LYNDEN LUND, Appellant v. WEST YELLOWHEAD WASTE RESOURCE AUTHORITY INC., and GOVERNMENT OF SASKATCHEWAN, EXECUTIVE DIRECTOR OF OCCUPATIONAL HEALTH AND SAFETY DIVISION, Respondents

LRB File No. 220-16; May 8, 2017

Vice-Chairperson, Graeme G. Mitchell, Q.C. (sitting alone pursuant to Section 9-95(3) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1)

For the Appellant:	Rhiannon F.L. Rees
For the Respondent, Employer:	Micheal Hudec
For the Respondent, Executive Director:	No one appearing

Appeal from Occupational Health and Safety Adjudicator – Board determines that reasonableness is standard of review for purposes of appeals under section 4-8(2) of *The Saskatchewan Employment Act*.

Appeal from Occupational Health and Safety Adjudicator – Appellant challenges Adjudicator's findings of fact – Board adopts deferential approach to Adjudicator's factual conclusions – Board determines that Adjudicator made no palpable and overriding error.

Appeal from Occupational Health and Safety Adjudicator – Appellant terminated from his position allegedly because he raised concerns with his Employer respecting workplace safety concerns – Occupational Health and Safety officials investigated and sustained Appellant's assertions – Ordered Employer to reinstate Appellant – Adjudicator set aside findings and ruled no causal connection between Appellant's termination and his workplace safety concerns – No discriminatory action under section 3-35 of *The Saskatchewan Employment Act* – Board finds the Adjudicator's determination reasonable.

Appeal from Occupational Health and Safety Adjudicator – Adjudicator considered alternative argument that Employer did not have "good and sufficient other reason" for terminating Appellant – Adjudicator concluded it did and had satisfied its burden under section 3-36(4)(b) of *The Saskatchewan Employment Act* – Board finds Adjudicator's determination reasonable.

Practice and Procedure – Costs – Employer sought costs on solicitor-client basis for Appellant's inappropriate allegation that Employer's witness fabricated evidence – Board reviews its jurisprudence respecting costs – Board finds no basis for awarding costs.

REASONS FOR DECISION

INTRODUCTION

[1] **Graeme G. Mitchell, Q.C., Vice-Chairperson:** Mr. Lynden Lund [the "Appellant"], pursuant to subsection 4-8(2) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [the "*SEA*"], appeals against a decision of an Adjudicator appointed under Part III of the *SEA*.

[2] On November 6, 2015, West Yellowhead Waste Resource Authority Inc. [the "Employer"] hired the Appellant as an equipment operator and driver. He commenced his employment on November 9, 2015. Less than two (2) months later, on December 31, 2015, the Employer terminated the Appellant.

[3] The Appellant believed he had been terminated because earlier he had raised with the Employer several health and safety concerns about a particular job site he was required to service. He brought his complaint to the Occupational Health and Safety Division ["OH&S"] of the Ministry of Labour Relations and Workplace Safety [the "Ministry"] and pursuant to section 3-35 of the *SEA* filed a Discriminatory Action Confidential Questionnaire [the "Questionnaire"] on or about January 11, 2016.

[4] On March 23, 2016, following an investigation, OH&S officials advised the parties by letter that the Appellant's complaint of discriminatory action was well-founded, and directed the Employer to reinstate the Appellant in the position from which he had been terminated, and to make him whole in respect of lost wages and other benefits.

[5] On March 30, 2016, the Appellant pursuant to subsection 3-35(1) of the *SEA,* appealed against this finding of discriminatory action by OH&S and its remedial order.

[6] On April 21, 2016, this Board appointed an adjudicator to hear and adjudicate the Employer's Appeal. The OH&S Adjudicator, Ms. Darlene Wingerak [the "Adjudicator"], heard the appeal on July 7, 2016.

[7] On September 9, 2016, the Adjudicator released her Decision. In it, she concluded that the Appellant's termination did not amount to discriminatory action against a worker for the purposes of section 3-35 of the *SEA*, and set aside the findings of the OH&S officials.

[8] On September 29, 2016, the Appellant formally appealed against the Adjudicator's Decision to this Board. The Appellant's Notice of Appeal identifies the following ground of appeal:

> *The conclusion that the termination of employment did not constitute discriminatory action against a worker under Section 3-35 of the Act is an error of law. The Applicant voiced safety concerns to his superior on numerous occasions and but for these vocal concerns termination would not have resulted. As identified in the Adjudicator's decision there is evidence that Ms. Neufeld was aware of the Applicant's safety concerns and that these concerns were never addressed. In paragraph 30 of the decision, the Employer states that the decision to terminate the Applicant's employment was made. The incident leading to the decision to terminate the Applicant is premised on the Applicant's safety concerns and therefore the determination that the decision does not provide for a casual connection is an error of law.*

[9] The appeal was heard on February 28, 2017. At its conclusion, the Board reserved its decision. These Reasons for Decision explain why the Board has concluded that the Appellant's appeal must be dismissed and Adjudicator Wingerak's Decision affirmed.

