Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2019-09-24
Case No.: 2019-31

Between:

G.T.A. dnata World Cargo Ltd., Applicant

Indexed as: *G.T.A. dnata World Cargo Ltd.*

Matter:	Application for a stay of a direction issued by an official delegated by the Minister of Labour
Decision:	The application for a stay is granted.
Decision rendered by:	Ms. Ginette Brazeau, Appeals Officer
Language of decision:	English
For the applicant:	Mr. Jim Theriault, G.T.A. dnata World Cargo Ltd.
Citation:	2019 OHSTC 18

REASONS

[1] G.T.A. dnata World Cargo Ltd. (the applicant) applied for a stay of a direction that was issued on June 21, 2019, by Ms. Elizabeth Porto, in her capacity as an official delegated by the Minister of Labour (ministerial delegate). The applicant filed an appeal of this direction on July 22, 2019, and simultaneously filed an application for a stay of the direction. The present reasons relate solely to the stay application.

Background

[2] On March 4, 2019, the ministerial delegate conducted an inspection in the work place operated by the applicant. The ministerial delegate noted a series of contraventions to the *Canada Labour Code* (*Code*). One of these contraventions was to the effect that the applicant's employees were operating Motorized Material Handling Equipment (MMHE) that was not equipped with a roof or other structure to protect the employees from adverse weather conditions, which is in contravention, according to the ministerial delegate, of paragraph 125(1)(k) of the *Code* and subsection 14.9(1) of the *Canada Occupational Health and Safety Regulations* (*Regulations*). On March 18, 2019, the applicant signed an Assurance of Voluntary Compliance in which the applicant agreed to end the contraventions identified by the ministerial delegate and comply with the *Code* and *Regulations*.

[3] On June 5, 2019, the ministerial delegate conducted a follow-up inspection at the work place operated by the applicant. On this date, the applicant's MMHE was still not equipped with a roof or other structure to protect the employees from adverse weather conditions.

[4] On June 21, 2019, the ministerial delegate issued a direction to the applicant under subsection 145(1) of the *Code*. The direction issued identifies contraventions to paragraph 125(1)(k) of the *Code* and subsection 14.9(1) of the *Regulations*. 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 March 4, 2019, the undersigned Official Delegated by the Minister of Labour conducted an inspection in the work place operated by G.T.A. D'nata World Cargo Ltd., being an employer subject to the *Canada Labour Code*, Part II, at LBPIA Terminal 3, 6301 Silver Dalt Dr, Mississauga, Ontario, L5P 1B2, the said work place being sometimes known as GTA D'nata.
>
> The said official delegated by the Minister of Labour is of the opinion that the following provisions of the *Canada Labour Code*, Part II have been contravened:
>
> **No. / No:** 1
>
> Paragraph 125(1)(k) - Canada Labour Code, Part II
> Subsection 14.9(l) - Canada Occupational Health & Safety Regulations
>
> **The employer has failed to ensure that the following motorized material handling equipment, that is regularly used outdoors, has been fitted with a roof or other structure that will protect the operator from exposure to**

> **adverse weather conditions such as, snow, rain, freezing rain, and hail. (List of applicable motorized material handling equipment that requires a roof or other structure attached in Appendix A)**
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(l)(*a*) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than November 29, 2019.
>
> Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*b*) of the *Canada Labour Code*, Part II, to take steps no later than November 29, 2019, to ensure that the contravention does not continue or reoccur.
>
> Issued at Toronto, ON, this 21st day of June, 2019.
>
> Elizabeth Porto
> Official Delegated by the Minister of Labour

[5] The applicant filed an appeal of the direction on July 22, 2019, and also made a request for a stay of the direction. The application for a stay was accompanied by detailed written submissions. It should be noted that no other party sought to intervene in this matter.

Analysis

[6] The authority for an appeals officer to grant the stay of a direction is found at subsection 146(2) of the *Code:*

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

[7] In exercising the discretion conferred by subsection 146(2), appeals officers must keep in mind the preventative purpose of Part II of the *Code,* which is articulated at section 122.1:

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

[8] In order to guide their discretion under subsection 146(2) of the *Code,* appeals officers have adopted a three-part test derived from the Supreme Court of Canada's decision in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd*., [1987] 1 SCR 110. The three-part test is set out as follows:

> 1. The applicant must satisfy the appeals officer that the question to be tried is serious as opposed to frivolous or vexatious;
>
> 2. The applicant must demonstrate that it would suffer significant harm if the direction is not stayed by the appeals officer; and
>
> 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.

[9] I will use this test to guide the exercise of my discretion under subsection 146(2) of the *Code*, in order to determine whether a stay of the direction should be granted in this case.

[10] It is of note that two other directions concerning the same type of equipment were issued to other employers operating at Pearson International Airport, namely Air Canada and Swissport Canada Handling Inc. In both cases, the employer filed an appeal of the direction and a request for a stay of the direction pending the determination of the merits of the appeal was granted (see *Air Canada v. International Association of Machinists and Aerospace Workers, Local 2323*, 2019 OHSTC 10 and *Swissport Canada Handling Inc. v. Teamsters Local Union 419*, 2019 OHSTC 14). While I am not bound by these decisions, they offer useful guidance in the determination of the present application.

