Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Case No.: 2007-27
Decision No.: TSSTC-09-020

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

Maritime Employers' Association
appellant

and

Longshoremen's Union, Canadian Union of Public Employees, Local 375
respondent

May 21, 2009

TRANSLATION/
TRADUCTION

This case was decided by Appeals Officer Katia Néron.

For the Maritime Employers' Association
Robert Monette and André C. Giroux, Ogilvy Renault

For the Longshoremen's Union, Canadian Union of Public Employees, Local 375
Not represented

1- Nature of the appeal

[1] This case concerns an appeal filed on September 28, 2007, under the *Canada Labour Code, Part II* (*Code*), subsection 146(1), by Robert Monette on behalf of the Maritime Employers' Association (MEA).

[2] This was an appeal of the direction issued on September 7, 2007 by Health and Safety Officer (HSO) Denis Briffaud of Transport Canada – Marine Safety, in the course of his investigation of the August 28, 2007 accident involving a ship's crane during the unloading of sugar from a ship docked at that time at area 46 of the port of Montréal, the work site operated by Logistec Stevedoring Inc.

[3] In his request, Mr. Monette alleges that HSO Briffaud erred in fact and law in deciding to designate, in the direction he issued, the MEA as the employer within the meaning of the *Code*, an employer that, pursuant to the *Code*, HSO Briffaud was authorized to direct to investigate the situation of danger noted on August 28, 2007 in one of the holds of the vessel *Orsula* where a longshoreman had been exposed to the collapse of part of the cargo of sugar. According to Mr. Monette, HSO Briffaud should have designated, in the direction he issued, Logistec Stevedoring Inc., and not the MEA, as the employer.

2- Background

[4] On August 28, 2007, in the course of moving an excavator from the dock at area 46 of the port of Montréal in hold no. 1 of the vessel *Orsula* with the help of its ship's crane no. 1–the excavator that was intended to level the sugar cargo that was to be unloaded–the crane's cable weakened and broke, causing the excavator to fall to approximately three feet above the ground in the bottom of the hold. Due to the vibration caused by the rupture of the cable, portions of the sugar cargo–approximately six to eight feet wide by fifteen feet high–that were stuck to the walls of the hold collapsed while longshoreman Richard Tremblay was in the hold waiting to operate the excavator in question. In order to protect himself, R. Tremblay moved to the centre of the hold. As a result, he was neither buried nor hurt.

[5] When he arrived at the site, HSO Griffaud ordered a halt to the use of the ship's cranes until they received a new certificate.

[6] In addition, in order to launch an investigation–as required pursuant to paragraph 125(1)(*c*) of the *Code* and section 14.3 of the associated *Marine Occupational Safety and Health Regulations*–following the collapse of the sugar cargo in the ship's hold while an employee was in it, HSO Griffaud issued a direction pursuant to paragraph 141(1)(*a*) of the

Code, which is the contested direction, and which reads in part as follows:

> [translation]
> On August 28, 2007, the health and safety officer proceeded with an investigation at the unloading site of the vessel *Orsula* following a break in the used wire rope of one of this ship's cranes. The unloading site, located at area 46 of the Port of Montréal, is operated by the Maritime Employers' Association, which is subject to Part II of the *Canada Labour Code*, and whose head office is located in the Édifice du port de Montréal, wing 2, Cité du Havre.
>
> In the course of his investigation, the undersigned occupational health and safety officer noted that there could be a situation of danger when employees are in a ship's hold where the cargo lining the walls could collapse on them (such as sugar).
>
> Consequently, you are hereby directed, pursuant to the *Canada Labour Code, Part II*, paragraph 141(1)(a) to conduct an investigation pursuant to section 14.3 of the *Marine Occupational Health and Safety Regulations*, and to forward the findings of this investigation to the undersigned officer no later than November 1, 2007.

[7] On November 2, 2007, Vincent Thomin, union health and safety advisor to the Longshoremen's Union, Canadian Union of Public Employees (CUPE), local 375, notified the Canada Appeals Office on Occupational Health and Safety[1] that his union did not intend to make any representations in this case.

