Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2018-05-22
Case No.: 2017-24

Between:

Pierre Morin, Appellant

and

Employment and Social Development Canada, Respondent

Indexed as: *Morin v. Employment and Social Development Canada*

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by an official delegated by the Minister of Labour
Decision:	The decision is confirmed.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Himself
For the respondent:	Mr. Simon Deneau, Counsel, Treasury Board Secretariat Legal Services
Citation:	2018 OHSTC 5

REASONS

[1] This decision concerns an appeal brought under subsection 129(7) of the *Canada Labour Code* (the *Code*) by Mr. Pierre Morin against a decision that a danger did not exist rendered on June 19, 2017, by Ms. Mélanie Aumais in her capacity as an official delegated by the Minister of Labour (ministerial delegate).

Background

[2] Mr. Morin is employed as a senior program advisor at Employment and Social Development Canada (ESDC)'s Passport Strategic Modernization Office and was so employed at the time of his refusal to work on June 9, 2017. A few days prior to exercising his right to refuse to work, Mr. Morin requested paid leave in order to work on a complaint he had previously filed with the Office of the Auditor General of Canada (the Auditor General) pursuant to the *Public Servants Disclosure Protection Act* (PSDPA) alleging wrongdoings against the Office of the Public Sector Integrity Commissioner (PSIC). Following the denial of his request for paid leave, Mr. Morin wrote the following email in which he expressed the grounds for his work refusal as follows:

> […] As you are all surely aware, I am a Federal Public servant who blew the whistle pursuant to PSDPA because of workplace violence and wrongdoing and have received PSDPA funding of $3000.00 twice because of the exceptional circumstances relating to my PSDPA wrongdoing and reprisal complaints that were covered up by senior GoC officials in position of authority.
>
> […] In the absence of AG funding for this new PSDPA complaint which pertains to allegations of Criminal Act violations, serious breaches of conduct and violations of the PS code V&E against PSIC, our ombudsmen and Liberal members of parliament, I Pierre Morin effective immediately refuse to work as prescribed by OSH section 128 because of the psychological stressed caused by the GoC red and/or its refusal to uphold the laws and charters of Canada.
>
> Since the AG advised me that new PSDPA complaint(s) must be prepared by myself without further legal assistance, I can no longer work as indeterminate Service Canada employee responsibilities and also work full time after hours and on weekends to re-submit my allegations of criminal activity and PSDPA violations against PSIC and numerous other senior GOC officials and members of Parliament.
>
> I understand that it's my legal right as a Public Servant of Canada to refuse unsafe work that causes me recurring psychological injuries caused by the GoC refusal to address past workplace wrongdoing and violence within the Public Service of Canada. It is unreasonable and unhealthy for a whistleblower to be subjected to so many serious breaches of conduct and continued GoC red tape by its senior GoC senior officials who possess the authority to resolve all matters but refuse to do so.
>
> I have contacted and sought assistance to resolve employment discrimination matters within the Government of Canada's RCMP, PSLRB, NRCan, PSAC, RCMP, DoJ, PSC, PSPC, ESDC, PSIC, OIC,

> OPC,…) all of which have refused stipulating that it does not fall within their mandate which goes contrary to our PM Trudeau mandate letters provided to these institutions.
>
> Lawyer D'aoust and myself have validated systemic abuse of our laws and charters of Canada to the Auditor General of Canada, a systemic problem exists within your senior GoC ranks and the AG now wants me to submit a new revised PSDA complaint without further legal assistance and on my own time. I have approached my employer to ascertain if this could be resolved through a special project for the betterment of Canada, however, this was refused, Therefore, I understand that the code (OSH) deals with the right of an employee to refuse to work in a place, or to perform an activity if the employee has reasonable cause to believe that:(b)
>
> 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;
> GoC delays/red tape have taken its toll on my mental/physical/financial health all of which has been confirmed by Montfort Hospital and numerous other medical doctors.
>
> It has become clear to me and to my medical doctors that the continuation and absence of resolution constitutes a danger to my psychological/ mental/physical/financial health, it is for these reasons that I am exercising OSH section 128 to ensure that my medical situation does not worsen and/or scar me for life and/or leave me paralysed because of the GoC's systemic delays and/or refusal to address workplace wrong doing and violence within its senior ranks of the Public Service of Canada.
>
> […] I and medical doctors have concluded that this is a safety risk to my mental and physical health, therefore pursuant to section 128 of the OSH, I Pierre Morin effective May 24, 2017 refuse to continue working as an indeterminate GoC employee at ESDC save/except until all workplace issues/complaints/investigations initiated under PSDPA, the criminal code of Canada and/or the PS V&E of Canada are fully investigated under the laws and charters of Canada and more importantly until I finalize my Auditor General Of Canada requested PSDPA complaint(s) against PSIC to further validate and identify systemic breaches of Acts of Parliament, serious breaches of conduct and for violating the criminal code, laws and charters of Canada. […]

