Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2019-07-10
Case No.: 2019-24

Between:

Ronald Matte, applicant

and

Montreal Gateway Terminals Partnership, respondent

Indexed as: *Matte v. Montreal Gateway Terminals Partnership*

Matter:	Application for extension of the deadline to file an appeal under subsection 129(7) of the *Canada Labour Code*.
Decision:	The applicant's appeal will be heard by an appeals officer.
Decision rendered by:	Ginette Brazeau, Appeals Officer
Language of decision:	French
For the applicant:	Mr. Normand Léonard, Attorney, Lamoureux Morin Avocats Inc.
For the respondent:	Ms. Mélanie Sauriol, Attorney, BCF Avocats d'affaires
Citation:	2019 OHSTC 16

REASONS

[1] This matter concerns an application to extend the deadline for filing an appeal under subsection 129(7) of the *Canada Labour Code* (the *Code*). The applicant is asking to be relieved of his failure to file an appeal of a decision that a danger does not exist rendered on May 3, 2019, by Mohamed Leghfiri, an official delegated by the Minister of Labour (ministerial delegate) within the 10-day period prescribed by the *Code*.

[2] For the following reasons, the applicant's appeal will be heard by an appeals officer because the appeal deadline has been met.

Background

[3] The applicant is a crane operator employed by Montreal Gateway Terminals Partnership, the respondent in this application. On May 2, 2019, the applicant exercised his right to refuse to work under section 128 of the *Code*. At the time of his work refusal, the applicant alleged that the crane he was operating was making an unusual noise and vibrating.

[4] The ministerial delegate was dispatched to the site on May 3, 2019, to investigate the work refusal. The applicant was absent when the investigation took place. The ministerial delegate rendered a decision that a danger did not exist. The decision reads as follows:

> On [May 3, 2019] I carried out an investigation concerning a refusal to work by Ronald Matte, represented by Steve Desjardins (Longshoremen's Union) and Céline [Laframboise] (employer's representative) who were the investigating members. I was assisted by Manon Perreault and France de Repentigny of the [L]abour Program. Please note that I determined that **no danger existed** pursuant to subsection 129(4) of Part II of the *Canada Labour Code***.**
>
> Consequently, note that, pursuant to subsection 129(7) of Part II of the *Canada Labour Code*, the above-mentioned employee is not entitled under section 128 to continue to refuse to operate crane no. 1.
>
> The employee or designated representative may appeal the decision in writing before an appeals officer of the Occupational Health and Safety Tribunal Canada (OHSTC) within ten (10) days after receipt of the decision under subsection 129(7) of the *Canada Labour Code.* The procedure for doing so is outlined on the OHSTC web site at: ohstc-tsstc.gc.ca.
>
> Note that an investigation report and the decision will be communicated to the employer and employee as soon as possible.
>
> Yours truly,
>
> Mohamed Leghfiri
>
> Official delegated by the Minister of Labour
> Marine Safety Inspector

[5] The applicant submitted a notice of appeal of that decision to the Tribunal on May 15, 2019. As the ministerial delegate's decision was dated May 3, 2019, the appeal appeared to have been filed two days after the ten-day appeal deadline prescribed by the *Code*. On May 16, 2019, the registrar of the Tribunal contacted the applicant, asking for his observations on this matter. Mr. Desjardins, the union advisor who had submitted the appeal on behalf of the applicant, replied that he had received the ministerial delegate's decision on May 3, 2019, but had not communicated it to the applicant until May 6, 2019.

[6] The ministerial delegate informed the Tribunal that he had sent the decision that no danger existed to Mr. Desjardins on May 3, 2019, since Mr. Desjardins represented the applicant while he was absent from the investigation.

Issue

[7] The applicant is asking the Tribunal for an extension of the deadline for filing an appeal under subsection 129(7) of the *Code*. However, given the chronology of the events preceding the filing of the appeal, I must first determine the date when the 10-day time limit to file an appeal began.

Submissions of the parties

[8] In response to the Tribunal's request for observations, the applicant submitted that he believed the applicable time limit was ten business days, and that he had unsuccessfully attempted to reach the Tribunal to find out whether he should wait for the ministerial delegate's detailed report supporting the decision before submitting an appeal. The applicant states that he nevertheless decided to submit his appeal on May 15, 2019, before he received the detailed report, believing that he was within the deadline.

