

**Noteworthy Decision Summary**

**Decision:** WCAT-2004-01652-RB **Panel:** Heather McDonald **Decision Date:** March 31, 2004

***If an employer fails to participate in an appeal of a section 151 discriminatory action complaint, then, pursuant to the reverse onus provision in section 152(3), the worker can potentially introduce new evidence that meets the bare requirements of a prima facie case of unlawful discrimination and win the appeal.***

A worker, a banquet server, alleged the employer hotel discriminated against him in contravention of section 151 of the *Workers Compensation Act* (Act). The Workers' Compensation Board found the worker failed to establish a prima facie case against the employer, and the worker appealed.

The panel found that the new evidence by the worker raised a prima facie case against the employer, bringing into play the reverse onus provision in section 152(3) of the Act. Section 152(3) provides that in dealing with a complaint under section 152(1), the "burden of proving that there has been no such contravention is on the employer". The employer chose not to participate in these appeal proceedings. With the presence of the reverse onus evidentiary burden, an employer or trade union takes a real risk in failing to participate in appeal proceedings, since WCAT's ability to consider new evidence means that a worker may be able to provide new evidence that meets the bare requirements of a prima facie case of unlawful discrimination under section 151. The employer's position on the warning letter that gave rise to this dispute was that it was disciplining the worker for misuse of the hotel telephone. However, in the appeal proceedings, the worker's evidence was that hotel policy was always to permit employees (in a limited way) to use hotel telephones for personal use, but that hotel policy in that regard had changed while he was on medical leave. There was no response from the employer to the worker's allegation that the hotel knew the worker was unaware of the new policy, and issued the warning letter against him not because of the minor violation of using the hotel telephone, but in order to retaliate against him because he had raised occupational health and safety issues regarding his workplace injury in 2000. The employer, not having participated in the appeal proceedings, failed to prove that there was no contravention of section 151 as alleged by the worker, namely, that no part of its action in issuing the warning letter was motivated by retaliation against the worker for raising occupational health and safety complaints regarding his earlier workplace injury. The panel found that the worker raised a prima facie case under section 151 against the employer regarding the warning letter he received, ostensibly for improper personal use of the hotel telephone.

**WCAT Decision Number :**

WCAT-2004-01652

**WCAT Decision Date:****March 31, 2004****Panel:**Heather McDonald, Vice Chair

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## Introduction

The worker was employed as a banquet server with the employer's hotel. The trade union was the certified bargaining agent for servers at the hotel. In these proceedings before the Workers' Compensation Appeal Tribunal (WCAT), the worker is appealing an April 15, 2003 decision by a case officer, Prevention Division, Workers' Compensation Board (Board). In that decision, the case officer dismissed the worker's complaint of discriminatory action filed under section 152 of the *Workers Compensation Act* (Act) against the employer and the trade union. In the April 15, 2003 decision, the case officer found that the worker had failed to identify any conduct by the trade union that fell within the Act's definition of "discriminatory action." The case officer found that the worker had also failed to establish a *prima facie* case against the employer, as the case officer found that the employer's reasons for giving the worker a warning letter did not fall within the reasons prohibited under section 151 of the Act.

The worker's position on appeal is that the case officer's decision was wrong. He says that the decision was incomplete and that it "discarded" occupational health and safety issues.

## Issue(s)

Did the employer discriminate against the worker in contravention of section 151 of the Act?

Did the trade union discriminate against the worker in contravention of section 151 of the Act?

If so, what is the appropriate remedy?

## Procedural Matters and Jurisdiction

The worker represented himself in these appeal proceedings. WCAT invited the employer and the trade union to participate, but they did not do so. The worker requested an oral hearing. I decided that it was unnecessary to convene an oral hearing. The worker provided a substantial body of documentary evidence and very lengthy written submissions. My assessment of the case was that an oral hearing would not assist me to better understand the evidence or the arguments on appeal.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make a decision on the merits and justice of the case, but in so doing, it must apply a policy of the Board's governing body that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it. WCAT has jurisdiction to consider the record in the proceedings before the Board's case officer, to consider new evidence, and to substitute its own decision for the decision under appeal. Thus, this is an appeal by way of a rehearing.

