ONTARIO LABOUR RELATIONS BOARD

3990-10-OH Shlomo Conforti, Applicant v. **Investia Financial Services Inc. and Industrial Alliance Insurance and Financial Services Inc.**, Responding Parties.

BEFORE: Brian McLean, Vice-Chair.

DECISION OF THE BOARD: September 23, 2011

1. By decision dated May 19, 2011 the Board invited submissions from the applicant regarding whether this application made out a violation of s.50 of the *Occupational Health and Safety Act*, (the "OHSA") on the facts alleged and/or whether given the facts alleged, the application was something the Board should inquire into. The applicant filed submissions in response to the Board's invitation and also requested reconsideration of a decision made on May 19, 2011. The aspect of the May 19, 2011 decision which is the basis of the request for reconsideration is the Board's decision to receive and consider the employer's response to the application despite the fact it was delivered late to the applicant. I will deal first with this issue.

2. The Board's Rules describe the way in which applications and responses are to be delivered and filed and the time within which each must occur. The Rules provide that the response to the application must be "delivered" to the applicant before or at the same time as, the response is filed with the Board. Delivery of a Response is effected when the responding party faxes the response, hand delivers the response, posts the response by regular mail or gives the response to a courier to be delivered. The date a document is delivered is the date that document is received by the other party. A response delivered by regular mail is deemed to be delivered on the fifth day after the document was mailed (see Rule 6.7).

3. In this case the Board eventually set a date for response to the application as April 1, 2011. That was done by way of decision dated March 15, 2011 which said in relevant part: "the timeline for *filing* the response is hereby extended until April 1, 2011" [emphasis added]. The response was received by the Board on that date. Included with the response was a certificate of delivery indicating that the response was "posted by regular mail on April 1, 2011 at 2:00 p.m.". As a result, assuming the certificate of delivery was accurate, the response was "filed" in a timely fashion but possibly not delivered to the applicant on time. The applicant asserted the response was delivered late and asked the Board to note the respondent in default. There was no suggestion there was any prejudice to the applicant as a result of the delay.

4. The decision of the Board which the applicant requests reconsideration is in paragraph 2 which simply states:

> 2. The responding party filed its response with the Board on time but was arguably three days late in delivering its response to the applicant. To the extent necessary, the Board extends the time for the response to be delivered so that it is timely.

5. The Board's practice is to be quite lenient with certain time limits where no prejudice is alleged and where time is not of the essence. In this regard, Rule 3.2 provides a broad discretion and permits the Board to extend or abridge time limits as the Board considers advisable. I note that in this case the labour relations officer was to report back to the Board regarding settlement efforts by April 15, 2011, so any hearing of the application would not be delayed by the late delivery of the response. Accordingly, the Board did what it normally does in situations where there may be disputes about delivery. It raised the issue of a possible failure to make delivery on time and extended the time for filing the response. I note that it is only a possible failure to make delivery on time because the Board's March 15, 2011 decision only set a deadline for "filing" the response and set no deadline for delivery. The purpose of that aspect of the May 19, 2011 decision was to get past the delivery issue and on to the merits of this case.

6. Therefore, the applicant's suggestion that the Board in its decision "maliciously implies that the Applicant is lying" is wrong. The response was likely not "delivered" on time within the meaning of the Board's Rules, but there may have been an issue about whether the Board's March 15, 2011 decision was complied with. The Board recognized that this was simply not an issue worth a dispute so the time was extended if it was necessary to do so. The use of the word "arguably" in the decision is simply a device to avoid making a specific finding of fact where the Board has not received evidence or argument. It suggested nothing about the applicant. That decision was correct.

7. The applicant also questions the Board's omission of section 50(2) of the OHSA in the recitation of the relevant statutory provisions in the decision. He states:

> In my humble opinion, the Vice-Chair was not trying to save paper, but simply trying to eliminate from the untrained eyes of the Applicant the fact that in filing a complaint I'm fulfilling my rights under the law in the proper, prescribed way. In my eyes this is a malicious and prejudiced omission intended to obfuscate the Applicant, who is not represented or assisted by any lawyer.

8. Section 50(2) of the OHSA simply states that an employee may elect to have a complaint alleging a violation of section 50(1) dealt with by an arbitrator under a collective agreement (if the employee is represented by a union) or by the Board. Since this is an application made to the Board and the applicant is not unionized it was omitted as irrelevant.

