

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canada Post Corporation v. Canadian Union of Postal Workers, 2012 OHSTC 33

Date: 2012-10-03
Case No.: 2011-40
Rendered at: Ottawa

Between:

Canada Post Corporation, Appellant

and

Canadian Union of Postal Workers, Respondent.

Matter: Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer.

Decision: The direction is rescinded.

Decision rendered by: Mr. Michael McDermott, Appeals Officer

Language of decision: English

For the appellant: Mr. Jeremy Warning, Partner, Heenan Blaikie

For the respondent: Mr. Peter Denley, Regional Grievance Officer, CUPW.

Canada

REASONS

[1] This decision concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) against a direction issued by Health and Safety Officer Bob Tomlin on July 8, 2011, pursuant to subsection 145(1) of the Code. The appellant is the Canada Post Corporation (the Corporation) and the respondent is the Canadian Union of Postal Workers (CUPW).

Background

[2] The direction was issued by the Health and Safety Officer (HSO) following his investigation of an incident that occurred at approximately 12:30 pm on July 5, 2011, at Wallbridge Crescent, Belleville, Ontario, involving two dogs and resulting in serious injury to Letter Carrier Judy Norris. The HSO concluded that the Corporation had contravened section 124 of the Code, the general duty of the employer, and issued the following direction to the Corporation:

The said health and safety officer is of the opinion that the following provision of the Canada Labor Code, Part II, has been contravened:

No./No: 1

124. – Canada Labour Code Part II, - Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

The employer is assigning employees to deliver mail to locations where the resident(s) is known or where the employer ought to have known that the resident(s) keeps animals without adequate controls to protect the employee from being attacked by the animals(s).

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 8 July 2011.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the Canada Labour Code, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

Issued at Belleville, this 8th day of July, 2011.

[3] Appeal hearings were held in Belleville on February 28 and 29 and March 1, 2012. In addition to HSO Tomlin, the following witnesses gave testimony during the two and a half days of hearings: for the appellant, Belleville based Letter Carrier Supervisor Mr. Travis Shalla and Mr. Hichan Azzi, Ottawa based Operations Training Officer; for the respondent, Mr. Peter McCarthy, Employee Co-chair of the Local Joint Health and

Safety Committee, Letter Carriers Kelly Baldock and Judy Norris, all three Belleville based.

[4] Specific details of the July 5 incident and the resulting injury to the Letter Carrier are not in dispute. Ms. Norris is employed by the Corporation as a temporary or casual Letter Carrier who works on an as needed basis. On July 5, 2011, she was delivering mail on Letter Carrier route 14. When proceeding from number 50 to 48 Wallbridge Crescent and reaching the latter property, she was beset by two dogs belonging to its residents. Ms. Norris did not have time to retrieve the repellent pepper spray from her satchel. She tried to protect her legs with the satchel and mail she was holding. The larger of the dogs, a bull mastiff, bit her twice severing the lower part of her left hand thumb. The incident was witnessed by Mr. Shawn DesRochers, the resident of 50 Wallbridge Crescent, who called 911. Although injured and very upset, Ms. Norris telephoned the Belleville Post Office and spoke to Supervisor Travis Shalla, informing him of the attack and of her injury. Mr. Shalla alerted the Belleville Post Office Superintendent, Ms. Susan Coultis, and together they went to the incident scene where the police were already present and administering first aid. The ambulance subsequently arrived and Ms. Coultis accompanied Ms. Norris when she was taken to the Belleville Hospital. A search at the site of the incident for the severed portion of Ms. Norris's thumb was unsuccessful. At the hospital the injured thumb was surgically amputated to the knuckle.

[5] Mr. Shalla was still at the incident site when the municipal animal control officer, Mr. Ron Pierce, arrived. Mr. Travis testified that at the time Mr. Pierce informed him the dogs had been involved in previous incidents, notably one that involved a twelve year old boy who had been attacked in January 2011 when with his father delivering advertising material on Wallbridge Crescent and further that an off-property muzzle order had been issued for the larger dog. Mr. Travis testified that he had not been aware of the attack on the boy by the dogs before July 5. Counsel for the appellant's suggestion that nobody with knowledge of the attack had told anybody at the Corporation about it prior to Mr. Pierce informing Mr. Travis, was not challenged. Following the incident involving Ms. Norris, and apparently on orders from the Belleville Police, the bull mastiff was euthanized.

[6] HSO Tomlin began his investigation in Belleville at approximately 8:30 am on July 7, 2011. He testified that his activities on that and the following day were of a preliminary nature. He visited the Post Office and interviewed Travis Shalla, taking a formal statement from him. He spoke to Ms. Coultis but did not take a statement and, when under cross-examination at the hearing, had no firm recollection of the contents of his conversation with her. He said he spoke to other Letter Carriers at the Post Office but no names or specifics of the contacts were recorded or recalled. He did take account of the sortation case and specific address slot for 48 Wallbridge Crescent that was marked with a dog sticker. As previously noted, the direction under appeal was issued by the HSO on July 8, 2011, the second day of his preliminary investigation. HSO Tomlin notes in his report and confirmed in his testimony that the Corporation ceased delivery to 48 Wallbridge Crescent in compliance with the direction.

