



Occupational Health and Safety Tribunal Canada

Citation: Quebec Port Terminals Inc. and Canadian Union of Public Employees, Local 1375, 2012 OHSTC 40

Date: 2012-10-30
Case No.: 2012-64
Rendered at: Ottawa

Between:

Quebec Port Terminals Inc., Applicant

and

Canadian Union of Public Employees, Local 1375, Respondent

Matter: Application for a stay of directions

Decision: The stay of directions is denied

Decision rendered by: Mr. Pierre Guénette, Appeals Officer

Language of decision: French

For the applicant: Ms. Guylaine Lacerte, Counsel, McCarthy Tétrault

For the respondent: Mr. Mario Lamy, Canadian Union of Public Employees (CUPE), Local 1375

REASONS

[1] On October 2, 2012, Ms. Guylaine Lacerte, the representative for Quebec Port Terminals Inc., filed an application under subsection 146(1) of the *Canada Labour Code* (the “Code”) to appeal three directions issued by a health and safety officer. The appeal was accompanied by the present application for a stay of the three directions, in accordance with subsection 146(2) of the Code.

Background

[2] On September 20, 2012, after conducting an inspection of the workplace operated by Quebec Port Terminals Inc., Mr. Alain Testulat, health and safety officer (HSO), issued three directions.

[3] The first direction reads as follows:

IN THE MATTER OF THE CANADA LABOUR CODE
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER PURSUANT TO SUBSECTION
145(1)(a)

On September 20, 2012, the undersigned health and safety officer proceeded with an inspection of the workplace operated by Quebec Port Terminals Inc., an employer governed by Part II of the *Canada Labour Code*, located at 355 boulevard Alphonse-Deshaies in Bécancour, Québec. The said workplace is also known as the Port of Bécancour.

The said health and safety officer is of the opinion that the following provisions of Part II of the *Canada Labour Code* are being contravened:

124 - Part II of the *Canada Labour Code*

The employer is not ensuring the health and safety of its employees since it is not providing persons exposed to the risk of falling into the water, when the water temperature is around or below freezing, with adequate hypothermia protection clothing to ensure their health and safety at all times.

Consequently, you are HEREBY ORDERED, pursuant to subsection 145(1)(a) of Part II of the *Canada Labour Code*, to terminate the contravention by no later than October 4, 2012.

Issued at Bécancour on this 20th day of September 2012.

[4] The second direction reads as follows:

IN THE MATTER OF THE CANADA LABOUR CODE
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER PURSUANT TO SUBSECTION
145(1)(a)

On September 20, 2012, the undersigned health and safety officer proceeded with an inspection of the workplace operated by Quebec Port Terminals Inc., an employer governed by Part II of the *Canada Labour Code*, located at 355 boulevard Alphonse-Deshaies in Bécancour, Québec. The said workplace is also known as the Port of Bécancour.

The said health and safety officer is of the opinion that the following provisions of Part II of the *Canada Labour Code* are being contravened:

125(1)(o) - Part II of the *Canada Labour Code*
12.11(2) – *Canada Occupational Health and Safety Regulations*

The employer has not provided at all times (day and night) drowning prevention equipment for the position of linesman and the other classifications of employees who work in sections 1, 2 and the other sections of the terminal, which equipment is used to rescue someone who has fallen into icy water within a timeframe that protects the person's health and safety.

Consequently, you are HEREBY ORDERED, pursuant to subsection 145(1)(a) of Part II of the *Canada Labour Code*, to terminate the contravention by no later than October 4, 2012.

Issued at Bécancour on this 20th day of September 2012.

[5] The third direction reads as follows:

IN THE MATTER OF THE CANADA LABOUR CODE
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER PURSUANT TO SUBSECTION
145(2)(a)

On September 20, 2012, the undersigned health and safety officer proceeded with an inspection of the workplace operated by Quebec Port Terminals Inc., an employer governed by Part II of the *Canada Labour Code*, located at 355 boulevard Alphonse-Deshaies in Bécancour, Québec. The said workplace is also known as the Port of Bécancour.

The said health and safety officer is of the opinion that a situation in the workplace constitutes a danger to an employee while at work, that is:

That the employer does not have the appropriate equipment at all times at the Port of Bécancour to rescue an employee who has fallen into the

water, considering that it takes the City of Bécancour emergency services a timeframe of 27 minutes in good weather to pull someone from the water. When the water temperature is around or below freezing, this timeframe constitutes a danger since the water temperature could cause someone to quickly suffer serious hypothermia resulting in death.

