

DECISION OF THE APPEAL DIVISION

#2002-0458

February 21, 2002

RE: Appeal Division Reference #2002-0458

Panel Appointed:
John Steeves

- (1) The worker filed a complaint of discriminatory action against his employer alleging that the employer laid him off because he had raised safety concerns at the workplace and that the employer had berated him in front of co-workers for his concerns.
- (2) The complaint was initially denied by the Prevention Division's Review and Penalty Section, but that decision was overturned by the Reviewing Officer. The employer now appeals the April 17, 2001 decision of the Reviewing Officer.
- (3) In appeal division *Decision No. 2001-1350*, the employer was granted a conditional stay of the Reviewing Officer's decision, pending the decision on this appeal.

ISSUE(S)

- (4) Was there discriminatory action against the worker contrary to the *Workers Compensation Act* (the "Act")?

BACKGROUND

- (5) The worker is a boilermaker with 19 years experience in the trade. On May 1, 2000, he was dispatched from his union hall and commenced work at the employer's site. Because of air quality issues, workers on site are provided with half-mask respirators and supplied with compressed breathing air.
- (6) On May 3, 2000, the worker advised his supervisor that he had concerns regarding the lack of a cleaning station for respirators and the potential for exposure to sulphur dioxide gas. This was reported to the general foreman and the site superintendent. The worker states that, on or about May 10, 2000, he was exposed to a "sniff" of sulphur dioxide when he removed his mask to speak with a welder. This exposure was not reported to the employer. That same day, the worker states that he threatened to call the Workers' Compensation Board (the "board") if a cleaning station was not set up. The employer set up a cleaning station on May 11, 2000.

- (7) At a safety meeting on May 11, 2000, the worker again raised the issue of sulphur dioxide exposure. He wanted oxygen monitors installed. Another worker at the meeting raised the issue of the fittings on the respirators.
- (8) On May 12, 2000, the worker refused work, relying on the duty to refuse unsafe work as described in Regulation 3.12. He stated that he had no faith in the safety equipment offered to him. The employer called in the board. The investigating board Prevention officer attended the site but found no violations of the *Act* or Regulations. He issued the employer a clean inspection report and assured the worker that "everything was fine". The worker was clearly dissatisfied by the officer's decision. The employer offered the worker a lay-off which he refused, indicating that he wanted to complete the job. The employer also offered the worker an alternative position as a material handler, with no loss of pay, away from the area of concern. This offer, too, was declined. The worker later explained that he believed the job being offered was in the same area of concern. In the end, the employer provided the worker with a full face mask.
- (9) The worker states that he was told by his shop steward that the initial reaction of the general foreman, upon hearing of the worker's refusal to work, was to fire the worker. The employer submits that, even if this is true, the worker was not fired at this point.
- (10) Early in the morning on May 13, 2000, the worker called the board's emergency line and expressed his continuing safety concerns. The employer denies any knowledge of this phone call. Despite his reservations, the worker accepted the offer of an overtime shift. Before his shift, the worker was asked by the general foreman to sign a statement relating to safety matters determined by the board officer the day before. The worker refused and instead signed a statement he drafted indicating that he would not "incite or aggravate" the crew over these issues. The worker perceived the employer's statement as restricting his right to raise safety issues. The employer later conceded that the letter was a "mistake" and "in poor taste".
- (11) The worker also alleges that he was publicly "berated" by his foreman at the morning toolbox meeting on May 13, 2000. The worker states that his foreman "chewed him out", called him an idiot, and told him he was stupid for doing what he did the day before. The foreman only stopped once the worker threatened to take the matter up with the union. The berating incident was not identified specifically as a ground for complaint in the original complaint form, but was described in the attached chronology of events. The employer denies that the incident occurred. That same day, the air compressor malfunctioned, causing the air system to break down, and work was temporarily shut down.
- (12) Early on the afternoon of May 15, 2000 the worker telephoned the board to request that another officer visit the workplace as he felt that his safety concerns had not been satisfactorily addressed. Later that afternoon, seven workers, including the worker,

were laid off. The worker states that two other fitters from his shift who were laid off had specifically requested a lay-off.

- (13) In a meeting on May 16, 2000 between two board Prevention officers and the employer, the employer indicated that the May 15, 2000 lay-offs were due to a shortage of work and a corresponding need to reduce the workforce. The employer's lay-off policy is to lay-off on a production basis, in accordance with the project demands, with the least productive employees laid off first, according to the employer. Lay-offs are not subject to seniority rights or workers' requests. Overtime is scheduled based on the "critical path" of the projects. Areas which are critical to the project and which fall behind are scheduled for overtime. The employer could not confirm whether, as indicated by the worker, overtime was again offered the following Sunday (May 21, 2000).
- (14) The worker has submitted evidence, in the form of a letter from another worker, indicating that the May 15, 2000 lay-offs created a shortage of workers. The employer submits that as of May 15, 2000 the project was more than half completed and therefore lay-offs were necessary.
- (15) On May 23, 2000, the worker filed a complaint of discriminatory action against the employer.
- (16) A letter dated October 13, 2000 from the worker's union representative documented a telephone call received by the union on September 28, 2000 from an unnamed representative of the employer. The caller asked whether there was any way to replace the worker who had been dispatched for a job with the employer starting October 2, 2000. The stated reason was "a confrontation between [the employer], W.C.B. and [the worker]". The business representative contacted the worker who indicated that this was a new job, unconnected to what had transpired, and as a result, the business representative advised the employer that the worker would be taking the job.

