

**Occupational Health and Safety Council  
Appeal Hearing**

**February 23, 2011**

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**Decision upon Application By:**

**Rob Eirich – Appellant**

**And**

**Jacobs Industrial Services Ltd. - Respondent**

**Board Members**

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

**Appearances:**

For the appellant: Rob Eirich

For the respondent: Brett Horan, Labour Relations Manager, Jacobs Industrial Services  
Ltd.  
Matthew McArady, Field Superintendent, Jacobs Industrial Services  
Ltd.

The Appeal Panel (the Panel) convened on February 23, 2011 to hear an appeal pursuant to Section 36 and 37 of the *Occupational Health and Safety (OHS) Act. (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 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 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 June 11, 2010, Mr. Eirich was dismissed from Jacobs Industrial Services Ltd.
- Mr. Eirich believes he was dismissed for exercising his right to refuse unsafe work.
- Mr. Eirich believes this action was a violation of section 36 of the OHS Act.
- Mr. Eirich filed an appeal under section 37(3) of the OHS Act.

**The respondent contends that:**

- The disciplinary action taken against the appellant does not constitute a violation of s.36 of the Act.
- Mr. Eirich was dismissed for an illegal strike as per a union agreement.

**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, Mr. Eirich***

- OHSC Complainant Questionnaire – completed by Mr. Eirich
- Evidence presented by Mr. Eirich (Appellant)
- Exhibit “1”: Exert from Labour Relations Code
- Exhibit “2”: Labour Relations Decision Grant v CJA, Local 1325
- Exhibit “3”: Labour Relations Decision Paul v CJA, Local 1325
- Exhibit “4”: Exert from Labour Relations Code
- Exhibit “5”: Product Information Sheet, JSP Invincible Mark 3/2 Surveyor Short Peak

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

***From the Respondent, Jacobs Industrial Services Ltd***

- Evidence presented by Brett Horan and Matthew McArady
- Exhibit “6”: Hazard Communication Acknowledgement and My Commitment signed and dated by the Appellant.
- Exhibit “7”: Jacobs Industrial Services Ltd. Orientation Package.

***From Occupational Health & Safety***

- Written record of the worker’s complaint, the investigation and the action taken. The record also contained for reference the Appellant’s information, OHS investigation, investigating officer notes and the Respondent’s information [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. Eirich was employed by Jacobs Industrial Services Ltd.
- Mr. Eirich received new employee orientation including review of the rules and regulations related to his employment with Jacobs Industrial Services Ltd.
- Jacobs Industrial Services Ltd. has specific policies surrounding personal protective equipment including hard hats and the specific requirement to wear hard hats with the bill forward.
- Mr. Eirich signed and acknowledged reading, understanding and intent to comply with the principles, guidelines and rules set out by Jacobs Industrial Services Ltd. including the hard hat rule.
- All Jacobs Industrial Service Ltd. employees participate in a daily Safe Plan of Action (SAP) for all tasks to identify last minute hazards and suitable controls.
- The foreman reviews and signs all SAP's within the first two hours of each workday and as conditions change.
- Mr Eirich worked from March 31, 2010 to June 10, 2010 in compliance with the hard hat policy.
- Mr. Eirich was injured on June 10, 2010.
- On June 11, 2010 Mr. Eirich refused to cooperate or comply with the hard hat policy requirement to wear the bill forward as he perceived this caused an unsafe condition.
- On June 11, 2010, Mr. Eirich refused to work due to a perceived unsafe condition.
- Mr. Eirich was terminated from Jacobs Industrial Services Ltd. on June 11, 2010.

**Position of the Parties and Remedy Requested:**

**The Appellant, believes he was terminated for refusing unsafe work.**

**Mr. Eirich believes that the Respondent's policy which requires the hard hat to be worn with the bill forward endangers employees as it obstructs their vision.**

**Mr. Eirich believes that the policy requirements have caused injuries.**

**Mr. Eirich believes he is bound to refuse what is unsafe.**

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.
- Removal of any reprimand or other reference to the matter from my employment records.

**Respondent(s)** believe the policies/rules surrounding the wearing of hard hats are fair and reasonable to protect the health and safety of employees.

The Respondent believes that Mr. Eirich was not acting in compliance with the Act as they do not believe this is a case of imminent danger.

The Respondent believes that, as the employer, they have the right to make the rules that meet or exceed legislative requirement in the interest of employee health and safety.

The Respondent submits that the Appellant was terminated for an illegal work stoppage.

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

**Decision:**

In order to make a determination as to whether there was a contravention of s.36 of the *OHS 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 adopted 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 adopted Code?

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

The Panel finds the Appellant was not acting in compliance with the *OHS Act*, Regulation or adopted Code.

The Panel finds that because the Appellant was not acting in compliance with the *OHS Act*, Regulation or adopted Code, the complaint does not meet the requirements under the *OHS* legislation for a disciplinary action complaint.

**Therefore the panel finds that the disciplinary action taken against the appellant by the employer does not constitute a violation of s.36 of the Occupational Health and Safety Act.**

The reasons for the decision are as follows:

- The requirement for the Appellant to wear a hard hat with the bill to the front did not create a danger that was not normal for the Appellant's occupation thus constituting imminent danger per section 35(2) of the OHS Act.
- The requirement to wear a hard hat with the bill to the front does not itself endanger the Appellant per section 228(3) of the Code.
- The Respondent fulfilled their obligation to ensure, as far as reasonably practical, the health and safety of workers engaged in the work of the Respondent under section 2(1) of the Act.
- The Respondent's policy is consistent with the legislation including section 228(2) of the Code specific to the requirement to wear the personal protective equipment in accordance with the training and instruction received.
- The Appellant had received training and instruction in the Respondent's requirements to wear the hard hat with the bill to the front.
- The Appellant had complied with the work rule from the date of hire (March 31, 2010) to June 10, 2010 without issue/complaint.
- The disciplinary action taken was not a result of Mr. Eirich's compliance with the *Act*, Regulation or adopted Code.

**Occupational Health and Safety Council Appeal Panel**

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

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**Ernest Tessier**  
**Occupational Health and Safety Council**  
**Worker Representative**

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**Cheryl Hamer**  
**Occupational Health and Safety Council**  
**Employer Representative**