IN THE MATTER OF AN ADJUDICATION
PURSUANT TO SECTION 3-54 OF *THE SASKATCHEWAN EMPLOYMENT ACT*

BETWEEN:

A.N., J.M. and S.D.

Appellants/Employees

- and –

Stuart Olson Contracting Ltd. and Stuart Olson Dominion Construction Ltd.

Respondent/Employer

For the Appellants:	self-represented
For the Respondent:	Robbie McLellan, Stuart Olson In-house Counsel
Hearing:	January 26, 2015, Saskatoon
Adjudicator	R. Blanke

For purposes of this Decision, the personal information of individual workers is protected by the removal of personal identifiers.

DECISION

INTRODUCTION

On November 21, 2013, an Officer in the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace (the "Officer") issued a decision (OR-SBO-0135) with respect to complaints of discriminatory action brought by three workers, (the "Appellants", **"Ms. AN", "Mr. JM" and "Mr. SD"**), against **Stuart Olson Dominion Construction Ltd.** (the "Respondent", "SODCL"). Following an investigation, the Officer determined that "*there was not sufficient evidence on which to determine that the reason for terminations of [the three Appellants] was a result of section [3-35] activities. Although they did raise concerns, based on the balance of probabilities, it cannot reasonably be concluded that the raising of health and safety issues was the reason for their termination*".

ISSUE:

[1] Whether the employer's action against the Respondent is discriminatory in circumstances prohibited by section 3-35 of *The Saskatchewan Employment Act* (the "Act").

RELEVANT LEGISLATION (FRAMEWORK FOR ANALYSIS)

[2] For purposes of this appeal[1], the relevant provisions of the Act are as follows:

3-1(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 dismissal, 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 but does not include…

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

(a) acts or has acted in compliance with:

(i) this Part or the regulations made pursuant to this Part;

…

(b) seeks or has sought the enforcement of:

(i) this Part or the regulations made pursuant to this Part; or

…

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.

(3) If an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 3-35, the occupational health officer shall advise the worker of the reasons for that decision in writing.

(4) If discriminatory action has been taken against a worker who has acted or participated in an activity described in 3-1(i) 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.

PRELIMINARY MATTER

[1] This appeal was commenced pursuant to the provisions of *The Occupational Health and Safety Act, 1993,* since repealed. Provisions of the former Act, with minor revision, are found in Part III of The *Saskatchewan Employment Act* and, with respect to appeals and hearings, in Part IV of the Act. Unless otherwise indicated, references herein to "the Act" and various sections of the Act, are references to *The Saskatchewan Employment Act.*

[3] Prior to the hearing of this appeal, the parties engaged in protracted mediation and settlement discussions. As set out in section 4-5(2)(b) of the Act, and with the express consent of all parties, I stepped into the role of mediator and as an intermediary to facilitate communication between the parties. Resolution efforts were not successful.

[4] In the event a matter is not settled through mediation, nothing in the *Act* precludes the adjudicator originally assigned from proceeding to hear the appeal. Indeed, paragraph (b) suggests the contrary inasmuch it allows for mediation to occur at any time before or *during* a hearing without any qualification of the adjudicator's prospective role as mediator or facilitator of such discussions. In other words, should mediation efforts during the hearing fail, the original adjudicator would reconvene the hearing. Nonetheless, I alerted the parties that in the event settlement efforts were unsuccessful, I would canvass their positions with regard to reassignment of the appeal to another adjudicator before setting the matter down for hearing. When I subsequently did so, the Respondent and each of the three Appellants confirmed their agreement to proceed with the hearing before me, the originally assigned adjudicator. My decision herein is based solely on the evidence and arguments presented during the hearing and not on anything said during mediation.

BACKGROUND AND EVIDENCE

[5] I have reviewed and considered all the evidence and argument with respect to the within appeal, including the record consisting of the Occupational Health Officer's investigative materials. I will set out sufficient evidence below to explain the issue before me and the reasons for my findings.

