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

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Case No.: 2004-40
Decision No.: CAO-07-008

Canada Labour Code
Part II
Occupational Health and Safety

Crystal Glaister
appellant

and

Correctional Service Canada (CSC)
respondent

Decision No. CAO-07-008
March 16, 2007

This appeal was heard by Appeals Officer Richard Lafrance, in Abbotsford, British Columbia, on January 26, 2006.

Appearances

For the appellant
Corinne Blanchette, Union Advisor, Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)
Crystal Glaister, Correctional Officer (CO)
Clayton Stamler, Correctional Officer and Local President of UCCO-SACC-CSN
Doug Noon-Ward, Correctional Officer

For the respondent
Harvey Newman, Counsel, Justice Canada
Andrea Duval, Security and Intelligence Officer (SIO), Mission Institution, CSC
Carole Chen, Coordinator of Correctional Operations (CCO), CSC
Terry Hackett, Assistant Warden, Correctional Program (AWCP)

Health and safety officer (HSO)
Melinda Lum, Human Resources and Skill Development Canada (HRSDC), Labour Program, Vancouver, B.C.

[1] On November 16, 2004, Crystal Glaister, employed by Correctional Service Canada as a Correctional Officer at the Mission Institution, in Mission, B.C., made an appeal under subsection 129(7) of the *Canada Labour Code* (the *Code*), Part II. The purpose of her appeal was to challenge the decision of absence of danger rendered by health and safety officer Melinda Lum on November 16, 2004, following the investigation of her refusal to work on that same day.

[2] The report and documents submitted by HSO Lum in addition to her testimony established the following chronological events that preceded the refusal to work on November 14, 2004.

[3] Prior to November 14, 2004, the gymnasium[1] at Mission Institution was supervised by a Social Program Officer[2] (SPO) who worked from 09:45 to 21:00, seven days a week. The gym was normally closed when no SPO was on shift to supervise the gym.

[4] Earlier in 2004, CSC conducted an analysis of the SPOs' duties to determine how they could do their work more effectively. After the analysis was completed, CSC decided that the SPO shifts would be changed from 7 days a week to 5 days a week, Monday to Friday, starting at 08:00 and ending at 21:00.

[5] Consequently, there would be no more SPOs on duty on weekends, unless there was a special activity organised by an SPO.

[6] However it was decided that the gym would remain open on weekends from 08:00 to 21:00. During those hours, hourly security rounds would be done by the Correctional Officer in post in the A-27[3] corridor.

[7] Two members of the occupational health and safety (OHS) committee provided feedback to a memo sent by the Assistant Warden, T. Hackett, to the health and safety committee members.

- J. Ratzlaff had concerns with regard to fire safety. He questioned whether having only one CO present in the Program Complex would be sufficient in case of a fire emergency.
- He was also concerned regarding the supervision of the area on weekends, as there would be only one officer present and lots of activities would be going on in the shops. In the past, there were at least recreational officers present in the gym area in addition to the Correctional Officer.

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[1] The gymnasium includes SPO office, balcony, storage room, peer counseling room, glass shop, equipment storage, weight room, men's and women's washrooms.

[2] The Social Program Officer's duties are to facilitate inmates' recreational activities, cultural events and hobbies, to liaise with agencies, to work with groups and to distribute equipment related to activities.

[3] The A-27 post is part of the Program Complex that consists of a corridor coming from the living area (cells) and leading to a number of meeting rooms such as: inmate committee offices, library, hobby shops, tool crib, pottery room, canteen, barber shop, washrooms, storage rooms, as well as to the administration offices and the gymnasium.

- D. Noon-Ward expressed concerns with regard to the safety of the inmates as well as that of the CO in post at A-27. He considered the change to be irresponsible, taking into consideration that:
  i. Over the years, several inmates had been injured and assaulted in the gymnasium;
  ii. The glass shop was a major distribution centre for drugs;
  iii. When the CO would be at the A-27 post, opening and closing the barrier leading to the administrative office as well as patting down inmates, there would be no supervision in the gymnasium and the inmates could be at risk of accidents or assaults;
  iv. The operator in the Main Communications and Control Post (MCCP) has seven monitors to watch, answers the telephone and controls the switchboard on evenings and weekends. As well, he responds to the Perimetric Intrusion Detection System (PIDS). There is no time to sit and stare at the monitor that covers the gymnasium.

[8] The change in the A-27 post order was scheduled for November 17. However, B. Thompson, Deputy Warden, decided to implement the change on November 14.

[9] On the said date, C. Glaister started her shift at 6:45 in the communications post and worked there until 11:00. After lunch, she worked in the mobile post until 16:30, when she moved to continue her work in the A-27 post.

[10] At 18:00, Correctional Supervisor (CS) D. Trenaman asked CO Glaister why the gymnasium was closed. She answered that according to procedures, it was kept locked because there was no SPO in the gymnasium. CS Trenaman then informed her that the Deputy Warden had decided to implement the new SPO shift schedule on November 14 and that, as the CO in the A-27 post, she was now to do the security rounds in the gymnasium.

