Code is to determine whether the direction, on all of its aspects, is well-founded in fact and law. My inquiry must relate to the circumstances as they existed at the time of issuance of the direction, as stated by subsection 146.1(1). The arguments presented by the applicant in support of his participation in the appeal proceedings would have me consider facts that are subsequent to the circumstances that gave rise to the direction and consequently take us outside of the scope of the appeal.

[30] The purpose of my inquiry is not to assess the appropriateness or sufficiency of the measures taken by the employer to comply with the direction. That question falls in the province of the Minister of Labour, as part of its enforcement continuum. Yet, Mr. Carter's application and submissions make it rather clear that his fundamental concern is with the outcome of the review of the Auxiliary Constable Program and his contention that the program, as it stands today, threatens the health and safety of auxiliary constables. This is clearly outside the inquiry mandated by subsection 146.1(1) of the Code. It would be inappropriate to allow

the applicant the right to participate in the appeal proceedings, already knowing that the issues that he wishes to bring to the fore fall outside the scope of the appeal.

[31] I should add that Mr. Carter's reply submissions in particular have reinforced my conclusion. His submissions revealed that he has been advocating changes to the RCMP Auxiliary Constable Program for some time (at least since 1998 in fact), and has voiced criticism of some features of the program and of the RCMP's management of the program, such as its failure to consult auxiliary constables before implementing changes to the program. I am persuaded that this being the thrust of the applicant's case, his participation would result in an inappropriate expansion of the scope of the appeal, which the Code does not permit.

[32] It warrants emphasizing that the purpose of this appeal is to determine whether the Ministerial Delegate was correct in issuing the direction to the employer, in the *circumstances prevailing at the time of its issuance*. The direction under appeal identifies a number of contraventions to the Code. In his submissions, Mr. Carter did not address the contraventions specified in the direction, nor did he explain how his participation would assist me to determine whether the direction is well-founded, taking into account the circumstances prevailing at the time of its issuance. The basis for his request for participation is not to assist me in resolving this issue. Rather, it is clearly to challenge the merits of subsequent changes brought by the RCMP to the Auxiliary Constable Program, an issue that is not before me in this appeal. Thus, Mr. Carter's participation would inappropriately involve venturing into a different debate than the one that is central in this appeal, that is, the correctness of the direction. In my view, granting him the right to participate on such grounds would also be unfair to the RCMP, the immediate party that is adversely affected by the direction, by forcing it to address issues that are beyond the scope of this appeal.

[33] Secondly, Mr. Carter's application should be denied on the grounds that the question that he raised for my consideration is not governed by the Code. Indeed, the Code does not apply to the volunteer relationship between the RCMP and auxiliary constables. As I determined in my decision issued on May 11, 2016, the Auxiliary Constable Program is a volunteer program which does not fall under the Code, as there is no employment involved. This determination is not contested by the parties to this application. Mr. Carter acknowledges that fact in his submissions and refers to a Minute of the British Columbia Workers Compensation Board that deems auxiliary constables to be "employees" for the purpose of the provincial *Workers Compensation Act* which, by necessary implication, clearly reinforces their non-employee status.

[34] Section 122.1 of the Code provides as follows:

122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in

the course of employment to which this Part applies.
[Underlining added]

[35] I am persuaded that allowing Mr. Carter to participate in the appeal on the grounds that he has put forward in support of his application would be an implicit recognition that he has employee status and that the Auxiliary Constable Program is directly subject to the Code, akin to an employment program. The basis for his participation is clearly to challenge the changes brought by the RCMP to the Auxiliary Constable Program. Venturing into that debate would imply that auxiliary constables benefit from the health and safety protections given to federally-regulated employees who are subject to the Code. They do not.

[36] A volunteer program is antithetic to an employment program, in its fundamental characteristics: absence of remuneration and no element of legal subordination or dependence between the parties. Auxiliary constables are free to join and participate in the program. When they do, they obviously act under the direction of the RCMP management and the rules of engagement into that program. It would not make sense otherwise. I recognize the value of citizens volunteering their time and efforts by participating in the program, as a way one may choose to serve their community: it is a commendable undertaking. But citizens are free to cease participating in the program should the conditions no longer be convenient to them. These features fundamentally distinguish such an entirely voluntary commitment from an employment relationship. The Code regulates the latter, not the former.

[37] As I stated in my May 11, 2016 decision, the auxiliary program is brought into play by the provision of the Code which sets out the duty of every employer to ensure the safety of persons to whom it grants access to the work place, and which Mr. Tetarenko considers to have been breached. This does not mean that those persons, as a result, become subject to the rights and obligations set out in the Code.

[38] Finally, I agree with the RCMP that no information on file establishes that Mr. Carter is speaking on behalf of a group of persons who have a common direct interest on the issues raised by the appeal. Mr. Carter resides in British Columbia and has no apparent link with the St. Albert Detachment, or with the circumstances that occurred in January 2015 and that caused the death of a member of the RCMP and gun wounds to an auxiliary constable. As the applicant himself states in his submissions, he is acting on his own behalf, as an individual who participates in the Auxiliary Constable Program. If I were to authorize Mr. Carter's participation in the appeal procedure for the purpose that he has stated, there is no reason why all auxiliary constables across the country could not claim the same right, which would be an unthinkable and unmanageable outcome. Parliament clearly expressed its intention at subsection 146.1(1) of the Code that appeals ought to be dealt with without delay and in a summary way. Under the circumstances, it would be inappropriate to exercise my discretion in Mr. Carter's favour and I find no justification to do so.

Decision

[39] The application is dismissed.

Pierre Hamel
Appeals Officer