Occupational Health and Safety Council

Imminent Danger Complaint
Disciplinary Action Complaint

Kimberly MacDougall

Appellant

and

941370 Alberta Ltd. (o/a Showgirls)

Respondent

ORDER

Panel Members: Peter Bowal (Chair), Wally Baer and Darlene Halwas

Appearances: For the Appellant: Ms. Kimberly MacDougall

For the Respondent: Mr. Mardy Peterson

For the Crown (OHS): Ms. Sarah Dolgoy

Appeal Hearing March 19, 2014

Decision May 13, 2014

Alberta Jobs, Skills, Training and Labour

Occupational Health and Safety Council

Disposition

This appeal on the imminent danger complaint is unanimously dismissed.

The appeal on the disciplinary action complaint is dismissed for the reasons stated by Council Members Peter Bowal and Wally Baer. Council Member Darlene Halwas filed a dissenting opinion on this issue.

Reasons of Council Members Bowal and Baer

Summary

In the period April 1, 2009 to September 30, 2012 (approximately 3 years and 9 months) the appellant, Ms. Kimberly MacDougall, was in the part time employ of the Respondent, 941370 Alberta Ltd. which operated as "Showgirls" in Grande Prairie, Alberta. Ms. MacDougall, in three to four assigned shifts per week, worked as a DJ in the VIP room in this men's night club. Her job was to operate the computer and play songs, keep track of dances that dancers performed, monitor the VIP room and alert security to any problems that might arise in the club during her shift. She counted the cash received from dancers at the end of the night and delivered this cash to the office.

An altercation occurred between Ms. MacDougall and her supervisor, Mr. Cody Funk, during her shift on September 26, 2012.[1] What precisely happened is disputed. During a heated argument, Ms. MacDougall claims to have been struck on her hand by a chair flung in her direction by Mr. Funk in anger. Although her hand was bruised, Mr. Funk denied it happened that way. Ms. MacDougall had two days off, then worked another shift on September 29. This shift was tense and acrimonious for most staff, including Ms. MacDougall. Upset that Mr. Funk was not terminated after the September 26th incident, Ms. MacDougall indicated she was not returning to work after her September 29th shift. She did not return to work at this workplace after September 29.

Ms. MacDougall said all this trouble stemmed from the September 26 injury by a supervising co-worker, which incident was never properly addressed and appropriately sanctioned by the employer. She claims that she was constructively dismissed by not being assigned more shifts after September 29, 2012. She filed an imminent danger complaint and a disciplinary action complaint to Alberta occupational health and safety.

[1] The doorman / security worker was also involved but to a lesser extent.

A different OHS officer was assigned to each complaint. Each officer gave evidence at the appeal hearing and discussed their findings. We conclude that they were fair and thorough in their investigation. After a review of the evidence they collected, we conclude that their decisions to dismiss both complaints were reasonably drawn from the evidence and within the range of their discretion pursuant to the applicable law. We dismiss both appeals.

Preliminary Applications

(a.) To Exclude the Crown's Written Submissions

At the outset of the hearing, Ms. MacDougall applied to exclude the Crown's (OHS) coil bound submissions package from being used in the oral appeal hearing. She said she received a courier's card that the package had arrived and could be picked up. However, she did not pick up the Crown's written materials from the courier's office until one day after the procedural deadline had passed. She did not deny that she had also received an emailed pdf version of the OHS written materials before the deadline.

This Council's *Rules* about the exchange of documents are sturdy guidelines but they are not absolute, especially in the absence of prejudice. Ms. MacDougall said the one day difference meant she could not read the written OHS materials in time for the oral appeal hearing, but this was not convincing. We did not hear why she could not collect the package before the day that she did, or have someone else collect it for her. Her waiting for the deadline to pass before she collected the package could be interpreted as a deliberate attempt to manufacture a technical defect to the inclusion of those written materials in this appeal. Parties must not be permitted to take advantage of their own postponements to point the fingers of delay and technical irregularity at other parties.

Moreover, delivery and service is deemed complete when it reaches the zone of control of the recipient. Otherwise, one could readily evade service *in toto* by refusing to open the envelope. Once the written submissions arrived in Ms. MacDougall's control, service has been effected. Both the courier delivery and the pdf version had arrived in Ms. MacDougall's zone of control before the deadline had expired. Ms. MacDougall's objection was dismissed. The OHS written submissions were admitted in the appeal hearing.

(b.) To Admit Fresh Evidence

At the oral appeal hearing, Ms. MacDougall also applied to admit a considerable volume of fresh evidence that she chose to not present to the OHS officers when they were conducting their investigations into her imminent danger and disciplinary action complaints. This evidence included approximately hundreds

of pages of emails, text messages and letters to and from Ms. MacDougall and a range of other persons such as the parties, occupational health and safety employees, the Minister of Human Services and his assistant deputy, other agencies, as well as Ms. MacDougall's narrative and statements interpreting these documents. The new evidence also included some eight secretly-taped voice recordings comprising several hours of her conversations with Showgirls' general manager Mardy Peterson and several OHS personnel.

Ms. MacDougall's request for the admission of this fresh evidence was based on two points: she was given a mere week to share all her evidence with the OHS officers and her lack of trust in the same officers.

