Occupational Health and Safety Tribunal Canada

Citation: Bell Canada v. Abderrahmane Bouzerda, 2012 OHSTC 44

Date: 2012-11-30
Case No.: 2011-47
Rendered at: Ottawa

Between:

Bell Canada, Appellant

and

Abderrahmane Bouzerda, Respondent

Matter:	Appeal under subsection 146(1) Part II of the *Canada Labour Code* of a danger direction issued by a health and safety officer
Decision:	The direction is rescinded
Decision rendered by:	Ms. Katia Néron, Appeals Officer
Language of decision:	French
For the Appellant:	Mr. Yan Boissonneault, Counsel
For the Respondent:	Mr. Maxime Lazure-Bérubé, Counsel, Conseillers en relations de travail Inc.

REASONS

[1] This decision concerns an appeal brought under subsection 146(1) Part II of the *Canada Labour Code* (the Code) by Mr. Yan Boissonneault, on behalf of Bell Canada, of a danger direction issued by Health and Safety Officer (HSO) Mr. Daniel Boulanger, on August 3, 2011.

[2] This matter was heard at Montréal on January 17, 18 and 19, 2012.

Background

[3] The following has been excerpted from HSO Boulanger's testimony, investigation report and related documents.

[4] This matter began with a refusal to work on July 26, 2011 by Mr. Abderrahmane Bouzerda, a Class 1 Business Technician for Bell Canada.

[5] A Class 1 Business Technician's duties are to answer by telephone any questions other technicians may have about the tests to be performed for installation or repairs of a customer's telephone line, Internet connection, television signal or other services. To perform his duties, Mr. Bouzerda uses a workstation with a computer, two screens and a keyboard installed in front of him. Because Mr. Bouzerda is right-handed, his keyboard mouse is installed on his right and the telephone is on his left. Mr. Bouzerda wears a headset to make and receive calls.

[6] At the time of his refusal, Mr. Bouzerda was back to work from sick leave following a fracture of his left clavicle, injury sustained on May 12, 2011, when he was playing soccer. Following this accident, he was examined on May 17 and July 6, 2011 by Dr. John Antoniou, orthopedist. Dr. Antoniou's last report, dated July 12, 2011, (the "BC 1935 Form") shows the following:

- Wearing a sling and physiotherapy were the treatments prescribed for the fracture of Mr. Bouzerda's left clavicle;
- His total unfitness to perform his regular duties in connection with his employment was due to the fact that he was unable to use his left arm;
- Dr. Antoniou considered that Mr. Bouzerda was fit to hold regular employment on August 5, 2011;
- Dr. Antoniou did not have any plan for a gradual return to work for Mr. Bouzerda.

[7] Bell Canada employees are covered by a disability insurance program, which is administered by the Manulife Financial management group; this group accordingly studied the reports submitted by Dr. Antoniou about Mr. Bouzerda.

[8] Following this examination, two letters were sent to Mr. Bouzerda, one on

June 13, 2011, and the other on June 29, 2011, notifying him that, as of June 27, 2011, he was no longer entitled to disability benefits, which were paid after his accident, for the following reasons:

- In their opinion, he was not totally disabled by his medical condition, considering the duties he performed as well as the gradual return to work plan proposed by his employer which was to work 5 half-days per week with short breaks of 5 minutes every hour, with a reduction in his performance objectives;
- In their opinion, the functional restriction identified by Dr. Antoniou, that is not to use his left arm, could be accommodated for the tasks he was performing.

[9] After receiving these notices and a verbal confirmation of this decision by telephone, and considering the end of disability benefit payments on June 27, 2011, Mr. Bouzerda returned to work on July 21, 2011. He began performing his duties only the next day. During the day of July 22, 2011, he used his left arm to answer the phone and dial phone numbers, and he experienced pain in his left shoulder.

[10] After beginning his work on the following Monday, July 25, 2011, Mr. Bouzerda told his supervisor, Mr. Denis Mazerolle, that he had pain in the left shoulder. Mr. Mazerolle reminded him that he had to work at his own pace and use his right hand and arm. In addition, he helped him move his telephone so that he would not use his left arm. In spite of these changes, Mr. Bouzerda had pain in both arms that day when performing his duties. After reporting for work on July 26, 2011, and having pain in the left shoulder and right arm, as well as numbness, and fearing that this situation would aggravate his injury or create other injuries, Mr. Bouzerda invoked a work refusal.

[11] Mr. Bouzerda's work refusal reads as follows: *[Translation]*

> Hello Denis,
> I notified you yesterday that I had pain when performing my work. You told me to use only my right arm, which I did. I unfortunately felt pain in my right arm and shoulder as well as numbness. I do not want to aggravate my condition and develop other problems. I am invoking my right of refusal.

[12] When conducting his investigation, HSO Boulanger obtained the reasons invoked by Mr. Bouzerda in support of his refusal. The employer's representative, Mr. Patrick Casavant, Associate Director, Environment, Health and Safety, Field Services, gave HSO Boulanger the following information.

[13] Following Mr. Bouzerda's work refusal, Bell Canada offered to have an assessment of his workstation conducted by the occupational therapist and ergonomist, Ms. Chantal Boucher. According to the report written by Ms. Boucher on August 2, 2011, and forwarded to HSO Boulanger during his investigation, she met Mr. Bouzerda on July 29, 2011, with Messrs. Casavant, Mazerolle and Alain Paradis, union representative.

At that meeting, she explained to Mr. Bouzerda that the purpose of her intervention was to optimize his comfort and to ensure that there was no danger for him when performing his work, considering his medical condition. Mr. Bouzerda refused to collaborate in this study.