[7] The HSO continued his investigation in August 2011. He interviewed and took statements from the following persons: Ms. Norris on August 18; Ron Pierce the animal control officer on August 22 and 30; and, Wally Purchase on August 31, Mr. Purchase was the regular Letter Carrier for route 14 in Belleville prior to his retirement from the Corporation. Reference will be made below to these interviews and statements as needed and appropriate. Suffice it to note here that, after completing his investigation and with reference to paragraph 125(1)(z.03) of the Code and subsection 19.7(2) of the *Occupational Health and Safety Regulations*, HSO Tomlin issued a second direction to the Corporation on September 2, 2011. The direction, which has not been appealed, was issued under paragraph 145(2)(a) of the Code after the HSO found a condition that constituted a danger to employees while at work. The offending condition is identified in the direction as follows:

The safe work procedures for addressing the hazard of threatening or hostile dogs is not being consistently implemented by employees and/or consistently implemented and monitored by supervisor

Issue

[8] The issue I have to decide is whether or not the HSO erred when he issued the direction with respect to section 124 of the Code on July 8, 2011, and, if he did err, whether the direction should be varied or rescinded.

Evidence

[9] Testimony given by witnesses and exhibits entered during the proceedings have been comprehensively reviewed. I have retained what I consider to be the most pertinent evidence relevant to the appeal. I look first at the policies and practices in place at the Corporation with respect to identifying and recording the presence of dogs at particular points of call and at responses the policies and practices call for in cases where the dogs demonstrate hostile and aggressive tendencies. Subsequently, evidence on the scope and content of training offered to Letter Carriers with respect to the presence of dogs will be summarized. Evidence given by Mr. McCarthy concerning his view of delays in management responses to health and safety incident reports will be referred to, as will that given by Ms. Baldock and Ms. Norris concerning their experience with dog attacks and responses to them.

[10] Testimony from Mr. Shalla and Mr. Azzi confirms that the presence of a dog at a point of call is indicated by a small sticker label portraying the image of a dog affixed to the address above the relevant slot in the sortation case. The label simply indicates a dog's presence at the address but does not record information as to its temperament or aggressive propensity. According to testimony the Letter Carriers are the Corporation's prime source of information as to the presence of a dog at a particular point of call. Corporation policy expects that a Letter Carrier who spots a previously unnoticed dog at

an address on his or her route will affix a dog sticker to the appropriate place on the sortation case, will advise the Supervisor and will arrange for a customer letter to be sent to the address signed by the Supervisor advising residents of their responsibilities as dog owners.

[11] In the event that a dog threatens or manifests aggressive behaviour towards a Letter Carrier, sections 6-1-1 and 6-3-2 of the CMS are to be followed. These procedures are somewhat similar to those relating to all causes of hazards and impediments to delivery, including climate, state of repair, humans and not just to dogs. The CMS describes a Letter Carrier's responsibility to report the incident to the Supervisor and to briefly document and date the incident or encounter on a Letter Carrier warning or pink card with an indication of the nature of the hazard or impediment. It appears that it is practice at Belleville for the Supervisor to approve the warning card following an investigation. In any event, the pink card is to be inserted into the address slot in the sortation case, taken with mail destined for delivery and returned to the slot when the route is completed.

[12] Following a report of an aggressive dog by a Letter Carrier, the Supervisor contacts the resident dog owner and undertakes an investigation. Depending on the outcome, a letter of assurance that steps are being taken to control the offending dog or dogs is sent to the dog owner. A dog owner's response to that letter and the nature of actions the owner takes to control the associated hazard, may determine whether or not sanctions up to temporary or permanent suspension of delivery are imposed. The presence of a pink card does not suspend delivery in itself. However, it is important to note that the Corporate policy of, "if you don't feel safe, don't enter", applies to threats from dogs as well as to, other hazards and impediments to delivery.

[13] Again the principal source of information as to the presence of an aggressive dog is the Letter Carrier. There was no evidence given to indicate that Letter Carriers had refrained from delivery at 48 Wallbridge Crescent because of hostile dogs or that written reports of such circumstances had been made. The statement taken by the HSO on August 31, 2012, from Mr. Purchase, the Letter Carrier who regularly delivered on route 14 prior to his retirement, was not entered as evidence. However, I note that Mr. Purchase did indicate he had reported to a previous Supervisor that the dogs at 48 Wallbridge Crescent often attempted to get over the fence of the yard to which they were confined. The attempts to cross the fence that he observed were unsuccessful and he did not describe the dogs as being uncontrolled. Mr. Purchase's apparently oral report does not seem to have been documented as policy requires or followed up by him or by a Supervisor.

[14] At the time of the July 5 attack on Ms. Norris, there was no systematic exchange of information between the Corporation and the municipal animal control officer. Mr. Shalla testified that communication was always initiated by the Corporation's staff, presumably when a dog issue arose, and that Mr. Pierce never volunteered information to them on problem dogs. The interviews the HSO had with Mr. Pierce and the statements he took from him on August 22 and 30, 2012, were also not entered at the hearing.

Nevertheless, I note that Mr. Pierce's untested statement gave a more nuanced account of the sequence of exchanges with Mr. Shalla but in the end indicated that he could not be certain that he had informed him of the January 2011 incident in which the two dogs had been involved, other than at the site of and after the attack on Ms. Norris on July 5, 2011.

