

Occupational Health and Safety Council

Appeal from Disciplinary Action Complaint

Mark McCormack

Appellant

and

DLM Oilfield Enterprises Ltd.

Respondent

ORDER

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

Appeal Decision: February 13, 2017

I. Nature of this Appeal

[1] Mr. Mark McCormack (“Mr. McCormack”) was hired by the Respondent, DLM Oilfield Enterprises Ltd. (“DLM”) on October 18, 2013 as an oilfield worker. This work involved moving wellsite installations and equipment. On April 28, 2016, at a site near La Corey, Alberta, Mr. McCormack and his work group were asked to move a drive head to another location at the well site. Mr. McCormack did not think the equipment provided would render the task sufficiently safe.

[2] While he was requesting better equipment (a picker truck) and arrangements were being made for it, Mr. McCormack lost confidence in DLM management. He refused to do the task. He was suspended and, two business days later, he was terminated from his employment.

[3] Mr. McCormack complained to Alberta Occupational Health and Safety on the basis that he had been disciplined by his employer for raising a safety concern and refusing to work when unsafe to do so.

[4] An OHS officer (“OHS officer”) was appointed to investigate and make a decision on the merits of the complaint. He did not find that Mr. McCormack had fully made out his disciplinary action complaint and he dismissed it.

[5] This is Mr. McCormack’s appeal from the decision of the OHS officer.

II. Summary of Decision

[6] For the reasons which follow, the Occupational Health and Safety Council (“Council”) dismisses this appeal under section 37(4)(a) of the *Occupational Health and Safety Act* (“the Act”).¹

III. OHS Officer’s Investigation

[7] The OHS officer gathered information surrounding the termination. On June 1, 2016, the OHS officer interviewed Mr. McCormack, who gave a statement and produced three documents to OHS. Later the same day, the OHS officer interviewed and took statements from DLM’s Sean Hannah and Chris Vernon. Follow-up telephone calls back and forth generated more information for the file. The OHS officer prepared a Table of Evidence and Findings for the parties and Council.

¹ RSA 2000, c O-2

[8] Further discussions and mediation between the parties took place on June 6, 2016. Mr. McCormack wanted his supervisor to be punished or terminated. OHS is not authorized to order that.

IV. Positions of the Parties

[9] Both parties gave evidence at the oral hearing. As is often the case, the essential physical facts are not in material dispute. The disagreements between the parties turn out to be more on perception, degree, motivation and managerial judgment.

Mr. McCormack's Evidence

[10] At the core, Mr. McCormack struggled to abide the demanding, volatile style of his senior supervisor (JO). Mr. McCormack said DLM on the first phone call refused to furnish the safer drive head equipment for the task, but agreed with the request on the second phone call. Yet that still did not solve the problem with JO who seemed erratic and difficult to work with. The job, already dangerous with possible high pressures, seemed to be rushed and Mr. McCormack was made to feel bad and manipulated as he was questioning it. There was a 7-minute telephone call during which Mr. McCormack was holding out and JO was berating him: telling him just to do it, calling him names, and generally being very pushy. Mr. McCormack felt responsible to protect his sister and another co-worker on the job as he was concerned that in his current mental state some harm could happen.

[11] While DLM assured the equipment he sought would be provided, Mr. McCormack still said he felt too frustrated to do the work at that time. Putting this April 28 experience in the context of earlier experiences at DLM, and particularly previous worksite interactions with JO, Mr. McCormack began to reflect “about how bad this company was with safety generally over time.” With his co-workers, this time he needed to take a hard stand which is why he refused to complete the task he was asked to do.

[12] At the time Mr. McCormack refused the work, in the second phone call, the reason was not a physical safety problem. Rather, what caused the refusal to work was a generalized frustration, a lack of trust and a personal disregard for JO's supervisory style. Mr. McCormack would like to work for DLM but he could never work again under JO who pushes subordinates too hard.

[13] Mr. McCormack did not need to go to this job site to know there were safety concerns. The specific task had already changed, his interaction with JO was unpleasant and there were no standard operating procedures for this job.

DLM's Evidence

[14] DLM testified that a pre-job assessment is completed for every task. This job was originally characterized as a production flush but a drive head move was added to the flush. The scope and circumstances change for every job. This was a unique task that required McCormack to go to the site. No one can do a proper safety evaluation unless one has been to the site. The conflict on April 28th arose because Mr. McCormack was making decisions about safety without him going to the site to see the actual hazards that existed there for this task.

[15] DLM said Mr. McCormack was concerned about how long the job would take but he was lawfully eligible, and could have been asked, to work for 5 hours longer at the point he refused. In the end, that job was fully finished that same afternoon eventually in 3½ hours total time including travel, so the time the job would take was not an issue when this refusal occurred.

[16] If there are any safety concerns at DLM, the first call is to a field supervisor. Since Mr. McCormack did not go out to the site, the field supervisor did not do so either. [When the task was eventually done by a different group, the crew was out at the site along with the supervisor.]

