Raising Health And Safety Concern Real Motivation For Terminating Worker For "Poor Fit" During Probationary Period



A recent decision[1] by the British Columbia Workers' Compensation Appeal Tribunal ("WCAT") upheld a Workers' Compensation Board (the "Board") decision that determined an employer's termination of a worker during her probationary period for "poor fit", was likely motivated by her raising a health and safety concern.

What Happened?

The worker was employed as a warehouse production worker commencing November 20, 2018. She was also the on-site occupational first aid attendant. On January 4, 2019, one of the owners of the company advised the worker that some of the warehouse staff were not correctly shutting down the machinery, including closing off the nitrogen cylinder safety valves. After this discussion, the worker suspected that her recent symptoms of burning eyes and a sore throat could be due to an exposure to nitrogen gas. On January 8, 2019, the worker reported her concerns to her supervisor and exercised her right to refuse unsafe work due to a potential nitrogen gas leak. She subsequently left the workplace as she felt unsafe.

On January 9, 2019, the worker notified WorkSafeBC of her concerns about air quality in her workplace. On January 10, 2019, a WorkSafeBC hygiene officer attended at the employer's premises. An order was issued alleging the employer failed to ensure there were work procedures and training for workers to prevent leak incidents. The employer was given time to comply with the order. In the meantime, the worker remained off work.

The worker stated she informed her supervisor on January 18, 2019 of her desire to return to work when it was safe to do so and asked him to keep her updated on the status of compliance with the order. The employer disputed the worker's version of events and stated the worker knew from speaking with the hygiene officer that the gas leak was resolved and it was safe to return to work. On January 21, 2019, the worker, who was still within her three-month probationary period, was terminated for not being a "good fit" and for being dishonest about the resolution of her safety concern and continued refusal to return to work. On January 22, 2019, the worker filed a prohibited action complaint with the Board alleging she was terminated for raising a health and safety concern. In British Columbia, sections 47 to 50 of the *Worker's*

Compensation Act (the "**Act**") protect a worker from negative employment consequences if that worker engages in certain types of protected safety activities, such as a work refusal or reporting a safety concern. On April 7, 2020, the Board determined that the employer took prohibited action against the worker by terminating her for engaging in protected health and safety activities. The Board found no evidence to support the employer's position that the worker was dishonest about the resolution of her safety concern. Instead, the Board found the evidence supported that, at the time of her termination, the worker had reason to believe the employer had not fully addressed her health and safety concern because she had not received clear notice from her employer that it was safe to return to work.

What did WCAT decide?

The WCAT upheld the decision of the Board, finding that the evidence did not support the employer's assertion that the worker was aware it was safe for her to return to work and that she chose not to do so, thereby giving the employer a reason to terminate her. The WCAT further determined that the employer was not able to prove, on a balance of probabilities, that they were *not* motivated to terminate as a result of the worker raising a health and safety concern.

Key Takeaways

This case is an important reminder for employers that taking retaliatory action against workers for raising health and safety concerns is strictly prohibited by health and safety legislation across Canada.

This case also reinforces that employers must meet all of their statutory and regulatory obligations arising from a worker's complaint of health and safety concerns, including advising a worker when a concern has been addressed so that the worker may return to work. In this case, WCAT said the employer should have advised the worker that it was safe to return to work due to her concerns being addressed and satisfied, at which point her employer could have taken disciplinary action if she continued to refuse to return to work. The limited evidence confirming the employer met its onus by informing the worker to return to work ultimately led to the decision in this case.

This case is also a cautionary tale for any employer who may think that a termination in the face of a reprisal allegation will not be treated seriously because an employee is still within their probationary period.

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