DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

[1] In an April 7, 2020 decision, the Workers' Compensation Board, operating as WorkSafeBC (Board), determined that the employer took prohibited action against the worker by terminating the worker for engaging in protected health and safety activities.

[2] The employer appeals the Board's April 7, 2020 decision to the Workers' Compensation Appeal Tribunal (WCAT). The employer is not represented but provided a submission prepared by the Employers' Advisers Office.

[3] The non-represented worker is participating in the employer's appeal.

Procedural Matters

[4] On the WCAT notice of appeal form, the employer did not specify or request how the appeal should proceed; however, the employer noted the following:

> [The employer] should be allowed to have WorkSafeBC employees be able to provide testimony which is crucial to obtaining the truth and coming to a correct decision that no Prohibited Action took place. WorkSafeBC Compliance and Legal Department has denied [the employer] the opportunity for a fair hearing.

[5] I considered the rule at item #7.5 of the WCAT *Manual of Rules of Practice and Procedure* and did not find it necessary to convene an oral hearing. I am satisfied I am able to resolve any contentious evidentiary issues using the test articulated by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 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. In *Nuosci v. Canada (Royal Canadian Mounted Police RCMP)*, [1994] F.C.J. No. 293 (C.A.), the court set out that an administrative tribunal is not required by considerations of administrative fairness to order an oral hearing merely because there is an issue of credibility as to some matter before it when there is otherwise an adequate basis in the record for its decision. Similarly, in *Wyant v. British Columbia (Workers' Compensation Board) et al.*, 2006 BCSC 680, the court noted that it was open to the party to supply additional information (if they had it) on facts relevant to the issue under appeal.

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[6] In this matter, I considered that the employer had obtained the assistance of the Employers' Advisers Office and the parties, including the worker, had an opportunity to and provided written submissions to address any contested evidence. I found the evidence and submissions before me sufficient to render a finding on the employer's appeal.

[7] In addition, I did not consider it necessary to directly examine or seek further evidence from the Board officers involved in the investigation of this matter. I found the disclosure documents provided a contemporaneous record outlining the investigation and findings respecting the matters relating to this appeal. In the text *Administrative Law in Canada, Fifth Ed.* (Ontario: LexisNexis, 2011), Ms. Blake states, in part, the following:

> Unless required by statute to do so, a tribunal need only permit cross-examination of witnesses when necessary for a fair hearing. **Refusal to permit cross-examination does not constitute a denial of fairness, if equally effective methods of responding are available. All that is necessary is a fair opportunity to correct or controvert any relevant and prejudicial statement.**
>
> [emphasis added and footnotes deleted]

Issue(s)

[8] Did the employer take prohibited action against the worker in contravention of the *Workers Compensation Act* (Act)?

Jurisdiction

[9] The Act was reorganized and renumbered under the *Statute Revision Act* (RSBC 1996, c. 440), effective April 6, 2020. All references to the Act in this decision refer to the *Workers Compensation Act* (RSBC 2019, c. 1). Unless otherwise indicated, it should be noted that despite the different section numbers, the relevant provisions of the Act and the applicable legal tests are the same in both versions. The revisions to the Act did not change the law; however, in the former version of the Act, the terminology "discriminatory action" was replaced with "prohibited action."

[10] Section 289 of the Act provides a right of appeal to WCAT of a decision regarding a complaint of prohibited action.

[11] WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (subsection 303(1) of the Act). 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 308 of the Act). WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

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[12] The standard of proof in this appeal is the balance of probabilities.

Background and Evidence

[13] The background is provided in the disclosure documents provided to the parties. The Board's decision also provides a summary of the information and evidence.

[14] The employer operates a manufacturing plant using various types of laser cutters and other machinery, some of which are connected to cylinders containing nitrogen, helium, and/or carbon dioxide.

[15] In mid-November 2018, the employer hired the worker (via an employment agency and under a wage-subsidy program) as a warehouse worker/first aid attendant.

[16] According to the worker's report to the Board, in early December 2018, she developed a cough and breathing difficulties. Initially, she attributed her symptoms to the influenza virus.[1] Her symptoms persisted and subsequently she also developed burning in her eyes and a sore throat. On January 4, 2019, one of the owners of the company advised her that some of the warehouse staff were not correctly shutting down the machinery, including closing off the nitrogen cylinder safety valves. The worker reported that, after this discussion, she suspected her symptoms could be due to an exposure to nitrogen gas.