[11] CO Glaister replied to CS Trenaman that she did not feel comfortable opening the gymnasium, since she was working alone, with no other staff in the gymnasium.

[12] CO Glaister indicated in her refusal to work statement that she felt unsafe to supervise the gym and the A-27 post at the same time. She wrote:

- The gym and the A-27 are two different posts, run by two different staff members. One should not be responsible for two separate posts.
- The A-27 officer is responsible for the A-27 door/corridor, Hobby Shop, Tool Crib, Pottery room, Lifer's store, Lifer's Office, Library, Classrooms (groups gather in classroom 4), Native Brotherhood room and inmate Committee office to name (but not all) areas of A-27. To expect the A-27 Officer to be also in charge of the Gym, Weight pit, Art room, Glass shop and Peer counselling office to name the main (but not all) areas of the gym, is not only unrealistic but unsafe.
- With having no partner (gym officer), nobody knows where the A-27 officer is at any given time. When there is an officer in the A-27 and an officer in the gym, we check on each other from time to time to make sure each other is alive and well.

- The MCCP camera does NOT cover the gym. There are many large areas where there are blind spots, such as; the whole upper gym catwalk and all those rooms on the upper floor, the stairwell, the south/west corner of the gym and the whole handball court in the south/east corner. That's too many areas where the A-27 officer could be accosted.
- If the A-27 officer is working both A-27 and Gym, the closest staff member is not very close at all.
- If the A-27 officer is in trouble and presses the PPA[4], the A-27 and Gymnasium is an extremely large area for staff to search to find the A-27 officer. By the time staff finds the A-27 officer, it could definitely be too late.
- If the A-27 officer is unable to press the PPA, it could take HOURS before another staff member came by and realized that there is no A-27 officer.
- When the A-27 officer is doing rounds of the gym, the A-27 door is locked. The one response officer from communications is carrying the emergency belt and the camera. Having to unlock the door will only slow down the response time.
- In no other area of the institution is one officer expected to do rounds alone. Even in the yard post, the mobile watches the officer and there are not even any inmates in the area when rounds are done there. It is NOT acceptable to make one officer do rounds of a major traffic, very large area by themselves with no back-up watching or even close by.

[13] HSO Lum established, as referenced in her investigation report, that:

- The original posted orders for the A-27 post consisted of doing rounds, opening and closing the doors in and out of the area, patting down inmates moving in and out of the area, doing tool crib check before opening and closing the hobby shop.
- The revised post orders added to the duties of the officer by having to conduct security rounds of the gym every hour.
- The employer is to further amend the orders to include that the CO is to radio the MCCP operator before going into the gym to watch them on the camera. If the MCCP operator does not see the CO on the monitor after some time as passed, the operator is to contact the officer. If there is no response, then staff will be alerted to the area.
- From the corridor, the CO can see in the offices, rooms and hobby shop as they are equipped with windows.
- There is limited visibility down the staircase.
- From the upper walkway, the CO can see the gym floor, the weight room and most of the handball court.
- The SPO shift changed on November 13, 2004. Scheduled for November 17, the change in the A-27 post order was forwarded to November 14 by decision of the Deputy Warden.

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[4] What the CO refers to as a PPA is a Personal Portable Alarm System (PPAS), according to chapter 7, CSC's *Resource Manual, Additional Information - Commonly Used Abbreviations within CSC.* The acronym PPAS will be used throughout, except when being quoted.

[14] The report further stated that there was inadequate consultation with the occupational health and safety committee on the revised post orders before they were implemented. It was clarified by the Assistant Deputy Warden, Management Services, and the employer co-chair of the OHS committee that the last committee meeting was held on November 3, 2004 and that the post orders were not discussed because no one had received them yet.

[15] An Assurance of Voluntary Compliance[5] was received to address the issue of consultation with the health and safety committee.

[16] HSO Lum concluded that there was absence of danger because:

- the A-27 post was manned by a single correctional officer before the revisions were made to the post order;
- the camera that monitors the corridor in A-27 has been in position, with a limited view for the last 5 years;
- with the addition of the gym, the area to cover is larger but there are control measures in place to mitigate the risk;
- the cameras in the gym and the corridor give some visibility into the area from MCCP for monitoring purposes, but there are some areas in both the corridor and the gym which are not in view of the cameras as both cameras are fixed point cameras. The camera in the gym is also a fixed camera and has been in place for about 5 years[;]
- [a]mendments are being made to the post orders to include that the A-27 CO is to communicate with the MCCP before entering the gym to conduct security rounds. This will help with monitoring the CO while in the gym, at least on an hourly basis.

[17] HSO Lum further indicated that working in an area with inmates and the possibility of inmates assaulting Correctional Officers is an inherent part of a Correctional Officer's job.

[18] As well, HSO Lum reasoned that the possibility of an inmate assaulting a Correctional Officer working alone at this post had been minimized with the equipment given to COs (PPAS, radio, phone access) and the amended post orders (communicating with the MCCP). The employer had done what was reasonably practicable to minimize the risk of working at this post.