FACTS IN BRIEF

[10] A brief summary of the facts leading up to the Appellant's termination is useful as it will provide context for the analysis of the issues presented on this appeal. That said, it is apparent from the Adjudicator's Decision that certain of the factual circumstances in this matter were disputed. What follows in this section is a summary of the chronology of the events culminating in the Appellant's termination. The factual circumstances in dispute and the Adjudicator's findings on those issues will be discussed later in these Reasons under the heading "The Adjudicator's Decision".

[11] As noted earlier, the Appellant officially commenced employment as an equipment operator and driver with the Employer on November 9, 2015. One of his assigned job responsibilities involved emptying the waste disposal bin at the Delta Co-op in Unity, Saskatchewan. The Appellant serviced this particular bin on two (2) occasions, *i.e.* November 27, 2015, and December 18, 2015.

[12] On his first attendance, he observed that this bin was in close proximity to overhead power lines. In the Questionnaire dated January 11, 2016[1], the Appellant described his concerns about the situation as follows at page 7:

> *I had moved this bin (40 yd. recycle bin) two times prior to Dec. 31/2015. The first time would be somewhere between Nov. 20-27 After doing so I stated to Lori & Pat that I had a major concern that the area was not safe due to overhead power in the area. From running picker (boom truck) I had told them both that I understood minimum distance to be 7m (22+ ft) not the 5-6 ft. that I was dealing with, but all that needed to be down was have Sask. Power verify that the site was safe for me to my job. Lori said everyone else just did the job and she did not want to lose the bins. On Dec. 18…the same bin was on my list. Against better judgement I did it again but did warn people back as I didn't think it was safe. Upon return to the shop I asked Pat not to put that bin back on my list until I had written verification from Sask Power that I was safe for me to work at.*

[13] In this extract from the Appellant's Questionnaire, the individual referred to as "Lori" is Ms. Lori Neufeld, the Employer's General Manager, and the individual referred to as "Pat" is Ms. Pat Foley. Ms. Foley is identified in the evidence as the Employer's route coordinator.

[14] Following his first visit to the Delta Co-op site, the Appellant advised Ms. Foley of his concerns about his safety. Ms. Foley advised him to take his concerns to his supervisor, Ms. Neufeld. There is a dispute about whether the Appellant ever followed Ms. Foley's advice to tell Ms. Neufeld of his fears about the safety of that particular worksite.

[15] After the Appellant's second visit to the Delta Co-op work site on December 18, 2015, Mr. Lindsay Kalmakoff, a representative of the Employer, received a telephone call from Mr. Marvin Phillips, a representative of Delta Co-op, inquiring why the Employer would no longer service the company's waste disposal bin. It transpired the Appellant had told unnamed employees of Delta Co-op that he would not be servicing the company's bin until his safety concerns were addressed to his satisfaction.

[16] Upon learning this, Ms. Neufeld contacted Mr. Roy Nolin, the chairperson of the Employer's Board of Directors, and advised him of what had transpired. In consultation with Mr. Nolin, it was determined that Ms. Neufeld should terminate the Appellant. However, because Christmas was fast approaching, they agreed to postpone the Appellant's termination until the end of the year.

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[1] Exhibit "L"

[17] While the Appellant's workplace concerns were ongoing, Ms. Neufeld also experienced some work related difficulties with the Appellant. On November 18, 2015, for example, the Appellant had allegedly been verbally abusive towards her. She testified that after he had returned from his route that day, he told her the equipment was "the worst piece of s***" that he had ever driven.[2]

[18] A second occurrence of verbal abuse took place on December 2, 2015. The Adjudicator described this incident at paragraph 25 of her Decision as follows:

> *Ms. Neufeld testified that a second incident of abusive behavior occurred on December 2, 2015. Ms. Neufeld stated she was in the shop at about 7:20 a.m. with LL and some of the other drivers. LL came up and started to swear about unit 1029 not being properly repaired. According to Ms. Neufeld, LL started to rant and rave at her in the presence of a couple of the other drivers. LL said "this is bullshit. Real mechanics need to look at the trucks". Ns. Neufeld stated that he swore at her.*

[19] The Employer asserted, and the Adjudicator agreed, that it fired the Appellant because of his insubordinate behavior and abusive treatment of its other employees and customers. Not because of the health and safety concerns he raised.

