

**Making worker voice a reality under the Internal  
Responsibility System: The limits of Section 50 protections  
for workers experiencing OHS reprisals**

Andrew King\*, Wayne Lewchuk\*, Ellen MacEachen\*\* and Julia Goyal\*\*

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\* School of Labour Studies, McMaster University

\*\* School of Public Health and Health Systems, University of Waterloo

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## **Section One: The role of worker voice in Occupational Health and Safety**

Workers in Ontario have a right to know from their employer the hazards they face, a right to voice their concerns, both directly and through a representative, and the right to refuse unsafe work. The law prohibits employers firing workers for seeking enforcement of the health and safety act.

### **Part 1: Worker participation and representation in Occupational Health and Safety(OHS)**

#### **History and experience – OHS is a struggle**

The origin of the state's role in regulating health and safety goes back to the industrial revolution and, in particular, the late 1800s in Europe, Canada and the United States. In countries that derive their legal system from Great Britain, the existing legal system at that time provided limited protection. The obligation was on the worker to determine whether or not he wanted to work and, by choosing to work, was taken to have accepted the risks inherent in the job. Other similar rules were used by judges to deny victims and their survivors any compensation. This led to considerable social unrest and ultimately laws imposing regulations on employers and providing compensation for injured worker and survivors.[1]

This experience, and pressure from workers, unions and social movements to reduce injury and illness from work and prevent them from happening - repeated itself. In Ontario, in the 1920's, workers in mining faced the twin hazards of silica dust and tuberculosis in the northern gold mines. Their unions campaigned for their protection and compensation and the law was changed to recognize silicosis as an occupational disease. In the 1960's and 1970's there was wide spread disruption over health and safety issues in major industries led by unions and their members which influenced governments to pass comprehensive occupational health and safety legislation. This legislation imposed responsibility on employers for the health and safety of their workers, provided workers with rights and representation on these matters in the workplace and gave wide powers to government appointed inspectors to enforce standards.

The element of conflict continues in health and safety to this day. Unions still wage company and sector wide campaigns to change laws and practices to protect the health and safety of their workers.

#### **Conflict is built into our economic system**

This conflict should not surprise us. Our economic system views worker health and safety as a consideration in the wage bargain. The unequal power and private knowledge which the employer has conveys a huge advantage in controlling working conditions. At common law, a worker's remedy was to quit and seek other work.[2] Many employers use discipline when addressing workers' health and safety concerns. It is inherent in some forms of management

health and safety systems such as behaviour based safety.[3] It is also a result of the power dynamics in the workplace.[4,5]

### **Different perspectives regarding costs.**

Society has changed since the 19<sup>th</sup> century. There is broad recognition that workers should be protected at work by their employers. There is more knowledge and evidence about how, where and when the organization of work creates hazards for worker health and safety. Nonetheless the conflict over health and safety remains. The hierarchical division of labour creates different perspectives which in turn influences whether problems are identified or whether anything is done. Employers put more emphasis on influencing individuals and their behaviours while workers and unions seek to modify management practices and OHS policies.[27]

### **Worker health and safety representatives**

The occupational health and safety legislation of 1978 built on the experience of unions with worker health and safety representatives. Prior to the law, some unions had bargained health and safety committees with their employer as a vehicle for raising and addressing these problems. The law took this example and, in Ontario, gave many workers a right to be represented on health and safety concerns. In Ontario, at establishments with twenty or more workers regularly employed, the legislation requires a joint committee of which half are worker representatives. Where there is less than twenty and more than six, a worker should be chosen as health and safety representative.

This approach is characterized as the Internal Responsibility System (IRS), i.e. that problems of OHS should be resolved internally as between the employer and workers. In this context, worker voice is critical to balance against the power and authority of the employer. External responsibility, i.e. the role of government and the inspectorate, must insure that workers can exercise voice freely and without reprisal in order for IRS to function.

There are concerns about how comprehensive the implementation of these rights are. Temporary workers and migrant workers have been identified as areas with limited representation.[20]

### **A human right**

Workers' rights to a safe and healthy workplace, protection from hazards at work, worker health and safety representation, and compensation for work injury and illness have been recognized by international agreements and should be considered human rights.[17,18,19]

### **Effectiveness**

Research has shown that the labour-management context of individual workplaces influences the effectiveness of worker participation and joint health and safety committees. In particular, worker OHS representation is more effective when workers have a union and where management accepts co-management of the health and safety function.[4,2,7,8,9,10,11,12] Changes in enforcement practices also have an impact on worker participation. Governments take different

approaches to worker representation either leaving enforcement up to the workplace parties or by intervening to resolve disputes. [13]

Research has raised concerns about the impact of changes in work organization and a decline of union representation on worker participation.[2] Changes in work organization have led to an increase in psychosocial and ergonomic hazards which are not as easily recognized as occupational health and safety and may be complicated to address under existing OHS legislation.[15] Demands for legislative changes to address workplace harassment and violence as a health and safety hazard lead to changes to the *Occupational Health and Safety Act* (OHS Act) in 2009 and 2016.[16]

Studies of worker OHS representatives suggest that success in achieving health and safety improvements relies on a knowledgeable and strategic approach to dealing with the employer with access to training and resources in order to avoid confrontations that can lead to conflict.[7,8,9]

## Part 2: Worker voice

Employee voice is an expression used in literature exploring workers' reasons and practise for speaking up at work. Tucker et. al. described worker voice as "constructive change-oriented communication intended to improve the situation." Employee voice was usually defined as improving managerially sanctioned goals. The authors acknowledged the challenge for employee safety voice because it may be seen as dissent if critical of management's actions.[28, 29] Employee safety voice may be excluded from worker voice research because it is ostensibly protected by law and has authorized procedures designed to encourage its use.[30]

Workers generally fear to speak out at work because of the risk of a reprisal from the employer. A second reason is the belief that speaking out will not make a difference.[31, 32] Hierarchy and power dynamics in the workplace have a negative effect on safety voice.[33] Teenage workers reported a lack of willingness to speak up because of fear of being fired, inexperience, and lack of status as well as the belief that it would not make a difference.[34]

Two older studies identified problems for workers who wanted to exert their health and safety rights, especially the right to refuse.[5,6] Both V. Walters and Harcourt, in separate reviews of labour board and arbitral decisions, found that adjudicators framed their decisions in terms of insubordination, in which a worker's approach to raising concerns was given equal or greater weight than the health and safety issue being addressed.

In 2012, Lewchuk, drawing on 3,280 surveys of workers primarily from the Toronto to Hamilton corridor, showed that a worker's reluctance to report health and safety concerns was influenced by employment insecurity with those in the most precarious of jobs being most reluctant to report even though they may be in a hazardous environment. Increasing numbers of workers in precarious employment are afraid to raise health and safety concerns, including those facing significant hazards and those represented by unions.[25] Similar results were found in a project studying Latin American immigrant workers in Ontario.[26]

In 2014, King reviewed Ontario's OHS legislation and case law as part of a project lead by Ellen McEachen to study the impact of changes in the organization of work on the effectiveness of enforcement under legislation originally developed in the 1970's for a very different economy. An area of concern raised by the review focused on the intersection of harassment complaints and the ineffective enforcement of worker protection from reprisal. The failure to address harassment as a psychosocial hazard and the lack of protection from reprisal formed a perfect storm to undermine workers confidence in the OHS system. This paper was written prior to the amendments in 2016.[13]

### **Promoting voice**

In 2009, the Ontario Federation of Labour (OFL) published a report by Brendan McCutcheon on the status of enforcement of reprisal protection for workers under the OHSA. McCutcheon interviewed inspectors, worker OHS representatives and reviewed Ministry policy. He found evidence of a serious reprisal problem and a lack of worker knowledge of their rights. The report demonstrated a lack of action by the Ministry of Labour in which many reprisals were not investigated and few were prosecuted. It showed that victims of reprisals faced many challenges utilizing the Ontario Labour Relations Board (OLRB).[21]

In 2010, the Expert Advisory Panel chaired by Tony Dean produced a report for the Minister of Labour. It considered the OFL's submissions on reprisals and made three recommendations to address concerns: an expedited process for reprisal appeals at the OLRB, prosecution of employers who violate the law, and a role for the Office of the Worker and Employer Advisor representing workers and employers respectively in reprisal complaints.[22]

These recommendations were addressed in Bill 160, the *Occupational Health and Safety Statute Law Amendment Act*, 2011. The Bill made no substantive changes to the reprisal provision. It added a procedural option which allowed an inspector who did investigate a reprisal to send an application directly to OLRB with the consent of the worker.[23] The bill also gave the Office of the Worker Advisor (OWA) prescribed functions to represent workers who were not members of trade unions.[23, 14] The Office of the Employer Advisor (OEA) was given similar responsibilities for employers.

In March 2012, regulations assigned to the OWA the functions to educate, advise and represent in proceedings before the OLRB workers who are not members of a trade union.[24] Since that time, there has been a real and significant increase in demand for legal assistance with OHS reprisals cases. Workload at the OWA has increased steadily with increased staffing. Demand for service has been high despite limited outreach and would likely result in even greater demand if any outreach was undertaken.

### **Role of unions**

Unions provide support to members who want to exercise safety voice in several ways. They provide support to workers at work through the bargaining process, paid work time, training and other resources.[8,9] Unions elect or appoint worker OHS representatives and provide training and support so they can raise and address members' concerns. Union support for health and

safety in the workplace is more effective with the support of its members.[36] If a member suffers a reprisal, the collective agreement grievance procedure may provide a more efficient and effective remedy than the OLRB. Union representatives have access to the workplace so they can conduct investigations. Union interventions can lead to a worker being reinstated if terminated or by having discipline removed. Reinstatement is a remedy often ordered in unionized workplaces because of union protections.

The challenge is declining union membership and the changed workplace.[10,2,37] Alternative models of worker support have been identified but none have the access to the workplace that unions have.[8,9,38]

### **Management and worker voice**

Researchers in employee relations have examined different approaches of supervisors [39] and leadership [40] and their effect on worker voice and silence. Safety climate was seen as having a significant positive impact on safety voice.[41] Many management health and safety programs focus primarily on employee behaviour with blame and punishment a frequent response. This can lead to a corresponding reduction in the willingness of workers to exercise safety voice.[3,42]

### **Role of the individual**

Despite well founded fears of reprisal, some workers do speak out. Anger has been shown to play a role in moving workers from silence to speaking.[31] Anger in behaviour towards a boss can lead to discipline if interpreted as insubordination. Knoll et. al. investigated authenticity as a predictor of worker voice. In their study, an individual's perceived sense of authenticity, of "owning oneself" was a predictor of worker voice.[43]

## **Part 3: Protections in place for workers who exercise health and safety voice**

In Ontario, workers are protected from reprisal for voicing an health and safety complaint under Section 50 of the Occupational Health and Safety Act. The protection originated in the Occupational Health and Safety Act of 1976 in conjunction with explicit workers' rights to be consulted on health and safety issues that could affect them and the right to know the hazards they faced. It was one of three legislated protections for workers provided in the Act. In addition, there is a right to refuse unsafe work which has a separate procedure and specified role for an Ministry of Labour inspector in order to protect the worker who exercises their rights. The third is worker representation. All workers covered by the Act, whether unionized or not, have rights to independent representation on OHS matters at work. If there are twenty or more workers regularly employed, there must be a joint committee. Less than twenty, there must be a worker representative.

The legal protection from reprisal is:

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](#). R.S.O. 1990, c. O.1, s. 50 (1).

(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

The Board is the OLRB which has had this jurisdiction from the beginning in 1976.

The OLRB specifies the documents that workers (called applicants) and employers (called respondents) must use and the procedures that must be followed. Cases are heard and mediated at the OLRB's offices in Toronto.

Workers who are members of unions have the option to proceed by way of arbitration. Seven of the interviews conducted in this project were union members, six of whom utilized the arbitration process. Beyond that, this report does not address the experience of workers using the arbitration process.

The majority of cases that go to the OLRB are settled. Only a few go to a hearing and, when they do, workers usually lose or may find their award reduced if the manner in which they were behaving was disrespectful. About 10% are terminated by the OLRB for procedural failings (non delivery of documents, timeliness etc.) or for failing to demonstrate in the written forms provided that there was a prima facie case, i.e. that the complaint fits within the jurisdiction of the OLRB.

The published decisions suggest that the OLRB is strict on these issues. The specified forms must be delivered in a timely fashion as set out to all the people required. Secondly, the application must meet the criteria set out in Section 50, i.e. that the worker suffered a reprisal as defined and because the worker had acted in one of three ways: 1) compliance with this Act or the regulations or an order made thereunder, 2) has sought the enforcement of this Act or the regulations, or 3) 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](#). Thirdly, in some cases, even if the Board has jurisdiction, it may not inquire if it believes another body can better deal with the case such

as Human Rights if the case involves racism or sexism. In these cases, the claim is terminated without a hearing.

Although the OLRB does submit its decisions to the online CANLII service for public access, the claim file is not available without the permission of both parties. Settlements by their very nature are not public or publicized and are subject to strict limitations. Both parties – employers and workers – speak strongly in support of confidentiality because of the potential to damage reputation and future employment. There is a recent decision of the Ontario Court of Justice questioning the limits that the OLRB and other tribunals impose on their process.

In 2010, the Ontario Expert Advisory Committee on Occupational Health and Safety heard evidence of reprisals and concerns about the lack of protection that the law gave workers. The Committee made 3 recommendations ( #s 33, 34 and 35) addressing reprisals: expedited hearings, enforcement action against employers, and providing non-union workers with independent representation.

Subsequent legislation addressed two of the recommendations. Inspectors can expedite the making of a claim through a direct referral and the Office of the Worker Advisor was mandated in 2013 to represent victims of reprisals.

