

### Noteworthy Decision Summary

**Decision:** WCAT-2004-02587      **Panel:** Heather McDonald      **Decision Date:** May 18, 2004

***Discriminatory action – Dismissal from employment – Remedies – Reinstatement – Compensation – Sections 151, 152, 153 of the Workers Compensation Act – Policy item D6-153-2 of the Prevention Manual – Item #6.00 of the Manual of Rules, Practices and Procedures***

The employer terminated the worker's job in circumstances that suggested the employer suspected the worker had made a complaint to the Workers' Compensation Board (Board). The panel found the employer violated section 151 of the *Workers Compensation Act* (Act) and ordered the employer to compensate the worker for lost wages but did not order reinstatement.

The worker worked as a sorter at a recycling transfer station for two weeks. During that time, someone made an anonymous telephone call to the Board to report a workplace incident. In response, a Board safety officer visited the work site to inspect the employer's operations.

Six days later, a senior employee, B, threatened the other workers at a meeting, warning them not to contact the Board about safety problems but rather to speak to him. He also said that the employer had an idea of who made the telephone call and that the person would be gone in the next day or so. The worker believed B thought he was the person who had reported the incident. Two days later the worker went home early because he was ill. The next day he was sent home from work early. The employer refused to give him a reason even though the worker protested, saying that he was not the one who had contacted the Board. As the worker was leaving B began to swear and yell at the worker, threatened him and chased him off the property. The employer did not discipline B for his actions. Two days later, the worker contacted the employer about future work and was told he would have to be placed on a different shift from B. The employer then swore at the worker and hung up.

The worker filed a complaint with the Board under section 151. The Board found the employer in violation of section 151 and ordered them to reinstate the worker to his former job and compensate him for any loss of income. The Prevention Division of the Board confirmed the decision that the employer had violated section 151 but varied the remedy by not ordering reinstatement. Instead, the reviewing officer ordered the employer to pay compensation to the worker for lost shifts and for a further two weeks of lost wages. The worker and employer both appealed to the Workers' Compensation Appeal Tribunal (WCAT).

The panel first found that there was discriminatory action by the employer, as defined in section 150, in that it was a party to B's intimidating behaviour and supported B afterwards, resulting in the discontinuation of the worker's job.

The panel considered whether the discriminatory conduct was motivated by reasons prohibited by section 151. The panel noted that section 151 deals with an employer's motivation for taking discriminatory action, and does not require actual conduct by a worker. The panel held that illegal discrimination is established even if anti-safety motives were only part of the reason for the employer's actions (the "taint" principle). The panel also noted the employer bore the burden of proof under section 152(3).

The panel concluded the employer had violated section 151 based on the following factors:

- B targeted the worker as the likely candidate who had made the complaint to the Board.
- Although not a supervisor, B had *de facto* authority at the workplace.
- The employer either did not reprimand, or only mildly reprimanded, B.
- The employer gave the clear message that it supported B, not the worker and that the worker was not welcome back at the workplace.
- While the employer may not have actively encouraged B, by aligning with and supporting him, they were a party to his threats and intimidation.
- The employer's conduct was not consistent with having told the worker to go home because of illness or a shortage of work or they would have told him to report back to work as previously scheduled.
- Although an independent witness contradicted the worker, the inconsistency was likely a result of the worker not remembering rather than not telling the truth. Furthermore, nothing of significance turned on the contradiction. The worker was a credible witness and the panel accepted his version of the final conversation with the employer.

The panel then considered the issue of remedy. The panel noted that section 153 provides the Board with a wide discretion to design remedies for unlawful discrimination that are appropriate to the circumstances of each individual case and that policy item D6-153-2 of the *Prevention Manual* sets out guidelines for applying remedies under section 153. It is important that workers not profit beyond being restored to the position that it is reasonable to expect they would have been in but for the unlawful discrimination. It is also important that employers not be allowed to escape the consequences of their discriminatory action by applying lesser standards for the remedy, such as the provisions found in the *Employment Standards Act*. Reinstatement is the primary remedy for unjust dismissal under section 153(2). However, reinstatement does not need to be automatically granted, particularly when damages are adequate compensation.

The panel decided not to order reinstatement, but directed the employer to compensate the worker for lost wages for a period of six months after the dismissal, corresponding to the time at which the station closed and most of the workers were laid off. Although the worker may possibly have been transferred to another location and worked beyond this date, this was mere speculation.

As the panel did not have sufficient evidence to fix a dollar amount, the parties were requested to participate in an alternative dispute resolution process with a WCAT mediator under item #6.00 of WCAT's *Manual of Rules, Practices and Procedures* to agree on the dollar amount of the remedy.

An amendment was issued for WCAT-2004-02587 and is attached to this document.

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## Introduction

The employer operates a recycling transfer station. The worker worked as a sorter at the transfer station for approximately two weeks in March 2002, his last day of work being March 28, 2002. The worker filed a complaint with the Workers' Compensation Board (Board) under section 151 of the *Workers Compensation Act* (Act), alleging that the employer unlawfully discriminated against him by firing him because it believed he had reported a workplace incident to the Board.

After an oral hearing at which both parties appeared to give evidence, a hearing chair in the Board's Review & Penalty Section, Prevention Division, issued a decision dated September 12, 2002. In that decision, the hearing chair found that the employer had violated section 151 of the Act as alleged by the worker. Under section 153(2) of the Act, the hearing chair ordered the employer to:

- reinstate the worker to his former job within two weeks of the decision, or at such time as the parties could agreed upon;
- restore all the benefits to the worker he would have received had he been continuously employed since March 29, 2002;
- compensate the worker for any loss in income suffered as a result of his discharge from March 29, 2002 to the date of his reinstatement;
- remove any documentation pertaining to the worker having quit his job.

The employer requested a review of the hearing chair's decision by the Prevention Division. It also requested a stay of the hearing chair's remedy pending the review on the merits of the decision. In a decision dated February 3, 2003, the Prevention Division granted the employer's request for a stay.

In a decision issued July 18, 2003, a reviewing officer in the Prevention Division's Policy and Legal Services Department confirmed the earlier finding that the employer had violated section 151 of the Act in terminating the worker's employment. With respect to remedy, however, the reviewing officer varied the earlier decision by not ordering reinstatement. Instead, he ordered the employer to pay the worker compensation in the form of wages (based on a 40-hour work week) for lost shifts from March 28 to April 6, 2002 (the last day scheduled for the worker to work in the records provided to the Board

at the oral hearing), and for a further period of two weeks up to and including April 20, 2002. The reviewing officer retained jurisdiction to deal with any dispute between the parties over the calculation of the amount.

Both the worker and the employer appealed the reviewing officer's July 18, 2003 decision to the Workers' Compensation Appeal Tribunal (WCAT). The employer also requested a stay of the reviewing officer's July 18, 2003 decision. In a decision dated October 28, 2003, I denied the employer's request for a stay.

This decision deals with the merits of the appeals initiated by both the worker and the employer of the reviewing officer's July 18, 2003 decision. The worker's position is that while correct in confirming the finding that the employer violated section 151 of the Act, the reviewing officer erred in varying the remedy aspect of the hearing chair's decision. The worker's position is that WCAT should restore the remedy provided by the hearing chair, in particular the reinstatement of the worker's job with the employer.

The employer's position is that both the hearing chair and the reviewing officer erred in finding a violation of section 151 of the Act. The employer requests WCAT to find that there was no such violation and to cancel the reviewing officer's decision. In the alternative, on the issue of remedy, the employer's position is that the remedy ordered by the reviewing officer should be confirmed. The reviewing officer ordered approximately four weeks of wages as compensation for the worker, and the employer submits that this would have been reasonable compensation at common law for wrongful dismissal, and more compensation than the worker would have been entitled to under the *Employment Standards Act*.

