

Occupational Health and Safety Council

Appeal from Disciplinary Action Complaint

Adam Howse

Appellant

and

Driver Iron Inc.

Respondent

ORDER

Panel: Peter Bowal (Chair), Nina Novak and Rob Munro

Appeal Decision: November 17, 2017

I. Nature of this Appeal

[1] Mr. Adam Howse (“Mr. Howse”) was hired by the Respondent, Driver Iron Inc. (“Driver”) on September 6, 2016 as a structural journeyman ironworker. At the weekly safety meeting on December 21, 2016, Mr. Howse raised three safety concerns and expressed his unwillingness to participate in future safety meetings. He was terminated from his employment later that day.

[2] Mr. Howse complained to Alberta Occupational Health and Safety on the basis that he had been disciplined by his employer for raising safety concerns.

[3] An OHS officer (“OHS officer”) was appointed to investigate and make a decision on the merits of the complaint. He found that while Mr. Howse had been disciplined by his employer, such discipline was not due to Mr. Howse’s raising of any safety concern. As a result the OHS officer concluded that Mr. Howse failed to make out his disciplinary action complaint and the complaint was dismissed.

[4] This is Mr. Howse’s appeal from the decision of the OHS officer. He requested that the appeal be conducted exclusively by written submissions.

II. Summary of Decision

[5] 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

[6] The OHS officer gathered information surrounding the December 21, 2016 termination of Mr. Howse. The officer’s “Appendix G: Document to Organize Findings & Evidence” indicates statements of JM and SI were provided by the employer. These statements were also provided by the employer to the Council in the current appeal. We refer to the contents of these statements below.

[7] The Officer does not refer to two more employer statements from RB and BM, although the employer also shared these statements with Council on this

¹ RSA 2000, c O-2

appeal. Council cannot be certain whether these statements were before the OHS officer to inform his decision on the complaint. Since the officer did not explicitly refer to these letters in reaching his decision, we cannot consider them at this stage.

[8] According to the Decision Letter dated June 30, 2017, the OHS officer also took a statement from Mr. Howse and received his information.

[9] Mr. Howse advanced no objections to the OHS officer's investigation. While Council is always best served by OHS officers' clear statements detailing the investigation conducted, and the nature of evidence presented by both sides, we are satisfied that the OHS officer's investigation in this case was thorough and fair.

IV. Positions of the Parties

[10] Each party stated its case in the appeal. Everything comes down to what precisely was said by Mr. Howse at the December 21, 2016 safety meeting, the tone in which it was communicated, and how that may have been perceived by the employer.

Mr. Howse's Evidence

[11] Mr. Howse described Driver's safety policies and procedures as "amazing." However, he did not have confidence in his safety supervisor CH who he said did not resolve issues. At the safety meeting Mr. Howse said he "calmly raised (his) hand and asked if (he) could be excused from further meetings." He "felt they were not being conducted in manner (sic) that helped our safety." He said he asked this in a regrettably sarcastic manner since they were in a safety meeting but they "never talked about the real safety issues." Mr. Howse said the stance he took to ask questions and challenge what has been done in the past actually served to focus the meeting properly on safety.

Driver's Evidence

[12] In its written submission, Driver says Mr. Howse was terminated:

as a result of the disruptive and disrespectful manner by which he raised his concerns during an important site wide safety communication meeting combined with the fact that Mr. Howse publicly undermined the meeting by publicly stating in front of the entire group of employees working at the site in question that he was no longer prepared to participate in any further safety meetings.

. . . Mr. Howse clearly was not prepared to be supportive of safety meeting process and publicly said so in front of the entire workforce employed on the site in question . . . such displays that seriously undermine the safety culture on a site including the efforts of management and others to foster that culture through safety meetings and other safety related activities, simply cannot be condoned.

. . . Mr. Howse's event occurred during a site-wide safety meeting involving all employees which made his conduct even more negatively impactful for those who were participating in a positive solution based manner.

V. OHS Officer's Finding of Fact and Disposition

[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 officer concluded that parts 1 and 2 were met here but not part 3. He found that Mr. Howse had been compliant with the OHS legislation and had suffered disciplinary action – namely, dismissal – there was not sufficient evidence to conclude that Mr. Howse was dismissed from his employment because he raised a safety issue to his employer. The officer accepted the employer's claim that the dismissal arose from Mr. Howse's position that he no longer wanted to participate in the employer's weekly safety meetings.

[16] Therefore, since the causal connection was not established, the complaint was dismissed in a decision letter dated June 01, 2017.

VI. Case on Appeal to this Council

[17] Mr. Howse, in his Notice of Appeal, does not set up a list of grounds of appeal from the OHS officer's decision. Instead, he repeats what he said and what he sought to achieve at the meeting on December 21, 2016. He does not point to

any errors or unreasonableness of the OHS officer's conclusions. Ultimately, Mr. Howse 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.

[18] Mr. Howse seeks the payment of equivalent wages that he would have earned if he had not been dismissed.

VII. Standard of Review

[19] 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.

[20] *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.

[21] In order for him to succeed in this appeal, Mr. Howse bears the burden to show, on a balance of probabilities, that the OHS officer's conclusions or decision were unreasonable.

VIII. The Law

[22] 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.

[23] 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

[24] 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 . . .

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

[26] The evidence shows that Mr. Howse was a highly capable and valued employee. Everyone agrees that he raised safety concerns with his employer. The OHS officer found, after a fair and sufficient investigation, that the employer dismissed Mr. Howse from his employment because he had publicly undermined the employer by firmly communicating his unwillingness to participate in future corporate safety meetings.

[27] The question in this case is not whether Mr. Howse's behaviour at that December 21, 2016 meeting was legally sufficient for the dismissal which followed. Rather, the OHS officer is concerned only about whether Mr. Howse may have been disciplined (in this case dismissed) *because* he raised a safety concern to his employer. The OHS officer concluded that this causal connection was not established on these facts, and that Mr. Howse may have been dismissed for other reasons.

[28] This appeal focuses only upon whether the OHS officer's decision was reasonable. Council is of the view that the OHS officer's decision is reasonably supported by the evidence in this case. After he conducted a fair investigation of Mr. Howse's complaint, the OHS officer's decision on the disciplinary action complaint reasonably and sensibly flowed from his findings.

X. Order

[29] Mr. Howse's appeal of the OHS officer's decision dated June 30, 2017 is dismissed under section 37(4)(a) of the *Occupational Health and Safety Act*.