DECISION OF THE REVIEW AND PENALTY SECTION

- (17) Following a failed attempt to mediate a settlement, an oral hearing was held on October 18, 2000 before a three-member panel of the Prevention Division's Review and Penalty Section. A hearing was held on October 18, 2000.
- (18) In a decision dated December 15, 2000 the panel denied the complaint. The panel focused on the lay-off of the worker rather than the worker's allegation that he was berated on May 13, 2000. They concluded that the decision to lay-off the worker was for the legitimate reason of reduced workforce need and was unrelated to the worker's health and safety activities.

- (19) I have listened to the tapes of the hearing of October 18, 2000. With a careful review of these tapes and the information on file I have been able to obtain an adequate familiarity with the facts. An oral hearing before the appeal division is not necessary. However, it is worth mentioning that the hearing in this case was not a rigorous exercise in evidence gathering. Informality is important to these kinds of proceedings and the expectation is not that the Review and Penalty Section have a hearing like the appeal division might conduct. But there also has to be some structure for the hearing and some attention to the burden of proof, relevance and other legal issues. The appeal division relies on the evidence gathering and expertise of the Review and Penalty Section to provide a complete and well-organized record as a basis for appeals.

DECISION OF THE REVIEWING OFFICER

- (20) The Reviewing Officer allowed the worker's complaint. That decision can be summarized as follows:
- (a) The worker provided a sufficient case for "intimidation" within the meaning of section 150(2)(d) with regards to the berating incident. The employer denied that the berating episode occurred, but failed to discharge its burden under section 152(3) of proving that no violation occurred.
 - (b) The general approach developed by the Ontario Labour Relations Board in occupational health and safety matters, is applicable to an interpretation of section 152(3) of the *Workers Compensation Act* in this province. The employer's decision to lay-off the worker cannot be tainted, in any way, by the worker's activities to seek enforcement or compliance with the *Act*.
 - (c) The employer did not provide sufficient evidence to meet the burden of proving that the worker's health and safety activities were not a factor in the decision to lay-off the worker. While the employer had proper grounds for laying off workers on May 15, 2000, it must still show that the decision to lay-off this particular worker was not improperly motivated.
 - (d) By way of remedy, the Reviewing Officer ordered the employer to pay the worker his regular wage for the period May 16 – 24, 2000, inclusive, but excluding May 21, 2000.
- (21) The employer has appealed this decision to the appeal division and that is the matter before me.

LAW AND POLICY

- (22) The prohibition against discriminatory action is found in Division 6 of Part 3 of the *Act*.
- (23) Section 150 describes those actions considered discriminatory under the *Act* and section 151 describes the prohibition against discriminatory action. These provisions are discussed more fully below. Section 152(3) contains what is referred to as a “reverse onus” clause. It states that the employer or the union, as the case may be, bears the burden of proving that there has been no contravention of the *Act*.
- (24) Section 153(2) sets out the orders available to the board where it is determined that a contravention has occurred. Determinations of the board made under section 153 are reviewable by a Reviewing Officer under Division 13 of the *Act*: section 199. Decisions of Reviewing Officers are, in turn, appealable to the “appeal tribunal” which, as defined in section 106, means the appeal division.
- (25) In the appeal before me, the employer appeals the April 17, 2001 decision of the Reviewing Officer to the appeal division pursuant to section 207(b) of the *Act*. Under section 212(1) of the *Act*, the appeal division has the authority to “confirm, vary or cancel” the decision or to refer the matter back to the board for reconsideration.
- (26) Appendix “D” of appeal division Practice and Procedure *Decision No. 33* (published in Volume 17 of the *Workers’ Compensation Reporter*) sets out the appeal division’s scope of review on Part 3 appeals:

5.2 Scope of Review

An appeal involves an analysis of the correctness of the Board’s decision; that is, whether there is a proper factual, legal and policy basis for the decision. ...

- (27) As the *Act* does not require that a party establish grounds for the appeal to proceed, the appeal is a rehearing by the appeal division. It follows that the appeal division may substitute its own view of the evidence, law and policy for that of the Reviewing Officer.

SUBMISSIONS

- (28) The employer’s submissions on this appeal (including submission on the application for a stay) are dated April 27, 2001, July 5, 2001, May 2, 2001, July 4, 2001 and September 11, 2001. The employer is represented by the Employers’ Advisers Office and the submission is twofold.

- (29) The first prong of the employer's argument concerns an issue of statutory interpretation. The employer objects to the Reviewing Officer's reliance on the so-called "taint theory", developed in Ontario. It is submitted that this approach to discriminatory actions should not be adopted in B.C. for the following reasons:
- (a) The taint theory undermines section 107 of the British Columbia *Act* which sets out the purposes of the B.C. legislation;
 - (b) The taint theory has the effect of immunizing any worker who makes reference to the *Act* from a legitimate lay-off;
 - (c) The language of section 151 of the *Act* in this province differs significantly from the parallel provision in the Ontario *Act* making the taint theory inapplicable in B.C.; and
 - (d) The only applicable test is the balance of possibilities.
- (30) The second prong of the employer's argument is of a more factual nature: was there, in fact, a violation of the *Act*? On this point the employer submits that:
- (a) There was no intimidation within the scope of section 150(2)(d);
 - (b) The employer did not discriminate against the worker either with respect to the telephone call, of which the employer denies knowledge, or any health and safety activities on site; and
 - (c) The employer met its burden under section 152(3) by providing a credible explanation for the lay-off.
- (31) The worker provided submissions dated June 25, 2001 and August 31, 2001. He has primarily provided his own submissions but he also been represented by the Workers' Advisers.

DECISION AND REASONS

Discriminatory Action

- (32) Effective October 1999 the *Workers Compensation Act* included new occupational health and safety provisions and a prohibition against discriminatory action was added to the *Act*. There are two main provisions of the *Act* which apply for the purposes of this part of my decision, sections 150 and 151 (other important provisions include sections 152 and 153).

