Human Resources Development Canada
Développement des ressources humaines Canada

Canada Appeals Office on Occupational Health and Safety • Bureau d'appel canadien en santé et sécurité au travail

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

François Jeanson
applicant

and

Correctional Service of Canada
employer

and

Mario Thibault
health and safety officer

Decision No. 01-023
October 11, 2001

This case was heard by Michèle Beauchamp, appeals officer, in Cowansville, Quebec, on June 1, 2001.

Appearances

For the applicant:

François Jeanson, program officer
Robert Guimond, union advisor, *Confédération des syndicats nationaux* (CSN)
Jean-Yves Cyr, local union president, UCCO-SACC, CSN

For the employer:

Roger Quesnel, assistant director, Management Services, Correctional Service of Canada (CSC)
Serge Doyon, CSC senior advisor

This case concerns an appeal made by François Jeanson, program officer at CSC's Cowansville Institution in Quebec, under subsection 129(7) of Part II of the *Canada Labour Code* (the Code), against a decision of no danger given by Health and Safety Officer Mario Thibault of Human Resources Development Canada's Labour Program on November 30, 2000.

[1] On November 14, 2000, François Jeanson refused to work on the basis of subsection 128(1) of Part II of the Code in a situation described as follows:

> I refused to perform an unarmed security escort because I considered that it could be dangerous for my personal safety and that of my colleague to go to the designated destination, the Granby Radiology Centre. In making this decision, I was aware of reports in the local media that in the vicinity of this clinic there were 3 bars (including one with strip dancers) with possible links to criminal gangs. I also took into consideration the fact that the clinic is located in a basement with either very few or no emergency exits and that the building housing the clinic is in a crime-prone area of Granby (as indicated by a nearby CSC office, several halfway houses, and, according to the local police, several places where drugs are sold); there was thus a definite possibility of criminal presence in the neighbourhood. Finally, I think that it would have been essential for this security escort to be armed — both for our own protection and the inmate's.

[3] François Jeanson was due to perform this unarmed escort in the afternoon of November 14 , together with another correctional officer, Éric Guillemette, who also refused to work on that occasion for the same reasons as Mr. Jeanson.[*]

[4] In his investigation report sent to the parties, Health and Safety Officer Thibault notes that he was informed of Mr. Jeanson's refusal to work at around 2:30 p.m. the same day. It was then agreed in a conference call with the parties that officer Thibault would conduct his investigation at the Cowanswille Institution the following morning. The officer also notes that Roger Quesnel, Assistant Director, Management Services, informed him during the afternoon of November 14 that Correctional Supervisor Stephan Felx had cancelled the escort detail that officers Jeanson and Guillemette should have performed.

[5] The health and safety officer states that he knew that another escort for the same inmate and the same destination was scheduled for November 15 with different correctional officers. He notes that everywhere in Canada except for Quebec, CSC policy for a number of years has been to arm correctional officers escorting inmates only when necessary. In Quebec, this policy has only been in effect since January 2000.

[1] Mr. Guillemette also appealed the "no danger" decision rendered by Health and Safety Officer Thibault, but he subsequently gave verbal notification to the Canada Appeals Office on Occupational Health and Safety that he was withdrawing his appeal.

[6] Officer Thibault explains that an investigating officer looking into a case of refusal to work must ensure that the Code is being applied and is not governed by any policy of the employer in question. In this particular case, the health and safety officer attempted to discover whether the employer had analysed the situation, was aware of the risks, and had duly informed the employees concerned. He emphasized that he had asked the employer, and not the union, for a risk assessment, since, under Part II of the Code, it is the employer who is responsible for ensuring employee health and safety.

[7] In his investigation, officer Thibault took into account the fact that the escort was cancelled on November 14 and that, as a result, Correctional Officer Jeanson was no longer required to go to the Granby Radiology Centre. The health and safety officer therefore concluded on November 15 that escorting the inmate to the clinic did not represent any danger for this employee.

[8] François Jeanson explained to the hearing that there were two reasons for his refusal: the particular destination and the particular inmate. The centre where he was supposed to escort the inmate is located in a crime-prone area — specifically, in the basement of a building surrounded by three bars (one of which was popular with bikers), with which it shares a municipal parking lot. To reach the radiography room, it is necessary to go through a waiting room that could contain some of the inmate's friends. Furthermore, the centre only has two emergency exits, one to the parking lot behind the building and far from the escorting officers' vehicle, and the other at the far end of the clinic which opens into the waiting room. According to Mr. Jeanson, it would take 4 – 5 minutes to get back to the escort vehicle.

