Occupational Health and Safety Council

Imminent Danger Complaint and Disciplinary Action Complaint

Tyson Peredery

Appellant

and

Trican Well Service Ltd.

Respondent

ORDER

Issued by: Peter Bowal, Chair, Occupational Health and Safety Council

Date: December 19, 2014

Alberta Jobs, Skills, Training and Labour
Occupational Health and Safety Council

Procedural History

The Appellant filed an Imminent Danger and Disciplinary Action Complaint on October 1, 2013. An OHS departmental investigation was launched and completed. The OHS report of findings was contained in a letter, written and signed by Mr. Arend Post. This letter was dated December 4, 2013 ["the December 2013 letter"].

The December 2013 letter did not grant the relief the Appellant sought. Both of Mr. Peredery's claims were dismissed. Mr. Arend summarized his conclusions at the beginning of the letter thus:

> Your complaint has not been substantiated and/or the issues brought up are not within scope or authority of the Occupational Health and Safety legislation. No further investigation will be conducted by Occupational Health and Safety (OHS), and the file surrounding your complaint to OHS is now closed. You are referred to other appropriate agencies to deal with the issues you have with the agencies that have the scope, mandate and authority . . .

The officer then went on to detail the decision and the facts of the case in four different captions: Background, Brief Timeline of Events, Review of Medical Records Provided by the Worker, and Decision of the Officer. The letter was detailed and four pages in length.

This December 2013 letter did not make specific reference to the right of the Appellant to appeal these dismissal decisions to the Occupational Health and Safety Council within 30 days of receipt of that decision letter.

This letter appears to have been received by the Appellant approximately December 21, 2013. Mr. Peredery did not appeal the OHS decisions contained in the December 2013 letter to the OHS Council within 30 days or receiving it, or at all.

More than eight months after the close of the appeal period, the OHS department appears to have been convinced that the December 2013 letter it had issued in this matter was wholly ineffective solely because it did not specifically advise Mr. Peredery in writing (in the December 2013 letter) of his right to appeal that decision within 30 days to the OHS Council.

To address what it perceived was an insurmountable flaw in the December 2013 decision letter, the OHS department issued to Mr. Peredery another letter, the only intended effect of which was to then insert a right-to-appeal notification. This new letter was signed by Mr. Len Kobernick, Director of Inspections, OHS Programs, in the Northern Alberta region, which letter is dated September 19, 2014 ["the September 2014 letter"].

This September 2014 letter confirmed that the December 2013 decision letter reported there was insufficient evidence found to support a finding of imminent danger and unlawful disciplinary action. It restated that Mr. Peredery's claims were dismissed.

The September 2014 letter sought to re-activate Mr. Peredery's appeal period. The letter continued:

> Upon review of the original record sent to you it was not made clear that you have the right to appeal this decision. As such, if you wish to appeal this decision, an appeal package can be retrieved at the website of the Occupational Health and Safety Council . . . The Director of Inspection must receive the notice of appeal package within 30 days of this letter. The package will be sent to the OHS Council for review.

Mr. Peredery's Notice of Appeal was filed on September 25, 2014. This is within the 30 day appeal period of the September 2014 letter.

Issues

The main question in this appeal is whether the OHS officer or department is under a legal duty to inform complainants in writing of their statutory right to appeal the decision at the time that decision is made known to the complainant, or at all.

A further issue is whether the statutory limitations period for filing an appeal may be extended by the OHS officer or department dispatching subsequent substantively-unchanged decision letters to the complainant.

Applicable Jurisdiction and Law

In relation to complaints of imminent danger and disciplinary action, the *Occupational Health and Safety Act*, RSA 2000, c O-2, as amended, reads

> Existence of imminent danger
>
> 35(7) . . . the worker may file a complaint with an officer.
>
> (8) An officer who receives a complaint under subsection (7) 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.
>
> (9) A worker or an employer who receives a record under subsection (8) 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 date of receipt of the record.***

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.***

[emphasis added]

Analysis

In practice, the OHS decisions on the Imminent Danger Complaint and the Disciplinary Action Complaint are rendered and sent to complainants at the same time. That was the case here, so the applicable 30 day appeal period to this Council would have been the same period for both complaints. The final date for an appeal to be filed pursuant to the December 2013 letter was January 20, 2014.

