



Occupational Health and Safety Tribunal Canada

Date: 2016-10-26
Case No.: 2016-34

Between:

Brink's Canada Limited, Applicant

and

Robert Dendura, Respondent

Indexed as: *Brink's Canada Ltd. v. Robert Dendura*

Matter: Application for a stay of a direction issued by an Official Delegated by the Minister of Labour.

Decision: The stay of the direction is granted

Decision rendered by: Mr. Olivier Bellavigna-Ladoux, Appeals Officer

Language of decision: English

For the Applicant: Mr. Gregory J. Heywood, Roper Greyell LLP

For the Respondent: Mr. Les Murphy

Citation: 2016 OHSTC 18

REASONS

[1] These reasons concern an application brought under subsection 146(2) of the *Canada Labour Code* (the Code) for a stay of a direction issued by Jason Elliott, Official Delegated by the Minister of Labour (Ministerial Delegate) on August 18, 2016.

Background

[2] On July 17, 2016, Mr. Robert Dendura, an armed guard for Brink's Canada Limited (Brink's) exercised his right to refuse to work alleging that the new crew structure implemented by his employer, namely the "All Off" model, exposed him to a danger.

[3] The "All Off" crew is comprised of a two person crew where both crew members exit the vehicle and enter customer locations to drop-off or pick-up valuables. After the completion of the work, both crew members return to the vehicle together.

[4] Mr. Dendura stated the following to the Ministerial Delegate:

The employer has switched the new crew structures of several runs to use an all off model. Using the three person crew, the driver would stay with the armoured truck and advise the employees doing the work inside if it is safe to exit the customer location. Using the all off model, the armoured truck is unattended and the crew inside are not aware if it is safe to exit the customer location or if they will be facing bandits when they exit the location to proceed to the armoured truck.

[5] On July 26, 2016, the Ministerial Delegate conducted an investigation into the circumstances that led Mr. Robert Dendura to refuse to perform his regular duties. Following his investigation, the Ministerial Delegate concluded that the implementation of this new model constituted a danger and issued a direction to the employer under paragraph 145(2)(a). The relevant portion of that direction reads as follows:

The said official delegated by the Minister of Labour considers that the performance of an activity constitutes a danger to an employee while at work:

The "All Off" model that is currently being used (in which the driver/guard exits the armoured vehicle and escorts the messenger carrying the valuables, into customer locations for drop-offs and pick-ups) does not sufficiently mitigate against the danger of employees being assaulted during a robbery attempt. The model does

not provide the employees with any information of suspicious persons or activities occurring outside while they are inside the customer's location. As a result, the employees have a diminished ability to avoid potential ambush upon returning to the armoured vehicle.

Therefore, you are **HEREBY DIRECTED**, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to alter the activity that constitutes the danger immediately.

[6] The employer filed a notice of appeal accompanied by an application for a stay of the direction on August 22, 2016.

[7] Following the receipt of the appeal and application for stay, the Occupational Health and Safety Tribunal Canada (Tribunal) contacted the Teamsters, Local 362 (Teamsters), the union representing Brink's employees, to enquire as to whether they would participate in the appeal proceedings. Legal counsel for Teamsters subsequently informed the Tribunal that the union would take no position regarding the stay application and that Mr. Dendura would be represented by one his colleague, Mr. Les Murphy, throughout the proceedings.

[8] A teleconference was held on September 1, 2016, during which both parties presented their submissions on the application. At my request, the applicant filed further written submissions on September 2, 2016, and September 9, 2016.

[9] On September 12, 2016, I rendered my decision to grant the application for a stay and the Tribunal so informed the parties on the same day. The following are the reasons in support of my decision.

Analysis

[10] The authority of an appeals officer to grant a stay is derived from subsection 146(2) of the Code, which reads as follows:

Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction

[11] In exercising their discretion under subsection 146(2), appeals officers apply the following three part test. The elements of this test are as follows:

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

2) The applicant must demonstrate that he, she or it would suffer significant harm if the direction is not stayed.

3) 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.

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

[12] The applicant submits that the main issue to be determined in this appeal is whether a danger, as defined by the Code, existed at the time of the Ministerial Delegate's investigation.

[13] According to the applicant, the Ministerial Delegate ignored recent legislative changes to the definition of danger under the Code which restricts the circumstances within which an employee may exercise his rights to refuse dangerous work. During his investigation, the Ministerial Delegate was observed using outdated materials that references the prior definition. Moreover, in his investigation report outlining the reason in support of his decision, he used the term "potential" ambush, as opposed to "imminent" ambush or "present threat" thereby demonstrating an application of the old test.

