Federal Court  Cour fédérale

Date: 20100127

Docket: T-505-09

Citation: 2010 FC 87

Ottawa, Ontario, January 27, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Applicant

and

Éric VANDAL
Jacques ST-PIERRE
Joël TURBIS
Philippe GOSSELIN

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by an appeals officer (the appeals officer) of the Occupational Health and Safety Tribunal Canada, appointed under section 145.1 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the CLC), who dismissed the applicant's objection that he did not have jurisdiction to hear the respondents' appeals.

Factual Background

[2] The respondents work for the Correctional Service of Canada (the employer) as correctional officers (COs) in a penitentiary. On two separate occasions, the employer asked the respondents to

escort, unarmed, an inmate outside the penitentiary. The respondents refused because the prisoner had a price on his head and they allegedly feared for their safety.

[3] The employer assessed the risk presented by the situation and concluded that the unarmed escort did not endanger the safety of the respondents. Disagreeing with the employer's assessment, the respondents cited section 128 of the CLC to invoke their right to refuse to work. Unable to resolve the dispute, the employer notified a health and safety officer (the HSO) in accordance with subsection 128(13) of the CLC.

[4] The HSO conducted a preliminary inquiry and found that the circumstances of the respondents' refusal to work constituted normal conditions of employment. Thus, as provided by paragraph 128(2)(*b*) of the CLC, the circumstances could not be cited to justify a refusal to work. The HSO therefore ended his inquiry, withdrew from the process and did not issue a decision on whether or not a danger existed. He was thereby following Operations Program Directive – OPD 905-1: Response to a Refusal to Work in Case of Danger (pages 203, 204 and 209 to 218, volume II, applicant's memorandum).

[5] Dissatisfied with the HSO's decision, the respondents availed themselves of subsection 129(7) of the CLC and appealed to an appeals officer.

[6] From the outset, the applicant challenged the jurisdiction of the appeals officer. The applicant's argument was essentially that the appeals officer did not have jurisdiction because the

HSO had not determined that no danger existed and that under subsection 129(7) of the CLC, only such a determination can trigger the appeal process. Concerning the applicant's objection, the appeals officer issued an interlocutory decision finding that he had jurisdiction, but reserved the right to revisit the decision once the matter had been heard on the merits. This Court dismissed the application for judicial review of the interlocutory decision on the ground that it was premature and the Federal Court of Appeal did likewise because the final decision had been rendered in the interim and the appeal had become moot (*Canada v. Vandal*, 2008 FC 1116, [2008] F.C.J. No. 1408 (QL); *Canada v. Vandal*, 2009 FCA 179, [2008] F.C.J. No. 660 (QL)).

[7] On February 27, 2009, the appeals officer issued his final decision and again dismissed the objection as to his jurisdiction and allowed the respondents' appeal on the merits. This application for judicial review deals only with that part of the officer's decision which concerns his authority. The applicant no longer challenges the reasonableness of the decision on the merits.

Impugned Decision

[8] In his reasons, the appeals officer set out the arguments of the parties on the question of jurisdiction. He based his decision on the interpretation and application of section 128 of the CLC and on the HSO's investigation and decision.

[9] The appeals officer determined that paragraph 128(2)(*b*) of the CLC must be interpreted narrowly because it is an exception that limits the circumstances in which a CO can exercise his or her right of refusal to work. In addition, he characterized the preliminary inquiry process in OPD

905-1 as contrary to section 129 of the CLC and held that it cannot obstruct the application of that statute. He relied on the reasoning of Deputy Judge Lagacé in *Vandal v. Canada*, at paragraphs 25 to 27, repeating his assertion that the applicant's perspective in this matter was too restrictive and that the appeal procedure must be given a broad interpretation.

[10] The appeals officer noted that under sections 128 and 129 of the CLC, the HSO's role originates from the information he receives regarding the employee's continued refusal to work and gives rise to the obligation to investigate and decide. Thus, he could not accept the applicant's argument that the HSO must apply subsection 128(2) of the CLC before investigating and deciding on the refusal to work. In his opinion, such an approach impinges on the ability of employees to invoke their right to refuse to work. He added that the notion of a normal condition of employment in paragraph 128(2)(*b*) of the CLC refers to the danger as such and not to the circumstances of the refusal to work. According to the officer, this exception aims to prevent the unjustified use or even abuse of the right to refuse to work but does not extinguish that right in case of danger.