[19] C. Glaister testified at the hearing. I retain the following from her testimony.

[20] No other CO is required to work by his or herself in any other area in the institution, let alone in an area where the CO may be exposed to up to 60 inmates at the same time.

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[5] Under the Labour Program operational policy, an Assurance of Voluntary Compliance (AVC) is the employer's or employee's written commitment to a health and safety officer to correct a contravention to the *Canada Labour Code* within a specified period.

[21] In the past, no CO was asked to do rounds in the gymnasium when no SPO was there. Normally, when there was no SPO in the gym on a shift, the gym was closed for the duration of the shift.

[22] SPOs never worked alone in the gym; there was always a CO in the A-27 post close by.

[23] C. Glaister presented five incident reports in relation to the A-27 post that had taken place in the last five years. However, none was found for the last year. Nonetheless, she considers that this constitutes a clear indication that assaults are committed on inmates and on staff.

[24] In one incident where she was involved in the response to a PPAS, it took quite some time to find the CO that was calling for assistance. The reason is that the PPAS only identifies the number of the PPAS, not where the person using it is located.

[25] C. Glaister introduced a draft threat-risk assessment for the A-27 control post that she found at the institution. This undated and unsigned document indicated that there was a potential for serious risk to staff should an incident occur in this area. It was mentioned as well that the post in question was vulnerable to confrontation with a large number of inmates being around.

[26] C. Glaister stated that when a CO works alone in one area, the inmates are more aggressive and have a tendency to defy authority, especially that of female employees.

[27] C. Glaister conceded that after the work refusal, the posted order was amended so that COs now have to report to the MCCP before going to do a round in the gym. Therefore, in an emergency, the staff would effectively know where to go.

[28] As well, C. Glaister recognized that the fixed camera in the gym was changed for a mobile camera that can now cover most of the gym.

[29] D. Noon-Ward, who works in the MCCP, testified that the MCCP operator has seven monitors to watch, as well as responds to the Perimetric Intrusion Detection System and answers the telephone and the switchboard on evening and weekends. There is no time to sit and stare at the monitor that covers the gymnasium. Consequently, it is difficult to follow the CO on the monitors when he or she is in the gym or to estimate how much time has elapsed since the CO was last seen on the monitor. He believes that a considerable amount of time could elapse before one realizes that the CO has not been seen on the monitor.

[30] In addition, D. Noon-Ward's testimony clarified that even with the new directive in place, COs do not always inform him when they are going into the gym. This is especially true for the replacement COs at meal time.

[31] Under cross examination, D. Noon-Ward acknowledged that the risk of being assaulted by inmates was part of the job. However, he also observed that it was management's duties to minimize this risk and to protect the COs from such assaults.

[32] D. Noon-Ward indicated as well that based on his personal experience and the results of a test conducted by the Emergency Response team (ERT), it can take as long as three to four minutes to respond to an emergency in the gym, compared to 30 to 40 seconds in other parts of the institution. The reason for such a long response time is that many doors have to be unlocked to get to the gym and numerous rooms have to be checked in the gym itself.

[33] As a health and safety committee member, D. Noon-Ward believes that when COs are given more responsibilities, such as increasing the size of the area to be covered by one CO and adding a large number of rooms with more blind corners to be checked, the COs are not facing a normal inherent danger anymore.

[34] Security Intelligence Officer A. Duval testified that assault on staff is very infrequent, perhaps twice a year, and normally not severe.

[35] A. Duval also indicated that she did not recall any assault on COs in the gym since 2001. An inmate was assaulted by another inmate a short while ago, but no serious injury resulted from it.

[36] C. Chen, Coordinator of Correctional Operations, testified that a new tilt zoom pan camera was recently installed in the gym to better cover all areas, as demonstrated in a video that CSC entered as evidence.

[37] Assistant Warden T. Hackett testified that when he decided to change the work orders of the A-27 post, he took into consideration the history of past incidents that had occurred in the gym and consulted the Union President.

[38] T. Hackett believed that while this was adding to the duties of the A-27 CO, it was not an unmanageable responsibility. In his mind, there was no added risk other than that of the regular inherent risk of working in a penitentiary.

Applicant's arguments

[39] C. Blanchette, Union Advisor, pointed out that Mission Institution is a medium-security prison where the environment is very open, as there are no barriers between staff and inmates.

[40] C. Blanchette argued that I should rescind the decision of absence of danger rendered by the health and safety officer, replace it with a decision of presence of danger and issue a direction to the employer to the effect that rounds in the gym should be conducted with a partner in attendance or any other appropriate direction. She based her arguments on the testimony of the Correctional Officers, which established the following:

- Prior to the change in the work orders, the COs were never asked to work alone in the gym when the SPOs were not on shift. The gym was closed when no SPOs were on shift.
- Presently, the A-27 post is the only position in the institution where a CO works alone and can be directly exposed to more than 60 inmates at the same time. In all other situations, the COs work in pair, even in the segregation unit where the inmates are locked up. When inmates are moved in the segregation unit, three COs are required.