### **Issue(s)**

Did the employer violate section 151 of the Act in terminating the worker's employment? If so, what is the appropriate remedy?

### **Jurisdiction, Procedural and Preliminary Matters**

Legal counsel represented the employer in these appeal proceedings. A trade union advocate represented the worker.

Section 240(1) of the Act provides a right of appeal to WCAT from a decision under section 153 of the Act regarding a complaint of unlawful discrimination. Sections 241(4) and 242(1) provide that any person directly affected by a decision or order in that regard may appeal the decision or order to WCAT by filing a notice of appeal with WCAT. Section 243 provides that a notice of appeal regarding a Board decision involving unlawful discrimination must be made within 90 days after the decision being appealed was made. In this case, both the employer and the worker are parties directly affected by the reviewing officer's July 18, 2003 decision. They both filed their notices

of appeal to WCAT within 90 days of that decision. I am satisfied that WCAT has jurisdiction to deal with their appeals.

The employer requested an oral hearing in the WCAT appeal proceedings. It understood these appeal proceedings to be by way of *de novo* hearing. The employer submitted that an oral hearing was necessary because the issues on appeal turn on the worker's credibility. In particular, the employer has relied on the evidence of Mr. T, a truck driver who testified at the oral hearing before the hearing chair who issued the first decision in this matter (September 12, 2003). The employer submits that neither the hearing chair nor the reviewing officer gave sufficient weight to Mr. T's testimony, which the employer says totally undermines the worker's credibility. The employer also submits that the hearing chair made other findings as to credibility that were patently unreasonable. The employer argues that it "would be infinitely more desirable for the panel to actually hear the witnesses and draw their own inferences and conclusions and to assess the credibility of those witnesses" in light of what the employer submits are patently unreasonable findings by the hearing chair.

I decided against convening an oral hearing in these appeal proceedings. These proceedings are a rehearing by WCAT, but not a hearing *de novo* in the sense that WCAT must commence a matter anew without the ability to consider evidence and argument tendered in the proceedings from which the appeal was initiated. The evidence and argument before the hearing chair and the reviewing officer are also available to me in these appeal proceedings.

The file documentation in this case included a typed transcription of the oral hearing that took place on July 17, 2002 before the hearing chair. I have been able to read the transcription and to become familiar with the testimony provided by all the witnesses at the hearing. With that transcription, and the written submissions of the parties that compare and contrast the testimony of various witnesses, I did not find it necessary to convene an oral hearing. My view is that it would not have been of much benefit to me in reaching my decision to observe the witnesses as they gave their testimony. I have applied the test articulated by the B.C. Court of Appeal in *Faryna v. Chorney* (1952) 2 D.L.R. 354, [1951] 4 W.W.R. (NS) 171, which indicates that the test of the credibility of a witness cannot be gauged solely by whether the personal demeanour of the particular witness carried conviction of truth. Instead, the real test of the truth of the story of a witness must be its "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." I have kept in mind that the oral hearing before the hearing chair took place approximately four months after the events in question, and one can not expect perfection in memory from witnesses. Further, reasonable persons may perceive the same event in very different ways, influenced by their individual personalities and life circumstances. I have also kept that in mind in assessing credibility when there was a dispute or variation in the testimonial evidence.

There are three preliminary issues raised by the parties that I will deal with first.

In a written submission dated February 3, 2004, the worker argued that WCAT has no jurisdiction to amend the hearing officer's September 12, 2002 decision, as the only decision under appeal is the reviewing officer's July 18, 2003 decision. The worker suggested that WCAT is bound by the factual conclusions reached by the hearing chair on the evidence. I agree with the employer's response that this is not the case. The entire matter originated by the worker's section 151 complaint to the Board is before me in these appeal proceedings, as the reviewing officer's July 18, 2003 decision was a review of the Board's decision on that complaint.

The employer raised the second preliminary issue in its written submission dated February 20, 2004. The employer submitted that WCAT must cancel both the September 12, 2002 and the July 18, 2003 decisions on the ground that the hearing chair and the reviewing officer committed jurisdictional error by breaching natural justice. This argument was made in response to an earlier submission by the worker that both decisions were based on a finding under section 117 of the Act and the guidelines in Item D3-117-1 of the *Prevention Manual* (Manual) that Mr. B, the excavator operator, was a supervisor within the meaning of the Act. The employer's position is that these Manual guidelines do not have the force of regulation. It says that it heard of this argument for the first time in the worker's February 3, 2004 submission in these appeal proceedings, and did not have an opportunity to present its position on the issue before the hearing chair and the reviewing officer. The employer argues that if the two decision-makers referred to and relied on the Manual guidelines as a law or regulation under the Act in reaching their decision, then they committed a breach of natural justice. The employer requests WCAT to set aside their decisions for that reason.

I have found no breach of natural justice by the hearing chair or the reviewing officer. The issue of Mr. B's authority to speak and/or act on behalf of the employer was an important one in the proceedings, and both parties led evidence before the hearing chair on the matter. The reviewing officer's decision never referred to section 117 of the Act or item D3-117-1 of the Manual, and I conclude that consideration of those provisions did not form part of his reasons for decision. Instead, the reviewing officer found on the evidence that Mr. R, one of the employer's lead-hands, condoned Mr. B's conduct (specifically the conduct at the March 25, 2002 meeting) and that therefore Mr. B's intimidating conduct constituted discriminatory action by the employer under section 151 of the Act. In addition, the reviewing officer also found that the employer had laid off the worker on March 28, 2002, and that action also constituted discriminatory action under section 151 of the Act.

Similarly, the hearing chair did not refer to section 117 of the Act or item D3-117-1 of the Manual. He found that the evidence at the hearing established that Mr. B was not a

member of the employer's management team, but that the evidence established that he instructed, directed and controlled workers in the performance of their duties. In that sense, the hearing chair found Mr. B to be a supervisor. The hearing chair also noted the evidence that Mr. R's conduct while Mr. B was speaking, as well as the employer's lack of action toward Mr. B, should be construed as the employer condoning Mr. B's words and conduct. Therefore the hearing chair found that the employer's intent and mindset coincided with Mr. B's conduct in warning workers not to report occupational health and safety matters to the Board. Both parties were aware of the relevance of these issues during the proceedings before the hearing chair, and they presented evidence directed to these issues. I find no breach of natural justice by the hearing chair.

The third preliminary issue involves the employer's second allegation of a breach of natural justice by the hearing chair. The employer stated that the hearing chair breached natural justice and denied the employer fairness by refusing to require the worker to disclose particulars of allegations in his section 151 complaint form regarding threats, intimidation, coercion, reprimands and dismissals of other workers at the transfer station. The employer's position was that it wanted the details of the allegations involving other workers as it was quite sure that there were no incidents involving other workers, and it wanted to test the worker's credibility in that regard. The hearing chair denied the request on the ground that the Board was dealing only with the individual complaint made by the worker regarding allegations of discriminatory action against him by the employer, not with matters related to discriminatory action against other workers. With that focus in mind, I agree with the hearing chair's ruling on the point. I also note that the oral hearing revealed the full extent of the worker's case, and the worker's case illustrated that other workers were present when Mr. B made threatening and intimidating comments to them at a crew meeting. The employer had a reasonable opportunity to understand the case it needed to meet. If the employer had been surprised by any element of the worker's case, it could have requested an adjournment for time to prepare, but it did not do so. The hearing chair provided the employer with a full opportunity to present the evidence it wished to meet the worker's case, and I do not find that the employer was prejudiced in any way by the conduct of the oral hearing.

### **Relevant Law**

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(3) of the Act provides that the burden of proving that there has been no contravention of section 151 is on the employer.



