Occupational Health and Safety Council

Disciplinary Action Complaint

Adrian Tican

Appellant

and

Alberta Solicitor General and Public Security

Respondent

ORDER

Panel Members: Peter Bowal (Chair), Andrew Smith and Wally Baer

Appeal Decision: August 28, 2014

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

Summary

In this Disciplinary Action Complaint under sections 35 through 37 of the Alberta *Occupational Health and Safety Act* ("the Act"), [1] the Appellant claims that his probationary employment as a Correctional Peace Officer I was terminated because he raised the concern that his work was unreasonably dangerous. The Occupational Health and Safety officer ("OHS officer") investigated and dismissed the complaint on the basis that the Appellant`s dismissal was unrelated to his health and safety compliance.

For the reasons which follow, we are all of the opinion that the appeal of the OHS officer's decision has essentially no chance of success and the request for review must be refused under section 37(4) of the Act. We conclude that the OHS officer's decision is reasonable on the basis of the facts and law applicable to this case.

Background

Before we set out the facts, we note that this is the second Disciplinary Action Complaint made within a year by the Appellant, Mr. Adrian Tican, against an employing department of the Government of Alberta in the course of temporary or probationary employment.[2] These appeals tend to be overly papered and highly personalized. Numerous, and repetitive, complaints about process and other extraneous matters to OHS are tossed into the appeal package mixture. Of the some 257 pages of materials in this appeal file, a small percentage relates to the specific safety issue which is our jurisdiction and the focus of this appeal. However, we have read and considered all material filed mindful of our jurisdiction.

The Appellant's job as Correctional Peace Officer I commenced on July 17 2011. He was to complete a mandatory nine week induction training program during a first year of probationary employment. The Appellant denies the probationary period, although it is stated in the following terms in the employment letter (Tab 5, emphasis added):

> You will be required to serve *a twelve month probationary period*. During this probationary period, it is required that you attend and successfully complete all aspects of the Correctional Peace Officer Induction Training and any other training requirements that may be determined by the Department. If you do not successfully complete these training requirements, your suitability for continued employment will be reviewed. *You will be granted permanent appointment providing you have successfully completed all of the Department's training requirements and your performance is satisfactory. Your probationary period will expire on July 16, 2012.*

The Appellant acknowledged his acceptance of these terms ("I understand and accept the terms and conditions of this offer") at the bottom of the same letter on July 11, 2011.

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[1] RSA 2000, c O-2, http://canlii.ca/t/5246j

[2] *Adrian Tican v. Alberta Health Services* http://work.alberta.ca/documents/ohsc-tican-vs-ahs.pdf

In any event, whether terms of employment called for cause or no cause for dismissal is irrelevant for the purposes of this appeal because we are concerned whether *any* discipline was brought to bear as a result of raising a legitimate safety concern.

Likewise, Mr. Tican denies receiving an August 7, 2011 letter which set out warnings about his obedience to rules and procedures three weeks after starting this highly safety and security sensitive job. While he denied receiving the letter, he did not deny the meeting described and issues raised in its contents. Whether the Appellant received this early warning about his performance is not germane in this appeal. What is relevant is whether the employer had identified employee performance issues that may have contributed to the subsequent dismissal.

Mr. Tican reported his work duties as "the care, custody and control of inmates. Commenced pat downs, patrols, drafted reports" (Tab 3). Mr. Tican's evidence is that the AUPE President, three years earlier, described the job as one of the most mentally and physically demanding public service jobs anywhere."

October 6, 2011 Pepper-Spraying Event

The Appellant claimed that he was "excessively pepper sprayed" during training, "evidently in a retaliatory manner". This was raised in his first email to OHS on December 28, 2011 in a context of discrimination. He said "a few other recruits" may not have been sprayed as much as he was. Safety was not presented as an issue in this incident and no mention of it was made in the original formal claim filed eleven months after the dismissal. The Appellant refers to a "reprimand" given to him for his response to the pepper-spraying incident. The Respondent refers to disciplinary actions, of which this presumably was one. Otherwise, since it was not an issue in the Disciplinary Action Complaint, it was not addressed by either the OHS officer or the employer.

