Decision No.: 00-013

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146 of the Canada Labour Code,
Part II, of a direction given by a safety officer

Applicant:	United Parcel Service Canada Represented by: Mr. J. Graham Counsel
Respondent:	Mrs. C. Smith Employee, United Parcel Service Ltd.
Mis-en-cause:	Dave Furlotte Safety Officer Human Resources Development Canada
Before:	Douglas Malanka Regional Safety Officer Human Resources Development Canada (HRDC)

Background:

On November 24, 1999, Mrs. Smith, an employee of United Parcel Service Canada (UPS),contacted HRDC and reported to a safety officer that she was exercising her right to refuse work. Safety officer Furlotte proceeded to her workplace to investigate the refusal and met Mrs. Smith who was waiting in the vestibule of the building. He noted that she did not appear to be ill at that time, but observed that within minutes of entering her workplace, her breathing became harsh and her voice changed as though she had a cold. Safety officer Furlotte decided that Mrs. Smith's workplace constituted a danger for her and orally ordered UPS to protect her safety and health. On December 7, 1999, he issued a written direction to UPS pursuant to subsection 145.(1) of the Canada Labour Code, Part II (hereto referred to as the Code or Part II). See copy attached. The direction stated that Mrs. Smith's worksite constitutes a danger to her health and ordered UPS to terminate the contravention by November 24, 1999. UPS requested a review of direction and a hearing was held on June 7, 2000.

Safety Officer:

A copy of safety officer Furlotte's Report was provided to parties prior to the hearing and he also testified at the hearing. His Report will not be repeated here but forms part of the file. I retain the following from his Report and testimony.

On November 5, 1999, Mrs. Smith complained to safety officer Luc Sarrazin at HRDC that she was refusing to work because of her reactions to perfumes and scented products in her workplace. Later that day, Mr. A. Noel, Human Resources Supervisor, at UPS, contacted HRDC and

confirmed that UPS would investigate that matter with Mrs. Smith. On November 24, 1999, Mrs. Smith again contacted HRDC and continued to exercise her right to refuse work. Safety officer Furlotte proceeded to UPS to investigate her refusal to work. He encountered Mrs. Smith in the vestibule of the building and observed that she did not appear to be ill. She told him that she was sensitive to scented products in her workplace and showed him a certificate of illness that Dr. Li, her family doctor, had signed on November 9, 1999. The certificate stated that Mrs. Smith had to be off work indefinitely until her workplace can be made scent free. Shortly thereafter, safety officer Furlotte and Mrs. Smith entered her work area and met with Mr. Noel, Ms. R. Mills, employer representative on the workplace safety and health committee, Ms. P. Chambers, employee co-chair of the workplace safety and health committee and Ms. N. Leblanc, her Employee Development Assistant (EDA). Safety officer Furlotte testified that, within minutes, Mrs. Smith's breathing became harsh and her voice changed as though she had a cold. Her rapid deterioration in breathing and speaking convinced him that a "*potential*"[1] danger existed for her in her workplace and orally directed UPS to protect her safety and health. On December 7, 1999, safety officer Furlotte confirmed his oral direction with a written direction made pursuant to subsection 145.(1) of the Code. The direction affirmed that Mrs. Smith's worksite constituted a danger to her health and ordered UPS to ensure that she was protected while at work.

Safety officer Furlotte clarified in his testimony that he did not consider the certificate of illness from Dr. Li when he decided that Mrs. Smith's workplace constituted a danger for her. He said that the certificate of illness only persuaded him that the physical deterioration he observed was genuine. He admitted that he did not know what danger existed in the building for Mrs. Smith, whether it was air quality or a ventilation issue, but felt the first priority was to protect her occupational safety and health. He also confirmed that he did not have any specialized knowledge regarding the nature of Mrs. Smith sensitivity to scents, and that he had not consulted with any expert prior to deciding that a danger existed for her. He further attested that he had not interviewed other employees at Mrs. Smith's workplace to determine if the workplace adversely affected their occupational safety and health.

Applicant:

Dr. Mathew D. Burnstein, B.Sc., MD., M.R.O., C.I.M.E., testified on behalf of UPS as an expert witness. I retain the following from his testimony.

Dr. Burnstein testified that one could not decide that a danger existed in the workplace simply because an employee appeared to become ill. He explained that, while the symptoms experienced by the person may be real, that does not mean that they are having actual organic difficulties. All that one could say about the reaction that safety officer Furlotte observed on the day of the refusal is that Mrs. Smith appeared to be ill in some way on that occasion. According to Dr. Burnstein, safety officer Furlotte simply did not have enough information to decide that a danger existed and to make a link between Mrs. Smith's workplace and her sensitivity.

