

## Noteworthy Decision Summary

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**Decision:** WCAT-2004-05922 **Panel:** Heather McDonald **Decision Date:** November 10, 2004

***Discriminatory action – Discipline – Reprimand – Intimidation – Sections 150, 151, and 152 of the Workers Compensation Act***

The employer warned the worker, a member of the workplace occupational health and safety committee, that his inappropriately aggressive communication on workplace safety issues might lead to his termination. The panel found that, in the overall context, the employer's actions were not in the nature of discipline or a reprimand, and thus were not discriminatory actions within the meaning of section 150 of the *Workers Compensation Act* (Act). The panel also found the employer was not motivated by any of the reasons prohibited under section 151.

The employer gave the worker feedback about his behaviour. The employer told him that if he continued to challenge the employer, this would lead to progressive discipline and probably ultimate termination of his employment. Three months later, the employer gave the worker a written performance review with both negative and positive comments. The worker claimed the employer intimidated and disciplined him for raising safety issues. The Workers' Compensation Board (Board) found the employer took discriminatory action against the worker in violation of section 151. A reviewing officer cancelled that decision, finding that, although the employer had disciplined the worker, it was not motivated by any of the reasons prohibited under section 151. The worker appealed to the Workers' Compensation Appeal Tribunal.

The panel found that the employer's conduct did not constitute "discriminatory action" because:

- It did not constitute 'discipline' under section 150(2)(e) of the Act; it was a formal process towards the ultimate penalty of job termination.
- Section 150(2)(e) uses the words "discipline" and "reprimand" in combination with the phrase "or other penalty." As there was no evidence of concrete disadvantage, loss, or punishment, the worker was not "reprimanded" within the meaning of the Act.
- The definition of "discriminatory action" in section 150 is expansive. It includes acts or omissions that adversely affect a worker with respect to any term or condition of employment and includes "intimidation".
- If the employer had intimidated the worker such that he felt unable to fulfill his duties and responsibilities as a member of the workplace safety committee, this would constitute "discriminatory action".
- The use of the term "intimidation" is not meant to capture any and all exchanges between a worker and a manager that the worker objects to or feels is "harassment". Intimidation implies an aspect of threat or abuse of authority.
- It was not useful to analyze individual statements by the employer in isolation from its advice to the worker as a whole during the meeting and in the performance review.
- To the reasonable person, the employer did not communicate to the worker that unless he stopped raising safety issues, he might eventually find himself the subject of a progressive discipline process. Rather, the message was that the worker needed to re-evaluate his communication style and his overall approach.

The panel further found that, if it was wrong in finding that the employer's conduct did not constitute a discriminatory action, it was satisfied the employer was not motivated by the anti-safety reasons referred to in section 151(a), (b), and (c) of the Act.

**WCAT Decision Number :** WCAT-2004-05922  
**WCAT Decision Date:** November 10, 2004  
**Panel:** Heather McDonald, Vice Chair

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## Introduction

The worker is appealing an August 6, 2003 decision by a reviewing officer in the Policy and Legal Services section of the Prevention Division, Workers' Compensation Board (Board). In that decision, the reviewing officer cancelled an earlier Board decision dated February 19, 2003 that found the employer in violation of section 151 of the *Workers Compensation Act* (Act). Section 151 of the Act prohibits an employer or trade union from taking "discriminatory action" against a worker. The circumstances revolve around a meeting between the parties on July 5, 2001, a performance review of the worker undertaken by the employer in October 2001, and certain letters by the employer to the worker during the intervening period that documented the worker's job performance and outlined required changes in the worker's attitude and behaviour. The worker's position is that the employer disciplined him for raising safety issues, which was one of his responsibilities as a member of the workplace safety committee. The worker also alleges that the employer intimidated him, in a way that affected a term or condition of his employment, because he had raised safety issues at the workplace.

The first Board decision of February 19, 2003 found a violation of section 151 and by way of remedy, directed the employer to either remove specific letters found to be of a disciplinary nature from the worker's personnel file, or revise them by removing the aspect of discipline. The employer requested a review of that decision.

In the August 6, 2003 decision, the second reviewing officer found that the employer had disciplined the worker in issuing him warnings, but she also found that the employer had rebutted section 152(3)'s statutory presumption of discriminatory action. This was because the second reviewing officer found that in no part was the employer's performance review motivated for reasons prohibited under section 151 of the Act.

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the worker submits that the employer's process of performance evaluation in 2001 constituted intimidation by the employer as prohibited under section 151 of the Act. The worker submits that he was intimidated to stop making efforts, as part of his duties as a member of the workplace safety committee, to make the workplace a safer place. He requests WCAT to reinstate the Board's February 19, 2003 decision.

