Occupational Health and Safety Tribunal Canada

Date: 2016-09-22
Case No.: 2016-31

Between:

Central Grain Company Ltd., Applicant

Indexed as: *Central Grain Company Ltd.*

Matter:	Application for a stay of directions issued by an Official delegated by the Minister of Labour.
Decision:	The application is granted and a stay of the directions ordered until October 15, 2016.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the applicant:	Ms. Tracey L. Epp, Pitblado LLP
Citation:	2016 OHSTC 17

REASONS

[1] On August 12, 2016, Central Grain Company Ltd. (Central) filed an appeal against five directions that had been issued to the latter on July 13 and August 2, 2016, respectively, by an Official delegated by the Minister of Labour, Mr. Gordon Logan (hereinafter the Ministerial delegate), at the conclusion of the latter's inspection of the work place operated by Central at 172 Archibald Street, Winnipeg, Manitoba, said work place being sometimes known as Central Grain Company Ltd. That inspection purported to follow up on an earlier inspection of the same work place that had been conducted by the same Ministerial delegate on October 1, 2013, at which time eight directions had been issued to the appellant employer (the applicant) for various dangers and contraventions to the *Canada Labour Code* (Code) and an Assurance of Voluntary Compliance (AVC) comprising some 68 items of concern had been received from the applicant.

[2] The wording of subsection 146(2) of the Code is very clear. The mere filing of an appeal against a direction does not, in and of itself, operate to stay the application and execution of the direction being appealed and thus, the obligation to comply with said direction as formulated. That same provision however clearly specifies that an appeals officer has the authority to order a stay upon application by an employer, employee or trade union. Consideration of a stay application is also conditional upon the employer, employee or trade union having standing to apply for such a stay by being one concerned by the direction. One must also add that unless an appeal has been filed against a direction, no appeals officer may be seized of an application to stay a direction issued by a ministerial delegate.

[3] Upon filing its appeal, Central also applied to have the application of the directions stayed pending determination of said appeal on the merits by an appeals officer. Submissions in this regard by the applicant were received by the undersigned at a teleconference hearing held on August 25, 2016, which was attended by the Ministerial delegate, as well as in writing subsequent to the Ministerial delegate having improperly submitted directly to the undersigned, shortly after the teleconference, additional information which he considered contradicted information provided by the applicant, without informing the applicant of such. No party has sought to act as respondent in this matter.

[4] An application for a stay is decided by an appeals officer upon consideration of a three-part test or criteria derived from the pronouncements of the Supreme Court of Canada in *Manitoba (A.G.)* v. *Metropolitan Stores Ltd.***,** *[1987] 1 SCR 110* , and adapted to the specificity of the matters governed by the Code. It consists of the following:

- The applicant must satisfy the appeals officer that there is a serious question to be tried at appeal as opposed to a frivolous or vexatious claim.

- The applicant must demonstrate that he, she or it would suffer significant harm if the direction is not stayed by an appeals officer.

- 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.

[5] I will add that this three-part test must be met in its entirety by the party making the application and that the assessment as to whether the applicant has satisfied the said test needs to take into account the circumstances of the case that prevailed at the time of the issuance of the direction by the Ministerial delegate, the circumstances present at the time of the hearing of the application for a stay as well as the nature and extent of the stay sought.

Is the question to be tried serious as opposed to frivolous or vexatious?

[6] As stated above, this appeal concerns five directions that were issued to the applicant. Of those, the first contravention direction (July 13, 2016), issued under subsection 145(1) and pursuant to paragraph 125(1)(*x*) of the Code, states that Central has failed to comply with directions previously issued to it regarding the existence of unprotected fall hazards, safe occupancy of the work place in light of excessive accumulations of dust inside and outside of the facility as well as the failure to have regular and scheduled work place inspections in conjunction with the work place health and safety representative. The second contravention direction (August 2, 2016), issued under subsection 145(1) and pursuant to paragraphs 125(1)(*q*) and 125(1)(*g*) of the Code, states that Central has failed to properly instruct and train employees in the use, operation and maintenance of fall protection equipment and that such instructions have not been set out in writing and kept readily available by the employer for examination by every person granted access to the work place.

[7] Of the three *danger* directions issued under subsection 145(2) of the Code on August 2, 2016, one concerns the failure to have a qualified person develop, and the employer implement, specific written procedures for the use of fall protection equipment, while the two others order that outside walkways and vertical ladders not be used due to the structural integrity of the walking surfaces of outside walkways appearing to not have the structural capacity and integrity to resist safely and effectively all reasonably expected loads and influences, and access gates and hatches of the outside walkways and fixed vertical ladders not meeting prescribed standards by reason of not being self-closing.

[8] It is with this legislative background that the applicant has argued under the first element of the test that this appeal presents a serious question to be tried. At the outset, one needs to point out however that underlying the question of whether any or all of the three parts of the test have been met is the fact, brought forth by counsel for the applicant, that this undertaking, which remains registered as a grain

elevator and has been in operation since the 1960s, and has in more recent years operated as a feed mill as shown on its website under the descriptive *feed products*, will be going out of business and ending operations on October 14, 2016.
[9] However, counsel for the applicant put forth that Central no longer processes or sells feed pellets, with clients inquiring as to availability of this product being directed elsewhere, and has restricted its operations for the last 1 1/2 year to the production and sale of fuel pellets for burning made out of recyclable materials, those being mostly paper and wood products, with this now representing the only business being conducted by Central at the work place and the only one it intends to conduct until it closes. In this regard, counsel pointed out that sales of fuel pellets in 2015 amounted to 6900 tonnes, which exceeded substantially its sales of feed pellets and that, at present, its inventory of the sole product it produces amounts to 2000 tonnes which, at the sale rate of 250 tonnes per week, will take the plant to its definitive closure date of October 14, 2016. It needs to be pointed out that the Ministerial delegate, who attended the teleconference stay hearing, disputes this affirmation by Central and states that, while engaged in fuel pellet production and sale, Central still has a feed mill function.

