Occupational Health and Safety Council

Appeal from Disciplinary Action Complaint

Derek Thompson

Appellant

and

Procrane Inc.

Respondent

ORDER

Panel: Peter Bowal (Chair), Andrew Smith and Rob Munro

Appeal Decision: December 21, 2017

Alberta Labour
Occupational Health and Safety Council

I. Nature of this Appeal

[1] Mr. Derek Thompson ("Mr. Thompson") was hired by the Respondent, Procrane Inc. ("Procrane")[1] on September 8, 2014 as an operator for three different cranes. About October 29, 2014, Mr. Thompson noted in the crane log book that it was not apparent Procrane had been bleeding air out of the suspension cylinders in accordance with the manufacturer's specification. The notes were not given to Procrane but were discovered a week later.

[2] A meeting was held on November 4, 2014 to discuss Mr. Thompson's concerns and how to bring them to Procrane's attention. Procrane stated it would look into the issue and asked Mr. Thompson to document these concerns using a different process – not in the log books. Procrane says it followed up and investigated the concern around the maintenance of the suspension cylinders over the next few months.

[3] On December 1, 2014, Mr. Thompson was observed to violate crane operating safety procedures (he has not disputed this). Procrane advised him of this in a letter delivered on December 9, 2014 which was also the same day Mr. Thompson, unknown to Procrane, drafted and sent an imminent danger complaint about Procrane's suspension cylinder maintenance to Alberta Occupational Health and Safety (OHS). Mr. Thompson says he received the Procrane letter on December 10, 2014. This letter refers to performance issues around work hours (discussed at the November 4 meeting) and non-compliant lift incident on December 1. The letter describes these as issues of insubordination and warned that similar incidents would lead to further discipline.

[4] Two days later, on December 11, 2014, the project manager to whom Procrane was contracted notified Procrane of the completion of the work involving the class of 55-ton cranes which Mr. Thompson was operating (this conversation was documented in an email dated March 4, 2015). The next day, on December 12, 2014, Mr. Thompson was laid off by Procrane. The reason provided was a shortage of work and the end of the contract or season. Two other crane operators, presumably with superior competencies, were re-assigned to other sites.

[5] On December 15, Procrane sent a letter to Mr. Thompson that was not

[1] Procrane Inc. was, at all material times, operating as "Sterling Crane".

received until December 21. The letter stated Procrane would no longer accept Mr. Thompson at any of their sites across Alberta due to his "unwillingness to work as a team player". The Record of Employment indicated that Mr. Thompson would not be returning.

[6] On December 17, OHS received Mr. Thompson's imminent danger complaint and conducted an inspection of Procrane the next day. This is the first time Procrane learned of Mr. Thompson's imminent danger complaint to OHS. Mr. Thompson's imminent danger complaint was dismissed by OHS on January 16, 2015.

[7] When Mr. Thompson, Procrane and the union met on January 9, 2015, the parties agreed to withdraw the December 9, 2014 discipline letters on file and to the union, and the reason for departure on the Record of Employment was amended to "unknown". These changes were not confirmed until February 2, 2015.

[8] On January 13, 2015, Mr. Thompson complained to Alberta Occupational Health and Safety. This Disciplinary Action Complaint (DAC) alleged that he had been disciplined by his employer for raising the suspension cylinder safety concern.

[9] On March 25, 2015, while the OHS officer's ("OHS officer") investigation was ongoing, Mr. Thompson bid on a new Procrane job. Mr. Thompson was asked by the OHS officer if he wanted to withdraw his DAC. Council finds that, despite the officer's good intentions, this is not an appropriate inquiry for the officer to make as it suggests withdrawing the DAC was the *quid pro quo* for continued work, or perhaps even that the officer had already concluded there was little merit in the DAC. Nevertheless, the nasty personal way in which Mr. Thompson responded to the officer was likely known to Procrane when it rejected Mr. Thompson's request for new work. Procrane says the language referred to "Mr. Thompson's website, which contained defamatory and malicious content against [Procrane] along with litigious threats against [Procrane] and some of its employees". On April 1, 2015, an email from Procrane advised that it was "not accepting the dispatch of Derek Thompson, given the litigation history and related issues between the parties."

