Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2019-09-26
Case No.: 2018-23

Between:

Halifax Port Authority, Applicant

Indexed as: *Halifax Port Authority*

Matter:	Application for an adjournment of the proceedings in an appeal of a direction issued by an official delegated by the Minister of Labour
Decision:	The application is denied.
Decision rendered by:	Olivier Bellavigna-Ladoux
Language of decision:	English
For the applicant:	Grant Machum, Counsel, Stewart McKelvey Lawyers
Citation:	2019 OHSTC 20

REASONS

[1] This decision concerns an application to adjourn the proceedings in an appeal filed pursuant to subsection 146(1) of the *Canada Labour Code* (*Code*). The appeal concerns a direction issued on July 13, 2018, by Ms. Mary Alice Clark, in her capacity as an official delegated by the Minister of Labour.

[2] For the reasons below, the application for an adjournment is denied.

Background

[3] On July 9, 2018, a dump truck driver employed with Scotia Scapes Landscaping was delivering a load to the Fairview Cove Sequestration Facility (FCSF). Later that morning, the driver was found fatally injured. The operations conducted at the FCFS are overseen by the Halifax Port Authority. The fatality prompted the ministerial delegate to conduct an investigation in the work place operated by the applicant, the Halifax Port Authority.

[4] Following her investigation, the ministerial delegate considered that the performance of an activity constituted a danger to persons granted access to the applicant's work place. Accordingly, she issued a direction under subsection 145(2) of the *Code*. The direction issued reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II - OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER
> UNDER PARAGRAPHS 145(2)(*a*) AND (*b*)
>
> On July 12, 2018, the undersigned official delegated by the Minister of Labour conducted an investigation in relation to a fatality at the work place operated by HALIFAX PORT AUTHORITY, being an employer subject to the *Canada Labour Code*, Part II, at 6245 Africville Road, Halifax, Nova Scotia, the said work place being sometimes known as the Fairview Cove Sequestration Facility.
>
> The said official delegated by the Minister of Labour considers that the performance of an activity constitutes a danger to persons granted access to the employer's workplace:
>
> > The employer is granting access to their work place, to third party dump-truck drivers for the purpose of dumping Pyritic Slate into the Halifax Harbour, without the employer ensuring these persons are informed of every known or foreseeable health or safety hazard to which they are likely to be exposed. Specifically, the exact location of the embankment while backing-up the truck in preparation to dump the load; thereby creating a danger to the driver backing the truck over the edge of the embankment and falling into the Harbour The aforementioned is required by Paragraph 125(1)(z.14) of the *Canada Labour Code*, Part II.

> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*a*) of the *Canada Labour Code*, Part II, to protect any person from the danger immediately.
>
> You are HEREBY FURTHER DIRECTED, pursuant to paragraph 145(2)(*b*) of the *Canada Labour Code*, Part II, to not perform the activity, in respect of which the notice of danger no. H0931 has been affixed pursuant to subsection 145(3), until this direction has been complied with.
>
> Issued at Dartmouth, Nova Scotia, this 13th day of July, 2018**.**
>
> [signed]
> Mary Alice Clark
> Official Delegated by the Minister of Labour

[5] On August 10, 2018, the applicant filed a notice of appeal of the direction with the Tribunal. A hearing on this matter was set to take place during the week of April 22 to 25, 2019.

[6] On February 26, 2019, the applicant sought an adjournment of the appeal proceedings until August 27, 2019, which I granted on the same day. On August 27, 2019, the applicant filed an application for a further adjournment of the proceedings, this time until July 9, 2020.

Issue

[7] The issue before me is whether I should exercise my discretion under paragraph 146.2(e) of the *Code* to adjourn the applicant's appeal until July 9, 2020.

Analysis

[8] The applicant filed an appeal under subsection 146(1) of the *Code*. Subsection 146(1) of the *Code* reads as follows:

> **146(1)** An employer, employee or trade union that feels aggrieved by a direction issued by the Minister under this Part may appeal the direction in writing to an appeals officer within 30 days after the date of the direction being issued or confirmed in writing.

[9] When an appeal is filed under subsection 146(1) of the *Code*, section 146.1 of the *Code* provides that an appeals officer *shall*, in a summary way *and without delay*, inquire into the circumstances of the direction appealed and provide a written decision with reasons to the applicant. Section 146.1 reads as follows:

> **Inquiry**
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> **146.1(1)** If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
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> **(a)** vary, rescind or confirm the decision or direction; and

> **(b)** issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).
>
> **Decision and reasons**
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> **(2)** The appeals officer shall provide a written decision, with reasons, and a copy of any direction to the employer, employee or trade union concerned, and the employer shall, without delay, give a copy of it to the work place committee or health and safety representative.
>
> [my underlining]

[10] The power of an appeals officer to adjourn the proceedings as requested by the applicant is found at paragraph 146.2(e) of the *Code*:

> **146.2** For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
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> [...]
>
> **(e)** adjourn or postpone the proceeding from time to time;

[11] Before addressing the applicant's main arguments in favour of an adjournment of these proceedings, I will first address the applicant's claim that the Labour Program is continuing to gather and review information. The applicant claims to have been made aware, on May 15, 2019, that the Labour Program is continuing to gather and review information.

