

Occupational Health  
and Safety Tribunal Canada



Tribunal de santé et  
sécurité au travail Canada

Ottawa, Canada K1A 0J2

**Case No.:** 2008-01  
**Decision No.:** OHSTC-09-030

**CANADA LABOUR CODE  
PART II  
OCCUPATIONAL HEALTH AND SAFETY**

Correctional Service of Canada  
*Appellant*

and

Jeff Holliday  
*Respondent*

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August 20, 2009

This appeal has been decided by Appeals Officer Michael Wiwchar.

**For the appellant**  
Harvey Newman, Counsel

**For the respondent**  
Jeff Holliday, Correctional Manager

## **APPEAL**

- [1] This appeal was filed by Correctional Service Canada (CSC), pursuant to subsection 146.(1) of the *Canada Labour Code*, Part II, (*Code*), against a direction issued by Health and Safety Officer (HSO) Diana Smith on January 23, 2008. The said direction was issued under subsection 145.(1) of the *Code* and concerned a contravention to paragraph 125.(1)(l) of the *Code* and paragraph 12.9(c) of the *Canada Occupational Health and Safety Regulations (Regulations)*.

## **BACKGROUND**

- [2] I retain the facts stated below as obtained from the HSO investigation report dated January 30, 2008, and other relevant documents submitted by the parties.
- [3] On December 20, 2007, employees occupying the position of Correctional Manager (CM) at the Kent Institution (work place), made an internal complaint to the employer pursuant to subsection 127.1(1) of the *Code* regarding an issue pertaining to wearing stab resistant vests as a form of personal protective equipment. The CMs were of the view that they should be issued the same protective equipment in the performance of their duties as what was being provided to Correctional Officers (COs) and that not being provided with the said equipment placed them at risk while at work.
- [4] The employer's policy was to require all employees occupying Correctional Officer 1 (CO1) and Correctional Officer 2 (CO2) positions to wear stab resistant vests in the performance of their daily duties.
- [5] An investigation into the complaint was performed in accordance with paragraph 127.1(3)(a) of the *Code* by an employer and an employee member of the work place health and safety committee.
- [6] On January 15, 2008, the Acting Assistant Warden, Operations, on behalf of the employer, issued a memorandum to all correctional staff of the work place, requiring that employees occupying the positions of CO1 and CO2 begin wearing stab resistant vests as part of their personal safety equipment on January 21, 2008. The memorandum stated the following:

As of 14 January, 2008, we have been able to issue stab resistant vests to more than 95 percent of our COI and COII Correctional Officers. The remaining staff has been measured and are awaiting delivery of their vests. As a result we have been given the authority to authorize staff to begin wearing the vests as part of their safety equipment, starting on January 21, 2008, at 0630 hours.

Staff members that are currently awaiting delivery of their vests will be posted to a non inmate contact posts (sic) such as motor patrol, tower etc. Those staff members who have not been issued a vest must notify the correctional manager, desk (K6) prior to the start of their shift.

As with other safety and security equipment which has been issued to staff, it is mandatory that the vest be worn at all times while working inside the perimeter fence. Failure to do so may result in disciplinary action. Failure to report to work with the vest could result in denial of shift or may result in a staff member being sent home, at his/her own expense, to retrieve their vest.

- [7] On January 18, 2008, a joint investigation report was issued and concluded that the complaint was justified. The writers recommended to the employer that the same personal protective equipment, stab resistant vests, provided to CO1 and CO2 staff, should be provided to CMs. The employer did not accept the recommendation and therefore the dispute between the CMs and the employer was left unresolved.
- [8] On January 21, 2008, six employees of the work place occupying CM positions invoked their right to refuse dangerous work pursuant to subsection 128.(1) of the *Code*. The HSO attended the work place and conducted an investigation into the work refusal as required by the *Code*.
- [9] The stated grounds for the refusals concern the fact that, contrary to the memorandum to all correctional staff at the work place, the refusing employees were not issued stab resistant vests in the same manner as other employees occupying the positions of CO1 and CO2.
- [10] Respondent Jeff Holliday occupies the position of CM at the Kent Institution and he was the designated representative of the employees at the time of the work refusal. He wrote a memorandum to the Acting Warden stipulating reasons for the refusal. Among those reasons, Mr. Holliday explained that CMs deal with the exact same inmates as CO1s and CO2s and they are required to attend and resolve almost every potentially violent and dangerous incident within the institution whereas CO1s and CO2s only respond to a portion of those incidents.
- [11] Following her investigation on January 21, 2008, the HSO determined that the issue regarding the danger related to the specific statements made in the memorandum rather than any particular incident involving inmates interacting with CMs. In addition, the inmates were deemed to be the source of the alleged danger, as defined by the *Code*, that required specific employees to be provided with personal protective equipment namely, the stab resistant vests.

