Occupational Health and Safety Council

Disciplinary Action Complaint

ISRAEL VERA, FRANCESCO VERA and IVAN VARELA

Appellants

and

LYDALE CONSTRUCTION LTD.

Respondent

ORDER

Panel Members: Peter Bowal (Chair), Nina Novak and Evan Edbom

Appearances: For the Appellants: Jasvir Sandhu, Calgary Workers' Resource Centre

For the Respondent: Mark M. Kirwin

Appeal Hearing: October 8, 2015

Decision: February 8, 2016

Alberta

Labour

Occupational Health and Safety Council

Disposition

The three individual Appellants were co-workers at the Respondent Lydale Construction Ltd. ("Lydale"). They allege that they were dismissed from their employment at the same time by Lydale for what they say was their compliance with the Alberta occupational health and safety legislation.

The OHS officer who investigated their complaint did not find sufficient evidence to support the Appellants' claim that they had been dismissed from their employment because they raised a safety issue in compliance with the legislation. He dismissed the complaint. As a result of our review of his decision, and for the reasons which follow, we dismiss the appeal.

Procedural History

The Appellants were dismissed by Lydale on March 31, 2014. They filed their Disciplinary Action Complaint on April 28, 2014. The OHS officer rendered his decision by letter dated May 12, 2015. An appeal was received by this Council on June 9, 2015, which is within the requisite statutory 30 day period for filing an appeal. The oral hearing was held in Calgary, Alberta on October 8, 2015.

What the Parties are Seeking

The Appellants are seeking compensation damages under section 37(4)(b)(iii) of the *Occupational Health and Safety Act*. The Respondent seeks dismissal of the appeal.

Preliminary Issues

The Appellants worked together and, despite only one of them working on the second project as described below, the facts material to this appeal are essentially the same as applied to them. They filed their claims together and their claims were joined and considered together by the officer. The same joint process was followed before the OHS Council.

The Appellants requested and were provided with a Spanish-language interpreter at the oral hearing of this appeal.

Facts

As is frequently the case in these Disciplinary Action Complaints, the facts are difficult to ascertain. Or, put another way, it is difficult to distinguish safety-related issues from other human resource or performance management-related issues. The parties here disagree on what happened in relation to critical actions and communications leading up to the employer discipline. In this case, the safety concerns revolve around two projects at work in Calgary: the Norfolk Asbestos Project and the Woodbine Mould Remediation Project.

Norfolk Asbestos Project (March 3 to 14, 2014)

The Appellants complained to their supervisor that the Project Manager had once entered the containment area without wearing a mask which was proper Personal Protective Equipment (PPE). The employer investigated. The Project Manager denied this breach but was reprimanded anyway.

The employer had contracted with an outside safety consultant to monitor the project overall. During its inspections, the consultant found this asbestos abatement work to be compliant with requirements. Nothing about this PPE incident was noted in the Hazard Assessments and Safety Worksheets.

This incident demonstrated that the Appellants were vigilant and even small safety violations would be quickly dealt with by the employer. It did not, at least at that time, result in any discipline to any of the Appellants.

Woodbine Mould Remediation Project (March 27 to 28, 2014)

Of the Appellants, only Mr. Israel Vera and another employee, Mr. U. (who is not one of the Appellants) worked on this small job. Mr. Vera, outside the containment area, observed Mr. U. working without proper PPE inside the containment area. Mr. Vera made a 45-second video of that violation with his phone and gave it to the Safety Manager at Lydale later that day.

At the beginning of the next work day, March 31, 2014, all three Appellants were dismissed from their employment by Lydale, along with Mr. U. and the fifth member of this asbestos remediation team.

Evidence and Position of the Appellants

The three Appellants say they jointly delivered letters to Lydale's safety officers early on the morning of March 31, 2014. They left them with a secretary or receptionist who they could not identify. These letters generally warned that Lydale's own safety procedures were not being followed and they were being forced

to work under unsafe conditions. We refer to these as "the protest letters." We are not convinced that communications which generally express safety concerns, such as these letters, provide sufficient specificity to enable employers to respond effectively. If not, such communications cannot afford protections against discipline under the Act to the person expressing them. As it turns out, we do not have to decide that issue in this case.