- (33) The broad purpose of the prohibition in the legislation is to prevent discriminatory actions by employers and unions. Discriminatory action is defined generally in section 150 as any act or omission by an employer or union, or a person acting on their behalf, that adversely affects a worker with respect to any term or condition of employment, or of membership in a union. 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) Discontinuation or elimination of the job of the worker.
- (34) The prohibited grounds for discriminatory action are set out in section 151 of the *Act*. Specific situations are contemplated: exercising a right or carrying out a duty under the *Workers Compensation Act*, testifying or being about to testify under the *Act* or before the Coroner and providing information about occupational health and safety conditions (see section 151(a), (b) and (c)).
- (35) Section 151 is as follows:
- 151 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.

(36) The three areas described in section 151 are illustrated by the following examples:

(a) The legislation applies to all workers but worker representatives or worker members of health and safety committees are further protected from discriminatory action if this action occurs when they are acting in their capacity as representatives or committee members. However, if a worker is exercising a duty under another statute there may be no protection.

(b) A person who was suspended from work or who lost an opportunity for promotion because she testified before a Coroner on an issue related to occupational health and safety would have a remedy under the *Workers Compensation Act*. The same protection is afforded to those testifying under the *Act*. Presumably a worker who was dismissed because he/she testified in a criminal proceeding related to an occupational health and safety prosecution would have the protection of the *Criminal Code* or the testimony would be in relation to "any matter" under the *Workers Compensation Act* as described in section 151(b).

(c) An employer or union could be subject to a complaint under section 151 if there was coercion or intimidation of a worker because he/she provided the board with information about the occupational and safety environment of the worker. But providing information that is not related to occupational health and safety may not be protected.

(37) It may be that different fact situations will arise which will change the above examples. But it is significant that, for example, not all actions that may be discriminatory are prohibited. The test is whether discriminatory action relates to one of the occupational health and safety grounds in section 151. Dismissals, for example, based on grounds other than occupational health and safety occur all the time and any complaints about those dismissals have to be made to agencies other than the Workers' Compensation Board. Occupational health and safety protections are not the solution for all workplace problems (*General Motors of Canada* [1997] O.L.R.B. Rep. March/April 223 at para. 20).

(38) In the following examples there may be a question whether occupational health and safety legislation is applicable at all. For example, if a worker is complaining about the noise level from an adjoining office, and that noise does not create a hazard or violate a Regulation, it is not obvious there is an issue of occupational health and safety. Similarly, if the issue is one of personal preferences as opposed to an issue arising

under the *Act* or the Regulations there may not be an issue of occupational health and safety. For example, whether a worker has a personal preference for one kind of safety gloves over another is not an issue of occupational health and safety as long as both kinds of gloves are appropriate for the specific exposure.

- (39) By raising these issues I do not intend to suggest that occupational health and safety exists in a vacuum or that it is always an easy matter to separate it from other issues at the workplace. In the complex cases, there may be an overlap between occupational health and safety protections and other protections such as human rights and labour law. Some understanding of the scope of discriminatory action is required.
- (40) There are many occupational health and safety issues that arise in the context of labour relations - it is, after all, *occupational* health and safety. There must always be a role for the prevention of occupational injuries and diseases as well as enforcement of health and safety standards. Similarly, workers must be protected from discriminatory actions prohibited in the *Act*.
- (41) Some occupational health and safety matters may arise in the context of human rights. For example, there could be situations where a person alleges that he was dismissed because he was exercising his rights under workers' compensation legislation and he also has raised a human rights issue about his physical or mental disability. The former is a matter to be adjudicated under the *Act* and the latter is for the appropriate human rights agency. The relationship between prevention and human rights or labour relations is a new one because of recent legislation in the area of prevention. But other parts of the workers' compensation system, such as vocational rehabilitation, have had to work for some time with overlaps with human rights and labour relations' issues.
- (42) One must also be mindful that there can be situations of discrimination where there is no application of the *Act*. For example, if the sole issue is discrimination based on racial origin and there is no occupational health and safety issue then that is a matter for the appropriate human rights' agency. On the same reasoning, if the issue is solely one relating to the formation of a trade union then that is a matter for the appropriate labour relations agency. And discriminatory actions include, for example, demotions that are related to testifying before the Coroner on an occupational health and safety issue. But there can also be demotions that are solely labour relations' matters.
- (43) In summary, there may be issues of discrimination under human rights or labour legislation but this does not necessarily make them "discriminatory actions" under the *Workers Compensation Act*. There must be a nexus or connection with occupational health and safety.
- (44) As a final matter under this section I note that discrimination is also a term that is used in human rights legislation. However, the public policy objectives of these two kinds of

legislation are quite different. This is apparent from the use of “discriminatory action” in the *Workers Compensation Act* rather than “discrimination”. In fact, the term “discrimination” is not used at all in the *Act* and “discriminatory action” is not used anywhere in human rights legislation, at least in this province.