After having lost his original Complaint, the Appellant, for the first time in his appeal materials, put into issue the pepper-spraying incident. He said he "voic(ed) concerns in relation to such, *which included concerns of an Occupational Health and Safety manner*." [emphasis added] Expressing safety concerns is the core of the Act's remedial intent. It is not credible that Mr. Tican would suddenly remember, years after the October 19, 2011 incident that led to his dismissal, that he had two weeks earlier raised another safety issue. Since the pepper-spraying was not an issue in the original Disciplinary Action Complaint, and because it has never been framed as an OHS issue, we decline to consider it further, other than to note that it gave rise to a reprimand.

October 19, 2011 Training and Appellant `s Response

Correctional Peace Officer training, by necessity, is intense. The Appellant knew that. On October 18, 2011, he invited his Union Steward to attend training the next day because "some recruits are a bit intimidated." Again, no safety issue was raised.

On October 19, 2011, the recruits were taking part in a training exercise that involved vigorous muscular endurance and cardiovascular activities such as push ups, stretching,

walking up and down stairs with weights, and boxing all within a set short time, according to Mr. Tican, "while the sergeants yell at you". This is followed by a bout of wrestling with a Sergeant, called the "Circle of Strength" exercise. This routine did not go well for the Appellant. He complained about it, said it was not safe and pointed out the lack of Emergency Medical Services on site.

We pause here to note that the Appellant raised the safety concern *after* he had gone through this strenuous training exercise. We do not know whether Mr. Tican was the first in his class to go through this routine on October 19th, or if this was the first time this routine was performed as it was performed as it was already into the sixth week of the nine week physical training program. If not, he would have seen others go through it and he did not raise any concerns until after he went through it on October 19th. He says in his routine "the sergeants/instructors were harder unto me than unto other recruits" but there is no corroborating evidence of that.

During the break after the first training round, the Appellant had a confrontation with Sergeant Pascoe who had considered himself a mentor to the Appellant. He described how the Appellant disobeyed him when he asked Mr. Tican to refrain from making a phone call during training and instead prepare for the second round of wrestling on October 19, 2011. He said Mr. Tican answered, "Fuck you, I am going to make this call." He found the Appellant to have acted in a manner that was "offensive, inappropriate and disrespectful".

Despite the safety concerns he expressed, Mr. Tican did not refuse to participate in the second bout of wrestling. Again, he found it hard to endure, claiming he was struck in his ribs. He summoned an ambulance and was taken to a hospital and soon discharged.

Two days later, on October 21, 2011, Mr. Tican's employment was terminated by the Respondent Alberta Solicitor General and Public Safety, as the department was then known. The dismissal letter noted: "your unsuitability for the role as displayed by your inappropriate behaviour during your time at Staff College. Despite being counseled and previously disciplined in relation to these matters, you have shown little improvement." In its filed response to this claim, the Respondent reiterates that Mr. Tican "was not successful at completing many of the portions of the 'Induction Training' and after numerous attempts to council (sic) and coach was terminated on October 21 based on unsuitability for the CPO role."

Over two months later, on December 28, 2011, the Appellant first made contact with the OHS Call Centre. He filed his formal written appeal to the OHS officer some 11 months after his dismissal.

OHS Decision

OHS investigated the Disciplinary Action Complaint in what appears to be a fair and thorough manner. The Appellant was given adequate time and opportunity to provide supporting evidence for his allegations. Evidence from the Respondent was obtained and fairly considered. The OHS officer's decision was released on January 30, 2014.

The standard three-part test was applied:

1 . the employee has complied with the legislation;

2. disciplinary action was taken against the employee; and

3. that discipline resulted from the employee's act of compliance.

