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

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

Denis Leclair
applicant

and

Correctional Services Canada
Employer

and

David Furlotte
health and safety officer

Decision No. 01-024
Date November 19, 2001

This case was heard by Serge Cadieux, appeals officer, in Moncton, New Brunswick, on October 4, 2001.

Appearances

Mr. Vernon Brido, correctional officer, for the employee, Mr. Denis Leclair.

Ms. Anna Gaston, acting assistant warden, Correctional Services Canada, Atlantic Institution, Renous, N.B.

[1] This case concerns an appeal made by Mr. Denis Leclair under subsection 129(7) of the *Canada Labour Code*, Part II (the Code) of a decision of absence of danger given by health and safety officer David Furlotte, Human Resources Development Canada on December 14, 2000.

[2] Health and safety officer David J. Furlotte reports that at approximately 1:05 a.m. on Thursday, December 14, 2000 a refusal to work had been reported at the Atlantic Institution in Renous, N.B. A correctional officer with Correctional Service Canada, Mr. Denis Leclair, refused to work because he felt that a danger existed from the fact that four inmates had been designated to clean-up the halls of the Institution after usual lock-up time. Mr. Leclair explained that there could be a danger to the inmates should an altercation break out or possible danger to the person overseeing the cleaning duties.

[3] The health and safety officer attended the Institution the same day. He met with the refusing employee and visited the areas where the four inmates were working. He found that the areas in question were confined by means of gates and that the inmates were not in direct contact with the guards. Their movements would be restricted to the areas to which they would be assigned to carry out their duties. The health and safety officer found that there were also other officers in the control area and an additional officer in each unit as well as one person, referred to as an "aggregate", who makes rounds. Mr. Leclair had also expressed a concern that there would be danger to the guards escorting the inmates to and from the work area due to the fact that there was a lack of officers to accompany each inmate.

[4] Mr. Vernon Brido, who is the representative of Mr. Leclair, explained that the Atlantic Institution in Renous is a maximum security prison. Mr. Brido explained that when the Institution was first opened there were two mobile officers working the parameters of the Institution and one officer working at the gate, a situation which has changed drastically over time. He asked the health and safety officer whether he felt, when carrying out his investigation, that the guards were prepared to deal with a situation where inmates would be causing problems. The health and safety officer responded that the inmates were confined to their cells and therefore they could not be in a position to cause any problem.

[5] Mr. Brido asked the health and safety officer whether he spoke to the keeper that evening, that is the supervisor of the Institution that night, as to whether he felt that it was safe at the Institution. The keeper responded that he felt it was not safe. When questioned whether he felt he had all the necessary information that night to make a decision, the health and safety officer replied that he did because he met with everybody concerned i.e. the supervisor, the complainant and members of the health and safety committee. After meeting with these people, the group made a walk through the area to see what the circumstances were. When asked by Mr. Brido how the health and safety officer saw the inmates as representing a danger, the health and safety officer responded by saying that he concluded that the inmates did not represent a danger to the officers.

[6] Mr. Brido expressed concern that although the health and safety officer is a well qualified person, he does not have knowledge of the Institution, he is not a correctional officer and the potential danger for the health and safety officer in this Institution is something he is relating to an industry and not to the working of a correctional institution. From this perspective Mr. Brido is concerned that the health and safety officer has no knowledge of the working of an institution and therefore do not understand the dangers that correctional officers are faced with.

[7] Miss Anna Gaston was the acting assistant warden and employer co-chair for the health and safety committee at the Atlantic Institution in Renous. She said that the Institution relied heavily on inmate labour as far as cleaning is concerned. During the day with so much movement of the inmate population, it is impossible to do a very good cleaning. That is why the inmates do the cleaning during the morning shift which starts at 2300 hours and finishes at 0700 hours.