[11] The appeals officer summarized his findings on section 128 of the CLC as follows:

> An employee who has refused to work and who has reasonable cause to believe that a danger continues to exist, notwithstanding his employer's investigation and the action the employer is proposing, can continue to refuse to work (subsection 128(13)) [of the CLC]. At that point the employer must inform an HSO so that the latter can investigate. The [CLC] thus imposes a mandate on the HSO when he is informed that an employee is continuing to refuse to work. That mandate is both simple and clear. The HSO is obliged to investigate and to determine whether a danger exists.
> (Appeals officer's decision, at paragraph 266)

[12] With regard to the HSO's investigation, the appeals officer noted that the legislation does not allow the HSO to conduct a preliminary inquiry and then to withdraw from the process as he did. The HSO must conduct a full investigation under subsections 129(1) to (7) of the CLC. Even though the HSO characterized his inquiry as preliminary, the appeals officer considered that the steps undertaken were sufficiently similar to an investigation of the danger and inferred that the HSO had implicitly determined that no danger existed.

[13] Lastly, the appeals officer found that he could entertain the respondents' appeals because subsection 129(7) of the CLC applied in full.

Issue

[14] The applicant proposed two issues:

a. What is the applicable standard of review in this matter?

b. Did the appeals officer err in law in finding that he had jurisdiction to hear the respondents' appeals?

Relevant Legislation

[15] The relevant legislation is appended to these reasons.

Analysis

What is the applicable standard of review in this matter?

Applicant's Submissions

[16] The applicant submits that the issue to be decided is a true question of jurisdiction. She cites the recent judgment, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, in which the Supreme Court of Canada reiterated the principle that the correctness standard continues to apply to questions of jurisdiction. In this regard, the Supreme Court wrote:

> 59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6.
> …

[17] The applicant argues that the question before the appeals officer was whether he had the requisite authority to hear the appeals and that the correctness standard must apply.

Respondents' Submissions

[18] The respondents, for their part, submit that the reasonableness standard applies here. They argue that the existence of a privative clause, the discrete and special regime of labour law and the nature of the question mean that this more deferential standard must be applied (see *Dunsmuir,* at paragraph 55).

[19] The respondents note that sections 146.3 and 146.4 of the CLC are privative clauses that give the appeals officer's decisions finality and call for greater deference.

[20] They submit that the field of occupational health and safety is a discrete and special administrative regime that also argues for a more flexible standard.

[21] Lastly, the respondents argue that the question here is not one of jurisdiction, but rather of interpretation of the appeal procedure itself as set out in the CLC. They add that the question is not of central importance to the legal system and falls outside the Court's area of expertise.

Analysis

[22] In the case that concerns us, the officer had to determine whether he could hear the COs' appeals even though the HSO had declined to decide on the existence or non-existence of danger and withdrawn from the process after a preliminary inquiry. I consider that this is a question of law because interpretation of the CLC is involved. In *Dunsmuir*, the Supreme Court cautioned that reviewing judges must not brand as jurisdictional issues that are doubtfully so (end of paragraph 59).

[23] The existence of the private clause and the nature of the regime in issue argue for reasonableness. The statute in question is central to the tribunal's expertise. As the Supreme Court wrote in *Dunsmuir*, the mere fact that the question is one of law does not justify applying the correctness standard where other factors call for deference (paragraphs 55 and 56). Before

Dunsmuir, the Federal Court of Appeal had held that interpretation of questions of law by an appeals officer was reviewable on the patent unreasonableness standard (*Martin v. Canada (Attorney General)*, 2005 FCA 156, [2005] 4 F.C.R. 637, at paragraph 13). In *Sachs v. Air Canada*, 2006 FC 673, 294 F.T.R. 205 Justice Hughes noted that a jurisdictional question does not always lead to the correctness standard (paragraph 22).

[24] Having regard to the factors and the case law, reasonableness is the appropriate standard of review here.

[25] Even if I were to apply the correctness standard, I would arrive at the same result.