[6] On July 17, 2012, the three Appellants Ms. AN, Mr. JM and Mr. SD, were dismissed by SODCL. Each was informed their dismissal was without cause.

[7] On March 7 and March 3, respectively, the Appellant Ms. AN submitted an Harassment Confidential Questionnaire and a Discriminatory Action complaint to Occupational Health and Safety ("OHS"). The Appellants Mr. SD and Mr. JM each submitted Discriminatory Action complaints dated, respectively, March 3 and March 7, 2013. The basis of their complaints of discriminatory action was that their employment had been terminated in retaliation for JM's and AN's complaints of harassment brought to the attention of the Respondent in emails dated, respectively, June 28, 2012 and July 4, 2012.

[8] On November 21, 2013, the Officer rendered the decision now under appeal.

[9] The Appellants disagreed with the Officer's conclusion, stating in the Notice of Appeal that SODCL had provided no proof that the decision to eliminate the business unit the Appellant's all worked in was made prior to the receipt of the Appellant AN's harassment complaint..

[10] As aforesaid, after a protracted resolution efforts which were ultimately unsuccessful, the matter was set down for hearing. The hearing was conducted in Saskatoon on January 26, 2015.

[11] The three Appellants testified on their own behalf. Mr. Roger Klees testified on behalf of the employer, Stuart Olson Dominion Construction ("SODCL", "the Respondent")

[12] The three Appellants each commenced employment with SODCL's Saskatoon branch within a few weeks of each other on January 3, 2011 (SD and JM) and February 14 2011 (AN). Ms. AN has a Bachelor of Architecture degree. It appears AN was recruited by SODCL from the University of Manitoba. Mr. SD is a graduate mechanical engineer. Ms. AN and Mr. SD were employed by SODCL as Project Coordinators, with Mr. SD being an EIT, or Engineer in Training. Mr. JM had been in the construction industry for 20 years, advancing from field positions to field management. He was hired by SODCL as a Field Manager.

[13] Mr. Klees, who testified for the Respondent SODCL, is a civil engineer who has worked in the construction industry in Canada and the U.S.A. since 1972. He was hired by SODCL in October 2011 as the Project Director in charge of all SODCL's work in the province. At the time, SODCL's Saskatoon branch had approximately 45 employees working in the commercial, industrial and civic construction divisions, as well as administration, e.g., branch HR, finance/accounting.

[14] Each of the three Appellants was employed in the civil construction division, referred to throughout testimony as the "Civil Group" or civil business unit. At the material time, the general nature of the Civil Group's then-existing projects appears to have been construction related primarily to water and wastewater works. Comparable to the commercial and industrial divisions, the Civil Group was described as a small niche unit which was not a major player in the overall commercial operations of the company.

[15] At the material time, the Civil Group was comprised of 5 individuals: a Project Manager, a Field Manager (Appellant JM) and three EITs/Project Coordinators (Appellants AN and SD, and Mr. MY). Mr. MY, who is not a party to these proceedings, was also dismissed on July 17, 2012.

[16] The Project Manager is responsible for all that is entailed in the overall management of the Civil Group's projects, as well as supervision, leadership and mentoring of staff, most, if not all of whom were typically inexperienced. For an unspecified period of time prior to May 28, 2012, the Civil Group was without a Project Manager. There is some suggestion in evidence that while the Project Manager position was vacant, the Appellant AN was Acting Project Manager or performed some performance management duties. In any event, SODCL filled the Project Manager position on May 28, 2012, by hiring a civil engineer with 30 years' experience in heavy construction. For all further purposes herein, this individual will be referred to as "the Project Manager".

[17] Mr. Klees testified that through the course of the Appellants' employment (about 18 months), there had been a succession of about five project managers leading the civil business unit. In his career, Mr. Klees said he had never seen turnover as high as at SODCL. The Branch Manager who hired him in October, 2011 was released in January, 2012. His replacement was first demoted, then let go. At the material time, the then-current Branch Manager was relatively new to the position.

