Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Drew Lefebvre and Correctional Service Canada, 2012 OHSTC 45

Date: 2012-12-14
Case No.: 2012-71
Rendered at: Ottawa

Between:

Drew Lefebvre, Appellant

and

Correctional Service Canada, Respondent

Matter:	Request for an extension of time to file an appeal under subsection 146(1) of the *Canada Labour Code*
Decision:	The request is denied
Decision rendered by:	Mr. Pierre Guénette, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Drew Lefebvre
For the respondent:	Ms. Christine Langill, Counsel, Treasury Board Secretariat Legal Services

REASONS

[1] This matter concerns an appeal of a direction pursuant to subsection 146(1) of the *Canada Labour Code* (the Code) and the subsequent request to be granted an extension to file the appeal. The direction was issued on August 31, 2012, by Health and Safety Officer (HSO) Bob Tomlin.

Background

[2] On August 29, 2012, the appellant, Mr. Drew Lefebvre, Correctional Officer (CO) at the Joyceville Institution correctional facility and employee for Correctional Service Canada (CSC), initiated a work refusal pursuant to section 128 of the Code. The ground of his refusal was that he believed himself and other COs were facing an increased risk of an incident when the inmates were placed in the Temporary Detention Unit (TDU) range. At the time of the refusal, Mr. Lefebvre stated that the TDU, which is designed to accommodate 19 inmates, is too small to be occupied by what he claimed could be up to 38 inmates.

[3] On August 30, 2012, HSO Tomlin attended the Joyceville Institution to conduct an investigation. The next day, on August 31, 2012, HSO Tomlin communicated to the parties that he had made a finding of danger, but instead of issuing a direction of danger under subsection 145(2) of the Code, he issued to CSC a direction for a contravention of the Code under subsection 145(1). The direction reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)
>
> On 30 August 2012, the undersigned health and safety officer conducted an investigation in the work place operated by Correctional Service of Canada, being an employer subject to the *Canada Labour Code*, Part II, at P.O. Box 880, Hwy 15, Kingston, Ontario, K7L 4X9, the said work place being sometimes known as Correctional Service - Joyceville Institution.
>
> The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code,* Part II, are being contravened:
>
> **No. / No : 1**
>
> Paragraph 125(1)(z.04) - Canada Labour Code Part II, Occupational Health and Safety
> where the program referred to in paragraph (z.03) does not cover certain hazards unique to a work place, develop, implement and monitor, in consultation with the work place committee or the health and safety representative, a prescribed program for the prevention of those hazards that also provides for the education of employees in health and safety matters related to those hazards.
>
> Reference: Subsection 19.5(1) of the Canada Occupational Health and Safety Regulations

The employer shall, in order to address identified and assessed hazards, including ergonomics-related hazards, take preventive measures to address the assessed hazard in the following order of priority:

(a) the elimination of the hazard, including by way of engineering controls which may involve mechanical aids, equipment design or redesign that take into account the physical attributes of the employee;
(b) the reduction of the hazard, including isolating it;
(c) the provision of personal protective equipment, clothing, devices or materials; and
(d) administrative procedures, such as the management of hazard exposure and recovery periods and the management of work patterns and methods.

The employer failed to develop and/or identify preventive measures to address unique hazards associated with the Temporary Detention Unit prior to the implementation of the Unit.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than 28 September 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 by E-mail, this 31st day of August, 2012.

BOB TOMLIN
Health and Safety Officer
Certificate Number: ON0243

[4] Further, as outlined in his correspondence dated August 31, 2012, HSO Tomlin accepted as temporary compliance to his direction that Mr. Lefebvre not be required to go down range for security patrols when there are more than 19 inmates on the TDU range.

[5] On October 19, 2012, HSO Tomlin accepted that the CSC had achieved compliance with his direction.

