

ONTARIO LABOUR RELATIONS BOARD

0970-88-OH Brian Sidorchuk, Complainant v. Westbrook Technologies Inc., Respondent.

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members M. Rozenberg and E. G. Theobald.

APPEARANCES: David G. Leitch and Brian Sidorchuk for the complainant; David Hager for the respondent.

DECISION OF THE BOARD; November 4, 1988

I

1. This is a complaint under section 24 of the Occupational Health and Safety Act. The complainant, Brian Sidorchuk, contends that he was discharged because he raised a variety of safety concerns, refused to work in conditions that he believed to be unsafe, and brought in an inspector from the Ministry of Labour to examine the situation. The respondent employer replies that Mr. Sidorchuk was not discharged because of his safety complaints, but rather because of his poor productivity and work performance. At the time of his discharge, Mr. Sidorchuk had been actively employed by the respondent for about six weeks. The relevant provisions of the statute are as follows:

24.-(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 or has sought the enforcement of this Act or the regulations.

...

(5) On an inquiry by the Ontario Labour Relations 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.

...

(7) Where on an inquiry by the Ontario Labour Relations 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.

2. This case does not raise any novel legal propositions. The conclusions urged upon us by the contending parties are largely matters of fact. The key question is whether the discharge of the complainant was motivated in whole, or in part, by a desire to penalize him because he sought to exercise rights protected by the Occupational Health and Safety Act.

3. Because the Board must make inferences about motive from the evidence before it, the credibility of the parties' witnesses is necessarily a critical element in the equation. In assessing the credibility of those witnesses, we have taken into account such factors as: the demeanour of the witnesses when giving their evidence; the clarity, consistency and general plausibility of their testimony when weighed against other testimony and subjected to the test of cross-examination; the responsiveness of the witnesses when questioned; their apparent ability to resist the tug of self-interest or self-justification when framing their answers; and what seems to us to be most probable and plausible in all the circumstances. On these criteria, we are inclined to accept the evidence of Kenneth Westbrook, a principal of the respondent, whenever it is in direct conflict with the evidence of the complainant.

4. We recognize, of course, that an untrained layman cannot be expected to recall with precision events which may have occurred some months before; moreover, some allowance must be made for the natural tendency of some witnesses to portray their own position in its most favourable light. However, even making such allowances, we are satisfied that the complainant was not being totally candid with the Board and we have taken that into account both in assessing the substance of his allegations, and in deciding whether to exercise our discretion under section 24(7) of the Act.

II

5. The respondent company is a manufacturer of chemical compounds with business premises in two adjoining units on McNicoll Avenue in Scarborough, Ontario. It is a small family enterprise run by Kenneth Westbrook, his brother Stephen, and his wife Judy. At the relevant time, the complainant was the only other employee of the company.

6. Kenneth Westbrook is an engineer. From 1971 to 1986 he worked for W. W. Wells Limited, a manufacturer of plating solutions, protective coatings for metals, and cleaning, buffing and polishing compounds. He was fired in October 1986 and incorporated Westbrook Technologies Inc. ("WTI") in December 1986. Stephen Westbrook, who was also employed by W. W. Wells Limited, joined his brother's business in January 1987.

7. WTI manufactures additives to enhance electroplating solutions, and coatings to protect metal surfaces. During the company's first year, Ken Westbrook was responsible for the design and manufacture of the firm's products together with a good deal of related manual labour. Westbrook looked after the shipping and receiving, the mixing, packaging, and storage of the ingredients, and the general maintenance of the machinery. His brother Stephen took care of the sales and paperwork. His wife Judy worked in the office and did the bookkeeping.

8. The details of the manufacturing process need not be reproduced here. It suffices to say that it involves the mixing or blending of both dry and liquid chemical materials in accordance with an established "recipe", then pouring the resulting product into containers for shipment to the customers. Because some of these ingredients are corrosive or toxic, it is necessary to use protective clothing and safety equipment, and to ensure that the manufacturing area is properly ventilated.

