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

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Case No.: 2006-63

Canada Labour Code
Part II
Occupational Health and Safety

Howard Page et al
appellant

and

Richard Fader
respondent

Decision No.: 06-050-A(S)
December 18, 2006

Appeals Officer: Richard Lafrance
The decision was rendered verbally on December 8, during the teleconference being held at the time with reasons to follow.

For the Applicant
John Mancini, Counsel, Confédération des Syndicats nationaux (CSN)

For the Respondent
Richard Fader, Counsel, Justice Canada

Health and Safety Officer
Bob Tomlin, Labour Program, Human Resources and Skills Development Canada (HRSDC), Toronto, Ontario

[1] The present decision is about the motion presented by John Mancini during a teleconference on the application for a stay of a direction by Correctional Services. (Case No. 2006-63, Decision 2006-45(S)).

[2] J. Mancini presented a motion that I recuse myself from the proceedings of Correctional Service's application for a stay of a direction, because his clients believed they had reasonable apprehension of bias in that they did not expect complete impartiality and indifference from myself.

[3] In his arguments, J. Mancini stated that the apprehension of bias was caused by the fact that in a recent decision[1], I granted a stay to the same employer, under the same circumstances, for the same work place involving the same parties as in the present case. He pointed out as well that I had overturned the health and safety officers' decision of a presence of danger in that case.

[4] Finally, he indicated that H. Page et al had applied for judicial review to the Federal Court on the basis that the above mentioned decision was patently unreasonable because they believed that:

- I had disregarded evidence presented by the respondent; and that
- my decision was based on future promises of the employer; and
- I summarily rejected overwhelming scientific documentary evidence that second hand smoke constituted a danger to health.

[5] He argued as well that I should withdraw because in its stay application, the employer relies extensively on the said decision to request a stay of the direction issued in the present case by health and safety officer Tomlin.

[6] J. Mancini argued that H. Page et al are entitled to an impartial and disinterested decision and they have a reasonable apprehension that given the circumstances outlined above, I could not provide such an impartial and disinterested decision.

[7] Richard Fader argued in reply to J. Mancini's arguments that nothing in the *Canada Labour Code* (the *Code*) prohibits an Appeals Officer from dealing with the same parties on the same issues.

[8] He stated that the appellant should not, under the guise of reasonable apprehension of bias, be permitted to shop for decisions from different Appeals Officers.

[9] He went on to say that the fact that an Appeals Officer has taken a position on an issue, any more than that of a judge taking a position on an issue, involving mixed facts and law, cannot be a basis for a finding of bias. The recourse for disagreement of such a finding is an application for judicial review.

[10] R. Fader further states that to the extent the appellants say this appeal deals with the same fact, they misconstrue the nature of an investigation under section 129 of the Code. While the case deals with the same issues addressed in the case mentioned above (decision No. 06-026), it does so on a different factual basis.

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[1] Correctional Service Canada (CSC) Millhaven Institution and Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada- CSN (UCCO-SACC-CSN) CAO-BCA Decision No. 06-026, [August 10th, 2006]

[11] He argued that based on the Fletcher[2] Federal Court[3] decision, it follows that an allegation of "danger" under the Code depends on specific time and place and therefore has a temporal element. The fact that the work refusal in the above mentioned decision (No. 06-026), predates the actual work refusal by over a year indicates that the factual determination to be addressed by the Appeals officer are not the same.

[12] Having received the arguments from the parties, I decided not to recuse myself from the hearing on the application for a stay of Correctional Service Canada for the following reasons:

- Nothing in the Code or any other law prohibits me from dealing with the same parties on the same issues.
- The fact that I have heard a motion for a stay of a direction and an appeal of the same direction in a similar case in the past does not, in my mind, affect my ability to rule on a motion for a stay for a different direction in a similar case.
- Whether my decision is the subject of a judicial review or not has no bearing on myself until the Court has heard the case and reached a decision. I am not tied by any of my past decisions, or that of another Appeals Officer for that matter.
- As I indicated during the proceeding, I was seized of Correctional Services' motion for a stay of the direction and I was, and I am still convinced that I could hear the parties' arguments and render a fair, impartial and disinterested decision.

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Richard Lafrance
Appeals Officer

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[2] Canada (Attorney General) v. Fletcher (C.A.) [2003] 2 F.C. 475 Date: 20021105 Docket: A-653-00

[3] [18] The mechanism is an *ad hoc* opportunity given employees at a specific time and place to ensure that their immediate work will not expose them to a dangerous situation. It is the short-term well-being of an employee which is at stake, not a hypothetical or speculative one.
[21] The mechanism is a continuing one available whenever, and as often as, an employee has reasonable cause to remove himself from the workplace.
[22] It follows, in my view, that the right of an employee to refuse to work for safety reasons is an important but limited right that has to be exercised in accordance with the particular context ..[emphasis added]

Summary of Appeals Officer's Decision

Decision No.: CAO-06-050A(S)

Appellant: Howard Page et al.

Respondent: Richard Fader

Key Words: Second-hand smoke, impartiality, apprehension of bias, Appeals Officer was impartial.

Provisions: *Canada Labour Code*, Part II, 129(7)

Summary:

On December 8, 2006 the Appeals Officer held a teleconference to hear the submissions from Mr. J. Mancini as to his apprehension of bias on the ability of the Appeal Officer to hear and render a decision in an un-biased manner. Based on the evidence and arguments submitted by Mr. Mancini, the Appeals Officer made the decision that he would not recuse himself from the case and that he was able to hear and render in an unbiased, fair and impartial, disinterested decision.