[8] On January 22, 2008, at the start of the hearing into the case, Mr. Monette made a request to stay the procedure in view of an application for judicial control by the MEA to the Federal Court to determine whether the MEA or the stevedoring companies operating at the Port of Montréal, Logistec Stevedoring Inc. among others, or under what circumstances the MEA or these companies, were the employer, within the meaning of the *Code*, of the longshoremen working at this port.

[9] However, while presenting his argument to me, Mr. Monette tabled for the record a letter sent by the MEA on October 24, 2007 to HSO Briffaud in response to his direction. Attached to this letter were the following documents:

- the "accident/injury/damage investigation report" prepared by Éric Collin for the Longshoremen's Union, CUPE, local 375, and by Mathieu Fortin for Logistec Stevedoring Inc., the latter having signed the report. In this report, it is indicated that the local health and safety committee set up for the Logistec Stevedoring Inc. work site would study whether changes to the work procedures were required further to the incident on August 28, 2007;

[1] Now known as Occupational Health and Safety Tribunal Canada

- the minutes of the meetings of this committee held on August 31 and October 12, 2007. At pages 5 and 7 of the minutes of August 31, 2007, it is reported that the committee had decided that the work procedures that were already in place for unloading bulk sugar cargo would be distributed to the workers at the start of each shift for the next ships in order to offset the risk of an employee being exposed to injuries or buried if the cargo collapses on them in the holds of a ship, although other measures are under study and may later be introduced. In terms of the minutes of the meeting of October 12, 2007, at page 4 of this document, it is indicated that other measures have been taken and approved by the committee.

[10] During the hearing of January 22, 2008, HSO Briffaud also indicated to me that he had reviewed the documents in question and that the measures taken by Logistec Stevedoting Inc. complied with his direction.

[11] After reviewing said documents and for the reasons indicated in my interlocutory decision of January 30, 2008[2], I agreed to suspend the proceedings until the Federal Court has rendered a decision on the application for judicial control filed by the MEA.

[12] Further to the decision rendered on December 18, 2008 by the Honourable Max M. Teitelbaum of the Federal Court[3] on the application for judicial control, the hearing into this case was set for May 19 and 20, 2009.

[13] In view of the question raised by Mr. Monette in this case, and the order issued by Judge Teitelbaum in *Association des employeurs maritimes*, *supra*, on January 30, 2009, I forwarded a letter to Mathieu Fortin of Logistec Stevedoring Inc. notifying him of this appeal and seeking their input as intervenors in the appeal process in order to give them the opportunity to make their representations in the case, if they so deemed appropriate. I gave them until February 9, 2009 to notify me as to whether or not they wished to intervene in the case. I received no response further to this request.

[14] On May 13, 2009, André C. Giroux, on behalf of the MEA, submitted a request that I close this file, alleging that the issue raised in the case had become moot.

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[2] *Maritime Employers Association (sic) and Longshoremen's Union, Canadian Union of Public Employees, local 375*, Interlocutory decision CAO-08-002(I), issued on January 30, 2008

[3] *Association des employeurs maritimes et Sa Majesté La Reine du Canada (Ressources humaines et Développement social Canada) et Syndicat des débardeurs S.C.F.P. section locale 375 et Association internationale des débardeurs, ILA, section locale 1657 et Logistec Stevedoring Inc. et Montreal Gateway Terminals Partnership et Termont Montréal Inc. et Empire Stevedoring Co. Ltd. et Cerescorp Inc.*, 2008 CF 1393, dossier T-643-07, 18 décembre 2008

[15] I must first decide whether the issue has become moot before deciding if this case can be closed or if, on the contrary, I must exercise my discretion to hear it.

3- The matter of a moot issue

[16] In *Borowski v. Canada (Attorney General)* (1989) 1 S.C.R. 342, the Supreme Court set out a two-step analysis to determine whether a controversy is moot. I must first ask myself whether in this case the tangible and concrete dispute has disappeared to determine whether the issues has become moot. If so, then I must decide whether I should exercise my discretion to hear the case.

