Occupational Health and Safety Council

Disciplinary Action Complaint

Georgeta Tican

Appellant

and

Incor Group Inc.

Respondent

ORDER

Panel Members: Peter Bowal (Chair), Nina Novak and Darlene Halwas

Appearances: For the Appellant: Mr. Adrian Tican

For the Respondent: Ms. Dixie Inman

Appeal Hearing January 31, 2014

Decision April 14, 2014

Alberta Jobs, Skills, Training and Labour

Occupational Health and Safety Council

Summary

The Appellant, Ms. Georgeta Tican, was a Calgary hairdresser in the employ of the Respondent, Incor Group Inc. which was operating as Great Clips. She started working for Great Clips on January 24, 2011 and was terminated by the employer some 14 months later on March 14, 2012. Ms. Tican says she was terminated because she expressed a safety concern to her employer.

Ms. Tican's disciplinary action complaint, filed six months after the termination, was dismissed by the OHS manager on September 19, 2013. The OHS manager concluded that there was insufficient evidence that the termination was a retaliatory reaction to the safety concern. Ms. Tican appealed that ruling to this OHS Council on September 27, 2013. The hearing of the appeal took place in Calgary on January 31, 2014. Ms. Tican was not present at the hearing. She was represented by her son, Mr. Adrian Tican.

After reviewing the matter, the Panel dismisses the appeal.

Preliminary Motion to Adjourn

Beginning two weeks prior to the January 31, 2014 hearing date, Mr. Tican contacted the Council Chair and / or Secretary on at least eight occasions to ask for an adjournment. The first request was to adjourn to June 2014 "so as to preserve tribunal resources, due to the fact, there is a pretrial conference in the Provincial Court of Alberta scheduled in March 6th, 2014 in relation to the matter that may result in a successful resolution."[1] A voice message was left on the Chair's telephone around the same time, which stated:

> . . . We're looking right now if possible to set a date in June. Uh, the reason for that is that there's other matters presently outstanding. And uh, if those matters get dealt with prior to that, there may not even be a need to attend the hearing appeal. However at this point in time, we're looking for a date in June in 2014 possible . . . if you could facilitate that.

A few days later, Mr. Tican requested an adjournment to April 2014, "due to the fact, there is a provincial court of alberta pretrial conference scheduled for March 6th, of 2013. The matter may be resolved at such hearing, and therefore, there would be no loss of resources on behalf of the OH and S tribunal. [*sic*][2] Mr. Tican

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[1] Email from Mr. Tican to Council Chair, January 20, 2014 10:35 p.m.

[2] Email from Mr. Tican to Council Secretary, January 22, 2014 11:20 a.m.

was advised by the Council secretary that an adjournment would not be granted for this reason.

At the outset of the hearing on January 31, 2014, Mr. Tican applied for an adjournment again to save the tribunal's resources. He said a pre-trial court hearing in early March relating to the matter might obviate this OHS Council proceeding. The Respondent objected to the adjournment, noting that she had taken the time to prepare for this appeal and that her witness had taken the time off work.

The three panel members had also spent considerable time preparing and were not aware how a court proceeding would necessarily impact this particular OHS appeal. Already four months had passed since the appeal had been filed and any withdrawal of the appeal rested entirely within the discretion of the Appellant. If it was a matter of merely adjourning this hearing to a later date, the balance of convenience and the tribunal's resources would be best served by not adjourning.

The adjournment application was dismissed.

Facts

(i.) Ms. Tican's Evidence

As has been pointed out, the Appellant, Ms. Tican, did not attend the appeal hearing, but was represented by her son, Adrian Tican. In the documentation on file, she appears to have authorized her son Adrian to represent her.[3] We accept that Mr. Tican is the Appellant's representative at the hearing. However, there is an important difference between being a representative or advocate and being a witness to facts. Being the Appellant's representative does not qualify Mr. Tican to provide credible evidence as a witness.

Mr. Tican admitted that he was not on the worksite when the events he alleged occurred. This makes the Appellant's evidence in this appeal rather unusual. The OHS officer interviewed Ms. Tican personally and that transcript is in the record. Mr. Tican's evidence at the appeal hearing is based on what his mother told him. He provided unclear and, at times, contradictory testimony about critical details such as dates. At the hearing, he admitted that he was "guessing" what his mother did or thought or said. For example, he was not sure when his mother

[3] We note, in passing, that well into the hearing when Mr. Tican was questioned about certain facts he was asserting, he responded that his mother was sick and could not attend. He had indicated by telephone in the weeks before that the Appellant would probably not be attending the hearing personally and her health was not given as a reason then or in any request for an adjournment.

first complained to the employer, whether it was in 2011 or 2012. When pressed for details on many matters by the Respondent or panel members, Mr. Tican simply was not in a position to know.

