Occupational Health and Safety Tribunal Canada

Citation: Tanya Thiel v. Correctional Service Canada, 2012 OHSTC 39

Date: 2012-10-23
Case No.: 2010-04
Rendered at: Ottawa

Between:

Tanya Thiel, Appellant

and

Correctional Service Canada, Respondent

Matter:	Application to have the matter dismissed on mootness
Decision:	The Appeal is dismissed on the basis of standing
Decision rendered by:	Mr. Douglas Malanka
Language of decision:	English
For the appellant:	Christine Langill, Labour and Employment Law Group, Department of Justice
For the respondent:	Jack Haller, Union Advisor

REASONS

[1] For the following reasons, I find in favour of the motion by Correctional Service Canada (CSC) that Correctional Officer (CO) Tanya Thiel has no standing to proceed in this appeal. I also find in favour of the motion to declare the appeal moot as Mr. Carter is no longer employed by CSC. The motion to dismiss the appeal is hereby granted.

Background

[2] The appeal before this Tribunal was made pursuant to subsection 129(7) of the *Canada Labour Code*, Part II, (the Code) and was lodged on behalf of Mr. Carter by Tanya Thiel, a Correctional Officer with CSC and Union Representative with Union of Canadian Correctional Officers – Confédération des Syndicats Nationaux (UCCO-CSN). CO Thiel is also a member of the Joint Health and Safety Committee at Nova Institution (Nova). The present matter concerns an appeal of the February 12, 2012 decision of Health and Safety Officer (HSO) Ron Thibault made pursuant to subsection 129(4) of the Code. HSO Thibault decided that a danger did not exist for Mr. Carter when he refused to work on November 30, 2009.

[3] The motion to dismiss the appeal was filed by Ms. Langill on behalf of CSC just days prior to the scheduled hearing on May 22, 2012 after Mr. Haller confirmed that Mr. Carter would not attend the hearing and that he was no longer employed by CSC. Given the lateness of the new information, parties agreed to proceed to hearing and to deal with CSC's motion to dismiss the appeal at the hearing. While it was initially agreed that I would hear both the motion and the merits of the case, I subsequently adjourned the hearing on May 22, 2012 after hearing evidence and argument from parties on the motion to dismiss the appeal.

[4] The decision that follows here deals only with the motion to dismiss the appeal filed by the respondent. However, for a better understanding of the decision it is helpful to briefly review the circumstances of the case prior to the motion to dismiss on both, the lack of standing of CO Thiel, and mootness.

[5] On November 30, 2009 Mr. Carter exercised his right pursuant to section 128 of the Code and refused to escort an outside contractor through the accommodations accompanied only by a commissionaire. Mr. Carter wrote a letter that he felt conducting such an escort without another correctional officer would constitute a serious health and safety hazard as the risks could result in assault, hostage taking and other security concerns. Mr. Carter stated that he would be escorting an individual who is not a trained correctional officer and there is no direct visual surveillance within the medium and minimum accommodations. CO Thiel later testified that Mr. Carter wrote the letter because he was on leave and was unavailable.

[6] CO Thiel stated that she and Assistant Warden Laurie Bernard conducted the employer's joint investigation of Mr. Carter's refusal to work and could not agree that a danger did not exist. CO Thiel further testified that she had received a telephone call from

Mr. Carter in the presence of Assistant Warden Bernard and Mr. Carter asked her to represent him in his refusal to work complaint during that telephone call. CO Thiel testified that this was her authority to represent Mr. Carter on an ongoing basis on his refusal to work complaint.

[7] Following the employer's joint investigation of Mr. Carter's refusal to work by CO Thiel and Assistant Warden Bernard, Assistant Warden Bernard wrote to HSO Thibault on December 9, 2009 and confirmed that there was no agreement that a danger did not exist for Mr. Carter. She requested HSO Thibault to come and investigate Mr. Carter's refusal to work. The email read:

> Please find attached JOSH Investigation report pertaining to a 128 which was invoked by Primary Worker Andrew Carter on November 30, 2009. Please note that myself and UCCO Health and Safety rep Tanya Thiel were unable to come to a consensus on this matter. As such, I am requesting HRSDC [Human Resources and Skills Development Canada] to investigate this 128. Could you please advise when you are able to come to Nova?