The employer's position is that it did not engage in any conduct that falls within the definition of "discriminatory action" in section 150 of the Act. Specifically, the employer says that it did not take disciplinary action against the worker, nor did it intimidate or coerce the worker within the meaning of section 150 of the Act. In the alternative, the

employer submits that its conduct was in no way motivated by reasons prohibited under section 151 of the Act.

**Issue(s)**

Did the employer impose discipline, reprimand or other penalty under section 150(2)(e) of the Act? Did the employer intimidate the worker under section 150(2)(d) of the Act? Was the employer motivated to act, in any part, because the worker had acted in accordance with his rights and duties as referred to in section 151 of the Act? Did the employer violate section 151 of the Act as alleged by the worker? If so, what remedy or remedies are appropriate under section 153(2) of the Act?

**Procedural Matters and Jurisdiction**

WCAT's jurisdiction in this appeal arises under section 240 of the Act, which provides that a determination, an order, a refusal to make an order, or a cancellation of an order made under section 153 may be appealed to WCAT.

The worker represented himself in these appeal proceedings. WCAT invited the employer to participate, and it did so, represented by legal counsel. On his notice of appeal, the worker indicated that an oral hearing was unnecessary, and I agree. The parties have presented extensive written submissions in this case, and as well I have had the benefit of the documentary evidence on file from the two prior proceedings before the reviewing officers at the Board.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's board of directors 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.

**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) an 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(3) of the Act provides that the burden of proving that there has been violation of section 151 is on the employer or the trade union, as applicable.

Like the former Appeal Division, WCAT has applied the “taint” principle in appeals involving section 151 complaints. This principle requires that in health and safety matters, employers (or trade unions, as the case may be) must disprove any anti-safety mindset in order to avoid a finding that they have contravened anti-discrimination legislation. A complainant will establish a case of illegal discrimination even if anti-safety attitude provides only a partial motivation for the employer or trade union action. The “taint” 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. In *Appeal Division Decision #2002-0458* (February 21, 2002), the panel referred to the taint principle in the following terms:

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 reasons for the employer's action, but rather, it is sufficient if it is one of the reasons for the employer's actions under review.

Division 3 of Part 3 of the Act describes the general duties of employers, workers and others. Section 116 of the Act refers to the general duties of workers, and includes the duty to report to an employer any contravention of Part 3 of the Act, the regulations or an applicable order of which the worker is aware, and the absence of or defect in any protective equipment, device or clothing, or the existence of any other hazard, that the worker considers is likely to endanger the worker or any other person. Further, section 116 of the Act requires workers to cooperate with the joint health and safety committee. Division 4 of Part 3 of the Act deals with joint committees and worker representatives.

Section 130 outlines the duties and functions of a joint committee. Those duties and functions include identifying situations that may be unhealthy or unsafe for workers and advising on effective systems for responding to those situations; consulting with workers and the employer on issues related to occupational health and safety and the environment; making recommendations to the employer to improve health and safety; advising the employer on programs and policies required under the regulations for the workplace; and advising the employer on proposed changes to the workplace or work processes that may affect the health or safety of workers.

### **Background and Evidence**

The worker is an engineering technician employed by the employer. He is also a member of the workplace joint occupational health and safety committee (the committee or the safety committee).

The two Board decisions have reviewed the evidence in this case. I will be repeating much of that evidence as I think it important to describe in some detail relevant background as it relates to the worker's complaint that the employer disciplined him and intimidated him in a way that adversely affected him with respect to a term or condition of his employment, allegedly because he raised safety issues at the workplace. It is necessary to convey not only the statements and conduct of the employer, but also to provide the context in which the employer acted.

The documents on file included minutes of a July 5, 2001 meeting. The minutes were prepared by the employer's human resources manager. In attendance at the meeting were the worker, the employer's manager, the human resources manager, the union's business agent and the camp chairman. At the outset of the meeting, the manager outlined the meeting's purpose as follows to the worker:

- To clearly define expectations of you in relation to the employer/employee relationship;
- To apprise you of what is and what is not acceptable regarding your approach, manner and behaviours;
- To discuss your "way of being" – to look at how you are presenting yourself and your ideas and how it negatively affects the workplace. There are a growing number of people that are upset, disturbed and frustrated, particularly on the safety committee, other employees in Engineering and supervisors;
- To apprise you of the consequences of not adhering to expectations as we will outline today;
- To define our expectations as they relate to productivity.

The minutes illustrate that the employer then made the following points to the worker (in addition to others that I need not relate in this decision). The worker had become a safety hazard to the employer's operation by causing negative feelings within the safety committee and the crews. The worker's approach and the amount of time he spent on issues needed to be reduced. The employer was hearing from other employees that they did not want to work with the worker and that they wanted him off the safety committee. Employees were complaining that the worker's approach was leading to a lack of focus on their own jobs and an inability to concentrate on job safety. The work environment had become toxic in some areas. The employer stated that the worker wore people down and wore people out. There was a resulting unnecessary stress, especially in the management team, and both safety and productivity were suffering as a result. The employer stated that the worker took issue and challenged almost everything, including grieving issues that were not grievable issues.