The Appellants say they were then promptly dismissed because they raised these legitimate safety issues at their workplace. They were not aware of any performance shortcomings on their part. In fact, some of them enjoyed a small pay increase over the year they were employed with Lydale. They claim that the timing of the dismissals almost immediately right after they delivered the letters could only be understood as retaliatory discipline. They say the three separate events – namely, the two projects leading up to the delivery of their protest letters – within about two weeks constituted one and the same safety issue, dealing as they did with the same individuals at the same workplace.

Mr. Israel Vera added that the video he took was about 45 seconds even though the PPE non-compliance of his co-worker on the mould project continued for 1½ hours. He said he did not work during that time.

Overall, the Appellants' appeal is grounded in how the OHS officer accorded most weight to the employer's evidence on matters which were factually unclear.

Evidence and Position of the Respondent

Mr. Darren Tangen, the corporate safety manager at Lydale, testified about how Lydale employees are trained and monitored. Lydale is regularly inspected by OHS because of the hazardous nature of its abatement and remediation work. To date these safety inspections have turned up nothing of concern and no orders have been issued. Mr. Tangen says the company takes safety seriously and invests heavily in safety training. In the two issues in this case, asbestos and mould, both non-compliant workers were immediately disciplined. He pointed out that a third party hygiene consultant also confirmed that there were no safety concerns.

Lydale managers had several concerns about the work performance of these Appellants and the rest of their group. These included extra hours that were being charged and how containment was being done. Costs were higher than on other jobs and teams. Some overtime was unauthorized, containment set-ups and jobs were taking much longer than budgeted, and this group's overall labour costs were too high. This crew once caused significant damage to a client's floor for which Lydale had to pay. These seemed to be beyond skill or training matters because the workers were well trained, internally and through the Government of Alberta. These problems were confined to this crew.

After the Woodbine Mould Remediation project, Mr. Tangen was called by the safety supervisor who mentioned the video. They watched the video and saw their employees working unsafely. They were concerned things were not being done right, knowing they had protocols on how to deal with co-workers who are not following the safety rules. This included the requirement to directly and immediately confront the non-compliant co-worker and reporting the problem to a supervisor. Provincial regulations require refusal of further work in an unsafe environment and Mr. Vera here assisted with the take down of the containment area.

Lydale said Mr. Vera also violated the safety rules in making the video. He was secretly shooting video while his co-worker was at risk. Not only did he record his unprotected co-worker, he failed to stop him from working unsafely and he failed to immediately report this breach to the employer. Lydale says he waited and kept the hazard alive deliberately, when he should have immediately dealt with it. Lydale said Mr. Vera himself did not comply with safety legislation or corporate policy.

The supervisors said they had to be aggressive on safety violations, especially statutory violations, and the culture animating this particular crew. There had been warnings and now the time had come to deal with it. Lydale saw this video as "the last straw" to dismiss that whole asbestos group, especially as this group "was losing money for us and we had to cut our losses." The decision was made on the afternoon of Friday, March 28, once the video was discovered, to terminate this whole asbestos crew on Monday morning when they showed up for work.

As for the protest letters, Lydale said the safety managers were not in the office that morning of March 31, 2014. They received one letter when they arrived back in the office that afternoon. The other letter was only received when the OHS officer showed it to Lydale.

Mr. Tangen said Lydale gave pay increases to keep these employees because it is hard to get and keep asbestos workers. In fact, the company still had not replaced them as of the date of the hearing. That was convincing evidence that Lydale did not lightly or frivolously dismiss these Appellants nor dismiss them out of retaliation. Lydale dismissed all five members of this asbestos group because it was a crew that was not working out. That the company did this even when it could not get enough asbestos workers suggests this was a decision made about this group of workers.

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 *OHS Act*:

> *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 to succeed under section 37.

Decision of the OHS Officer

The investigating OHS officer, in a five-page decision letter dated May 12, 2015, dismissed the complaint by the appellants. He found that Mr. Vera had not notified his employer of his refusal and the reason for his refusal pursuant to section 35(3) of the Act. Indeed he seemed to conclude there was no refusal by Mr. Vera at all: "[Mr. Vera] took a video of his co-worker grinding without proper PPE but did not communicate this to the employer until after the project was completed. The evidence indicated that [he] helped his co-worker to finish the project." (page 3) Mr. Vera helped the co-worker dismantle the containment structure.