[10] The OHS officer appointed to investigate made a decision on the merits of the DAC on May 4, 2015. She found that while Mr. Thompson had been disciplined by his employer, all such discipline was revoked prior to Mr. Thompson's filing of the DAC, and no discipline was in effect at that that time or since.[2] As a result, the

[2] The OHS officer did not identify herself in the May 4, 2015 Decision Letter but elsewhere in the file is identified as Ms. Gray.

OHS officer concluded that Mr. Thompson failed to establish the basis for his DAC and it was dismissed.

[11] Mr. Thompson appealed the decision of the OHS officer.

II. Procedural History

[12] Mr. Thompson's first appeal to this Occupational Health and Safety Council ("Council") was filed on May 26, 2015. He requested the appeal be conducted exclusively by written submissions without an oral hearing. Council's decision was filed on October 22, 2015.

[13] Procrane obtained judicial review in the Court of Queen's Bench of Alberta. On November 16, 2016, Verville J. vacated Council's Order and remitted the matter to Council for fresh consideration.[3] His Lordship stated:[4]

> . . . it is my view that the Council's Decision should nonetheless be remitted back to be heard again. It should be heard on the basis of written submissions - unless Council, Sterling and Thompson agree otherwise – and this time with the benefit of all of the information that was before the Officer.

[14] Alberta Occupational Health and Safety made a 54-page transcript from an audio recording and assembled the whole file ("all of the information that was before the Officer") which Council then distributed to the parties. In late February 2017, a new schedule was set for the exchange of written submissions and rebuttal, which exchange concluded at the end of April 2017.

[15] An entirely new panel of Council was established to conduct the re-hearing of this matter. This is a new decision in compliance with Mr. Justice Verville's direction to review "all of the information that was before the Officer". Accordingly, Council has considered more than 600 pages of filed materials, in addition to numerous judicial decisions associated with protracted procedural actions between these two parties.

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3 *Procrane Inc (Sterling Crane) v Thompson*, 2016 ABQB 646 (CanLII)

4 *Ibid*, para 68

III. Summary of Decision

[16] For the reasons which follow, Council dismisses this appeal under section 37(4)(a) of the *Occupational Health and Safety Act* ("the Act").[5]

IV. OHS Officer's Investigation

[17] The substantial file attests to a thorough investigation and information gathering by the OHS officer surrounding the December 12, 2014 lay-off of Mr. Thompson. The officer's Table of Findings and Evidence is detailed and shows a fair, balanced and thorough investigation of pertinent individuals and documents.

[18] Mr. Thompson advanced no objections to the OHS officer's investigation as such, just the officer's conclusions. Council is satisfied that the OHS officer's investigation in this case was thorough and fair.

V. Positions of the Parties

Mr. Thompson's Position

[19] Mr. Thompson states that he was disciplined in several ways because he expressed a safety concern as early as October 29, 2014, formalized it in an imminent danger complaint on December 9, 2014 and even after he filed the DAC on January 13, 2015. The employer's discipline took the form of the lay-off itself, the disciplinary letter on his personnel file, another letter to his union and a "not returning" notation on the Record of Employment.

[20] Mr. Thompson seeks reinstatement, cessation of disciplinary action, payment of equivalent wages that he would have earned if he had not been dismissed and removal of any reprimand or other reference to the matter from his employment records.

Procrane's Position

[21] Procrane argues that the OHS officer acted reasonably in concluding that there was no disciplinary action in effect when the DAC was filed. The December 12, 2014 lay-off was not disciplinary and the other actions were all withdrawn. Accordingly, Procrane asks that this appeal be dismissed.