The employer specifically alleged that the worker's mannerisms were accusatory to the point of intimidation. The employer stated that if the worker found that his opinions were not agreed with, he would take the matter to grievance, or allege harassment, intimidation or discrimination. The employer gave examples, such as the worker initiating a grievance that resulted in the employer not being able to hire summer students, as it could only hire persons with tech diplomas. Another example was the worker agreeing to get formal training but then subsequently refusing to do so, and grieving the matter. A third example was the worker pointing his finger at the manager during a safety meeting discussion about caulk boots, and demanding that the manager make a decision on the matter, when in fact the employer had already stated a policy

that caulk boots would require all their caulks. The minutes state that the manager then went on to say:

You take issue with and will refer to WCB Regs even though [the particular workplace of the employer] strives for a higher standard. You pick and choose the rules and regulations and will take things out of context and apply them to suit your needs. If things are not dealt with to your satisfaction you will claim “discrimination”. As an example, you have taken issue with supervisors not advising you when a safety audit will take place. Management has the right to choose when to do an audit and does not have to ask your permission.

What is discriminatory is the amount of time spent on issues and complaints of one person, you, in relation to time spent with others in the operation. You make claims of being “in violation of” H & S Regs. This is intimidating language which puts people on the defensive. This approach is not constructive. You lack credibility because you challenge everything. People are tuning out. When you do have a good idea your credibility is lacking because of your constant challenging. You lack credibility with the WCB because of all the challenges made. You contradict yourself. As an example, when the Joint Safety Tour Inspection process was introduced as a draft at a recent safety meeting you took issue with it. Now you insist that “audits” must be “joint”.

[reproduced as written]

The manager outlined its expectations of the worker. Among other things, it asked the worker to cooperate, to work safely and abide by employer policies and Board regulations, to achieve productivity levels at standard or above, to follow legitimate work direction from supervisors, to be a “positive contributor versus one who constantly challenges,” to take a leadership role, “to be a leader, a coach, an effective member” of the safety committee, to accept responsibility and to be accountable for what he said and did. Further, the employer told the worker that it was fine to be “assertive versus aggressive,” and that if he were to lodge a grievance, he needed to outline the issue in writing and identify the section of the collective agreement on which he was relying.

The manager advised the worker that the employer was going to “micro manage” his work performance. The manager concluded the meeting by stating:

What we want to see less of in the future is the tactics you use to manipulate and intimidate, your making allegations (often unfounded), the challenging, the claiming of harassment and intimidation and the abusing the grievance procedures. We want to see less time spent on policy and personal grievances initiated by you. At present there is an inordinate



amount of time consumed and wasted on most complaints...you have some options.

- You can improve your performance and become a team player in the department and operation. I would sincerely like to see this from you.
- You can continue to challenge in the manner you have been accustomed to doing. If so, this will lead to progressive discipline and probably ultimate termination of your employment.
- You can move on to a fresh start elsewhere and we will supply you with a severance package.

In conclusion, we will manage all aspects of your performance – productivity, safety and conduct. We will micro-manage. I want to reiterate that this is a very serious situation, particularly the causing of negativity in the operation and the concerns of others for their own safety and work performance. You have a choice to make about how you want to proceed in the future. We expect changes.

We are prepared to give you Friday (July 6<sup>th</sup>) off, with pay, to think about what has been said, to think about your future and what you want to accomplish. This is not a suspension, it is not discipline.

We also want to make you aware that there is assistance available to you if you want help. We need to see change and we need it now.

The evidence is that the worker accepted the offer of taking July 6, 2001 as a day off to reflect on what had been said at the meeting. At the conclusion of the July 5, 2001 meeting the worker asked the employer if it would consider assisting him in taking a “geomatics” course. At that time the manager committed to considering the matter. In a letter dated July 9, 2001 to the worker, the manager summarized the employer’s message to the worker at the July 5, 2001 meeting, and reiterated the commitment to looking at assisting him to further his education. The letter concluded as follows:

...I wish to reiterate that no matter what job function you are performing, now or in the future, you are expected to conduct yourself appropriately at all times.

A copy of the July 9, 2001 letter was also sent to the union business agent and the camp chairman who had attended the meeting.

Further documentation on file is a letter dated August 7, 2001 from the employer's human resources manager to the worker. A copy of the letter was also sent to the union business agent and the camp chairman. The August 7, 2001 letter denied a grievance initiated by the worker on July 16, 2001, on the grounds that the worker's supervisor had appropriately disciplined him for theft of company time and breach of trust, in accordance with Article II, section 2 of the collective agreement. The letter also advised the worker that with respect to the worker's stated intent in a letter dated July 26, 2001 to initiate a step 1 grievance regarding the July 5, 2001 meeting, the employer's position was that it was not a grievable issue. This was because the employer's view was that the July 5, 2001 meeting was a counselling session held for the purpose of clearly defining its expectations of the worker. The human resources manager stated that given the worker was proposing to grieve a counselling session, it appeared that he did not fully understand the message the employer had been trying to convey. The human resources manager stated that this further put in question the ability to continue with a constructive employee/employer relationship in the future.