[8] Miss Gaston introduced a set of blue prints of the Institution showing the living blocks and the corridors that were to be cleaned by the four inmates. She indicated on the diagram the various armed controlled posts at various locations and she also pointed to an extra armed controlled post referred to as the Y controlled post that had been added as a result of the cleaning activity to be carried out by the inmates. She also pointed to several barriers. The barriers between which the inmates were held are operated manually and one at a time from the armed controlled post. She explained that the inmates would be cleaning, at various points in time, at each one of the sections shown on the diagram which would be controlled by any one of the officers in the armed posts in terms of their movements.

[9] Miss Gaston explained that on the night in question, there was a total of five armed controlled posts inside and two armed controlled posts outside of the Institution. Able to respond to any situation on that night there were:

- a cleaning supervisor, Mr. Finnigan, who accompanies the inmates performing cleaning duties. Mr. Finnigan is not a correctional officer.
- an aggregate officer i.e. an officer that makes rounds,
- any of the officers on the floor, and
- the mobile officer.

[10] Mr. Leclair testified on his behalf. He said that on that night, he was working the central control post. Mr. Leclair affirmed that there was no direct danger to himself at that moment but he felt that he needed to look at the security of the staff, the inmates and other people. Mr. Leclair stated that he became concerned when he was given a memo which said that inmates would be cleaning the Institution during the morning shift. Mr. Leclair was concerned because he felt that it was not proper to let inmates clean the Institution during that shift since the only time inmates are allowed outside of their cells is in an emergency situation.

[11] Mr. Leclair explained that, as a rule, inmates are not to be left out of their cells unless there are two officers to receive them and accompany them in an emergency situation, for example, for going to a clinic or something of that nature. Only those types of situations would be considered emergency situations. Mr. Leclair said that cleaning the Institution is not an emergency situation, therefore, the inmates should not have been let out.

[12] When asked who he felt was in danger that night, Mr. Leclair replied that he felt everybody working on the floor was in danger, especially Mr. Finnigan, the cleaning supervisor, since he was amongst the inmates. Mr. Leclair acknowledged that 99% of the time, nothing happens in the Institution except that 1 % of the time, something does happen and when it does, it is usually fatal.

[13] Miss Gaston added that the four inmates in question were selected to do the cleaning. They were selected when the cleaning supervisor went to the Unit and spoke to the correctional officer and asked which would be the appropriate inmates to do this type of work. The correctional officer knew the inmates and recommended them to the cleaning supervisor.

[14] Miss Gaston acknowledged that Mr. Leclair did not feel there was a personal danger to himself but had a concern for the whole Institution. In this particular case, Miss Gaston believed that the Institution took additional security measures by having the Y control post manned, by having the cleaning supervisor present with the inmates to who's job it is anyhow, on a regular basis, to supervise these inmates and by having the Unit correctional officer recommending which individuals could come out of their cells to clean. She believes that the risk was properly managed and, according to her statement, "was a well assumable risk".

[15] Mr. Leclair made reference to the fact that inmates do pre-plan for escape and the problem with having four inmates cleaning the floor should an escape actually happen is that there would be four inmates on the loose inside the Institution that could assist the other inmates in the escape. At the same time, Mr. Leclair admitted that he had no specific information that on December 14, something was about to happen. In fact, he did not believe that something was about to happen. There was no rumor inside the Institution that something was about to happen. Furthermore, Mr. Leclair admitted that the cleaning supervisor that was amongst the four inmates did not fear for his own safety and that, as a rule, every time he goes to work he acknowledges that he is in a potential situation of danger. This is a normal condition of his employment.

[16] Mr. Brido commented that, if an emergency situation arises on the morning shift, they do not have access to the same number of officers to respond to the emergency because they are operating on a minimum staffing basis. Mr. Brido closed the hearing by saying that they felt they were not represented in the Code although they have been in business for 125 years. HRDC people have no understanding of their type of business. Mr. Brido also indicated that there are at this point 36 persons at home for various

reasons such as sick leave, injuries and many other reasons similar to that and yet there seems to be nothing that can be done to protect these people. Mr. Brido feels that there is here a minimum manning issue which is not being addressed.