### **Relevant Statutory and Regulatory Background**

Section 151 of the Act has a summary title "Discrimination against workers prohibited" and states as follows:

An employer or union, or a person acting on behalf of an employer or union, must not take or threaten discriminatory action against a worker

- (a) for exercising any right or carrying out any duty in accordance with this Part, the regulations or an applicable order,
- (b) for the reason that the worker has testified or is about to testify in any matter, inquiry or proceeding under this Act or the *Coroners Act* on an issue related to occupational health and safety or occupational environment, or
- (c) for the reason that the worker has given any information regarding conditions affecting the occupational health or safety or occupational environment to
  - (i) another employer or person acting on behalf of an employer,
  - (ii) another worker or a union representing a worker, or
  - (iii) an officer or any other person concerned with the administration of this Part.

[reproduced as written]

Section 150 of the Act defines "discriminatory action" as follows:

- (1) For the purposes of this Division, "**discriminatory action**" includes any act or omission by an employer or union, or a person acting on behalf of an employer or union, that adversely affects a worker with respect to any term or condition of employment, or of membership in a union.

- (2) Without restricting subsection (1), discriminatory action includes
- (a) suspension, lay-off or dismissal,
  - (b) demotion or loss of opportunity for promotion,
  - (c) transfer of duties, change of location of workplace, reduction in wages or change in working hours,
  - (d) coercion or intimidation,
  - (e) imposition of any discipline, reprimand or other penalty, and
  - (f) the discontinuation or elimination of the job of the worker.

[reproduced as written]

Section 152(1) of the Act provides that a worker who has a complaint of discriminatory action "may have the matter dealt with through the grievance procedure under a collective agreement, if any, or by complaint in accordance with this Division."

Section 152(2) of the Act states that:

A complaint under subsection (1) must be made in writing to the Board,

- (a) in the case of a complaint referred to in subsection (1)(a), within 1 year of the action considered to be discriminatory, and
- (b) in the case of a complaint referred to in subsection (1)(b), within 60 days after the wages became payable.

Section 116 of the Act refers to the general duties of workers. Among other things, a worker must not engage in horseplay or similar conduct that may endanger the worker or any other person, and a worker has a duty to report to the employer any contravention of Part 3 of the Act, the Occupational Health and Safety Regulation (OHS Regulation), or any applicable order of which the worker is aware.

The "Workplace Conduct" provisions of the OHS Regulation state as follows:

#### **4.24 Definition**

In sections 4.25 and 4.26

*"improper activity or behaviour"* includes

(a) the attempted or actual exercise by a worker towards another worker of any physical force so as to cause injury, and includes any threatening statement or behaviour which gives the worker reasonable cause to believe he or she is at risk of injury, and

(b) horseplay, practical jokes, unnecessary running or jumping or similar conduct.

**Note:** Worker means a worker as defined in the *Workers Compensation Act*, and includes a supervisor or other representative of the employer (see Part 3, Division 1, section 106).

#### **4.25 Prohibition**

A person must not engage in any improper activity or behaviour at a workplace that might create or constitute a hazard to themselves or to any other person.

#### **4.26 Investigation**

Improper activity or behaviour must be reported and investigated as required by Part 3 (Rights and Responsibilities).

[reproduced as written]

### **Background**

The worker's section 151 complaint was dated January 8, 2003 and filed with the Board on February 12, 2003. The April 15, 2003 decision does not indicate whether an oral hearing was held by the case officer, nor does the decision indicate whether the employer and trade union participated in the proceedings before the case officer. From my review of the decision, it appears that the matter was dealt with by way of written submissions and that only the worker participated. I have reviewed the material in the Review and Penalty Section's file on this case, and have not found any written submissions made to the case officer by either the employer or the trade union.

The file did contain a memo dated February 6, 2003 and a consultation record dated February 17, 2003 by the Board safety officer who initially investigated the worker's Section 151 complaint. In the February 6, 2003 memo, the safety officer stated that he had unsuccessfully attempted to resolve the disputes between the worker, the employer and the trade union. The safety officer observed that many of the issues in the complaint had been addressed in grievance proceedings and before the Labour Relations Board. The safety officer stated that the worker did not appear to be satisfied with the outcomes and therefore had approached the Board under section 151 with many of the same matters. The safety officer said that in addition, the worker was

constantly changing and adding new complaints to his list of issues which made it very difficult to bring closure to the dispute. The safety officer stated that he had determined many of the issues raised by the worker to be “out of scope” of the Board’s jurisdiction to deal with under section 151, because they had already been the subject of grievances under the collective agreement between the employer and the trade union.

