Occupational Health and Safety Council

Disciplinary Action Complaint

Andrea L. MacPhee-Lay

Appellant

and

FHR Lake Louise Operations Corporation

Respondent

ORDER

Panel Members: Peter Bowal (Chair), Rob Munro and Hal Griffith

Legal Counsel: For the Appellant: E. Wayne Benedict
For the Respondent: Michael D. A. Ford, Q.C.

Appeal Hearing October 15, 2013

Decision March 14, 2014

Alberta Jobs, Skills, Training and Labour

Occupational Health and Safety Council

Summary

This appeal is dismissed for the reasons set out by Council members Peter Bowal and Rob Munro. Member Hal Griffith would have allowed the appeal and his dissenting reasons follow further below.

Reasons of Peter Bowal and Rob Munro

Introduction

On October 31, 2011, the Appellant Andrea L. MacPhee-Lay ("Ms. MacPhee") was hired as a Massage Therapist at the Fairmont Chateau Lake Louise hotel ("Fairmont") which is a trade name of the Respondent. The employment went well for about the first ten months until Fairmont proposed a new item of equipment to be used in conjunction with a hot stone massage treatment. What happened in regard to that new equipment, and why Ms. MacPhee was suspended with pay on September 28, 2012 and dismissed on October 1, 2012, is the subject of this appeal.

Ms. MacPhee says she was dismissed because she raised concerns that this new equipment was unsafe to use for the purpose proposed, and because she asked to see the hazard assessment on that new equipment. Fairmont says the suspension and dismissal were unrelated to any safety issue in September 2012 but were due to Ms. MacPhee's workplace behaviour and performance.

Ms. MacPhee filed a complaint under section 37(1) of the *Occupational Health and Safety Act*, R.S.A. 2000, Ch. O-2 ("the Act") with Occupational Health and Safety officers on January 09, 2013 (Tab 2 of the Hearing Package).[1] After conducting an investigation, on March 8, 2013, the OHS officer dismissed the complaint, concluding "that there was insufficient evidence to support your allegation that disciplinary action occurred in contravention of Section 36 of the Occupational Health and Safety Act."

On April 04, 2013, Ms. MacPhee appealed to this Council for a review of that decision under section 37(3) of the Act. Another box on the appeal form was checked: Ruling from an Imminent Danger Complaint Investigation (s. 35 OHS Act). This appeal was received within the statutory 30 day period of the OHS officer's decision. We convened the hearing of this appeal on October 15, 2013 in Calgary, Alberta.

[1] In this Order, "Tabs" refer to the official record of the white binder, the Hearing Package, while "Exhibits" refer to the evidence in the black binder adduced at the hearing.

For the reasons which follow, we dismiss this appeal. It is our view that the OHS officer properly investigated this complaint and made the decision that is best supported by the evidence. The OHS officer was in error in concluding compliance with the Act requires a refusal. Notification may be sufficient compliance. In the result, the conclusion in this case was supported by the evidence and it remains unchanged.

Facts

Some of the evidence, including critical aspects to this case, was contradictory. These cases are largely fact intensive and fact dependent. We will carefully outline the evidence and facts as we conclude them to be.

Basalt stones, immersed in water heated to 120F, are applied to clients' bodies in special hot stone spa massages. The porous stones retain heat and moisture. Normally a purpose-built stone kettle filled with water heats the stones for this purpose. Fairmont proposed to replace the kettle with a household electric Black and Decker grill in one of the spa rooms.

A large part of this appeal turns on what occurred at a meeting at the Fairmont workplace on September 12, 2012. At least that meeting accelerated the decline of the working relationship of Ms. MacPhee and the Respondent employer. The meeting was attended by the Spa Director, Mr. Graeme Harper and several or most of the Registered Massage Therapists on staff at the time. It was a meeting of at most one hour, the primary purpose of which was for Mr. Harper to communicate to the massage therapists the proposed new menu of spa treatments that might be rolled out for the upcoming Christmas season. From that point on, the evidence is in dispute.

(i.) Ms. MacPhee's Evidence

Ms. MacPhee said she attended this training or demo session where two household grills were turned up to 350F. This alarmed Ms. MacPhee. She was concerned that the rocks might explode when heated like this. Any moisture left on or inside the stones could cause the stones to explode when heated. She immediately raised her concerns at that September 12 session and told her supervisor, Mr. Harper, who had overall responsibility for the spa staff and operations, that she would refuse to use that household grill for heating the spa stones. On cross examination, Ms. MacPhee was vague about what else transpired at the one-hour September 12th meeting.[2] She said Mr. Harper said the grill "was a done deal and if she did not like it, that was too bad." She

[2] In fact, we cannot be sure this training meeting was even on September 21st. The OHS call report of September 28 mentions the training session the previous Friday which would be September 21st. The precise date is not important as the parties agreed that the meeting referred to happened.

conceded, though, that it is possible Mr. Harper said something to the effect of "let me think about this hot rock issue and work it out later and get it back to you." In any event, she asked at that meeting not to perform hot stone services.

Over the next few days, Ms. MacPhee went online and found literature that she said supported her concerns (see Exhibit 28). Dry stone heating was not an approved use of the household grill (Exhibit 23). Her insurance might be void if she used the grill (Exhibit 25 - 27). She shared this literature with the other massage therapists to inform them, and she repeated her concerns with Mr. Harper. By September 24th, Ms. MacPhee said she felt intimidated and said she "was being bullied into using these grills." She said Mr. Harper "started to look for reasons to write me up, including for leaving my purse" in his office / dispensary.

There was another training session on September 28, for the new protocol on hot stone massage. Mr. Chad Friel, another Registered Massage Therapist, testified that he had been at one demo one day. He did not remember what day it was, but it would appear to have been on the September 21st or 28th meeting. He did not agree with using the grill. The stones were heating up unevenly and it did not seem logical to use this device at a 4/5 star hotel. He said when the grill was turned on, it made crackling noises. People backed away, and one person screamed. Ms. MacPhee immediately objected and she spoke up to Mr. Harper about it: "she was suspended that afternoon and fired shortly after that." He knew the grills would not be deployed soon because the new treatment menus took a very long time to change, get approved and get implemented. He quit his job at Christmas and never saw the grills being used with massages.

Ms. MacPhee said she offered her internet literature again at the September 28th session. She was never booked for any sessions in the couples room using the electric grills. On the afternoon of September 28th, Ms. MacPhee was suspended with pay and called OHS to file a complaint. In the call to OHS on September 28, it was recorded that Ms. MacPhee "said that she initially raised the concern in a training meeting last Friday." That would have been on September 21st, although it was accepted that the meeting referred to took place on September 12th.

The OHS Call Centre intake sheet also notes Ms. MacPhee contacted OHS on the morning of September 28th, before she was suspended, and was advised to ask for a hazard assessment. At the hearing, Ms. MacPhee said she "not know about hazard assessments until she contacted OHS" and the OHS intake clerk "told [her] to ask for a hazard assessment." (Tab 1). Ms. MacPhee was disciplined with the suspension on the afternoon of Friday, September 28th. Her employment was terminated on the next work day, October 1, 2012.