- As indicated by C. Glaister, the inmates are more aggressive when COs work alone in one area. They rely on the fact that there is no witness to what they do or say.
- Evidence is that PPASs do not indicate the precise location of the officer requiring assistance, but only the general area were the CO is assigned. Therefore, the response time for an alarm in the A-27 post is much longer than at any other posted position in the institution.
- According to evidence submitted by D. Noon-Ward, it can take as long as three to four minutes to respond to an emergency in the gym, compared to 30 to 40 seconds in other parts of the institution. As well, contrary to the other positions in the institution, there is no other officer in the gym to hear a CO's call for help.
- As stated by D. Noon-Ward, the MCCP post is very busy and the CO monitoring the cameras may not be watching all the time.

[41] Citing paragraph 51 of Federal Court Justice Gauthier's decision in *Juan Verville*[6], C. Blanchette argued that COs Glaister, Noon-Ward and Stamler have all the necessary experience and knowledge to affirm that the situation poses a danger capable of injuries. There is a reasonable possibility that a Correctional Officer working alone in the gymnasium could be subject to being injured during an assault by an inmate.

[42] In addition, C. Blanchette pointed out that the draft risk assessment for the A-27 post, which was presented by C. Glaister, indicated serious safety concerns raised by senior managers. Those concerns were not taken into consideration when the new orders were drafted.

[43] One of these concerns was the potential for serious risk to staff should an incident occur in this area. As well, it was specified that there was a realistic potential risk for the safety of staff and the security of the institution.

[44] C. Blanchette also pointed out that according to the document, the post is very vulnerable to confrontation because of the large number of inmates usually present in the area. She reasoned that it made no sense to change the post orders of the A-27 without conducting a risk assessment.

[45] C. Blanchette alleged that:

- Inmates knew where the blind spots of the camera coverage were.
- In case of planned or even spontaneous attack from inmates, the CO may not be able to activate the PPAS.

[46] In addition, C. Blanchette argued that the health and safety officer's reasoning that the possibility of assault by an inmate was an inherent part or normal condition of a Correctional Officer's job was wrong.

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[6] *Juan Verville and Service Correctionnel du Canada, Institution Pénitentiaire de Kent*, 2004 FC 767, May 26, 2004.

[47] With regard to that last argument, C. Blanchette referred to paragraphs 52 and 55 of *Juan Verville, supra,* to argue that because C. Glaister's job was modified to include the added responsibility of doing rounds alone in the gym, the job was no longer the same and it was no longer a normal condition of work.

Respondent's arguments

[48] Referring to paragraph 13 of Appeals Officer (AO) Serge Cadieux's decision in *Darren Welbourne*[7], H. Newman argued that an Appeals Officer's role is not to carry out a new investigation, but to begin with and build on the health and safety officer's initial investigation and report.

[49] H. Newman contended as well that the test to determine the presence of danger was set in paragraph 38 of AO Cadieux's decision in *Jack Stone*[8], which states that:

- a hazard or condition will come into being or the future activity in question will take place;
- an employee will be exposed to the hazard or condition or activity when it occurs; and
- there is a reasonable expectation that:

  the hazard or activity will cause injury or illness to the employee exposed thereto; and,

  the injury or illness will occur immediately upon exposure to the hazard or activity.

[50] H. Newman argued that violence is a normal condition of employment for a person working in a correctional institution, as Appeals Officer Cadieux stated in *Jack Stone, supra*. He claimed that the risks are mitigated by the numerous controls and security policies and procedures put in place by CSC.

[51] H. Newman argued as well that it must be demonstrated that the facts are sufficiently compelling to establish that there is a real or potential danger and that the risk surpasses the level of a normal condition of employment, as AO Michèle Beauchamp stated in paragraph 68 of her *Paul Chamard*[9] decision.

[52] H. Newman indicated that according to the HSO's report, there was no intelligence on the day of the refusal to indicate that anything unusual was occurring on the institution. The gym was locked, there was a security camera in place and the CO was equipped with a radio and a portable alarm.

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[7] *Darren Welbourne and Canadian Pacific Railway Company*, Appeals Officer S. Cadieux Decision No. 01-008, March 22, 2001.

[8] *Mr. Jack Stone and Correctional Service Canada*, Appeals Officer S. Cadieux Decision No. 02-019, December 6, 2002.

[9] *Paul Chamard and Simon Ruel and Correctional Service Canada, Donnacona Institution*, Appeals Officer M. Beauchamp Decision No. 05-004, January 20, 2005.

[53] H. Newman argued that the HSO's report showed that the A-27 post has always been filled by only one CO, who conducted rounds in the A-27 corridor but not in the gymnasium. The supervision of the gym was done by four SPOs, who, as indicated by D. Noon-Ward, are not Correctional Officers.

[54] H. Newman also pointed out that the employer believes that the possibility of an inmate assaulting a Correctional Officer working alone has been minimized with the equipment given to the CO (PPAS, radio, phone access) and the amended post orders (communicating with MCCP). Any concern about danger was merely and clearly speculative and hypothetical.

