

ONTARIO LABOUR RELATIONS BOARD

3936-10-OH Oneal Walters, Applicant v. **PPL Aquatic, Fitness and Spa Group Inc.**,
Responding Party.

BEFORE: Patrick Kelly, Vice-Chair.

APPEARANCES: Oneal Walters appearing on his own behalf, Leah Simon and Paul Denstedt
appearing on behalf of the responding party.

DECISION OF THE BOARD: January 4, 2012

Background

1. This is an application under section 50 of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended (the “Act”), alleging a reprisal. The case raises issues pertaining to recent amendments to the Act on workplace harassment. The applicant, Oneal Walters alleges that he was subject to name-calling by a member of management of the responding party, and that when he raised his concerns about his treatment, he was terminated. Mr. Walters seeks financial compensation and punitive damages.

2. The responding party (“PPL” or “the company”) responds that section 50 relief is not available to the applicant in respect of allegations of workplace harassment, and in any event, that Mr. Walters was not harassed, nor was his cessation of employment in any way related to the raising of his concerns about harassment. In fact, PPL maintains that Mr. Walters resigned his employment. Moreover, even if section 50 could apply in the circumstances of this case, the company says the way in which it responded to the applicant’s concerns was appropriate and lawful.

The Evidence

3. Alexandra Coles and Eldon Ramsey, both managers, testified for PPL. Their testimony was followed by that of Mr. Walters. Where there were any discrepancies between the evidence of PPL’s witnesses and that of Mr. Walters, I prefer the evidence of the former, for reasons that I will explain later in the decision.

4. PPL is in the business of designing and constructing pools, hot tubs, spas and fitness centres, mainly in condominiums. PPL also does some residential pool construction, provides pool maintenance, repair and upkeep and equips the fitness rooms. All of these services are provided through five divisions. At the relevant time, Ms. Coles was the Fitness Supervisor in the Fitness Division, and Mr. Ramsey was a Service Manager in the Pool Service Division.

5. Mr. Walters commenced employment on or about August 10, 2010 in the Pool Service Division, under Mr. Ramsey’s supervision. Sometimes Mr. Walters was supervised by Ms. Coles when Mr. Walters was away or very busy. According to Ms. Coles, it is routine that, upon hire, all employees are given a uniform and an employee handbook. The employee handbook contains

a provision dealing with the right of employees to complain about harassment, negativity, racial comments or any other situation in the workplace that might give rise to discomfort. There may be a dispute as to whether or not Mr. Walters ever received the handbook, but whether or not he did is not germane in this matter. The fact is there was an employee handbook containing workplace policies, including a policy on harassment.

6. Mr. Walters began his employment in the Vacuum/Maintenance Division, attending to the maintenance of pools. He received three or four weeks of training under the supervision of an experienced worker. Mr. Walters worked hard at his assigned tasks, but he had difficulties comprehending the chemistry of pool maintenance. This led to a rather serious error on his part in October 2010. While servicing a condominium pool, Mr. Walters inadvertently mixed chlorine with acid. That combination created mustard gas which permeated the building, resulting in its evacuation. Mr. Walters was overcome by the fumes, and sent to hospital for a brief stay.

7. When Mr. Walters returned to work a few days later, the company reviewed chemical procedures with him, but it became clear that he was no longer comfortable in his pool maintenance role. It was agreed he would be transferred to the Construction Division. There he went out on a pool installation. However, after one day on that project it became evident that Mr. Walters had an inadequate sense for his own personal safety while engaged on a construction site. The Construction Division was a poor fit for a person of his experience.

8. Because Mr. Walters had demonstrated a strong work ethic and was otherwise an affable individual, the company considered a more suitable assignment for him, in the Pool Service Division. Unfortunately, this job also went badly. During the installation of a pool cover, Mr. Walters nearly pulled his co-worker into the pool on top of the cover, creating a potentially very dangerous situation. The co-worker was unharmed, but Mr. Walters' days in the Pool Service Division were at an end.

9. The company moved Mr. Walters into the Fitness Division, where he was expected to deliver fitness equipment to PPL's customers. However, Mr. Walters apparently had trouble with map directions, and in any case, by the end of the day he reported that his back was not up to the physical demands of the job.