Did the appeals officer err in law in finding that he had jurisdiction to hear the respondents' appeals?

Applicant's Submissions

[26] The applicant submits that the HSO did not decide that the danger did not exist under and within the meaning of subsection 129(7) of the CLC, therefore the appeals officer did not have the authority to hear the respondents' appeals.

[27] She argues that the CLC provides two mechanisms for appealing to an appeals officer with respect to a refusal to work under subsection 129(7): where the HSO decides that the danger does not exist and where he decides that the danger exists and issues directions under subsections 129(6) and 145(2).

[28] According to the applicant, the HSO is free to end the process after a preliminary inquiry and is not obliged to decide whether or not a danger exists. This stems from the exception under paragraph 128(2)(*b*) of the CLC which limits the right of refusal to work in dangerous circumstances if the danger in question is a normal condition of employment. The only recourse available is not an appeal to an appeals officer but an application for judicial review before the Federal Court.

[29] The applicant cites *Sachs* in support of her argument. Where an HSO does not issue a decision, the appeal mechanism provided for in the CLC is not open to the employee. Instead, the employee should apply for judicial review of the HSO's finding that the danger is a normal condition of employment. In *Sachs*, an appeals officer decided that he did not have jurisdiction to hear the appeal from the decision of an HSO who had accepted an assurance of voluntary compliance from the employer and had not made a determination as to danger. Justice Hughes affirmed the decision and rejected the argument that an implicit right to appeal exists in such cases and ruled that the provisions of Part II of the CLC respecting appeals are clear and that the *Charter* does not have to be invoked in order to arrive at the proper interpretation (paragraphs 27, 31 and 32).

Respondents' Submissions

[30] The respondents submit that the interpretation put forward by the applicant limits the scope of the appeal procedure provided for under subsection 129(7) of the CLC and cannot be inferred

from a reading of the relevant provisions. In support of their argument, the respondents cite the words of Justice Lagacé in *Vandal*, at paragraphs 25 and 26:

> … The employer's proceedings result from a restrictive, literal view of certain sections of the CLC and of the role the CLC gives the appeals officer in the context of the parties' conflict.
>
> The Court cannot support such a view. The appeal procedure provided for in the CLC must be interpreted liberally so the employees can make their arguments. To this end, we should let the AO conduct his inquiry and then decide what the AO is responsible for deciding.

[31] The respondents argue that the exception provided for under paragraph 128(2)(*b*) of the CLC serves to prevent the abuse of the right to refuse to work but not the exercise of that right where justified by danger.

[32] The respondents note that the appeals officer distinguished the facts in the instant case from those in *Sachs*. In the latter case, the appeals officer had refused to hear an appeal from the decision of an HSO not to issue directions, therefore the issue was not a refusal to work as it is here.

[33] Lastly, the respondents submit that the HSO's decision here is equivalent to a determination that no danger exists and opens the way to the appeal procedure under subsection 129(7). The interpretation advanced by the applicant is too restrictive. The appeals officer made a correct decision.

Analysis

[34] In an 88-page decision, the appeals officer explained, at paragraphs 243 to 282, his reasons for dismissing the applicant's objection as to his jurisdiction to hear the appeals.

[35] First, he held that paragraph 128 (2)(*b*) must be interpreted narrowly in that it constitutes an exception to the principle of the right to refuse to work set out in subsection 128(1). This view reflects the *obiter dictum* of Justice Lagacé in *Vandal.*

[36] The Court considers that this approach is not only reasonable but correct.

[37] The appeals officer then addressed the directive in issue and found that it cannot obstruct the application of the CLC. The Court agrees with that proposition.

[38] His exhaustive analysis of sections 128 and 129 is consistent with the relevant provisions as a whole.

[39] His finding that there is no reference in the legislation to a preliminary inquiry stage whereby an HSO could begin by considering the application of the exception provided for at paragraph 128(2)(*b*) is also correct.

[40] The appeals officer's inference that a formal investigation was conducted pursuant to subsection 129(1) despite the HSO's characterization of it as a "preliminary inquiry" is justified (see paragraphs 271 to 273 of the decision, at pages 67 and 68, volume I, applicant's record).