- [12] The HSO concluded that no danger existed because at the time of the refusal and in the course of her investigation, the refusing employees were not involved or in contact with inmates. The inmates were in fact locked in their cells at the time of the investigation because of a full lock down as a result of the refusals.
- [13] Notwithstanding her decision of absence of danger, the HSO determined that the employer was in contravention of the *Code* and the *Regulations*, that is to say, CMs were not provided with adequate personal protective equipment, stab resistant vests, when in the vicinity of inmates.
- [14] On January 21, 2008, the HSO issued a verbal direction to CSC, the employer, pursuant to subsection 145.(1) of the *Code* and she described the contravention. A written direction followed on January 23, 2008.
- [15] The written direction issued on January 23, 2008, that reiterated the verbal direction of January 21, 2008, stated the following:

IN THE MATTER OF THE *CANADA LABOUR CODE*  
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On January 21<sup>st</sup>, 2008, the undersigned health and safety officer conducted an investigation in the work place operated by Correctional Service of Canada, being an employer subject to the *Canada Labour Code*, Part II, at P.O. Box 1500,, (sic) 4732 Cemetery Road, Agassiz, British Columbia, V0M 1A0, the said work place being sometimes known as Kent Institution (Max.).

The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:

125.(1)(l) – *Canada Labour Code* Part II,  
12.9(c) – *Canada Occupational Health & Safety Regulation* (sic).

Correctional Managers, when in the vicinity of in-mates (sic), are not provided with and required to use a properly fitted stab-resistant body covering. Further, any Correctional Managers required to use this equipment must be instructed and trained in its proper inspection, use and care.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention immediately.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, to take steps to ensure that the contravention does not reoccur.

Issued at Vancouver, this 23<sup>rd</sup> day of January, 2008.

Diana M. Smith  
Health and Safety Officer  
Certificate Number: BC1635

To: Correctional Service of Canada  
P.O. Box 1500, 4732 Cemetery Road, Agassiz, British Columbia,  
V0M 1A0

- [16] The employer response to the direction was to immediately issue CMs with stab resistant vests.
- [17] On August 12, 2008, Mr. Harvey Newman, Senior Counsel, representing the employer, informed the Tribunal that an agreement had been reached between the Warden and CMs who had refused to work on January 21, 2008.
- [18] The document was signed by Ms. D.K., Warden, for the appellant and Mr. Holliday, Mr. R.K., A/Correctional Manager and Mr. D.L., A/Correctional Manager, Mr. R.M., Correctional Manager, Mr. T.R., Correctional Manager and Mr. J.V., A/Correctional Manager, all on behalf of the respondent. It stated the following:

Memorandum of Agreement

Re: Correctional Service of Canada v. Jeff Holliday et al.  
(2008-01)

The parties to the above noted matter agree that the Direction issued by Health and Safety Officer Diana M. Smith (BC1635), dated January 23, 2008, is overbroad and should be rescinded. The parties agree that Correctional Managers at Kent Institution working the K12 position and Correctional Managers working on living units should be provided with and required to use stab-resistant body covering at all times when they are working the K12 position and/or on a living unit.

The parties agree that they will ask for a pre-hearing conference before an Appeals Officer for the purpose of having the January 23, 2008 Direction of Health and Safety Officer Smith rescinded. The parties agree that providing stab-resistant body covering as described above meets the requirements of the *Canada Labour Code* and *Regulations*.

- [19] On September 5, 2008, I held a pre-hearing teleconference with Mr. R. Fader, counsel representing the appellant at that particular time, and Mr. Holliday. During the teleconference, the parties presented their

positions and allowed me to inquire into the matter.

