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

275 rue Slater Street, Ottawa, Ontario, K1P 5H9 – Fax : (613) 953-3326

Canada Labour Code
Part II
Occupational Health and Safety

Raymond Leblanc
appellant

and

NAV Canada
respondent

Decision No. 06-023
July 14, 2006

This case proceeded by inquiring into the evidence on file.

Attempts to secure the participation of the appellant in the appeal inquiry and his submissions were unsuccessful.

The respondent provided submissions through David K. Law, Counsel.

The health and safety officer involved in the case was Gilles Hubert, Human Resources and Social Development Canada, Labour Program, New Brunswick Region, Moncton Regional Office*.

Background

[1] Raymond Leblanc, an electronic systems technologist for NAV Canada working in Riverview, New Brunswick, refused to work under section 128 of the *Canada Labour Code*, Part II (hereafter the *Code*), on the morning of August 23, 2004.

[2] Health and safety officer (HSO) Gilles Hubert conducted a thorough investigation into the refusal to work of R. Leblanc on the same day. The HSO concluded that a danger, as defined in the Code, did not exist for the employee. He issued a written decision to this effect and hand delivered it to R. Leblanc on that day. Mr. Leblanc appealed the decision of the HSO in a timely manner under subsection 129(7) of the Code.

* The departments of Human Resources and Skills Development Canada and Social Development Canada were recently merged into the Department of Human Resources and Social Development Canada.

[3] The file confirms that there were numerous oral and written communications between Raymond Leblanc and the Case Management and Hearing Coordinator (Appeals Office Coordinator) of the Canada Appeals Office of Occupational Health and Safety (Appeals Office). On February 13, 2006, Mr. Leblanc stated verbally to the Appeals Office Coordinator that he was maintaining his appeal of HSO Hubert's decision. In a letter to Mr. Leblanc dated May 8, 2006, the Appeals Office Coordinator referred to a subsequent telephone conversation she had with Mr. Leblanc respecting his request to obtain an extension to file written submissions. The letter reads:

> I am writing in response to our telephone conversation of May 5th, 2006 in which you request an extension. Please be advised that the Appeals Officer is granting you an extension until May 31st, 2006 to remit your submissions regarding the Nav Canada (Leblanc) case. Also I take this opportunity to remind you that you must provide the other party with a copy of your submissions.

[4] Mr. Leblanc has not remitted his written submissions as requested. He has not returned repeated calls from the Appeals Office Coordinator to explain this omission. It should be noted that Mr. Leblanc has resigned from his position and is no longer at the employ of NAV Canada. He has signed an agreement with NAV Canada respecting terms of separation with his employer. The full terms of this agreement, termed *Minutes of Settlement* and dated May 17, 2005, have not been disclosed to this Appeals Officer.

[5] Nonetheless, the appeal lodged by Mr. Leblanc under subsection 129(7) of the Code was timely and therefore protected by the Code. The correspondence between him and the Appeals Office Coordinator suggests that it was his firm intention to proceed with the appeal. Since Mr. Leblanc has not formally withdrawn his appeal, I am required by subsection 146.1(1) to investigate the matter in a summary way.

[6] Given the absence of submissions by Mr. Leblanc, I will do so by first analyzing the *Investigation Report and Decision* (Report) issued by the HSO on August 25, 2004. I will also take into consideration the submissions of NAV Canada, which are, to a limited extent, already on file. I note that in a letter of May 1, 2006 to the Appeals Office, Mr. Law requested time to file additional submissions "…in response to submissions filed by Mr. Leblanc…" I infer from this that in the absence of submissions filed by Mr. Leblanc, additional submissions by the employer would not be necessary. I am proceeding on this basis.

Investigation by health and safety officer Gilles Hubert

[7] In his *Investigation Report and Decision*, HSO Gilles Hubert noted that upon his arrival, at approximately 13:15h on August 23, 2004, at the work place of the refusing employee, Raymond Leblanc, he obtained the employee's written statement of refusal to work, explaining, among other things, the employee's reasons for refusing to work. The statement reads:

> Navcan has not provided the ergonomic accommodation necessary to prevent injuries from becoming chronic, unable to progress thru assigned self-studies without severe problems.