WCAT, like the former Appeal Division, has applied the "taint" principle in appeals involving section 151 complaints. This principle originated in Ontario jurisprudence which requires that in health and safety matters, employers must disprove any "anti-safety animus" in order to overcome a finding that they have contravened anti-discrimination legislation. Illegal discrimination is established even if anti-safety animus provides only a partial motivation for the employer action. 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. The Appeal Division commented as follows on the "taint principle" in *Decision #2002-0458* (February 21, 2002):

There is no doubt that the taint theory makes it more difficult for the employer to discharge its burden under Section 152(3). The employer must demonstrate that its reasons for taking action against the worker were not related to any of the prohibited grounds in Section 151. This means that the employer cannot shield itself by pointing to proper cause, or what may be a valid business reason for the impugned conduct, where there is also evidence of a prohibited action...

The taint theory stands for the proposition that safety considerations need not be the only or dominant reason for the employer's action, but rather, it is sufficient if it is one of the reasons for the employer's action under review.

On the issue of remedy, section 153(2) of the Act states as follows:

If the Board determines that the contravention occurred, the Board may make an order requiring one or more of the following:

- (a) that the employer or union cease the discriminatory action;
- (b) that the employer reinstate the worker to his or her former employment under the same terms and conditions under which the worker was formerly employed;
- (c) that the employer pay, by a specified date, the wages required to be paid by this Part or the regulations;
- (d) that the union reinstate the membership of the worker in the union;
- (e) that any reprimand or other references to the matter in the employer's or union's records on the worker be removed;

(f) that the employer or the union pay the reasonable out of pocket expenses incurred by the worker by reason of the discriminatory action;

(g) that the employer or the union do any other thing that the Board considers necessary to secure compliance with this Part and the regulations.

Item D6-153-2 of the *Prevention Manual* provides that it is the Board's objective in exercising the remedial powers in section 153(2) of the Act to, *in so far as it is practicable*, to put the worker in the same position the worker would have been in if a discriminatory action had not occurred. The policy also provides that the Board may order an employer to pay back wages and "perform other incidental acts," with the authority to do so found in section 153(2) of the Act.

### **Background and Evidence**

This case is at its third stage of proceedings, and the parties are well aware of the basic facts, although some, of course, are in dispute. The parties have the transcription of the oral hearing before the hearing chair, as well as his written decision that described the evidence in detail. I have reviewed all the evidence and the parties' submissions, but in this decision will not be reciting every aspect of those matters. I have found it necessary to analyze the evidence in some detail, however, in order to address the parties' arguments in these proceedings.

My summary of the events in question, as gleaned from the testimony at the oral hearing, is as follows:

The worker was a new employee who had been working for approximately two weeks as a sorter at the employer's recycling transfer station. There was an incident on March 19, 2002 when another sorter, Mr. L, was struck by the bucket of the excavator operated by Mr. B. Mr. L was not injured. Mr. B was very upset by the incident. Someone made an anonymous telephone call to the Board reporting the incident, although no one knows who made the report. In response to the anonymous report, a Board safety officer visited the site the next day, March 20, 2002 to inspect the employer's operation.

Mr. D, the employer's operation manager, testified that he generally went to the transfer station every second day or so. He testified that when he was not there, the two lead hands, Mr. M and Mr. R, were "supposed to be running the show" at the transfer station.

On March 20, 2002, one of the lead hands, Mr. M, held a safety meeting attended by numerous workers. Nothing of significance to these appeal proceedings occurred at

that meeting. On March 25, 2002, however, there was another informal meeting called by Mr. R, the afternoon lead hand. Although Mr. R was present at this meeting, Mr. B, the excavator operator, took the dominant role and did virtually all the speaking. With Mr. R standing by, Mr. B made threatening and intimidating comments, advising the workers not to contact the Board about safety problems but rather to speak to him if they had any such issues. He stated that “we have an idea” about who had contacted the Board although “we don’t know who” and that the person would be gone in the next day or so. Mr. B threatened to hit or punch someone out if they reported safety problems to the Board. He indicated that the employer could deal with safety matters itself, and that if the Board discovered safety problems, both the workers and the employer could be fined by the Board. Mr. R concurred, and also indicated that the employer’s premiums (assessments) could rise, too.

The worker’s perception was that Mr. B believed he was the person who had reported the March 19, 2002 excavator incident to the Board, as he thought that Mr. B was “eye-balling” him and another worker during his tirade.

Another employee at the transfer station, a sorter/picker, Mr. P, testified that during the meeting on March 25, 2002, he believed Mr. B was talking on behalf of the employer, and that he believed Mr. B would be able to terminate his employment, with the help of the lead hand Mr. R. Mr. P testified that he believed that Mr. R was supporting what Mr. B said at the meeting. Mr. P testified that he was scared of Mr. B. When questioned regarding what he thought would happen to him if he complained about a safety issue to Mr. B, Mr. P answered, “Probably lots of swearing and maybe get hit...When he made that threat I...I made a point of staying away from him....” Mr. P testified that Mr. R’s only comments at the meeting were dealing with safety wear issues and that it would be better for the employer to deal with safety wear matters in-house, as the Board would be able to fine workers and the employer if it found safety violations. Mr. P testified that Mr. B did “pretty well all the speaking” at the meeting. Mr. P testified that Mr. B “said it and [Mr. R] agreed and that we don’t need our premiums going up, we don’t need the WCB down here.”

Mr. L, the sorter who was struck by the excavator bucket, testified that Mr. B had a disagreeable personality and was a “power-tripper.” Mr. L confirmed the testimony of the worker and Mr. P about what transpired at the March 25, 2002 crew meeting: essentially that Mr. B took the dominant role, threatened physical violence to anyone who complained to the Board about safety issues, implied that he knew who had contacted the Board and indicated that the person was going to be fired. Mr. L confirmed that Mr. R stood by and mainly listened to Mr. B address the crew. Mr. L testified that he did not believe for one minute that Mr. B had the ability to terminate his employment because he (Mr. L) was used to head games, but he did pay attention to what Mr. B stated regarding work directions and that when Mr. B told him to do something he did it, because “I have to respect his position and myself as a lowly worker.”

The worker was ill on March 27, 2002 and went home early from work as a result, with the employer's knowledge and permission. He returned to work on March 28, 2002 and when he first arrived, Mr. R told him that he could leave if he wanted, as the crew was only working "till lunch tonight." The worker declined as he had missed a few hours the night before due to illness.

Mr. R testified that the worker did not look well to him and that when Mr. D., the operations manager, telephoned to ask how things were going, Mr. R mentioned to him that the worker was not pulling his weight and that he appeared to still be "under the weather" from the previous day's illness. Mr. R testified that Mr. D told him to send the worker home.

Mr. R testified that he then approached the worker and told the worker that Mr. D had phoned and directed that the worker was to go home. Mr. R did not give a reason for sending the worker home, although the worker pressed him on the point. Mr. R testified that he did not feel it necessary to justify the reason to the worker, as it was instructions from the boss and Mr. R felt that "if my boss told me to do it, it's done." The worker assumed that it was due to the employer believing that he had reported the March 19, 2002 work incident to the Board, and began protesting that he had not done so, that he was not the person who had contacted "compo" and that he was not a "union rat." The worker was upset because he had not worked for approximately 18 months before starting the job with the employer. He protested that he had not contacted the Board as he was not going to jeopardize the job because he really needed it, and he was not going to cause trouble. There was a heated dispute between Mr. R and the worker, with the worker protesting about being sent home. Mr. R would not give him a reason, but simply specified that Mr. D had instructed that he be sent home. The worker wanted to know if he should show up for work on Saturday, March 30, 2002 (his next scheduled day to work), and Mr. R told him to telephone Mr. D about the matter. Mr. T, the truck driver, was a witness to approximately two minutes of the interchange between the worker and Mr. R, which lasted in total approximately twelve minutes.

