

## Noteworthy Decision Summary

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**Decision:** WCAT-2010-00430    **Panel:** H. McDonald    **Decision Date:** February 11, 2010

***Section 151 of the Workers Compensation Act – Discrimination – Occupational environment - Occupational Health and Safety Regulation***

This decision considers the meaning of “occupational environment” in section 151 of the *Workers Compensation Act* (Act), which addresses prohibited discrimination against workers.

The worker, an information technology business analyst, raised concerns about his employer’s computer security systems on February 20, 2009. The worker’s employment was terminated on February 24, 2009. The employer said the termination of the worker’s employment was due to downsizing of its information technology department. The worker filed a complaint alleging the termination of his employment violated section 151 of the Act, which prohibits certain types of discrimination.

The Workers' Compensation Board, operating as WorkSafeBC (Board), dismissed the complaint finding that the worker had not established a *prima facie* case under section 151 of the Act. The worker appealed to WCAT. The worker argued that the phrase “occupational environment” in section 151 of the Act is broad enough to include discrimination based on concerns raised by the worker about data security.

The panel denied the worker’s appeal, finding that the worker had not raised a *prima facie* case under section 151 of the Act of unlawful discrimination by the employer. The panel found that the worker’s conduct in providing information to the employer about problems with the employer’s computer security systems does not fall within the conduct referred to in section 151 of the Act. In the *Occupational Health and Safety Regulation*, “occupational environment” refers to general workplace conditions that directly relate to the health and safety of workers and others in that environment because unsafe conditions lead to accidents causing injury to persons or to human illness. Computer fraud is not the type of workplace hazard intended to be encompassed by the provisions of section 151 of the Act and the *Occupational Health and Safety Regulation*.

<b>WCAT Decision Number :</b>	WCAT-2010-00430
<b>WCAT Decision Date:</b>	February 11, 2010
<b>Panel:</b>	Heather McDonald, Vice Chair

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## Introduction

- [1] On November 17, 2008 the employer hired the worker as an information technology (IT) business analyst. Several months later, on February 19, 2009, the employer's computer system was the victim of an after-hours unauthorized remote access. On February 20, 2009 the worker noticed a back-up data tape was missing and notified the employer's IT director, suggesting that executive management be advised and that the police are contacted. The worker also directly telephoned the employer's board chair to report the theft. Initially the employer suspected the worker of the thefts and so advised the worker on February 23, 2009. The worker contacted the police himself to file a complaint about the data theft but the police advised that the complaint would need to come from the employer so the worker then contacted the employer's chief executive officer to request that he initiate a police complaint.
- [2] On February 24, 2009 the employer advised the worker that its internal investigation into the incident had concluded. The employer said that the worker was no longer a suspect and that nothing serious had transpired, but also told him that the employer was downsizing its IT Department and that his position was terminated.
- [3] The worker complained about his employment termination to a variety of agencies, including the Workers' Compensation Board (Board)<sup>1</sup>. The worker's complaint to the Board was filed under section 152 of the *Workers Compensation Act* (Act) alleging that in terminating his employment the employer had violated section 151 of the Act which prohibits certain types of discriminatory action. The worker complained of being a "victim of fraud, work place harassment, discrimination and serious attempts to hide criminal activity." The worker also said the employer had subjected him to "unsafe and unsecured work environment that compromised my integrity."
- [4] In a May 15, 2009 decision a Board case officer dismissed the worker's complaint, finding that the worker had not established a basic (*prima facie*) case under section 151 of the Act. The Board case officer found that the object of Part 3 of the Act (of which section 151 is part) and the *Occupational Health and Safety Regulation* (OSH Regulation) is to regulate physical workplace hazards that expose workers to a risk of compensable injury or disease. He found that the Board lacks jurisdiction to regulate employer data security and that even if the situation involved personal harassment, the

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<sup>1</sup> Operating as WorkSafeBC

Board does not regulate personal harassment in the workplace. The Board case officer concluded that:

Without a Board-regulated health and safety nexus or connection raised by the worker, the worker's termination is not subject to Board review, but rather remains a labour relations issue for which the worker has recourse to the usual civil remedies.

- [5] On appeal to the Workers' Compensation Appeal Tribunal (WCAT) the worker submits that section 151 of the Act expressly refers to a worker raising information about "occupational health or safety or *occupational environment* of that worker". The worker argues that a worker's occupational environment includes data security and therefore section 151 is broad enough to include a situation where a worker suffers discrimination because he raised concerns about data security or the security of a corporate asset.

## **Issue(s)**

- [6] Has the worker raised a basic case under section 151 of the Act of unlawful discrimination by the employer? Does the worker's role in informing the employer about the problem with the employer's data security/procedures fall within the conduct referred to in section 151(c) of the Act as giving information regarding conditions affecting the worker's occupational environment?