- (45) Human rights legislation has its own public policy objectives. It is to rectify and prevent discrimination against particular groups who are, “suffering social, political and legal disadvantages in our society” (*British Columbia (Public service Employee Relations Commission) v. British Columbia Government and Services Employees’ Union*, [1999] 3 S.C.R. 3 at para 68). This is reflected in human rights protection on the basis of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sexual orientation, age or criminal conviction. Discrimination in human rights legislation acknowledges both direct and adverse effect discrimination and it has adopted a unified approach for examining discrimination, whether intentional or not. There is recognition of the necessity of some kinds of discrimination where there is a *bona fide* occupational requirement or where there is a *bona fide* scheme based on seniority. From this brief summary of human rights legislation it can be seen that it is of a very different character than the prohibition against discriminatory action in occupational health and safety legislation.
- (46) Applying this analysis at a practical level it is clear that there is a preliminary issue to be decided in discriminatory action complaints: whether the complaint raises an issue of discriminatory action as defined by sections 150 and 151. That is, has there been a suspension, lay-off, imposition of discipline and so on in the context of one or more of the three situations in section 151? I think it is clear from the legislation that the burden of proof to demonstrate this is on the worker for this preliminary question. For the most part this will not be a difficult burden to meet because suspensions, dismissals, discipline or elimination of a job are generally straightforward factual questions: if, for example, the worker provides some evidence to show that he/she has been dismissed for one of the reasons in section 151 then he is entitled to an inquiry by the board pursuant to section 152. I emphasize that it is not necessary for the worker to prove that there was discriminatory action by the employer or union.
- (47) What is required is for the worker to provide a *prima facie* case of discriminatory action by an employer or union. A *prima facie* case is one which will “prevail until contradicted and overcome by other evidence” (*Black’s Law Dictionary*, Fifth Edition). In most cases a written complaint (see section 152(2)) describing, for example, a dismissal because of testifying before the Coroner on an occupational health and safety matter (with basic particulars such as dates and locations) will suffice as an evidentiary basis for proceeding to the next step in discriminatory action complaints. There is then an obligation on the board, pursuant to section 153, to inquire into the complaint to determine if the alleged contravention occurred. In this sense the burden on the worker

is shared in a practical sense by the board. In these cases the onus will then shift to the employer or union as provided for in section 152(3).

- (48) There will be some areas where the burden on the worker and the inquiry responsibility on the board may require more evidence and perhaps even an adjudicated decision from the board. Examples of these are “loss of opportunity for promotion”, “coercion and intimidation” and/or “other penalty” in section 150. In these situations the context is not as defined as, for example, a dismissal or transfer of duties. There may also be questions such as constructive dismissal that will need to be more fully described by the worker and investigated by the board.
- (49) In the case before me the worker has the burden of proving that there is a *prima facie* case of discriminatory action as described in sections 150 and 151 of the *Act*. It is not disputed that the worker was attempting to comply with his duty to refuse unsafe work. There are no other issues such as human rights or labour relations. The worker was attempting to comply with his duty to refuse unsafe work and, therefore, this complies with section 151(a). He was also laid-off and that is captured by section 150. The employer submits that this was for non-safety reasons but that is something to be decided at the next stage of the process. Having met this preliminary requirement the worker is then entitled to the application of the reverse onus provision in section 152(3).
- (50) With regards to the issue of intimidation there is the worker’s account of the berating episode. Berating can be intimidation and, as with the lay-off, the context is the worker’s attempts to comply with his duty to refuse unsafe work. The employer submits that the episode did not occur or, if it did, at worst it reflects poor management skills. Again, at this preliminary stage it is not appropriate to adjudicate the correctness of the worker’s *prima facie* case but to determine whether it meets the bare outline of discriminatory action. In my view the worker has done what is required of him on this issue as well. As with the lay-off, he is now entitled to the application of the reverse onus provision in section 152(3). If the incident genuinely did not occur then the employer will have met the burden of proof and the complaint will be dismissed.

The Burden of Proof in Cases of Discriminatory Action

- (51) Section 152(3) of the *Act* states that, when dealing with a worker’s complaint of discriminatory action or failure to pay wages, the burden of proving that there has been no contravention is on the employer (or union, if it is a complaint against a union). This is referred to as a “reverse-onus” provision because, in situations without a reverse onus clause, the burden or onus of proof is on the person making the application. In this case it would be the worker. Section 152(3) “reverses” this burden and puts it on the employer or union to prove that there was no prohibited discriminatory action (ie, a contravention of section 151).

- (52) This is a new provision under Part 3 of the *Act* and it may be helpful to examine the legislative intent behind this provision. The obvious first questions are what is the burden of proof and then why should the proof be reversed in the case of discriminatory action?
- (53) The burden of proof describes the person or party who has the obligation to persuade the decision-maker to decide a matter in a particular way. Generally, the party who has the burden of proof will proceed first and lose if the burden is not met. For example, in criminal cases, the Crown has the burden to prove the allegation against the accused. If it is not proved then the accused is acquitted.
- (54) The burden of proof is different from the standard of proof. The standard of proof is the level of proof that is required to discharge the burden of proof. For example, in a criminal matter, the Crown will discharge its burden of proof if it provides evidence that meets the standard of beyond a reasonable doubt. The Crown must prove beyond a reasonable doubt that the accused committed the crime. In workers' compensation, the standard of proof issue is often posed as, for example, whether the injury or disease was as likely as not related to the work. The issue in prevention matters, where the standard is balance of probabilities, is whether it is more likely than not that the employer breached the *Act* or Regulations.
- (55) In most cases the party making an application has to discharge the burden of proof. However, in some circumstances the burden is placed on another party or "reversed". For some time, either the courts or various legislatures have determined that the burden should be reversed in some situations.
- (56) In Britain the House of Lords considered a tort claim by a worker who had contracted dermatitis while working in a brickworks (*McGhee v. National Coal Board*, [1972] 3 All ER 1008). At issue was whether there was a duty of care on the employer to provide proper washing facilities. The ability to shower immediately after work materially reduced the risk of contracting dermatitis but it was not possible to say that washing facilities would probably have protected the particular worker from the disease. The decision accepted as a "sound principle" that, where a person (the employer in that case) has created a risk and injury occurs from that risk, the loss caused should be borne by the employer, unless another cause can be shown. Further, addressing the impossibility of proof in these kind of situations,

If one asks which of the parties, the workman or the employers should suffer from this inherent evidentiary difficulty [of proof], the matter as a matter of policy or justice should be that it is the creator of the risk who, ... must be taken to have foreseen the possibility of damage, who should bear its consequences. (at 1012)