The human resources manager concluded by advising that all union business would be held in abeyance as the operation was shut down; thus she did not reply regarding the worker's query about a time and place to hold a step 2 grievance meeting.

The other relevant document relied on by the worker is his crew performance evaluation dated October 11, 2001. The evaluation document was divided into subheadings such as "Safety Performance," "Communication and Organization," "Technical Skills and Productivity," "Computer Skills and Office Procedures," "General Performance – Supervisor's Evaluation," and "Suggestions for Career Advancement – Supervisor's Evaluation."

Under "Safety Performance," the employer noted as follows:

- The worker's personal safety performance was "above standard". The worker's drive to keep himself in top physical condition likely went a long way toward preventing and/or avoiding job related physical accidents and injuries;
- The worker did a good job of ensuring that his equipment and work related gear were in good order;
- The employer was impressed with how the worker dealt with a situation where the engineering crew had expressed concern over the driving habits of a crew member. The worker dealt with the matter at the crew level, without the involvement of supervisors, and the crew member's driving improved. The employer appreciated that a crew concern was analyzed and handled at the crew level;

- The employer noted that the worker had “brought to the forefront” several safety items that could have potentially affected workers, namely, vehicle inspection sticker and swaybar concerns. The employer commented, however, that it was unfortunate that resolution of the issues resulted in so “many bad feelings” and much more work, time and expense than necessary. The employer stated that safety must not be used as a “front” to further other personal causes or to intentionally “cause a stir”. The employer stated that safety concerns needed to be acted on in a team atmosphere. The employer observed that there were concerns raised by some crew and some safety committee representatives that the worker’s “confrontational style can not be expected to create a better product than one born of a healthy working relationship built on trust and respect of others”.
- The employer commented that in his role as a committee member, the worker’s attention to detail had been “unrelenting”. According to the employer, this drive had not always cultivated a strong following or support from the engineering crew and other committee members. The employer suggested that the worker should ensure that he was “truly basing his activities, actions, opinions and the way he carries himself” on the wishes and desires of the crew. The employer stated that this “suggestion is not intended to stifle” the worker’s personal opinions or hold him back from presenting items he truly feels need addressing, but only to point out that the worker must be explicitly clear with the crew and the committee as to the basis of the opinions and thoughts he expresses. The employer stated that if the worker is voicing his personal thoughts and suggestions, and not those of the crew collectively or by consensus, he is obligated to inform the parties involved. The employer also stated that the worker needed to become constructive as opposed to disruptive in providing and/or receiving suggestions for improvement.

Under “Communication and Organization,” the employer observed as follows:

- The worker’s communications are “generally good regarding safety issues”, but there was room for improvement in the techniques he uses to garner support and to voice or further his concerns. The employer suggested that the worker should work on eliminating confrontation and accusation from his style, and that he should define specifically on whose behalf he is speaking regarding safety issues.
- The worker has taken noticeable steps to improve his organization prior to and during safety meetings, such as posting minutes and following up on old business. The employer recommended,

however, that he required focus. The employer gave as an example that a safety concern did not have to result from each and every meeting; if the team had difficulty identifying a specific safety concern, then the meeting's focus could be switched to the positive, in communicating pro-active actions by the committee.

- The employer mentioned a concern similar to one it had mentioned in the worker's performance review the previous year: the worker was reluctant to seek assistance with field decisions when he was having difficulty making a decision on his own. The employer recommended that the worker report to a supervisor and ask for assistance earlier in the process. This would help with improved field organization and contribute to effective and efficient decisions in the field.

Under "Technical Skills and Productivity," the employer noted:

- In the past, the worker had demonstrated technical skills standard for his level, but in both the current evaluation period and the immediately prior evaluation period (2000 and 2001), he had not consistently demonstrated those skills. The worker's average production numbers were well below the crew average production. The employer indicated that it was not prepared to accept a continued trend of substandard productivity coupled with no significant indication of a move towards improvement.

Under "Computer Skills and Office Procedures," the employer observed as follows:

- The employer viewed the worker's computer skills and his knowledge of applications required of the engineering crew as "standard".
- The employer rated the worker's office procedures as below standard for his level. The employer viewed the worker's reports in the "bluebooks" as sometimes unacceptable for presentation to outside agencies or for use in the preparation of documents required for forest development approvals, road permits or cutting permits. In several instances, a supervisor was required to re-do the worker's bluebook work. The employer provided an example of the worker using a "high random winds" statement in almost all of his windthrow reports. The employer stated that the worker made the statement without any rationale or justification regarding the windfirmness of the final boundary location selected or any

prescribed treatment options designed to reduce the chance of post harvest windthrow.