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[5] RSA 2000, c O-2

VI. OHS Officer's Finding of Fact and Disposition

[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 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 that Part 1 was met here on the basis that Mr. Thompson "inspected the cranes [he] operated at the worksite and documented those entries in their log books."

[25] The OHS officer found that Part 2 of the test was not met. While discipline was imposed in the form of the disciplinary letter on the personnel file, the letter to the union indicating the Procrane would not re-hire Mr. Thompson on any Alberta sites and the notation on the Record of Employment that Mr. Thompson was "not returning", all of these were agreed to be withdrawn before the DAC was filed, although implementation was not actually confirmed until several weeks later. Mr. Thompson received a dispatch from Procrane in April, which was later revoked for other reasons unrelated to safety.

[26] The officer found the lay-off to be in accordance with the applicable Collective Agreement. Since there was no enduring discipline on the part of Procrane against Mr. Thompson, the Part 3 issue of causation was not addressed. The DAC was dismissed in the Decision Letter dated May 4, 2015.

VII. Case on Appeal to this Council

[27] Mr. Thompson, in his Notice of Appeal, does not set up a list of grounds of appeal from the OHS officer's decision. Instead, in an unstructured format, he repeats what he considers the most important facts and issues. He does not focus on any errors or unreasonableness of the OHS officer's conclusions. Ultimately, Mr. Thompson appears to be sending the case up to this Council in an attempt to re-litigate the same facts, issues and conclusions. This time he hopes Council will be more receptive to his perspective on those things than the OHS officer was.

[28] The main points Mr. Thompson makes in his Notice of Appeal are that the

disciplinary letter was promised to be removed on January 9, 2015 but remained on the files until February 2, 2015, well after he filed his DAC. Council does not find this to be relevant to any substantive issue in this case because the DAC was not filed until January 13, 2015 which is after this remedial agreement was reached. In any event, the later date is when the remedial actions (other than the Record of Employment amendment) were confirmed, not necessarily taken. Mr. Thompson has not shown that he has suffered any prejudice by any delay in this regard.

[29] Mr. Thompson also drew Council's attention to the April 1, 2015 email from Procrane re: "litigation history and related issues". He characterizes this as a new breach of the OHS *Act* that the officer ignored. This mischaracterizes the nature of a DAC, which focuses on previous events. Filing a DAC cannot create liability for future events, especially events unrelated to workplace safety. It is clear from the record that Mr. Thompson is antagonistic to Procrane, but the DAC is not the appropriate instrument to address ongoing grievances of any kind between employee and employer.

[30] Mr. Thompson points out that the crane he was operating on the subject project continued in use after his termination on December 12, 2014. The evidence on this point is not complete. To the extent that Mr. Thompson submits he was singled out for an earlier lay-off than his two colleagues, Council is satisfied that the OHS officer meticulously tracked and followed up on the lay-off outcomes of all three crane operators. She found nothing to support Mr. Thompson's claim that he had suffered greater unjustified hardship than his two fellow crane operators.

[31] Mr. Thompson has the evidentiary and legal burden to overturn the OHS officer's decision. He has failed to discharge it. He has only advanced two irrelevant grounds of appeal. He has not set out any basis for finding the officer's decision unreasonable to the point that it cannot stand.

VIII. Standard of Review

[32] 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.

[33] *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: "Council

reviews the Officer's decision for reasonableness".[6]

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

IX. The Law

[35] 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.

[36] 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)].

X. Analysis and Reasons for Decision

[37] 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 . . .

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

[39] Council finds that the essence of the OHS officer's investigation and decision is found in her Table of Evidence and Findings. This document is very detailed and explains the conclusions in the OHS officer's Decision Letter. The

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[6] Per Verville J. at para 58.

Council finds the investigation to have been thorough and fair and the OHS officer's conclusions on the DAC to be consistent with the evidence and her findings.