10. Mr. Walters was next assigned to light duties, in the warehouse. There, finally, Mr. Walters excelled. He demonstrated a real ability to organize the inventory. The trouble was that there was no budgeted warehouse position. However, Mr. Ramsey was sufficiently impressed with Mr. Walters' work on the inventory, that he sought the permission of PPL's President, Paul Denstedt, to create a budgeted warehouse position to be filled by Mr. Walters. Mr. Denstedt agreed. Mr. Ramsey and Ms. Coles then drafted a job description for the purpose of subsequently presenting it to Mr. Walters on November 12, 2010.

11. There is a discrepancy in the testimony of Mr. Walters, on one hand, and Mr. Ramsey and Ms. Coles about how the events of November 12, 2010 unfolded. Mr. Walters testified that prior to reporting for work on the morning of November 12, 2010 he prepared a text message from his cell phone to Mr. Ramsey in which he complained that he had been called some unflattering names by Ms. Coles. He provided the Board with a copy of a document that he said was what he sent by text to Mr. Ramsey. It reads:

Hi Elton, this is Oneal. Nov 12. I have been very patient and calm with the ill treatment that I have been receiving from supervisor/manager Alex. You said it yourself, 'you two don't get along'. That's not true I have been

respectful and calm with everything that she has said to me and about me. You said, 'ill [sic] help you to be on her good side.' Her treatment, verbal harassment, has gotten worst [sic]. I have been yelled at, called a turkey and a banana. This has been going on for longer than a month. I ask you to look into this again but this time to stop it completely I don't deserve to be bullied in the workplace. I am a hard worker. I do my best everytime [sic]. I lifted things that are normally too heavy for me to manage in order to be a team player. I am available to talk to you about this issue. However you have been present many times and therefore know what issues I am seeking a solution for.

12. At around 10:00 a.m., Mr. Walters said he was summoned to meet with Mr. Ramsey and Ms. Coles. They told him his prior position was gone, and that they were offering him a new position and showed him a document. Mr. Walters repeated his question about his prior job, and was given the same answer, that it was no longer available. Mr. Walters testified that he wanted to have his concern with Ms. Coles calling him names to be dealt with. It is not clear from his testimony whether or not he received a response on that issue, but he was adamant that no one apologized to him. According to Mr. Walters, he asked for more time to think about the new job being offered him, and was told that he had to make up his mind. Then either Mr. Ramsey or Ms. Coles reminded Mr. Walters that he had a child to support and that Christmas was coming. They told him they wanted to help him out. They said the company would facilitate Mr. Walters' application for Employment Insurance benefits by permanently laying him off. Mr. Walters refused the warehouse job. He then asked what work he should perform. Mr. Ramsey replied he was done for the day.

13. Mr. Walters' version of the events of November 12, 2010 differs in many respects from the versions offered by Mr. Ramsey and Ms. Coles. Mr. Ramsey denied receiving any text message from Mr. Walters, and testified that the first he heard about Mr. Walters' complaint was when he showed up in his office on November 12, 2010. According to Mr. Ramsey, Mr. Walters then informed him he had a complaint about Ms. Coles. Mr. Ramsey felt that the complaint should be dealt with right away, and he summoned Ms. Coles to his office. Mr. Walters explained his concern about having been called some unflattering names. In her evidence, Ms. Coles acknowledged that, in the course of moving a large shelf in an enclosed area with Mr. Walters' assistance, she felt that Mr. Walters had inadvertently pinned her against a wall, and she called him a turkey. She also acknowledged she might have called him a banana on some other occasion, but she could not recall it. In any event, when confronted with the complaint at the meeting, according to both Mr. Ramsey and Ms. Coles, Ms. Coles apologized and insisted that she had not meant to offend Mr. Walters, that it had just been a momentary flare-up of irritation on her part.

14. Mr. Ramsey testified that Ms. Coles' explanation and apology appeared to him to have resolved the matter, and he moved on to discuss the warehouse position with Mr. Walters, with Ms. Coles present. Mr. Ramsey then moved on to discuss Mr. Walters' future employment with PPL. Mr. Ramsey asked Mr. Walters if he agreed that he had not been able to do the assignments in Vacuuming/Maintenance, in Construction, in Pool Services and in Fitness. Mr. Walters agreed. Then Mr. Ramsey presented Mr. Walters with the job description for the warehouse position. To the surprise of Mr. Ramsey and Ms. Coles, after reviewing the job description Mr. Walters expressed reservations about the physical demands. He complained that he could not lift objects weighing as much as 75 pounds as required in the job description. Both Ms. Coles and Mr. Ramsey agreed that Mr. Walters received assurances that the company would arrange to get him help in those circumstances. They both also agreed that Mr. Walters expressed concern about shovelling snow from the sidewalk near the warehouse, another job requirement.