Consequently, you are HEREBY ORDERED, pursuant to subsection 145(2)(a) of Part II of the *Canada Labour Code*, to ensure the protection of persons against this danger by October 4, 2012.

In accordance with subsection 145(3), a notice of danger bearing number 3733 has been posted on the bulletin board in the cafeteria and may not be removed without the officer's authorization.

Issued at Bécancour on this 20th day of September 2012.

[6] On October 2, 2012, Ms. Lacerte filed an application for appeal with this Tribunal, together with an application for stay of the three directions.

[7] The application for stay was heard on October 3, 2012 by teleconference. Prior to the telephone conference hearing, Ms. Lacerte filed written arguments.

[8] After considering the written and oral arguments made by Ms. Lacerte and the oral representations made by the CUPE representatives on behalf of the respondent, I denied the application for stay of the three directions. The reasons for my decision are set out below.

Analysis

[9] The authority of an appeals officer to grant a stay arises from subsection 146(2) of the Code:

146(2) Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.

This discretionary authority must be exercised taking into account the general purpose of Part II of the Code, as specified in section 122.1:

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

[10] To analyze the present application for stay, I used the following test:

- 1) The applicant must demonstrate to the satisfaction of the appeals officer that this is a serious question and not a frivolous or vexatious claim.

- 2) The applicant must demonstrate that it would suffer significant harm if the appeals officer refused to stay the direction;
- 3) The applicant must demonstrate that, in the event the stay is granted, measures will be put in place to protect the health and safety of employees and any other person granted access to the workplace.

[11] Before proceeding with an analysis of the arguments, it is important to mention that, given the arguments of the parties and since the parties believe the three directions constitute a serious question, I deem that the applicant has met the first criterion for all three directions.

[12] Although the parties made a number of arguments concerning the first criterion, several of these arguments focus primarily on matters that should preferably be analyzed when the appeal of the directions is heard on the merits. Accordingly, the following analysis focuses solely on the arguments concerning the second and third criteria, as they were made by the parties for the three directions.

Direction No. 1

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

[13] Ms. Lacerte submits that the employer will suffer significant harm if this direction is not stayed since compliance with it means that the employer would potentially have to pay out additional amounts to purchase several pieces of individual protection equipment. Since HSO Testulat did not specify in the direction the group of employees targeted, Ms. Lacerte maintains that the employer could be required to purchase equipment potentially for some one hundred employees.

[14] Ms. Lacerte also claims that the cost incurred for such a purchase would represent irreversible harm to the employer, because if the direction is overturned when the appeal is heard on the merits, the employer will end up with a large quantity of individual protection equipment it will not be able to return to the merchant. Ms. Lacerte submits that supplying this type of individual protection equipment also represents for the employer the time and extra cost of training employees on the use of the equipment.

[15] Ms. Lacerte argues that this direction causes the employer additional harm, given everything that is already in place to ensure the health and safety of employees at the Port of Bécancour. In her opinion, the risk of an incident is properly controlled since the employer has put adequate measures in place to handle emergencies.

[16] Ms. Lacerte also argues that, given the time of year and the fact that the water temperature is not close to freezing, there is presently no risk of hypothermia and therefore no urgent need to implement measures to protect employees from situations of hypothermia.

[17] For his part, the respondent specified that the employees targeted by the direction are the linesmen. He indicated that the employer will suffer harm if the direction is not stayed, but that the harm to the employees would be even more significant since two of them have fallen into the water in the past and the union deems that the employer has not corrected the situation after more than a year of discussions.

[18] First, while I believe that circumstances can exist in which economic harm can be considered significant harm, for example, when the expenses required to comply with a direction would significantly compromise the employer's operations, I do not believe that the applicant has demonstrated the employer will suffer such harm if the application for stay of the first direction is denied.

[19] Second, the applicant has not convinced me that, if the application for stay is denied, the employer will suffer significant harm due to the fact that there are already measures in place at the Port of Bécancour to ensure the safety of employees.

[20] I am also not convinced that the argument whereby there is no urgent need to implement measures to protect employees from situations of hypothermia because the water temperature is not yet close to freezing at this time of year demonstrates the presence of significant harm.