[12] I am not concerned by whether the Labour Program's investigation about the fatality that occurred in the Halifax harbour is ongoing or not. On August 10, 2018, I was seized of an appeal of a direction issued to the applicant under subsection 145(2) of the *Code*. This appeal was brought under subsection 146(1) of the *Code*, which provides that I shall, without delay, inquire into the circumstances of the direction appealed.

[13] An appeal before an appeals officer under Part II of the *Code* is a *de novo* proceeding (*Martin v. Canada (Attorney General)*, 2005 FCA 156). A *de novo* proceeding does not, however, allow for an appeals officer to conduct an independent inquiry into entirely new circumstances. The evidence that may be gathered by an appeals officer during his or her inquiry under 146.1 of the *Code*, whether this evidence was considered by the ministerial delegate or not, must relate to the circumstances that were investigated by the ministerial delegate before the issuance of the direction appealed (See *City of Ottawa (OC Transpo) v. MacDuff*, 2016 OHSTC 2).

[14] When a ministerial delegate is exercising his or her authority to issue a direction under Part II of the *Code*, he or she is *functus officio*, which means that, once the ministerial delegate issues a direction, the ministerial delegate may not re-examine or reconsider his or her decision to issue the direction; his or her powers have been exhausted. The information the applicant alleges the Labour Program is still gathering and reviewing cannot form the basis of the direction that is the subject of the appeal filed by the applicant. Under the *Code*, the appeals officer is the only authority with the power to vary, rescind or confirm a direction that was issued by the Minister, or, as in this case, the official delegated by the Minister.

[15] That being said, I will now address the applicant's arguments in support of the application to adjourn these proceedings. In support of its application for an adjournment of these proceedings, the applicant raised three main arguments: 1) there is no risk to any party or individual entering the work site; 2) the limitation period under subsection 149(4) of the *Code* to bring criminal charges against the applicant expires on July 9, 2020; and 3) the applicant did not receive the ministerial delegate's complete report supporting the direction she issued. I will address the appellant's three arguments, one by one.

[16] Concerning the applicant's first argument, about there being no risk to individuals entering the work site, the evidence before me at this early stage of the proceedings shows otherwise. The ministerial delegate issued a direction under subsection 145(2) of the *Code*, which indicates that she found that the performance of an activity by the applicant constitutes a danger to persons granted access to the applicant's work place.

[17] Following her investigation, the ministerial delegate concluded that the applicant's activity of granting access to third party dump-truck drivers for the purpose of dumping pyritic slate into the Halifax harbour, without ensuring that these persons are informed of every known or foreseeable health or safety hazard to which they are likely to be exposed, constitutes a danger to these persons.

[18] If the applicant feels aggrieved by those findings, it must appeal the direction issued by the ministerial delegate to an appeals officer, who has the power to vary, rescind or confirm the direction. If the applicant wants the appeals officer to vary or rescind a direction, the applicant must follow through with the appeal process. The applicant cannot make a determination that there is no more risk to persons having access to the work site after the ministerial delegate has concluded otherwise, even if the notice of danger affixed by the ministerial delegate has been removed. Because the ministerial delegate found that the performance of an activity in the applicant's work place constitutes a danger, the applicant may not, through a mere allegation, claim that there is no risk to any party or individual entering the work site until a proper investigation into the merits of this appeal has been conducted by an appeals officer, who is the only administrative authority with the power to confirm, vary or rescind the direction.

[19] In what concerns the applicant's first argument, I conclude that the evidence before me at this preliminary stage of the proceedings does not support the applicant's claim that there is no risk to individuals entering the work site and I therefore cannot accept it.

[20] Relative to the applicant's second argument, I gather what follows. The applicant is seeking that the matter be held in abeyance until the expiration of the two-year limitation period provided for at subsection 149(4) of the *Code* for the Minister to institute proceedings under Part II of the *Code*. Section 149 of the *Code* must be read in conjunction with section 148. The relevant subsections of sections 148 and 149 of the *Code* read as follows:

> **148 (1)** Subject to this section, every person who contravenes a provision of this Part is guilty of an offence and liable
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> [...]

> **149(1)** No proceeding in respect of an offence under this Part may be instituted except with the consent of the Minister or a person designated by the Minister.
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> [...]
>
> **(4)** Proceedings in respect of an offence under this Part may be instituted at any time within but not later than two years after the day on which the subject-matter of the proceedings arose.

[21] What is provided for at sections 148 and 149 of the *Code*, is that every person who contravenes a provision of Part II of the *Code* is guilty of an offence, and that proceedings in respect of an offence under Part II may be instituted with the consent of the Minister or a person designated by the Minister. This is one of the mechanisms that are available to the Minister for the enforcement of provisions of Part II of the *Code*.

