Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2018-11-19
Case No.: 2017-19

Between:

Sherry Foster and Matthew Daigneault, Appellants (Respondents to the Motion)

and

Correctional Service of Canada, Respondent (Applicant to the Motion)

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

Matter:	Motion by the respondent to dismiss for mootness an appeal of a decision rendered by an official delegated by the Minister of Labour under subsection 129(7) of the *Canada Labour Code*.
Decision:	The motion is granted and the appeal is dismissed.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellants:	Self-represented
For the respondent:	Mr. Adam Gilani, Counsel, Treasury Board Legal Services, Department of Justice
Citation:	2018 OHSTC 15

REASONS

[1] This case concerns an appeal brought under subsection 146(1) of the *Canada Labour Code*, RSC (1985), c. L-2 (the *Code*) by Sherry Foster and Matthew Daigneault (the appellants) against a decision of absence of danger rendered on May 29, 2017, by Greg Garon, an official delegated by the Minister of Labour (ministerial delegate). The appellants are correctional officers at Warkworth Institution (the institution), a medium security establishment situated in Campbellford, Ontario. The following reasons relate to a motion by the respondent to have the appeal dismissed on two preliminary grounds: (1) because the appellants acknowledged that their work refusal puts the life, health or safety of another person in danger; and (2) because the matter is moot.

Background

[2] The respondent's motion precedes a hearing of the appeal on the merits, meaning that no evidence relating to the facts and circumstances of this case has been presented for consideration by the undersigned. The following background information has been drawn from the ministerial delegate's investigation report prepared in support of his decision of absence of danger.

[3] On May 8, 2017, a change in the deployment of correctional officers was implemented at the institution. This change, or post restructuring, affects staffing levels and is being implemented in accordance with the respondent's policy and the National Deployment Standards. This change, or post restructuring, modified site deployment levels at the institution with the result that one officer got removed from the roster for the industrial movement shack post (WW37). The deployment change includes the reassignment of an officer posted in the walkway outside the kitchen/dining building (WW13) to the institution compound, and the removal of an officer from WW37 whose function was to monitor inmate movement to and from the industrial site identified as Corcan (WW18), and to control the gates to buildings 11, 18 and 19, and who would also be assigned to the compound area. As a result, the correctional officer that was posted in post WW13 to monitor inmate movement to and from the building would therefrom be posted to the compound and would roam between the compound/living units and the dining building with another correctional officer during feeding hours, and in the same team fashion (dynamic security) during work hours between the Corcan and the living units.

[4] It appears from the ministerial delegate's report that management had initially proposed to eliminate one of the officers' position in the compound. During a meeting of the workplace health and safety committee in December 2016, concern was expressed regarding health and safety aspects of the proposed scheduling changes. Yet, it was not before April 28, 2017, that the matter of realignment of post positions to meet deployment standards could be discussed with a new union executive (UCCO). On May 3, 2016, the new union executive presented a plan that was in keeping with the deployment standards and requested that two officers remain in the compound, thereby leading to the reassignment of the WW37 officer. This meant that two officers would perform their multi-function duties by patrolling areas in a dynamic fashion as opposed to remaining in a static post, thereby offering more officer presence in patrolled areas. Those recommendations were accepted by management and implemented on May 8, 2017. The appellants' refusal to work took place on May 12, 2017.

[5] It is not necessary at this stage of the proceedings to describe at length the reasons invoked by the refusing employees for their refusal to work. Suffice it to say that from the rather lengthy statement of refusal, one can derive an initial suggestion that the changes detailed above, what the refusing employees describes as a "reduction of posts" and the employer as a "post-restructuring", was being rushed through to take advantage of a change in union representation to avoid resistance to the proposed changes and without proper consultation through the joint safety and health committee. In essence however, having read through the statement of refusal, one perceives that the refusing employees disagree with the new placement of officers and the deployment standards, mainly as regards the withdrawal of a static officer at WW37 and the initiation of a two-officer roaming patrol in the compound between the kitchen/dining area, the industrial area and the living units, therefore not maintaining constant line of sight and leaving the compound unsupervised at times. It would appear that the refusing employees consider the main issue resulting from the changes as being weapons coming from the shops and being more easily passed between inmates, this constituting a major risk to the inmates' safety and that of other officers.

[6] While this appeal has not been heard on the merits, the respondent has applied to the Tribunal to have the matter disposed of on two grounds. First, the respondent seeks to have the appeal dismissed without a hearing, claiming that the appellants were not entitled to refuse to work since they have acknowledged that their refusal to work put the life, health or safety of another person in danger; a fact that would automatically, under the *Code*, prohibit having recourse to the right to refuse to work. Second, the new deployment standards for correctional officers were made with the collaboration and the support of the bargaining agent and did not change the work of the appellants. It is therefore the position of the respondent that there remains no live issue between the parties and consequently, the matter has become moot.

