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ORDER NO. 44
CASE NO. 441/07/WSH

IN THE MATTER OF: ***THE WORKPLACE SAFETY AND HEALTH ACT***

- and -

IN THE MATTER OF: **An Appeal by**

MANITOBA FAMILY SERVICES AND HOUSING,
Appellant,

- and -

Director, Workplace Safety and Health,
Respondent,

- and -

S.M.,
Interested Party.

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

WHEREAS:

1. On May 8, 2007, a Safety and Health Officer (the "Officer") of the Workplace Safety and Health Division (the "Division") issued an order, pursuant to Section 42.1(2) of *The Workplace Safety and Health Act* (the "*Act*"), in which order the Officer determined that the Appellant, Manitoba Family Services and Housing ("FSH") had discriminated against the Interested Party, S.M., contrary to Section 42(1)(f) of the *Act*, by suspending her from further work assignments/shifts from and after February 20, 2007. In reaching this conclusion, the Officer came to the conclusion that one of the reasons for FSH's decision was that S.M. had raised health and safety concerns, a protected form of activity under Section 42(1)(f) of the *Act*. The order of the Officer directed that FSH take the following remedial measures:

    a. reinstate S.M. to her former position as a DSW4 by placing her on the roster for future jobs, on the understanding that the position is casual in nature and work would only be awarded on an "as needed" basis;

    b. pay S.M. for wages and benefits she would have earned up to the time (i.e. April 11, 2007) when FSH was no longer required to care for the client for whom S.M. had been hired to provide certain services; and

c. remove any reprimands or disciplinary references regarding the matter from S.M.'s employment records.

2. On August 20, 2007, the Director of the Division, pursuant to Section 37(4) of the *Act*, confirmed the Officer's order and dismissed an appeal which had been filed by FSH from that order, under Section 37(2) of the *Act*. As FSH had terminated S.M.'s employment during her probationary period, by letter dated April 23, 2007, [Ex. 4] (a fact not known to the Officer prior to his issuing the order of May 8, 2007), the Director ordered FSH:

a. to reinstate S.M. to her former employment on the same terms and conditions on which she was formerly employed; and

b. to pay S.M. any wages she would have earned had she not been discriminated against and to compensate her for any loss of benefits.

3. On September 4, 2007, FSH, through counsel, filed an appeal (the "Appeal") with the Manitoba Labour Board (the "Board"), pursuant to Section 39(1) of the *Act*. Based on the grounds set out in the Appeal, FSH sought an order of the Board that both the Officer's order of May 8, 2007, and the Director's order of August 20, 2007, be rescinded. The grounds of appeal advanced by FSH included the following:

a. that if S.M. did raise safety and health concerns with FSH, the Director erred in holding that S.M.'s employment was terminated as a result of her raising health and safety concerns;

b. that any health and safety concerns raised with FSH by S.M. were not related to the decision to reject S.M. during her probationary period; and

c. the Director erred in failing to hold that the decision to reject S.M. on probation was a result of a number of serious performance issues including breaches of confidentiality, insubordination, harassment of fellow employees and lack of professionalism.

Further, FSH sought an order of the Board, pursuant to Section 39(7) of the *Act*, suspending the operation of the Director's order pending the determination of the Appeal by the Board.

4. On September 13, 2007, the Manitoba Government and General Employees' Union (the "MGEU"), through Counsel, filed correspondence with the Board advising that S.M. is a member of the MGEU and that three grievances had been filed by the MGEU on behalf of S.M. that related to the matters raised in the Appeal filed by FSH. Counsel for the MGEU further advised that the MGEU would be representing S.M. at the Appeal hearing.

5. On September 27, 2007, following an extension of time, the Director, through Counsel, filed its Reply. Part III of the Director's Reply summarizes the Director's position in the following terms:

1. In order to assess whether discriminatory action was taken against the worker contrary to Section 42 of the *Act*, there are two principle questions that must be answered:

    a. did the worker engage in conduct described in Section 42 that on the face of it could be the reason, even in part, for a discriminatory action; and

    b. can the employer show that the action by the employer was not influenced by the conduct, that another reason provided by the employer is the real and only reason for the discriminatory action.