When the worker started to leave the worksite, Mr. R followed him out as he walked off the property. The excavator operator, Mr. B, began to swear and yell at the worker. Mr. B jumped off the excavator, and he and the worker began to argue about safety and who had contacted the Board. There was a yelling match between them, with Mr. R eventually telling Mr. B that it "wasn't worth it" to pursue. Mr. B then ran the worker off the property, chasing him out to the street. Mr. R could hear physical threats.

The evidence is that Mr. B was upset about the report to the Board regarding the excavator incident, as he was worried that it would affect his safety record and he would have trouble getting contracts to work from other employers. He had a family to support and this was a great concern to him.

The employer did not formally discipline Mr. B for his behaviour at the crew meeting on March 25, 2002 or his conduct on March 28, 2002 in chasing the worker off the property. Mr. R, the evening lead hand, confirmed in his testimony that Mr. B had been “quite out of line” and screamed at the workers at the crew meeting on March 25, 2002, saying “some things he really shouldn’t have said.” Mr. R testified that he did not want to make a scene in front of the crew at the crew meeting on March 25, 2002 by reprimanding Mr. B for his behaviour. He testified that after the meeting, however, he told Mr. B that he had been really out of line to make physical threats against the workers, and that Mr. B understood that what he had said was wrong. Mr. R also testified that on March 28, 2002, when Mr. B walked back into the work yard, he told Mr. B that it was unacceptable to physically threaten people at work.

The morning lead hand Mr. M testified that sometime after March 25, 2002, Mr. B had approached him, concerned that he had over-stepped the boundaries in speaking to the crew. Mr. M testified that he told Mr. B that he (Mr. B) was not the boss and that he could not advise the workers about the employer’s policies. Mr. M testified that he was not Mr. B’s supervisor, but he thought Mr. B approached him on the matter because they had a good rapport and Mr. B was more comfortable discussing his mistake with Mr. M, who was more his age, than with his supervisor Mr. R, who was a younger man.

The employer’s operation manager, Mr. D, testified that he had a discussion with Mr. B sometime after March 28, 2002 that he was to be a “little more toned down with his fellow workers.” This was in response to a report from Mr. R about the final interchange between Mr. B and the worker. Mr. D had asked Mr. R to put together a written report regarding the confrontation on March 28, 2002 between the worker and Mr. B. Legal counsel for the employer indicated to the hearing chair that the employer had a copy of the report but the employer was not going to tender it as evidence in the proceedings. Mr. D did not remember hearing any report about Mr. B behaving inappropriately during a crew safety meeting on March 25, 2002. Mr. D understood from Mr. R that the meeting had gone very well, that it had been a good safety meeting.

Mr. D testified that he gave Mr. B a warning letter (the date was not specified) for inattentiveness by Mr. B while loading trailers, that resulted in some property damage to the building.

On Friday, March 29, 2002 (a statutory holiday), the worker telephoned Mr. D and wanted to know why he had been sent home. Mr. D’s first response was that he would send the least productive sorter/picker home first. The worker asked if he should report to work the next day, and Mr. D responded that he did not know. Mr. D testified that the worker felt unsafe working with Mr. B and there was some discussion about whether the employer could, in the future, find some openings on the day shift so that the worker would not have to work with Mr. B. Mr. D testified that he told the worker that he could not accommodate the worker at that time as there were no openings on the day shift, but if something came up he would “definitely accommodate him.” Mr. D testified that

the worker was quite abusive and belligerent and “we probably ended the conversation very shortly.”

By contrast, the worker’s testimony was that after Mr. D stated he did not know whether the worker should come to work on the Saturday, the worker asked, “Why?” and Mr. D responded that “you guys seem to have a problem with [Mr. B].” The worker testified that he said “no, there’s no problem, he’s just upset about getting a black mark on his safety record and he mistakenly believed it was me that phoned compo.” The worker testified that Mr. D then hung up on the worker. The worker testified that he then phoned Mr. D back and they agreed to meet at the transfer station later that afternoon, at 1:00 p.m., to discuss the matter further.

Mr. D telephoned the worker’s home some time later that day and spoke with the worker’s uncle, who advised Mr. D that the worker was out with a person that Mr. D understood to be a trade union organizer.

Although both Mr. D and the worker testified that they were at the transfer station at the agreed time, they somehow missed each other and there was no meeting.

The worker knew he was scheduled to work the next day, Saturday March 30, and his testimony was that he phoned Mr. D early Saturday morning from a pay telephone, to ask about coming in to work that day. This was the final communication between Mr. D and the worker. Mr. D’s testimony was unsatisfactory as he professed not to recall particulars, indicating only that the worker was belligerent and kept interrupting him. Mr. D testified that he could not recall the worker’s words or the worker’s intent when speaking to him. Mr. D’s testimony was that he asked the worker to quit swearing and when he figured out what he wanted to talk about, to call back. The hearing chair asked Mr. D if the worker had asked for his job back during the telephone conversations. Mr. D’s response was, “I don’t know that he ever lost his job from something under my control other than abandoning his position.” Apart from that response, Mr. D’s testimony shed no light on the final telephone conversation between him and the worker. The specifics of that final telephone conversation are important, however, and Mr. D’s failure to offer any details in that regard does not assist the employer’s case in meeting the burden under section 152(3) of the Act that there was no contravention of section 151 of the Act in this case.

The worker’s testimony about the final telephone conversation with Mr. D was that after he asked Mr. D if he should go to work that day, Mr. D started “talking about not getting along with an older guy.” The worker testified that he immediately told Mr. D that there was no problem with Mr. B, that he and Mr. B were going to shake hands and “that would be the end of it, no big deal.” The worker testified that Mr. D insisted on making a big deal about it and did not want to schedule the worker on the shift when Mr. B was working. The worker said that it was unnecessary to put him on a different shift, and there was further heated discussion between them on the point. The worker’s

testimony was that he asked Mr. D if he could come into work that morning and if not, when could he come in to work, and Mr. D told him "You can go F-- the F-- right off" and hung up on him. The worker testified that he tried to phone Mr. D back, but had no success. The worker telephoned the Labour Relations Board (LRB) some time later. On the basis of the worker's reports regarding Mr. D's words, the LRB representative advised him that he should consider himself fired.

Mr. R testified under direct examination that he did not have a telephone number for the worker, and so did not telephone him to ask why he did not report for work the following week. Under cross-examination, Mr. R conceded that the worker's telephone number was readily available to him, as Mr. R had written it down on the work schedule, but that he must have missed it.

Evidence was presented at the oral hearing indicating that in approximately the second week of March 2002, a trade union had applied to the LRB to be certified as the bargaining agent for a unit of the employer's employees at the recycling transfer station.

The employer's position was that the worker abandoned his position when he did not show up for work the next week. Eventually the employer issued a record of employment indicating that the worker had quit his job.

Evidence at the oral hearing indicated that the employer did, from time to time, send individual employees home early from their shift when there was a lack of work or they were ill.

The evidence at the oral hearing indicated that the worker had been unemployed for an extended period of time before beginning work with the employer in March 2002. He belonged to a job club that helped people find jobs, and it was through the job club that he obtained a job interview with the employer. After he lost his job with the employer, the worker was able to find some work through a temporary labour service, but as of the date of the oral hearing, he had been unable to find a permanent job.

The reviewing officer's decision noted that Board records showed that the recycling transfer station was shut down on October 10, 2002 due to a Board order under section 191(1)(a) of the Act for reasons unrelated to the complaint of discriminatory action. The employer's evidence is that all workers were laid off. The union's evidence is that at least one worker, a lead hand, was transferred to another employer location. The Board's stop work order for the recycling transfer station was not removed until March 10, 2003.