[9] The respondent opposes the application. It claims that the grounds alleged by the applicant have no legal or factual basis and that the applicant cannot plead ignorance of the law to justify non-compliance. The respondent also states that the applicant's allegation that he had unsuccessfully attempted to contact the Tribunal is dubious and that nothing prevented him from filing his appeal within the deadline prescribed in the *Code*.

[10] The applicant replies that the deadline set out in subsection 129(7) is not a strict deadline and that appeal officers may exercise the discretionary power conferred on them by subsection 146.2(f) of the *Code* to extend the deadline for initiating proceedings, taking into account the length of the delay, the explanations of the party, reasonable diligence and the harm sustained by the other party (*Alex Hoffman v. Canada (Canada Border Services Agency*, 2013 OHSTC 9)).

[11] The applicant also notes in his response that his attempt to communicate with the Tribunal demonstrated his intention to file an appeal, and that no allegation of harm appears in the respondent's contestation. The applicant asks to be relieved of his delay.

Analysis

[12] Subsection 129(7) of the *Code* sets out a 10-day time limit for filing an appeal of a determination that a danger does not exist. Subsection 129(7) reads as follows:

> **129(7)** If the Minister makes a decision referred to in paragraph 128(13)(b) or (c), the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within 10 days after receiving notice of the decision.
>
> [My underlining]

[13] Subsection 129(4), which empowers the ministerial delegate to render a decision that a danger does not exist, such as the one being appealed by the applicant, requires that the decision be communicated to the employee in writing. Subsection 129(4) reads as follows:

> **129(4)** The Minister shall, on completion of an investigation, make one of the decisions referred to in paragraphs 128(13)(a) to (c) and shall immediately give written notification of the decision to the employer and the employee.
>
> [My underlining]

[14] While analyzing this file, I noted that the ministerial delegate never transmitted his decision to the applicant. It is clear to me that, according to the terms used by the legislator, the ministerial delegate must communicate his decision to the employee personally and in writing, which was not done in this case. The ministerial delegate simply indicated that he had been unable to reach the applicant, in an email sent to Mr. Desjardins and dated May 3, 2019 at 9:30 p.m. Mr. Desjardins acknowledged receipt of the email from the ministerial delegate at 9:32 p.m. that same evening. That is why the registrar referred to May 3 when he notified the applicant that his appeal of May 15, 2019, appeared to have been filed after the deadline.

[15] Subsection 129(4) of the *Code* makes it clear that it is the employee who refused to work who must be notified of the ministerial delegate's decision. Appeals officers have ruled on several occasions that the right to refuse dangerous work is an individual right. Only an employee who believes there is a danger as defined by the *Code* may refuse to work, and it is this employee who must be personally notified of a decision made under subsections 128(13)(a) to (c). The employee was not represented at the investigation conducted by the ministerial delegate on an employee's refusal to work, contrary to what is stated in the ministerial delegate's decision. The fact that Mr. Desjardins was present at the investigation does not mean that the ministerial delegate's decision had to be communicated to him.

[16] Subsection 129(1.4) of the *Code* states that an investigation by a ministerial delegate may be conducted in the presence of the employer, the employee and the health and safety representative designated by the employer. However, the ministerial delegate may investigate an employee's refusal to work even in the employee's absence if the employee decides not to attend the investigation (subsection 129(3) of the *Code*). However, the fact that the applicant

was absent from the investigation does not mean that the conclusions of the investigation could be communicated to another person.

[17] The employee must be notified personally and in writing of decisions made under subsections 128(13)(a) to (c). The employee may subsequently choose to avail himself of the appeal mechanism set out in subsection 129(7) of the *Code* or have a person he designates do so. The ten-day appeal deadline referred to in subsection 129(7) therefore begins to run when the *employee* receives written notification of the ministerial delegate's decision. Since the ministerial delegate never communicated his decision to the employee for all practical purposes, I am unable to determine the date when the appeal period started to run.

[18] At best, the date of May 6, 2019, suggested by Mr. Desjardins is the only date I can consider as the starting point to calculate the appeal deadline. If I use May 6 as the date of the applicant's receipt of the determination that no danger existed, I conclude that the applicant had until May 16, 2019, to file his appeal and that the appeal filed on May 15, 2019, was within the deadline set by the *Code*.

[19] For the above reasons, I do not have to use the discretion subsection 146.2(f) gives me to extend the appeal deadline, since the evidence before me leads me to conclude that the applicant's appeal was filed within the ten-day deadline set out in subsection 129(7) of the *Code*.

Decision

[20] The applicant's appeal was filed within the prescribed deadline and will be heard by an appeals officer.

Ginette Brazeau
Appeals Officer