**Date: 20081010**

**Docket: A-53-08**

**Citation: 2008 FCA 305**

**CORAM:** **DÉCARY J.A.**
**SEXTON J.A.**
**SHARLOW J.A.**

**BETWEEN:**

**CANADA POST CORPORATION**

**Appellant**

**and**

**CAROLYN POLLARD**

**Respondent**

Heard at Toronto, Ontario, on October 2, 2008.

Judgment delivered at Ottawa, Ontario, on October 10, 2008.

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: SEXTON J.A.
SHARLOW J.A.

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**REASONS FOR JUDGMENT**

**DÉCARY J.A.**

[1] This appeal deals with the exercise by an employee of her right under section 128 of the *Canada Labour Code* (the Code) to refuse unsafe work.

[2] The employee (the respondent) is a rural and suburban mail carrier (the "carrier") with Canada Post Corporation (Canada Post). Her duties include delivering mail to rural mail boxes along the right side of the road on a delivery route in Brampton, Ontario. The carriers had developed

a practice of driving on the “wrong” (left) side of the road on their routes, in order to enable them to deliver mail through their driver’s side window. That practice was known to, and tolerated by, Canada Post.

[3] As the practice violated the *Ontario Highway Traffic Act*, in June 2004, Canada Post ordered its carriers to drive on the right side of the road. The expectation was that carriers would have to reach across the passenger seat in order to deliver mail out the right side window.

[4] In November 2004, the appellant, who for years had been following the practice of delivering mail through the driver’s side window, was directed from that time on, to drive on the right side of the road. She immediately refused to work, alleging the ergonomic difficulties she would face by stretching and twisting across the passenger seat, and by being forced to unfasten her seatbelt to deliver mail. She also alleged that in some areas the road’s shoulder was not wide enough to enable the carrier to pull her vehicle completely off the road. In other areas some boxes were not compliant with Canada Post Regulations, in that the boxes were further away from the passenger window, thereby compounding the ergonomic hazard.

[5] The work refusal was investigated by a Health and Safety Officer, who found that the ergonomic hazard posed no “danger” within the meaning of subsection 122 (1) of the Code. The Officer did not consider any issues of traffic safety. He ordered Canada Post to undertake a hazard assessment, to develop safe work procedure, and to train employees regarding the same.

[6] Canada Post appealed the Officer's decision to the Canada Appeals Office on Occupational Health and Safety. At the hearing, there was clearly some dispute about the scope of the Appeals Officer's jurisdiction, in particular whether the issue of traffic safety was properly before him. Throughout the hearing, the respondent's representative adduced evidence on the traffic safety issue. Counsel for Canada Post repeatedly objected, on the basis that the issue was not properly before the Appeals Officer, and did not adduce any of the substantial evidence he said he had on the issue.

[7] The Appeals Officer overturned the Health and Safety Officer's decision, concluding that the appellant faced a danger due to both the ergonomic and traffic safety hazards. Canada Post sought judicial review of the Appeals Officer's decision.

[8] Madam Justice Dawson allowed the application for judicial review, in part; she held that there was no reason to interfere with the decision that the ergonomic hazard represented a danger, but she overturned the ruling on traffic safety as Canada Post was denied procedural fairness. The traffic safety issue was remitted to the Office for re-determination (2007 FC 1362). Canada Post appealed the first part of the decision. The respondent cross-appealed the second part.

**The Appeal : the "danger"**

[9] The parties are in agreement that since Dawson J. applied the pre-*Dunsmuir* test of patent unreasonableness, her use of that now outdated test requires this Court to review *de novo* the decision of the Appeals Officer.