[8] CO Thiel testified at the hearing held on May 22, 2012 that she was representing Mr. Carter when she signed the HRSDC Refusal to Work Registration document dated January 11, 2010. CO Thiel also confirmed that she signed the Application of Appeal on to the Occupational Health and Safety Tribunal Canada on February 2, 2010 subsequent to HSO Thibault's decision that a danger did exist for Mr. Carter as the representative of Mr. Carter.

[9] CO Thiel further confirmed in cross-examination that: Mr. Carter did not participate in the investigation of his refusal to work by HSO Thibault; she could not recall if she had informed Mr. Carter of HSO Thibault's decision that a danger did not exist for him in connection with his refusal to work; she did not inform Mr. Carter that she was appealing the decision of HSO Thibault that a danger did not exist for him as he was not at work at the time; she had never communicated with Mr. Carter regarding the several adjournments connected with the appeal and did not provide him with a notice hearing; and she has not had any communication with Mr. Carter since his refusal to work in 2010.

[10] CO Thiel also confirmed her understanding that Mr. Carter is no longer an employee or CSC and that she was not aware of Mr. Carter's current address.

[11] Assistant Warden Bernard testified at the hearing held on May 22, 2012 and provided evidence that CO Thiel was not working at Nova the day Mr. Carter exercised his refusal to work and that Mr. Carter had returned from a Leave of Absence on November 23, 2009. The evidence also established that: Mr. Carter was redeployed elsewhere on October 15, 2010; he took parental leave from November 26, 2010 to August 9, 2011; and he resigned from employment with CSC on September 20, 2011.

Issue

[12] The issue in this case are whether CO Thiel has standing to advance the appeal in question and whether the matter is moot given that Mr. Carter is no longer employed by CSC.

Submissions of the Parties

A) Submissions by the Applicant (Respondent)

[13] Ms. Langill's principal submissions to support her motion that the appeal be dismissed were that CO Thiel does not have standing and that the matter is moot.

Standing

[14] Ms. Langill submitted that the ordinary meaning of subsection 129(7) is that an employee who refused to work may appeal the decision of a Health and Safety Officer that a danger does not exist for the employee. Ms. Langill further submitted that subsection 129(7) establishes that the notice of appeal must be made to an Appeals Officer within ten (10) days of receipt of the finding of no danger, must be in writing, and must be filed by the employee or a person designated by the employee for that purpose. Ms. Langill held that the Code does not authorize the designated person to continue the appeal proceeding without the refusing employee participating in pre-hearing conferences; asking for adjournments; and ultimately attending the hearing of appeal.

[15] Ms. Langill held that CO Thiel does not have standing because the designation specified in subsection 129(7) of the Code is only for the purpose of filing an appeal to the Tribunal of the Health and Safety Officer's decision that a danger does not exist for the refusing employee.

[16] Ms. Langill submitted that CO Thiel was not authorized orally or in writing to file an appeal for Mr. Carter pursuant to subsection 129(7) of the Code. Ms. Langill pointed to the evidence that CO Thiel was unable to provide Mr. Carter with a copy of HSO Thibault's decision that a danger did not exist for Mr. Carter because she was unable to communicate with him and was uncertain as to his whereabouts. Ms. Langill held that, CO Thiel failed in the circumstances to obtain clear instructions or designation. Ms. Langill added that Mr. Carter did not attend the hearing of May 22, 2012 or provide evidence of a designation. As a result, Ms. Langill maintained that the designation is CO Thiel is hearsay evidence and, even if Mr. Carter had proved such blanket authority, the Code does not permit it. Ms. Langill submitted that these facts alone are grounds for dismissal.