Lots of people had left the organization coincident with Stuart Olson's purchase of "Dominion". There had been a mad scramble to hire, but acquiring people with industry experience was an on-going challenge for SODCL. .Project Managers who started in the unit would quit or proved to be bad hires. An example of the latter is illustrative: the background experience of one former Project Manager of the Civil Group was in construction-related finance, with no actual experience whatsoever in the management of construction projects. In Mr. Klees' opinion, you could not put inexperienced employees on major projects and expect success. Other EITs had had left the Group, at least one of whom cited a negative work environment and others who pursued other opportunities in or outside the company.

[18] SODCL had had on-going concerns about the viability of the civil business unit. The business unit was not performing strongly financially (losing money, and in-progress projects were not being executed properly. The Civil Group had few projects in progress at any given time and insufficient generation of new business opportunities such that there was no substantial new work in its book of business. At the material time, there were two projects wrapping up, no other work of any substance in its book of business, no new work secured, and the prospect of significant losses stemming from its existing projects.

[19] Mr. Klees testified that in his capacity as Project Director and because he was SODCL's most experienced employee (by background, not tenure), he had been asked in February, 2012 by SODCL's (then) President (Don Pearson) and branch management to evaluate the civil division as a business unit. Mr. Klees could not recall the specific date he received such instructions, but testified that he would have discussed his opinions and recommendations with the President monthly, in both the first and second quarters of 2012.

[20] Mr. Klees' evaluation confirmed SODCL's concerns. His initial and continuing recommendation to the President with regard to the civil business unit was that SODCL needed to hire experienced personnel or get out of that business segment.

[21] Mr. Klees testified that there had been wide range of problems in the Civil Groups few existing projects, some of which were due to "the nature of the construction industry", and others related to lack of effective, consistent and experienced project management. While there were some performance concerns relating to employees in the Civil Group, some of which did not fully come to light until after the Appellants were dismissed, the employees in the group were largely inexperienced. The staff and the group's projects suffered from lack of effective supervision, leadership and mentoring and constantly changing leadership.

[22] When asked in cross-examination whether the Appellants' performance issues on the Civil Group's projects was due to the lack of experienced management, Mr. Klees responded affirmatively, saying that he was "sure of it". He reiterated that one thing he had expressly stated in his verbal assessments of the Civil Group to the President is that you can't put inexperienced people on a $10 million dollar project and expect success. In further response, Mr. Klees acknowledged that there

were many factors contributing to the decline of the civil business unit and that SODCL was not blaming the Appellants for its failure. In cross-examination he acknowledged, for example, that some financial losses on projects could be attributable to faulting estimating in the bidding process.

[23] SODCL proceeded to hire a civil engineer with 30 years' experience in heavy construction to fill the vacant Project Manager position. In on-going discussion with the President and Branch Manager, Mr. Klees testified that in his opinion the new Project Manager was "old-fashioned", a "dinosaur", who had learned a specific way to manage projects, i.e., he was set in his ways, and he was a "screamer". Mr. Klees did not think the group could be successful without an effective leader/mentor to staff, who tended to be inexperienced recent graduates. Nor did he think that the new Project Manager improved the civil group or business unit. In on-going reporting discussions in the second quarter, he expressed his opinion about the Project Manager to the President.

[24] When asked in cross-examination whether six weeks was enough time to make that call, Mr. Klees reiterated that his recommendation had been to hire an experienced person who would be an effective supervisor, leader and mentor to inexperienced staff or get out of the business segment. In Mr. Klees' opinion, the new Project Manager was not that person, despite his solid industrial background—the Project Manager knew the business, but in Mr. Klees' opinion, he was neither a leader nor a mentor.

[25] Mr. Klees testified that as a result of his on-going discussions with the President and Branch Manager, the President made the final decision in the second quarter to follow his (and branch management's) recommendation and "get out of that business segment", i.e., to eliminate the civil business unit and dismiss the staff. SODCL later became aware of the two email complaints sent to Mr. Tobin (Director of Human Resources, Calgary) on June 28 and July 4 while he was on vacation, but the decision had already been made to shut down the business unit (without Mr. Tobin's input) and to proceed with the terminations.