[17] At paragraph 15 of *Borowski*, *supra*, the Supreme Court summarizes the general principle of the mootness of a controversy as follows:

> [15] The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have not practical effect on such rights, the court will decline to decide the case.

a) In this case, has the controversy become moot?

[18] In his request of May 13, 2009, Mr. Giroux pointed to the following elements as demonstrating the mootness of this appeal:

> [translation]
> [...]
> Given the direction issued by HSO Briffaud on September 7, 2007;
>
> Given that the vessel *Orsula* had already left the Port of Montréal at the time that the direction was issued;
>
> Given the union's decision not to make any representation on the case;
>
> Given the measures taken by Logistec Stevedoring inc., the Employer, aimed at offsetting the risk of cargo collapsing on employees working the hold of the ship, these measures having been approved by its local occupational health and safety committee, as you had indicated in your decision of January 30, 2008;
>
> Given that HSO Briffaud had indicated that he was satisfied that these measures complied with his direction, also as you had indicated in your decision of January 30, 2008;
>
> Considering that, under the circumstances, it would be pointless to raise the constitutional issue we had raised in case no. 2007-22;
> [...]

[19] In my opinion, in issuing his direction of September 7, 2007, HSO Briffaud

identified a contravention to the *Code*, that is to say the fact that an investigation had not been done following the collapse of the sugar cargo in hold no. 1 of the vessel *Orsula* while an employee was in it, in accordance with paragraph 125(1)(*c*) of the *Code* and section 14.3 of the associated *Marine Occupational Health and Safety Regulations*.

[20] The MEA appealed the direction from HSO Briffaud on the grounds that–as reflected in the wording of the appeal, as formulated by Mr. Monette–it deemed that it was not its responsibility to comply with said direction because, in Mr. Monette's opinion, the appropriate employer in that case should have been Logistec Stevedoring Inc., not the MEA.

[21] As indicated above, neither the Longshoremen's Union, CUPE, local 375, nor Logistec Stevedoring Inc. deemed that they should make representations in the case. I therefore conclude that there is no tangible and concrete dispute between them and the MEA on the issue raised by the latter in this case or, in other words, there is no contradictory debate between them.

[22] For this reason, I find that at this point this appeal is merely moot.

[23] All that remains is for me to review whether my issuing a decision on the merits of the appeal would have a practical impact on the rights of the MEA only, given that the latter is the only party to the appeal.

b) Would a decision by me on the merits of the appeal have a concrete impact on the rights of the MEA?

[24] Given that HSO Briffaud recognized–basing himself on the documents submitted by the MEA on October 24, 2007 in response to his direction–that there was no longer a contravention to the *Code* because the investigation as ordered by him in his direction of September 7, 2007 was carried out by Logistec Stevedoring Inc., and that the preventive measures to offset the risk that an employee would be exposed to injury or buried by a possible collapse of the bulk cargo, such as sugar, in a hold of a ship were approved by the local health and safety committee set up by Logistec Stevedoring Inc. for its work site at the port of Montréal, I consider that it would be useless to rule on the identity of the employer that should or should not have received the contested direction since there is now, according to HSO Briffaud, compliance with the provisions of the *Code* in this case.

[25] Given this request by Mr. Giroux submitted on behalf of the appellant in this case, given that the Longshoremen's Union, CUPE, local 375, as well as Logistec Stevedoring Inc. have chosen not to make a representation in the case, given that the contravention identified in his direction of

September 7, 2007 has been corrected, even in the opinion of HSO Briffaud, given as well that my finding that this case is now nothing more than moot–for all of these reasons, but also in view of my understanding of the provisions as they were set out in the *Code*–I am of the opinion that a decision by me on the merits of the appeal would have no practical effect on the rights of the MEA.

4) Decision

[26] Accordingly, I shall not exercise my discretionary authority to hear this case, and I thereby close file.

Katia Néron
Appeals Officer