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

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Case No.: 200709
Decision No.: CAO-07-041(I)

Canada Labour Code
Part II
Occupational Health and Safety

Éric V. and *al.*
appellants

and

Correctional Service of Canada
respondent

November 23, 2007

This interlocutory decision was rendered by Appeals Officer Serge Cadieux.

For the appellants
John Mancini, Counsel, UCCO-SCOC—CSN

For the respondent
Nadine Perron and Nadia Hudon, Counsel

[1] This is the interlocutory decision rendered orally and hereby confirmed in writing as initially requested by Ms. Perron at the hearing of the present appeal on November 13, 2007.

[2] In this matter, four Correctional Service of Canada Correctional 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] Both the employer and Health and Safety Officer (HSO) Régis Tremblay conducted a summary investigation. Both found that the conditions cited by the COs are normal conditions of employment within the meaning of section 128 of the *Canada Labour Code*, Part II (the *Code*). This section provides 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

> (*a*) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
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> (*b*) a condition exists in the place that constitutes a danger to the employee; or
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> (*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] In fact, after being notified of the COs' refusal to work, the HSO conducted a preliminary investigation in order to determine whether the stages in the procedure of refusal to work in case of danger had been followed. In conducting that investigation, the HSO relied on a form in an Operations Program Directive (OPD) of the Labour Program, Human Resources and Social Development Canada. This form led the HSO to find as follows:

> [Translation]
> The refusal to work is not authorized under paragraph 128(2) (*b*).

[5] At that point, therefore, the HSO halted his investigation and withdrew from the refusal to work procedure since the refusal was not authorized under the *Code*. As well, the HSO did not render a decision on the danger alleged by the COs.

[6] The COs filed an appeal pursuant to subsection 129(7) of the *Code*, which provides 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.

[7] The employer continued to maintain that the Appeals Officer does not have jurisdiction to hear the present appeal, and asked that the Appeals Officer rule on this preliminary objection. In fact, the employer alleged that, because the HSO did not render a decision on the alleged danger, the Appeals Officer does not have jurisdiction to hear the present appeal since, under subsection 129(7) of the *Code*, an HSO must first render a decision of no danger before an Appeals Officer may hear an appeal.

[8] At the beginning of the hearing of the present appeal, it was agreed that the Appeals Officer would take the employer's preliminary objection under advisement and would hear the parties on the merits of the case. A decision on the Appeals Officer's jurisdiction

would be rendered at the conclusion of the appeal procedure. If the Appeals Officer found that he did not in fact have jurisdiction to hear the present appeal, he would provide a written decision on his jurisdiction, with reasons; otherwise, he would render a decision on his jurisdiction and on the merits of the case.

[9] On November 13, 2007, Ms. Perron objected to the continuation of the hearing. She referred to two Federal Court decisions that, in her opinion, would be decisive in the debate over the Appeals Officer's jurisdiction in the present appeal and would favour the employer. These two decisions are:

Sachs v. Air Canada, 2006 FC 673; and
Sachs v. Air Canada, 2007 FCA 270.

[10] The Appeals Officer dismisses Ms. Perron's objection, for the following reasons.

[11] The appeal brought before the Federal Court and the Federal Court of Appeal had to do with a complaint filed by the Canadian Union of Public Employees and investigated by an HSO pursuant to section 127.1 of the *Code*, entitled Internal Complaint Resolution Process. Subsection 127.1(10) of the *Code* provides as follows:

> (10) On completion of the investigation, the health and safety officer
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> (*a*) *may* issue directions to an employer or employee under subsection 145(1);
> (*b*) may, if in the officer's opinion it is appropriate, recommend that the employee and employer resolve the matter between themselves; or
> (*c*) shall, if the officer concludes that a danger exists as described in subsection 128(1), issue directions under subsection 145(2).
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> [Emphasis added.]

[12] The use of the word "may" in paragraph 127.1(10)(*a*) above refers to HSOs' discretionary authority over whether to issue directions. In danger exists, there is no discretionary authority, and directions shall be issued in accordance with paragraph 127.1(10)(*c*) above. Sections 146 and 146.1 of the *Code* provide a mechanism to appeal any *direction* issued under a provision of the *Code*.

[13] The subject of *Sachs* (*supra*), the appeal brought before the two levels of the Federal Court, was an Appeals Officer's refusal to hear the appeal because he was of the opinion that he did not have jurisdiction to do so. In fact, the internal complaint resolution process set out in section 127.1 of the *Code* does not provide for an appeal mechanism when an HSO conducts an investigation and does not issue a direction under paragraph 127.1 (10)(*a*) above. The HSO had exercised his discretionary authority not to issue a direction to the employer for a violation; instead, he received an Assurance of Voluntary Compliance (AVC). An AVC is an *administrative* instrument of compliance and therefore may not be appealed under sections 146 and 146.1 of the *Code*. The same is true of an HSO's decision not to issue a direction under the internal complaint resolution process set out in section 127.1 of the *Code*.

[14] The Federal Court of Appeal acknowledged that it was well established that there is no constitutional right of appeal. However, in *Préfontaine v. Canada (Minister of National Revenue—M.N.R.)*, [2001] A.J. No. 1444, 2001 ABCA 288, Berger J. ruled that, "when the Legislature chooses to provide a mechanism for appeal, that mechanism, in my opinion, must function in a manner that respects the principles of natural justice". The Court also recognized that employee rights are not infringed upon because of the fact that an HSO does not issue a direction because, if employees believe that a danger exists, they may exercise their right to refuse to work under section 128 of the *Code*.

[15] In the present appeal, the employees exercised their right, under subsection 128(1) of the *Code*, to refuse to perform work that they alleged was abnormally dangerous. They then availed themselves of the appeal mechanism set out in subsection 129(7) of the *Code*, still within the procedure of refusal to perform dangerous work provided for in the *Code*. Here, it should be noted that the Appeals Officer must still decide whether he has jurisdiction to hear the present appeal: the employer has argued that the HSO *did not issue a direction* that would authorize the employees to appeal to an Appeals Officer, thus likening the present matter to the appeal brought before the Federal Court and the Federal Court of Appeal, in which the HSO *had not issued a direction*, a similarity that forms the basis of the above-described objection by Ms. Perron and of Ms. Hudon.

[16] The following distinction must therefore be made. In the present matter, an appeal mechanism is set out in subsection 129(7) of the *Code* that allows an Appeals Officer, under subsection 146.1(1) of the *Code*, to hear the appeal within the procedure of refusal to perform dangerous work. In *Sachs*, no appeal mechanism was set out in subsection 127.1 or any other provision of the *Code* including sections 146 and 146.1, for cases where an HSO decides not to issue a directive, which would allow an Appeals Officer to intervene.

[17] For the reasons set out above, the Appeals Officer dismisses the objection by Ms. Perron and Ms. Hudon to his jurisdiction to hear the present appeal since, in the present matter, there is an appeal mechanism giving the Appeals Officer the necessary jurisdiction to hear an appeal within the procedure of refusal to perform dangerous work, provided that the conditions authorizing the Appeals Officer to exercise this jurisdiction are met, a point that the Appeals Officer will be called upon to decide.

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Serge Cadieux
Appeals Officer