[14] The applicant submits that a question such as this one regarding the interpretation and application of the Code is a serious question to be tried.

[15] The respondent stated that the employee's concern relates to the fact that there is no warning system in place to notify employees of a possible ambush and agreed that the present appeal does indeed raise a serious issue to be tried.

[16] I agree with the parties that the determination of whether the new All Off model utilized by Brink's creates a danger as defined in the Code is a serious issue to be tried.

[17] I therefore conclude that the applicant has satisfied the first element of the test.

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

[18] The applicant submits that the direction will significantly impact the entire armoured car industry. According to the applicant, there are similar circumstances between this case and the case in *Bell Mobility Inc.(Re)*, 2012 OHSTC 4, where the appeals officer granted a stay partly because the direction would have caused widespread disruption in the company's operations.

[19] The applicant submits that one of its core functions is to provide ATM and cash management services (the ATM services) to banks, retailers and other

commercial and governmental agencies throughout Canada. These customers also rely on Brink's to replenish and pick up ATM deposits or commercial deposits from night depositories. If Brink's is unable to provide the ATM services, in addition to the delivery of branch cash, coin and foreign currency, the banks will not be able to operate and service their customers.

[20] The applicant contends that there is no other company that can provide the ATM services to its customers due to the fact that it exclusively controls the access to the many ATM's and night depositories. The applicant is currently exclusively using the "All Off" crew to carry out their ATM services at night. The applicant's inability to use the "All Off" crew will have an impact on its ability to provide the ATM services, which in turn, will negatively impact its customers. This will also, on a larger scale, have an impact on the cash and coin in circulation by a reduction in service to the banking industry.

[21] The applicant submits that since receiving the direction, widespread disruption in the performance of the ATM services has already occurred and it has received multiple customer complaints from all financial institutions serviced by the Edmonton branch.

[22] The applicant argues that it is unrealistic to expect that it could alter in a very significant manner within a short period of time a practice that has been in place since earlier this year. The direction places great stress on Brink's and its transportation system and is, in effect, an immediate stop work order.

[23] In addition to the immediate impact on the banking industry, the applicant also argues that compliance with the direction would have significant financial consequences that are not of the same order as a mere inconvenience. The elimination of the "All Off" crew model will result in a 50 % increase in labor costs. Compliance with the direction will also require a 50 % increase in the use of employees, which will significantly impact the employer's ability to staff its operations. The applicant does not have the internal resources to staff a three people crew on every route.

[24] The applicant submits that the cost of adding an additional crew member to the "All Off" crews in Edmonton is approximately 1 million dollars per year. In addition, although the direction only applies to the Edmonton Branch, the other branches were made aware of the direction and similar work refusals could occur elsewhere. As a result, the cost of compliance must be assessed nationwide and Brink's estimates these cost to be around 4 million dollars.

[25] The applicant submits that it already incurred a cost of 4 million dollars in implementing this new model in an effort to be competitive in the industry where the "All Off" model has been in used since 2003. The additional cost associated with compliance with the direction would impede on Brink's future expansion in

two of the largest markets in Ontario and British Columbia, which would put Brink's in a competitive disadvantage in the market.

[26] The applicant refers to the decision in *City of Ottawa (OC Transpo) v. Norman MacDuff*, 2013 OHSTC 27, in which the appeals officer stated that the prospect of the applicant incurring considerable costs warranted consideration in the determination of whether the employer would suffer significant harm.

[27] Based on all the above, the applicant submits that it would suffer significant harm if the direction is not stayed.

[28] The respondent did not provide extensive submissions on this criterion and simply indicated that the applicant has only started to use the "All Off" model since April of this year.

[29] After having reviewed the parties' submission on this criterion, I am convinced that the applicant will suffer significant harm by having to comply with the direction pending the outcome of the appeal proceedings for the reasons that follow.

[30] First, I would like to note that I consider the fact that the "All Off" model has been used by Brink's' competitors for over 10 years to be very relevant in assessing the prejudice that would be caused to the employer if it was required to comply with the direction pending the resolution of the appeal. The applicant has argued in this stay proceeding that it has only recently introduced its version of the "All Off" model and in doing so, has made significant safety enhancements to the competitors' alleged "inferior model".

