Noteworthy Decision Summary

Decision: WCAT-2005-00892-AD **Panel**: Heather McDonald **Decision Date:** February 22, 2005

Use of information arising from mediation before the Workers' Compensation Board

The worker appealed a decision by the Workers' Compensation Board (Board) to dismiss his complaint under section 151 of the *Workers Compensation Act* (Act). The worker and the employer had attempted mediation with the Board. The substance of the employer's settlement offer was in the material before the panel. The panel decided not to refer the appeal for reassignment to another panel. The employer did not participate in the appeal and the worker did not object to her deciding the appeal. The panel was satisfied that in deciding the merits of the case, she was able to ignore the substance of the parties' settlement discussions.

The worker alleged his employer terminated his employment because he had raised safety concerns on the job. He made a complaint under section 151 of the Act. The Board initially confirmed the worker's complaint as valid and ordered the employer to pay the worker eight weeks of wages. The Board then rescinded its decision. The worker appealed to the Workers' Compensation Appeal Tribunal (WCAT).

In reviewing the file material, the panel noted documents on the file referring to an offer from the employer to the worker in the course of mediation with the Board. The Board had disclosed file documents, including the reference to the employer's settlement offer, to both the worker and the employer. Thus, the substance of the employer's settlement offer was in the material before the Board officer that made the initial decision as well as the Board officer that rescinded the initial decision. Furthermore, the worker's written submission to the Board referred to the worker's request for severance, and the employer's counter-offer, made during the settlement discussions with the mediator.

The employer did not participate in the appeal. WCAT wrote to the worker to advise him the assigned panel had read the settlement offers, and provided him with an opportunity to comment on whether he objected to the panel adjudicating his appeal. The letter stated that if the worker did object, a different panel would be assigned to the appeal, and all references in the file to the settlement offers would be removed before the new panel assumed conduct of the appeal. The worker did not state any objections.

The assigned panel decided to remain as the adjudicating panel. The panel took into account that the employer's settlement offer was in the material before the Board, and the employer raised no objection on that issue in those proceedings. The panel also took into account that the employer chose not to participate in the appeal proceedings, and that the worker did not object to the panel deciding the appeal even after he was specifically alerted to the issue. The panel was satisfied that in deciding the merits of the case, she was able to ignore the substance of the parties' settlement discussions.

The panel concluded that, in terminating the worker's employment, the employer was not motivated in any part by the worker having acted according to his rights as specified in section 151. The worker's appeal was denied.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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Panel: Heather McDonald, Vice Chair

Introduction

On or about December 13, 2001, the employer terminated the worker's employment. The employer is a telecommunications firm, and the worker had been in its employ for over two years working on cable installation on a power plant project. The worker filed a complaint against the employer under section 251 of the *Workers Compensation Act* (Act), alleging that the employer terminated his employment because he had raised safety concerns on the job.

The worker appeals a January 7, 2003 decision made by the senior policy director, Policy & Legal Services Section, Prevention Division, Workers' Compensation Board (Board). In that decision, the policy director rescinded a June 19, 2002 decision by a reviewing officer in the Prevention Division's Review & Penalty Section. The reviewing officer had confirmed the worker's section 151 complaint as valid. By way of remedy, under section 153(2)(c) of the Act, the reviewing officer ordered the employer to pay the worker eight weeks of regular wages, subject to the normal statutory deductions. In rescinding the reviewing officer's decision, the policy director found that the employer had met the burden of proving that its termination of the worker's employment was not motivated in any part by the worker having raised safety concerns at the workplace.

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the worker submits that the last work he did for the employer was just before he brought an unsafe situation to the attention of a supervisor. The worker says that he can see no other reason for the termination of his job. He requests that WCAT restore the reviewing officer's finding that the employer violated section 151 of the Act, and he requests a remedy of twelve weeks severance pay and a written reference.

Issue(s)

In terminating the worker's employment, was the employer motivated in any part by the worker having raised occupational safety concerns? If the employer contravened section 151 of the Act, what is the appropriate remedy?

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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 a violation of section 151 is on the employer or the trade union, as applicable. Section 153 gives the Board's procedure for dealing with a complaint.