2. The first question must be answered in the positive before it becomes necessary to determine the answer to the second, however, in answering the first question, the determination is not whether the worker's safety and health activities motivated the employer's discriminatory act, but rather whether the worker had in fact engaged in activities described in Section 42.

3. If the worker engaged in activities described in Section 42, there is a presumption that the employer's act was taken because of the worker's Section 42 activities. To rebut the presumption, the employer must provide a good and sufficient reason for the act, which on the balance of probabilities is found to be the real and only reason for the employer's actions.

4. From the facts of this case, D.H. and the Director found that the Complainant established that she had raised safety and health concerns with her employer, and as a result of this her employment with the Department was terminated.

5. The Department did not provide sufficient proof that the termination of the Complainant was not related to conduct.

6. Therefore the Director submits that the appeal be dismissed.

6. On September 28, 2007, following an extension of time, S.M., through counsel for the MGEU, filed a Reply in which she stated that the decision/order of the Director be upheld and that the Appeal of FSH be dismissed.

7. On February 12, 2008, counsel for the MGEU filed correspondence with the Board advising that, after discussions with S.M., it appeared that all of the issues that would have to be canvassed at the hearing would be dealt with by the submissions of counsel for FSH and the

Director and, therefore, counsel for the MGEU would not be attending the hearing. Rather, a Staff Representative of the MGEU would attend as an observer.

8. On February 25, 26, 27 and 28, 2008, and September 8, 9 and 10, 2008, the Board conducted a hearing, at which time FSH, the Director and S.M. appeared before the Board. FSH and the Director were represented by Counsel. A Staff Representative of the MGEU attended the hearing on February 25 and 26, 2008, on a watching brief only.

9. At the outset of the hearing on February 25, 2008, S.M. was advised that she had the right, pursuant to Section 39(5) of the *Act*, to fully participate in the hearing as an independent party notwithstanding the fact that the position(s) being advanced by the Director supported her interests. S.M. was advised that she had the right to and would be afforded the right to cross-examine all witnesses called by either FSH or the Director; that she had the right to present evidence to the Board on her own behalf, either by testifying personally or by calling witnesses; and that she had the right to make her own submissions to the Board at the conclusion of the evidence. Throughout the course of the hearing, S.M. was afforded the opportunity, at the appropriate times, to exercise the foregoing rights. She declined to cross-examine all witnesses, to present evidence on her own behalf or to submit independent argument, on the basis that she was content to rely on the evidence and argument submitted by or on behalf of the Director.

10. At the outset of the hearing on February 25, 2008, the Director and the FSH admitted that a *prima facie* case existed under Section 42.1(4) of the *Act* because:

    i. a discriminatory action, objectively speaking, had been taken by FSH against S.M., namely, the suspension of work opportunities or assignments and her rejection on probation (dismissal); and

    ii. S.M. had raised safety and health concerns, as contemplated by Section 42(1)(f) of the *Act*, at a meeting held on February 20, 2007, regarding the care being provided to a client of FSH.

    Accordingly, the presumption in Section 42.1(4) was applicable and FSH proceeded to call its evidence first, reflecting the onus cast on an employer under Section 42.1(4) of the *Act*.

11. During final submissions to the Board on September 10, 2008, counsel for the Director advised the Board that the request made by FSH in its Appeal to suspend the operation of the Director's order reinstating S.M., had not been pursued before the Board because there had been a tacit agreement between FSH and the Director, under which the Director had agreed not to insist on compliance with the Director's order pending the disposition of the Appeal. It was further asserted that the Director's tacit agreement did not extend to the consequences of not insisting on compliance with the Director's order. In the result, the Director submitted that, regardless of the final disposition made by the Board in this case, S.M. should be entitled to monetary damages at least up to the date of the Board's decision equivalent to the wages and other

monetary benefits she would have received had the Order of the Director been implemented immediately, in accordance with Section 39(7) of the *Act*. Counsel for the FSH disputed the submissions of the Director on remedial relief.

