

Occupational Health and Safety Council

Disciplinary Action Complaint

Ron Nagy

Appellant

and

Safway Services Canada Inc.

Respondent

ORDER

Panel Members: Peter Bowal (Chair), Maggie Fulford and Rob Munro

Appearances: For the Appellant: Mr. Ron Nagy
For the Respondent: Ms. Lindsay Jacobs (by telephone)

Appeal Hearing June 19, 2014

Decision July 18, 2014

 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. Nagy's employment records follows the reasons set out below.

Evidence of the Parties

The Appellant, Mr. Ron Nagy, was hired by the Respondent, Safway, as a scaffolder on May 29, 2013. At the appeal, he spoke about the events that related to the termination of his employment some four months later by the Respondent on October 2, 2013. Much of his evidence related to his recollection and interpretation of statements and events that occurred before and after the termination.

He testified to the written disciplinary report (Tab 5) dated August 4, 2013 which reads:

While waiting for the evening bus on Aug 3, I witnessed a verbal exchange between Ron Nagy and an FT employee escalate to an unacceptable level. Both men were guilty of taunting each other.

While Mr. Nagy signed this report, he said he was not at fault as he was trying to stop an altercation with another employee. He said the other individual involved apologized. The report recorded this discipline as a 'warning' only but 'termination' was the indicated consequence if he failed to improve his job performance.

Mr. Nagy was asked by his supervisor, Mr. Hubley, to write up events of September 12, 2013. This three-page statement, dated on September 14, 2013 is contained in Tab 5. Mr. Nagy says on September 12th, there was a large job to be done in a short time. When a representative of site operator (Imperial Oil Ltd.) asked how that job was going, Mr. Nagy replied, "do you want the bad news or the bad news?" Mr. Nagy wrote in his statement "the job was being pushed to be done from the start as fast as possible. Not safely. There was a lot of pressure on all of us." He indicated to the site operator that scaffolding job would not be completed for another day. The next day he and the rest of his crew were taken off that job.

Mr. Nagy said at the beginning of October 2013, he was working very hard for Safway at Imperial Oil Ltd's Kearl site. He was working 14 and 16 hours a day which he said demonstrated his commitment. He said he did not have an attitude that he was trying to slow down the work on the site.

Mr. Nagy said he raised three separate safety concerns around him on the site on October 2, 2013. All were remediated as a result of his expressing those concerns. First, he said he noticed two workers were 35 feet in the air on pipes and they were not harnessed and tied off. He immediately expressed his apprehension, the workers were then ordered down and the matter resolved itself. Shortly thereafter, he spotted another nearby safety concern relating to radiation flagging around a welding hazard cordon. He inquired about that and says it was brought into compliance. The third safety incident that caught Mr. Nagy's attention that day was a 12 inch pipe hanging by a chainfall, installed by two workers who were not using the required fall protection. This pipe was supposed to be lashed with steel cables. He told a supervisor who agreed.

At 3:36 p.m. that day, by way of an email directive from Imperial Oil, Safway was ordered to "remove" Mr. Nagy from the Kearl site, "as we do not see Paul [*sic*] as a good fit for our scaffolding requirements." The Respondent Safway obliged this demand and fired Mr. Nagy that same afternoon at 4:09 pm (Tab 5). The Imperial Oil Ltd. Kearl site ban was indefinite but the Respondent says this did not constitute a ban or corporate termination by Safway. Nevertheless, Mr. Nagy was escorted off the site property and transported to Fort McMurray to find his own way home.

The Respondent employer's evidence was primarily contained in the documentary record that was shared with the OHS officer in connection with this Disciplinary Action Complaint. The statement of Mr. Nagy's supervisor, Mr. Hubley, was signed on October 25, 2013 and referenced an incident on October 3, 2013 (when clearly Mr. Nagy was no longer on the site):

Ron Nagy was put on a simple hording job. On this particular job Ron Nagy came up with various questions and reasons to hold up job. A IOL (Imperial Oil Ltd.) coordinator . . . came to me and told me he does not want someone with his attitude in his unit . . . Ron Nagy was a good worker and really knew his job. Due to his negative attitude towards work caused conflict between the employer and co-workers.