He additionally opined that safety officer Furlotte could not conclude that Mrs. Smith's workplace constituted a danger for her based on the certificate of illness that Dr. Li provided to Mrs. Smith. He said the certificate of illness did not identify the health problem or danger, or its adverse health

[1] During his testimony, safety officer Furlotte indicated that he decided that Mrs. Smith's workplace constituted a "*potential*" danger for her and issued a direction to UPS. However, he refers only to a danger in his direction and written report.

affect or severity. In addition, the safety officer could not conclude that a danger existed for Mrs. Smith based on the note written by Dr. Li because there was no documentation on air quality and it was anecdotal in nature. Dr. Burnstein commented that Sick Building Syndrome has not been found in the past to be an organic illness.

According to Dr. Burnstein, to establish that the air quality in a workplace constitutes a danger for a person, it is necessary to assess both the workplace and the medical history of the person. With regard to the workplace, it is necessary to assess the general environment in the workplace and the specific area around the employee's individual workplace. An environmental assessment would typically test the air quality for the presence of hazardous substances and determine if quantities of hazardous substances found exceed applicable exposure limits. Another test would be to analyze the ambient air for carbon dioxide levels, a known marker of air circulation or ventilation. An assessment would also include interviewing other employees to determine if they experienced similar health reaction or illness, and for determining if Mrs. Smith's reaction or illness was consistent every time. He said that it would also be important to inspect the heating, ventilation and air conditioning (HVAC) system, including valves, ducts and outlets, to see if they are clean and operating properly, and to measure the humidity and temperature in the workplace.

With regard to the individual, Dr. Burnstein held that it would be necessary to review the medical history of the person for determining when the reaction or illness started, its duration and its severity. He explained that it would also be necessary to test the person to identify the illness, to determine if it was organic or inorganic and to determine if there was a dose relationship. It would also be important to confirm what treatment, if any, has been employed. He stated that once information regarding the workplace and the individual has been obtained, one can determine if a causal link exists between the two.

Dr. Burnstein said the illness reaction safety officer Furlotte observed could have been asthma, an allergic reaction not related to asthma, or an anxiety attack or globus hysteria. He explained that asthma can be triggered by allergies, stress, irritants such as humidity, temperature, and scents. Dr. Burnstein clarified that sensitivities and allergies are different. An allergy means antibody-antigen reaction, while sensitivities tend to be irritants that are not generally life threatening. However, he acknowledged that if a sensitive person was exposed to a high enough level of the thing to which they are sensitive, including perfume, the exposure could be life threatening. Dr. Burnstein said that there is no specific allergy test for perfumes because they include anywhere from 150-300 chemicals. However, one can determine if a person has an allergy to a perfume by exposing the person and conducting pulmonary functions tests to confirm a reaction.

Respondent:

Mrs. Smith testified on her on behalf. I retain the following from her testimony. In January, 1999, she was in constant communication with her supervisor and EDA, Ms. Isabelle Snowden regarding her sensitivity to scented products and perfumes and her reactions at her work. Ms. Snowden permitted Mrs. Smith to work at different work stations in the call center to get away from scented products and asked people around her to refrain from wearing scented products. However, Mrs. Smith said that, with shift changes and high level of staff turnover, she was never around the same person and so this did not offer a permanent solution.

She then went to another supervisor, who sent out an e-mail to the Centre asking staff to use scented products in moderation. However, Mrs. Smith insisted that moderation does not avoid exposures and the advisory was not respected by all staff. She acknowledged that UPS had provided her with a respirator for use at her work, had permitted her to go home whenever she was sick, and rented a HEPA filter for her use at work.

On the recommendation of the Human Rights Commission, Mrs. Smith suggested ways that UPS could accommodate her illness. She suggested that they either permit her to work at home, or provide her with an enclosed office equipped with a HEPA filter, and limit access to persons free of scented products. She said that she could wear a respirator if someone wearing scented products had to enter. She said that UPS did not respond to her proposals.

Mrs. Smith testified that Dr. Li advised her that the more she is exposed to scented products, the more severe the reactions will be. She experiences shortness of breath when exposed to scented products and now fears that she has reached the point where a reaction could be life threatening.

Summations:

Mr. Graham said that the basis for appeal in this case is two fold. First, he held that safety officer Furlotte had not conducted a proper investigation of Mrs. Smith's refusal to work and so did not have sufficient objective evidence regarding her medical history or her workplace to decide that there was a danger for her. Instead, he insisted that safety officer Furlotte had relied on his personal observation of Mrs. Smith's health reaction after she entered her workplace, the certificate of illness from Dr. Li, and Mrs. Smith's medications for deciding that a danger existed for her.