[9] When inmates are escorted anywhere, they are only told they are being moved at the last possible minute and are not told where. They are restrained by handcuffs and leg irons to prevent them from escaping. On the other hand, they know that the officers escorting them are unarmed. The inmate in this case was serving a sentence of two years and two months for aggravated assault. At the time the escorting officers refused to accompany him, the Correctional Service had not yet made the assessment that inmate supervision is normally based on. In Mr. Jeanson's opinion, the inmate in question did not take kindly to authority and was potentially very violent — in fact, he had threatened prison staff during the months preceding the escorting officers' refusal because he knew that he was going to be sent back to his native country after serving two thirds of his sentence.

[10] Mr. Jeanson stated his opinion that the van transporting the inmates is an extension of the medium-security prison where he works. This prison is surrounded by two fenced perimeters with armed guards watching from watchtowers and armed patrols making the rounds. Moreover, when officers escort prisoners, he said, they not only have to protect the prisoners, they also have to prevent escapes and intrusions. Although officers wear bullet-proof vests, such situations are dangerous for them if they are not armed.

[11] For his part, union advisor Robert Guimond pointed out that there is extensive reference in the jurisprudence to the idea of "immediate danger" and that Parliament had made a radical change when it added the idea of "potential" danger to the new Part II of the Code that came into force in September 2000. In his view, this idea that employees must receive as much protection as possible would mean that, in this case, in accordance with the preventive approach laid out in section 122.2 of the Code, correctional officers should be armed when escorting prisoners.

[12] Mr. Doyon, a senior advisor with CSC, testified that CSC policy on inmate outings is that the decision on whether temporary absences for resocialization purposes should involve armed escort is based on the risk assessment made by a unit team composed of correctional and parole officers. This team is understood to be familiar with the inmate's file and the reasons for the outing and, after assessment, submits the case to the Unit Board. In this particular case, the Board, on the basis of its knowledge of the destination and the degree of the inmate's capacity for violence, recommended to the institution director that the outing take place with an unarmed escort, and the director agreed.

[13] In response to a request from Health and Safety Officer Thibault, Cowansville Institution officials shared with the hearing participants its assessment, dated December 6, 2000, of the risks associated with the Granby Radiology Centre. This assessment concludes that "the clinic and the area where it is located should not be considered high-risk during normal working hours."

[14] According to Mr. Doyon, section 122.2 of the Code implies that hazards should be eliminated by reasonable measures and that the general steps taken by CSC to protect its employees and inmates are of this type. Inmates, by definition, represent risks, he said, and each situation is analysed in terms of the risks particular inmates represent and the need to protect the employees involved. In this particular case, the Unit Board, composed of correctional professionals, assessed the situation and concluded that the situation represented an acceptable risk for the correctional service — namely, that not arming the correctional officers would not expose them to unreasonable risk.

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[15] Subsections 146(1) and 146(2) of Part II of the Code define the appeal officer's role when an appeal is brought against a "non-existent danger" decision issued under subsection 129(7). Here are relevant excerpts from these subsections:

> 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:
> (a) vary, rescind or confirm the decision or direction; and

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

(2) The appeals officer shall provide a written decision, with reasons, and a copy of any direction to the employer, employee or trade union concerned, and the employer shall, without delay, give a copy of it to the work place committee or health and safety representative.

[16] Was Program Officer Jeanson facing a danger within the meaning of the Code when he refused to work on November 14, 2000? Here are the clauses of Part II of the Code that cover refusal to work:

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 constitutes a danger to the employee or to another employee;
(b) a condition exists in the place that constitutes a danger to the employee;
(c) the performance of the activity constitutes a danger to the employee or another employee.

(2) An employee may not, under this section, refuse to operate a machine or thing, to work in a place or to perform an activity if
(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.

[17] A considerable number of decisions have established jurisprudence on what constitutes a danger. These have clearly showed that, in Part II of the Code as in effect prior to September 30, 2000, the safety officer should decide whether, at the time of the inquiry into the employee's refusal to work, the place in question represented such a real and immediate danger that the employee was justified in refusing to work.

[18] The judgement handed down by Hon Marc Nadon of the Federal Court – Trial Division in *The Attorney General of Canada and Mario Lavoie*[2] is particularly interesting in this respect, inasmuch as the notion of danger was directly related to a Correctional Service context.