## **Reasons and Findings**

### ***Was there discriminatory action by the employer?***

A threshold test in establishing a *prima facie* case under section 151 of the Act against an employer is whether or not the employer took action that comes within the meaning of discriminatory action in section 150. In this case, the worker ended up without a job. After reviewing the evidence, I have found that the evidence does not support a finding that the worker quit or otherwise abandoned his position. The evidence supports a finding that there was discriminatory action by the employer under section 150 of the Act in that it was a party to Mr. B's intimidating behaviour on March 25, 2002, and that ultimately the employer's continued support of Mr. B resulted in the discontinuation of the worker's job.

Mr. R was the employer representative on site at the time of the crew meeting, and the weight of the evidence indicates that he approved of Mr. B's message to the workers that they should not contact the Board about safety matters. In front of the crew, Mr. R was silent while Mr. B supported his statements with threats of physical violence, which sent a message to the crew that the employer was not unhappy with Mr. B's comments. Mr. R called the meeting, allowed Mr. B to behave as he did, and later advised Mr. D, the operations manager, that it had been a good safety meeting. Mr. R's subsequent conduct in sending the worker home without a reason, even after the worker pressed him for a reason, is inconsistent with Mr. R's testimony that, on Mr. D's directions, he sent the worker home because the worker did not look well, was not pulling his weight, and there was a shortage of work. The worker wanted to know if he could come to work the next scheduled day, and logic would dictate, if Mr. R's testimony had been credible as to his reasons for sending the worker home, an answer from Mr. R that if the worker was feeling better and could do the job, of course he should report the next day. Alternatively, Mr. R could have told the worker to call him the next day to inquire if there was sufficient work, or that he would call him the next day if there was sufficient work to do. Instead, there was no response except to direct the worker to contact Mr. D about the matter.

When the worker contacted Mr. D, Mr. D's first response was a shortage of work as the reason for sending the worker home the day before. When the worker began to question about whether he could come back to work, Mr. D let him know that he did not want the worker to work on the same shift as Mr. B as the worker could not get along with the older man, while advising him at the same time that there were no other shifts at the time for the worker. This sent the worker the unmistakable message that he should not return to work at the transfer recycling station anytime in the near future. The worker was obviously upset at this turn of events, as he needed the job badly. The conversation became heated when the worker, sensing the position of influence and authority that Mr. B had with the employer, began to protest that there was really no problem and that he would be able to get along with Mr. B at the workplace. When the worker asked the point-blank question, if he should report to work as scheduled on the Saturday shift, Mr. D swore at him and hung up. The employer never telephoned the worker to question why he did not report for work the next week, although Mr. R had the worker's telephone number. In these circumstances, I find that the employer



discontinued the worker's job. The worker did not know what to do, knew that he was not welcome to report for work, and was advised (correctly in my view) by the LRB that he should consider himself fired.

Therefore, under section 150(2)(d) and (f) of the Act, I find that the employer's conduct constituted discriminatory action against the worker.

***Was the discriminatory conduct motivated by reasons prohibited under section 151 of the Act?***

I agree with the reviewing officer's legal interpretation of section 151 of the Act that even though the evidence is that the worker maintains that he did not report the occupational safety issue to the Board, section 151 deals with an employer's motivation for taking discriminatory action, and does not require actual conduct by a worker in taking action on occupational health and safety issues. I adopt the reviewing officer's reasoning from the following passage in his July 18, 2003 decision:

Section 151 prohibits discriminatory action "for" the grounds set out in the paragraphs (a) to (c) of the section; it does not require that the facts in paragraph (c) must actually have occurred. The purpose of the discriminatory action provisions is to protect and encourage workers in the exercise of their health and safety rights and responsibilities. This protection would lose much of its significance if it was necessary to show that the worker in question had actually done something covered by section 151. This would mean, for example, that, if an employer suspected that one of a group of workers had reported information to the Board, it could take action against all, knowing that only in the case of the worker who actually made the report could it be held to account.

In the "relevant law" portion of this decision, I have referred to the "taint theory." I have applied the taint theory when assessing the evidence to determine whether any part of the employer's motivation in discontinuing the worker's job was due to a belief that he had reported the excavator incident to the Board. I have also kept in mind that under section 152(3) of the Act, the burden of proof is on the employer to prove otherwise.

I have concluded that the employer has failed to meet the necessary burden of proof in this case. The following points summarize my conclusion about what happened in this case:

- I am satisfied that the worker was correct in believing that Mr. B had targeted him as the likely candidate who had made the complaint to the Board. The worker's testimony about Mr. B 'eye-balling' him at the crew meeting while making threats is supported by Mr. B's behaviour a few days later on March 28, when chasing him off the property and making physical threats to the worker;

- Mr. B did not hold a position of a supervisor or manager with the employer, but the evidence indicates that he held some type of emotional power or other type of psychological influence over employer representatives. At the very least, the conduct of the employer representatives illustrates that they respected Mr. B, and that he was a person of authority and influence at the employer's work site. He was one of the older workers (note Mr. M's testimony and the worker's evidence about Mr. D indicating that the worker could not get along with "an older guy"). Both Mr. P and Mr. L. confirmed the worker's testimony that Mr. R, the lead hand, called the crew meeting on March 25, 2002 and stood by while Mr. B threatened the crew with physical violence if they reported safety matters to the Board. Mr. R testified that he did not want to make a scene in front of the crew by reprimanding Mr. B for his conduct. But the evidence is that he was quite willing to tolerate the scene made by Mr. B in physically threatening the workers. This illustrates management's deference to Mr. B over the safety and security of the crew at large. Mr. P testified that he was scared of Mr. B and believed that Mr. B could get him fired, with Mr. R's assistance. Although Mr. L. did not believe that Mr. B could get him fired, his testimony indicates that Mr. L. viewed himself as a "lowly worker" compared to Mr. B, who was required to follow Mr. B's work instructions. Thus crew members knew that Mr. B had *de facto* authority at the workplace, and at least some crew members justifiably perceived that Mr. B would be able to threaten them (and perhaps actually hit them) with the employer passively condoning his conduct.
- If the employer reprimanded Mr. B at all for his threatening, intimidating behaviour toward other workers, it was of a very mild nature. I find it telling that the employer gave Mr. B a written warning for being negligent in damaging company property, but did not find Mr. B's conduct toward other crew members warranted much more than advice to be "a little more toned down" (Mr. D's testimony).
- Mr. R told Mr. D that the March 25, 2002 meeting had been a "good" safety meeting and Mr. R reported the March 28, 2002 incident between the worker and Mr. B to Mr. D. No employer representative took steps to reassure the crew, after the fact, that Mr. B's conduct was unacceptable and that the employer did not align itself with his words or behaviour to them. Instead, the employer remained silent in that regard. Finally, in the last telephone conversation with the worker, Mr. D did not reassure the worker that he could return to work when he felt better, or that it was fine to return to work on Saturday as scheduled. Instead, Mr. D commented on the worker's inability to get along with Mr. B and indicated that the worker should not be on the same shift with Mr. B. Further, Mr. D advised that there were no vacancies at the time for the worker on a different shift, although there might be in the future. He hung up on the worker after swearing at him when the worker asked if he could come to work that day as scheduled. The evidence satisfies me that Mr. D gave the worker the clear message that the employer supported Mr. B, not the worker, and that the worker was not welcome back at the workplace.

