

Occupational Health and Safety Council

Disciplinary Action Complaint

David Potinteanu

Appellant

and

KBR Industrial Canada Company

Respondent

ORDER

Panel Members: Rob Munro (Chair), Andrew Smith and Sean Evans

Decision: September 28, 2015

 Jobs, Skills, Training
and Labour

Occupational Health and Safety Council

Procedural History

On November 24, 2014, the appellant, Mr David Potinteu, was terminated from his employment with KBR Industrial Canada Company (KBR). A disciplinary action complaint was filed against KBR by Mr Potinteu on December 12, 2014.

The complaint was investigated by Occupational Health and Safety Officer Stephen Gledhill. In the decision letter dated January 13, 2015, Mr Gledhill stated in part:

Our assessment into this matter included the gathering and review of information from yourself and KBR Industrial Canada Co. My findings, in relation to the three part test, are as follows:

- 1. I find that the issue causing the termination of employment from the work site is not related to an act of compliance with the Occupational Health and Safety Act, Regulation and adopted Code. In that the worker failed to inform KBR Industrial Canada Co of a pre-existing condition that impacted the workers ability to use the personal protective equipment the employer provided.*
- 2. I find that had the worker completed the 'Medical Sign-on Form' accurately on August 12, 2014, he would have been accommodated with appropriate personal protective equipment that would not have aggravated his pre-existing condition. As the worker withheld the information from the employer, the employer was unable to facilitate an accommodation.*

The evidence does not meet all three parts of the legal test; therefore OHS does not support your complaint and does not find KBR Industrial Canada Co in violation of section 36 of the Occupational Health and Safety Act.

The January 13, 2015 decision letter was received by Mr Potinteu on January 30, 2015. The Notice of Appeal from Mr Potinteu was received on March 2, 2015 and was considered launched within the requisite 30 days because the Notice of Appeal was received the next business day after the 30 day time period. Mr Potinteu requested an oral hearing.

The hearing was scheduled for June 8, 2015. Mr Potinteu requested a postponement or extension on the hearing date. The *Rules of Procedure* for the Alberta Occupational Health and Safety Council cover such requests:

VII ADJOURNMENTS AND EXTENSIONS OF TIME

(a.) Any request for an adjournment of an oral hearing or more time to file written submissions shall be made in writing to the Chair of the Appeal Panel as soon as possible with detailed reasons for the request.

(b.) Adjournments are not granted as of right and they will rarely be granted near to, or during, an oral hearing in the absence of strong grounds. The Chair may consider the timeliness of the request, the reason(s) for the adjournment or extension of time, the position of the other party on the adjournment and time extension issue, and prejudice to any person that may be caused by the adjournment and the interests of effective administration of justice. The Chair may also consider the regulatory objectives and the overall interests of natural justice in considering whether to grant an adjournment or extension.

(c.) Where an adjournment of an oral hearing may cause inordinate delay, the Chair may direct that the appeal be conducted or completed by written submissions.

(d.) The personal convenience of legal counsel or other agents will generally serve as insufficient reason for an adjournment or extension of time unless the circumstances are exceptional or highly unusual.

The request for extension was treated as a request for an adjournment and the Panel Chair directed that the appeal would be conducted by written submissions as per article VII (c) of the *Rules of Procedure*. Mr Potinteu provided his written submissions on June 15, 2015. The respondent did not provide any additional information.

Jurisdiction and Applicable Law

The disciplinary action complaint and appeal of the decision of the OHS officer or manager are made under the authority of section 37 of the *Occupational Health and Safety Act*, RSA 2000, c O-2:¹

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

¹ <http://canlii.ca/t/5246j>

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.

The three-part legal test in disciplinary action complaints defined in 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 appeal to be successful under section 37.

Evidence and Facts

We reviewed all of the information provided by the parties. What follows is an outline of the evidence, which is neither in dispute nor unreasonable and can therefore be accepted as the facts underlying this appeal.

- Mr. Potinteanu was employed by KBR at the time material to this appeal;
- A document titled *KBR Disciplinary Notice* dated November 24, 2015 states that Mr Potinteanu's employment was terminated as a result of not wearing mandatory PPE – traction aids; and
- Mr Potinteanu replied in a statement dated December 5, 2014 with the following information
 - Mr Potinteanu was informed by KBR in October that traction aids were required to help prevent slipping
 - Mr Potinteanu experienced pain and discomfort while wearing the traction aids

- Mr Potineau informed his foreman that he could not wear the traction aids as they were causing pain
- Mr Potineau has a medical condition that can cause pain and discomfort in his legs under certain conditions
- Mr Pontinteu provided information on an alleged dispute that occurred earlier with respect to KBR providing the necessary precautions as listed on a Material Safety Data Sheet (MSDS).²
- Mr Potinteu provided a document dated December 9, 2014 from a physician at the Fort William Family Health Team that indicates he requires some accommodation on the type of device used as a traction aid.

Analysis

The standard of review applied by Council is one of reasonableness in regard to the decision rendered by the OHS Officer. That is to say, Council grants deference to the judgment of the OHS Officer who has expertise in conducting the investigation and making decisions on the facts and applicable law. Council will intervene to substitute its judgment only in the case of unreasonableness or palpable error in fact or in application of the applicable law.

The OHS Officer concluded that the evidence did not meet all three parts of the legal test. Therefore OHS did not support the complaint and did not find KBR in violation of Section 36 of the *Occupational Health and Safety Act*. Specifically, the officer concluded that the cause of termination of Mr Potinteu's employment was not related to an act of compliance with the *Occupational Health and Safety Act*, Regulation and the adopted *OHS Code*. If the employer was not made aware of Mr Potinteu's accommodation need, or otherwise was not aware of it (and there is no evidence it should have known about it in this case), it could not have terminated Mr Potinteu for that reason.

We agree with the OHS officer that the issue causing termination of employment was not related to an act of compliance with the *Occupational Health and Safety Act*, Regulation and adopted *Code*. KBR determined that traction aids were a necessary piece of Personal Protective Equipment and several attempts were made to find a suitable traction aid for Mr Potinteu. However, Mr Potinteu has a

² The panel reviewed this evidence and excluded it from consideration as it was not germane to the case and represented a separate matter outside the scope of this appeal.

specific condition that makes this difficult. Ultimately, KBR terminated employment as Mr Potinteu would not wear any traction aid. As such, there was no act of compliance on the part of the appellant that caused or resulted in his discipline at work.

The OHS officer also found that Mr Potinteu failed to inform KBR of a pre-existing condition on a “Medical Sign-On Form” and that if he had informed KBR, he would have been accommodated. The Alberta occupational health and safety legislation does not mandate medical accommodation. Accordingly, this issue falls outside of the legal authority of this Council.

Conclusion

We find that the employment discipline in this case did not occur as a result of Mr Potinteu acting in compliance with the Act. The job discipline pre-dated the appellant’s health condition being brought to the employer’s attention.

The appeal is dismissed and the decision of the OHS officer is confirmed.