9. Throughout 1987 Kenneth Westbrook was a "jack of all trades", performing a variety of product development and manufacturing functions by himself with the occasional assistance of his brother and his wife. In the summer of 1987 the company hired a summer student identified in the evidence only as "DJ". At the end of the summer "DJ" left to go back to school.

10. By January 1988, there was a sufficient volume of business to warrant hiring a permanent employee. An individual named Bill Jeffers worked for the firm for about 6 weeks in January-February 1988. The complainant was approached to replace Jeffers at the end of March 1988. At the time, the complainant was working for MacDonald Douglas Aircraft.

11. On April 5, 1988 Kenneth Westbrook interviewed the complainant and outlined the job requirements. Westbrook warned that it was a difficult job with a variety of facets. There was a large component of manual labour. Mr. Sidorchuk would be expected to produce the company's products at a rate of 40,000 lbs. per week. In addition, his job would involve the maintenance of the machinery, the operation of a fork lift, the organization and cleaning of the warehouse and manufacturing area, and some paper work.

12. Westbrook indicated that there were no job guarantees and if the complainant's performance was inadequate he would not be retained. On the other hand, Westbrook advised that if the complainant did fulfill his work responsibilities, he would have an opportunity to grow with the company, and if more employees were hired he might become their supervisor. The complainant was offered a wage rate competitive with that of MacDonald Douglas and told that, with business success, there would be a profit-sharing plan. However Westbrook also warned the complainant that there was a cloud hanging over the company's business future. W. W. Wells was suing Westbrook and his company, alleging the improper solicitation of customers and use of proprietary information. W. W. Wells Limited was claiming damages in the sum of \$4 million. If that suit were successful, it would put WTI out of business.

13. The complainant testified that during this job interview there was no discussion of performance standards. He said he was not advised of the manufacturing target of 40,000 lbs. per week, and it was never suggested that a failure to meet the company's expectations might result in his termination. When pressed in cross-examination the complainant admitted that he knew he was expected to meet the

40,000-pound target and we are satisfied that the complainant also knew, or ought to have known, that if he did not perform to the company's expectations, his job would be in jeopardy. To put that production target in perspective, we should note that it was fixed at that level by Kenneth Westbrook, based upon his own experience in the job. The uncontradicted evidence is that the complainant's replacement has recently produced at a rate of 49,000 lbs. per week while still attending satisfactorily to his other duties.

14. The complainant commenced work on Monday, May 16th. In the following days there were a number of discussions about safety matters and the kind of protective equipment that he would require. During the first few days, Westbrook outlined the hazards of the job, explained the production process, and provided the complainant with assistance. On May 18th they discussed the adequacy of the existing face masks and decided to obtain a new respirator and a variety of "cartridges" designed to screen out specific toxic materials. Certain necessary cartridges were temporarily out of stock, and the company made no immediate effort to obtain them from another supplier. The company did purchase new lab coats, sleeve protection and a face shield. The forklift, about which the grievor complained, was shortly scheduled for inspection and repair.

15. On or about May 19th Westbrook discussed the installation of a shower, but at that time, neither he nor the complainant had a clear idea of the kind of shower which would be required. As the complainant put it, both he and Westbrook were "on the wrong track". The complainant suggested to Westbrook that he (the complainant) had a friend in the bathroom business who might be able to give the company a good price. Westbrook was content to let the complainant pursue the matter.

16. As early as April 5th when the complainant was being interviewed, Westbrook indicated that the complainant would be expected to help construct a platform around the large mixing machine. The platform would make it much easier to pour material into the vat. However, whatever his intentions, (as with the shower) Westbrook did not move immediately to make these improvements.

17. On or about May 20, 1988 Westbrook met with the complainant and reviewed his progress. While Westbrook was not unduly critical because the complainant had only been there a few days, Westbrook was concerned about both cleanliness and the organization of the manufacturing area. This was not just a question of efficiency or productivity. The presence of a

chemical residue could lead to an unanticipated and perhaps dangerous reaction. For example, Mr. Sidorchuk complained about the production of ammonia, and the Ministry of Labour inspector eventually directed that the complainant's respirator should have cartridges designed to protect him against that noxious gas. Much earlier, however, Westbrook had pointed out to the complainant that the best way to minimize the risk of an unanticipated generation of ammonia gas, was to ensure that the equipment and implements he used were properly cleaned. Westbrook was not oblivious to the problem.

