Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2018-11-30
File No.: 2018-33

Between:

Canadian Food Inspection Agency, Applicant

and

Public Service Alliance of Canada, Respondent

Indexed as: *Canadian Food Inspection Agency v. Public Service Alliance of Canada*

Matter:	Application for a stay of a direction issued by an official delegated by the Minister of Labour
Decision:	The application is denied.
Decision rendered by:	Pierre Hamel, Appeals Officer
Language of the decision:	English
For the applicant:	Mr. Karl Chemsi, Counsel, Labour and Employment Law Group, Department of Justice
For the respondent:	Ms. Leslie Robertson, Legal Officer and Representation Officer, Public Service Alliance of Canada
Citation:	2018 OHSTC 16

REASONS

[1] These reasons concern an application brought under subsection 146(2) of the *Canada Labour Code* (*Code*) for a stay of a direction issued on October 17, 2018 by Mr. Normand DeVarennes in his capacity as an official delegated by the Minister of Labour (ministerial delegate).

[2] The direction was issued against the Canadian Food Inspection Agency (CFIA or the employer or the applicant) pursuant to subsection 145(1) of the *Code* further to the ministerial delegate's investigation into a complaint by an employee, Ms. Petitclerc (the complainant), alleging that she had been subject to work place violence within the meaning of the *Code*. The English version of the direction reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)
>
> On 17th September, 2018, the undersigned Official Delegated by the Minister of Labour conducted an examination in the work place operated by CANADIAN FOOD INSPECTION AGENCY, being an employer subject to the *Canada Labour Code,* Part II, at 1081 Main Street, Moncton, New Brunswick, E1C 8R2, the said work place being sometimes known as CFIA – Management Services, Federal Bldg. Moncton.
>
> The said Official Delegated by the Minister of Labour is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:
>
> Paragraph 125(1)(z.16) – Canada Labour Code, Part II, Subsection 20.9(3) – Canada Occupational Health and Safety Regulations.
>
> The employer, Canadian Food Inspection Agency, has not appointed a competent person to investigate the allegation of workplace violence.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*a*) of the *Canada Labour Code*, Part II, to terminate the contravention no later than November 8th, 2018.
>
> Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*b*) of the *Canada Labour Code*, Part II, no later than November 8th, 2018, to take steps to ensure that the contravention does not continue or reoccur.
>
> Issued at Moncton, New Brunswick, this 17th day of October, 2018.
>
> (s) Normand DeVarennes
> […]

[3] The employer appealed the direction and filed its Notice of Appeal with the Tribunal on November 6, 2018. The notice included the present application for a stay of the direction, and

argument supporting the application. The Public Service Alliance of Canada was designated as the respondent in the present matter, as the bargaining agent and representative of the complainant.

[4] The application was heard by way of teleconference on November 22, 2018, during which the parties had an opportunity to present their submissions and introduce additional relevant documentary information on the Tribunal's record.

[5] On November 28, 2018, a registrar of the Tribunal informed the parties of my decision to deny the application for a stay, with reasons to follow. The following pages set out the reasons in support of my decision.

Background

[6] The circumstances leading to the direction under appeal are set out in the Notice of Appeal and the ministerial delegate's report and may be briefly summarized as follows for the purpose of the application.

[7] The complainant submitted two work place violence complains to the employer on October 6, 2017, alleging exposure to violence in the work place by two individuals, her supervisor and manager. In essence, the complainant refers to discussions with her supervisor suggesting that she was talking too much with others, dumping work on other employees, taking long breaks and that many tasks associated with her position had been taken away from her since 2014. She also makes reference to the fact she was asked to change cubicles a number of times since 2009, without apparent reason. The complainant believes that the employer has abused its powers and that she is being singled out by her employer, causing her stress and prejudice to her health. The complainant considers the employer's actions to fall under the definition of "work place violence" set out in section 20.2 of the *Canada Occupational Health and Safety Regulations* (*Regulations*).