- (57) This principle has been carried forward by the legislature of this province when it created section 6(3) of the *Act*. It places the onus of proof on the board or the employer to disprove work causation for diseases that are described in Schedule B. The worker is not required to prove causation in the limited circumstances of Schedule B.
- (58) Other examples of reverse onus provisions include the bail provisions of the *Criminal Code* which place the burden of proof on the accused to prove why he or she should be released if the charges are of a specific kind (section 515(6)). And, reverse onus clauses are commonly used in labour relations for unfair labour practices. Section 14(7) of the *Labour Relations Code* is the provision in this province. The burden of proof that an employer did not, for example, discharge an employee because the employee participated in the formation of a trade union, lies with the employer.
- (59) From these authorities it can be taken that reverse onus clauses are used where there are evidentiary difficulties in applying or satisfying the burden of proof. It has to be taken that the legislature of this province had in mind the same approach when it passed section 152(3) of the *Act*. The evidentiary difficulties arise from the fact that the worker will not usually know the reasons why he was the object of discriminatory action. Put another way, the employer or union is in the best position to disprove an allegation of discriminatory action because they know the facts of how the worker was treated.
- (60) Further, as a practical matter of getting to the heart of the dispute between the worker and the employer or union, it is logical to start with the party who has the most information. To ensure that the party with the most information starts the case, and leads evidence if there is a hearing, the technique is to reverse the burden of proof. When this is done it will become quickly apparent if there is a basis to the complaint or not and the application or hearing can be more effectively managed. For example, if the employer or union take the view that the incident alleged by the worker did not happen that is a critical factual issue that can be examined at the start.

Determining the Motives of Employers in Discriminatory Action Complaints

- (61) As described above the Reviewing Officer's decision of April 17, 2001 adopted the Ontario approach to these types of complaints. Specifically, he adopted the principles in the Ontario Labour Relations' Board decision in *Westinghouse Canada Limited* [1980] O.L.R.B. Rep. April 577. (The Ontario LRB has jurisdiction over occupational health and safety appeals in that province including "unlawful reprisals"). The result was the adoption by the Reviewing Officer of the so-called "taint theory". This means that if an employer's actions impact individual employees and the motives underlying the employer's actions are in any way tainted by the employer's concern over the worker seeking enforcement of the legislation then a violation will be found.

- (62) The employer, represented by the Employer's Advisers, vigorously opposes this approach to discriminatory actions.
- (63) The crux of the employer's legal argument is that the Ontario approach is not applicable to discriminatory actions under the *Act* in this province. For this reason it is necessary to outline, in some detail, the nature of the discriminatory action provisions in the Ontario *Occupational Health and Safety Act*, R.S.O. 1990, c.0.1 (the "*Ontario Act*") and how those provisions have been interpreted.
- (64) Section 50(1) of the *Ontario Act* provides:
- 50(1) No employer or person acting on behalf of an employer shall,
 - (a) dismiss or threaten to dismiss a worker;
 - (b) discipline suspend or threaten to discipline or suspend a worker;
 - (c) impose any penalty upon a worker; or
 - (d) intimidate or coerce a worker,
- because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or an inquest under the Coroners Act.
- (65) The Ontario Labour Relations Board has jurisdiction over what are described there as unlawful reprisal applications and other health and safety appeals. Like the *Act* in this province, the Ontario statute contains a reverse onus provision (section 50(5)) which places the burden of disproving a contravention of section 50(1) on the employer.
- (66) In interpreting the reverse onus provision, the Ontario Labour Relations Board has borrowed from the labour relations context. Under the unfair labour practices provisions of the Ontario *Labour Relations Act*, an employer must establish that its actions against an employer are not "tainted" by "anti-union animus":

...the appearance of a legitimate reason for the discharge does not exonerate the employer if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of

probabilities in order for the employer to establish that no violation of the Act has occurred.

The Barrie Examiner, [1975] O.L.R.B. Rep. Oct. 745 at para 17.

- (67) Similarly, the Ontario Board, in health and safety matters, has held that employers must disprove any “anti-safety animus” in order to overcome a finding that they have contravened section 50(1). A contravention is established even if anti-safety animus provides only a partial motivation for the employer action:

In appropriate cases, an employer’s conduct which is arbitrary, patently unfair or unreasonable, unduly harsh, precipitous or a response which is extraordinary given the employer’s previous practice may lead to an inference of “anti-safety animus”. In contested section 24(1) [now s.50(1)] complaints, one would not normally expect an employer to openly and candidly admit it acted in contravention of the OHSA. For this reason, the Board carefully scrutinizes the employer’s conduct and surrounding circumstances to determine if the “true” or “real” motives (*or one of the motives*) of the employer was “tainted” by the employer’s “anti-safety animus”, or more correctly the employer’s animus towards the employee because the employee sought enforcement or compliance with the OHSA.

Bo Ramjit, [1990] O.L.R.B. Rep. Aug 874 at para 15.

- (68) The employer submits that the Reviewing Officer erred in applying the Ontario approach to consideration of a complaint made under the *Act* in this province. For the reasons that follow, I am of the opinion that this argument cannot succeed.
- (69) The employer argues that the *Ontario Act* is distinguishable because it contains no equivalent provision to section 107 of the *Act* in this province. Section 107 sets out the purposes of Part 3 of the *Act*, the general intent being to promote occupational health and safety. While it is true that the *Ontario Act* has no express statement of purpose, the provisions prohibiting retaliatory or discriminatory action have been characterized in terms that mirror section 107. See, for example, the decision in *Ministry of Community and Social Services*, [1998] O.L.R.B. Rep. Jan 50 at para. 19:

...Conduct which seeks enforcement of the Act is protected activity in order to encourage workers to raise health and safety concerns with their employer and others and to thereby reduce the likelihood of injury in the workplace...