#### **Part 4: The research project**

The ability of workers to voice health and safety concerns without fear of reprisal is critical to the effective functioning of the Internal Responsibility System. What follows provides a detailed investigation of cases where workers have suffered reprisals for voicing health and safety and made a claim under OHSA. It assesses the effectiveness of Section 50 protections of this voice. This paper covers the period from approximately 2006 to 2016. A previous research paper by Brendan McCutcheon examined the period prior to 2006.[21]

The project focused on three key questions:

1. What are the circumstances that give rise to complaints by workers that they have suffered a reprisal by their employer for:
  - raising a health and safety concern;
  - making a complaint that their OHS rights have been violated;
  - or seeking the advice of a worker OHS representative, a worker Joint Health and Safety Committee (JHSC) representative or inspector?
2. How do workers respond to reprisals and under what circumstances do they make a complaint to their health and safety representative, union representative, Joint Health and Safety Committee representative, inspector or other authority?
3. What are the impacts on workers when they seek enforcement of their rights under the Occupational Health and Safety Act?

## **Section Two: Study of the protections offered workers who suffered a reprisal for exercising voice**

### **Part 1: Interviews with workers who reported a reprisal**

Individuals were recruited who had experienced an OHS reprisal, made a claim under the legislation and whose claim was completed. The goal was to explore the circumstances, responses, and impacts from the perspective of the worker.

An invitation to participate was sent out through the OFL, the Workers' Health and Safety Centre (WHSC) and the Office of the Worker Advisor (OWA). The invitation requested the person contact the researchers directly if they were interested in participating. The researchers did not know to whom the invitations were sent and the organizations distributing the invitation did not know who responded to the researchers. Fifty-six individuals responded. Twenty-six did not meet the criteria for inclusion. Thirty were contacted by the researcher. Twenty-five respondents were interviewed. Five declined to participate or did not respond to a follow up.

Strict confidentiality rules were established to protect the reputations of participants (workers and employers) and to respect undertakings on confidentiality that were given as a condition of settlement. Interviewees were requested not to identify themselves, their employer or anyone else involved by name. If the claim had been settled, no questions were asked about the settlement.

Questions were open ended and designed to allow the interviewee to construct the narrative of their experience. Minimal background was obtained. The approach taken was to ask the interviewee to focus on what happened. The draft interview guide was approved by McMaster Board of Research Ethics.

Three areas were explored:

- The circumstances of the reprisal: what was the complaint, how was it expressed, what was the process;
- The response of the affected worker – what actions did the worker take, what happened and how did the worker respond; and
- The impact of the reprisal on the worker – what did the worker do and what effect did it have on the worker's future.

Interviewees were specifically asked to recount their experiences, if any, with their co-workers, union, any other representative, the MoL inspector and the OLRB.

Of the twenty-five (25) people interviewed, seven (7) were union members at the time of their experience of a reprisal; thirteen (13) were not union members; four (4) held management roles, and one (1) was an independent contractor. Twelve were women and thirteen were men.

The interviews were placed into one of four categories.

- The seven interviewees who were union members were analyzed as a group. This decision was based on the assumption that union members would have access to representation, training, and resources that non-members would not. Union protection was expected to encourage worker voice.
- The six non-union interviewees who had knowledge and experience of OHS and/or internal company processes were analyzed as a group. These workers had acquired this knowledge either by virtue of prior employment (two were union members in prior employment), prior positions or education. Our hypothesis was that this group would have fewer resources available to them than the unionized applicants, but more than non-union interviews without this knowledge.
- The eight non-union interviews without OHS knowledge were examined as a third group. This included the one independent contractor.
- Finally the four interviewees identified as management were analysed as a separate group.

Interviews were transcribed and then reviewed to verify the transcript, identify key themes, and to create summaries of each interview and identify representative quotes that preserve narrative integrity. Finally, key themes within the summaries were identified.

### Union workers

Seven of those interviewed were, at the time of the reprisal, union members. Four - interviews 1, 4, 5, 6 were active worker health and safety representatives. Interview 2 was a union member seeking to enforce the rules regarding work refusals. Interview 8 was a union member whose job required him to supervise students working safely on site and while using tools. Interview 7 was a union member who was highly educated regarding the specific health and safety hazard that she faced and took on her redress personally.

**Interview 1** was a worker OHS representative working in a unionized facility. He was facing repeated accusations and discipline related to his OHS inspection activities. The specific reprisal that was the subject of the interview was discipline for an alleged infraction. The union grieved his discipline and the discipline was overturned but the harassment was ongoing due to the efforts of management to restrict and limit the role of union OHS representatives. At the time of the interview, this grievance had been successful but there were several others still outstanding.

In the experiences of **Interviews 4 and 5**, the manager/employer took personally their actions as H&S Reps seeking a response to a health and safety matters, leading to ongoing harassment. In **Interview 4**, the worker rep wanted sufficient time for OHS inspections, part of a larger corporate wide campaign by the union. When management refused to allow this, the MoL was contacted and an inspector attended the site:

The Ministry of Labour came in. I supposedly knew about it. Called it in and if I wasn't the one that called it in I knew who did it. He [the manager] was going to make me pay.

In **Interview 5**, the worker JHSC co-chair wanted an effective OHS policy for his particular workplace as required by legislation to address a problem that co-workers had recently faced. Management refused to collaborate:

He was really about you know, 'This is what it is. That's what my lawyer says.' Those kinds of things and trying to quash any sorts of efforts... as far as I'm concerned. I mean ...[he] did not take it with the seriousness that it [the safety incident] deserved I think.

The worker rep ended up contacting the MoL and an inspector attended:

I called the Ministry of Labour to come in and sure enough he came in with some work orders and stuff around again, 'We're not in compliance,' and that kind of stuff.

The persistence of both workers, and in particular that they contacted a MoL inspector to enforce their rights, lead to a lengthy experience of repeated harassment, negative actions and remarks by their manager which ultimately led the workers to file a grievance. The harassment formally ended after the grievance was settled but neither worker continued active in health and safety. As **Interview 5** said:

That's when I put in a grievance and that's when I left the health and safety committee. For me at that point it was a health issue around stress and that kind of stuff.

**Interviews 1 and 2** continue to be employed by the same employer after the reprisal. **Interview 1** has continued in health and safety and was still fighting the good fight when interviewed. **Interview 2** was a worker who tried to enforce her rights to refuse unsafe work. Management had recently changed and, in her words, "guidelines had become rules."

She made two efforts to enforce her rights by refusing unsafe work. In the first the employer ignored her refusal until the end of her shift and in the other case threatened the worker with insubordination. Both cases went to a hearing and were rejected on extenuating circumstances. Although currently on suspension for an unrelated matter, she remains an employee.

In **Interview 6**, a large factory setting, the interviewee was the union OHS co-chair, had been successful in building support among workers and was systematically trying to improve safety. This spanned a period from 1990 to 2003. In the earlier stages, inspired by OHS reforms in 1990, when the employer refused to address issues internally:

We brought them [MoL] in and what we ended up eventually doing is dealing with all of their health and safety issues with a lot of times the Ministry's involvement because we weren't getting them [management] on board. It took a while but we actually got management to actually take different view of safety. So, our success really, the success of the committee

and the success that we had as health and safety on the workers side brought about a change of morale because now management was responding to our concerns.

Conditions improved. However, after a change in ownership and location, management targeted him. This took place in the early 2000's and the response of the MoL was less supportive:

I got a letter from the Ministry saying, 'You shouldn't be calling us. The only time you should be calling us is when the entire committee agrees to call you in and only for a serious safety issue.'

Management terminated him on specious charges after he intervened in health and safety work refusals to get management to investigate the underlying issues.

In **Interview 8**, the interviewee was not a worker health and safety representative but he was a union member who was training young workers on site and concerned about the lack of safety equipment. Prior to teaching, he had worked in construction and had health and safety qualifications. He realized his teaching work had implications for health and safety:

Direct implication for the students. Direct implication for me. Implication for me if somebody was to get hurt. Me being the supervisor then I am legally bound by the Occupational Health and Safety Act to do... as a supervisor role. They [the students] are considered workers.

The training company and the site owner refused to accept responsibility. The worker contacted the MoL and an inspector came in and wrote orders. The training company cancelled the program, transferred the worker to another location and subsequently fired him.

In both of these cases, the workers had the full support of their unions who filed the grievances and represented them at arbitration. Both of the workers entered the process seeking reinstatement. Both were highly committed and motivated. However, as the case proceeded to hearing, the advice from their union, their lawyers and the arbitrator was that the employer did not want them back. Both workers were told that they might win this case but, as **Interview 8** was told:

Not only are you going to have a paper bull's eye but you're going to have it tattooed on your back. They are going to be in there on you, watching you 24/7, 7 days a week... They would terminate me again and I'm like, 'This is the only time I'm going through this process. I don't want to keep fighting to keep my job for someone who really doesn't want me to work for them.'

Ultimately both settled. In **Interview 6's** words:

I left there the real loss wasn't necessarily me but the fundamental belief that I can stand up for myself on health and safety concerns and not be reprisal against because the message that was sent to the entire plant is,

‘Here’s the head guy. The guy that’s the certified member who’s talking safety up and down and what happened to him? He got canned.’

**Interview 7** involved a union member who, after experiencing sexual harassment from a supervisor, followed the internal process and then complained to upper management when appropriate action was not taken. She observed:

One thing that is really significant is that I didn’t find the sexual harassment as traumatic as the process that followed.

Although union representatives showed up at each stage of her struggle with the employer to address her concerns, they did not speak up and, after one meeting, the union rep challenged her, she said:

‘Why were you talking to him (the manager) like that? Why were you challenging his authority like that?’

She initiated each stage, including complaints to higher management. Ultimately, she was terminated during her probation. The union supported her grievance through to arbitration but was unwilling to ask for an adjournment of the hearing when she had a conflict with another job she obtained after she was terminated. This pressured her to settle. She saw her experience within a large socio-political context.

The union members were motivated to be active in health and safety by higher goals than just themselves. **Interview 4** spoke:

Really. I like it. It’s one of those things I can actually do and to contribute to what’s going on.

To **Interview 5**:

Right, this is important. It’s about safety and this is our right.

**Interview 7** said,:

I’m obviously health and safety conscious...I have no dependents. I don’t care. I’m there to teach students. I’m not there for the paycheque... my co-workers are afraid to complain about health and safety because they fear reprisal and the fear losing their jobs.

For **Interview 7**, the matter was deeply rooted in her studies and beliefs. When challenged by a manager on how she knew what she experienced was sexual harassment, she replied:

I said, ‘Well, I just finished my Masters in Social Justice and before that I did my BA in sociology. So, I know what sexual harassment is. Don’t tell me that I don’t know what it is.’

## Summary

Of the seven union members interviewed, four were formally worker OHS representatives in their workplace, in three cases also co-chairs of the committee. A fifth acted as a OHS representative on behalf of his students who were learning to do the work in a real life albeit controlled context of a school. All five of these workers interviewed were formally acting on behalf of their co-workers as set out in OHSA at the time of the reprisal. All five spoke strongly about their commitment to health and safety and how their reprisal had a negative affect on the expectations of co-workers.

Noticeably only three retained their jobs after the reprisal was resolved but the consequences followed them. The worker representatives who did return to work stopped being active as OHS reps or in their union after the resolution. One continued to experience harassment. Two others were terminated. Determined to defend their rights to voice health and safety concerns and with the support of their union, both cases went to an arbitration hearing. In both cases, with pressure from all sides, despite strong desires to return to work, both agreed to accept a settlement that did not include their reinstatement. Quite simply, they did not want to go back to a workplace with a target on their back.

The two remaining interviewees were union workers who raised health and safety issues to protect themselves. In these cases, while there was some support from their union in terms of how it was ultimately resolved, during the process there was much less so. Both individuals were strong willed and willing to stand for themselves on the issues that faced them. One is still employed though under suspension. The other took a settlement when she was unable to get an adjournment of her hearing.

Overall, the experience of this group of workers in making use of their rights to voice OHS concerns was less than satisfactory. Even with the support of their unions, most lost their jobs, all found the process as stressful as the original reprisal and no one felt they had been properly compensated. The process seemed to work against their interests.

## Educated and experienced but not union members

The second group of six interviewees were not union members. Two had previously been employed in a union workplace and had been trained to address their rights with the employer. Now working in a non-union workplace, they followed their training. One was a recent immigrant but like **Interview 7** above had strong beliefs in social justice which she attributed to her cultural background. one had come from the aerospace sector with a strong tradition of health and safety concerns. The remaining two had received health and safety training, one in their management responsibilities in a previous job and the other from the employer who ultimately terminated him as a reprisal for raising health and safety concerns.

**Interview 15** had been a union member in prior employment.:

In the beginning in 1986 when we talked about the WHMIS – they're educating WHMIS I was in a group of people that actually, I was an individual that really listened carefully and then went out in the work place and started looking at labels and looking at what I was dealing with and the horrors of the chemicals and the carcinogens we were working with and then when I brought those to light I was reprimanded, I was harassed and harangued, even by my own fellow workers and the company and was, there was reprisals even back then and if it wasn't for the union I probably would have been fired.

He described himself as an oddball, often at odds with co-workers too:

I wanted to be safe but I also wanted the people around me to be safe because here's the problem when people around you don't care and it's happened to me where I was almost blown up by a panel because of people.

After retirement, he obtained a job with a small construction company. Insisting on safety precautions to prevent a fall from height, he refused to work and the employer fired him. He called the MoL but was unable to get a response until several days later. Not called back to work, he followed up with the MoL and eventually an inspector was sent out:

They (the MoL) cited the job site....people kept working. I went back ... there were people still working up there... They were cited to close it down but there was nobody there to stop anything from going on.

He decided to pursue his complaint because:

I told him [the Mediator], I don't care about the money that I'm going to get. This guy should be fined, put in jail, whatever. He should be – his hands should be wrapped. Put out of business or whatever.' Q: When you said that what was the response? A: 'Well, we can't do that. This is not about that. This is not about that! This is about getting you your settlement and resolving this issue' and I'm thinking, This is a health and safety issue. This guy broke the law!

In the end, he settled but only received a token amount:

We went through the case and he said, 'Well, you were only employed for one and a half weeks and that's about all you're going to get is about a week and a half wages.'

**Interview 18** was also a union member and activist in prior employment. After retirement, he obtained non-union work as a truck driver on a work site. After reporting an incident where his truck was damaged by a co-worker who was harassing him, this interviewee was fired. He felt he was set up. He pushed back:

It was on my mind that I didn't want this stuff to happen to anybody else. It could be the next newbie coming in and he could be as green as grass and he doesn't know his rights and by me doing what I did maybe they'll think twice next time and that's what I wanted. I wanted that put forth. You know, you can't step on people's toes like that. It's too dangerous. I'm all about health and safety and I still am and that's what worried me.