Respondent's Submissions

[7] On the circumstances of the case, the respondent refers to May 8, 2017, as the date when the new deployment standards and in turn staffing levels were implemented. According to the respondent, before the May 2017 deployment standards, one correctional officer was posted at WW13 to monitor inmate movement to and from the building. After the implementation, that correctional officer was deployed to a dynamic post in the general compound area to patrol between the kitchen/dining building and the living areas. Along the same line, before the implementation of May 2017 deployment standards, a correctional officer was posted at WW37 *when* there was an inmate movement from the living areas to WW18. However, since the May 2017 deployment standards implementation, WW37 is no longer staffed, but the area remains monitored by a two-officer roaming patrol of the general compound area who assist during inmate movements. On the factual circumstances of the case, the respondent circumscribes the appellants' position as claiming that the May 2017 deployment standards limit the supervision of inmate movements by correctional officers and thus seek that more staff be assigned to the supervision of inmate movements. The respondent, for its part, puts forth that this is exactly what the employer has done: deploy two correctional officers posted to the dynamic posts to monitor the general compound area and to patrol from the living areas to the kitchen/dining building. The respondent points out that while the post-restructuring was put in place in May 2017, it was confirmed in July 2017, after the appellants' work refusal and following a review period with additional consultation and agreement from the bargaining agent.

[8] On the first ground for its motion, the respondent submits that the appellants have acknowledged that their work refusal puts the life, health or safety of another person in danger, and that under paragraph 128(2)(a) of the *Code*, an employee may not refuse to work if the refusal puts the life, health or safety of another person directly in danger. Accordingly, the respondent submits that on this basis alone, the appeal should be dismissed.

[9] As for the second ground for the motion, that of mootness, the respondent submits that while the work refusal relates to staffing levels and deployments at a particular time, the deployment changes of May 2017 fully satisfy the corrective action sought, thus rendering the matter moot. More specifically, the respondent submits that the deployment implementation included the reassignment of one correctional officer and also the addition of two dynamic postings, in both instances not involving the appellants, such measures by the employer allowing correctional officers to monitor inmates in a more dynamic fashion instead of remaining in one static post, thus having greater oversight over the areas that were of concern to the refusing employees.

[10] The respondent submits that the May 2017 deployments have addressed the concerns raised by the appellants through their refusal and provide more inmate supervision compared to what existed before. No significant changes were made given that a correctional officer still maintains a line of sight over those areas of concern to the appellants, namely in the area of the compound between the work site and the rear of the dining building, as well as the walkway leading from the dining building to the living areas. The respondent further submits that the implementation of the deployments at issue in May 2017 occurred following substantial consultation with the bargaining agent to ensure their satisfying the new staffing standards, and that this was subsequently confirmed through a review conducted in July 2017. Given what precedes, the respondent is of the opinion that there is no adversarial context or live dispute remaining for determination, and that as such, a decision on the merits would have no concrete effect on the parties and no precedential value.

[11] In support of its arguments, the respondent notes that in *Canada (Attorney General) v. Fletcher*, 2002 FCA 424, the Federal Court of Appeal decided that the refusal-to-work mechanism represents an *ad hoc* opportunity given to employees at a specific time and place to ensure their immediate work does not expose them to a dangerous situation and where their short-term well-being is at stake, such opportunity not serving to raise hypothetical or speculative issues, or, as stated by the Tribunal in *Stayer v. Correctional Service Canada*, 2018 OHSTC 8 and in *Mungham v. Correctional Service Canada*, 2017 OHSTC 26, to challenge the staffing or policy decisions of the employer, such challenge being more properly debated in the fora offered by the health and safety policy committee and the workplace health and safety committee.

[12] The respondent submits that the Supreme Court of Canada's decision in *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 (*Borowski)*, which founds the principle according to which a court or tribunal may decline to decide a case which raises merely a hypothetical or abstract question, should be followed. An appeal will be moot when the decision will not have the effect of resolving a controversy affecting the rights of the parties. To determine whether a dispute is moot, the court or tribunal must first determine whether the requisite tangible and concrete dispute has disappeared, rendering the issues academic. If the response to this first question is affirmative, the court or tribunal needs to decide whether it should exercise its discretion to hear the case nonetheless, having in mind the presence of

an adversarial context, a concern for judicial economy and its proper law-making function. Based on what precedes, the respondent is of the view that there should be a finding of mootness in this case.