[17] The worker reported that, on January 7, 2019, she did not attend work but saw her attending physician to report her respiratory symptoms. The following day, she came to work and spoke to her supervisor (D) reporting that she suspected a nitrogen gas leak was compromising the air quality in the warehouse and potentially jeopardizing her health and that of her co-workers. She informed D that she had sought medical attention and her doctor would be filing a medical report to the Board. She requested D take appropriate safety measures to monitor the air quality in the warehouse. According to the worker, at this time, she also expressed other health and safety concerns and requested the employer provide its warehouse workers with personal protective safety equipment and appropriate access to first aid services. She also raised concerns of potential harmful emissions that may have occurred further to a fire in the warehouse the previous day. D later explained there had been no fire but that a filter on a piece of equipment had emitted smoke.

[18] According to the worker, during the aforementioned conversation, D seemed non-committal about implementing the necessary safety and air quality measures. She then advised him that, in the absence of an air quality monitor, she felt unsafe in the workplace. She provided him

[1] The worker also filed a Board compensation claim for an occupational disease. I also sought disclosure of the Board's claim file for the purposes of this appeal. Parties were offered disclosure of these documents.

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printed copies of safety information from the Board's website respecting a worker's right to refuse unsafe work and subsequently left the workplace. Later that day, D telephoned her to advise her that he had contacted the Board as well as the nitrogen gas supplier, the latter to request that a gas detector/air quality monitor be installed in the warehouse. D advised it could take up to a week for the detector to be installed but that he would contact the worker in a few days (one to three days) with a further update. Later that day, D called again and advised her that the Board officer had explained to him that nitrogen gas, while an asphyxiant, was not poisonous.

[19] According to the Board's documents, on January 9, 2019, the worker sent the Board Health and Safety Department an email expressing concerns about the air quality, the lack of personal protective equipment, and other safety concerns in her workplace and, specifically, outlining her fears of potentially losing her job for refusing to perform unsafe work since she had been working for the company for only two months.

[20] On January 10, 2019, the worker discussed her health and safety concerns with a Board representative and later that day, a Board hygiene officer was dispatched to attend the employer's premises. According to the hygiene officer's inspection notes from that day, D conceded that there may have been an incident when a nitrogen container valve was left unsealed overnight. D also advised the hygiene officer that he had obtained a quote in efforts to procure an air quality monitor. The hygiene officer documented that D was advised that a worker was within their rights to report their safety concerns to their supervisor or employer.

[21] The Board hygiene officer then prepared an inspection report issuing four orders and citing the employer for contraventions of the *Occupational Health and Safety Regulation* (OHS Regulation). Specifically, and among other matters, the hygiene officer required the employer to provide its workers with health and safety information, instruction, training, and supervision.[2] The hygiene officer also noted the employer's report that a quote had been obtained to procure an oxygen monitor. An order was issued that the employer had contravened the Act by not ensuring that there were work procedures and training for workers to ensure there would be no leak incident. The employer was required to complete a notice of compliance by no later than February 1, 2019.

[22] In the interim, the worker remained off work. The worker reported that, on January 15, 2019, she received a text message from a co-worker informing her that a Board officer had attended the worksite for an inspection. The co-worker asked the worker about her plans to return to work and she responded that she would return to work once the employer assured her that it was safe to do so.[3]

[2] The Board hygiene officer emailed the Board's inspection report to the employer on January 16, 2019.

[3] Copies of the texts were provided by the worker and are located on the Board's disclosure documents.

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[23] According to the worker, on January 18, 2019, she emailed the employment agency that had arranged for her to work for the employer with her concerns about not having heard back from the employer.[4] She also left a message for the Board hygiene officer. The worker reported that the agency representative responded to her email stating he had spoken to D and that D would contact her no later than February 1, 2019 with an update. The worker reported that soon after receipt of the agency representative's email, D telephoned to advise her he had until February 1, 2019 to implement the required conditions, including installing a gas detector to monitor oxygen levels in the workplace. According to the worker, she informed D of her desire to return to work and asked D to keep her apprised of the situation.

[24] Based on the Board hygiene officer's January 18, 2019 handwritten notes, the worker had called that day inquiring about the status of the matter and requesting assistance as she had not heard from him since January 8, 2019. In her notes, the hygiene officer also documented that, later that morning, she spoke to D who reported he had now spoken to the worker and provided her with an update. The hygiene officer also documented that according to D, on January 8, 2019, he had told the worker that he was in the process of procuring an oxygen monitor. In respect to the conversation with D, the hygiene officer documented "we discussed the employer's responsibility to get back to the worker." The hygiene officer also documented that D informed her that he had sought advice from another Board officer about the employer's responsibilities in a case of a "work refusal." An hour later, D called the hygiene officer again to report that he had spoken to the worker twice that day.

[25] The worker reported that on January 21, 2019, D contacted her by telephone to terminate her employment. During the conversation, D advised her that she was a poor communicator and not a good fit for the company. D also reminded her that she was still in her probationary period. When she asked D if he was terminating her in retaliation for reporting a safety matter, he responded that he had the right to terminate her because she was still in her probationary period. The worker reported that D then said that while he owed her nothing, he was willing to pay her for the two-week period she missed from work. She then advised him she would think about it. According to the worker, she did not immediately accept the pay because she felt that D was trying to "buy her silence."