[17] Miss Gaston's final comment was that they are not insensitive to the desire to provide a safe environment for all staff. A correctional service, she said, is not a no risk environment. There are some very important risks. She nonetheless feels that they responded properly by providing an additional armed post on that evening and believes that they provided adequate staff on the night of Mr. Leclair's refusal to work.

* * *

[18] Once notified of a refusal to work, the health and safety officer is required to investigate the matter and decide whether danger exists or not. Danger is defined at subsection 122(1) of the Code. It reads:

> *"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;*

[19] I have dealt with the concept of danger, following amendments to the Code which came into force on September 30, 2000, in *Darren Welbourne vs Canadian Pacific Railway Company.* I said:

> [16] This new definition of danger is similar to the previous definition of danger that existed in the pre-amended Code, which read:
>
> > *"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.*
>
> [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.*
>
> [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.
>
> [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.
>
> [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[1]. 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.

[20] In the case at hand, the health and safety officer considered the pertinent facts related to the danger feared by Mr. Leclair and decided that danger did not exist. I agree with the health and safety officer's decision for the following reasons.

[21] Firstly, the health and safety officer decided that danger did not exist on the basis of the following facts:

- He found that the areas in question were confined by means of gates and that the inmates were not in direct contact with the guards.
- Their movements would be restricted to the areas to which they would be assigned to carry out their duties.
- The health and safety officer found that there were also other officers in the control area and an additional officer in each unit as well as one person, referred to as an "aggregate", who makes rounds.

[22] The facts collected by the health and safety officer are sufficient to support his decision that the inmates did not represent a danger to correctional officers. The allegation that, in the event of an escape, the inmates could assist other inmates participating in the escape is highly hypothetical. Indeed, Mr. Leclair admitted that he had no evidence that an escape was being planned or that there were any rumour to this

[1] *Brailsford v. Worldways Canada Ltd. (1992), 87 di 98 (Can. L.R.B.)*
Bell Canada v. Labour Canada (1984), 56 di 150 (Can. L.R.B.)

effect. There is simply no evidence that the guards were, or could be, in any greater danger by having four hand picked inmates cleaning the Institution during the morning shift than there would be on a normal day in that type of environment.

[23] In a maximum security environment, such as the Atlantic Institution, the risk of being assaulted by one or several violent inmates is ever present and is inherent to a correctional officer's job. Evidently, correctional officers need to be constantly vigilant when working with inmates and be aware of their environment. Anytime the procedures are altered in a maximum security environment, it causes concern for those who are charged with the responsibility of providing security. They become concern for their own safety. The concern expressed by Mr. Leclair was a general concern for the employees of the Institution. Mr. Leclair admitted that he had no specific information or knowledge that anything was about to happen. In my opinion, he was merely expressing his concern and disagreement, and that of others, with the policy of the Institution of using inmates considered to be dangerous offenders to clean the penitentiary. However, Mr. Leclair's fear of danger had no factual basis. His concern was hypothetical and therefore, outside the scope of danger as defined in the Code.

[24] Secondly, and technically, the health and safety officer could not have declared that a danger existed to Mr. Leclair following his refusal to work. Mr. Leclair's refusal to work exceeded the parameters within which he was authorized to refuse to work. While the health and safety officer can decide that danger exists regardless of the conditions under which the refusal to work was exercised, he must firstly decide whether the situation investigated constitutes a danger to the refusing employee or to any other employee affected by the actions of the refusing employee. In this case, the provisions that authorize Mr. Leclair to refuse to work did not apply to him. Those provisions are found at section 128(1) and (2) of the Code. They read as follow:

> *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;*
> *(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.*
>
> *(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*
>
> *(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.

[25]Section 128(1) provides specific conditions under which this right may be exercised by an employee in the workplace. Specifically, under paragraph 128 (1)(*a*), the employee may refuse to use or operate a machine or thing if that employee while at work has reasonable cause to believe that the use or operation of the machine or thing constitutes a danger to the employee or to another employee. In this particular case, Mr. Leclair was not using or operating a machine or thing and therefore this aspect of the right to refuse is not an issue in the case. Clearly then, paragraph 128(1)(*a*) has no application in this instance.