[6] On October 29, 2012, the Tribunal received Mr. Lefebvre's application for an appeal. The same day, the Tribunal sent a letter to Mr. Lefebvre to inform him that his application was received outside the 30 days statutory time limit set out in subsection 146(1) of the Code and to ask him to provide the Tribunal with his submissions establishing his grounds to request an extension of the time for instituting the appeal. Mr. Lefebvre's submissions were received on November 8, 2012.

Issue

[7] The question that I must address is whether I should, in the present matter, exercise my discretion to extend the legislated time limit of 30 days for appealing a direction issued by an HSO pursuant to subsection 146(1) of the Code.

Submissions

Appellant's submissions

[8] In his submissions, the appellant starts by indicating that a finding of danger was made based on conditions that existed on the TDU range. In addition to the finding of danger, HSO Tomlin stated that the employer was in violation of the Code by not completing a Job Hazard Analysis.

[9] The appellant argues that even if HSO Tomlin has determined that the employer is no longer in violation of the Code after completing a Job Hazard Analysis, the danger that motivated his job refusal still remains. The appellant believes that to date, the employer has not put any controls in place that address the unique hazards associated with the TDU range. In his opinion, the employer has done nothing more than complete a document.

[10] Furthermore, the appellant maintains that he did not exceed the deadline to submit his application for appeal because HSO Tomlin made a finding of danger on August 31, 2012, but reversed it on October 19, 2012 by determining that the employer was no longer in contravention of the Code by completing a Job Hazard Analysis.

Respondent's submissions

[11] The respondent opens by stating that it is undisputed that Mr. Lefebvre had notice of HSO Tomlin's findings as of August 31, 2012. CSC records indicate that Mr. Lefebvre was at work on August 31, 2012 when HSO Tomlin called the institution to render his decision and that Mr. Lefebvre acknowledged that he received the decision by email the same day.

[12] The respondent submits that had Mr. Lefebvre sought to challenge HSO Tomlin's direction, including the temporary nature of a portion of that direction, then, pursuant to subsection 146(1) of the Code, he was required to do so within 30 days following the date the direction was issued. Under the statute, Mr. Lefebvre had until October 1, 2012 to challenge the direction. The respondent adds that having failed to do so, Mr. Lefebvre is out of time as of October 2, 2012 to file such an appeal.

[13] The respondent indicates that the Application to Appeal filed by the appellant is date stamped October 29, 2012, being 28 days past the statutory deadline. The respondent submits that Mr. Lefebvre has failed to offer an explanation as to why he failed to file his appeal within the 30 day limitation period. According to the respondent, the appellant has offered no explanation as to why he was approximately a month late in filing his appeal.

[14] The respondent argues that it does not appear that Mr. Lefebvre even directly disputes the direction issued on August 31, 2012 by HSO Tomlin. Instead, Mr. Lefebvre appears to take issue with an email correspondence of HSO Tomlin dated October 19, 2012. However, that email correspondence is simply correspondence between the CSC and HSO Tomlin acknowledging that the direction was complied with. The correspondence does not amount to a direction.

[15] According to the respondent, what Mr. Lefebvre appears to challenge is HSO Tomlin's email correspondence of October 19, 2012 which acknowledged that the CSC complied with his direction of August 31, 2012. The respondent submits that though there is authority under the Code to appeal a direction issued by an HSO, as long as it is within the 30 day time limit set out under subsection 146(1), the Code does not provide the authority to challenge a brief follow-up email correspondence which simply confirms compliance of that direction.

[16] The respondent argues that the sole document which, in the case of Mr. Lefebvre's work refusal, constitutes a "direction" within the meaning of subsection 146(1) of the Code is the August 31, 2012 direction. That document is explicitly entitled, at the top of the page in capital letters, as being the "DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)."

[17] In the respondent's view, if Mr. Lefebvre had an issue with the August 31, 2012 direction, he had 30 days from August 31, 2012 to do so. The respondent submits that Mr. Lefebvre has failed to do so and has not provided any explanation for his delay. Therefore, the respondent maintains that Mr. Lefebvre's request for an extension of the delay to file an appeal should be dismissed as should his appeal for failing to comply with the statutory filing deadline.