Under “General Performance Rating (Supervisor’s Evaluation),” the employer indicated that the worker had failed, over the 2000 and 2001 review periods, to meet the standards reasonably expected of an engineering technician. The employer stated that the worker was clearly capable of producing a quality product in an efficient manner, provided he set his mind on the task. The employer referred to the worker’s recent good showing in an Iron Man competition, and noted that if the worker applied a similar focus and schedule to his work, he would excel.

Under “Suggestions for Career Advancement (Supervisor’s Evaluation),” the employer advised the worker that he must seriously decided where he wanted to go with his career with the employer. The employer referred to the July 5, 2001 meeting, and the July 9, 2001 letter as setting out clearly defined expectations of the worker on the job. The employer advised that it expected the worker to achieve productivity levels at standard or above and that he follow legitimate work direction from supervisors. Continuation along the performance trend referred to in the 2000 and 2001 reviews and as pointed out in the July 9, 2001 letter would not be acceptable to the employer. The employer concluded:

We believe that we have provided ample opportunity and support for you to have easily achieved a substantial positive move towards reaching our standards; this has not happened. We are considering the preparation of a formal notice of unsatisfactory performance. This notice will be in writing and will include specific performance targets that must be attained, when these targets must be reached, and what the consequences of not reaching these goals will be.

The worker’s position is that the employer had clearly threatened him with progressive discipline and job termination, and that this resulted in an intimidating situation for the worker. The worker points out that his approach to safety issues was a matter of contention between the employer and himself. The employer expressly advised the worker that he lacked credibility because of all the safety challenges he had made, and offered specific examples relating to problems arising from a caulk boot issue and a safety accountability paper. The worker says that when he raised safety issues as a member of the workplace safety committee, he was acting in accordance with his responsibilities as a committee member under section 130 of the Act. The worker submits that when the manager warned him against continuing to “challenge” in the manner he had been doing, or risk progressive discipline and ultimate employment termination, this was a warning that he should no longer raise safety issues. The worker’s view is that the only way he could redeem himself with the employer was to stop communicating as a member of the safety committee.

The worker's position is that the "challenges" referred to by the manager included raising safety issues at the workplace, and that the employer was displeased with the amount of time it was spending dealing with the safety concerns raised by the worker. The worker submits that the employer's message to him was that he risked job termination if he continued to identify what he viewed as legitimate safety issues. In the July 5, 2001 meeting, the manager had expressly advised the worker that in making claims of violations of health and safety regulations, the worker was using "intimidating language" that put people on the defensive. Therefore, submits the worker, the message from the employer was that he should stop alleging violations of health and safety regulations. The worker states that because of the manager's acts of intimidation, the worker felt unable to fulfill his statutory responsibilities as a member of the safety committee. In this sense the worker submits that the employer violated section 151 of the Act by intimidating him so that he was unable to fulfill his statutory duties as a member of the workplace safety committee.

The worker submits that the employer has failed to meet the burden of proof under section 152(3) of the Act. The worker says that the employer's criticisms of his behaviours are untrue. He denies that he behaves in an accusatory, intimidating, confrontational or destructive manner and that he lacks credibility when he raises safety issues. The worker submits that beyond making these allegations and claiming that other employees and committee members were upset with his behaviour, the employer brought no evidence to support those allegations. The worker submits that without such corroborating evidence, the employer is unable to rebut the statutory presumption in section 152(3) of the Act.

By way of remedy, the worker no longer requests an apology from the employer, but requests that WCAT otherwise reinstate the remedy awarded by the first Board reviewing officer in the February 19, 2003 decision. That remedy required the employer to either remove the July 5, 2001; July 9, 2001 and October 11, 2001 documents entirely from the worker's personnel file, or alternatively to revise them to remove unfavourable comments and "the directive imposing discipline so that the complainant will have an opportunity to comply with the renewed terms of employment." The first reviewing officer also directed the employer to "indicate that the complainant's terms of employment will now closely follow the company's workplace conduct/business ethics core policies."

The employer's position is that the July 5, 2001 meeting and subsequent documents regarding the worker's work performance did not constitute "discriminatory action" under section 150 of the Act. The employer notes that under section 150, "discriminatory action" must be an action that "adversely affects a worker with respect to any term or condition of employment." The employer submits that a discussion with an employee, and resulting letters of expectation and performance appraisals, do not adversely affect the worker with respect to any term or condition of employment.