[55] H. Newman indicated as well that as testified by C. Chen, a new mobile camera had been installed in the gym after the work refusal occurred.

[56] Referring to paragraph 138 of AO Cadieux's decision in *Brent Johnstone*[10] and to paragraph 40 of AO Katia Néron's decision in *Waldin Williams*[11], H. Newman argued that even if there is a finding of danger, no direction pursuant to subsection 145(2) of the Code should be issued if it serves no practical effect.

[57] Finally, H. Newman indicated that in any event, since the appellant, CO Glaister, has changed position within the institution, she is not required to do rounds in the A-27 and gym area. Therefore, it would not be appropriate for me to issue a direction, even if I found that the decision of absence of danger rendered by HSO Lum should be rescinded.

Applicant's rebuttal

[58] In her rebuttal of H. Newman's response to her arguments, C. Blanchette argued that an appeal before the Appeals Officer is *de novo*, as stated by Federal Court Justice Rothstein in paragraph 28 of his decision in *Douglas Martin*[12].

[59] C. Blanchette disagrees as well with H. Newman's reference to Appeals Officer Cadieux's decision in *Jack Stone, supra,* about the three point test formula used in the past by Appeals Officers. Referring to Justice Gauthier's decision in *Juan Verville, supra*, she argued that this test was flawed and that it had been replaced by Justice Gauthier's statement in paragraph 36 of that decision, to the effect that

> the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.

[60] C. Blanchette contends as well that according to paragraphs 52 to 55 of *Juan Verville, supra*, the Courts do not accept Appeals Officer Cadieux's analysis that violence is a normal condition of employment for a person working in a medium security penitentiary.

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[10] *Brent Johnstone et al and Correctional Service Canada, Atlantic Institution*, Appeals Officer S. Cadieux Decision No. 05-020, May 3, 2005.
[11] *Waldin Williams and Airport Group Canada Inc*., Appeals Officer K. Néron Decision No. 05-031, July 8, 2005.
[12] *Douglas Martin et al v. Attorney General of Canada*, FCA 156, May 6, 2005.

[61] As well, C. Blanchette noted that in paragraphs 33 and 35 of *Douglas Martin, supra*, the Court disagreed with Appeals Officer Cadieux, because he did not explain why additional mitigating measures would not reduce the risk of injury further.

[62] C. Blanchette stated that C. Glaister's refusal was based on her concern of being assaulted during the evening shift while doing rounds alone, in the gym, away from any other officers. She believes that it is only logical to conclude that a female Correctional Officer doing rounds alone in the gym, on an evening shift, is at greater risk of injury than if she was paired up with a partner.

Analysis and decision

[63] The issue to be decided in the present case is whether danger, as defined in the *Canada Labour Code*, Part II (the *Code*), existed for C. Glaister. To decide this issue, I must refer to the definition of danger established in subsection 122.1 of the *Code*, as well as to the facts and circumstances of the case and the jurisprudence cited by parties.

[64] With regard to the *de novo* issue raised by H. Newman, Honourable Justice Rothstein clearly stated, in paragraph 28 of *Douglas Martin*, *supra*, that

> [a]n appeal before an appeals officer is de novo.

[65] Therefore, an appeal before the Appeals Officer being a *de novo* proceeding, this allows me to review the matter anew and to receive, in addition to the evidence gathered by the HSO, any evidence that the parties may submit, whether or not it was or could have been available to the HSO conducting the investigation.

[66] On the subject of the applicable test to establish the presence of a danger, I agree with C. Blanchette that Honourable Justice Gauthier redefined the test that one must apply when determining if there is an existing or potential danger.

[67] To this effect, Justice Gauthier stated in paragraph 36 of *Juan Verville*, *supra*, that for a finding of danger, one must ascertain in what circumstances the potential hazard or condition or future activity could reasonably be expected to cause injury or illness to any person and to determine that such circumstances will occur in the future as a reasonable possibility, as opposed to a mere possibility. She wrote:

> [36] In that respect, I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in Martin above, particularly paragraph 57, to require evidence of a precise time frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.
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> [My underline]

[68] Regarding a potential or future activity; Honourable Justice Gauthier clarified in paragraph 32 of *Juan Verville*, *supra*, that

> [w]ith the addition of words such as "potential" or "éventuel" and future activity, the Code is no longer limited to specific factual situations existing at the time the employee refuses to work.

[69] More recently, the Federal Court of Appeal commented on this in the *Douglas Martin, supra*, decision. Honourable Justice Rothstein stated in paragraph 37 that for a finding of danger, the determination to be made is whether it is more likely than not that what the applicant is asserting will take place in the future. Justice Rothstein wrote:

> [37] I agree that a finding of danger cannot be based on speculation or hypothesis. However, when attempting to ascertain whether a potential hazard or future activity could reasonably be expected to cause injury before the hazard could be corrected or the activity altered, one is necessarily dealing with the future. Tribunals are regularly required to infer from past and present circumstances what is expected to transpire in the future. The task of the tribunal in such cases is to weigh the evidence to determine whether it is more likely than not that what an applicant is asserting will take place in the future.
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> [My underline]

[70] The *Canada Labour Code*, Part II, defines danger in subsection 122(1), as follows:

> "danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system[.]

