

Occupational Health and Safety Council

Appeal Hearing

May 8, 2007

Decision upon Application By:

Robert Moir – Appellant

And

Freeze Maxwell Roofing – Respondent

And

Workplace Health and Safety – Respondent

Board Members

Wendy Clark – Appeal Panel Chair, Public Representative,
Occupational Health and Safety Council

Peter Schaefer – Employer Representative
Occupational Health and Safety Council

Ernest Tessier – Employee Representative
Occupational Health and Safety Council

Appearances:

For the appellant: Robert Moir

For the respondent: Jack Tate, Freeze Maxwell Roofing

For the respondent: Gurdip Sanghera, Workplace Health and Safety (WH&S)
Shantha Nandana – (WH&S)

The Appeal Panel (the Panel) convened on May 8, 2007 to hear an appeal pursuant to Section 37(3) of the *Occupational Health and Safety (OH&S) Act*. (Act)

Section 37 of the Act reads:

Disciplinary action complaint

(1) A worker who has reasonable cause to believe that the worker has been dismissed or subjected to disciplinary action in contravention of section 31(5) or 36 may file a complaint with an officer.

(2) An officer who receives a complaint under subsection (1) shall prepare a written record of the worker's complaint, the investigation and the action taken and shall give the worker and the employer a copy of the record.

(3) A worker or an employer who receives a record under subsection (2) may request a review of the matter by the Council by serving a notice of appeal on a Director of Inspection within 30 days from the receipt of the record.

(4) After considering the matter, the Council may by order (a) dismiss the request for a review, or (b) require one or more of the following: (i) reinstatement of the worker to the worker's former employment under the same terms and conditions under which the worker was formerly employed; (ii) cessation of disciplinary action; (iii) payment to the worker of money not more than the equivalent of wages that the worker would have earned if the worker had not been dismissed or had not received disciplinary action; (iv) removal of any reprimand or other reference to the matter from the worker's employment records.

(5) If the worker has worked elsewhere while the dismissal or disciplinary action has been in effect, those wages earned elsewhere shall be deducted from the amount payable to the worker under subsection (4)(b)(iii).

(6) An appeal lies to the Court of Queen's Bench from an order of the Council on a question of law or a question of jurisdiction and on hearing the matter the Court may make any order, including the awarding of costs, that the Court considers proper.

(7) An appeal under subsection (6) shall be made by way of originating notice within 30 days from the date that the order of the Council is served on the person appealing the order of the Council.

(8) The commencement of an appeal under subsection (6) does not operate as a stay of the order of the Council being appealed from except insofar as a judge of the Court of Queen's Bench so directs.

1983 c39 s15; 1988 c36 s12

The specific reasons for appeal are:

- Robert Moir believes there was disciplinary action taken against him because he identified unsafe actions by his employer, Freeze Maxwell Roofing.
- Robert Moir believes he was laid off because he was attempting to obey the law (Occupational Health and Safety Act).
- Robert Moir believes that Workplace Health and Safety did not investigate his complaint in a proper manner.

The respondents contend that:

- Freeze Maxwell has never disciplined a worker for working safe.
- Freeze Maxwell did not discipline nor lay off Robert Moir for attempting to comply with the Law.
- Workplace Health and Safety conducted the investigation of the worker's case in a thorough manner.

The Issue to be Resolved:

Was Robert Moir dismissed or disciplined as a result of attempting to comply with the Occupational Health and Safety Act?