THE ADJUDICATOR'S DECISION

[20] The Adjudicator canvassed the relevant factual circumstances in some detail. She also made certain findings of credibility against the Appellant. First, she disbelieved the Appellant's evidence that he had raised his safety concerns with Ms. Neufeld on November 27, 2015. Ms. Neufeld presented independent evidence that proved she had been in Edmonton, Alberta on that date with the result that it was impossible for her to have been present when the Appellant allegedly complained about safety at the Delta Co-op site.[3]

[21] Second, she did not accept the Appellant's version of what happened on December 18, 2015 following his servicing of the waste removal bin at the Delta Co-op. She rejected the Appellant's assertion that because Ms. Neufeld's hand written note describing Mr. Phillips' telephone conversation with Mr. Kalmakoff was incorrectly dated it should not be believed. Instead, the Adjudicator accepted Mr. Kalmakoff's evidence that the Appellant had told a representative of Delta Co-op that the Employer would no longer service its facility.

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[2] Decision of Adjudicator Wingerak dated September 9, 2016, at para. 24.
[3] *Ibid.*, at para. 23.

[22] Third, the Adjudicator accepted Ms. Neufeld's evidence that when confronted at his termination meeting on December 31, 2015 with the facts surrounding his statement to a representative of Delta Co-op that the Employer would no longer service the company's waste disposal bins, the Appellant initially denied it. She also appears to have accepted that in fact, the Appellant did not raise his concerns about safety at the Delta Co-op work site with Ms. Neufeld until this meeting.

[23] Respecting the legal questions relevant to the matter before her, the Adjudicator concluded firstly that the Employer's termination of the Appellant's employment fell within the definition of "discriminatory action" set out in subsection 3-1(1)(i) of the *SEA*.[4] As a consequence, a further legal question had to be determined.

[24] This question proved to be the central issue, namely had the Employer fired the Appellant because he had raised occupational health and safety concerns about the Delta Co-op worksite. If so, this would be in violation of section 3-35 of the *SEA*, and the Appellant's termination illegal unless the Employer discharged its burden under subsection 3-36(4).

[25] The Adjudicator ultimately concluded that the Appellant was terminated for legitimate reasons. She set out her conclusions at paragraphs 36, 37 and 39 of her Decision as follows:

> *I am satisfied based upon the evidence that LL did have a safety concern with servicing the bin at the Delta Co-op and that he did voice his safety concern to the route coordinator, Ms. Foley I am also satisfied however, that Ms. Foley clearly advised LL that he needed to bring this to the attention of the general manager, being Ms. Neufeld which he did not do. The issue was never discussed directly with Ms. Neufeld until when it came up in the meeting of December 31, 2015 when Ms. Neufeld informed LL that he was being terminated from his employment. I am satisfied the purpose of the meeting on December 31, 2015 was to inform LL that he was being terminated and that this decision was made prior to the meeting.*
>
> *I am not satisfied that [the Employer] terminated LL because of LL acting or participating in an activity described in section 3-35. LL did not communicate to [the Employer] that he was invoking a right to refuse work under section 3-31. While LL did raise safety concerns which could fall under the category of seeking enforcement of the Act, one of the protected activities. LL never raised these safety concerns through the proper channels. He was specifically instructed by Ms. Foley that he needed to inform Ms. Neufeld, the general manager. There was nothing preventing him from doing so and there appeared to be ample opportunity for him to do so. There was evidence of other examples where LL did bring up maintenance issues with equipment directly to Ms. Neufeld in accordance with*

[4] *Ibid*, at para. 41.

> *established procedure i.e. filling out a form and communication with Ms. Neufeld directly.*
>
> ***. . . .***
>
> *Having regard to all of the evidence I am not satisfied that LL's termination was a result of LL participating in an activity enumerated in Section 3-35. I am not satisfied having regard to all of the evidence that a causal connection was established the raising of a health and safety concern was the reason he was terminated. Accordingly, the presumption in favour of the worker that the termination was taken against the worker because the worker acted or participated in an activity described in section 3-35 and the onus on the employer to establish good and sufficient other reason is not triggered.*

[26] Although the Adjudicator was satisfied that on the proven facts of this matter the Employer had legitimate grounds to terminate the Employer, she went on to assess the circumstances as if the reverse onus found subsection 3-36(4)(b) of the *SEA* applied. On this question, she concluded that even if it had, the Employer had demonstrated a "good and sufficient other reason" for the Appellant's termination. She explained at paragraph 40:

> *Further and in the alternative, if I am incorrect in my conclusion that the presumption does not apply, I am satisfied that the employer discharged the onus upon it to establish that LL was terminated for good and sufficient other reason. Specifically, I accept the evidence of Ms. Neufeld there were a series of incidences leading up to the decision to terminate LL being the two incidences of what Ms. Neufeld described as disrespectful communications with her on November 18, 2015 and December 2, 2015, a complaint made about LL to [the Employer] by another customer, and the communication to the Delta Co-Op by LL that [the Employer] would no longer service them. I accept it was the employer's determination, based upon these incidences, that LL was not a fit for the organization and that this was the reason for this termination versus the reason being that he raised health and safety concerns.*

[27] As a consequence, and in accordance with subsection 4-6(1)(a)(ii) of the *SEA*, the Adjudicator allowed the Employer's appeal from the Occupational Health Officers' Report dated March 23, 2016.