[17] Ms. Langill further submitted that the designation specified in subsection 129(7) does not provide for a blanket authority for a wholesale takeover of all and any proceedings related to the appeal under this provision. She held that such blanket authority would be contrary to the Code as the right to refuse is an individual right. Ms.

Langill referred to several statutes that authorize a delegated person to act for and/or make decisions on behalf of another person and held that the safeguards specified in those statutes are not included in the Code. They are not specified here but were carefully considered.

[18] Ms. Langill added that, even if CO Thiel was designated by Mr. Carter for the purposes of subsection 129(7), she filed her own appeal and not Mr. Carter's appeal. In this regard, Ms. Langill held that CO Thiel had failed to identify herself as representative and identified herself on the notice of appeal as "complainant". Ms. Langill held that in *Eugenia Martin-Ivie v. Canadian Border Services Agency*[1], the Tribunal limited the appeal to the refusing employees who were named in the appeal notice. Ms. Langill submitted that the appeal should be dismissed on the ground that CO Thiel failed to substantiate that she was designated by Mr. Carter to file an appeal on his behalf pursuant to subsection 129(7).

[19] Ms. Langill referred to the plausible meaning rule discussed in *Driedger on the Construction of Statutes*[2] (*Driedger*), and submitted that it is implausible to interpret the word "designate" in subsection 129(7) as meaning anything more than a designate may file the application to appeal on behalf of the refusing employee. Ms. Langill stated that, if subsection 129(7) is accepted as permitting more than the filing of an appeal, it would be contrary to the scheme of the Code since a work refusal is an individual right as opposed to a collective one. Ms. Langill added that allowing an employee to pursue an appeal regarding someone else's working refusal would run contrary to section 128 of the Code. Ms. Langill additionally held that, if this appeal is allowed to proceed on its merits in Mr. Carter's continued absence, he will likely only learn of the circumstances of the appeal and its outcome when the Appeals Officer decision is made public.

[20] In this regard, Ms. Langill further held, that if a designate under subsection 129(7) may take over the proceeding for a the refusing employee in his absence, a number of procedural and evidentiary problems arise. For example, the appellant's evidence would be hearsay and the respondent would be denied the opportunity to cross examine the proper litigant. Ms. Langill added that the evidence of Mr. Carter's refusal to work would be that of CO Thiel and her two identified witnesses, none of whom were present at Mr. Carter's refusal to work. Thus, the respondent would be required to respond to a general position instead of the facts related to Mr. Carter's specific refusal to work.

[21] Finally, Ms. Langill held that subsection 129(7) does not grant authority for a person, other than the party, with a participatory role in the party's legal proceeding as found in other statutes when such authority is granted. In this regard, Ms. Langill cited the following Acts where Parliament has granted the power for a person to carry on legal proceeding for another person under clear and express authority and within specific situations:

---

[1] 2011 OHSTC 6.

[2] Ruth Sullivan, Elmer A. Driedger, *Driedger on the Construction of Statutes*, 3rd ed., Toronto, Butterworths, 1994.

- *Bankruptcy and Insolvency Act*;
- *Immigration and Refugee Protection Act*;
- *Human Rights Act*;
- *Ontario Human Rights Code*;
- *Federal Court Rules*.

[22] Ms. Langill submitted that those specific situations referred to above include: requiring the person acting for another party to acquire their authority in writing; expressing limits on the non-party's role, including duties and obligations; requiring appellant who is being represented to remain the party and to assume a direct role.

[23] Ms. Langill maintained that permitting CO Thiel under subsection 129(7) to make continued decisions for Mr. Carter about his legal issues without consulting him would be an exceptional power that goes well beyond what most statutes provide and should be of last resort. Ms. Langill held that parental leave does not leave someone incapable of managing their legal affairs and making decisions. Ms. Langill submitted that there is no basis for CO Thiel having such power over Mr. Carter's refusal.