[15] Testimony given by Mr. Shalla and Mr. Aziz is most pertinent with respect to training and information provided to Letter Carriers concerning hazards and impediments to delivery involving dogs. Several exhibits entered during the hearings, some of which have already been referred to, are also of relevance. In sum, the testimony and exhibits point to a comprehensive training and information program in this important area. Exhibit 7 is a copy of Ms. Norris's training history containing a listing of training taken when she first entered employment as a Temporary Letter Carrier at Belleville in September 2007. Mr. Azzi, who confirmed he provided some of the training to Ms. Norris, testified that it is the same training offered to all Letter Carriers, temporary or permanent, when joining the Corporation.

[16] The training program was developed by the Corporation with the Union's involvement and certain health and safety classroom modules are given by CUPW instructors, including one specific to outside Letter Carrier work that has a section on dealing with wild animals and aggressive dogs. The training package is also referred to as Letter Carrier School, although the latter appears to include five days of on the job mentoring subsequent to class room sessions. Mr. Azzi for the Corporation delivers a module on safety on the job again with a specific section on dealing with dog attacks. A fifteen to twenty minute video presentation on dog issues is also included as part of the training program and was viewed during the hearings. The video covers steps from initial awareness of potential dog threats, through preventive avoidance of dog attacks and protective steps to be taken if an attack occurs, to reporting of incidents with and attacks by aggressive dogs. The Instructor's guide for the video presentation indicates that time may be allowed for questions and discussion.

[17] The detail of information on dog awareness and handling of dog related incidents contained in the CMS and in the formal classroom presentations is succinctly consolidated in five dog awareness bulletins used by Supervisors as the basis for safety talks with the Letter Carriers. Mr. Shalla testified that he and his colleague give regular talks almost every week. The talks are relatively brief lasting from five to ten minutes. A range of safety matters and not just dog issues are covered over time but Mr. Shalla indicated that particular attention is paid to the dog awareness bulletins in the spring as milder weather sees dogs spending more time outside. Like the video, the bulletins cover dog awareness, dog bite prevention and what to do if an incident has occurred. The actions expected by the Letter Carrier and the Supervisor are summarized. Two examples of the dog bite talks were entered at the hearing, one given on April 28, 2011, covering "what to do when approached by a dog" and another given on May 5, 2011, covering "what to do at the customer's door." Attendance at these sessions is recorded. Ms. Norris is shown to have attended both the April 28 and May 11 sessions but she disputed attendance on the latter day and supplied notes showing that she was not at work.

[18] Questioned on Letter Carrier access to the CMS, Mr. Azzi indicated that it is available to all through the internal internet. He said that internet access is provided at the Belleville office and the new hire welcome package offers guidance on accessing the internet. Employees who require a hard copy can request a print out. Again, much of the CMS information relevant to dog issues is available in digestible form in the succinct summaries outlined in the previous paragraph. Mr. Azzi indicated that copies of the texts of the five dog safety talks are available with the info book located at the point where Letter Carriers sign into the office. The info book contains a variety of business and personal information and is accessible to Letter Carriers who are accorded a two minute daily time credit in order to peruse the book.

[19] Testimony by Mr. Peter McCarthy, employee Co-chair of the Local Joint Health and Safety Committee (LJHSC) since 2008, generally confirmed the policies in place relating to dog issues and incidents outlined previously. However, much of his evidence related to what he regards as omissions and delays on the part of Supervisors and management in providing information on injuries on duty, in particular the provision to the LJHSC in a consistent and timely manner of Supervisors Accident Investigation Reports (SAIR). Copies of LJHSC agendas and SAIRs were entered, to which Mr. McCarthy referred when submitting that some SAIRs were not written up and others were written up but not brought to the LJHSC. He further alleged that LJHSC members are often not included in accident investigations as policy requires, with the July 5 incident involving Ms. Norris being such a case. He said that names and phone numbers of LJHSC members are available on the Health and Safety Board (located near the info board) and confirmed that he or another employee representative would respond if called. In cross-examination Mr. McCarthy agreed that the info board and the five dog safety talk bulletins kept adjacent to it have significant information on dog incidents.

[20] Ms. Kelly Baldock, a Letter Carrier with over 22 years of service with the Corporation, testified about two incidents in July 2011 that involved dogs manifesting aggressive behaviour to her while she was delivering mail. The first concerned a German shepherd owned by a newly moved in resident at 15 McFarland in Belleville. The initial event occurred early in July 2011 prior to the attack on Ms. Norris. When Ms. Baldock first noticed the dog from across the street at McFarland, it was not tied up and was standing at what she described as a child's gate that she evidently believed to afford inadequate restraint. At the time she had no mail for the newly arrived resident of 15 McFarland. Apparently apprehensive that the German shepherd might give her cause to withhold delivery at certain points on McFarland, Ms. Baldock spoke to residents at number six who do not own a dog explaining that she might have to withhold their mail. The residents appear not to have been pleased with the news and may have complained. Ms. Baldock subsequently took a photograph of the dog standing at a window in 15 McFarland that she showed to a Supervisor indicating that she did not feel safe walking past the dog behind a child's gate. Ms. Baldock testified that a Supervisor told her she was not allowed to cut off delivery to 6 McFarland, advice that she says she took as a direct order. A further incident, apparently subsequent to the July 5 attack on Ms. Norris,

involved three dogs that surrounded Ms. Baldock on McFarland. She testified that the incident was followed up by the Manager and Health and Safety Manager at the Belleville office who together made an inspection with her of the McFarland points of call. It appears that the inspection resulted in mail delivery to number 15 McFarland being taken over by a contract driver. In cross-examination, it was put to Ms. Baldock that there is a distinction between cutting off or suspending delivery, a decision that rests with a Supervisor, and a Letter Carrier withholding delivery under the "if you don't feel safe, don't enter" policy on a particular day or days. Ms. Baldock agreed that the Supervisor did not say she could not withhold delivery in the sense of that policy.