[14] In spite of this refusal and with the employer's agreement, Ms. Boucher conducted an assessment of another Class 1 Business Technician's duties as well as of Mr. Bouzerda's workstation. The purpose of this assessment was to document the physical requirements of Mr. Bouzerda's duties to help him better plan a gradual return to his regular work.

[15] Following his investigation, HSO Boulanger decided that it was dangerous for Mr. Bouzerda to perform his duties for the following reasons.

[16] According to HSO Boulanger, Dr. Antoniou's last report prohibited any type of work for Mr. Bouzerda until August 5, 2011.

[17] In addition, Mr. Bouzerda's attempts to perform his duties caused him pain, even when using only his right hand and arm.

[18] As well, in spite of the fact that the employee had been advised to work at his own pace and only with his right hand and arm, that his telephone had been installed to his right, and that an ergonomic assessment had been conducted for the work in question, according to HSO Boulanger, none of these measures or this assessment helped determine whether the performance of his duties could aggravate or not Mr. Bouzerda's personal medical condition.

[19] Based on the above, HSO Boulanger reached the conclusion that on August 3, 2011, Mr. Bouzerda could not perform any task in connection with his employment before August 5, 2011, without a potential danger that his injury would be aggravated or that new injuries would be caused.

[20] Following this decision, HSO Boulanger gave a danger direction to Bell Canada, ordering that immediate measures be taken to protect Mr. Bouzerda from the danger identified above until he obtained a medical certificate from his attending physician, authorizing him to perform his duties.

[21] The direction given by HSO Boulanger reads as follows: *[Translation]*

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER PURSUANT TO
> SUBPARAGRAPH 145(2)(a)(ii)
>
> On August 2, 2011, the undersigned Health and Safety Officer conducted an investigation of Mr. Abderrahmane Bouzerda's work refusal in the

> work premises operated by Bell Telephone Company of Canada, or Bell Canada, an employer subject to Part II of the *Canada Labour Code*, located at 600 Jean-Talon, Suite 318, Montréal, Québec, H2R 3A8, said premises sometimes referred to under the name of Bell Canada.
>
> Said Health and Safety Officer considers that the performance of the tasks of a Class 1 Business Technician is a danger for the employee at work, that is:
>
> Performing the tasks of a Class 1 Business Technician by the employee, when his doctor determined that he was unfit to do so and the employee's attempt to perform said tasks caused significant pain and discomfort, which is a danger to develop new injuries or to aggravate existing ones.
>
> Therefore, YOU ARE HEREBY DIRECTED, pursuant to subparagraph 145(2)(a)(ii) of the *Canada Labour Code* Part II, to immediately take steps for the protection of this employee from this danger until he obtains a medical certificate from his attending physician, authorizing him to perform said tasks.
>
> Issued at Montréal, on August 3, 2011.
>
> Daniel Boulanger
> Health and Safety Officer
> Certificate No.: ON9279

Issue

[22] The issue in this matter is to determine if the danger direction given on August 3, 2011 by HSO Boulanger was well founded.

A) Appellant's submissions

[23] On behalf of the appellant, Mr. Boissonneault, submitted that the danger alleged to the effect that the performance of his duties could aggravate Mr. Bouzerda's injury or cause him new injuries, did not exist on August 3, 2011.

[24] If, on the other hand, I reach the conclusion that there was a danger for Mr. Bouzerda in this case on August 3, 2011, which he did not admit, Mr. Boissonneault submitted that because of the decisions made by Mr. Bouzerda about his return to work, just like at the time of his work refusal, I could not do otherwise but conclude that this danger resulted from this employee's own actions, which in any event according to Mr. Boissonneault, infringed the Code. He also submitted that Mr. Bouzerda was not entitled to invoke a work refusal pursuant to the Code in these circumstances, as well as for the reason he gave.

[25] In support of these submissions, Mr. Boissonneault had Mr. Denis Mazerolle, Director of the Bell Canada Tickets, Volume and Installation management team, Mr. Patrick Casavant, Associate Director, Environment, Health and Safety for Bell

Canada, Dr. Liliane Demers, consulting physician for Bell Canada, disability benefits applications management group, as well as Ms. Chantal Boucher, the occupational therapist and ergonomist who conducted an assessment of the work performed by Mr. Bouzerda, testify. After hearing the statement of qualifications of Dr. Demers and of Ms. Boucher, I acknowledged Dr. Demers as an expert in the field of industrial medicine and Ms. Boucher as an expert in the assessment of work-related ergonomic risks.

[26] Mr. Mazerolle explained that when Mr. Bouzerda invoked his work refusal, he was a supervisor of the Class 1 Business Technicians, replacing Ms. Josée Phillie, who was on holidays at that time.

[27] Mr. Mazerolle stated that on July 6, 2011, he received a call from Mr. Bouzerda, asking him why his disability benefits were no longer being paid. He said that after checking, he explained to Mr. Bouzerda that, according to his attending physician, his only restriction was not to use his left arm; accordingly, his tasks could be modified so he could work at his own pace with no expectations regarding his productivity and only using his right hand and arm. The Manulife Financial disability management group had decided that his benefits would no longer be paid to him as of June 27, 2011, as they considered that he was on unauthorized leave from that date. In addition, they told him that he was expected to report for work on July 5, 2011, as specified in the letter sent on June 29, 2011 by Manulife Financial. Mr. Mazerolle said that he also told Mr. Bouzerda that he was free not to come to work but the consequence would be that he would not receive his salary because he would not be working and would not be receiving any disability benefits because Manulife Financial considered that he was not totally unfit to hold employment, considering his single functional restriction.

[28] Mr. Mazerolle stated that he received two other calls from Mr. Bouzerda on July 20 and 21, 2011. During these telephone calls, Mr. Bouzerda told him that he had consulted his attending physician once again and that, in his opinion, Mr. Bouzerda should not return to work before August 5, 2011. Mr. Mazerolle stated that after checking, he advised Mr. Bouzerda that Manulife Financial still considered, after studying the last report written by his attending physician, that he was not totally unfit to return to work and that his employer was able to accommodate his only functional restriction, that is not to use his left arm.