[26] On January 21, 2019, the worker contacted the Board Prevention Department reporting she was terminated for raising a safety concern, and on January 22, 2019, the worker filed a prohibited action complaint to the Board. The worker alleged that neither the employer nor the Board hygiene officer had informed her that it was safe for her to return to work; yet, later a co-worker told the worker that her termination was due to her refusal to return to work. The worker reported that, during the course of the employer's investigation of the health and safety matter, she had every intention of returning to work and had even informed her co-worker that she planned to return to the workplace once the employer advised her it was safe.

[4] Copies of these emails as provided by the worker are located on the Board's disclosure documents.

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[27] On January 22, 2019, and on a follow-up inspection report, the Board hygiene officer documented D's report that initially, there were six workers at the site thus requiring a first aid attendant but, given the worker's refusal to return to work, having five workers meant the employer would only be required to ensure there was a basic first aid kit which was already present on site. The hygiene officer then noted that, given the worker was no longer working at the site, the order has been closed. The hygiene officer noted that the employer had submitted a sign that would be posted on the exit door reminding staff to check that all gas cylinders were closed before the alarm was set at the end of the day.

[28] Based on a January 24, 2019 memorandum, situated on the worker's Board compensation claim file, D spoke to a Board claims officer about the worker's claim for an inhalation injury and reported that he had terminated the worker's employment on January 21, 2019. D explained the worker was still within her three-month probationary period and he felt she was not a good communicator. D explained that he had appreciated the Board's assistance regarding the health and safety recommendations and that he was receptive to the Board's hygiene officer's guidance. While he was initially uncertain of the necessary process to follow when a worker refused to work in an unsafe work environment, after his discussions with the Board, he felt better informed. The claims officer also documented D's report that, as a gesture of good will, he had paid the worker for the two-week period she had missed from work due to her safety concerns. The claims officer also documented that, according to D, the payment was not particularly for severance pay but the employer felt it was appropriate, under the circumstances.

[29] Later that day, the Board claims officer also spoke to the worker and documented the worker's report that, following her January 8, 2019 refusal to work, D had not contacted her advising whether it was safe for her to return to work. Instead, on January 21, 2019, D terminated her employment. The claims officer documented that the worker seemed uncertain as to why D had terminated the worker but the worker believed it was because she had filed an injury claim and raised a health and safety concern about the workplace.

[30] According to the worker, on January 24, 2019, the Board claims officer advised her that her compensation claim was denied. Because she had no income to pay her bills, she contacted D and advised him she was willing to accept his offer to pay her for the two-week period she had missed from work.

[31] On February 4, 2019, a Board prevention officer advised D of the worker's prohibited action complaint. According to the prevention officer's notes of that conversation, D reported that on Friday, January 18, 2019, he had spoken to the Board hygiene officer who requested he provide the worker with return-to-work information. According to D, on January 17, 2019, the hygiene officer advised him that she had spoken to the worker to tell her it was safe to return to work. D reported that, after receiving the information from the hygiene officer, he concluded the worker knew it was safe to return to work on January 17, 2019 but, on January 18, 2019, she had been dishonest with the employment agency and with him that she was not aware it was

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safe for her to return to work. D reported that when he thought it over that weekend, he decided to terminate the worker for her dishonesty. The prevention officer's notes from the February 4, 2019 conversation indicate that the prevention officer contacted the hygiene officer who advised the prevention officer that she had not spoken to D on January 17, 2019.

[32] In a May 1, 2019 submission to the Board's Compliance Section, D wrote, in part, the following:

> I strongly deny the worker was terminated for raising Health and Safety concerns. It was myself who initiated contact with the Board for assistance with the worker's concern. The sole reason for her termination was my strongly held belief the worker was being dishonest with me. She denied the Board advised her it was safe to return to work. Board Officer [JC] confirmed to me that they had spoken with the worker on January 16, 17 or 18 and advised the worker the issue of a gas leak from December had been resolved and had been investigated by the Board.

[33] D stated that, soon after that initial telephone call to the worker, he called her back later that same day and after speaking to the Board, that there was no real safety concern but, in any event, he had followed the correct protocol by ordering an oxygen monitor for the warehouse. D reported that he also contacted the worker to provide her a further update within days of the Board's January 10, 2019 worksite inspection. D argued that on January 18, 2019, and based on information he had received from the Board, the Board hygiene officer had already advised the worker that the gas leak issue had been resolved. D argued this established the worker was aware it was safe for her to return to work and, that by not doing so, she had refused to return to work.