[10] The "reasonable standard' set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 is described as follows:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. (para.47)
>
> (my emphasis)

The Court goes on, at para. 48, to say

> … deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. …

[11] At paragraphs 53 and 54, the Court finds guidance in the existing case law when it sets out the following propositions:

> Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated. (at 53)
>
> … Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. … (at 54)

[12] In the case at bar, the very reasons that led Dawson J. to conclude that the applicable standard was the now-defunct “patent unreasonableness”, lead me to conclude that decisions of an Appeals Officer with respect to the definition and application of the concept of “danger”, in subsection 122(1) of the Code and of “normal condition of employment”, in paragraph 128(2)(*b*), - the two provisions at issue in this appeal – are to be assessed with the deference under the new “reasonableness standard”.

[13] Dawson J. having applied a test which has since been discarded by the Supreme Court, my duty is to review, not the decision of the learned judge, but that of the Appeals Officer, in light of the applicable standard, i.e. reasonableness. I do not take that duty to mean, however, that I cannot rely on or refer to her reasoning when it is persuasive independently of any standard of review.

**<u>The provisions at issue</u>**

| CANADA LABOUR CODE | CODE CANADIEN DU TRAVAIL |
|---|---|
| PART II | PARTIE II |
| Occupational Health and Safety | Santé et sécurité au travail |
| Interpretation | Définitions et interprétation |
| Definitions | Définitions |
| 122.(1) In this Part,<br>…<br>"danger"<br>«*danger* »<br>"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity | 122. (1) Les définitions qui suivent s’appliquent à la présente partie.<br>(…)<br>danger »<br>"*danger*"<br>«danger » Situation, tâche ou risque — existant ou éventuel — susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade — même si ses effets sur l’intégrité physique |

altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;

ou la santé ne sont pas immédiats — , avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d'avoir des effets à long terme sur la santé ou le système reproducteur.

No refusal permitted in certain dangerous circumstances

128 (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
(*a*) the refusal puts the life, health or safety of another person directly in danger; or
(*b*) the danger referred to in subsection (1) is a normal condition of employment.

Exception

128 (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*) son refus met directement en danger la vie, la santé ou la sécurité d'une autre personne;
*b*) le danger visé au paragraphe (1) constitue une condition normale de son emploi.

CANADA POST CORPORATION ACT

Mail Receptacles Regulations
PART IV

*Rural Mail Boxes*

15. Mail may be delivered by means of deposit in rural mail boxes and mailable matter may be collected from rural mail boxes where the rural mail box is
(*a*) constructed in accordance with the specifications set out in Schedule VI;
(*b*) placed outdoors at a location on a rural mail route approved by the local postmaster; and
(*c*) located, erected and identified as required by section 16.

16. A rural mail box shall be
(*a*) located along the right hand side of the

LOI SUR LA SOCIÉTÉ CANADIENNE DES POSTES

Règlement sur les boîtes aux lettres
PARTIE IV

*Boîtes aux lettres rurales*

15. Une boîte aux lettres rurales peut servir au dépôt ou à la levée du courrier si
*a*) elle est conforme aux exigences de l'annexe VI;
*b*) elle est placée à l'extérieur, le long d'une route rurale approuvée par le maître de poste local; et
*c*) elle est installée et identifiée conformément à l'article 16.

16. La boîte aux lettres rurale doit :
*a*) être installée du côté droit du chemin, selon la direction prise par le facteur rural,

road according to the courier's line of travel in a position where the courier can reach and service it from his vehicle without impeding pedestrian or vehicular traffic;
(*b*) erected so that
(i) the box is securely attached to a fixed post or canti-lever arm,
(ii) the bottom of the box is approximately 100 cm above the roadway,
(iii) the box does not obstruct or obscure other boxes located nearby, and
(iv) the box allows the ready delivery or collection of mail; and
(*c*) identified by having the name of each boxholder printed in indelible lettering not less than 2.5 cm high on the side of the box or on a name plate securely attached to the box and facing towards the courier as he approaches the box in the course of his usual travel route.