[21] Ms. Judy Norris, who joined the Corporation as a Temporary Letter Carrier in September 2007, confirmed that she had received the two weeks of training for new hires also known as Letter Carrier School. While acknowledging that the training program included information on dog attacks, she does not recall details. Ms. Norris testified that, in March 2008, she was lunged at by a dog while delivering mail on Belleville route or walk 15, later identified as 90 Cannifton Road. She said that she told the dog "No" and backed away. At the time she was not equipped with dog repellent spray. After the dog had retreated she endeavoured to call the Post Office and after several tries reached Mr. Shallis. Her testimony indicated that there was no immediate follow up and Ms. Norris had no knowledge of the union being involved in an investigation about the incident. Questioned on the presence of a dog sticker or warning card at the address slot, she could not be certain one way or the other. On her return to the office another Supervisor gave her a dog spray canister for which she signed. She said that she was given oral advice as to how to operate the spray and tried it out the following day. Ms. Norris testified to another incident with a smaller dog about one year later but said she did not report it since nothing had happened with respect to the previous attack.

[22] In response to questions on follow up training to the initial sessions on dog safety, Ms. Norris said that she had not received such training. She did, however, agree that she had attended safety talks but confirmed that she was not at work on May 5, 2011, when a dog bite prevention talk was given. In cross-examination Ms. Norris acknowledged that while she did not recall details of the training program, she was not saying that the training had not been given to her. Similarly, while not suggesting that they do not exist, Ms. Norris indicated that she was not familiar with the CMS or the info book and the copies of dog safety talks, testifying that her main interest in the binder was with respect to job-postings. Again, while not denying she had seen the dog bite video during her initial training, she did not recall its contents. Ms. Norris did review the video after the July 5 attack on her.

Submissions of the parties

Note: As will be evident in the following sections, I have borrowed freely from the wording of the parties' submissions. I have, however, refrained in the main from using quotation marks.

Appellant's final submissions

[23] The appellant's final submissions firstly argue that the relevant evidence does not support the HSO's conclusion and in consequence the direction he issued on July 8, 2011, should be rescinded. In the alternative, it is argued that the direction should be rescinded because the Corporation had exercised due diligence by having in place comprehensive measures to ascertain the presence of aggressive and inadequately controlled animals in order to protect its employees.

[24] The submissions include relatively detailed argument relating to the appellant's position on the scope of both the hearing and of the direction. With respect to the hearing and noting the objections it voiced to the relevance of certain evidence the respondent endeavoured to introduce, the appellant argues that much of the evidence is irrelevant and should be given no weight in the appeal. Several examples are offered including: reference to the manner in which the investigation into the July 5 attack on Ms. Norris was conducted citing for one testimony about whether a union representative was immediately involved in the process; testimony about prior dog incidents in Belleville and other places in Ontario; and, testimony about the lack of or delays in the provision of SAIRs to the LJHSC.

[25] The appellant submits that the hearing is about the direction and the HSO's conclusion that the Corporation was assigning employees to deliver mail to locations where it knew or ought to have known that residents were keeping animals without adequate controls to protect its employees. Consequent to the Appeals Officer standing in the shoes of the HSO, it is argued that relevant evidence and information is that probative of whether or not the Corporation did know or ought to have known that an employee was delivering mail to such a location. That, it is submitted, is the issue under appeal and it would be contrary to the structure of the Code to entertain new issues that were not before or addressed by the HSO.

[26] In support of its argument on the scope of the hearing the appellant cites from section 146.1 of the Code with the appellant's emphasis as follows:

- [...] the appeals officer shall, in a summary way, and without delay, inquire into the circumstances of **the decision or direction** as the case may be, **and the reasons for it** and may
- (a) vary, rescind or confirm the decision or direction; and
 - (b) issue any other direction that the appeals officer considers appropriate under subsection 145(2) or (2.1). [My emphasis]

The appellant argues that this plain wording means an appeal against a direction is an inquiry into the decision in question and that the parameters of the hearing are set by the direction and the reason or reasons for its issuance. It is submitted that, in such circumstances, an appeal is not the time to raise new or additional issues that were not the subject of the direction because new issues that were never raised before the HSO could not have been among the reasons for issuing the direction.

[27] The appellant further submits that this framework has been accepted by Appeals Officers when considering their *de novo* quality, quoting with added emphasis from the Appeals Officer's decision in *Duplessis v. Forest Products Terminal Corp.*¹:

Hence, the AO hearing a matter *de novo* has sufficient powers to receive any new evidence, including evidence that an HSO could or should have received, as long as it relates to the circumstances that gave rise to the refusal to work or the issuance of the direction under appeal. [My emphasis]

[28] Turning to the scope of the direction, the appellant submits that the issues and circumstances germane to the direction are those probative of its wording, wording that reflects the HSO's conclusion. Attention is drawn initially to the direction not referring to a specific point of call, street, municipality or other location, whereas evidence at the hearing establishes that it was issued in respect of 48 Wallbridge Crescent in Belleville. It is submitted that there is no evidence of the HSO undertaking a broader investigation at other locations or of other circumstances prior to issuing the direction. It is also argued that the HSO's acceptance of suspension of delivery at 48 Wallbridge as compliance with its terms is further evidence of the direction's intended and specific scope.