[34] D also submitted that, after the Board's initial inspection, the Board hygiene officer suggested that D call to keep the worker apprised of the situation. D submitted that he also heard the same feedback from the employment agency representative. D argued the worker was already made aware by the hygiene officer that there was no ongoing safety concern and that she could return to work but she had been dishonest. He felt he could no longer trust the worker and terminated her. D alleged that, before deciding to terminate the worker, he sought the advice of the Board – specifically, he inquired how to proceed given that the worker had refused to return to work even after knowing it was safe for her to do so. D stated that the hygiene officer told him it was within his rights to terminate the worker's employment if she refused to return to work. Additionally, the hygiene officer had suggested he pay the worker only for the one day (January 8, 2019) when she had refused the unsafe work.

[35] D explained that, when terminating the worker on January 21, 2019, the worker told him his actions were discriminatory because her termination was due to her making a safety complaint. The worker informed him she could file a discriminatory action complaint, so, while not obliged to do so, he offered her a settlement/severance to resolve the matter. On January 24, 2019, the

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worker accepted his offer. D argued he had been clear with the worker that the two weeks' pay was in exchange for the worker to forgo a "potential Discriminatory complaint." D argued there was never any discussion that the pay was in compensation for the two-week period of her absence from the workplace. D also concluded with the following, in part:

> We submit that the evidence confirms we were not motivated in whole or in part to retaliate against the worker for raising concerns about a gas leak that had occurred weeks prior after the worker was off shift. The worker's termination did not arise from the worker reporting a safety concern. As a result of the worker being concerned about a gas leak that happened weeks prior I contacted the Board for information and to resolve any potential issue. The sole reason I terminated the worker was because she of her dishonest communication. The worker made misleading statements to the Board, the employment agency and was out rightly dishonest with me and continues to be so in her written complaint.

[36] In a June 12, 2019 submission to the Board's Compliance Section, the worker argued she was terminated for raising a health and safety issue. She submitted that from the outset, D had not taken her safety concerns seriously and, among other matters, had failed to adhere to the necessary process require due to her refusal for unsafe work. The worker reported that she spoke to the Board hygiene officer on January 18, 2019 and was told that the employer was still in the process of addressing her concerns. As she understood from the Board hygiene officer, the employer had the onus to contact her and advise her when it was safe for her to return to work. The worker said that, during their January 18, 2019 conversation, D told her that he had until February 1, 2019 to meet the Board's requirements. She was then awaiting further communication from D respecting her return to work. The worker provided a screenshot from her telephone which she argued established that D had called her twice on January 8, 2019, once on January 18, 2019, and then on January 21, 2019 to terminate her. The worker also provided a copy of a January 18, 2019 email correspondence from the employment agency representative wherein the representative advised the worker that D would contact her no later than February 1, 2019. The worker also attached her January 21, 2019 email to the employment agency stating that D had terminated her and that he was willing to pay her for the two weeks she had missed from work. The worker submitted that when D told her he was willing to pay her for the two-week period she had missed from work, he mentioned he would contact the employment agency representative to ensure that the wage-subsidy contract was still in effect.

[37] The worker submitted that, during their January 21, 2019 telephone conversation, D did not mention that the two weeks' pay was an offer of settlement. The worker reported she had not been required to sign any papers binding her to a settlement or dissuading her from filing a prohibited action complaint.

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Board's April 7, 2020 Decision

[38] As a preliminary matter, the Board found that, on a balance of probabilities, the parties did not enter into a settlement precluding the worker from filing a prohibited action complaint. The Board accepted the worker's evidence that the amount paid by the employer represented the two weeks she had missed from work due to the investigation of the safety matter.

[39] The Board also found the worker had established a *prima facie* (basic) case of prohibited action, and that the employer had not proven, on a balance of probabilities, that it was in no way motivated to dismiss the worker because she engaged in protected health and safety activities. The Board officer decided it was undisputed that, on January 8, 2019, the worker had refused to work due to her safety concerns about the potential nitrogen gas leak. The Board's file documents did not support the employer's position that the hygiene officer advised the worker it was safe for her to return to work, or that the worker was being dishonest by disputing that she had received such advice from the hygiene officer. Instead, the Board found the evidence supported that, as of January 17, 2019, the worker still believed the employer had not fully addressed her health and safety concerns. The Board considered it significant that, on January 18, 2019, the worker contacted the Board to request an update from the hygiene officer, which then led the hygiene officer to remind D that the onus was on him to provide the worker an update. The Board also accepted the worker's evidence that, on January 18, 2019, D informed her that he still had a number of conditions to meet prior to the February 1, 2019 deadline, thereby leaving the worker with the impression that the employer was continuing the process of addressing her health and safety concerns.