ISSUES

[28] Counsel for both the Appellant and the Employer filed extensive and very helpful written Briefs of Law. Each identified five (5) grounds of appeal from the Adjudicator's Decision. Although the wording of these particular grounds differed in each Brief, they raised essentially the same legal issues.

[29] For purposes of this appeal, the Board is satisfied that these various grounds of appeal can be distilled to three (3) grounds of appeal. These grounds are:

- Did the Adjudicator reasonably conclude that the Appellant's termination did not violate section 3-35 of the *SEA*? [The "Section 3-35 Issue"]

- If not, did the Adjudicator reasonably conclude that the Employer had satisfied its onus under section 3-36(4) of the *SEA* to demonstrate that "the discriminatory action was taken against the worker for good and sufficient other reason"? [The "Section 3-36 Issue"]

- Should costs be awarded to the Employer on a solicitor-client basis for allegations made by the Appellant that the Employer's general manager had fabricated evidence against him? [The "Costs Issue"]

RELEVANT STATUTORY PROVISIONS

[30] The following provisions of the *SEA* authorize appeals from occupational health and safety adjudicators and outline the remedial powers of the Board on such appeals:

> ***4-8(2)*** *A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III may appeal the decision to the board on a question of law.*
>
> ***. . . . . .***
>
> *(6) The board may:*
>
> *(a) affirm, amend or cancel the decision or order of the adjudicator; or*
> *(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.*

[31] For purposes of this appeal, the following provisions of the *SEA* are also relevant:

> ***3-1****(1) In this Part and in Part IV:*
> *. . . . .*
> *(i)* ***"discriminatory action"*** *means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes termination, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty[.]*
> *(j)* ***"employer"*** *means subject to section 3-29, a person, firm association or body that has, in connection with the operation of a place of employment, one or more workers in the service of the person, firm, association or body.*
>
> *. . . . .*

*(gg)**"worker"** means:*

(i) an individual, including a supervisor, who is engaged in the service of an employer[.]

. . . .

3-8 *Every employer shall:*

(a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers[.]

. . . . . .

3-9 *Every supervisor shall:*

(a) ensure, insofar as is reasonably practicable, the health and safety at work of all workers who work under the supervisor's direct supervision and direction;

(b) ensure that workers under the supervisor's direct supervision and direction comply with Part and the regulations made pursuant tot his Part;

. . . .

(e) comply with this Part and the regulations made pursuant to this Part.

3-31 *A worker may refuse to perform any particular act or series of acts at a place of employment if the worker has reasonable grounds to believe that the act or series of acts is unusually dangerous to the worker's health or safety or the health or safety of any other person at the place of employment until:*

(a) sufficient steps have been taken to satisfy the worker otherwise; or

(b) the occupational health committee has investigated the matter and advised the worker otherwise pursuant to subsection 3-33(2).

. . . . .

3-35 *No employer shall take discriminatory action against a worker because the worker:*

. . . . .

(b) seeks or has sought the enforcement of :

(i) [Part III] or the regulations made pursuant to [Part III].

. . . . .

(f) refuses or has refused to perform an act or series of acts pursuant to section 3-31[.]

. . . . .

3-36*(1) A worker who, on reasonable grounds, believes that the employer has taken discriminatory action against him or her for a reason mentioned in section 3-35, may refer the matter to an occupational health officer.*

(2) If an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 3-35, the occupational health officer shall serve a notice of contravention requiring the employer to:

(a) cease the discriminatory action;

(b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;

> *(c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and*
> *(d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.*
>
> . . . . .
>
> *(4) If discriminatory action has been taken against a worker who has acted or participated in an activity described in section 3-35:*
>
> *(a) in any prosecution or other proceeding taken pursuant to this Part, there is a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 3-35; and*
> *(b) the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason.*

STANDARD OF REVIEW

[32] The parties to this appeal agreed that the standard of review respecting the Section 3-35 Issue, and the Section 3-36 Issue was "reasonableness". They both rely on this Board's decision in *Wieler v Government of Saskatchewan*, LRB File No. 115-14, 2014 CanLII 76501 (SK LRB) ["*Wieler*"], leave to appeal granted: 2015 SKCA 8. The Board agrees that reasonableness is the appropriate standard of review but for slightly different reasons that are set out below.