[29] Mr. Mazerolle stated that he had never threatened Mr. Bouzerda with a disciplinary measure if he did not return to work before August 5, 2011, and that he told him he was free not to return to work before that date.

[30] Mr. Mazerolle stated that Mr. Bouzerda reported for work on July 21, 2011, around 1:00 p.m. Because of the reactivation of his computer access, Mr. Bouzerda did not perform his tasks that afternoon as well as during part of the next day.

[31] Mr. Mazerolle stated that Mr. Bouzerda worked in the afternoon of July 22, 2011.

[32] Mr. Mazerolle stated that at mid-day on the following day, that is July 25, 2011,

when he saw that Mr. Bouzerda complained about pain in his left shoulder and seeing that he was working with his left hand and arm, they moved his telephone so that he would work only with his right hand and arm.

[33] Mr. Mazerolle stated that on July 25, 2011, Mr. Bouzerda requested to do overtime. After obtaining approval from the Manulife Financial disability management group, Mr. Mazerolle authorized Mr. Bouzerda to do the requested overtime.

[34] Mr. Mazerolle stated that on July 27, 2011, following his refusal and considering his pain, Mr. Bouzerda was offered the assistance of an occupational therapist to conduct an assessment of his workstation in the performance of his duties. Mr. Bouzerda refused, saying that he would accept only a specialist like Dr. John Antoniou to make recommendations about his case. Dr. Demers was then contacted and she suggested that Ms. Boucher conduct an ergonomic assessment of Mr. Bouzerda's workstation.

[35] Mr. Mazerolle stated that, on July 29, 2011, Mr. Bouzerda refused to participate in the proposed ergonomic assessment, still claiming that only a specialist like his attending physician could evaluate if he could perform his work without any risk to himself, with the accommodations proposed by his employer, considering his injury. Mr. Bouzerda refused to participate in the proposed ergonomic assessment.

[36] Mr. Casavant stated that he was notified of Mr. Bouzerda's refusal to work on July 26, 2011. He stated that he began an investigation into this refusal on July 27, 2011.

[37] Mr. Casavant testified that when he asked Mr. Bouzerda the reasons for his refusal, he said that he had decided to return to work because he was no longer receiving any disability benefits, and that since he returned to work he had pain on both sides. Because of that, he was afraid of aggravating his injury or of sustaining new injuries by continuing to work.

[38] Ms. Boucher stated that if she could have assessed Mr. Bouzerda's movements when working, while taking into consideration the pain he said he had, she could have ensured that there was no risk factor for him in performing his work.

[39] As mentioned above, Ms. Boucher stated that she conducted an ergonomic assessment of the tasks performed by another employee who was a Class 1 Business Technician and she also assessed Mr. Bouzerda's workstation. She submitted a report of these analyses. As mentioned above, this report was dated August 2, 2011.

[40] As specified at page 5 of her report, Ms. Boucher stated that Mr. Bouzerda's productivity was not evaluated when he returned to work or during the other days before his refusal.

[41] Referring to pages 5 and 6 of her report, Ms. Boucher stated that a Class 1 Business Technician performed the following tasks for each call:

- Take the call to contact the field technician;
- Note a 6-digit work code on the B screen;
- Note down a telephone number;
- Move the windows on the A screen according to the information required for the connections while noting the information given by the field technician who is on line;
- Conduct tests with functions (key functions) while noting data, involving a few letters at most (there are waiting periods, as the field technician must conduct tests at each step and the two technicians also communicate back and forth);
- Once the problem is corrected, the technician enters the nature of the intervention in the file on the B screen using 3 scroll-down menus;
- Note a comment (an average of less than 10 words) in the text box on the B screen;
- If the technician is unable to spot the problem, he makes a telephone call for another level of expertise. He notes the file and telephone numbers on a pad if necessary.

[42] As mentioned at page 6 of her report, Ms. Boucher stated that Mr. Bouzerda's workstation included namely the following:

- An adjustable keyboard support for the computer keyboard and mouse with a space available for a notepad;
- A removable wrist support;
- An adjustable writing pad;
- Two flat screens on a removable, height-adjustable base;
- A telephone with a headset;
- A footrest;
- An adjustable ergonomic chair (height- and width-adjustable, pivoting armrests – height-adjustable backrest – depth-adjustable seat).

[43] Referring to pages 7 and 8 of her report, Ms. Boucher described the physical activities inherent in the work of a Class 1 Business Technician as follows:

- The employee is always seated and stands occasionally but not for long;
- When he performs his duties, the employee's physical effort is sedentary and there is no significant load to be handled;
- The back is static without any required movements, considering the support given by the ergonomic chair backrest, the adjustable workstation and the equipment installed within reach and for which it is not necessary to bend the trunk;
- The range of neck movement is minimal and non-repetitive, considering the view from the screen and keyboard/work surface and the visual scanning, which is within a functional viewing angle and complies with standards, even with the use of two screens;
- With the equipment properly adjusted for the worker, shoulder movements are minimal and the chair with height- and width-adjustable, pivoting armrests allows

support points to absorb arm weight;

- The standard mouse allows for a neutral shoulder position and an arm aligned with the trunk if a proper adjustment is made to the workstation while the elbow remains supported by the armrest;
- The viewing angle covers the width of the keyboard, allowing a neutral position with slight internal rotation of the shoulder while the elbow remains supported by the armrest;
- When using the telephone, there is an occasional unilateral use of the shoulder within a reduced range of movement (less than 45 to 60 degrees according to where the telephone is placed – e.g. reaching the switch, the dial pad, picking up a pencil, using the checklist on the work surface);
- There are no repetitive movements of the shoulders;
- There is average flexion of the shoulder of 1 movement every 2 minutes to reach the telephone (dial pad, switch);
- There are no repetitive movements of the elbows, but an elbow extension on an average of once every 2 minutes to reach the telephone components; The elbows are flexed at 90 degrees and the forearm is in pronation during the activity;
- Dynamic use of the wrists is minimal;
- Use of the fingers is within minimal range and recovery time is substantial because there are short pauses (lots of waiting time).