- (70) The employer also argues that the Ontario approach has the effect of immunizing any worker who makes reference to the *Act* from a legitimate lay-off. This is also an issue

that Ontario adjudicators have addressed. For a worker to invoke section 50(1) of the *Ontario Act*, the worker must have engaged in a legitimate exercise of his or her rights under the *Act*. As stated in *General Motors of Canada Limited*, [1997] O.L.R.B. Rep. March/April 223 at para. 20:

...saying the words “health and safety” or “section 43” or otherwise invoking the *Act* does not operate as some sort of charm or incantation which operates to protect anyone who utters it...

- (71) 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 section does not, however, guarantee an automatic acceptance of every complaint. I am not persuaded that the potential for abuse is as great as suggested by the employer. Further, I am satisfied in this case that the worker was engaged in a legitimate exercise of his rights under the *Act*. There is nothing on the evidence to suggest that the worker’s concerns were frivolous or that his actions in expressing his concerns in any way trivialized the *Act*.
- (72) The employer next turns to a comparison of the language of the respective provisions in the B.C. and Ontario *Acts* as further support for the argument that the Ontario approach is inapplicable. For convenience, the sections are set out below.
- (73) I set out again section 151 of the British Columbia *Act*:

151. 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...
- (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 person concerned with the administration of this Part.

[Emphasis added]

(74) Section 50(1) of the *Ontario Act* provides:

50. (1) No employer or person acting on behalf of an employer shall,
- (a) dismiss or threaten to dismiss a worker;
 - (b) discipline suspend or threaten to discipline or suspend a worker;
 - (c) impose any penalty upon a worker; or
 - (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or an inquest under the Coroners Act.

[Emphasis added]

(75) The employer focuses on the difference between the phrase “for the reason” found in the *Act* in this province and the term “because” employed by the *Ontario Act*. This difference, it is argued, mandates a narrow view of section 151. That is, for a complaint to be valid, the actions of the worker must be *the* reason for, or the principal or proximate cause of, the alleged discriminatory action by the employer. This interpretation, it is argued, is inconsistent with the application of the taint theory which would anchor a complaint of discriminatory action on a finding that the employer was improperly motivated, in whole *or in part*. The employer cites as support *Regina v. Bushnell Communications Ltd. et al.* (1974), 1 O.R. (2d) 442 (H.C.J.), *aff’d* (1974), 4 O.R. (2d) 288 (C.A.).

(76) A closer reading of *Bushnell* reveals that the employer’s interpretation of that case is not correct.

(77) The employers in *Bushnell* were charged under section 110(3) of the *Canada Labour Code*, R.S.C. 1970, c.L-1 for unlawfully refusing to employ a worker because he was a member of a trade union. That section provided that: “No employer...shall...refuse to employ or to continue to employ any person, or otherwise discriminate against any person in regard to employment or any term or condition of employment because the person is a member of a trade union...” [Emphasis added]. The charge was initially dismissed on the basis that the Crown had failed to prove that the fact that the worker was a member of the union was the principal reason for termination of his employment.

(78) The primary authority relied on by the provincial court judge, in dismissing the charge, was *Canadair Ltd. v. The King*, [1948] 1 D.L.R. 434. The Court in *Canadair* was considering section 502A of the 1947 *Criminal Code* which made it an offence to refuse

to employ or dismiss from employment any person “for the sole reason” that such person is a member of a union. The Court turned to earlier interpretations of the words “sole reason” as meaning the principal or real reason or determining cause.

- (79) On appeal, the provincial court judge was found to have “...erred in applying to its interpretation considerations developed by the Courts in dealing with an enactment differently worded...” The High Court of Justice found that the term “because” required a broader approach:

In considering an enactment devoid of the words “sole reason” or “for the reason only” applied to the act of dismissal and resting only on the word “because”, the Court must take an expanded view of its application. If the evidence satisfies it beyond a reasonable doubt that membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of many reasons regardless of priority, s.110(3)...has been transgressed...

- (80) In this appeal, the comparison is between “because” and “for the reason”. Section 151 does not read “for the sole reason” or “for the reason only”. In urging a narrow interpretation, the employer is essentially asking the panel to read in the words “sole” or “only”. I see no basis to do so. The use of the definite article “the” does not signal a legislative intent to dictate a particular approach. On its face, the language of the *Act* does not limit the approach of the board in assessing the motivations of the employer and determining whether a violation of the *Act* has occurred.
- (81) An additional factor that weakens the employer’s reliance on *Bushnell* is that *Bushnell* is the very case which moved the Ontario labour relations jurisprudence away from an analysis of the principal or proximate cause toward acceptance of the taint theory.
- (82) The employer’s final point with respect to the applicability of the taint theory is that, unlike in Ontario where case law has been applied, in this province there is statutory language (section 99) and policy (Prevention Manual D12-196-5) setting out how the board is to weigh evidence.
- (83) In my view, this argument confuses the issue. Section 152(3) provides that “...the burden of proving that there has been no such contravention is on the employer or the union, as applicable.” The employer bears the burden, on a balance of probabilities, of proving that there has been no discriminatory action on the prohibited grounds. The taint theory stands for the proposition that safety considerations need not be the only or dominant reason for the employer’s action, but rather, it is sufficient if it is one of the reasons for the employer’s action under review. The taint theory goes to the issue of the employer’s motivation and not to the weighing of evidence. The *Act* is clear where the burden lies and, as identified by the employer, the policy cited refers to

administrative penalties and not to discriminatory actions. I fail to see how this approach is inconsistent with either the *Act* or policy. Also, I am not convinced that section 99, under Part 1 of the *Act*, is the applicable standard of proof for adjudications under Part 3 of the *Act*.