The OHS officer concluded the Appellant satisfied the first two branches of this test. He wrote in his decision letter:

> The evidence reviewed indicates that you were attempting to act in compliance with section 2(2) of the Occupational Health and Safety Act. This section states, "every worker shall, while engaged in an occupation, take reasonable care to protect the health and safety of the worker and of other workers present while the worker is working, and co-operate with the worker's employer for the purposes of protecting the health and safety of the worker, other workers engaged in the work of the employer, and other workers not engaged in the work of that employer but present at the work site at which that work is being carried out."
>
> On October 19, 2011, you raised concern for your health and safety during the "Circle of Strength" training exercise, therefore you were attempting to comply with OHS legislation, specifically s. 2(2) of the OHS Act.

Everyone is agreed that the Appellant was dismissed from his employment on October 21, 2011. Therefore the second branch of the test is met.

As to the third branch, causal connection between the compliance and the discipline, the OHS officer wrote:

> There is no evidence to suggest that the disciplinary action taken against you was connected to your act of compliance.
>
> Your letter of termination dated October 21, advised you that your probationary employment with the Solicitor General was terminated as a result of your unsuitability. There is no evidence to suggest that the unsuitability determination was related to your health and safety compliance.

The OHS officer's overall decision was stated thus:

> Based upon the information you have provided, I find that the Employer did not violate s. 36 of the OHS Act in relation to your employment. The evidence does not meet all three elements. A connection has not been established between your act of compliance with the legislation and your dismissal. Therefore, OHS does not support your claim.

Applicable Jurisdiction and Law

The Act protects workers who are disciplined in any way for complying with the legislation. They have access to an OHS officer and, by appeal, to Council for a remedy.

If one has reasonable cause to believe one was disciplined for complying with applicable occupational health and safety legislation, one may file a disciplinary action complaint under section 37(1). It will then be investigated and reported upon by an OHS officer.

An officer's decision may be appealed to this Council [*OHS Act*, section 37(3)] and "the Council shall . . . hear appeals in accordance with this Act and the regulations" [*OHS Act*, section 7(b)]. The 30 day time period for filing the appeal was met in this case [*OHS Act*, section 37(3)].[3] As a reviewing body, Council`s standard of review is fairness of the OHS officer`s investigation and reasonableness of his or her decision according to the applicable law and facts.

Analysis and Order

We find that the OHS officer's conclusions on three branches of the test were supported by the evidence and reasonable. The Respondent states there were non-safety reasons why Mr. Tican was dismissed, including the fact that he had been admonished on at least two occasions prior to October 19, 2011 for behaviour-related matters. The employer said Mr. Tican was not meeting his training performance standards. The altercation with Sergeant Pascoe on October 19, 2011 was serious when one considers the importance of strictly following orders and higher authority in a security-sensitive environment. Ironically, the evidence suggests that the Appellant's behaviours during his short period of employment may have, especially if they carried over into the corrections environment, increased safety risks for himself and co-workers. If this Respondent said it dismissed the Appellant because he was not fit for this job, there was an evidentiary basis for that. If the OHS officer accepted that explanation, we see no basis to interfere with it.

The OHS Council has discretion to dismiss the request for a review without a hearing. Section 37(4) reads: *After considering the matter, the Council may by order (a) dismiss the request for a review . . .*

Council exercises this preliminary discretion to decline review of the OHS officer's decision on occasion. Grounds for doing so include where an appeal has on its facts or the law essentially no chance of success. We dismiss Mr. Tican's request for review of the January 30, 2014 OHS decision under section 37 (4) (a) for this reason.

The Appellant's request for a review of the OHS officer's decision contained in the January 30, 2014 letter is dismissed under section 37 (4) (a) of the *Occupational Health and Safety Act*.

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[3] The Appellant's Notice of Appeal was filed on time on February 4, 2014.