[29] The appellant takes particular issue with the HSO's testimony to the effect that the July 8 direction related to his conclusion that there were consistency concerns with the implementation of the Corporation's procedures relative to threatening dogs. The appellant submits that the HSO testified implementation concerns were the subject of the September 2 direction which was not appealed. It is argued that the HSO misspoke when relating implementation concerns to the direction under appeal.

[30] With respect to the conclusion reached by the HSO as a result of his investigation and as recorded on page eleven, section 3.1, of his report, the appellant argues that it should be looked at in two distinct parts with corresponding distinct remedies. The first paragraph refers specifically to the injury incurred by Ms. Norris concluding that it could have been avoided had the Corporation been aware of aggressive dogs at this residence and had also ceased delivery. The appellant notes that the HSO expresses no other conclusion with respect to any other incident or point of call and submits that this is consistent with the testimony he gave at the hearing which supports the contention that the direction was issued with respect to 48 Wallbridge Crescent. The appellant then makes reference to the second paragraph containing the HSO's finding on monitoring and complying with policies and procedures regarding aggressive dogs, arguing that its wording is consistent with evidence the HSO gave at the hearing on the direction he issued on September 2, 2011, following completion of his investigation (see paragraph seven above).

¹ C.L.C.A.O.D. no. 38 at par. 82.

[31] Having argued that the HSO's conclusion should be regarded as having two distinct paragraphs, the appellant submits that each paragraph relates to only one of the two different and distinct directions detailed in section 3.2 on page eleven of the HSO's report. More specifically, it is submitted that the first direction issued on July 8, 2011, corresponds to the first paragraph of the HSO's conclusion and the second direction issued on September 2, 2011, corresponds to the second paragraph.

[32] In addition to argument on the scope of the hearing and the scope of the direction, the appellant submits that there is no factual basis to justify the issuing of the direction under appeal. It is argued that the evidence establishes that it was impossible for the Corporation to know that the dogs were not adequately controlled on July 5, 2011, maintaining that nobody at the Corporation was aware there was an aggressive dog at 48 Wallbridge Crescent, there had been no reports of aggressive animal behaviour from Letter Carriers assigned to deliver mail to the address nor had any advice as to such presence or behaviour been received from municipal officials and the HSO had presented no evidence to the contrary.

[33] The appellant points out that the knowing or ought to have known of the inadequate control of the animals aspects of the direction's wording go beyond knowledge, actual or expected, of the presence of an aggressive dog at 48 Wallbridge. It is submitted that control of an animal is in the hands of the person who has custody of it and that the person can change the means of control at any time without notifying the Corporation. Further, an existing means of control may fail or be overcome by the animal. Neither prospect, it is argued, can be controlled by the Corporation. Citing that the HSO agreed at the hearing that it is impossible for the Corporation to know how a particular animal is controlled at any particular time, the appellant suggests he concluded that it had breached section 124 of the Code by not being aware of what was impossible to know. The appellant concludes that the direction should be rescinded because there is no evidentiary basis for it.

[34] The final portion of the submissions addresses the appellant's alternative position that the Corporation exercised due care and diligence by having in place a comprehensive system of on-site hazard identification, internal communication, employee training, protective equipment, and public awareness. As will be evident below, I have not found it necessary to pursue the appellant's alternative position and I will not go into details of its contents here. Suffice it to say that the appellant gives examples of the various components of the system aspects of which have been described previously in this decision. The appellant submits that evidence about components of the system was unchallenged, that section 124 was not breached and that the direction should be rescinded.

Respondent's final submissions

[35] At the outset, the respondent indicates less than full agreement with the appellant's submission that the scope of the hearing should be restricted to only the issues

that were before the HSO when he issued the direction under appeal. Quoting with added emphasis from Duplessis and Forest Products Terminal Corp, an opinion is offered that the Appeals Officer "has sufficient powers to receive new evidence that an **HSO could or should have received**, as long as it relates to the circumstances that gave rise to the refusal to work or the issuance of the direction under appeal." The submission does not expand upon this opinion but the different placing of emphasis makes it reasonable to assume the respondent would envisage a broader interpretation and application of the full quotation than that argued by the appellant (see paragraph 27 above). However, the respondent continues with assurances that its submissions will be limited to evidence relating to the following portion of the July 8 direction, "where the employer ought to have known that the resident(s) keeps animals without adequate controls to protect the employee from being attacked by the animal(s)."

[36] Drawing on the HSO's testimony concerning his visit to the Belleville Post Office on July 7, 2011, the respondent notes that, in addition to taking a formal statement from Mr. Shalla, he also spoke to other people including Letter Carriers and acquired information about the inconsistent application, enforcement and implementation of the Corporation's policy with respect to hostile dogs. Against this background the respondent submits that the HSO had formed a theory on July 7, prior to issuing the direction the following day that there were implementation issues with respect to the Corporation's hostile dog policy and that it is not clear that the direction was based solely on the situation at 48 Wallbridge Crescent as the appellant maintains. The respondent argues that the direction's identification of locations in the plural supports its theory. Although acknowledging that the HSO testified that the September 2, 2011 direction addressed the consistency of implementation issues, it is submitted he did not state that the July 8 direction was not intended to cover the same issues.

