

Noteworthy Decision Summary**Decision:** WCAT-2004-02065 **Panel:** H. McDonald **Decision Date:** April 23, 2004***Discrimination – Section 151 of the Workers Compensation Act – Effect of grievance under collective agreement – Interpretation of “discriminatory act”***

The worker alleged that she had been subject to a number of discriminatory actions, including a 4 month suspension with pay, because she had raised safety concerns at the workplace. Section 151 of the *Workers Compensation Act* (Act) prohibits discrimination against a worker on the basis that the worker has given information regarding occupational health or safety conditions to the Workers' Compensation Board (Board). At issue is whether the employer and/or the union unlawfully discriminated against the worker contrary to section 151 of the Act.

The panel dismissed the worker's complaints of unlawful discriminatory action under section 151 of the Act against both the employer and the union. In this case the actions by the employer and the union were due to the worker's behaviour and personality conflicts, not for reasons prohibited under section 151 of the Act. Despite finding that there was no discrimination in this case the panel did take issue with the narrow interpretation of “discriminatory action”, adopted by the review officer. The review officer interpreted this phrase as meaning that the employer's acts or omissions must adversely affect a worker's terms or conditions of employment or of union membership in a way that can be concretely referred to as a loss of rights under either the collective agreement, written employment agreement, or union constitution. The panel interpreted “discriminatory action” as including these scenarios but not limited to them. Therefore, actions could fall within the definition of discriminatory action even though the worker did not lose pay or benefits.

The panel also noted that it did not have the jurisdiction to deal with one of the complaints about a 3 day suspension as WCAT can not consider new section 151 complaints that are not part of the appeal proceedings as they were never made to the Board. Moreover, the worker had filed a grievance under the collective agreement with respect to that suspension, and according to section 152(1) of the Act, the same matter could not be the subject of a discriminatory action complaint to the Board under section 151 of the Act.

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Panel: Heather McDonald, Vice Chair

Introduction

The worker was employed as an outreach worker with the employer. Her duties involved assisting mentally disordered offenders to develop social and daily living skills, including complying with requirements issued them by the courts. In her job with the employer, the worker was a member of the bargaining unit represented by the union. In August 2001, the worker wrote a letter to the Workers Compensation Board (Board) requesting that the letter be considered a formal complaint of discriminatory action under Section 151 of the *Workers Compensation Act* (Act). Subsequently, on October 29, 2001, the worker completed a Section 151 complaint form in which she named both the employer and the trade union in her complaint, indicating that the discriminatory actions took place between March 2000 and “peaking” in April 2001.

In the complaint form and the August 2001 letter, the worker referred to the following incidents which she alleged constituted unlawful discrimination by the employer and the union:

- 1) The employer suspended the worker for a four-month period (with pay);
- 2) During the four-month suspension, the worker received some job postings but did not receive a posting for a vacant supervisor position for which she was well-qualified. The worker alleged that in this way, the employer did not allow her to apply for the vacant position and thus she lost the opportunity for promotion;
- 3) The employer gave the worker a disciplinary letter in August 2001 regarding a joke she had placed on a marker board in the outreach office;
- 4) The union did not take a grievance or otherwise properly represent the worker with respect to the loss of opportunity for promotion;
- 5) The union removed the worker from her position as a member of the workplace Occupational Health and Safety committee.

The worker generally alleged that these discriminatory actions occurred because she raised safety concerns at the workplace.

In subsequent submissions to the Board, the worker also alleged that:

- 6) The employer had intimidated her when outlining a code of conduct and ethics for employees in several letters to her.
- 7) The union discriminated against her by denying her the opportunity to attend a shop steward seminar in August 2001.

In a written decision dated March 5, 2003, a review officer in the Board's Prevention Division, Review and Penalty Section, dismissed the worker's complaint under Section 151 against both the employer and the union. The review officer found that the actions by the employer and the trade union did not adversely affect the worker with respect to any term or condition of employment, or of membership in a union. Therefore the review officer found that the alleged actions did not fall within the definition of "discriminatory action" in Section 150 of the Act.

On May 15, 2003, the worker filed a notice of appeal of the review officer's March 5, 2003 decision with the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

Did the employer and/or the union unlawfully discriminate against the worker as alleged by the worker in her discriminatory action complaint under Section 151 of the Act? If so, what is the appropriate remedy?