In her April 15, 2003 decision, the case officer identified seven allegations forming the worker’s complaint under section 151:

1. October 8, 2002 incident – the employer failed to pay the worker 30 minutes of overtime.
2. October 13, 2002 incident – the worker arrived 30 minutes late for his shift and the employer gave the worker a disciplinary letter dated October 25, 2002 regarding that incident.
3. October 24, 2002 incident – the worker had been directed to report to his supervisor but instead he stated he was ill and went home without reporting illness to the supervisor. The employer gave the worker a 3 day suspension for the incident. Subsequently the employer retracted the suspension.
4. October 25, 2002 incident – the employer failed to give the worker appropriate notice before cancelling his hours.
5. November 13, 2002 incident – the worker was absent from work on that date and provided several doctor’s notes to explain the absence. The employer did not accept the medical notes and gave the worker a three-day suspension.
6. October 9, 2002 incident – the worker used the guest phone for making personal calls and the employer gave the worker a warning letter noting the incident.
7. Unknown date – at a holiday function at the hotel, the worker reported to his supervisor that there was a broken elevator safety guard, broken class cart, broken chair cart, inappropriate carts, ergonomic issues and a dangerous transportation route. The case officer found that it was not clear from the information submitted by the worker what, if any, discriminatory action was taken by the employer or the trade union as a result of these reported occupational safety complaints.

The case officer noted that the first five allegations referred to above were the subject of grievances filed by the worker under the collective agreement between the employer and the trade union as bargaining agent.

The case officer noted the provision in section 152(1) of the Act that states that a worker with a complaint of discriminatory action may proceed through the grievance procedure or by way of filing a complaint with the Board. She also referred to Item #D6-153-1 of the *Prevention Manual* (Manual) which states in part that:

The worker cannot pursue both a grievance under a collective agreement and a complaint to the Board regarding the same alleged discriminatory action or failure to pay wages. The worker is required to elect between the two processes.

If the worker elects to pursue a grievance under a collective agreement, but the union decides not to pursue the grievance, the worker may revoke his or her election within 30 days of the union's decision and pursue a complaint to the Board. The complaint must, however, still be made within one year of the action considered to be discriminatory or within 60 days after the wages became payable.

With section 152 and Board policy in mind, the case officer decided that the Board did not have jurisdiction to deal with the first five allegations of the worker's complaint.

With respect to the sixth allegation involving the October 9, 2002 incident, the case officer found that the letter constituted "discriminatory action" but found that the evidence established that the reason for the warning letter was that the worker had made unauthorized phone calls. This reason did not come within section 151's prohibited motivations for disciplinary action and accordingly the case officer found that with respect to the sixth allegation, the worker had not made a *prima facie* case against the employer. The case officer also found that the evidence did not establish that the warning letter adversely affected the worker with respect to any term or condition of membership in the union, and therefore no *prima facie* case against the trade union had been established.

The case officer also dismissed the worker's section 151 complaint based on the seventh allegation. Although the worker had raised occupational health and safety issues at the holiday function, he had failed to identify any discriminatory action taken by either the employer or the trade union against him in response to him raising those issues. Again, the case officer found that the worker had failed to make a *prima facie* case under section 151 of the Act against the employer and the trade union.

### **Worker's Allegations In These Appeal Proceedings**

In these appeal proceedings, the worker made nine allegations that he characterized as discriminatory conduct. For ease of reference, I will summarize them as follows:

#### **(1) September 12, 1999 back injury followed by job termination:**

The worker states that he injured his back at work and reported the injury to the employer's banquet manager in October 1999. The worker states that he chose to avoid work because it would result in further injury, and that his physician supported his decision. The worker states that the employer terminated his employment in October 1999 for failing to show up for a scheduled shift. The worker also states that when he returned to work in March 2000, the employer threatened to terminate his employment and both the union and the employer withheld wages, seniority and benefits. The trade union proposed a settlement of the dispute. Subsequently, in May 2002, the worker filed a complaint under section 12 of the Labour Code against the trade union regarding its representation of him in the dispute.