18. The complainant initially denied that there were any criticisms of his efforts to keep the work place clean. He later conceded that there were such criticisms but asserted that they were unwarranted because Westbrook had "thwarted his efforts to clean".

19. In the first couple of weeks of the complainant's employment, Westbrook was not unduly critical of Mr. Sidorchuk's productivity because he was still learning the job. By mid-June, however, productivity was a concern. The complainant was producing at a rate of only 18,000 lbs. per week which, in Westbrook's view, was well below target; moreover, even at this relatively low rate of production, he was not keeping up with his ancillary duties - in particular, keeping his work area clean. The complainant was also advised to keep his tools in a centralized location so that he would not have to waste time looking for them.

20. In his evidence before us, the complainant asserted that he was never criticized about his work habits, productivity, or work performance. We do not accept this submission.

21. June 24, 1988 was something of a watershed. That day, the complainant mixed the wrong ingredients resulting in a material loss of about \$1,000.00. The complainant claims that he was confused because the valve on a chemical drum had been moved the day before. Kenneth Westbrook testified that, in his view, it was simple carelessness because the complainant had neglected to read the labels on the drums. Westbrook added that this was not the complainant's first mistake of this kind.

22. On June 24th the complainant also had a mishap with the forklift truck. He drove it into the door separating the two units, causing structural damage. The complainant decided that he was having a bad day and should go home.

23. Westbrook had German sales representatives in his office at the time of these incidents. It was an unfortunate interruption. Westbrook concluded that the complainant was simply not "working out". On June 25th he wrote in his business diary that it was necessary to "dump Brian" and replace him with "DJ" (the student who had worked for the company the previous summer). We conclude therefore that on June 25, 1988, PRIOR to Mr. Sidorchuk's work refusal or complaint to the Ministry of Labour, Westbrook had decided that his employment would be terminated. It was just a matter of timing and securing an appropriate replacement.

24. On June 27th the complainant was not at work. On June 28th Westbrook had a scheduled meeting with Bill Wells, the principal of W. W. Wells Ltd. to discuss their pending litigation. There was no opportunity or inclination to pursue the question of the complainant's continued employment. On June 29th a Ministry of Labour inspector visited the plant in connection with Mr. Sidorchuk's safety complaints and refusal to work.

25. As a result of the Ministry inspector's visit, a number of orders were made to, inter alia, rectify the ventilation system, install a déluge shower, provide a platform around the mixing machine, put in an eyewash station, repair the door, and ensure the availability of respirator cartridges to meet any potential hazard. According to Westbrook, during or near the end of this investigation the complainant said "you can't fire me now". The complainant denies this statement absolutely and testified that he had "no idea, at the time, that he (Westbrook) was thinking of firing me". Yet he unexpectedly removed his tools and a picture from the plant, and he admitted on cross-examination that he had fears for his job as early as June 27 when he made anonymous complaints to the Ministry of Labour, and had further doubts about his job security on June 29-30. The initial unequivocal denial followed by a grudging admission merely undermines his credibility on more important matters.

26. On June 29th, the complainant was offered alternative work: namely, moving materials around the work area with the use of a lift truck, and unloading vehicles or loading finished product. The complainant refused to perform that work because, he said, it would require him to be in the plant area which, in his view, was unsafe. There was no manufacturing going on at the time. We are satisfied that the alternative work was reasonable in the circumstances.

27. On July 4, 1988 the complainant did not appear for work but rather phoned the company late in the afternoon to

advise that, on his doctor's instructions, he was making a workers' compensation claim and would be off for a week or two. The next day, Westbrook spoke to officials from the Workers' Compensation Board and was told that it was his responsibility, as an employer, to make a report, setting out the circumstances surrounding the complainant's claim. On July 6, 1988 the complainant appeared to collect his cheque, but refused to provide Westbrook with any information about his workers' compensation claim or the time from which it would run. He told Westbrook that he was not prepared to discuss the matter "on his own time". He would only provide the requested information during his working hours when he would be paid for it. This uncooperative response merely confirmed Westbrook's earlier conclusion that the complainant's employment with the company should be terminated.