à un endroit où celui-ci peut l'atteindre et y prendre ou y déposer le courrier sans avoir à descendre de sa voiture et sans entraver la circulation des piétons ou des autres véhicules;
*b*) être installée de manière
(i) à être assujettie solidement à un poteau fixe ou à une potence,
(ii) que sa partie inférieure se trouve à environ 100 cm du sol,
(iii) qu'elle n'obstrue ni ne cache les autres boîtes situées à proximité, et
(iv) qu'il soit facile d'y laisser ou d'y prendre le courrier; et
*c*) être identifiée par le nom du propriétaire, inscrit en caractères indélébiles d'au moins 2,5 cm de hauteur sur le côté de la boîte ou sur une plaque fixée solidement à celui des côtés de la boîte qui fait face au facteur lorsque ce dernier vient déposer ou recueillir le courrier.

**<u>whether there is "danger"</u>**

[14] The appellant argues that failure to train an employee on the mechanics of effecting delivery through the passenger-side window does not in itself constitute a danger. Since the Appeals Officer does not conclude in his reasons that failure to train constitutes a danger, this argument is without merit in the circumstances.

[15] The appellant argues, also, that where the methodology of effecting passenger-side mail delivery is solely within the control of the employee, there is no "danger" within the meaning of the Code.

[16] The Appeals Officer**,** at paragraphs 71 to 78, reviewed the case law on the concept of "danger". Relying more particularly on the decision of this Court in *Martin v. Canada (Attorney General)*, 2005 FCA 156 and that of Madam Justice Gauthier in *Verville v. Canada (Correctional Service)*, 2004 FC 767, he stated that the hazard or condition can be existing or potential and the activity, current or future; that in this case the hazards were potential in nature; that for a finding of danger, one must ascertain in what circumstances the potential hazard could reasonably be expected to cause injury and to determine that such circumstances will occur in the future as a reasonable possibility (as opposed to a mere possibility); that for a finding of danger, the determination to be made is whether it is more likely than not that what the complainant is asserting will take place in the future; that the hazard must be reasonably expected to cause injury before the hazard can be corrected; and that it is not necessary to establish the precise time when the hazard will occur, or that it occurs every time.

[17] This statement of the law is beyond reproach or is, at the least, reasonable in the *Dunsmuir* sense.

[18] The Appeals Officer then proceeded to apply the law to the facts of the case. He examined the argument that because of her existing back injury any danger the respondent would experience was due to her own health situation. Relying on the "reliable and credible" testimony of the respondent that she had an arthritic condition in her back, as opposed to an on-going back problem, and relying on the ergonomic reports prepared by Canada Post itself, he found at para. 105 that "… it is reasonable in the aforementioned circumstances to expect that the hazard related to

stretching and twisting in order to deliver rural mail to [mail boxes] through the front passenger window of her vehicle could reasonably be expected to cause injury to C. Pollard".

[19] This conclusion is reasonable. It is well-articulated. It results in an acceptable outcome.

[20] Counsel for Canada Post argued at the hearing that if training would have been suitable to correct the hazard before an injury could occur, there cannot be a finding of "danger" within the meaning of the Code. I can see no merit in this argument in the circumstances of this case. Ms. Pollard had been pressing Canada Post ever since she had been informed that she would have to revise her method of delivery. She went through internal mechanisms in an attempt to resolve her health and safety concerns. She was given no training at all. She was informed that she would have to pay for a helper out of her own pocket. So when, on November 24, 2004, she was instructed to make her mail deliveries from the right shoulder of the roadway through the front passenger side window of her vehicle, she immediately refused to work (see para. 3 to 12 of the Appeals Officer's reasons).

[21] The risk of danger became reality at that very moment. She did not have to face that risk. An immediate recourse open to her at that time was to refuse to work. Waiting for training was just too late.

**whether a "normal condition of employment"**

[22] Paragraph 128(2)(*b*) of the Code provides that no refusal to work is permitted if the danger is a "normal condition of employment". Canada Post submits that delivery of mail to rural mail boxes through the passenger-side window is a "normal condition of employment".

