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

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Case No.: 2005-47
Decision No.: CAO-07-018

Canada Labour Code
Part II
Occupational Health and Safety

Howard Page
Correctional Officer,
appellant

and

Correctional Service Canada
Millhaven Institution
respondent

May 25, 2007

This case was heard by Appeals Officer Richard Lafrance, in Kingston, Ontario on May 25, 2006.

Appearances

For the appellant

Michel Bouchard, Union Advisor, Confédération des Syndicats Nationaux, (CSN) Ontario
Corinne Blanchette, Union Advisor, CSN

For the respondent

Richard E. Fader, Counsel, Treasury Board Secretariat, Legal Services

[1] This case concerns an appeal against a decision rendered by health and safety officer (HSO) B. Tomlin, under Section 128 of the *Canada Labour Code* (the *Code*), regarding his investigation of a work refusal by H. Page employed as a Correctional Officer (CO) by Correctional Service of Canada, Millhaven Institution (CSC).

[2] I retain the following from the investigation report and testimony of HSO Tomlin.

[3] HSO Tomlin was called on October 17th, 2005 at about 11:30pm to investigate a continued work refusal by H. Page.

[4] HSO Tomlin testified that in a 20 to 30 minutes telephone conversation, he spoke to H. Page as well as K. Hinch, Acting Assistant Warden, Correctional Programs, Millhaven Institution, individually. He did not believe that he had them on line simultaneously. In

fact he did not remember if both parties were in the presence of each other when he spoke with them. As the query was conducted by telephone, he did not obtain a written record of the refusal to work.

[5] However HSO Tomlin noted in his report that H. Page told him that he refused to work because he had to spend the entire night shift walking the range[1] where second-hand smoke was present and that this would expose him to second hand smoke in the workplace and this presented a danger to his health.

[6] HSO Tomlin noted as well that K. Hinch stated that: "The employee was required to walk the range during his shift with another Correctional Officer. After he refused to work no other officer that was approached would perform the function. Being exposed to second hand smoke is, at this time, a normal condition of employment for a Correctional Officer that works on the range and it is essential to complete the duties of the I.C. to assist in the overall safety of the institution."

[7] HSO Tomlin noted the following facts in his report:

- The Officer is trained to Correctional Service of Canada Standards.
- Inmates are allowed to smoke in their cells and very often do so till late in the morning shift.
- The Officer would be in an environment where he would probably be exposed to second hand smoke over most of his shift.

[8] HSO Tomlin explained that on a previous assignment at Millhaven Institution, where he had conducted smoke tube test to determine the flow of ventilation, he had established that air from some of the cells could seep out to the range. Therefore he knew that if an inmate smoked in those cells, the smoke could escape to the range and therefore expose anyone who was on the range to second hand smoke.

[9] HSO Tomlin finally rendered a decision on October 19th, 2005, and I quote:

> "The employer could not find another officer to perform the work the refusing employee was scheduled to do because all Officers approached also refused. The fact that every Officer that was approached to perform the activity was also evoking their right to refuse placed the life, health or safety of another person, inmates and employees included in danger. The Officers provided a level of safety and security for each other and for the inmates. The institution still requires these necessary functions to be performed and that Officers cannot continue to refuse to work that jeopardize the completion of these tasks. **Therefore I determine that a refusal is not permitted under Section 128 (2)(a)(b).**"

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[1] Hallway and row of prisoner cells: Correctional administration vocabulary, Ottawa : Public Works and Government Services

[10] In cross examination by M. Bouchard, HSO Tomlin could not explain or describe any actual danger that could result from having only one CO walk the range at that time of day, with all the inmates locked up in their cells for the night.

[11] Upon questioning by M. Bouchard, HSO Tomlin admitted that to his knowledge there were no special conditions on that night that may pre-empt any particular perturbing activities from the inmates.

[12] The appellant, H. Page testified that he refused to work because he believed that exposure to second hand smoke was a danger to his health.