Procedural Matters and Jurisdiction

The worker represented herself in these appeal proceedings. She requested an oral hearing and I convened an oral hearing on April 20, 2004 at WCAT's Richmond premises. The employer and the trade union also participated at the oral hearing.

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 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.

The employer raised a preliminary objection to the worker presenting evidence regarding a three-day suspension in 2003 as part of the evidence in these appeal proceedings. The employer observed that the 2003 suspension was not part of the worker's initial complaint to the Board and the Board had never dealt with the issue. Further, the employer stated that the worker had filed a grievance under the collective agreement with respect to the 2003 suspension, and that according to section 152(1) of

the Act, the same matter could not be the subject of a discriminatory action complaint to the Board under section 151 of the Act.

While WCAT is able to consider new evidence on appeal, the evidence must relate to an issue in the appeal proceedings. WCAT can not consider new section 151 complaints that are not part of the appeal proceedings as 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. In this case, the 2003 suspension did not form part of the worker's initial section 151 complaint to the Board and I am unable to deal with it in these proceedings.

As well, section 152(1) of the Act and Board policy in item #D6-153-1 of the *Prevention Manual* (Manual) preclude the Board (and hence WCAT on appeal proceedings) considering the worker's complaint regarding the 2003 suspension. Item D#6-153-1 states in part that:

The worker cannot pursue both a grievance under a collective agreement and a complaint to the Board regarding the same 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.

In this case, the evidence is that the worker pursued the matter of the 2003 suspension through the collective agreement grievance procedure. The Act and Board 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 or she cannot later complain to the Board under section 151. In this case I am satisfied that in these appeal proceedings there is no jurisdiction under section 151 of the Act to deal with the issue of the 2003 three-day suspension.

For the foregoing reasons, I upheld the employer's preliminary objection at the oral hearing. I ruled that the worker was not entitled to lead evidence regarding the 2003 three-day suspension as the matter was not within the scope of these appeal proceedings.

During the oral hearing, at times both the worker and the employer attempted to introduce evidence regarding workplace events in 2003. I ruled that they could not do so, for the same reasons given in my ruling with respect to evidence about the 2003 three-day suspension constituting new evidence not related to the initial section 151 complaint. I ruled that the evidence about 2003 workplace events constituted new evidence that did not relate to the issues in these appeal proceedings originating from the worker's initial complaint under section 151 to the Board.

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.

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.

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(3) of the Act provides that in dealing with a discriminatory action matter, the burden of proving that there has been no such contravention is on the employer or the union, as applicable.

Background and Evidence

Since the worker filed her Section 151 complaint with the Board, all parties participated by way of extensive written submissions to the Board’s review officer and later to WCAT when the matter went on appeal. The review officer’s March 5, 2003 decision outlines the evidence and parties’ arguments. Thus there is a substantial body of documentation reviewing the evidence and the parties’ positions. The parties are familiar with the documentation, and all three parties participated at the oral hearing on April 20, 2004. I have considered the entire body of evidence and the parties’ submissions, but will not review them in detail in this decision. Rather, I will summarize the evidence and focus on the matters in dispute between the parties.

The worker began working for the employer as an outreach worker in 1998. At the oral hearing on April 20, 2004, a courtworker “X” testified on the worker’s behalf regarding the worker’s competence in her position as an outreach worker. X did not work directly with the worker in the outreach office, but interacted with the worker in the general business of the court community as both their jobs required frequent attendance at the courthouse. X testified that the worker was well-respected in the court community for her ability to deal with a difficult caseload of aggressive, drug-involved clients. X had never witnessed the worker behaving in any improper way.

“Y”, a rights advocate working for the employer, also testified on the worker’s behalf. Y did not work closely with the worker during the events at issue in these appeal proceedings, as she was operating from a different location. However, she had worked with the worker for several years at a different workplace for a different employer. As well, Y, like the worker, was a member of the employer’s Occupational Health and Safety (OSH) committee for the workplace. The OSH committee is comprised of both management and union representatives. Y testified that she had never observed the worker behave in an inappropriate or unprofessional way.

