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

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Canada Labour Code
Part II
Occupational Health and Safety

Canada Post Corporation
applicant

and

Canadian Union of Postal Workers (CUPW)
respondent

Decision No.: 06-037 (S)
November 3, 2006

Appeals Officer: Richard Lafrance
Written submission received between July 12 and August 31, 2006

For the appellant
Stephen Bird
Counsel for Canada Post Corporation

For the respondent
David Bloom
Counsel for Canadian Union of Postal Workers (CUPW)

Health and Safety Officers
Gilles Hubert: Case No: 2006-10 (Fredericton, NB)
Karen Malcolm: Case No: 2006-17 (Midland, Ontario)
Bob Tomlin: Case No: 2006-18 (Napanee, Ontario)

[1] This decision concerns the request for a stay of directions issued to Canada Post Corporation (Canada Post) under Paragraph 145(2)(*a*) of the *Canada Labour Code* (*Code*), Part II by health and safety officers (HSO) Gilles Hubert, Karen Malcolm and Bob Tomlin:

[2] At the request of the applicant, this request for a stay of the directions deals with three similar situations and ensuing directions issued by the above named health and safety officers. These cases were numbered by the Canada Appeals Office as 2006-10, 2006-17 and 2006-18.

[3] While each direction dealt with specific employees, circumstances and work places, because of the great similarities of the situations, the parties provided general arguments for the stay of the three directions.The directions were issued following the investigation by the health and safety officers of work refusals initiated by Rural Service Mail Carriers (RSMC): Nicole Logan, Arthur Allen Jr., Valery Horbatiuk, and Sylvia Princis-Bothwell.

[4] The directions were issued following the investigation by the health and safety officers of work refusals initiated by Rural Service Mail Carriers (RSMC): Nicole Logan, Arthur Allen Jr., Valery Horbatiuk, and Sylvia Princis-Bothwell.

[5] In each of the cases, the circumstances revolve around the ergonomic aspect of the movement required to be made by a rural service mail carrier in delivering the mail through the passenger side window of a vehicle.

[6] Each direction states that the performance of the activity constitutes a danger to the named employees while at work and directs Canada Post to take measures to correct the hazard or condition that constituted the danger.

[7] The danger is identified as follows in the directions issued to Canada Post:

i. Case No. 2006-10 (Fredericton, NB)

> "The repetitive movement of sliding and stretching from left to right, from the driver's seat to the passenger seat, in order to reach the mailboxes on the side of the road, in rural areas, constitutes a danger as defined in Part II of the *Canada Labour Code*."

ii. Case No. 2006-17 (Midland, Ontario)

> "The employee is required to navigate from left hand driver's seat to the right hand passenger seat of the vehicle to deliver mail through the window. To perform this activity, the employee must twist the trunk of the body in such a way that could reasonably be expected to cause injury."

iii. Case No. 2006-18 (Napanee, Ontario)

> "Rural Service Mail Carriers (RSMC) are required to manoeuver (*sic*) themselves in a manner that may not be ergonomically safe, within the confines of a vehicle that is not designated for the purpose of the task they are performing and this places them in a potential danger."

[8] Mr. S. Bird, counsel for Canada Post, presented his arguments for a stay of the directions based on the Metropolitan Store[1] Supreme Court decision. In that decision the Supreme Court adopted a three-part test for either a stay or an interlocutory injunction. That is:

[1] *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] S.C.R. 110

i. Serious issue to be tried.
ii. Irreparable harm.
iii. Balance of inconvenience.

[9] S. Bird contends that Canada Post meets the first test, that of serious issue to be tried. He argues that the question is neither frivolous nor vexatious and that similarly to other cases decided by Appeals Officers2,3,4 the health and safety of employees is always a serious question to be tried.

[10] Regarding the second test: that of irreparable arm, S. Bird pointed out that the courts generally look for an indication that the loss occasioned is incapable of being remedied by the issuance of damage.

[11] He argued that if Canada Post was successful in its appeal, it has no avenue to recover any of the funds expended to pay for the additional assistants it has hired to assist the RSMC in delivering mail through the passenger side window.