[41] A reading of the appeals officer's reasons shows that he examined the CLC's provisions thoroughly. His interpretation is logical and not tainted by any error in law.

[42] The facts of the instant case differ from those in *Sachs.* The issue in the latter case was not a refusal to work based on a perceived danger but rather an appeals officer's refusal to hear an appeal following an HSO's decision not to issue directions.

[43] The Court considers that the appeals officer properly directed himself in law and that there is no reviewable error. The Court's intervention is therefore not warranted.

[44] The parties accepted the Court's suggestion that a lump sum be awarded instead of the traditional costs.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed. The applicant shall pay a lump sum of $2,500 plus GST in costs.

"Michel Beaudry"
Judge

Certified true translation
Brian McCordick, Translator

APPENDIX

Canada Labour Code, R.S.C. 1985, c. L-2.

Refusal to work if danger	Refus de travailler en cas de danger
128. (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that	128. (1) Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas :
(a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;	a) l'utilisation ou le fonctionnement de la machine ou de la chose constitue un danger pour lui-même ou un autre employé;
(b) a condition exists in the place that constitutes a danger to the employee; or	b) il est dangereux pour lui de travailler dans le lieu;
(c) the performance of the activity constitutes a danger to the employee or to another employee.	c) l'accomplissement de la tâche constitue un danger pour lui-même ou un autre employé.
No refusal permitted in certain dangerous circumstances	Exception
(2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if	(2) L'employé ne peut invoquer le présent article pour refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche lorsque, selon le cas :
(a) the refusal puts the life, health or safety of another person directly in danger; or	a) son refus met directement en danger la vie, la santé ou la sécurité d'une autre personne;
(b) the danger referred to in subsection (1) is a normal condition of employment.	b) le danger visé au paragraphe (1) constitue une condition normale de son emploi.
Employees on ships and aircraft	Navires et aéronefs
(3) If an employee on a ship or an aircraft that is in operation has reasonable cause to believe that	(3) L'employé se trouvant à bord d'un navire ou d'un aéronef en service avise sans délai le responsable du moyen de transport du danger en cause s'il a des motifs raisonnables de croire :

(a) the use or operation of a machine or thing on the ship or aircraft constitutes a danger to the employee or to another employee,

a) soit que l'utilisation ou le fonctionnement d'une machine ou d'une chose à bord constitue un danger pour lui-même ou un autre employé;

(b) a condition exists in a place on the ship or aircraft that constitutes a danger to the employee, or

b) soit qu'il est dangereux pour lui de travailler à bord;

(c) the performance of an activity on the ship or aircraft by the employee constitutes a danger to the employee or to another employee.

c) soit que l'accomplissement d'une tâche à bord constitue un danger pour lui-même ou un autre employé.

The employee shall immediately notify the person in charge of the ship or aircraft of the circumstances of the danger and the person in charge shall, as soon as is practicable after having been so notified, having regard to the safe operation of the ship or aircraft, decide whether the employee may discontinue the use or operation of the machine or thing or cease working in that place or performing that activity and shall inform the employee accordingly.

Le responsable doit aussitôt que possible, sans toutefois compromettre le fonctionnement du navire ou de l'aéronef, décider si l'employé peut cesser d'utiliser ou de faire fonctionner la machine ou la chose en question, de travailler dans ce lieu ou d'accomplir la tâche, et informer l'employé de sa décision.

No refusal permitted in certain cases

Interdiction du refus

(4) An employee who, under subsection (3), is informed that the employee may not discontinue the use or operation of a machine or thing or cease to work in a place or perform an activity shall not, while the ship or aircraft on which the employee is employed is in operation, refuse under this section to use or operate the machine or thing, work in that place or perform that activity.

(4) L'employé qui, en application du paragraphe (3), est informé qu'il ne peut cesser d'utiliser ou de faire fonctionner la machine ou la chose, de travailler dans le lieu ou d'accomplir la tâche, ne peut, pendant que le navire ou l'aéronef où il travaille est en service, se prévaloir du droit de refus prévu au présent article.