[44] As specified at page 8 of her report, Ms. Boucher stated that the work of a Class 1 Business Technician is sedentary. She added that the physical requirements for performing this work are minimal and this is why the tasks in connection with this work are defined as being light.

[45] Dr. Demers stated that the first report submitted (the "BC 1935 Form") by Dr. Antoniou, dated May 31, 2011, showed a diagnosis of a fracture to the left clavicle without a secondary diagnosis and Mr. Bouzerda's inability to use his left arm as his only restriction. As far as the second report submitted by Dr. Antoniou, dated July 12, 2011, was concerned, Dr. Demers stated that this report still mentioned that the only restriction was Mr. Bouzerda's inability to use his left arm. Dr. Demers added that, within the context of industrial medicine, once the attending physician determines the functional restrictions, it is then up to the employer to determine if he can have the employee perform his work while respecting these restrictions. On the basis of Dr. Antoniou's two above-mentioned reports, Dr. Demers stated that because he specified that Mr. Bouzerda's only functional restriction was that he could not use his left arm, he was not completely unfit to perform his duties, considering the type of work in question. She also stated that, in his last report, Dr. Antoniou mentioned that Mr. Bouzerda was fit to hold his regular employment without any restrictions as of August 5, 2011, and he did not consider it necessary to see him again before September 2011. According to Dr. Demers, the only logical conclusion which may be reached is that Mr. Bouzerda's attending physician was not in any way preoccupied by Mr. Bouzerda's healing.

[46] Referring to page 1226 of a document entitled "*Pathologie médicale de l'appareil*

locomoteur" [Medical Pathology of the Musculoskeletal System] which she submitted, Dr. Demers stated that the healing of a fracture of the clavicle is almost always complete two months following the injury. Referring to page 34, section 3 of the document entitled "*Guide de l'employeur concernant le traitement des périodes d'absence pour invalidité* (2000/2003)" [Employer's Guidebook for the Processing of Disability Leave (2000/2003)] published by the Ministère de la Santé et des Services sociaux, [Department of Health and Social Services], she added that an employee who sustained a fracture of the clavicle is able to perform light work within 6 to 8 weeks following the fracture. Referring to page 4 of a document entitled "Fracture Clavicle – Medical Disability Guidelines," she added that the duration of the period of disability in the case of a fracture of the clavicle was a minimum of 7 days to a maximum of 28 days for sedentary work, while the duration of this period of disability is of a minimum of 14 to 56 days for light work.

[47] Dr. Demers submitted a letter sent on July 13, 2011 to Dr. John Antoniou, asking him to confirm his agreement for the gradual return to work plan proposed for Mr. Bouzerda, which involved him working 5 half-days per week from June 27, to July 4, 2011, with short 5-minute breaks per hour with a reduction in performance requirements, to return to his full-time tasks only from July 11, 2011. Dr. Antoniou did not answer this request.

[48] On the basis of the medical reports submitted by Dr. Antoniou, as well as the medical literature mentioned above, but also taking into consideration the fact that Mr. Bouzerda's workstation could be adjusted so that he would not have to use his left arm, as prescribed by his attending physician, by using a headset to make and answer calls, Dr. Demers stated that it was decided not to pay any more disability benefits to Mr. Bouzerda as of June 27, 2011, while proposing to him the gradual return to work plan described above. She added that in the most favourable case, she considered that Mr. Bouzerda was fit to return to work as a Class 1 Business Technician on July 7, 2011, at the latest, that is 56 days after the date of his injury on May 12, 2011. She also stated that from July 26, 2011, at the time of his work refusal, to August 5, 2011, this was Mr. Bouzerda's 11th week following his injury, and she accordingly considered that Mr. Bouzerda was fit to hold employment without running any danger of sustaining injuries related to the fracture of his left clavicle, even without the accommodations offered by his employer.

[49] Dr. Demers stated that it was normal to feel pain during the healing of a fracture of the clavicle. This, according to Dr. Demers, is a normal step in the healing process. She added that having pain during this process is not necessarily a danger to health. As an example, she mentioned that physiotherapy for this type of injury frequently involved pain.

[50] On the basis of this evidence, Mr. Boissonneault submitted that there was no reasonable possibility that Mr. Bouzerda could aggravate his injury on August 3, 2011, or sustain any other injuries while performing his duties and, accordingly, there was no hazard for him at that time within the meaning of the Code. In support of this submission,

he referred to the Federal Court judgment in *Verville v. Canada*,[1] which established the criterion of a reasonable possibility to conclude that there was an existing or potential hazard as defined in subsection 122(1) of the Code.

[51] On the other hand, if I reach the conclusion that there was a hazard for Mr. Bouzerda on August 3, 2011, which Mr. Boissonneault did not admit, he submitted that Mr. Bouzerda could not invoke a work refusal under the Code for the following reasons.

[52] First, Mr. Boissonneault submitted that an employee cannot invoke a hazard in connection with a personal medical condition to refuse to work pursuant to the Code, According to Mr. Boissonneault, a person's state of health is not included in the definition of the term "danger" at subsection 122(1) of the Code. In support of this submission, Mr. Boissonneault cited the following case law: *Antonia di Palma and Air Canada*[2] and *Grams and Canadian Pacific Limited*[3].