The incident is alleged to have occurred on September 26, 2012 and the discipline is alleged to have been imposed approximately on September 30, 2012 when she was scheduled for three shifts when she wanted four shifts. Ms. MacDougall filed her formal complaints on December 5, 2012 and January 28, 2013. She said that on March 8, 2013 she received email from OHS that all her evidence had to be shared with the officers by March 15th. She adds that she was a student at the time and was also dealing with the police at the time. All of the voice recordings were completed and the documentary evidence was available by March 15th.

Ms. MacDougall also conceded that there was a trust factor in turning this evidence over to the two female OHS officers investigating her complaints. She testified at the hearing, "I did not trust them right off the bat when we first met on February 14 because they said the voice recordings were illegally obtained and then they asked for them." [Ironically, at this first face-to-face meeting with the officers, Ms. MacDougall arrived already planning to surreptitiously record it.]

The OHS officers say they formally requested Ms. MacDougall to share her evidence with them for more than a month. When they met with her on March 14th, they requested the evidence from Ms. MacDougall, which they say she had with her but she decided not to share the evidence. The OHS officer said Ms. MacDougall was turning the pages of evidence of what she only wants now to be considered at this appellate level.

On March 3rd, they asked for "all voice recordings regarding showgirls [and] any additional information" to which Ms. MacDougall replied the next day [Tab 9], "... I did not indicate I would be handling them over to OHS, including but not limited to all voice recordings regarding showgirls. I will review the list of items you are requesting this week and will have those that I feel are relevant to the investigation forwarded to you."

The next communication was an OHS email to Ms. MacDougall on March 8th asking her to "please send the remaining information that you feel relevant in my investigation to me by March 14, 2013. If there is no additional information that

you wish for me to consider please respond to my email advising me and I will continue with my investigation." Ms. MacDougall responded that she was trying to obtain an amended Record of Employment and closed, "my apologies for the inconvenience but if OHS had begun the investigation in a reasonable time frame and Showgirls hadn't filed the ROE four months late and containing errors, this would already be completed." [Tab 10]

On the morning of March, Ms. MacDougall wrote another email to the OHS officer in which she clearly indicated she was not going to release the voice recordings and tossed back to the officer the issue of what was relevant. She wrote [Tab 11]:

> 6. Any Additional Relevant Information.
>
> Would You like pictures or the injuries? Police Report etc? Schedules? I am unsure of what other information would be relevant to your investigation since I am unaware if you are still going to be investigating ALL the sections of the legislation that the business was/is not in compliance with or simply the disciplinary action complaint. *[sic]*

The OHS officers said they did not return these last two emails because they were speaking to her in meetings and did not think she planned to turn over any more relevant information. We also note that Ms. MacDougall had severely and publicly criticized the department in writing in the recent past for acting too slowly.

In response to the request to have all her evidence by March 15, Ms. MacDougall did not indicate to OHS that she was too busy, the time was too short, she wanted more time or that she did not trust the OHS officers, all of which she now asserts. She had the evidence that she now wishes to introduce by that deadline, which was five and a half months after the incident.

The suggestion arose at the hearing that Ms. MacDougall refused to turn over the voice recordings under a mistaken belief that she should not or could not do so for legal reasons. She said she received advice from the RCMP that disclosure to OHS might potentially compromise a criminal investigation into her assault complaint. The OHS officer testified that she advised Ms. MacDougall that this evidence and OHS process could be confidential and not affect other proceedings.

The law governing the introduction of fresh evidence in appellate proceedings is set out in the *Palmer* case.[2] While that was a criminal law decision, its principles

[2] *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759, http://canlii.ca/t/1mjtn

have generally been extended to the administrative realm. These standards reflect a desire to preserve the expertise and integrity of the original decision maker by discouraging fresh evidence on appeals. It is admitted only if:

1. by ordinary diligence, it could not have been produced to the officers conducting the original investigation;

2. it is relevant and credible in the sense that it bears upon a decisive or potentially decisive issue in the decision; and

3. it would likely make a difference in the result.

The Crown cited the recent case of *Benson*, where the Manitoba Court of Appeal stated:[3]

> 2. We see no basis to grant the applicant's fresh-evidence motion, as the evidence proposed to be filed does not meet the test for admission (*Palmer*). Specifically, the evidence could have been obtained for the application by the exercise of due diligence, and/or the proposed evidence is such that it would not have affected the result.

All parties were asked at the appeal hearing for their position on Ms. MacDougall's request that we consider all the new evidence. The Showgirls manager, Mr. Mardy Peterson, conceded that on the voice recording he could be perceived as threatening Ms. MacDougall, that she could lose her job if she went to the police. He said what he meant by that is that as a practical business management matter she could not be working at Showgirls as long as an assault trial was ongoing. He added that he did keep her job open. He assigned her a shift on September 29 and she worked it. She did not get a discretionary $50 house tip "because she was very difficult for other co-workers that shift." She was scheduled for a regular number of additional shifts the following week but chose not to work them.