[17] DLM defended JO as a very well respected supervisor. He can get excited which may be misunderstood by others. There was no complaint about harassment here.

[18] This was a case of a pre-emptory refusal by Mr. McCormack. He refused to go to the site to identify hazards at this specific site. It was his job to go to that site to make the pre-hazard assessment. He also was disciplined for refusing to do the full task that could have been, and indeed was, safely done that afternoon.

[19] The picker truck was offered to Mr. McCormack. After he refused to do the task, the second crew assigned to complete it went to the site and determined it actually was not necessary. They did not use the picker truck and they finished the job in good time and without any problem.

[20] DLM uses progressive discipline in dealing with employees. As this was Mr. McCormack's third employment misconduct – two previous warnings were issued to Mr. McCormack in January 2016 and March 2016 – the appropriate discipline for breach of duty on May 2, 2016 was termination of employment.

V. OHS Officer's Finding of Fact and Disposition

[21] The OHS officer focused upon the initial safety concern as expressed by Mr. McCormack, namely the need for the picker truck to be supplied to the site. The employer complied with this request but Mr. McCormack still refused to perform the task. None of these facts are in dispute.

[22] 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.

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

[24] The OHS officer concluded from his investigation that parts 1 and 2 were met here but not part 3. Mr. McCormack had been disciplined, but he had *not* been disciplined by his employer for any act of compliance with the OHS legislation. That termination accordingly had been justified as a part of progressive discipline. Therefore, since the causal connection was not established, the complaint was dismissed in a decision letter dated July 26, 2016.

VI. Case on Appeal to this Council

[25] Mr. McCormack seeks reinstatement to his former employment, cessation of disciplinary action, payment of equivalent wages that he would have earned but for the disciplinary action and removal of any reference to this matter from his employment records. He has asked for an oral hearing of this appeal.

[26] Mr. McCormack, in his Notice of Appeal, does not set up a list of grounds of appeal from the OHS officer's decision. Instead, he takes issue with essentially all the OHS officer's findings and conclusions. Ultimately, Mr. McCormack appears to be sending the case up to this Council in an attempt to re-litigate the same facts, conclusions and issues but this time he hopes Council will agree with his perspective on those things.

VII. Standard of Review

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

[28] A 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.

VIII. The Law

[29] 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 has been 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.

[30] 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)].

IX. Analysis and Reasons for Decision

[31] This Council has discretion to dismiss the appeal. Section 37(4) reads:

After considering the matter, the Council may by order
(a) dismiss the request for a review . . .

[32] 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. Mr. McCormack fails to advance the basis of the review beyond general disagreement with the OHS officer's decision. Ultimately, Council's focus must fix on the reasonableness of the OHS officers' investigation and decision.

[33] Everyone agrees that Mr. McCormack was a conscientious and capable employee. The task he was called out to do in the afternoon of April 28, 2016 changed. In addition to the flush, the well head had to be moved. This added some uncertainty and very quickly caused Mr. McCormack to lose trust and confidence

in his employer. He already doubted whether a permit for this work had been issued, and he had been frustrated by the lack of standard operating procedures.

[34] Mr. McCormack would have known the general hazards, but not the specific hazards of loading and moving this well head. Still, he decided not to go out to the site and check out the hazards at this specific site. This day was a Friday. It was 4:00 pm and he had already put in 10 hours, although his employer was entitled to ask for up to 5 more hours from him. The change of the job, the uncertainty about how long it would take, his frustration with JO, his not wanting to go to the site: all of these factors may explain why he quickly resisted and the conflict escalated.

[35] At that point, the employer DLM may still have interpreted Mr. McCormack's resistance as an equipment and supply safety issue. It was engaged in two phone calls with him over some eight minutes. This demonstrates a timely response by the employer. DLM understood it was offering Mr. McCormack what he was asking for but it could not understand why he continued to refuse the work.

[36] As it turned out, the issue was *not* about physical equipment safety at all. Instead, Mr. McCormack was personally distrustful and frustrated at JO and DLM at that moment. He said he placed that second call to DLM only a minute after hanging up from the first one. He knew that there was nothing DLM could do to satisfy him in that moment, short of dismissing JO. Employees' internal frustrations and distrust of their employers are not inherent safety concerns. Mr. McCormack's malaise was not communicated to DLM as a safety issue it could address. If emotional or psychological hazards are present and can compromise safety, the employee must bring them to the timely attention of the employer.

[37] At the point of refusal in this case, the concerns experienced by the employee were attitudinal and behavioural. If the concern was not an objective OHS safety issue, it was a human resources or performance management issue. Mr. McCormack was under a duty to obey lawful orders at the point of refusal since there was no actual unsafe condition present or communicated.

[38] The OHS officer in this case clearly conducted a thorough and fair investigation of Mr. McCormack's complaint. His decision on the disciplinary action complaint reasonably and sensibly flowed from his findings.

X. Order

[39] Mr. McCormack's appeal of the OHS officer's decision dated July 26, 2016 is dismissed under section 37(4)(a) of the *Occupational Health and Safety Act*.