[26] Mr. Klees testified that the Project Manager was not immediately dismissed, but was kept on to complete the two remaining projects which he should have been able to do on his own. Not long afterward, the Project Manager bid successfully on another position in the company. Although his transfer was conditional on completion of the one remaining project in the civil unit, the Project Manager distanced himself from the unit and was uncooperative. As a result, Mr. Klees ended up overseeing completion of the projects himself, assisted as necessary by staff who were not being fully utilized elsewhere in the organization. The record reflects that the Project Manager was subsequently dismissed from his new position in the company.

[27] When asked why the Project Manager had not been dismissed, Mr. Klees' indicated he was not privy to that information. He thought it was likely because the Project Manager was a senior level employee with a solid industrial background (that being the division that he transferred into) and alluded to the high costs likely incurred to hire the Project Manager out of the U.S.

[28] As for reduction of staff, the Civil Group was the only group or division impacted. The record indicates that throughout 2012, SODCL dismissed 93 employees in various offices across the country for very similar reasons (lack of sufficient growth or projects). Mr. Klees testified that in the Saskatoon office, there were lots of extremely old projects in the other divisions requiring completion, and SODCL continued to reduce staff in other business units as those projects wrapped up. Since the dismissal of the Appellants, SODCL not only eliminated the civil business unit, but has all but shut down its Saskatchewan operation. Today, of approximately 45 staff SODCL employed in its Saskatchewan branches during the Appellants' tenure, there are only 2 remaining employees.

[29] Against this background, it appears that the Appellant AN was experiencing difficulty establishing a working relationship with the new Project Manager.

[30] Ms.AN testified, and other evidence reflects[2], that the new Project Manager was initially cordial to her, but within a week his attitude toward her started to change. Their working relationship and the manner in which the Project Manager allegedly treated AN grew increasingly "difficult". AN discussed her concerns with the Project Director (Roger Klees), the Branch Manager (Jeff Balon) and with their "Pam", SODCL's Human Resource Business Partner in the Saskatoon office.

[31] In cross-examination, Mr. Klees acknowledged AN talked to him about the manner in which the Project Manager had spoken to, and treated her. He said that the Project Manager had an "old school" style of management and a "gruff" manner, which he discussed with AN. In his view, their discussion was about the Project Manager's style of management, not discrimination or harassment. He stated that he followed up on their conversation by speaking to the Project Manager about his style of communication/management.

[32] AN testified that as a young female in project management, she felt she was being discriminated against by the Project Manager because of her age and gender. She said that when nothing was done at the local level in response to her raising these concerns, she escalated her complaint to the corporate level (SODCL's Calgary office, following the process in the employee manual pointed out to her by "Pam". Her email complaint, dated July 4, 2012 was directed to Chris Tobin, the Director of Human Resources in Calgary. In her email, AN she expressed the belief that the Project Manager and Mr. Klees were casting her (her projects/competence) in a negative light to those "higher up" in the company and, as a result, she felt that the Branch Manager had not taken her [concerns] about the Project Manager seriously—hence the, email directed to Chris Tobin .

[33] AN's email complaint appears to have been precipitated by a conversation allegedly had with Mr. Klees' wife at an after-hours retirement party on June 29, 2012 which was "the last straw". That conversation caused the Appellant to fear that she was going to be fired. In the email complaint,

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[2] As matter of procedure, AN's did not refer expressly to the email complaint she submitted to her employer on July 4 and it was not entered or marked as an Exhibit. The same is true with respect to JM's email complaint to the employer. Both are on record as part of the Officers' investigative file. On my own motion, I have marked AN's email complaint Exhibit A and JM's email complaint Exhibit B.