In particular, the employer submits that the July 5, 2001 meeting and the documents that followed did not constitute discipline or reprimands under 150(2)(e) of the Act. The employer refers to arbitral jurisprudence in the labour relations area that has determined that warning letters and performance appraisals, even where they indicate that discipline might be taken in the future, do not constitute disciplinary action in and of themselves. See *Lake Cowichan and District Credit Union* (1984), 15 L.A.C. (3d) 248 and *Re Zuibrycki and the Crown in Right of Ontario* (1982), 5 L.A.C. (3d) 282.

The employer states that it routinely and regularly conducts performance reviews of its employees on an annual basis. The October 11, 2001 evaluation of the worker was nothing more than a regular annual performance review. The employer submits that the evaluation contained both positive performance aspects as well as performance issues that required improvement. The employer says that it commended some of the worker's efforts with respect to safety and his role as a committee member. The portion of the performance appraisal that dealt with safety was only a small portion of a detail performance evaluation addressing many general topics. The employer points out that the evaluation indicated that its recommendations regarding the worker's approach to safety were not intended to stifle the worker's personal opinions or hold him back from presenting items he felt needed to be addressed.

The second reviewing officer, in the August 6, 2003 decision, did not accept the employer's argument that the July 5, 2001 meeting and relevant documents did not constitute discipline under section 150 of the Act. She noted that on its stay application, the employer had argued that the removal of the documents from the worker's personnel file would hamper any implementation of progressive discipline. The reviewing officer found that the definition of discriminatory action ("discipline") in section 150 of the Act was more liberal than the employment law context. As the employer's intent in issuing the documents in question were to rely on them to affect the terms and conditions of the worker's employment in the future if his behaviour did not change, then they were disciplinary in nature and constitute "discriminatory action" under section 150 of the Act.

The employer argues that the second reviewing officer misconstrued its submission on the stay application. The employer was not relying on the documents in question as the first step in any progressive discipline procedure. Rather, the employer stated that the notes of the July 5, 2001 meeting and the associated documents were the necessary evidence that it advised the worker as to the employer's expectations of his performance. In the stay application, the employer's position was that, should the worker's performance indicate in the future that discipline was required, it would lack the necessary evidence to prove that it had counselled the worker as to what it expected of him. The employer submits that this is a long way from saying that the October 5, 2001 counselling meeting and relevant letters and documents were disciplinary action in and of themselves.

The employer also disagrees with the second reviewing officer that section 150's definition of discriminatory action is so liberal that it includes warning letters, performance evaluations, and other criticisms that do not adversely affect a worker with respect to any term or condition of employment. The employer notes that in section 150(2)(e), the legislation refers to the imposition of "any discipline, reprimand *or other penalty.*" In the circumstances at hand, there was no penalty imposed on the worker.

The employer relies on *WCAT Decision #2004-04688* (September 3, 2004) for the proposition that intimidation and coercion under section 150 do not apply every time an employer says something that a worker does not like or that causes the worker to have a negative emotional reaction. The employer adopts the definitions of intimidation and coercion used by the panel in *WCAT Decision #2004-04688*. In that case, the panel stated that coercion can be defined generally as using force to compel something, or the act of compelling by force or authority. Intimidation is a broader term than coercion, and includes frightening by threats. In law, coercion is viewed as coercing a person by threats of violence, or other illegal action into doing or abstaining from doing something that he would otherwise have every right to do.

The employer submits that it did not tell the worker that he should not address or advance safety issues in the future. The employer reminded him that his manner of bringing forward all sorts of workplace concerns was disruptive. The employer reiterates that it commended the worker and gave him positive feedback about several aspects of how he dealt with safety issues, and that it encouraged him to be a leader, a coach and an effective member of the safety committee. The employer's message to the worker was that his approach to workplace issues, (not just safety issues) was often confrontational and not constructive, and that needed to change. The employer submits that neither the July 5, 2001 meeting nor the letters and documents in question, taken separately or as a whole, could be interpreted as being coercive or intimidating under section 150 of the Act.

On the issue of whether the employer's conduct in this case constituted disciplinary action under section 150(2)(e) of the Act, the worker responds that as the employer did not appeal the August 6, 2003 decision of the reviewing officer, her decision on the matter should stand.

In the alternative, even if the October 5, 2001 meeting and the documents that followed are found to constitute "discriminatory action" under section 150 of the Act, the employer submits that the fact that the worker was a member of the safety committee and raised safety concerns did not play any part in the employer's performance evaluation of the worker. The employer submits that its evaluation of the worker and its recommendations to the worker were clearly directed at the *manner* in which the worker raised issues in the workplace, not the fact that he raised safety issues. The employer submits that the evidence establishes that its motivation for holding the July 5, 2001 meeting, sending the worker the letters in question, and conducting the October 11,



2001 performance evaluation, were to bring the worker's unacceptable performance to the worker's attention in order to allow him time to improve his performance.

The employer requests WCAT to dismiss the worker's appeal of the reviewing officer's August 6, 2003 decision.

