

Government of Alberta ■
Human Services

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Occupational Health and Safety Council
Appeal Hearing
November 2, 2012

Decision upon Application By:

Valerie Fowler – Appellant

And

Western Refractory Services Limited – Respondent

Board Members

Andrew Smith – Appeal Panel Chair, Employer Representative,
Occupational Health and Safety Council
Janice Peterson – Worker Representative
Occupational Health and Safety Council
Nina Novak – Employer Representative
Occupational Health and Safety Council

Appearances:

For the appellant: Valerie Fowler

For the respondent: Jim Dragon, Western Refractory Services Limited
Jim Drover, Western Refractory Services Limited

The Appeal Panel (the Panel) convened on November 2, 2012 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 I4)(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 5, 2011, Ms. Valerie Fowler was dismissed from Western Refractory Services Ltd. (WRSL) Ms. Fowler believes this dismissal was a result of raising safety issues regarding respirator fit testing and subsequent requirement for fit testing to occur pursuant to the Occupational Health and Safety Code for the type of work WRSL was undertaking. Ms. Fowler's contention is that she was dismissed for identifying the fit testing issue in response to a June incident which was identified to her following her return to the worksite after days off.
- Ms. Fowler believes this action was a violation of section 36 of the OH&S Act.
- Ms. Fowler 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.
- Ms. Fowler was dismissed for on-going issues related to her performance.

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, Valerie Fowler

- Email statement from Ms. Fowler to Heather Edenloff (Alberta Occupational Health and Safety) – Dated June 13, 2011.
- Oral evidence presented by Ms. Fowler at the appeal hearing.
- Submission binder produced from Occupational Health and Safety containing: Disciplinary Action Complaint Assignment (June 8, 2011); Email to Heather Edenloff (June 13, 2011); Occupational Health and Safety Decision Letter (January 25, 2012); Occupational Health and Safety Evidence Table (January 5, 2012); Record of Employment (July 12, 2011); Witness Statement Ken Coghill (July 14, 2011); Witness Statement Rick Derksen (July 13, 2011); Statement from Jim Drover (undated); Witness Statement from Matt Vaags (July 12, 2011); Email from Valerie Fowler (April 14, 2011); Questionnaire Employer Copy (September 15, 2011); Questionnaire Complainant Copy (October 24, 2011).
- Additional evidence provided by Ms. Fowler at the appeal hearing including email from Valerie Fowler to Patricia Ross Canadian Natural

Resources Ltd. (CNRL) (April 14, 2011); email from Scott Peddie (October 28, 2012); Hand written diary notes (July 13).

In consideration of the Decision the Appeal Panel reviewed all the submitted material in the decision. There was an objection raised by the respondents to the hand written diary notes (July 13) submitted by Ms. Fowler.

From the Respondent, Western Refractory Services Ltd.

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

- Submission binder produced from Occupational Health and Safety containing: Disciplinary Action Complaint Assignment (June 8, 2011); Email to Heather Edenloff (June 13, 2011); Occupational Health and Safety Decision Letter (January 25, 2012); Occupational Health and Safety Evidence Table (January 5, 2012); Record of Employment (July 12, 2011); Witness Statement Ken Coghill (July 14, 2011); Witness Statement Rick Derksen (July 13, 2011); Statement from Jim Drover (undated); Witness Statement from Matt Vaags (July 12, 2011); Email from Valerie Fowler (April 14, 2011); Questionnaire Employer Copy (September 15, 2011); Questionnaire Complainant Copy (October 24, 2011).
- Oral evidence presented by Mr. Dragon and Mr. Drover at the appeal hearing.
- Additional evidence provided by the respondents during the appeal including Memorandum from Jim Dragon (July 14, 2011); Witness Statement from Rick Fehr (June 5, 2011); Witness Statement from Kevin Jansen (July 13, 2011).

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:

- WRSL was contracted to CNRL for work near Fort McMurray.
- Ms. Fowler was employed by WRSL from the period of March 17, 2011 through June 5, 2011. For most of this period of employment Ms Fowler was assigned to the night shift (19:00 to 07:00).
- The project Ms. Fowler was hired for had a completion date of July 31st as identified by Mr. Dragon in the evidence he presented at this appeal.
- The fit testing protocol expected on site by CNRL has transitioned from qualitative to quantitative fit testing, and WRSL Employees were being fit tested by EHS in Fort McMurray.
- There was an initial incident involving fit testing on April 12, 2011 where WRSL employees were working in an environment where fit testing was

required and had not been completed as required; Ms. Fowler was returning to work from days off. The details of the incident are as follows:

Six (6) WRS� Employees were working inside an environment where respirators were required but there was an absence of the required fit test.

Ms. Fowler became aware of this when advised by CNRL safety personnel when she returned from her days off. She advised Pat Murphy (WRS� night foreman) and the workers were removed from the space and assigned other duties.

Following her shift Ms. Fowler advised Matt Vaags about her concerns regarding fit-testing and sent an email to Mr. Coghill (WRS� General Supervisor) about the incident requesting his support on this issue.

She followed up with CNRL safety representatives via email to confirm that the incident had been addressed and completed the required incident report.

- During the Disciplinary Action Complaint (DAC) appeal Mr. Dragon identified that Ms. Fowler's response to the April 12th incident met the performance expectations of WRS�.
- A second incident occurred where a lack of fit testing was identified for WRS� employees at some time prior to June 5th when Ms. Fowler was returning from days off; it was as a result of this incident that Ms. Fowler indicated that her employment was terminated. The details of the incident are as follows:

At the start of her June 5, 2011 night shift CNRL (Ron Robert) made Ms. Fowler aware that new WRS� employees on site required fit testing and that they had been working inside the confined space without being fit tested or trained in fit testing.

Ms. Fowler confirmed at a safety meeting held after the conversation with Mr. Robert (as per bullet point above) that WRS� employees had not been fit tested or trained in fit testing. These workers were assigned alternative duties that did not require them to wear respirators.

Ms. Fowler followed up with WRS� day shift safety lead Matt Vaags on the morning of June 6 with regards to the fit testing issue that had been identified by CNRL and the requirement that fit testing and training be completed. Ken Coghill (WRS� General Supervisor) heard

this conversation and approached Ms. Fowler and asked her to step outside. He then threatened that he would have her replaced if she did not stop raising this issue in this manner.

Mr. Coghill's tone was identified as aggressive by Ms. Fowler and she indicated that she covered her ears when he was addressing her and moved back from him at which time Mr. Coghill indicated that Ms. Fowler was fired and must leave the site.

Ms. Fowler left the site, driving to Edmonton. During the trip she stopped her vehicle and made a call to Mr. Jim Drover (WSRL Construction Manager) and advised him she had been terminated. Mr. Drover expressed surprise and advised her that there was no indication at that time of any performance issues. In addition, he made negative comments regarding Mr. Coghill's past behaviour.

Mr. Drover called Ms. Fowler the next day advised that she was to return to the job site to continue her duties. During the return trip to the job site Mr. Drover contacted Ms. Fowler and indicated that he had been told that CNRL had banned her from the site.

- Ms. Fowler was limited in the records she could access or obtain regarding the June incident as a result of her termination.
- Mr. Dragon indicated there were further statements that were not provided to the investigating officer from Occupational Health and Safety or to the Appeal Panel. When asked if he would like to submit these statements he declined.
- Both appellant and respondent indicated that Mr. Coghill had difficulty with interpersonal relationships.
- WRS� has a progressive discipline process commencing with a verbal warning, moving through subsequent levels of escalating enforcement such a written warning and ending with the ability for the employer to terminate employment. This policy was reviewed with all new employees and applied to both permanent and temporary employees.
- Within the WRS� testimony during the appeal the representatives confirmed that Ms. Fowler had not received any warnings or discipline for performance issues and Mr. Drover acknowledged that he had given positive verbal feedback on Ms. Fowler's performance such as her response to previous fit testing incident in April.
- In the decision letter written by Heather Edenloff dated January 25, 2012 it is identified that Mr. Drover refutes the claim of Ms. Fowler regarding

the events, which is contrary to the evidence presented by Mr. Drover during the appeal which corroborated Ms. Fowler's statement of events.

- As part of his oral evidence. Mr Dragon, stated that the reason for the termination was insubordination and a personality conflict between Ms. Fowler and Mr. Coghill. This evidence conflicted with Mr. Dragons written witness statement which identified on-going performance concerns as a reason for her termination.

Position of the Parties and Remedy Requested:

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

The appellant is requesting the following:

- Cessation of disciplinary action.
- Payment of money not more than the equivalent of wages that would have been earned if not dismissed or received the disciplinary action complaint (minus any wages earned elsewhere while the dismissal has been in effect).
- Removal of any reprimand or other references to the matter from employment records.

Respondent believes the termination was just based on insubordination.

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 (Ms. Valerie Fowler) was acting in compliance with the OHS Act, Regulation and 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:

- There was an incident that occurred on June 5, 2011 following Ms. Fowler's days off work where WRSL had employees working in the confined space who did not have, but required, fit testing and fit test training.
- During the hearing the representatives of WRSL failed to produce documentation of any performance related issues and confirmed that they were not aware of any concerns with Ms. Fowler's job performance until after her termination.
- Ms. Fowler responded to the April fit testing incident in a manner that met the expectations of WRSL, and responded to the June incident similarly with her response to the incident in June resulting in her termination, which is inconsistent with the previous expectations of WRSL.
- Mr. Coghill reacted to the conversation between Matt Vaags and Ms. Fowler on June 6, 2011 that they were having about the June fit testing incident at which time the panel believes that Mr. Coghill threatened and immediately terminated Ms. Fowler's employment. The panel believes this to be a clear causal connection between the fit testing safety incident in June and Ms. Fowler's termination of employment.
- Evidence provided by WRSL representatives at the hearing was contradictory to the evidence that was provided to the Occupational Health and Safety Officer during the investigation. In addition the WRSL representatives contradicted their own oral evidence during the hearing regarding the reasons for the termination and Mr. Coghill's behaviour in dealing with other employees.
- No witnesses who had provided written statements as evidence, with the exception of Mr. Dragon and Mr. Drover, attended the appeal hearing and were available for cross examination.

We find that the respondent Western Refractory Services Ltd. violated section 36 of the Act when disciplinary action was taken against the appellant for responding to the fit testing issue of Western Refractory Services Ltd. employees in June.

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

- Payment to the worker of money from the period of dismissal up to and including wages that would have been earned to the end of July 31, 2011.
- Removal and destruction of any record of discipline and any other documents related to the matter from the worker's employment records.

- If the worker has worked elsewhere while the dismissal action has been in effect, those wages earned elsewhere shall be deducted from the amount payable to the worker.

Occupational Health and Safety Council Appeal Panel

Andrew Smith, Appeal Panel Chair
Occupational Health and Safety Council
Employer Representative

Janice Peterson
Occupational Health and Safety Council
Worker Representative

Nina Novak
Occupational Health and Safety Council
Employer Representative