[19] Judge Nadon allowed an application for judicial review of a decision whereby Regional Security Officer Serge Cadieux had confirmed a decision of "existing danger" involving the movement of two inmates at the Leclerc Institution and the resultant direction for the Correctional Service. Explaining that this was not the first time that a correctional officer had raised the question of occupational danger, Judge Nadon cited the reasons on which the federal Public Service Staff Relations Board (PSSRB) based its

[2] Decision T-2420-97 of the Federal Court –Trial Division, rendered September 9, 1998

conclusion of no danger in the *Stephenson* case[3] concerning the number of correctional officers on duty in a maximum security institution. Judge Nadon stated that these reasons were totally pertinent to the case before him:

> The root of the problem is that the danger, under the law, must be actual and real whereas, the reality in a correctional institution is that the source of the danger, the inmate, has intelligence and free will.
>
> The law provides that an employee may not refuse to work until the danger has crystallised and is present in the work place. The reality is that until the moment that the inmate acts in a manner which endangers a correctional officer, there is no danger. The reality is, as well, that once an inmate has ceased to act in a manner which endangers a correctional officer, there is no longer a danger and, therefore, no right to refuse to work. This is true even if all of the conditions which led the inmate to act as he did continue unchanged.
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> Indeed, under the law as it now stands, a correctional officer who is endangered by the malicious conduct of an inmate could refuse to work only while the inmate is engaging in such conduct. Whether the inmate would, under such circumstances, be willing to recognize a correctional officer's right to withdraw is another matter.
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> Another matter, as well, is the question of whether services could be withdrawn even under the conditions described above. Faced with rampaging inmates, it might well be the case that a correctional officer would find his right to invoke Section 128(1) of the Code barred by the provisions of Section 128(2)(*a*) : "the refusal puts the life, health or safety of another person directly in danger".
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> The reality is that under the law as it now stands, correctional officers are, except in the most unusual cases, effectively barred from exercising the right to refuse to work under Section 128 of the Code where the source of danger lies in misconduct on the part of the inmates. Mr. Brenda would argue that this is as it should be, that the Code was never intended to cover such risks and that threats arising from the conduct of inmates are a labour relations matter rather that a health and safety problem.
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> It would appear that Mr. Brenda has the law on his side. However, that does not alter the fact that there is a problem, that the problem is real enough to those who must live with it and that the law provides no remedy.
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> …….
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> Perhaps consideration ought to be given to the explicit removal of inmate generated dangers from the kind of dangers contemplated by Section 128 of the Code and the substitution therefor of some other procedures which takes account of the special nature of such dangers.
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> Due to the omission in the statute, I indeed must find that the applicants could not reasonably exercise their rights under subsection 128(1) since the danger was prospective rather than real. The report of the safety officer is therefore confirmed.

[3] Decision 165-2-83 of the federal Public Service Staff Relations Board, rendered July 29, 1991

[20] In view of this new definition of danger, might it not now be possible to state that, as in the Stephenson case, employees cannot avail themselves of the right provided for in subsection 128(1) because the condition, activity or hazard facing them does not constitute an "immediate danger" (the term very widely used in the related jurisprudence), but rather a "potential hazard that could reasonably be expected to" cause them injury or illness?

[21] In response to this question, I would like to refer to what Appeals Officer Serge Cadieux stated in the *Darren Welbourne and Canadian Pacific Railway Company* case,[4] when he was exploring the new definition of danger contained in Part II of the Code that came into effect in September 2000:

> [15] Danger is defined at subsection 122(1) of the Code as follows:
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> | | |
> |---|---|
> | *"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.* | *"danger" Situation, tâche ou risque – existant ou éventuel – susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade – même si ses effets sur l'intégrité physique ou la santé ne sont pas immédiats -, avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d'avoir des effets à long terme sur la santé ou le système reproducteur.* |
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> [16] This new definition of danger is similar to the previous definition of danger that existed in the pre-amended Code, which read:
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> > *"danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."*
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> [17] The current definition of "danger" sets out to improve the definition of "danger" found in the pre-amended Code, which was believed to be too restrictive to protect the health and safety of employees. According to the jurisprudence developed around the previous concept of danger, the danger had to be immediate and present at the time of the safety officer's investigation. The new definition broadens the concept of danger to allow for potential hazards or conditions or future activities to be taken into account. This approach better reflects the purpose of the Code stated at subsection 122.1, which provides:
>
> > 122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

[4] Decision 01-008, rendered on March 22, 2001

> [18] Under the current definition of danger, the hazard, condition or activity need no longer only exist at the time of the health and safety officer's investigation but can also be potential or future. The New Shorter Oxford Dictionary, 1993 Edition, defines "*potential*" to mean "possible as opposed to actual; capable of coming into being or action; latent." Black's Law Dictionary, Seventh Edition, defines "*potential*" to mean "capable of coming into being; possible." The expression "*future activity*" is indicative that the activity is not actually taking place [while the health and safety officer is present] but it is something to be done by a person in the future. Therefore, under the Code, the danger can also be prospective to the extent that the hazard, condition or activity is capable of coming into being or action and is reasonably expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected or the activity altered.
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> [19] The existing or potential hazard or condition or the current or future activity referred to in the definition must be one that can reasonably be expected to cause injury or illness to the person exposed to it before the hazard or condition can be corrected or the activity altered. Therefore, the concept of reasonable expectation excludes hypothetical or speculative situations.
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> [20] The expression "*before the hazard or condition can be corrected*" has been interpreted to mean that injury or illness is likely to occur right there and then i.e. immediately. However, in the current definition of danger, a reference to hazard, condition or activity must be read in conjunction to the existing or potential hazard or condition or the current or future activity, thus appearing to remove from the previous concept of danger the requisite that injury or illness will likely occur right there and then. In reality however, injury or illness can only occur upon actual exposure to the hazard, condition or activity. Therefore, given the gravity of the situation, there must be a reasonable degree of certainty that an injury or illness is likely to occur right there and then upon exposure to the hazard, condition or activity unless the hazard or condition is corrected or the activity altered. With this knowledge in hand, one cannot wait for an accident to happen, thus the need to act quickly and immediately in such situations.

