Occupational Health and Safety Tribunal Canada
Tribunal de santé et sécurité au travail Canada

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Case No. 2007-09

Interlocutory Decisions
OHSTC-08-010(I)
CAO-07-0041(I)

Canada Labour Code
Part II
Occupational Health and Safety

Éric V. and al.
appellants

and

Correctional Service of Canada
respondent

April 25, 2008

Interlocutory Decision and Order No. OHSTC-08-010 (I) issued by Appeals Officer Serge Cadieux.

For the appellants
Mr. John Mancini, Counsel, UCCO-SIOC-CSN

For the respondent
Ms. Nadine Perron and Ms. Nadia Hudon, Justice Canada

[1] This matter concerns an order rendered orally at the hearing of April 16, 2008 and confirmed hereunder in writing at the request of Ms. Nadia Hudon.

[2] In this matter, four Correctional Service of Canada Officers (COs) in turn refused to escort a notorious inmate to a local health care institution. The reason given for their refusal was that the escort was unarmed, thus putting the COs' health and safety in danger, since the inmate to be escorted had a price on his head.

[3] The employer and Health and Safety Officer (HSO) Régis Tremblay in turn conducted an investigation on the refusal to work. Both found the COs' working conditions were normal conditions of employment that did not entitle them to invoke their right to refuse to work pursuant to paragraph 128(2)(*b*) of the *Code*. Section 128 reads as follows:

> 128(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
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> (*a*) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
> (*b*) a condition exists in the place that constitutes a danger to the employee; or
> (*c*) the performance of the activity constitutes a danger to the employee or to another employee.
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> (2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if
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> (*a*) the refusal puts the life, health or safety of another person directly in danger; or
> (*b*) the danger referred to in subsection (1) is a normal condition of employment.

[4] The four COs did however allege the HSO found no danger existed even though his investigation was limited to concluding working conditions referred to by the employees in invoking their right to refuse to work were normal conditions of employment. The COs therefore appealed this decision under subsection 129(7) of the *Code*, which reads as follows:

> 129(7) If a health and safety officer decides that the danger does not exist, 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 ten days after receiving notice of the decision.

[5] On November 23, 2007, I rendered an interlocutory decision in this matter. This decision deals with the employer's objection that the Appeals Officer (AO) did not have jurisdiction to hear the four appeals filed by the COs. I rejected the employer's objection. Grounds for the decision are set out in *Éric V. and al.* v. *Correctional Service of Canada*, Decision No. CAO-07-041(I). The employer requested judicial review of this decision in Federal Court (the Court).

[6] As the AO hearing this matter, I found nothing prevented the hearing from being pursued, as the Court did not grant the employer's application for a stay. Furthermore, the employer made no formal objection to the pursuit of the hearing. Consequently, the hearing continued on April 14, 15 and 16, 2008.

[7] During the hearing, all witnesses summoned by Mr. John Mancini gave testimony freely. These witnesses stated without hesitation that a contract was still out on the inmate requiring an escort at the time the COs refused to work.

[8] However, witnesses for the employer were more reluctant to acknowledge a contract was still out in the inmate requiring an escort at the time the COs refused to work. They were more inclined to imply they were not in the best position to respond to Mr. Mancini's questions on this particular point.

[9] In one instance, the employer's witness Mr. G.F. was unyielding. Although in possession of the information requested by virtue of his position as a Security Intelligence Officer (SIO), the witness prevaricated rather than answering Mr. Mancini's questions directly on this issue.

[10] A similar situation occurred when the last witness, Mr. S.H., testified. This witness, also an SIO, provided indirect and vague responses to Mr. Mancini's questions, making it difficult for Mr. Mancini to show conclusively, on the basis of this testimony, the status of the contract on the inmate.

[11] Mr. Mancini notified the Tribunal testimony provided by these two witnesses did not reflect the information in their possession and, consequently, he was considering the possibility of requesting the inmate's file from his Parole Officer (PO). He believed this file dealt with all the issues played down by the employer's witnesses, specifically, that the matter of the contract was outdated, the inmate was ineligible for placement in a minimum security institution, he was unable to reintegrate into the community because of security problems, arrangements were required with the police for his absences, etc. According to Mr. Mancini, the documents he intended to request would demonstrate the inmate's file remains current. As a result, if the testimony of the two witnesses who gave the Tribunal a wrong impression regarding the inmate's level of danger called for a rebuttal, he was prepared to provide it and, in fact, requested leave to do so.

