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

Canada Post Corporation
applicant

and

Volker Wiesener *et al.*
and
Canadian Union of Postal Workers
respondents

Decision No.: 06-034 (S)
October 12, 2006

This request for a stay was decided by Katia Néron, Appeals Officer, based on the written submissions provided by the parties.

For the applicant
Stephen Bird, counsel

For the respondents
David I. Bloom, counsel

Health and safety Officer
Bruce McKeigan, Labour Program, Human Resources and Skills Development Canada (HRSDC), Ottawa, Ontario

[1] The present decision concerns a request for a stay in respect of the direction that health and safety officer (HSO) Bruce McKeigan issued to Canada Post Corporation (Canada Post) on April 3, 2006, under subsection 145(1) of the *Canada Labour Code*, Part II (the *Code*). HSO McKeigan issued this direction following his investigation of a work refusal made, on March 30, 2006, by four rural suburban mail carriers (RSMCs) working at the post office in Englehart, Ontario.

[2] HSO McKeigan's direction issued to Canada Post included two items. The arguments submitted by the applicant's counsel to support the request for a stay and the rebuttal forwarded by the respondents' counsel concerned only the first item of the direction.

[3] The first item of the direction reads as follows:

> The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code* – Part II, have been contravened:
>
> 1. Subsection 128(10)
>
> *An employer shall immediately on being informed of the continued refusal under subsection (9), investigate the matter in the presence of the employee who reported it and of*
>
> *(a) at least one member of the work place committee who does not exercise management functions;*
>
> *(b) the health and safety representative; or*
>
> *(c) if no person is available under paragraph (a) or (b), at least one person from the work place who is selected by the employee.*

[4] In other words, HSO McKeigan concluded that Canada Post was in contravention of subsection 128(10) of the Code because, at the time of the work refusal investigation, he observed that, even though it was not specified as such in the direction, the local Englehart postmaster, who was acting as the workers' representative, was in fact exercising managerial functions since he was responsible for supervising the Englehart post office and the RSMCs working out of that office.

[5] The issue to be decided in the present case is whether or not there are substantive grounds justifying that I grant a stay of HSO McKeigan's direction to Canada Post.

[6] To reach a decision, I have to consider the evidence provided by both parties, as well as the jurisprudence they submitted on the three main tests to consider a stay application: the seriousness of the issue, the irreparable harm resulting from a refusal and the balance of inconvenience, *i.e.* the greater harm suffered by a party as a result of the granting or refusal of the stay, applied by the Supreme Court of Canada, particularly in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] S.C.R. 110, and *RJR-Macdonald Inc. v. Attorney-General of Canada*, [1994] 1 S.C.R. 311.

Applicant's arguments and respondents' rebuttal

[7] I retain the following from the applicant's arguments and the respondents' rebuttal with regard to the stay request, given the Supreme Court's three tests mentioned above.

Prima facie case

[8] Canada Post's counsel, Stephen Bird, submitted that for a stay to be granted, it must meet the three tests set by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra*, that is:

1. the seriousness of the issue to be tried;

2. the irreparable harm; and
3. the balance of inconvenience.

[9] With regard to the first test, counsel Bird argued that in *Manitoba v. Metropolitan Stores (MTS) Ltd., supra*, the Supreme Court reviewed the jurisprudence on stays and injunctions and noted that two streams of thought were developed on the first test.

[10] The Court stated that on the one hand, the traditional test consists in asking whether the litigant who seeks the interlocutory injunction can make a *prima facie* case. If not, the injunction will be refused. This stream of thought requires a preliminary and tentative assessment of the merits of the case.

[11] Counsel Bird conceded that the focus of the present issue is whether local postmasters exercise sufficient managerial authority to exclude them from being considered as workers' representatives under Part II of the Code. To determine that it requires an analysis of their duties and responsibilities within the framework of established jurisprudence and an interpretation of the inter-relationship of the meaning of these terms under the *Canada Labour Code,* Part I and Part II.

[12] However, counsel Bird argued that this evidence is not necessary for Canada Post to meet its burden at this stage of the inquiry, nor should it be considered at this stage of the proceedings. To support his position, he referred to paragraph 50 of *RJR-Macdonald Inc. v. Attorney-General of Canada, supra,* where the Supreme Court stated that "prolonged examination into the merits is generally neither necessary nor desirable."

[13] Furthermore, counsel Bird affirmed that even if the more stringent standard is applied, he has established a strong *prima facie* case, as evidenced by the fact that rural postmasters are members of the Canadian Postmasters and Assistants Association (CPAA) bargaining unit. They also do not exercise managerial authority within the meaning of the *Canada Labour Code*, Part I. If they did, they would not be eligible to be members of a bargaining unit as defined under subsection 3(1).

[14] On the other hand, counsel Bird stated that the second stream of thought on the first test was the one adopted by the British House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504, who held that all that was necessary to meet this test was to satisfy the Court that there was a serious question to be tried, as opposed to a frivolous or vexatious claim.