12. The Board, following consideration of material filed, evidence and argument presented, determined that a number of principles and/or material facts govern the disposition of this Appeal, including the following:

    a. There is no dispute that S.M. raised safety and health concerns at the meeting of February 20, 2007, and that, on balance, the evidence of all witnesses, including those called by the Director, were that many of the concerns raised by S.M. and a co-worker were legitimate in terms of the manner that FSH was dealing with the particular client and/or the client's needs.

    b. As a *prima facie* case is admitted, the onus is on FSH to establish, on the balance of probabilities, that the fact S.M. raised safety and health concerns on February 20, 2007, did not influence the decision to deny S.M. further work assignments or, ultimately, to terminate her employment on probation.

    c. An improper motive (here, safety and health concerns) that may be found to exist does not have to be the dominant motive or reason for Section 42.1(4) of the *Act* to be applied in a given case.

    d. The Board may be required to balance conflicting interests to decide whether it ought to "infer" an improper motive on the evidence. The Board must distinguish between unlawful conduct, which the Board can remedy under the *Act*, and conduct that may be regarded as unfair but, nevertheless, lawful conduct, which the Board cannot remedy under Section 42.1(4).

    e. Counsel for both the Director and FSH, from their own perspectives, referred to the Board's decision in ***Juniper Centre Inc. - and - United Steelworkers of America - and - T. Sollis et al*** (1992), M.L.B.D. No. 2 ("***Juniper***"), particularly the principles summarized at Pages 6, 7 and 8 thereof. Recognizing that ***Juniper*** addresses the similar reverse onus which arises under Section 7 of *The Labour Relations Act*, the Board affirms that these principles outlined in ***Juniper*** apply to the determination(s) the Board is required to make under Section 42.1(4) of the *Act*.

    f. Given the mandate of FSH, the Board accepts that matters of safety and health in respect of the workplace environment, the employees and the clients are matters of continuing and ongoing concern in the normal course, meaning that the fact safety and health concerns may be the subject of a discussion or a dispute in a particular case does not, standing alone, mean that such concerns were the basis, in whole or in part, for a discriminatory action. Each case must be assessed on its own merits, the Board being required to draw the necessary inferences from proven facts and the evidence as a whole.

g. The Board does not function as a surrogate arbitration board when assessing whether or not reasons given in the termination letter [Ex. 4] are sufficient to reject S.M. on probation. A denial of hours or a dismissal (rejection during probation) is not illegal under the *Act* even if the Board may view those actions as unfair. Such considerations are for arbitrators, the courts or other tribunals established to make such decisions under the Collective Agreement [Ex. 6] (the "Agreement").

h. The fact S.M. raised safety and health concerns does not, standing alone, shield her (or any employee) from discipline or corrective action at the hand of FSH. Neglect of duty or employee behaviour adverse to the interests of the employer's business are still adequate reasons for discipline and a legitimate explanation offered by FSH for actions taken in good faith, even if founded on incorrect information or viewed to be inadequate, will satisfy the onus under Section 42.1(4) if there is no evidence of anti "safety" animus.

i. As credibility findings are required to be made in respect of a number of factual issues in this case, the Board adopts the guidelines distilled in the seminal case of ***Farnya vs. Chorney***, [1952] 2 D.L.R. 353 (BCCA), particularly the principles noted at P. 357:

> … In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would reasonably recognize as reasonable in that place and in those conditions.