***(2) March 2000 workplace injury followed by job termination:***

The worker refers to a workplace injury that occurred in March 2000. He states that he reported this injury to the employer's banquet manager and the banquet captain. The worker states that he chose to avoid work so as not to reinjure himself, and that his physician supported him in that decision. The worker alleges that the employer terminated his employment, and that this termination amounted to discipline for not carrying out a dangerous work process.

***(3) October 11, 2002 workplace injury followed by retaliatory discipline:***

The worker states that he injured his back in the morning of October 11, 2002. He states that he immediately informed the supervisor of his injury and advised the supervisor that he was going to "accommodate his regular duties" to avoid further injury. The worker states that on October 11, 2002 he received "discriminatory verbal discipline" from the employer for avoiding the dangerous work.

The worker states that he "continued to inform" the supervisor of damaged and dangerous equipment, including the damaged elevator safety guard, damaged glass cart and damaged room service cart. The worker also states that he continued to inform the supervisor that the shift was severely under staffed. The worker says that the supervisor told him that he was not working at industry standards and that a disciplinary letter was placed in the worker's employment file to that effect. The worker's position is that he was disciplined as retaliation for him reporting the safety issues with the damaged equipment.

***(4) October 12, 2002 workplace injury followed by late start to shift on October 13, 2002 followed by retaliatory discipline:***

The worker stated that he discovered his injury on the evening of October 12, 2002. He was scheduled to work for a 5 a.m. shift on October 13, 2002. The worker states that when he arrived on October 13, 2002, there was no supervisor on duty to address the medical issue. The elevator safety guard was still broken and equipment was damaged. The worker states that he chose to avoid work, so as to avoid further injury to his back.

When the banquet captain arrived at 7 a.m., the worker told him that he had chosen to change his regular duties to accommodate the back injury, which resulted in a delay of 15 minutes of starting work. The worker states that he was disciplined for the late start of the shift, and that he received a disciplinary letter in his employment file. The worker alleges that his supervisor was retaliating against him for raising occupational health and safety issues.

***(5) October 2002 use of hotel telephone followed by retaliatory discipline:***

The worker states that prior to his medical leave, the use of the hotel telephone was acceptable. The worker states that he had been on an extended medical leave relating to the March 2000 workplace injury. The worker alleges that the employer intentionally withheld policy changes from him when he was away on extended medical leave. The worker states that the employer placed a disciplinary letter in his file for unauthorized use of the hotel telephone. The worker alleges that in giving him the disciplinary letter, the employer was retaliating against him for his actions in addressing the employer's "failure to report, document and investigate the March 2000 work-related injury." The worker argues that any discipline against him would be discriminatory and in violation of section 151 of the Act.

***(6) November 13, 2002 incident followed by retaliatory discipline:***

The worker states that he was suffering mild mid-back pain on that date and that he told his supervisor that as a result, he would be avoiding regular duties. The worker states that he worked for a different employer to accommodate his injury. The worker states that the supervisor reported him as absent from work as the supervisor believed that the worker was capable of performing his regular duties, despite the fact that the worker had provided a physician's note to the supervisor. The employer suspended the worker for several days and gave him a disciplinary letter in his employment file. The worker submits that the employer was retaliating against him for raising occupational health and safety issues.

***(7) November 2002 – fabricated criminal activity and fabricated police investigations:***

The worker refers to an incident in which the hotel director stated that a knife had been plunged into her car windshield. The worker says that the director contacted the hotel's security department about the incident. The worker says that the hotel security department questioned him about the incident and that he was treated as a suspect. The worker says that the director herself approached various hotel employees and asked them about the worker's involvement in the alleged criminal activity. The worker says that the supervisor and the director advised that a police investigation was underway and that police had arrived "on the scene." The worker advises that he contacted the city police department to determine if there was a police investigation, and was advised that no police report had ever been made about the matter. The worker alleges that the windshield incident was a complete fabrication.