[12] Ms. Nadia Hudon and Ms. Nadine Perron were vehemently opposed to this practice, i.e., presenting any rebuttal which would strengthen the appellants' evidence. They stated that only new items such as those raised unexpectedly by the defence can be subject to rebuttal. Ms. Perron pointed out that Mr. Mancini had the opportunity to question the PO when he was called as a witness. It was now too late to do so.

[13] I advised Ms. Perron and Ms. Hudon that, as the OHSTC was a quasi-judicial administrative tribunal, it was in my power to accept evidence which would otherwise be inadmissible in a court of law, provided such evidence was relevant and required for the Tribunal to render a decision in this matter. I therefore considered we were pursuing the investigation of the case. If information liable to prove useful to the Tribunal is available, I am required to pursue the investigation until such time as I am satisfied all relevant information is in my possession. This notwithstanding, the AO's investigation is undertaken *de novo* and empowers the AO to seek out all relevant information. As a result, rules governing rebuttal may not apply in the circumstances to limit the AO's powers of investigation.

[14] The documents identified by Mr. Mancini are highly relevant and, given the hesitation shown by the employer's witnesses as described above, they are required by the Tribunal

to render an informed decision in this matter. Consequently, I have decided to allow Mr. Mancini's request for the information he seeks.

[15] Mr. Mancini then applied to the Tribunal for an order to produce the four documents which would clearly show there was still a contract out on the inmate who required an escort when the COs refused to work. In addition, Mr. Mancini specifically identified CSC personnel who took part in discussions or the drafting of reports on the information contained in these documents. Mr. Mancini requested that one of these individuals submit the required documents. It should be noted the parties jointly identified an individual who took part in all such discussions. Mr. Mancini requested that this individual,[1] i.e., the inmate's PO, be the person to submit the documents.

[16] Ms. Hudon notified the Tribunal that the aforementioned PO requested a written order of the Tribunal in order to appear before it when submitting the requested documents. I advised Ms. Hudon and Ms. Perron that the parties jointly identified the inmate's PO at the hearing of April 16, 2008, and the Tribunal concurred with this identification. As a result, I will merely refer to this description in the attached order without identifying the person involved.

[17] Very briefly, and without reference to their particulars, the four documents[2] referred to by Mr. Mancini are the following:

- an assessment of an escorted compassionate leave decision, decision no. 14 (6 pages);
- a memo [prepared by the person identified above by Mr. Mancini to deposit the requested documents] (7 pages);
- a review of a decision [date . . .], decision no. 13, inmate's security clearance (4 pages); and
- the inmate's file [initials . . . and date . . .], Correctional Plan Progress Report (pre-full parole, pre-day parole) [date . . .] and "Information pertaining to current request/situation" (5 pages).

[18] Ms. Hudon and Ms. Perron requested and were granted a recess to verify and confirm the existence of the four documents identified by Mr. Mancini. Upon resumption of the hearing, Ms. Hudon notified the Tribunal she was unable to trace the fourth document identified above through the CSC computer system. She added further research would be conducted to trace the document in point and submit it in compliance with the order.

[19] Consequently, I confirm hereunder the order rendered orally on April 16, 2008 to the Correctional Service of Canada. I rendered this order under the powers vested in me by section 146.2 of the *Code*, more specifically, paragraph 146.2(*a*), which provides as follows:

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[1] This person remains anonymous in this interlocutory decision for the sake of protecting the identity of all persons involved in this case. However, the parties are aware of this person's identity, which will be confirmed when the recorded proceedings of this case are heard.

[2] These four documents are identified in a document submitted by Mr. Mancini (**Exhibit A-38**), and are described in detail therein.

> 146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
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> (*a*) summon and enforce the attendance of witnesses and compel them to give oral or written evidence under oath and to produce any documents and things that the officer considers necessary to decide the matter . . . .

[20] The Correctional Service of Canada is thus HEREBY ORDERED to produce, at the continuation of the hearing on this matter scheduled for May 1 and 2, 2008, and to require the Parole Officer jointly identified by the parties on April 16, 2008 to submit the four documents identified above by Mr. Mancini at the hearing of April 16, 2008.

Issued at Ottawa, on April 25, 2008

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Serge Cadieux
Appeals Officer