Like the former Appeal Division, WCAT has applied the "taint" principle in appeals involving section 151 complaints. 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(2)(e) of the Act provides that a worker must report to a supervisor or employer the existence of any hazard that the worker considers is likely to endanger the worker or any other person. Section 3.10 of the *Industrial Health and Safety Regulation* (Regulation) refers to a similar obligation of any person who perceives such a hazard. Section 3.12 of the Regulation provides that a person must not carry out or cause to be carried out any work process or operate or cause to be operated any tool, appliance or equipment if that person has reasonable cause to believe that to do so would create an undue hazard to the health and safety of any person.

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, but it did not respond to the invitation and did not participate in the proceedings.

In reviewing the material on file, I noticed that there was documentation on file which referred to the substance of the parties' offers in mediation proceedings with a Prevention Division mediator. The mediation was unsuccessful, but the file contained references to the employer's settlement offer in the form of an e-mail exchange between Board officers. In the disclosure provided to the parties by the Prevention Division in the initial proceedings before the reviewing officer, both parties were provided with disclosure of the file documentation, which included the reference to the employer's settlement offer. Thus the substance of the employer's settlement offer was in the material before both the reviewing officer who made the initial decision and the policy director on her review.

As well, the worker's written submission dated October 12, 2002 to the Board in the proceedings before the policy director, referred to the worker's request for severance, and the employer's counter-offer, made during the settlement discussions with the mediator. It appears that the policy director did not have that written submission before her when she rendered her January 7, 2003 decision, as she did not refer to it when, in her decision, she gave a very specific description of the material she had considered on her review. However, the worker's October 12, 2002 submission was before me in these WCAT appeal proceedings.

The employer did not respond to WCAT's invitation to participate in the appeal proceedings. By letter dated June 25, 2004, the WCAT appeal coordinator assigned to this case, at my direction, wrote to the worker advising him that I had read the settlement offers, and provided him with an opportunity to comment on whether he objected to my continuing assignment as adjudicating vice chair on his appeal. The letter advised the worker that if he did object, a different WCAT panel would be assigned to the appeal, and all references in the file to the settlement offers would be removed from the file before the new panel would take conduct of the appeal. The letter also indicated that the worker might wish to consult with the office of the Workers' Advisers about the issue before providing his written comments on the matter. The letter requested the worker's response by July 16, 2004, and advised that if WCAT received no response by that date, WCAT would assume the worker had no objection to the current panel assigned to adjudicate the appeal.

WCAT received no response from the worker to its June 25, 2004 letter. The WCAT appeal coordinator wrote the worker by letter dated July 22, 2004, advising that as no response had been received, WCAT was assuming he had no objection to the current panel adjudicating the appeal, and the appeal would therefore continue without a change to the panel. The appeal coordinator then requested a written submission from the worker on the merits of his appeal. After being granted an extension of time to do so, the worker provided a written submission dated November 7, 2004. In that submission, the worker addressed the issues on the merits of the appeal and did not object to my assignment as the panel to adjudicate the appeal.

I have decided to remain as the adjudicating panel instead of referring the appeal for reassignment to another vice chair. In reaching that procedural decision, I have taken into account that the employer's settlement offer was in the material before both the reviewing officer and the policy director, and the employer raised no objection on that issue in those proceedings. I have also taken into account that the employer chose not to participate in the WCAT appeal proceedings, and that there has been no objection by the worker to my deciding the appeal even after WCAT specifically alerted the worker to the issue. I am satisfied that in deciding the merits of the section 151 case, I am able to ignore the substance of the parties' settlement discussions. Those discussions have not formed part of my consideration in reaching a decision on the merits of the worker's appeal.

In his notice of appeal to WCAT, the worker requested an oral hearing. He stated that he felt thwarted by his writing abilities and wanted to "convey an honest light on proceedings of the actual event." I reviewed the submissions provided by the worker in the proceedings before the reviewing officer and the policy director, and have concluded that his writing abilities are very good. In my view, a read and review process does not prejudice the worker as he is a competent writer.

In deciding whether or not to convene an oral hearing, I also considered the matters in dispute between the parties. Although they disagree about the employer's motivation for terminating the worker's employment, they concur on the basic history of past disputes between the parties, and that the culminating incident occurred on December 10, 2001 when the worker objected to two workers, "H" and "C", doing multiple crimp connections on power cables when they were not properly trained for the specific procedure. The employer has not disputed the worker's point that these two workers were not properly trained on the specific procedure, nor that the worker raised the safety issue. The worker has conceded that he was upset, and the worker has not denied the employer's allegations that he used inappropriate language in a heated conversation with the supervisor "N" about the matter, in the presence of the two workers. The primary area of dispute between the worker and the employer is whether or not he was fired because of his inappropriate language and tone, or because he had raised the safety issue. I find that I am able to decide the issue in dispute without an oral hearing because most of the material facts are not in dispute and there are no serious issues of credibility. Where there has been a minor difference or a minor gap in the stories provided in the written versions by the employer's witnesses and the worker's version of events, I have applied the test in *Faryna v. Chorney* [1952] 2 D.L.R. 354, namely, that "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."