[10] With these facts as background to the first element of the test, and quite apart from the obvious issue raised by this appeal, as in any appeal, as to the merits of the decision(s) made by a Ministerial delegate, counsel for Central has argued that given the present circumstances, and what she put as final activities of Central, the initial question to be considered by the undersigned on appeal will be whether an appeals officer has jurisdiction to determine the validity of the directions, which underscores the obvious underlying question of whether the Ministerial delegate had jurisdiction under the Code to act as he did. In a nutshell therefore, the question raised by counsel can be better summarized as whether Central is or remains a federal undertaking, given that the Code does not apply to facilities producing fuel pellets, with an answer in the negative obviously signifying that an appeals officer would have no jurisdiction to act in this matter. In my opinion, this represents a serious, actually probably the most substantial question to be determined in proceeding with this appeal.

[11] Given what precedes, I am of the view that the applicant has satisfied the first element of the test.

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

[12] The applicant has submitted that it would suffer significant harm if the stay is not granted, mostly because of the financial burden it would incur to satisfy entirely the directions issued by the Ministerial delegate given that all the applicant is seeking is to be capable of continuing operations until October 14, 2016, before definitively shutting down. In this regard, counsel noted that following the issuance in 2013 of eight directions and the giving of an AVC comprising 68 items of concern requiring correction, the plant had undergone a temporary closure around 2014/2015 to bring about improvements in excess of $1,000,000.00 and that given

the age of the buildings (built in the 60s) and the upcoming closure, it would not be worth it to go through additional expenditure and continue improvements that would prove too expensive for the results to be achieved in such short term. Counsel has also noted that Central has shifted its focus to that of getting rid of its remaining inventory of fuel pellets through the Manitoba bio-fuel program and taken a number of steps to improve the saleability of the plant and operations before the October deadline date, failing which the plant is to be demolished. In this regard, counsel pointed out that some of those steps would have the effect of improving the safety of the employees. Counsel also pointed out that of the eight buildings that make up the plant, only three are used and that of the five or six employees working there, only three are directly involved in operations.

[13] This case presents a situation that is not habitual in that the relief that is being sought through this stay application is for a very short length of time as Central is to terminate operations by October 14, 2016. While the financial burden that would potentially affect an employer where a stay would be denied should not be the sole reason to evaluate whether the applicant would suffer significant harm should such stay not be granted, the fact remains that in exceptional circumstances, this consideration can be given significant weight. In my opinion, this is such a case, more so when one considers some of the steps taken by the applicant in the interim and the complexity and scope of the work involved to comply with the directions. One can simply not discount the considerable economic loss that would result if Central were to undertake the required work, only to shut down the plant a few weeks later. Therefore, upon consideration of the submissions made by the applicant, I have come to the conclusion that, in the unique circumstances of this case, significant harm would be suffered by the applicant should the stay application be denied. The applicant has thus satisfied the second element of the test.

Has the applicant demonstrated that measures will be put in place to protect the health and safety of employees or any person granted access to the work place should the stay be granted?

[14] As stated above, five directions were issued to the applicant by the Ministerial delegate. Of those, two concerned the use of elevated outside walkways and fixed vertical ladders with the Ministerial delegate ordering that those not be used or accessed at any time by employees prior to compliance with the directions. At the hearing on the present application, it was submitted by counsel and confirmed by the Ministerial delegate that employees have been informed that roof areas and outside walkways as well as any areas where fall protection would be required are not to be accessed at any time for any reason.

[15] Furthermore, as Central has engaged third party contractors to rectify deficiencies in the outside walkways pertaining to their structural integrity and to rectify deficiencies in the fixed vertical ladders, ladder access gates and ladder access hatches, seemingly to improve the safety as well as the saleability of the

plant, it was submitted by counsel, and not contested by the Ministerial delegate, that permission was given by the latter through the manager to the said contractors to access these areas. The Ministerial delegate also stated at the hearing that he had been verbally informed by the applicant (although not verified by the former) that regular scheduled inspections of the work place were now being conducted and records of such being made, as required by the direction. In addition, it was submitted by counsel and confirmed by the Ministerial delegate that employees attended a full day course of safety training on fall protection equipment and procedure on July 29, 2016, with another session taking place on August 11, 2016, with written procedures for the use of fall protection equipment in the work place being provided and filed accordingly.

[16] Having regard to what precedes, even though the above measures do not represent compliance in full with all the directions that were issued, they nonetheless represent a serious attempt, in my opinion, at protecting the health and safety of employees should the stay be granted. I am thus of the opinion that the applicant has satisfied the third element of the test. I am reinforced in this opinion by the fact that the applicant has agreed to proceed with the hearing of the appeal on the merits within essentially weeks of my hearing this application and the rendering of this decision, and has indicated that it is not seeking a stay duration that would go beyond the date it has indicated it will terminate operations.

Decision

[17] For the reasons set out above, the application for a stay of the directions issued by the Ministerial delegate on July 13 and August 2, 2016, is granted and a stay of the said directions is ordered until October 15, 2016.

Jean-Pierre Aubre
Appeals Officer