[53] Second, according to Mr. Boissonneault, the work conditions in the performance of his tasks at the time of Mr. Bouzerda's refusal were not any different from what they normally were. According to Mr. Boissonneault, they were part of his normal work conditions and that accordingly Mr. Bouzerda was not entitled under paragraph 128(2)(*b*) of the Code to invoke a work refusal. In support of this submission, Mr. Boissonneault referred to the following case law: *David Pratt and Gray Coach Lines Limited and the Syndicat uni du transport, Local 113*[4], *Jack Stone and Correctional Service of Canada*[5], *Ernest L. Labarge and the Communications, Energy and Paperworkers Union of Canada and Bell Canada*[6].

[54] Third, according to the definition of "danger" in subsection 122(1) of the Code, the requirement before reaching the conclusion that there is a hazard, is that the alleged risk for injury or that the condition can be corrected or altered. According to Mr. Boissonneault, this means that the right to refuse to work under the Code is an "emergency measure." In support of this submission, Mr. Boissonneault referred to the following case law: *Canada (Attorney General) v. Fletcher*[7], *Federal Marine Terminals and Canadian Union of Public Employees, Local 375 (Stevedorer's Union)*[8] and *Antonia di Palma and Air Canada*, cited above. On the basis of the evidence, Mr. Boissonneault submitted that Bell Canada was ready to take immediate measures to modify Mr. Bouzerda's tasks and eliminate any hazard for him according to the

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[1] *Verville v. Canada (Correctional Service)*, 2004 FC 767
[2] *Antonia di Palma and Air Canada*, 29 C.L.R.B.R. (2d) 212
[3] *Grams and Canadian Pacific Limited*, D.T.E. 95T-238
[4] *David Pratt and Gray Coach Lines Limited and the Syndicat uni du transport, Local 113*, 1 C.L.R.B.R. (2d) 310
[5] *Jack Stone and Correctional Service of Canada*, decision No. 02-019
[6] *Ernest L. Labarge and the Communications, Energy and Paperworkers Union of Canada and Bell Canada*, 82 CLLC 16, 151
[7] *Canada (Attorney General) v. Fletcher* (C.A.), 2003 2 FC 475
[8] *Federal Marine Terminals and Canadian Union of Public Employees, Local 375 (Stevedorer's Union)*, 1999 C.L.C.R.S.O.D. No. 10

recommendations made by Ms. Boucher, occupational therapist and ergonomist, considering his functional restrictions and the pain he said he had.

[55] Fourth, according to Mr. Boissonneault, subsection 128(1) of the Code contains two prior conditions to allow a work refusal: the employer must require that the employee perform the tasks in question and the employer must have some control over such tasks. As submitted by Mr. Boissonneault, these two conditions did not exist at the time of Mr. Bouzerda's work refusal, because he made the decision to return to work before August 5, 2011, without his employer requiring it, and he also refused to cooperate in the ergonomic assessment.

[56] Fifth, Mr. Boissonneault submitted that Mr. Bouzerda put himself in a situation which he subsequently described as being a danger for him only for monetary reasons, Mr. Boissonneault also submitted that invoking a work refusal provided for under the Code to have Bell Canada pay him disability benefits or his salary up to August 5, 2011, is not authorized within the meaning of the Code, nor is it the proper way to settle such a work dispute. In support of this submission, Mr. Boissonneault referred to the decision of the Canada Labour Relations Board in *Ed Koski and David Boose and Canadian Pacific Limited*[9].

[57] In addition, in referring to paragraph 126(1)(*e*) of the Code, Mr. Boissonneault submitted that by refusing to cooperate in the ergonomic assessment, Mr. Bouzerda infringed his obligation as an employee to "cooperate with any person carrying out a duty imposed under this Part," in this case, the employer's representatives who were trying to protect his health. As also submitted by Mr. Boissonneault, because it was Mr. Bouzerda who decided to return to work before August 5, 2011, although he was not threatened with any disciplinary measures if he did not do so, and considering that he used his left arm when he returned to work, although advised that he could not do so, Mr. Boissonneault claimed that Mr. Bouzerda once again infringed another one of his obligations as an employee, that is "take all reasonable and necessary precautions to ensure the health and safety of the employee" under paragraph 126(1)(*c*) of the Code. Mr. Boissonneault submitted on this basis that if I reach the conclusion in this case that there was a hazard for Mr. Bouzerda, which he did not admit, this hazard resulted from Mr. Bouzerda's own conduct as well as from his infringement of his obligations as an employee, which were specified under the Code.

[58] According to Mr. Boissonneault, not taking into consideration the circumstances of Mr. Bouzerda's work refusal or the prior conditions mentioned above to invoke a work refusal under the Code, alters the nature of this right provided under law and may pave the way to abuses as in this case, in his opinion.

[59] For these reasons, Mr. Boissonneault submitted that HSO Boulanger erred in deciding that there was a danger for Mr. Bouzerda and he demanded that I rescind his direction issued on August 3, 2011.

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[9] *Ed Koski and David Boose and Canadian Pacific Limited*, 21 C.L.R.B.R. (2d) 306

B) Respondent's submissions

[60] On behalf of the respondent, Mr. Maxime Lazure-Bérubé submitted that there was a danger within the meaning of the Code for Mr. Bouzerda to perform his duties on July 26, 2011. In addition, he submitted that Mr. Bouzerda was entitled to invoke a work refusal pursuant to the Code. In support of these submissions, Mr. Lazure-Bérubé invoked the testimony of Mr. Bouzerda, which was given at the hearing on this matter.

