Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canada Post Corporation and Canadian Union of Postal Workers, 2012 OHSTC 43

Date: 2012-11-28
Case No.: 2012-62
Rendered at: Ottawa

Between:

Canada Post Corporation, Applicant

and

Canadian Union of Postal Workers, Respondent

Matter:	An application for a stay of a direction
Decision:	The stay of the direction is denied
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Language of decision:	English
For the applicant:	Mr Stephen Bird, Counsel, Bird Richard
For the respondent:	Mr David Bloom, Counsel, Cavalluzzo Hayes Shilton McIntyre and Cornish LLP

REASONS

[1] On September 28, 2012, the Canada Post Corporation (CPC) filed an appeal under subsection 146(1) of the *Canada Labour Code* (the Code) of a direction issued by Ms Amy Campbell, Health and Safety Officers (HSO), Human Resources and Skills Development Canada (HRSDC), Labour Program, on September 21, 2012. On October 11, 2012, the applicant filed an application for a stay of items nos. 1 and 2 of the direction, pursuant to subsection 146(2) of the Code.

Background

[2] On September 11, 2012, HSO Campbell visited the work place operated by CPC located at 688 Brant Street, Burlington, Ontario, for the purpose of conducting a complaint investigation. During that visit, she was accompanied by the complainant, an employee committee member, the union local president, the acting superintendent, an employer committee member, the CPC health and safety manager, and a CPC health and safety advisor.

[3] Following her investigation, HSO Campbell issued a direction to CPC on September 21, 2012. The direction reads as follows:

> **IN THE MATTER OF THE *CANADA LABOUR CODE***
> **PART II – OCCUPATIONAL HEALTH AND SAFETY**
>
> DIRECTION THE EMPLOYER UNDER SUBSECTION 145(1)
>
> On September 11, 2012, the undersigned health and safety officer conducted a complaint investigation in the work place operated by CANADA POST CORPORATION, being an employer subject to the *Canada Labour Code*, Part II, at 688 Brant St, Burlington, Ontario, L7R 2H0, the said work place being sometimes known as Canada Post Corp. - Burlington.
>
> The said health and safety officer is of the opinion that the following provisions of the Canada Labour Code, Part II, have been contravened:
>
> **No. / No : 1**
>
> Paragraph 125.(1)(z.12) - Canada Labour Code Part II
>
> Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, ensure that the work place committee or the health and safety representative inspects each month all or part of the work place, so that every part of the work place is inspected at least once each year.
>
> **The employer has failed to ensure that the work place health and safety committee inspects each month all or part of the work place, such that every part of the work place is inspected at least once per**

year. The work place health and safety committee's current inspection activity is restricted to the building located at 688 Brant St Burlington, Ontario.

No. / No : 2

Paragraph 135.(7)(e) - Canada Labour Code Part II

A work place committee, in respect of the work place for which it is established, shall participate in all of the inquiries, investigations, studies and inspections pertaining to the health and safety of employees, including any consultations that may be necessary with persons who are professionally or technically qualified to advise the committee on those matters.

As part of National Depot Management, the employer's inspection program requires supervisors to conduct inspections of letter carriers work activity called "On-Street Activities and Safe Work Observations". The employer refuses to allow the workplace health and safety committee any participation in this inspection activity which pertains to the occupational health and safety of employees.

No. / No : 3

Paragraph 125.(1)(z.11) - Canada Labour Code Part II

Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, provide to the policy committee, if any, and to the work place committee or the health and safety representative, a copy of any report on hazards in the work place, including an assessment of those hazards.

As part of the National Depot Management On-Street Activities & Safe Work Observations inspection program, the employer completes a Report Form following each "Safe Work Observation". The employer failed to provide the records of inspection generated by these on-street inspections to the health and safety committee, as required. The employer also failed to provide "Mail Problem Delivery Reports", identifying health and safety hazards reported by employees, to the health and safety committee.

No. / No : 4

Paragraph 125.(1)(z.19) - Canada Labour Code, Part II

Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, consult with the work place committee or the health and safety representative on the implementation and monitoring of programs developed in consultation with the policy committee.