j. The fact S.M. did not testify is relevant when assessing the evidence and making credibility findings. In this regard, when a party can shed light on a matter in dispute and fails to do so, the Board is entitled to infer that the evidence that would be given by the party would not support his/her position. The failure to call a witness who is available to be called, where the evidence is material to the case, can lead to an adverse inference being drawn and a finding that the uncontradicted evidence of the other party's witnesses be accepted. While the failure of a party to testify cannot change the onus or burden of proof, meaning that FSH cannot rely on the failure of S.M. to testify to fill in a gap in its own case, the Board is entitled to take and has taken into account the failure of S.M. to testify on a number of issues or events on which witnesses for FSH testified under oath. These issues include: the events that transpired on February 20, 2007; the "breach of confidentiality issue," as it arose at the February 20th meeting; the events surrounding the meetings held on April 13 and 16, 2007; and the evidence given by a number of FSH witnesses regarding their being "harassed" by S.M. in a number of ways.

k. The fact that S.M. was a probationary employee under the terms of the Agreement does not disentitle her (or any employee) to the protections of the *Act*, if the *Act* is found to be violated. Nevertheless, the provisions of the Agreement are relevant to the issue of (potential) remedy or remedies because, under either the Officer's order or the Director's order, any reinstatement in employment or re-establishment of a prior employment status cannot provide S.M. with wages, benefits and/or rights in excess of those provided in the

Agreement, as the Agreement contained the terms and conditions of employment under which she was hired.

l. Neither the Officer nor the Director, in the orders of May 8, 2007, and August 20, 2007, respectively, disputed the fact that FSH had performance concerns with S.M. nor did either order dispute that management has the right to address performance concerns. Both the Officer and the Director correctly observed in their respective orders that the critical question is whether engaging in a protected activity under the *Act* was one of the reasons for the decision(s) made by FSH.

13. After applying the principles and material facts outlined in Paragraph 12 to the factual circumstances of this case, the Board has determined the following:

a. FSH has satisfied the Board, on the balance of probabilities, that its decisions not to offer S.M. any further shifts or work assignments following the meeting of February 20, 2007, and to reject S.M. on probation by its letter dated April 23, 2007, [Ex. 4] were not influenced by the fact S.M. had raised safety and health concerns.

b. Having made this finding, the required *nexus* between the discriminatory action(s) and the fact S.M. was exercising a right under 42(1)(f) of the *Act* has not been established. Accordingly, the appeal of FSH will be allowed and the order of the Director will be set aside. As a consequence, the order of the Officer issued on May 8, 2007, is also rescinded.

c. As to the Director's request that the Board ought to award S.M. monetary damages, regardless of the final disposition by the Board, based upon the tacit agreement reached between the parties [see Paragraph 11, *supra*], the Board finds that such relief is not warranted in the circumstances. Given the findings of the Board, *supra*, monetary redress could only be awarded for the period from September 4, 2007, to the date of this Order, and such relief could only be based on the provisions of the Agreement [Ex. 6]. Without commenting on all applicable provisions, the Board notes that the employees covered by the Agreement are casual employees and are assigned work on a case-by-case basis [Article 9]. Articles 11.01 and 11.02 provide that there is no obligation on FSH to offer work to any employee nor is there an obligation on any employee to accept work that is offered and any employee who does not work for forty-five calendar days may be terminated at the sole discretion of FSH. There are no seniority rights under the Agreement, meaning that an employee has no right to claim any particular shift or shifts. Terms and conditions such as these, which were binding on S.M., militate against the Board making an order of compensation because such an order would not only be speculative but would also be inconsistent with the core determinations of the Board on the merits of the appeal.

T H E R E F O R E

The Manitoba Labour Board **HEREBY ALLOWS** the Appeal of the Appellant, Manitoba Family Services and Housing, filed on September 4, 2007, and, pursuant to Section 39(6) of the *Act*, the order of the Director, Workplace Safety and Health, issued on August 20, 2007, is **SET ASIDE**.

DATED at **WINNIPEG**, Manitoba, this 26th day of November 2008 and signed on behalf of the Manitoba Labour Board by

"Original signed by"

W.D. Hamilton, Chairperson

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