Since we understand this is the most compelling piece of new evidence proposed, we will address it specifically. This voice recording could have been produced to the OHS officer and entered into her consideration with the rest of the evidence when coming to her decision on the disciplinary action complaint. We take it to be relevant and credible, since it was admitted by Mr. Peterson. But would it have affected the result? We do not think so. Whatever the prudence of advising employees not to report their concerns to the police, and back it up with a threat of dismissal, we cannot say that this was of any consequence in this OHS case.

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[3] *Benson v. Workers' Compensation Board (Man) et al.*, 2014 MBCA 19 (Man. C.A.) at para 2

Sections 35 to 37 of the Alberta *Occupational Health and Safety Act*[4] is focused on preventing and sanctioning employer retaliation for safety concerns brought to the attention of *employers*, not law enforcement authorities. While this sounds like an arbitrary distinction, and one which workers may not always discern, the role of Council is to interpret and apply this specific regulatory legislation as enacted, and not to expand it according to our fancy. Moreover, as will be shown below, this particular case is a classic example of an employer which appears to have surgically separated its private business interests from any pubic law enforcement. The evidence is clear that Mr. Peterson did not dismiss or otherwise retaliate against Ms. MacDougall for her act of reporting her safety concern to Showgirls. He assigned her shifts for the next week, even while he was managing what had suddenly become an acrimonious workplace.

We are convinced that Ms. MacDougall is disingenuous in her claim that she did not have enough time to produce her evidence. It was available and she simply chose not to produce it, without valid reason. Some of that may have been due to her own misunderstanding but we conclude that she also did not want to be completely forthright with the officers. The suggestion some five and a half months after the incident in question that she did not have enough time, when the facts show she had all this fresh evidence in hand by then, is an attempt on her part to blame others for her own misjudgments and choices.

A breakdown of trust cannot be used as a reason to refuse cooperation with an investigation by a complainant who does not show goodwill toward trusting or cooperating with others. If there was a "right off the bat" first-meeting breakdown in trust with the officers, Ms. MacDougall may have herself been a major contributing factor. By mid-December 2012, she had written to the Minister responsible for the legislation, with copies to the Opposition Leader and a federal Minister, a letter highly critical of the department's response, including invoking the example and scenario of the Pickton murders. Ms. MacDougall may be clearly committed to her complaint, but she demonstrated in this file a readiness to needlessly escalate matters. In her written disciplinary action complaint, she indicated that she had contacted the following in regard to the same issue:[5]

> Service Canada, Employment Standards, Employment Insurance, Workers Compensation Board, Human Rights Commission, RCMP, Federal Minister for the Status of Women in Canada, Grande Prairie MLA and various other MLAs in the provincial legislature, Provincial Minister of Human Services, Provincial

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[4] R.S.A. 2000, c. O-2

[5] *Questionnaire, Complainant Copy*, at p. 5

> Minister of Justice. After receiving unsatisfactory results from the first OHS investigation and some government officials, the Wild Rose Party was contacted and various media outlets.

As the fresh evidence was producible by the deadline set by the OHS officers (indeed, it was already in hand), a deliberate decision was made by Ms. MacDougall to withhold it which could lead to further discords with authorities and discontinuities in the proceedings which she launched. We are not satisfied that any of this new evidence proposed to be put before the Council at this point would materially affect the outcome. Accordingly, we did not admit it.

Despite this procedural ruling, Ms. MacDougall applied later during her cross-examination of Mr. Peterson in the appeal hearing to admit at least some parts of this fresh evidence as, in her words, "rebuttal evidence." This was not permitted as it would have been tantamount to undoing the above inadmissibility ruling on fresh evidence. What Ms. MacDougall sought to rebut were answers in reply to her cross-examination. She was not rebutting Mr. Peterson's direct evidence. If we allowed her cross-examination latitude and an opportunity to rebut every answer he gave with her own new evidence, any ruling on fresh evidence would be effectively undermined.

Now that we have disposed of these two preliminary motions made by the appellant, we turn to the merits of this appeal.

Facts

(a.) *Ms. MacDougall's Evidence*

After she said the chair struck her hand, Ms. MacDougall finished that shift and went to the emergency room physician who noted her condition as "Bruised left hand and thumb. Will likely resolve in one week." [Tab 4] The next morning, Ms. MacDougall wrote an email to Mr. Mardy Peterson, the club manager. [Tab 5] She described a "very swollen" hand and thumb and left forearm lacerations. Neither the swelling or lacerations were noted in the physician's note, nor advice to take time off work. In her email that next morning, she advised Mr. Peterson, "until it [her hand] is back in working condition, hopefully by the beginning of October, I am not supposed to lift/grip/or use my left hand." She suggested delivering "the WCB form and we can see where to go from here." Ms. MacDougall also wrote she was "upset" and "incredibly disturbed" by Mr. Funk's actions.

Her next assigned shift was September 29. This shift did not go well. Ms. MacDougall was upset that Mr. Funk was also working that night in the same building. She said she was "again . . . treated poorly that evening". There was no reference to any specific contact with Mr. Funk during that shift.