Submissions Considered by the Appeal Panel

From the Appellant, Robert Moir

- OHSC Appeal Questionnaire – completed by Robert Moir
- Letter to Robert Moir from Freeze Maxwell dated October 13, 2006
- Medical Examination for Motor Vehicle Operation
- Robert Moir's ROE (record of employment) from Freeze Maxwell dated October 26, 2006
- Robert Moir's summary of the most important points to consider

From the Respondent, Jack Tate, Freeze Maxwell Roofing and Workplace, Health and Safety (WH&S)

- Package of information relating to the appeal obtained from both the Appellant and the Respondent including:
 - OHSC Appeal Questionnaire – completed by Robert Moir
 - Letter of October 13, 2006 to Robert Moir from Jack Tate, Freeze Maxwell
 - Statements obtained by WH&S during their investigation
 - ROE for Robert Moir issued October 26, 2006 by Freeze Maxwell
 - Letter, dated Dec 8, 2006 from Jack Tate to WH&S
 - Submission binder produced from WH&S, containing appellant's information, WH&S investigation, interviews and findings

Facts:

The following is a list of facts agreed to by the parties and considered by the appeal panel:

- Robert Moir was employed twice by Freeze Maxwell Roofing. The second time in 2004 until October 2006.
- The letter to Robert Moir from Jack Tate was received and discussed on October 13, 2006.
- Robert Moir was requested via discussion and in writing to see a physician and seek counselling for anger management on October 13.
- Robert Moir refused to seek help for anger management.
- On October 16, 2006 Robert Moir returned his truck to Freeze Maxwell Roofing and was driven home by Pat Murphy. He advised Mr. Murphy that he would not be seeking counselling.
- Robert Moir was a good worker and had raised safety issues in the past which had been addressed by Freeze Maxwell Roofing.
- Robert Moir admitted when questioned that he was never forced or asked by Freeze Maxwell Roofing to conduct work in an unsafe manner.
- Robert Moir filed a complaint to WH&S on October 26, 2006 alleging unlawful dismissal and provided information and witnesses to assist in an investigation.
- The ROE (record of employment) issued October 26, 2006 and supplied by Robert Moir indicated the reason for issuing as other (k) and expected return as unknown.
- November 29, 2006 WH&S advises Robert Moir that there is insufficient evidence to support the claim of dismissal under section 37 of the OH&S Act.

Position of the Parties:

Appellant, Robert Moir asks the board to rule that Freeze Maxwell roofing laid him off when he was attempting to obey the law (OH&S act). Robert Moir stated that demanding a worker see a mental health professional because he was concerned about safety is a disciplinary action.

Robert Moir requests payment of money, not more than the equivalent of wages that he would have earned if he had not been dismissed or had not received disciplinary action.

Finally, Robert Moir desires that there is a removal of any reprimand or other reference to the matter from his employment records.

Respondent, Jack Tate, stated that Freeze Maxwell objective is to provide a safe work environment for their employees. He did not fire anyone for doing things safely.

Jack Tate wrote the letter of October 13, 2006 with the desire to help Robert Moir and in his opinion he was not firing Robert Moir. It was his intention to continue Rob's employment once he received counselling.

Respondent, Workplace Health and Safety, upon reviewing all the evidence provided to them, concluded that Robert Moir was not dismissed while trying to comply with legislation and Freeze Maxwell Roofing did not force Robert Moir to work unsafe.

Decision:

Robert Moir did provide much information relating to his concerns about the safety practices of Freeze Maxwell and others. The submission of the ROE, although factual is not proof that Robert Moir was laid off. Jack Tate's letter of October 13, 2006 indicates an offer of assistance and not a lay off notice. Also, much of the information from Robert Moir is hearsay or not relevant.

The panel considered the submissions and positions of the parties and has concluded that there are no facts to substantiate Robert Moir's claim. For this reason the panel finds that Robert Moir was not dismissed or disciplined for acting in compliance with the OH&S Act (section 37) and no remedy is awarded.

Occupational Health and Safety Council Appeal Panel

Tim Bennett, Chair
Occupational Health and Safety Council
Signed on behalf of Wendy Clark, Appeal Panel Chair
Public Representative

Peter Schaefer
Occupational Health and Safety Council
Employer Representative

Ernest Tessier
Occupational Health and Safety Council
Employee Representative