Submissions to WCAT

[40] In a May 6, 2021 submission, the D (the employer) argued the worker was terminated for her dishonesty, and not for raising a health and safety concern. The employer argued that once it learned of the worker's health and safety concerns, it initiated contact with the Board and during a January 16, 2019 telephone conversation, the Board hygiene officer advised the employer that the worker knew that the safety matter (gas leak) was resolved and it was safe to return to work. The employer argued that the hygiene officer and another Board occupational health officer also advised the employer that the worker could be terminated for her refusal to return to work. The employer argued that the preponderance of evidence established there was no anti-safety animus on the employer's part.

[41] The employer provided an additional submission on May 17, 2021 requesting that WCAT contact the Board hygiene officer and the Board occupational health officer to provide testimony about their discussions with the employer regarding the worker's termination. The employer argued that this direct evidence was "central to this appeal."

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[42] The employer argued that, prior to rendering his finding, the Board had failed to verify the sequence of events. The employer maintained that at all times and even prior to the worker's termination, the employer had consulted with the hygiene officer and followed the guidance she provided. The employer argued that at the time of her termination, the worker was still in her three-month probationary period – thus, the employer had no obligation to pay her severance pay. Nonetheless, in efforts to resolve any potential prohibited action dispute, the worker had been paid a settlement.

[43] In her written submission, the worker argued that the evidence, including the Board hygiene officer's handwritten notes, established the employer spoke to the hygiene officer on January 18, 2019 and informed the employer that it was obliged to contact the worker about the status of any safety concerns. The worker argued that she was not advised and nor was there any evidence to support the employer's allegation that the hygiene officer of the employer had told her it was safe to return to work. The worker argued that, based on an email she received from the employment agency representative, the employer had until February 1, 2019 to address the safety violations identified by the Board. The worker argued that, even on January 18, 2019, the employer informed her it was still in the process of obtaining an oxygen detector for the warehouse. The worker explained that when the employment agency representative later spoke to the employer, it advised the representative that the worker was terminated because she refused to come back to work.

[44] The worker argued that at no time did she understand that the two weeks' pay the employer provided was a settlement, otherwise, despite her grave financial circumstances at the time, she would not have accepted the pay. The worker argued she was not asked to sign a release establishing that the two weeks' pay was in lieu of a settlement. She also argued that, neither the cheque nor the envelope containing the cheque stated the monies paid to her were a settlement.

[45] The worker argued that she had provided additional supportive evidence, including written submissions, copies of email correspondence, photographic evidence, and screenshots of texts, call history, etc. to support that the employer had engaged in prohibited action by terminating her employment.

[46] The employer did not file a rebuttal submission; however, in a July 30, 2021 letter, the employer requested that WCAT seek information and obtain direct evidence from both the Board hygiene officer and another identified Board employee respecting the matter. The employer also requested an oral hearing be arranged to allow for the Board employees involved to testify.[5]

[5] I have addressed the employer's request to obtain direct testimony from the Board officers at the beginning of my decision. Given the evidence and information on the file documents, which I found to be sufficient, I did not consider it necessary to obtain further evidence from the Board officers. However, I expand on this matter further in my analysis.

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Statutory Provisions and Analysis

[47] The standard of proof for prohibited action matters is the balance of probabilities.

[48] The worker's allegation of prohibited action relates to the termination of her employment, a matter contemplated by section 47 of the Act. The Act, however, limits the ability of the Board to determine whether the alleged contravention occurred only if the complaint is not settled or withdrawn. Specifically, subsection 50(1) of the Act provides:

> **50** (1) If the Board receives a complaint under section 49 (3), it must immediately inquire into the matter and, if the complaint is not settled or withdrawn, must
>
> (a) determine whether the alleged contravention occurred, and
>
> (b) deliver a written statement of the Board's determination to the worker and to the employer or union, as applicable.

[49] *Prevention Manual* item #D6-153-1 provides, in part, as follows:

> The worker may withdraw a complaint at any time, settle the dispute privately with the employer or union, or pursue alternative remedies under a collective agreement.

[50] As a preliminary matter, I concur with the Board's finding that the two weeks' wages paid by the employer to the worker on January 24, 2019, did not relieve the employer from any obligation it had with regard to the worker's prohibited action complaint. While not entirely determinative of the matter, the worker did not sign a release or a settlement agreement establishing the amount paid was in settlement of a potential prohibited action complaint.

[51] I have considered the law on the interpretation of releases and other contracts and note that generally, the courts (and WCAT) view disputes about the effect of releases and other settlement based on the particular facts and circumstances of the matter.

