

# Occupational Health and Safety Council

## Disciplinary Action Complaint

(by written submissions)

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**Kirk Perrin**

**Appellant**

and

**Flint Integrated Services Inc.**

**Respondent**

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## ORDER

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**Panel Members:** Wallace Baer (Chair), Andrew Smith, Sean Evans

**Document Submissions:**

For the Appellant	Mr. Kirk Perrin
For the Respondent	none

**Decision:** January 12, 2016

 Jobs, Skills, Training  
and Labour

**Occupational Health and Safety Council**

## **Disposition**

An email to Mr. Kirk Perrin dated December 18, 2014 confirmed a job opportunity for pipefitters with Flint Integrated Services Inc. (Flint) at the Keyera De-Ethimizer project “for one 24 day shift starting January 5<sup>th</sup> in Fort Saskatchewan.”

On January 16 and 17, 2015, Mr. Perrin raised a safety concern with Flint and his employment was terminated. The OHS officer found this termination to have been caused by Mr. Perrin’s raising of the safety issue and ordered Flint to pay one week of compensation to Mr. Perrin.

Mr. Perrin appeals the quantum of that compensation order and seeks other relief, including reinstatement. We grant Mr. Perrin’s appeal in part as to the compensation amount and dismiss his appeal for other remedies.

## **Procedural History**

On January 19, 2015, Mr. Perrin filed a complaint with Occupational Health and Safety alleging he was wrongfully disciplined by Flint for complying with the Alberta *Occupational Health and Safety Act*, Regulation or adopted Code.

An investigation was conducted by an OHS officer who issued his decision in a letter dated August 31, 2015. The compensation order was issued by letter the next day.

On September 28, 2015, Mr. Perrin’s appeal to this Council was filed under section 37 (3) of the *Occupational Health and Safety Act*, which is within the requisite 30 days of receiving that decision. He requested that this appeal be heard and decided by written submissions only.

After the appeal was filed, we invited the OHS officer to provide further reasons for his decision. He did so in an email dated October 2, 2015, which statement was distributed to the parties and which we have also taken into consideration in this appeal.

## **What the Parties are Seeking**

Mr. Perrin requested full relief under section 37 (4) (b) (i) through (iv), which reads as follows:

37 (4) 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.

Flint did not make any submissions in this appeal.

## **Facts**

The facts in this case were not challenged. On the day after starting work, Mr. Perrin received an email from Flint confirming its "plan on transitioning all reliable workers on this job to other jobs starting in February and March as well, as our recruitment strategy always considers rehires and transfers number one priority when filling roles for upcoming work." The Flint email also described a \$1000 completion bonus to be earned if one would "show up to site first day (yesterday) and work until the end of the contract (24 days as of now)."

Mr. Perrin would not see that extension of work, nor the bonus. Indeed his employment was brought to an end about half way through the January 2015 commitment. We quote the following from the OHS officer's decision letter:

On January 16<sup>th</sup>, 2015, you [Mr. Perrin] brought forward a concern to your supervisor that the valves you were replacing were only rated for 2000 psi and the subsequent hydro test was to be conducted at 2150 psi. On January 17<sup>th</sup>, 2015 you raised the same concern in a morning toolbox meeting in which your supervisor and the manager were present. In a side meeting with the manager you raised your concern again and before you left the site you made your safety concern known to the Health and Safety Lead at the worksite.

On the morning of January 17<sup>th</sup>, 2015, you were relieved of your duties from Flint Integrated Services Inc. at the Keyera De-Ethanizer project and provided with a ride off site.

### **Disciplinary Action Complaint**

To address allegations of disciplinary action taken by employers, it is necessary to establish that there is a contravention of section 36 of the *OHS Act*, which states:

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 or the adopted code or an order given under this Act or the regulations.

An OHS investigation into disciplinary action complaints must establish the following three elements:

- (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.

### **Decision of the OHS Officer**

The investigating OHS officer found that Mr. Perrin had made out all three elements of this Disciplinary Action Complaint. These findings have not been challenged and are not before this Council.

In September 1, 2015 letter setting out the remedy, the OHS officer wrote:

The employer has been ordered to pay you the equivalent of one week's wages equaling the gross amount of \$2180.56 less \$745.12 for deductions of Federal Income Tax, CPP, EI and Merit equaling a net total of \$1435.44. This is equal to the amount on the pay stub you received for the pay period ending 01/10/2015.

In an email dated October 2, 2015, the officer followed up with his reasons for this remedy:

The rationale for the amount of the payout follows the Employment Standards consideration of two weeks' pay. However in this case

there were more experienced workers being let go throughout the job duration because the work was ending.

