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

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Case No.: 2006-65

Interlocutory decisions
Preliminary objection: CAO-07-026 (A)

Canada Labour Code
Part II
Occupational Health and Safety

Ryan Lelonde
appellant

and

Correctional Service Canada
Pacific Institution
respondent

August 10, 2007

This case was decided by Appeals Officer Douglas Malanka, based on written submissions. (Written submissions received between May 15, 2007 and June 8, 2007)

For the appellant
Corinne Blanchette, Union Advisor, Union of Canadian Correctional Officers (UCCO-SACC-CSN)

For the respondent
Simon Kamel, Counsel for the respondent, Department of Justice Canada, Treasury Board Legal Services.

[1] On December 18, 2006, Ryan Lelonde, a Correctional Officer (CO) employed by Correctional Service Canada at the Pacific Institution, refused to work pursuant to section 128 of the *Canada Labour Code* (the *Code*). Specifically, CO Lelonde refused to escort with another Correctional Officer a particular inmate from the Pacific Corrections Institution to the Vancouver General Hospital for medical treatment. CO Lelonde complained that it was unsafe to conduct that escort without being equipped with sidearm.

[2] Following the employer's joint investigation of CO Lelonde's refusal to work with a member of the health and safety committee, the employer concluded that a danger did not exist for CO Lelonde. CO Lelonde disagreed and continued to refuse to work. The employer immediately advised a health and safety officer at HRSDC of the continued refusal to work.

[3] Health and safety officer (HSO) Melinda Lum investigated into CO Lelonde's refusal to work the next day, December 19, 2006. At the conclusion of her investigation, she concluded that the danger alleged by CO Lelonde did not exist. CO Lelonde appealed the decision of HSO Lum to an appeals officer pursuant to subsection 129(7) of the Code on December 22, 2006, within the ten days prescribed in the Code.

[4] A case management meeting was held by telephone on May 3, 2007. At that time, Simon Kamel, Counsel for Correctional Services Canada, submitted a preliminary objection to proceeding on the merits of the appeal because the question of the appeal submitted by CO Lelonde is moot.

[5] Simon Kamel wrote on May 14, 2007, that since the time of the refusal to work by CO Lelonde, the Warden has decided that future medical escorts for this inmate would be armed. The Respondents submitted that the issue is, therefore, moot and that there is no reason to decide the issue in the abstract. The Respondents submitted that the appeal should be dismissed on the basis of mootness.

[6] In support of the submission, Simon Kamel cited Justice Sopinka in *Borowski v. Canada (Attorney General)*, 1989, 1 S.C.R. 342 at 353:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question…if, subsequent to the initiation or the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.

[7] Simon Kamel stated that, according to the above noted decision, the doctrine of mootness is underpinned by the rationale that: i) the issue will not be well and fully argued by one or more of the parties given its prior resolution; ii) scarce judicial resources should be applied to the resolution of live disputes, not moot ones; and iii) courts or arbitrators should not intrude into the role of the legislative branch of government by deciding issues in the abstract.

[8] Simon Kamel noted that Justice Sopinka had allowed in his decision that where there is no longer a live controversy between the parties, a court may nevertheless, in very narrow circumstances, exercise it's discretion to hear the case where the case raises an issue of significant public concern or that the situation is likely to recur in future and there will likely always be impediments to a timely hearing on the issue before it becomes moot.

[9] Simon Kamel held that there is no longer a live controversy to be decided in this case, the issue is clearly not one of significant public concern and there is no indication that there will likely always be impediments to a timely hearing in future incidents of this type. He added that this is a very fact specific decision to make in consideration of the risks surrounding a particular inmate and it would be inappropriate to give any consideration to, or make any declaration on the arming of escorts in the abstract.

[10] Corinne Blanchette representing the Appellant, Ryan Lelonde, responded that the employer's objection was groundless, and that the principles in *Borowski v. Canada (Attorney General)*, *supra,* had no useful application in the present case because the

appellant's standing in that case relied on provisions of the *Criminal Code* that were already revoked. She held that there is a live dispute in this case, i.e., an appeal brought under subsection 129(7) of the *Canada Labour Code* against a decision of no danger rendered by a health and safety officer. According to Corinne Blanchette, the issue to be determined by the appeals officer is whether or not a danger existed. In this regard, she noted that the definition of danger was amended in 2000.

[11] Simon Kamel responded that the Union's response confirms that they wish to revisit the health and safety officer's interpretation of the term "danger" under the Code, as opposed to whether or not an unarmed escort transporting Inmate X constitutes a danger under the Code. He held that this matter is no longer about the factual situation that existed at the time of HSO Lum's investigation of CO Lelonde's refusal to work.

