

Occupational Health and Safety Council

Disciplinary Action Complaint

SYED JAFRI

Appellant

and

SHELL CANADA LTD.

Respondent

ORDER

Member: Peter Bowal (Chair)

Decision: February 12, 2016

The logo for Alberta Labour, featuring the word "Alberta" in a stylized script font followed by a small square icon.

Labour
Occupational Health and Safety Council

Disposition

Mr. Jafri worked at Shell Canada Ltd. He was dismissed from his employment on June 9, 2015. The employer's position was that he was not following safety procedures, namely not wearing proper Personal Protective Equipment (PPE) in a confined space. He denies entering a confined space and adds several other employment-related grievances to his claim.

The OHS officer who investigated his complaint did not find sufficient evidence to support the Appellant's claim that he had been dismissed from his employment because he raised a safety issue in compliance with the legislation. He dismissed the complaint.

For the reasons set out below, the Council dismisses Mr. Jafri's request for a review pursuant to section 37(4) (a) of the *Occupational Health and Safety Act*.¹

Irregularities in Form

The Appellant, in his Notice of Appeal, does not identify his employer and does not name his employer as the Respondent. He identifies the OHS officer as the Respondent. The Notice of Motion contains a few allegations but far too little in the way of facts and details to facilitate a defence from an employer and to enable proper adjudication of an appeal. The OHS officer did determine that the employer was Shell Canada Ltd. but the file does not have a department or responsible person identified in that company with which this Council can engage. It is the responsibility of Appellants to provide the basic information of the parties to this Council in order to administer an appeal. OHS Council does not embark upon investigations and research of its own.

The Appellant does not identify this as a Disciplinary Action Complaint in the Notice of Appeal. We can discern the true nature of this appeal from the brief written allegations. However, these deficiencies in form often result from Notices of Appeal, such as in this case, which have the look and feel of general protests to a government agency to address employee grievances against former employers. Employees should appreciate that the legal jurisdiction of OHS Council is limited to what is defined in the OHS Act. More to the point, this Council does not intervene in all cases where employers discipline employees in Alberta. Not every employee – employer dispute can be coloured as a safety issue. This Council is not the recourse where employers seek to manage and enforce their safety obligations through discipline of their employees.

¹ RSA 2000, c O-2 <http://canlii.ca/t/52kfx>

What the Appellant is Seeking

The Appellant does not identify this appeal as a Disciplinary Action Complaint (DAC), so he did not identify any DAC remedy he is seeking. On the Notice of Appeal, he checked off that he wanted the Order “revoked”, which may mean he wants the OHS officer’s decision revoked.

Apart from disagreeing with the employer’s and OHS officer’s conclusion about entering the confined space, the Appellant now refers to four other matters: employer provision of proper gas testing equipment, no issuance of a personal lock, harassing / threatening environment, and the employer’s one-sided investigation. The Appellant offers no details of any kind about any of these complaints and the OHS officer’s decision makes no reference to any of them. There is no indication these issues were advanced before now. Apart from the lack of Council jurisdiction over most of these items, an employer would not be able to prepare defences against such general claims, all of which appear to have not been investigated.

The only two witnesses identified by the Appellant to give evidence at the appeal are designated to testify that the Appellant “did not enter [a] confined space after signing the permit as an area authority.” That is not an issue for this Council.

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 prepared a Table of Evidence, which is attached hereto as an Appendix. In his decision letter addressed to the Appellant, the OHS officer wrote: "... you have stated that you entered a confined space, without using the prescribed personal protective equipment, as identified on a confined space entry permit you had signed." The officer concluded "there is no evidence supporting that your employment was terminated for bringing up safety concerns."

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, incomplete Notice of Appeal, 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*, 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 Council would have little practical effect.

As it has been framed and adjudicated to date, this case is not within the jurisdiction of OHS Council. Nowhere in his appeal is there even a *prima facie* case that the Appellant has positioned himself within section 35 of the *OHS Act*, even if one were to accept as true what he stated. Simply summarized, if there was an "imminent danger" here, it would have been due to the Appellant's actions.

Order

A review of the OHS officer's decision contained in his letter dated December 8, 2015 is dismissed under section 37(4)(a) of the *Occupational Health and Safety Act*. The decision of the OHS officer is confirmed.

APPENDIX

Occupational Health and Safety Evidence Table

In order for Occupational Health and Safety to proceed with a disciplinary action complaint, it is necessary to establish that there is a contravention of Section 36 of the Occupational Health and Safety Act. Section 36 states:

“No person shall dismiss or take any other action against a worker by reason of that worker in acting in compliance with this Act, the regulations, the adopted code or any order given under this Act or the regulations”

An Occupational Health and Safety investigation into a disciplinary action complaint must establish the following three part legal test:

1. There has been an act of compliance with the Occupational Health and Safety legislation on the part of the worker,
2. There was a disciplinary action taken against the worker, and
3. There is a causal connection between the act of compliance and the disciplinary action taken.

Has there been an act of compliance with the legislation on the part of the worker?	
<u>Allegation:</u> The complainant alleges that he was working in compliance with the Alberta Occupational Health and Safety Act, Regulation or Code.	<u>Evidence:</u> Alberta Occupational Health and Safety Act Section 36. Disciplinary action against a worker for an act of compliance with at Act, Regulation or Code.
<u>Conclusion:</u> The employer has statements from three workers indicating that the complainant did enter a confined space without following the employers safe work practice. The permit associated with this confined space requires a half mask respirator and the use of a Tyvek cover-all when entering. The complainant agrees that he did not use either of these pieces of equipment, when he entered the confined space.	

Was disciplinary action taken against the worker?	
<u>Allegation:</u> The complainant alleges the he was disciplined by his employer in the form of: termination.	<u>Evidence:</u> <ol style="list-style-type: none">1. Employers Investigation Report - Tab XX2. Confined space entry permit Tab XX
<u>Conclusion</u> Evidence supports that the complainant was terminated. However, the evidence does not support that the worker was terminated as a result of an act of compliance with the Alberta Occupational Health and Safety Act.	
This there a causal connection between an act of compliance and the disciplinary action taken?	
<u>Allegation:</u> The complainant alleges the he was disciplined by his employer in the form of: termination	<u>Evidence:</u> <ol style="list-style-type: none">1. Record of Employment – Tab XX
<u>Conclusion:</u> The evidence does not support the claim that the complainant was terminated for an act of compliance. The workers that were on site at the time of this event provided consistent and credible accounts of the events. They indicated that the complaint had failed to follow the employers safe work practices. <u>Overall Conclusion:</u> Evidence supports that the complainant was terminated for failing to comply with the employers safe work practice. Evidence does not support a causal connection between the complainant's termination and the complainant's contention that he was acting in compliance with the Alberta Occupational Health and Safety Act.	