- [20] The appellant reiterated that the direction was ambiguous, overbroad and did not accurately describe the areas where CMs are exposed to the hazard stated by the HSO, that is, when employees are in the vicinity of inmates. The employer stated the problem with the direction was the wording and did not argue the fact that the employees were exposed to a hazard or that a hazard did not exist.
- [21] I requested that the appellant provide written submissions to explain the rationale of how the hazard had been assessed and provide the employer's response to the HSO in accordance with the direction and accompanying letter.
- [22] The respondent stated during the pre-hearing teleconference that he had no concerns regarding his health and safety in the circumstances because the stab resistant vests had been issued by the employer immediately following the HSO direction.
- [23] Also, the respondent stated that the memorandum of agreement addressed what the CMs had requested from the outset of their complaint and refusal. It was the HSO who had decided to broaden the issue and not restrict the wearing of stab resistant vests to the specified posts and areas identified in the agreement.
- [24] The respondent stated that in his opinion, providing stab resistant vests as described in the agreement would meet the requirements of the *Code* and the *Regulations*.
- [25] On September 26, 2008, a written submission from the appellant was received by the Tribunal. The submission consisted of a letter and an attached document. The document was a job hazard analysis outlining all the posts and duties where CMs are in contact with offenders/inmates. Each task was assessed for the hazards that the stab resistant vest is designed to protect against, the tasks were identified, the hazard was described, the risk was evaluated and weighted and the recommended control measure identified.
- [26] The appellant requested that I exercise my authority under subsection 146.1(1) of the *Code*, to rescind the direction and replace it with the memorandum of agreement entered into by the parties themselves.
- [27] The respondent reviewed the employer's written submission and had no concerns and nothing to add.
- [28] On November 5, 2008, upon my request for further factual evidence,

the appellant submitted additional documents to the Tribunal. The appellant provided letters from Warden and A/Assistant Warden Management Services and minutes of the health and safety committee meetings.

- [29] I was not able to arrive at a decision to rescind the direction as requested by the parties with the evidence provided and an oral hearing was held on June 9 and 10, 2009, at Abbotsford, B.C.
- [30] On June 9, 2009, at the outset of the hearing, the parties arranged a visit of the work place, in order to provide me with an opportunity to obtain knowledge of the CMs duties as they relate to the hazardous circumstances. The visit was guided by Mr. Holliday and he provided me with additional information during the tour relating to the stab-resistant vests from the standpoint of the instruction received by CMs for its proper use and maintenance.

### **ISSUE**

- [31] The issue raised in this appeal is whether HSO Smith erred in her direction to the employer pursuant to subsection 145.(1).

### **JOINT SUBMISSIONS FROM THE PARTIES**

- [32] The parties submit that the gist of the HSO direction concerns the failure by the employer to provide CMs at the work place with an appropriate body covering in circumstances where there is a hazard of injury to or through the skin.
- [33] The direction issued by the HSO comprised two components. The first dealt with the provision to CMs and the requirement that they use a properly fitted stab resistant body covering, and the second concerned instruction in the inspection, use and care of the equipment.
- [34] The employer's present policy is to provide all CMs at the Kent Institution with made to measure stab resistant vests and to also give them appropriate instruction and training in their proper inspection, use and care. It is submitted that this is in compliance with the *Regulations*.
- [35] Subsequent to the filing of this appeal, the parties came to an agreement as to the conditions that would give rise to the mandatory wearing of the vests. The HSO direction stated that CMs were to be required to use the vests "when in the vicinity of inmates". Following the hearing, the parties jointly submitted that the direction should

be varied so as to replace the words "when in the vicinity of inmates" by the following:

"when carrying out duties which normally would require them to act as primary responders to inmate incidents, or when actually acting as a primary responder."

- [36] The parties further argued that the evidence submitted demonstrates that there is no reasonable likelihood of hazard of injury to or through the skin in the work place if the mandatory wearing of the vests is confined to the situations as proposed by the parties, and that this would be in compliance with the *Regulations* under paragraph 12.9(c) and subsection 12.15(2).

### **ANALYSIS**

- [37] I must decide if the HSO erred in her direction to the employer pursuant to subsection 145.(1) of the *Code*. Consequently, I will first address the specific *Code* and *Regulations* provisions that she referred to in the direction by raising the following question:

**Were paragraph 125.(1)(l) of the *Code* and paragraph 12.9(c) the *Regulations* contravened by the employer?**

- [38] Paragraph 125.(1)(l) of the *Code* reads as follows:

125.(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

(l) provide every person granted access to the work place by the employer with prescribed safety materials, equipment, devices and clothing;

- [39] The prescribed safety devices referred to in paragraph 125.(1)(l) are specified in paragraph 12.9(c) of the *Regulations* as follows:

12.9 Where there is a hazard of injury or disease to or through the skin in a work place, the employer shall provide to every person granted access to the work place ...

c) an appropriate body covering.