The rationale for this window of time during which appeals must be filed, if at all, is twofold. First, it is sound policy for matters of imminent danger (by definition) as well as unlawful employment discipline to be addressed and dealt with expeditiously for this remedial legislation to be effective in protecting worker. Second, the employer is entitled to enjoy finality and closure of the matter once the date has passed if an appeal has not been filed.

According to the Appellant, the primary event in this case that gave rise to the alleged danger was the morning of January 3, 2013. The impugned workplace discipline occurred on February 12, 2013. The Appellant did not file the claim with OHS personnel until October 1, 2013, some seven and a half months later. This is already a long delay for an imminent danger complaint in particular. Filing and appealing on matters purportedly involving imminent danger and unlawful disciplinary action ought to be sooner in preference to later so that they can be promptly investigated and addressed if necessary.

There is no authority in the legislation for the OHS Council to ignore or expand this 30 day period. Rather, the jurisdiction of Council is to consider only appeals that have been properly filed within that period.
While one can readily understand the service-oriented instinct of the OHS officer and department to advise complainants of their statutory rights – in this case, the right to appeal their own decisions – Council is not aware of any legal authority that renders their

decisions invalid for failing to do so. Or, to put it in affirmative terms, Council is unaware of any positive legal obligation on the part of OHS to inform complainants of their statutory rights of appeal. There is no such duty contained in the *Act* or in the regulations thereunder.

Complainants often receive information about the law from government departments but a failure to provide that information, short of a clear statutory mandate to furnish it, does not invalidate or amend appellate rights that are clearly set out in the same legislation. Indeed, in the practice of quasi-judicial tribunals such as this one, and in the courts, it would be exceptional for the decision-making body to inform or advise the parties about their rights of appeal. Canadians are expected to know or apprize themselves of the law that governs them. In the context of occupational health and safety, workers are expected to know or learn about their rights and recourses to legal remedies, including appellate rights, deadlines and forms.

In this case, Mr. Peredery was able to able to inform himself of the legislation sufficiently to file the complaints. There is no reason why he could not have read and complied with the 30-day appeal filing deadline in sections 35 and 37 of the *Act*, which were the provisions under which the original complaints were filed. If he did not know, he could have asked the department with which he was in frequent contact, or another source of information. In any event, the burden is upon persons vindicating their rights to know what they are vindicating.

It is not a legal obligation for the OHS department, or its officers, to inform complainants under the legislation of their rights of appeal in writing or at all. Failing to do so is not a legal error. Accordingly, the December 2013 letter is the effective and operative OHS departmental decision letter in play here. Any appeal therefrom was only open to be filed by January 20, 2014. This was not done.

This raises the second issue, namely whether the OHS officer or department may essentially invalidate earlier section 35 and 37 decision letters merely to reactivate appeal periods under the legislation. I am of the view that the officer or the department cannot do this, even with good intentions to support an individual complainant.

Sections 35 and 37 contemplate one written "record" being issued by the officer or department, and there is no statutory provision for that one record being revoked, amended or re-delivered. A practice of re-issuing letters would offend the dual interests of expedition and finality described above. It would also offend the spirit, if not the letter, of the statutory regime applicable in these matters. Once the letter is completed and delivered, subject to obvious *errata* being corrected on the face of that letter, the officer and department role is at an end. The letter cannot be re-issued to circumvent the legislation or achieve another objective, even if the well-intentioned objective is to favour the complainant. Respondent employers are also entitled to rely on the statutory deadlines.

Order

The appeal period for any appeal to be filed in this case closed on January 20, 2014. Mr. Peredery filed this appeal to OHS Council on September 25, 2014. This Council is without jurisdiction to receive it or consider it on the basis that it was filed over eight months too late.