28. On July 11, 1988 the complainant reported for work - late. He was advised that his work was being terminated. He was paid for work performed up to and including June 28th, and for four hours on June 29th. On June 30th, the complainant purported to "rescind" his work refusal, but, at the same time continued to refuse the alternative work offered to him the day before. He spent about two hours with a further Ministry of Labour official who visited the premises, and was then sent home. The complainant was not paid for this two hours.

29. The complainant testified that his activities following his discharge were not intended in any way to inconvenience the company or cause it economic harm. He said that he was acting purely out of "civic duty", "concern for the public", or a desire to ensure compliance with the law. He maintains that he would have made the same complaints even if he had continued to be an employee. We do not believe him.

30. Following the complainant's termination, he appeared at the employer's premises, taking pictures. He said, without elaboration, that such pictures would be "valuable for the future". He also stopped a truck driver making a delivery to the plant, and while we do not have direct evidence from the driver as to what was said, the complainant admits that he sought to dissuade the driver and his firm from dealing with the respondent. Kenneth Westbrook's evidence (albeit hearsay) was that the complainant suggested that the company was "bankrupt" or "going out of business". In any event, there is no doubt that Mr. Sidorchuk was interfering with the company's deliveries. It is difficult to characterize such interference as the exercise of a "civic duty".

31. On or about July 11th Mr. Sidorchuk contacted Bill Wells, a principal of W. W. Wells Limited which, as we have already noted, was engaged in litigation with the respondent. Mr. Sidorchuk testified that his only purpose in making such contact was to discuss the termination of Bill Jeffers who had briefly worked for the respondent and had previously worked for "Wells". It is not clear why Bill Wells would have known anything about Jeffers' experience at WTI or why the complainant would be interested. The complainant told the Board that he gave Wells "no glimmer of hope" that he (Wells) would receive any information which might be useful in his pending litigation with the respondent, although Mr. Sidorchuk did advise Wells about his intention to make complaints before certain regulatory agencies. Again, this submission is simply not plausible. The only reasonable inference, and the only reason why Wells would agree to meet the complainant, is that the complainant could provide information about the respondent's customers or production process which would be useful to Wells in its pending litigation.

32. For an individual who asserted before us, that he had no intention of causing his former employer inconvenience or economic harm, Mr. Sidorchuk's actions following his termination are rather difficult to explain.

33. We have already mentioned the complainant's meeting with Wells and his attempt to persuade a truck driver not to deal with the respondent. In addition, on or about July 15, 1988 Mr. Sidorchuk made a complaint to the Department of Transport concerning the way in which the company packaged, labelled and shipped its goods. He suggested that the company's packaging procedures, labelling or shipping methods were unsafe. He admitted in cross-examination that he had no evidence whatsoever to substantiate that claim. He was just "suspicious". He said he was not familiar with the shipping procedures, but suspected that there might be flaws there. He urged the Department of Transport to initiate an investigation. There is no evidence before us to suggest that the Department of Transport found any problems. On the contrary, according to Westbrook, there were none.

34. The complainant also contacted the Ministry of the Environment concerning what he alleged were improper procedures concerning the disposal of chemical wastes. Again there is no evidence before us to suggest that there was any illegal conduct in this regard.

35. The complainant also contacted the local fire marshal to urge an investigation of the company's labelling and storage procedures and its record keeping for the chemicals

kept on site. The complainant said he felt responsible for both the safety of the fire department personnel who might be involved in the event of a fire and for the safety of the public at large. Again, it is not our responsibility (nor is there any evidence before us) to establish whether there has been some breach of the local fire regulations. There is no evidence that the fire marshal found any problems.

36. Then there is the late-night phone call(s) to Mr. Westbrook's residence. The complainant called after 2:00 a.m., and when Mrs. Westbrook eventually answered the phone, he engaged her in a debate about the use of his car while he was an employee. The complainant said at one point in his evidence that he called because Ken Westbrook had told him that he could call any time. At another point he testified that he thought the Westbrooks might be on vacation and he wanted to test the company's "hot line". He later admitted that he knew the Westbrooks were not on holiday at the time of his phone call.