Mr. Ramsey's evidence is that he replied he would get him a snow blower. When Mr. Ramsey expressed reservations about not knowing how to operate a snow blower, Mr. Ramsey said he would train him. This does not correspond exactly with Ms. Coles' evidence: she stated that Mr. Walters indicated he had a snow blower at home, and that he did not shovel snow. Finally, according to Mr. Ramsey, Mr. Walters expressed similar doubts about the requirement to cut the grass around the warehouse. He said he did not know how to operate a lawn mower. Again, Mr. Ramsey said he would provide the training. Ms. Coles did not in the course of her testimony refer to any discussion about grass cutting or lawn mowers.

15. All three witnesses agreed that the meeting went on for a very long time. Mr. Walters' concerns were apparently not alleviated by any of Mr. Ramsey's or Ms. Coles' responses. Mr. Ramsey and Ms. Coles agreed in their testimony that they made it clear that if Mr. Walters was not prepared to take the job, there was nothing else for him at PPL. They also said that Mr. Walters, not either of them, raised a question regarding Employment Insurance benefits, and that Ms. Coles advised Mr. Walters to look that up on the Internet because she was unfamiliar with the process. In the end, Mr. Walters refused to accept the warehouse position. He wrote on the job description that he was physically unable to accept the position. He asked about resuming his tasks, but was told not to do so. He went home and did not return to PPL. Later he received from the company a Record of Employment that indicated he had quit his employment.

Analysis and Conclusions

16. Section 50 of the Act reads:

- 50.** (1) No employer or person acting on behalf of an employer shall,
- (a) dismiss or threaten to dismiss a worker;
 - (b) discipline or 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 in an inquest under the Coroners Act.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Board in which case any rules governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

(3) The Board may inquire into any complaint filed under subsection (2) and section 96 of the Labour Relations Act, 1995, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Board into a complaint filed under subsection (2), sections 110, 111, 114 and 116 of the Labour Relations Act, 1995, apply with all necessary modifications.

(5) On an inquiry by the Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

(8) Despite subsection (2), a person who is subject to a rule or code of discipline under the Police Services Act shall have his or her complaint in relation to an alleged contravention of subsection (1) dealt with under that Act.

17. The new provisions of the Act dealing with workplace harassment read:

“workplace harassment” means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome; (“harcèlement au travail”)

Policies, violence and harassment

32.0.1 (1) An employer shall,

- (a) prepare a policy with respect to workplace violence;
- (b) prepare a policy with respect to workplace harassment; and
- (c) review the policies as often as is necessary, but at least annually. 2009, c. 23, s. 3.

Program, harassment

32.0.6 (1) An employer shall develop and maintain a program to implement the policy with respect to workplace harassment required under clause 32.0.1 (1) (b). 2009, c. 23, s. 3.

Contents

(2) Without limiting the generality of subsection (1), the program shall,

- (a) include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;
- (b) set out how the employer will investigate and deal with incidents and complaints of workplace harassment; and
- (c) include any prescribed elements. 2009, c. 23, s. 3.

Information and instruction, harassment

32.0.7 An employer shall provide a worker with,

- (a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment; and
- (b) any other prescribed information. 2009, c. 23, s. 3.

18. The Board has recently dealt with workplace harassment complaints under the new statutory provisions. In the first case, the Board opined in *obiter* that it has no jurisdiction over an alleged reprisal for having complained of harassment.¹ More recently, the Board, relying upon the *obiter* from the *Investia* decision, determined categorically that it lacks that jurisdiction.² In my view, it is unnecessary to decide the issue of jurisdiction in this case. That is because, on a balance of probabilities, I conclude that PPL did not make any reprisal against Mr. Walters as a result of his having complained about harassment, or for any other unlawful reason.

19. Before I go on to explain the basis for my conclusion that there was no reprisal in this case, I wish to make it clear that, in my view, PPL terminated Mr. Walters from employment. He did not quit. He simply did not accept the warehouse position, ostensibly because he felt he could not physically perform some of the job duties or because he wanted to be employed in some other capacity. That does not constitute a resignation from employment. Nor was Mr. Walters' conduct during the meeting consistent with an intention to resign. Clearly, he wished to remain employed by PPL.