Analysis

[18] This request for an extension of time comes before me in light of the appellant's interest in filing an appeal pursuant to subsection 146(1) of the Code, which states that an appeal of a direction must be filed within 30 days following the date the direction was issued or confirmed in writing. This section of the Code reads as follows:

> 146(1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.

[19] Pursuant to paragraph 146.2(f) of the Code, an appeals officer may, at their discretion, extend the prescribed time limit for initiating an appeal. This section reads as follows:

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

[20] The extension of the time limit for filing an appeal pursuant to paragraph 146.2(f) gives an appeals officer the discretionary power to restore a right of appeal that is extinguished by the time the employee seeks to initiate the appeal process. This is not a guaranteed nor absolute right enjoyed by the employee, but rather a procedural right that permits an appeals officer to work with a degree of flexibility when presented with

particular circumstances that are out of the ordinary and within which a strict application of the fixed time for filing an appeal can cause prejudice to a party.

[21] For example, in the case of *Len Van Roon v. Kinonjeoshtegon First Nation*[1], the Appeals Officer reasoned that the presence of paragraph146.2(f) in the Code demonstrates that the timeframes featured in the Code for initiating an appeal are not strict time limits:

> 11 As an Appeals Officer, I recognise that I should give some latitude to a self represented party, who through lack of knowledge and inexperience in the procedures; takes some time to properly understand the process and focus his concerns and file an appeal.
>
> 12 I believe that the prescribed time limit is not a strict limit; otherwise, Parliament would not have provided Appeals Officer with the powers to abridge or extend those limits.
>
> 13 I am of the opinion that the delay was minimal, it was not intentional and the appellant was of good will in believing that he had to present a complete documented case in order to file an appeal. I also believe that the delay in filing the appeal would not cause prejudice to the employer. Consequently, as empowered under subsection 146.2(f) of the *Canada Labour Code*, I grant the request to extend the time to file the appeal to the date that it was officially recorded, being June 21, 2007.

[22] In *Len Van Roon*, the Appeals Officer attached particular importance to the demonstrated good faith of the appellant and the absence of negligence on the appellant's part, on the one hand, and the absence of prejudice suffered by the employer if the request for an extension is granted, on the other.

[23] In the present case, after considering the arguments presented to me by the parties, I find it difficult to conclude that the appellant faced unusual circumstances that have prevented him to file his appeal within the prescribed time limit.

[24] First, it appears that the grounds for Mr. Lefebvre's appeal, and by extension his demand for an extension to file this appeal, is that he believes the measures taken by the employer and deemed in compliance with the direction by HSO Tomlin do not address the alleged danger that motivated his August 29, 2012 work refusal. However, as was mentioned by the respondent, subsection 146(1) of the Code offers a right of appeal to an employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer, but offers no remedy to an employee who feels aggrieved by the measures taken by an employer in order to comply with a direction. Therefore, I agree that an extension of the time to file an appeal should not be granted on the basis that corrective measures are deemed insufficient by the appellant.

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[1] *Len Van Roon v. Kinonjeoshtegon First Nation*, [2007] C.L.C.A.O.D. No. 47.

[25] Furthermore, as stated in *Len Van Roon*, an appeals officer should take into account any prejudice suffered by the employer if the request for an extension is granted. In the present case, the CSC has made an effort to comply in good faith with the direction by adopting measures that were ultimately deemed satisfactory by HSO Tomlin. Allowing an extension for an appeal that seeks to reverse the decision of a health and safety officer who accepted that an employer has complied with a direction would have the effect of adding an unwarranted burden on the employer.

[26] Therefore, for all the above reasons, I am of the opinion that I should not exercise my discretion to grant the appellant's request for an extension of time to file an appeal.

Decision

[27] The request for an extension of time to file this appeal is denied.

Pierre Guénette
Appeals Officer