[33] The instant appeal is brought pursuant to subsection 4-8(2) of the *SEA* which authorizes appeals from decisions of occupational health and safety officers made under Part III of the *SEA*. The text of this subsection is identical to the text of subsection 4-8(1).

[34] In a number of recent Decisions, this Board identified the relevant standard of review for appeals brought pursuant to subsection 4-8(1) of the *SEA*. See: *Littlemore Express v Government of Saskatchewan, Director of Employment Standards and Aaron Humble*, LRB File No. 041-17; *Burton Aggregates Ltd. v Government of Saskatchewan, Executive Director, Employment Standards and Rae-Anne Hoflin*, LRB File No. 272-16, 2017 CanLII 20063 (SK LRB) ["*Burton Aggregates*"], and *Thiele v Hanwell*, 052-16 to 056-16, 2016 CanLII 98644 (SK LRB) ["*Thiele*"]. In those Decisions, the Board relying on the recent judgment of the Supreme Court of Canada in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 SCR 293, 2016 SCC 47, determined that that "reasonableness" was the appropriate standard

of review on appeals commenced pursuant to subsection 4-8(1). See especially: *Thiele*, *supra*, at paras. 28-33.

[35] In view of the fact that the text of these two (2) subsections is identical, the appropriate standard of review on appeal should be the same, *i.e.*, the reasonableness standard.

[36] It is helpful, as well, to remind ourselves of what is connoted by a reasonableness standard of review. In *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC, the seminal case on standard of review in administrative law matters, Bastarache and LeBel JJ. explained as follows at paragraphs 46-47:

> *[46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?*
>
> *[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [Emphasis added.]*

[37] In *Burton Aggregates, supra*, at paragraph 23, the Board further acknowledged that it has a very limited power to review and revisit alleged factual errors committed by an adjudicator. See: *Weiler, supra*, and *Anwar Group International Ltd. and Naveed Anwar v Jeannine Poulin and Director of Employment Standards*, LRB File No. 171-15, 2016 CanLII 30541 (SK LRB). The Board noted that to successfully appeal against an adjudicator's factual findings, an appellant must satisfy a very rigorous standard. This standard was first identified in *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 (CanLII), where the Supreme Court of Canada ruled that an appellate body may only interfere with finding of facts made by a lower tribunal – in this case, an occupational health and safety adjudicator – if the appellant

demonstrates the tribunal committed "a palpable and overriding error in coming to a factual conclusion": *Housen*, *supra*, at para. 21 [emphasis is original].

[38] A similar standard of deference is appropriate when a trier of fact's assessment of credibility is assailed. See *e.g.*: *Gross v Wawanesa Mutual Insurance Co.*, 2003 SKCA 49, 232 Sask R 232.

[39] It is these standards of review that are relevant on this appeal.

ANALYSIS AND DECISION

A. Introduction

[40] The Adjudicator found that even though the Appellant was a probationary employee, his termination by the Employer fell within the definition of "discriminatory action" set out in subsection 3-1(i) of the *SEA*. On this appeal, the parties accepted the Adjudicator's finding on this point. As a consequence, the central issue on the appeal becomes: did the Appellant's termination violate the statutory protection against "discriminatory action" found in section 3-35 of the *SEA*. Essentially, it requires a consideration of whether or not there was a causal connection between the Appellant voicing concerns about workplace safety, and his subsequent termination a few weeks later. The Board turns to consider this question now.

B. The Section 3-35 Issue

1. The Adjudicator's Decision respecting the Section 3-35 Issue

[41] It will be recalled that the Adjudicator concluded no causal connection existed between the Appellant's termination and his concerns about workplace safety, essentially for two (2) reasons. First, she determined that based on the evidence before her, the Appellant did not notify the Employer about his concerns until his termination meeting on December 31, 2016.

[42] Second, the Adjudicator accepted the Employer's evidence that the Appellant had been insolent and insubordinate to Ms. Neufeld, and, without any authorization, had advised a client that the Employer would no longer be servicing its waste removal bin.

[43] The Adjudicator stated at paragraph 39 of her Decision as follows:

> *Having regard to all of the evidence I am not satisfied that LL's termination was a result of LL participating in an activity enumerated in Section 3-35. I am not satisfied that having regard to all of the evidence that a causal connection was established that the raising of a health and safety concern was the reason he was terminated.*

2. The Appellant's Submissions

[44] The Appellant's principal submission on this issue pertains to factual findings made by the Adjudicator. In particular, he assails the Adjudicator's complete failure to refer to his testimony about what happened at the Delta Co-op work site on or about December 18, 2015. The Appellant's version of what transpired that day is set out in the Questionnaire and quoted at paragraph 12 above. He asserts that at no time did he tell workers at Delta Co-op the Employer would no longer service the waste disposal bin. Rather, the Appellant expressed to them his concerns about the close proximity of the power lines to the bin and indicated he would not service the bin again. The Appellant submits that the Adjudicator's failure to refer to his evidence which contradicts evidence presented by the Employer amounts to reviewable error and relies upon *Bacchus v Canada (Minister of Citizenship & Immigration*, 2010 FC 616, and *Cepeda-Gutierrez v Canada (Minister of Citizenship & Immigration)*, 1998 CanLII 8667, 157 FTR 35. See: Appellant's Brief of Law, at paragraphs 22-28.