When she saw she was given only three shifts the following week (she expected four), she "was convinced the incident was not being dealt with by the company and the threat of violence still existed." [Complainant Questionnaire, Tab 10] She sent an email to Mr. Peterson on September 30 advising that she would not work those upcoming shifts and repeated that she felt mistreated and in danger because Mr. Funk remained a Showgirls employee. She wrote, "I have taken all of my belongings from Showgirls last night at the end of my shift and have no reason to return." She asked how she could "receive the last cheque(s) that I am owed for my time employed at Showgirls." In this long, detailed email, there was no reference to her feeling retaliated against for only getting three shifts that following week. The number of shifts, nor any reduction of them, was not mentioned. Desirous to further clarify her position 27 hours later, she sent Mr. Peterson another email to say she had not quit her job and set the condition for her return as:

> Until Showgirls is deemed safe by all agencies that have been notified of the situation, all of their investigations are completed, and the police have conducted a full and complete investigation as well to ensure those that have threatened, abused and coerced me at the workplace have been brought to justice, I will not be returning.

She did not work the shifts and was assigned no more shifts.

(b.) Respondent's Evidence

Showgirls' general manager, Mr. Peterson, was the only witness for the respondent at the appeal hearing. He was not a witness to the September 26 incident. He said he did speak individually with Ms. MacDougall and Mr. Funk, as well as other employees shortly after.

To him, Mr. Funk denied Ms. MacDougall's version of what happened. He gave a handwritten statement that alleged in detail how argumentative, demanding and insubordinate Ms. MacDougall was behaving on that shift. A chair was being pushed around by both of them to contest who controlled the VIP room. He raised his voice to counter Ms. MacDougall's "screaming and yelling" at him. No injury is mentioned in his statement. [Tab 8]

The respondent produced three other statements [Tab 8]. One did not identify the author and was undated. Therefore, it was not considered. The other two statements are from co-workers who were apparently on the scene [Tab 8]. One writes: "I couldn't help but watch what was going on." They are each consistent with the other and both witnesses support Mr. Funk's version. They describe a hostile, defiant, unreasonable and belligerent Ms. MacDougall who rapidly escalated her demand to be relieved for a cigarette break from the doorman to

Mr. Funk. This co-worker witness said Ms. MacDougall claimed she had been "hit" by the doorman and Mr. Funk's chair. This witness wrote: "I did not see any physical contact from all three parties involved with Kim's (two) claims."

The other co-worker corroborated this. She referred to Ms. MacDougall's loud "smoke break" call on the radio. When the doorman came, Ms. MacDougall "start[ed] screaming" and claimed he hit her. He left and Mr. Funk came into the room, asked her to leave, put her chair outside and then back in the room and departed. This co-worker concluded: "Kim pushes chair into the door and claimed Cody threw it at her even though he wasn't in the room."

Mr. Funk was no longer employed by the respondent when the oral hearing took place and neither he nor any other employee at the time who supported his version appeared and testified at the oral appeal hearing.

Mr. Peterson testified that in the immediate term after September 26 he had the sense Ms. MacDougall could not or would not work for a few days and he did not schedule her for the two days after September 26. We find this to be a reasonable inference given Ms. MacDougall's email to him the same day of the incident: "until [my hand] is back in working condition, hopefully by the beginning of October, I am not supposed to lift/grip/or use my left hand." [Tab 5]

Mr. Peterson testified that his investigation of the incident did not support Ms. MacDougall's version of what happened, but he concluded that the doorman, Mr. Funk and Ms. MacDougall "had all behaved badly" at work that night. All three were given written warnings. Only Ms. MacDougall refused to sign hers.

Imminent Danger Complaint

Ms. MacDougall's first appeal to this Council is based on what she alleges is her imminent danger complaint. The Act mandates workers to refrain from working under what they reasonably believe to be imminently dangerous conditions. Once the worker believes, on reasonable and probable grounds, that she is asked to work under dangerous conditions, she must notify the employer about that danger and the refusal. This then sets in motion a series of legal obligations upon the employer to investigate, abate the danger and report on the mitigation efforts [see section 35(4) to (13)]. If the worker refuses to operate the dangerous equipment, and is then disciplined in any way for that, she has access to an OHS officer and, by appeal, to this Council for a remedy. The applicable subsections of this duty to refrain from operating dangerous equipment is set out in section 35 of the *Act*:

> Existence of imminent danger
> *35(1) No worker shall . . .*

(c) operate any tool, appliance or equipment if, on reasonable and probable grounds, the worker believes that it will cause to exist an imminent danger to the health or safety of that worker or another worker present at the work site.

(2) In this section, "imminent danger" means in relation to any occupation

(a) a danger that is not normal for that occupation, or

(b) a danger under which a person engaged in that occupation would not normally carry out the person's work.

(3) A worker who . . .

(b) refuses to operate a tool, appliance or equipment

pursuant to subsection (1) shall, as soon as practicable, notify the worker's employer at the work site of the worker's refusal and the reason for the worker's refusal.

(4) On being notified under subsection (3), the employer shall

(a) investigate and take action to eliminate the imminent danger,

(b) ensure that no worker is assigned to use or operate the tool, appliance or equipment or to perform the work for which a worker has made a notification under subsection (3), unless

(i) the worker to be so assigned is not exposed to imminent danger, or

(ii) the imminent danger has been eliminated,

(c) prepare a written record of the worker's notification, the investigation and action taken, and

(d) give the worker who gave the notification a copy of the record described in clause (c).