[40] Council, however, favours a focus on *when* Procrane *imposed* the discipline to determine whether that discipline was *in response* to Mr. Thompson raising the safety concern, not when Procrane withdrew the discipline or whether any discipline remained outstanding at the time the DAC was being investigated. The purpose of the legislation is to illegalize, and therefore profoundly discourage, discipline in response to communication of a legitimate safety concern. Employers withdrawing unlawful discipline after the fact are not excused and may face sanctions.

[41] In the same way, Council refuses to conjecture why the disciplinary letters were withdrawn and the Record of Employment was re-worded. Reasons were not given as to why these amends were made toward Mr. Thompson. Procrane's motivations are unknown and merely invite ambiguous and unreliable speculation. It would be inappropriate to take this as an admission on the part of Procrane that it sought to rectify a legal miscalculation. Clarity on the reasons for originally enacting the discipline is far more important than understanding why the discipline was later removed.

[42] In this case, the OHS officer determined that there were three aspects of discipline imposed in December (she found the lay-off not to be disciplinary). Letters on one's file and sent to one's union are discipline as long as they remain on the files. Their removal weeks later would not change their essential character as disciplinary, which is what the legislation is designed to prevent. However, because these disciplinary actions were all withdrawn, she did not inquire into Part 3 of the test, namely whether they were *caused* by Mr. Thompson's raising the safety concern around the maintenance of the suspension cylinders.

[43] Council has reviewed the evidence on the letters and Record of Employment and does not find a sufficient evidentiary basis to support Part 3 causation. None of the three documents reference Mr. Thompson's safety concern, which Procrane was dealing with after November 4, 2014. The December 8 discipline letter sets out a number of reasons for the discipline but it did not mention Mr. Thompson's concern around the suspension cylinders. Since the discipline letter speaks for itself, there is no obvious link between the discipline letter and Mr. Thompson's raising the safety issue. There was evidence of Procrane's own independent concerns about Mr. Thompson's performance on the job. From raising the first safety concern about the suspension system maintenance, there is no clear and direct line in the evidence between that issue at the November 4 meeting and the December 12 lay-off.

[44] The timing of events also tends to show that Procrane acted independently and was not motivated by retaliation. The registered letter reporting an imminent danger was sent by Mr. Thompson on December 9. OHS assigned the matter on December 17 and performed an inspection on December 18. Procrane would not have known Mr. Thompson had reported an imminent danger until December 17 or 18. Procrane's letter stating it would not accept dispatches from Mr. Thompson was dated December 15. The lay-off of Mr. Thompson had already occurred on December 12. Since Procrane would not have known of Mr. Thompson's reporting of an imminent danger at the time it took these actions, there cannot be a link between the actions taken by Procrane and the reporting of an imminent danger. Moreover, even if causation could be established, these three items were *de minimis* and had no lasting effect in this case.

[45] The main issue in this DAC for Council remains the same: reasonableness of the OHS officer's decision. What about the lay-off itself? Procrane provided credible information that there was a lack of work at the worksite that necessitated the release of Mr. Thompson. The OHS officer determined that the lay-off was not discipline. Rather it was due to a lack of work. The OHS officer stated in the Table of Evidence and Findings: "[b]ased on the evidence collected, the terms of the lay-off are considered legitimate and do not indicate any link to raising health and safety concerns." The OHS officer concluded that Mr. Thompson's lay-off was not disciplinary but rather a formal end of work lay-off according to Collective Agreement procedures and in conjunction with two other crane operators. This was a reasonable conclusion from the evidence before the officer.

[46] Even if the December 12 lay-off could be considered disciplinary in nature, which Council does *not* consider it to be, a link is not sufficiently established between the act of compliance and the discipline. Procrane had concerns with Mr. Thompson's performance as documented in the rescinded discipline letters. If there was disagreement on the nature of the job performance issues, the appropriate resolution was through union and management processes and not through OHS processes.