The OHS officer noted that all three Appellants were dismissed from their employment but the causal connection between an act of compliance and the dismissal had not been established.

OHS Council Review: Analysis and Findings

Independent and objective investigation by OHS officers in these cases is usually very helpful in ascertaining the facts most material to the outcome. The critical facts in dispute here are whether there was a proper refusal to work by Mr. Vera on March 28, 2014, and whether Lydale had actual possession of the Appellants' protest letters before it made its dismissal decisions and, if so, whether it based its dismissal decisions at least in part on those letters.

The OHS officer gave evidence at our appeal hearing. He said he started the investigation the day the complaint was filed in Spanish. He met with each of the appellants in June and July, and all three were together in the meetings. He met with representatives of the Respondent several times and the company provided internal records. From the bits and pieces of evidence, some of it contradictory, the OHS officer pulled the case together over a year. He continued to go back and seek more evidence and cross-check the information so as not make assumptions, although much proof of the allegations was absent. The officer called on a technical advisor and another officer but made the decision himself.

We are convinced the OHS officer conducted a full and thorough investigation and meticulously sorted through the evidence gathered to make his conclusions. He reviewed Lydale's safety program and practice and found it to be compliant, consistent with external validation. He relied on witness statements and evidence he obtained independently. Where oral evidence was contradictory, he gave priority to written evidence and carefully followed the paper trail on text messages, receipts and date stamps. He evaluated the credibility of the oral evidence such as where the Appellants said they dropped off the protest letters with the secretary, observing that they could have left them with other safety supervisors if their intended recipient was out of the office. The secretary said she did not remember them dropping off the letters and the Appellants did not know the identity of the secretary. The officer weighed oral evidence against documentary evidence such as texts sent at the time. He asked Mr. Vera for phone and text records to support claims that he tried to communicate his refusal to Lydale. None were forthcoming. The OHS officer chose to rely on documentation prepared before the dismissal because records filed with government agencies after the dismissal would not necessarily be informative about pre-dismissal safety issues.

The Appellants concede that the OHS officer's investigation was fair. They disagree with the OHS officer's conclusions. Our standard of review is reasonableness. If we conclude the OHS officer's conclusions were reasonable on the basis of the relevant evidence before him, we must dismiss the appeal. We are of the view that the OHS officer's factual and legal conclusions were reasonable and we accordingly dismiss this appeal.

At this appeal hearing, the officer reviewed the evidence he had before him when he arrived at his decision. He had perceived some personal conflict between at least one of the Appellants and a safety supervisor. He concluded that the asbestos incident was a minor isolated event that had been quickly dealt with. Likewise, Mr. Vera did not refuse unsafe work as he was required to do under the legislation. The officer accepted that the judgment to make the video – and not to immediately escalate the safety issue – was a plausible factor in his dismissal, and the employer's disquiet that had been building with this asbestos crew may have been a reasonable explanation for the termination of the entire group without further incident on a performance management basis. The OHS officer could not confirm that the protest letters were both received by Lydale at all, much less received before the dismissal decisions were taken. Lydale's evidence that it only received one of those letters, and that occurred after it had made its decision on the afternoon of March 28, was plausible and unchallenged.

The whole five member asbestos group was dismissed at the same time early on March 28, 2014. Dismissed in this group was an unidentified worker who was not associated with any of these three events and two of the Appellants who were associated with only two of them. By taking this action, the Respondent suddenly put itself at corporate risk of not being in a position to replace them. It might remain understaffed in asbestos abatement talent. The OHS officer was free and reasonable to infer from this scenario that the reason for these concurrent group dismissals was consistent with the rationale offered by the employer and not the rationale offered by the Appellants.

Finally, we believe that the Appellants received, for the first time at the appeal hearing, some valuable disclosure about the circumstances of their dismissal. This information should be shared by employers with their employees before this administrative process stage. Likewise, we encourage OHS officers who generate, as products of their investigations, tables of evidence and findings to attach these documents to their decision letters.

In conclusion, we are of the view that the OHS officer's investigation was thorough and fair. His conclusions were reasonable in light of the evidence before him.

Order

Under section 37(4) of the *OHS Act*, for the reasons set out above, we dismiss the appeal. The decision of the OHS officer is confirmed.

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