Occupational Health and Safety Tribunal Canada

Citation: Martin Collin v. Montreal Gateway Terminals Partnership, 2012 OHSTC 35

Date: 2012-10-12
File No.: 2012-54
Rendered at: Ottawa

Between:

Martin Collin, Appellant

and

Montreal Gateway Terminals Partnership, Respondent

Matter:	Application for extension of time in which to file an appeal.
Decision:	The application is dismissed.
Decision rendered by:	Mr. Michael Wiwchar, Appeals Officer
Language of decision:	French
For the appellant:	Mr. Éric Collin, Union Health and Safety Advisor, CUPE Longshoremen's Union, Local 375
For the respondent:	Mr. Alexandre Gagnon, Director, Occupational Health and Safety, Maritime Employers Association

REASONS

[1] This matter involves an application for extension of time in which to file an appeal under subsection 129(7) of the *Canada Labour Code* (the Code) introduced by Mr. Martin Collin regarding a decision of absence of danger rendered orally by health and safety officer (HSO) Alain Testulat on July 9, 2012.

Background

[2] On July 4, Mr. Martin Collin, a longshoreman employed by the Montreal Gateway Terminals Partnership, exercised his right to refuse to work under section 128 of the Code, alleging that he felt abnormal shocks and kicks inside the gantry crane when loading and unloading material.

[3] The same day, HSO Testulat went to the work place to investigate the situation. On July 9, 2012, HSO Testulat once again went to the work place to verbally deliver his decision of absence of danger.

[4] On August 10, 2012, more than 30 days after verbally receiving the HSO's decision, an appeal under subsection 129(7) of the Code, accompanied by an application for extending the time, was received by this Tribunal.

Issue

[5] The issue I must consider in this matter involves determining whether I should exercise my discretion to extend the 10 days provided for under subsection 129(7) for the Code to appeal a no-danger decision.

Appellant's arguments

[6] The appellant's reasons were presented by his representative, Mr. Éric Collin, Union Health and Safety Advisor for the CUPE Longshoremen's Union, Local 375.

[7] First, Mr. Collin said that it was impossible for him to appeal within the timeframe stated in the Code, since he was suspended by his employer until August 19, 2012. Accordingly, he claimed he didn't have access to several witnesses, including HSO Testulat, who was on vacation when the appeal application was sent, as well as to evidence to justify the decision to appeal the HSO's decision.

[8] Mr. Collin also claimed that the person replacing him in his duties while he was away did not have the training or experience required to intervene in this type of matter.

[9] For these reasons, Mr. Collin asked that the appeals officer exercise the discretion afforded him by the Code to grant an extension of the time for filing an appeal. He subsequently asked that his appeal application be accepted.

Respondent's arguments

[10] The respondent, represented by Mr. Alexandre Gagnon, Director, Occupational Health and Safety for the Maritime Employers Association, said that the request for extension should be dismissed.

[11] To support his position, Mr. Gagnon submitted to this Tribunal a decision[1] issued on July 27, 2012 by the Canada Industrial Relations Board (CIRB) in which he says that certain passages confirm that Mr. Éric Collin was exercising his duties from July 9 to August 10, 2012. Mr. Gagnon underscored that in paragraphs 14 and 15 of the decision, Mr. Collin confirms that "his suspension had not prevented him from continuing to perform his duties at the union's offices and so he felt that he was able to provide the same services to union members." Mr. Gagnon also pointed out that Mr. Collin affirms in this CIRB matter that he can delegate an experienced person to replace him when he has to be away.

[12] Mr. Gagnon also submitted a second document to the Tribunal involving a complaint filed by Mr. Collin with the CIRB on July 24, 2012. Mr. Gagnon claimed that this complaint proves that Mr. Collin was able to represent workers during the period from July 9 to August 10, 2012.

[13] Lastly, Mr. Gagnon concluded by saying that Mr. Martin Collin was able to appoint a person of his choosing to represent him or to appeal the no-danger decision himself, that he had a union representative to assist him to meet the deadline, and that the representative assigned to the file, Mr. Éric Collin, was available from July 9 to August 10, 2012 to file an appeal on behalf of the employee before the deadline.