[13] H. Page confirmed that he had told the employer and HSO Tomlin that he was refusing to do the routine walk on the range, because he could smell second hand smoke on the range. However, he also told them that he would respond to emergencies, if any occurred.

Appellant’s arguments

[14] C. Blanchette argued that HSO Tomlin accepted the employer’s arguments at face value that it was a security issue and that two COs were required to do this work. She argued that he accepted this without verifying with the concerned employee.

[15] She contended that he accepted this even though the refusing employee had told him that he would go on the range if an emergency occurred.

[16] C. Blanchette argued that because HSO Tomlin conducted his investigation by telephone, he was not provided with all the facts. Therefore, the decision should be rescinded because he did not have sufficient information to determine if there were dangerous circumstances that would put the life, health or safety of other persons directly in danger, as per subsection 128.(2) (*a*)(*b*) of the Code.

Respondent’s arguments

[17] R. Fader, Counsel for CSC, asserted that the employees believed that the employer has the ability to remove people from posts and carry on as if nothing happened. In fact, removing the CO from his post would have jeopardized the security of the institution. The decision of health and safety officer was the correct one under the circumstances.

Appellant’s rebuttal

[18] C. Blanchette’s rebuttal was that the employer did not demonstrate the need for having two COs present at that time. In fact, everything was normal in the institution that night, with all the inmates locked up in their cells. In addition, the refusing employee had already indicated that in case of an emergency he would respond and go on the range to perform his normal CO duties and therefore would not put the health and safety of others in danger. In conclusion, she reiterated that the HSO’s decision should be rescinded.

Analysis and decision

[19] The issue in this case is whether or not HSO Tomlin conducted an investigation in accordance with the Code and whether or not failure to do so constituted sufficient reason to justify rescinding or varying his decision that a danger did not exist for H. Page.

[20] In this case, H. Page exercised his right to refuse to work on October 17, 2005 around 22:30 pursuant to section 128 of the Code, which states:

> **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
>
> (a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee, or
>
> (b) a condition exists in the place that constitutes a danger to the employee, or
>
> (c) the performance of the activity by the employee constitutes a danger to the employee or to another employee.

[21] The employer called for a health and safety officer to investigate the continued work refusal as per subsection 128.(13) of the Code.

> 128. (13) If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. <u>On being informed of the continued refusal, the employer shall notify a health and safety officer.</u>
>
> (my underline)

[22] HSO Tomlin testified that upon being informed of the work refusal he contacted CSC by phone and conducted his investigation by telephone in a 20 to 30 minute conversation with the employer. He could not remember however if the employee was present while he spoke with the employer. Furthermore, there was no mention about the required presence of a member of the health and safety committee.

[23] Subsection 129.(1) of the Code states :

> 129. (1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13) <u>the health and safety officer shall without delay investigate or cause another health and safety officer to investigate the matter in the presence of the employer, the employee and one other person</u> who is
>
> (a) an employee member of the work place committee;
>
> (b) the health and safety representative; or

> (c) if a person mentioned in paragraph (a) or (b) is not available, another employee from the work place who is designated by the employee.
>
> (my underline)

[24] Subsection 129. (4) of the Code states

> 129.(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.
>
> (my underline)

[25] In both Subsections 129.(1) and (4), the word used to describe the obligation of the HSO to do something is "shall" which is defined in the *Dictionary of Canadian Law*[2]:

> Shall. v. 1. Is to be construed as imperative.
>
> 2. Parliament when it used the word "shall" in s. 23 of the Manitoba Act, 1870, and 133 of the Constitutional Act, 1867 [(30 & 31 Vict.), c, 3] intended that those sections be construed as mandatory or imperative, in the sense that they must be obeyed, unless such an interpretation of the word "shall" would be utterly inconsistent with the context in which it has been used and would render the section irrational or meaningless.

[26] I regard this to mean that once a health and safety officer is seized with the investigation of a work refusal, he has no choice but to;

- investigate the work refusal in the "presence" of the employee and the other persons required by the Code, and
- he shall upon completing his investigation decide if the danger exists or not.