Background and Evidence

The employer provided evidence in the form of handwritten and typewritten statements from supervisors and workers about specific workplace events, commencing in the autumn of 2001, involving the worker. The worker has not contradicted the substance

of that evidence. It is clear that the worker was having a personality conflict with another member of the crew, H, and that this was causing some disruption at the workplace.

The first two incidents occurred on November 13, 2001. H's written statement said that at approximately 9 a.m., a supervisor N asked H and another worker, W, to help the worker move cabinets. H went into the power room and asked him if he was ready to move the cabinets. The worker responded in a sarcastic tone, something to the effect of "What can I do for you, Mr. H?" H again stated that N had requested H and W to help the worker move the cabinets. The worker then called H a backstabber. H asked the worker to put their differences aside and concentrate on the job. H's evidence is that the worker responded with swear words, calling H names, so H simply threw his hands in the air and walked away.

W provided a handwritten statement which, in substance, corroborated H's version of events. W stated that H simply walked away as the worker responded with yelling and rude comments.

An hour or so later on November 13, 2001, H and W were working on racking, and the worker and the supervisor N were mounting bays. An issue arose about shortage of material, which H and N were discussing. H offered to telephone another supervisor, M, to try to locate the missing material. The worker began taunting H, in vulgar terms, suggesting that H was currying favour with the supervisor M. H did not respond to the taunts. The supervisor N told the worker to stop it, and the worker responded with words to the effect that N should be careful, or H would steal his job. H proceeded to make the phone call to M and the dispute ended at that point.

It is noteworthy that N reported the incident to M who documented it in the employer's records on November 14, 2001. At that time, M decided to do nothing about the incident, assuming that it was a personal dispute between the worker and H that they would work out themselves.

On December 11, 2001 (the day after the "culminating incident"), N also documented in a report to M that on November 13, 2001, H had reported to N that the worker had made threatening remarks to him about past job-related issues. As N had not witnessed those threatening remarks, he told H that he would speak to the worker about whether he had any issues with H. N spoke to the worker, who advised N that he was upset about an incident in the past where he felt he should have been put in charge of a job rather than H. N told the worker that he should deal with past issues in a proper manner, and that he should discuss that matter with M. The worker agreed, and apologized for his outburst with H. N later told H that if a similar incident were to again occur, he should advise N immediately.

The next matter concerning the worker was documented by the employer on November 27, 2001, concerning the worker's failure to show up for work on

November 26, 2001 and failing to phone in to report that he would not be in for work. The supervisor N reported the incident to M. M telephoned the worker's home on the evening of November 26, 2001 and spoke to his wife, who advised that the worker was sleeping. The worker's wife perceived that M's manner was rude, and told him so. M requested that the worker phone him before coming in to work the next morning. The worker did not telephone M the next morning before arriving at work, but did phone M after he arrived at work. M reprimanded him for his behaviour on November 13, 2001 disrupting the crew, and for failing to telephone in to report his absence on November 26, 2001. The worker responded that the disruption incident was a "personal thing" between himself and H. The worker also advised that he did not have N's telephone number and so could not have phoned him to report the absence. M advised that none of those explanations were acceptable, and he suspended the worker for one week to "reflect on his attitude, his future with the company, and his cooperation with the crew."

I have read the worker's version of the "failing to phone in to work" incident, and accept his evidence that on November 26, 2001, he had attempted to telephone the Vancouver office as well as the telephone number of another employer contact, but there was no answer at either line. I also accept his evidence that his wife thought M to be very rude during their telephone conversation on the evening of November 26, 2001.

What I have found relevant about the November 26/27 incident, however, is not who was right or wrong about the "failure to report incident." Rather, I have found it significant that the employer documented both the failure to report, as well as the worker's earlier disruptive behaviour with crew member H, and that the employer treated the incidents as so important that it took the disciplinary measure of suspending the worker for one week. At this point, there was no issue of the worker having raised health and safety concerns, but rather the employer's perception that the worker's behaviour was disruptive and inappropriate. Clearly, by the suspension, the employer was attempting to warn the worker that his behaviour needed to improve.