(5) The employer may require a worker who has given notification under subsection (3) to remain at the work site and may assign the worker temporarily to other work assignments that the worker is reasonably capable of performing.

(6) A temporary assignment under subsection (5), if there is no loss in pay, is not disciplinary action for the purposes of section 36.

(7) If a worker who receives a record under subsection (4)(d) is of the opinion that an imminent danger still exists, 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.*
>
> *(10) After considering the matter, the Council may by order*
> *(a) dismiss the request for a review, or*
> *(b) require the employer to eliminate the imminent danger.*

Our jurisdiction is bifurcated in section 35(10). We can "dismiss the request for [the] review" of the imminent danger complaint or "require the employer to eliminate the imminent danger."

We dismiss the request for a review of this matter. The OHS officer inspected the worksite, spoke to Mr. Peterson, reviewed the employer's violence policy, and observed the disciplinary action taken toward all the parties involved which the officer saw as reasonable. She saw no existing current imminent danger. She was of the view that the employer had investigated the incident and addressed any concerns. We find this conclusion reasonable and would not interfere with it.

Ms. MacDougall stated she was frustrated that OHS did not deal with this fast enough when she first raised it in October 2012, that she felt discriminated against, and believes, as she said at the appeal hearing, "the government of Alberta is OK with assault on women." We find that there is no imminent danger today as alleged, there was not one on June 4, 2013 when the OHS officer's decision was made, and likely there was never an imminent danger as alleged.

Mr. Peterson did not concede that there was any assault. On the totality of the evidence before us, we are not convinced any imminent danger existed at the material time, or at all. If it did exist in Ms. MacDougall's mind, we do not see how it could be held "on reasonable and probable grounds." Ms. MacDougall's repetitive and furious declarations of danger, in increasingly inflammatory language, do not by themselves establish that imminent danger existed in this case.

Mr. Peterson indicated that none of the three parties involved in this incident are employed today at Showgirls. We wish to emphasize that the evidence in the appeal does not objectively support any conclusion that either of the men implicated by Ms. MacDougall presented a danger to anyone. Workers should be careful and fair about characterizing as dangerous (under OHS standards) other employees with whom they have interpersonal conflict.

Disciplinary Action Complaint

This complaint was filed on January 28, 2013. The OHS officer concluded that Ms. MacDougall wanted Mr. Funk to be terminated from Showgirls and saw that as the only resolution to this dispute. This was a reasonable conclusion from the September 30 email [Tab 6].

Mr. Peterson said there was no guarantee of, or rights to, shifts for Ms. MacDougall. The schedules always changed. She often was assigned 4 shifts in the week, but occasionally she got 3 shifts. He may have decided on assigning 3 shifts that next week not because he was disciplining her for raising a safety concern but because he had misgivings about how she behaved on her September 29 shift when she "made things really bad for everyone" at work. He said she was argumentative, rude and difficult with other staff that night.

Once she did not work any of her 3 scheduled shifts the next week, she was not scheduled for more. He said "employees just can't miss a week or two of work when they want and still be considered employed."

Mr. Peterson referred to an incident 18 to 24 months prior of Ms. MacDougall accusing another co-worker of violence against her. That co-worker was immediately fired. However, in this present case there was just insufficient evidence to dismiss Mr. Funk for cause. All three were given written warnings.

Mr. Peterson spoke well of Ms. MacDougall as an employee up to September 26th. She was given leeway to come in late to work and was allowed to do her homework on the job at times. He said she had been a good employee, despite two previous warnings[6] but became a most difficult employee around the time of this incident.

He assumed she was quit because she wrote that she had removed her belongings and had "no reason to return." By the November 29th meeting with WCB and Ms. MacDougall, he acknowledged that there was no job for her at Showgirls. The workplace was completely toxic and all other employees would have quit if she had returned then because she had become a disruptive workplace influence with co-workers at Showgirls since the incident. He said Showgirls did not discipline Ms. MacDougall after she raised her safety concern, which was evidenced by his scheduling her more shifts the next week.

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*:

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[6] Tab 20 was the only written warning produced.

> 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.*
>
> *(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.*

The OHS decision is contained in the June 4, 2013 letter sent to Ms. MacDougall [Tab 1, with further reasons in Tab 2]. 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 OHS officer found the last two parts not made out. There had been no discipline as she was scheduled for more shifts and chose not to work them.

This Council's standard of review is reasonableness of the OHS Department's decision. We find that the OHS officer conducted a thorough investigation and

drew reasonable conclusions, supported by the facts and within the applicable law. We see no reason to alter the result. However, we would add that the evidence suggests any fear she expressed about danger from a co-worker during those shifts was much exaggerated.

Ms. MacDougall dictated the terms of her return in her September 29 and 30 emails and again on November 29. Her objective seemed to be little more than to personally ensure Mr. Funk was dismissed. She would settle for nothing less. It appears that she invoked OHS proceedings primarily, if not wholly, to beget human resource changes at Showgirls. The General Manager, Mr. Peterson, found he could not accede to her human resource demands.