[37] Referring to the HSO's testimony on his expectation that the Corporation ought to know where hostile dogs are located given information that is available from agencies in the city and on there being no formal process to ensure that the Corporation obtains such information from the agencies, the respondent describes the lack of pro-active liaison as a serious deficit in the identification of locations where hostile dogs might be found. It is submitted that the HSO's testimony in this respect was given in support of his decision to issue the July 8 direction.

[38] Elaborating on the lack of a formal communication link between the Corporation and city agencies, the respondent refers to the eight year working relationship that Mr. Shalla testified he had with Mr. Ron Pierce, Belleville's contract municipal animal control officer. Mr. Shalla described Mr. Pierce as "part of the Canada Post team" but also testified that contact with him was always initiated by the Corporation and that "Ron never called me." The respondent expresses concern that it never occurred to Mr. Shalla or any other Supervisor to seek to establish a protocol with Mr. Pierce that would offer the Corporation a source of information on hostile dogs additional to that provided by its own staff. The respondent submits that there was an excellent opportunity to identify locations where hostile dogs were kept without adequate controls to protect employees

and it should have occurred to the Supervisors to have a system for the reciprocal exchange of such information in place.

[39] Taking issue with Mr. Shalla's testimony that he encouraged Letter Carriers to report dog incidents to him as soon as possible and that he or another Supervisor investigated all dog attacks, the respondent refers initially to an occasion in March 2008 and Ms. Norris's testimony concerning being lunged at by a dog at 90 Cannifton Road (see paragraph 21 above). The testimony referred to by the respondent indicated that Ms. Norris reported the incident to Mr. Shalla whose first response was to ask if the mail was ok. The testimony further indicates that no dog sticker or pink warning card was given to her during the rest of the week she spent on the route, nor as far as she knew did an investigation take place or was the union informed of the incident. With respect to subsequent dog incidents that she experienced, Ms. Norris testified that she did not report them because she believed there was no point in doing so when nothing had happened in response to the previous case.

[40] Continuing with the issue of the Corporation's responsiveness to dog incidents, the respondent refers to evidence given by Ms. Baldock concerning a dog incident at 15 McFarland in early July 2011 shortly before the July 5 attack on Ms. Norris (see paragraph 20 above). It is argued that the Supervisor's initial response to that incident was to inform Ms. Baldock that she could not cut off delivery demonstrating a greater concern with customer relations than with employee safety. The respondent also makes brief reference to Mr. McCarthy's testimony on instances where accidents and near misses were not being investigated and to SAIRs not being referred to the LJHSC in a timely manner. While acknowledging that the Corporation cannot prevent all dog attacks, the respondent concludes that failures to investigate dog incidents inhibit access to information about locations where hostile dogs are located. The respondent argues that the Corporation's poor response record prior to the issuing of the July 5 direction should be given weight and evaluated in order to determine if it ought to have known that there were dogs present without adequate control. For this and other reasons given in its submissions, including a lack of reciprocal liaison with the Belleville animal control officer, the respondent submits that the direction under appeal should not be rescinded.

Appellant's reply submissions

[41] The appellant takes issue initially with the respondent's submission that the scope of the July 8, 2011 direction extends beyond 48 Wallbridge Crescent and its claim that the HSO had developed a theory on the inconsistent application of the Corporation's hostile dog policies before he issued the direction. More particularly, reference is made to the conversations the HSO had with other letter carriers about other dog incidents at other points of call when he visited the Belleville Post Office on July 7, the day he commenced his investigation. Characterizing the information obtained from those conversations as hearsay, the appellant argues the presumptive inadmissibility of hearsay and in the case at hand submits, with reference to relevant jurisprudence, that the information does not meet the threshold of reliability required to render it admissible. While acknowledging that

paragraph 146.2(c) of the Code permits an Appeals Officer to receive evidence that may not be admissible in a court of law, the appellant insists that it would have no meaningful way to test the merit and veracity of the information and that admitting it as evidence would be unfair to the Corporation. The appellant concludes that the information is non-probative and should be given no weight.

[42] The appellant also counters the respondent's argument that the wording of the direction refers to "locations" in the plural thus indicating a broader application than would be the case if the singular had been used. This "small matter of syntax" it is argued does not displace the overwhelming evidence that the direction was issued in respect of 48 Wallbridge Crescent. That evidence includes, it is submitted, the HSO having issued the direction after he established there was no warning card in the sortation case slot for 48 Wallbridge and that he regarded suspension of delivery to that address as compliance with its terms. The appellant also cites the HSO's conclusion on page eleven of his report that, in the first paragraph of section 3.1, refers to the residence in the singular.

[43] The appellant refers again to, the respondent's argument that the HSO had formed a theory regarding concerns with implementation of the Corporation's hostile dog policies prior to issuing the direction and its submission that the HSO's testimony had not said that the direction did not address such concerns. The appellant submits that the argument overlooks the absence of reference to implementation concerns in both the direction itself and the relevant part of the conclusions on page eleven of the HSO's report, the latter being the first sentence in section 3.1. Had the intent been for the direction to cover implementation matters, the appellant argues that there would have been no need for the second direction on September 2, 2011.

[44] With respect to the respondent's submissions on the lack of a formalized system of communication between the Corporation and municipal animal control authorities, the appellant cites the Appeals Officer's decision in *Verville v. Correctional Services Canada*², that maintained a breach of section 124 of the Code does not occur simply because an additional step or measure could have been taken and that to substantiate such a breach compelling evidence must be led to show that an extra level of protection is needed. The appellant further argues that, although regrettable, an injury to an employee does not of itself demonstrate that existing measures were inadequate. The appellant concludes on this point that the respondent has not proven that employee safety would not be protected without formalization of a communication system with the municipal authorities and submits that no evidence was given as to what such a system would include.