As a former active union member he knew his rights and took steps to enforce them. His employer let him go after they received his complaint. He called the MoL after his termination. The company had an anti-harassment policy with zero tolerance:

They stressed it every time they could.

But when it came to **Interviewee 18's** complaint,:

It [harassment policy] was non-existent... and down the road somebody else is going to be affected by the same non-compliance of their policies.

After receiving no response from upper management, he sought the help of the OWA and brought an application to OLRB:

I think it took approximately three to six months before anything. I never did have a hearing. I wanted to but I was kind of led to believe that, the lawyer, he wanted a monetary settlement. I was on the grounds that being I didn't need the money, I would've rather faced them in court and I would rather have the company possibly reprimanded for what had happened. That was my goal.

In the end, he settled:

I feel like I was let down by the system... I would rather see I get reinstated back in the company. Mind you I probably wouldn't have stayed but just for principle get reinstated and them have to acknowledge the fact that they were wrong in firing me.

**Interview 13** was a female recent immigrant and person of colour and working in the same industry as union member **Interview 7**. She was injured by equipment that she was required to operate but poorly trained:

I joined the Joint Health and Safety Committee to try and help out. Prevention is better than cure and on the committee, I felt like I would have a good platform to bring my concerns and actually be able to do something in order to propel change.

She also experienced harassment from a manager's supervision style. She complained about harassment to upper management who transferred her to another department:

Because there are guidelines and systems in place to help people, and people don't know about it, or they don't know that it's for real, that this can help them or its very time consuming or so.

She was persistent in her demands at the JHSC and was terminated, despite recently receiving a wage increase and complements for her customer service. For this worker:

Am I going out looking for trouble or is this well?' It's not like that. Everywhere we go there is something and it's my right to always raise these points. Just because there's ten jobs it's my right at every workplace to see and if it's founded or there's grounds for it then I won't be labeled by the Ministry or the government, 'Oh trouble-maker there.'

**Interview 21** had previously worked in upper management and through some unfortunate decisions ended up working in a non-union factory:

h\Health and safety, security, those kinds of things were a part of that job.

Although reluctant to complain about health and safety issues at first because it was not part of his job, when transferred to a department with serious chemical hazards, he began to report concerns to management about the inadequate protection:

A: The beginning of the end was actually when I finally put the complaints in writing, in an official form. There were four of them...

Q: You made formal complaints – at this point were they in a form that the company itself provided?

A: Yeah.

He was subsequently fired for an argument with co-worker over a minor issue. When asked to reflect on why he made the complaints, he expressed concern for co-workers, especially the many Asians workers who did not understand English well. He considered his co-workers vulnerable because of their low wage (\$10 per hour) and believed the company was abusing the temporary workers program:

I thought those people were really, really at risk and vulnerable as far as I'm concern to abuse and misuse, and with the attitude of management towards it, it just looked like a disaster.

When he was terminated, he contacted the MoL and was persistent until they agreed to do an inspection:

I mean I spent the first half of my career as a middle-management and being responsible and accountable for my human resources and financial resources and their safety and the security of the premises and all that sort of thing. I

think I have an innate sense of responsibility and I don't like to be pushed around if I really feel I'm right.

**Interview 16**, worked 25 years in aerospace. After a slowdown, he took a job in a small non-union fabrication shop in order to work with a relative who would help him get licenced on more advanced equipment. He had been working there about four years before the problem started:

It was a perfect fit for me doing that work. So away that went and I enjoyed it very much.

He received regular salary increases and no complaints. His employer had sent him for first aid and safety training. Then about a year or so prior to the reprisal, he started to experience harassment from two co-workers. He complained to the foreman:

I said to the foreman, 'You have to take care of this.' He didn't want to do anything... It's like all the time. Letting air out of my tires, damaging tools of mine, removing parts of my program so that my machine would crash but I would catch it cause I wasn't stupid.

Matters came to a head when he saw them working without proper personal protective equipment. Again he complained to the foreman:

'You know, they (the co-workers) should be really wearing proper footwear and safety glasses, you know. I'm not trying to be an idiot, you know. They just need to be because I was trained as health and safety. Like first aid, first responder ... and he told me, 'Be quiet and leave those guys alone... when he said that, I said, 'Oh, do I have to make a phone call?' [Meaning] the Ministry of Labour. 'Well, you do that you'll get fired.' I told him, 'You can't threaten me like that. You can't do that.'

Apparently, they could. He did call the Ministry and an inspector was sent in:

Right then and there they knew it was me. Although I had already had a talk with the foreman. Just like put the finger right on me.

Not a week later, he and his partner were laid off due to lack of work. A couple of weeks later, his partner was called back but not him. He called the inspector again who in turn contacted the employer with the information sheet explaining reprisals in OHS were prohibited. He was then called back in. He worked for a few more weeks and was then formally terminated as "not a good fit." While he was working however:

When I did come back, boy, every day he [the owner] was yelling at me. Never before that but afterwards, every day he was out yelling at me and telling me my work was no good. Telling me I as an effing lazy or whatever I was. Effing the dog or whatever it was he was saying.

This time when he called the MoL, he was referred to the OWA.

The impact on his employment was significant. While he was able to find work soon after, it was \$4 less an hour pay and significantly less benefits.

Why his co-workers harassed him is still not clear to him. Of greater concern to him was the threat of the supervisor:

Well, what went on with the foreman, he was threatening to fire me. I felt that was really unacceptable and I was really angry about it.

Looking back, he felt that he knew that there would be consequences when he called the inspector but:

I thought 'Well, there's going to be some protection. They just can't fire me because if they do they're really in trouble.' Well, that was a joke. A little slap on the wrist.

**Interview 22** had worked in many jobs mostly non-union. He went from one company with strong OHS to another with less. In the new workplace, he raised OHS concerns, complained about safety conditions at work and was terminated. When he contacted them, the MoL told him that he should have refused unsafe work. He understood this to mean that if he had formally refused then the inspector would have been contacted and would have addressed the issue. Because he had waited, there was no longer an issue and nothing the inspector could do about it.

**Interview 22** had done considerable OHS training in early 90s because he felt it was the direction of government at the time. However, subsequently it became a liability. He did a lot of OHS training at night school under the NDP government, when there were jobs and a stronger safety culture. Then under the Conservative government, the safety jobs dried up and having safety courses on his resume became a liability. He tested it out, submitting resumes sometime with and sometimes without. He never got called back from employers when safety courses were included. This experience was shared by **Interview 6** who noted a change in the way he was treated by the MoL. In the early 90's, the inspectors played a more active role, in his view, often acting as mediators to help resolve the issues. By 2000, this approach changed. He was only expected to contact them with the agreement of the management co-chair.

## Summary

Among the interviewees who were not union members, six expressed knowledge and experience of their OHS rights and the procedures their employers designed ostensibly to address these issues. They were motivated by the knowledge of their rights, commitment to others and principles of social justice. Although they anticipated resistance, they also expected that the employer would comply with their concerns.

All six were terminated by their employer because of their activities. In response, these applicants were motivated by the belief that their employer should be punished for breaking the

law. They contacted the MoL first and then proceeded on to the OWA and made an application in order to achieve some protection for their co-workers as much as compensation for themselves. In the end they were disappointed. Much like their unionized brothers and sister, they all settled but were disappointed that there was no penalty for the employer.

### **Non-union workers**

The third group of people interviewed were eight individuals who were neither represented by a union nor professed to have any prior experience or training about how to deal with health and safety issues. One was a self-employed contractor. These interviews were examined by age group in order to highlight any differences that may be related to their employment trajectory and experience. All of these workers were terminated as a result of raising their concerns.

Four were young workers in their 20s who experienced a reprisal in their first full-time work. Two were older workers who confronted losing their employment late in their working life, in their 50s and 60s. Two were in mid-career, in their 40s.

#### **a. Young workers first job**

All four young workers interviewed were women and starting out in the workforce. All but one was working for minimum wage.

**Interview 9** had recently moved to Toronto to find work in her field of interest:

I was very much a precarious employee and had been jumping around a lot just to figure out how to get work in Toronto and yeah, I just wasn't somebody that was settled in her career.

She found what she described as a 'sort of factory job,' filling boxes, on her feet. She was initially excited to be there:

Shortly after getting there it became very apparent they had a very strong sense of – there were very strict timelines that you had to meet. Lots of pressure in terms of how you did your work and what you were you getting done. They would have a shame sheet on the wall for when you made errors.

When the employer asked her opinion, she gave it, critiquing the shame sheet in particular. Later when she was blamed for an accident that was due to the equipment, she also spoke back:

I was called into the office again to discuss the incident ... I think I just kind of stood up for myself... I certainly expressed concern about the safety that was taking place. They were cutting corners because they were growing too fast and yeah, they fired me shortly thereafter.

It was the day before the end of her probation and just before Christmas when she received the notice that she was not any good at her job and terminated. She contacted the MoL after she was

terminated. She got the impression that the MoL did not think her complaints were worth a visit. She persisted and found that other employees had also made complaints. An inspector did visit the workplace subsequently.

**Interview 14** had considered herself very fortunate. She had successfully applied for a permanent position in her field right out of college at more than minimum wage. The job started well and she enjoyed the work. However, things changed after she returned from maternity leave:

The organization had changed while I was gone. I was no longer with just a manager. I was micro-managed. So, I had a manager underneath a manager underneath a manager.

Whereas before she controlled her own spending, now it was under the microscope of her boss and the finance manager. After she managed a significant event, her report on spending was not accepted:

My manager said, ‘This is not how the money was supposed to be spent.’ So, it was my word against both of their words. So basically, they wanted me to re-do the report. So, I had to re-do the report and show exactly where the money went to, show every receipt and then when I re-did that I gave it to my manager. My manager took it then to the finance manager and I guess it was still not how she wanted it to look. So, I kept re-doing it and re-doing it. I think I’ve re-done it like four times just so she understood exactly where the money went to.”

She felt more and more unsupported and more and more depressed. She decided to take some time off and wrote a letter:

I took a sick leave ... I wrote a letter and I said, ‘I felt very unsupported. I felt that... I used some pretty good words. I said ‘I was feeling disheartened, attacked. I didn’t feel comfortable having to explain myself. I didn’t feel comfortable having to feel like I was stealing money,’ or something like that.

The letter was in accordance with the workplace policy to deal with harassment at work. The persons to whom she reported were the managers who were harassing her. While on sick leave she was called in to a meeting at work and fired:

‘Without cause.’ That’s what I was fired for. I was fired without cause and there’s no explanation about my being fired. ... That was it. I reported that they were mentally making me sick. I was physically, mentally incapable of working after being yelled at, at work.”

**Interview 17** had been working for the employer from whom she suffered the reprisal for eight years. She had started while in university and continued on full-time afterwards as the night

manager on shift. While she was aware other employees had had problems with the employer, she had not had any concerns for herself prior to the incident.

She went into work one evening early and ordered some food. The owner's reaction was incomprehensible. Firstly he swore at her and told her to get out. Then he pushed her:

'Get the fuck out of here,' and then pushed me towards the door and then was, 'Like get the fuck out,' and then at which point I was absolutely shocked because it was a fully-grown man pushing me.

She was going to leave, quite shaken by the experience, but the day manager persuaded her to stay and work her shift because he had no one to replace her. The next day:

When I went in, the schedule was done and I wasn't on it and our day manager was the person who was responsible for the calendar or shift, whatever. So, I said, 'You know, what's going on?' and he was like, 'They don't want you on the work schedule.'

She never received any further hours of work. She contacted the owner my text and email demanding to know why she wasn't working:

Yes, and said, 'You know, if you want to suspend me you need to tell me why,' and he said that, 'I actually had to apologize for ... my rude, obnoxious behavior,' or something like that.

That was the last that she heard from him. She had the support of her family and in particular a family friend:

I was very lucky I have a very close family friend who sort of works in the social services who sort of walked me specifically...through the details.

The friend advised her to contact the OWA who in turn advised her to report her complaint to the MoL. Although her employer was represented by the OEA at the OLRB, the employer himself never showed up. As a result the process at the Board went to a hearing where she testified and an order was made in her favour. She never received any of the compensation that was ordered. As far as she knew, her employer had declared bankruptcy.

**Interview 25** had also started work with the reprisal employer directly out of college in the trade which she had been studying. It was a very small business comprised of the owner and herself. She had been working there for four years without incident when the behaviour of her employer began to change:

She started spending more time at the store and she installed security cameras one day while I was away on the weekend or something like that which she didn't mention ahead of time.

Then abruptly and without explanation:

she told me on a Thursday afternoon at 5 minutes till 6 not to come in Friday or Monday and to just come in the next Tuesday.

When she returned to work the next week, she asked her employer repeatedly about her future employment. Her employer refused to answer or provide any explanation. Fearing her job was in jeopardy, she phoned first the Law Society who in turn referred her to the Ministry of Labour. She was told:

If I thought that there were any workplace safety hazards they could basically send the inspector who does the postal code or however its divided and kind of nail her for those and possibly provoke her. So, I just said, 'Sure, I'm at my wits end. I'm going to lose this job anyways looks like. So, sure send an inspector and see what they find,' and they found a number of violations.

When the inspector showed up at her workplace, both she and the employer were present:

Before he left to make his summary he told her that any action against me – like sending me home, firing me, anything like that, any reprisal was not allowed, any change in basically the pattern of my employment that had already been set as a result of this was not allowed and he told her that it wasn't necessarily that I called him.

Nonetheless, just after he left:

She (the employer) gave me a working notice that I was fired. That my employment was terminated. Immediately after he had told her not to do that.

She continued working under the notice for about a week before she was able to find alternative employment and left.

## **b. Older workers**

Two interviewees were 50 or older when they experienced a reprisal at work. While their circumstances were very different from the each other, both had been working with the reprisal employer for some time and shared a common experience of having to deal with autocratic employers who had no interest in addressing their concerns.