Acting as agent and advocate for the Appellant, Mr. Tican asked Council "to adopt the previous submissions [in the written materials] as her evidence." Apart from the transcript of the interview with the OHS officer, which interview fails to serve as a clear, incisive contribution to the factual foundation in this case, most of the 463 pages filed in this appeal (including 17 pages filed at the hearing) are broad, unsupported, repetitive allegations made by the Appellant and her son. When asked for proof of his claims, Mr. Tican would frequently gesture to the huge package of written allegations and say "it is in the materials there", without providing specific references.

At the hearing, Mr. Tican said his mother's finger became infected and the fingernail "fell off" sometime during her employment at the Great Clips salon. He said this happened because there was insufficient disinfectant (barbicide) in the shop to clean the combs. Nevertheless, despite the seriousness of this, his mother and he did not believe this was an imminent danger. Mr. Tican's understanding was that his mother only drew attention to the infected finger as a safety concern on March 9, 2012 to a representative of the employer, Ms. Dawn MacKay. When Ms. MacKay pointed out that she was not physically present at that salon on that day, Mr. Tican immediately adjusted to say that the notification 'must have been by phone'. If this personal injury was as serious as alleged, such reporting details should be clear.

Mr. Tican said his mother raised the concern ("I believe it was to Ms. Dawn MacKay") about the shortage of barbicide to sterilize combs again on March 12th 2012. He said the Appellant "then was coerced to sign a reprimand even though she had no prior written warnings. She disagreed with the write-up and was dismissed."

He later added that the concern about infection and comb sterilization was raised online, in person and on the telephone in three communications to the employer on March 9, 12 and 15. No further elaboration or evidentiary support was offered for these notifications. He said his mother raised the safety concern in a text to Carla and Lisa, other stylists without managerial responsibilities. Carla had been an assistant manager before Ms. MacKay filled that role in January 2012. In March 2012 Carla was not in a position of employer authority in the salon.

The Appellant produced no documentation or other evidence from any physician confirming that the Appellant's finger infection was caused by unsterile instruments at her work. A prescription in 2011 for an ointment was related to a different medical condition. Indeed, of the several hundred pages of material filed by the Appellant, there was no proof of any kind (such as a photograph) that

she even suffered an infection, much less that she contracted an infection at work from lack of comb sterilization.

Several inconsistencies remained unexplained. For example, Ms. Tican claimed to have allergies that were affected by this lack of sterilization and finger infection when she called the Call Centre. However, the medication from Shoppers Drug Mart indicates "no known allergies".

The Appellant was not present at the hearing to be cross examined although she and her son (at the hearing) made many claims of serious fact and injury without substantiation.

On cross examination, Mr. Tican was asked if the original complaint was 2011 or 2012. He said "basically from my understanding the first finger infection was in 2011 and it was reported at that time," which was inconsistent with his earlier version. While not certain, he said the fingernail fell off in September 2011 because that is when a medical prescription was written. He could not explain what finger it was, on what working hand it was, and how his mother could continue to work in the salon during that time.

(ii.) Respondent's Evidence

Ms. Dawn MacKay:

Ms. Dawn MacKay managed three Great Clips salons, including the salon at which the Appellant was employed. She gave evidence as the Appellant's manager during the last three months of the Appellant's employ. Ms. MacKay spoke from her personal experience at the shop in question, and appeared knowledgeable and forthright.

She said she started in the stylist business in 1995 and since then has never seen infections with stylists as alleged in this appeal. She said some stylists get nicked or cuts to their skin and some need creams in our dry climate. Ms. Tican never brought to her attention an infection or any problem with her finger. She never saw a Band-Aid on the Appellant's finger and the Appellant worked all her shifts, never complaining that she could not work due to her finger.

Ms. MacKay said the Appellant "had gotten into a few fights with Esther [another hairdresser on staff] and both got written up. One was in January 2012 when Ms. Tican had an incident about a blow dryer in front of a customer; yelling and screaming in front of customers about doing their [co-workers'] work."

She never got a call or heard from Ms. Tican about any infection concern on March 9th. On March 12, Ms. MacKay saw Ms. Tican "almost attack one of my girls and that is when I took her into the office. She was documented but did not

need to sign it." Ms. Tican was involved in a serious confrontation with Esther on March 14th, where Ms. MacKay "was afraid for Esther's life." She said Ms. Tican was confrontational and unco-operative, unlike Esther. When Ms. Tican refused to sign the report acknowledging this warning, she was dismissed.

Ms. MacKay said the first she heard about Ms. Tican's infection issue came months after the termination. To her knowledge, no other staff received any complaints or concerns about the sterilization issue from Ms. Tican. She said large supplies of barbicide are transported to the busy Signal Hill shop and is used there. This was supported by invoices provided as evidence.