[3] Upon receipt of this email, the employer took steps to investigate the matter and concluded that no danger existed for Mr. Morin. On May 26, 2017, Ms. Marlène Hein, acting manager at the Passport Strategic Modernization Office, sent a letter to Mr. Morin informing him of the outcome of the investigation and demanding that he either report to work or submit a leave request to justify his absence from work.

[4] On May 31, 2017, upon being apprised of Mr. Morin's decision to continue his refusal to work, Ms. Hein wrote to Mr. Morin to advise him that as per the requirements of the *Code*, he must report his work refusal to the local health and safety committee in order for them to conduct an investigation into his work refusal. She again instructed Mr. Morin to report to work but offered to assign Mr. Morin alternative duties to perform pending the resolution of his work refusal.

[5] Following its investigation into the circumstances that led Mr. Morin to refuse to work, the local health and safety committee also found that there was no danger for Mr**.** Morin in his work place.

[6] On June 8, 2017, Mr. Morin informed his employer via voicemail of his intention to continue his refusal to work despite the findings of his employer and his local health and safety committee. On June 9, 2017, the Labour Program was made aware of the situation and Ministerial Delegate Aumais was assigned to investigate the matter.

[7] In her investigation report, Ministerial Delegate Aumais indicated that when she met with Mr. Morin, his union representatives and representatives from ESDC on June 16, 2017, he mentioned that the reason for his work refusal was the stress caused by the different time limits and formalities imposed by the Auditor General in the processing of his complaint pursuant to the PSDPA. Mr. Morin also stated that he was unable to devote time evenings and weekends to the preparation of his complaint in addition to having to work full-time.

[8] On June 19, 2017, the ministerial delegate concluded that no danger existed for Mr. Morin in his work place. Among the reasons cited for such conclusion, the delegate found that the circumstances that had led to the employee's work refusal were not related to his work as a senior program advisor in the Passport Strategic Modernization Office at ESDC, but rather to the preparation of his complaint to the Auditor General. She also found that the preparation of the complaint to the Auditor General was not a task that Mr. Morin was required to do by his employer or that was part of his duties as a senior program advisor.

[9] On July 4, 2017, Mr. Morin filed an appeal against Ministerial Delegate Aumais' decision with the Occupational Health and Safety Tribunal Canada (the Tribunal). With his notice of appeal, the appellant also sought from the Tribunal that his appeal be heard on an expedited basis for reasons that need not be described here. In a letter to both parties to the appeal, the Tribunal suggested that the hearing be held from January 15 to 19, 2018. While the proposed hearing dates were accepted by the appellant, the respondent objected to them, arguing the absence of any compelling information justifying an expedited scheduling and asking the Tribunal to continue its well established practice of scheduling hearings in chronological order and propose hearing dates no earlier than April 2018.

[10] As is customary for this Tribunal, a pre-hearing teleconference was scheduled with both parties to address and deal with any administrative or other issues that could affect the orderly and timely conduct of the hearing, including unresolved issues regarding the actual hearing dates. That conference was scheduled to proceed on October 13, 2017.

[11] Shortly before that date, the appellant informed the Tribunal that, for a variety of reasons, including his involvement in other proceedings as well as personal/health issues, he would not be prepared, at that time, to take part in a conference. As a result, the conference did not proceed then and has not proceeded since.

[12] In the following interim, the respondent filed with the Tribunal an application seeking to have this appeal dismissed without an oral hearing for the reason that the appeal does not relate to the work place or to a work place activity of the appellant governed by the *Code*. Said application, which was received by the Tribunal on November 21, 2017, was passed on to the appellant on November 23, 2017, with a request that the latter respond to the application no later than January 12, 2018.