- My assessment of the evidence is that while the employer may not have directed or actively encouraged Mr. B to behave as he did, after the incidents in question (March 25 and March 28), the employer aligned itself with Mr. B and supported Mr. B in his conduct. I find that the employer was a party to Mr. B's threats and intimidation, and discontinued the worker's job at least in part for the reason that like Mr. B, the employer perceived the worker as a union trouble-maker who had contacted the Board about the excavator incident. Mr. B clearly did not want the worker around for that reason, and the employer supported Mr. B's position over the worker's desire to return to work.
- I have earlier given my reasons for not finding credible, the testimony of Mr. R and Mr. D that they expected the worker to return to work on the Saturday as scheduled, as well as the next week, and that they did not lay him off or fire him. If the worker's illness, his inability to do the job due to illness, or shortage of work on the shift had truly been the only reason for sending him home early from his shift on March 28, then the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" suggests that Mr. R and Mr. D would have told him to report back to work on the Saturday as scheduled, or that he should return to work when he felt fully well, or that they would call him back to work when there was sufficient work available. This did not happen.
- I have found the worker's version of the final telephone conversation between him and Mr. D to be more credible than Mr. D's version of the telephone conversation. Earlier in this decision, I have referred to the vagueness of Mr. D's recall and the unhelpfulness of his testimony on a critical point of evidence. The worker's version of the final telephone conversation makes more sense, fitting in with the other evidence as corroborated by Mr. P and Mr. L. in this case. The worker had experienced an extended period of unemployment prior to being hired by the employer two weeks earlier, and the job was important to him. He wanted to return to work, was told by Mr. R that he should contact Mr. D about coming back to work, and he took the step of contacting Mr. D to ask about returning to work. It does not make sense that he would voluntarily abandon his position.
- Many of the employer's submissions in these appeal proceedings put forth its view that the findings by the hearing chair and reviewing officer on "constructive dismissal," "intimidation" and "motivation" by the employer were patently unreasonable. While my reasons have differed to some degree from the two preceding decision-makers, my ultimate conclusions applying the evidence to the law of unlawful discrimination have been similar, as I confirm the finding of both the hearing chair and the reviewing officer that there was unlawful discrimination under section 151 of the Act by the employer in this case. I have explained my reasoning in support of that finding.

The employer has also challenged the earlier decisions' assessment of witness credibility. I have explained some of my findings about credibility, but will now deal

expressly with an important argument by the employer about credibility, that so far in this decision I have not fully explained.

A main point in the employer's case on appeal is that the worker's testimony was rendered, in whole, not credible by the testimony of Mr. T, the truck driver. The employer characterizes Mr. T as the "only truly independent witness," and submits that his testimony supported the testimony of Mr. R regarding what transpired between Mr. R and the worker in the office when the worker was sent home on March 28, 2002.

The employer submits that it was patently unreasonable for the hearing chair to have believed any of the worker's testimony, as Mr. T's evidence proved the worker to lack credibility.

I do not share the employer's view of the value of Mr. T's testimony. Mr. T was clear that he stayed in the office a very brief period of time at the beginning of the discussion between the worker and Mr. R. His evidence confirms that Mr. R gave no reason for sending the worker home. The transcription of the oral hearing indicates that Mr. T testified that the worker began to protest that he was not "a union rat, I didn't bring the union in here, I've got nothing to do with the union at all." Legal counsel for the employer then asked Mr. T in direct examination, "Nothing to do with the WCB?" and Mr. T's reply was inaudible. Legal counsel then asked Mr. T, "He was talking about the union?" then Mr. T began to reply, "Union and" but was interrupted by legal counsel who stated, "OK, Alright, and then a physical incident occurred, is that right?" Mr. T then began to describe the worker "tapping" Mr. R on the chest and Mr. R backing away. Mr. T testified that he immediately left the office and then saw the worker emerge about ten minutes later. Thus Mr. T missed an entire ten minutes of interchange between the worker and Mr. R.

The transcription of Mr. R's testimony indicates that the worker "poked" him several times in the chest to emphasize a point he was making in the discussion. Mr. R testified that after he gave the worker Mr. D's telephone numbers, the worker "moped around for a while, we continued the discussion, he was, he wanted to know if I thought that he was the one that had called compo and I said I have no idea who called compo." Mr. R testified that there was more discussion about the "compo" issue and then eventually the worker gathered his things to leave.

In his testimony, the worker denied poking Mr. R in the chest or shaking his finger at him. Apart from that detail, the worker's recall of the conversation generally coincided with that of Mr. R. They both agreed that Mr. R did not provide a reason for sending the worker home, but told the worker to contact Mr. D about it. Both Mr. R and the worker remembered the worker asking about whether he was being sent home because the employer thought he was the one who reported the excavator incident to the Board.

Reviewing the testimony of Mr. R, Mr. D and Mr. T about the office interchange on March 28, 2002, I do not find that Mr. T's testimony renders the worker not credible in his testimony. In argument, legal counsel for the employer characterized the "poking on the chest" incident to be an assault. Whether it was "finger-tapping" (as Mr. T described it) or "finger-poking" (as Mr. R described it), and whatever the technical characterization of that conduct in legal terms, I do not find it to be important, and note that Mr. R did not find it important at the time, either. His evidence was that after the finger poking by the worker, there was more discussion, and the worker moped around for a while before leaving the office. Mr. R's reaction was hardly one of fear for his physical safety. The worker and Mr. R were having a heated discussion and the worker was upset about being sent home without any reason. When giving his testimony at the oral hearing, the worker may not have remembered that in the heat of the discussion, he tapped or poked Mr. R on his chest for emphasis. That explanation is just as likely as the worker having lied about the point in testimony. I am prepared to give the worker the benefit of the doubt on the matter, but in any event, in my view, nothing of significance turns on the finger tapping/poking incident. I have noted that most of Mr. T and Mr. R's evidence corroborates the worker's testimony about the March 28, 2002 office interchange between the worker and Mr. R, and that supports a finding that the worker was, on relevant aspects of the story, a credible witness.

For the foregoing, reasons, I confirm the finding by the reviewing chair in his July 18, 2003 decision that the employer contravened section 151 of the Act by unlawfully discriminating against the worker in this case.

### **Remedy**

The hearing officer ordered the employer to reinstate the worker to his job and to compensate him financially for the lost income he had suffered as a result of the unlawful discrimination. The hearing officer did not provide reasons for ordering this remedy. Because the Board granted a stay of that order, pending the decision by the reviewing officer, the worker was never reinstated to his position with the employer.

The reviewing officer varied the remedy, as he found it inappropriate to order reinstatement in the circumstances. He noted that almost 15 months had passed since the events in question. The reviewing officer took into consideration the fact that the worker had been employed for only two weeks before losing his job. The reviewing officer found that the evidence suggested that the employer did not provide regular and continuous employment, as the employer did send workers home from time to time because of lack of work. The reviewing officer also noted that the transfer station was closed from October 10, 2002 to March 10, 2003, and that worker would likely have been without employment due to that closure. The reviewing officer found the trade union's argument highly speculative that the employer could have or would have employed the worker at other locations during the closure.

Having concluded that reinstatement was not an appropriate remedy, the reviewing officer decided to order compensation for the “period for which the employment might reasonably have been expected to continue.” The reviewing officer decided that it was reasonable to award back wages (based on a 40-hour work week) beyond March 28, 2002 up to at least April 6, 2002, which was the last scheduled work day for the worker in the employer’s records. He decided to add a further period of compensation of two weeks, up to and including April 20, 2002, commenting on the “short period the Complainant was employed with the Employer before the discriminatory action occurred, the apparently unpredictable nature of that employment, and the unemployment of the Complainant before commencing that work.”

On behalf of the worker, the trade union argues that the reviewing officer took into account irrelevant considerations in refusing to confirm the hearing chair’s order of reinstatement. The trade union submits that the length of time between the events in question and the reviewing officer’s decision in July 2003 was beyond the worker’s control and should not be a factor in denying reinstatement to his job. Further, the trade union argues that the worker’s extended period of unemployment prior to commencing work with the employer is also irrelevant.