[52] I have also considered the employer's arguments and acknowledge that the employer maintains that the worker was paid a further two weeks' wages as a "release" and in an effort to dissuade her from filing a prohibited action complaint. The employer argues there was no discussion with the worker that the wages were to recognize the worker's loss for the two-week period she missed from work while her health and safety concerns were being investigated and addressed. However, it is notable that, on January 24, 2019, when speaking to the Board claims officer, the employer was documented to report that, as a gesture of good will, it had paid the worker for the two-week period she had missed from work. The employer was also noted to report that the amount paid was not for severance pay but, under the circumstances, the employer felt it was

the right thing to do. I have also considered that it is conceivable that the employer made the offer to pay the worker to potentially dissuade her from filing a prohibited action complaint. Certainly, the employer was alive to the possibility that the worker could file a complaint as she advised it during their January 21, 2019 telephone conversation.

[53] Bearing in mind the above, I considered whether the wages paid could be construed as a "general release" – thus, precluding the worker from filing any or all claims, including a prohibited action complaint. Several cases on the interpretation of general releases have been considered and applied by the courts.[6] There are also several WCAT decisions, which while not binding here, provide some guidance on this matter.

[54] However, as I noted above, in this matter there is no executed settlement agreement that bears interpretation corroborating that the employer's offer for two weeks' wages was made in consideration of the worker not filing a prohibited action complaint. While the Board considered it relevant that the matter could not be settled as the employer was unaware of the worker's complaint, in my view, and with a fair, large, and liberal interpretation of subsection 50(1), I consider parties are able to negotiate settlements of prohibited action matters even when the worker may not yet have filed a prohibited action complaint. I acknowledge that the worker conceded that, during their January 21, 2019 telephone conversation, she informed the employer that it was being discriminatory by terminating her for raising a safety issue; however, it is also relevant that the employer argues and maintains that the worker's termination was not in any event retaliation for her raising a health and safety concern.

[55] For the aforementioned reasons, I find the employer's offer and subsequent payment to the worker of two weeks' wages did not form a release for the purposes of precluding the worker from filing a prohibited action complaint or, in the alternative, that it was in settlement for the purposes of a prohibited action complaint.

[56] I now turn to the merits of the employer's appeal.

[57] The question here is whether the employer retaliated against the worker, or engaged in prohibited action, by terminating her on January 21, 2019 and specifically for raising any of the safety activities protected under Part 3 of the Act. The standard of proof in this appeal is the balance of probabilities.

[58] In order to promote safe workplaces in British Columbia, the Act prohibits employers from retaliatory action against workers for raising safety concerns. Sections 47 to 50 of the Act

[6] See for example *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236, 54 N.B.R. (2d) 293 (C.A.) (White); *Keefer Laundry Ltd. v. Pellerin Milnor Corporation* 2009 BCCA 273; *Hannan v. Methanex Corp.* (1998), 46 B.C.L.R. (3d) 230 (C.A.); and *The Owners, Strata Plan BCS 327 v. IPEX Inc.* 2014 BCCA 237.

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protect workers from employer retaliation in relation to workplace safety issues and specifically protect a worker from negative employment consequences if that worker engages in certain types of protected safety activities. The purpose of these provisions in the Act is to foster safer workplaces by removing/diminishing the fear that a worker might otherwise feel about raising safety concerns in the workplace.

[59] Section 47 of the Act defines a "prohibited action" as including any act or omission by an employer, or by a person acting on behalf of an employer, that adversely affects a worker with respect to any term or condition of employment. Prohibited action includes dismissal.

[60] Section 48 of the Act protects a worker from a prohibited action. An employer, or a person acting on behalf of an employer, must not take or threaten a prohibited action against a worker:

> (a) for exercising any right or carrying out any duty in accordance with the OHS [occupational health and safety] provisions, the regulations or an applicable order,
>
> …
>
> (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 ...

[61] I have also considered Part 3 of the OHS Regulation entitled "Rights and Responsibilities." Section 3.10 "Reporting unsafe conditions" requires that an employer investigate and immediately take corrective action after a report of a workplace hazard. Section 3.13 of the OHS Regulation provides that a worker, who has complied with section 3.12 in refusing to perform unsafe work, must not be the subject of prohibited action in violation of section 47 of the Act. In other words, an employer must not take prohibited action against a worker as retaliation for the worker refusing to perform unsafe work.

[62] Under the legislation and policy provisions set out above, the initial burden of establishing a complaint of prohibited action lies with the complainant (in this case the worker) who must establish a *prima facie* (basic) case establishing a prohibited action under section 47 of the Act has occurred. Establishing a *prima facie* case is not intended to place an onerous task on a worker.

[63] In order to establish a *prima facie* case, the worker must suffer a negative employment consequence as described in section 47 of the Act; the worker must have engaged in the type

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of safety activities protected under section 48 of the Act; and, there must be a causal connection between the negative employment consequence and the safety activity in question.