[45] The Appellant also submits that the Adjudicator erred by her uncritical acceptance of Exhibits A, B, and C which are handwritten notes prepared by Ms. Neufeld allegedly following the events which these notes purport to memorialize. He suggests, for example, that because the date in Exhibit C was incorrect – December 15 rather than December 18, 2015 – it is of dubious origin and should have been view with considerable skepticism by the Adjudicator, especially since this event represented the "final straw" and "led to the decision to terminate [the Appellant". See: Appellant's Brief of Law, at paras. 24, 29-35.

[46] These particular submissions were abandoned in part by Appellant's counsel at the opening of the hearing of this appeal.

[47] Finally, the Appellant submits the Adjudicator failed to take into account the fact that the Appellant's unflattering comments respecting the Employer's machinery were not identified as performance issues until after the decision of the OH&S officers released their

decision on March 23, 2016. He asserts that had the Adjudicator considered the chronology of these circumstances there would have been no credible basis upon which she could find that the Appellant had been terminated for cause other than his occupational health and safety complaint. See: Appellant's Brief of Law, at paras. 36-40.

3. The Employer's Position

[48] The Employer submits that the Adjudicator's findings and ruling on the Section 3-35 Issue are reasonable and supported by the evidence presented at the hearing.

[49] To begin, the Employer submits the Adjudicator correctly concluded that the Appellant had not notified the Employer of his occupational health and safety concerns or that he would be exercising his right to refuse dangerous work as permitted by section 3-31 of the *SEA*. The Employer noted that the Adjudicator accepted evidence relating to these circumstances provided by its witnesses over that of the Appellant's. In particular, the Employer points to evidence that demonstrate the Appellant had opportunities to raise his concerns with Ms. Lori Neufeld, his supervisor, on at least two (2) occasions – November 15, 2015, and December 2, 2015 – but failed to do so. See especially: Respondent's Brief of Law, at paragraph 22.

[50] The Employer accepts the Adjudicator's finding that the Appellant did advised Ms. Foley of his concerns after returning from his first visit to the Delta Co-op work site. It also accepts the finding that as Ms. Foley told the Appellant to communicate his concerns to Ms. Neufeld, as she was the Employer's supervisor and in a position to do something about it. See: Respondent's Brief of Law, at paragraphs 23 – 24.

[51] As far as the Adjudicator's alleged failure to recount and weigh all of the Appellant's evidence, the Employer submits that she did review evidence and made credibility findings against the Appellant. It was appropriate for her to do and when the record is considered in its entirety, the Employer submits the Adjudicator's findings satisfy the reasonableness standard.

4. Decision

[52] At the outset, it useful to set out two (2) general principles most relevant to this particular ground of appeal. The Appellant has attacked some of the factual conclusions reached by the Adjudicator, and in particular, asserts she ignored or neglected to weigh, contrary evidence that he presented. As noted in paragraphs 34 and 35 above, the standard of review in respect of factual findings and credibility assessments is very stringent, *i.e.* a standard of "palpable and over-riding error".

[53] Second, it is important to remember that the reasonableness standard does not demand that the tribunal under review – in this case the OH&S Adjudicator – consider and comment upon each and every issue raised by the parties: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 ["*Newfoundland and Labrador Nurses' Union*"]. Rather, the issue is whether the decision when considered in light of the record as a whole is reasonable *i.e*. "the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union*, at paragraph 16. Put another way, a tribunal's decision will be held to be unreasonable "only if there is no line of analysis within the given reasons that could reasonable lead the tribunal from the evidence before it to the conclusion at which it arrived": *Law Society of New Brunswick v Ryan*, [2003] 1 SCR 247, 2003 SCC 20, at para. 55.

[54] Turning first to the Appellant's submission that the Adjudicator failed to consider and weigh the Appellant's testimony about what transpired on December 18. It is true that the Appellant's version of events differs from the evidence given by Mr. Kalmakoff that the Adjudicator accepted. Yet, it is clear from both versions that the Appellant told employees of Delta Co-op he would no longer service its waste disposal bin as he believed it was unsafe to do so. Not surprisingly, Mr. Phillips from Delta Co-op interpreted this to mean the Employer would no longer service the bin in question. Indeed, it is apparent the Adjudicator viewed the evidence in a similar way as she stated at paragraph 28 of her Decision that Mr. Phillips called the Employer "because he <u>understood</u> WYRA would no longer be servicing him" [emphasis added].