[13] On that date, in response to the respondent's application, the appellant submitted voluminous documentation, essentially dated records, described as the latter's "oral hearing request", to which he added an application for an extension of time to submit additional unspecified records, essentially claiming the additional time to be needed "because of delays imposed by Employer ESDC" relative to an Access to Information and Privacy (ATIP) request.

[14] On February 2, 2018, the undersigned dismissed the appellant's application for an extension of time to supplement his reply with additional documents and indicated to the parties that he would next deal with the respondent's request to proceed with the merits of the appeal without holding an oral hearing as authorized under subsection 146.2(i) of the *Code*.

[15] According to the respondent, the investigation report and the documents in the Tribunal's file illustrate that this matter does not relate to Mr. Morin's work place or work activities, and provide a sufficient evidentiary basis to decide this appeal. In a similar appeal in *Aviation General Partner Inc. v. Jainudeen*, 2013 OHSTC 32 (*Jainudeen*), the appeals officer decided the matter without conducting an oral hearing.

[16] In his written submissions, the appellant opposed the respondent's application and expressed his wish to proceed with an oral hearing so he would have the opportunity to submit all his arguments to the appeals officer; however, he did not provide additional supporting reasons, arguments or information.

[17] Subsection 146.2(i) of the *Code* provides that appeals officers may decide any matter before them without holding an oral hearing. This provision affords appeals officers with a certain amount of flexibility to manage appeals in the manner they deem to be the most efficient.

[18] An oral hearing is not necessary for every appeal filed under subsection 146.1(1) of the *Code*, particularly when the issue under appeal is a question of law and/or does not involve complicated facts or contradictory evidence. As illustrated by the respondent's application, the present appeal raises a simple question, to wit, whether the circumstances that led to the employee's work refusal and the alleged danger in this case relate to his work place or a work place activity.

[19] Considering the nature of the issue under appeal and having reviewed all the material on file, I am satisfied that the Tribunal's factual record in addition to what written submissions were presented are sufficient for the undersigned to determine the appeal without an oral hearing. The Tribunal's record is essentially comprised of the ministerial delegate's investigation report as well as all other documents that she consulted in the course of her investigation.

Issue

[20] The issue before me in this appeal is whether the circumstances that led to the employee's work refusal may be considered a danger covered by the *Code*. More specifically, I need to determine whether, at the time he exercised his right to refuse to work, there existed a danger for Mr. Morin caused by a condition in his work place.

Submissions of the parties

Respondent's submissions

[21] The respondent first submits that in contrast with the purpose of the *Code* as stated at section 122.1, Mr. Morin's work refusal and appeal do not relate to a risk of accident or injury arising out of, linked with or occurring in the course of his employment at ESDC. It seems, according to the respondent, that the appellant is instead using this appeal to pursue a complaint against the PSIC and possibly other government departments.

[22] Moreover, the respondent submits that to constitute a danger under the *Code,* there must be a nexus between the alleged danger and the employee's work place or work activities. In *Canada (Attorney General) v. Fletcher et al.*, 2002 FCA 424, the Federal Court of Appeal held at paragraph 18 that the refusal-to-work mechanism of the *Code* is an *ad hoc* opportunity given employees at a specific time and place to ensure that their immediate work will not expose them to a dangerous situation, and that it is their short-term well-being which is at stake. This reasoning was also applied in *Canada Border Services Agency v. Public Service Alliance of Canada*, 2014 OHSTC 11, at paragraphs 84-85 and in *Canada (Revenue) and Public Service Alliance of Canada, Local 90060,* [1999] C.L.C.R.S.O.D. No. 15, at paragraphs 13-15.

[23] The respondent then refers to the decision in *Aviation General Partner Inc*. *v. Jainudeen*, 2013 OHSTC 32, where the appeals officer held as follows:

> [63] It is clear that a "hazard", a "condition" or an "activity" referred to in the definition of danger must be something in the course of employment that a person is exposed to that could reasonably be expected to be a cause of an accident or injury to health.