Y confirmed the worker’s testimony that the chair of the OSH committee (the employer’s executive director) tended to “run” the meetings as he saw fit. When the worker wanted

to pursue an issue regarding the health risk posed by syringes left on sidewalks, the chair refused to let the worker pursue the matter on the ground that it was outside the scope of the workplace, as the syringes were left on public property, that is, the streets and sidewalks, not on workplace property. Y also testified that the chair would also not allow the worker to pursue stress and “wellness” issues such as workload, again on the ground that this was outside the scope of the committee’s role. Y also testified that sometimes she herself failed to get a response from the chair regarding safety issues, referring by way of example to a memo she had written to him regarding the replacement of lights at the workplace. Y testified that some issues raised by the worker, such as the creation of a TB clinic, had never been followed up on by the OSH committee.

I accept the evidence of X and Y that the worker was very competent in her job and that many people in the court community respected her abilities and liked her. Other evidence, however, illustrates that in the Spring of 2001, dissension and unhappiness emerged in the employer’s outreach office, involving the worker’s relationship with some of her colleagues. Out of seven colleagues with whom the worker interacted closely, four out of the seven colleagues felt intimidated and harassed by the worker’s behaviour. The events in question occurred after the worker took an OSH training course and was appointed to the workplace OSH committee.

The evidence is that some of the worker’s colleagues disagreed with her interpretation of safety, WCB requirements, and appropriate enforcement in that regard. The worker began to advocate her preferred version of practices and policies regarding issues such as working in isolation, violence in the workplace, and exposure to bloodborne pathogens. The result was that some colleagues felt that the worker was harassing them by reporting them absent to a supervisor when they failed to return cell phone calls or otherwise report in to the worker. Other colleagues perceived that the worker was pressuring them to make WCB compensation claims when they did not want to and did not perceive themselves as having suffered a workplace injury. The worker was raising other issues, such as challenging the practice of putting tapwater in the water cooler instead of distilled water (she was concerned about the HIV and immune-compromised clients of the employer), and requesting specific information about clients’ criminal records. At the oral hearing on April 20, 2004, the worker testified that she knew that some of her colleagues disagreed with her interpretation of these safety issues, they did not feel unsafe in the workplace, and they did not agree with her perception that they were unsafe. The worker was arguing with these colleagues, and resentment was building in the workplace.

Resentment peaked when, in April 2001, the worker began to post stickers that said something to the effect of “I’m voting Yes for More Training – re OSH issues”. She posted the stickers on the union bulletin board at an office in the courthouse and on the outside of a door. Several co-workers removed the stickers, and the worker put them up again. Again, colleagues removed the stickers, and the worker’s inventory of stickers disappeared. The colleagues took the position that it was an inappropriate

location for the stickers, as court workers, not the employer's outreach workers, occupied the courthouse office. The worker was very angry about the removal of the stickers and reported to the executive director that her colleagues were harassing her. The executive director then scheduled interviews on April 23, 2001 with four of the worker's colleagues to investigate the matter.

"Z", now the employer's manager of community services, testified at the oral hearing on April 20, 2004. In April 2001, Z was a member of the bargaining unit, employed as a senior advocate, and was a union shop steward. Z testified that the executive director requested her to attend the April 23, 2001 interviews of the four colleagues.

Each of the four colleagues was interviewed separately. Z testified that there was a constant theme arising from the four interviews. The colleagues reported being confronted by the worker and feeling intimidated and harassed by her. Most of the complaints concerned the sticker event. The colleagues stated that the worker told them they had broken the law in removing the stickers and that she was going to report them for it and take charges against them. There was a report that the worker had telephoned a shop steward to complain about a colleague harassing her, and requested the shop steward to get the colleague "back in line". The colleagues indicated that they felt harassed as the worker would not let go of issues, and they were uncomfortable working with her. Z testified that at the end of the four interviews, the executive director had the impression that the relationship between the worker and these coworkers had deteriorated so significantly that the workplace had become a toxic environment. Therefore, he decided to suspend the worker with full pay and benefits, pending a more thorough investigation of the matter.

Z testified that the executive director telephoned the worker and requested to meet with her immediately. Z was present when the executive director advised the worker about her suspension. Z testified that the worker was very upset.

