Decision No. 94-009

CANADA LABOUR Code
PART II
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146 of the Canada Labour Code, Part II
of a direction issued by a safety officer

Applicant:	Transport Canada Gander International Airport Gander, Newfoundland Represented by: Hilyard Rossiter
Respondent:	Gary Hiscock, Fire-fighter Represented by: Gary Bannister Health and Safety Representative Public Service Alliance of Canada
Mis en Cause:	Ron J. Dooley Safety officer Human Resources Development Canada Labour Program
Before:	Serge Cadieux Regional Safety Officer Human Resources Development Canada Labour Program

An oral hearing was held in Gander, Newfoundland on June 28, 1994.

Background

In the summary report that he prepared for this inquiry, the safety officer made the following observation:

> "This case has been a long time complaint which has been forced to reach its present level for resolution..."

On January 10, 1994, Mr. Gary Hiscock, a fire-fighter at the Gander International Airport, invoked his right to refuse to work. The ***Statement of refusal*** to work registered by Mr. Hiscock reads as follows:

> I was requested to work overtime which would have required me to work 34 consecutive hours. I felt it was unsafe for me and my coworkers. I refused on these grounds.

Mr. Hiscock was asked by his supervisor "to cover the night shift (14 hours) which would mean that he would have to be on duty for a continuous period of 34 hours. He was working day shift that day (10 hours) and his own regular 10 hour shift would again commence at the completion of the 14 hour shift he was requested to work."

The safety officer began his investigation the following day. The safety officer consulted with several persons concerning the issue of hours of work for fire-fighters. A meeting took place on January 17, 1994 at which time both the employer and the employee representatives presented their positions. The safety officer noted that the Gander Firehall is the only hall in Atlantic Canada with a four-hour phone watch. A phone watch is the presence of a designated fire-fighter, on duty, in the alarm room for a period of 4 hours. The alarm room is staffed 24 hours a day.

As a result of his investigation into this matter, the safety officer concluded that danger existed to Mr. Hiscock. A direction was issued to Transport Canada under paragraph 145(2)(a) of the Canada Labour Code, Part II (the "Code") to protect any person from the danger immediately. The danger was described as follows:

> "The fire-fighters at the Gander Airport are requested from time to time to work three consecutive shifts which converts into a continuous work shift of thirty four (34) hours or a continuous work shift of thirty eight (38) hours depending on the shift cycle. This represents for employees who are required to work the three consecutive shifts a risk of fatigue effecting performance and safety awareness.
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> This direction is in response to the refusal to work invoked by fire-fighter, Gary Hiscock."

Submission of the Employer

Mr. Rossiter states that the direction of the safety officer is of great concern to management in that if 34 hours of work are considered a safety risk, then 24 hours may as well be considered a safety risk. The question to be answered, in Mr. Rossiter's opinion, is as follows: If 34 hours are considered unsafe, then how many hours are considered safe?

Also, the phone watch issue raised during the investigation of the safety officer was never a problem before since management has never received a complaint to that effect. It has never been reported as a problem. Mr. Rossiter states that under the worst case scenario, the minimum rest period would be six and one half hours.

Submission of the Employee

Mr. Bannister supports the safety officer's direction because, in his opinion, no employee should be working beyond a 24 hour period. There are regulations and standards which support that assertion such as the Motor Vehicle Regulations, regulations under the Shipping Act and also the collective agreement between Transport Canada and the air traffic controllers. Fatigue applies to fire-fighters just as it applies to air traffic controllers and both occupations should be treated equally.

Because of the phone watches and of the different sleep pattern of other employees and the disturbances which occur in a fire hall, the employee is not getting fresh sleep. Consequently, that employee cannot function properly in his capacity as a fire-fighter. In some cases, employees who have worked excessively long hours have suffered or caused other persons to suffer injuries. Basically, it is not humanly possible to work an individual on a regular basis for that many hours.

Decision

In my opinion, the issue to be decided in the instant case is whether fatigue, caused by working excessively long hours, is unsafe and consequently constitutes a danger as envisaged by the Code? To answer that question, it is necessary to look closely at the provisions which apply in the instant case.

Subsection 128(1) of the Code provides the following:

> 128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that
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> (a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or
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> (b) a condition exists in any place that constitutes a danger to the employee,
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> the employee may refuse to use or operate the machine or thing or to work in that place.

Therefore, subsection 128(1) of the Code contemplates only two distinctive sets of circumstances which entitle an employee to exercise his/her right to refuse to work. The first set of circumstances involves the use or operation of a machine or thing. The second set of circumstances involves the existence of a condition in a place. Both set of circumstances must be serious enough to constitute a danger to the employee to the extent that the employee would be justified in not working under those circumstances.

In the instant case, Mr. Hiscock did not refuse to use or operate a machine or thing. He refused to work the excessively long hours because he felt it was unsafe to do so. It is quite possible that, if Mr. Hiscock had accepted to work 34 consecutive hours as requested, he might also have refused, at a certain point during that period, to use or operate fire fighting equipment. However, this is not the issue before me presently since, on the day of the refusal, Mr. Hiscock did not work the overtime requested.