Mootness

[24] Ms. Langill held that the work refusal is moot because Mr. Carter is no longer an employee. In this regard, Ms. Langill referred to the evidence of Assistant Warden Bernard that Mr. Carter resigned from employment at Nova on September 10, 2011. Ms. Langill referred to *Harper v. Canada (Canadian Food Inspection Agency)*[3] where the Tribunal concluded that the employee who was no longer employed by the Canada Food Agency was no longer exposed to the alleged condition of work and the health and safety matter had become moot.

[25] Ms. Langill submitted that, even if it is decided that CO Thiel has standing to proceed with the appeal, the appeal is moot since Mr. Carter is not longer an employee and is no longer exposed to the alleged danger. Ms. Langill held that this constitutes grounds for dismissal.

B) Submissions by the Respondent (Appellant)

[26] Mr. Haller agreed that the issue connected with CSC's motion by to dismiss the appeal is whether or not CO Thiel has standing under subsection 129(7) to represent Mr. Carter's in this appeal and whether or not the matter is moot.

Standing

[27] Mr. Haller submitted that CO Thiel had standing because subsection 129(7) of the Code permits an employee to designate another person for the purpose of appealing the

[3] *Harper v. Canada (Canadian Food Inspection Agency)*, 2011 OHSTC 19.

decision of a Health and Safety Officer who decides that danger does not exist for the employee.

[28] Mr. Haller maintained that the evidence establishes that both the employer and HSO Thibault were aware that CO Thiel was not the refusing employee but continued their investigations with her representing Mr. Carter. He referred to the evidence of CO Thiel that she had received a phone call from Mr. Carter in the presence of Ms. Bernard authorizing her to be his designate. Mr. Haller also referred to Mr. Carter refusal letter dated November 30, 2009.

[29] Mr. Haller submitted that the employer is estopped from objecting on the grounds of standing and mootness as these issues were not raised at the time of the filing of the appeal and subsequent to it.

[30] Mr. Haller submitted that an expansive and broad interpretation of the statutory term in subsection 129(7) includes the right of a health and safety representative to appeal on behalf of the employee who refused to work.

[31] Mr. Haller maintained that the Code does not state that only the refusing employee is to provide evidence at the appeal. Rather, he said, the Code permits the employee who refused to work and who is appealing the decision of the HSO to designate another person to appeal the decision in writing.

[32] Mr. Haller added that it can be implied from the wording in subsection 129(7) that the designated person can continue the appeal and then represent the employee at the hearing held pursuant to subsection 146.1(1). Mr. Haller submitted that CO Thiel had received verbal authorization from Mr. Carter to, not only represent him during the investigation, but to represent him on this appeal as his designate.

[33] Mr. Haller noted that paragraph 146.2(g) of the Code permits an Appeals Officer to add a party to a proceeding at any stage if the officer believes that the new party has the same interest as one of the parties and could be affected by the decision. Mr. Haller held that CO Thiel has an interest in the appeal as a health and safety representative at the workplace in question and could be affected by the decision.

Mootness

[34] Mr. Haller disagreed that the matter is moot because Mr. Carter was an employee at the workplace when he refused to work. Mr. Haller held that the evidence in the case shows that this is an important health and safety issue still current at Nova institution. Mr. Haller maintained that Mr. Carter had requested Ms. Thiel to pursue this appeal on his behalf and on behalf of other employees who still believe it is dangerous for a lone correctional officer to escort a contractor wearing tools to a housing unit at Nova.

[35] Mr. Haller noted that CO Thiel had testified that she would similarly refuse to work if asked to do the same work as Mr. Carter.

[36] Mr. Haller maintained that the Respondent has not shown how Mr. Carter would be prejudiced if this appeal were to continue.

[37] Mr. Haller submitted that, even if I decide that the matter is moot because Mr. Carter is no longer employed at Nova Institution, it makes sense to hear the merits rather than waiting for another refusal to work, investigation and appeal. Mr. Haller held that the matter is still a live issue for other employees at the workplace.

[38] Mr. Haller submitted that the motion to dismiss the appeal based on standing and mootness should be dismissed and that the appeal should proceed regardless.