The trade union submits that the worker’s co-workers at the recycling transfer station enjoyed continued employment until station’s closure in October 2002, and that there is no reason why the worker would not have enjoyed the same opportunity, were it not for the unlawful discrimination by the employer. The trade union disputes the reviewing officer’s conclusion that the employer did not provide regular and continuous employment. While the evidence suggests that sometimes the employer sent workers home early from their shifts, there was otherwise no evidence that the employment was not steady and continuous.

The trade union argues that the employer had other locations throughout the Lower Mainland and in British Columbia, and that the worker could well have been transferred to other locations, despite the October 2002 closure of the transfer station.

The trade union submits that WCAT should vary the reviewing officer’s decision by confirming the hearing chair’s remedy; that is, ordering the worker reinstated to his employment with the employer, with compensation for lost income and benefits retroactive to March 29, 2002, excluding earnings he has made in the meantime. The trade union advises that the worker will submit evidence of those earnings at a later date.

In the alternative, the trade union submits that WCAT should order the employer to compensate the worker for lost income and benefits from the period March 29, 2002 through to October 8, 2002, plus three days pursuant to section 192 of the Act. That statutory provision specifies that if workers are laid off due to a stop work order, then three days of lost wages are to be paid by the employer.

The employer submits that a remedy should not be the basis of a “windfall recovery” by the worker “all out of proportion to what he might expect under the *Employment Standards Act* or at common law with a finding of wrongful dismissal.” The employer argues that under the common law or *Employment Standards Act*, an employer may terminate an employee at any time for any reason as long as the employee is provided with reasonable notice of that termination and is either appropriately compensated or works through that period of reasonable notice. The employer says that under the common law or the *Employment Standards Act*, it is rare where an order of reinstatement is made, as the law recognizes that in contracts of personal service, neither party can be forced by injunction or otherwise to continue that relationship if they choose not to. The employer argues that this principle applies in the case at hand as well.

The employer argues that the findings by the review officer regarding the lack of regular and continuous employment at the recycling transfer station should not be overturned unless found to be patently unreasonable.

The employer submits that there is no evidence regarding what other employment opportunities might have existed for the worker after the closure of the transfer station. It says that apart from the heavy equipment operator, it did not rehire any of the employees when the recycling transfer station reopened, and the worker’s former job would not have been available for him on the station reopening.

The employer’s position is that the reviewing officer’s remedy was fair and reasonable and should not be disturbed, as it provided the worker with approximately four weeks’ compensation, more than he would have received under the *Employment Standards Act*, and reasonable even for a wrongful dismissal finding at common law.

Section 153 of the Act provides the Board with a wide discretion to design remedies for unlawful discrimination that are appropriate to the circumstances of each individual case. Policy D6-153-2 of the Manual sets out guidelines for applying remedies under section 153 of the Act. It provides:

The Board’s object in exercising these powers is, as far as is practicable, to put the worker in the same position as the worker would have been in if the discriminatory action or the failure to pay wages had not occurred. This may involve measuring not only the worker’s actual loss, but determining whether there were any measures the worker could have reasonably taken to reduce or eliminate that loss.

WCAT’s authority to grant a remedy is no greater or any less than that provided to the Board under the Act and policy.

I agree with the employer's submission that, in granting an appropriate remedy, it is important that a worker not profit by the remedy, beyond being restored to the position that it is reasonable to expect the worker would have been in were it not for the unlawful discrimination. By the same token, however, it is also important that the remedy provisions of section 153 not be applied in such a way that they enable an employer to effectively escape the consequences of its unlawful action. Therefore, I do not agree with the employer's reliance on the remedy provisions of the *Employment Standards Act* as an example of the appropriate quantum where there has been a statutory violation under the workers' compensation legislation resulting in the loss of a worker's job. In *Appeal Division Decision #2003-0089* (January 15, 2003), I made the point that allowing an employer the benefit of the *Employment Standards Act* in such circumstances:

would render meaningless the anti-discrimination provisions of Section 151, for in a non-union situation, an employer could contravene Section 151 and simply be able to dismiss an employee on the same basis as if the employer were terminating, for non-illegal reasons, the employment of another employee. The reviewing officer referred to the policy in D6-153-2 of the Prevention Manual as justification for his reasoning. However D6-153-2 states that the "wages, salaries and other employment benefits" under Section 153 are those falling within the definition of "wages" in the Employment Standards Act. The policy does not say that the damages under Section 153 are limited to the severance and notice remedies specified in the Employment Standards Act. Thus my interpretation of Section 153 is that it permits the Board to devise remedies that assist, insofar as it is possible to do, to returning a complainant to the position he or she would have been in were it not for the contravention of Section 151.

In *Individual Employment Law* (Kingston: Quicklaw, 2000), Geoffrey England reviews the differences in remedies granted under the common law for wrongful dismissal, and those remedies available to an unjustly dismissed employee under statutory schemes in the Canadian federal jurisdiction and several provinces. He concludes that the differences are dramatic. England notes that under common law, reinstatement is rarely available as a remedy, for three main reasons. The first reason is referred to as "mutuality," namely, that it would reduce employees to a state tantamount to slavery if either party were allowed to obtain specific performance of the employment contract. The second reason England offers is that it is against public policy and basic business theory to compel an employer to maintain the services of an employee where mutual trust and confidence no longer subsists. The third reason deals with the practical difficulties of supervising reinstatement orders.

Unlike the common law, however, compulsory reinstatement is viewed as the primary remedy for unjust dismissal under statutory schemes, and there is a "make whole" philosophy empowering a decision-maker to do any other like thing that it is equitable to



require the employer to do in order to remedy or counteract any consequence of the dismissal. This make-whole authority is apparent in the wording of section 153(2) of the Act. England points out that the broad remedies available under statutory schemes are intended to be pivotal features of the protection against illegal termination of employment. He states:

Indeed, were it not for these special remedies, there would appear to be little point to enacting the statutory schemes, since they would largely parallel the common law. Therefore, those adjudicative awards that have applied the common law measure of damages or have suggested that reinstatement is an exceptional remedy should be regarded as palpably wrong.

While reinstatement is the primary remedy afforded for termination of employment that is in violation of statutory schemes, it is clear that reinstatement need not be automatically granted as a remedy, particularly if damages can “make whole” a claimant. See *Atomic Energy of Canada Ltd. v. Sheikholeslami* [1998] 3 F.C. 349 at paragraph 12. England offers seven circumstances in which reinstatement may be denied to an employee who requests it, albeit that there has been a finding that employment has been terminated in contravention of a statutory provision:

1. The deterioration of personal relations between the complainant and management or other employees, if the claimant is largely responsible for the breakdown, or where the enterprise is relatively small so that face-to-face contacts between the protagonists are inescapable;
2. The disappearance of the relationship of trust which must exist in particular when the complainant is high up in the company hierarchy;
3. Contributory fault on the part of the complainant justifying the reduction of his dismissal to a lesser sanction;
4. An attitude on the part of the complainant leading to the belief that reinstatement would bring no improvement;
5. The complainant’s physical inability to start work again immediately;
6. The abolition of the post held by the complainant at the time of his dismissal;
7. Other events subsequent to the dismissal making reinstatement impossible, such as bankruptcy or layoffs.

In reviewing the circumstances of this case, I have decided not to order reinstatement, but to direct that the employer compensate the worker by way of financial damages. I have decided not to order reinstatement because the evidence satisfies me that it is unlikely that the worker's job would have continued with the employer beyond early October 2002, when the recycling transfer station was closed and the employer laid off virtually all of the employees. I have considered the trade union's argument that there may well have been other job placements for the worker in other business locations operated by the employer. However, there is little evidence, particularly given the worker's short tenure with the employer, to support that the worker would have been transferred to another location (most employees were not). The prospect of such a transfer is too speculative, in my view, to support reinstatement as a remedy in this case. On the other hand, while the evidence indicates that the employer did send employees home early from shift from time to time, I find their jobs were not uncertain nor were they subject to periodic layoffs on a regular basis.