By failing to provide the National Depot Management On-Street Activities & Safe Work Observations document, identified as "Confidential", and reports referred to in Item #3 above, the employer failed to consult the workplace health and safety committee, as required, on the implementation and monitoring of the National Depot Management On-Street Activities & Safe Work Observations inspection program.

Therefore you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II to terminate the contraventions no later than November 7, 2012.

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 Burlington, this 21st day of September, 2012.

Amy Campbell
Health and Safety Officer
Certificate Number: ON3052

[4] On September 28, 2012, the applicant's counsel filed an appeal of the direction issued by HSO Campbell before this Tribunal, and on October 11, 2012, counsel filed a request for a stay of items nos. 1 and 2 of the direction. It was requested in the same letter by the applicant that, because of the seriousness and complexity of the issue, the stay application be set down for a *viva voce* hearing and that it be scheduled on an expedited basis. Further, applicant's counsel requested that HSO Campbell be summoned to the hearing of the stay application in order for her to produce additional documents in addition to her investigation notes. On October 17, 2012, the Canadian Union of Postal Workers (CUPW) confirmed their intention to act as a respondent in this case and that they will be represented by counsel.

[5] In a letter sent to this Tribunal on October 18, 2012, the applicant's counsel expressed the applicant's disposition to sit for a hearing for the stay application on evenings or weekends if necessary in order to expedite the matter, since the date of compliance of the direction was approaching. The same day, the Tribunal proposed, to both parties, the dates of October 22 to 24, to hold a *viva voce* hearing and indicated that the appeals officer initially assigned to hear the stay application would be out of country after those dates until the week of November 19. Counsel for the applicant answered that he could not be available from October 22 to 24. Counsel for the respondent subsequently informed the applicant and the Tribunal that he could not be available for an oral hearing before the New Year.

[6] On November 5, 2012, counsel for the applicant requested that the appeals officer convene a teleconference to deal with the stay application. Furthermore, given that the applicant had two days until the direction came into force, counsel for the applicant

requested that the Tribunal grant an interim stay of the direction under appeal until the stay application can be heard.

[7] In order to expedite the proceedings and to give the parties an opportunity to submit their arguments before the direction came into force, the case was reassigned to me. A hearing for the stay application was held accordingly on November 7, 2012. Given that the issues raised in this case were time sensitive, I decided to hear this stay application by way of teleconference, a practice that appeals officers resort to in a majority of cases and that has proven to be highly effective. Present at the teleconference were Mr Bird, counsel for the applicant, Mr Bloom, counsel for the respondent, and HSO Campbell, who was present for a portion of the call.

[8] My decision on this matter was rendered and communicated to both parties on November 8, 2012, and the parties were informed that the reasons for my decision would follow shortly.

Analysis

[9] The authority of an appeals officer to grant a stay is derived from subsection 146(2) of the Code, which reads as follows:

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

[10] In deciding this stay application, I applied the following three criteria which have been sent to the parties prior to the hearing:

1) The applicant must satisfy the appeals officer that there is a serious question to be tried as opposed to a frivolous or vexatious complaint.

2) The applicant must demonstrate that it would suffer significant harm if the direction is not stayed by the appeals officer.

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

[11] As mentioned earlier, the applicant is asking for a stay of items nos. 1 and 2 of the September 21, 2012, direction. While some arguments presented at the teleconference pertain to one item specifically, I will be addressing in the following analysis the arguments for both items in the order they were presented to me by the parties during the teleconference.

Is the question to be tried serious as opposed to frivolous or vexatious?

[12] At the teleconference, I indicated to the parties that from my initial assessment of this case, I was of the opinion that the question to be tried was in fact serious. Notwithstanding an objection made by the respondent, arguing that the appeal is founded on a matter of interpretation of the Code and that the applicant should provide evidence as to why this matter is a serious question to be tried, I concluded that I am satisfied that the requirements for the first criterion have been met.