AN described an "unreasonably difficult working situation" with the Project Manager who had belittled her in front of others, spoken to her in a hostile tone and was often unfairly critical. She stated the Project Manager didn't talk to her if he could avoid it, did not inquire into her work or provide her with direction. AN also expressed concern that the Project Manager had sworn at a site Superintendent, and had been disrespectful to some crew and excessively negative about their performance.

[34] AN identified the problem between herself and the Project Manager as being an "unwinnable one". She alleged that although she had been "half-promoted" to Project Manager, the Project Manager (whom she referred to as the "PD" (Project Director)) was taking over tasks and projects for which she had been responsible. As a result, AN wrote that she had been put in a position where she found herself in direct competition with the "PD". In AN's opinion, he ought to have been coaching her to be a better Project Manager and pursuing the next projects so that they would have somewhere to put their crew next month, rather than on asserting his authority on projects that are near completion.

[35] AN concluded her email by saying that she would even go so far as to formally ask if there were other opportunities available within the organization to help her get out of her current situation.

[36] Mr. Tobin did not respond to the Appellant's July 4 email as he was on vacation.. Likewise, both AN and JM were off work for vacation or other reasons, for a period of time following the delivery of their emails to him. On Sunday, July 15, 2012, AN was notified by the branch HR office ("Pam") that Mr. Tobin would be coming to Saskatoon on July 17, 2012 and wanted to meet with her. JM and SD were similarly notified. Each assumed the purpose of the meeting was in response to the email complaints, i.e., further inquiry/ investigation. However, on that date, AN, JM and SD were dismissed, as was co-worker MY.

[37] AN testified that she spoke with Mr. Tobin the next day for about an hour. She testified that he said her termination was "not right" and expressed a willingness to hire her as a contractor or sub-contractor to work on a pending lawsuit, which was work she(and the other Appellants) had been doing in addition to her/their other duties. She considered the offer, but declined it the next day because she felt it was unfair to her colleagues SD and JM who were also dismissed.

[38] AN testified that she further discriminated against on the basis of her gender because she was not paid as much as the EIT who was let go at the same as she and the other two Appellants (Mr. MY), nor had she been compensated when she was "half-promoted to do [the previous project manager's]work". She stated at the time of her termination she was acting in the capacity of Project Manager.

[39] The Appellant JM testified that he does not take his responsibilities light, and as reflected in his email to Mr. Tobin he felt a responsibility to speak up "when one of them is discriminated against or is made to feel like less than part of a team". JM's email describes two recent incidents. On

June 8, he saw and heard the Project Manager yell at AN ("that's bullshit") on a job site, loudly enough to attract the attention of himself and their consultants. When JM interceded in an attempt to defuse the situation, the Project Manager started ranting and raving about the three of them missing the scheduled divisional meeting and yelled at AN "and why the fuck do you need to be here". JM stated that AN was the acting project on the job and had been since pretty much day one, and no one had informed them differently. JM also made reference to other complaints about the Project Manager yelling and swearing at JM's field staff. JM indicates in his email that they "decided as a team…to give the Project Manager the benefit of the doubt and just let it slide, hoping to work towards building a better working relationship with him….but this was not the case" and goes on to describe a second incident.

[40] JM indicated that "last Tuesday" (June 19th?), he and SD were on a work site with the Project Manager. In casual conversation, the Project Manager allegedly spoke negatively about AN SD confronted the Project Manager, asking him "flat out" what was his problem with AN. The Project Manager said he didn't have one. SD and JM suggested to the Project Manager that maybe he should sit down talk to AN as he had done with the rest of them, because she was not feeling like part of the team. The Project Manager said he had not had a chance to sit down with the whole team yet, rolled his eyes and commented: "fucking broads".

[41] JM's stated purpose as per the email is to make Mr. Tobin aware of the situation, alluding to "sexual discrimination" and wanting it to be documented in the event that any further discrimination continues against AN.

[42] The Appellant JM testified that he absolutely believes he and the other two Appellants were dismissed because of his and AN's complaints, and because his complaint included reference to SD's involvement. JM stated that has been involved in downsizing before, and in his opinion, it made no business sense to bring someone in from the U.S. as a project manager only to close the department and dismiss the staff.

[43] JM finds it astonishing that there is no email or other documentation about the closure, just Mr. Klees' word. From a business perspective, he felt that their dismissal was unwarranted because there was plenty of work to be done, and, further, that there were other jobs posted within SODCL into which all three Appellants could have been transferred laterally rather than dismissed.

[44] The Appellant SD testified that contrary to Mr. Klees' evidence, he thought that the new Project Manager was a strong leader who was trying to be a mentor. He had spent some time with the new Project Manager before the PM was hired, which he described as "positive". However, when the Project Manager spoke negatively about AN to him, and "tried to get him on board against Amanda", SD confronted the Project Manager as JM had described.

[45] SD also expressed the belief that there was at least six months work still left that he and the other two Appellants could have been kept busy doing. He stated that because of the timing of

the dismissal, he missed out on the opportunity to continue in SODCL's accelerated development program and a planned transfer to estimating in the next phase of his development.

[46] Each of the three Appellants testified that they were not given reasons for their dismissal other than being informed that their dismissal was "without cause". None of the three Appellants questioned the dismissal of their colleague, MY, whose performance was seen to be a known issue.

ANALYSIS

Framework for Analysis

[47] Section 3-36 of the *Act* provides a framework for analysis of a discriminatory action complaint. Pursuant to section 3-36(1), the initial onus is on the worker (Appellant) to establish, *prima facie*, that the employer has taken discriminatory action against him for one or more of the reasons mentioned in section 3-35 of the *Act*.

[48] I am mindful that the foundation of occupational health and safety legislation is the internal responsibility system. Fundamental to the concept is the principle that employers and employees have a shared responsibility to identify and address health and safety issues. In such a milieu, employees are encouraged to bring health and safety related issues to the attention of the employer. Employees who raise health and safety concerns in the circumstances described in section 3-35 are protected by the prohibition against adverse employment consequences in retaliation for having done so.

[49] The protection of section 3-35 is reinforced by the imposition of a reverse onus in section 3-35(4). By the reverse onus, the intent of the legislation is clearly to impose the ultimate, and heavier, burden of proof on the employer to establish on a balance of probabilities, that there was good and sufficient other reason for the discriminatory action.

[50] While the foregoing considerations point to the conclusion that the initial burden of proof on the Appellants is a less onerous one, it does not relieve the Appellants from the requirement to establish a *prima* facie case. the reverse onus is *not* triggered unless a *prima facie* case is established. Stated another way, if the Appellant(s) do not establish a *prima facie* case, the Respondent is not called upon for an answer, i.e., to provide good and sufficient reason for the action taken. To summarize, the Appellant(s) must establish

(1) Adverse employment action falling within the scope of the definition of a discriminatory action in section 2(1)(g);

(2) That he/she was engaged in a health and safety activity protected by section 3-35 of the *Act* and that there is a *prima facie* causal connection or *nexus* between the protected activity and the discriminatory action.

If a *prima facie* case is established, the onus shifts to the employer to establish

(3) That there was good and sufficient reason for the discriminatory action other than the workers' protected health and safety activity.

Discriminatory Action

[51] Turning to the first step in the analysis, I find, as did the OHS Officer, that the Appellants have established a *prima facie* case of discriminatory action.

[52] Section 3-1(i) describes a number of adverse actions characterized as discriminatory actions, one of which is "termination", (formerly "dismissal"). There is no dispute that each of the three Appellants were dismissed from their employment with SODCL on July 17, 2012. Such action falls squarely within the statutory definition of a discriminatory action. I am satisfied that discriminatory action is established, both *prima facie* and as an objective fact.

Protected Section 3-35 Activity

[53] Bearing in mind that the evidence is untested at this stage, there is circumstantial evidence and a temporal connection between the complaint emails of JM and AN, dated June 28 and July 4, 2012 respectively, and their dismissal. Their employment was terminated on July 17, 2012, immediately upon the return to work of those among them who had been away from work on vacation or for other reasons between July 4 and July 16, 2012.