9. I turn next to the issues which caused me to issue the May 19, 2011 decision: whether the application discloses a breach of the OHSA on its face and, if it does, whether the Board should inquire into the application.

10. With respect to the first issue, it is not at all clear that the conduct complained of here – being discharged for making a harassment complaint – is a violation of the OHSA. In this regard, the Board must find its jurisdiction with respect to an application in the legislation, in this case the OHSA. The Board's authority to deal with a matter under s.50 of the OHSA arises when a worker complains that he or she has been subject to dismissal or discipline, threat of dismissal or discipline, intimidated or threatened or coerced by employer's because the worker has "acted in compliance with the Act"; when a worker has given evidence, or when a worker "has sought the enforcement of the Act or regulations". The Board cannot take jurisdiction over something unless the OHSA or another piece of legislation says it can. Section 50 of the OHSA tells the Board when it can take jurisdiction over health and safety reprisal complaints. There are three bases upon which the Board can take jurisdiction under section 50 of the OHSA: - when a worker

has "acted in compliance with the Act"; when a worker has "given evidence"; or when a worker "has sought the enforcement" of the Act or the regulations. In my view, the latter basis is the only one that applies in the "typical" harassment complaint situation as in this case.

11. In this regard, section 32.0.1(b) of the OHSA requires an employer to create a policy with respect to workplace harassment. Sections 32.0.6 and 32.0.7 of the OHSA require an employer to develop and maintain a program to implement the policy with respect to workplace harassment, and to provide a worker with information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment. The Applicant makes no allegations that the Respondent has not fulfilled these obligations or that he was discharged for seeking to enforce these provisions of the OHSA.

12. The OHSA provides no further duties or obligations with respect to workplace harassment. Harassment and workplace violence provisions were only recently added to the OHSA. The language of the new amendments to the OHSA appears to specifically omit an obligation to prevent workplace harassment from further duties and obligations where new obligations were created with respect to workplace violence issues:

> (a) Section 32.0.3, which addresses the requirement for a risk assessment in respect of workplace violence, states in subsection (4): "An employer shall reassess the risks of workplace violence as often as is necessary to ensure that the related policy under clause 32.0.1 (1) (a) and the related program under subsection 32.0.2 (1) continue to protect workers from workplace violence."
>
> (b) Section 32.0.5(1) states: "For greater certainty, the employer duties set out in section 25, the supervisor duties set out in section 27, and the worker duties set out in section 28 apply, as appropriate, with respect to workplace violence."
>
> (c) Section 43, which addresses the right of a worker to refuse unsafe work, states at subsection (3)(b.1): "A worker may refuse to work or do particular work where he or she has reason to believe that, (b. 1) workplace violence is likely to endanger himself or herself."

13. Therefore, it appears the OHSA only requires an employer to put a workplace harassment policy and program in place and to provide a worker with information and instruction as appropriate. The OHSA does not provide any further requirements and, in particular, does not provide that the duties under ss. 25, 27, and 28 apply with respect to workplace harassment. Further, the OHSA provides no specific rights to a worker with respect to workplace harassment.

14. To look at it another way, the OHSA specifically gives the Board the power to enquire into the situation where an employee is fired for complaining about a missing guard on a machine but does not specifically give the Board the power to enquire into the situation where an employee is fired for complaining about harassment. In the case of an employee who claims that the workplace is unsafe because a machine is lacking a guard, the employee is, when complaining, seeking to force the employer to comply with the statutory obligation to ensure protective devices as prescribed in the Act are provided (section 25(1)(a)) or take every precaution reasonable in the circumstances for the protection of a worker (section 25(2)(h)).

15. In the case of an employee who complains that he has been harassed, there is no provision in the OHSA that says an employer has an obligation to keep the workplace harassment

free. The only obligation set out in the Act is that an employer have a policy for dealing with harassment complaints. The legislature could very easily have said an employer has an obligation to provide a harassment free workplace but it did not.