**Interview 3** was just turning fifty and had been working for five years as a temporary employee at the reprisal employer's industrial worksite. Up until the incident that led to the reprisal, he had not experienced any health and safety concerns. He and a co-worker were assigned to carry out specific work by a supervisor. The supervisor was required to lock out and tag out a certain part of the process in advance of the work being carried out. **Interview 3** started the work but,

unbeknownst to him, the lock out had not put in place. As he hit the place that was supposed to have been locked out there was an accident and he was thrown from a moving vehicle:

I don't know how I landed. I remember seeing the safety sign fly before my face and I declared my injury. I was then suspended that day after I even – they're sitting there saying I didn't declare medical.

Initially they suspended him. When he protested and threatened to call the MoL, they backdated their complaint to something which happened previously and terminated him. He received the call from the temp agency that was his official employer as he was driving home from the work site. He did not hear from them again until they were at the OLRB.

He contacted the MoL who he understood had visited the plant and wrote orders. They did not address his termination but did refer him to the OLRB. These events occurred before the OWA was authorized to represent victims of reprisals so he represented himself. At the OLRB he faced two sets of lawyers, one representing the site employer and the other representing the temp agency. He told the mediator that he wanted his job back and he wanted accommodations for his injury:

The mediator pretty much tainted my whole decision. If I look back, she like going, 'I've never seen anyone win this. Would you want to go back and work for them?'

He settled. He also had to fight with the Workplace Safety and Insurance Board (WSIB) to get his injury compensated. The site employer had delayed filing any report of accident. His claim was ultimately recognized after 2 years. He had not worked since the incident and continued to experience problems as a result of the injury:

I have to sell everything off now to survive. Now, I'm on welfare at my parents' house. Yeah... And I can't find a job to save my life.

**Interview 20** was a grandmother and experienced worker with a variety of customer service jobs over 25 years. She moved into the city as she got older and obtained a job with a delivery company:

Right away it seemed to be great. It was a lady management that had hired me but in the first few months though it became apparent that there was going to be some changes to the company being made.

Within a few months, a new manager was hired to make the company more profitable. The vehicles started to deteriorate, new management would not respond to concerns and communications became more hostile. A number of events happened that raised health and safety concerns that were not being addressed so:

I made a call to an inspector, especially when I started taking pictures of the cars' deterioration... I tried to get cars vehicles off the road to a mechanic

that I felt was in jeopardy or a hazard as a driver only to have that car vehicle thrown right back out on the road that the manager would just overtrump and say, 'No it doesn't need repair,'

An inspector was sent in, did an inspection and orders were written:

... he (the manager) fired me right away after they had to post a report of the inspection. He (the manager) glorified over the fact that he was firing me and I felt very bullied in the office when he did it.

When asked why she was prepared to take a stand and call the inspector, she responded:

I think because of the gentleman, the manager, and his arrogant attitude that I should just be quiet made me want to yell more. He just kind of disregarded me as a foolish old woman and I was probably determined to prove him that I'm not a foolish old woman. That's why I took a stand.

She pursued her claim to the OLRB with the help of the OWA. She had to travel into Toronto on a number of occasions and confront the same manager each time. It was, as she said, "very stressful." When asked why she pursued it:

Fear that somebody was really going to seriously get hurt. Me or others or kids and I think the grandma in me, I wasn't going to have any more of that... Anger. Anger, yeah. That it wasn't right... And that I was going to take it all the way because it wasn't right.

She no longer works because of a disability. In retrospect:

It's given me a bad view of employers and how there are good employers out there and some pretty bad employers, and when the pretty bad employers are out there it leaves a bad taste in your mouth.

### **c. Middle career**

**Interview 23** was a male worker who had been in his line of work for about eight years when he took the job where the reprisal occurred. He was thirty-nine. It was a contract job in a remote location where they would fly in for fourteen days of work and then be flown out for fourteen days. There may have been as many as sixty other people working there. The employer was a large contractor and this was one site.

Four days before the end of his third time in, and just before Christmas, an incident occurred. He was sent to do a job:

It was sketchy to begin and it wasn't the first time that I told them, 'You know, should we be at this point?'

He spoke with different supervisors about the problem but little was done about it:

The safety rep for the company, not the contractor, but for the company itself came down and said, ‘Oh, hell no.’ He said, ‘Somebody’s going to die. We can’t do this and that didn’t stop them.’

Workers on his cross shift agreed but the work was set up the same way the next time he came on shift. He refused a second time. This time his supervisor told him:

‘If you don’t want to do the job I’ll put you on a plane tomorrow,’ and that’s pretty much —after I finished that I had like one more night shift after that and that’s when they told me the company doesn’t want you back on the property.

When he returned home, he contacted the MoL. He had taken pictures of the scene with his camera. He knew that once he had refused the work was supposed to stop and the company should have called in an inspector then:

I indicated on all my paperwork – we had to fill out a few forms during the shift and I clearly indicated ... stop work refusal performed. So basically, they didn’t follow the process, right. They didn’t want to get the Ministry in to assess the situation. They stuck someone in my cross shift in the same heading, doing the same job.

The inspector did visit the site and sent the worker by email a list of the orders he had written. The inspector could not rule on the refusal as the work had been completed by the time he arrived. The worker was referred to the OWA and the process was fairly quick. The complaint was settled within a week and a half. For him, the concern was more the repercussions, i.e. his name became known because of his complaint and he changed the kind of work he was doing to reduce the risk of confronting the same situation again. Despite this he pursued his claim:

My initial thought was I am not going to let you do this to me. Secondly, I can probably be saving another man’s life because they’ll be less hesitant about doing this to someone else. I’m making a difference. They may be a little cautious that they know, ‘Let’s not do that just in case.’ You know, having another complaint on hand. Who knows, but to me it feels good that possibly, you know, I might make a difference down the road.

**Interview 24** was a female in her 40's and was employed as an independent contractor in her field of health care in one of several locations operated by her employer. She was working part time for about a year with expectations that she would soon become full-time. Similar to **Interview 3**, prior to the incident that lead to her injury, she had no health and safety complaints:

Q: So, what took place that changed that? What happened?

A: I came on to my shift. I was advised by *another worker* that I needed to take care of *a specific assignment* immediately. *The work had been*

*prepared by a co-worker, also trained in the same profession. I reviewed all the records, I went to the site and there were no warning signs... I started to do the work. Something went wrong and my arms and hands bearing the brunt of it.*

She went immediately to the emergency at a local hospital. After a five hour wait she was losing feelings in her hand. She was finally seen and when she called in to her workplace, she was asked to come in on her next shift. As an independent contractor, she could not refuse without loss of pay. She went in to work and continued to work despite the pain and the limitations in her arm because the employer was short staffed over the holiday season.

She wanted to know what investigation her employer had done regarding the cause of her injury:

*I had finally gone to them nine days after the accident because I was having so many difficulties and all the time constraints it was causing me... She hadn't even spoken to the contractor responsible about the incident, about the accident at that time. It wasn't until I started complaining that she finally actually went and talked to that person."*

The investigation was poorly done in the worker's view, ignoring evidence of the other contractor's safety failures:

*She (the manager) took the wrong information. She had no idea. She took the wrong information to the board and they came back and said, 'There were no errors. This is was completely appropriate action [that lead to the incident].' because they had the wrong ... records.*

She continued to push for action by the employer. She called the MoL for advice and was told that she could not be fired for making an OHS complaint:

*They (management) were really pushing the line that the other contractor did not do anything wrong and they accepted that they made an error in the ... records and she said she was going to have a re-investigation done on it... she really felt I was the one blowing things out of proportion... . I was fired that afternoon over email.*

She received the email at home. It simply said she was terminated. She called the MoL again and an inspector was sent to the workplace:

*I wrote the board of directors some letters. I was trying to resolve it amicably. That didn't happen. I contacted the Ontario Health and Safety Board. They did send an inspector out. He was a really nice guy but I really felt that he dropped the ball.... Didn't ask for any reports or anything. He basically came back to me and said, 'Oh, you know, they felt it was just an accident and that's it.'*

At the same time she was experiencing serious problems with her injured arm. She was told that she had nerve damage and might never fully recover. She struggled with depression. She was off work for two years. As an independent contractor, she was not covered by WSIB. She did have personal disability insurance that provided her benefits during this period. At the time of the interview, she had returned to work with another employer but with limitations on the work that she could perform.

The employer had offered her a settlement shortly after she was fired but she did not think it was enough so she commenced an application under Section 50 with help from the OWA.

Part one of the things that I had in my settlement was I wanted reinstatement of my job and that was probably there to show them I'm not backing down but they did not want me back there for numerous reasons, right:

She experienced the same advice from her lawyers that was heard from other workers interviewed:

Hearing, yes. But it would've taken a long time and it would've been really stressful and my lawyer he felt that we would've won. He felt we had a really, really strong case but some things are just not worth it.

She was very happy with the assistance that she got from the OWA. She had reservations about the MoL investigation concerned about the inspector's willingness to accept what the employer had to say despite the concerns she had raised:

It's probably my type of industry. Like I'm sure it's probably different for construction industries or other industries where you see a lot more accidents. There's a little bit of an attitude. There's less and I don't know what the word is. It's almost like it's more acceptable for us to get hurt in this industry. 'You deal with dangerous people. Well, it's part of your job. So, just deal with it.'

## Summary

These non-union workers were a diverse group in both work type and reprisal experience. Within the younger workers group, all were women in their first job out of school. Two were being proactive in defense of their rights – one giving feedback to her employer critical about their programs and the other using health and safety as a means to deliver a message to her employer. The other two faced serious violations – violence and harassment by their boss. Unable to deal with the issue directly with their employer, they went to the OLRB to resolve the outstanding matters.

Of the two older workers, both were affected by physical consequences as well as the reprisal. In one case, the worker's injury at work triggered his dismissal. In the second, the worker took on the role of speaking to the new boss on behalf of others because of her age and experience. Neither has returned to work since, both compounded by some disability.

The workers in mid-career had to make changes to their work as a consequence of the reprisal

All the workers were terminated by management for raising and defending OHS rights and obtained a financial settlement when they took their case to the OLRB.

## **Management**

The final group of individuals interviewed were four women who identified themselves as holding a management or supervisory position when they suffered a reprisal. Two were supervisors and had direct access to the OLRB as they are considered workers under OHSA. The other two held more senior managerial responsibilities and utilized Section 50 of OHSA at least in part because other remedies were not available to them.

Three of the four women suffered the reprisal because they were trying to get their employer to comply with health and safety rules and regulations. While all of them suffered harassment at work, only one was terminated solely because she complained that she was being harassed and bullied at work.

**Interview 10** was employed specifically to provide health and safety supervision for the workers on site. Her position became threatened when she disciplined an employee who was a favourite of her boss:

The one particular guy ... was ... constantly without any fall protection doing things that were absolutely unsafe. I'd gone to the boss several times to talk to him ... because I knew it was going to be uncomfortable. It didn't happen and then what ended up happening, is that the other workers of course noticed this and they noticed the favouritism and .... started complaining ... I needed to do something. I wasn't going to lose the respect and the control that I had on the site. So, I did go write the worker up that was in an unsafe position.

The next day, when she arrived at 6.30am at the worksite, security would not let her in. She was taken to an external trailer and met by the head of security and head of human resources:

It was just the two of them and they basically told me that I was dismissed for — the reasons they gave me was that my skills were not acceptable.

The MoL helped her make a report and to get her personal stuff. She immediately contacted the OWA and began the legal process which she knew about as part of her training. She had support from the MoL, the OWA, the other workers at the site:

But they (the employer) made it very clear that bringing them out to the public will affect the rest of my career.

Ultimately she settled and got the confidentiality protection that she needed:

It did affect me in the next job because they had called around before we went to settlement. They had called around and basically, anytime someone saw them on my reference they called them and they tell them, Oh, don't touch her. Don't touch her.

The inspector was helpful in helping move the process along. However:

no, he didn't really mention ... charges. He did mention that there was an opportunity that they could either reinstate my job back. ... He did advise that in a lot of cases that unfortunately you can get your job back but they would then find any way they can to get rid of you.

**Interview 11** had recently started with a small company. She was the third in line management and responsible for health and safety. The company worked with chemicals that were not being properly stored onsite and they were missing safety procedures:

I started writing emails. You know I wanted to make a paper trail. I was aware of it in case anything happened that I was making an effort to make things better but it wasn't respected. A lot of it was because I was a woman. I was very young, 25 or 26, at this time, I think when it all started. So, there was no respect for what I was bringing to the table.

In the end, she contacted the MoL and an inspector came in and wrote orders. The employer's behaviour got worse:

He had sent me a letter that was saying about how I was crazy and making fun of my *disability* and stuff like that. Like some really terrible things.

The environment made it impossible to continue. The inspector advised her to go to the OWA who assisted her. Her former employer remained hostile throughout and the lawyer from the OWA helped her to remain calm. She had wanted to bring both a human rights complaint and OHS complaint and was frustrated that they could not be brought together. She chose the OHS route in order to keep the regulator, and the MoL, involved:

During the year long period before her complaint was settled, she returned to school and studied health and safety. As she put it:

I got sick of all these people saying, 'Well, why do you know all this stuff?' I paid for the education. I was right with all the stuff. I found out I had good reason to be upset and everything.

When asked what motivated her in this direction, she said:

Probably like a history of family fatalities at work.

Her grandfather had been killed at work and her brother seriously injured. She herself had been injured in an accident. To her, being concerned about health and safety made sense. She could not accept how her co-workers – some personal friends – did not support her after she contacted the Ministry.

**Interview 19** had over 20 years' experience working in supervisory positions on industrial sites. She had recently hired on with a medium sized employer supervising employees on a seasonal worksite. The concerns that she noticed were primarily related to equipment and hours of work:

That's the main part of it and then also there was a lot of bullying and harassing going on there by the owner, to myself as well as the people working for me. So that was a pretty broad spectrum of Health and Safety concerns.

Ultimately she decided to put her concerns in writing to the owner:

I'd written a letter explaining that I really enjoyed the work there and that I really enjoyed that people there, but that I had personal boundaries that he was regularly crossing and that I was hoping we could find a way to reach some sort of understanding about how we treat each other in the workplace so that we could put it behind us and move forward. The next day I came in and got fired.