A Safway supervisor, Mr. Miskel, emailed the OHS officer on October 28, 2013:

Regarding the Ron Nagy incident:

Nagy was not discharged because he reported safety violations . . . He was discharged because is an argumentative and confrontational worker. IOL decided that they had enough of Nagy's attitude and requested that he be removed from the site. In the short time that he has been on the Kearl site he was in a situation that almost came to blows, and was banished from [another part] of the Kearl site. Some of the comments I received from IOL included: poor job

performance, poor communication, argumentative, did not complete jobs as requested. Frankly, I witnessed Nagy's negativity and confrontational nature almost daily at Safway's Job Box Meetings. The fact that the customer asked for his removal was not a surprise to me.

At the appeal hearing, Mr. Nagy responded to these allegations. He agreed that he raised at toolbox talks that others were getting paid overtime for the same work he was doing. He said Mr. Miskel did not like that. Mr. Nagy also asked to be equipped with radios. These two requests were made during the safety toolbox talks shortly before he got fired. Mr. Nagy said he worked very hard and very long hours in those last days. There were no complaints from Safway or other co-workers about his behaviour or job performance.

Mr. Nagy also pointed out that none of the witness statements written by three other co-workers about workplace events that same day made any reference to any inappropriate behaviour on his part (Tab 5 statements of Ms. Newton, Mr. Robinson, and Mr. Howard). If anything, they corroborated Mr. Nagy's narrative of that day.

Ms. Jacobs attended the appeal hearing by telephone on behalf of Safway. She admitted not being on the site at the material time but said the client (Imperial Oil Ltd.) "requested removal of Ron because every job he is on there is an issue." She added that Safway:

agreed that the tied-off-at-heights (fall protection) event was well handled but that is not how it came across the other times. This was not Safway's decision to terminate him, we were willing to employ him elsewhere but the client requested that he be banned from the field. We would not have fired Ron. There was no company ban. We would have re-located him, but the client demanded it.

When pressed about what was the termination-triggering event on October 2nd, 2013. Ms. Jacobs said "it was the last coffee break that Ron was a bit too adamant, disruptive about the hoarding, asking for engineering diagrams and load capacity specs – all related to the lashing of the pipes. He was constantly raising safety specification issues. He did not feel safe, was very demanding, constantly asking questions." He was dismissed, she concluded, because of the "irritating, cumulative, belligerent nature" of Mr. Nagy's behaviour.

When asked whether Safway had followed its own progressive discipline approach in this case, she conceded the employer did not do so and that was "a clerical error here." Safway did not give Mr. Nagy a chance to answer the company's concerns, perhaps at least in part because Safway itself did not have any concerns of its own about Mr. Nagy's performance on October 2, 2013. It might be said that Safway's

primary concern was complying with what Imperial Oil Ltd. demanded with respect to Safway's field personnel and their performance.

Safway indicated that it would now be willing to give Mr. Nagy his job back but, due to the client Imperial Oil Ltd directive, he could not work at the Kearn site. Safway said Mr. Nagy could be relocated to another site, but the company never did re-hire or re-deploy him.

Mr. Nagy suggested he would only return to Safway if he could work at the Kearn site because the 10 days in and 10 days out format was very attractive to him. He said Safway had a 5 year contract and he expected to work through that time. No evidence was presented to indicate that Mr. Nagy had job security beyond indefinite employment that could be brought to an end by one side giving reasonable notice to the other. He said he committed to building a house in the area.

For about a month after he was removed from the site, Mr. Nagy awaited the return of his tools by Safway. On November 9, 2013, once he recovered his tools, he started work with PCL at a wage rate similar to what he was earning with Safway. He was then laid off in early December to mid-February. At that point, he started working for Suncor and was laid off June 9th which was 10 days prior to this appeal hearing. To some degree, this pattern reflects the seasonal and cyclical nature of this work. Scaffolding work comes in cycles and projects.

Overall, Mr. Nagy appeared to the panel to be a reasonable and credible witness who spoke from, and about, his personal experience. By contrast, Ms. Jacobs' evidence, on behalf of the respondent employer, was not based on personal experience or personal knowledge of these events. Generally, her evidence and answers were less specific and conclusive when compared to the evidence of Mr. Nagy.

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 *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.