[12] He further argues that Canada Post is limited in the options it has to meet its legislated mandate of delivering the mail. The only solution is to provide the assistants at an additional cost to Canada Post, a cost that cannot be recovered.

[13] In addition, he submits that the harm that would be suffered by Canada Post would not be just monetary. Canada Post must continue to deliver mail as mandated under the Canada Post Corporation Act. Without the rural mail carriers using their personal vehicle, delivery of mail would be seriously curtailed.

[14] On the test of balance of inconvenience, S. Bird maintains that Canada Post will be greater inconvenienced if the stay is not granted. He argued that the harm to the employees is minimal if not non-existent. He contends that the impact on mail delivery functions outweighs the speculative ergonomic risk to the rural carriers.

[15] Mr. D. Bloom, counsel for CUPW argued that Canada Post, must, in accord with the Dialadex Communications5 Court decision, demonstrate a prima facie case, when the facts, as in this case, are not substantially in dispute. He indicated that in this case many of the underlying facts are not in dispute; therefore, it is in this line of thought that I should rule that Canada Post does not have a prima facie case, and reject the request for a stay of the directions.

[16] Regarding the irreparable harm test, D. Bloom, pointed out that irreparable harm involves substantial harm which in the normal course cannot be cured.

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[2] *Canada (Correctional Service) and Union of Canadian Correctional Officers* – CAO, No. 2005-45 (Lafrance)
[3] *Canadian National Railway Co. and Canadian Auto Workers, Local 5.1* – CAO, No. 2005-49 (Guenette)
[4] *Canadian Pacific Railway Co. v. Canadian Auto Workers*, CAO- No. 2006-03 (Malanka)
[5] Dialadex *Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.) Page 396.

> (RJR MacDonald)[6] "par. 59
> "Irreparable" harm refers to the nature of the harm suffered rather than its magnitude. It is harm which cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damage from the other.

[17] D. Bloom submits that Canada Post claims that the hiring of assistants for RSMCs will impose additional costs on Canada Post. However, it is to be noted that the additional costs claimed by Canada Post have not been particularized. In the absence of information regarding the actual costs, a finding of irreparable harm is not appropriate.

[18] In addition, he submits that in accordance with the collective agreement the cost of hiring assistants is to be included in the total amount already allocated for RSMC delivery. It appears that the cost will merely be a reallocation of funds already committed to rural mail delivery. Therefore, there would be no additional costs to Canada Post.

[19] Finally, regarding the suggestion by Canada Post that mail delivery will be curtailed, D. Bloom indicated that mail deliveries are still taking place and that curtailment of deliveries has not occurred.

[20] On the balance of inconvenience test, D. Bloom argued that the harm to the employees that would result if the stay is granted outweighs any harm to Canada Post resulting from the directions remaining in place pending the hearing of the Appeal.

[21] D. Bloom contends that Canada Post seeks to diminish the health and safety concerns of the workers by suggesting that the work process has remained unchanged for many years. However, Canada Post has changed the work practices by prohibiting RSMCs from delivering mail from the driver side of the vehicle or from getting out of their vehicle to deliver the mail.

[22] He contends that even though the directions were issued in January and February of 2006, to date, Canada Post has not put forward any ergonomic report in support of its claim that the concerns of the RSMCs are based on pure speculation. He noted that Counsel for Canada Post made similar submissions in the Pollard7 case, which was rejected by Appeals Officer Malanka.

[23] In rebuttal to D. Bloom's arguments about the irreparable harm test, S. Bird contends that Canada Post needs only to demonstrate that it will suffer losses that will not be recoverable.

[24] In addition, he submits that if this is incorrect, Canada Post has submitted to CUPW, evidence on both irreparable harm and balance of convenience by way of affidavit8 in the stay motion before the Federal Court in the Pollard9 matter.

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[6] RJR MacDonald Inc *v.* Canada (Attorney General of Canada), [1994] 1 S.C.R. 311
[7] *Carolyn Pollard v. Canada Post Corporation*, Appeals Officer D. Malanka, Decision No. 06-022
[8] *Affidavit* of Sanjay Paliwal, Federal Court, Trial Division, Court file No. T-14280-06

[25] S. Bird further submits that Canada Post reiterates that the underlying rationale for the work refusals in question are predicated on the individual circumstances of the refusing employees, such as a medical restriction instead of a "dangerous work" situation as envisaged by the legislation. It is important to note that Appeals Officer Malanka made specific findings, in the Pollard case, that the employee's back problems fell within the range of the average person and was not associated with any particular accommodation obligation under other legislation.