After her termination, she contacted the MoL and met with an inspector:

I had immediate concern about the health and safety of the people there because I knew that they were going to be out doing specific jobs.

The inspector visited the workplace and made sixteen separate orders:

Of the sixteen (orders), eight of them were to do with lack of or violation of workplace bullying and harassment and then she got me in touch with the Office of the Worker Advisory and I started working with a woman there who guided me through the rest of the process.

She also found out that eight other women had suffered similar experiences with the same employer and met with two of them. One of the women who met with **Interview 19** brought along her son who told her:

Working there she would often come home from work in tears and all he wanted was for his mom to quit that job.

She pursued a complaint because she had been counting on her paycheque at least until the end of the year. She knew given the standards of the place that she probably would not stay much after that. There was also something else at stake:

And there had to be standards set in place... it's not okay to be treating people like that and the fact that it has happened to so many people before me, I just thought he's going to continue to do this to people or somebody gets hurt here or worse and I don't know, it was something that I could do about it, so I should.

She felt she had actually made a difference for standing up for herself:

So, getting fired might affect your self-esteem but overall it does affect your confidence. To stand up for yourself, you know what I mean. There's way better jobs out there, ones where you don't have to die for a ridiculously low wage.

All three of these woman had raised safety concerns on behalf of the people that they supervised believing it was their responsibility to do so. When higher management refused to act, they put their concerns in writing and called in the Ministry of Labour. The response of higher management included harassment, intimidation and belittlement as well as the abrupt termination of employment.

The experiences of **Interview 12** was similar with significant differences. Initially she did not experience harassment as a result of raising other health and safety concerns. Harassment was the central hazard. The source was another female manager of equal rank who utilized harassment, non-cooperation and obstruction to undermine **Interview 12** and cause her emotional stress. When she consulted her direct supervisor she was advised to put in a formal bullying complaint to the corporate office. She did so and "six weeks later I was handed a pink slip."

The corporate office contacted her, conducted an investigation and initially offered mediation. The next thing she heard was that the employer had eliminated her position. She went to see an employment lawyer who advised her that she signed an employment contract that took away her right to sue. After further investigation, she contacted the OWA who assisted her. She did not contact the MoL. In fact, she did not think of what had happened to her as an health and safety issue until many months afterwards. She has remained sensitive to mental health issues at work ever since. She experienced significant mental anguish as a result of her experiences but in the end it had little impact on her future employment.

## Summary

Of the four interviewees who identified as management, three were terminated for raising a health and safety concern with their employer. Two held training in OHS and were addressing issues which directly affected the risks facing the workers that they supervised. The third was responsible for OHS in her management position. All three were terminated for being persistent in raising concerns about unsafe practices to management higher up.

## Representation at the OLRB

All but one of the people interviewed were represented subsequent to experiencing a reprisal and during the process of making a complaint. This is not surprising as the source of our interview requests was through unions and the OWA.

The one non-union worker who represented himself did experience problems making his claim:

I thought as I was sending them all my information. Countering two lawyer groups, one for the temp agency and one for the client was sufficient. Come to find out when I got to mediation the mediator was going, ‘Well, you didn’t submit your stuff as evidence.’ I’m going, ‘I submitted it to you folks.’ So, I don’t know if due process was not served properly or if they’re blowing smoke.

The other interviewed workers who were represented were generally satisfied with the quality of the representation. Two union represented workers – **Interviews 2 and 7** – were not satisfied. A few of the interviewees, including all of the management, just wanted a settlement and to get on with their lives. Many wanted to proceed to a hearing and saw the opportunity as a way to send their employer a message. As **Interview 21** put it:

Q: Why did you not want to settle? Why did you want to fight it out?

A: Because these things get settled out and nothing ever happens, nothing ever comes out.

Almost universally they received the same advice: their case was strong and they could go to a hearing. However, the process would be long and conflictual with the possibility that they would not win. Furthermore, the award was limited:

My representative lawyer ... said I had a clear-cut case, right. He said, ‘Yes, you are going to get paid,’ but he didn’t tell me how much I was going to get paid or for how long... we went through the case and he said, ‘Well, you were only employed for one and a half weeks and that’s about all you’re going to get is about a week and a half wages, (**Interview 15**)

In all these cases, the worker decided to settle.

## Role of the Ministry of Labour in reprisals

Only three of the twenty-five people interviewed did not contact the Ministry of Labour concerning their OHS concerns. **Interview 1**’s experience of reprisal resulted from internal procedures and was addressed by an arbitrator. Two other people who did not complain to the MoL (**Interviews 7 and 13**) involved harassment as a complaint that was not initially seen as a health and safety matter.

Ten interviewees contacted the Ministry about their health and safety concern before their termination. In all ten of these cases, an inspector was sent into the workplace to conduct an investigation. Five of these were union members (**Interviews 2,4,5,6 and 8**), one was a manager (**Interview 11**) and four were non-union (**Interview 16, 20, 24 and 25**). **Interview 16** was incensed that he was told if he complained to the MoL he would be fired. **Interview 20** contacted the MoL because her employer was not responding to the workers' health and safety concerns. **Interview 24** contacted the MoL for advice prior to the reprisal and was told she could not be fired for raising an health and safety concern. She then called again after she was terminated. **Interview 25** contacted the MoL concerned about her job security and was told that if she complained about health and safety concerns, an inspector could be sent in.

In most of those cases where the person called the inspector while employed, the interviewees felt the attendance of the inspector played a role in the reprisal by the employer:

The Ministry of Labour came in. I supposedly knew about it. Called it in and if I wasn't the one that called it in I knew who did it. He was going to make me pay. (Interview 4)

Among those who contacted the Ministry after they suffered a reprisal, most lead to a subsequent inspection (**Interviews 3, 9, 10, 13, 19, 21**) to address the underlying health and safety complaint. The response was usually supportive though not always (**Interviews 9 and 24**). In cases involving a refusal of unsafe work, the inspector was unable to address the concern after the worker had left work (**Interviews 2, 15, 22 and 23**).

In only one case did an inspector intervene directly regarding a reprisal and, in that case, the inspector contacted the employer in response and provided them with an information pamphlet that reprisals were prohibited (interview 16).

Two workers were told by the MoL that their employer could not discipline them for making an health and safety complaint just prior to being terminated (**Interviews 24 and 25**).

### **Resolution of reprisal cases**

All of those interviewed made a complaint and completed it. All but one of the union interviewees utilized the arbitration process. The one who opted for the OLRB (**Interview 2**) explained it like this:

Q: Why did you make that decision?

A: Because I've never gotten any satisfaction. Any *arbitration* stuff that I have gotten written things for, they violate anyways and they tell you grieve it. They knowingly violate it. Tell you to grieve it. You go back to *arbitration*. They get their fingers slapped. No, this is still in play.

Q: Okay. So, you thought going to the OLRB this would be a more serious process?

A: Because I've never gotten any satisfaction. Any GSB stuff that I have gotten written things for, they violate anyways and they tell you grieve it. They knowingly violate it. Tell

you to grieve it. You go back to the GSB. They get their fingers slapped. No, this is still in play.

The theme that proceeding to the OLRB would send a message to the employer that their behaviour was wrong was repeated by many of the people interviewed. There was an expectation that the employer would be punished and perhaps would next time treat health and safety more seriously:

I told him (the OLRB mediator), I don't care about the money that I'm going to get. This guy should be fined, put in jail, whatever. He should be – his hands should be rapped. Put out of business or whatever.' Q: When you said that what was the response? A: 'Well, we can't do that. This is not about that. This is not about that! This is about getting you your settlement and resolving this issue' and I'm thinking, 'This is a health and safety issue. This guy broke the law. (**Interview 15**)

Q: "Why did you not want to settle? Why did you want to fight it out?" A: "Because these things get settled out and nothing ever happens, nothing ever comes out." (**Interview 21**)

I just thought he's going to continue to do this to people or somebody gets hurt here or worse and I don't know, it was something that I could do about it, so I should. (**Interview 19**)

By the end of the process, several interviewees expressed disappointment that there was no penalty and nothing happened:

I thought, 'Well, there's going to be some protection. They just can't fire me because if they do they're really in trouble.' Well, that was a joke. A little slap on the wrist. (**Interview 16**)

Only four of the cases went through to a hearing. One was lost by the worker (**Interview 2**). Two union cases objecting to harassment by the employer over health and safety were won but only in a limited sense. Both of these workers resigned their position in health and safety and stopped being active in their union (**Interviews 4 and 5**).

The claim of **Interview 17** went through to hearing because the employer stopped participating. Although represented by the OEA, the employer himself did not show up. A hearing was held without him and an award made. **Interview 17** had not received any monies from the employer.

Several people interviewed received advice from the arbitrator or mediator to settle as well. As **Interview 6** put it:

they tried to get me to settle for whatever they could and when I said, 'No, I want my job back, I'm going back because I did nothing wrong,' they just kept upping the ante and when the arbitrator saw this. 'You know what?

Let's make some sort of a deal here' They just twisted my arm with more money. Finally, the arbitrator sits in front of me and says \*\*interviewee\*\*, 'Look, If I were you I'd take the money... look, I don't know what the case is. I haven't seen anything. I'm not going to tell you what I'm going to decide here but I can tell you this. They want to get rid of you. They're going to get rid of you, whether it's now or later or they're going to do it.

### **Observations**

Ultimately union membership, knowledge of OHS and related rules, age or management status were not protective. Most workers interviewed knew this from the beginning but were prepared to take the risk often motivated by a belief beyond themselves, in social justice or fairness, and by a belief it would benefit others as well.

Most hoped or expected that their employer would be punished for what the employer had done. In this they were disappointed even when supportive of the assistance that they got from the Ministry of Labour, their representatives such as the OWA and the OLRB.

Most cases were settled for money. Workers did not get their jobs back, even those where the worker wanted to be reinstated and in cases where the union supported the worker. The knowledge that their employer did not want them put a target on their back too heavy to bear.

Workers who contacted an inspector who came in and wrote orders in support of the worker's positions were harassed and fired for that reason.

## Part 2: OLRB case files

A second component of this study was a review of case files submitted to the OLRB between January 2007 to January 2017. These files had case file numbers from 2006 to 2016 as the OLRB case file years run from March to March of any given year. Only closed files were reviewed.

Electronic case files contained an application in a form provided by the OLRB that required the applicant to provide details regarding their claim. The OLRB then required that a copy of the application be delivered to the respondent, i.e. the employer and any others who are alleged to have a role in the reprisal. The respondent(s) then may file a response to the application if they disputed the claim and were also required to provide details regarding their response. Supplementary documentation may be filed in support by either side. The means by which the case was ultimately resolved was recorded. Researchers reviewed the application, response, supplementary documentation if filed and the manner in which the case was resolved. The information was summarized using a coding strategy developed through an initial review of twenty-five cases.

All data was collected under an agreement regarding confidentiality which precluded capturing information in a way that would identify any of the parties involved.

In Applications, the reviewers recorded the year that the reprisal allegedly took place, summarized key demographic information if available, categorized the explanation of the reprisal given by the applicant, and identified whether worker representation or an inspector was involved. The inspector's report, when filed, was summarized to determine whether it aligned with the applicant's concerns. Any documentation filed in support was listed.

In Responses, key demographic information was summarized when available. The reviewers then listed admissions, denials and allegations regarding the Application. The formal legal reason for the reprisal was recorded. Similarly, reference to worker representation and inspector involvement was collected along with a list of supporting documentation.

The cases were recorded resolved in one of three ways – by order of the Board, by settlement, by hearing by the Board or by the applicant withdrawing the claim. The means of resolution were documented and details recorded, if available.

The OLRB provided the researchers with a list of 1,256 closed cases that were filed between April 1 of 2006 and March 31 of 2017. Our initial plan was to review all cases. Two researchers began reviewing files, one starting with cases filed in 2006 and the other with cases filed in 2016. However, part way through the data collection it was realized it would take too long to review all cases given the project time limits and the length of many files. The strategy was shifted to randomly sampling a minimum of 20 cases filed in each year. Once this was completed, researchers randomly sampled more cases between 2011 and 2014 so that our sample was weighted towards more recent cases. A total of 688 cases (54.8% of all cases filed at the OLRB) were suitable for analysis.<sup>1</sup> The second column in Table 1 records the distribution of the

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<sup>1</sup> 14 files were not included in Table 1 as the data in the files was incomplete.

cases based on the year the reprisal occurred rather than the year the case was opened at the OLRB. As a result the correspondence between when a case was filed and the year the reprisal occurred varies. These numbers also vary as the OLRB uses March 31 as a year end and we used December 31 as our year end. The collected data was entered into STATA software and analysed.

**TABLE 1: Cases reviewed**

<b>Year</b>	<b>Number of OLRB Cases filed in Year (year end March 31)</b>	<b>Number of Cases Reviewed by Actual Year that Reprisal was claimed to occur (year ending December 31)</b>
<b>2005</b>		3
<b>2006</b>	29	7
<b>2007</b>	115	81
<b>2008</b>	90	15
<b>2009</b>	82	30
<b>2010</b>	110	25
<b>2011</b>	123	31
<b>2012</b>	130	70
<b>2013</b>	138	62
<b>2014</b>	164	107
<b>2015</b>	162	137
<b>2016</b>	113	120
<b>TOTAL</b>	1256	688

## Applicants

### Who brought a reprisal case to the OLRB?

The findings related to who brought a case to the OLRB indicate that a wide range of workers with very different characteristics reported having experienced a reprisal for raising a health and safety issue. While workers who reported being reprised tended to be younger, lower seniority, low income and in permanent full-time, a significant number were over fifty-five years of age, earned more than \$50,000, or were temporary employees.