Mr. Nagy contacted the OHS Call Centre the morning after he was dismissed. He filed his written Disciplinary Action Complaint with OHS on December 13, 2013. The OHS officer conducted an investigation and her undated decision letter is Tab 1 of the Hearing Package. She did not find in favour of Mr. Nagy, stating:

My findings, in relation to the three-part legal test, are as follows:

1. I find that the issue causing the termination of employment from the work site is not related to an act of compliance with the Occupational Health and Safety Act, Regulation, and adopted Code.
2. I find that your dismissal from Safway Services Canada was not because you reports [*sic*] safety concerns but because of insubordination. Therefore there was no disciplinary action taken against you.
3. I find that there is insufficient evidence of a connection between an act of compliance with the Occupational Health and Safety Act, Regulation, and adopted Code and the action taken by Safway Services Canada.

The evidence and reasons upon which the OHS officer arrived at her decision were set out in Tab 2. Mr. Nagy's appeal to OHS Council was filed on February 3, 2014. Since the officer's written decision was undated, we accept that it was properly filed within the statutory 30 day deadline.

This Council's standard of review is reasonableness of the OHS Department's decision. That is to say, Council grants deference to the judgment of the OHS officer who has expertise in conducting the investigation and making decisions on

the facts and applicable law. Council will intervene to substitute its judgment only in the case of unreasonableness or palpable error.

This is a case where OHS Council has decided to intervene and reverse the OHS officer's decision. We agree that the officer reached the correct conclusion on the first two parts of the test, namely that Mr. Nagy was acting in compliance with the legislation, and he had been disciplined (in this case, terminated) by his employer. We disagree with the officer's conclusion on the connection between Mr. Nagy's raising several safety concerns in the manner that he did on October 2, 2013 and his termination that afternoon.

With respect, we are of the opinion that the OHS officer uncritically accorded too much weight to the employer's assertions. In Tab 2, the officer refers to the employer's documentation as evidentiary proof of a lack of causal nexus. She notes "the worker did not provide documentary evidence to support a link between the act of compliance and the disciplinary action." Mr. Nagy's long written statement dated October 7, 2013 and his two filed complaint documents allege facts that could constitute support of a causal link. It is hard to imagine what more documentation he might be able to produce. Moreover, his oral testimony, presumably which the officer obtained, was consistent and persuasive.

The reasons given by the employer for dismissing Mr. Nagy are:

"not . . . a good fit for our scaffolding requirements" (Imperial Oil Ltd. on October 2, 2013)

"(box checked) Inappropriate behaviour towards clients/fellow workers . . . customer asked that employee be removed from site." (Mr. Miskel, October 2, 2013)

"Ron Nagy came up with various questions and reasons to hold up job . . . [Imperial Oil] does not want someone with his attitude in his unit . . . his negative attitude towards work caused conflict between the employer and co-workers." (Mr. Hubley, October 25, 2013)

"he is an argumentative and confrontational worker. IOL decided that they had enough of Nagy's attitude and requested that he be removed from the site . . . he was in a situation that almost came to blows . . . some of the comments I received from IOL included: poor job performance, poor communication, argumentative, did not complete jobs as requested . . . negativity and confrontational nature almost daily at Safway's job box meetings." (Mr. Miskel, October 28, 2013)

“it was the last coffee break that Ron was a bit too adamant, disruptive about the hoarding, asking for engineering diagrams and load capacity specs – all related to the lashing of the pipes. He was constantly raising safety specification issues. He did not feel safe, was very demanding, constantly asking questions . . . he was dismissed because of [Mr. Nagy’s] irritating, cumulative, belligerent behaviour.” (Ms. Jacobs, oral evidence at appeal hearing June 19, 2014)

The OHS officer concluded that Mr. Nagy was dismissed for insubordination. The employer could have checked off the “insubordination” box on the October 9th termination document and it did not do so. The employer never used the word “insubordination” at all in connection with Mr. Nagy’s termination, although the officer states “documents from the employer stated that the discipline was for insubordination.” (Tab 2)

The OHS officer suggested in her rationale (Tab 2) that there was no causal relationship between Mr. Nagy’s raising his safety concerns and his termination the same day because “the worker’s disciplinary letter does not indicate any link to raising health and safety concerns.” The employer will rarely give ‘raising safety concerns’ as the reason for the contemporaneous dismissal. Nevertheless, that operating motive may reasonably be imputed from the circumstances and timing of the dismissal. Indeed in this case, the evidence demonstrated that Mr. Nagy’s questions and demands all appeared to be in relation to safety, with the single exception of the pay inequity expressed at the tool box meeting. Ms. Jacobs’ evidence at the hearing seemed to us, if anything, to confirm that Mr. Nagy was terminated because his questions and demands about safety were an insurmountable annoyance for Safway’s client. The evidence also is clear, and unchallenged by Safway, that the various safety concerns voiced by Mr. Nagy were legitimate. They were addressed and rectified.