[24] At paragraph 69 of that same decision, the appeals officer further held that voluntary activities unrelated to employment cannot be included in the determination of whether a danger existed in the work place within the meaning of the *Code*. While in that case, said voluntary activities related to work separate and apart from the employee's regular employment within the purview of the *Code*, I have no difficulty in finding that the expression "voluntary activities" can receive a wider interpretation and can be found to mean or apply to activities outside of employment or work *per se.*

[25] The respondent alleges that, similar to the employee in *Jainudeen,* Mr. Morin is attempting to use the *Code* to facilitate his pursuit of voluntary activities that are not related to his employment with ESDC. The employer did not ask Mr. Morin to prepare submissions for the Auditor General of Canada and has no control over his decision to do so. Mr. Morin's

submissions to the Auditor General of Canada are not related in any way to his duties as a senior program advisor and for that reason, any stress caused to Mr. Morin by his efforts to prepare such submissions is not a factor that ESDC has to consider in ensuring safety and preventing danger in the work place.

[26] Additionally, the respondent contends that it is apparent from Mr. Morin's correspondence regarding this appeal that he intends to use his appeal of Ms. Aumais' decision as a forum for his allegations of wrongdoing under the PSDPA against the PSIC and possibly other government officials. The appeals officer does not have jurisdiction to consider these allegations as they do not fall within the *Code*. Mr. Morin has already taken steps to have his allegations of wrongdoing heard in accordance with the procedures set out in the PSDPA. The appeals officer should not allow Mr. Morin to re-litigate matters or seek a different result.

[27] In conclusion, the respondent submits that because Mr. Morin has never alleged a danger in his work place or related to his work activities, there can be no danger within the meaning of the *Code* and the appeals officer should therefore dismiss the appeal.

Appellant's submissions

[28] The appellant's submissions consist of a series of documents totalling more than 1500 pages, which contain emails sent and received between 2010 and 2012 while he was working as a Senior Access to Information and Privacy Advisor for Natural Resources Canada. The documents were divided into the following categories:

- Unwarranted (or undeserved) punishment;
- Spreading malicious rumours, gossip, or innuendo that is not true;
- Undermining or deliberately impeding a person's work;
- Underwork – creating a feeling of uselessness;
- Excluding or isolating someone socially;
- Assigning unreasonable duties or workload which are unfavorable to one person (in a way that creates unnecessary pressure);
- Establishing impossible deadlines that will set up the individual to fail;
- Criticizing a person persistently or consistently;
- Intruding on a person's privacy by pestering, spying or stalking;
- Belittling a person's opinion;
- Blocking applications for training, leave or promotion;
- Removing areas of responsibility without cause;
- Physically abusing or threatening abuse;
- Withholding necessary information or purposefully giving the wrong information; and
- Intimidating a person.

[29] The appellant provided no explanation as to how the content of these documents relates to his work refusal and appeal under subsection 129(7) of the *Code*.

[30] Notwithstanding the above, the undersigned did have the benefit of the appellant's work refusal statement which explains in sufficient details the circumstances surrounding his work refusal.

Analysis

[31] Subsection 128(1) of the *Code* authorizes employees to exercise their right to refuse to perform dangerous work in the following terms:

> **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.

[32] The *Code* defines the notion of danger as follows:

> **122.(1) danger** means any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered; **(underlining added)**

[33] Section 12 of the *Interpretation Act* deems all legislation to be remedial and requires that it be interpreted with a view to furthering the purpose of the legislation. The purpose of Part II, as set out in section 122.1 of the *Code*, is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment.

[34] A plain reading of the aforementioned provisions of the *Code*, in conjunction with the purpose of Part II of the *Code*, leads one to conclude that a danger that justifies an employee to refuse to work must pertain to a hazard, condition or activity related to the employee's work place or that occurs in the course of his or her employment, to wit, for which the latter's services have been retained through employment.

[35] The terminology used in section 128 of the *Code* makes it clear that the work refusal mechanism provided by the *Code* is meant to apply to matters arising out of the work or that are occurring in the work place. In this regard, I share the view expressed by the appeals officer in *Canada Post Corporation v. George Stout*, 2013 OHSTC 39,when he stated as follows:

> [44] […] The better interpretation of section 128 in that statutory context is that the notion of danger should properly be understood on the assumption that employees are otherwise fit to carry out the work for which they have been employed in the first place. The source of the problem that section 128 of the Code is aimed at correcting must, in my view, relate to a condition in the work place itself, to the work methods, the activity, or the lack of protective equipment or inadequate training, in other words

> circumstances over which the employer has control and which are independent of the employee. (underlining added)

[36] In the present case, the appellant is claiming that the source of the alleged danger for which he exercised his right to refuse to work is the stress generated by the requirements he must fulfill in order to file a revised complaint to the Auditor General. The appellant contends that he is unable to maintain full-time employment while having to work evenings and weekends on the preparation of his submissions to the Auditor General.