[8] The employer reviewed the complaints and found that it was clear and obvious on the face of the complaints that the situations described by the complainant did not constitute work place violence, but rather the exercise of management's rights regarding the complainant's performance. The employer took no further action on the complaint.

[9] The complainant filed a work place violence complaint to the Labour Program of Employment and Social Development Canada (ESDC) on February 27, 2018, claiming that the employer was in violation of the *Code* because it had dismissed her complaint without interviewing her and had not appointed a "competent person" to investigate her work place complaint, contrary to subsection 20.9(3) of the *Regulations*.

[10] Ministerial Delegate DeVarennes was assigned to look into the complaint in May 2018. Further to his investigation and review of the alleged facts, he considered that it was not "clear and obvious" that the allegations in the complaint did not constitute work place violence and issued the direction under appeal. His conclusion is largely founded on the application of the Federal Court of Appeal's judgement in *Canada (Attorney General) v. Public Service Alliance of Canada*, 2015 FCA 273.

Analysis

[11] The authority of an appeals officer to grant a stay of a direction is found in subsection 146(2) of the *Code*:

> **146(2)** 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.

[12] Appeals officers have considerable discretion in determining whether a stay should be granted. However, such discretion must be exercised in a way that supports the objectives and legislative framework of the *Code* and largely depends on the impact of the direction on the employer's operations. As such, each case turns on its own set of facts.

[13] The Tribunal's jurisprudence has set out a test comprising various factors that appeals officers should consider in dealing with an application for a stay; those factors serve as the appropriate analytical framework for appeals officers to apply their discretion in each case: see *S.G.T. 2000 Inc. v. Teamsters Quebec, local 106,* 2012 OHSTC 15, at para. 5. Originally derived from the Supreme Court of Canada decision in *Manitoba (A.G.) v. Metropolitan Stores Ltd*., [1987] 1 S.C.R. 110 (*Metropolitan Stores*), the test has been applied in a manner that furthers the objectives of the *Code*. The elements of the test are as follows:

1. The applicant must satisfy the appeals officer that the question to be tried is serious as opposed to frivolous or vexatious;

2. The applicant must demonstrate that it would suffer significant harm if the direction is not stayed by the appeals officer; and

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.

[14] I will consider in turn each of these criteria, as required.

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

[15] Regarding this first element of the test, the employer argues that the question to be addressed on the merits of the appeal is an important one, as it relates to the issue of whether it is "clear and obvious" that the allegations of violence do not constitute violence in the work place within the meaning of the *Code*, as set out by the Federal Court and the Federal Court of Appeal in *Canada (Attorney General) v. Public Service Alliance of Canada*, 2014 FC 1066, 2015 FCA 273.

[16] The employer submits that the complaint on its face is related to the exercise of management rights and not to violence in the work place and as such the employer had no obligation to appoint a "competent person" under subsection 20.9(3) of the *Regulations*. The appeal is therefore far from being frivolous, vexatious or otherwise dilatory.

[17] The respondent did not vigorously challenge the employer's contention that the appeal raised a serious question, but submitted that the employer's argument in fact addressed the merits of the appeal, which is not to be discussed at this early stage of the proceedings.

[18] I agree with the respondent that the application for a stay is not the proper place to debate the merits of the appeal. However, one must look at the subject matter of the direction and the grounds supporting the appeal as set out in the Notice of Appeal only to determine whether the applicant's challenge of the direction is on its face futile or frivolous. That being said, the determination made is not to be construed in any way as prejudging the outcome of the appeal on its merits.

[19] As I have stated in previous applications of the same kind, the threshold for meeting the first criterion is low and I see no basis on which to find that the present appeal is futile, frivolous or vexatious. (see: *Employment and Social Development Canada v. Longval,* 2014 OHSTC 12 (*Longval*); *Via Rail Canada Inc. v. Unifor,* 2014 OHSTC 5; *Canada Post Corporation v. Canadian Union of Postal Workers and King,* 2017 OHSTC 16). The interpretation of section 20.9 of the *Regulations* has been the subject of a number of appeals officers' and Court decisions. In *Canada (Attorney General) v. Public Service Alliance of Canada*, 2015 FCA 273, the Court expressed the view that those provisions are not "a model of legislative drafting" and gave rise to many questions of interpretation. The question raised by the present appeal is one of them.