[71] Keeping in mind the above noted Code provision and the findings of the Courts, I am of the opinion that a danger exists when there are circumstances in which an existing or potential hazard, condition or activity could reasonably be expected to cause injury or illness to any person exposed thereto before the hazard, condition or activity can be corrected or altered, when the circumstances will occur in the future **as a reasonable possibility** as opposed to a mere possibility or a high probability, and when the employer fails, to the extent reasonably practicable, to:

1. eliminate a hazard, condition, or activity;
2. control a hazard, condition or activity within safe limits; or
3. ensure employees are personally protected from the hazard, condition or activity.

[72] In the present case, C. Glaister refused to execute her work because she feared being assaulted while doing rounds alone, in the gym, away from any other officers. This came about because her work orders had been modified.

[73] The new work orders were that she was now to conduct hourly rounds in the gymnasium, on weekends, with no other correctional personnel present at the time in the gymnasium or the A-27 corridor. Before this, she conducted rounds in the gymnasium while there were Social Program Officers present in the gym. When no SPO was there, the gym was locked and the inmates did not have access to it.

[74] I noted that the respondent did not provide evidence to disprove the testimony of C. Glaister to the effect that even though SPOs are not Correctional Officers, the COs relied on them for assistance in case of an emergency and as some kind of support in the presence of inmates. C. Glaister testified that when a CO works alone in an area, the inmates have a tendency to defy authority, especially that of female COs. Having an SPO present in the gym alleviates this.

[75] I retain as well that C. Glaister testified and presented five reports of assaults on inmates and COs that occurred in the last five year.

[76] I take into account as well that Security Intelligence Officer Duval testified that assaults to staff were very infrequent, perhaps twice a year, and generally not severe.

[77] A. Duval also indicated that she did not recall any assault on COs in the gym since 2001. She pointed out however that an inmate had been assaulted by another inmate a short while before, but no serious injury resulted from this.

[78] Nonetheless, based on this past history, I find that it is neither speculative nor hypothetical to believe that a potential hazard, taking the form of an assault, can occur on COs or inmates.

[79] Having determined that a potential hazard exists, *i.e.* that there is a reasonable possibility that an assault on a CO will occur in the future, is it reasonable to expect that the assault will cause injury before the hazard can be corrected or the activity altered?

[80] An injury does not necessarily have to take the form of a disabling injury to be considered as a valid argument that a danger exists. The *Webster Dictionary*[13] defines injury as an act that damages or hurts. It is easy to believe that any altercation with an inmate can easily result in an injury. Consequently, I find that it is reasonable to conclude that an assault by an inmate on a Correctional Officer can cause injury or illness to the said officer before the assault can be stopped.

[81] To completely eliminate the risk of assault is unthinkable in the present circumstances. The only way to totally eliminate the risk would be to completely segregate the inmates from the COs so that no physical contact would be possible between them. As C. Blanchette pointed out, Mission Institution is a medium-security prison, where the environment is very open as there are no barriers between staff and inmates.

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[13] *Merriam Webster's Collegiate Dictionary*, Tenth Edition, 1996.

[82] However, control measures should be in place to bring the hazard within safe limits.

[83] Assistant Warden T. Hackett testified that when the decision was taken to change the work orders of the A-27 post, he took into consideration the history of incidents that occurred in the gym in the past and consulted with the Union President.

[84] T. Hackett believed that while this was adding to the duties of the A-27 CO, it was not an unmanageable responsibility. In his mind, there was no added risk other than that of the regular inherent risk of working in a penitentiary.

[85] In order to determine if an employer has taken the necessary steps to mitigate a risk, one needs first to properly assess the risks, as stated by Madam Justice Gauthier in the *Juan Verville* decision, *supra*. She wrote:

> (60) The Court notes that in its written argument, the respondent said that the finding at paragraph 21 was of major importance. I agree with the respondent's initial position because as is clearly indicated by the appeal officer at paragraph 24, in order to determine if an employer has taken the necessary steps to mitigate the risk, one needs first to properly assess that risk.
>
> [My underline]

[86] C. Blanchette pointed out that the draft risk assessment for the A-27 post that was submitted during testimony was not disputed by management. However, even though the assessment indicated concerns raised by senior managers, they were not taken into consideration when the new orders were decided upon.

[87] One of the concerns raised was that empirical data supported the potential for serious risk to staff should an incident occur in this area.

[88] Even though this risk assessment was dismissed by H. Newman as an undated, unsigned and, therefore, unreliable document, it still represents an indication that a high level of risk existed at the time in the A-27 control post. Furthermore, this risk assessment did not take into consideration the added duty of conducting rounds in the gym.