[47] Was discipline operating on April 1, 2015 with Procrane's email about "not accepting the dispatch of Derek Thompson, given the litigation history and related issues between the parties"? The inferences one may draw about "litigation history and related issues" do not inescapably relate to the original safety concern.

[48] What to make of the April 1, 2015 email? "The litigation history and related issues" that the record discloses includes the failure to submit the logs with timesheets, demands made on management at the November 4 meeting, the December 1 safety violation, the December 9 imminent danger complaint six weeks

after it was first identified and five weeks after the meeting, harsh condemnation of Procrane on a public website, and the union grievance. Procrane credibly makes the case that it had significant "litigation history and issues between us" to choose from. As these are substantively performance issues, Council has no jurisdiction over how Procrane responds to Mr. Thompson's personal behaviours and decisions relating to work.

[49] When the DAC was filed on January 13, 2015, the letters and lay-off had already occurred. They could not have been in response to the DAC filing. Mr. Thompson argues that Procrane was still retaliating against him on April 1, 2015 but Procrane provides other bases than DAC retaliation for its refusal to re-engage him. Procrane referred to Mr. Thompson's 'malicious website comments' in its April 1, 2015 email.

[50] Mr. Thompson observed the alleged imminent danger as early as October 29, 2014. Yet he did not send in his formal notification by registered letter to OHS until December 9 which did not arrive until December 12. No explanation for this delay was offered although it is an unusual and troubling delay for a claim of imminent danger. The safety issue was documented in late October and early November and was discussed on November 4. It is not clear what triggered the complaint on December 9. Mr. Thompson's letter to OHS states that he started the job on October 29, 2014 and that he was lodging the complaint because he had been on the crane for over 100 hours and /or one month, as referenced in the manufacturer's specification. However Mr Thompson's DAC in January 2015 stated he had been with Procrane since September 8, 2014.

[51] Sending an imminent danger notification by registered mail is inappropriate. If it truly is perceived to be an imminent danger, there should be no delay at all in reporting the issue. Mr. Thompson's complaint to OHS (unknown to the employer) was drafted the same day as he was advised of the disciplinary letter on his personnel file. The OHS complaint might even be seen as retaliatory against Procrane, especially since Mr. Thompson knew Procrane was working on the concern and he continued to work on the crane.

[52] Council has doubts that Mr. Thompson's December 9, 2014 imminent danger complaint was submitted in good faith. Accordingly, it may not even comprise an act of compliance to attract DAC protection under the legislation. The only other arguable act of compliance with the legislation was the initial logging of the concern. Even then, Mr. Thompson did not raise that personally with his employer although he purportedly viewed it as an imminent danger. As has already been stated, there is no evidence of any employer retaliation for those log book entries.

[53] The question in this case is not whether Mr. Thompson's behaviour and performance at the worksite between October 29, 2014 and December 12, 2014 were legally sufficient for the disciplinary action and lay-off which followed. The OHS officer is concerned only about whether Mr. Thompson may have been disciplined at all *because* he raised the imminent danger safety concern to his employer and / or to OHS. Council finds that this causal connection was not established on a balance of probabilities on the facts of this case.

[54] 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 she conducted a fair investigation of Mr. Thompson's complaint, the OHS officer's decision on the disciplinary action complaint reasonably and sensibly flowed from her findings. Mr. Thompson has not satisfied Council that the decision of the OHS officer was unreasonable or unsupported by the evidence before her.

XI. Order

[55] The record shows that Mr. Thompson has been paid one month of salary from December 12, 2014, in compliance with the previous Council Order. This amount, unlike the previous Order itself, appears to have not been fully remitted. If that is the case, any unrecovered payments made by Procrane under the October 22, 2015 Council Order is ordered to be returned to Procrane by Mr. Thompson within 60 days of the date of this decision.

[56] Mr. Thompson's appeal of the OHS officer's decision dated May 4, 2015 is dismissed under section 37(4)(a) of the *Occupational Health and Safety Act*.