## **Jurisdiction and Procedural Matters**

- [7] This appeal is brought pursuant to section 240 of the Act, which provides that a refusal to make an order under section 153 may be appealed to WCAT.
- [8] WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case. WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it (section 254 of the Act).
- [9] This appeal does not involve a compensation issue. The standard of proof is the balance of probabilities.
- [10] Only the worker participated in these appeal proceedings. WCAT invited the employer to participate but did not receive a response. On his notice of appeal the worker indicated an appeal method by way of written submissions. After considering item #7.5 of WCAT's *Manual of Rules of Practice and Procedure* I agreed that an oral hearing was unnecessary in this case and that the appeal could be conducted by written submissions. This is because the threshold issue in this case is a legal one involving WCAT's jurisdiction under section 151 of the Act. The appeal issue turned on the

appropriate interpretation of the phrase “occupational environment” in section 151(c) of the Act.

## Relevant Law and Policy

- [11] 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 of that worker or any other worker 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.

[italic emphasis added]

- [12] A complainant worker must establish a basic case (a *prima facie* case) under section 151 of the Act. To do so, the worker must establish that a respondent took action that could fall within the meaning of discriminatory action in section 150 of the Act. Section 150 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.

- [13] The worker must also provide sufficient evidence to establish a *prima facie* case that the discriminatory action was causally linked to the worker's conduct under section 151 of the Act.
- [14] If a worker has provided sufficient evidence to establish a *prima facie* case against the respondent, then the respondent bears the burden of showing that their actions were not motivated in any part by unlawful reasons as specified in section 151 of the Act.
- [15] This is because 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 union, as applicable. Section 153 gives the Board's procedure for dealing with a complaint.

## Reasons and Findings

- [16] In determining the meaning of the phrase "occupational environment" in section 151 of the Act, it is important to consider and apply appropriate principles of statutory interpretation. The leading Canadian case on statutory interpretation is *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27 which relies on Dreidger's "modern principle of statutory interpretation" described as follows:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

- [17] According to Ruth Sullivan in *Statutory Interpretation (Essentials of Canadian Law)*, 2<sup>nd</sup> ed., 2007 (Irwin Law), at page 42, this modern principle of statutory interpretation has become "the mantra of statutory interpretation in Canada." Sullivan makes the point that statutory interpretation cannot be founded on the wording of the legislation

alone. It is important to read and analyze the words of the legislative text in light of a purposive analysis, a scheme analysis, the larger context in which the legislation was written and operates and the intention of the legislature, which includes implied intention and the presumptions of legislative intent.

- [18] With the principles of statutory interpretation in mind, I agree with the Board case officer that section 151 of the Act does not include the worker's description of his unsafe and unsecure occupational environment and his raising of concerns about that environment. In this case, the worker's concerns were about the theft of a data backup tape as well as unauthorized remote access to the employer's computer system. His references to unsafe and unsecure are references that do not relate to his own physical safety or that of another worker, however, but rather to his perception that the employer's computer system was at risk.
- [19] First, I note that section 151 and its phrase "occupational environment" are found in Part 3 of the Act which is entitled "Occupational Health and Safety" indicating that all the provisions in Part 3 relate to that topic. The purpose of Part 3 of the Act is related in section 107 which says that the purpose is to benefit all British Columbia citizens by "promoting occupational health and safety and protecting workers and other persons present at workplaces from work related risks to their health and safety." I note that section 107(2)(d) specifically uses the phrase "occupational environment", relating that a specific purpose of Part 3 is to "ensure an occupational environment that provides for the health and safety of workers and others." This relates to another specific purpose described in section 107(2)(b) of the Act which is to prevent work-related accidents, injuries and illnesses. Therefore I find that the phrase "occupational environment" in Part 3 should be interpreted in the context of the purposes referred to in section 107 so that the phrase refers to the type of environment that affects the health and safety of workers. I find that the type of occupational environment referred to is the physical environment that can be affected by positive changes to prevent work-related accidents, injuries and illnesses. The type of insecure computer system to which the worker refers is not that type of "occupational environment."
- [20] My finding is strengthened by reference to the OSH Regulation. I note that under section 225 of the Act, the Board makes the OSH Regulation according to a mandate in relation not only to occupational health and safety but also "occupational environment." Part 4 of the OSH Regulation, entitled "General Conditions" does not refer to any of the types of concerns raised by the worker in his complaint to the Board in this case. It deals with occupational health and safety issues such as ergonomic requirements, work area guards and handrails, workplace illumination, indoor air quality, and safe physical storage of materials to avoid materials falling on people.
- [21] However Part 4 of the OSH Regulation does have a specific set of provisions in sections 4.84, 4.85, 4.86, and 4.87 subtitled "Occupational Environment Requirements." Section 4.84 provides rules for workplace eating areas, dealing with ways to prevent

unsafe food such as food rendered unwholesome by workplace contaminants. Section 4.85 provides rules for workplace washroom facilities so that they will be clean and sanitary. Section 4.86 requires employers to provide adequate change areas if workers must change into protective work clothing at the workplace. Section 4.87 requires employers to warn workers about unsafe water if such water exists at a workplace at a source that a person might reasonably believe renders the water fit for human consumption. Thus in the OSH Regulation, “occupational environment” refers to general workplace conditions that directly relate to the health and safety of workers and others in that environment because unsafe conditions lead to accidents causing injury to persons or to human illness. Computer fraud is not the type of workplace hazard intended to be encompassed by the provisions of the Act and OSH Regulation. The unsecure, unsafe computer system about which the worker alerted his employer is not that type of “occupational environment” to which Part 3 of the Act and the OSH Regulation apply.

