Occupational Health and Safety Council

Disciplinary Action Complaint

(by written submissions)

Derek Thompson Appellant

v.

Sterling Crane Ltd. Respondent

ORDER

Panel Members	Nina Novak (Chair), Evan Edbom, and Bill Spring
Document Submissions	For the Appellant: Mr. D. Thompson
	For the Respondent: Mr. B. Picken
Decision	October 22, 2015

Disposition

This disciplinary action complaint appeal is granted. The removal of any reference to this matter on Mr. Thompson's employment and union records and reinstatement of employment is ordered for the reasons set out below.

Facts

The Appellant requested the appeal format to be in written submission format only. The following documents were submitted for this review:

- Notice of Appeal dated May 26, 2015, with attached email from Appellant to the Director of Inspection, Alberta OHS dated May 25, 2015;

- Respondent Statement questionnaire dated June 8, 2015;

- Letter from M.D. McGown, Q.C. of McGown Johnson legal firm to Ms. Tannis Brown, Director of Settlement, Alberta Labour Relations Board dated June 26, 2015 with copies sent to Mr. Derek Thompson, Mr. Bruce Moffatt of Local 955 of the International Union of Operating Engineers, and to the Labour Relations department of Procrane Inc.

The Appellant, Mr. Derek Thompson, started work at Sterling Crane Ltd., Division of Procrane Inc. in Edmonton, Alberta on September 8, 2014. His duties included working with cranes operated by his employer. He discovered that the employer was not doing required maintenance, specifically failing to bleed out the air from the suspension cylinders as required in the Operation and Maintenance Manual. He made note of this in the crane log book.

The Appellant raised concerns regarding cranes not receiving necessary maintenance work on November 3, 2014 at a meeting requested by the employer. The employer apparently indicated that it would look into the problem and get back to the Appellant. During this meeting the Appellant stated that if the maintenance was not implemented within 30 days, that he would report this as an imminent danger to Alberta OHS. The Appellant was not aware of any evidence that the crane suspension system lines were being bled of any air after the 30 days.

On December 8, 2014 the Respondent's representative, Mr. Jason Cain, sent a letter to the International Union of Operating Engineers (IOUE) stating that the Respondent would not accept any dispatches of the Appellant to any of their Alberta branches.

On December 9, 2014, the Appellant filed a complaint to the Alberta OHS department, by registered mail, regarding the employer's lack of resolution on the crane safety concern that he had raised. The Appellant said he discussed this complaint submission with Mr. Justin Brodziak, the Appellant's foreman at Sterling Crane on December 10, 2014. This conversation is refuted by the Respondent.

On December 12, 2014, the Appellant was laid off, with the Respondent indicating that the customer did not need the crane operated by the Appellant any more. The Appellant's Record of Employment referenced 'not returning'. The Respondent indicated that an email supporting the lack of customer need had been provided to the investigating OHS officer but this material was not included in the Appellant or Respondent's submissions to the OHS Council.

On behalf of the Respondent, Mr. Bob Picken submitted a 'letter' to Bill Stewart of the IUOE Local 955 on the Appellant's employee file on December 15, 2014.

The Respondent was contacted on December 18 by an OHS officer who informed them of the filed complaint. The next day, the Appellant discussed his concerns with an OHS officer.

At a union facilitated meeting on January 9, 2015 discussions regarded the removal of the two letters issued by the Respondent. Discussions were also held about crane usage and safety (swinging over the side), layoff of operators, transportation to and from the site, issues about a site suspension, termination issues, alleged harassment issues by the Appellant against company personnel including Bob Pickens, and the Appellant's legislated right to make safety complaints. In attendance were Neil Tidsbury (CLR), Jason Cain and Bob Picken (Sterling Crane), and the Appellant. There was no resolution of the issues at that meeting.

The Respondent subsequently removed these two letters, the December 8 letter written by Jason Cain to the Appellant's employee file and the December 15 letter of expectation from Bob Picken to Bill Stewart of IUOE Local 955, on February 2, 2015.

