Occupational Health and Safety Council

Disciplinary Action Complaint

Adrian Tican

Appellant

and

Alberta Health Services

Respondent

ORDER

Panel Members: Peter Bowal (Chair), Sean Evans and Wally Baer

Appeal Decision: April 30, 2014

Alberta Jobs, Skills, Training and Labour

Occupational Health and Safety Council

Background

On March 14, 2011, the appellant, Mr. Adrian Tican, became employed on a temporary, full time basis with the respondent Alberta Health Services (AHS) at the Foothills Medical Centre in Calgary, Alberta. This temporary job was scheduled to end on July 25, 2011.

The appellant's job title was Service Worker 1. The job description read thus [Hearing Package Tab 16]:

> Under general supervision, responsible for the movement of all equipment and furniture as follows: stores reusable equipment /furniture; prepares surplus equipment and materials for disposal; physically moves furniture and equipment; exchanges beds and related patient room furniture as requested, assists in other areas of Asset Mgt at AHS and performs other related duties as assigned.

The stipulated job qualifications included [Tabs 16 and 17]:

> Warehousing experience is desired
>
> Must have demonstrated physical strength to handle frequent heavy lifting of bulk items (50 lbs or more) using safe lifting techniques
>
> Must how *(sic)* initiative and resourcefulness to set priorities and organize the timely delivery of equipment
>
> Must be dependable, thorough and be able to work effectively with minimal supervision.

In his original Disciplinary Action Complaint, the appellant described his work duties as "among other things, transporting and carrying heavy equipment and items around the hospital." [Tab 6]

In the appellant's original complaint, dated June 1, 2012 (but not filed until January 26, 2013), he states:

> . . . on or about June 17th, 2011, I, Adrian Tican, brought some safety concerns up to my superiors prior to suffering an injury and after suffering such injury and, in return, I was immediately dismissed … A lot of materials presently exist that can substantiate such unlawful, retaliatory, discriminative and unjust dismissal. [Tab 6]

It is not in dispute that on June 17, 2011, he was given slightly over two weeks' notice by AHS that this job would end three weeks earlier, on July 4, 2011. The June 17, 2011 termination letter gave no reason for the termination three weeks earlier in the temporary job. [Tab 29]

On June 18, 2011, the day after receiving the notice of upcoming termination, the appellant emailed his manager to say that he had suffered a back injury on June 17, 2011 while moving a television. He informed the manager that was medically advised to take 7 days off work and sent medical documentation. He did not return to work after June 17, 2011.

The Record of Employment shows the appellant was paid to July 4, 2011 and the reason for the termination was "shortage of work/ end of contract or season". [Tab 36]

More than 18 months after the termination, on January 26, 2013, the appellant filed the Disciplinary Action Complaint with Alberta Occupational Health and Safety ("OHS"). [Tab 6]

OHS Decision

OHS investigated the Disciplinary Action Complaint in what appears to be a fair and thorough manner for almost one year. The appellant was given a significant amount of time and opportunity to provide supporting evidence for his allegations. Several AHS co-workers, a supervisor and manager were interviewed. The OHS officer's decision was released on January 6, 2014.

We note that this is not a case of whether moving these televisions at work gave rise to imminent danger. This case is all about whether Mr. Tican raised a safety concern in mid-June 2011 to his AHS supervisors and, if so, whether the raising of that safety concern in any way contributed to discipline at his workplace, in this case the June 17, 2011 notice of termination. The essence of the complaint is that the appellant was disciplined as a result of raising a safety concern at work.

The OHS officer concluded that, apart from Mr. Tican, there was no evidence from the three identified co-workers, the supervisor and the manager that the appellant raised a safety issue before the afternoon of June 17, 2011 when he was notified that his employment would be ending on July 4, 2011. Indeed, the evidence received and filed during the investigation includes internal emails to and from the appellant's manager indicating the decision and process to terminate Mr. Tican before 1:00 p.m. on June 15, 2011 [Tab 27]. Before noon on June 16, 2011, an internal email reported: "A termination for Adrian Tican has been submitted." [Tab 28]

The substantial evidentiary record shows, and the OHS officer reasonably accepted, that Mr. Tican first raised the issue of safety and injury in an email to his manager the day *after* he was notified of his termination.

The OHS officer did not find evidence that the appellant's termination was disciplinary in nature. Accordingly, the Disciplinary Action Complaint was dismissed.

On January 18, 2014, Mr. Tican filed his appeal to this Council. [Tabs 1 and 14]

Nature of this Appeal to the OHS Council

In his Notice of Appeal, the appellant does not take issue with the conduct of the OHS officer's investigation or the reasoning of the decision. Rather, the appellant changes his story and adds more facts.

For the first time in the Disciplinary Action Complaint written documentation, the appellant now states that two days earlier, on June 15, 2011, he informed his immediate supervisor that he "was experiencing back pains, issues and that only one staff member being ordered and dispatched to lift heavy items can pose a grave safety concern." [para 3 of the Notice of Appeal]. No mention of that safety concern being raised on June 15, 2011 were evident in written materials relating to the grievance, human rights complaint and appeal to the Labour Relations Board, at least as far as the record of those proceedings were included in the material filed with this appeal.

It is curious that some 30 months after the event in question, a critical fact – if not the decisive fact – about when the safety concern was first advanced is first pleaded by the appellant. Mr. Tican's original complaint asserted that he first raised the safety concern on June 17th. The investigation established that the decision to terminate was made sometime before 1 p.m. on June 15th. For the first time some 30 months after the termination, the appellant adds to his narrative and claims to have raised the safety concern on June 15th.