Mr. Graham cited the case of Bugden and Treasury Board, (Solictor General Canada - Royal Canadian Mounted Police, PSSRB No. 236,(1988), (PSSRB File No. 165-2-55) before Korngold Wexler, Deputy Chairman, Public Service Staff Relations Board; the case of Gilmore versus Canadian National Railways, between the Attorney General for Canada and Canadian National Railways before Regional Safety Officer (RSO) Serge Cadieux; and the case of Environment Canada and C. Hutchinson, 1997, Decision No. 97-003 before RSO Douglas Malanka. He argued that these findings establish that a decision of danger must be based on objective evidence that a hazard or condition existed in the workplace of the affected employee and that a causation link is objectively established between that workplace and the sensitivity experienced by the person.

Mr. Graham's second basis for appeal was the lack of jurisdiction under subsection 146.(3) for a Regional Safety Officer to vary the authority specified in a direction from subsection 145.(1) [violations] to subsection 145.(2) [danger]. He argued that this would be tantamount to issuing a new direction which I am not authorized to do.

In her summation, Mrs. Smith insisted that she has kept management at UPS informed of her reactions to scented products and that they have observed her attacks and know that they are real. She disagreed with Dr. Burnstein that her attacks are related to stress or anxiety stating that she was not reacting at the hearing despite it being stressful for her. She reiterated that Dr. Li has been her family doctor for more than 4 years and that he has first hand medical knowledge of her attacks. He has told her that the more she is exposed to scented products and perfumes the worse her reactions will become. She now fears that a exposure to scented products and perfumes could

be fatal to her. She reminded me that Dr. Burnstein had earlier acknowledged that if a sensitive person was exposed to a high enough level of the thing to which they are sensitive, that could be life threatening. She insisted that she has a serious health issue and, although UPS has tried things to accommodate her, she must either be permitted to work from home or be provided with a filtered enclosed private office in order to do her job.

Decision:

Issue(s):
There are two issues before me in this case. The first issue to decide is whether I agree with safety officer Furlotte that an danger existed for Mrs. Smith at the time of the his investigation on November 24, 1999. If I decide that a danger existed at the time of his investigation, then I must decide if section 146 of the Code authorizes me to vary the authority of the direction from 145.(1) to 145.(2) since safety officer Furlotte issued his direction pursuant to 145.(1) of the Code.

Applicable Legislation:

For deciding these questions, it is necessary to review the applicable provisions in Part II and the Canada Occupational Safety and Health Regulations (COSHRs). These include:

Section 122.1.
This section specifies the purpose of the Code and establishes that Part II applies to accidents and injury directly attributable to employment.
Subsection 122.1 reads:

> *"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."*;

Section 122. (1).
This section defines the term, "*danger*" in the Code. The definition contains two elements that for a finding of danger under the Code. The first is the existence of a hazard or condition which, in accordance with section 122.1, arises out of, is linked to or is connected to employment in the workplace. The second is that there is a reasonable expectation that the hazard or condition detected will cause an injury or illness before the hazard or condition is corrected. In my view, this includes establishing a causal link between the hazard or condition detected and the illness or injury caused to the person exposed thereto. The definition of "*danger*" reads:

> *"122. (1) In this Part,*
>
> *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;"* [My underline.];

Subsection 128.(1).
This subsection empowered Mrs. Smith to refuse to work because she believed that a hazard or condition existed in her workplace that constituted a danger to her. Subsection 128.(1) reads:

> *128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that*

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or
(b) a condition exists in any place that constitutes a danger to the employee,
the employee may refuse to use or operate the machine or thing or to work in that place. [My underline.];

Subsection 128.(8).
This empowered Mrs. Smith to continue to refuse to do dangerous work because she disagreed that UPS had taken measures to make her workplace safe for her. Subsection 128.(8) reads:

128.(8) Where an employer disputes a report made to the employer by an employee pursuant to subsection (6) or takes steps to make the machine or thing or the place in respect of which the report was made safe, and the employee has reasonable cause to believe that
(a) the use or operation of the machine or thing continues to constitute a danger to the employee or to another employee, or
(b) a condition continues to exist in the place that constitutes a danger to the employee, the employee may continue to refuse to use or operate the machine or thing or to work in that place." [My underline.];