The next incident was the "culminating" incident of December 10, 2001. It was documented in the employer's written records on December 13, 2001. The employer's written record is a typewritten statement by M. It indicates that the supervisor N had telephoned M on the evening of December 10, 2001, to advise that he had requested the worker to leave the work area and not return. M recorded N's version of the incident as follows: N had instructed H and another worker, C, to perform multiple crimp connections on power cables. They were in the process of doing so, when the worker, loudly and antagonistically, stated that it was unsafe. N then stopped the work and asked H and C if they had received instruction on the use of a power crimper. They replied that they had been given some instruction, but it was quite some time ago, and they could use an update. N then asked the worker to instruct H and C, but he declined, using foul language. Again, N asked him to give H and C instructions, in the interest of safety, but the worker responded in the same way. The worker indicated that H and C were taking his job away, and he announced that he was leaving for a smoke.

N then asked the worker to leave the work area, as N was concerned that the worker was out of control and he was concerned about H's safety. M's written statement says that he completely supported N's actions.

N provided a typewritten statement dated December 11, 2001 to M regarding the December 10, 2001 incident. N's statement is as follows:

> **Incident**:
>
> [The worker] claimed in abusive language that installers [H] and [C] were not qualified to be performing the cable crimping job that they were engaged in and that he was the only one that knew how to operate the hydraulic crimper tool that was in use by [H] and [C].
>
> I asked [H] and [C] if they were familiar with the crimper and if they were aware of its proper operation. [H] replied that he had been shown how to operate it, however would welcome some training and any further instruction to ensure proper operation of this tool.
>
> I asked [the worker] to share his knowledge, and to instruct both [H] and [C] in the proper and safe methods of operating the crimper.
>
> [The worker] refused, and started shouting incoherent profanities at all parties present and seemed out of control.
>
> **Action Taken:**
>
> I ordered [the worker] to leave the work site. [The worker] left the work site at 1:10 pm carrying his toolbox and a cardboard box of undisclosed contents.
>
> I did not attempt to request [the worker] to leave the above items on site, since I was concerned about his disposition.

> This action was taken as a direct result of his refusal to comply with my request to provide instruction on the crimper tool, and his seemingly out of control attitude towards [H], [C] and myself.
>
> [reproduced as written]

The worker C provided a handwritten statement regarding the December 10, 2001 incident. He wrote that he and H were using a hydraulic crimper, when the worker entered the room, asking them in a raised voice and sharp tone if the crimper was being properly used and monitored for 600 pounds per square inch. H and C answered that the tool was shutting off when the crimp was sufficient. C's statement continued as follows:

> [The worker] blasted back with comments saying we weren't properly trained & could not see the meter from above the rack. With that comment [the worker] started yelling at [H] "(don't f-----ing lie to me)". [N] then intervened, requesting [the worker] to calm down & show the boys the proper procedure. Not calming down, [the worker] walked away yelling "I'm going for a smoke", [N] responded, "If your going to walk, keep walking." [The worker] disobeyed [N], then returned to snap back. At this point I thought [the worker] was going to get physical with [H]. As if to blame him for all this.
>
> [N] told [the worker] to leave, don't come back & would be in touch. I thought [N] handled this well. [The worker] has brought all of this on himself & created an uncomfortable work environment for us all. It's a shame. I used to enjoy working with him.
>
> [reproduced as written]

H also provided a handwritten statement about the December 10, 2001 incident. I will not reproduce it in this decision, as it simply corroborates the version of events reported by C and N.

On Thursday, December 13, 2001, M telephoned the worker and advised him that the employer no longer wanted his services.

The worker met with a Board safety officer on December 21, 2001 regarding his job termination. The worker admitted that at the time of the December 10, 2001 workplace incident, he had been concerned about the security of his job with the employer, and was upset that he was the only one who had adequate training to operate the crimper, yet other workers were operating it. However, the worker was also genuinely concerned for the safety of the workers operating the crimper. The worker also explained that there had been awkward working conditions between himself and the employer in the past regarding health and safety issues and labour concerns. The

safety officer advised the worker that the Board could not deal with labour issues, but only with health and safety issues.

The safety officer inspected the employer's workplace and issued an inspection report. He found that the employer had not developed safe work procedures for the operation of the crimper, and that the employer had not adequately trained workers in the operation of the machine. The safety officer provided the worker with the appropriate documents for filing a section 151 complaint. The worker filed his section 151 complaint with the Board on January 14, 2002.