[55] This case is quite different from *Bacchus*, *supra*, which was relied upon by the Appellant. There the Federal Court of Canada concluded that the Immigration and Refugee Board had erred when it failed to refer to documentary apparently from diplomatic sources which contradicted evidence presented to it. This documentary evidence was unassailable and potentially undermined the validity of the Immigration and Refugee Board's final decision. As a consequence, Boivin J. (as he then was) determined that its decision was unreasonable because "due to lack of discussion with respect to the documentary evidence, the Board could not reach the conclusion it did without further substantiation": *Bacchus*, *supra*, at para. 23.

[56] Here it cannot be maintained that as a result of the Adjudicator's failure to outline expressly the Appellant's version of events set out in the Questionnaire, for example, her findings of fact are unsubstantiated and unreasonable. When the entire record is reviewed, it is apparent that the Appellant told employees at Delta Co-op he would no longer service the waste disposal bin because of safety concerns. In the Board's view her findings respecting this particular event are reasonably supported by the evidence and the record.

[57] Turning to the Appellant's assertions that the Adjudicator gave too much weight to the three (3) handwritten notes prepared after the fact by Ms. Neufeld, the Board concludes that as there was corroborating evidence supporting at least two (2) of those incidents, her reliance on these exhibits was not unreasonable.

[58] The central question on this aspect of this appeal is whether the Appellant advised the Employer of his workplace safety concerns prior to the termination meeting. The Adjudicator concluded that he did not, and the Board finds that on the record this was a reasonable conclusion. Section 3-31 of the *SEA* which codifies the right of workers to refuse dangerous work does not explicitly state that a concerned worker must advise his or her employer. However, when read together sections 3-31 and 3-32 the only reasonable interpretation is that a worker must notify his or her employer or supervisor, a workplace occupational health committee if one is required (see: subsection 3-22) or a OH&S officer before he or she can lawfully refuse work.

[59] The Adjudicator concluded the Employer failed to do so, and the Board finds her conclusion on this point to be reasonable. The Appellant advised Ms. Foley of his workplace

safety concerns. Ms. Foley who held no managerial position with the Employer advised him to notify Ms. Neufeld and he did not, even though he had a number of opportunities to do so.

[60] Accordingly, for these reasons, the Board concludes the Adjudicator's Decision that the Employer's termination of the Appellant did not violate section 3-35 of the *SEA* was reasonable. There was, to paraphrase the Supreme Court of Canada in *Ryan*, *supra*, at para. 55, a clear "line of analysis within the given reasons" which reasonably led the Adjudicator from the evidence before her to the conclusion which she arrived at. Simply put, it fell within the range of acceptable outcomes.

[61] As a result, this ground of appeal must be dismissed and the Adjudicator's Decision affirmed.

C. The Section 3-36 Issue

[62] In view of the Board's conclusion respecting the Section 3-35 Issue, it is not strictly necessary to consider this particular issue. However, as the Adjudicator dealt with it in her Decision as an alternative ground of appeal, and as it was argued briefly at the hearing of this appeal, it will be addressed here.

[63] The Adjudicator stated that even had she found the Appellant advised the Employer about his workplace safety concerns and, as a result, had lawfully invoked his right to refuse dangerous work under section 3-31, she would have concluded the Employer had satisfied its onus under subsection 3-36(4) of the *SEA* "to establish that the discriminatory action was taken against the worker for good and sufficient other reason". In particular, she cited the incidents where the Appellant had been insolent to Ms. Neufeld, the Appellants' inappropriate statements made to employees of Delta Co-op on December 18, 2015, and a complaint made by an unidentified customer of the Employer which was the first reference to such a complaint in her Decision.

[64] The Adjudicator concluded at paragraph 40:

> *I accept it was the employer's determination, based upon these incidences, LL was not a fit for the organization and that this was the reason for his termination versus the reason being that he raised health and safety concerns.*

[65] While the Board may not have come to the same conclusion as the Adjudicator on the question of whether the Employer met its onus under subsection 3-36(4), the Adjudicator's finding is one that falls within "the range of acceptable outcomes", and as a result, satisfies the reasonableness standard. See: *Newfoundland and Labrador Nurses' Union*, *supra*, at para. 16. For this reason, it must be affirmed.

D. The Costs Issue

[66] In its Brief of Law, and again at the hearing of this appeal, the Employer sought an order from this Board for solicitor-client costs against the Appellant. The Employer submitted that as the Appellant in his Brief of Law had effectively alleged Ms. Neufeld fabricated documentary evidence to support her oral testimony before the Adjudicator, an allegation that the Appellant knew or ought to have known was false, costs on a solicitor-client basis should be assessed against him. See: Employer's Brief of Law, at paras. 38-41.