There was another inconsistency with the Call Centre logs and what Ms. MacPhee stated at the hearing. The Call Centre recorded her saying that the electric grill

had not been used. At the hearing, she said that she doesn't know whether she said that or not. If she did, she meant she meant "it was not used for guests, only training sessions. The grill could have been used for one of the training sessions."

Ms. MacPhee's performance in this job the first 11 months was generally acceptable. She met or exceeded expectations in all assessments except one. In those written assessments were documented some concerns about "find[ing] common ground," "colleague conflict" and not always following the employer's uniform policy (Exhibit 6). Her supervisor, Mr. Harper, said he talked to her about this but Ms. MacPhee said she did not recall that. She was late for a massage in February 2012, which required guest reimbursement. The next month, she called in only one hour before her shift was to start to say she was not coming to work. On April 28, 2012, Ms. MacPhee was "written up" for making an inappropriate comment during training (Exhibit 5). There were a few instances of specific guest dissatisfaction with Ms. MacPhee but we think that will occasionally occur in any service business such as this.

The employer implied that the nine sick days in 10 months was on the high end (Exhibit 8). The last sick call-in was on September 6, 2012. On cross examination, Ms. MacPhee admitted there was a discussion with Mr. Harper where she raised the concern that she had been charged two absences the previous month that were not accurate. She said the tone became contentious: "this is the point where things were starting to get a little bit rough." Ms. MacPhee challenged Mr. Harper on her attendance record. She said, ". . . his treatment of me and I was offering to do what I could. I have challenges with transportation living where I lived and child care. This was all out of my control, they are acts of God."

Ms. MacPhee said she did not remember the other performance issues. She seemed reluctant to admit that her late arrivals and absences caused friction with Mr. Harper. She said she had a good rapport with him and their relationship broke down only on September 12 regarding the hot stone issue. She also said Mr. Harper was "disrespectful and dismissive" to all employees. On cross examination, she conceded the eight enumerated concerns set out in the Dispute Note in paragraph 4 of Exhibit 20. She therefore admitted to being late for work, missing client appointments, providing insufficient notice of absenteeism, making inappropriate comments to co-workers and being disruptive, being frequently absent, being insubordinate to her supervisor, leaving personal belongings in inappropriate locations and refusing to follow directions.

It is clear that tensions mounted after September 12th. She had left a special coffee cup in Mr. Harper's office and he threw it out. This made her sad. Exhibit 10 shows that Ms. MacPhee left her personal bag on the small office/dispensary floor on September 21, 2012 and it was alleged that this had been happening for weeks. She denies being counselled or warned about her purse being left on the

floor of the dispensary although she admitted that "it had been an issue at least once before", but she did it because she had lost the key to her locker. She said she never saw Exhibit 10 and did not sign it. There was a meeting on September 22nd with human resources about the purse. Ms. MacPhee was upset with Mr. Harper. She considered him disrespectful and unfair for pushing the purse issue.

Ms. MacPhee attached to her appeal a very detailed, undated "Chronicle of Events" (Tab 2 in white binder). At the appeal hearing, she occasionally refreshed her memory from that document. However, some of her evidence, particularly in cross-examination, seemed to add to or conflict with the detailed chronicle. For example, at the hearing she said she saw the machine on and it was set at 350F during training, but she made no reference there to either of those points in her very specific and encompassing chronology. Her counsel distinguished between that document as a pleading and her other evidence. That chronology was an extraordinarily detailed pleading.

As it turns out, essentially the identical document comprises Ms. MacPhee's letter (through her legal counsel) to the OHS officer, dated November 20, 2012 (Exhibit 14). Ms. MacPhee concedes that this is her evidence and she prepared it and reviewed it before it was sent to OHS. In it, she did not refer to her working relationship with Mr. Harper.

(ii.) Mr. Harper's Evidence

Mr. Harper said the working relationship changed with Ms. MacPhee in April 2012. She seemed to take constructive criticism personally, was "confrontational and struggled to find common ground in conflict." "Common ground" were her own words from her performance appraisal (Exhibit 6). The relationship with Ms. MacPhee deteriorated when she was confronted with the documentation of her performance shortcomings and absences. When he addressed her attendance, she said she thought he was "out to get her." The performance appraisal (Exhibit 6) covered the full range of "below" to "exceeds" expectations.

The September 12 meeting was pre-scheduled to discuss the new menu of treatment options, which were increasing from 30 or 40 to almost 100, to be consistent with the spa business in the rest of the hotel chain. The agenda was to go through the brochure which set out the list of treatments offered to guests and discuss the rollout of new treatments, changes from current treatments, and to obtain feedback and buy-in from the massage therapists.

Mr. Harper had seen and used the grill before and thought it was safer in that one does not need two roasters filled with hot water. He received feedback from staff that the couples room was quite hot with the roasters and it was safer to go with the grills. He thought the grill option would reduce overall level of heat in the small room with 4 people at close quarters and would be safer generally.

The meeting started at 1:30 p.m but the purpose of this training session was not to discuss hot stone massage.. The lead therapist was there leading the meeting until Mr. Harper arrived about 17 minutes later. It is possible that the grill was turned on and off before Mr Harper arrived. Shortly after he arrived, the topic changed to the hot stone treatments and equipment. Ms. MacPhee became vocal about the changes, saying she was scared. She turned the meeting about the new treatment menu into one about the hot stone equipment.

He tried to get the meeting back on track about the brochure of treatments, but Ms. MacPhee wanted to bring it back to the old procedure. She engaged in, or caused, some back conversation in the room with another therapist. There was no demonstration of the new grill. It was not even plugged in. This meeting was not really a training session. It was about conveying new information. The anticipated start date of the new menu was December 2012. He mentioned generally that there would be several stages in rolling out a new treatments. For example, there would be an instructor-led demo, another demo; then the therapists would perform it on an instructor. None of these stages were taken in hot stone couples massage using the grills. It was not rolled out at all.

The operating temperature of the grills is 135F and the maximum is 200F. After the meeting, he took the concerns of Ms. MacPhee and decided to get the input of Richard Gosse, the Fairmont OHS manager, and get further information on using the grill. He reviewed with Richard Gosse the safety issues (exploding, rocks that would burst into flames, massage oil splashing on the grill, etc.). Mr. Gosse reviewed and investigated it. He found no concerns. Mr. Harper mentioned it to Ms. MacPhee who rejected it.

The written record about Ms. MacPhee's purse (Exhibit 10) was prepared on September 22. Ms. MacPhee's bag had fallen from a shelf to the floor and things had fallen out. There is no space to store it in this little office/dispensary. A locker was provided for this purpose. She had been warned for the previous three weeks. Mr. Harper did not show Exhibit 10 to Ms. MacPhee because it was a very busy day. He just mentioned it to her orally, and that he would take this up with her later because discussions with Ms. MacPhee were "usually extended and heated."

Mr. Harper blocked out a meeting with Ms. MacPhee a few days later to discuss with her the need for her to comply. September 27 was the next day they were at work together and he asked to speak with her but she replied, "We won't be having that discussion but we will be having that discussion with HR." He asked when and she said "right now." He had not booked a time or appointment with HR, but they did go to HR and met with Jen Cavanagh. Ms. MacPhee mentioned "she was getting hassle for leaving the bag in his office, the locker policy, he

thought she had been insubordinate and he had to be consistent in applying the rules to all therapists."

What started out as disciplinary meeting on September 27 about the bag on the floor was just going around in circles. Then Ms. MacPhee "brought up the hot stone issue and they went around on that for the next hour." He thought he heard at this meeting for the first time her say that she would refuse hot stone treatments with the grills, or wanted to be exempt from performing all hot rock therapy. He was continuing to investigate safety of the grills with Mr. Gosse.

The final item at the September 27th meeting was Exhibit 10. It stated, *inter alia*, "I need Andrea to comply with Fairmont policy immediately." He put this report to Ms. MacPhee. She refused to sign it. Ms. Cavanagh signed it for her.

On September 28th Ms. MacPhee complained about Ms. Cavanagh and Mr. Harper in the staff cafeteria which was overheard by other staff. She used expletives. Mr. Harper thought Ms. MacPhee had stopped receiving and acting upon corrective information. He said Ms. MacPhee was fired because of her refusal to follow directions and procedures and her growing insubordination.

There was no demonstration of the grill on September 28. The grills were tested in late November 2012 and the Hazard Assessment (Exhibit 15) was prepared. Soon thereafter, the grills were removed (Exhibit 17), the couples hot stone treatment was deleted from the new menu of treatments after OHS clearance failed to materialize. To date, there is no operational plan for any grills.

Imminent Danger Complaint

Ms. MacPhee's first appeal to this Council is based on what she alleges is her imminent danger complaint. The Act mandates workers to refrain from using what they reasonably believe to be imminently dangerous equipment. Once the worker believes, on reasonable and probable grounds, that she is asked to operate dangerous equipment, 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.*

It is clear that the employer did not comply with the formalities contained in subsections 4 through 6. The OHS officer investigated under subsection 8. The officer's "record" is contained in Tab 1 ("Record of Activity CMIS File No. OHS-030960-88337) at page 6. He found that since the grill was never used and was removed from the workplace, there was "no potential for the existence of imminent danger."

Our jurisdiction is delimited 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 for several reasons, as follows:

(1.) The evidence makes it clear that the electric grills were never put into use in the Respondent's spa;

(2.) We would also dismiss the request on substantive grounds. There was no imminent danger here in any prospective sense. There was a demonstration of a grill on September 12, 2012 only and once concerns were expressed, it was never used again for this purpose in the spa. The imminent danger, if there was any, when the demonstration took place, ended as fast as it arose. All parties agreed that the grill idea was a proposal only; and

(3.) For the purposes of a section 35 imminent danger complaint, the worker "shall, as soon as practicable notify the worker's employer . . . of the worker's refusal and the reason for the worker's refusal". A refusal and notification are both required as soon as practicable because that constitutes the only way an employer can address the danger and accommodate the worker.

We are not convinced that Ms. MacPhee communicated her refusal (assuming there was one) "as soon as practicable" which would have been at the September 12 meeting. Ms. MacPhee said she "would" refuse to use it in the future at that meeting. Her letter on November 20, 2012 (Exhibit 14), after she was dismissed

and had consulted legal counsel, contained a rather vague "she would likely refuse to perform hot stone massage services for clients unless proper equipment and methods were uses (sic) to heat the massage stones. After Ms. MacPhee-Lay had notified Chateau Lake Louise that she would likely refuse to refuse to carry out (sic) work . . . or to operate a tool, appliance or equipment . . . " This chronology does not make it clear when the hypothetical or anticipatory refusal occurred. By far, most of the evidence about the September 12 meeting related to the danger, not the refusal. For a section 35 imminent danger complaint, it is important for the complainant to clearly establish when and how the refusal was communicated to the employer.

Mr. Harper indicated the first refusal he clearly heard from Ms. MacPhee was at the September 27th meeting with HR. Again, all of this was hypothetical in any event because Ms. MacPhee was never asked to use the grill and there was no actual refusal of a direction to work on unsafe equipment.

Disciplinary Action Complaint

The disciplinary action complaint, and appeal from the officer's decision, 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 officer's decision is contained in the OHS manager's letter dated March 8, 2013 to Ms. MacPhee (Tab 5). He states that an investigation into the Disciplinary Action Complaint was completed and "the results of the investigation indicated that there was insufficient evidence to support your allegation that disciplinary action occurred in contravention of Section 36 of the Occupational Health and Safety Act." The OHS officer's reasons are found in the CMIS record in Tab 1.

The oft-stated 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 officer found there was no refusal of unsafe work proven, and there was no imminent danger. He concluded that the disciplinary action was not taken against Ms. MacPhee as the result of her compliance with the *Act*.

The OHS Council standard of review is reasonableness. We find that the officer conducted a fair and reasonable investigation. We have reviewed all the evidence in the case and find the officer's investigation and conclusions to be reasonable in light of the facts and law, except his interpretation that only a refusal could constitute compliance with the *Act*. We hold that 'notification as soon as practicable' alone can amount to compliance with the *Act* under the first part of the test. In the end, Ms. MacPhee fails under the first prong of the test because there was no imminent danger, even though she did comply by rendering a swift notification to Fairmont of the danger she perceived. The notification can be only as effective as the imminent danger.

We agreed with the officer and find that the third part of the test is also not made out here. Accordingly, we dismiss the appeal, and would add the following reasons to each of these three tests in turn.

Did Ms. MacPhee Act in Compliance with Section 35 of the *Act*?

We find that Fairmont heated and demonstrated an electric grill on September 12 in the anticipation of using it as a new appliance to heat rocks for hot rock massages in the couples spa room as a new treatment option beginning in December 2012. The new appliance, a standard electric household kitchen grill, was not approved by the manufacturer for such use and Ms. MacPhee reasonably had safety concerns about its use for that purpose. She vigorously expressed her concerns and objections at that meeting to the employer. She left no doubt about her position on the use of the grill for heating massage rocks among the other massage therapists and with the employer at that meeting and in the two weeks which followed.

We conclude that she was not acting in compliance with the *Act* for several reasons, one of which has been set out above under the section 35 analysis; namely, there was no prospective imminent danger here in fact.

We conclude that there was no refusal. There could not be a refusal to use equipment if there is no actual employer instruction to the worker to use the equipment. This is not an anticipatory refusal, but a merely hypothetical one because no demand was ever made to her to use the equipment she believed unsafe. Hypothetical refusals are not contemplated for protection under the *Act*. Rather, the *Act* envisions real, palpable and imminent dangers. None of those existed here, other than perhaps the demonstration itself which was not the subject of Ms. MacPhee's complaint.

However, Ms. MacPhee does not require a refusal to be compliant with the *Act*. She needs only to show *some* compliance that draws the discipline. She may be able to sustain a Disciplinary Action Complaint on the basis of notification only as that would be "compliance" with section 35 that could precipitate discipline. It is foreseeable that the raising of the safety concern with the employer will provoke swift discipline and preclude any refusal. The policy of the *Act* governing disciplinary action complaints in particular is to extend protection to notifications without refusals, but not necessarily refusals without notifications.

Therefore Ms. MacPhee did not need to refuse, but may have been wrongfully disciplined for merely notifying Fairmont of the dangerous equipment as soon as practicable. We find that she did notify the employer of her safety concern with the use of this new equipment as soon as practicable, but she still fails on this part because what she notified Fairmont about was not an imminent danger.

It is possible, perhaps likely, that her raising the safety concern was instrumental in the eventual nixing of the grill option to heat massage rocks. However, the fact that the worker gives the employer pause to proceed with a piece of equipment

and even succeed in having proposed equipment withdrawn does not automatically satisfy or substitute the 35 criteria of what "imminent danger" is.

The analysis can stop here and Ms. MacPhee's complaint fails. However, for the sake of completing the three-part test, we continue.

Was Ms. MacPhee Disciplined?

The evidence is clear, and all parties agree, that Ms. MacPhee was disciplined. She was suspended on September 28, 2012 and dismissed on October 1, 2012.

Was Ms. MacPhee Disciplined *Because* of Her Act of Compliance?

Since there was already a finding of no compliance with the *Act's* technical requirements, this part falls away. On the other hand, if we are wrong about the compliance issue, we would conclude that her discipline in any event was not *caused* by her compliance (reporting the dangerous equipment and stating her refusal to operate the equipment if asked). It is apparent from the evidence that Ms. MacPhee was a good employee in some ways but also suffered serious performance issues at Fairmont. These problems were growing in number and significance in the months and weeks leading up to the September 12th meeting.

Absenteeism, lateness, collegial working relationships, the use of language, and lapses in customer service can always be problems any employer must manage. They are a regular part of the challenge of building and maintaining any successful business. Nevertheless, when the employer is in the business of offering expensive, high end personal services and relaxing ambiance to a select clientele, this kind of unprofessionalism is even more a critical business issue about which an employer such as Fairmont may be understandably sensitive. Ms. MacPhee admitted to the eight breaches of performance or policy that occurred before and around the time the safety issue surfaced (Exhibit 20).

It appears to us that after the September 12th meeting at which she raised her safety concern, Ms. MacPhee embarked upon a course of conduct that was destructive to her working relationship at Fairmont. She pursued the safety issue with a persistence and fervor that seemed unjustified, given that the proposed deployment of the grills was under re-consideration and study, as well as rather distant if it was going to happen at all. It seemed to provide a flashpoint for other grievances to be aired, such as the locking up of her personal belongings, which appeared to us as a reasonable request in this case given that space was so limited and all therapists were expected to do the same. Her insubordination was evident and it appeared that she was willing to cast her non-safety workplace irritations with Mr. Harper in a personal light and embarrass him publicly.

Raising a safety issue does not insulate a worker from the general behavioural and performance expectations that are unrelated to the safety issue. Put another way, raising a safety issue does not license or empower one to unilaterally destroy the rest of the employment relationship.

The employer said it dismissed Ms. MacPhee for legitimate performance reasons unrelated to her raising the safety concern and signalling her refusal to operate the equipment. She had been subject to previous warnings. There is a strong evidentiary basis here before and after September 12th for that conclusion and we would accept several serious performance problems as the cause of her discipline on September 28 and October 1, 2012. Accordingly, Ms. MacPhee has not satisfied us that she has met this part of the test.

Conclusion

The appeal is dismissed.

Reasons of Hal Griffith (dissenting)

The Appeal Panel (the Panel) convened on October 15, 2013 to hear an appeal pursuant to Section 36 and 37 of the *Occupational Health and Safety (OHS) Act*.

OHS Act: *Section 36*

> *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 or the Regulations.*

OHS Act: Section 37

> *37(1) A worker who has reasonable cause to believe that 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.*

(5) If the worker has worked elsewhere while the dismissal or disciplinary action has been in effect, those wages earned elsewhere shall be deducted from the amount payable to the worker under subsection I4)(b)(iii).

(6) An appeal lies to the Court of Queen's Bench from an order of the Council on a question of law or a question of jurisdiction and on hearing the matter the Court may make any order, including the awarding of costs, that the Council considers proper.

(7) An appeal under subsection (6) shall be made by way of originating notice within 30 days from the date that the order of the Council is served on the person appealing the order of the Council.

> *(8) The commencement of an appeal under subsection (6) does not operate as a stay of the order of the Council being appealed from except insofar as a judge of the Court of Queen's Bench so directs.*

The specific reasons for appeal are:

- On September 28, 2012, Ms. MacPhee-Lay filed a complaint with the OHS call centre that she had been suspended after raising concerns about using an electric hot-plate to heat stones.
- On October 1, 2012 Ms. MacPhee - Lay was terminated from employment with Fairmont Chateau Lake Louise. The termination letter suggested no cause for the termination.

- Ms. MacPhee - Lay believes her objections to employer plans to use unsafe equipment provoked her termination.

- On March 8, 2013 OHS responded to the disciplinary action complaint in a letter. "The results of the investigation indicated that there was insufficient evidence to support your allegation that disciplinary action occurred in contravention of Section 36 off the Occupational Health and Safety Act."

- Ms. MacPhee -Lay disagreed with the finding and filed an appeal to the Occupational Health and Safety Council dated April 4, 2013

The appellant contends that:

- The termination was discipline following her refusal to use a griddle to heat stones for massage.

- That the griddle was put into use in a training exercise

- During that exercise she stated her concerns that the rocks could explode from pressurized moisture.

- During that exercise she stated she would likely refuse to use the griddle in actual practice with a patient.

- Competent persons in her occupation should refuse to use a residential grill to dry heat stones for hot stone massage.

- A hazard assessment had not been completed when the grill was first used to heat rocks.

- The grill was used in a circumstance prohibited by the manufacturer.

- She stated her concerns to her supervisor and her OHS representative.

- She brought written materials to work supporting her concerns.

- That she had received positive performance appraisals throughout her term of employment.

- That the termination was more likely than not a result of her refusal to use improper, unsafe equipment.

The respondent contends that:

- The equipment in question was never turned on during the term of Ms. Lays employment with Fairmont Chateau Lake Louise.

- That Ms. MacPhee-Lay could not have refused to use the equipment that had not been actually used.

- That Ms. MacPhee-Lay was an insubordinate employee with a history of upsetting clients and breaking rules.

- That Ms. MacPhee-Lay's absence frequency was above the norm

- That Ms. MacPhee-Lay was not a good fit as a Colleague

- That Ms. MacPhee-Lay had acted inappropriately in discussing her opinions in the staff break area where others could overhear.

- That Ms. MacPhee-Lay's positive evaluations were actually negative and just had a positive appearance as a result of good-bad-good sandwiching of feedback.

- That the Appellants termination had nothing whatsoever to do with a claimed act of compliance.

- The real reason for her OHS complaint and subsequent Appeal is furtherance of a wrongful dismissal lawsuit.

The Issue to be Resolved:

Does the action taken against the respondent by the employer constitute a violation of s.36 of the Occupational Health and Safety Act?

Submissions Considered by the Appeal Panel

The panel considered the:

• Submission binder produced from OH&S, containing appellant's information, OH&S investigation, investigating officer notes, interviews and findings [as applicable].

From the Appellant,

Written Submission, Written Reply Submission, and other written evidence adduced at hearing

Testimony from Ms. Andrea MacPhee Lay, Appellant and Mr. Chad Friel, former Massage Therapist at The Fairmont Chateau Lake Louise.

From the Respondent,

Written Submission, Relevant Documents binder, and other written evidence adduced at hearing

Testimony from Mr. Graeme Harper, Spa Director, The Fairmont Chateau Lake Louise

Position of the Parties and Remedy Requested:

Both parties were represented in this appeal by lawyers. Both parties agreed that the Panel could properly hear the appeal and should consider this matter de-novo. Parties had no objections to the specific panel members sitting on the matter. Oral and written submissions were accepted as evidence and argument.

The Appellant claims that she was disciplined for acting in compliance with Alberta's Occupational Health and Safety Act (the Act), contrary to the Act. The Respondent replies that the Appellant has no basis for her claim. She did not perform the act of compliance, namely an imminent danger refusal. She was terminated for reasons totally unrelated to her claimed act of compliance. The real reason for her OHS Complaint and subsequent Appeal is furtherance of a wrongful dismissal lawsuit.

Uncontested facts:

The employment of Ms. MacPhee-Lay was suspended September 28, 2012 and terminated October 1, 20012 by The Fairmont Chateau Lake Louise.

She had been employed as a spa massage therapist Since October 31, 2011.

She was an accredited massage therapist.

On September 12, 2012 a staff gathering was held in the couple's massage room at The Fairmont Chateau Lake Louse.

In the couples massage room was a Black and Decker home use grill with basalt rocks arranged upon it.

One of the topics at the gathering was a proposal to increase Guest menu options to include couple's hot stone massage.

At the gathering Ms. MacPhee-lay objected to a proposed plan to use the grill too heat rocks for couples massage.

Her objection was that the use of the grill would pose a safety hazard.

On September 23, 2012 Ms. MacPhee-Lay attempted to or did discuss her concerns about the proposed hot stone treatment with the Lead Therapist by showing her an article.

On September 27, 2012, Ms. MacPhee-Lay attempted to or did discuss her concerns about the proposed hot stone treatment with the OHS employee-representative by showing him an article.

On September 27, 2012 , Ms. MacPhee-Lay attempted to or did discuss her concerns about the proposed hot stone treatment with Mr. Harper and Ms. Cavanaugh.

On September 28, 2012 Ms. MacPhee-Lay was suspended from duties.

On October 1, 2012 Ms. MacPhee-Lay was terminated from her employment effective immediately.

Appellant:

On a request for review questionnaire dated April 4, 2013 the Appellant requested the following actions be ordered by this Panel:

- Reinstatement to former employment under the same terms and conditions of former employment
- Cessation of disciplinary action
- Payment of money not more that the equivalent wages that would have been earned had not discipline or dismissal occurred.
- Removal of any reprimand or other references to the matter from employment records.

In submission, the Appellant requested that the Council:

a) Order payment to the worker of money not more that the equivalent of wages that the worker would have earned if the worker had not been dismissed or had not received disciplinary action, in the amount of $25, 588.28;
b) Order removal of any reprimand or other reference to the matter from the worker's employment records;
c) Acknowledge and affirm in it's reasons for decision that:
    i. The investigating Occupational Health and Safety Officer failed to carry out statutorily mandated obligations under OSHA;
    ii. The Director of Inspection involved failed to carry out statutorily mandated obligations under OSHA;
    iii. Respondent Lake Louise Corp. failed to carry out statutorily mandated obligations under OSHA;
    iv. Ms. MacPhee-Lay believed on reasonable and probable grounds that the use of a retail griddle sold for home-use(an appliance) to dry-heat massage rocks for use on massage therapy clients (work) would cause to exist an Imminent danger to the health or safety of Ms. MacPhee-Lay or other workers present at the work site in compliance with OSHA s 35;

v. Ms. MacPhee-Lay refused to carry out the work and refused to operate the appliance; Ms. MacPhee-Lay, as soon as practicable, notified Respondent Lake Louise Corp. of her refusal and the reason for her refusal; and the Respondent Lake Louse Corp. terminated Ms. MacPhee-Lay's employment "by reason of that worker acting in compliance with this Act, the Regulations, the adopted Code" in breach of OHSA, s 36.

The Appellant advised that reinstatement was no longer being sought.

Respondent:

The Respondent submits that there are two issues for determination;

1. Was Ms. MacPhee-Lay terminated by reason of her compliance with *The Act;* and
2. Did an Imminent Danger exist on September 12, 2012.

The respondent further submits that the Panel does not need to consider the Appellants allegations of failure of behalf of the OHS officer and his manager in their involvement in the matter; the Panel's decision replaces any real or perceived deficiencies in OHS compliance divisions' officers' performance.

They submit "that an appeal before the OHS Council is a de novo hearing. Both parties present their facts and arguments to the OHS Council Appeals Panel and the Panel makes its decision. "

Preliminary Discussion on Party Expectations:

In the Appeal Hearing both parties present their evidence and arguments to the OHS Council Appeal Panel. The Panel considers arguments and weighs evidence and makes findings of facts and then forms a decision in consideration of the matter

The Panel is the first independent level of review and may consider the whole matter de novo. The panel's role is not to form an inquiry into the actions of the compliance branch. The compliance group has their own internal, quality assurance, performance management systems. The Panel does not need to establish a standard of review for an Officer or Director decision but rather considers the matter in a "fact intensive"[3] manner that is less "preliminary"[4]and

[3] Navrot v. Alberta OHS Council, 2005, ABCA 398 at para. 17
[4] Ibid at para. 28

affirms that "the worker has a chance to be heard by virtue of his written complaint as well as his oral submissions on an appeal before the panel[5]."

Panel Disciplinary Action Complaint decisions do not form decisions on the policy and operation of compliance branch officers.

Panel decisions do not direct the actions of the Officers to re-review matters.
The Panel operates independently of the compliance branch and shall not directly judge compliance policy or officer management.

This is not a Panel reviewing the professional standards or conduct of the Compliance branch, The Council is separate and independent.

The Panel seeks to determine if the Appellant was terminated by reasons of her compliance with the act.

The act of compliance would not necessarily have to be an imminent danger refusal.

In order to make a determination as to whether there was a contravention of s.36 of the Act, the Panel must consider the following:
1. Was disciplinary action taken against the appellant?
2. Was the disciplinary action taken as a result of the appellant acting in compliance with the OHS Act, Regulation, or Code; and
3. Is there a causal and demonstrable relationship between the disciplinary action taken against the appellant and the appellant`s act of compliance with the OHS Act, Regulation, or Code?

Evidence and Findings:

Three persons testified about events that took place in a September 12, 2012 staff gathering.

Ms. MacPhee-Lay stated that a grill had been turned on at that gathering in her presence and that the rocks heating on it began to vibrate and move. She stated that she told Mr. Harper that she would likely refuse to use the device. She testified that she had been trained to not use improper equipment to heat massage stones as it could cause the rocks to explode.

Mr. Friel testified that the grill had been turned on in his presence at that staff session and that the rocks began to crackle and he was concerned one might blow apart sending pieces flying. He stated that Ms. MacPhee was vocal about her concerns about the procedure being unsafe with the hotplate. Despite concerns

[5] ibid

there was a point when people touched rocks to find some of them hot and some not.

Mr. Harper testified that the gathering in question was not a training session as much as it was a staff meeting for updates including a new menu incorporating couples hot rock massage. He testified that he arrived late to the meeting and that a discussion about the hotplates was taking place when he entered. He testified that he did not see the grill turned on and furthermore did not believe one had ever been plugged in. He testified that Ms. MacPhee was quite vocal about her concerns over use of the grill and he had to take back control of the meeting and advised they could discuss her concerns about grill safety issues at another time. A number of other people were reportedly present in the room that day but none other was produced to witness.

The Appellant asks that an adverse inference be drawn here from the Respondent's failure to produce other witnesses to the events of September 12, 2013.

Relying on a useful explanation on adverse inference[6] I did not find myself compelled to add that weight at this point of the argument.

I consider the Appellant's voicing of an objection to the use of the hotplate as an act of compliance with *the Act*. I conclude that the Appellant reasonably believed that the intended of the hotplates would violate safety requirements and that she felt obliged to refuse to perform such work. Such belief was consistent with taking, "reasonable care to protect the health and safety of the worker and of other workers present "

OCCUPATIONAL HEALTH AND SAFETY ACT RSA 2000
Obligations of employers, workers, etc.

> (2) Every worker shall, while engaged in an occupation,
>
> (a) take reasonable care to protect the health and safety of the worker and of other workers present while the worker is working, and
>
> (b) co-operate with the worker's employer for the purposes of protecting the health and safety of
>
> (i) the worker,
>
> (ii) other workers engaged in the work of the employer, and
>
> (iii) other workers not engaged in the work of that employer but present at the work site at which that work is being carried out.

[6] R. v. N.L.P. 2013 ONCA 773 at 64 – 69 and 74-77

The Appellant stayed in the room during the demonstration of rock heating. The Responded submits that this is the most important point and that Ms. MacPhee lay has failed to explain why she waited until September 28, 2012 to raise the concern with OHS officials. The Respondent asks that it speak to her credibility.

Excerpt of RSA 2000 Section 35 Chapter O-2 OCCUPATIONAL HEALTH AND SAFETY ACT

Existence of imminent danger

35(1) No worker shall

(a) carry out any work if, on reasonable and probable grounds, the worker believes that there exists an imminent danger to the health or safety of that worker,

(b) carry out any work 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, or

(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**

(a) refuses to carry out work, or

(b) refuses to operate a tool, appliance or equipment pursuant to subsection (1) shall, as soon a 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).**
>
> **(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**. (Emphasis added)

Section 35 shows an expectation that a worker would report her concern to her employer as soon as reasonably practicable and give the employer the opportunity to investigate and respond prior to electing the optional filing of a complaint with OHS.

The testimony of Mr. Friel was that after the grill had been turned on, animating the rocks, Ms. MacPhee-Lay voiced her intent to likely refuse to use the process for couples massage. Mr. Harper testified that he had ended lively discussion with Ms. MacPhee-Lay during the September 12, 2012 staff gathering and promised to look into her concerns about the dangers of using the grill to heat rocks. A delay in complaining to OHS is not contrary to statutory expectations. It does not have to erode the Appellant's credibility.

On a similar track, the Appellant did not refuse to stay in the room at the moment that she perceived imminent danger. She remained for the whole of the demonstration. That she did not immediately remove herself from harm's way, does not prevent her from demonstrating that she otherwise acted in compliance with legislated requirements.

1. Was disciplinary action taken against the Appellant?

   Yes, the Appellant was terminated.

2. Was the disciplinary action taken as a result of the Appellant acting in compliance with the OHS Act, Regulation, or Code?

   Yes, the Appellant acted in compliance with the OHS Act

3. Is there a causal and demonstrable relationship between the disciplinary action taken against the Appellant and the Appellant`s act of compliance with the OHS Act, Regulation, or Code?

   A review of some cases discussing this relationship is useful.

In an Ontario Labour Relations Board decision[7] the panel noted

[7] 0193-12-OH Gerald Wilken, Applicant v. 1377041 Ontario Inc. (o/a Hotspot Auto

> 16. From the above, it is clear that before a determination can be made of whether the respondent violated section 50(1) of the OHSA, the following must be established by the applicant:
>
> a. The applicant must establish that he was acting in compliance with, or sought the enforcement of the Act or regulations made under the OHSA.
>
> b. The applicant must establish that he suffered one of the adverse consequences described in subsection 50(1) of the OHSA.
>
> c. Once the facts under subparagraphs (a) and (b) above, have been established by the applicant, the respondent has the onus to demonstrate, on a balance of probabilities, that the adverse consequences suffered by the applicant had nothing to do with any statutory protected activity in which the applicant may have been engaged in.
>
> d. If the Board establishes that the respondent's actions were motivated in any way by the applicant's exercise and/or enforcement of his rights under OHSA and its regulations, the Board will find a breach of the Act, even if the employer had provided other perfectly valid reasons for its actions.

Another case[8] discusses raising a bona fide safety concern as an act of compliance and also that performing an act of compliance is not a licence for insubordination.

> 25. ... in our view, it is inconceivable that the Legislature could ever have intended that a person in Mr. Frangis' position could be disciplined for an honest and bona fide exercise of his responsibilities under section 72 of the Regulation. As the "competent person" designated to satisfy himself and certify to the safety of the workplace, it would be anomalous if the raising of a bona fide safety concern could result in discipline - even if he is wrong in his assessment of the situation. On the contrary, it is our view that such concerns should be raised and resolved with his employer. This does not mean that Mr. Frongis has a licence for insubordination. If his refusal were frivolous, vexatious or improperly motivated, the Act would not protect him, and in appropriate circumstances, a prolonged debate might well raise a doubt about an employee's motives. Nor does it mean that the designated individual is

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Parts), Responding Party.

[8] Imperial oil Ltd., (19821) OLRB Rep. 580

> the last word on safety at the work site. Another competent person could certify the safety of the situation (as could have happened here) and the lack of foundation for a refusal to issue a permit or the inability to comprehend or accept the advice of more experienced persons might well raise doubts as to the individual's competence and could be dealt with accordingly. But in our view, Mr. Frangis was seeking compliance with the Act, and on the evidence his position cannot be characterized as frivolous. A disciplinary response from his employer - and this is how Mr. Lingley characterized it - was uncalled for.

The Canada Industrial Relations Board promotes broad interpretation to reasonable cause to exercise refusals and placing a focus on employer's reasons for discipline.

> 26. In cases of this type, a major consideration is whether the employee who has exercised the right to refuse did have reasonable cause to believe that danger existed. In this regard, the Board has always given the broadest interpretation possible to the concept of reasonable cause.
> 27. The purpose of the legislation is to prevent accidents and injury to health in the workplace. To achieve this goal, employees ought not to be discouraged from identifying potentially hazardous conditions by placing a heavy onus on them to establish that their fears were well founded. When employees complain that reprisals have been taken against them because they have exercised their right to refuse under the Code, the main focus should be on the reasons behind the employer's decision to take disciplinary action rather than on the reasonableness of the employee's refusal…9

The employer attached documentation to the questionnaire to support their argument that there were work performance matters, including the Appellant's attendance and other deficiencies, associated with how she conducted herself in the workplace. They attached a list of issues leading up to the decision to terminate her.

> On September 12, 2012 she "Questioned hot rock procedure during training. Mr. Harper assured her he has done this before with much success in the past"
>
> On September 23, 2012 she "Approached Rachael in the spa with articles regarding hot rock treatment then posted and highlighted them and stuck them to the wall in Mr. Harper's Office"

[9] Chaney v. Auto Haulaway, Inc., [2000] CIRB No. 47

> On September 25 Rachael tells Mr. Harper how angry and upset Andrea is with the hot rock situation and how she was trying to get her to read articles about it"
>
> On September 27, 2012 She "Approached another colleague in the spa (Eric) and tried to get him to read the article about hot rocks. When he declined she got 2 other colleague involved and asked them to witness him declining as he is the H&S rep"

Partial Recap:

Mr. Harper had proposed to implement a hot stone couple's massage into The Fairmont Chateau Lake Louse brochure. The Chateau had new brochures made up, for training purposes, although final approval had not yet been given to the whole new menu.

At least one 'residential use only' grill was placed in the couples massage room and was there long enough to require dusting. Rocks suitable for wet heating methods were placed on the grill. Nothing would have physically prevented staff from plugging in and turning on a grill to experiment with the rocks.

At some point a meeting was held to discuss the new brochure including the intended couples hot rock massage. Mr. Harper arrived about 15 minutes late to find the staff in a 'heated' discussion about the use of dry grills to heat stones. The Appellant was voicing strong concerns that the proposed method was unsafe and that she had been specifically trained to not use dry heat methods to warm those types of stones.

There is divided testimony over whether or not a grill was ever turned on. Mr. Harper stated that there was only one grill in the room and does not believe it ever was turned on. The Appellant and one other witness both stated that two grills were in the room and that one was turned on to the point where they observed the rocks moving, trembling, dancing and emitting loud cracking sounds. They described backing away from a grill in fear of a rock cracking and sending shards thought the air in an explosive manner. The heating process was described as having two stages; an initial high-heat phase followed by a lower-heat period.

Evidence relates that the Appellant's concerns were brought to the attention of management, and the health and safety representative in the clinic and to the OHS Chair. The Appellant brought in documentation about hot stone hazards for the head therapist and the health and safety representative to see. She put a copy in Mr. Harper's office.

Documentation indicates that if not for the intervention of OHS Officers they would have put grills into production in the couples massage room despite that action being contrary to manufacturer specifications and so also contrary to OHS legislation. Testimony from Mr. Harper was that he wanted to use the dry heat method as there would be less complaint of the room being hot from couples and also less risk of collogue fatigue.

Documentation indicates that if not for the Appellant's intervention, OHS might not have become aware of this foreseeable health and safety infraction.

It seems possible that because the Appellant's actions in compliance with the Act, regulation or adopted code ultimately prevented employees and the public from being exposed to imminent danger. The Panel does not have to find fact on the probability of this.

That Mr. Harper may have had his plans for dry heating of hot stones frustrated by Ms. MacPhee-Lay's act of compliance does not prevent the Respondent from showing that her discipline was probably not related to it.

The Respondent did submit that issues leading up to the decision to terminate the Appellant, included:

> September 21, 2012 she "Questioned hot rock procedure during training. Mr. Harper assured her he has done this before with much success in the past"
>
> September 23, 2012 she "Approached Rachael in the spa with articles regarding hot rock treatment then posted and highlighted them and stuck them to the wall in Mr. Harper's Office"
>
> September 25 "Rachael tells Mr. Harper how angry and upset Andrea is with the hot rock situation and how she was trying to get her to read articles about it"
>
> September 27, 2012 She "Approached another colleague in the spa (Eric) and tried to get him to read the article about hot rock. When he declined she got 2 other colleague involved and asked them to witness him declining as he is the H&S rep"

The Respondent considered the behaviours insubordinate, frivolous, vexatious, or improperly motivated and suggests it is more bad behaviour from a bad employee looking to either save her job or perhaps win a law suit. Although four of the listed actions could not have occurred without the initial objection, the Respondent's position is that these actions were not a continued act of compliance but were unrelated inappropriate behaviours.

The Respondent provided other reasons for the Appellant not being a good fit.

> November 13, 2011 – Guest disliked style of massage
>
> February 2012 - Was late for a massage
>
> March 29, 2012 - Called in one hour before shift saying she could not make it
>
> April 28, 2012 - Made an inappropriate comment during training for which she apologized. Later that day a guest complained she did not like her massage
>
> June 14, 2012 Performance Appraisal notes issue with colleague conflict and uniform policy
>
> August 2, 2012 – Unsatisfactory absence review
>
> August 3, 2012 - Counselled about leaving purse in office
>
> September 1, 2012 - Called in sick
>
> September 8, 2012 – Counselled about leaving purse in office
>
> September 22, 2012 - Left a personal item in an Mr. Harper's office /stylist's preparation area despite being told previously that month to not do that.
>
> September 28, 2012 - Was overheard by HR colleagues to be complaining to another colleague in the cafeteria about the meeting she had had with Mr. Harper and an HR person

Some supportive documentation was provided and testimony was provided by both parties to help assess the documents. On a balance, the more reliable documented evidence describes the Appellant as a good employee with many positive things going for her rather than the insubordinate employee and policy-scoff. Mr. Harper testified that the positive documented statements about the Appellant appear, at least in part, so as to present a good-bad-good sandwich when evaluating employees. The Appellant challenged a number of the documents describing performance issues as not being shared with the Appellant, or unsigned, undated, or unfounded and even suggested that some documentation may have been created after the fact to support the termination. The Appellant did 'own' some poor behaviour and admitted to having improved some behaviour. As well, the Appellant agreed that some of her absences were

beyond her control, including complications of traveling in winter from out of town in a mountain region, suggestive of innocent absenteeism, perhaps. Mr. Harper testified that over the last few months leading up to her dismissal, the Appellant had become a high-maintenance employee, with increasing insubordination, and beginning to get him "a little exasperated". He testified to advising his supervisor, on September 28, 2012, that the Appellant was not a good fit and that they could get rid of her.

The Appellant suggests it an unlikely coincidence that the timing of the discipline was so close to the work refusal.

The Respondent suggests it an unlikely coincidence that the timing of an OHS complaint came when she was being disciplined for her poor performance.

Two witnesses that could have been useful to the Respondent's account conduct and discipline issues were not produced. In particular, the Appellant challenged events that included Ms. Cavanaugh and Mr. McGillvary. Ms. Cavanaugh was present at the hearing but was not produced to support some of the Respondents assertions about the Appellants critical behaviours. A question about a 'failure' to produce these witnesses was raised in the Appellant's reply submission.

On this question, of a relationship of the discipline to the act of compliance, there is some onus on the employer to convince the Panel that the termination was probably not related to the act of compliance.

An adverse influence would not reverse the onus. That an opportunity to weight the evidence more in the Respondent's favor was not utilized may create enough of an adverse effect without, at this point, guessing why potentially important witnesses were not produced. Competent counsel conducted the case and certainly the Panel did not challenge the Respondent to produce another witness.

If there is sufficient credible evidence, such that other witnesses simply were not needed, the question does not have influence. If the decision teeters on a brink then the Panel may feel some influence from the concept of adverse influence but fair consideration must still be given of all evidence. Evidence is weighed accordingly for findings of fact. An adverse inference would not add weight to the Appellant's evidence here although it could cause minor erosion to the Respondent's case. Basically the responding Party either presented enough evidence to support a probability that the discipline was not demonstratively causal to the dismissal, or they did not.

Mr. Harper testified that the Appellant's "back conversation" at the training meeting was sufficiently disruptive of the training lead that he intervened. He related telling the Appellant that they would review the matter and discuss it at another time. He testified that he did not see the equipment being used and

noted that it was not plugged in when he was in the room. He did not take the Appellant's objections as a work-refusal.

Once an employer receives a concern that an employee envisions imminent danger and is 'refusing', they must act to investigate and report back.

> A worker who (a) refuses to carry out work, or (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.** (emphasis added)

As stated, Mr. Harper testified that he did not take the Appellant's objections over use of the grill for safety reasons to be a refusal. He stated that he did begin a process of looking into her stated concerns.

The Fairmont Chateau Lake Louise Orientation document, "*my*handbook", instructs employees to follow industry standards and applicable legislation for health and safety. About 3 pages of the submitted partial-document are dedicated to health and safety. A unsafe work refusal procedure is not specifically outlined. Employees are,"…, responsible for maintaining a constant awareness of Health and Safety requirements…," They are to, ",… safeguard their own as well a other Colleagues' health and safety at all times." Specifically, "Report all hazards, unsafe practices or defective equipment to your Supervisor." "Use the right tools and equipment for the job, and operate equipment in a way that will not be hazardous to you or other employees." The document describes requirements for reporting dangers and for controlling hazards. It describes a requirement to report incidents and accidents. Workers are directed to comply with OHS legislation. All in all while there is no instruction on a clear method for declaring a work refusal based on imminent danger, the expectation is clear that workers are not to engage in unsafe behaviours and are to report dangers to supervisors and or the Security Department. The most direct language may be this sentence. "If a colleague has reason to believe that the equipment or physical condition of the workplace is likely to endanger any colleague or Guest, or contravene legislation, contact the Security Department immediately."

Ms. MacPhee-Lay testified that she had been provided an orientation that included work refusal. She was aware of safe work procedures in the spa. She was not aware of any hazard assessments in the spa.
On one hand, it can be argued that if the Appellant was refusing to work dangerously, her Employer would clearly have no objection. She would be successfully aligned with the safety instructions put before her. The employer would have no cause to discipline her for following their training. If she was disciplined, the cause would likely be for something other than complying with the OHS Act.

On the other hand, the evidence lends to a considerations that, in the September 12, 2012 incident, the employer exposed employees to hazardous energy without assessing the hazards of the exposure and in the absence of safeguards. Was this sophisticated employer planning to use a piece of equipment contrary to manufacturer's recommendations and without an engineer's approval? This Panel does propose to make findings on contraventions of the act beyond the scope of appeal or jurisdiction; however the Panel should consider evidence that speaks to credibility.

> Occupational Health and Safety Code 2009 Part 3
> Specifications and Certifications
> Following specifications
>
> 12 An employer must ensure that
>
> (a) equipment is of sufficient size, strength and design and made of suitable materials to withstand the stresses imposed on it during its operation and to perform the function for which it is intended or was designed,
>
> (b) the rated capacity or other limitations on the operation of the equipment, or any part of it, or on the supplies as described in the manufacturer's specifications or specifications certified by a professional engineer, are not exceeded,
>
> (c) modifications to equipment that may affect its structural integrity or stability are performed in accordance with the manufacturer's specifications or specifications certified by a professional engineer, and
>
> (d) equipment and supplies are erected, installed, assembled, started, operated, handled, stored, serviced, tested, adjusted, calibrated, maintained, repaired and dismantled in accordance with the manufacturer's specifications or the specifications certified by a professional engineer.

Mr., Harper testified that the anticipated start date for the new treatment was December 2012. The September 12 session was to go over the new brochure. Prior to the actual rollout there would be an instructor led session with groups of 3 or 4 therapists getting tested in partner treatments.

A letter dated November 27, 2012 from Chateau Lake Louise Security Director Richard Goss stated the grills were removed from the workplace and would not be returned without an "all clear" from OHS. He references an attached SWP and Hazard ID

The only "safe work procedure and hazard id" produced was dated November 22, 2012

As per a February 19, 2013 letter at Tab 7, the hotplate was removed from the workplace on or about November 20, 2012 at the request of OHS and then removed again on or about January 23. 2013. The evidence suggests that the Occupational Health and Safety Compliance Officer did not at any point authorize a return of the hotplate to service. The letter describes that The Fairmont had re-introduced them with a training session on January 22, 2013 despite manufacturer specification that they not be used for other than residential and without approval from the Officer. Following a conversation between the Officer and The Fairmont's Director of Security/Loss Prevention, the grills were once again removed. On February 19, 2013 The Fairmont informed the Officer that the plan for use of the non-approved appliance was "completely abandoned".

I conclude that the Appellant's objection against use of an unsafe appliance probably caused her suspension and termination to happen when it did. While there may have been other reasons for the Fairmont Chateau Lake Louise to take exception to the Appellant's behaviour and performance, those reasons were not so influential that the act of compliance was inconsequential. There was a consequence for her act of compliance in the form of a suspension on September 28, 2012 and termination on October 1, 2012

Conclusion

Disciplinary action was taken against the appellant as a result of her acting in compliance with the OHS Act, Regulation, or Code; and
There a causal and demonstrable relationship between the disciplinary action taken against the appellant and the appellant`s act of compliance with the OHS Act, Regulation, or Code.

I find for the Appellant.

Remedy: (If this wasn't a dissent)

> Order payment to the worker of money not more that the equivalent of wages that the worker would have earned if the worker had not been dismissed or had not received disciplinary action, in the amount of $25, 588.28;
>
> Order removal of any reprimand or other reference to the matter from the worker's employment records;