

# Occupational Health and Safety Council

## Disciplinary Action Complaint

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**Aaron Gauthier**

**Appellant**

**and**

**Clearstream Energy Services LP**

**Respondent**

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## ORDER

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**Panel:** Peter Bowal (Chair), Sean Evans and Evan Edbom

**Appeal Decision:** May 3, 2016

## **Background and Summary of Decision**

Mr. Gauthier appeals only the quantum of wage compensation awarded to him by the OHS officer on December 18, 2015, which arose from his termination of employment on May 13, 2015. There is no appeal on liability as Mr. Gauthier was successful in his Disciplinary Action Complaint. His preference was for this appeal to be decided by written submissions without an oral hearing. The employer has not responded to this appeal.

For the reasons which follow, we dismiss this appeal and confirm the decision of the OHS officer.

## **OHS Officer Decision**

Mr. Gauthier had been employed about 13½ months when he was unlawfully terminated from his job by the Respondent Clearstream Energy Services LP (“Clearstream”). The OHS officer awarded him two weeks of wage compensation, a gross total of \$3940.

The OHS officer’s rationale in awarding this level of compensation was not contained in his decision letter. After this appeal was launched, we requested and were sent that rationale. It is in the form of a Table of Evidence and Findings that includes the basis for the calculation of compensation. This supplementary documentation was forthwith shared with the Appellant. As a matter of procedural fairness and administrative efficiency, we recommend OHS officers attach to, or otherwise incorporate into, their decision letters this supporting documentation.

OHS departmental policy calls for the application of sections 56 and 57 of the Alberta *Employment Standards Code*<sup>1</sup> to the Alberta *Occupational Health and Safety Act*,<sup>2</sup> section 37 determination of ‘the equivalent wages Mr. Gauthier would have earned if he had not been dismissed or had not received disciplinary action.’ As it turns out, the Table of Evidence and Findings and calculation sheet in this case were also not without some challenges. We do not know whether the employer paid the employee any severance under the *Code* or otherwise. The Appellant was transitioned in a successor-employer scenario and the employment start dates with each employer are contradictory in the officer’s records. One week of wages is indicated, but two weeks (126 hours) were actually awarded. There was no clarification about how 126 hours was calculated over a two week period. Some workers can work long hours, but some referencing to the weekly requirement of

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<sup>1</sup> RSA 2000, c E-9, <http://canlii.ca/t/52bwr>

<sup>2</sup> RSA 2000, c O-2, <http://canlii.ca/t/5246j>

hours in this position would have been helpful, as would have been any analysis of entitlement to overtime payment. The officer's calculation uses a straight line wage across all hours. It seems unlikely that one would work 126 hours over two weeks at one fixed wage rate, but this is left to conjecture. We also note that Mr. Gauthier himself never deals with this issue, does not dispute the hourly rate or number of hours, nor does he provide other information. We also understand, although it is not clear in the OHS officer's report, that Mr. Gauthier was not working immediately following his release by Clearstream.

The officer noted that with a 13½ month service period, Mr. Gauthier would have been entitled to one week of wages compensation under the minimum employment standards legislation and departmental policy. He applied a modifier to double that compensation period on the following basis: "The worker has been actively (sic) looking for work but in the current economic climate has been unable to find a position. The worker has relocated from the Red Deer area to Grande Prairie in the hope of gaining employment."

The \$3940 was the product of 126 hours multiplied by an hourly rate of \$31.27. It is this two week compensation period of a total of 126 hours at \$31.27 that Mr. Gauthier appeals.

### **Nature of this Appeal to the OHS Council**

The essence of Mr. Gauthier's appeal is that this quantum of compensation is not enough because he had been terminated from "a very good job", he had not (at the time of launching his appeal) found replacement work and his expenses "far exceed" this amount. He does not provide a compensation figure that he considers fair. He frames his appeal in this way:

The reason for my appeal is because I don't feel the amount [the OHS officer] was able to award in my favour, is a fair one. I don't feel 3940 dollars to be a fair payoff for me wrongfully being let go from a very good job.

The money that I have had to continuously spend monthly since losing my job, far exceeds 3940. To this day [December 23, 2015], I'm still looking for gainful employment and have even taken to relocating to Grande Prairie, Alb. not only for employment possibly, but family assistance as well.

### **Applicable Jurisdiction and Law**

The *Occupational Health and Safety Act* protects workers who are disciplined in any way for acting in compliance with the legislation. They can access an OHS officer to objectively investigate and decide on their allegations of illegal discipline.

If one has reasonable cause to believe one was disciplined for complying with the applicable occupational health and safety legislation, one may file a Disciplinary Action Complaint under section 37(1) which will be investigated and reported upon by an OHS officer.

An officer's decision, including the singular issue of quantum of compensation, may be appealed to this Council [*OHS Act*, section 37(3)] and "the Council shall... hear appeals in accordance with this Act and the regulations" [*OHS Act*, section 7(b)]. The 30 day time period for filing the appeal was met in this case [*OHS Act*, section 37(3)].

### **Analysis**

As has already been mentioned, the OHS officer's decision letter had some missing parts, and some information on the face of the underlying supporting documentation was in error. We would encourage more attention be paid to technical accuracy of officer documentation. However, in this case we have been able to piece together the rationale for the compensation amount in a way that we believe is undisputed by the employer, employee or OHS officer.

In this case, the OHS officer chose to apply a modifier in favour of Mr. Gauthier which had the effect of doubling the wage compensation period payable under department policy and the *Employment Standards Code*. He was sympathetic to the position Mr. Gauthier found himself in, and to which Mr. Gauthier alludes in his Notice of Appeal. Yet, the officer was not as generous as Mr. Gauthier would have preferred.

Our role is to review the OHS officer's decision for fairness of process and, with a focus on the evidence, on the reasonableness of his conclusions. Given the specific language of section 37 of the *OHS Act* that governs these cases, we are of the view that the officer's decision to grant a two week period of compensation for loss of a job that endured just over one year was reasonable. The officer gave appropriate consideration to the evidence and the circumstances of Mr. Gauthier who was seeking re-employment.

It is important for employees to appreciate that this statutory scheme of the Disciplinary Action Complaint in occupational health and safety is not a substitute for common law recourse and remedies in the private realm of employment law.

### **Order**

The OHS officer's decision contained in the December 18, 2015 decision letter, and supplemented by his Table of Evidence and Findings, is confirmed under section 37(4) of the *Occupational Health and Safety Act*.