[22] In the case at hand, the ministerial delegate was of the opinion that the performance of an activity constituted a danger in the work place operated by the applicant and issued what is commonly referred to as a "danger direction" under subsection 145(2) of the *Code*. Subsection 145(2) of the *Code* reads as follows:

> **145(2)** If the Minister considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,
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> > **(a)** the Minister shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the Minister specifies, to take measures to
> >
> > > **(i)** correct the hazard or condition or alter the activity that constitutes the danger, or
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> > > **(ii)** protect any person from the danger; and
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> > **(b)** the Minister may, if the Minister considers that the danger or the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, issue a direction in writing to the employer directing that the place, machine, thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the Minister's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.

[23] If the Minister is of the opinion that the performance of an activity in the work place operated by an employer constitutes a danger, and that this activity is not a normal condition of employment, the Minister is inextricably of the opinion that Part II of the *Code* is being violated. In the case at hand, following her investigation, the ministerial delegate opted to issue a direction to the applicant pursuant to subsection 145(2) of the *Code*, because she was of the opinion that not informing third parties who are granted access to the Halifax harbour to dump pyritic slate constituted a danger to these persons.

[24] When the Minister, or in this case, the ministerial delegate, is of the opinion that Part II of the *Code* is being contravened, Part II of the *Code* provides the Minister with an array of enforcement mechanisms. Directions issued pursuant to section 145 of the *Code* and proceedings instituted pursuant to section 148 of the *Code* are two of the mechanisms provided for under the same statutory scheme in order for the Minister to enforce the provisions of Part II of the *Code*. This is the statutory scheme of Part II of the *Code* intended by the legislator.

[25] Appeals officers are often seized of appeals of directions issued under section 145 of the *Code*. Every direction issued by the Minister under Part II of the *Code* is issued because the Minister is of the opinion that there is a violation of Part II of the *Code*. The applicant made it clear in its submissions that it wanted to have the appeal held in abeyance until it is known whether or not the Minister, or a person designated by the Minister, will institute prosecution proceedings pursuant to section 148 of the *Code*.

[26] I see no extraordinary circumstances in this argument that would support an additional adjournment of these proceedings. Every direction appealed to an appeals officer could be subject to proceedings under section 148 of the *Code*. The Tribunal does not, however, hold every appeal of a direction in abeyance until the two-year limitation period provided for at subsection 149(4) of the *Code* expires. This would be a counterproductive use of the mechanisms provided for under Part II of the *Code*.

[27] There is no legal principle that requires an appeals officer to automatically adjourn appeal proceedings because of eventual concurrent criminal proceedings. I find it important to note at this juncture that no criminal proceedings involving the same facts and the same party(ies) were instituted in the case at hand. What the applicant is alleging, is that it seeks an adjournment of these proceedings *until it is known* whether or not the Minister will institute proceedings under section 148 of the *Code*. The mere allegation that criminal proceedings could be instituted by the Minister under the statutory scheme of Part II of the *Code*, a scheme that is intended by the legislator, does not constitute of extraordinary circumstances and this argument does not warrant the use of my discretion to adjourn these proceedings under paragraph 146.2(e) of the *Code*.

[28] Finally, the applicant's third argument is that it has not received the ministerial delegate's complete report. However, the record shows that the Tribunal received the ministerial delegate's report on September 19, 2018. After the applicant first claimed not to have received the ministerial delegate's complete report, I instructed the ministerial delegate, on January 31, 2019, to provide her complete report. The same day, the ministerial delegate confirmed that she had already submitted her complete report. I have analyzed the report provided by the ministerial delegate and I am satisfied that I have before me all the documents that she relied on and that are relevant for the purpose of my inquiry into the circumstances of the direction appealed. Therefore, I cannot accept the applicant's third and final argument for an adjournment, based on the fact that the applicant was not provided with the ministerial delegate's complete report.

[29] The *Code* does not prescribe the factors that an appeals officer ought to consider when exercising the discretionary powers to adjourn or postpone the proceedings from time to time. However, as appeals officers have ruled in the past, appeals officer must exercise discretion

judicially, in a non-arbitrary or discriminatory manner, based on legal principles that support the interest of fairness and serve the purpose and objectives of the *Code* (*Alex Hoffman v. Canada (Border Services Agency)*, 2013 OHSTC 19).

[30] The purpose of Part II of the *Code* reads as follows:

> **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.

[31] The purpose of Part II of the *Code* is one of prevention. In the case at hand, the ministerial delegate concluded that the performance of an activity by the applicant constitutes a danger to persons being granted access to the work place. As far as I am concerned, the only evidence before me at this preliminary stage of the proceedings supports the conclusion that there is a danger in the work place operated by the applicant. Knowing this, further delay of these proceedings would go against the preventative purpose of the *Code*.

[32] Adjourning these proceedings for a period totalizing 2 years would be an unreasonable delay of the proceedings. I find nothing in the circumstances of this case to warrant the use of my discretion to adjourn these proceedings any further.

Decision

[33] The application for an adjournment of this appeal until June 9, 2020, is denied. The appeal process will resume its course.

Olivier Bellavigna-Ladoux
Appeals Officer