[8] HSO Hubert reported Mr. Leblanc's description of the events under scrutiny in the following manner:

> The employee began by stating he was refusing to work and not pursuing a complaint. He stated that he has been complaining about the same issues for the last two years. He stated that an ergonomic process was initiated but it was cut short on August 13, 2004. He also stated that the in-house nurse who had been involved in the file was no longer involved. He indicated that he suffers from back and neck pains and requires extensive adjustments to his work stations; his type of work involves working at several stations, including the one for self-study. The self-study station is used by employees to familiarize or train themselves on new technology and equipment. The employee was to start a 3-day self-study station this morning (August 23). He had found that the work station had not been adjusted for his needs. He proceeded to make the necessary adjustments by himself in preparation for August 23 (APPENDIX 2[1]). He stated that the employer arrived this morning and tore down the "adjustments" he had made. It is at that time that he refused to work. He stated that most of the station was correctly adjusted except for a neck and head rest. He required this equipment because he claimed he was unable to hold up a binder for a lengthy period of time. He went on to explain the nature of his physical condition and stated that his condition was mainly due to 2 vehicle accidents in which he was involved. He also recognized that a previous return-to-work program had failed in the recent past.

[9] HSO Hubert also reported the employer's description of the same events in the following manner:

> The employer, represented by Mike Burgess, indicated that the qualified Occupational Therapist ("OT") assigned to this case had recommended that the "make-shift" adjustments built by the employee, be torn down because they were not safe and secure. The OT visited the workstation on August 13, 2004 to ensure that previous recommendations had been implemented and also to determine of further modifications needed to be made. The employer pointed out that, in her August 20 report (APPENDIX 3) the OT concluded that "The added desktop surface is not secure and should be removed for safety reasons. The added footrests place the hips and knees in awkward postures…therefore, are not necessary." Further she finds that "A monitor riser/stand…received and provided to the client on August 23, 2004… will eliminate any awkward posture and therefore any ergonomic risk factor in terms of neck posture. As for the need for head support, with the above

[1] Appendix 2 is a photograph of the self-study work station.

> recommendation, there would be no ergonomic risk factors justifying the need for this support." The employer thus stated that they had followed and implemented all the recommendations made by the OT; since she was the specialist, they did not argue and attempted to fully accommodate the employee. The employer further indicated that the employee had been assessed by two different qualified medical doctors. As for the problems with the binders, the employer had suggested that the employee take out one page at a time, thus avoiding lifting the binders.

[10] HSO Hubert went on to describe the work being accomplished by the employee at the time of the work refusal as follows:

> The employee was to begin a self-study session, requiring different tasks, such as keyboard, mouse, reading on the monitor and reading from binders.

[11] HSO Hubert's investigation led him to establish the following facts in support of his decision, as indicated in his report:

(a) The employee is on a return to work program, after being off for the better part of the last two years, due mainly to injuries sustained in 2 separate car accidents.

(b) The employer, through Disability Management Branch, has cooperated with Rehabilitation Consultants at Great West Life Assurance Co. to implement an ergonomic process to accommodate the employee.

(c) The Great West Life Assurance Co. has contracted out the services of a professional Occupational Therapist: Renee Frenette, Bsc (Kin), CK, from the company Occupational Concepts, in Moncton, to establish, implement and follow-up on accommodations for the employee.

(d) the Occupational Therapist ("OT") has provided a report on August 20, 2003 establishing minor adjustments to be made to the self-study work station to accommodate the employee.

(e) The employer has complied with the recommendations of the OT, having the work station ready on August 23, 2004.

(f) Two previous return-to-work programs for this employee had failed; the last one being in the fall of 2003.

(g) This officer visited the work station where the refusals to work occurred, with the Ray Leblanc, Mike Burgess and Chris Hansen[2]; when asked what was wrong with the station, the employee made a statement to the effect that nothing was wrong with the station.