Subsection 129.(1).
This subsection specifies that, upon receipt of a notification of right to refuse, the safety officer must investigate the refusal to work. Subsection 129.(1) of the Code reads:

"129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative." [My underline.];

[According to Merriam Webster's Collegiate Dictionary, Tenth Edition, the term "*investigate*" is defined as:
"to observe or study by close examination and systematic inquiry: to make a systematic examination: to conduct an official inquiry."];

Subsection 129.(2).
This further specifies that a safety officer must investigate to decide whether a the thing or place constitutes a danger. Subsection 129.(2) reads:

129.(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not
(a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or
(b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),
and he shall forthwith notify the employer and the employee of his decision. [My underline.];

Subsection 129.(3).
This subsection specifies that the employer may require the employee concerned to remain at a safe place prior the investigation and decision of a safety officer. Subsection 129.(3) reads:

> *"129.(3) Prior to the investigation and decision of a safety officer under this section, the employer may require that the employee concerned remain at a safe location near the place in respect of which the investigation is being made or assign the employee reasonable alternate work, and shall not assign any other employee to use or operate the machine or thing or to work in that place unless that other employee has been advised of the refusal of the employee concerned."* [My underline.];

Subsection 145.(2).
This provision specifies that the safety officer must "*consider*" that a thing or condition constitutes a danger. Subsection 145.(2) reads:

> *"145.(2) Where a safety officer considers that the use or operation of a machine or thing or a condition in any place constitutes a danger to an employee while at work,*
> *(a) the safety officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer immediately or within such period of time as the safety officer specifies*
> *(i) to take measures for guarding the source of danger, or*
> *(ii) to protect any person from the danger; and…"* [My underline.]; and,

Subsection 146.(3).
This authority empowers a Regional Safety Officer to vary, rescind or confirm a direction. Subsection 146.(3) reads:

> *"146.(3) The regional safety officer shall in a summary way inquire into circumstances of the direction to be reviewed and the need therefor and may vary, rescind or confirm the direction and thereupon shall in writing notify the employee, employer or trade union concerned of the decision taken."* [My underline.]

Rationale

For deciding the first issue, which is whether Mrs. Smith's workplace constituted a danger under the Code for her at the time of the safety officer's investigation on November 24, 1999, I rely on an analysis of the facts in the case, the applicable provisions in the Code and previous decisions of the Public Service Staff Relations Board and of the RSO's.

In this case, Mrs. Smith indicated that she is highly sensitive to scents from plants, perfumes and scented products and suffers an immediate health reaction when exposed to a scent whether at her workplace or other locations. She did not claim that her sensitivity had originated at her workplace but indicated that her reactions to scents at the workplace are becoming more severe and are potentially life threatening. She said that she reacts to scents at concentration levels that might be undetectable to others and so it would not matter if the ventilation or air quality in her workplace were found to be in compliance with applicable standards. She regards her heightened sensitivity as a disability and held that UPS should accommodate her by permitting her to work from her home or by providing her with an enclosed office with a HEPA filter where persons

wearing scented products would be prohibited from entering the enclosed office unless she donned a respirator

In terms of the workplace, safety officer Furlotte testified that he did not conduct tests or require UPS to conduct tests prior to deciding that Mrs. Smith's workplace constituted a danger for her. Instead, he based his decision on his observation of her health reaction after she entered her workplace. He held that the severity of her health reaction after entering her workplace was sufficient proof that there was a potential danger for her in her workplace. He insisted that neither the certificate of illness nor the note from Dr. Li influenced his decision of danger. He said that he acted immediately to protect Mrs. Smith's occupational safety and health and was satisfied that the hazard or condition causing the illness could be determined later.

Dr. Burnstein agreed that the proper action in the circumstances was to immediately remove Mrs. Smith from the room. However, he held that safety officer Furlotte erred when he concluded that there was a danger without having conducted an investigation into her workplace and into Mrs. Smith's medical history. He compared the situation to someone deciding that the moon causes the stars to come out at night because the two are observed simultaneously. He held that all that safety officer Furlotte could conclude from his observations on that day was that Mrs. Smith appeared to become ill in her workplace at that time. He suggested that the reaction safety officer Furlotte observed could have be been asthma, an allergic reaction not related to asthma, or an anxiety attack .

In my opinion, safety officer Furlotte may well have acted appropriately from a humanitarian point of view. However, he fell short as a safety officer in interpreting and applying Part II provisions in respect of this case. Essentially, there were two shortcomings relative to this matter. The first is related to his decision to confirm that Mrs. Smith's workplace constituted a danger for her in order to protect her while he completed his investigation. This was unnecessary because subsections 128.(1), 129.(1) and (3) of the Code already provided for her protection. In accordance with subsections 128.(1) and 129.(1), Mrs. Smith could refuse to work and continue to refuse to work until the employer had acted to protect her occupational safety and health or until he, a safety officer, had decided that a danger did not exist.