- Men were more likely to submit a case (68.4%) than women (31.6%)
- The average age of persons submitting a case was 42.5. Just over 10% of applicants were twenty-five or younger and about 13% were over fifty-five.
- The majority of applicants were workers (89.3%). Almost 10% were managers, and a few were students.
- The majority of applicants (72.2%) earned less than \$30,000 a year. 6.4% earned more than \$50,000.
- Most applicants reported being in permanent full-time employment (71.1%).
- Almost 20% were temporary, contract or seasonal workers and just over 10% were permanent part-time employees.
- Almost one in six (15.4%) were on probation at the time of the reprisal
- Applicants tended to be low seniority workers. Almost half (49.4%) had worked less than one year with their current employer. Less than one in five (17.0%) had more than five years of seniority.
- Over 10% of the applicants were worker representatives (10.3%). Over three-quarters of the worker representatives were acting in either an official (73.2%) or unofficial (4.2%) occupation health and safety capacity and this was a factor in their being reprisal.

### **How did applicants present their cases to the OLRB?**

- Over one-third of applicants (39.2%) were not represented by a third party before the OLRB. The most common source of representation was the OWA (26.7%) followed by a legal representative (23.7%) and a union (8.9%). OWA only started representing applicants in 2012 after which they represented over one-third of all applicants (34.6%).
- Just under 20% of applicants were assisted at some point by a worker rep (17.4%).
- Less than 5% of cases were referred to the OLRB directly by inspectors as provided by OHSA. We know from interviews and the OWA that inspectors refer many to OWA instead of directly to the OLRB.
- Less than 20% of applicants were union members (19.9%). Union members have access to collective agreement and arbitrators who have experience reinstating workers who were wrongly dismissed.

### **OHS concerns that led to a reprisal**

The reasons provide by the applicant for the reprisal were coded into ten categories.

Table 2 lists the reasons applicants gave for why they felt there had been a reprisal. Some applicants gave more than one reason.

**TABLE 2: Reasons why applicant claimed they were reprisal**

Type of Reprisal	Number of cases	% of 688
<b>Physical based reprisal (93.0%)</b>		
<b>Harassment</b>	213	31.0
<b>Work hazard</b>	459	66.7
<b>Violence at work</b>	94	13.7
<b>Work refusals</b>	191	27.8
<b>Formal</b>	56	8.1
<b>Informal</b>	135	19.6
<b>Process based reprisal (43.2%)</b>		
<b>Was acting in an OHS role</b>	153	22.2
<b>Applicant called inspector</b>	199	28.9
<b>Health based reprisal (26.6%)</b>		
<b>Sickness</b>	48	7.0
<b>Injuries at work</b>	71	10.3
<b>Needed accommodation</b>	43	6.3
<b>Mental Health</b>	21	3.1

- Over 90% of applicants claimed some form of physical hazard was a key factor that led to a reprisal (93.0%). This included the applicant was being harassed, exposed to work hazards or violence at work, or had initiated a work refusal.
- Over 40% of applicants (43.2%) claimed that a process issue associated with enforcing rights under OHSA, i.e. acting in an OHS capacity or calling in an inspector regarding a safety issue, was a key factor that led to a reprisal
- Just under one-quarter of applicants claimed that a health issue was a key factor that led to a reprisal (26.6%). This included having been sick, injured, needing accommodation or having mental health issues.

#### **a. Concerns based on harassment**

Just over 30% of all reprisals cases had their root in some type of harassment at work. Table 3 lists the different types of harassment applicants claimed. There were 213 cases that listed harassment and 64 cases listed more than one type of harassment.

**TABLE 3: Types of harassment cases**  
 (There were 213 harassment cases. Some gave more than one type of harassment n=277.)

	<b>number</b>	<b>% of cases harassment cases (n=213)</b>
<b>Discrimination</b>	17	8.0
<b>Sexual harassment</b>	9	4.2
<b>Racial harassment</b>	6	2.2
<b>Intimidation (Bullying)</b>	137	65.0
<b>Criticism (Belittling)</b>	100	47.0
<b>Not specified</b>	8	3.8

- Intimidation (65.0%) and criticism (47.0%) were the most common forms of harassment.
- 48.1% of women were associated with cases involving harassment compared to 23.4% of men.
- Two-thirds of complaints of harassment involved a boss or manager (66.2%) while under one-third of harassment cases involved coworkers (30.4%).
- Over 80% of applicants complained about the harassment to their employer (84.5%), but less than half claimed their employer had a harassment policy (44.1%).
- Applicants claimed employers investigated their complaint in only one-third of the cases (33.3%). Nearly two-thirds of employers rejected the complaint (63.4%).

#### **b. Concerns based on specific hazards**

Two-thirds of all reprisal cases had their root in some type of specific hazard. Table 4 summarizes the different types of physical hazards associated with reprisals. There were 459 different cases that involved physical hazards at work and 82 cases listed more than one physical hazard.

**TABLE 4: Types of reported hazards**

There were 459 cases and some (82) reported more than one hazard.

	Number	% of 459 hazard cases
<b>Physical</b>	64	13.7
<b>Chemical</b>	93	20.3
<b>Biological</b>	8	1.7
<b>Psycho-social</b>	43	9.4
<b>Safety</b>	317	69.1

- The majority of hazard cases also involved a safety issue (69.1%).
- One in five involved a chemical exposure (20.3%).
- 51.4% of women were associated with cases involving hazards compared to 74.5% of men.
- There was no association between age and the frequency of reporting hazards at work.

### c. Concerns based on violence at work

There were 94 cases in total involving violence at work.

- 17.5% of women were associated with cases involving violence at work compared to 12.4% of men.
- There was no association between age and the frequency of reporting violence at work.
- Co-workers (42.6%) were the most likely to be involved in violence cases followed by bosses (38.3%) and clients (14.9%).

#### **d. Concerns based on work refusals**

There were 191 cases involving refusal to do work that the applicant thought was unsafe. Of these, 56 were formal refusals where a formal process was followed (investigation, second stage, possibly call inspector) and 135 were informal where the applicant did refuse and was reprimed without any steps taken.

- Inspectors were more likely (79.4%) to have investigated a formal work refusal than an informal work refusal (20.6%). (Note distinction above.)
- 14.6% of women were associated with work refusals compared to 33.4% of men.
- Workers between the ages of 26 and 55 were the most likely to be involved in cases involving work refusals.

#### **e. Concerns based on sickness and unable to work**

There were 48 cases in total involving sickness of which 36 were work related.

- The majority of sickness cases did not involve the applicant making a WSIB claim (75.0%).
- Women were more likely to make claims based in sickness (6.6%) than men (4.8%).
- There was no association between age and the frequency of reporting sickness at work.

#### **f. Concerns based on injury and unable to work**

There were 71 cases in total involving injury of which over 90% involved work injuries.

- Just under one-third of claims involving injuries also involved the applicant making a WSIB injury claim (32.4%).
- 7.5% of women were involved in of cases involving injury while 12.0% of men were involved in these cases.
- There was no association between age and the frequency of reporting sickness at work.

#### **g. Concerns based on applicant needing an accommodation**

There were 43 cases where the root of a reprisal was the worker requesting an accommodation at work.

#### **h. Concerns based on mental health issues and unable to work**

There were 21 cases in total involving mental health issues.

- Less than 20% of mental health issues were associated with a WSIB mental health claim (19.0%).
- 7.1% of women were involved in of cases involving mental health while 1.3% of men were involved in these cases.

#### **i. Concerns that applicant suffered a reprisal for acting in an OHS capacity**

Over 20% of all reprisal cases had their root in the applicant having acted in some type of OHS capacity. Worker representation was examined in each case from three different perspectives: acting as a representative of other workers was cited as a reason for the reprisal by the applicant; the applicant was a worker rep or a worker representative was involved; and the inspector wrote an order requiring either worker training or establishing a worker representative. The results are summarized in Table 5.

**TABLE 5: Reprisals where applicant was acting as a worker representative**

	<b>Number</b>	<b>% of 688 cases</b>
<b>Reason for reprisal – Acting as Worker Representative</b>	153	22.2
<b>Informal</b>	91	13.2
<b>Formal</b>	62	9.0
<b>Applicant was Worker Representative</b>	71	6.1
<b>Worker representative involved</b>	120	17.4
<b>Orders –worker training</b>	54/122*	44.3
<b>Orders – worker rep/committee</b>	39/122*	32.0

\* Orders only written in 122 cases.

- There were 153 cases involving the applicant acting in an OHS capacity of which a majority (just under 60%) were acting in an informal capacity (59.5%). These are workers who were not formally appointed or elected as a representative and whose actions were expressed in terms of addressing the effects on co-workers as well as oneself.
- 16.5% of women were involved in cases involving the applicant acting in an OHS capacity compared to 24.7% of men.
- There was no association between age and the applicant acting in an OHS capacity.

- While only a minority (17.4%) of claimants were helped by a worker rep, those who were helped were less likely (64.2%) to have been terminated than applicants not helped by a worker rep (88.2%).

#### **j. Concerns that the applicant suffered a reprisal for having called an inspector regarding a health and safety issue**

There were 199 case (28.9% of all cases) where the applicant claimed the reprisal was associated with having called in a MofL inspector.

- 34.0% of women were involved in cases involving the applicant having called in an inspector compared to 27.1% of men.
- There was no association between age and the applicant having called in an inspector.

#### **What was the reprisal?**

Table 6 summarizes the types of reprisals applicants reported. Of the 688 cases of reprisal claimed by applicants, 143 listed more than one type of reprisal.

**TABLE 6: Kinds of reprisals reported**

There are 688 cases and 143 listed more than one.

	<b>Number</b>	<b>% of 688 cases</b>
<b>Termination</b>	578	84.0
<b>Change in Employment Conditions</b>	143	20.8
<b>Harassment (as part of the reprisal)</b>	77	11.2

- Men (86.0%) were somewhat more likely to be terminated as part of their case than women (82.1%).
- Younger applicants were marginally more likely to be terminated than older applicants.
- Applicants who were union members (50.4%) were less likely to be terminated than non-union applicants (92.4%)

- Applicants who were worker reps were less likely (67.6%) to have been terminated than applicants who were not worker reps (85.9%).
- Applicants who were helped by a worker rep were more likely (37.5%) to have reported changed employment conditions than applicants not helped by a worker rep (17.3%)
- Applicants who were helped by a worker rep were more likely (20.8%) to have been harassed than applicants not helped by a worker rep (9.2%).

### **Involvement of inspectors in reprisal cases**

Table 7 documents the involvement of the Ministry of Labour health and safety inspector in the casefiles from the perspective of the applicants. Three different contexts for inspector involvement were identified. An inspector could refer a case directly to the OLRB on the request of a worker; calling or threatening to call an inspector could be cited by the applicant as a reason for the reprisal; or an inspector may be called to the workplace to address a concern and his or her report may be filed.

**TABLE 7: Role of inspector**

	Number	Number of cases	percent
<b>Inspector Referral</b>	31	688	4.5
<b>Reprisal for contacting inspector</b>	199	688	28.9
• actual	167	688	24.3
• threat	32	688	4.7
<b>Inspector contacted</b>	333	688	48.4
<b>Inspector attended workplace</b>	304	345	88.1
• before reprisal	187	333	56.2
• after reprisal	159	333	47.7
<b>report filed</b>	250	333	75.1
• aligns with worker claim	222	250	73.0
• reprisal mentioned	92	250	36.8

- An inspector visited the applicants place of work in 88.1% of cases that he or she was contacted.
- In just over half the cases, the inspectors became involved in the applicant's file as a result of a worker having contacted them (50.2%).
- Just over half the time an inspector was involved, they were contacted before the worker suffered a reprisal (56.2%). In 47.7% of cases they were only contacted after there was a reprisal.

- In over half the cases where the applicant called the inspector, the applicant also claimed this was one of the reasons for the reprisal (51.6%).
- Applicants who were union members were less likely to contact an inspector before the reprisal occurred (20.4%) than non-union members (28.9%). Applicants who were worker reps were more likely to call an inspector before the reprisal (43.7%) than non-worker reps (25.3%)
- An inspector's report was submitted in 81.2% of the cases where they attended the workplace.
- The inspector's report aligned with the applicant's complaint in most cases (73.0%).
- The inspector mentioned the reprisal in just over one-third of all reports (36.8%).
- The inspectors issued at least one order in about 40% of the cases they were asked to investigate (40.1%). Orders included improved worker training in 44.3% cases and an order to establish an OHS committee in 32.0% of cases.
- Inspectors attended the workplace in most cases including 88.8% of cases that involved a physical hazard, 86.3% that involved a health hazard and 88.0% that involved a procedure issue such as calling the inspector or acting in an OHS role was argued to be the cause of the reprisal.

### **Documentation provided by the applicant**

- Witness statements were provided in less than 5% of all cases (4.1%).
- Employment records were provided in just under 60% of all cases (58.4%).
- Exhibits were presented in just under 40% of all cases (39.9).
- Reports were presented in just over 30% of all cases (32.0).

### **Respondents**

- The majority of respondents (82.7%) were private for-profit organizations.
- Just under 14% were non-private sector respondents. About half of these were government organizations and just under one-third were not for profit organizations.
- About half the respondents (45.2%) for whom we have information came from large organization with the remainder evenly split between medium and small organizations.

- Most of the respondents were either locally based (38.8%) or regionally based (19.5%). Just over 20% were from international organizations (20.9) and the remainder were either provincial (5.7%) or national organizations (10.9).
- Just under half (48.1%) were single establishment organizations. Just over half involved employers who were part of a franchise, chain or larger organization.
- Over 40% of respondents were from the service sector. The remaining cases came from the goods producing sector (29.3%), construction (14.1%) or the public sector (13.5%).
- Cases coming from the public sector (65.6%) were less likely to be involved in cases where the applicant had been terminated than construction (92.8%), service sector (88.2%) or the goods sector (84.6%).

### **Elements of response to applicant**

- Most respondents (82.0%) were represented before the OLRB with the majority (56.4%) being represented by a lawyer.
- Over two-thirds of respondents (68.6%) admitted to at least part of the applicant's complaint, but the majority (86.2%) denied all or some of the applicant's allegations.

### **How respondents described their reactions to the application**

Table 8 summarizes how respondents described their actions towards the applicants. Of the 688 cases summarized, 93 respondents gave more than one description for their action.