Analysis

[14] This application for extension of time was filed along with an application to appeal a no-danger decision by a health and safety officer under subsection 129(7) of the Code, which provides for 10 days after receiving notice of the decision in which to appeal it. That subsection reads as follows:

> 129(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision. [My underlining]

[15] However, under paragraph 146.2(f) of the Code, the appeals officer may, at his discretion, extend the time for instituting an appeal. This provision reads as follows:

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[1] *Syndicat des débardeurs, Local 375 of the Canadian Union of Public Employees and Maritime Employers Association*, 2012 CIRB 652.

> 146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may:
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> (f) abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence;

[16] The extension of the time under paragraph 146.2(f) involves re-establishing, at the discretion of the appeals officer, the right to an appeal, which no longer existed when the employee requested it. It is not therefore a guaranteed and absolute right, but rather a procedure that allows the appeals officer to act with some flexibility in the face of special, out-of-the-ordinary circumstances in which the strict application of a certain number of days risks causing harm to a party.

[17] For example, in the matter of *Len Van Roon and Kinonjeoshtegon First Nation,*[2] the appeals officer stated that the presence of paragraph 146.2(f) in the Code shows that the timeframes for appealing a decision are not strict:

> 11 As an appeals officer, I recognize that I should give a little leeway to a party that is representing himself, and who, through lack of knowledge and inexperience with the procedure, takes the time to properly understand the process, address his concerns and also to appeal.
>
> 12 I think that the deadline is not a strict one, otherwise the federal legislator would not have given the appeals officer the powers to abridge or extend this time.
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> 13 I am of the view that the delay was minimal and non intentional, and that the appellant believed in good faith that he had to present a complete file for an appeal. Furthermore, I believe that the delay in the production of the appeal will not harm the employer. Accordingly as paragraph 146.2(f) of the *Canada Labour Code* authorizes me to do, I extend the period of appeal to the date at which it was officially recorded, that is, June 21, 2007.

[18] In this decision, the appeals officer also gives special importance to the appellant's good faith and the absence of negligence on his part, as well as the absence of harm to the employer if the application for extension of time is granted.

[19] Although I do not see any major harm that the employer could suffer if the application for extension is granted, it is difficult for me to conclude, after reading the arguments presented by the appellant, that the latter showed sufficient diligence in this file.

[20] Even ignoring the evidence submitted by the respondent about Mr. Éric Collin's ability to handle his duties as union representative between July 9 and August 10, 2012, I

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[2] *Len Van Roon and Kinonjeoshtegon First Nation* [2007] C.L.C.A.O.D. No. 47.

am of the view that the latter did not do all he could to ensure that the appeal application be filed in due form. If he was not truly able to represent the employee during this period, Mr. Collin was still responsible for making sure that the file be sent to the Tribunal via another representative before the time expired, or else take measures such as contacting the Tribunal to inform it of the situation.

[21] Furthermore, it should be noted that the application was received by this Tribunal 31 days after receipt by the employee of the no-danger decision by the HSO, which is 21 days after the time provided for in subsection 129(7) of the Code.

[22] Although I think that the discretionary power granted to the appeals officer under paragraph 146.2(f) shows the legislator's intention of implementing a deadline that is not a strict one, I nevertheless consider that the 10 days provided for in subsection 129(7) of the Code reflect the intention to make sure that appeals of no-danger decisions be filed within a shorter period than, for example, the 30 days provided to appeal an HSO's instruction under subsection 146(1) of the Code. In this light, I conclude that the delay of 21 days after the 10 days afforded by the Code is a major delay.

[23] For these reasons, I do not think that I should exercise my discretion to extend the time. Nothing in this present case shows me that the appellant had a sufficient inability to justify such a delay, or that there was the presence of special or out-of-the-ordinary circumstances that would call for me to exercise my discretion. On the contrary, I believe that despite Mr. Éric Collin's suspension, the appellant had sufficient means at his disposal to make sure that the appeal application be sent to the Tribunal with the time provided by the Code.

Decision

[24] I therefore dismiss the application for extension of time. Accordingly, the appeal of the no-danger decision is not receivable.

Michael Wiwchar
Appeals Officer