

Occupational Health and Safety Council

Appeal from Disciplinary Action Complaint

Paul Wilson

Appellant

and

Clearwater County

Respondent

ORDER

Panel: Peter Bowal (Chair), Wally Baer and Sean Evans

Appeal Decision: November 30, 2016

I. Nature of this Appeal

[1] Mr. Paul Wilson (“Mr. Wilson”) was hired by the Respondent, Clearwater County (“County”) on January 5, 2015 as an operator of equipment such as a plow truck, loader, distributor truck and pup trailer. Some thirteen months later, on February 12, 2016, his employment was terminated by the County.

[2] Mr. Wilson complained to Alberta Occupational Health and Safety on the basis that he had been disciplined by his employer for raising a safety concern. Two OHS officers (“OHS officers”) were appointed to investigate and decide.

[3] The OHS officers did not find merit in Mr. Wilson’s disciplinary action complaint and dismissed it.

[4] This is Mr. Wilson’s appeal from the decision of the OHS officers.

II. Summary of Decision

[5] For the reasons which follow, the Occupational Health and Safety Council (“Council”) dismisses this appeal without an oral hearing under section 37(4)(a) of the *Occupational Health and Safety Act* (“the Act”).¹

III. Facts

[6] The OHS officers gathered information surrounding the termination. Statements were obtained from Mr. Wilson and the County. The OHS officers’ investigation forms the factual basis of this case.

[7] The County’s employment termination letter set out reasons as follows:

The most recent concerns the County has with you in respect of your performance include:

On or about January 27, 2016 while you were washing a sanding unit you tipped the box too high and caused damage to the spinner. After investigating this incident, it was determined by the County that the damage was caused by operator error.

¹ RSA 2000, c O-2

On February 12, 2016, while you were operating County equipment on a gravel haul, the pup came disconnected from the truck on a public roadway. After you reported the incident, you admitted that you had failed to secure the trailer to the County equipment, therefore causing the trailer to detach. Although the precise extent of damage to the County equipment is not known at this time, nonetheless, of greater concern to the County in respect to this incident is the very significant potential harm, injury, and/or death that could have been caused to members of the public using the same roadway, as well as the County's significant legal liability exposure that could follow from such oversight on your behalf.

As a result of the foregoing, the County has determined that you are simply no longer a fit within the organization, and as a result, we wish to move in a new direction.

Notwithstanding the performance concerns outlined above, your employment is being concluded on a without cause basis, which entitles you to notice or pay in lieu thereof . . .

[8] Mr. Wilson's concerns were essentially that he had not received as much training on the equipment as he thought was necessary or what others had received. He also said "there was always equipment malfunctioning or leaking."

IV. OHS Officers' Investigation

[9] The OHS officers have provided to the parties and Council a Table of Evidence and Findings. Mr. Wilson and another supporting individual were interviewed on June 23, 2016. They completed the Disciplinary Action Complaint Intake form. Their concerns again were essentially that Mr. Wilson received insufficient training from the County.

[10] Six employer representatives were interviewed on July 12, 2016. They supplied witness statements and documents supporting that training had been completed with Mr. Wilson on the truck and pub trailer operation. Documents obtained included Mr. Wilson's resume, description of Mr. Wilson's position, supervisor notes, Incident and Investigation Reports, Mr. Wilson's performance evaluation, worker training documents, fleet maintenance records, and witness statements from other workers. Two of Mr. Wilson's supervisors indicated that

Mr. Wilson was trained on operations of all controls for the truck and pup trailer unit, including the hooking up of same.

[11] The OHS officers communicated their decision in a letter dated August 5, 2016. They had determined that the truck and trailer which Mr. Wilson was assigned to operate had both recently passed government inspections and tests for commercial vehicles. The OHS officers also found that the County had a preventative maintenance program in place.

[12] The OHS officers stated that Mr. Wilson conceded that he never did raise any health and safety concerns with the County prior to his employment being terminated.

[13] The three-part legal test in disciplinary action complaints defined in 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.

[14] All three parts must be answered in the affirmative for the appeal to be successful under section 37.

[15] The OHS officers concluded from their investigation that there was no evidence that Mr. Wilson was disciplined by the County while he was complying with the Act. Mr. Wilson had not raised any safety concerns prior, and particularly proximately, to his termination. He had been disciplined, but he had *not* been disciplined by his employer for any act of compliance with the OHS legislation. Therefore, since the causal connection was not established, the complaint was dismissed.

V. Case on Appeal to this Council

[16] Mr. Wilson's statement of the specific reasons and grounds for this appeal to the Council is a series of points which reads as follows:

- Clearwater County needs to produce a certificate of training I was given for the operation of the equipment I had the incident with. Who and how many hours of training.
- Reasons why I did not raise a complaint to OHS about insufficient training

- I have been discriminated by people in authority on who should be writing up incident reports
- Need clarification on the disciplinary action complaint #2 both parties agreed to the fact that the worker was terminated from employment at Clearwater County.
- Clarification of false accusation made by my supervisor at the scene of the incident.
- Being singled out for my incident when far more serious near fatal incidents occurred over and over again which included thousands of dollars of equipment damage (why were they allowed to still work there) double standards?
- Policies for training were not followed until I was there almost 1 year. Check dates on certificates
- Needed room to hire a relative.

[17] Mr. Wilson seeks reinstatement to his former employment and payment of equivalent wages that he would have earned but for the disciplinary action. He has asked for an oral hearing of this appeal.