On February 18, 2015, a second Alberta OHS officer notified the Respondent of the investigation into the filed complaint. The decision letter was issued May 15th, 2015 concluding that they did not find substantiation to all the necessary tests required to support the complaint.

A June 26, 2015 letter provided by the Appellant from Mr. M.D. McGown, Q.C to Ms. Tannis Brown of the Alberta Labour Relations Board stated, in part:

> . . . OHS inspected the cranes complained of and found that maintenance was not as required by the manuals. Sterling corrected the process and said they would be going to the manufacturer to

determine if the manual service in question was required. Local 955 has been advised that process as completed and in May 2015 a notice was sent (with a later confirmation from Sterling) that bleeding did not have to be done on a monthly basis as alleged by DT.

Disciplinary Action Complaint

The disciplinary action complaint and appeal of the decision of the OHS officer or manager are made under the authority of section 37 of the Alberta *Occupational Health and Safety 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.*

The three-part legal test in these disciplinary action complaints, from sections 36 and 37 of the *Act*, is:

(1.) The worker acted in compliance with the *Act*;
(2.) The worker was disciplined; and
(3.) The worker was disciplined *because of* his/her act of compliance.

All three parts must be answered in the affirmative for the worker's complaint to succeed under section 37.

The investigating OHS Officer in a decision letter to Mr. Thompson dated May 15th, 2015 determined that there was insufficient information to support Mr. Thompson's Disciplinary Action complaint. The basis for that conclusion was that:

- The worker had acted in compliance with the Act when he entered into a log book the perceived safety concern related to the crane

maintenance activities;

- Based on the investigating OHS officer's interpretation that a violation to section 36 requires knowledge on the part of the employer of the act of compliance, and that there was not an OHS Officer assigned to the complaint until December 17th, and only contacting the employer on December 18th, 2014, that the employer would have been unaware of the filed complaint;

- The investigating officer's dismissal of the disciplinary letters (one to the Union and the other on his employee file) on the basis that they had been rescinded prior to the complaint submission date; and

- That the Appellant's lay-off and that of two other employees was due to lack of work.

The investigating OHS officer concluded that the Appellant did not satisfy the second or third required conditions necessary to satisfy for a disciplinary action complaint.

While this Council grants deference to the investigating OHS officer, it is our respectful view that the investigating officer rendered a decision in this case that is not supported by a balanced review of the evidence.

We find the issuance of the two letters were disciplinary in nature, as was the Appellant's termination of employment. An important consideration in this written appeal process was that there was a lack of information submitted on behalf of the Respondent to support its contention of lack of employment need for that crane operator. As this was a key point for the conclusion of the OHS officer's evaluation, it is expected the Respondent would have provided this documentation in its written response to this appeal. There was no documentation provided to support this assertion.

The Appellant had also filed a grievance with the union, which facilitated the January 9, 2015 meeting between the Appellant and the Respondent to discuss crane usage and layoff of operators, among other items. The union indicated there was no resolution of the issues at that meeting, or a subsequent telephone discussion with the Appellant on January 20th, 2015. We note the two letters of concern, however, were subsequently withdrawn by the Respondent on February 2, 2015.

Consequently, the actions of employment termination and disciplinary letter issuance could be interpreted as causally connected to the Appellant's act of compliance with the OHS legislation (i.e. his noting inspection omissions related to the cranes both verbally and documented in the crane log books).

With regard to the OHS officer's conclusion that the Respondent was not aware of the

Appellant's complaint until after his termination, there does not appear to be sufficient documentation provided to support this in this written appeal process. The fact that the Appellant recorded his concerns in the crane log book and discussed these concerns with the employer when initially noted (and prior to his termination) suggests that the Respondent would have been aware of the Appellant's safety concerns before his termination.

It is our conclusion that Mr. Thompson has met all three parts of the applicable legal test in relation to the issuance of the disciplinary action related to the Respondent's submission of the two letters and termination of employment.

Legal Remedy

Section 37(4) of the *OHS Act* sets out the range of remedies available in this case:

> *After considering the matter, the Council may by order . . .*
>
> *(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.*

In the appeal submission, Mr. Thompson indicated that he was seeking all four forms of relief in section 37 (4) (b) above.