[21] For these reasons, I deem that the applicant has not convinced me that the employer will suffer significant harm if the first direction is not stayed. Consequently, the application for stay of the first direction is denied.

What measures will be put in place to protect the health and safety of employees and any other person granted access to the workplace if the stay is granted?

[22] Since the application for stay is denied on the basis of the second criterion, I will not consider the third criterion for this direction.

Direction No. 2

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

[23] Ms. Lacerte argues that the second direction is not specific enough and does not specify the corrective measures the employer must take.

[24] According to Ms. Lacerte, the employer already has rescue measures in place in the event that someone falls into the water. She asserts that the employer does not see which additional measures it should implement. The employer has enough measures in place to control the risk of a worker falling into the water and to react in a rescue situation. In her opinion, these risks are properly controlled.

[25] Ms. Lacerte reiterated that there is no risk of hypothermia at present since the water temperature is not yet close to freezing. Thus, there is no urgent need, in her view, to

execute this direction.

[26] The respondent argues that HSO Testulat analyzed the case, taking the measures in place into account, and that the direction is therefore reasonable. He points out that the harm the employer will suffer is solely financial. He maintains that the employees would suffer greater harm if the direction is stayed, particularly in the event that one of them falls into the water and risk suffering from hypothermia.

[27] In my opinion, the arguments made by the applicant do not demonstrate that the employer will suffer significant harm if the direction is upheld until the appeal is heard on the merits.

[28] I must, with respect to a stay application, grant some deference to the HSO's decision to issue a direction to the employer. I share the opinion of the respondent that, in conducting his inspection, HSO Testulat took the measures presently in place into account and deemed that they were inadequate. It would be premature and inappropriate at this stage for me to exercise my authority *de novo* by asserting that the measures in place are adequate before the parties have called their evidence on the matter. It is therefore more appropriate to analyze this matter when the appeal is heard on the merits.

[29] With respect to the argument that there is no urgent need to take action since the water temperature is not close to freezing, I maintain the position that this argument does not demonstrate significant harm.

[30] For these reasons, I deem that the applicant has not convinced me that the employer will suffer significant harm if the second direction is not stayed. Consequently, the application for stay of the second direction is denied.

What measures will be put in place to protect the health and safety of employees and any other person granted access to the workplace if the stay is granted?

[31] Since the application for stay is denied on the basis of the second criterion, I will not consider the third criterion for this direction.

Direction No. 3

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

[32] Ms. Lacerte submits that the notice of danger appearing in the third direction is unfounded and that it would be unreasonable for the employer to comply therewith, since the water temperature at present would not cause hypothermia. Consequently, there is no urgent need to execute the direction.

[33] Furthermore, Ms. Lacerte maintains that it would be prejudicial for the employer to put measures in place that are not specified before the case is heard on the merits. For

these reasons, Ms. Lacerte asserts that the employer would suffer significant harm.

[34] The respondent, for his part, deems that the direction is clear. He submits that, in his opinion, the measures adopted by the employer are inadequate since the employer has to rely on a third party to conduct an operation to rescue someone who has fallen into the water. The respondent further maintains that there is a risk of hypothermia if someone falls into the water at this time of year.

[35] In light of the applicant's argument, I am not convinced that the employer will suffer significant harm if the application for stay of the third direction is denied. As I have mentioned on two occasions, the argument that the water temperature at this time of year is not cold enough to cause hypothermia does not demonstrate, in my view, that the employer will suffer harm.

[36] With respect to the submission that the direction is not precise enough, I maintain that a lack of precision does not constitute significant harm for the employer. I repeat that it is the employer's duty to determine the appropriate measures that must be taken to comply with the direction. The implementation of additional measures to ensure the safety of employees in the event of a fall into cold water therefore does not constitute significant harm for the employer.

[37] For these reasons, I deem that the applicant has not convinced me that the employer will suffer significant harm if the third direction is not stayed. Consequently the application for stay of the third direction is denied.

What measures will be put in place to protect the health and safety of employees and any other person allowed access to the workplace if the stay is granted?

[38] Since the application for stay is denied on the basis of the second criterion, I will not consider the third criterion for the third direction.

Decision

[39] For these reasons, the application for a stay of the three directions issued by HSO Alain Testulat on September 20, 2012 is denied.

Pierre Guénette
Appeals Officer