The worker testified that she felt that the suspension meant that she was to blame for the toxic environment. The worker testified that she felt wronged, as all she was attempting to do was to address safety issues properly. At a subsequent meeting at which the worker, the executive director and a union representative attended, the worker agreed to a suspension with full pay and benefits, and agreed to meet with a psychiatrist for an assessment. The executive director was concerned from reports of colleagues that the worker had become hypersensitive to safety issues, spending considerable time talking about her fears of being attacked on the job, being exposed to blood and body fluids and parking lot safety. The worker testified that she knew she didn't suffer from a mental disorder and was willing to prove that by meeting with a psychiatrist. The parties agreed to try to resolve the workplace dissension by the non-disciplinary suspension of the worker, the worker consulting with a psychiatrist, and ultimately, by a mediation between the worker and her colleagues to facilitate the worker's return to work.

The psychiatrist, "Dr. C" provided a written opinion dated May 8, 2001, clearing the worker as being fit to return to work. Dr. C indicated that the worker did not have symptoms of any major psychiatric disorder. Dr. C stated that she had been treating the worker since January 2000 and that the worker indicated she was experiencing stress in the work situation because of her concern about non-adherence of safety protocols in the workplace.

The day after the executive director suspended the worker, a Board safety officer inspected the employer's work site and issued three orders for non-compliance of the Occupational Health and Safety Regulation (Regulation). Those orders addressed the employer's failure to develop or implement written procedures for workers working alone or in isolation, a risk assessment for injury to workers from violence arising out of their employment, and to develop an exposure control plan. There was no employer representative present at the inspection by the Board safety officer, and the employer was unaware of the inspection report until some time after the worker was away from the worksite on suspension. At the oral hearing, the employer indicated its position that the inspection was not properly conducted according to Board requirements.

The worker returned to work on August 20, 2001. The mediation with colleagues failed because not all were willing to participate, and two colleagues that did participate ended the mediation without a resolution of the dissension.

When the worker returned to work she discovered that during her suspension, she had not received a posting for a supervisor's position and therefore did not have notice to apply for the position. The worker testified that she not requested that job postings be mailed to her during her suspension, but she had received some job postings. The worker testified that she asked the receptionist (who had been mailing the postings to everyone absent on a leave) about the missing job posting. The receptionist told her that she always tried to send all postings to everyone absent from the workplace, but that she had been ill and thus away from work for some time. The receptionist did not know if her replacement had mailed every job posting, and that may have been why the posting for the supervisor's position was not mailed to the worker.

The worker testified that she telephoned Z to discuss filing a grievance about the loss of opportunity for a promotion, but Z dismissed the idea. The evidence is that while Z was a union official at that time, she was not the worker's union representative. The worker said that during the summer, there was no one else in the union to approach about a grievance, so she did not pursue the matter.

Approximately six months after she became a member of the workplace OSH committee, the union removed the worker from the committee. The worker testified that the union keeps changing its story to her regarding why it removed her as an OSH committee member. First, the union told the worker it was because she was not an elected member. When she pointed out to the union that no election was necessary, the union then told her that her appointment had been temporary only. Finally, a

member of the union executive told her that she was obnoxious, a “troublemaker”, and alleged that she had behaved inappropriately at a union meeting.

The evidence is that after the worker returned to work in August 2001, the situation between the worker and her colleagues did not improve. The employer sent the worker several letters addressing alleged unacceptable behaviour. Some matters related to non-occupational health and safety issues. The letters included the employer’s expectations of workplace conduct, ethical standards and professional responsibility.

The letter of August 23, 2001 was the subject of grievance proceedings under the collective agreement. The September 19, 2001 letter warned the worker about inappropriate client interaction. The October 3, 2001 letter is in memo form, addressed to all court workers and court outreach staff, discussing the deteriorating working relationships between staff and the need for each staff person to exercise ethical responsibility. One other letter, the April 22, 2002 letter was a letter of expectation sent to the worker by Z, then her manager. The letter stated that the worker had been insubordinate toward a supervisor, and expressed the expectation that the worker not make unfounded accusations lacking factual basis. The letter also dealt in part with the employer’s “working alone” safety policy and the manager’s perception that the worker did not understand the contents of the policy and had, contrary to policy, without first contacting a supervisor to arrange it, arranged on her own for a colleague to buddy up with her to attend a client meeting. The manager expressed the expectation that the worker be aware of the contents of work policies and seek clarification from a supervisor or manager if she did not understand them.