The parties attempted to reach a resolution of the complaint in mediation with the Board, but the mediation was unsuccessful. Subsequently, the reviewing officer provided an opportunity for the parties to present written submissions on the complaint, but the employer did not participate in those proceedings. The reviewing officer, based on the evidence before him, confirmed the worker's section 151 complaint as valid, and by way of remedy, ordered the employer to pay the worker a sum equivalent to eight weeks' wages.

The employer requested a review of the reviewing officer's decision, and provided documentation in support of its position that in no part was its decision to terminate the worker's employment due to the fact that he had raised safety issues. In response to the written statements provided by the employer, the worker noted that he was not perfect. He also stated, however, that the employer had not commented on the fact that his presence had been requested on various projects. Further, he stated that if the employer had been planning to terminate his employment in December 2001, it would not have paid his way to attend a training course in November 2001. The worker asked, "How many times should you watch the younger guys breach safety etiquette?"

In his October 12, 2002 submission, the worker stated that he had worked together with H, W and C on many job assignments. They all knew each other and had socialized at each other's homes. The worker was 48 years old, and the others were all under 25 years old. The worker stated that "There have always been differences of character and opinion on and off the job. We always shake hands and go on to the next endeavour." The worker discussed other incidents (the failure to report his absence and another incident about a missed airplane flight), which incidents, in and of themselves, I do not find significant in this case. Then the worker went on to say in part as follows, regarding the December 10, 2001 incident:

> The safety incident itself…On a previous job in Penticton, [H] and [W] had taken to using this crimping machine for things it wasn't designed to perform. This particular tool belonged to a different co. During the course of trying out the unit, Damage was done to it. I had to work the next 2 months with this gentleman thinking I had done the damage. Only reluctantly did he allow me use of this unit, and always when he was present. This is a specialty tool and always gets used by speciffically

> trained power people. Me. Therefore when I saw [H] and [C] using the crimping unit, improperly again, Yes I got upset. I have worked with these young guys on many projects now. Young and head strong. They bypass procedure, They don't like to listen. How often do you say, "HEY? WHAT ARE YOU DOING??? Anyway…To my closing statement. I say again that I don't think if [the employer] had been about to let me go, They would not have sent me on course prior to this project….
>
> [reproduced as written]

In her January 7, 2003 decision, the policy director noted that job termination is one of the adverse effects listed in section 150(2) of the Act as constituting a discriminatory action. As the worker had raised a safety concern before the employer terminated his employment, under section 152(3) of the Act the burden shifted to the employer to prove that in terminating the worker's employment, it had not been motivated in any way for any of the reasons mentioned in section 151 of the Act, specifically in this case because the worker had raised safety concerns. The policy director was satisfied, on the evidence, that the employer had met the burden under section 152(3) of the Act. She found that the employer dismissed the worker for his insubordinate behaviour and not for raising safety concerns over the operation of the hydraulic crimper. She found that it was not the voicing of those concerns, but rather the manner in which the worker did so, together with prior incidents of concern to the employer, that motivated the employer to terminate the worker's employment.

In these appeal proceedings, the worker made a brief written submission as follows:

> This has all happened so long ago. I hope we all arrive at the same logical conclusion as I. I do not have any new startling evidence or derogatory statements to present. This is how I perceive the situation. Just prior to the start of the project we were working on, [the employer] sent me on another power D.C. Power course pertaining particularly to the installation project at hand. That day, a couple of the younger guys were performing in an unsafe manner. I brought it to the attention of the supervisor. That is the last work I did for [the employer]. I see no other reason for my termination. I brought up a safety concern. Then I was told to go home. All other allegations really do not have any bearing here. Why would [the employer] send me on course If they planned to let me go a week later. I guess that is all the information.
>
> [reproduced as written]

Reasons and Findings

I have decided to dismiss the worker's appeal and confirm the policy director's January 7, 2003 decision. The worker made out a *prima facie* case of discrimination, because it is undisputed that the employer terminated his employment, and that the termination occurred soon after the worker had raised a safety issue regarding improper use of the hydraulic crimping machine by H and C. Under section 152(3) of the Act, the burden shifted to the employer to prove that in no part was the job termination motivated by the worker having raised safety concerns. Like the policy director, I find that the evidence in this case rebuts the statutory presumption in section 152(3).

