Occupational Health and Safety Tribunal Canada

Citation: Montreal Gateway Terminals Partnership and CUPE Longshoremen's Union, Local 375 and the International Longshoremen's Association, Local 1657, 2012 OHSTC 31

Date: 2012-09-13
File No.: 2012-42
Rendered at: Ottawa

Between:

Montreal Gateway Terminals Partnership, Appellant

and

CUPE Longshoremen's Union, Local 375, Respondent
International Longshoremen's Association, Local 1657, Respondent

Matter: Application for a stay of a direction

Decision: The application for the stay of direction is dismissed

Decision rendered by: Mr. Pierre Guénette, Appeals Officer

Language of decision: French

For the appellant: Mr. Erick Paré, Health and Safety Specialist, Montreal Gateway Terminals Partnership

For the respondent: Mr. Christian Parent, Health and Safety Coordinator, Checkers and Coopers Union of Montréal, Local 1657 of the International Longshoremen's Association; Mr. Éric Collin, Union Health and Safety Advisor, CUPE Longshoremen's Union, Local 375

REASONS

[1] On July 23, 2012, Mr. Erick Paré, Health and Safety Specialist, Montreal Gateway Terminals Partnership, filed an application to obtain a stay of direction pursuant to subsection 146(2) of the *Canada Labour Code* (the Code). This subsection reads as follows:

> 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.

Background

[2] On May 16, 2012, health and safety officer (HSO) Alain Testulat initiated an investigation following the receipt of two complaints about the participation of Montreal Gateway Terminals Partnership employees in the investigations of hazardous work place situations. Following this investigation, a direction was issued on June 18, 2012 by HSO Testulat.

[3] The direction under appeal is drafted as follows:

> IN THE MATTER OF THE CANADA LABOUR CODE
>
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145.(1)(a)
>
> On May 16, 2012, the undersigned health and safety officer conducted an investigation in the work place operated by Montreal Gateway Terminals Partnership, being an employer subject to the *Canada Labour Code*, Part II, at Terminals 62 and 77 of the Port of Montréal in Montréal, QC (PO Box 360, Station K, Montréal, QC).
>
> The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:
>
> 125.(1)(c) – Part II of the *Canada Labour Code*
> 15.4(1) – Canada Occupational Health and Safety Regulations
>
> **The employer did not inform employee members of the work place health and safety committee so that they could fully participate in the investigations of hazardous situations involving falling containers on the terminals or work place accidents involving machinery or equipment and with no disabling injuries.**
>
> Therefore you are HEREBY DIRECTED, pursuant to

> paragraph 145.(1)(a) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than July 3, 2012.
>
> Issued at Montréal, this 18th day of June, 2012.

[4] The hearing of the application for stay took place on August 16 by conference call. Prior to the call, Mr. Erick Paré sent arguments in writing.

[5] Following the review of the written and oral submissions presented by Mr. Erick Paré, as well as the oral submissions of Mr. Christian Parent (Respondent) and Mr. Éric Collin (Respondent), I denied the application for a stay of the direction. The reasons for my decision to deny the application for stay of the direction are as follows.

Analysis

[6] The authority for an appeals officer to grant a stay is derived from the aforementioned subsection 146(2) and the exercise of this discretion must be consistent with the purpose clause of the Code found in section 122.1 and any other applicable provisions:

> 122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

[7] To issue a decision under this application for stay, I applied the following three criteria:

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 significant harm would be suffered if the direction is not stayed; and

3) The applicant must demonstrate that measures would be put in place to protect the health and safety of employees or any person granted access to the workplace should the stay be granted.

Does it involve a serious question as opposed to a frivolous or vexatious claim?

[8] Mr. Erick Paré stated that an accident investigation is a process that the employer set up a long time ago, and that it is an important process.

[9] For this reason, Mr. Erick Paré deems that it involves a serious question to be tried.

[10] For his part, Mr. Christian Parent stated that the issue of the participation of the work place health and safety committee in accident investigations is a serious question to be tried.

[11] Taking into account the points raised by the parties, I am of the view that this matter raises a serious question to be tried.

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

[12] Mr. Erick Paré noted that it is difficult for the employer to comply with the direction since it would mean that many more situations would require an investigation. In other words, the employer would be required to investigate all incidents, no matter how minor, including finger cuts and sprained ankles, which would mean conducting an investigation every two to three days. Mr. Paré also added that the direction is vague and does not make it easy for the employer to know which situations should be investigated.

[13] M. Paré said he finds it excessive for the employer to investigate all situations. He said that there are already mechanisms (records, investigations) in place to try these questions.

[14] Mr. Paré also brought up the lack of availability of employee representatives on the work place health and safety committee to take part in all the investigations. This is because, he added, they are not always in the work place. Accordingly, there are delays for conducting the investigation, in addition to requiring additional resources to ensure the participation of employee members of the work place health and safety committee in such circumstances.

[15] On this point, Mr. Éric Collin specified that union representatives can be reached 24/7. He also added that unions have a delegate structure for responding, such that employee representatives are always present at the work place. Therefore, there is always someone to participate in an investigation and there would be no delays involved, as opposed to the appellant's claims.

[16] According to Mr. Christian Parent, the intervention process for an investigation always worked well before the change made by the Montreal Gateway Terminals Partnership, and this process did not harm the employer. He also does not see how the direction could suddenly harm the employer.

[17] Upon examining the arguments presented by both parties, I note that some points bear on the larger issue of the employer's obligation to investigate hazardous occurrences or accidents under paragraph 125.(1)(c) of the Code and subsection 15.4(1) of the *Canada Occupational Health and Safety Regulations*, rather than on the employer's obligation to inform employee members of the work place health and safety committee for them to take part in the investigations, as specified in the direction of June 18, 2012. I therefore think it would be more appropriate to try this question during the hearing on the merits of this matter.

[18] For the purposes of the application for stay, I am of the view that the arguments presented by the employer do not show significant harm if the direction is not stayed. The employer mentions the need to dedicate more resources for the conduct of investigations, without being able to give a specific number. Moreover, the argument whereby employee members of the work place committee are sometimes difficult to reach when a situation needs to be investigated does not, to my mind, represent significant harm to the employer.

[19] I conclude that the employer has not shown me that it will suffer significant harm if the stay is not granted. Accordingly, I consider that the second criterion is not satisfied.

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

[20] Given the dismissal of the second criterion, I do not have to consider the third criterion.

Decision

[21] For these reasons, the application for a stay of the direction issued by HSO Alain Testulat on June 18, 2012, is dismissed.

Pierre Guénette

Appeals Officer