- (84) To summarize, it is my opinion that the approach taken by the Reviewing Officer as to the legal interpretation and application of section 152(3) was correct. The employer bears the statutory burden of proving that no contravention has occurred. This means that the board must be satisfied, on a balance of probabilities, that the employer's actions were not motivated by consideration of the worker's health and safety activities. Whether there is a *de minimis* point where the anti-safety context is so insignificant as to be of no consequence is an issue that will have to be decided on specific facts.
- (85) I now turn to a consideration of whether, applying the tests articulated above, the facts support a finding that there has been no discriminatory action as a result of the "berating episode" or the lay-off.

The Berating Episode

- (86) As discussed above, the facts in this case comply with the preliminary determination required by section 151. The worker was attempting to comply with the duty to refuse unsafe work as set out in section 3.12 of the Regulations. This is a situation contemplated by section 151(a) of the *Act*.
- (87) The Review and Penalty Section panel, in their decision of December 15, 2000, did not identify the berating episode of May 13, 2000 as a separate event.
- (88) The Reviewing Officer, in his decision of April 17, 2001, found that the foreman's comments at the May 13, 2000 toolbox meeting constituted "intimidation" within the scope of section 150(2)(d) of the *Act*. This incident was described by the worker in the chronology of events attached to the May 23, 2000 complaint form in the following terms:

Saturday May 13, 2000 morning when I was at the morning toolbox meeting I was berated by my foreman . . . in front of the whole crew over my actions the previous day. I informed [my foreman] I would talk to him only about work and left the room. I came back in the room a few minutes later and he started in on me again I told him to lay off or I would charge him through the union that seemed to end it.

[Reproduced as written]

(89) It was further described in a letter dated January 13, 2001:

I then returned to work and had to suffer another embarrassment by being berated by my foreman in front of my fellow workers, my foreman called me “stupid” and an “idiot”, for declaring a 3.12 the pervious [sic] day.

(90) The employer submits that the episode did not occur. In the alternative, if it did occur, the employer submits that the comments, while perhaps demonstrating poor management skills, are not discriminatory under the *Act*. The employer appears to be arguing that there was no intimidation because there was no express threat linking the worker’s continued exercise of his rights to particular negative employment consequences.

(91) There is nothing in the *Act* to suggest that section 150(2)(d) is as limited in scope as the employer argues. Intimidation need not be blatant or obvious. Section 150(2)(d) would be of little use if it was only used to protect against direct threats or coercion. Most employers are sophisticated enough not to use tactics that are blatantly in violation of the *Act*. Similarly, “poor management skills” cannot be an excuse for discriminatory actions.

(92) In this case, the comments were made by the worker’s foreman. As evidenced by the employer at the hearing, the foreman enjoys considerable influence over the terms and continuation of the worker’s employment. When asked how the employer arrives at a decision as to which workers to let go, the employer indicated that the immediate supervisor or foreman submits a list to the site superintendent naming those workers best suited for the remaining work. It is the foreman’s position of authority which, in my opinion, changes the nature of his comments from, as suggested by the employer, merely a “personal opinion” to a form of intimidation. It was not necessary for the foreman to expressly threaten to fire the worker for safety reasons.

(93) Proof of intimidation is rarely a matter of finding a “smoking gun” and it requires consideration of circumstantial evidence. The employer has provided no evidence as to what occurred. I agree with the Reviewing Officer that a mere denial is not sufficient to discharge the burden of proof resting on the employer pursuant to section 152(3). It would be helpful if the worker had submitted additional evidence from other persons who had witnessed the interaction, but even without that, I am satisfied that the worker has made out a *prima facie* case of intimidation which has not been rebutted by the employer.

(94) For these reasons, I confirm the finding of the Reviewing Officer that there was “intimidation” amounting to discriminatory action pursuant to section 150 that was contrary to section 151(a) of the *Act*.

The Lay-off

- (95) The onus on the employer is to prove, on a balance of probabilities, that its decision to lay-off the worker on May 15, 2000 was not in a response to the worker's health and safety activities as described in section 151 of the *Act*.
- (96) As discussed above, the facts in this case comply with the preliminary determination required by section 151. The worker was attempting to comply with the duty to refuse unsafe work as set out in Regulation 3.12. This is a situation contemplated by section 151(a) of the *Act*.
- (97) The Review and Penalty Section decision of December 15, 2000 concluded that the lay-off was unrelated to the worker's occupational health and safety activities and, therefore, it was not discriminatory action. The Reviewing Officer reached the opposite conclusion on April 17, 2001. The main difference between those decisions appears to be that the Reviewing Officer accepted and applied the taint theory to the facts of the case. Both accepted that there was a valid reason for the lay-off but the Reviewing Officer considered the other evidence and concluded that there was also an anti-safety motive to the lay-off.
- (98) What is the evidence to disprove the reverse onus provision in section 152(3)?
- (99) The employer submits that the reason for the lay-off was only related to the requirements of the project and had nothing to do with the worker exercising his rights under the *Act*. The employer relies on the following as evidence that it has discharged its burden under section 152(3):
- (a) The employer took steps to address the worker's safety concerns including setting up a wash station, providing the worker with a full face mask when requested, and offering the worker another job away from the area of concern;
 - (b) The employer laid off a number of workers during the same period of time the worker was raising his safety concerns (May 5, 6, 8, 12, 2000);
 - (c) The employer had no knowledge of the worker's May 13, 2000 telephone call to the board;
 - (d) The employer's policy is to lay-off on a production basis depending on the demands of the project;
 - (e) The employer has virtually unlimited discretion regarding which workers to lay-off;