As to whether Mr. Hiscock refused to work because a condition exists in any place that constitutes a danger to him is irrelevant to the circumstances of this case since such a condition would have to relate specifically to the workplace. In this case, it is Mr. Hiscock's personal physical condition which would, as alleged, result in an unsafe situation. Fatigue is the issue here, not the workplace.

Nonetheless, it could be argued that Mr. Hiscock refused to work on the basis that if he had worked that many hours, he would suffer from fatigue that could possibly result in a serious accident if he is asked to use or operate fire fighting equipment. This possibility is obviously hypothetical and, in my opinion, does not come within the realm of the right to refuse to work under the Code.

I have dealt with the concept of danger in many decisions. In Air Canada vs. Canadian Union of Public Employees, unreported Decision No. 94-007, I wrote the following:

> "In order to answer these questions, I must consult the definition of the word "danger" in subsection 122(1) of the Code and apply this definition in light of the case law. "Danger" is defined as follows:
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> "danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected. (underlining added)
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> The courts have had many opportunities to interpret the scope of the term "danger". From this case law two extremely important points have emerged that have guided me in my decision.
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> The first point is that the danger must be immediate. Thus, the expression "before the hazard or condition can be corrected" has been associated with the concept of "imminent danger" that existed before the Code was amended in 1984. In *Pratt*, the Vice-Chairman of the Canada Labour Relations Board, Hugh R. Jamieson, wrote:
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> "...Parliament removed the word "imminent" from the concept of danger...but replaced it with a definition that has virtually the same meaning."
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> The second point I take from a large number of decisions is that the employee's exposure to the hazard or situation must be such that the likelihood of injury is obvious. Accordingly, the danger must be more than hypothetical, or there must be more than a small probability of its becoming a reality. The danger must be immediate and real, and no doubt must remain regarding its imminence. It must be sufficiently serious to justify, in the case under consideration, discontinuation of use of the seats for flight attendants."

There is increasing evidence that shift work can cause fatigue. There is no doubt in my mind that fatigue may effect performance and safety awareness as noted by the safety officer in the direction. However, fatigue does not, in my opinion, constitute a danger as defined in the Code. Only the impact that fatigue may have on an activity carried out by a fire-fighter could be considered a safety issue given the right conditions. However, a danger, as envisaged by the Code, only exists when the hazard or condition is likely to cause an injury immediately, not when the hazard or condition could cause an injury in the distant future.

In light of the principles described above, I have little choice but to declare that there was no danger to Mr. Hiscock when he refused to work and neither when the safety officer investigated. The danger feared by Mr. Hiscock was hypothetical. It was neither real nor present when the safety officer investigated. It was not a danger as envisaged by the Code and it certainly does not meet the test laid down by the tribunals.

The issue of hours of work is not a new issue to the parties before me. Mr. Hiscock has worked triple shifts many times before. The safety officer acknowledged that "This case has been a long time complaint..." It is only reasonable, in my opinion, to expect that problems of this kind will be resolved through the collective bargaining process. The right to refuse to work was meant to deal with problems that creep up unexpectedly and which put the safety and health of an employee in jeopardy. It was not meant to settle long standing problems of this sort which do not find resolution with the employer.

Nonetheless, I caution the employer in the instant case. While it is not evident that hours of work may become a safety issue, surely it must be recognized that excessively long hours of work have a direct effect on the various activities carried out by fire-fighters in the course of their duties. Given the right conditions, it will likely become a safety issue. To prevent accidents and injuries from occurring, the employer is invited to discuss and resolve this problem by consulting with the safety and health committee.

For all the above reasons, I HEREBY RESCIND the direction given by safety officer Ron J. Dooley on January 18, 1994 to Transport Canada, Gander International Airport.

Decision rendered on September 7, 1994

Serge Cadieux
Regional Safety Officer

Decision No.: 94-009

Applicant: Hilyard Rossiter/Transport Canada

Respondent: Gary Hiscock/PSAC

Mr. Hiscock is a fire-fighter at the Gander International Airport. On January 10, 1994 he refused to work a triple shift which would have required him to work 34 consecutive hours. Mr. Hiscock claimed that it was unsafe for him and for his co-workers to work that long. The safety officer agreed and gave a direction to Transport Canada.

The Regional Safety officer noted that Mr. Hiscock did not refuse to work for the reasons permitted in sub-section 128(1) of the Code i.e. to use or operate a machine or thing or to work in a place. As to the fatigue generated from those excessive long hours, the Regional Safety Officer concluded that Mr. Hiscock's personal physical condition does not constitute a danger as envisaged by the Code. In light of the jurisprudence a danger has to be real and immediate and not a hypothetical danger as feared by Mr. Hiscock. Consequently the Regional Safety Officer ruled that danger, as envisaged by the Code, did not exist when Mr. Hiscock refused and neither when the safety officer investigated. The Regional Safety Officer rescinded the direction.