The worker also complained about being denied the opportunity to attend a shop steward seminar in August 2001. The documentary evidence indicates that the seminar was very popular and oversubscribed, so that the union executive needed to select candidates to attend. The worker’s position is that the union rejected her application because she had pursued safety issues.

The worker testified at the oral hearing on April 20, 2004 that she felt ostracized and discriminated against at the workplace. She is frustrated and upset by her interactions with the employer, the trade union and some of her colleagues. She is now on long-term disability leave from the workplace.

The foregoing provides a general background to the worker’s allegations of discrimination. I will now focus on the separate allegations and provide analysis in relation to the law and policy relevant to section 151’s prohibition against unlawful discrimination. I have kept in mind that under section 152(3) of the Act, the burden of proving that there has been no unlawful discrimination as alleged by the worker is on the employer or the trade union, as applicable. I have also applied the “taint” principle applied by WCAT in other appeals involving section 151 complaints. That principle requires that in order to discharge the burden of proof under section 152(3) of the Act, a

respondent must prove that in no part were its actions tainted by “anti-safety” motivation prohibited under section 151 of the Act.

Analysis and Reasons

In the March 5, 2003 decision, the review officer dismissed the worker’s complaints on the ground that the actions complained of did not adversely affect the worker with respect to any term or condition of employment or of membership in the union. Thus, although the worker was suspended for four months, and subsection (2) of section 150 provides “suspension” as an example of a discriminatory act, because there was no change in the worker’s pay or other benefits, the review officer found that the suspension was not a discriminatory act. The review officer interpreted section 150’s definition of acts or omissions that are considered discriminatory as requiring that they adversely affect a worker’s terms or conditions of employment or of union membership in a way that can be concretely referred to as a loss of rights under either the collective agreement, written employment agreement, or union constitution (e.g. loss of union membership).

I do not necessarily agree with the review officer’s interpretation. Section 150 provides an expansive definition of discriminatory action, stating that it “includes” acts or omissions that adversely affect a worker with respect to any term or condition of employment or membership in a union. Arguably, therefore, there may be other acts which, albeit that they do not alter a worker’s position with respect to the written terms of a collective agreement, for example, might nevertheless constitute discriminatory acts under section 150.

Further, subsection (2) of section 150 gives specific examples of discriminatory action, also stating that they are included in the definition. The specific examples do not limit the definition of discriminatory action. Section 150(2) does state, however, that the specific examples constitute discriminatory acts. “Suspension” is a specific example of a discriminatory action in section 150(2), and therefore even a suspension with pay and full benefits, in my view, could constitute a discriminatory act under section 150.

With that in mind, I have decided it necessary to go further than did the review officer in her decision, and examine the motivation for the acts and omissions of the employer and the trade union of which the worker alleged in her complaint to the Board under section 151.

1. The four-month suspension

The weight of the evidence persuades me that the employer did not suspend the worker for reasons prohibited under section 151 of the Act. The Board inspection did not take place until after the decision was made by the employer to suspend the worker. Although the worker was pursuing safety issues at the workplace, the evidence satisfies me that it was not the safety issues themselves that were the reason for the conflict

between the worker and some of her colleagues. As with any other issue, reasonable persons may have disagreements on the interpretation of the concept of safety, and the interpretation and application of rules, regulations and policies in that regard. I am satisfied that the reason for the conflict between the worker and some of her colleagues was their perception that she would not tolerate any disagreement with her views, and that she would engage in haranguing and intimidating behaviour in an effort to make them change their minds. The worker's behaviour made these colleagues feel threatened and uncomfortable working with her at the employer's workplace, and they told the employer's executive director about their perceptions when he investigated the worker's complaint that they were harassing her.

The reason for the executive director suspending the worker, with full pay and benefits, was to provide a cooling-off period in the workplace pending a more complete investigation of the dissension between colleagues. The evidence is that the worker in fact agreed to the suspension and to a psychiatric consultation, although she did not agree that she was the harassing party. There were clearly personality conflicts in the workplace, and the executive director was trying to find a fair way to resolve them. The employer has met the burden in section 152(3) of the Act, as the evidence satisfies me that in no part was the employer's act in suspending the worker due to her raising safety concerns at the workplace or for any of the other reasons included in the section 151 prohibition against unlawful discrimination.