Appellants' Submissions

[13] The appellants were provided with the opportunity to formulate submissions regarding the respondent's motion. On October 17, 2018, Appellant Daigneault, provided the Tribunal with a very brief and somewhat cryptic email to serve as submissions. In its entirety, it reads as follows: "The employee's submissions are that a dismissal does not give the employee the right to be heard and in a complaint to the integrity commissioner on the investigation of this case it was stated the same in the response from the said commissioner as to why the complaint could not go forward." Given the submissions brevity and the somewhat apparent lack of understanding of and even relevance to the issue of the motion, the undersigned instructed the registrar of the Tribunal to contact the appellants and offer the opportunity to supplement their submissions. This was done by email dated October 17, 2018, which reads as follows: "The Appeals Officer would like to give the appellants the opportunity to provide additional submissions in regards to the motion to dismiss [...]". The respondent was informed of this action by the undersigned and formulated no objection. Neither appellant submitted additional submissions at the time of the writing of this decision.

Analysis

[14] The respondent has based its motion to dismiss on two grounds: (1) the first having to do with the right to refuse to work when the exercise of such right puts the life, health or safety of another person in danger, and (2) the second on a claim of mootness due to the disappearance of the tangible and concrete dispute rendering the matter originally raised academic. I will first deal with the mootness issue. The leading case on this issue is the decision by the Supreme Court of Canada in *Borowski*, to which the respondent has turned in claiming that this case has become academic and moot. The following excerpt from that decision clearly explains the doctrine:

> The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it.
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> The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (In the interest of clarity, a case is moot if it does not present a concrete controversy even though a court may elect to address the moot issue.)
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> [emphasis added]

[15] In the present matter, the sole issue to address in determining whether the appellants should succeed on the respondent's motion is whether, at the time the undersigned is considering a decision on this matter, there remains a live controversy between the parties to the appeal, or, stated differently and using the words of the court in *Borowski*, whether the tangible and concrete dispute has disappeared. There is no doubt that at the outset, when the appellants refused to work, a controversy with the respondent existed, that controversy relating with the application of the National Standard for the deployment of correctional officers at the institution to reflect the national policy. This resulted in deployment changes and reassignments with which the appellants disagreed, as evidenced by their work refusal.

[16] Examination of the issue followed the course established by the *Code* and ultimately resulted in a finding of absence of danger by the ministerial delegate, and the present appeal. However, at this time, deciding on the motion does not entail examining the merits of the appeal, but rather assessing whether there are sufficient grounds pro or con the motion. I find myself in somewhat of a predicament in that, as stated above, the only arguments or submissions in this regard are those of the respondent. Granted, one of the appellants did submit what the undersigned referred to above as a cryptic statement purportedly in response to the submissions of the respondent. However, try as I may and even accounting for what I suspect may be a lack of experience in legal or administrative proceedings matters such as the present, I cannot find in the words used by the appellant any element or indication that would go, even in the widest sense, to the points that have to be, at least minimally, put forth to answer the motion for a declaration of mootness. One cannot disregard in this respect the fact that one appellant failed to avail herself of the opportunity to strengthen the appellants' submissions and give suit to the Tribunal's request, and also the fact that the other appellant never even gave suit to the Tribunal's invitation to make submissions on the motion by the respondent.

[17] Having said this, the sole submissions and, to be specific, indications as to facts and circumstances, apart from the ministerial delegate's conclusion of no danger, are those of the respondent. While those may not have gone through the vetting process of a hearing on the merits where evidentiary elements are subjected to examination and challenge, they remain nonetheless the sole elements submitted to my consideration in deciding on the motion. In short, the respondent's claim is that there is no longer a live controversy or issue between the parties, a claim that is not challenged or contradicted by the appellants' words that the motion to dismiss seeks to deprive of the right to be heard. When applying the *dicta* by the Supreme court in *Borowski* and the doctrine of mootness, I have no hesitation in stating that where a claim is made that no live issue remains between parties to a proceeding, an opposing party needs to put forth some argument that the controversy not only existed but persists, even if such argument is made in the most succinct or *prima facie* manner, upon which case an appeals officer could elect to hold a hearing on the motion to obtain additional elements to decide. In the matter at hand, that has not been the case.

[18] In light of what precedes and the singularity of argument on the motion, I can only conclude that at the time of making the present decision, there remains or appears to remain no live controversy between the parties and that this matter has become academic. My conclusion is, therefore, that the matter is moot. Furthermore, taking into account the three criteria or elements to be examined in order to decide whether discretion should be exercised to hear this appeal on the merits nonetheless, my conclusion is that I will not exercise such discretion and I will not proceed to hear the appeal on the merits.

[19] As to the second ground raised by the respondent in support of its motion, namely the absence of the right of refusal for the appellants as such right puts the life, health or safety of another person directly in danger, my conclusion above makes it unnecessary to examine and decide on this issue.

Decision

[20] For the reasons stated above, the motion by the respondent is granted and the appeal is dismissed.

Jean-Pierre Aubre
Appeals Officer