[89] How did Mr. Hackett arrive at the conclusion that while this was adding to the duties of the A-27 CO, it was not an unmanageable responsibility? How could he determine that there was no added risk other than that of the regular inherent risk of working in a penitentiary? Nothing was said or presented on this other than that he believed that there was no added risk.

[90] H. Newman indicated that, in addition to the measures in place, the CO now working in the A-27 post must inform the officer in the Main Communication and Control Post whenever he is going to do his rounds in the gym. This will ensure that the CO is under observation while doing his round in the gym.

[91] However, as testified by D. Noon-Ward, who works in the MCCP, and as evidenced by the 10-page post orders on the MCCP, the MCCP operator must watch seven monitors as well as respond to the Perimetric Intrusion Detection System and answer the telephone and the switchboard on evening and weekends. There is no time to just sit and stare at the monitor that covers the gymnasium.

[92] Also, D. Noon-Ward testified that with everything that was happening in the Control Post, it was difficult to follow the CO on the monitors when he or she was in the gym or to estimate how much time had elapsed since the CO could not be seen on the monitors. Therefore, a considerable amount of time could elapse before one realizes that a CO cannot be seen on the monitor.

[93] Furthermore, D. Noon-Ward stated that the response time to an emergency call in the gymnasium was three to four minutes, compared to 30 or 40 seconds in other areas of the institution.

[94] In addition, D. Noon-Ward's testimony clearly showed that even with the new directive in place, COs do not always inform him when they are going into the gym. This is especially true in the case of the replacement COs at meal time.

[95] H. Newman indicated that COs also have all the necessary means to protect themselves, *i.e*. a radio and a Personal Portable Alarm System, and have access to telephones throughout the building. In addition, they are fully trained to deal with threats and assaults.

[96] C. Blanchette presented arguments to the effect that no phones are readily available, as they are locked in the gym's offices.

[97] With regard to the PPAS, C. Glaister testified that it only identifies the PPAS number, not the location of the person using it. As a result, finding the CO who activates the system in a place as large as the gym, with offices to be checked, could take an unreasonable amount of time. As well, one must take into consideration that the CO may not have enough time to activate the PPAS or may be prevented from activating the PPA.

[98] C. Blanchette argued that in no other area of the institution is an officer expected to do rounds unaccompanied, let alone in an area where the CO may be exposed to up to 60 inmates at the same time. Even in the yard post, the mobile (car) watches the officer doing the round and there are not even any inmates in the area during the rounds. In all the other positions, the COs work in pair, even in the segregation unit, where the inmates are locked up.

[99] In addition, the COs testified that the presence of a lone female Correctional Officer doing rounds amongst inmate, during the evening, in the gym, without any other correctional personal present, increases the risk of assault drastically.

[100] I have no reason not to rely on the experience of the Correctional Officers who testified that the current measures in place are insufficient and that the hazard of being assaulted can be mitigated further.

[101] When an employer changes the conditions of employment by significantly modifying the responsibilities of an employee, those controls, security policies and procedures must be reviewed through a job hazard analysis, to determine if any new hazards can be identified, if the measures in place can adequately respond to those new hazards or if new measures will need to be put into effect.

[102] Implementing a modification without doing so exposes the employees to a potential hazard for which there may be no procedures to deal with.

[103] H. Newman pointed out that "working in a medium security penitentiary is by the very nature of that environment a higher risk environment than most work places." In my view, the more hazardous a work environment, the more reason to conduct a risk assessment before making any changes to the work practices or procedures.

[104] Other than the draft threat-risk assessment that was submitted by the appellant, the employer provided no other risk assessment to indicate that the current controls and security policies and procedures in place were sufficient to protect the health and safety of the Correctional Officer.

[105] H. Newman also argued that exposure to violence is a normal condition of employment for a person working in a penitentiary.

[106] I find that before the employer can make such a statement, each and every hazard, existing or potential, must be identified and, in accordance with sections 122.1 and 122.2 of the Code, safety measures must then be put in place to eliminate the hazard, condition, or activity; if it cannot be eliminated, to develop measures to reduce and control the hazard, condition or activity within safe limits; and, finally, if the existing or potential hazard still remains, to make sure that employees are provided with the necessary personal protective equipment, clothing, devices and materials against the hazard, condition or activity.

[107] If all these steps have been followed and all the safety measures are in place, the "residual" hazard that remains constitutes what is referred to as the normal condition of employment. If any change is brought to this normal employment condition, a new analysis of that change must take place in conjunction with the normal working conditions.

[108] Evidence showed that Correctional Officers were physically assaulted in the past, as well as in the present, in Mountain Institution, in Agassiz, B. C., including a female officer, therefore removing the hypothetical and speculative element of the issue.

[109] H. Newman did not convince me that the controls and security policies and procedures put in place by CSC, including the new mobile camera, were sufficient to mitigate the potential danger of working alone in the A-27 post, especially in the gymnasium.