[64] For the reasons cited by the Board, which I accept and adopt as my own, I find the worker established a *prima facie* case of prohibited action. It is undisputed that the worker was terminated from her employment on January 21, 2019. There is a close temporal relationship between the termination of the worker's employment on January 21, 2019 and her report of safety concerns to the employer on January 8, 2019. The requirement for a causal connection results from the use of the word "for" in section 48 of the Act. It is not simply necessary for the negative employment consequence to chronologically follow the protected safety activity; rather, section 48 of the Act requires that the negative employment consequence occur to a worker "for" engaging in the safety activity in question.

[65] For the reasons that follow, I also concur with the Board that, there is a reasonable inference that there is a causal connection between some or all of the worker's reporting of health and safety issues and the employer's decision to terminate the worker. The worker has therefore made out a *prima facie* case of prohibited action. It falls then on the employer to disprove this case.

[66] In this regard, subsection 49(4) of the Act provides that the burden of proof that there has not been a violation of section 48 is on the employer. The examination of the requirement that the employer prove that in no part were its actions motivated by unlawful reasons is often referred to as the application of the "taint principle."

[67] The panel in *Appeal Division Decision #2002-0458* (February 21, 2002), 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) [now section 48]. 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 [now section 47]. 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 reason for the employer's action, but rather, it is sufficient if it is one of the reasons for the employer's actions under review....

[68] The taint theory essentially recognizes that there may be multiple reasons behind an employer's decision to discipline or terminate a worker; however, if the employer was motivated by any of the impermissible activities in section 48 of the Act, the employer's actions will generally be

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considered to amount to discrimination within the meaning of that section. Thus, to be successful in this appeal, the employer must prove, on the balance of probabilities, that it was not motivated in any way by the worker's protected activity. Even a taint of a safety-related retaliatory intent will result in the employer failing to rebut the worker's *prima facie* case of prohibited action. It is not necessary for the employer to prove that it had just cause for dismissing the worker; rather, because the Act places a reverse onus on the employer, I am limited to considering whether the employer has provided sufficient positive evidence to demonstrate that, on a balance of probabilities, it was not motivated in any part to terminate the worker for raising safety concerns. In my view, the employer has not succeeded in discharging this burden.

[69] It is undisputed that, on January 8, 2019, the worker raised health and safety concerns. I acknowledge that the employer took the initiative to contact the Board and seek assistance to address the worker's safety concerns. Following an inspection, a Board hygiene officer issued various orders requiring the employer to file a notice of compliance by no later than February 1, 2019.

[70] The employer maintains that the sole reason for the worker's termination was due to her dishonesty and, specifically stemming from her refusal to return to work even though the Board hygiene officer had advised the worker there were no safety concerns. According to the employer, given that the worker had refused to return to work despite knowing it was safe to do so, the employer had simply followed the Board's advice, as provided to him, that the worker could then be rightfully terminated for a refusal to return to safe work. Further, from the employer's perspective, the worker was a new employee and still within her probationary period and thus, there was no onus on the employer to continue to maintain the employment relationship.

[71] I find the sequence of events and the evidence respecting the events as documented as well as reported by the worker and by the employer, does not sufficiently support the employer's assertion that the worker was aware it was safe for her to return to work. Instead, it was only after the worker refused unsafe work, made a report to the Board respecting the unsafe work, and the Board's investigation ensued resulting in orders against the employer that the employer took its first disciplinary step by dismissing the worker from her employment. In my view, this does not support a finding that the reasons for dismissing the worker from her employment were not tainted by her refusing unsafe work and making a report to the Board in this regard. Most importantly, I am unable to find sufficient evidence establishing that, on the balance of probabilities, the worker was aware it was safe to return and she chose not to follow the Board hygiene officer's apparent advice to return to work. Also, part of the worker's concern around unsafe work appears to have been related to the absence of oxygen monitoring alarms, and, as I understand it, the employer had not yet installed oxygen/air quality monitors at the time of the worker's termination; thus, while some aspects of the worker's safety concerns were met prior to

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termination, not all of them were, such that it was reasonable for the worker not to have returned to work.

[72] I find the evidence does not sufficiently support that the Board hygiene officer told the worker that it was safe for her to return to work; instead, the evidence establishes that the worker contacted the hygiene officer on January 18, 2019 for an update and to advise that the employer had not been in contact with her. The hygiene officer documented the conversation in her handwritten notes, specifically which establish that the hygiene officer called the employer and informed it that it had the onus of informing the worker of the status of her health and safety concerns and when it was safe for the worker to return to work.