20. The company terminated Mr. Walters after and because he refused the warehouse job. In coming to this conclusion I prefer the testimony of Mr. Ramsey and Ms. Coles concerning the events of November 12, 2010. Although their evidence was not completely in unison, it was detailed and largely consistent. On the other hand, Mr. Walters' version lacked detail and was less than complete. More importantly, I am troubled by Mr. Walters' evidence concerning his text message to Mr. Ramsey. The document is dated November 15, 2010, three days after his termination. Mr. Walters explained that this was because he subsequently sent a copy of the text message to his e-mail address, and then printed the e-mail from his computer on November 15, 2010. Be that as it may, find it odd that the message begins by Mr. Walters noting the date of November 12. Why did it occur to Mr. Walters to specify the date within the body of the text message? And what prompted him on the morning of November 12 to prepare a remarkably lengthy and detailed text message, seemingly on the spur of the moment as he made his way to work? Finally, contrary to the claims made by Mr. Walters in the text message, there was no

¹ *Investia Financial Services Inc. and Industrial Alliance Insurance and Financial Services Inc.* 2011 Can LII 60897 (ON LRB).

² *Ludlow Technical Products Canada Ltd. (cob Covidien)* 2011 Can LII 73172 (ON LRB)

evidence adduced in the hearing that he ever previously spoke to Mr. Ramsey about Ms. Coles, or that Mr. Ramsey was aware of any previous tension between Mr. Walters and Ms. Coles.

21. On the other hand, I have Mr. Ramsey's evidence that he never received a text message from Mr. Walters. Mr. Walters did not seriously challenge that evidence when he cross-examined Mr. Ramsey. Nor did he offer any corroborating evidence, such as a telephone billing statement, that he successfully sent the text message from his cell phone to Mr. Ramsey on November 12, 2010, prior to their meeting. Accordingly, I prefer Mr. Ramsey's testimony on this point.

22. In my view, Mr. Walters also gave inconsistent evidence when he was cross-examined about his attempts to mitigate his damages in this matter. He produced copies of letters of application for employment that he sent to a number of prospective employers in January 2011. In those letters, he claimed to be employed at the time by Staples. In cross-examination, however, he testified he could not remember for sure if he was then employed at Staples, and that to the best of his knowledge, he was not. This inconsistency, together with his dubious evidence about the text message to Mr. Ramsey, suggests I ought to be concerned - as I am - about the reliability of Mr. Walters' testimony, particularly where it conflicted with that of Ms. Coles and/or Mr. Ramsey.

23. Leaving aside the discrepancies in the testimony, the evidence was clear and uncontradicted regarding Mr. Walters' first four assignments with PPL: he could not perform any of them satisfactorily for various reasons. The company showed considerable patience in trying Mr. Walters out in a number of roles. Mr. Ramsey then went the extra step to get budget approval for the warehouse position, so that Mr. Walters might remain employed with the company. The company to that point in time acted in good faith. Mr. Walters would have the Board believe, however, that because he complained about Ms. Coles' behaviour toward him, she and Mr. Ramsey hatched a plot to fire him. The theory is they created a ruse by offering him a position they knew he could not accept. The preponderance of the evidence does not come close to establishing such a theory as fact. What it demonstrates is that the company had come to the conclusion there was only one remaining job Mr. Walters was capable of doing. When he declined that opportunity, the company ended the relationship. Although Mr. Walters' termination followed quickly on the heels of his complaint about Ms. Coles, the evidence viewed contextually and in its entirety confirms that, in all probability, the complaint was not a contributing factor in the termination.

24. Mr. Walters' termination was not an unlawful reprisal under section 50. He was not terminated because of the exercise of any rights under the Act. Even assuming that there is a protected right under the Act to complain of harassment without reprisal (which previous Board decisions suggest is not the case), and assuming without deciding that the conduct complained of might fall within the definition of workplace harassment under the Act, I am satisfied that Mr. Walters' complaint against Ms. Coles had no bearing whatsoever in his termination.

25. Subsection 50(7) of the Act confers upon the Board the discretion to substitute such other penalty for a discharge for cause as the Board finds just and reasonable. Mr. Walters made no argument in favour of the exercise of that discretion, and in my view, there are no circumstances in this case that would warrant it.

26. The application is therefore dismissed.

“Patrick Kelly”
for the Board