16. If the employer simply ignores its obligations and doesn't create a policy, and a worker asks the employer to do so, and the employer penalizes the worker, then that worker can apply to the Board under section 50 on the basis that he was seeking enforcement under the Act. He or she seeks enforcement of the Act by asking the employer to comply with its obligation. In response to that request, the employee was penalized. A similar argument can be made for the worker who points out to the employer that a specified portion of the statutory requirement has been omitted. If, for example, an employer's policy had no measures and procedures for workers to report incidents of workplace harassment to the employer, and an employee was fired by insisting that the policy be changed to accord with the Act, that person can apply under section 50 on the same basis.

17. What it appears the Board does not have the authority to do is to adjudicate upon the practical application of a policy that otherwise complies with the Act. If an individual complains under an employer's workplace harassment policy and doesn't like the way the employer handled the investigation (i.e. it didn't interview anyone), and then that person complains to the employer about its poor investigation and is fired, the Board appears not to have the authority under section 50 to deal with that situation. The discharge is not a reprisal as defined under section 50, because the Act does not dictate how an employer will actually investigate a harassment complaint and protect a worker who complains about that practical task not being performed properly. The Act just does not give us the authority to deal with this situation.

18. The issue comes back to the rules of delegated statutory power. The Board only has the ability to adjudicate on matters that the Legislature, through the Act, tells us we have the authority to adjudicate upon and all powers which are practically necessary for the accomplishment of the statutory objective. Our authority to deal with reprisal complaints is set out in section 50 of the Act. With respect to the new harassment provisions, the Board's authority appears very limited. The Legislature could have very clearly opened up the Board's authority beyond what is there, but it chose not to. The Board has no power to decide otherwise. Individuals who find themselves in situations that the Board cannot remedy will usually have other options, via a grievance or a court action. But if for some reason they don't, the Board does not have the authority to create some free-standing jurisdiction in order to help them.

19. The history of harassment as a health and safety issue also supports this conclusion. Prior to Bill 168 (the Bill which brought the workplace violence and harassment sections into the OHSA), the Board frequently found that there was no protection in the OHSA for workplace harassment, or at least that the Board should not inquire into such complaints. (See *Meridian Magnesium* [1996] OLRB Rep. Nov/Dec 964, *Centro Donne Inc.* [1997] O.L.R.D. No. 309, and *Amdahl Canada 2000* CanLII 11966. *Ten Star Financial Services* 2009 CanLII 28174).

20. Given that history, in my view the Legislature would have been much more clear had it intended to make complaining about harassment a protected right under the Act. This is especially true given the fact that such an interpretation would likely significantly increase the Board's caseload.

21. However, it is unnecessary for me to determine in this case whether the Board has jurisdiction over alleged reprisal for harassment complaints. That is because if the Board does have jurisdiction over this kind of complaint, the Board ought to carefully scrutinize applications

at the outset. The risk is that the Board's resources will be overwhelmed by employee complaints arising out of routine disciplinary matters. This is just such a case. It is not a case the Board should exercise its discretion to inquire with having regard to s.50(3).

22. In the decision dated May 19, 2011 I raised the proposition that the behaviour on which the applicant complains might not constitute "harassment". The OHSA defines workplace harassment as meaning "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".

23. In the May 19, 2011 decision I noted there were one or two emails (the first of which was dated January 18, 2011) which appeared on their face to be simply employees doing their jobs in ensuring that the applicant complied with the employer's rules. The applicant took issue with my assessment in his submissions. He asserts the "harassment had been going already; this was just the peak that totally exasperated me, and was truly driving me into desperation". This assertion is difficult to reconcile with the application. In the application the applicant wrote "The harassment and provocative bullying *started* from Ms. Simone Maynard (please see attached e-mail dated Jan.18th 2011…" [emphasis added]. The applicant then goes on to generally describe the sequence of events that were set out in the Board's decision dated May 19, 2011. To the extent the applicant alleges there was "harassment" prior to this time, it is an entirely new allegation, it is not pleaded in the way required by the Board's Rules and is at odds with the statement made in the application.

