

Occupational Health and Safety Council

Appeal Hearing

July 08, 2009

Decision upon Application By:

Ron Nagy – Appellant

And

Bantrel Constructors – Respondent

And

Workplace Health and Safety – Respondent

Board Members

Wendy Clark – Appeal Panel Chair, Public Representative,
Occupational Health and Safety Council
Cheryl Hamer – Worker Representative
Occupational Health and Safety Council
Eugene Sarrasin – Employer Representative
Occupational Health and Safety Council

Appearances:

For the appellant: Ron Nagy

For the respondent: Mike York, Manager, Labour Relations, Bantrel Constructors Co.

For the respondent: Shelly MacDonald, Legal Council for Workplace Health and Safety
Andrew Pollock – Occupational Health and Safety Officer

Government of Alberta ■
Employment and Immigration
Occupational Health and Safety Council

The Appeal Panel (the Panel) convened on July 8, 2009 to hear an appeal pursuant to Section 36 and 37 of the *Occupational Health and Safety (OH&S) Act*.

Section 36 of the *Act* reads:

- 36 *No person shall dismiss or take any other disciplinary action against a worker by reason of that worker acting in compliance with this Act, the regulations, the adopted code or an order given under this Act or the regulations.*

Section 37 of the *Act* reads:

- 37(1) *A worker who has reasonable cause to believe that 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 14(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 Council 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.*

The specific reasons for appeal are:

- On July 30, 2008, Mr. Ron Nagy was dismissed from Bantrel Constructors. Mr Nagy believes he was dismissed for raising safety issues regarding scaffolding. On the day before his dismissal he wanted to advise his job steward of his concerns. Upon requesting to speak to the job steward about the scaffold issue a discussion occurred with the General Foreman. Mr Nagy did not wish to advise the General Foreman of his concerns as he felt the protocol was to advise his job steward. His concerns also included complaints about scaffold supervision and he did not want to discuss this with a supervisor. At this time a confrontation occurred with the General Foreman and Mr. Nagy. The following day (July 30) Mr. Nagy returned to the workplace and was terminated for "gross insubordination and violation of respect in the workplace policy.
- Mr. Nagy believes this action was a violation of section 36 of the OH&S Act.
- Mr. Nagy filed an appeal under s 37(3) of the OH&S Act

The respondents contend that:

- The disciplinary action taken against the appellant does not constitute a violation of s.36 of the Act.
- Mr. Nagy was dismissed for gross insubordination and non compliance with respect in the workplace policy.

The Issue to be Resolved:

Does the action taken against the appellant by the employer constitute a violation of s.36 of the Occupational Health and Safety Act?

Submissions Considered by the Appeal Panel

From the Appellant, Ron Nagy

- OHSC Appeal Questionnaire – completed by Ron Nagy
- Evidence presented by Mr Nagy (Appellant)
- Bantrel termination policy submitted by the Appellant

In consideration of the Decision the Appeal Panel reviewed all the submitted material.

From the Respondent, Bantrel Constructors and Workplace, Health and Safety (WH&S)

Package of information relating to the appeal obtained from both the Appellant and the Respondent including:

- o OHSC Appeal Questionnaire – completed by Ron Nagy
- o Statements obtained by WH&S during their investigation
- o Evidence by Witness(es) – Andrew Pollock, WH&S and Mike York, Bantrel Constructors
- o Witness statements of Bruce Olson, Trevor Dabels and Mary Cuddahy
- o Submission binder produced from WH&S, containing appellant's information, WH&S investigation, investigating officer notes, interviews and findings [as applicable]

In consideration of the Decision the Appeal Panel reviewed all the submitted material.

Facts:

The following is a list of facts received from the parties and considered by the appeal Panel:

- Mr Nagy was employed by Bantrel Constructors.
- Mr. Nagy was terminated from Bantrel Constructors on July 30, 2008.
- Mr. Nagy, raised safety issues related to scaffolding during the course of his employment with the respondent, Bantrel Constructors.
- Mr. Nagy and Ms. M. Cuddahy (co-worker) requested the job steward to address his safety issues including concerns related to the scaffold supervision.
- The job steward was contacted.
- The temporary general foreman (Trevor Dabels) was advised by the foreman (Bruce Olsen) that the Mr. Nagy was waiting for the job steward regarding building issues of scaffolding and issues with the scaffold supervision.
- The temporary general foreman stated that he was aware that no action was required on his part.
- The temporary general foreman approached the appellant to address the issues toward the scaffold supervision.