The job was a one-time offer of 24 days. No further work was guaranteed.

The bonus was paid out only if workers lasted the term.

The amount awarded to Mr. Perrin reflects the consideration that he may have continued to work for an additional week at the site before he would have been laid off.

It is reasonable to consider that if Mr. Perrin had not been disciplined for his attempt to comply with the OHS legislation, he may have been let go days later with other workers as part of the impending job shut down.

The awarded amount matches the exact amount of a previous pay check for a similar one week period.

I am not aware of any reprimand letter or that Mr. Perrin is being denied work.

The job he hired to was completed.

It is unreasonable for an employer on a temporary worksite with a fixed job duration to bear the burden of providing long term permanent work for a temporary work force.

Mr. Perrin seeks compensation for the full remainder of the 24 day employment. When his work was terminated on January 17, 2015, he would have had approximately 12 more days of employment entitlement. The officer limited his damages compensation to 7 days. Mr. Perrin also appeals for reinstatement, cessation of disciplinary action and removal of any reprimand which the OHS officer did not order.

### **OHS Council Review: Analysis and Findings**

As already indicated, this appeal is not about liability. Rather, Mr. Perrin appeals against the officer's determination of quantum of compensation damages and the failure to order other available remedies.

Mr Perrin says he was informed by Flint in April 2015 that he was on a "do not hire" list because of an unsatisfactory job completion. On the basis of Flint's

promise of extended work in its January 6, 2015 email, Mr. Perrin asks “that Flint make arrangements to transition me into a mutually suitable employment contract.” It is not clear whether this email was available and considered by the OHS officer.

Mr. Perrin argues: “it is impossible to predict what would have happened if the events of January 17<sup>th</sup> went differently. I would argue that it is just as likely that I would have completed the project as it is that I would have not completed the project. I was denied the opportunity to complete the end of my contract and the contract states a 24 day working period which shows that Flint had every intention of employing me for the 24 day period.” With respect to his entitlement to a \$1000 completion bonus, he continues: “[the Officer] found that Flint was acting in contradiction of the Occupational Health and Safety Act by terminating my employment on January 17<sup>th</sup>. Up until that time I had completed all the requirements to obtain the bonus. I should not be denied the bonus because of my employer violating the Occupational Health and Safety Act.”

We have carefully considered the OHS officer’s rationale for the compensation order as a result of Flint’s disciplinary action. We vary that part of the officer’s decision for the following reasons.

The documentary evidence is not strong enough to support the assumption that Mr. Perrin would have been laid off before the end of the 24 day contract. Reference to the *Employment Standards Code* is not compelling in this case. Mr Perrin’s contract is excluded from that legislation because he was employed for a definite term of less than 12 months and it was in the construction industry. If it did apply, the two week notice period would begin on the day of layoff and not the day of commencement. In any case, our obligation is to decide this matter based on section 37 (4) (b) (iii) of the *Occupational Health and Safety Act* where a successful employee is entitled to monetary compensation of not more than the equivalent of wages that he would have earned if he had not been unlawfully disciplined under the Act.

The unlawful termination having been established, we think Mr. Perrin should receive the balance of what he would have earned in this 24 day employment had it not been interrupted by the unlawful termination and the promised bonus.

As to Mr. Perrin’s request for reinstatement, cessation of disciplinary action and removal of reprimand, we find the decision of the OHS officer to be reasonable. The disciplinary action was specific to the 24 day contract. There is no documentary evidence of an employment record with a reprimand nor a further reaching position taken by Flint regarding hiring Perrin for future contracts. We agree with the officer’s position that it is unreasonable for an employer on a temporary worksite with a fixed job duration to bear the burden of providing long

term permanent work for a temporary workforce. The appeal for relief under Section 37 (4) (b) (i), (ii) and (iv) is denied.

**Order**

The appeal is granted in part and the decision of the OHS officer is varied only as to compensation damages.

We order Flint Integrated Services Ltd. to pay Mr. Kirk Perrin the unpaid balance of the 24 day contract including overtime, travel time and vacation pay, less statutory deductions. We further order Flint Integrated Services Ltd. to pay Mr. Kirk Perrin the completion bonus of \$1000, less statutory deductions.

All payments are to be made within 45 days of the date of this Order. In the event of any unresolved dispute between the parties as to final compensation calculations, or in default of payment by that date, Mr. Perrin may apply to the applicable Occupational Health and Safety Director of Inspection for quantum determination and enforcement under the legislation.

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