[23] The Appeals Officer disposed of this argument at paragraph 113 of his reasons. Relying on the decision of the Federal Court in *Verville*, which has stated that a "normal" danger does not include "the method used to perform a job", he concluded that the danger which Ms. Pollard was facing did not result from an essential characteristic of the job but from the methodology used.

[24] Dawson J. expanded on the Appeals Officer's reasons:

> [98] Canada Post has not argued that Justice Gauthier was in error when she interpreted paragraph 128(2)(*b*) to exclude from the concept of "normal condition of employment" a risk that is not inherent, but rather depends upon the method used to perform a job. I find no error in the appeals officer's interpretation of Justice Gauthier's decision in *Verville*, cited above.
>
> [99] Turning to the application of that principle to the evidence before the appeals officer, Ms. Marsh testified that, after she filed her injury report, Canada Post provided her with a helper who sat in the passenger seat of her vehicle and delivered mail out the front passenger-side window. This avoided all ergonomic concerns raised by Ms. Pollard. There was also evidence that the use of community mailboxes or right-hand drive delivery vehicles were alternate methods of mail delivery that would avoid the ergonomic hazards.
>
> [100] In light of that evidence, it was not, in my view, patently unreasonable for the appeals officer to find that the "danger" was not an essential characteristic of rural mail delivery and therefore paragraph 128(2)(*b*) of the Code did not apply. The "danger" arose from the methodology of requiring RSMCs to drive on the right-hand side of the road, delivering mail through the front passenger-side window without a helper.
>
> [101] Moreover, the evidence before the appeals officer established that, even following Ms. Pollard's refusal to work, her delivery route continued to include a number of mailboxes

> that did not meet Canada Post's specifications. I have difficulty accepting that delivery to mailboxes that do not comply with Canada Post's own policies is a normal condition of a RSMC's employment.

[25] I find that reasoning persuasive, independently of the standard of review applied by Dawson J.

[26] In its factum and at the hearing, counsel for Canada Post relied on the *Mail Receptacles Regulations* enacted under the *Canada Post Corporation Act* (SOR/83-743). Neither the Appeals Officer nor Dawson J. referred to the Regulations and I found nothing in the transcripts that alluded to them.

[27] As the argument goes, the mode of delivery having been prescribed by the Governor in Council, that mode is a normal condition of employment.

[28] I see little merit in this argument.

[29] The argument supposes that sections 15 and 16 prescribe a method of delivery. They do not. Section 15 only says that mail may be delivered by means of deposit in rural mail boxes. Section 16 (*a*) only says where the boxes are to be located, i.e. on the right-hand side of the road according to the courier's line of travel; it does not say how the courier is to access the boxes. For Canada Post to argue that under section 16 delivery is to be made through the passenger-side window, means that from the date of the Regulations (1983) to the date (2004) when the "long standing practice"

(Appeals Officer, para. 4) of making delivery through the driver-side window was stopped, a "normal condition of employment" was consistently ignored by Canada Post.

[30] There is no suggestion in the evidence that delivery from the passenger-side window was considered by Canada Post at the time as a condition of employment, let alone a normal condition of employment. Driving on the left shoulder is described merely as a method used to deliver mail and no reference is ever made to section 16 of the Regulations. In a letter sent to Ms. Pollard on June 20, 2004, Canada Post refers to driving on the wrong side of the road as an "operating issue" (A.B. vol. 1, p. 201). To illustrate why the within matter should be considered solely within the parameters of the circumstances as they existed at the time Canada Post ceased to tolerate the driving on the wrong side of the road, I note that as a footnote to paragraph 4 of his reasons, the Appeals Officer defines the terms "deliver" or "delivery" in the context of this case" (my emphasis) as including "placing mail … into mail boxes; picking up mail in the box for delivery; and raising the flag on the mail box …". In another context, perhaps, delivering from the passenger-side window might be described as being an essential characteristic of rural mail delivery akin to placing and picking mail and raising the flag.