When ship or aircraft in operation

Définition de « en service »

(5) For the purposes of subsections (3) and (4),

(5) Pour l'application des paragraphes (3) et (4), un navire ou un aéronef sont en service, respectivement :

(a) a ship is in operation from the time it casts off from a wharf in a Canadian or foreign port until it is next secured alongside a wharf in

a) entre le démarrage du quai d'un port canadien ou étranger et l'amarrage subséquent à un quai canadien;

Canada; and

(b) an aircraft is in operation from the time it first moves under its own power for the purpose of taking off from a Canadian or foreign place of departure until it comes to rest at the end of its flight to its first destination in Canada.

b) entre le moment où il se déplace par ses propres moyens en vue de décoller d'un point donné, au Canada ou à l'étranger, et celui où il s'immobilise une fois arrivé à sa première destination canadienne.

Report to employer

(6) An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1), or who is prevented from acting in accordance with that subsection by subsection (4), shall report the circumstances of the matter to the employer without delay.

Rapport à l'employeur

(6) L'employé qui se prévaut des dispositions du paragraphe (1) ou qui en est empêché en vertu du paragraphe (4) fait sans délai rapport sur la question à son employeur.

Select a remedy

(7) Where an employee makes a report under subsection (6), the employee, if there is a collective agreement in place that provides for a redress mechanism in circumstances described in this section, shall inform the employer, in the prescribed manner and time if any is prescribed, whether the employee intends to exercise recourse under the agreement or this section. The selection of recourse is irrevocable unless the employer and employee agree otherwise.

Option de l'employé

(7) L'employé informe alors l'employeur, selon les modalités — de temps et autres — éventuellement prévues par règlement, de son intention de se prévaloir du présent article ou des dispositions d'une convention collective traitant du refus de travailler en cas de danger. Le choix de l'employé est, sauf accord à l'effet contraire avec l'employeur, irrévocable.

Employer to take immediate action

(8) If the employer agrees that a danger exists, the employer shall take immediate action to protect employees from the danger. The employer shall inform the work place committee or the health and safety representative of the matter and the action taken to resolve it.

Mesures à prendre par l'employeur

(8) S'il reconnaît l'existence du danger, l'employeur prend sans délai les mesures qui s'imposent pour protéger les employés; il informe le comité local ou le représentant de la situation et des mesures prises.

Continued refusal

(9) If the matter is not resolved under subsection (8), the employee may, if otherwise entitled to

Maintien du refus

(9) En l'absence de règlement de la situation au titre du paragraphe (8), l'employé, s'il y est

under this section, continue the refusal and the employee shall without delay report the circumstances of the matter to the employer and to the work place committee or the health and safety representative.

fondé aux termes du présent article, peut maintenir son refus; il présente sans délai à l'employeur et au comité local ou au représentant un rapport circonstancié à cet effet.

Investigation of report

(10) An employer shall, immediately after 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 managerial 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.

Enquête

(10) Saisi du rapport, l'employeur fait enquête sans délai à ce sujet en présence de l'employé et, selon le cas :

a) d'au moins un membre du comité local, ce membre ne devant pas faire partie de la direction;

b) du représentant;

c) lorsque ni l'une ni l'autre des personnes visées aux alinéas a) et b) n'est disponible, d'au moins une personne choisie, dans le même lieu de travail, par l'employé.

If more than one report

(11) If more than one employee has made a report of a similar nature under subsection (9), those employees may designate one employee from among themselves to be present at the investigation.

Rapports multiples

(11) Lorsque plusieurs employés ont présenté à leur employeur des rapports au même effet, ils peuvent désigner l'un d'entre eux pour agir en leur nom dans le cadre de l'enquête.

Absence of employee

(12) An employer may proceed with an investigation in the absence of the employee who reported the matter if that employee or a person designated under subsection (11) chooses not to be present.

Absence de l'employé

(12) L'employeur peut poursuivre son enquête en l'absence de l'employé lorsque ce dernier ou celui qui a été désigné au titre du paragraphe (11) décide de ne pas y assister.

Continued refusal to work

(13) If an employer disputes a matter reported under subsection (9) or takes steps to protect

Maintien du refus de travailler

(13) L'employé peut maintenir son refus s'il a des motifs raisonnables de croire que le danger

employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer.

continue d'exister malgré les mesures prises par l'employeur pour protéger les employés ou si ce dernier conteste son rapport. Dès qu'il est informé du maintien du refus, l'employeur en avise l'agent de santé et de sécurité.