**TABLE 8: Respondents reasons for reactions to applicants**  
(There are 688 cases and 93 respondents gave more than one reason)

	<b>Number</b>	<b>% of 688 cases</b>
<b>Insubordinate employee</b>	259	37.6
<b>Justified action</b>	313	45.5
<b>Lack of work</b>	63	9.2
<b>There was no reprisal</b>	46	6.7
<b>Unsafe behaviour</b>	60	8.7
<b>Other</b>	40	5.8
<b>Missing</b>	102	14.8

In 83% of cases employer acknowledged events happened but characterized worker's behaviour as insubordinate or employer's reprisal was justified.

#### **How respondents categorized the legal grounds for their actions**

Table 9 summarizes how respondents categorized the legal grounds for their actions. Of the 688 cases, 33 respondents categorized their actions under more than one category. Due diligence in OHS was cited by the respondent in support of their legal grounds for the alleged reprisal.

**TABLE 9: Legal categories of respondents' actions**

	Number	% of 688 cases
<b>Due diligence</b>	223	32.4
<b>Business decision</b>	86	12.5
<b>Cause</b>	329	47.8
<b>Without Cause</b>	42	6.1
<b>Probation</b>	69	9.9
<b>No penalty</b>	99	14.4
<b>Missing</b>	112	16.3

- The most common categorizations was they acted with cause (47.8%) and they acted with due diligence (32.4%).
- Respondents were more likely to assert that they acted with due diligence where the applicant was acting in an OHS capacity (41.2%) than where the applicant was not (29.9%).
- Respondents were more likely to categorize their actions as a business decision where the applicant was acting in an OHS capacity (14.4%) than where the applicant was not (7.7%).
- Respondents were more likely to categorize their actions as acting with cause where the applicant was acting in an official OHS capacity (54.2%) than where the applicant was not acting in an official OHS capacity (46.0%).

#### **Did being on probation affect respondent's legal justification for their actions?**

- Workers on probation were as likely as non-probation workers to have been told by respondents that the respondent's actions were either consistent with due diligence or that it was a business decision. One-third were told the respondent acted with due diligence (33.0%) and over 10% were told it was a business decision (10.4%).

- Just over 20% of workers on probation (22.6%) were told by respondents that the respondent acted with cause compared to more than 50% of workers not on probation (52.4%).

## Outcomes of cases

Table 10 summarizes the outcomes of the 688 cases we examined. OLRB terminated case signifies decisions made by the OLRB prior to hearing. It included termination for procedural failings (e.g. documents not served or responded, outside time limits) and rulings that the application did not make a *prima facie* case, i.e. that it failed to set out facts that showed a contravention of reprisal provisions of OHSA.

Cases were identified as settled only when explicitly stated. It is likely that some, if not most, of the cases that were simply terminated by the applicant were also settled but this was not disclosed to the OLRB. Where a memorandum of settlement was also filed, key elements of the settlement were identified.

Those cases that went to a hearing of the OLRB were identified as awarded or dismissed.

Some cases were simply marked as terminated at the request of the applicant. No reasons were specified.

**TABLE 10: How cases were resolved**

	<b>Number</b>	<b>% of 688 cases</b>
<b>OLRB terminated case</b>	69	10.0
<b>OLRB terminated because no <i>prima facie</i> case</b>		26.1% (of terminated cases)
<b>Settlement reached</b>	510	74.1
<b>Settlement filed</b>		79.2 (of settled cases)
<b>Settlements averaged \$5000 or less</b>		68.3 (of settled and filed)
<b>Hearings</b>	40	5.8
<b>Awarded</b>	10	1.4
<b>Dismissed</b>	30	4.4
<b>Terminated by applicant</b>	81	11.8

- The majority of cases were resolved through a settlement (74.1%). Terms of settlement were provided in 79.2% of cases. Conditions of confidentiality were required in 100% of cases.
- Most respondents who settled and received a monetary settlement received \$5,000 or less (68.3%). About one-third (31.7%) received more than \$5,000. The average monetary settlement was \$5,461. Damages were paid in 54.2% of settlements and wages were paid in 18.0% of settlements
- Very few cases went to a hearing (5.8%) and most cases that went to a hearing were dismissed (75.9%).
- 11.8% of cases were terminated by request of the applicant with no further information provided.
- 10% of cases were terminated by the OLRB at the beginning of the process of which 26.1% were determined not to have a *prima facie* case.

## Section 3: Inspectors

### Results of interviews and case studies

Both the interviews and case studies point to the same fatal interactions involving the current role of the inspector. On the one hand, central to the workers, was that inspectors responded when a worker was unable to resolve an important health and safety issue with the employer. What the cases and interviews demonstrated was that to contact an inspector can lead to termination. There was little consequence to the employer other than the cost of discharging an employee.

The inspector provided the only external and independent assessment of the health and safety concerns that gave rise to the call. Their report was important to the resolution of the claim that the worker might bring for reprisal and to the prevention of unsafe conditions. Inspectors provided victims of reprisals with advice on what steps they could take and advised employers that reprisals are against the law.

Inspectors did respond to complaints from workers that their health and safety was at risk by visiting the workplace and conducting an investigation whether called before a reprisal occurs or after. The importance of this to workers cannot be understated.

### Interviews with inspectors

#### Secondary data analysis

Between January and March 2017, researchers did a secondary data analysis of verbatim transcripts of twenty-six in-depth interviews with Ontario OHS inspectors and Ministry of Labour regulators conducted by Ellen MacEachen and team in 2013<sup>2</sup>. The focus of the original study was to examine challenges faced by inspectors in relation to determining health and safety conditions of precariously employed workers.

The data from the original study were coded and organised in NVivo code reports, including a code called “reprisals”. Various relevant code reports were analysed and examined, together with interviews identified through variations of key words, including: reprisal, harass, Bill 168, warning, complain, dismiss, fire, laid refuse, warn, speak up. All names used in this report are pseudonyms.

### Findings

The findings are organised in four parts. First, inspector understandings of why workers do not speak up to them about OHS hazards are detailed. Mostly, workers are unaware of their rights or fearful of speaking up lest they lose their jobs. Second, an inspector strategy for “treading

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<sup>2</sup>The original analysis of the data can be found at: MacEachen, E., P.I.; R. Saunders, K. Lippel, E. Tompa, "Understanding the occupational health and safety inspection process in a changing labour market."

carefully” during an inspection so as to not trigger a reprisal by approaching a worker was briefly described. Part three describes inspectors' challenges with gathering evidence for reprisals cases, mainly because workers are reluctant to testify, again, fearing job loss. Finally, inspectors' challenges with their limited powers in reprisals cases are described.

#### **a. Workers don't speak up about hazards**

Inspectors described some workers as not speaking up about safety hazards because they are new to Canada and unaware of their rights:

These were the workplace parties that already knew their duties and responsibilities and their rights, so I didn't actually have to provide that sort of information, but there were some workers – like vulnerable workers who were new immigrants, new to the country, didn't really know about Ontario legislation, or they were really young. (Michelle, Inspector)

In some cases, workers don't speak English well enough to communicate with inspectors. However, inspectors mostly described workers as not speaking up because it's not worth it for the workers. Workers have appraised the relative risk of injury versus job loss and have a greater fear of job loss:

[Temporary workers] work with lead, they work with mercury, machine guarding, material handling, working at heights. So if any of them-- If they have an accident they will not have a job tomorrow, if they take time off. If they raise a safety concern they don't have a job tomorrow. (Caroline, Inspector)

It would be great if...the migrant workers or the vulnerable workers felt strong enough that they could exercise their rights and there would be no repercussions to the exercising of the rights. But also ..., just awareness of hazards in the workplace and the culture of the workplace and the whole safety focus. (Joan, MOL management)

Like it... depend how the economy goes. When the economy is going full steam, in construction everybody is busy. When the economy goes down... it slows down as well. So and this is when the employers or contractors...have a little bit more power over the workers. Otherwise the workers working in that industry cannot tell his boss, I'm not happy here I'm going to someplace else, I have another job next week; no. So it all depend on the economy. (David, Inspector)

Inspectors know that workers sometimes do not want the inspector to approach them. In this case, workers on temporary foreign worker contracts pretended they did not speak English in order to avoid interaction with officials:

I have been in some greenhouses where the offshore Jamaican workers speak English, but were giving me the eye of, do not talk to me because I don't need to go home because of you....As much as I can speak English I don't speak English, do not talk to me mister--Whether you're a boss or you're a law enforcement or you're a whatever, because when they come from countries where, yeah you know what, we shoot people for this stuff, you know what I mean? And in the case of Canada, they want to come back next year and they want to continue working. (Malcolm, Inspector)

Workers can also want to avoid inspectors if they are working illegally:

They're, they're more worried about the fact well first of all we've got some workers out here illegally ... They, they don't want anybody to know. (Joan, MOL management)

A complication for inspectors is that those workers who do speak will sometimes relay the "management" message rather than worker safety concerns:

And then it's more complicated as well because none of the workers want to talk to you for fear they will not have a job tomorrow. And if they do talk to you they tell you exactly what management wants them to say. And you have to understand that. (Caroline, Inspector)

#### **b. Inspectors encourage worker reporting, but carefully**

Graham describes how he takes care to interact with workers in a way that won't cause employer reprisals:

Okay so my next thing is, I had a place in [city name], a food company, and I went in there, smaller business. It was on a targeted list for us, so I went in and said that was why I was there. Owner is not there; we're going to call you the owner, so Lisa is not there ...I'm going to tread carefully because I'm dealing with her hourly employees now, and for all I know you're this medieval kill-your-staff type of stuff if they say or do anything, right [yeah], violence in the workplace sort of stuff. So I'm trying to tread very gently and just hit the highlights. (Graham, Inspector)

As well, inspectors had to be cognizant of the limitations of their official; role, however sympathetic they felt toward the workers:

And actually that was a bit of a culture thing we had to talk to the inspectors about too is because if you look at it from the inspector's lens they are dealing with this poor worker and they would find an attachment with this worker and we would really have to define what their role was.... Our training really focused on what is your role because in some of these small towns, the worker would be calling the inspector and you know, the

inspector became the person that was helping them through this difficult time and it was really hard on the inspectors. (Joan, MOL management)

### **c. Inspector challenges with evidence gathering**

Inspectors describe OHS investigations as difficult because workers are fearful about testifying. This could extend to reprisals cases:

There's the old 'circle the wagon' mentality out there that exists in a lot of workplaces. A lot of, even injured workers, don't want to see their employers get into trouble. So, quite often, you have uncooperative witnesses and/or injured workers that, you're just not getting anything out when you take a statement, for example. So, if you have poor statements, that can be challenging. Sometimes it's just – it's very difficult to see exactly what happened, through the evidence, right, so there's all sorts of different challenge that you run into. (Tom, MOL management)

Inspectors can listen to workers' anonymous complaints but, for witness statements, worker identities are required, and workers are often not willing to go this far:

On some of our sites, workers are afraid to talk to us because people have been fired for saying too much to the Ministry of Labour, but we also get anonymous complaints, and I take phone calls.... to talk to workers anonymously if need be..... Typically, if it's going to court, though – you can't have anonymous sources when you go to court. I would take witness statements, written and audio statements during the initial days of the investigation. (Cliff, Inspector).

Sometime I have some workers on the construction site that came, you know, they wave at me, they want to talk to me about an issue there and-- And which I try to keep that as much confidential with them... And sometime I explain to them the process and the way they should be for proper work refusal as per the Act here. And halfway through the guy said, forget it, you know. (David, Inspector)

### **d. Inspectors face legal limitations in reprisals cases**

Inspectors described their frustration that that cannot investigate reprisals complaints. This section is based largely on the account of key decision maker, Malcolm. Below, he describes his hands as tied:

But I can tell you, our hands are still very tied, we are not allowed to just take it upon ourselves and investigate reprisals, and that's wrong. And the more workers, precarious workers in particular, the more the workers recognize that, the even less they're going to talk like they currently do. (Malcolm, MOL management)

In cases of violence, the inspector's role is limited to assessing if employers have established policy on violence and/or harassment and subsequent training in workplaces:

You have people hanging their hat on it and yet it does very little to nothing, because an inspector is not allowed to investigate the fact that I just punched that guy. All I'm allowed to do is say, yes policy, no, okay do the assessment, do the policy and then train the policy, have a nice day. I don't talk to the worker because I don't want to hear about it; that's how that law works in the workplace, and yet most Ontarians don't know that... So when a worker calls up and puts in a complaint to the Ministry of Labour, whether I've been harassed or punched is irrelevant, other than the application of the two sections of the legislation, you know harassment versus the violence piece. The inspector doesn't need to talk to the worker because we are going in to basically, in sort of a proactive but under a complaint to say, well do you have a harassment policy?... We need to talk to the employer to say, have you done a risk assessment on violence and/or harassment [Okay] in your workplace? No? Here is your order. Have you done a policy (Malcolm, MOL management)

According to Malcolm, directly addressing the violence is the purview of the police, not of inspectors:

Make no mistake, if someone punches you in the workplace you need to call a cop, that's not a Ministry of Labour inspection, it never should be an inspection for the Ministry of Labour. (Malcolm, MOL management)

Civil matters, including employer-employee relations, are outside of the purview of inspectors. Inspectors cannot be compelled to testify in court in relation to civil matters. Section 63(3) of the OHS Act outlines that the inspector is not a "compellable witness in a civil suit or any proceeding":

So what that meant in terms of legal terminology is there's currently a piece, and has been for many years, that in a civil matter you can't compel me to go to court, you can't subpoena me as a worker, and we like that part, that's a good thing. However, under the reprisal piece, if you were to have been fired in front of me and the boss said to you, I'm firing you because you work refused, that 'not competent' piece, not only spoke to I wasn't compellable under there, but if I wanted to go I wasn't allowed to go, and they had written that into the proposed legislation. (Malcolm, MOL management)

Inspectors could also do little in the face of non-code harassment in the workplace, such as racial slurs. A strategy they used was to redirect the worker to the Human Rights Commission:

There was a decision by the Ontario Labour Relation Board, ... almost two years ago, and the decision spoke to harassment in the workplace and

policies. .... When the inspector goes in, the one thing they can do....is say, hey person, here is your avenue for, you know, they used a racial slur, for example, here's your avenue for that, please go talk to the Human Rights Commission. And if they called you, and I'll use the word 'ass', well that's not a code based thing but you don't get to call me that at work, right. (Malcolm, MOL management)