[54] While the circumstantial evidence and temporal connection may be sufficient to establish a *prima facie* causal connection between the complaint and dismissal, the question remains whether the Appellants were engaged in a protected health and safety activity. The Respondent submits the threshold question is whether the nature of the Appellants' complaints fall within the purview of the *Act*. I agree.

[55] In the described circumstances, section 3-35 protects workers who raise health and safety concerns. By establishing that he or she exercised the right (and responsibility) to raise a health and safety concern, a worker thereby establishes that he or she was acting in compliance with, or seeking enforcement of the *Act* or *Regulations*. The question which begs to be asked is whether the complaints raised were substantive complaints of harassment.

[56] On the evidence before me, I am not persuaded, on balance, that the Appellant AN's complaint is substantively a complaint of harassment. Rather, the impetus behind the complaint was the Appellant's defense against negative comments about her performance/competence allegedly made by the Project Manager and Mr. Klees to "higher ups" and her consequent fear of being fired. The focus of the complaint was on the Appellant's difficult (four week) working relationship with the Project Manager and her "unwinnable" position of being in direct competition with him in a roles and responsibilities conflict. AN's email complaint makes no reference at all to harassment or to discrimination.

[57] It my view, it cannot reasonably be concluded that the AN's email complaint was a complaint of harassment based on sex (gender) as alleged some months later in AN's complaint to Occupational Health and Safety, or a complaint based on age and gender as AN testified herein. For these reasons, I find that the Appellant AN was not seeking to enforce the *Act or Regulations* or otherwise engaged in an activity protected by section 3-35 prior to her dismissal.

[58] Likewise, the Appellant JM's complaint was not a complaint of harassment, nor did JM claim it was. JM's stated purpose was to document what he had heard and observed in the event that there was "further sexual discrimination" of AN. In short, JM identified himself as a prospective witness. I find that the Appellant JM was not seeking to enforce the *Act or Regulations* or otherwise engaged in an activity protected by section 3-35 prior to his dismissal.

[59] The Appellant SD made no complaint, verbal or written. His sole involvement was the reference to him in JM's email which, in essence, identified him as another prospective witness. I find that the Appellant SD was not seeking to enforce the *Act or Regulations* or otherwise engaged in an activity protected by section 3-35.

[60] Based on these findings, the reverse onus in section 3-35(4) is not triggered and it is unnecessary for the Respondent to rebut the presumption. However, in case the foregoing conclusions are wrong, I will still consider whether SODCL has rebutted the presumption.

Has SODCL rebutted the presumption?

[61] SODCL's position is that it had legitimate strategic business reasons for eliminating the civil business unit and that the decision to do so had been made prior to the receipt of complaints from AN and JM. SODCL reasoned that the Project Manager could compete the paperwork on the remaining projects on his own, so the services of the Appellants and Mr. My were no longer necessary. The decision to eliminate the business unit and dismiss the Appellants was made by the President prior to, and without the knowledge of the complaints delivered to Mr. Tobin on June 28 and July 4, 2012.

[62] I am mindful that an employer cannot shield itself by pointing to legitimate business reasons for the impugned conduct where there is also evidence of a prohibited action. My previous findings address that inasmuch as I have concluded that, on balance, the evidence has not established a prohibited action. That being said, whether I had reached those previous conclusions or not, the Appellants case with regard to the question at hand rests primarily on challenging the Respondent's explanation for its actions. In this regard, the Appellants put forward several areas in which it is argued the Respondent's explanations are not credible.

a. The Appellants contend that it did not make sense that the President would decide to eliminate the business unit in light of SODCL's decision, six weeks earlier, to hire an experienced Project Manager for the unit;

b. The Appellants contend that even if the business unit was to be eliminated, there was plenty of work to be done prior to the closure. The Appellants contend that other EIT's were brought in to do their jobs. Further, there were other vacant positions and they could all have been transferred laterally, into other positions with the company;

c. The Appellants were not informed that the business unit was being eliminated. Each was told that they were being dismissed "without cause and no other reasons were given; and

d. The Appellants took the position that there is there is only Mr. Klees' testimony, and no email or other documentation of Mr. Klees' recommendations to the President or the President's decision to eliminate the business unit and terminate their employment, or to establish that the decision was made prior to receipt of their complaints.

