Lib

Date: 20031016

Files: 165-2-201

Citation: 2003 PSSRB 93

Canada Labour Code,
Part II

Before the Public Service
Staff Relations Board

BETWEEN

GEORGE CZMOLA

Applicant

and

TREASURY BOARD
(Solicitor General - Correctional Service Canada)

Employer

RE: Reference under subsection 129(5) of the Canada Labour Code

Before: Yvon Tarte, Chairperson

For the Applicant: Himself

For the Employer: Ilan Rumstein, Employment Representation Officer

(Decided without an oral hearing following written submissions by the parties.)

[1] This is an application by Mr. George Czmola under section 27 of the *Public Service Staff Relations Act* (PSSRA) requesting the Board to review and, if necessary, amend the decision issued by Mr. P. Chodos on November 19, 1998, with respect to him and Mr. Charles Rodier: *George Czmola and Charles Rodier v. Treasury Board (Solicitor General-Correctional Service Canada)*, Board file no. 165-2-201 and 202. It should be noted that although the decision concerns two individuals, only Mr. Czmola has applied for a review of the decision.

[2] Mr. Czmola has since retired from the Correctional Service but in 1998, he worked as a correctional officer at Stony Mountain Penitentiary. When the employer issued a standing order reinstituting "open range walks", which require correctional officers to patrol the corridors of the range while the cell doors are open, and reduced the number of correctional officers conducting these walks, he and Mr. Rodier separately refused to perform such a walk on the ground that it constituted a danger to them within the meaning of the Code.

[3] After conducting an investigation into each refusal to work, the safety officers found that no danger existed. At the request of the applicants, the safety officers referred their decisions to the Board. The Board held that while the risks associated with an open range walks policy were inherent in the duties of a correctional officer, the employer was still responsible for taking measures to ensure that the performance of these duties was free from unnecessary risks. By virtue of its authority under paragraph 130(1)(b) of the Code, the Board issued certain directions to the employer with regard to procedures for open range walks.

[4] The employer filed a judicial review application with the Federal Court of Appeal. The application was dismissed on March 16, 2000.

[5] Early in 2003, Mr. Czmola contacted the Board and requested that it review its decision, enclosing documentation which he stated would "verify the reasons why this case should be redone and/or charges laid for misleading the Board and hindering a proper investigation."

[6] According to the information submitted by Mr. Czmola, the genesis of his request lies with a report issued in July of 2001 by Provincial Judge Ray Wyant into the death of an inmate at Stony Mountain on December 14, 1996. According to newspaper articles furnished by Mr. Czmola, an inmate at the penitentiary died of heart failure

apparently caused by an overdose of valium and morphine. Judge Wyant was appointed to chair the inquest into the inmate's death and issued his report 18 months after the inquest ended in December 1999. According to an article from the Winnipeg Free Press dated Saturday July 14, 2001, the inquiry was delayed for two years due to an RCMP undercover investigation into drug smuggling at the federal prison. As a result of this investigation, two inmates and a Stony Mountain employee pleaded guilty to smuggling drugs.

[7] Mr. Czmola contacted the Board via e-mail and advised that he wished to bring to the Board's attention additional information that was allegedly withheld at the original hearing. Further to his request, the Board, on April 30, 2003, requested that he provide details of the new evidence to which he referred. Mr. Czmola responded to the request by faxing documentation to the Board on June 1, 2003. Included in this letter are two one-page extracts taken from the July 2001 report of Judge Wyant, two articles from the Winnipeg Free Press dated July 14, 2001, and July 19, 2001, as well as extracts from the December 20-22, 1999 inquest itself. In his letter to the Board, Mr. Czmola states that the information contained in the report and newspaper articles was not available at the time of the hearing. His interpretation of the new information, as outlined in his correspondence of May 31, is as follows:

> 1. *management misled the Board, staff and the union in stating before Mr. Chodos that their first priority was safety when in fact this was not the case;*
>
> 2. *that the inquest revealed that at the time of the death, there was a drug operation being held within the institution without the knowledge of the staff, forcing officers to enter the range unaware that management and the RCMP had "lost" drugs;*
>
> 3. *this new information should change the decision issued by the Board because, had the information been presented to the Board initially, the adjudicator would have had a better picture of the dangers that management was creating and this in turn would have meant that the decision of the safety officer could not stand because those officers would have come to a different conclusion had they known that a drug operation was ongoing.*

[8] The Board provided a copy of the new information to Treasury Board on August 1, 2003.

[9] The response of Treasury Board was received on September 4, 2003. The employer submits that the new information submitted to the Board does not change the essence of the definition of "danger" mentioned in the decision of Mr. Chodos. According to the employer, the position of Correctional Service Canada remains unchanged. It is the employer's contention that the former employee has failed to show the Board that the danger he faced on a specific day was "actual and real" and not simply "potential". Nothing in the new information, the employer argues, establishes an actual and real danger on that specific day.

[10] The parties were then advised that the matter would be referred to the Board.