[61] Mr. Bouzerda stated that following his first medical examination by Dr. Antoniou on May 17, 2011, he submitted a first medical report (the "BC 1935 Form"), dated May 31, 2011, but also a letter dated May 17, 2011. In that letter Dr. Antoniou certified that Mr. Bouzerda had a follow-up at his orthopedic clinic for a fracture of the left clavicle, that he was unfit to hold employment until further notice and that a specific date for his return to work would be determined at his next medical examination in 4 weeks. Following Dr. Antoniou's second medical examination of Mr. Bouzerda on July 6, 2011, he submitted a second "BC 1935 Form" dated July 12, 2011, as described above, without any additional notice.

[62] Mr. Bouzerda stated that he thought that Dr. Antoniou's last report dated July 12, 2011, specified that he was not to work before August 5, 2011.

[63] Mr. Bouzerda explained that he wore a sling under his clothes to stabilize his shoulder until August 5, 2011.

[64] Mr. Bouzerda stated that he had no physiotherapy after July 21, 2011.

[65] Mr. Bouzerda explained that he had telephone conversations on several occasions with his employer's representatives before returning to work, namely on June 13, 2011, with Adèle Belzile from Manulife Financial, on June 27 and July 5, 2011, with Valérie Magistrale from Manulife Financial and on July 6, 20, and 21, 2011, with Mr. Mazerolle. According to Mr. Bouzerda, everyone explained to him the reasons for ending the payment of his disability benefits as of June 27, 2011, and the measures described above to accommodate him for his gradual return to work.

[66] Mr. Bouzerda stated that no one demanded that he return to work, but because he did not receive any more pay since June 27, he had no other choice but to return to work, as he had no income.

[67] Mr. Bouzerda explained that following his return to work on July 21, 2011, he began doing his tasks only in the following afternoon, on July 22, 2011. He stated that he worked that day from 1:00 p.m. to 9:00 p.m. with both hands and had pain in the left shoulder and his right arm was numb. He added that he had no pain during the weekend of July 23 and 24, 2011.

[68] Mr. Bouzerda stated that he worked with both hands during the morning of

July 25, 2011, and when the pain in his left shoulder started again, he told Mr. Mazerolle about it. His telephone was then moved to his right side and he was told to work only with his right hand and arm.

[69] Mr. Bouzerda explained that in the morning of July 26, 2011, even if he worked with his right hand and arm, he had pain in the right arm and left shoulder and numbness in the right arm.

[70] Mr. Bouzerda said that he returned to his regular work on August 5, 2011, using both hands without requesting any special accommodation.

[71] Mr. Bouzerda explained that he consulted Dr. Antoniou once again in September 2011.

[72] To explain the reasons for which he refused to participate in an ergonomic assessment conducted by Ms. Boucher, Mr. Bouzerda said that only the opinion of a specialist equivalent to his attending physician, Dr. Antoniou, could have reassured him and convinced him to return to work before August 5, 2011.

[73] On the basis of this evidence and referring to sections 122.1 and 122.2 of the Code, Mr. Lazure-Bérubé submitted that to determine the existence of a hazard or if a work refusal is authorized under the Code, we must take into consideration the main purpose of the Code, which is to give priority to prevention, that is the elimination and reduction of work-related hazards, to ensure the protection of every employee. Mr. Lazure-Bérubé submitted in referring to section 124 of the Code, that we must also take into consideration the fact that every employer has the obligation to protect the health and safety of each one of his employees and that as specified in subsection 126(2) of the Code, this obligation is not cancelled by the obligations of employees under subsection 126(1) of the Code. Although admitting that Mr. Bouzerda willingly returned to work before August 5, 2011, without being required to do so by his employer, Mr. Lazure-Bérubé submitted that he did so because he was considered to be on unauthorized leave, he was expected to return to work and the consequence of not doing so was that he had no salary. As submitted by Mr. Lazure-Bérubé, Mr. Bouzerda also did that because his employer never told him that he could or should remain at home until August 5, 2011, in spite of the fact he said that, according to his attending physician, it was recommended for him not to work before that date.

[74] In referring to article 2085 of the *Civil Code of Québec*, Mr. Lazure-Bérubé submitted that in addition to the fact that the essence of an employment contract is an employee's subordination to his employer, when Mr. Bouzerda returned to work, he performed his duties under the direction of his supervisor without being able to do what he wanted. According to Mr. Lazure-Bérubé, Bell Canada simply assigned to Mr. Bouzerda his usual tasks when he returned to work, disregarding the last report of his attending physician which, according to Mr. Lazure-Bérubé, mentioned that he was totally unfit to perform all of the usual tasks of his employment, or of any other employment, was unfit to use his left arm and to gradually return to work before

August 5, 2011. Mr. Lazure-Bérubé also submitted that on July 22, 2011, after having pain in the left shoulder, Mr. Bouzerda immediately notified his superior and Mr. Mazerolle merely told him to use his right arm and to move the telephone to his right. Although he complied with those instructions, Mr. Bouzerda invoked a work refusal the next day because the pain and numbness occurred again.

[75] In addition, Mr. Lazure-Bérubé submitted that the fact Mr. Bouzerda refused to participate in the ergonomic assessment is not a sufficient reason to cancel the direction issued by HSO Boulanger. Quite the contrary, Mr. Lazure-Bérubé submitted that not only did Mr. Bouzerda collaborate with his employer by participating in meetings convened following his work refusal, but he was right in claiming that an ergonomist was not competent to assess his medical capacity to perform his tasks. According to Mr. Lazure-Bérubé, only a doctor specialized in assessing fractures could give an opinion on this point and ensure, after examining Mr. Bouzerda, that there was no danger for him in performing his duties, considering the trauma he had sustained and the pain he had.