[45] With respect to the respondent's submissions on prior hostile dog incidents, principally those referred to in testimony given by Ms. Norris and Ms. Baldock, the appellant submits that they are not probative of whether the Corporation knew or ought to have known that an animal was being kept at a location with inadequate controls to

² [2002] C.L.C.A.O.D. No. 12.

prevent an attack on its employees. It is argued that the March 2008 incident encountered by Ms. Norris at 90 Cannifton Road pre-dates the July 5, 2011, incident by more than three years and, other than involving Ms. Norris, there is no connection between the two. The respondent's assertion that lack of response to the latter incident left another Letter Carrier vulnerable to attack was not backed by evidence and, the appellant also argues, the route's regularly assigned Letter Carrier was not called to demonstrate that there was an ongoing risk or awareness of an aggressive dog at the location.

[46] With respect to Ms. Baldock's testimony, the appellant refers mainly to the matter of her being told by a Supervisor, after reporting a hostile dog incident, that she could not cut off delivery. It is argued that there is a distinction between cutting off mail in the sense of a suspension of delivery and a refusal to make a delivery on a particular day if she believed it unsafe to do so. In such circumstances, the appellant submits that Ms. Baldock's evidence is of little probative value when assessing the validity of the direction under appeal.

[47] The appellant argues that testimony from both Ms. Norris and Ms. Baldock indicates that the Corporation did respond to their reports of dog incidents, although not to the respondent's satisfaction. In Ms. Norris's case, it is pointed out that she was provided with pepper spray after reporting a dog incident. In Ms. Baldock's case, the assessment of dog hazards undertaken on the route in question by Corporation officials is cited. In any event, the appellant submits that the evidence on these matters does not determine whether or not the Corporation knew or ought to have known about the presence of inadequately controlled dogs at 48 Walbridge Crescent.

[48] The appellant's last point concerns Mr. McCarthy's evidence that SAIRs were not being provided to the LJHSC with the result the Committee was prevented from addressing dog hazards. It is argued that the respondent gave little evidence to show that issues involving dogs would have required SAIRs to be prepared and further that Mr. McCarthy had agreed in cross-examination that SAIRs are sent to the union and he could have obtained copies from that source. I note, however, that the CMS does indicate a requirement for the Supervisor to prepare a SAIR when a dog incident results in injury to an employee and that a copy should be provided to the LJHSC member.

[49] In the light of arguments made in its final and reply submissions, the appellant maintains that the direction should be rescinded.

Analysis

[50] As is evident from my summary above of the parties' submissions, I was presented with argument on the scope of the present appeal. Consequently, I believe it important to indicate at the outset that I have concentrated my consideration and analysis of the issues raised before me only to the extent that they concern the direction issued by the HSO on July 8, 2011. I want to make it clear that, though mindful of an Appeals Officer's *de novo* capacity as discussed above in paragraphs 27 and 35, I find it would be

improper and redundant for me to render a decision on information and issues that were raised during the appeal but which are addressed in the second direction issued by the same HSO on September 2, 2011, following completion of his investigation. The matters that I refer to include concerns identified about inconsistent implementation of the Corporation's safe work procedures by employees and supervisors and inconsistent monitoring of the same procedures by supervisors. In other words, I will not address these concerns because in addition to finding that they are not for the most part of direct relevance to the present appeal, the subject is well covered by the September 2 direction. That direction has not been appealed and I understand that remedial steps in compliance with its terms are being instituted by the Corporation.

[51] With respect to the appellant's submissions on the scope of the hearing, I agree that the wording of section 146.1 of the Code offers guidance as to an Appeals Officer's duty to inquire into the circumstances of a direction and the reasons for it (see paragraph 26 above where the appellant discusses this issue). That said I am of the view that it was reasonable for me to allow testimony at the hearing about the circumstances of prior dog incidents and of inconsistent application and implementation of the Corporation's policies regarding hostile dog situations. Of course relevance and probative value must be assessed in determining the weight given to such testimony but an Appeals Officer may well be in a better position to make a determination fair to both parties after hearing the testimony and receiving the submissions in their entirety rather than responding to each and every objection on the spot.

[52] Turning to the scope of the direction that is the subject of this appeal, I accept that it is confined to the circumstances of the incident at 48 Wallbridge Crescent. Despite the plural and non-specific references to locations, the preponderance of evidence supports this view. For example, the first paragraph of the HSO's conclusion in section 3.1 on page eleven of his report states clearly that Ms. Norris's injury could have been avoided had the Corporation been aware of the aggressive dogs at the specific residence and had discontinued delivery to it. I agree with the appellant that this part of the HSO's conclusion section relates directly to and motivates the July 8 direction he issued and the contravention he found of section 124 of the Code.

[53] I also agree that in this case compliance with the direction reflects its intended scope and note that it calls for two actions: termination of the contravention and taking steps to ensure that it does not continue or reoccur. The HSO agreed the direction was complied with when the Corporation ceased delivery at 48 Wallbridge Crescent and so confirms in his report. If application to multiple locations was really the direction's intent, it is hard to see how cessation of delivery to a single address could provide assurances that the contravention would not continue or reoccur elsewhere. Furthermore, the only formal interview the HSO had before issuing the direction was on July 7 with Mr. Shalla from whom he obtained a witness statement. As the appellant points out, neither the interview or the statement deals with points of call other than 48 Wallbridge Crescent. Similarly, the HSO's noting of the presence of a dog sticker and the absence of

a pink warning card when he visited the Belleville Post Office on July 7 refers only to the sortation case slot for that address.