Conclusion

The appeal is dismissed on both complaints.

Reasons of Council Member Halwas (dissenting on the disciplinary action complaint appeal issue)

Background:

Ms. MacDougall was employed by Showgirls as a disc jockey from April 1, 2009 as well as attending university on a full time basis. Her last day of work at Showgirls was September 29, 2012. On September 25, 2012, Ms. MacDougall was injured while at work, attended the Grande Prairie Regional Hospital upon leaving work and was assessed by a physician. Subsequent to September 25th, Ms. MacDougall contacted Occupational Health and Safety to request an investigation. A formal investigation was not conducted by Occupational Health and Safety at that time. Several months later, after raising the complaint through an email to the Minister of Human Services, Occupational Health and Safety (OH&S) launched a formal investigation into the Disciplinary Action. The decision of the OH&S Officer, Ms. Heather Edenloff, was to dismiss the complaint.

Ms. MacDougall filed an appeal of this decision within the timeframe allowed under the Act.

All parties agree that the Appeal Panel has the jurisdiction to hear the Appeal.

The Appeal Panel convened to determine whether or not the decision of the OH&S Officer was reasonable.

Positions of Parties:

Appellant

Ms. MacDougall maintains that the decision of the OH&S Officer is not reasonable given her belief that her hours were cutback as a result of complaining about the injury which resulted from having a chair thrown at her by her supervisor at the time, Mr. Cody Funk. Secondly, she felt a continued threat existed as Mr. Funk continued to be her supervisor subsequent to the incident which resulted in her injury. Finally, she believes that Ms. Edenloff did not allow her adequate time in which to provide requested information following an in-person meeting between Ms. Edenloff and Ms. MacDougall, and as a result, Ms. Edenloff did not consider relevant information in making her decision to dismiss the Complaint. She is seeking the remedy of the OH&S Officer's decision to be reversed, and the Council to order remedy under Section 37 (4) of the Act.

Respondents:

Showgirls

Mr. Peterson maintains that it is unclear what happened the evening of September 25th which resulted in Ms. MacDougall's injury. Mr. Peterson stated that he was more than willing to work with Ms. MacDougall subsequent to her injury; however, she was being unreasonable. In order to manage Showgirls, he indicated that she would still report to the person who allegedly assaulted her, Mr. Funk. Mr. Peterson also maintained that Ms. MacDougall could not attend work at Showgirls while there was an open RCMP complaint against Mr. Funk due to a no contact order. Mr. Peterson maintains that Ms. MacDougall was not disciplined as a result of the alleged assault, instead she brought it on with her "drama" in the workplace. He believes that the Appeal should be dismissed.

OH&S Officer

Ms. Edenloff maintains that she met with Ms. MacDougall on February 14th, 2013. At that time, there was discussion regarding the provision of additional documentation for the investigation. No deadline date was given, nor requested by Ms. MacDougall. On March 8th, 2013, Ms. Edenloff sent an email to Ms. MacDougall advising her that the deadline to have all of her information to be provided in the Complaint was March 14th, 2013. Ms. Edenloff made a decision following March 14th, 2013 based on the information that she had received. In this regard, she believes that her decision was reasonable and should be upheld.

Facts not in Dispute:

Ms. MacDougall was employed by Showgirls as a disc jockey from April 1, 2009.

Ms. MacDougall was injured on September 25th, 2012, and attended the Grande Prairie Regional Hospital for care.

Dr. R. Martin issued a doctor's note summarizing the injury on September 26th, 2012. (Tab 4 of Large Binder, "LB")

A security videotape from Showgirls showed Mr. Funk aggressively pushing a chair into the room where Ms. MacDougall was located around the time of the alleged assault.

Ms. MacDougall's last day of work at Showgirls was September 29th, 2012. (Tab 9 of LB)

On November 14, 2012, Worker's Compensation Board determined that Ms. MacDougall's injury was work-related. As such, they provided compensation and established a case plan for rehabilitation. (Tab 12 of Supplementary Binder, "SB")

On January 18th, 2013, Ms. MacDougall sent an email to Ms. Edenloff which refers to a telephone conversation between them, and indicates that OH&S will be investigating. (Tab 3 of SB)

On February 14th, 2013, Ms. Edenloff met with Ms. MacDougall in Grande Prairie in order to interview her, and request information.

On March 1st, 2013, Ms. MacDougall provided a Record of Employment via Service Canada dated January 31, 2013 to Ms. Edenloff, indicating that it contained errors which she would be rectifying. (Tab 8 of SB).

On March 8th, 2013, Ms. Edenloff sent an email to Ms. MacDougall indicating that her deadline for submission of all of her documentation was March 14th, 2013. (Tab 10 of SB)

On March 14th, 2013, Ms. MacDougall forwarded emails between Mr. Peterson and herself related to the incident to Ms. Edenloff.

On March 14th, 2013, Ms. MacDougall sent an email to Ms. Edenloff which contained a series of questions related to documentation. Ms. Edenloff did not acknowledge the email, or respond to the questions. (Tab 11 of SB)

There was no further verbal or written communication between Ms. Edenloff and Ms. MacDougall.