C) Reply Submissions by the Applicant (Respondent)

[39] Ms. Langill argued that there is no support for the expansive interpretation of subsection 129(7) suggested by Mr. Haller. Ms. Langill referred to the decision of the Supreme Court of Canada's case of *Barrette v. Crabtree Estate*[4], where the Court cautioned against broadly interpreting a provision of a statute to the extent that such interpretation would alter the provision. Ms. Langill submitted that reading subsection 129(7) in the manner cited by Mr. Haller would require adding to the text of the subsection.

[40] Ms. Langill held that the words, "for the purpose" in subsection 129(7) speaks against a broad interpretation. She held that the similar phrase "for the purpose" is acknowledged in *Driedger* as a qualifier used by drafters to narrow, not broaden, the scope of a provision.

[41] Ms. Langill held that for the broad and ongoing power to act in place of another in legal proceeding, additional words would be used such as those found under subsection 34(5) and section 34.6 of the *Ontario Human Rights Code* (OHRC). According to Ms. Langill, subsection 34(5) of the OHRC states that a person "may apply on behalf of another person to the Tribunal for an order under subsection 45(2)", and subsection 34(6) of the OHRC states that the person bringing the application on behalf of another "may participate in the proceeding." Ms. Langill maintained that no such wording appears in subsection 129(7) of the Code and such expansion interpretation as sought by the Responding to the motion would be out of line with the statutory text used by Parliament to confirm power of a non party or representative to substantially be involved in legal proceedings on behalf of an individual.

[42] Ms. Langill maintained that a work refusal is an individual right and it would be absurd if a non-refusing employee could takeover and replace a refusing employee's substantive right of appeal in the absence of the refusing employee.

[4] [1993] 1 S.C.R. 1027.

[43] Ms. Langill disagreed with the respondent's position that the question of standing and mootness are subject to estoppel. She held that hearings before this Tribunal are *de novo* and Appeals Officers derive their jurisdiction from the Code and not from what powers may or may not be afforded by the parties. Ms. Langill held that the issue of standing and mootness is the very jurisdictional issues the Tribunal is empowered to decide whether raised by a party or not.

[44] Ms. Langill disputed the respondent's argument in the alternative that the Appeals Officer should make Ms. Thiel a party pursuant to paragraph 146.2(g) of the Code and to permit her to participate in the appeal of HSO Thibault's decision that a danger did not exist for Mr. Carter. Ms. Langill held that paragraph 146.2(g) does not apply here and CO Thiel should not be allowed to use paragraph 146.2(g) to do indirectly what she cannot do directly under subsection 129(7).

[45] On the issue of mootness, Ms. Langill cited the Tribunal's reference in *Tremblay v. Air Canada*[5] to the Supreme Court of Canada's decision of *Borowski v. Canada*[6], that states:

> An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the right of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision [...].

[46] Ms. Langill held that there is no live controversy between Mr. Carter and CSC since Mr. Carter is retired and no longer employed with the respondent.

[47] Ms. Langill held that dismissing this appeal does not prevent any primary worker from refusing to escort a contractor to a housing unit where, according to the employer's policy, the primary worker is only accompanied by a commissionaire.

[48] Ms. Langill submitted that while Ms. Thiel may have expressed concern for others who may have been asked or may be asked to perform the same task that Mr. Carter refused to do, her use of the Tribunal's resources and process as a platform for advancing such concerns is not the answer. She held that the individual right to refuse work is an emergency measure and not meant to be used to bring ongoing disputes to a head.

Analysis

[49] For the reasons that follow, I find that the matter is moot. Furthermore, I choose not to exercise my discretion to hear this appeal.

Was Ms. Thiel "designated" to file an appeal on behalf of Mr. Carter?

---

[5] OHSTC 09-004, at par. 32.
[6] *Borowski v. Canada (Attorney General)*, (1989) 1 S.C.R. 342.