Is there a serious question to be tried as opposed to a frivolous or vexatious claim?

[11] In regard to the first part of the test, the applicant submits that the grounds for the appeal are serious and not frivolous or vexatious. The applicant contends that the appeal raises a serious question regarding the interpretation of subsection 14.9(1) of the *Regulations*. For ease of reference, subsection 14.9(1) of the *Regulations* reads as follows:

> **14.9 (1)** Motorized materials handling equipment that is regularly used outdoors shall be fitted with a roof or other structure that will protect the operator from exposure to any weather condition that is likely to be hazardous to the operator's health or safety.

[12] The applicant alleges that the *Regulations* are subjective as they do not define what consists of a "roof or other structure". In addition, and relying on the *Air Canada* and *Swissport* decisions cited above, the applicant argues that subsection 14.9(1) of the *Regulations* requires an analysis of weather exposure of the equipment operators to determine whether there is a hazard to their health and safety. The applicant submits information related to a time study which it conducted to determine the amount of time the operators would be exposed to adverse weather conditions.

[13] The applicant further explains that a risk assessment was previously conducted on tractors equipped with a roof structure. This assessment determined that a roof structure creates several blind spots and reduces visibility for employees operating MMHE. The applicant also submits that further investigation could reveal that subsection 14.9(1) of the *Regulations* does not apply to airport operations on the tarmac.

[14] In *Swissport*, the appeals officer stated the following:

> [25] As it was stated many times, the threshold for this first criterion is rather low and I am of the view that the employer has a "reasonably arguable case" regarding the application of subsection 14.9(1). I note that subsection 14.9(1) appears to be concerned with protecting employees from their exposure to adverse weather conditions. The ministerial delegate's observations relate to the safe operation of the tractor that she considered to be compromised by the weather conditions, resulting in her view in a potentially dangerous situation for the employee. Whether subsection 14.9(1) is designed to address that type of hazard is, in my opinion, a debatable question.

[15] Considering the submissions of the applicant, as well as the reasons expressed in the *Air Canada* and *Swissport* decisions, I am of the view that the appeal filed by the applicant raises a serious question with respect to the interpretation and application of subsection 14.9(1) of the *Regulations*. Accordingly, the first part of the test is met.

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

[16] The applicant indicates that it employs 650 staff and services 11 international air carriers. Its daily operations necessitate 45 baggage tractors and 15 belt loaders. The applicant states that "roofs or other structures" are not readily available from the manufacturer so that, in order to comply with the direction, structures will need to be engineered and fabricated. The applicant also states that post-installation risk assessments and training would need to be conducted, and estimates the costs of these measures to be in the order of $750,000. The applicant states that it has considered purchasing all new equipment already equipped with roof structures, but that this alternative would cost over $2.5 million and presents delivery issues that make it questionable whether it could meet the timeline imposed in the direction.

[17] The applicant mentions not having supplementary ground support equipment and that the impact of removing the MMHE currently used from the tarmac to undergo retrofitting would cause undue hardship, cause customer dissatisfaction and impact flight schedules.

[18] The applicant claims that ground handlers have operated MMHE without a roof or other structure at the Pearson International Airport for several decades. The applicant alleges that it is unacceptable that a compliance date be set arbitrarily without regard to the actual time required to comply.

[19] Finally, the applicant makes the point that its competitors at Pearson International Airport operate the same kind of equipment at issue in the present case without a roof or other structure. If a stay of the direction were not granted, the applicant would be required to undertake actions and incur costs that would not be incurred by its competitors. This would cause a significant prejudice to the applicant and impair its competitive position. In the event that the appeal is successful, those costs could not be recovered, which would render the appeal pointless and moot.

[20] At the stage of assessing whether or not the applicant would suffer significant harm if the direction were not stayed, I rely on the ministerial delegate's report and the applicant's submissions. Based on the evidence before me, I am convinced that engineering and fabricating a structure in order to retrofit the MMHE operated by the applicant would have an impact on the applicant's operations and would create significant and undue hardship in the event that the direction issued by the ministerial delegate were to be varied or rescinded.

[21] Concerning the time allotted by the ministerial delegate to comply with the direction, the applicants in *Air Canada* and *Swissport* had less than two months to comply with their respective directions. In these cases, the appeals officer concluded that the compliance date that had been set by the ministerial delegate was unattainable. Therefore, in both of these cases, the appeals officer decided that the only option available to effectively relieve the applicants of their obligation to comply with their respective directions within the prescribed time limits, as the terms of the direction could not be varied at this preliminary stage, was to order a stay of the direction.