[110] I am satisfied that the conditions reported by Correctional Officer Glaister constitute a danger as defined in the Code. As stated by Madam Justice Gauthier in paragraph 51 of *Juan Verville, supra*:

> [51] Finally, the Court notes that there is more than one way to establish that one can reasonably expect a situation to cause injury. One does not necessarily need to have proof that an officer was injured in exactly the same circumstances. A reasonable expectation could be based on expert opinions or even on opinions of ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form the opinion. It could even be established through an inference arising logically or reasonably from known facts.
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> (My underline)

[111] Consequently, for all the above reasons, I am rescinding the decision of absence of danger rendered by HSO Lum with regard to the work refusal made by Correctional Officer Crystal Glaister on November 14, 2004, pursuant to paragraph 146.1(1)(*a)* of the Code, which reads:

> 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
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> (*b*) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

[112] Normally, subsection 145(2) of the Code comes into effect where a situation of danger exists in the work place. This provision reads:

> 145(2)(*a*) If a health and safety officer 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,
>
> (*a*) he officer 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 officer specifies, to take measures to
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> i. correct the hazard or condition or alter the activity that constitutes the danger, or
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> ii. to protect any person from the danger; and
>
> (*b*) the officer may, if the officer 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 or thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the officer's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.

[113] However, because more than two years have passed since C. Glaister's work refusal and since the CO has moved to other functions and does not work at the A-27 post anymore,

to order the employer to protect that refusing employee via a direction would serve no practical purpose. Consequently, it would not be appropriate to issue a direction to the employer in the present case, since the person in question no longer performs the work that she refused to do at the time.

[114] In *obiter,* I will however remind the employer that he should be in compliance with paragraphs 125(1)(*z*.03) and (*z*.04) of the Code. They read:

> 125(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,
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> (*z*.03) develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a prescribed program for the prevention of hazards in the work place appropriate to its size and the nature of the hazards in it that also provides for the education of employees in health and safety matters;
>
> (*z*.04) where the program referred to in subparagraph (*z*.03) does not cover certain hazards unique to a work place, develop, implement and monitor, in consultation with the work place committee or the health and safety representative, a prescribed program for the prevention of those hazards that also provides for the education of employees in health and safety matters related to those hazards [.]

[115] The employer should also be reminded and aware that Part XIX of the *Canada Occupational Health and Safety Regulations, Hazard Prevention Program,* has been in effect since November 28, 2005. Section 19.1 stipulates the components of the required prevention program. It reads:

> 19.1 (1) The employer shall, in consultation with and with the participation of the policy committee, or, if there is no policy committee, the work place committee or the health and safety representative, develop, implement and monitor a program for the prevention of hazards in the work place that is appropriate to the size of the work place and the nature of the hazards and that includes the following components:
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> *(a)* an implementation plan;
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> *(b)* a hazard identification and assessment methodology;
>
> *(c)* hazard identification and assessment;
>
> *(d)* preventive measures;
>
> *(e)* employee education; and
>
> *(f)* a program evaluation.

> (2) Subsection (1) applies in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity.

[116] I will leave it to the Labour Program to verify the employer's compliance with these provisions.

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Richard Lafrance
Appeals Officer

Jurisprudence cited by parties

Darren Welbourne and Canadian Pacific Railway Company, Appeals Officer Serge Cadieux Decision No. 01-008, March 22, 2001

Mr. Jack Stone and Correctional Service Canada, Appeals Officer Serge Cadieux Decision No. 02-019, December 6, 2002

Juan Verville and Service Correctionnel du Canada, Institution Pénitentiaire de Kent, 2004 FC 767, May 26, 2004

Douglas Martin et al v. Attorney General of Canada, FCA 156, May 6, 2005

Brent Johnstone et al and Correctional Service Canada, Atlantic Institution, Appeals Officer Serge Cadieux Decision No. 05-020, May 3, 2005

Correctional Service Canada and John Carpenter – UCCO/SAAC/CSN, Appeals Officer Michèle Beauchamp Decision No. 05-012, March 30, 2005

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Waldin Williams and Airport Group Canada Inc., Appeals Officer Katia Néron Decision No. 05-031, July 8, 2005

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Paul Chamard and Simon Ruel and Correctional Service Canada, Donnacona Institution, Appeals Officer Michèle Beauchamp Decision No. 05-004, January 20, 2005

Summary of Appeals Officer's Decision

Decision: CAO-07-008

Appellant: Crystal Glaister

Respondent: Correctional Service Canada

Provisions: *Canada Labour Code*, 129(7), 145(2), 122.1, 122.2, 122(1), 146.1(1)(a), 145(2), 125(a)(z.03)(z.04),
Canada Occupational Health and Safety Regulations, 19.1

Keywords: Correctional Officer, gymnasium, post A-27, absence of danger, alone, assaulted, rescind, direction.

Summary:

On November 16, 2007, a Correctional Officer (CO) refused to work because she felt unsafe to supervise the gym and the A-27 post at the same time.

The health and safety officer who investigated the refusal to work decided that a danger did not exist at the time of her investigation.

The Appeal Officer rescinded the decision from the health and safety officer. However, since the CO has moved to other functions and does not work at the A-27 post anymore, he did not issue a direction to the employer.