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

[13] The applicant started by stating that there are 74 letter carrier routes in the Burlington area, consisting of 38,000 points of call in an area that covers roughly 30 km^2, as show on a map provided by the applicant prior to the teleconference. There are also rural mail carriers that work out of that facility. Within those points of call, there are some facilities which are not controlled by the employer or by an individual, such as shopping malls, business towers, and apartment buildings with door to door delivery.

[14] The applicant argued that because the direction applies to the local joint health and safety committee, it applies to routes that will include mail carriers. It was stated that there are 16 rural mail carriers, servicing 8,604 points of call and collectively, they travel approximately 540 km per day. Letter carriers have a measured work day time and motion study for 8 hours, out of which approximately 6 hours is out on the route walking and delivering. However, it was added, under the letter carrier route measurement system, letter carriers only get credit for going to a certain proportion of houses on a given day since there may not be mail for every house on every day.

[15] The applicant submitted that the percentage of coverage in Burlington is 75.4%. Consequently, 6 hours of straight walking would not cover the entire route if the local health and safety committee were to walk it. Additionally, if they are walking the route, they are not looking at anything or analyzing anything. The applicant argued that if one were to multiply the 6 hours per route by the 74 routes, it would take 444 hours to cover every route by simply walking them. Furthermore, at 100% coverage, it would take 555 hours, almost a quarter of a year, just to walk the route without paying much attention to what is going on. It was added that to get a more realistic number, one would have to apply a multiple in terms of time if the local health and safety committee is going to make any type of investigation or look at anything in detail. According to the applicant, this multiple is going to be somewhere in between 2 and perhaps 10 times, because it can take a minute or two to look at something, where a letter carrier would take a normal step without stopping.

[16] Regarding the 16 rural mail carriers, the applicant submitted that they are driving pretty much everywhere in the 30 km^2 block covered by the direction. The work place for these rural mail carriers is their vehicle. According to the applicant, every one of the roads and every point of call is a work place under HSO Campbell's definition thus the rural mail carriers could not drive the route at 80 km/h if they are going to do an

The applicant added that if HSO Campbell's definition is to be given any degree of credence, one would have to inspect every roadway in Burlington where a letter carrier or a rural mail carrier goes.

[17] The applicant argued that it will take at least two members of the health and safety committee to cover the routes because it is a bipartisan task. Taking into account that it could take at least a quarter of a year to cover all the routes, it would take about half a year's worth of the committee's time. Additionally, the direction is also going to apply to the supervisors who are going to be out on the routes doing the inspections. The supervisors are part of a different union which has a separate health and safety committee. The applicant submitted that an inspection would also be required with them. Therefore, in Burlington alone, the employer would have to inspect every letter carrier route and every rural mail carrier drive twice if every potential point of call is considered a work place. Simply inspecting one station would take up to more than half a full time year of their job.

[18] According to the applicant, the harm it will suffer, if a stay of items 1 and 2 of the direction is not granted, will be the significant expense incurred with respect to the inspections required in Burlington. It was stated that those expenses are difficult to quantify because it is not possible to know how long an individual committee member would remain in one location to make an assessment. When I asked the applicant's counsel if the expense is the salary incurred, he answered in the affirmative, adding that it would take at least two people to do the inspections. Counsel also added that it is difficult to know what should be inspected, whether it is the roadways or the sidewalks, since every place is a work place according to HSO Campbell. As a result, any place outside the four walls of the facility is a work place, as long as the worker is on paid time. It was purported that such a requirement would have the effect of eviscerating the ability of the committee to do any other work.

[19] As for the respondent, counsel submitted that for item 1, the harm alleged by the applicant appears to pertain to the amount of time that would potentially be required to comply with the direction. It was added that it would appear that the applicant's argument is essentially that there would be a substantial cost allocation of time. According to the respondent, the subject of the direction is the fact that the current inspection activity is restricted to a single location, where only a small percentage of the overall work activities actually take place. Counsel for the respondent added that he cannot respond to the details that were submitted by the applicant in regard to the actual amount of time that would be required.

[20] In regard to item 2, the respondent submitted that the extent of participation by the health and safety committee is determined by the committee itself. Therefore, it is possible that the committee could decide that only one member is required to inspect the work places that are covered by item 1. It was pointed out that the applicant suggested that it would have to be 2 members of the committee to inspect each and every location within the work place and it is to be recognized that this could occur over an entire year.