[15] Counsel Bird stated that the question of whether postmasters exercise managerial authority for the purposes of the Code is a serious question, because it would have an impact upon approximately 1,700 post offices nationally having less than 20 employees, where there is a combination of RSMCs and CPAA members and where CPAA members predominantly occupy positions as health and safety representatives.

[16] Based on the above, counsel Bird stated that Canada Post has met the first test in that a serious issue was raised, this issue is not a frivolous one and the *prima facie* case has been demonstrated.

[17] In reply to counsel Bird's arguments on the first test, David I. Bloom, counsel for the respondents, stated that in the instant case, the first test requires that a strong *prima facie* case, or at least a *prima facie* case, be established. He added that the onus of establishing such a *prima facie* case fell on Canada Post and that the employer had not met this requirement for the following reasons:

- Canada Post relies on the postmasters' union membership and the collective agreement in force between the CPAA and the employer to sustain his argument. However, Canada Post has not provided any outline or analysis of the actual duties and responsibilities of the Englehart postmaster.
- Although he agrees with the applicant that the issue is whether the Englehart postmaster exercises managerial functions to an extent that excludes him from acting as a workers' representative under the Code, counsel Bloom believes that the determination of this issue should be based on an analysis of the postmaster's actual duties and responsibilities and that in the absence of any such outline or analysis, counsel for the employer has not established a *prima facie* case.

Irreparable harm

[18] With regard to the second test, counsel Bird contended that Canada Post will suffer irreparable harm because compliance with the direction will not only necessarily require the removal of the postmaster as the health and safety representative in Englehart, but also imply a nation-wide reorganization of the structure of health and safety committees. This will incur expenses in terms of both the reorganization itself and the training of new health and safety representatives.

[19] Counsel Bird added that the new health and safety representatives would be inexperienced until fully trained, which would put the health and safety of workers at risk as a result.

[20] In addition, counsel Bird argued that if Canada Post was successful in its appeal, it would have no avenue to recover any of the funds expended on these new representatives. Furthermore, there is no mechanism to accommodate the decreased efficiency that would be experienced by the health and safety committees during the required transition.

[21] In reply to counsel Bird's arguments on the second test, counsel Bloom referred to the definition of "irreparable" given in paragraph 59 of *RJR-McDonald Inc. v. Canada (Attorney General)*, *supra*. It reads:

> 59. "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry*

> (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. V. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

[22] Counsel Bloom also referred to *Syntex Inc. v. Novopharm Ltd*., [1991] F.C.J. No. 424 (C.A.), *Centre Ice Ltd. v. National Hockey League*, [1994] F.C.J. No.68 at paragraph 7 (C.A.) and *Boston Pizza International v. Boston Market Corp.*, [2003] F.C.J. No. 531 at 28, 35 (T.D.), where the Courts held that speculative or indirect evidence of harm is insufficient.

[23] Counsel Bloom affirmed that this approach had recently been endorsed by the Federal Court, as shown in paragraph 52 of *Canada Post Corporation and the Attorney General of Canada and Carolyn Pollard*, 2006 FC 1011. It reads:

> 52. The Federal Court of Appeal has held that applicants for a stay must present clear and cogent evidence of irreparable harm. Courts have consistently held that evidence of harm that is merely speculative, or is indirect evidence of harm, is insufficient.
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> *Syntex Inc. v. Novopharm Ltd*., [1991] F.C.J. No. 423 (C.A.)
> *Centre Ice Ltd*. v. *National Hockey League*, [1994] F.C.J. No. 68 at para. 7(C.A.)
> *Boston Pizza International v. Boston Market Corp.*, F.C.J. No. 531 at 28, 35 (T.D.)

[24] Since the direction pertains only to the Englehart post office, counsel Bloom stated that Canada Post has not demonstrated that it will be generally reorganizing its whole health and safety structure pending the result of the appeal of HSO McKeigan's direction.

[25] Counsel Bloom added that in order to obtain a stay of the direction in the present case, Canada Post had to establish that a denial of the stay would result in irreparable harm.

[26] Counsel Bloom maintained that it was obvious that compliance with the direction would only require that the Englehart postmaster be prohibited from serving as the workers' health and safety representative until disposal of the appeal.

[27] If that was the case and there was a work refusal at the Englehart post office, counsel Bloom argued that the refusing employee could be accompanied by a union representative or, if necessary, by a fellow worker, as permitted by paragraph 128(10)(*c*) of the Code. Therefore, any evidence of harm in this instance was speculative.

[28] For the above reasons, counsel Bloom affirmed that there was no clear and cogent evidence that a denial of the stay would cause irreparable harm to Canada Post, given how that term had been defined and interpreted in the relevant case law.