The worker also states that the director reported her car windshield smashed again on New Year's Eve, 2003. She also alleged in March 2003 that someone was phoning her and making threats. The worker submits that these incidents were fabricated. He says that these incidents amounted to intentional harassment, intimidation and coercion against him by the employer. The worker states that he made this allegation to the Board in April 2003 as an amendment to his discriminatory action complaint, but that the Board concluded it was "out of scope." The worker stated that he also filed a complaint with the Board about the director's misconduct, characterizing it as a violation of sections 4.24 to 4.26 of the OHS Regulation

***(8) April 2003 five-day suspension:***

The worker stated that the director was "terminated" as a result of his complaint about her misconduct. He then stated that following her termination, the director and the supervisor (who was also the union shop steward) retaliated against him. He stated that on April 1, 2003, the director suspended his employment "for performing regular hotel duties." He stated that the supervisor wrongfully reported him in a secure area of the hotel, accused him of breaking and entering, for which the employer suspended the worker for five days and placed a disciplinary letter in the worker's employment file. The worker says that he had complete access to the specific hotel area in question for seven years, and that he has continued to have access to the area after his wrongful suspension. The worker says that the director and the supervisor retaliated against him for raising the "worker conduct" violations of sections 4.24 and 4.26 of the Regulation.

***(9) July 2003 termination during medical leave:***

The worker states that his March 2000 work-place injury was affected by the unresolved "worker conduct" issues at the workplace. He states that these "environmental factors" exacerbated his asthma condition and required him to refrain from his regular hotel duties to avoid further injury. He told the worker of his decision to take medical leave and that he would obtain an assessment from his physician when his physician returned from holidays. The worker says that the employer disciplined him for refusing to carry out a dangerous work process, by withholding his wages, seniority and benefits.

**Reasons and Findings**

I have earlier referred to the work's nine allegations in these appeal proceedings, and will deal with them in the order in which they were earlier described.

***(1) September 12, 1999 back injury followed by job termination:***

The case officer did not refer to this issue in her decision, although I note that the worker mentioned it as the first item in his section 151 complaint he signed on January 8, 2003 and filed with the Board on February 12, 2003. Because it was not dealt with in the case officer's decision, it is understandable that the worker would raise this matter again in these appeal proceedings.

Section 152(2) of the Act requires that a section 151 complaint of discriminatory action be filed with the Board within one year of the action considered to be discriminatory. The worker's complaint about the October 1999 job termination was filed with the Board in February 2003, well beyond the one-year statutory filing deadline. I find that the Board did not have jurisdiction to deal with this aspect of the worker's section 151 complaint. This may have been the reason why there was no reference to it in the case officer's April 15, 2003 decision, although it would have been preferable if the case officer had referred to the issue and provided reasons for not dealing with it.

***(2) March 2000 workplace injury followed by job termination:***

This complaint does not appear in the worker's written section 151 complaint filed with the Board in February 2003. I see a reference to the matter in the worker's written submission dated February 5, 2002 to the Labour Relations Board, in which he alleged that the trade union had breached its duty to fairly represent him. In that submission, the worker wrote that he was having a reaction to dust at the workplace, and he went on medical leave after providing physician's notes. The worker wrote: "From the enclosed seniority list, I have been permanently removed. It appears the Hotel may have terminated my employment during my March 2000 Medical Leave."

The worker's complaint regarding a job termination by the employer on or about March 2000 is not a matter that I can deal with in these appeal proceedings. First, it was not raised as an issue in the section 151 complaint that the worker filed with the Board, which complaint formed the source of the proceedings before the case officer and these WCAT appeal proceedings. While WCAT is able to consider new evidence on appeal, the new evidence must relate to an issue in the proceedings. WCAT can not consider new section 151 complaints that are not part of the appeal proceedings because they were never made to the Board. In other words, WCAT does not have original jurisdiction to deal with a section 151 complaint – a complaint must first be filed with the Board and then WCAT may deal with an appeal of the Board's decision on the complaint. In the course of the appeal, WCAT may consider new evidence relating to that complaint.

The second problem with this aspect of the worker's case is the same as the problem with the first aspect of his case. This aspect of his complaint is out of time. The worker filed his section 151 complaint with the Board in February 2003 and this aspect of his complaint refers to events that occurred approximately three years earlier. Section 152(2) of the Act specifies a one-year deadline, from the date of discriminatory action, to file a complaint with the Board. The worker has missed that deadline in this case.