Notification of steps to eliminate danger

(14) An employer shall inform the work place committee or the health and safety representative of any steps taken by the employer under subsection (13).

Notification des mesures prises

(14) L'employeur informe le comité local ou le représentant des mesures qu'il a prises dans le cadre du paragraphe (13).

Investigation by health and safety officer

129. (1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to investigate the matter in the presence of the employer, the employee and one other person who is

(a) an employee member of the work place committee;

(b) the health and safety representative; or

(c) if a person mentioned in paragraph (a) or (b) is not available, another employee from the work place who is designated by the employee.

Enquête de l'agent de santé et de sécurité

129. (1) Une fois informé, conformément au paragraphe 128(13), du maintien du refus, l'agent de santé et de sécurité effectue sans délai une enquête sur la question en présence de l'employeur, de l'employé et d'un membre du comité local ayant été choisi par les employés ou du représentant, selon le cas, ou, à défaut, de tout employé du même lieu de travail que désigne l'employé intéressé, ou fait effectuer cette enquête par un autre agent de santé et de sécurité.

Employees' representative if more than one employee

(2) If the investigation involves more than one employee, those employees may designate one employee from among themselves to be present at the investigation.

Rapports multiples

(2) Lorsque plusieurs employés maintiennent leur refus, ils peuvent désigner l'un d'entre eux pour agir en leur nom dans le cadre de l'enquête.

Absence of any person

Absence de l'employé

(3) A health and safety officer may proceed with an investigation in the absence of any person mentioned in subsection (1) or (2) if that person chooses not to be present.

(3) L'agent peut procéder à l'enquête en l'absence de toute personne mentionnée aux paragraphes (1) ou (2) qui décide de ne pas y assister.

Decision of health and safety officer

(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.

Décision de l'agent

(4) Au terme de l'enquête, l'agent décide de l'existence du danger et informe aussitôt par écrit l'employeur et l'employé de sa décision.

Continuation of work

(5) Before the investigation and decision of a health and safety officer under this section, the employer may require that the employee concerned remain at a safe location near the place in respect of which the investigation is being made or assign the employee reasonable alternative work, and shall not assign any other employee to use or operate the machine or thing, work in that place or perform the activity referred to in subsection (1) unless

Continuation du travail dans certains cas

(5) Avant la tenue de l'enquête et tant que l'agent n'a pas rendu sa décision, l'employeur peut exiger la présence de l'employé en un lieu sûr proche du lieu en cause ou affecter celui-ci à d'autres tâches convenables. Il ne peut toutefois affecter un autre employé au poste du premier que si les conditions suivantes sont réunies :

(a) the other employee is qualified for the work;

a) cet employé a les compétences voulues;

(b) the other employee has been advised of the refusal of the employee concerned and of the reasons for the refusal; and

b) il a fait part à cet employé du refus de son prédécesseur et des motifs du refus;

(c) the employer is satisfied on reasonable grounds that the other employee will not be put in danger.

c) il croit, pour des motifs raisonnables, que le remplacement ne constitue pas un danger pour cet employé.

Decision of health and safety officer re danger

(6) If a health and safety officer decides that the danger exists, the officer shall issue the directions under subsection 145(2) that the officer considers appropriate, and an employee

Instructions de l'agent

(6) S'il conclut à l'existence du danger, l'agent donne, en vertu du paragraphe 145(2), les instructions qu'il juge indiquées. L'employé peut maintenir son refus jusqu'à l'exécution des

may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under this Part.

instructions ou leur modification ou annulation dans le cadre de la présente partie.

Appeal

(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.

Appel

(7) Si l'agent conclut à l'absence de danger, l'employé ne peut se prévaloir de l'article 128 ou du présent article pour maintenir son refus; il peut toutefois — personnellement ou par l'entremise de la personne qu'il désigne à cette fin — appeler par écrit de la décision à un agent d'appel dans un délai de dix jours à compter de la réception de celle-ci.

Direction to terminate contravention

145. (1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to

(a) terminate the contravention within the time that the officer may specify; and

(b) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.