### **Reasons and Findings**

The first issue is whether or not the July 5, 2001 meeting, the October 11, 2001 performance evaluation, and the associated letters sent to the worker constituted "discriminatory action" within the meaning of section 150 of the Act. On the preliminary matter raised by the worker, I disagree that the employer is barred in these appeal proceedings from disputing the second review officer's finding that it imposed discipline on the worker. While the employer did not appeal the review officer's August 6, 2003 decision, the ultimate result of the decision was to find in the employer's favour on appeal and cancel the remedy earlier awarded by the first reviewing officer. One would not expect the employer to bother appealing an ancillary issue that did not affect its ultimate success on review by the second reviewing officer. The worker's appeal to WCAT of the August 6, 2003 decision puts into question once more all the aspects of the worker's discriminatory action complaint, and hence the employer is entitled to raise, as a defence, the argument that it did not "discipline" the worker within the meaning of section 150(2)(e) of the Act.

Turning to that issue, I agree with the employer's argument that the July 5, 2001 meeting, the July 9, 2001 and August 7, 2001 letters to the worker, and the October 11, 2001 performance evaluation did not constitute "discipline" under section 150(2)(e) of the Act. I accept the relevance and applicability of the jurisprudence relied on by the employer that an employer's warnings and performance appraisals, in and of themselves, do not constitute discipline as it is generally understood, in the sense of a formal step in a penalty process by an employer towards the ultimate penalty of job termination.

I am not certain, however, that the employer's comments to the worker in the July 5, 2001 meeting might not constitute a "reprimand," as it is generally understood to mean an official rebuke for faults (in this case, for faulty work performance). I take the employer's point that subsection (e) of section 150(2) uses the words "discipline" and "reprimand" in juxtaposition with the phrase "or other penalty." A penalty suggests a punishment, some time of concrete disadvantage or loss, and in this case I do not find any evidence of that for the worker resulting from the July 5, 2001 meeting, the October 11, 2001 performance evaluation or the associated letters to the worker. In fact, as a result of the July 5, 2001 meeting, the worker accepted the employer's offer of a day off with pay to consider the issues discussed at the meeting. Further, the employer indicated its willingness to consider the worker's request for assistance in taking a special training course. Although the employer clearly communicated its perception about the worker's poor communication skills and poor substandard work

performance and indicated that there might be employment-related consequences *in the future* for the worker, I am hard pressed to find that the worker suffered any type of “penalty” under section 150(2)(e) of the Act from the July 5, 2001 meeting, the October 11, 2001 performance evaluation, or the associated letters.

This does not end the matter, however. In *WCAT Decision #2004-02065* (April 23, 2004), I indicated that section 150 provides an expansive definition of discriminatory action. The statutory language indicates that discriminatory action “includes” acts or omissions that adversely affect a worker with respect to any term or condition of employment or membership in a union. Thus there may be acts of an employer 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. This brings me to the worker’s allegation that the employer’s conduct intimidated him such that he felt unable to fulfill his duties and responsibilities as a member of the workplace safety committee. If valid, such an allegation would, in my view, qualify as “discriminatory action” by the employer, for it would constitute an act with an adverse consequence to a worker, specifically affecting him in an employment-related matter. This would be so albeit that strictly speaking, the employer’s conduct would not have affected the worker’s terms or conditions of employment under the collective agreement or his union membership *per se*.

*WCAT Decision #2004-04688* (September 3, 2004) has assisted me in deciding the issue of whether the employer’s conduct constituted intimidation within section 150 of the Act. I have found the definition of intimidation referred to in that decision to be helpful. I also agree with the panel’s comments that intimidation does not result every time an employer says something that a worker does not like or that causes a negative emotional reaction, and the use of the term “intimidation” is not meant to capture any and all exchanges between a worker and a manager that the worker objects to, or feels is “harassment” by an employer. Intimidation implies an aspect of threat or abuse of authority. As the panel stated in *WCAT Decision #2004-04688*:

Generally speaking, Canadian labour relations boards have defined intimidation as, at a minimum, acts that deprive an individual of his or her free choice in exercising rights under the applicable statute. This may include acts or threats which are physical or economic. The legislation is interpreted to prohibit pressure or force that removes an individual’s right to choose...

The prohibition in the Act is intended to focus on acts which deprive an individual of his or her rights under the Act.

The circumstances in this case are also similar to some of the circumstances in *WCAT Decision #2004-04688*, in the sense that the worker in this case, like the worker in *WCAT Decision #2004-04688*, was persistent about safety issues and had brought forward many safety issues, both meritorious and non-meritorious. In both cases, the employers and workers were frustrated, disagreeing on safety issues (and in this case,

on other workplace issues as well), and there had been a significant deterioration in the relationships between the parties.