[22] The current case differs from the *Air Canada* and the *Swissport* cases. Unlike Air Canada and Swissport, the applicant was allotted a period of five months to achieve compliance. However, although the ministerial delegate allotted a more generous compliance period to the applicant in the case at hand, I am of the opinion that this difference alone is not sufficient to dismiss the application for a stay. Although the issue of costs alone is generally not a factor on which appeals officers will rely to grant a stay, the measures needed to achieve compliance with the direction in this case would result in significant cost and impact on the operations of the applicant.

[23] The steps that the applicant would have to undertake in order to achieve compliance would call for significant resources and time and, in my view, consist of more than a mere inconvenience. The two cases involving Air Canada and Swissport are already scheduled to be heard later this fall to determine the merits of the appeal. Those cases raise the same legal considerations as in the present matter. This employer offers the same services with similar equipment on the same airport property. In my view, it would amount to significant and undue hardship for the applicant to be under the obligation to take immediate steps to comply with the ministerial delegate's direction and incur the costs of doing so while similar directions aimed at its competitors have been stayed pending a full examination and determination of the merits of the appeal and the applicability of subsection 14.9(1) of the *Regulations*.

[24] I am satisfied that in the context of this case, the applicant would suffer significant harm if the direction were not stayed pending a final determination on the merits of the appeal.

[25] For these reasons, the second criterion of the test to obtain a stay of the direction is met.

Has the applicant demonstrated that measures will be put in place to protect the health and safety of employees or any person granted access to the work place, should the stay be granted?

[26] The third part of the test deals with the protective measures to be put in place should a stay of the direction be granted pending determination of the appeal. The applicant emphasized the fact that there has been no incident involving operators being exposed to adverse weather conditions where a roof or other structure would have been required for protection. It undertakes to take the following measures pending the appeal, should a stay be granted:

- Ensure that protective clothing and supplemental items are made available to operators;
- Adjust operations to take into account severe weather events;
- Closely monitor and assess weather related working conditions;
- Encourage employees to report weather related concerns to their superiors and managers;
- Brief employees regarding hazards associated with weather conditions.

[27] The measures suggested by the applicant are the measures that were ordered to be implemented in *Air Canada* and *Swissport* pending determination of the appeals on the merits. In *Air Canada*, the appeals officer wrote the following:

> [58] The direction arose out of a "specific" inspection by the ministerial delegate that was not triggered by a work refusal, a complaint by an employee or a particular incident. The ministerial delegate observed that, because of the blowing snow and freezing rain, several uncovered tractors

> were covered with ice (brake pedals and steering wheels). I note that the ministerial delegate did not consider it necessary – or justifiable – to issue a "danger direction" under subsection 145(2) of the *Code*, which would have required that the employer take immediate corrective measures to address the condition that she had observed. To me, this is an indication that the *status quo* could continue, subject of course to all existing provisions and protections under the *Code* and *Regulations*, until the measures ordered in the direction that she issued are taken.
>
> [...]
>
> [60] Consequently, for the purpose of deciding on a stay pending the appeal on the merits, I am of the view that the health and safety of employees will be protected under the *status quo*, which consists of a mode of operation that has been in place at the Toronto airport for many decades. In the circumstances, I believe that, in light of all other obligations placed on the employer under the *Code* to eliminate or mitigate hazards and the ability for employees to exercise their rights, including the right to refuse to work, should conditions warrant it, the health and safety of employees would be protected pending final resolution of the appeal.
>
> [my underlining]

[28] I am satisfied that, as in the *Air Canada* and the *Swissport* cases, the health and safety measures already in place in the applicant's work place are in line with the preventative purpose of the *Code* and will protect the health and safety of the employees pending a decision on the merits of this appeal. However, I would like to point out, as the appeals officer did in the *Swissport* decision, that the fact that health and safety measures have been in place for many years without incident does not relieve the applicant from its obligation to be in compliance with the *Code* and *Regulations*. Whether or not the applicant violated subsection 14.9(1) of the *Regulations* will be determined following a determination on the merits of this case.

[29] The applicant's undertakings will be integrated into my decision as conditions for the stay.

Decision

[30] For the above reasons, the application for a stay of the direction issued by the ministerial delegate on June 21, 2019, is granted under the following conditions:

1. The applicant must immediately inform the workplace and health and safety committee of the stay of the direction;
2. The applicant must, immediately and in writing, inform employees of the hazards associated with severe weather conditions;
3. The applicant must remind employees who operate motorized material handling equipment of their duty to report any weather related concerns regarding the use of the equipment to their supervisor;
4. The applicant must remind employees of their right to refuse to work should they consider that the operation of the equipment exposes them to a condition presenting an imminent or serious threat to their health or life; and

5. As undertaken in its submissions, the applicant must:
    a. Ensure that protective clothing and supplemental items are made available to operators;
    b. Adjust operations to take into account severe weather events;
    c. Closely monitor and assess weather related working conditions; and
    d. Brief employees regarding hazards associated with weather conditions.

[31] The stay will be effective until the final disposition of the appeal.

Ginette Brazeau
Appeals Officer