It was submitted that the amount of time and the cost at this point is uncertain, and there is an element of speculation in respect of what would actually be required.

[21] The respondent referred to a decision of the Federal Court presented by the applicant, *Canada Post Corp.* v. *Canada (Attorney General)*[1] (*Pollard* case), where the Court does an analysis with respect of the application of the test created by the Supreme Court of Canada for stay applications in *RJR - MacDonald*[2]. The Federal Court stated in the *Pollard* decision that an applicant for a stay must present clear and cogent evidence of irreparable harm, and courts have consistently held that evidence of harm that is merely speculative or indirect evidence of harm is insufficient. The respondent argued that in the present case, there is an element of speculation as to the amount of time and the cost that would be required. The respondent pointed out that this Tribunal has said that cost in itself is not substantial or irreparable harm, and in the present case we are left with the applicant's evidence that it would take a lot of time and resources to comply with the direction. Consequently, the respondent argued that the applicant has not satisfied the normal requirement of clear and cogent evidence of irreparable or substantial harm.

[22] According to the respondent, the evidence presented by the applicant that compliance with the direction could be very costly or time consuming is not of sufficient quality or of sufficiently precise nature to satisfy the requirements that are normally applied. The respondent recognized that if the direction is very broadly construed by the health and safety committee, this could result in some allocation of time and resources, but there is no certainty as to how it would be interpreted by the committee. And to that end, the respondent argued that what is left is the applicant's speculation concerning how this could be construed by the committee and how it would exacerbate or protract the amount of time and resources required.

[23] In reply, the applicant submitted, with respect to respondent's submission that the local health and safety committee can determine its own level of participation, that the HRSDC document submitted by the applicant titled "Participation of the Safety and Health Committee or Representative in Inquiries and Investigations – Part II – Canada Labour Code, 935-1-IPG-004", applies and is to be considered in respect to the second item of the direction and not the first.

[24] With respect to the aforementioned Federal Court decision in the *Pollard* case, the applicant submitted that the case was about an individual route where CPC had already made changes, whereas the present case concerns a potential prejudice that has not yet occurred and for which CPC has not done any direct amelioration. It was added that in the present case, it is possible to know exactly what the potential harm is, and that more is known now than what applied in the *Pollard* case. It is put forth that one can do some extrapolations because we know how many letter carriers are in the facility and the time it takes.

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[1] *Canada Post Corp. v. Canada (Attorney General)*, 2006 FC 1011.
[2] *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311.

[25] After carefully considering the arguments presented by both parties, I have come to the conclusion that the applicant has not demonstrated that it would suffer a significant harm if a stay of items nos. 1 and 2 of the direction is not granted.

[26] Although the applicant made reference to a number of facts, such as the time required to investigate every point of call and every route in the Burlington area, it was not able in my opinion to demonstrate how those factors are going to cause the employer significant harm. When I posed a question on this issue, the applicant agreed that the alleged harm is essentially the time and salary of the employees delegated to perform the task of inspecting the routes.

[27] While I recognize that complying with the direction until the matter is settled on the merits can potentially necessitate an allocation of additional time and resources by the employer, the applicant did not convince me that this amounts to a significant harm. As mentioned by the respondent, appeal officers have ruled that an allegation of harm cannot be based primarily on a prejudice of a pecuniary nature unless its significance can be clearly demonstrated, which the applicant has not done.

[28] The arguments presented by the applicant were largely based on the premise that HSO Campbell's direction includes requirements that are practically impossible to meet. I believe the issue of whether the requirements contained in the direction are too stringent is central to the resolution of this case, and consequently, it will be better determined when the appeal is heard on the merits by an appeals officer.

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

[29] Given my rejection of the second criterion, I do not need to consider this criterion.

Decision

[30] The employer's application for a stay of items nos. 1 and 2 of the direction issued by HSO Amy Campbell on September 21, 2012, is denied.

Michael Wiwchar
Appeals Officer