[20] 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?

[21] The second element of the test is often the most difficult to satisfy for an applicant.

[22] The employer submits that the complainant has been away from the work place since November 2016 and that she has indicated that she does not wish to interact with management. She has been uncooperative in responding to the employer's request for updates of her medical certification of absence and the most recent certification indicates that she is unfit for medical reasons, with no anticipated return to work date.

[23] Consequently, the employer argues that it would be unable to comply with the direction as the complainant has indicated that contact from the employer is exacerbating her stress and would set her further back in her recovery. This would place the employer at risk of being liable should the complainant's health worsen as a result of the appointment of a competent person to investigate the complaint.

[24] Counsel for the employer also referred to the medical condition of the complainant's supervisor, who is directly targeted by the complaint and would be one of the most important witnesses in the investigation. She is under medical care for her stress, is very fragile and essentially is unable to participate in a competent person investigation at the present time.

[25] The respondent's representative submits that the employer has not met this second criterion of the three-fold test dictated by the jurisprudence. She noted that she filed with the Tribunal a medical note dated November 20, 2018 provided by the complainant, stating that she "is able to participate in the resolution of her work place violence complaint" [my translation] and wishes to start the process in order that the conflict be resolved so that she can envisage returning to work. In the representative's view, there is no issue of liability for the employer in proceeding with the appointment in light of the above evidence.

[26] The representative also stresses that appointing a competent person to carry out an investigation as mandated by the *Code* and the direction does not necessarily involve having contact with the complainant. Communications regarding acceptance of the proposed competent person may be made in writing and/or through the complainant's local union representative.

[27] As to the supervisor's medical condition, the respondent's representative submits that it does not prevent the employer from appointing a competent person, at least to get the investigation under way.

[28] My discretion to grant a stay must be exercised in a way that supports the purpose of the *Code* and is respectful of its fundamental structure. Subsection 146(2) is drafted in a way that leaves no doubt as to the intent of Parliament to ensure that directions issued by the Minister (or his delegates) shall be complied with, in spite of an appeal having been filed. That scheme supports the important objective of bringing immediate correction to violations of the *Code* and *Regulations* identified by a ministerial delegate and of preventing work place injury. The ministerial delegate may be right or wrong in his/her conclusions, but the direction is presumed valid and must be complied with, unless exceptional and compelling circumstances establish significant harm to the employer if the direction is complied with. Furthermore, it must be assumed that Parliament was alert to the possibility that a direction could be rescinded on appeal, with the effect that, in retrospect, the corrective measures taken in compliance of the direction were not required.

[29] I see no reason not to apply this framework to circumstances where the corrective action relates to a situation of alleged work place violence. The importance of the scheme set out in subsection 20.9(3) of the *Regulations* is described in rather strong words by De Montigny, J. in *Canada (Attorney General) v. Public Service Alliance of Canada*, 2015 FCA 273 at paragraphs 31 and 35 of his reasons:

> [31] The Regulations are clearly meant to prevent accidents and injury to health occurring in work places and to protect employees who have been victims of work place violence, whatever form it may take. The appointment of a competent person, that is, a person who is impartial and is seen by both parties to be impartial, is an important safeguard to ensure the fulfillment of that objective.
>
> […]
>
> [35] In the present case, it was not plain and obvious that the facts as alleged did not amount to work place violence. The complaint was not clearly vexatious or frivolous, and it was not the employer's role to decide at that early stage, without even meeting with the employee, whether

> the particular conduct alleged was serious enough in the circumstances so as to constitute work place violence. That determination should only be made by a competent person with a full understanding of the circumstances following an investigation under subsection 20.9(3).
>
> [Underlining added]

[30] In his oral submissions, counsel for the employer stressed that it is clear and obvious that the allegations on their face solely relate to the exercise of management's right to manage employee performance, and cannot constitute violence as defined in the *Regulations*. It would cause great prejudice to proceed with the investigation by a competent person with all of the commotion that such investigation will create where the appeal is likely to succeed.