An inspector can put a reprisal into OLRB on behalf of a reprised worker and, in turn, the OLRB deals with helping the worker get their money or job back. Therefore, inspectors play a very limited role in the reprisals process. They cannot get the worker re-hired. They can only charge the company with not having a policy in place:

Inspectors now have the .... ability to put a reprisal into the OLRB on behalf of a worker if the worker says they want to which is not something that the inspectors were able to do previously. And the thought around that was that a reprised worker may be a more vulnerable worker and they may not feel comfortable with the whole system... That's, that's different so there's two functions. So, the one is, can the inspector determine if there was actual reprisal or not and then can the inspector help the worker with reprisal? Because if we determine there's a reprisal we can't get that workers back their job or we can't get the worker any money, all we can do is charge the company, the OLRB has the authority then to take care of the worker and try and get the worker something. (Joan, MOL management)

A further challenge for inspectors during a reprisals investigation is finding a 'nexus' between the reprisal and a workplace hazard. Muddying the waters is the potential overlap between labour relations and hazard complaints:

But they will go in and, and they will investigate whether a reprisal has occurred or not and the first thing they have to do is, is establish what we call Nexus, so is there a connection between that reprisal and an actual hazard in the workplace, if there's not and you this is where you get into some labour relations stuff again, right? If there's not, if they can't establish that Nexus we don't have the authority to deal with the reprisal because the reprisal is outside of the act and the reprisal isn't because of the Act. (Joan, MOL management)

An additional challenge for inspectors is that, if they investigate a company to lay a reprisal charge, they may concurrently cause harm to the worker because the OLRB hearing will be suspended until the investigation is over. The inspectors have up to a year to do their investigation, so the workers' harassment complaint with the OLRB can be suspended for up to one year. For that reason, inspectors described being very careful to pursue only very clear cases. In effect, this process reduces pressure on employers:

If we determined that we thought that there was enough evidence to have us investigate the reprisal, the OLRB held the reprisal complaint, because they didn't want to do a process. So, the poor worker that was putting their reprisal concern into the OLRB and wanted some type of individual award, they were holding off doing it...[They suspended the hearing at the OLRB]...Until we, until we finished our investigation and we have a year to lay charges so we really then scrutinized our um, policies around whether you do an investigation or not...So, what we've, what we've done is we've really scrutinized the criteria as to whether we would do an investigation or not and we've put much more stringent approval process in place, so if the inspector does feel that there's a strong contravention for a reprisal then they talk to their manager and director and myself to determine whether we want to go forward and investigate that or not, based on the impact of the worker, based on the impact to the evidence in the workplace.(Joan, MOL management)

## **Ministry of Labour policy**

The directions provided to inspectors are set out in the Ministry of Labour Operations Division Policy and Procedures Reference Manual (Manual), a copy of which was requested from the MoL under FOI and received.[44]

Policy in regards to reprisals is set out in five documents in module 4 section 11 subsection 7 of the Manual.

The procedure to be followed is set out in 4.11.7.2

When notified of a reprisal allegation, inspectors attend the workplace and issue appropriate orders for any underlying health and safety violations that may have led to the reprisal complaint.

Inspectors shall not investigate the issue of whether there has been a reprisal. They shall not make a determination as to whether a reprisal has been committed, nor shall they take any enforcement action with respect to any alleged act of reprisal.

An exception may only be made with prior approval of a manager in case of a prosecution. According to a MoL reply to another FOI request, there have been no prosecutions for violation of Section 50.

Further, an inspector is directed:

To avoid unnecessary duplication of proceedings at the OLRB, the inspector shall not issue any orders under OHSA Section 50 with respect to the alleged reprisal.

The rationale for this is set out in the next document, 4.11.7.3, entitled Enforcement Activity:

Enforcement activity is limited to the health and safety issues underlying the reprisal allegation.

...

This approach reflects the respective areas of expertise of the inspectors and of the OLRB. The OLRB inquiries into the reprisal allegation (which involves an assessment of the employer's and worker's motivation, and the reasonableness of the discipline imposed); the OLRB does not address the underlying health and safety concern. The inspector, on the other hand, shall investigate the underlying health and safety concern that led to the reprisal allegation, and shall take appropriate enforcement action with respect to that health and safety concern (e.g. issues orders, recommends prosecution).

The policy goes on to require the inspector to contact a worker who has complained about a reprisal and to investigate the underlying health and safety issues. It also notes, however, that the narrative of the inspector's report should not contain any details with regard to the alleged reprisal, or information that links identified individuals to the reprisal. Specifically the report must not contain:

- the name of the worker alleging reprisal
- the name of the person(s) who were alleged to have caused the reprisal
- the names of any witnesses to the alleged reprisal
- other identifying details, including job title, work area etc.
- statements made by any workplace parties with regard to the alleged reprisal
- any statement that a MOL Referral of Alleged Reprisal has been made.

## Section four: Conclusions and recommendations

### The Limits of Section 50 protection

The Internal Responsibility System (IRS) was implemented to allow workers and employers to resolve occupational health and safety issues at the workplace with limited direct intervention by Ministry of Labour officials. The effectiveness of the IRS in making work safer depends on the ability of workers to participate in the process, to freely voice their concerns without fear of reprisal, and to contact an inspector when they cannot get the health and safety concern addressed.

Section 50 of the OHSA was designed to protect the right of workers to voice their OHS concerns. As stated in the 2010 report of Ontario Expert Advisory Panel on Occupational Health and Safety:

Section 50 is intended to enable workers to freely raise health and safety concerns and to fully exercise their rights under the OHSA, such as refusing unsafe work, without fear of reprisal.[22]

This is reiterated by the Ministry of Labour in their Policy Manual:

The prohibition of reprisal in Section 50 is fundamental to the functioning of the Internal Responsibility System. Inspectors must respond to reprisal allegations on a priority basis. (4.11.7.1)

Section 50 stipulates that employers are not allowed to fire or threaten to fire workers, suspend or discipline workers, intimidate workers or impose penalties on workers who are seeking to have their rights under the OHSA enforced or who are seeking the assistance of the Ministry in having those rights enforced. This research report explored the effectiveness of Section 50 and the OLRB appeals process in protecting workers from reprisals for attempting to exercise their OHS rights. The overall conclusion is that there are serious gaps that discourage workers from exercising voice and limit the effectiveness of the IRS in improving OHS outcomes.

OHS reprisals are not uncommon occurrences. Between 2006 and 2016, there were 1,280 cases filed with the OLRB. This is at best a small portion of the overall reprisals experienced as many cases are resolved outside of the OLRB process, are settled privately or simply abandoned by workers. The numbers of reprisal cases addressed by way of grievance and arbitration are not included in the above number.

The majority of reprisal claims that were made were settled. This is clear from the OLRB case studies and supported by the experience of the twenty-five individuals interviewed for this project. Two of the seven unionized claimants resolved their cases through their union arbitration process and then left being active in their union and in OHS. Two union members were still employed at the time of their interview. The rest of the union and all the other interviews lost their jobs and were not reinstated. All but one settled before the case could be heard by the OLRB or arbitrator.

At the OLRB, the majority of all cases are settled without a hearing. Settlements are not necessarily an undesirable outcome. Settlements provide a resolution and compensation to claimants. The average in this study was about \$5,000. As salary replacement, it could be considered adequate for a minimum waged worker who was off work for less than three months due to the reprisal. For those workers earning more than minimum or who had to wait more than three months to get their compensation, the adequacy of the compensation is questionable. Several interviews pointed out they were in a better position than most to pursue their claim to the OLRB because they could weather the loss of income due to a partner, family or age.

From this perspective, workers received some compensation that they might not have otherwise received. The limitation of this process is that the amount that complainants receive is often minimum compensation and there is no deterrence for employers who violated the fundamental rule. Workers are seldom reinstated, at least outside union workplaces. In union workplaces, there is clearly greater job protections but the impacts can be much more severe especially if the employer decides to make an example of you. Harassment can be ongoing, relentless and miserable as attested by even those union health and safety representatives that this project interviewed who had strong support from their union. Ultimately, even the strongest case may not lead to reinstatement if the employer just does not want the worker back. At best it can lead to more money for the victim and, as more than one interviewee noted, at worse, often leads to demoralizing the coworkers who remain.

All of the non-union interviewees who were represented by the OWA clearly benefited from the services that they received and said so. In the OLRB cases files, the applications of those workers who were represented by the OWA were clearly set out and supported by relevant evidence.

Even with this assistance, reprisal victims are at a serious disadvantage in facing their employer at the OLRB. Unless a union member, reprisal victims and their representatives do not have access to the workplace to investigate or to find witnesses. They are without income because of the reprisal. The primary function of the OLRB is to rule on matters related to labour relations, a context in which both sides are represented and resourced, and have an ongoing relationship. Settlements take on a particularly important role in the context of ongoing relationships. In the reprisal context, where the relationship has been severed abruptly by a fundamental breach of the law protecting workers' health and safety, settlements can be seen as a loss especially when no other action is taken.

The role of the inspector is the critical connection between employer and workers on OHS matters when the employer refuses to take action on the OHS concern. The fact that, when called by a worker, inspectors respond on a priority basis, visit the workplace, investigate the concerns and write up a report is very important. At the same time, however, inspectors are not allowed to protect the worker who has just suffered a reprisal, even when the reprisal is for calling the inspector to resolve the OHS issue in the first place and/or the worker was representing co-workers' interests.

The research shows that the authority of the inspector to make a direct referral to the OLRB has had virtually no impact on the system. Under the current system which provides minimum compensation for workers and prohibits an inspector from investigating the reprisal, the action by inspectors to refer victims directly to the OWA is both more effective and efficient for the worker.

## **How to provide workers with better protection and compensation from reprisals**

One of the surprising results of the project was the frequency with which workers acting in either a formal OHS role or in an informal role were the victims of a reprisal. The outcome for these workers, who play a central role in the IRS, was the same as workers in general who experience a reprisal: they lost their jobs, often receive minimum monetary compensation and were frustrated by the failure of their employer to resolve the initial health and safety problem. The findings also suggest that calling an inspector to investigate a health and safety concern can be dangerous for workers. Calling in an inspector, a basic right under the IRS, was cited as a factor in a worker being reprimed in nearly 30% of the 688 OLRB cases reviewed.

As noted under findings, while only a minority (17.4%) of claimants were helped by a worker representative in dealing with their employer, those who were helped were less likely (64.2%) to have been terminated than applicants not helped by a worker rep (88.2%).

The inability of the existing system to protect OHS representatives speaking on behalf of workers as a whole needs to be resolved. The voice of OHS representatives is essential to the efficient functioning of the IRS. What is needed is a system that will provide a real deterrent to employers repriming workers who speak up regarding health and safety concerns.

An initial intervention could be a public campaign to educate employers that occupational health and safety reprisals are not socially acceptable and that, if they engage in reprisal, they will be investigated and, if guilty, they will face penalties. It would stress that penalizing health and safety representatives or workers for calling in an inspector to investigate a health and safety concern, is not acceptable and undermines the IRS. The approach would be similar to ongoing campaigns that stress that drunk driving is not socially acceptable. It is now a reality that drunk drivers face clearly understood and significant penalties which act as a deterrent to such behaviour. Police investigate the cases, drivers are charged with an offence, they lose their licence, face a stiff fine, and potentially end up in jail.

In order to make such a public awareness campaign viable, there must be clear penalties for those who violate the fundamental rule against reprisals. In Ontario's current system, there is no penalty for repriming workers who speak out regarding health and safety issues. There is no independent investigation, employers are not charged with an offence and, at worst, face a tax deductible cost of a few thousand dollars in a settlement that is confidential and largely buried from public purview.

The need for enforcement was recognized and included in Recommendation 34 of the 2010 Ontario Expert Advisory Panel on Occupational Health and Safety. The Expert Panel proposed:

The Ministry of Labour should review its prosecution policy and develop guidance for inspectors on when to lay charges for a contravention of Section 50 of the *Occupational Health and Safety Act*. [2]

Even if the enforcement was at first limited only to those cases where workers were fired for calling an inspector or because they were acting as a workers' health and safety representative, that would be a major step towards prevention.

Furthermore, the rationale for limiting inspectors' investigations to only the underlying concerns robs the system of the independent evidence necessary for both effective enforcement and effective compensation. The reprisal and the underlying OHS concern are not two separate things. They are intertwined in the circumstances that the inspector is dealing with. To separate them is artificial and further weakens the IRS.

Giving inspectors a role in investigating and resolving reprisal cases is in place in British Columbia under sections 151 and 152 of the BC Workers Compensation Act. In BC, the protection from reprisal provided to workers requires the OHS authority to investigate and determine whether the prohibited acts took place. Similar to Ontario, BC provides union members with a right to make a complaint through arbitration. Otherwise, the complaint must be made to the OHS Division, the part of the Workers' Compensation Board (WorkSafeBC) that is responsible for enforcement of OHS. Workers may be represented by their union or, if not a union member, by the BC Workers' Advisor office. Private settlement is encouraged. The difference is that the complaint is investigated by a WorkSafeBC officer. If the case is not settled, a decision is made by a legal officer at WorkSafeBC and may be appealed to the Workers' Compensation Tribunal (WCAT). A comparison between the experiences of victims of reprisal in Ontario and BC would provide further evidence that could be used to strengthen the protection of the fundamental right against reprisal.

The Ministry of Labour should go further by prosecuting particularly egregious cases and by writing orders. The process, as it exists, imposes relatively minor costs on employers who reprise workers for playing their role in the IRS. The knowledge that such actions might attract public scrutiny and a substantial financial penalty would give employers a greater incentive to act differently.

In the end, protecting workers from reprisals and strengthening worker health and safety voice is essential under the IRS. This was the ultimate conclusion of the 2010 Expert Panel:

A new process to address serious reprisals involving worker dismissal would have significant benefits: an early and accurate recording of the event; a proactive response from the OLRB without the worker having to file a separate complaint with the Board; and, most important, it would enable workers to raise health and safety concerns without the fear of being fired, which may ultimately prevent injuries and fatalities.[22]

This report is evidence that much work is needed before this can become a reality.

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