[50] The matter before me originates from a November 30, 2009 invocation of a right to refuse dangerous work which was exercised by former Correctional Officer, Andrew Carter. Now retired, Mr. Carter is no longer an employee of the respondent, Correctional Service Canada CSC. An employee of CSC at the time of the refusal, the right that Mr. Carter exercised pursuant to subsection 128(1) of the *Canada Labour Code* reads as follows:

> 128(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
>
> (a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
>
> (b) a condition exists in the place that constitutes a danger to the employee; or
>
> (c) the performance of the activity constitutes a danger to the employee or to another employee.

[51] Subsequent to his work refusal, but prior to the undertaking of an investigation by a Health and Safety Officer, it was submitted by the appellant in this appeal, Ms. Thiel, that Mr. Carter had a phone conversation with the appellant. Ms. Thiel testified that during this conversation, Mr. Carter expressed his interest in having Ms. Thiel, who is the health and safety representative of the local bargaining agent, take over the matter by way of pursuing an appeal on his behalf.

[52] In particular, Ms. Thiel submits that during this pre-investigation phone conversation, Mr. Carter gave her verbal authorization to: represent him during the HSO investigation; file an appeal and also represent him on his appeal as his designate.

[53] It is suggested by the appellant that she was given this authority by Mr. Carter, because the latter was not able to file an appeal of the HSO's decision of no danger within the statutory time limit given that he was absent from the workplace at the relevant time. It is also submitted by the appellant that Mr. Carter could not testify at the hearing to support Ms. Thiel's testimony because, as of that time, he had retired and could not be located.

[54] It is important to note that the right to refuse dangerous work is an individual one and once a decision that a danger does not exist is rendered by an HSO, pursuant to subsection 129(7) of the Code, only the refusing employee or a person designated by him/her can file an appeal to an Appeals Officer. Subsection 129(7) 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. [emphasis added]

[55] On the question of whether Ms. Thiel was designated, I have found the respondent's arguments made in support of the position that Ms. Thiel was not designated useful, informative, and I have given them much thought. However, I am convinced by Ms. Thiel's testimony that, in accordance with subsection 129(7), she was designated by Mr. Carter to represent his interest in his refusal to work, including her filing of an appeal with the tribunal, and do so in light of HSO Thibault's decision that a danger did not exist for Mr. Carter.

[56] The undisputed evidence in this case is that Ms. Bernard, Assistant Warden of Management Services with the employer, was present in the room with Ms. Thiel when Mr. Carter orally designated the former by telephone to represent his refusal to work. Assistant Warden Bernard testified that she did not hear the actual words of Mr. Carter but that is of little consequence. Subsection 129(7) does not specify what words must be uttered to make a designation or that the designation must be in writing. Thus, I am satisfied that Ms. Thiel was designated by Mr. Carter to file his appeal.

[57] Nonetheless, when the hearing opened in Halifax on May 22, 2012, Mr. Carter was not present and Ms. Thiel confirmed that Mr. Carter was no longer employed at CSC and that she did not know of his whereabouts. Therefore, there was simply no way that Ms. Thiel could represent Mr. Carter in the appeal process because she could not communicate with him in any way or receive instructions. From that point, Ms. Thiel's role became that of appellant, as she essentially took over the appeal.

[58] I am of the opinion that Ms. Thiel has essentially taken over this appeal for a number of reasons, including the fact that:

- Ms. Thiel did not provide Mr. Carter with a notice of hearing;
- She has not had any communication with Mr. Carter since his phone call with Ms. Thiel subsequent to his refusal to work in 2009. Ms. Thiel could therefore not receive any instructions from Mr. Carter;
- Ms. Thiel is not aware of Mr. Carter's current address; and
- Mr. Carter was not on the witness list provided by her union.

[59] The Code does not permit the person designated to file an appeal on behalf of a refusing employee to effectively takeover the appeal in the way Ms. Thiel has. The proper appellant in this case was and remains Mr. Carter. As such, it is Mr. Carter's appeal that I now have before me and on which I must render a decision.

[60] Given that Mr. Carter is no longer employed by CSC, counsel for CSC also argued that I should dismiss the appeal on the grounds that it is now moot.