24. It is worth repeating the facts at this point:

> …
>
> 4. The basic facts do not appear to be in dispute. The applicant was employed (or engaged as an independent contractor) by the responding party, Investia Financial Services Inc. ("Investia").
>
> 5. There appears to be some disputes concerning work practices between the applicant and another employee Simone. The applicant believes the other employee's e-mail constituted harassment. The dispute began when the other employee wrote to the applicant as follows:
>
> > Hi Shlomo,
> >
> > Please be reminded that the NCAAF for this plan is not in good order and the restriction has not been removed. The trade below will be permitted as 1 understand that you met with the clients last week and have explained why the NCAAF is not in good order.
> >
> > Please note that in order to have the trade restriction removed, the deficiencies noted must be corrected.
> >
> > Thanks,
> > Simone
>
> 6. The applicant replied as follows:
>
> > Simone,

> As I mentioned before the client WAS GIVEN THE RISK OF BORROWING, LEVERAGE and COMPLAINTS forms and disclosures.
> Please remove IMMEDIATELY all restrictions for transactions with this client. Otherwise, please escalate this situation immediately to the President of Investia, so that a decision may be made if I'm forced to leave Investia due to not being allowed to operate normally.
> Thank you.
> Shlomo Conforti, 7599-C3480

7. The applicant complained about Simone to his superiors:

> Sorry to bother you again, but the harassment of Simone is exasperating, and I can not continue to work this way.
> Today I was trying to do transactions for two other clients, …, and in both instances there was a Stop Trade Plan Watch obstruction, imposed by Simone, just as in yesterday's case of the client …, for what must be the same reasons. Both these clients KYC were done, discussed and misunderstandings resolved through you John, with Simone.
> Please resolve once and for all this untenable situation, or, alternatively, as I suggested, let us discuss with Louis my separation from Investia due to harassment and not being allowed to operate normally.
> Thank you for your immediate attention to this matter.
>
> Shlomo Conforti,

8. Management communicated to the applicant about the technical issue involved. The applicant asserts that management did nothing about the "harassment and provocative bullying," however. The applicant believed a resolution was reached in a way which included Simone no longer communicating with the applicant.

9. However, the next day a different employee, Debbie, wrote to the applicant about a different issue as follows:

> As per weekly advisor communications dated September 09, 2010 -the deposit batch must be closed everyday and faxed with the deposit slip to Investia.
>
> We would like to remind you that deposits must be closed every day in Univeris. Deposit slips and daily reports should only include the day's trading activity. Any differences must be accounted for directly on the report in order to facilitate our account reconciliation process. In addition, all cheques for each day's purchases must be deposited at the bank on the same day.
>
> We kindly request that you fax your daily deposit reports and stamped bank slips or ATM slips to Head Office

10. The applicant considered the e-mail further harassment and responded as follows:

> Debbie,
> I closed this batch already, on Jan 17th. Please see attached image copy. This was faxed to your Processing … number as required. Proof of this faxing is available.
> Please explain back to me, as soon as possible, why you are asking me for this, and who/what prompted you to do so. Also please clarify to me in which department of Investia do you work, in what capacity and what is your role, as I do not understand this situation.
> Thank you. I'm looking forward to your prompt and clear reply with answers to all my questions.
> Best regards,
> Shlomo

11. Investia's Manager of Customer Service, Guiseppe Nocera, wrote to the applicant regarding what had occurred:

> Good afternoon Shlomo,
>
> Debbie my employee came to me with the following e-mail from you. I think I'm in a better position to provide you with answers to your question.
>
> Every morning, in Client Services, we have a report where it is indicated all the Branches who did not close their batches the previous day. My Team has the responsibility to send a reminder to these Branches to close their batch and to fax or e-mail to us the supporting documents. You have received the following reminder for a batch you did generate but you did not click on the next button which says "process" so you batch was still opened. Once you click "process" it will give you a confirmation and there should be a number which you don't have on the attached report. Also, there is no proof of deposit attached to this report so it is not valid for our trust accounting. If you still continue to do it this way, you will show up in our daily report and you will be receiving regular reminders from my Team.
>
> Also, next time you have an issue, please ask for a Supervisor. This is a request from Head Office. I found the tone of your message very abusive and offensive for an employee just doing her job. I don't think I will accept this kind of attitude in the future.
>
> Best regards,
>
> Giuseppe

12. In reply the applicant wrote to the manager as follows:

> Dear Mr. Nocera,
>
> I actually am not reading all details of your letter, but in the present, never mind the future, I am positively and completely sure, without any doubt or any lack of conviction, that I am not, and will not, accept your attitude. So, you can take your

> time until the future will catch up with you and my attitude, and in the mean time I'm dismissing you, and your attitude, as simply irrelevant and of no consequence. And, by the way, young Mr. Nocera, in case you don't know it yet, you should not abusively and possessively refer to a worker as "my employee", that is offensive, demeaning and belittling language, she is" not yours at all "!!! You are simply incompetent. End of paragraph.
>
> Yours sincerely,
> Shlomo Conforti (Mr.)