[22] It thus appears clear that the second part of the current definition of danger now takes into account the possibility of exposure to a condition, activity or hazard which, if it materializes before it has been possible to correct the condition or hazard or alter the activity would very likely result in — or to use the wording of the Code itself, "could reasonably be expected to" (as in the condition, activity or hazard in question) cause — injury or illness to the employee, even if the effects on the individual's health or physical integrity do not make themselves felt immediately.

[23] Consequently, I would say that an employee can refuse to work if the employee has reasonable grounds to believe that performance of the activity would represent a danger to the employee personally, providing that before the activity is performed, the task in question has not been changed so as to no longer be likely to cause the employee injury or illness. What is implied, as stated by Appeals Officer Serge Cadieux in the *Darren Welbourne and Canadian Pacific Railway Company* case, is that that this concept of "could reasonably be expected to cause" excludes all hypothetical situations.

[24] Regardless of whether the condition, activity or hazard “exists” or “is possible,” it is thus necessary to correct the condition or hazard or alter the activity before injury or illness occurs. And these steps should be taken, while paying particular attention to the purpose of Part II of the Code, as stated in section 122.1, and the recommendation expressed in section 122.2 concerning the order of priorities for preventive measures. These two sections read as follows:

> 122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.
>
> 122.2 Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.

[25] The Correctional Service is totally aware of the risks that inmates represent and applies a series of measures to reduce these risks as much as possible. Throughout the country, the service has established a specific procedure for temporary inmate absences — on medical grounds in this instance. Thus, all the applications for temporary absence are considered by a review body that is responsible for making a recommendation to the institution director based on thorough consideration of the all the eligibility criteria for temporary absences. These criteria include the destination in question, the time and length of the absence, the mode of transportation used, the type of escorting officers, the safety equipment carried by these officers, the restraining equipment to be used if necessary, the security level of the inmate in question, the inmate’s potential for violence, and the inmate’s links with criminal circles.

[26] In this case, the testimony presented at the hearing showed that the review committee duly made its assessment and recommended to the institution director that the officers escorting the inmate be unarmed. The institution director endorsed this recommendation. It is not my responsibility to determine whether CSC procedures, based on the *Corrections and Correctional Release Act* which governs the service, should require escorting officers to be armed at all times when going on an outing with such-and-such a category of inmate. This determination is strictly a CSC responsibility.

[27] My role as an appeals officer is, first, to determine whether at the time Health and Security Officer Thibault investigated Mr. Jeanson’s refusal to work, there was an actual or possible condition, activity or hazard that represented a danger for the employee, and, then, to change, confirm or cancel the health and safety officer’s decision.

[28] Was Program Officer Jeanson facing a danger within the meaning of the Code when he refused to work? I do not believe that the risk Correctional Officer Jeanson was facing fell outside the normal range of his duties to the extent that it represented a danger within the meaning of the Code. The risk involved derives from the fact that a correctional officer's duties are performed in a work environment which, by its very nature, involves interacting with inmates who are potentially violent, at least to some extent. CSC, the officer's employer, tried to reduce this risk as much as possible by such steps as an assessment conducted by a committee of professionals who were very familiar with the circumstances involved in escorting inmates and could recommend appropriate action to the institution director — in this instance, that the escorting officers not be armed.

[29] For all the above reasons, I agree with the decision of no danger given by Health and Safety Officer Thibault.

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Michèle Beauchamp

Appeals Officer

SUMMARY OF APPEALS OFFICER DECISION

Decision No. 01-023

Applicant: François Jeanson

Employer: Correctional Service of Canada

Key Words: Refusal to work, danger, armed or unarmed escort

Code: 122, 128(1)
COHSR: n/a

Summary: A Correctional Service of Canada officer refused to work on the grounds of subsection 128(1) of the Code, alleging that it was dangerous for him to escort an inmate to an outside clinic without being armed. After his investigation, the health and safety officer decided that escorting the inmate without being armed did not represent any danger for the employee concerned.

The appeals officer confirmed the health and safety officer's decision because performing the escort duties in question without being armed did not constitute a danger within the meaning of the *Canada Labour Code*.