[18] The County's position is that Mr. Wilson is asserting new facts, issues and allegations in this appeal that are not found in his initial complaint. These new issues include: Mr. Wilson's reasons for not filing a formal complaint with the County regarding the adequacy of his training, discrimination and double-standards and concerns over nepotism. In any event, the County continues, some or all of these new allegations are irrelevant to this matter because they do not serve to establish the three-part test. Parts V and VI of Council's *Rules of Procedure* are cited in support.

[19] The County also argues that Mr. Wilson's allegations outlined for this appeal are outside the scope of the issue under review, which is whether Mr. Wilson was terminated from his employment due to his compliance with the Act. The Respondent maintains that Mr. Wilson was discharged from his employment solely due to his poor safety record and his negligence in failing to secure a trailer to the vehicle he was operating on February 12, 2016. The County points out that Mr. Wilson, in his Notice of Appeal, has failed to identify any reviewable error committed by the OHS officers.

[20] The Respondent asks for summary dismissal, and in the alternative asks that submissions on the appeal merits be limited to written submissions.

VI. Standard of Review

[21] The standard of review is reasonableness. In *MacDougall v Occupational Health and Safety Council*, 2015 ABQB 591, the reviewing judge wrote at paragraph 14:

. . . the Council was not engaged in anything more than I am engaged in. They were assessing the reasonableness of the officer’s decision and the fairness of the process by which she arrived at that decision.

[22] A very recent decision of the Court of Queen’s Bench, *Procrane Inc (Sterling Crane) v. Thompson and Occupational Health and Safety Council*, 2016 ABQB 646, thoroughly canvassed this issue and confirmed the same standard of review at that level with regard to this legislation.

VII. The Law

[23] The 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.

[24] An officer’s decision 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)].

VIII. Analysis and Reasons for Decision

[25] This 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 . . .

[26] Council exercises this preliminary discretion to decline a full hearing of an

appeal against an officer's decision on occasion. Grounds for doing so include the following: 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; filing an incomplete Notice of Appeal; asserting for the first time on appeal new material facts or issues without adequate justification; 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*; where it is clear that the Appellant's matter has been adequately reviewed and decided in another forum with overlapping jurisdiction (such as a union grievance); where the appeal is frivolous, vexatious, filed with improper motives or otherwise an abuse of process; where the Appellant requests a remedy that is not in this Council's statutory jurisdiction to provide; where the original event that gave rise to the complaint is substantially dated; and other varieties of mootness where any Order of the OHS Council would have little practical effect.

[27] The Notice of Appeal in this case does not disclose any error or appealable ground against the process and decision of the OHS officers. Rather, it asks for more information, clarifications, documentation, and explanations – not from the OHS officers, but from the employer. The Council cannot order production of documents or order further answers to Mr. Wilson's queries.² Mr. Wilson wants to know, for example, why he was treated differently than others (if that was the case) by his employer. This is not a matter for Council.

[28] What Mr. Wilson is asking for is not something this Council is empowered to order. OHS Council is unable, due to lack of authority under section 37 of its enabling statute, to grant the relief sought. This Council is not an investigatory, prosecutorial or judicial body. It is an appellate body only, with jurisdiction to review administrative decisions of OHS officers for reasonableness, fairness and error.

[29] It appears that Mr. Wilson seeks to enlist this Council, and perhaps the OHS department, to engage in a protracted civil process to furnish the evidence he desires which might serve to advance other private litigations. His inquiries seem to be heading toward a fishing expedition that has more to do with general treatment and terms and conditions of work. There may be the hope that by forcing the employer to produce more records, which we have no authority to do and the employer says it does not have, Mr. Wilson's performance and responsibility for what occurred on February 12, 2016 might be at least partially excused.

² See powers of the Council in Disciplinary Action Complaints in Act, section 37(4)

[30] The Council normally grants self-represented appellants a wide berth to state their case. In the present appeal, however, the Appellant fails to advance the basis of the review beyond general disagreement with the OHS officers' decision and a list of new grievances that may or may not produce any factual substance. Ultimately, Council's focus must fix on the reasonableness of the OHS officers' investigation and decision. The Appellant has provided no grounds of appeal but has only requested further disclosure from the employer.

[31] Council is also unable to ascertain Mr. Wilson's "reasonable cause to believe" under section 37 (1) that he was dismissed because of an employer contravention under section 36. The OHS officers did not find an employer contravention. Mr. Wilson did not provide evidence of one. See *Mirza v. Shell Canada Ltd.*³

[32] OHS officers must investigate disciplinary action complaints but OHS Council is not required to provide a full oral hearing of every proposed appeal of OHS officers' decisions, especially appeals which enjoy no reasonable chance of success. This was the disposition in *Tican v Alberta Solicitor General*,⁴ among others.

[33] The OHS officers in this case clearly conducted a thorough and fair investigation of Mr. Wilson's complaint. They reviewed training and maintenance records and concluded the employer had complied with all applicable requirements. Their decision on the disciplinary action complaint reasonably and sensibly flowed from their findings.

IX. Order

[34] Mr. Wilson's request for review of the OHS officers' decision dated August 5, 2016 is dismissed without a hearing under section 37(4)(a) of the *Occupational Health and Safety Act*. This decision is made on the grounds that the Notice of Appeal discloses no request that is within the statutory jurisdiction of the OHS Council, there is no foundation for Mr. Wilson's "reasonable cause to believe" under section 37 (1), and because this appeal demonstrates no reasonable chance of success.

³ (OHS Council, 2014) <https://work.alberta.ca/documents/Mirza-vs-Shell-Canada-Limited.pdf>

⁴ (OHS Council, 2014) <https://work.alberta.ca/documents/ohsc-tican-vs-Alberta-Solicitor-General.pdf>