[26] S. Bird states that in the instant case, the individual circumstances of the refusing employee have not been properly considered. He further argues that such considerations are empirical, due to the fact that a finding of danger precludes any employee from performing the function and supports the conclusion that the balance of convenience favors Canada Post.

[27] S. Bird agrees that safety is an extremely important concern for Canada Post and that no decision should be made which impacts on the safety of a worker. However, in these cases, no ergonomic movement is specified as unsafe, and that is the focus of the stay application; that presumably every movement is potentially unsafe.

[28] In response to the above rebuttal from S. Bird, about the affidavit that was submitted by Canada Post to the Federal Court, D. Bloom indicated that the application for the stay was dismissed by the Federal Court on August 22, 2006. The stay application was dismissed because irreparable harm was not established.

[29] He noted as well that of the three locations that are the subject of the instant application, the affidavit in question only identifies Fredericton as a location where Canada Post has been required to alter its method of delivery (i.e. hiring an assistant for the RSMC) and may have experienced some reputation impact. However, the extent of any reputation impact is unclear and somewhat speculative in nature.

Analysis and decision

[30] The issue in this case is whether or not to grant a stay of direction pursuant to subsection 146(2) of the Code which reads as follows:

> 146(2) Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.

[31] The Supreme Court of Canada set out the test for the granting of a stay in the Metropolitan Stores decision supra.

- "The first test is a preliminary and tentative assessment of the merits of the case. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a prima facie case. A more recent formulation holds that all that is necessary is to satisfy the court that there is a serious question to be tried as

[9] *Canada Post Corporation and Attorney General of Canada and Carolyn Pollard* [Aug 28 2006] Docket: T -1428-06, Citation: 2006 FC 1011

opposed to a frivolous or vexatious claim. The "serious question" test is sufficient in a case involving the constitutional challenge of a law where the public interest must be taken into consideration in the balance of convenience.

- The second test addresses the question of irreparable harm.
- The third test, called the balance of convenience, is a determination of which of the two parties will suffer the greater harm from the grant or refusal of an interlocutory injunction, pending a decision on the merits.”

[32] As indicated in the RJR-MacDonald decision supra, all the elements of the three-part test must be proven, if one of them is not met, the stay is not granted.

[33] With regard to the first test, D. Bloom argued that Canada Post did not have a prima facie case and that I should dismiss the request for a stay. He based his argument on the Dialadex Communications decision supra where it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

[34] In this case, I disagree with D. Bloom where he states that the facts are not substantially in dispute. Based on the arguments presented so far by the parties, I can determine that one of the main facts argued by the employer is that the harm to the employees is minimal if not non-existent; that the impact on mail delivery functions outweighs the speculative ergonomic risk to the employees. D. Bloom suggests to the contrary that Canada Post seeks to diminish the health and safety concerns of the workers. I believe there is a substantial dispute with regard to facts.

[35] I am of the opinion that the question is not frivolous or vexatious and that there is a substantial question to be tried as it deals with the health and safety of employees. In addition the applicant must, in all fairness, have the opportunity to present its case to the tribunal. As well, on a lower level, but nonetheless, taking into consideration that the decision rendered by this tribunal is of public interest as it deals with the future of rural mail deliveries, I believe that Canada Post has met the test of a serious question to be tried.

[36] The second test deals with the irreparable harm that the applicant may sustain if the stay is not granted. Canada Post argued that it is suffering irreparable harm because of the cost incurred in hiring assistants to help the RSMCs and that even if it was successful in its appeal, it is a cost that they could not recover.

[37] In addition, Canada Post submitted the affidavit of Sanjay Paliwal, which contains the arguments that were submitted to the Federal Court in the motion for an interim order staying the direction issued by Appeals Officer Malanka in his Pollard decision.

[38] I retain the following from Mr. Paliwal's affidavit.