The other lapse was that safety officer Furlotte decided that a danger existed without establishing that a hazard or condition existed in Mrs. Smith's workplace that could be expected to cause her illness or injury and that her illness or injury was linked to her workplace. While subsection 145.(2) states only that the safety officer must "*consider*" that a danger exists, "*consider"* does not imply the absence of facts or of reasoned judgment. Subsections 129.(1), and (2) of the Code both confirm that the decision must follow an "*investigation*". Mr. Graham held that common sense alone dictates a decision of danger must be an informed one given the great powers of a safety officer and the impact on an employers business when a finding of danger is made and the employer is required to modify the workplace immediately or cease operations completely. The cases cited by Mr. Graham also confirm that there must be a causal link between the illness or injury and a workplace hazard or condition.

Decision:

Safety officer Furlotte did not establish that a hazard or condition existed in Mrs. Smith's workplace on the day of his investigation that could reasonably be expected to cause her illness or injury, or that there was a link between her health reaction and the workplace. Since no such

evidence was provided to me during the hearing, there is no factual basis for his decision that Mrs. Smith's workplace constituted a danger for her and for issuing the direction he issued. For this reason, I HEREBY RESCIND the direction that safety officer Furlotte issued to United Parcel Service Canada on December 7, 1999, pursuant to subsection 145.(1) of the Code. Since the direction is rescinded, I will not comment on my jurisdiction to vary the authority specified in the direction from subsection 145.(1) [contravention] of the Code to subsection 145.(2) [danger].

Decision rendered August 17, 2000.

Douglas Malanka
Regional Safety Officer

APPENDIX

IN THE MATTER OF THE CANADA LABOUR Code
PART II - OCCUPATIONAL SAFETY AND HEALTH

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On November 24th, 1999, the undersigned safety officer conducted an inquiry in the work place operated by UNITED PARCEL SERVICE CANADA LTD., being an employer subject to the Canada Labour Code, Part II, at 1 FACTORY LANE, 2ND FLOOR, MONCTON, N.B., the said work place being sometimes known as UNITED PARCEL SERVICE.

The said safety officer is of the opinion that the following provision of the Canada Labour Code, Part II, is being contravened:

1. SECTION 124. Every employer shall ensure that the safety and health at work of every person employed by the employer is protected.

The Worksite constitutes a danger to employee's health.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada labour Code, Part II, to terminate the contravention no later than November 24th, 1999.

Issued at Moncton, N.B., this 7th day of December 1999.

Dave Furlotte
Safety Officer
1628

To: UNITED PARCEL SERVICE CANADA LTD.
UNITED PARCEL SERVICE CANADA LTD.
1 FACTORY LANE, 2ND FLOOR
MONCTON, N.B.
E1C 9M3

Decision No.: 00-013

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: United Parcel Service Canada

Respondent: Mrs. C. Smith

KEY WORDS

danger, allergies, sensitivity, anxiety, scented products, perfumes, plants, accommodation

PROVISIONS

Code: 122.1, 122.(1), 124, 128.(1), 128.(8), 129.(1), (2) and (3), 145.(1), 145.(2), 146

SUMMARY

On November 24, 1999, Mrs. Smith , an employee of United Parcel Service Canada (UPS),contacted HRDC and reported to a safety officer that she was exercising her right to refuse work. Safety officer Furlotte proceeded to her workplace to investigate the refusal and encountered met Mrs. Smith waiting in the vestibule of the building. She did not appear to be ill, but within minutes of entering her workplace, her breathing became harsh and her voice changed as though she had a cold. Safety officer Furlotte decided that Mrs. Smith's workplace constituted a danger for her and orally ordered UPS to protect her safety and health. On December 7, 1999, he issued a written direction to UPS pursuant to subsection 145.(1) of the Canada Labour Code, Part II. The direction stated that Mrs. Smith's worksite constitutes a danger to her health and ordered UPS to terminate the contravention by November 24, 1999. UPS requested a review of direction and a hearing was held on June 7, 2000.

Following his review the Regional Safety Officer decided that safety officer Furlotte had not established that a hazard or condition existed in Mrs. Smith's workplace that could be reasonably be expected to cause her illness or injury and that was linked to her reaction on the day of his investigation, and that no such evidence was provided to him. For that reason, he rescinded the direction.