- [40] The above stated *Code and Regulations* provisions require that an employer provide every person granted access to the work place with appropriate safety equipment. The HSO determined that CMs were exposed to a hazard of injury through the skin and that the employer must provide an appropriate body covering as protection. The appropriate body covering in this case was a stab resistant vest.
- [41] Although not explicitly stated in her report, I infer from it and the wording in her direction that the HSO determined that a hazard of injury is present when CMs are in the vicinity of inmates because it is possible for an inmate to spontaneously attack a CM with a sharp skin penetrating object.
- [42] The hazardous activity and condition are described clearly in an undated report titled "*127 Complaint – Stab Resistant Vests, Kent Institution*". The report was produced jointly by an employee and an employer member of the health and safety committee. The report cited CM testimony of being involved in serious incidents where inmates used or threatened to use sharp skin penetrating objects on CMs. The authors concluded by recommending to the employer that all CMs at Kent Institution be fitted and provided with the same vests for personal protection as all other operational staff (CO1s and CO2s).
- [43] I assign significant weight to the above mentioned report and the recommendation made by the employee and employer members of the health and safety committee regarding the section 127.1 complaint made by the CMs. On the whole, the impression I draw from the report is that the investigation was conducted by personnel knowledgeable and experienced in the realm of institutional operations relative to security, health and safety issues. The report concisely explains the issue and offers an objective conclusion and recommendation relative to the issue of the complaint which further demonstrated to me the competency of the writers. The latter concluded that a hazard existed and that CMs should be provided with the same protection, in this instance stab resistant vests, as employees in the CO1 and CO2 positions.
- [44] Also of significant weight is the employer's job hazard analysis document included in the appellant's submissions, which demonstrates that the above described activities and hazardous conditions exist in the work place. The document describes eight specific tasks where a CM at the Kent Institution may be subjected to a spontaneous physical assault by an inmate armed with a stabbing or edged weapon.
- [45] Now I will address the question of whether or not the employer

contravened the *Code* and *Regulations*. Through its hazard assessment program, the employer determined that employees are exposed to hazardous conditions and activities when they are attacked spontaneously by inmates using sharp skin penetrating objects.

- [46] The employer's prevention measure to address the hazard was to issue personal protective equipment in the form of a stab resistant vest. I accept that the hazard resulting from spontaneous human behavior or action is not under the employer's control and cannot be eliminated or reduced to the point of securing the health and safety of employees. This being said, at issue in this case is the fact that some employees were issued the equipment while others were not.
- [47] I find that the employer contravened the *Code* and its *Regulations* on January 21, 2008, by not issuing CMs stab resistant vests in the same manner as it had for CO1s and CO2s. CMs were in fact exposed, in the course of their duties, to a hazard that was identified and accepted by the employer. For this reason, CMs were entitled to obtain the personal protection equipment in the same manner as CO1s and CO2s.
- [48] As a result, I agree with the HSO that the employer did not provide CMs with the appropriate body covering as required by the *Code* and the *Regulations* and therefore, the employer was in contravention of the *Code*.
- [49] The HSO direction stated only one contravention under paragraph 125.(1)(l) of the *Code* and paragraph 12.9(c) of the *Regulations*. Upon analysis of the description of the contravention, it has however become clear to me that a second issue was stated in the same paragraph. The second sentence reads as follows:

Further, any Correctional Manager required to use this equipment must be instructed and trained in its proper inspection, use and care.

- [50] As a result, I raise the following question:

**Were paragraph 125.(1)(l) of the *Code* and paragraph 12.15(2) of the *Regulations* contravened by the employer?**

- [51] The *Regulations* under paragraph 12.15(2) are as follows:

12.15 (2) Every employee who uses protection equipment shall be instructed and trained in the use, operation and maintenance of the equipment.

[52] This additional element of the contravention goes beyond stating that the employer failed to provide a stab resistant body covering, which was the issue of the refusal. It introduces another element to the direction that pertains to a completely different subject within the *Regulations*. In my opinion, the matter of instruction and training on the use, operation and maintenance is a separate issue and should have been addressed either as a second item in the direction or alternatively in a separate direction.

[53] I find that since the employer did not issue the stab resistant vests to the CMs then also, it stands to reason that the employer did not provide instruction and training in the proper operation, use and care of the equipment at the time of the refusal.

[54] For that reason, I can agree with the HSO that the employer did not provide CMs with the necessary instruction and training in the proper operation, use and care of the equipment as required by the *Code* and the *Regulations* and that the employer was in contravention.

[55] The next issue pertains to the description of the contravention by the HSO in the direction. The description has to do with the exposure of CMs to the hazard when not properly fitted with stab resistant body coverings while they are "in the vicinity" of inmates. In using the expression "in the vicinity", the HSO offers no context to a situation and therefore I interpret the direction to be applicable to exposure by a CM in any situation or during any activity when in the same general area as an inmate.