[26] Similarly, under paragraph 128(1)(*b*), the employee may refuse to work in a place if the employee while at work has reasonable cause to believe that a condition exists in the place that constitutes a danger to the employee, the employee in this case being Mr. Leclair. Mr. Leclair has clearly stated in his testimony that there was no direct danger to him at any time and that he never felt that his health or safety could be jeopardized while he is working at his post. This is important because it could be argued that this provision could have some application to Mr. Leclair if he felt that the actions of the Institution were placing him at risk of injury. Since this is not the case, paragraph 128(1)(*b*) also has no application to Mr. Leclair, or to any other person for that matter, since this paragraph restricts its application to the refusing employee, not to other employees or inmates who, in passing, are not covered by the Code. Mr. Leclair was refusing because he felt that the actions of the Institution i.e. allowing four inmates to clean the Institution on the morning shift, would place the inmates, the cleaning supervisor and the guards that would accompany the inmates to their cells at risk of being injured. Mr. Leclair had a general concern for the people inside the Institution but manifestly, he had no concern for himself. Consequently, paragraph 128(1)(*b*) also has no application in the instant case.

[27] Finally, under paragraph 128(1)(*c*), the employee may refuse to perform an activity if the employee has reasonable cause to believe that the performance of the activity constitutes a danger to the employee or to another employee. However, the activity of Mr. Leclair on the day of his refusal to work was to provide essential security services within the Institution by working at the central post. There is simply no evidence that this activity was the source of any danger to Mr. Leclair or for that matter to any other employee, such as Mr. Finnigan who was working with the inmates, or to other guards on his shift. This provision may have found application had Mr. Finnigan refused to work with the inmates or had the guards refused to accompany the inmates to their cells however this was not the case although I am uncertain as to whether they would have been any more successful than Mr. Leclair given that performing those duties are a normal condition of employment as specified under paragraph 128(2)(*b*) above. The end result of this analysis is that paragraph 128(1)(*c*) also has no application to Mr. Leclair's refusal to work.

[28]The circumstances reported by Mr. Leclair do not authorize him to exercise a refusal to work. However, since the general concern expressed by Mr. Leclair related to health and safety concerns outside of section 128, his concerns should have been addressed through the Internal Complaint Resolution Process found at section 127.1 of the Code. That process concerns the general type of complaints that are expressed by employees outside the refusal to work provisions.

[29] For all the above reasons, I confirm the heath and safety officer decision.

Serge Cadieux

SUMMARY OF THE APPEALS OFFICER'S DECISION

Decision No.: **01-024**

Applicant: Denis Leclair

Employer: Correctional Service Canada

KEY WORDS: Cleaning Institution, inmates (on the loose), armed controlled posts, morning shift, escape, emergency, danger, maximum security.

PROVISIONS:

Code: 128

Regulation:

SUMMARY:

A correctional officer refused to work on the morning shift (2300 hrs - 0700 hrs) because he felt that employees of the Atlantic Institution were in danger. The basis for Mr. Leclair's refusal to work was that four inmates were selected by the Institution to clean the halls of the Institution, a maximum security penitentiary, after lock up time. Mr. Leclair felt that this constituted a danger under the Code because this creates a situation where four inmates would be on the loose inside the Institution should a pre-planned escape take place. The health and safety officer found that the four inmates were well contained inside the Institution and that sufficient officers were present to respond to any emergencies. On appeal, the appeals officer agreed with the health and safety officer. He further added that the correctional officer was not authorized to refuse under the Code because the basis of the refusal was outside the parameters established by section 128 of the Code. In the instant case, not only did the danger not exist but the conditions authorizing Mr. Leclair to refuse to work were not met. For all these reasons, the appeals officer confirmed the decision of absence of danger initially rendered by the investigating health and safety officer.