[31] Under these circumstances, it was reasonable for the Appeals Officer to conclude that delivery from the passenger-side window was a method used to perform a job within the meaning of the test, unchallenged by Canada Post, as set out in *Verville.* His finding is an acceptable outcome which is defensible with regard to both the circumstances of this case and the law.

**<u>Movement “solely within the control of the employee”</u>**

[32] The appellant argues that the ergonomic movement necessary to effect passenger-side mail delivery is solely within the carrier's control. In its submission, there can be no "danger" because the respondent can avoid any risk of injury by altering her own movements, which the appellant suggests is a matter of "common sense". Accordingly, the appellant also argues that there is no obligation to train an employee on "common-sense" ergonomic movements, and that any such training would have to be customized to each carrier's body type and particular vehicle.

[33] There is no authority standing for the proposition that there is no obligation to train employees on "common sense" ergonomic movements. *Canadian Railway Co. and Tetley,* [2001] C.L.C.A.O.D. No. 21 was cited by the appellant in this regard. However, the decision in that case did not consider the issue of training, since the Appeals Officer concluded that the hazard complained of would be resolved in a very short time, before there was any reasonable chance that an injury would materialize. Further, Canada Post's own internal study recommended that the employer develop best ergonomic practices for delivering mail to rural mail boxes, and should inform carriers of vehicle configurations that would be more ergonomical. In light of these factors, the Appeals Officer's conclusion that a danger existed despite the respondent's ability to alter her movements was open to him as a matter of fact and law. The conclusion was reasonable.

[34] For these reasons I would dismiss the appeal.

**<u>The Cross-Appeal : procedural fairness</u>**

[35] The cross-appeal deals with the procedural fairness argument raised by Canada Post. It is well-established that the content of procedural fairness is determined by the courts in the circumstances of a given case. Principles developed with respect to the standard of review apply to the end product, i.e. the decision of the tribunal; they do not apply to the manner in which a tribunal goes about making its decisions (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at para. 102). It follows, as noted by my colleague John M. Evans, *The Role of Appellate Courts in Administrative Law,* (2007) 20 Can. J. Admin. L. & Prac. 1 at page 25, that

> … an appeal court may only intervene if satisfied that the reviewing judge had made a palpable and overriding error in applying the duty of fairness to the particular facts, or that some more general question of law was involved. …

[36] Madam Justice Dawson, after reciting various extracts of the transcripts, concluded as follows:

> With the benefit of hindsight, it would have been prudent for Canada Post to adduce at least some evidence about traffic safety. Nevertheless, by concluding only in his final decision that the issue of traffic safety was properly before him, without advising Canada Post of that conclusion and allowing it to adduce evidence as to traffic safety, the appeals officer deprived Canada Post of the opportunity to present its case fully and fairly. In so doing, the officer breached the duty of procedural fairness that he owed to Canada Post.

[37] I find no palpable and overriding error in her conclusion. It was open to her, on the evidence, to find that Canada Post had been denied the opportunity to address the safety issue. It was within her discretion, having found that procedural fairness had been breached, to order a redetermination of the issue. (see *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH*, 2006 FCA 398)

[38] I would dismiss the cross-appeal.

**Costs**

[39] In view of the divided success, I would make no order as to costs.

"Robert Décary"
J.A.

"I agree.
J. Edgar Sexton J.A."

"I agree.
Karen Sharlow J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-53-08 |

**(APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE DAWSON DATED DECEMBER 21, 2007, DOCKET NUMBER T-1428-06.)**

| | |
|---|---|
| **STYLE OF CAUSE:** | Canada Post Corporation<br>v. Carolyn Pollard |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | October 2, 2008 |
| **REASONS FOR JUDGMENT BY:** | DÉCARY J.A. |
| **CONCURRED IN BY:** | SEXTON J.A.<br>SHARLOW J.A. |
| **DATED:** | October 10, 2008 |

**APPEARANCES:**

| | |
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