[56] As a result, I raise the following question:

**Did the HSO accurately describe, in the direction under appeal, the contravention relating to the conditions or activities concerning the employees' refusal to work?**

[57] I do not believe that the HSO made a grievous error in her description. The memorandum issued by the employer on January 15, 2008, which based the CMs refusal to work, states that it is mandatory for CO1s and CO2s to wear their vests at all times while working inside the perimeter fence. (my underline)

[58] The CMs' refusal, as stipulated in their refusal registration forms, concerned their intention to be provided vests in the same manner as CO1s and CO2s. The HSO concurred with this request following her

investigation and stated the same in the direction.

- [59] In the section 127 complaint, CMs sought the same protection as had been afforded CO1s and CO2s. In their recommendations, the investigators failed to offer any particulars as to when and where the equipment was to be used. The finding of the investigators was that they agreed that the equipment should be provided.
- [60] The appellant and the respondent now argue that the direction issued by the HSO is excessive. The parties entered into an agreement which clearly states this position and in an effort, I believe, to demonstrate to me that their concerns were resolved cooperatively by the work place stakeholders.
- [61] The parties, in their joint submissions, have now made clear the specific hazardous activity or condition that in their opinion requires protection, as described by the following wording:

“when carrying out duties which normally would require them to act as primary responders to inmate incidents, or when actually acting as a primary responder.”

- [62] Having considered the evidence, I find that this describes the activity and condition accurately.
- [63] In conclusion, the issue before me is not to determine if the employer adequately complied with the direction but whether or not the circumstances warrant that a direction be issued.
- [64] Under paragraph 146.1(1)(a) of the *Code*, I have the authority, following an inquiry into this matter, to vary, rescind or confirm the direction.
- [65] Paragraph 146.1(1)(a) of the *Code* read as follows:

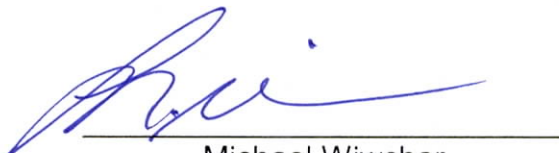
146.1 (1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may

(a) vary, rescind or confirm the decision or direction;

- [66] I find that while the direction issued by the HSO correctly identified the contraventions, it did not accurately identify the hazardous conditions and activities that the CMs were exposed to. Therefore, I must take the appropriate action as stated below in order to address these anomalies.

**DECISION**

- [67] For the reasons stated above, I vary the written direction issued on January 23, 2008, by HSO Diana Smith by replacing the words “when in the vicinity of inmates” with the following: “when carrying out duties which normally would require them to act as primary responders to inmate incidents, or when actually acting as a primary responder.” as per the appended text.
- [68] I am satisfied that the employer has taken the necessary measures to protect CMs from the circumstances relating to this matter as stipulated in the direction and therefore, no further action is required by the employer regarding the contraventions described therein.



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Michael Wiwchar  
Appeals Officer

APPENDIX

Case No: 2008-01  
Decision No: OHSTC-09-030

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145.(1)

Following an appeal brought under section 146 of the *Canada Labour Code* (*Code*), Part II, the undersigned Appeals Officer conducted an inquiry, pursuant to section 146.1, with respect to a direction issued verbally by health and safety officer Diana Smith, on January 21, 2008, and followed in writing on January 23, 2008, at the conclusion of her investigation into a refusal to work which occurred in the work place operated by Correctional Service of Canada, being an employer subject to the *Canada Labour Code*, Part II, at Kent Institution, on January 21, 2008.

The said Appeals Officer considers that the following provisions of the *Canada Labour Code*, Part II, were contravened:

1. Correctional Managers, when carrying out duties which normally would require them to act as primary responders to inmate incidents or when actually acting as a primary responder, are not provided with and required to use a properly fitted stab-resistant body covering,

Paragraph 125.(1)(l) of the *Code* and paragraph 12.9(c) of Part XII, Safety Materials, Equipment, Devices and Clothing, *Regulations*,

2. Correctional Managers required to wear a properly fitted stab-resistant body covering are not instructed and trained in its proper use, operation and maintenance prior to donning the equipment,

Paragraph 125.(1)(l) of the *Code* and paragraph 12.15(2) of Part XII, Safety Materials, Equipment, Devices and Clothing, *Regulations*.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to take measures to correct the contraventions immediately.

Issued at Ottawa, this 20<sup>th</sup> day of August, 2009.



Michael Wiwchar  
Appeals Officer

To: Correctional Service of Canada  
Kent Institution  
Agassiz, British Columbia