[31] Without in any way prejudging the merits of the appeal, I will simply note that the definition of violence is very broad, as noted by the Federal Court of Appeal in *Canada (Attorney General) v. Public Service Alliance of Canada* (paragraphs 31 to 35), and the manner in which the employer's representatives conduct themselves in exercising their management rights could very well fall in the definition. That question may nevertheless be debated and determined in due course on the merits of the appeal, as compliance with the direction does not render the appeal moot (see: *Correctional Service of Canada v. Laycock*, 2017 OHSTC 21).

[32] Thus, one must ask, what is the employer required to do to comply with the direction? It must appoint a competent person accepted by all parties to investigate the complainant's unresolved allegations of violence. What are the implications of this measure for the employer's operations? Once that person is appointed, he/she must conduct an investigation independently from the employer, gather all the relevant facts and, if he/she finds that violence has occurred, make findings and recommendations to the employer. The competent person may also find that no violence has taken place and that would be the end of the matter.

[33] It is trite to state that, in carrying out his/her mandate, the competent person must act fairly, which includes the obligation to hear all persons concerned by the complaint. The competent person must, therefore, conduct the process with that objective in mind and deal with issues such as the ones the employer has raised in support of the present application. For example, if one of the persons concerned by the complaint is incapable, for medical reasons, to participate in the investigation, it is for the competent person to determine the proper manner to address that situation in the conduct of its investigative process.

[34] In light of the documentation on the Tribunal's record, including the information related to the complainant's and her supervisor's state of health, I am not persuaded by the employer's argument that it will suffer significant harm by complying with the direction. The employer is clearly under an obligation to comply with the direction, which is a legally binding order, and appoint a competent person to conduct an investigation into the complaint. The appointment process is by no means cumbersome, and can be done via written communication with the parties or their representatives if need be (see: *Via Rail Canada Inc. v. Unifor,* 2014 OHSTC 5; *Canada Post Corporation v. Canadian Union of Postal Workers and King,* 2017 OHSTC 16).

[35] Moreover, the complainant seeks the enforcement of the direction, asks that the investigation proceed as it should and there is no evidence that her participation in the investigative process would be prejudicial to her health, quite the contrary. Thus, the present situation is unlike the situation in *Canadian Food Inspection Agency v. Public Service Alliance of Canada,* 2013 OHSTC 36, where the appeals officer was persuaded, on the evidence presented to him, that participating in an investigation would be prejudicial to the complainant's health. In light of these factors, the employer's argument that its liability would be engaged should the complainant's medical condition be exacerbated by the investigation process is not well-founded.

[36] Insofar as the health condition of the complainant's supervisor is concerned, I have considered the information provided by the employer's counsel at the teleconference and by way of email on November 26, 2018. I accept the fact that she is under medical care for her stress, is very fragile at this time and states that "due to my personal health and well-being, I am not able to participate in a competent person investigation". I am not persuaded that the supervisor's condition should lead me to order a stay of the direction. First, as I stated above, I simply cannot see how the employer would be in breach of its duty of keeping its employees safe if it were to appoint a competent person in compliance with the ministerial delegate's order. Second, once appointed, the competent person acts independently from the employer, is master of his/her procedure and is required to deal with and accommodate any particular situation affecting persons whom he intends to interview in his fact-gathering process. I fail to see how the employer's liability may be engaged in the circumstances.

[37] For the reasons stated above, I conclude that the employer has not established that it would suffer significant harm by complying with the direction and, as a result, has not met the second criterion of the test.

What measures will be put in place to protect the health and safety of employees or any person granted access to work place, should the stay be granted?

[38] Given my conclusion regarding the second criterion, I do not have to make any determination on the third criterion for the purpose of the present application.

Decision

[39] For the reasons set out above, the application for a stay of the direction issued on October 17, 2018 by Ministerial Delegate Normand DeVarennes is denied.

Pierre Hamel
Appeals Officer