13. Mr. Nocera responded as follows:

> No comment. As I'm incompetent, the top Management will be taking care of this.

14. Finally, the applicant wrote back to Mr. Nocera:

> Excellent! You made my day Recognition of one's own incompetence is the start of realizing one has reached the limit of his own capabilities!
> And by the way, neither Debbie nor anyone else is "Your employee ", in spite of you have reached the limit of your incompetence, as you don't pay her a cent of your own money for her hard work, she simply, and unfortunately, reports to you as a fellow worker, she is an " Investia " employee" which pays her for her work, and pays you, without any good reason, for your incompetent" attitude".
> I'm looking forward to discuss this matter with Investia's President. And the matter of who and why you are copying in your" attitude e-mails".
> In the mean time, go back to your little corner of incompetence, while we, the Financial Advisors that Investia works with us, create the business that provides the money we pay Investia, so that Investia can pay some employees like Debbie, to work with us, and some incompetents like you, to sit and do damage, harass and abuse those who provide you with the means to make a living.
> As I said before, you are irrelevant and of no consequence. Back to your little corner. End of concluding paragraph.

15. The applicant's emails were sent to upper management, the Assistant Chief Compliance Officer for Investia. He wrote to the applicant as follows:

> Mr. Conforti, please govern yourself accordingly as your continued verbal bashing of the Investia staff, who are here to assist you is absolutely unacceptable and will not be tolerated. I assure you, the people copied on this email are relevant.
>
> Giuseppe and Simone, I'm sorry you have to put up with this non-sense.
>
> John, I look forward to addressing this today during our conference call.

> Regards,
>
> Cas Litwin I Assistant Chief Compliance Officer

16. The applicant responded as follows:

> "I'm looking forward to further analyze your "non-sense "comments about relevance in discussions about the harassment and abuse that I" have been submitted to. I had requested previously to discuss this harassment with the President of Investia, which I'm looking forward to do. In the mean time , I would suggest you find advise from competent people about governing your language skills so they may become, hopefully in the not too distant future, more acceptable and ,perhaps, even tolerable. I wish you have some time to prepare your communication skills in preparation to your conference call. If you need any assistance from me, please feel free to ask for it, we Financial Advisors are here to support you in becoming more competent. l'm really sorry, and profoundly regret, having had to put up with your non-sense. Comments ? Call me any time, no need for conference calls, I'm not incompetent like others."

…

25. I do not accept that the two emails sent to the applicant by two different compliance employees amounted to a "course of vexatious comment or conduct" against the applicant. Nor is there any possibility - based on the materials filed with the application – that the compliance employees knew or ought to have known that the comments were unwelcome. Harassment is not the same as an employer (or employees responsible for ensuring that other employees comply with rules and regulations) ensuring that rules are complied with. No person acting reasonably could have thought the two emails amounted to harassment. And thereafter, the employer's conduct amounted to simply dealing with the applicant's behaviour.

26. Nothing in the submissions affects my concern expressed in the May 9, 2011 decision regarding whether this application is one that the Board should inquire into. The applicant's employment was terminated by notice given February 16, 2011. There is no doubt that it occurred almost immediately after the applicant, by letter dated February 14, 2011, requested that the responding party investigate his harassment complaint. There is no doubt (assuming, that harassment complaints are protected activity under the OHSA) that termination of employment following so closely on the heels of a complaint would normally cause the Board significant concern. However, close review of the materials filed, and despite the reverse onus provisions contained in section 50(5) of the OHSA, eliminates the concern.

27. There is no dispute that on February 8, 2011 the applicant was advised that his communications were "less than professional, specifically belligerent and derogatory in nature". This advice was undoubtedly accurate. At that time he was warned that any further such communications "will result in your immediate termination".