- [22] The phrase “occupational environment” did not appear in the Act prior to the significant amendments made effective October 1, 1999 by the *Workers Compensation (Occupational Health and Safety) Amendment Act*, 1998 S.B.C. 1998, c. 50 (Bill 14). The Bill 14 amendments, among other changes, replaced the occupational health and safety provisions in the Act with the new Part 3 and repealed the *Workplace Act*, R.S.B.C. 1996, c. 493. The duties of the former Ministry of Labour’s Occupational Environment Branch were transferred to the Board with these amendments. The duties of the former Occupational Environment Branch under the *Workplace Act* were to ensure that environmental conditions at workplaces were conducive to the health, safety, and comfort of employees as required by the former *Occupational Environment Regulations* that preceded the current OSH Regulation.
- [23] The former *Occupational Environment Regulations* covered topics such as: workplace illumination, control of atmospheric conditions, ventilation systems, heating, lunchrooms, washrooms, and the storage of clothing. The current OSH Regulation repealed most of the *Occupational Environment Regulations*, except for those which I have described under Part 4 relating to lunchrooms, washrooms, and change areas as well as other matters dealt with as “general conditions”. My view is that when the Act uses the term “occupational environment” the general intent is to continue the scope of the Board’s jurisdiction over occupational health and safety matters that were previously dealt with by the former Occupational Environment Branch under the former *Occupational Environment Regulations*. The former *Occupational Environment Regulations* did not include jurisdiction over computer fraud, theft of backup computer data, or unauthorized remote access issues such as those raised by the worker to his employer in this case. This is consistent with the lack of that type of jurisdiction exercised by the Board under the current Act and OSH Regulation, albeit that there is jurisdiction to deal with occupational environment issues that directly link to the health and safety of persons in a workplace.

- [24] My last reference is to the intention of the provincial legislature in enacting section 151 of the Act with its prohibition against discriminatory action motivated by anti-safety reasons. During the Hansard debates on the introduction of Bill 14, there was concern raised by opposition members that section 151 meant that there would be an overlap between the Board's jurisdiction and the jurisdiction of the Labour Relations Board. On June 1, 1998, in the afternoon session (Hansard Debates, 1998 Legislative Session: 3<sup>rd</sup> Session, 36<sup>th</sup> Parliament, Volume 10, #6), the Hon. D. Lovick stated in part as follows:

*The discriminatory action contemplated here has entirely and only to do with occupational health and safety...What one wants to ensure is simply that nobody is punished, if you like, for his or her activity regarding an unsafe workplace and for reporting thereon, in a way that will affect either their employment – as the employer is empowered to do so -- or their ability to work, as affected by their membership in a union.*

The LRB has nothing to say on this subject; the Labour Code has nothing to say on this subject. *This is about discriminatory action arising from occupational health and safety matters. It seems to me that the line is absolutely clear.* There isn't any mixing of jurisdictions.

[italic emphasis added]

- [25] This statement is further support that the legislative intention in enacting section 151 was not to give the Board jurisdiction to regulate disagreements between employers and workers outside of the context of occupational health and safety issues.
- [26] The worker is relying on a literal interpretation of the phrase “occupational environment” but that leads to such a general meaning that it could potentially cover almost every aspect of a workplace and its activities. A literal interpretation of the phrase in section 151 would include the worker's alert about a breach of workplace computer security as well as workers' complaints about production and marketing issues, labour relations issues relating to vacations, salaries or allocation of offices/vehicles/equipment between workers and even the paint colour of the workplace walls. This would involve significant overlap and conflicts of authority between the Board and other tribunals such as the Labour Relations Board, the Employment Standards Branch, and the Human Rights Commission. I find that the phrase “occupational environment” should not be interpreted so broadly as to give the Board such a general scope of authority under section 151 to investigate and resolve workplace disputes. Section 151 should not be interpreted so as to create new health and safety responsibilities for employers and trade unions beyond those they are required to deal with under the *Regulation* and the other provisions of the Act.

## Conclusion

- [27] For the foregoing reasons, I deny the worker's appeal and confirm the Board case officer's decision dated May 15, 2009. I have found that the worker has not raised a basic or *prima facie* case under section 151 of the Act of unlawful discrimination by the employer. This is because the worker's conduct in providing information to the employer about problems with the employer's information/computer security systems does not fall within the conduct referred to in section 151(a), (b) or (c) of the Act. Specifically, the worker was not providing information regarding conditions "affecting the occupational health or safety or occupational environment of that worker or any other worker" as contemplated by the Act and OSH Regulation.
- [28] There was no request for reimbursement of appeal expenses, none are apparent from the file, and accordingly I make no award in that regard.

Heather McDonald  
Vice Chair

HMcD/hb