Concerning Mootness

[61] For the reasons that follow, I find that the appeal is moot, and I chose not to exercise my discretion to hear the appeal.

[62] The leading decision on the mootness doctrine is articulated in *Borowski*, cited above. In *Borowski*, the Supreme Court stated that the approach with respect to mootness involves a two-step analysis. The first step is to determine whether the requisite tangible and concrete dispute has disappeared, thereby rendering the issue academic. The second step requires the decision-maker to determine if the Court should exercise its discretion to hear a moot case.

[63] Regarding the second step of the mootness analysis, the Supreme Court indicated that a decision-making authority must be guided by considerations of the underlying rationale of the mootness doctrine. The Court in *Borowski* describes these rationales:

> The first rationale for the policy with respect to mootness in that a court's competence to resolve legal disputes is rooted in the adversary system. […] The second is based on the concern for judicial economy […] The third underlying rationale of the mootness doctrine is the need for courts to be sensitive to the effectiveness or efficacy of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. […]

[64] The right to refuse dangerous work, pursuant to subsection 128(1) of the Code, makes reference to "an employee". This means that this right is an individual one held by a person who possesses the status of an employee at a federally-regulated workplace. In view of the fact that Mr. Carter is no longer employed by CSC and given that the Code only avails the right to refuse dangerous work to employees working for an employer subject to the Code, the appellant's initial ground for instituting the proceedings disappeared once Mr. Carter left his occupation at CSC sometime around September 2011.

[65] Additionally, when the right to refuse unsafe work is exercised by an employee, in accordance with Part II of the Code, the role of an HSO and an Appeals Officer is to assess whether the alleged danger existed and persists and thus whether the refusing employee may continue to refuse to either use or operate the machine or thing, work in that place or perform that activity.

[66] In the present matter I see no reason to continue with these appeal proceedings as Mr. Carter is no longer exposed to the alleged dangerous condition while at work. This is because the ceasing of Mr. Carter’s employment relationship with CSC has removed him from the work place.

[67] After assessing the arguments presented to me on the question of mootness, I am convinced by the respondent’s submissions as they pertain to the applicability of the decision of *Harper v. Canada (Canadian Food Inspection Agency)*, cited above, to the present appeal. What this means is that I find that this appeal is moot because the necessary employment relationship between the originator of these proceedings, Mr. Carter, and CSC (the respondent) has been severed and non-existent since September 10, 2011.

[68] In other words, I find that this appeal is moot because there is no live controversy or a current, tangible dispute between the parties in this case, namely Mr. Carter and CSC. In light of the fact that there is no longer an employment relationship between Mr. Carter and CSC, I am also of the opinion that rendering a decision on the merits of this appeal would have no concrete effect on the rights of the parties. Accordingly, I find that the appeal is moot.

[69] In light of all of the above and the evidence before me, I choose not to exercise my discretion to hear this moot appeal. For this reason, I dismiss the appeal.

On adding Ms. Thiel as a party

[70] The appellant suggested in the alternative that, pursuant to paragraph 146.2(g), Ms. Thiel should be added as a party to these proceedings because she could be affected by a decision that a danger existed in the circumstances that led to Mr. Carter's refusal. On this point, Ms. Thiel argues that she has the same or similar enough interest in this matter to justify my hearing of this case even though I find that the appeal is moot.

[71] Paragraph 146.2(g) of the Code reads as follows:

> 146.2 For the purposes of a proceeding under subsection 146.1(1), an Appeals Officer may
>
> (g) make a party to the proceeding, at any stage of the proceeding, any person who, or any group that, in the officer's opinion has substantially the same interest as one of the parties and could be affected by the decision;

[72] In my opinion, this section only applies where there is an ongoing proceeding before an Appeals Officer to which a party could be added. Given my conclusion that Mr. Carter's appeal is now moot, there is no longer an ongoing proceeding to which I could add Ms. Thiel. For these reasons, Ms. Thiel's request is denied.

Decision

[73] For all of the stated reasons, the appeal is dismissed.

Douglas Malanka
Appeals Officer