28. There is also no dispute that, as noted, on February 14, 2011 the applicant wrote to Cas Litwin, Assistant Chief Compliance Officer, to request an investigation into his harassment complaint. The applicant's email stated:

From: SCA [mailto: scacanada@globalserve. net]
Sent: Monday, February 14, 2011 7:43 PM
To: Cas Litwin
Subject: Harassment Complaint

February 14, 2011

Mr. Cas Litwin
Assistant Chief Compliance Officer

Dear Mr. Litwin,

RE.: Harassment Complaint

Thank you for your letter of February 8, 2011, received on February 11th, 2011.

As per the forwarded e-mails, which will follow this one, it will be noted that I had brought to Investia's attention the harassment that I had been subjected to by Compliance personnel, which was perpetrated in a completely un-professional way, and in derogatory, demeaning and bellicose manner, before your intervention. For some strange reason this was not taken seriously by Investia's management.

I would like to remind you that in keeping with Investia's Compliance Policy and Procedures Manual, Section I, General, Sub-section (A) Standard of Conduct" All Officers, Employees , Branch Managers and Representatives must at all times deal fairly, honestly and in good faith....". Failure to comply with all applicable laws and the policies and procedures outline in this Compliance Policies & Procedures Manual may be sufficient cause for dismissal".
(This applies obviously even to the employees of Compliance Department).

In light of the seriousness of the harassment misconduct, in an un-fair, dishonest and bad faith manner, I'm providing you with this formal letter advising you that my expectations and undeniable rights, as all officers, employees, branch managers and representatives of Investia and Industrial Alliance as one, are as outlined in the above section of the Compliance Policy and Procedures manual, and any further harassment or similar unacceptable behaviour , should be addressed immediately by Investia/Industrial Alliance Executive Management, in accordance with Laws regulating Labour in Canada. In that case all previously e-mails and recorded voice messages will be retrieved and presented as evidence of the exasperating harassment.

I'm certainly happy that finally this Harassment Complaint has been brought to the attention of Investia's President, as I requested early-on, in my original memo of January 18th, (see forwarded e-mail, dated Jan 18th). I strongly believe that no Corporation and its Executives are too big, nor any harassment case too small, to be kept from escalating to the highest level, and taken care of seriously. I have no doubt that Mr. DeConinck will likewise review it with his own colleagues at Industrial Alliance Executive level.
I'm sure that at that opportunity Investia/IA Executives will wish to re-visit the unique situation were the perpetrators of harassment, its investigators, its judges and its executioners, were all and one the same people.

> I do share with you the hope that this most senseless (as in non-sense) act of harassment will not be repeated by yourselves at Compliance, and hence there will be no need for an immediate opening of a process of separation due to harassment, with all its most serious implications and major un-intended consequences.
> A copy of this Harassment Complaint letter will be retained in your file, obviously.
>
> Finally, as a true believer in good management practices, and not only in providing early" heads -up "to Executive Management, but also in the" open-doors" policy, I want to invite you to contact me personally, and speak to me, at your convenience, anytime you believe there is a serious issue that concerns both of us, and Investia -Industrial Alliance. Please do not hesitate at all to call me.
>
> Yours very truly,
>
> Shlomo Conforti
> Financial Advisor
>
> P.S. As soon as I receive the long overdue delivery of Investia stationery, I will mail you a hard-copy of this letter, to be retained in your hard-copy file.
> [emphasis added]

29. Given the applicant's history of blatantly unprofessional and derogatory language (as set out in the May 19, 2011 decision) and his practice of unreasonable and unfounded harassment complaints it is not surprising the company took the action it did. There are implicit threats in the body of the email and it is distinctly disrespectful in tone even if not at the same level as his earlier emails. In my view, it is apparent on the face of the application that the employer naturally came to the conclusion that the applicant was not willing to communicate in a more appropriate manner or accept compliance department oversight. The employer acted on that conclusion.

30. For all of the foregoing reasons, I am of the view that this application has no prospect of success as pleaded even if the Board has jurisdiction to inquire into it. Accordingly, the Board declines to inquire into this application and it is dismissed.

31. Finally, I understand the applicant has made a number of submissions to the Chair of the Board. He was informed that the submissions ought to be sent to me for my consideration. However, he did not do so. Nevertheless, I have reviewed the submissions which are essentially unsupported by any facts. The allegations are without merit and are dismissed by the Board.

"Brian McLean"
for the Board