Balance of inconvenience

[29] Finally, on the balance of inconvenience test, counsel Bird submitted that Canada Post readily acknowledged that the test will generally favour ensuring that safe work practices are followed; it will seldom, if ever, favour an employee to perform dangerous or hazardous work.

[30] However, counsel Bird argued that these two options do not apply to the present case, for the following reasons:

- while the direction is specific to Englehart in Ontario, this is not an isolated situation in Canada;
- Canada Post will suffer the greater inconvenience if the stay is not granted, because compliance with the direction would involved a fundamental change in the composition of health and safety committees and, in the interim, committees would function at less than optimum level;
- maintaining the *status quo* that has existed since January 2004 – when rural route contractors became employees of Canada Post, now referred to as RSMCs, and members of CUPW –, by not automatically including RSMCs' representatives in health and safety committees, is less prejudicial than requiring Canada Post to reorganize its entire health and safety structure, incur substantial costs to retrain CUPW employees as health and safety representatives and, in the short term, placing the health and safety of employees at risk by having inexperienced health and safety representatives operating at less than optimum level;
- the harm that would be suffered by the employees is minimal, if not non-existent.

[31] In reply, counsel Bloom affirmed the third test for the party seeking a stay is to establish that the refusal to grant such relief would cause more harm than would result from allowing the direction to remain in force. Counsel Bloom believes that Canada Post has not met this requirement for the following reasons:

- the first item of the direction was issued to protect the health and safety rights of workers and to ensure appropriate health and safety representation;
- the consequence of a person exercising managerial functions acting as a workers' health and safety representative is inherently prejudicial to the members of CUPW and to the vigorous protection of their health and safety rights under the Code and the collective agreement;

- the extent of any inconvenience to Canada Post in establishing an arrangement compliant with the direction for a temporary period of time is not apparent on the face of the application;
- in *RJR-Mac Donald v. Canada (Attorney-General), supra*, the court indicated that where the balance of inconvenience does not clearly favour one side or the other, this requirement of the test for obtaining a stay is not satisfied;
- the inconvenience for Canada Post of temporarily removing the postmaster from this possible conflict of interest is not evident.

Analysis and decision

[32] Does Canada Post have substantive grounds to support obtaining a stay of HSO McKeigan's direction?

[33] In *RJR-MacDonald Inc. v. Canada (Attorney-General), supra*, the Supreme Court of Canada referred to the three-stage test to apply when examining a stay request that it had adopted in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd*., *supra*. The test was summarized in paragraph 43 as follows:

> Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a primary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[34] The arguments submitted by counsel Bird for Canada Post clearly reveal that the employer fears that failure to obtain a stay of the direction would imply that the direction could be applicable to all other similar post offices across Canada and would affect the structure of the health and safety committees nationally.

[35] With regard to the first test, I find that, since the direction only relates to the Englehart Post Office and specifies that it was issued as a result of a work refusal investigation that took place pursuant to subsection 129(1) of the Code, there is no ground at this stage of my inquiry to imply that the direction applies to other similar post offices across Canada. Therefore, I find that Canada Post has not established a *prima facie* case.

[36] On the irreparable harm test, I find that the direction would not affect the national structure of health and safety committees. As a result, Canada Post would not suffer irreparable harm in terms of both the reorganization and training of new health and safety representatives in order to comply with the direction.

[37] In addition, with regard to the balance of inconvenience test, pending the Appeals Officer's hearing, subsection 129(1) of the Code gives other alternatives to protect the rights of workers to an appropriate representation during a refusal to work investigation.

[38] As a consequence, the arguments submitted by the applicant did not convince me that he had established a *prima facie* case, that the employer would suffer irreparable harm and that Canada Post would suffer the greater inconvenience.

[39] For this reason, I refuse to grant Canada Post's request for a stay of HSO McKeigan's direction.

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Katia Néron
Appeals Office

Summary of Appeals Officer's Decision

Decision No.: 06-034

Applicant: Canada Post Corporation

Respondent: Volker Weissner et al. and Canadian Union of Postal Workers

Provisions: *Canada Labour Code*, 145(1), 128(10),

Keywords: Stay, managerial functions, refused.

Summary:

A request for a stay was brought forth by Canada Post Corporation on the direction issued by health and safety officer Bruce McKeigan (HSO) on April 3rd, 2006 following the work refusal of four rural suburban mail carriers (RSMCs). The direction was issued for the fact that section 128(10) of the *Canada Labour Code*, Part II (*Code*) was contravened when an employee representative held managerial functions at the time of the investigation conducted by the HSO. The *Code* clearly outlines that someone with managerial functions cannot be an employee representative, as was the Post Master at the time of the investigation. The Appeals Officer considered three tests to satisfy the grant of a stay; 1) seriousness of the issue to be tried, 2) irreparable harm and 3) balance inconvenience as set out by the Supreme Court of Canada's decision, *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* Further to his analysis, the Appeals Officer refused the stay.