[54] Having determined that, despite its multiple location wording, the scope of the direction under appeal is confined to the events at 48 Wallbridge Crescent on July 5, 2011, I now turn to an examination of the validity of the contravention it identifies. The substance of that contravention is that the employer either knew or ought to have known about the presence of animals kept without adequate controls to prevent its employees from being attacked by them.

[55] In this respect, no admissible evidence emerged from the other contacts the HSO made when he visited the Belleville Post Office on July 7, 2011. He took no statement and had no firm recollection of the content of his discussion with Ms. Coultis, the Superintendent. The information concerning hostile dog incidents that the HSO picked up from apparently casual conversations with other Letter Carriers is marred by the anonymity of the informants, its lack of precision and the impossibility of it being tested in cross-examination. While I maintain that there are circumstances where an Appeals Officer's discretionary powers pursuant to paragraph 146.2(c) of the Code may permit the acceptance of hearsay as evidence, I find that the information obtained from these conversations is not among them.

[56] The respondent's argument that the HSO had formed a theory on July 7, 2011, prior to issuing the July 8 direction, that there were issues with respect to the inconsistent implementation of hostile dog policies, would rely in part on the hearsay testimony that I have found to be inadmissible. I accept that the HSO would have gained some information as a result of his interview with Mr. Shalla whose statement on July 7, 2011, reports that he had learned on July 5 from Mr. Pierce, the municipal animal control officer, about the attack on the young boy by the dogs at 48 Wallbridge Crescent some months previously. However, that incident was address-specific and evidence confirmed that nobody at the Corporation was aware of it before the July 5 attack on Ms. Norris. The weight of admissible evidence leaves the respondent's argument on the theory unproven.

[57] I look again at the specific wording of the direction and the contravention it identifies. I heard no testimony and received no evidence that the Corporation knew about animals, in this case the dogs, being kept without adequate controls at that address before the attack on Ms. Norris. On the ought to have known aspect of the text, the HSO agreed in cross-examination by the appellant's Counsel that prior to issuing the July 8 direction he had no evidence of any other incident involving the dogs and a Corporation employee at 48 Wallbridge Crescent and no evidence of any Letter Carrier having refused delivery to that address. He also agreed that he did not expect the Corporation to know the specific location of a particular dog at a particular time and that it is not possible for it to know whether a particular dog is restrained at any particular time.

[58] The HSO went on to say that, “[a]t that time I had no evidence at all except that the person who was injured lost half of her thumb, part of her thumb, which is substantial evidence for me.” Then in reply to Counsel’s suggestion he said:

[b]ecause there was an injury there was a hostile dog. So, I’m saying that Canada Post ought to have known that there was a hostile dog at that location and there was no pink warning card or caution card in the pigeon hole. At that time there was no formal process for ascertaining knowledge of where hostile dogs might be even though there is in the city that information is available.

I find the HSO’s moving from the fact of the injury and the presence of a hostile dog to concluding what the Corporation ought to have known prior to the incident to be at the very least premature and not supported by the evidence available to him at the time.

[59] After considering the HSO’s testimony just referred to together with credible evidence that the Corporation was unaware of the presence of uncontrolled animals at 48 Wallbridge Crescent, I find that the wording of the direction and the contravention cannot be maintained.

[60] In support of the “ought to have known” aspect of the direction, both the HSO and the respondent point to the absence of formal two-way communication on dog incidents between the Corporation and the municipal authorities. Had such liaison existed they maintain, there would have been an investigation and at least a pink caution card would have been prepared. While such speculation is reasonable I am mindful of the appellant’s reference to *Verville v. Correctional Services* (see paragraph 44 above) and the argument that a breach of section 124 does not occur simply because an additional step or measure could have been taken. While I believe there are limits to which this argument should be taken, what I find here is a classic case of hindsight. The Belleville Post Office’s contact with the municipal authorities appears from the evidence to have taken place when a hostile dog incident has affected a postal employee and remedial action beyond the Corporation’s authority is required. There was no expectation of a reciprocal arrangement. The Corporation’s principal source of information on hostile dogs is its own employees who are more numerous than and who I venture have more regular and routine presence at addresses across the city than the municipal animal control staff. It was not unreasonable for the Corporation to believe that it had the bases covered.

[61] As a post-script and although there can be no certainty as to outcomes in areas where both animal and human behaviours are concerned, it is hard not to believe that assiduous implementation and monitoring of the policies regarding hostile dogs could have increased the prospects for avoiding the still physically painful and emotionally stressful injury suffered by Ms. Norris. However, as maintained at the outset of my analysis, I find that the application of the hostile dog procedures and policies is well covered by the direction issued by HSO Tomlin on September 2, 2011, following completion of the investigation he began on July 7, 2011.

[62] In conclusion, I find that the evidence presented to me does not justify maintaining or varying the terms of the direction issued by HSO Tomlin on July 8, 2011. The direction must be rescinded.

Decision

[63] For the reasons given above, the direction is hereby rescinded.

Michael McDermott
Appeals Officer