On June 3, 2013, Ms. MacDougall was notified that her Disciplinary Action Complaint was dismissed. (Tab 1 of LB)

Procedural Matters

The panel heard submissions from all parties regarding the admissibility of documentation and voice recordings that Ms. MacDougall had provided all parties in advance of the hearing, and referred to in her Request for Review Questionnaire dated July 10th, 2013. (Tab 12 of LB)

Ms. MacDougall's position was that all the documentation and voice recordings were relevant to the matter being heard.

Ms. Dolgoy's (Counsel for HMQ) position was the documentation and voice recordings should be examined individually for relevance and ruled on.

Mr. Peterson had no objection to having the documentation and voice recordings being examined individually.

No attempt was made by the Appeal Panel to individually assess which information supplied by Ms. MacDougall was available and had been submitted to OH&S prior to March 14th, 2013.

By a majority vote of the Appeal Panel, all documentation and voice recordings submitted by Ms. MacDougall were ruled inadmissible "on a global basis". No attempt was allowed to be made to establish relevance of individual documentation or voice recordings.

Ms. Dolgoy provided a written submission in the form of a coiled binder in advance of the hearing date which was not considered by the Appeal Panel.

Evidence of Parties:

OH&S:

Written Evidence in the form of two binders, (one Large, "LB", and one Supplementary, "SB"), were provided in advance of the hearing date by OH&S.

Occupational Health and Safety Compliance Letter (Tab 1 of Large Binder, "LB")

Occupational Health and Safety Evidence Table (Tab 2 of LB)

Evidence – Document Record of Employment (Tab 3 of LB)

Evidence – Document – Doctor's Note (Tab 4 of LB)

Evidence – Document – Email – September 26, 2013 (Tab 5 of LB)

Evidence – Document – Email – September 30, 2013 (Tab 6 of LB)

Evidence – Document – Email – October 1, 2013 (Tab 7 of LB)

Evidence – Document – Incident Report- September 27, 2013 (Tab 8 of LB)

Evidence – Document – Questionnaire – Employer Copy (Tab 9 of LB)

Evidence – Document – Questionnaire – Complainant Copy (Tab 10 of LB)

Imminent Danger – OHS Decision Letter (Tab 11 of LB)

Evidence – Document – Email – October 24, 2012 (Tab 1 of Supplementary Binder, "SB")

Evidence – Document – Email – December 7, 2012 (Tab 2 of SB)

Evidence- Document – Email – January 18, 2013 (Tab 3 of SB)

Evidence – Document- Email- January 24, 2013 (Tab 4 of SB)

Evidence- Document – Email – January 27, 2013 (Tab 5 of SB)

Evidence- Document – Email – February 13, 2013 12:20 p.m.(Tab 6 of SB)

Evidence- Document – Email – February 13, 2013 5:59 p.m. (Tab 7 of SB)

Evidence- Document – Email – March 1, 2013 (Tab 8 of SB)

Evidence- Document – Email – March 4, 2013 (Tab 9 of SB)

Evidence- Document – Email – March 8, 2013 (Tab 10 of SB)

Evidence- Document – Email – March 10, 2013 (Tab 11 of SB)

Evidence – Document – WCB Information – November 14, 2012 (Tab 12 of SB)

Evidence – Document – WCB Information – November 19, 2012 (Tab 13 of SB)

Evidence – Document – WCB Information – November 23, 2012 (Tab 14 of SB)

Evidence – Document – WCB Information – December 11, 2012 (Tab 15 of SB)

Evidence – Document – WCB Information – January 7, 2013 (Tab 16 of SB)

Evidence – Document – written warning – Gerald Amos – October 25, 2012 (Tab 17 of SB)

Evidence – Document – written warning – Cody Funk – October 25, 2012 (Tab 18 of SB)

Evidence – Document – written warning – Kim MacDougall – September 29, 2012 (Tab 19 of SB)

Evidence – Document – written warning – Kim MacDougall – August 2,2010 (Tab 20 of SB)

Evidence – Document – Copy of a text message from Kim MacDougall (Tab 21 of SB)

Evidence – Document – Showgirls Policy Manual (Tab 22 of SB)

Evidence – Verbal- Ms. Edenloff – She had reviewed original documentation received in September, 2012, some of which were not part of the OH&S Evidence package. During cross-examination, Ms. Edenloff indicated that some of the same documentation reviewed was part of Ms. MacDougall's information package.

Evidence – Verbal – Ms. Edenloff – During cross-examination from the Appellant, Ms. Edenloff indicated that she had reviewed the notes from Mr. Chris Powell. She could not comment on why he did not see fit to formally investigate Ms. MacDougall's complaint against Showgirls. She was assigned to formally investigate the Disciplinary Action Complaint against Showgirls, and described the process and outcomes of her investigation.

Evidence – Verbal – Ms. Edenloff- During questions from the Appeal Panel, Ms. Edenloff indicated that she had in the past granted extensions of deadlines to receive information during investigations. She also indicated that she had not advised Ms. MacDougall that Ms. MacDougall could ask for an extension, nor did Ms. Edenloff offer an extension or answer Ms. MacDougall's questions after she received the questions from Ms. MacDougall via email (Tab 11 of SB).