[37] In his statement of refusal to work, the appellant specifically cited paragraph 128(1)(b) as the basis for his work refusal. Paragraph 128(1)(b) provides for the right to refuse to work if there exists a condition in the work place that constitutes a danger to an employee. The question thus becomes whether, in the circumstances of this case, the preparation of a complaint pursuant to the PSDPA can be considered a condition in the employee's work place that could reasonably be expected to be a threat to his life or health.

[38] From a review of the material on file, it appears that Mr. Morin initiated his work refusal after he requested leave from his employer to work on his complaint to the Auditor General and his request was denied. This request was made shortly after receiving notice from the Auditor General that he needed to provide clear allegations against the PSIC supported by documents and facts. The Auditor General also informed Mr. Morin that his file would be closed if this requirement was not met.

[39] Based on his statement of work refusal, I find that the situation described by Mr. Morin to support his apprehension of danger does not relate in any way to his work place or his work place activities. While it may be said that the refusal to work was triggered by the denial of his application for leave, and I make this statement with a great deal of reservation, particularly in light of the request/notice formulated by the Auditor General, I certainly have no reservation in recognizing an employer's prerogative to refuse leave to an employee who is seeking such leave to conduct activities that are not related to the work for which the employee has been and is being employed to do by the said employer. Consequently, it cannot be said that there existed a condition in Mr. Morin's work place that could be considered a threat to his life or health.

[40] I agree with the respondent's contention that the filing of a complaint to the Auditor General is not part of Mr. Morin's regular duties as a senior program advisor at the Passport Strategic Modernization Office (ESDC), nor is it a task that he was required to do by his current employer, ESDC. I consider Mr. Morin's complaint to the Auditor General to be a voluntary activity, outside the control of the employer, which he is free to pursue outside of his working hours. In this respect, I share the opinion formulated by my colleague Mr. Peter Strahlendorf when he stated as follows in the *Jainudeen* decision:

> [69] To include voluntary activities outside the work place as relevant to what may be a danger in the work place would lead to somewhat absurd results. Outside activities might consist of strenuous sports activities voluntarily entered into. It would not make sense to say that an employer should reduce the number hours at work so as to allow for an employee's strenuous sport activities. Mr. Jainudeen's activities outside the work place consisted of a part time job at Centennial College, and while one may believe a part time job to be more serious activity than

> sports, it remains a fact that Mr. Jainudeen's outside activities were voluntary and were outside of the control of the employer.

[41] In my opinion, while it can be said in the case at bar that Mr. Morin's complaint to the Auditor General is also a more serious activity than sports, it would equally be absurd to consider that the *Code*, and more specifically the protections afforded by the work refusal process under the *Code* against danger in the work place could apply to a situation where an employee has, on his or her own initiative, decided to pursue a PSDPA complaint against his previous employer. This is simply not the type of situation envisaged by section 128 of the *Code*.

[42] It bears emphasizing that Mr. Morin's complaint to the Auditor General was not made against his current managers or even senior government officials at his current employer, ESDC. His allegations pertain to other government officials employed by the PSIC, a completely different department than the one where he is currently employed.

[43] It is clear from the record before me that the real source of the problem is that Mr. Morin feels he needs time off from work in order to complete his submissions to the Auditor General. Mr. Morin acknowledged that fact when he was asked by the ministerial delegate and confirmed that his reasons for refusing to work were not related to his work as a senior program advisor.

[44] While I do not doubt the employee's assertion that the significant time and effort needed to prepare his complaint to the Auditor General are causing him a lot of stress, I have no difficulty in finding that this situation cannot benefit from the protection provided under section 128 of the *Code* against danger to an employee while at work.

[45] In view of the foregoing, I am satisfied that Mr. Morin's performance of his regular duties on the day of the refusal did not expose him to any threat that could endanger his health and safety. Consequently, I find that there was no danger to Mr. Morin at his work place on the day he exercised his right to refuse to work.

Decision

[46] For these reasons, the appeal is dismissed and the decision that a danger does not exist rendered on June 19, 2017, by Ministerial Delegate Aumais is confirmed.

Jean-Pierre Aubre
Appeals Officer