- Mr. Nagy was not prepared to discuss the safety issues (i.e. Scaffold building issues and issues with scaffold supervision) with the temporary general foreman as conveyed by his repeated requests for the job steward.
- Mr. Nagy had the right to request his job steward as per the Collective agreement and was exercising that right.
- There was a verbal confrontation between the temporary general foreman and Mr. Nagy.
- Ms. M. Cuddahy confirmed that the goal was to address unsafe scaffold issues with job steward.
- Ms. M. Cuddahy confirmed that the temporary general foreman was aware of the scaffold safety issues.
- Mr. Nagy was subsequently terminated.

Position of the Parties and Remedy Requested:

Appellant, believes he was terminated for raising health and safety concerns.

The appellant is requesting the following:

- Reinstatement to my former employment under the same terms and conditions.
- Cessation of disciplinary action.
- Payment of the money not more than the equivalent of wages that would have been earned if I had not been dismissed or had not received disciplinary action, minus any wages I earned elsewhere while the dismissal or disciplinary action has been in effect).
- Removal of any reprimand or other reference to the matter from my employment records.

Respondent(s) believe the termination was just based on gross insubordination and violation of Respect in the Workplace policy.

The respondent requests the Workplace Health & Safety decision be upheld.

Decision:

In order to make a determination as to whether there was a contravention of s.36 of the Act, we considered the following:

1. Was disciplinary action taken against the appellant?
2. Was the disciplinary action taken as a result of the appellant acting in compliance with the OHS Act, Regulation, or Code; and
3. Is there a causal and demonstrable relationship between the disciplinary action taken against the appellant and the appellant's act of compliance with the OHS Act, Regulation, or Code?

The Panel finds the appellant (Mr. R. Nagy) was acting in compliance with the OHS Act, Regulation or adopted Code.

The Panel finds that the appellant was disciplined by way of termination.

The Panel finds the appellant was terminated for reasons of the appellant acting in compliance with the Act, regulations, and the adopted Code.

The reasons for the decision are as follows:

- The appellant attempted to exercise his right to speak to the job steward about safety issues.
- The appellant confirmed during the hearing that his refusal to speak to the temporary general foreman was because he had concerns, in part, with how supervision was inspecting and re-certifying the scaffolding.
- The temporary general foreman intervened with due process by confronting the appellant and pressing the issue when the appellant clearly did not want to speak to him as the issue related to scaffold safety including the building of scaffolding and scaffold supervision inspecting and re-certifying scaffolds.
- The evidence supports that the appellant was attempting to exercise his right under the Act to raise safety concerns and bring them forward to the job steward which was his right under the Collective Agreement. The appellant was prevented from exercising his right to raise safety concerns by the temporary general foreman, which contravenes section 36 of the OH& S Act.

- The Panel finds that the appellant was terminated for not cooperating with the temporary general foreman. However, the panel concludes the lack of cooperation by the appellant was a result of the appellant's request for a job steward and ensuing interference of the temporary general foreman with his right to discuss the scaffold safety concerns (including scaffold supervision) with the job steward was justified given the safety concern related to the supervision.
- The appellant's right to raise safety concerns was impeded by the conflict with the temporary general foreman and the refusal of the temporary general foreman to allow due process.
- Based on the facts, the foreman and temporary general foreman were aware of the safety issues and the request to submit them to the workers job steward.

We find that the respondent (Bantrel Constructors) violated section 36 of the Act when disciplinary action was taken against the appellant for attempting to raise safety concerns with the job steward, related to the building of scaffolding and inspection and re-certifying of scaffolding by the respondent's supervisors.

As per s. 37(3) the Appeal Panel hereby Orders the following:

- Cessation of disciplinary action.
- 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.
- Removal of any reprimand or other reference to the matter from the worker's employment records.
- 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.

**Appeal Hearing
Ron Nagy/Bantrel Constructors Co.**

July 8, 2009

Occupational Health and Safety Council Appeal Panel