[73] The worker's evidence, as provided in her submissions, supports that when she spoke to the employer on January 18, 2019, she was left with the impression that the employer was still in the process of addressing her health and safety concerns. I concur with the Board that this is supported by the emails the worker exchanged with the employment agency representative in addition to the Board hygiene officer's handwritten notes. The various Board officers' documentation of the involvement respecting the health and safety matters including the inspection report and order, the worker's compensation claim, and the subsequent prohibited action investigation, are on the file. These documents are not supportive of the employer's arguments; rather, they suggest that the employer considered the worker's concerns, whether valid or not, were a non-issue and that a safety concern never even existed.

[74] I am not satisfied that the employer's decision to terminate the worker was not tainted by "anti-safety" animus. I do not consider this was a situation whether the employer, having met all of its statutory and regulatory obligations arising from the worker's complaint of health and safety concerns, including addressing the air quality issues that led the worker to stop working, had then provided the worker alternative safe work or had advised the worker that it was safe to return to work due to her concerns being addressed and satisfied, was then left with no other option but to terminate her employment because she continued to refuse to return to work. The employer has clearly reported that it felt the worker was being dishonest by not returning to work when she was aware it was safe to do so, but there is limited evidence confirming the employer clearly met its onus by informing the worker to return to work.

[75] Notwithstanding the above, I also consider it necessary to further address the employer's arguments respecting obtaining direct evidence from the Board officers. The employer requested that I conduct an oral hearing solely for the purposes of directly examining the Board officers. The employer argued that the Board officers whom he had contacted had advised him it was within his rights to terminate the worker for refusing to return to work. The employer considered that if I obtained this direct testimony, the matter would be rectified in the employer's favour. I carefully considered the employer's request and after doing so, did not consider it necessary to seek direct testimony from the Board officers involved. In reaching my decision, I considered that, even if the employer believed the worker was being dishonest about knowing

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that it was safe for her to return to work, there is insufficient evidence establishing that the worker had clear notice from the employer that it was safe for her to return to work. While the employer has argued that the Board hygiene officer's direct testimony at an oral hearing could be assistive because it would establish the worker was aware that it was safe to resume work, I find that, based on the hygiene officer's written notes on January 18, 2019, the employer had been advised that the onus was on it to give the worker direction on returning to work. Further, that another Board officer, who the employer has also identified, had told the employer that it was within its rights to terminate the worker's employment for her refusal to return to work, does also not overcome the evidentiary requirement of the employer having given the worker clear notice to return to work. Certainly, if the employer had given the worker clear notice that it was safe for her to return to work, and the worker had then refused to return, it is more likely that not that the worker would have evidentiary difficulties in even establishing a *prima facie* case.

[76] Pursuant to the law and regulations set out above, both the worker and an employer have specific responsibilities and there are procedures that they are required to follow under section 3.12 of the OHS Regulation when a worker exercises a right to refuse unsafe work. As noted above, that the employer believed that the worker could have returned to work as the unsafe working condition did not exist is of little relevance to the matter. The only requirement is that the worker has reasonable cause to believe that continuing the work she identified as unsafe would create an undue hazard to the health and safety of any person.

[77] In the facts of this matter, I note that the Board hygiene officer had issued orders requiring the employer's compliance by no later than February 1, 2019. This was not a case whether it seems more likely that the worker reached a decision not to return to work as a personal choice or that there was an order issued by the Board hygiene officer that there was no hazard in the workplace.

[78] So, while I have carefully considered the employer's submissions and arguments, I find that the employer has made only vague and unpersuasive references to the worker having awareness of it being safe for her to return to work and then potentially being dishonest about her beliefs. Certainly, I appreciate that an employer maintains the right to manage its workplace as it sees fit; however, that principle does not protect the employer in the face of challenges with respect to its decisions under prohibited action matters. I am not satisfied that the employer has positively proved that the worker's engagement in safety activities had no bearing on the employer's decision to terminate her.

[79] The worker complied with the Board's regulated procedure in refusing what she believed to be unsafe work. Accordingly, the worker was protected from layoff and other prohibited action at the hands of her employer, pursuant to section 3.13 of the OHS Regulation, from the time she provided notice of her refusal to work until the time the worker was aware of the safety of the worksite.

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[80] In this case, for the foregoing reasons and in applying the "taint" principle, I have concluded that the employer has failed to establish, on a balance of probabilities, that it was not in any way motivated to terminate the worker's employment because she raised occupational safety concerns with the employer and provided information to the Board. It follows that, as the employer took action against the worker in laying her off during the time she was protected by section 3.13 of the OHS Regulation, the employer engaged in a prohibited action against the worker, pursuant to section 48 of the Act.

Conclusion

[81] I deny the employer's appeal and confirm the Board's April 7, 2020 decision.

[82] I find the employer took prohibited action against the worker contrary to the Act by terminating her employment on January 21, 2019.

[83] No expenses were requested and none are apparent. Consequently, I make no order for the reimbursement of appeal expenses.

Shelina Shivji
Vice Chair

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