***(3) October 11, 2002 workplace injury followed by retaliatory discipline:***

I have reviewed the documentation filed by the worker in support of his section 151 complaint with the Board, and can find no reference to an October 11, 2002 workplace injury followed by retaliatory discipline (verbal discipline and a warning letter) for his refusal to perform his regular duties on or immediately after that date. The worker is raising a new complaint. Thus, like item **(2)** immediately preceding this item, I am unable to deal with this complaint in these appeal proceedings as WCAT does not have original jurisdiction to deal with an initial complaint under section 151.

***(4) October 12, 2002 workplace injury followed by late start to shift on October 13, 2002 followed by retaliatory discipline:***

My assessment of this complaint is that it is the same as the second allegation that the case officer identified in her decision of April 15, 2003. She dismissed the allegation as it had already been the subject of a grievance by the worker. I have reviewed the documentation on file and have confirmed that the worker filed a grievance against the employer with respect to the disciplinary action. I agree with the case officer's interpretation and application of section 152(1) of the Act and Board policy in Item #D6-153-1 of the Manual. The legislation and policy contemplate that a worker will elect to pursue one avenue of complaint over another, and that if a worker chooses to pursue a collective agreement grievance, he cannot later complain to the Board under section 151 if dissatisfied with the results of the grievance. Accordingly, I confirm the case officer's decision on this aspect of the worker's complaint.

***(5) October 2002 use of hotel telephone followed by retaliatory discipline:***

This complaint was not the subject of grievance proceedings and was raised as an allegation in the section 151 complaint filed by the worker with the Board. The case officer found that the worker had failed to make a *prima facie* case against either the employer or the trade union. In these proceedings, the worker has provided additional evidence by clarifying that the reason the employer gave him a warning letter was because he had earlier provided information about, and took steps to address, a workplace injury of March 2000 and the employer's failure to "report, document and investigate" the injury.

After reviewing the evidence, I confirm the case officer's decision that on this aspect of the complaint, the worker has still failed to raise a *prima facie* case against the trade union. This is because there is no evidence that the warning letter for misuse of the hotel telephone adversely affected the worker with respect to any term or condition of membership in the trade union.

I have found, however, that the new evidence by the worker has raised a *prima facie* case against the employer, bringing into play the reverse onus provisions of section 152(3) of the Act. Section 152(3) provides that in dealing with a complaint under

section 152(1), the “burden of proving that there has been no such contravention is on the employer.” In this case, I am satisfied that the worker has provided evidence meeting all the criteria of an unlawful discriminatory complaint: His written evidence refers to a warning letter (constituting discriminatory action) and refers to an employer motive under section 151(c) (retaliation for the worker giving information about a March 2000 workplace injury and complaining about the employer’s failure to investigate the incident that gave rise to the injury). The worker’s complaint about the warning letter was filed within the one-year deadline specified in section 152(2) of the Act.

The employer has chosen not to participate in these appeal proceedings. With the presence of a reverse onus evidentiary burden like section 152(3) of the Act, an employer or a trade union takes a real risk in failing to participate in appeal proceedings, since WCAT’s ability to consider new evidence means that a worker may be able to provide new evidence that meets the bare requirements of a *prima facie* case of unlawful discrimination under section 151 of the Act. I understand that the employer’s position on the warning letter was that it was disciplining the worker for misuse of the hotel telephone. However, in these proceedings, the worker’s evidence is that hotel policy was always to permit employees (in a limited way) to use hotel telephones for personal use, but that hotel policy in that regard had changed while the worker was on medical leave. There is no response from the employer to the worker’s allegation that the hotel knew the worker was unaware of the new policy, and issued the warning letter against him not because of the minor violation of using the hotel telephone, but in order to retaliate against him because he had raised occupational health and safety issues regarding a March 2000 workplace injury. I find that the worker has raised a *prima facie* case against the employer on this aspect of his section 151 complaint.

***(6) November 13, 2002 incident followed by retaliatory discipline:***

This complaint is the same as the fifth item identified by the case officer in her April 15, 2003 decision. The worker initiated a grievance under the collective agreement with respect to the suspension. Accordingly, for the reasons earlier provided in this decision under item (4), I confirm the case officer’s decision to dismiss the worker’s complaint in this regard.