Reasons for Decision

[11] As was acknowledged in *Public Service Alliance of Canada v. Treasury Board* (Board file no. 125-2-83), applications of this type under section 27 of the Act have been the subject of relatively few decisions. However, this is not to say that the Board has not, in the relatively few decisions it has issued, given parties clear and consistent directions on what is required in any such application. The seminal decision on the issue is *Public Service Alliance of Canada v. Treasury Board* (Board file no. 125-2-41). In this decision, the Board interpreted the scope of section 27 (formerly section 25) and decided that the purpose of section 27 was not to enable an unsuccessful party to reargue the merits of its case. Rather, the purpose was to enable the Board to reconsider a decision either in light of changed circumstances or so as to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing or where some other compelling reason for review exists: see *C.A.T.T. and Treasury Board and Federal Government Dockyard Trades and Labour Council East*, Board file no. 125-2-51. The Board held that it would be not only inconsistent with the need for some finality to proceedings, but also unfair and burdensome to a successful party to allow the unsuccessful one to try to shore up or reformulate arguments that had already been considered and disposed of. The power to reconsider a decision must be used judiciously, infrequently and carefully.

[12] I accept Mr. Czmola's argument that the evidence submitted to the Board by him is new evidence which could not reasonably have been presented at the original hearing, given that this new information came to light over 2 ½ years after the Board had rendered its decision in his case. However, although I agree with Mr. Czmola on this point, I do not agree with him on the substance of his submission.

[13] The Board, in *Public Service Alliance of Canada v. Treasury Board* (Board file no. 125-2-41), quotes with approval the Ontario Labour Relations Board decision in *Lorain Products (Canada) Ltd.* [1978] OLRB Rep. March 262. In that decision, the following statement is found:

> *The Board having regard to the labour relations chaos which would result if there were not some finality to its decision has been loathe to reconsider where the parties have been afforded a full and fair hearing unless the party seeking reconsideration can show that it has uncovered new evidence which could not have been obtained with reasonable diligence and adduced at the initial hearing and which, if adduced, would have a material and determining effect on the decision of the Board.*

[14] I have come to the conclusion that the new material provided by Mr. Czmola would not have such an effect on the initial decision. That decision found that danger was inherent in a Correctional Officer's duties, but that the employer had an obligation to ensure that the performance of these duties was free from unnecessary risks. The fact that the RCMP was conducting an undercover drug operation at the penitentiary at the time of the work refusal does nothing to change the fact that risks are inherent in the performance of a correctional officer's duties. The decision was based on the definition of danger as set out in the Code and as applied to the factual situation within the penitentiary as it was known to be at the time of the investigation. In order to succeed in his complaint, Mr. Czmola had to prove that a danger, in accordance with the definition of the Code, existed at the time that he exercised his right to refuse unsafe work and that this danger went beyond the inherent dangers that correctional officers face in the normal performance of their work. The Board held that the danger posed by drugs, alcohol and weapons was an inherent part of the officer's duties. Would it have been different had the board known that drugs were not only present in the institution but were being introduced by the RCMP? I do not believe so. There is no indication in the new evidence that drugs were being introduced into the institution in amounts sufficient to constitute a danger for correctional officers or that the introduction of these drugs had changed the atmosphere in the institution. Indeed, the new information submitted by Mr. Czmola fails to prove that any drugs related to the undercover operation were present in the institution on the day at issue. While the information supplied by Mr. Czmola indicates that the RCMP's undercover drug operation was ongoing at the time that Messrs. Czmola and Rodier exercised their right to refuse unsafe work, it is only speculation that this activity was either in action on

April 28, 1998, or in effect to such a degree as to heighten security concerns within the institution on the day in question.

[15] In the recent decision of the Federal Court of Appeal in *Attorney General of Canada v. Fletcher et al.* [2002] 2 F.C. 475, 2002 FCA 424, the Court held that while a safety officer was permitted to consider all of the evidence, whether it be historical or present at the time of the investigation, in determining whether or not a danger existed in the workplace, it is only with respect to a danger that exists at the time of the investigation that directions may be given. None of the new information provided by Mr. Czmola relates specifically to the day of April 28, 1998, and the situation as it existed at the time that Mr. Czmola exercised his rights under the Code. The evidence provided by Mr. Czmola is general in nature only. The specific evidence which was tendered at the hearing indicated that on the morning of the day in question, there was nothing unusual noted on the range, there were no threatened gestures or perceived threatening activities, no rumours of possible violence and there was a full complement of staff on duty. Therefore, had Mr. Czmola submitted the evidence which came to light at the inquest, it is my belief that the decision would have been the same. In other words, I do not believe that the new evidence submitted by Mr. Czmola would have had a material and determining effect upon the initial decision.

[16] I do not believe that this case is one where the Board should exercise its discretion under section 27 of the *Public Service Staff Relations Act.* Mr. Czmola has not convinced me that the material which he has recently provided in support of his application would have had, if adduced at the initial hearing, a "material and determining effect" on the decision of the Board.

[17] The application is therefore dismissed.

Yvon Tarte,
Chairperson

OTTAWA, October 16, 2003.