[27] Mr. Justice Mahoney of the Federal Court of Appeal commented in the case of *Darrel Dragseth et al and Her majesty in right of Canada as represented by Treasury Board* (F.C.A. no-A-937-90) relative to the mandatory nature of subsection 129(1). In that case, which also involved Correctional Service employees, no investigation had been conducted following a work refusal, the employer arguing that "no inspection by a safety officer was required because the employees were no longer refusing to work". Describing this argument as "fatuous", Mr. Justice Mahoney commented very briefly as follows:

> In any event, s.129(1) is mandatory. The safety officer is bound to investigate if either employer or employee serves notice under s. 128(8).

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[2] The Dictionary of Canadian Law, Third Edition, Thomson- Carswell, 2004

[28] It is worth noting that Mr. Justice Mahoney did not qualify the mandatory nature of the provision, and thus, I conclude that all of the elements of that provision are mandatory. Furthermore, while this matter may have been decided pursuant to the Code as it was prior to the September 2000 amendments to the legislation, there is no reason to put a different interpretation on this statutory obligation, as that subsection, 129(1), remained unchanged following those September 2000 amendments to Part II of the Code.

[29] I am satisfied that the Code places an obligation on health and safety officers to attend the place where the employee has refused to work, and conduct an investigation in the presence of the required persons to preserve both the integrity and the usefulness of the refusal process. Such presence will enable the HSO to base his or her decision on objective facts and to make a timely decision.

[30] The word investigate is defined in the Canadian Oxford Dictionary, second edition 2005, as

> "investigate: 1) inquire into; examine; study carefully. 2) make a systematic inquiry or search"

[31] There is no evidence that what occurred in a 20 to 30 minute telephone conversation can qualify as an investigation.

[32] One can conceive exceptional circumstances that may arise where it would be physically impossible for a health and safety officer to conduct an investigation in accordance with subsection 129(1), in the presence of the parties to the refusal. In my opinion however, the circumstances that prevailed in the present case, as briefly described by the health and safety officer, were not of that nature.

[33] If such circumstances arose, which was not the case here, it is reasonable to expect that, as a minimum, the HSO would communicate simultaneously with all the required persons in a manner that the health and safety officer could positively identify participants. This would enable the HSO to obtain evidence from all the concerned persons and corroborate the information and evidence with the affected persons.

[34] It is clear from the testimony of HSO Tomlin that this did not occur.

[35] As a result; I find that the investigation was flawed from the beginning and that HSO Tomlin could not, therefore, render a decision based on a properly conducted investigation.

[36] That stated, H. Page was advised at the opening of the hearing that the Appeals Officer review is *de novo* in nature and, as such, I could receive any evidence that he wished to put before me regarding his contention that a danger existed for him in the work place. However, H. Page did not provide any evidence whatsoever to support his contention that a danger existed for him.

[37] Consequently, for the reasons stated above, I hereby rescind the decision that health and safety officer Tomlin rendered on October 19, 2005.

Richard Lafrance
Appeals Officer

Summary of Appeals Officer's Decision

Decision: CAO-07-018

Appellant: Howard Page

Respondent: Correctional Service Canada

Provisions: *Canada Labour Code*, 128, 128 (2)(a)(b), 128.(13), 129.(1), 129.(4)

Keywords: Second hand smoke, exposure, rescinded

Summary:

On October 17, 2005, Howard Page, a correctional officer, refused to work because he believed that a danger existed for him as he was exposed to second hand smoke while walking the range. On October 19, 2005 health and safety officer Bob Tomlin (HSO Tomlin) rendered a decision on the continued work refusal of Mr. Page determining that a refusal to work was not permitted under Section 128 (2)(a)(b). Due to the fact that HSO Tomlin did not go to the work site and conduct his investigation, the Appeals Officer found that the HSO could not render a decision based on a properly conducted investigation. Furthermore, the appellant did not provide any evidence whatsoever to support his contention that a danger existed. Therefore the Appeals Officer rescinded HSO Tomlin's decision.