Mr. Peterson

Evidence – Verbal – Mr. Peterson – Mr. Peterson indicated that security video footage showed Mr. Funk hauling the chair out of the room where Ms. MacDougall worked, and throwing it back in. In Mr. Peterson's words, the assault was "alleged", as no one saw it happen. After the alleged assault, Ms. MacDougall had approached him to have Mr. Funk removed from being her

supervisor. She requested that she report directly to Mr. Peterson. Mr. Peterson refused to allow her to work for him and indicated that Mr. Funk would continue to be her direct supervisor. Mr. Peterson was concerned about what the other staff would think of allowing Ms. MacDougall to report directly to him. The other staff may have requested the same reporting relationship.

Evidence – Verbal – Mr. Peterson - Mr. Peterson indicated that he had conversations with Ms. MacDougall where he requested that she stay away from work for another day in order to allow him to figure things out. He did not make the same request of Mr. Funk. He also indicated he did not give her a $50 house tip as he felt that she did not deserve it, and it was a discretionary tip.

Ms. MacDougall

Evidence – Verbal – Ms. MacDougall – Ms. MacDougall provided a recount of the events between September 26th and 30th. As well, the efforts she has undertaken to report the events to the relevant authorities. She indicated that her first attempt to engage local OH&S authorities, Mr. Chris Powell, did not result in a formal investigation of the events. According to Ms. MacDougall, Mr. Powell visited Showgirls, but did not interview staff, or inspect the premises. Instead, he informally told Ms. MacDougall that there were no signs of an OH&S violation. Ms. MacDougall followed up with an email to the Minister of Human Services in December, 2012. After which, Ms. Edenloff was assigned to formally investigate the complaint.

Evidence – Verbal- Ms. MacDougall- Ms. MacDougall indicated that she was told by the OH&S call centre to send in all of her information for the Appeal and the Appeal Panel would decide to consider it on a piece by piece basis.

Evidence- Verbal- Ms. MacDougall – Ms. MacDougall described the difficulties in receiving a Record of Employment from Showgirls following her cessation of employment. It is dated January 31, 2013, and according to Ms. MacDougall, contains errors (Tab 3 of LB, Tab 8 of SB).

Decision:

In making my decision regarding the reasonableness of the dismissal of the Disciplinary Action Complaint, three questions came to the forefront.

The first question is related to the reasonableness of the decision of the OH&S Officer given the information introduced as written and verbal evidence. Was the decision of the OH&S Officer reasonable given the facts introduced as evidence?

Under section 36 of the Act:

"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, the regulations, or the adopted code."

In the decision letter sent to Ms. MacDougall from Ms. Edenloff (Tab 1 of LB), Ms. Edenloff found that Ms. MacDougall acted in compliance with the Act by reporting her concerns to her manager on September 26, 2012. At the time, she found insufficient evidence to indicate that disciplinary action as defined under Sec. 1(j) took place, and as a result, no connection between her act of compliance and her cessation of employment.

During cross-examination, Mr. Peterson indicated that he had asked Ms. MacDougall to stay away from work for another day in order for him to figure things out. During this time, she would not be paid. He also maintained that he did not provide her with her share of house tips as they were discretionary and she did not deserve them. When the work schedule for the following week was released, it indicated that she would not be working on Saturday evening, which was not the norm. Given that the test in Section 36 of the Act is "any disciplinary action", and Mr. Peterson provided evidence that he had asked Ms. MacDougall to stay away from work, I conclude that disciplinary action took place. The timing of the act of compliance on September 26, 2012 , and Ms. MacDougall's last day of work September 29, 2012 are inextricably linked both in time and in conversation (Tab 6, 7, and 9 of LB), which leads me to conclude that the decision to dismiss Ms. MacDougall's complaint was not reasonable.

The second question is related to the reasonableness of the deadline provided to Ms. MacDougall for submission of information, and therefore the information available to Ms. Edenloff to make a decision. Was the deadline a reasonable one? My opinion is that it is unreasonable to assume that Ms. MacDougall would know that she had the opportunity to ask for an extension and be granted one, or that Ms. Edenloff had granted extensions in the past. The Act and Regulations are silent in this regard and it is unlikely that the general public is aware of internal OH&S protocols. No discussions of deadlines had taken place prior to the March 8th, 2013 email (Tab 10 of SB), which provided Ms. MacDougall with 6 days to deal with external agencies that would be providing some of the information requested.

The third question relates to the ability of the Appeal Panel to effectively hear all evidence provided by all the parties in order to assess the reasonableness of Ms. Edenloff's decision. Was the Appeal Panel fair or was there a reasonable perception of bias? My opinion is that the procedural ruling of disallowance of information without an individual review for both relevance and determination if it had been provided to OH&S prior to the March 14th, 2013 deadline created an environment where the Appellant believed that the process was unfair and as a

result, she did not provide fulsome verbal information subsequent to that. The ruling by the majority of the Appeal Panel went against the recommendation of the Appellant, Ms. Dolgoy, and was not objected to by the Respondent.

As a result, I find that the decision of the OH&S Officer was unreasonable. In accordance to Section 37(4)(b), I would require (iii) and (iv) be instituted.