[76] Mr. Lazure-Bérubé also submitted that Bell Canada never requested that a doctor verify the medical conclusions reached by Dr. Antoniou. Mr. Lazure-Bérubé did not acknowledge Dr. Demers as an expert witness in this case because she never examined Mr. Bouzerda or submitted a medical assessment report about him. According to Mr. Lazure-Bérubé, a court of law cannot hear or accept the testimony of an expert if said expert has not drafted and filed a prior assessment report. In support of this submission, Mr. Lazure-Bérubé referred to pages 308 and 309 of a book entitled "*La preuve civile*" [Civil Evidence], 3rd edition, 2003, Éditions Yvon Blais Inc., written by the attorney and professor at the Law Faculty of Université Laval, Mr. Jean-Claude Royer.

[77] Mr. Lazure-Bérubé also submitted that the hazard alleged by Mr. Bouzerda in this case was not a normal condition of his employment within the meaning of paragraph 128(2)(*b*) of the Code. In support of this submission, he referred to the Federal Court judgments in *Éric V. and others, and Correctional Service of Canada* [10], and *P&O Ports Inc. v. International Longshoremen's and Warehousemen's Union, Local 500*[11]. On the basis of these judgments, Mr. Lazure-Bérubé submitted that before invoking normal employment conditions within the meaning of paragraph 128(2)(*b*) of the Code, Bell Canada had to assess the situation and apply corrective measures. According to Mr. Lazure-Bérubé, Bell Canada never did so, as it allowed Mr. Bouzerda to perform his duties without having his medical condition checked beforehand by a doctor specialized in fractures who would have met him, examined him and handed in a written report.

[78] Mr. Lazure-Bérubé also submitted that a danger within the meaning of the Code may result from an employee's personal medical condition and not only from his work environment. Although admitting that the duties of a Class 1 Business Technician are not inherently dangerous for a healthy person, he submitted that this work could become dangerous for a person with a fractured clavicle and for whom the attending physician, as

[10] *Éric V. and others v. Correctional Service of Canada*, OHSTC-09-009
[11] *P&O Ports Inc. v. International Longshoremen's and Warehousemen's Union, Local 500*, 2008 FC 846

he claimed was the case here, had not authorized his return to work. In support of this submission, Mr. Lazure-Bérubé referred to the Federal Court judgment in *Canada Post Corporation v. Pollard*[12].

[79] On the basis of the above and referring to the term "danger" defined under the Code as "any existing or potential hazard or condition or any current or future activity," Mr. Lazure-Bérubé submitted that because Mr. Bouzerda had pain and numbness when performing his duties even after his telephone was placed on his right-hand side, and he used only his right hand and arm, there was a reasonable possibility that his injury would get worse when performing his tasks or that he would sustain a new injury.

[80] For these reasons, Mr. Lazure-Bérubé submitted that Mr. Bouzerda was entitled to believe that the performance of his work was reasonably likely to aggravate his injury or to cause another injury and that he was accordingly entitled to invoke a work refusal. On that basis, he argued that the decision to the effect that there was a danger for Mr. Bouzerda, rendered by HSO Boulanger, as well as his direction issued on August 3, 2011, following that decision, were well founded.

[81] For these reasons, Mr. Lazure-Bérubé requested that I uphold the direction given on August 3, 2011 to Bell Canada by HSO Boulanger.

Appellant's reply

[82] In reply to the submissions made by Mr. Lazure-Bérubé, Mr. Boissonneault argued that, on the basis of the testimony given by Messrs. Mazerolle and Bouzerda, it is wrong to claim that Bell Canada demanded that Mr. Bouzerda return to work. Quite the contrary, he claimed that Bell Canada never obliged Mr. Bouzerda to return to work.

[83] On the basis of the evidence, Mr. Boissonneault also submitted that not only was Mr. Bouzerda perfectly fit to perform his duties without any danger to himself when returning to work, but Bell Canada advised him even before, that he could use only his right arm, that he was entitled to short pauses and that he would not be required to meet any performance objectives.

[84] According to Mr. Boissonneault, the fact that Mr. Bouzerda criticizes his employer for not having prevented him from using his left arm when he returned to work, although he did so himself until Mr. Mazerolle told him to use only his right arm, is somewhat of a paradox.

[85] As far as the medical evidence is concerned, Mr. Boissonneault completely disagrees with Mr. Lazure-Bérubé when he claimed that Dr. Antoniou's medical reports were of great probative value because he was the only doctor who examined Mr. Bouzerda, but he did not testify in this case. According to Mr. Boissonneault, merely filing a medical certificate does not prove the existence of a danger within the meaning of

[12] *Canada Post Corporation v. Pollard*, 2008 FCA 305

the Code. He also underlined the fact that, after examining Mr. Bouzerda twice, Dr. Antoniou mentioned in his reports that the only functional restriction was "unable to use left arm" while at the time of his work refusal, Mr. Bouzerda stated that he had pain in the right arm. He also submitted that Dr. Demers was perfectly qualified as a doctor specialized in industrial medicine, to determine if the work performed by Mr. Bouzerda respected his functional restriction and was a danger for him, considering the fracture of the clavicle he had sustained and the nature of his work.

Analysis

[86] The issue to be determined in this matter is whether the danger direction given on August 3, 2011 to Bell Canada by HSO Boulanger was well founded.

[87] HSO Boulanger issued his direction because he concluded on August 3, 2011 that there was a potential danger for Mr. Bouzerda that his injury to the left clavicle would be aggravated or that he would sustain other injuries by continuing to do his work, because Mr. Bouzerda had pain even when working at his own pace and only with the right hand and arm, but also, according to HSO Boulanger, because his attending physician had prohibited any type of work for this employee until August 5, 2011.