The appellant "certified" that the information he provided on his original complaint dated June 1, 2012 was "true and accurate to [his] knowledge." On the Notice of Appeal dated January 9, 2014, he "certified" a more favourable set of facts of the same event also to be "true and accurate to [his] knowledge". He provided no explanation how his memory had improved 18 months later on such a pivotal factual matter as to when he first raised the safety concern.

Applicable Jurisdiction and Law

The *Occupational Health and Safety Act*[1] protects workers who are disciplined in any way for acting in compliance with the legislation. They have access to the OHS officer and, by appeal, to this Council for a remedy.

If one has reasonable cause to believe one was disciplined for complying with the applicable occupational health and safety legislation, one may file a disciplinary action complaint under section 37(1) which will 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)].

Analysis

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 officer's decision on occasion. Grounds for doing so include failure of the appellant to state a case within the legal authority of the Council, or one which has on its facts or the law essentially no chance of success, filing an incomplete Notice of Appeal, asserting for the first time on appeal new material facts or issues without adequate justification, refusal of the appellant to participate in the appeal or remain in contact with the Council, where the relief requested or obtainable is *de minimis*, where there it is clear that the appellant's matter has been adequately reviewed and decided in another forum with overlapping jurisdiction (such as a union grievance), where the appeal is frivolous, vexatious, filed with improper motives or otherwise an abuse of process, where the original event that gave rise to the complaint is substantially dated and other varieties of mootness where any Order of this OHS Council would have little practical effect.

Council dismisses Mr. Tican's request for review of the January 6, 2014 OHS decision under section 37(4) for the following two reasons.

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

(1.) Inordinate Delay in Filing the Disciplinary Action Complaint

Mr. Tican filed the Disciplinary Action Complaint more than 18 months after the conduct he complained of took place. While there is no specific limitation period in the governing legislation during which one must file the Complaint, a reasonable length of time will be implied for the case to be considered on appeal to Council. This is consistent with processing these Complaints, their investigation and decisions with realistic professional dispatch. For example, for Disciplinary Action Complaints, section 37(3) sets a 30-day deadline to this Council and section 37(7) sets the same 30-day deadline for appeals from this Council to the Court of Queen's Bench.

The Alberta OHS legislation is primarily remedial in nature. Imminent danger matters in section 35(3) call on a worker to notify employers "as soon as practicable." The scheme of Disciplinary Action Complaint legislative processes are designed to effectively and swiftly address both imminent dangers and employer retaliations for workers raising safety concerns and refusing work. This is reflected in the prompt and practical legal remedies: reinstatement to the former employment under the same terms and conditions, cessation of the disciplinary action, compensation and removal of reprimand or other references in the employment records. We note that the appellant has requested all of these remedies in this case. Even if he was successful, reinstatement to the same temporary job almost 3 years after termination to work out the balance of 3 more weeks is infeasible. It is not fair to the employer and it does not serve the interests of effective investigation of the Complaint to abide a worker who files it whenever he chooses unconstrained by time.

The OHS department and its officers may feel bound by the legislation to investigate and render a decision on all Disciplinary Action Complaints whenever filed. OHS Council, on the other hand, does not feel likewise bound and will exercise its discretion under section 37(4) to refuse reviews on the basis that the original Complaint was filed after inordinate delay without sufficient explanation. We note that the appellant appears to have completed and dated this written Complaint in proper form almost a year after the termination, but then did not file it with OHS for more than six months after that.

We refrain from setting a bright line limitation period for original Disciplinary Action Complaints to be filed before a right of appeal will be in jeopardy. We will consider each case on its individual merits under the totality of section 37(4) circumstances. In this case, delaying the start of the process by more than 18 months without justification is too long.

(2.) Essentially No Chance of Success

On a read of the written evidence, which is what the appellant has essentially requested,[2] the timing of the appellant's communicating any safety concern to the employer, if it was done at all, is dispositive to this case. As has been pointed out, one critical factual assertion on that point has been added to this appeal. Not only is this to be discouraged after a yearlong investigation to preserve the integrity of the administrative process, it raises the joint issues of credibility and fresh evidence at a very late stage – 30 months after the discipline is alleged to have happened.

Moreover, no fresh evidence is proposed in the Notice of Appeal. In particular, no fresh, independent, corroborative evidence of a June 15 safety notification to the employer is offered at this state in the proceedings. If there was no assertion or evidence of the June 15 safety notification for the first 30 months – lack of evidence being the reason for the OHS officer dismissing the Complaint – it is inconceivable how that evidence would materialize now. The appellant must appreciate that facts are established as such not by their mere utterance on an unsworn Notice of Appeal but by consistent and credible evidence of their substance. The OHS officer, after an exhaustive investigation found no credible evidence of Mr. Tican's claims to have notified the employer on June 17th. On the face of the record, at this point in this matter, we can see no reasonable chance of the appellant furnishing Council with consistent and credible evidence that he raised a safety concern with his employer on June 15th as he alleges.

Order

We all agree that Mr. Tican's request for a review of the OHS officer's decision contained in the January 6, 2014 letter is dismissed under section 37(4)(a) of the *Occupational Health and Safety Act*.

[2] The Notice of Appeal (para 2) reads: "My preference, at this point in time, is that the hearing of this appeal proceed solely by written submissions, and if contingent and possible, in part, orally."