[67] The Employer relied upon *Siemens v Bawolin*, 2002 SKCA 84, 219 Sask R 282 ["*Siemens*"] in support of its request. In *Siemens*, *supra*, the Court *per* Jackson J.A. adopted the Ontario Court of Appeal's approach to awarding solicitor-client costs set out in *Foulis et al v Robinson*, 1978 CanLII 1307, 21 OR (2d) 769, and *Gerula v Flores*, 1995 CanLII 1096, 126 DLR (4th) 506 (ONCA) ["*Gerula*"]. In *Gerula*, *supra*, Weiler J.A. summarized the relevant principles as follows at 42 (CanLII):

> *(1) Solicitor and client costs as opposed to party-and-party costs will only be awarded in rare and exceptional cases.*
>
> *(2) A defendant is entitled to defend an action and to put a plaintiff to the proof of his case.*
>
> *(3) Where a defendant's acts are a deliberate attempt to frustrate the proceedings by fraud or deception, where the conduct of the defendant is calculated to harm the plaintiff, or where the unreasonable conduct of the defendant compounds the complexity of the proceedings, there are proper grounds to order solicitor and client costs.*
>
> *(4) The fact that the issue of liability was not contested at trial and that the defendant did not give evidence at trial are not factors which, by themselves, should result in an award of solicitor and client costs. [Emphasis added.]*

[68] It is the third principle identified in *Gerula* that the Employer asserts is relevant to this appeal

[69] At the outset, it is settled that the Board possesses the authority to award costs in certain cases, see especially: *Stewart v Saskatchewan Brewers' Bottle & Keg Workers, Local Union No. 340*, [1996] Sask LRBR 386, LRB File No. 025-95 ["*Stewart*"], and, most recently, *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*, LRB File Nos. 226-14 & 016-15, 2017 CanLII 20060 (SK LRB), at paras. 236ff. Yet, in practice, costs are rarely awarded. As the Board observed in *Rattray v Saskatchewan Government and General Employee's Union*, LRB File No. 011-03, 2003 CanLII 62853 (SK LRB) at paragraph 13, "requests for costs are made so often and awards for costs are made so infrequently."

[70] Prior to the coming into force of the *SEA*, appeals like this one were heard in the Queen's Bench. See: *The Occupational Health and Safety Act, 1993*, SS 1993, c O-1.1, s 56. In contrast with this Board, the Queen's Bench enjoys a far more robust jurisdiction to award costs, and its' judges make such awards on a regular basis. As a result, the principles respecting awards of solicitor-client costs enunciated by the Saskatchewan Court of Appeal in *Siemens*, *supra*, are, perhaps, more relevant to the civil courts than to a statutory administrative tribunal, such as this Board.

[71] In any event, the Board concludes that no costs, let alone costs on a solicitor-client basis, are warranted in this appeal for the following reasons.

[72] First, the Appellant's allegations of fraud and perjury on the part of Ms. Neufeld and Ms. Foley (if they can properly be characterized this way) were withdrawn by his counsel at the outset of the hearing. It is unfortunate that criticism of the Adjudicator's reliance on the evidence in question could be construed as alleging fraudulent actions on the parts of these two witnesses. However, the Appellant's counsel recanted the more incendiary aspects of those criticisms, and, as these assertions were disavowed, they form no part of the formal record of these appeal proceedings. Any harm flowing from them is minimal, if not negligible.

[73] Second, apart from this allegation, nothing has arisen on this appeal which would remotely support a costs award. As the Board stated in *Stewart*, *supra*, at 395:

> *In this connection, it is perhaps helpful to think of legal expenses in terms other than the notion of "costs" as it is understood in connection with proceedings in civil courts. For reason which have been alluded to earlier, this Board has never*

> *considered it appropriate to award costs in that sense of the term as part of the determination of applications under The Trade Union Act.*

[74] As a result, an award of costs following the cause, *i.e.* costs awarded to the successful party in a particular case – so common in civil courts like the Queen's Bench – is unknown in proceedings before this Board.

[75] Accordingly, for these reasons, the Employer's request for costs is rejected.

E. Conclusion

[76] For all of these reasons, the Board concludes that Adjudicator Wingerak's Decision satisfies the reasonableness standard, and pursuant to subsection 4-8(6)(i) of the *SEA* must be affirmed. Accordingly, the Appellant's appeal is dismissed.

[77] The Board extends its appreciation to counsel for their excellent written briefs and oral submissions. They were very helpful.

[78] An appropriate Board Order will accompany these reasons.

DATED at Regina, Saskatchewan, this **8th** day of **May, 2017.**

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson