Occupational Health and Safety Council

Disciplinary Action Complaint

Vern Morris

Appellant

and

Loblaw Inc.

Respondent

ORDER

Panel Members: Peter Bowal (Chair), Wally Baer and Bill Spring

Appearances: For the Appellant: Mr. Vern Morris

For the Respondent: Mr. Elton Pang (by telephone)

Appeal Hearing October 27, 2014

Decision December 17, 2014

Alberta Jobs, Skills, Training and Labour

Occupational Health and Safety Council

Disposition

This disciplinary action complaint appeal is unanimously granted. The remedy of financial compensation and removal of reference to this matter on Mr. Morris' employment records follows the reasons set out below.

Facts

In 1987, the Appellant, Mr. Vern Morris, started work at Real Canadian Superstore (Edmonton West) on Stony Plain Road. He stocked dairy cooler shelves for many years, working 8 hour day shifts that were subject to varying start and end times between the hours of 7:00 a.m. and 11:00 p.m.

The employment went well for all of the time from when he started working there until November 22, 2013. That is when management had an existing four inch high anchored angle iron moved two feet further away from the shelves he was stocking in the dairy cooler. Mr. Morris viewed that change on the floor in his work area as a dangerous tripping hazard, capable of causing severe injury. Until then, this angle iron had been anchored only four inches away from the shelves. It was installed to protect the shelves from being damaged by machinery.

He raised his safety concerns on November 22, 2013 with managers after the angle iron had been moved. He was given written notice of this change and signed a form acknowledging that he was aware of possible hazards related to it. What happened after that, for a week stocking the shelves with dairy products from the customer side of the cooler, leading up to when he missed two weeks of work, is the subject of this appeal.

After Mr. Morris raised his concerns with management and his union about the new location of the angle iron, he refused to stock the shelves by stepping over the angle iron. The Respondent sent the issue to its Joint Work Site Health and Safety Committee for review and recommendations about how best to address these safety concerns. This led to modifications of the new installation in ways it considered to adequately address the tripping hazard. A highly visible yellow paint was applied and the bolts that projected from the angle iron were reversed. The angle iron itself was left in the location to where it had been moved.

Mr. Morris, in order to stock the shelves from inside the cooler, even after that modification, would have had to repeatedly step over the newly located angle iron "several hundred times per day while carrying 40 pound cases of milk and eggs". The angle iron ran the entire width of the room in front of the shelves in what Mr. Morris calls a "high traffic area". He explained why the administrative control and engineering control measures used to modify the angle iron did not in his opinion reduce the risk sufficiently to allow for him to do his work safely the way he had been directed to do it. These reasons included:

1. Loading the shelves from the rear would require him to step back and forth across this four inch high and four inch wide steel obstruction several hundred times a day while carrying forty pound cases of milk;

2. There was the very real possibility of tripping on something else nearby, such as the corner of a pallet, and falling on the iron (he noted he has fallen several times in the this cooler and is well aware of just how easily and quickly that can happen);

3. Working in the two foot wide trough between the beam and the shelves left no room to move one's feet to recover one's balance if one were to trip or stumble;

4. Ingrained work habits might cause him to trip because he has worked in that cooler for nine years and it is very repetitive work. He is so used to walking to and from the shelving that it is almost an automatic action. Should he forget even for a second that the iron is there he could trip on it and suffer a serious fall;

5. The angle iron, being relocated two feet further into the room from the shelves, made the room that much smaller and tighter to work in; and

6. Often one had to pull the heavy pallet into the cooler which increased the tripping hazard.

The Loblaw Safe Operating Procedures require "a clear pathway" through where one is moving something. Mr. Morris found no clear pathway to the dairy products cooler. He says he "refused to work in an unsafe manner" constantly stepping over the angle iron carrying heavy loads. So he stocked the shelves from the customer side in front of them, so that he could "do his job safely".

Mr. Morris asked via email and by phone for Alberta Occupational Health and Safety officers to inspect the angle iron with its modifications to determine if it was safe. In the meantime, he continued to stock the shelves outside of the cooler from the front of them. This was a slower process, but one that Mr. Morris believed was also safer.

Mr. Morris says he was told by management that he could not continue to work if he did not perform the work from inside the cooler by stepping over the angle iron. He was told that before an OHS Investigating Officer had opportunity to conclude an investigation.

Then Mr. Morris was notified to come to work on a different, earlier 4:00 a.m. shift which he characterized as a "penalty shift," doing other duties that did not require

him to stock the shelves stepping over the angle iron. This early shift was inconvenient because he did not have a car and would have to either take a cab for fifteen dollars or walk three kilometers because there is no transit service available that early in the morning.

On his next scheduled shift of work that he had to start at 4:00 a.m. on December 1, a supervisor asked him if he was still refusing to work in the cooler. Mr. Morris reiterated his position that he considered the configuration behind the shelves unsafe so he would only work from the front of the shelves. Later that day he was paged by two unionized employees, one a shop steward. He was told by them that he was being sent home because he was refusing to work in the cooler. The supervisor indicated that loading the cooler from the front was too slow and unproductive. He agreed that Mr. Morris to go home. Mr. Morris was not offered any alternative work to do. Mr. Morris asked him if he should come in for the next shift and was told "not until this is settled".

Mr. Morris said for the next two weeks he was off work, he did not receive a call from the store and no written confirmation from the Respondent that he had been suspended. Mr. Morris typically worked 28 hours during four days each week. He lost 56 hours of pay during the two weeks of suspension. He estimated that his pay rate was $25.24 per hour at that time. He earned pension benefits based on his hours of work, but he did not know what that amounted to.

Mr. Morris was not scheduled for two weeks of work. At some point during this suspension, Loblaw further modified the angle iron by cutting out a two foot wide section of it in one place to allow someone stocking the shelves to go through it instead of stepping over it and then move to the left or right to put cases of dairy products on the various different shelves. He said there were other workers stocking shelves in the cooler who complained to him about the trip hazard, but they did not bring their concerns to management. Other workers are still doing that work in the way he had refused to do it. He said he knows of three workers who have tripped over the angle iron in question but they were not injured.

When he visited the store on December 9, the schedule was still showing him as working the 4:00 a.m. shifts. He called the union to request them to obtain written confirmation from the employer that he was suspended. The union told him he could return to work, but Loblaw would not pay lost wages for the period he was off work.

Mr. Morris returned to work the next scheduled work day on December 13, 2013, continuing to work the 4:00 a.m. shift performing other duties outside of the dairy cooler. He worked that shift for the next month. He was then put on a night shift that is more acceptable to him, a shift which he is still working as of the date of this hearing. He was not asked to resume working in the cooler with the angle iron on the floor.

He had the union file a grievance against Loblaw for wrongfully suspending him from work after he refused to work in the way directed, but nothing specific has come of it. After he got back to work, Mr. Morris was given some extra pay, approximately $700, without any explanation from the Respondent about what it was for. He presumes it might have been intended as a settlement for the wages he lost when he was suspended from work for the two weeks, and someone at work may have told him that. He said he could not think of any reason for the $700 payment other than that it was related to the suspension. His concern was that it was not enough to cover his lost earnings for that period because that amount was less than his lost wages. We note the timing of this $700 payment which came shortly after he returned from the suspension. There was no evidence from either party of it being for any other purpose. On a balance of probabilities, we conclude this payment was not bonus compensation or anything else which Mr. Morris expected or to which he would otherwise be entitled. Accordingly, this payment must be accounted for and credited to the employer in connection with the disposition of this appeal.

Mr. Morris complained to OHS that he had been disciplined by the Respondent for refusing to work unsafely. The Respondent disagreed he had been disciplined at all, and not for that reason in particular.

Mr. Morris continues to work for the Respondent to date. He is now working in a different position, no longer being asked to do the work he had refused to do in the cooler. In almost 25 years working for Loblaw, he is proud of his attendance record, performance and absence of disciplinary actions. He is a valued long term employee for the company.

Mr. Pang had not been personally involved in these events and was not in a position to gainsay Mr. Morris' evidence. He could not specifically vouch for the purpose of the $700 payment.

Disciplinary Action Complaint

The disciplinary action complaint and appeal of the decision of the OHS officer or manager are made under the authority of section 37 of the Alberta *Occupational Health and Safety Act*:

> Disciplinary action complaint
> *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.*

The three-part legal test in these disciplinary action complaints, from sections 36 and 37 of the *Act*, is:

(1.) The worker acted in compliance with the *Act*;
(2.) The worker was disciplined; and
(3.) The worker was disciplined *because of* his/her act of compliance.

All three parts must be answered in the affirmative for the worker to succeed under section 37.

The investigating OHS Officer in a decision letter to Mr. Morris, dated April 7, 2014, determined that Mr. Morris' refusal to work was not a reasonable reaction to the safety concern he had reported to his employer. Accordingly, the officer concluded Mr. Morris was not acting in compliance with section 2(2) of the Act. The basis for that conclusion was that:

- The safety concern was minor in nature (tripping hazard was not located in a high traffic area);
- The safeguard, which created the tripping hazard, was designed to address a larger safety concern (potential to break shelving in the dairy cooler) and;
- The employer implemented a reasonable administrative control (highly visible yellow paint) and an engineering control (reversed angle iron bolts) to control the hazard.

The officer concluded that Mr. Morris' refusal to work did not therefore constitute "reasonable care" in the circumstances as envisioned under the legislation and he did not meet the first part of the legal test set out above.

The OHS officer went on to find that Mr. Morris was disciplined under the OHS *Act* for his refusal to work. However, because his refusal to work did not constitute "reasonable care" under section 2(2) of the *Act*, the disciplinary action was not

causally connected to any act of compliance with the OHS legislation. Hence his complaint was found not to meet the third part of the legal test either.

While this Council grants deference to the investigating OHS officer, it is our respectful view that the officer rendered a decision in this case that is not supported by a full view of the evidence. The OHS officer erred in concluding that Mr. Morris' refusal to work was an unreasonable reaction to the safety concern he had reported to his employer in this case. His unilateral adaptation to his work in these circumstances did constitute "reasonable care" under section 2(2) of the *Act*. Therefore the disciplinary action was casually connected to an act of compliance with the OHS legislation. Mr. Morris has met all three parts of the applicable legal test.

Legal Remedy

Section 37(4) of the *OHS Act* sets out the range of remedies available in this case:

> *After considering the matter, the Council may by order . . .*
>
> *(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.*

Subsections (i) and (ii) do not apply here. At the appeal hearing, Mr. Morris indicated that he was only seeking monetary compensation from his employer for two weeks of wages. He said he is not looking for any monetary compensation because of the change of responsibilities and schedule he was given after his suspension or in respect to fewer hours of work the Hearing Package reflects that he was scheduled to work after he refused to work as directed. He noted that he gets along well with his current supervisor which has made the job changes agreeable to him.

Mr. Morris asked that the angle iron in the cooler to be moved back to where it was for nine years. This Council cannot make that order under the Disciplinary Action Complaint remedial authority conferred by section 37(4)(b) above. Moreover, no imminent danger complaint was launched, nor was there a finding of imminent danger made in this case.

We do find a basis to order compensation by the Respondent to Mr. Morris for his lost wages during the suspension, with credit given for the $700 payment already received, and to order removal of any reprimand or reference to this matter from Mr. Morris' employment records.

Conclusion

The appeal is granted and the decision of the OHS officer is set aside.

The Council concludes that the appellant employee, Mr. Morris, was disciplined by his employer *because* he raised legitimate safety concerns at his workplace on November 22, 2013.

Mr. Morris is entitled to monetary compensation of not more than the equivalent of wages that he would have earned if he had not been suspended from December 1, 2013 to December 13, 2013 [section 37(4)(b)(iii)]. This amounts to 28 hours per week times 2 weeks at $25.24 per hour – the amount of which is $1,413.44 – less regular and standard payroll deductions. The Respondent employer shall be granted a credit of $700 for the payment already made to arrive at a "final compensation payment". If the parties do not agree on the "final compensation payment", either party may apply to the OHS Director of Inspection (Alberta North) who will appoint an OHS officer to serve as the final arbiter of the matter.

The Respondent Loblaw Inc. is ordered, within 45 days of the date of this Order, to remove any reprimand or other reference to this matter from Mr. Morris' employment records and to pay to Mr. Morris the "final compensation payment".

In the event of default of payment by that date, Mr. Morris may apply to the OHS Director of Inspection for enforcement under the legislation.

****