[88] The term "danger" is defined as follows under subsection 122(1) of the Code:

> "danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;. [Our emphasis]

[89] As far as the criterion which applies to determine the existence of an existing or potential hazard within the meaning of subsection 122(1) of the Code is concerned, Federal Court Justice Gauthier wrote the following at paragraph 36 of her judgment in *Verville* (cited above):

> [36] In that respect, I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in Martin above, particularly paragraph 57, to require evidence of a precise time frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one. [Our emphasis]

[90] The potential hazard alleged by Mr. Bouzerda in support of his work refusal was that considering his attending physician's last report and the pain in the arms and left

shoulder as well as the numbness he had when performing his work, even at his own pace and only with his right hand and arm, he was afraid that in performing his work he would aggravate his injury or sustain other injuries.

[91] On the basis of the above, and referring to the judgment of Justice Gauthier, cited above, and considering the issue to be decided in this matter, I understand that to reach the conclusion that there was a danger for Mr. Bouzerda on August 3, 2011, I must determine, on the basis of the evidence adduced before me, whether there was on August 3, 2011 a reasonable possibility that when performing his work at his own pace and only with his right hand and arm, Mr. Bouzerda could aggravate the fracture of his left clavicle or could sustain other injuries, considering the pain and numbness he had.

[92] Federal Court Justice Gauthier also wrote the following at paragraph 51 of the judgment in *Verville*, cited above:

> [51] Finally, the Court notes that there is more than one way to establish that one can reasonably expect a situation to cause injury. One does not necessarily need to have proof that an officer was injured in exactly the same circumstances. A reasonable expectation could be based on expert opinions or even on opinions of ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form the opinion. It could even be established through an inference arising logically or reasonably from known facts. [Our emphasis]

[93] Referring to the testimony of Dr. Demers, a doctor who I acknowledged as an expert in industrial medicine, the evidence shows that the reports written by Dr. Antoniou only mention one functional restriction for Mr. Bouzerda, that is he was unable to use his left arm. Dr. Demers also stated that after studying Dr. Antoniou's reports and the medical literature on this issue, the situation existing from July 26, 2011 to August 5, 2011, was not a danger to Mr. Bouzerda's health.

[94] Mr. Lazure-Bérubé argued that the testimony given by Dr. Demers was of very little probative value and credibility because she is not an orthopedist, she did not examine Mr. Bouzerda and did not submit an expert's report in this case. On the other hand, as submitted by Mr. Boissonneault, I consider that, once Mr. Bouzerda's functional restrictions were established by his attending physician, Dr. Demers was qualified as an expert in industrial medicine to determine if the tasks performed by him respected his functional restrictions and were a danger to him.

[95] I considered that Dr. Demer's testimony was of considerable weight in this case, to the extent that it was based on medical literature acknowledged in the field of industrial medicine, to reach the conclusion that an employee who sustained a fracture of the clavicle is fit to perform light work and even medium work within 6 to 8 weeks following that injury.

[96] Dr. Demers also stated that it is normal to have pain during convalescence following a fracture of the clavicle. In Dr. Demers' opinion, this is normal in the healing

process. She added that having pain during such a process is not necessarily a health risk. As examples, she mentioned that physiotherapy for this type of injury frequently involves pain. I would add that Mr. Lazure-Bérubé did not adduce any expert evidence to contradict this testimony.

[97] Referring to the testimonies of Ms. Boucher and Dr. Demers, the evidence I have is also to the effect that the work performed by Mr. Bouzerda is light and sedentary and that the potential risk for him, which was mentioned above, was minimal on August 3, 2011, considering the time that went by since the injury to the left clavicle.

[98] In addition, invoking strictly Mr. Bouzerda's subjective belief to conclude that the risk he alleged could happen on August 3, 2011 is not in my opinion sufficient to establish the fact that there was a reasonable possibility of injury to Mr. Bouzerda at that time.

[99] In addition, I have no expert evidence in this matter to the effect that by using only his right hand and arm and by working at his own pace to perform his duties, Mr. Bouzerda was at a risk to aggravate the injury to his left clavicle, which he sustained on May 12, 2011, or that this would cause him other injuries on August 3, 2011. On the contrary, the evidence is to the effect that the last report of his attending physician, which was given to OSH Boulanger during his investigation, clearly mentions that Mr. Bouzerda was fit to hold his regular employment on August 5, 2011, that is two days later.

[100] I accordingly consider that the evidence before me, which was described above, just like the evidence which HSO Boulanger had at the time of his investigation, does not allow reaching a conclusion that there was a reasonable possibility of injury to Mr. Bouzerda on August 3, 2011.

[101] I would add that at the time of HSO Boulanger's investigation, Bell Canada had proposed to Mr. Bouzerda to have Ms. Boucher, an expert in occupational therapy and ergonomics, conduct an ergonomic assessment of his workstation when performing his duties. The evidence also shows that the purpose of this study was to ensure that Mr. Bouzerda was not subject to any risk in performing his work in the circumstances which existed at the time of his work refusal or in considering the accommodation offered by his employer.

[102] On the basis of the above, I reach the conclusion that by performing his work strictly with his right hand and arm and at his own pace, in circumstances which existed at the time of HSO Boulanger's investigation, the possibility that Mr. Bouzerda could have aggravated the injury he sustained to his left clavicle or sustain other injuries by continuing to perform his work was, on August 3, 2011, a mere possibility and not a reasonable possibility and that this possibility could have been reduced even more if he had agreed to participate in the ergonomic assessment offered by his employer. Accordingly, there was no danger to Mr. Bouzerda's health within the meaning of the Code.

[103] Considering this conclusion, I am of the opinion that it is not necessary for me to deal with all the other arguments raised by Mr. Boissonneault to justify the rescission of the direction.

[104] For these reasons, I consider that the direction issued by HSO Boulanger on August 3, 2011 was unfounded.

Decision

[105] For all these reasons, as authorized under paragraph 146.1(1)(*a*) of the Code, I rescind the danger direction given to Bell Canada by HSO Boulanger on August 3, 2011.

Katia Néron
Appeals Officer