- The Appeals Officer's decision and direction could be extended to every movement by every RSMC across Canada, and could effectively prevent Canada Post from delivering mail to 840,000 rural mailboxes.
- The Direction could be used as a precedent that would not only impact all other RSMCs in Brampton, ON but also all other RSMCs currently delivering and picking up mail through the passenger side window of their vehicles across Canada. This type of direction would be completely unmanageable if it extended to the office or national level due to the lack of time and flexibility regarding alternate solutions.
- Canada Post has already suffered irreparable harm to its reputation as a quality service provider due to changes that it has had to make in order to comply with the Appeals Officer's decision and direction, which cannot be compensated by damages.
- In respect of accommodating the ergonomic issue, Canada Post has provided paid assistants to RSMCs who have complained or refused. Canada Post is currently expending approximately $200,000 per month in this regard. In the event that this decision and direction is given broader application by HRSDC, the cost to Canada Post will increase exponentially, and are not capable of recovery in damages.

[39] In RJR-MacDonald, Sopinka and Cory JJ. defined "irreparable harm" as follow:

> At this stage the only issue to be decided is whether a refusal to grant relief could adversely affect the applicant's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the results of the interlocutory application.
>
> "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 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 favor of the other party who will ultimately be able to collect damages, although it may be a relevant consideration (Hubbard v. Pitt, [1976] Q.B. 142 (C.A.))

[40] While the Federal Court, in Pollard, ruled on a situation of some similarity to the case at hand, the fact remains that the said ruling dealt with the specific circumstances of a case. As such, while I do take this ruling into account, I give little weight to the arguments contained in the affidavit as it does not deal specifically with the cases at hand, but rather deals with the Pollard case itself.

[41] Similar to the Pollard case, Canada Post relies on monetary issues and on the speculations that the decision and direction could be given broader application by HRSDC and renders it unmanageable.

[42] With the temporary measures it has put in place, Canada Post continues to meet its legal obligations of delivering the mail and no curtailment of mail delivery were confirmed by the Corporation.

[43] Therefore, Canada Post did not demonstrate that it suffered irrevocable damage to its business reputation and/or that it would suffer substantial irreparable harm if I reject the request for a stay of the directions. The fact that it pays for additional assistants for a few RSMCs in the cases at hand, does not constitute a substantial irreparable harm.

[44] With regard to the supposition that HRSDC may apply the directions at large across the country and render the situation untenable, I find that the directions address specific situations with regard to specific employees and therefore are limited to the three work places identified in the directions and as such do not constitute irreparable harm to Canada Post.

[45] As mentioned above, all the elements of the three-part test must be proven, if one of them is not met, the stay is not granted. Because Canada Post failed to meet the second test, that of irreparable harm, I see no reason to continue with the analysis of the third test.

[46] In conclusion, the motion for a stay of the three directions issued by the health and safety officers to protect the health and safety at work of the refusing employees: Nicole Logan, Arthur Allen Jr., Valery Horbatiuk, and Sylvia Princis-Bothwell in cases No. 2006-10, 2006-17 and 2006-18 is rejected.

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Richard Lafrance
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 2006-037 (S)

Applicant: Canada Post Corporation

Respondent: Canadian Union of Postal Workers

Provisions: *Canada Labour Code*, 145(2)(a)

Keywords: Stay, ergonomic movements, Rural Service Mail Carriers, rejected

Summary:

The stay request was brought forth by counsel for Canada Post Corporation. Counsel for Canada Post Corporation stated that the supreme court adopted a three-part test which is designed to test: i) Serious issue to be tried, ii) Irreparable harm, iii) Balance of inconvenience. Counsel argued that it met all three tests and that by not granting the stay that the risk to the employees does not outweigh the possible impact on mail delivery as outlined in the Canada Post Corporation Act. Irreparable harm as pointed out by Counsel for the Canadian Union for Postal employees cannot be settled by monetary value; therefore it does not apply to Canada Post Corporation. The Appeals Officer decided that Canada Post Corporation did not demonstrate substantial irreparable harm. The appeal officer stated that all three parts of the test must the met, because one part was not met; the Appeals Officer saw no need to continue with the third test and refused the stay.