[12] At the end of his investigation and having regards to the above established facts, HSO Hubert concluded that a danger did not exist for Raymond Leblanc. He reported his rationale for arriving at this decision as follows:

> Given the fact that the employee stated that nothing was wrong with the work station where the refusal occurred at the time of this Officer's visit and, given

[2] Mr. Hansen was the employee representative present during HSO Hubert's investigation.

> the fact that the employee has been provided with specific health assessments, monitoring, as well as the employer's participation in an ergonomic process to aid in relieving any physical problems and obstacles identified by qualified professionals, this officer has determined that the performance of the activity of self-study could not reasonably be expected to cause injury or illness to a person performing it, as defined in the *Canada Labour Code,* Part II.

Submissions for the employer

[13] Much of the submissions made by David Law, counsel for the employer, relate to the status of the appeal. It is Mr. Law's submission that the agreement signed between Raymond Leblanc and NAV Canada respecting the terms of separation between the employee and his employer effectively constitutes a withdrawal of the employee's appeal. The agreement in question involves the payment of monies to Mr. Leblanc, in addition to his pledge to comply with certain terms. For example, in a letter to the Appeals Office dated September 8, 2005, Mr. Law referred to Article 7 of the Settlement, which reads:

> The grievor releases and finally discharges NAV CANADA, its employees, former employees, officers, directors, agents and insurers <u>from all actions, causes of actions, grievances, claims, complaints, debts or demands in any way connected with the grievor's employment</u>, claims for short and long term disability benefits, sick leave or cessation of employment.
>
> (My underline)

[14] Mr. Law submits that the Appeals Officer should conclude that "this provision in the *Minutes of Settlement* acts effectively to withdraw Mr. Leblanc's appeal…" Mr. Law further argues that this case should not proceed because R. Leblanc has shown a total lack of interest in the case. Mr. Leblanc has, for all practical purposes, abandoned his appeal when he entered into an agreement of separation with his employer, NAV Canada. Mr. Law interprets the terms of the agreement, and particularly Article 7 of the *Minutes of Settlement,* to mean that Mr. Leblanc is prohibited from taking any action against his employer. An appeal of the decision of the HSO is considered such an action. Since Mr. Leblanc has formally agreed "…to release and discharge NAV Canada, and others, from all actions…", the appeal should be considered, in light of this provision, has having been effectively withdrawn by Mr. Leblanc.

[15] Mr. Law also submitted that Mr. Leblanc's "…original work refusal was a form of complaint …against the working conditions afforded by NAV Canada." He further submits that the fact that the remedy sought by Mr. Leblanc i.e. to have the alleged ergonomic deficiencies identified at his work stations corrected, "…is now moot – Mr. Leblanc having departed his employment at NAV Canada – does not alter the fact that as the employer respondent to the appeal, NAV Canada remains a party subject to the appeal." Mr. Law argues that the appeal itself constitutes an "action" specified in Article 7 above. However, NAV Canada has been released from such action and, consequently,

the Appeals Officer should consider -that the appeal has been withdrawn implicitly by Mr. Leblanc.

[16] HSO Hubert found that no deficiency existed for Raymond Leblanc and concluded that the danger did not exist. However, if the appeal was to be allowed in any part, NAV Canada would be expected to remedy those deficiencies. Since Mr. Leblanc is no longer with NAV Canada, the remedy is moot and the appeal must be regarded as withdrawn.

Decision

[17] According to Mr. Law, I should consider that Mr. Leblanc implicitly withdrew his appeal by signing an agreement with NAV Canada. I would remind him that, as an Appeals Officer, I am not bound by any agreement, or interpretation of an agreement, made between NAV Canada and R. Leblanc. When inquiring into an appeal of a decision of a health and safety officer, I am bound by the provisions of the Code, and most specifically by subsection 146.1(1), which provides:

> 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).
>
> (My underline)

[18] Mr. Law also submitted that any remedy that would be asked of NAV Canada would be moot and the appeal must be regarded as withdrawn because the work refusal was a form of complaint, no deficiency and no danger had been found and Mr. Leblanc was no longer with NAV Canada.