Cessation d'une contravention

145. (1) S'il est d'avis qu'une contravention à la présente partie vient d'être commise ou est en train de l'être, l'agent de santé et de sécurité peut donner à l'employeur ou à l'employé en cause l'instruction :

a) d'y mettre fin dans le délai qu'il précise;

b) de prendre, dans les délais précisés, les mesures qu'il précise pour empêcher la continuation de la contravention ou sa répétition.

Appointment

145.1 (1) The Minister may designate as an appeals officer for the purposes of this Part any person who is qualified to perform the duties of such an officer.

Nomination

145.1 (1) Le ministre peut désigner toute personne compétente à titre d'agent d'appel pour l'application de la présente partie.

Status

Attributions

(2) For the purposes of sections 146 to 146.5, an appeals officer has all of the powers, duties and immunity of a health and safety officer.

2000, c. 20, s. 14.

(2) Pour l'application des articles 146 à 146.5, l'agent d'appel est investi des mêmes attributions — notamment en matière d'immunité — que l'agent de santé et de sécurité.

Appeal of direction

146. (1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.

Procédure

146. (1) Tout employeur, employé ou syndicat qui se sent lésé par des instructions données par l'agent de santé et de sécurité en vertu de la présente partie peut, dans les trente jours qui suivent la date où les instructions sont données ou confirmées par écrit, interjeter appel de celles-ci par écrit à un agent d'appel.

Direction not stayed

(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.

Absence de suspension

(2) À moins que l'agent d'appel n'en ordonne autrement à la demande de l'employeur, de l'employé ou du syndicat, l'appel n'a pas pour effet de suspendre la mise en oeuvre des instructions.

Inquiry

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).

Enquête

146.1 (1) Saisi d'un appel formé en vertu du paragraphe 129(7) ou de l'article 146, l'agent d'appel mène sans délai une enquête sommaire sur les circonstances ayant donné lieu à la décision ou aux instructions, selon le cas, et sur la justification de celles-ci. Il peut :

a) soit modifier, annuler ou confirmer la décision ou les instructions;

b) soit donner, dans le cadre des paragraphes 145(2) ou (2.1), les instructions qu'il juge indiquées.

Decision and reasons

(2) The appeals officer shall provide a written decision, with reasons, and a copy of any

Décision, motifs et instructions

(2) Il avise par écrit de sa décision, de ses motifs et des instructions qui en découlent l'employeur,

direction to the employer, employee or trade union concerned, and the employer shall, without delay, give a copy of it to the work place committee or health and safety representative.

l’employé ou le syndicat en cause; l’employeur en transmet copie sans délai au comité local ou au représentant.

Posting of notice

(3) If the appeals officer issues a direction under paragraph (1)(b), the employer shall, without delay, affix or cause to be affixed to or near the machine, thing or place in respect of which the direction is issued a notice of the direction, in the form and containing the information that the appeals officer may specify, and no person may remove the notice unless authorized to do so by the appeals officer.

Affichage d’un avis

(3) Dans le cas visé à l’alinéa (1)b), l’employeur appose ou fait apposer sans délai dans le lieu, sur la machine ou sur la chose en cause, ou à proximité de ceux-ci, un avis en la forme et la teneur précisées par l’agent d’appel. Il est interdit d’enlever l’avis sans l’autorisation de celui-ci.

Cessation of use

(4) If the appeals officer directs, under paragraph (1)(b), that a machine, thing or place not be used or an activity not be performed until the direction is complied with, no person may use the machine, thing or place or perform the activity until the direction is complied with, but nothing in this subsection prevents the doing of anything necessary for the proper compliance with the direction.

Utilisation interdite

(4) L’interdiction — utilisation d’une machine ou d’une chose, présence dans un lieu ou accomplissement d’une tâche — éventuellement prononcée par l’agent d’appel aux termes de l’alinéa (1)b) reste en vigueur jusqu’à exécution des instructions dont elle est assortie; le présent paragraphe n’a toutefois pas pour effet de faire obstacle à la prise des mesures nécessaires à cette exécution.

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	**HER MAJESTY THE QUEEN IN RIGHT OF CANADA v. ÉRIC VANDAL, JACQUES ST-PIERRE, JOËL TURBIS, PHILIPPE GOSSELIN**
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APPEARANCES:

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