37. After hanging up, the telephone rang again, repeatedly. This time Mrs. Westbrook decided not to answer. The evidence cannot establish, beyond doubt, that it was the complainant again, but that is the most likely explanation.

38. The complainant also contacted the local police. He had heard, indirectly, that there was a shooting incident involving W. W. Wells Limited. Apparently, someone fired a bullet through a window. The complainant suggested that the culprit might well have been Kenneth Westbrook. The complainant, of course, had no direct information about this incident.

39. In reviewing these matters, we are mindful of our limited role. We need not determine whether the complainant's work environment was unsafe, whether the company's work practices may have contravened transport, environmental, or fire regulations, or even whether there may be some civil or criminal proceedings against the respondent or its principals which might ultimately be successful. Our primary concern is the one that we identified at the outset: whether the complainant's discharge was motivated in whole or in part by his purported exercise of rights protected by the Occupational Health and Safety Act.

40. Was the complainant's termination a breach of section 24 of the Occupational Health and Safety Act? In our view there has not. The timing of the complainant's termination is suspicious, coming, as it did, shortly after he engaged in a work refusal which brought in a Ministry of Labour

inspector; moreover, that inspector did make certain orders designed to rectify the conditions which the inspector believed to be unsafe. The work place was not as safe as it could be - a point which the company readily admits. To this extent, the complainant's concerns were justified (although we should note, parenthetically, that in a number of cases Westbrook himself had identified the need for action but had simply not moved quickly enough; and even the complainant concedes that Westbrook was an avid reader of safety magazines because of certain unfortunate experiences while he was working at W. W. Wells Limited).

41. On the other hand, the evidence establishes that Westbrook had decided to terminate the complainant's employment before Mr. Sidorchuk engaged in a work refusal and triggered the dispute settlement mechanism set out in section 23 of the Occupational Health and Safety Act. Westbrook was concerned about the complainant's work performance and had already decided that he should be replaced by the student who had worked for the company the previous summer (as in fact eventually occurred). The only question was the timing of the complainant's departure, and that process was interrupted by the events mentioned above and the complainant's decision to take two weeks off on workers' compensation. Any residual doubts about the timing of the complainant's departure were resolved when the complainant refused to cooperate in the filing of the employer's report on his compensation claim. Having regard to the totality of the evidence, we are satisfied that the complainant's termination was not a reprisal or penalty imposed upon him because he sought to exercise rights under the Act; however we are of the view that he would be entitled to payment, at his regular wage rate, for the time that he was actively involved with the inspector(s) in the investigation. This would amount to about two hours pay for the period he was engaged on June 30th. He is not entitled to any other payments, because we find that he was offered reasonable alternative work which he refused.

42. Should we exercise our broad discretion under section 24(7) to direct reinstatement? In our view, we should not.

43. The complainant was employed for only a few weeks. He had no established seniority or significant investment in this job. He was unable to meet the company's performance requirements. We cannot conclude on the evidence before us, that these performance requirements were unreasonable. The complainant was about to be fired at the time of the events giving rise to his work refusal, and that decision was made prior to the work refusal itself. If anything, his discharge was postponed by the events set out above.

44. Following his dismissal the complainant engaged in a pattern of conduct which (despite his denial) was obviously designed to cause difficulties, inconvenience, or economic damage to his former employer. His explanation that he was simply doing his "civic duty", and would have made the same complaints had he remained employed, is simply unworthy of belief; and such obvious lack of candour merely reinforces the conclusion that no viable employment relationship could be re-established. Likewise the late night phone calls, the innuendo in his visit to the police, the meeting with Bill Wells, the attempt to persuade truckers not to make deliveries, and the complainant's repeated assertion that Kenneth Westbrook is "morally bankrupt". Finally, even the complainant himself admits that he has no desire to return to work at WTI and that it is not in his best interests to do so.

45. In all the circumstances of this case, we do not think it is appropriate to make any order under section 24(7) of the Act.

"R. O. MacDowell"
for the Board