I have therefore decided to vary the reviewing officer's remedy; however, because I cannot confirm his finding that employment with the employer at the recycling transfer station was not regular and continuous in nature. Assessing the evidence as a whole, I find that were it not for the unlawful discrimination by the employer, the worker could legitimately have expected to be employed at the recycling transfer station until its closure in October 2002. In this case, the appropriate "make-whole" remedy under section 153(2) of the Act is for the employer to:

- (a) compensate the worker for loss of wages and benefits suffered as a result of the unlawful discrimination, from March 29, 2002 until October 11, 2002, taking into account any monies already paid to the worker by the employer, and any monies earned by the worker during that period, and including appropriate interest;
- (b) remove any documentation pertaining to the worker having quit his job;
- (c) cease and desist discriminatory conduct against the worker.

I am not in a position to fix the exact dollar amount of (a) above, at this point in the proceedings because the parties did not provide the sufficient evidence and submissions to enable me to do so. Item #6.00 of WCAT's *Manual of Rules, Practices and Procedures* (MRPP) provides that in appropriate cases WCAT may recommend an alternate dispute resolution process. I find that this is an appropriate case in which to recommend an alternative dispute resolution process in accordance with item #6.00. Consequently, I request Mr. Dan Cahill, WCAT deputy registrar and vice-chair, to contact the parties to offer mediation assistance to them to reach agreement on the exact dollar amount of the remedy I have ordered. I give the parties until June 15, 2004 to reach agreement on the exact amount of compensation owing from the employer to the worker as a result of this decision. Pursuant to item #6.00 of the MRPP, if the

parties reach an agreement on the monetary calculation of remedy that is consistent with the Act, I will confirm the agreement as a WCAT order.

If the parties are unable to reach agreement by June 15, 2004, I direct the parties to file their written submissions together with all necessary evidence on the monetary calculation issue by no later than June 30, 2004. I will then issue an order having considered the parties' submissions.

This decision is therefore not fully complete, as I have not yet addressed the monetary calculation issue. Under item #15.22 of the MRPP, I will issue the order as an addendum to this decision.

### **Conclusion**

I dismiss the employer's appeal and allow, in part, the worker's appeal of the reviewing officer's July 18, 2003 decision. I confirm the reviewing officer's finding that the employer contravened section 151 of the Act in unlawfully discriminating against the worker. I vary the reviewing officer's decision by changing the remedy. I have directed the employer to:

- (a) compensate the worker for loss of wages and benefits suffered as a result of the unlawful discrimination, from March 29, 2002 until October 11, 2002, taking into account any monies already paid to the worker by the employer, and any monies earned by the worker during that period, and including appropriate interest;
- (b) remove any documentation pertaining to the worker having quit his job;
- (c) cease and desist discriminatory conduct against the worker.

I have remained seized of this appeal, pending the parties' attempt to reach agreement on the exact monetary calculation of the compensation owing from the employer to the worker in (a) above. WCAT will offer mediation assistance to the parties. Failing the parties' agreement by June 15, 2004, I will issue an order after considering the parties' submissions (to be submitted no later than June 30, 2004) on the monetary calculation issue.

Heather McDonald  
Vice Chair

HM/cmm/mkn

**WCAT Amended Decision Number :**    **WCAT-2004-02587a**  
**WCAT Amended Decision Date:**       **June 23, 2004**  
**Panel:**                                   Heather McDonald, Vice Chair

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This decision has been edited to remove identifying information. Changes are marked as [ ]\*

### **Amended Decision**

In WCAT Decision #2004-02587, issued on May 18, 2004, I denied the employer's appeal (WCAT Appeal [appeal number]\*) and found they contravened section 151 of the *Workers Compensation Act* in unlawfully discriminating against the worker. I allowed the worker's appeal (WCAT Appeal [appeal number]\*) in part by varying the review officer's decision, by changing the remedy. I am adding an addendum of the original decision on page 25, after paragraph five of the conclusion as follows:

### **Addendum**

**The employer operates a recycling transfer station. The worker worked as a sorter at the transfer station for approximately two weeks in March 2002, his last day of work being March 28, 2002. The worker filed a complaint with the Workers' Compensation Board (Board) under section 151 of the *Workers Compensation Act* (Act), alleging that the employer unlawfully discriminated against him by firing him because it believed he had reported a workplace incident to the Board.**

**On September 12, 2002, after an oral hearing at which both parties appeared to give evidence, a hearing chair in the Board's Review and Penalty Section, Prevention Division, issued a decision finding that the employer had violated section 151 of the Act as alleged by the worker.**

**The employer requested the Prevention Division to review the hearing chair's decision. In a decision issued July 18, 2003, a reviewing officer in the Prevention Division confirmed the earlier finding that the employer had violated section 151 of the Act. However, the reviewing officer varied the remedy ordered by the hearing chair.**

**Both the worker and the employer appealed the July 18, 2003 decision to the Workers' Compensation Appeal Tribunal (WCAT). The employer appealed the finding that it had violated section 151 of the Act, and the worker appealed the remedy aspect of the decision.**

On May 18, 2004, as the WCAT panel assigned to deal with the appeals of both the worker and the employer, I issued a written decision: *WCAT-2004-02587*. In that decision, I confirmed the reviewing officer's finding that the employer contravened section 151 of the Act in unlawfully discriminating against the worker. I allowed the worker's appeal in part by varying the reviewing officer's decision, by changing the remedy. By way of remedy, I directed the employer to:

- (a) compensate the worker for loss of wages and benefits suffered as a result of the unlawful discrimination, from March 29, 2002 until October 11, 2002, taking into account any monies already paid to the worker by the employer, and any monies earned by the worker during that period, and including appropriate interest;
- (b) remove any documentation pertaining to the worker having quit his job; and
- (c) cease and desist discriminatory conduct against the worker.

I was not in a position to fix the exact dollar amount of (a) above, because the parties had not provided sufficient evidence and submissions to enable me to do so. Pursuant to item #6.00 of WCAT's *Manual of Rules, Practices and Procedures* (MRPP), I found that it was an appropriate case in which to recommend an alternate dispute resolution process in accordance with item #6.00. Therefore I requested Mr. Dan Cahill, WCAT deputy registrar and vice chair, to contact the parties to offer mediation assistance to help them to reach agreement on the exact dollar amount of the remedy I had ordered. Failing agreement by the parties, I would obtain their written submissions on the monetary issue and provide a written order in that regard. I remained seized of the appeal, pending the parties' attempt to reach agreement on the monetary issue.

The parties agreed to meet with Mr. Cahill. With his assistance, they were able to reach a written agreement dated June 18, 2004 regarding the monetary amount owed to the worker by the employer as a result of my May 18, 2004 decision. I have reviewed the terms of the June 18, 2004 agreement between the worker and the employer. I am satisfied that the agreement is not inconsistent with the Act. Accordingly, pursuant to item #6.00 of the MRPP, I confirm that the worker and the employer have reached a consensual settlement of part (a) of the remedy I directed in my May 18, 2004 decision. Accordingly, pursuant to section 253(1) of the Act, I vary the July 18, 2003 decision of the reviewing officer by directing the employer to:

- (a) pay the worker the amount agreed upon by the worker and the employer in their written agreement dated June 18, 2004;

- (b) remove any documentation pertaining to the worker having quit his job; and**
- (c) cease and desist discriminatory conduct against the worker.**

Heather McDonald  
Vice Chair

HM/hba