In this case I have decided that it would not be useful to analyze every sentence or statement made by the employer at the July 5, 2001 meeting and in its October 11, 2001 performance review, in isolation from its advice and suggestions to the worker as a whole during the meeting and in the performance review. The employer was giving a comprehensive message to the worker about his style and approach to resolving workplace issues, and it would be unfair to isolate a sentence, taking it out of context from an entire communication. I have applied the same approach with respect to the employer's letters of July 9, 2001 and August 7, 2001.

The evidence satisfies me that the employer's message to the worker was not to discourage him from raising safety issues or from fulfilling his duties as a member of the workplace safety committee. In the July 5, 2001 meeting, the manager did indicate that the worker was using "intimidating language" when he alleged violations of health and safety regulations. He also alleged that the worker was spending too much time on issues, including safety issues. Taken out of context, those sentences alone might well have constituted discrimination under section 150. Alone and at face value, they would seem to be a message that the worker should never allege a violation of a health and safety regulation and that he should stop raising safety issues, or else he would be subjected to progressive discipline. This, indeed, is what the worker has done in its arguments in these appeal proceedings: focused on a sentence or two, ignoring that they were embedded in a comprehensive communication that also praised him for some of his safety initiatives and encouraged him to be an effective member of the safety committee.

I am satisfied that the sentences in question cannot be divorced from the employer's overall message to the worker. To the reasonable person, the message from the employer to the worker was not a threat that unless he stopped raising safety issues, he might eventually find himself the subjective of a progressive discipline process. The message was that the worker needed to re-evaluate his communication style and his overall approach, which in the employer's view was aggressive and confrontational rather than assertive and productive. The employer expressly encouraged the worker to take a leadership role with respect to safety issues and to take an active role on the safety committee. The employer expressly advised the worker that it was not trying to discourage him from raising issues that needed to be raised, including safety issues. I have found it specious for the worker in these appeal proceedings to have seized on a couple of the employer's remarks, analyzed them in isolation from their context, and argued that the employer's conduct had intimidated him from fulfilling his duties and responsibilities as a member of the safety committee.

For the foregoing reasons, I find that the worker has not raised a prima facie case that the employer's conduct in this case constituted "discriminatory action" within the meaning of section 150 of the Act.

If I am wrong in finding that the employer's conduct did not constitute "discriminatory action" under section 150 of the Act, in any event the evidence satisfies me that the employer has rebutted the statutory presumption in section 152(3) of the Act that its conduct in this case was motivated by the anti-safety reasons referred to in subsections (a) through (c) of section 151.

The worker has denied the employer's allegations that his communication style was aggressive or accusatory, and submits that the evidence does not substantiate those allegations. I do not find it necessary to rule on whether or not the employer's perceptions were accurate. The evidence satisfies me that the employer had an honest perception that the worker's communication style had created a toxic environment in the workplace, and the employer was sincerely motivated by an intent to improve not only the worker's productivity on the job, but also the unhappy work environment for which the employer held the worker largely to blame. I find that the employer's motivation in meeting with the worker on July 5, 2001, making the suggestions in the October 11, 2001 performance evaluation, and in sending the worker the associated letters, was not because the employer wanted to discourage the worker from raising safety issues or otherwise fulfilling his rights and responsibilities under the Act and occupational health and safety regulations. The employer's motivation was not because of a conflict about the worker raising safety issues *per se*, but rather because it perceived the worker's communication style to be aggressive and offensive, contributing to a dysfunctional work environment.

It is irrelevant whether the worker's views and attitudes on safety or other workplace issues were or might have been "better" or more valid than that of the employer or other colleagues of the worker. Reasonable people can often disagree on the appropriate interpretation and application of safety rules.

The evidence persuades me that the employer sincerely found the worker's overall work performance to be well below standard, and it was motivated to help him understand his problems and improve his performance in the workplace. Some of the examples of the worker's confrontational style happened to involve his performance as a member of the workplace safety team. This contextual link with occupational health and safety issues was merely coincidental, however. In this regard, the employer took pains to impress upon the worker that it was not trying to curb his ability to raise safety issues or to function as a leader and an effective member of the safety committee. If anything, the employer was trying to impress upon the worker that he would be a more effective member of the safety committee, if he changed his style to become an assertive, rather than a confrontational and aggressive, communicator. Thus, applying the "taint" principle referred to earlier in this decision, I find that the employer's motivation in meeting with the worker on July 5, 2001, in its comments at that meeting, in the performance evaluation of October 11, 2001, and its remarks in the associated letters, was in no way due to the worker having acted according to his rights in furthering occupational health and safety as specified in section 151 of the Act.

**Conclusion**

For the foregoing reasons, I dismiss the worker's appeal and confirm, for different reasons in part, the reviewing officer's decision of August 6, 2003. I have found that the employer did not violate section 151 of the Act in this case. The worker is not entitled to a remedy under section 153 of the Act, and I make no award as to expenses.

Heather McDonald  
Vice Chair

HM/hb