[31] In arriving at my conclusion, I have taking into consideration the substantial financial cost that the applicant would have to incur in order to comply with the direction pending the resolution of its appeal. I am mindful however, that appeals officers, myself included, have in previous cases, held the view that financial cost alone is not enough to satisfy the second element of the test. Nonetheless, in the circumstances of this particular case, I find that there is more than just financial cost involved. Indeed, I am convinced that compliance with the direction could have a significant impact on the applicant's operations as well as on the industry as a whole.

[32] Indeed, the direction issued by the Ministerial Delegate directly affects the applicant's staffing decisions. To correct the danger identified by the Ministerial Delegate, the applicant would have to ensure that an additional crew member is always added to the runs in question, thereby eliminating completely the "All Off" model. The applicant submits that it does not have the internal resources to staff an additional person to the "All Off" crew on every route and would have to retain the services of a third party security company.

[33] Additionally, I find very compelling the applicant's argument concerning the impact that compliance with the direction could have on the banking industry. The applicant stated that its inability to use the "All Off" crew could have an effect on its ability to provide the ATM service to its customers. Upon my request, the applicant submitted more detailed explanation regarding the control it has on the access to many ATMs and night depositories. In a nutshell, the applicant explains that there is a locking system in place for all electronic locks on certain ATM's and night depositories that are maintained and managed by Brink's. In the event of a change in service provider, the locks would have to be removed from all ATMs to be replaced by a competitor's. This process could take several weeks which would create some service disruption for the applicant's customers.

[34] It is the combination of these factors that has convinced me that the harm that would be caused to the applicant by having to comply with the direction during the appeals proceedings is significant. I therefore find that the applicant has met the second criterion.

What measures would 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?

[35] The applicant first submits that the employee involved in the work refusal is currently on medical leave and upon his return will not work the "All Off" model. He may work the night shift on a three person crew and will only be working alternate shifts. If he works the day shift, he will be working on a one-on-one crew, where one crew member always remains in the vehicle.

[36] The applicant then claims that it has an exceptional safety record in its Canadian Operations and is seen as a world leader in the provision of reliable, cost effective and safe service. Furthermore, since the introduction of the "All Off" crew model in the Québec, Atlantic and prairie regions, there has not been a single robbery of the "All Off" crew.

[37] The applicant also provides a summary of all the extensive risk mitigating measures that it introduced in implementing the "All Off" model, which differs considerably from the one utilized by its competitors. Those measures include specialized protocols, advanced communication tools and equipment, enhanced training and updated personal protective equipment. According to the applicant, these measures are unique to Brink's' model and provide additional protection that is in excess of what a conventional three-person crew utilizes.

[38] Nevertheless, while the applicant is of the view that the extensive measures that are already in place are sufficient to protect employees health and safety, it undertook to take these additional risk mitigation measures, at the Edmonton location , in the event of a stay:

- Review with each regularly assigned “All Off” crew member on a monthly basis their comfort with the “All Off” protocols and procedures and consolidate any constructive feedback to be assessed and considered for any revision of All Off standard operating procedures;
- Continuous updating and revision as necessary of Site Risk Assessments;
- Continuous updating and revision of “All Off” Specific Operating Procedures as necessary;
- In Edmonton, there are 11 routes which use the All Off model. Brink’s will ensure that over the course of each month, each “All Off” crew will be shadowed a minimum of two times by additional personnel for all portion of their route to ensure adherence to procedures, avoid complacency, assess and abate risk and to act as a further deterrent to the criminal element such that Brink’s is not reviewed as a “soft target”; and
- Review the “All Off” model with the National Health and Safety Policy Committee.

[39] The respondent does not agree that the technology, equipment, procedures as well as the training provided by Brink’s is sufficient to protect employee’s health and safety. The respondent provided multiple examples of instances when procedures and protocols were not followed or there was failure of the technology tools utilized by Brink’s.

[40] In my view, the adequacy and effectiveness of the risk mitigating measures implemented by the applicant when it introduced its version of the “All Off” model are issues that should be dealt with on the merits of the case and that are outside the scope of an application for a stay. That said, I have reviewed the additional mitigation measures as described above that the applicant undertook to implement in the event of a stay and I am satisfied that they will serve to protect employees’ health and safety pending a final decision on this matter.

Decision

[41] For the reasons set out above, the application for a stay of the direction issued by Ministerial Delegate Jason Elliott on August 18, 2016, is granted. As mentioned in my letter of September 12, 2016, informing the parties of my decision, the granting of the stay is conditional to the immediate implementation of the measures referred to in paragraph 38 of this decision. These additional measures shall remain in place until the final resolution of the appeal.

Olivier Bellavigna-Ladoux
 Appeals Officer