- (f) It is estimated that the project was 75% completed as of May 15, 2000.
- (100) I accept that the employer was not required to lay-off by seniority and I also accept that other workers were laid off before the worker and after. And I accept that the employer attempted to make some accommodation of the worker's complaints by, for example, providing a wash stand. Apparently the worker's concerns about the air compressor not being adequate for breathing air were made after the lay-off. Further I agree with the Review and Penalty Section decision that a board official has no authority to amend the Regulations, as the worker submitted at one point. And there is some evidence that the worker may have overreacted to some of the incidents he was trying to correct.
- (101) On the other hand there is reason to believe it took some time to get the washstand and the worker was required to persist in his attempts to get the stand. There were problems getting a proper mask that was appropriate to the exposure since the masks were for lead exposure and not sulphur dioxide. The worker was not the only one to raise these concerns. For reasons that are not fully explained the employer tried to get the worker to sign a statement about the state of safety at the work site.
- (102) There is the reaction of the general foreman on May 12, 2000 to the news that the worker had refused work. The worker was told by the shop steward that the reaction of the foreman to the worker's refusal to work was to fire the worker. The employer submits that, even if this is true, the worker was not fired or laid off at that point. Regardless of whether he accepted the advice of the shop steward that he couldn't legally fire the worker, this reaction evidences a degree of anti-safety considerations that I find troubling. However, this is double hearsay and I would not place great weight on this incident by itself.
- (103) The telephone call received by the union on September 28, 2000 is noteworthy. The October 13, 2000 letter from a union representative described receiving a telephone call from a representative of the employer on or about September 28, 2000. The worker had been dispatched a second time to the employer and the employer was asking, "if there was any way [the union representative] could replace [the worker] due to the fact of a confrontation between [the employer], W.C.B. and [the worker]". The union representative discussed the matter with the worker and then advised the employer that the worker was willing and able to perform his duties and that he would be starting work on October 2, 2000. The employer's submission to the Review and Penalty Section was that they were unaware of any telephone calls being made and they relied on the fact that the worker did start work on October 2, 2000.
- (104) I find that the implication of the call is that the employer has identified the worker as a troublemaker and the basis of the "confrontation" was safety issues. Clearly the employer considered the worker as something of a bother when it came to safety issues. The employer's statement that they were not aware of the call is not sufficient to

counter a written statement from a union representative. That representative does represent the worker as a member of the union but it has not been suggested by the employer that there was collusion between the representative and the worker in any way. The content and tone of the letter are factual and not accusatory or strident. The employer did not request the opportunity to examine the union representative and they apparently did not contact the union representative to question his statement. A simple denial of this kind of evidence is not sufficient to rebut it.

- (105) On this basis I think it is clear that, in September 2000, the employer sought to deprive the worker of work he was entitled to by means of the regular dispatch system. Is this relevant to the lay-off of the worker in May 2000?
- (106) In my view the events of September 28, 2000 were relevant to the lay-off in May 2000. What occurred in September 2000 is consistent with what the worker says occurred in May 2000 – the employer wanted to be rid of the worker for the lay-off and when he was despatched again to the employer. The September 2000 event is not a new and different incident but a continuation of the previous actions of the employer. The employer relies on the fact that the employer accepted the worker back to work. However, it is evident that the preference was not to have the worker back. As well, as set out in the letter from the union, if a dispatched worker is willing and able to perform the duties required it is not open to an employer to decline to accept that worker.
- (107) It is also important to bear in mind that the two events, the intimidation and the lay-off, cannot be treated in isolation. The berating of the worker in front of co-workers took place on May 13, 2000 and the lay-off took place two days later, on May 15, 2000. Again I appreciate that the employer does lay-offs on a production basis but the evidence is also that the foreman who berated the worker has considerable authority over who gets laid off. In my view, the finding that there was intimidation on May 13, 2000 is relevant and it supports a conclusion that one of the reasons for the lay-off two days later was for an anti-safety purpose.
- (108) Neither I nor anyone else can accurately discern the “true motives” of the employer. The best I can do is to assess the reasonableness and credibility of the employer’s explanation by considering the evidence as a whole in the context of the requirements of the legislation. On this basis I am not convinced that the employer has proven on a balance of probabilities that there was no discriminatory action against the worker. There is some evidence to assist the employer but this is largely countered by the evidence in support of a finding of discriminatory action.
- (109) As a final matter the employer has submitted that the use of the taint theory “undermines” section 107 of the *Act*. Section 107 is a statement of the specific purposes of Part 3 of the *Act* and it includes broad statements such as a purpose of Part 3 is to, “promote a culture of commitment on the part of employers and workers to

a high standard of occupational health and safety". The Employer's Adviser points out that there is no equivalent provision in Ontario and this is discussed above. It is also submitted that Division 6 of the *Act* (the division which includes the prohibition against discriminatory action) is included "in order that the purpose of the *Act* is achieved". I agree but this very broad point does not answer any of the specific questions in this appeal. The Adviser goes further and submits that it was an error when the Reviewing Officer "implies" (according to the Employers' Adviser) that the employer must have a way of measuring individual performance before laying off. I agree that this conclusion is not expressly stated in the decision of the Reviewing Officer but I disagree that it is implied. In fact the Reviewing Officer's decision makes no mention of the term "performance" or "individual performance" or related labour relations issues. It is reading too much into his decision to say that it is implied.

(110) I confirm the April 17, 2001 decision of the Reviewing Officer on this issue.

CONCLUSION

(111) The employer's appeal of the April 17, 2001 decision is denied and that decision is confirmed.

(112) The conditions attached to the stay of July 10, 2001 are hereby removed and the employer is directed to pay to the worker his regular wage for the period May 16 to May 24, 2000, excluding May 21, 2000 plus interest, calculated in accordance with section 96(7) of the *Act*. If the employer has taken the option available to it in paragraph 24 of the stay decision then this matter is concluded and no interest is payable.

John Steeves
Chief Appeal Commissioner

JS:kt