[19] I agree with the findings of HSO Hubert that no danger existed for Mr. Leblanc. I agree also with Mr. Law that R. Leblanc's work refusal was in reality a form of complaint that culminated into a refusal to work. However, under the Code, an employee has the right to refuse to work and to have the issue investigated. Therefore, it is not my intention to further comment Mr. Law's assertion that R. Leblanc's refusal to work was a form of complaint against the working conditions at NAV Canada.

[20] The investigation of HSO Hubert was thorough and factual. An outside occupational therapist (OT) was involved in assessing and correcting the working conditions of the employee. Specific minor corrections were made to the self-study work station where Mr. Leblanc was expected to work on August 23, 2004. Evidently, Mr. Leblanc was not satisfied with these corrections as he personally made additional adjustments to the work station. The absence of Mr. Leblanc from the appeal process leaves this Appeals Officer little choice but to agree with the OT that those adjustments were unsafe and could have aggravated Mr. Leblanc's condition.

[21] In fact, there is little that the employer could have done to accommodate further the employee in the instant case. Mr. Burgess, the employer representative, fully cooperated with the OT to identify and eliminate obstacles from Mr. Leblanc's work station. On August 23, 2004, the employee admitted to the HSO that there was nothing wrong with the work station. It was his personal medical condition that was the source of his problems. Mr. Leblanc had suffered injuries from two previous automobile accidents which left him with after-effects of back and neck pains.

[22] The term "danger" is defined in section 122.1 of the Code as follows:

> "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[.]
>
> (My underline)

[23] Clearly, for danger to exist under the Code, the hazard or condition expected to cause injury or illness must be one that can be corrected or the activity altered. I am satisfied that NAV Canada had done everything reasonable in the circumstances to remedy any deficiency in the work station that had the potential to cause injury or illness to Mr. Leblanc. Notwithstanding this, Mr. Leblanc was still suffering from back and neck pains.

[24] Mr. Leblanc stated to HSO Hubert that most of the station was correctly adjusted except for a neck and head rest. In final analysis, I concur with the OT who, in reference to a headrest solution for the employee, stated:

> However, the need for headrest support becomes an issue related to pain management and therefore should be reviewed from a medical point of view.

[25] Mr. Leblanc's problem was addressed by his employer in a reasonable and diligent manner. This employee was on a return-to-work program. His employer cooperated with the OT and other professionals to find health and safety solutions to his problems. Solutions were being implemented when the employee decided to stop that process and initiate a refusal to work for danger.

[26] The HSO found that Mr. Leblanc was not in danger as defined in the Code. I agree with his factual findings and his decision of absence of danger on the basis of those facts. For all the above reasons, I confirm the decision of absence of danger rendered by HSO Gilles Hubert on August 23, 2004 to Mr. Raymond Leblanc.

_____

Serge Cadieux
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 06-023

Appellant: Raymond Leblanc

Respondent: NAV Canada

Provisions: *Canada Labour Code*, 122(1), 127.1, 129(7), 146.1(1)

Keywords: Refusal to work, complaint, occupational therapist, ergonomic accommodations, return-to-work program, self-study work station, personal medical condition

Summary:

An employee of NAV Canada was on a return-to-work program after suffering injuries as a result of two car accidents. The employee was to work at a self-study work station. His employer cooperated with an outside occupational therapist (OT) to identify and remedy any deficiency in that work station required to accommodate the employee. The employee was not satisfied with the corrections made and proceeded to make his own adjustments to the station. On the recommendation of the OT who believed that the adjustments were unsafe, the employer proceeded to tear down the make-shift adjustments. This caused the employee to refuse to work.

A health and safety officer (HSO) investigated the refusal to work and concluded that the employee was not in danger as defined in the Code. The Appeals Officer agreed with the HSO. The Appeals Officer found that the situation identified by the employee was not one that his employer could correct under the Code since it was the employee's personal medical condition that was the source of the employee's problems. The decision of the HSO was confirmed.