2. Lost opportunity for promotion due to failure to receive job posting for supervisor's position

The collective agreement between the parties (effective April 1, 2001 to March 31, 2004) does not impose an obligation on the employer to distribute job postings to employees away on leave from the workplace. Article 12.1(e) of the collective agreement provides that where the employer has a current practice to distribute postings it shall be maintained, unless otherwise agreed at the local level. The worker did not request that job postings be sent to her while she was away on suspension. The evidence is that the employer's receptionist, a member of the union bargaining unit, maintained the practice of mailing job postings to employees on leave. I have earlier referred to the worker's evidence about the receptionist's response when questioned about the reason for the worker not receiving the job posting for the supervisor's position.

Beyond the worker's suspicion that the employer may have had something to do with the posting not being sent to her, there is a dearth of evidence to link the employer with a deliberate intention to deprive the worker of the supervisor position by ensuring that she did not receive the job posting for the position. The evidence points to human error by the receptionist or her replacement as the reason for the lost job posting. On this allegation, the employer has rebutted the presumption in section 152(3) of the Act.

3. The August 2001 disciplinary letter regarding a joke card on the marker board

During the oral hearing, it became clear that the worker had already grieved this matter under the collective agreement between the parties. For the same reasons I provided regarding the three-day suspension in 2003, under section 152(1) of the Act, I do not have jurisdiction to deal with this allegation in these appeal proceedings.

4. The union did not grieve or otherwise represent the worker regarding the loss of opportunity for promotion to the supervisor position

The union's position is that such an omission would not constitute a discriminatory act under section 150 of the Act. Further, it submits that the worker was well aware of how to file a grievance, and she did not pursue the matter. Apart from one discussion with Z, the worker did not take any steps to initiate a grievance about the failure to receive the job posting. Finally, the union submits that it would have been a reasonable position for the union not to pursue such a grievance, as there was no right under the collective agreement to be enforced.

After considering the evidence, I have decided that the union has met the burden of proof in section 152(3) of the Act. Weighing the evidence as a whole, I am satisfied that the failure to file a grievance regarding the lost opportunity for promotion was not motivated by the worker having raised safety issues or by her having acted for other reasons expressed in section 151 of the Act. The evidence persuades me that the worker asked Z about filing a grievance and Z honestly responded in words to the effect that she did not believe it was a worthwhile issue to grieve. As earlier stated, Z was not the worker's representative, although she was a union official. The worker made no further enquiries in that regard. She did not seek advice from her representative or another union official on their return from vacation. My interpretation of the collective agreement is that there would have been very little likelihood of the grievance succeeding in any event. While that is not the only consideration for a union in deciding whether or not to support a member's grievance, I am satisfied that in this case, even if the union had seriously considered filing a grievance, it would have been a reasonable decision not to file the grievance. The evidence in this case, as a whole, does not support a finding of anti-safety motivation on the union's part.

5. The union removed the worker from the workplace OSH committee

The review officer simply stated that this act did not adversely effect the worker's terms or condition of her membership in the union. For reasons earlier stated, I do not agree with so narrow an interpretation of section 150's definition of a discriminatory act. The worker was acting as a union representative, in her capacity as a union member, on the OSH committee. The union's act in removing a union member from the committee could, for example, be found to constitute an act of intimidation or coercion, if appropriate circumstances were present, such as specific motivation to prevent the member from raising safety issues. In my view section 150's definition of a discriminatory act is sufficient to encompass that type of conduct.

In this case, however, the weight of evidence persuades me that the union did not remove the worker from the OSH committee because she raised safety issues or acted otherwise according to her rights as specified in section 151 of the Act. I have reviewed the minutes from the OSH meetings from January 2001 onwards that were included as evidence in the section 151 proceedings before the Board review officer. The minutes indicate that the worker, like other members, raised a variety of safety issues. The minutes indicate that the worker's issues were documented with directions for "action" on the issues. The minutes illustrate that while not all members were always in agreement on jurisdictional issues, or appropriate action to be taken on some issues, there was a concerted goal by OSH committee members to work together to maintain and improve safety in the workplace. Members might not always have agreed on the way in which to achieve that goal. But the minutes do not support a finding that either the executive director or the union were motivated to prevent the worker or anyone else from raising safety concerns.