The worker has not denied the allegations in the written documentation about his behaviour toward H. His position is that these allegations have no bearing on the issue, and that the only reason for his loss of job is because he complained to N about H and C's improper, unsafe use of the hydraulic crimper. He can also not understand why the employer would pay his way on a training course in November 2001 if it planned to terminate his employment.

The evidence satisfies me that the employer had not been planning or plotting to terminate the worker's employment. I am satisfied that there was no "set-up" by the employer to have the worker fired. It is obvious from the documentation on file (and there was other documentation included about other workers as well, of which I have not found it important to give details), that the employer's management engaged in the human resources practice of careful documentation of inappropriate workplace behaviour of all its workers. It is clear that the employer kept careful records about all employees. This does not suggest a plan to terminate the employment of all its workers, but rather that management of the employer emphasized the importance of documenting workplace events for future reference. The worker's position is that the employer would not have sent him on a training course in November 2001 if it had intended on firing him, but my response is that the evidence does not suggest that the employer was planning on firing him. Rather, the evidence indicates that the employer was trying to impress upon the worker the importance of good relations with his colleagues, and was hoping that the worker would improve his behaviour and continue in his job.

While the worker's October 12, 2002 written submission portrayed his relationship with the younger men on the crew as amiable despite their differences on projects, the evidence is clear that the worker was openly hostile toward H, perceiving H as a threat to his job. The employer had a documented complaint that the worker had threatened H in the past, and when N spoke to the worker about the matter in November 2001, the worker told him that he had been upset about H being put in charge of a job rather than him. The worker apologized for his remarks to H.

The worker's taunting behaviour toward H on November 13, 2001 was also documented by the employer. Subsequently, after the "failure to report absence" incident on November 26, 2001, M advised the worker that the employer was giving him a one-week suspension due to his earlier disruptive behaviour with the crew, as well as the

failure to phone in and report his absence. A one-week suspension should have been a strong warning to the worker that the employer was not going to tolerate the worker behaving inappropriately toward other crew members.

Unfortunately, the worker did not heed the warning. The evidence about the December 10, 2001 incident supports a finding that the worker felt a threat to his job security when he found H and C working on the hydraulic crimper, which in the worker's view, should have been a job assignment for him alone to perform. Admittedly, the worker had a legitimate safety concern, but he did not voice his concern in an appropriate way. I find it telling that N, the supervisor, did not immediately tell the worker to leave the job site. Instead, N took the worker's concern seriously and asked the worker to instruct C and H on the safe and proper way to operate the crimper. Both C and H were open to learning more about the correct way to operate the hydraulic crimper. No one took offence at the worker's suggestion that they were operating the crimper improperly. But the worker reacted in a volatile and inappropriate way, declining to give assistance and swearing at the crew, accusing them of taking his job away from him. In their written statements, both C and N indicated that they were concerned that the worker was out of control and was going to take physical action against H. I accept as credible N's explanation that he told the worker to leave the work site because of the worker's inappropriate behaviour and the concern that the worker was out of control and might harm someone.

The worker advised the Board safety officer that there had been a history with the employer regarding health and safety issues and labour issues. However, the evidence in this case is that the only safety issue of significance raised by the worker was his concern on December 10, 2001 regarding the use of the hydraulic crimper. My review of the evidence in this case supports a finding that the employer terminated the worker's employment because the worker was unable to manage his personality conflict with H, and the worker's behaviour in that regard had reached an intolerable level in the workplace. The employer had earlier suspended the worker for his unacceptable behaviour as well as the failure to report incident, but that disciplinary measure had no effect on the worker's ability to control his temper and his jealousy of H. Therefore the employer, after the December 10, 2001 outburst by the worker, decided to terminate the worker's employment. The context for the worker's outburst involved his anger at H and C using the crimper improperly. But this contextual link with occupational health and safety was merely coincidental to the fact of the worker's job loss. Applying the "taint" principle referred to earlier in this decision, I am satisfied that in no part was the employer's decision to terminate the worker's employment due to the worker having raised safety concerns in the workplace or otherwise having acted according to his rights as specified in section 151 of the Act.

Conclusion

For the foregoing reasons, I dismiss the worker's appeal of the policy director's January 7, 2003 decision. I have found that in terminating the worker's employment, the employer was not motivated in any part by the worker having raised occupational

health and safety concerns or otherwise having acted according to his rights as specified in section 151 of the Act. I have found that the employer did not contravene section 151 of the Act. 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