Safway itself did not have grounds to discipline Mr. Nagy on October 2, 2013. It was told by Imperial Oil Ltd. to remove him from the Kearl site. This imperative was clear in the documentation of October 2nd and in the days following. This also explains why Safway ignored its own progressive discipline protocol in this case.

While Safway could have re-deployed Mr. Nagy to another location, it chose to summarily terminate his employment on October 2, 2013 at the behest of Imperial Oil Ltd. Only several weeks later, after Mr. Nagy contacted OHS, did the added reasons of negativity, argumentativeness, conflict with co-workers, etc. appear. The August 2013 warning for Mr. Nagy’s verbal exchange with another worker was not a material factor in his termination on October 2nd. The timing of this dismissal, coming as it did, on the same afternoon of several legitimate site safety concerns being raised was noted. We find that the several safety concerns Mr. Nagy expressed on the worksite triggered his dismissal that afternoon. The alleged

negativity, argumentativeness, conflict with co-workers, etc. were grounds later invoked to justify the discipline.

We conclude that the employer, in response to third party client demands, disciplined its employee Mr. Nagy *because of* his act of compliance in raising several safety concerns at the Kearnl worksite on October 2, 2013.

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.

Mr. Nagy is desirous of returning to the Kearnl site but the evidence in this case shows that he is a banned worker there by the third party site operator. Reinstatement under the same terms and conditions he enjoyed on October 2, 2014 is impractical or impossible. Accordingly, we will not order reinstatement to the Kearnl site. Safway indicated at the appeal hearing that it is willing to re-employ Mr. Nagy at another location but Mr. Nagy seemed most, or exclusively, interested in the Kearnl site. While Mr. Nagy was unemployed at the time of the appeal hearing, we take Safway on its good faith that it will use reasonable efforts to re-employ Mr. Nagy at a non-Kearnl location if he indicates that he remains available and interested in that.

Apart from the dismissal, we are not aware of any disciplinary action on Safway's part that continues against Mr. Nagy. Accordingly, an order to cease discipline is not required. Safway is ordered to forthwith remove any reprimand or other reference to this matter from Mr. Nagy's employment records.

We further order Safway to pay Mr. Nagy compensation amounting to “the equivalent of wages that the worker would have earned if the worker had not been dismissed” [section 37(4)(b)(iii)]. Mr. Nagy was indefinitely employed with Safway and was terminated after only four months. He found other work approximately one month later when he got his trade tools back. We award Mr. Nagy compensation for four weeks of gross wages in the amount of \$8199.53, calculated as follows:

Mr Nagy worked 10 days in and 10 days out, which means he worked on a 20 day cycle. The EI Record of Employment shows pay on 7 day cycles. We use 20 weeks (140 days) as this is exactly 7 work cycles. Compensation is the sum of the last 20 pay period weeks prior to dismissal on Oct 2, 2013 (\$40997.67) divided by 20 to obtain the average weekly wage (\$2049.88), multiplied by 4 weeks equals **\$8199.53**

From this amount, the employer is obliged to make regular and standard payroll source deductions and remit the net amount to Mr. Nagy within 45 days of the date of this Order. In the event of default of payment by that date, Mr. Nagy may apply to the OHS Director of Inspection for enforcement under the legislation.

Conclusion

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

The Council concludes that the appellant employee, Mr. Nagy, was disciplined by his employer *because* he raised legitimate safety concerns at his workplace on October 2, 2013.

The respondent Safway is ordered to immediately remove any reprimand or other reference to this matter from Mr. Nagy’s employment records and to pay to Mr. Nagy the net (after regular and standard payroll deductions) of \$8199.53 in gross wages within 45 days of the date of this Order. Any dispute about the calculation of the final net amount of wages payable pursuant to this Order shall be administratively and conclusively settled by the OHS Director of Inspection, or the Director’s designate, on the written request of either party.