[12] Simon Kamel added that he did not see the relevance of Union's argument against HSO Lum's view that "working in an environment where individuals have the potential to become violent or the possibility of escape during an escort is an inherent part of the Correctional Officer's job."

[13] Simon Kamel reiterated that there is no "live" issue and hearing this case is not the best use of already scarce resources available to the Appeals Office as the appeals officer could only render a theoretical decision on danger. He added that role of the appeals officer is not to review the employer's policy on whether or not to arm the escorts of offenders. In this respect he referred to Canada (Attorney General) v. Fletcher (C.A.), A-653-00 and asked that the present matter should be dismissed based on the doctrine of mootness.

[14] Simon Kamel essentially argued that there is no "live" issue because the Warden has conceded to do what the employee was requesting when he refused to work. Specifically, the Warden decided that future medical escorts for Inmate X would be armed.

[15] Corinne Blanchette essentially argued that, notwithstanding the Warden's concession, there is a live dispute in this case which is whether or not a danger existed for CO Lelonde. She held that this is an appeal brought under subsection 129(7) of the *Canada Labour Code* against a decision of no danger rendered by a health and safety officer.

[16] Where an appeal is brought under subsection 129(7), or section 146, subsection 146.1(1) of the Code specifies that, the appeals officer is required to inquire in a summary way and without delay into circumstances of the decision or direction and reasons for it. The appeals officer is further authorized by this section to vary, rescind or confirm the decision or direction. In this regard, the appeals officer is further authorized to issue any direction that the appeals officer considers appropriate under subsection 146(2) or (2.1). Subsection 146(1) 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).

[17] As an appeal before an appeals officer is *de novo*, the appeals officer may make a determination under subsection 145(1) of the Code if the appeals officer finds a contravention of Part II of the Code, notwithstanding that the health and safety officer had issued a direction pursuant to subsection 145(2). This is due to the wide powers that appeals officer have under section 146.2 of the Code and the fact that subsection 145.1(2) of the Code gives an appeals officer all the powers of a health and safety officer.

[18] The effect of subsection 146.1(1) of the Code and the fact that the review by an appeals officer is *de novo* causes me to conclude that the role of the appeals officer following an appeal made pursuant to subsection 129(7) is to review the facts in the case anew and decide whether or not a danger exists. The appeals officer is empowered to decide whether to confirm, vary or rescind the direction issued by the health and safety officer, if any issued, or to issue any direction pursuant to subsections 145(1) (*contravention*) or 145(2) (*danger*) the appeals officer deems to be appropriate. As part of the inquiry, the appeals officer can consider any measures that the employer has taken to address the alleged danger and, in light of the facts in the case, decide whether or not they are adequate.

[19] On that basis, I cannot accept Simon Kamel's position that the matter in this case is moot because the employer has unilaterally taken measures to address an alleged danger, which the Warden could rescind at any time.

[20] Simon Kamel argued that the appeals officer is not to review the employer's policy on whether or not to arm the escorts of offenders. I would agree that such a general review of an employer's policy may not generally be authorized by the Code. However, pursuant to subsection 146.1(1), the appeals officer is authorized to inquire into all circumstances that existed at the time of CO Lelonde's refusal to work and to make a finding. The inquiry includes a fact specific review related to CO Lelonde, Inmate X and work procedures that were in place at the time, including the arming policy that applied to CO Lelonde at the time of his refusal to work.

[21] In my opinion, there is a live controversy in this case affecting the rights of the parties and every indication that the issue will be well and fully argued by both parties.

[22] During the case management meeting held by telephone on May 3, 2007, both parties agreed that three hearing days would be needed to hear the appeal if it proceeded. I am aware that the Occupational Health and Safety Tribunal Canada (the Office) will be contacting the parties to secure agreement on dates for the appeal hearing. I am confident that you will provide the Office with every assistance in this regard.

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Douglas Malanka
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: CAO-07-026 (A)

Appellant: Ryan Lelonde

Respondent: Correctional Service Canada

Provisions: *Canada Labour Code*, Part II, 128, 129(7), 146, 146.1(1), 146.2, 145(1), 145(2),

Keywords: Work refusal, moot, *de novo*, live controversy

Summary:

On December 22, 2006, Ryan Lelonde appealed a decision of no danger rendered on December 19, 2006, following his work refusal.

A preliminary objection was raised by the counsel for the respondent on the basis of mootness.

On June 10, 2007, the Appeals Officer dismissed the moot objection and advised the parties that there was a live controversy on this case affecting the rights of the parties and every indication that the issue will be well and fully argued by both parties.