I accept the testimony of Y that the worker did not misbehave or act unprofessionally at OSH meetings. I also accept Y's testimony that sometimes the executive director decided against pursuing some initiatives suggested by the worker. However, the evidence is that he did not always pursue all initiatives, even those raised by other members. I am satisfied that this was not due to an anti-safety bias, but rather because the executive director's views differed on issues of jurisdiction and priority. This finding is consistent with Y's testimony that the executive director did not agree with the worker that some issues were within the scope of the OSH committee's role, and that the executive director failed to respond to at least one of Y's concerns, too.

The conclusion I have reached is that the union executive decided to remove the worker from the OSH committee because of a personality conflict between the worker and some other union members who were also members of the executive or on the OSH committee. I find that the motivation was not because of a conflict about the raising of safety issues *per se*, but rather because some of the worker's colleagues as well as other union members disliked the worker's communication style. They perceived her as aggressive, obnoxious and vindictive in her pursuit of her objectives, some of which involved safety issues. Whether or not these perceptions were accurate is not for me to rule. It is also not important to decide whether the worker's views on safety were "better" than those of her colleagues on the OSH committee, although clearly she believes that she was in the right. The evidence satisfies me that any contextual link with occupational health and safety issues was merely coincidental, and that the only motivation for removing the worker from the OSH committee was one of personality conflict. That is a matter beyond the scope of section 151.

6. Employer's letters to worker outlining expectations and code of conduct

I have dealt with the August 23, 2001 letter under item three in this decision.

The September 19, 2001 letter dealt with the employer's perception that the worker had interacted inappropriately with a client. The evidence satisfies me that the reason for the letter was stated on its face, and was not motivated in any part because the worker had acted according to her rights in furthering occupational health and safety as specified in section 151 of the Act.

The October 3, 2001 letter was addressed to all court workers and court outreach staff, and is factual in tone and content. It does not target the worker and in my view, does not constitute a discriminatory act within the definition in section 150 of the Act.

The April 22, 2002 letter was a letter of expectation and it addressed, in part, the worker's behaviour in the context of her dealing with the occupational health and safety issue of working alone. Although the context for the alleged improper behaviour of the worker was the realm of occupational health and safety, I am satisfied that the employer's motivation for sending the letter was not to discriminate against the worker because she had acted within her rights in raising or addressing safety issues in the workplace. Rather, the evidence is clear that the employer was dealing with a problem of a worker acting in apparent insubordination and in contravention of a workplace policy and procedure, to the confusion and detriment of other workers. The fact that the policy and procedure involved an occupational health and safety issue was irrelevant to the main points addressed in the letter. Thus I find that the employer has discharged the burden under section 152(3) of the Act of proving that there was no anti-safety motivation in sending the letter to the worker. Further, although the letter sets out the employer's expectations of the worker, it does not impose discipline. I am unable to find that the letter constituted a discriminatory act within section 150 of the Act.

7. Union not permitting the worker to attend an August 2001 shop steward seminar

I have reviewed the evidence on this point and have reached the conclusion that the union did not deny the worker an opportunity to attend the seminar because she had acted according to her rights in raising occupational health and safety issues as specified in section 151 of the Act. While the worker may be correct in her belief that the union did not want her to attend the shop steward seminar, in my view any antipathy toward the worker by union executive members had its genesis in the personality conflicts I have described under item 5 in this decision. In the absence of anti-safety motivation as described in section 151 of the Act, I do not have jurisdiction to rule on who was right and who was wrong in a personality conflict.

Conclusion

For the foregoing reasons, which differ in part from those given by the review officer in her March 5, 2003 decision, I confirm the review officer's March 5, 2003 decision to dismiss the worker's complaints of unlawful discriminatory action under section 151 of

the Act against both the employer and the trade union. The worker is not entitled to a remedy under section 153 of the Act, and I make no award as to costs.

Heather McDonald
Vice Chair

HM/hf