Carla and Lisa, the two other stylists named as recipients of Ms. Tican's reports, were not authorized to receive safety or management concerns. On March 15th, Carla received a text message from Ms. Tican and passed it on to Ms. MacKay who told her not to respond. The message read: "Hi Carla, I need your help in regards to the human rights matter!" (Evidence Binder Tab 2)

Ms. MacKay described their sterilizing protocol. With some 700 customers per week at the Signal Hill salon, this is one of the busiest in the city. At such a busy salon, there is a full time receptionist who, about 95% of the time, does the barbicide sterilization in one larger vessel at the back. The combs and brushes must be in there at least 5 to 10 minutes to be sterilized. Stylists do not have to do that. The clippers and other instruments, on the other hand, are the personal responsibility of each stylist who owns them. Barbicide is changed every evening.

Ms. Inman:

The salon owner, Ms. Inman also gave evidence. She said her salons do not do perms, colours, peroxide "so we don't really have any chemicals, other than barbicide, clippercide, sprays, gels. We have all the warnings and in books available to staff." Sanitation is her priority. If they fall on the floor, combs are not used until they are sterilized. She said the AHS or health board has approved her sanitation system. The random inspection around the termination date turned up only a few minor unrelated matters. Ms. Inman said "we have always scored very high on our sanitation systems twice each year when we are assessed. No concerns were ever raised about barbicide." She said Ms. Tican "never contacted me about any safety concern. We fired her because she intimidated and threatened another employee and she refused to acknowledge that in the supervisor's report."

Ms. Inman added that in her "17 years as a salon owner [she] never has had any experience of any worker getting a hand or finger infection" as alleged. She said stylists at this shop do not do the disinfecting of the combs but would see the disinfecting process taking place there. She did not receive any online complaints, or telephone or in-person complaints. She pointed out that Ms.

Tican's receipts for medical treatment related to shingles which occurred a year earlier. There were no medical receipts for 2012 and no physician's notes.

In the industry, salons standardly require all stylists be responsible for supplying and sterilizing their own clippers, neck trimmers and scissors. The salon supplies a light spray that the stylist sprays on her own tools. Ms. Inman said, without conceding the point, if Ms. Tican got some infection from the workplace, it might have been her own failure to properly sterilize her own equipment. Barbicide is mostly for the protection of customers, not the stylists, because of lice and other things that could be passed on from customer to customer, but also to and from the stylists.

The owner testified about Ms. Tican's behavioural problems as the reason for her termination on March 14th. She "ripped a blow dryer out of the wall in January" and there were other problems those first three months. Ms. Tican was embroiled in staff conflicts for one to two months before she was dismissed. Oral warnings were given at that time. Then Ms. MacKay saw the altercation with Esther on March 12 and documented it after both stylists left. When they both came in on March 14, Esther was apologetic and signed the report. Ms. Tican strenuously and profanely verbally attacked Esther that day and refused to sign the report. She was dismissed that day and sent home. The whole series of problems with Ms. Tican was the reason she was dismissed on March 14. Her behaviour and attitude were problematic and "to protect . . . a seriously affected [co-worker], we had to let [Ms. Tican] go."

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.*
>
> *(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 manager's decision is contained in the September 19, 2013 letter sent to Ms. Tican (Evidence Binder Tab 4). It is accompanied by a detailed set of investigation notes (Evidence Binder Tab 5) and a thorough investigation that culminated in a 5 page report.

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 and manager drew the following conclusions in their report:

> The complainant indicated that she suffered a finger infection due to a lack of barbicide at work and was terminated when she communicated this concern to her employer. The documentation supplied by the complainant did not validate such diagnosis nor could the finger infection be attributed directly to the work at Great Clips. OHS finds that the evidence is insufficient to conclude that the employer, or any other worker at the work site, was ever made aware of this concern by the complainant.
>
> The employer demonstrated through purchase order receipts that barbicide was regularly available. Statements by the employer

> indicate there was a specific process in place for the sterilization of hair styling equipment.
>
> Furthermore, the employer provided documentation of an accident between the complainant and a co-worker at the work site in which it was determined by the employer that the complainant needed to alter her behavior at the work site if employment was to continue. The complainant refused to cooperate with the employer during this process and the complainant's employment was terminated as a result of that refusal.
>
> The evidence received did not indicate a causal or demonstrable link between the worker's termination and the occupational health and safety complaint.

This Council's standard of review is reasonableness of the OHS Department's decision. We find that the OHS officer conducted a thorough investigation. Together with the OHS manager, reasonable conclusions were drawn, supported by the facts. We see no reason to alter the result.

The Panel was not convinced there was a fingernail injury, much less when it occurred and whether it was as serious as described. A damaged finger so infected that it cast off the nail would not be something that would go unnoticed in a busy salon. Hair cutting and styling are highly digital stylist tasks. It is unlikely that customers or co-workers would not have noticed it. If they noticed it, they would say anything about it. For the hundreds of pages of Appellant-submitted documentation, much of it repetitive, there is no evidence to support the central allegation of the alleged infected finger.

We are not satisfied that it arose from an imminent danger in the sense that it was "a danger that is not normal for that occupation" [section 35(2)], that there was a refusal to work, and that there was a notification to the employer "as soon as practicable" [section 35(3)].

Conclusion

The appeal is dismissed.