***(7) November 2002 – fabricated criminal activity and fabricated police investigations:***

The case officer did not mention this matter in her April 15, 2003 decision. It is not mentioned in the worker’s letter dated January 8, 2003 to the Board’s safety officer in which he elaborates on the details of his section 151 complaint. It is also not mentioned in the section 151 complaint form filled out by the worker on January 8, 2003 and filed with the Board on February 12, 2003. It is not mentioned in a March 10, 2003 letter to the Board’s assistant director of investigations that the worker described as an “amendment” to his section 151 complaint. It is mentioned, however, in a letter dated

April 14, 2003 from the worker to the Board's director of investigations, as an amendment to his section 151 complaint.

The worker states that the Board found this aspect of his complaint to be "out of scope" of section 151 and thus "discarded" it. There is no express reference to this incident and the Board's conclusion about it anywhere on file.

After reviewing the evidence on file, I have concluded that the worker has not raised a *prima facie* case against either the employer or the trade union on this aspect of his section 151 complaint. Evidence in the form of a trade union memorandum dated March 6, 2003 indicates that the investigation into alleged criminal acts was not targeted at the worker in a discriminatory way, but rather that the workforce in general was under suspicion and there was more than one suspect. Although section 150(2) includes "intimidation" as within the definition of discriminatory action in section 151, it is not enough that a worker feels intimidated by an investigation to establish a *prima facie* case under section 151 against either an employer or a trade union. My assessment of the evidence in this case is that it does not establish a *prima facie* case that either the employer or the trade union was using the investigation as a means of discriminating against the worker because he raised occupational health and safety issues.

Turning to the worker's allegations against the hotel's director for wrongful "worker conduct" under sections 116 of the Act and 4.25 and 4.26 of the OHS Regulation, even if the allegations were true, I find that the director would have taken herself out of the scope of responsibility as agent for the employer if indeed she had acted illegally to fabricate the incidents of threats and damage to her personal property. Accordingly, I find that the worker's allegations against the hotel director do not establish a *prima facie* case under section 151 of the Act against the employer. As the hotel director was never acting as an agent of the trade union, the worker's allegations also do not establish a *prima facie* case under section 151 of the Act against the trade union.

**(8) April 2003 five-day suspension:**

This incident was not mentioned in the case officer's April 15, 2003 decision. I have reviewed the file material and can find no reference to it anywhere. It constitutes a new complaint. As I have earlier stated in this decision, in these appeal proceedings WCAT does not have original jurisdiction to deal with a new complaint under section 151 of the Act that has not been considered by the Board as part of the proceedings before the case officer. Accordingly, I do not have jurisdiction to consider this new complaint by the worker.

**(9) July 2003 termination during medical leave:**

This is another new complaint by the worker that did not form part of his original section 151 complaint in the proceedings before the case officer. Accordingly, in these WCAT appeal proceedings, I do not have jurisdiction to consider this new complaint by the worker.

**Remedy**

I have found that the worker has raised a *prima facie* case under section 151 of the Act against the employer regarding the warning letter he received, ostensibly for improper personal use of the hotel telephone. The employer, not having participated in these appeal proceedings, has failed to prove that there was no contravention of section 151 as alleged by the worker, namely, that no part of its action in issuing the warning letter was motivated by retaliation against the worker for raising occupational health and safety complaints regarding his workplace injury of March 2000.

I have considered the worker's requests for various remedies. I find that the appropriate remedy in this case is to direct the employer to cease and desist from the discriminatory action. Therefore, under section 153(2) of the Act, by way of remedy, I direct that the employer remove the warning letter from the worker's employment file. In this way, the worker will be returned to the position he would have been in with respect to terms and conditions of his employment with the employer, had the discriminatory action not taken place.

**Conclusion**

I vary the case officer's April 15, 2003 decision by finding that the employer violated section 151 of the Act in issuing a warning letter against the worker relating to an incident on October 9, 2002 for improper personal use of the hotel telephone. The employer has failed to prove that no part of its motivation in issuing the warning letter and placing it on the worker's employment file was tainted by retaliation against the worker for raising occupational health and safety issues related to his March 2000 workplace injury. By way of remedy, I have directed the employer to remove the warning letter from the worker's employment file.

Heather McDonald  
Vice Chair

HM/mak



***WCAT***

Decision Number: WCAT-2004-01652

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