The requested removal of any reprimand or reference to this matter from Mr. Thompson's employment records, and the letter to the union have already been removed, satisfying (ii) and (iv) above.

Based on the information provided, we note a temporal and an inferred association between the retracted letters issued by the Respondent and the Appellant`s safety concerns mentioned both verbally to his employer at the time these concerns were observed and their documentation in the crane log books. In addition, this association appears coincidental to the employee`s termination. When considered in

conjunction with the lack of information provided by the Respondent to support its contention that the layoff was due to lack of work, we agree that the Appellant`s termination is related to the safety concerns he raised. We order the reinstatement of the worker to the worker's former employment or equivalent duties on the condition that the Respondent has sufficient workload to require additional staff with the Respondent's skills.

We further order Sterling Crane to pay Mr. Thompson compensation amounting to 'the equivalent of wages that the worker would have earned if the worker had not been dismissed' (section 37 (4) (iii)). This amount is to be limited to a period of one month, or less if the Appellant had started employment within one month after termination from Sterling Crane Ltd. To calculate the dollar amount, Sterling is to determine Mr. Thompson's average weekly wages based on his employment history. The number of weeks constituting one month after Mr. Thompson's termination December 12, 2014, or the days until he received income from other employment within that one month timeframe, shall then be used to determine the gross amount owing to Mr. Thompson. From this amount, the employer is obliged to make regular and standard payroll source deductions and remit the net amount of payment to Mr. Thompson within 45 days of the date of this Order. In the event of default of payment by that date, Mr. Thompson may apply to the OHS Director of Inspection for enforcement under the legislation.

Conclusion

The appeal is granted and the decision of the OHS officer is set aside.

The Council concludes that the appellant employee, Mr. Derek Thompson, was disciplined by his employer because he raised legitimate safety concerns at his workplace in November 2014, specifically crane maintenance not following operating manual requirements.

Mr. Thompson is entitled to monetary compensation of not more than the equivalent of wages that he would have earned if he had not been suspended from December 12, 2014 until his subsequent fulltime employment, to a maximum of one month's wages. Mr. Thompson is also entitled to reinstatement to his former employment or equivalent duties on the project he had worked on, given the condition that the Respondent has sufficient workload to require additional staff with the Respondent's skills or if there have been similar project hires since his termination that are still active. The entitlement to reinstatement of employment shall be in effect up to one year from the date of Mr. Thompson's termination from Sterling Crane Ltd. This condition to reinstate on the provision of sufficient employer's work needs expires on midnight December 12, 2015.

In the event of default of payment by that date, Mr. Thompson may apply to the OHS Director of Inspection for enforcement under the legislation.

Reasons of Bill Spring, dissenting in part:

I generally agree with what is reflected above respecting some of the documentation our appeal panel received and conclusions we decided upon, including the finding that the appellant had his employment terminated by the respondent because of his promised intent to formally complain and his actual complaint to OHS about crane maintenance not being done.

I agree with the remedies prescribed for the Appellant by the majority of the appeal panel insofar as him being reinstated to work, but I disagree with the maximum of one month's lost wages ordered for the respondent to pay him leading up to that reinstatement.

Given my finding that the crane the appellant had been operating continued to be utilized on the project he'd been working on after his termination of employment, contrary to what the respondent had indicated to the investigating OHS Officer; and my further finding that other similarly skilled operators were subsequently hired to do work he was capable of doing there; he should be paid lost wages for all of the time that crane remained there and/or for as long as any of those other similarly skilled operators continued working there leading up to the time of his reinstatement.

An OHS Officer should act to:

1. Review respondent equipment log book records to confirm how long the crane the appellant was operating remained operating on the site in question leading up to the appellant's reinstatement to work; and

2. Request the appellant's union to provide documentation reflecting what number of its members in this closed shop working environment with similar skills as what the appellant had were dispatched to work for the respondent for how long on that site leading up to the appellant's reinstatement to work.

Based on those findings, the OHS Officer should direct the respondent to pay lost wages to the appellant within the time and way described above for as long a time period as what the majority of the panel ordered and additionally for as long as one or the other of the above two scenarios continued.