[63] Where material evidence conflicts, it is necessary that there be an assessment of credibility. Such an assessment is not an exercise where the adjudicator simply listens to the oral testimony of witnesses, observes their demeanour while testifying and decides who appears to be telling the truth. Assessing credibility involves consideration of a variety of factors. In order to making findings of fact, I have been guided by the seminal decision of the British Columbia Court of Appeal in *Faryna v. Chorny*,[1952] 2 D.L.R. 354 (B.C.C.A.). It held

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[64] I found each of the three Appellants to be honest and sincere in their belief that they each had been unjustly dismissed. It is important to point out, at the outset, that whether a dismissal is unjust, unfair, based on inaccurate facts, with or without cause or just "not right", are not matters within the remedial jurisdiction of an adjudicator under occupational health and safety-related legislation. An adjudication pursuant to the *Act* is not akin to a wrongful dismissal action, although in some cases a worker might choose to pursue such legal recourse. Likewise, the scope of an adjudicator's remedial jurisdiction is not analogous to arbitration, or a surrogate for arbitration. Unlike an arbitrator, it is not within the jurisdiction of an adjudicator to assess the severity of the action taken or the reasonableness. An adjudicator's remedial jurisdiction is essentially the same as that of the Officer as set out in section 3-36 or that of the convicting judge as set out in section 3-37.

[65] I found Mr. Klees to be a credible witness. He delivered his evidence in a forthright manner. He was responsive in cross-examination, in which his testimony was consistent and unshaken. That he had been assigned to evaluate and make recommendations as to the viability of the civil business unit was not seriously disputed, nor was it contradicted by other evidence. Mr. Klees did not hesitate to acknowledge, in cross-examination, that it was not the Appellants' fault that the civil business unit was unsuccessful. He did not over-state SODCL's concerns about their performance, some of which did not come to light until after their dismissal, which he attributed largely to constantly changing and ineffective supervision, leadership and mentoring.

[66] Overall, I found Mr. Klees' testimony to be consistent with the probabilities that surrounded the then-existing conditions. That is to say, the civil business was floundering, and had been for some time. It was under scrutiny for reasons in evidence which it is not necessary to reiterate here [see, in particular, para 18], but from which the inference can reasonably be drawn that elimination of the business unit would have been under consideration—hence Mr. Klees' assignment to evaluate the unit—and based on Mr. Klees' subsequent recommendations. However, I am not prepared to draw the inference that the decision to eliminate the civil business unit and terminate the Appellants' employment was a mere pretext for the dismissal of the Appellants for a prohibited reason from the fact that a new Project Manager had been hired six weeks earlier.

[67] I accept Mr. Klees' evidence that it was reasoned the Project Manager could manage wrapping up the two remaining projects himself, such that the services of the Appellants and Mr. MY were no longer required. There is no evidence that new employees were hired to fill their positions, nor is there any persuasive evidence that their former positions were filled by other SODCL employees. Mr. Klees' readily acknowledged that EIT's or other employees whose services were not being fully utilized elsewhere assisted in the completion process periodically, particularly after the Project Manager distanced himself from the civil business unit, leaving Mr. Klees to wrap up the remaining project himself. There is, in any event, no suggestion that the reason the Appellants were dismissed due to shortage of work *per se*. There was completion work to be done, and SODCL anticipated the Project Manager could do it on his own. If, as it appears, that was not entirely the case

[68] The evidence suggests that loss of confidence in the Appellants may have been a factor in the decision to terminate the Appellants forthwith the decision to eliminate the business unit. Even if it was, the Respondent employer elected to terminate the Appellants' employment "without cause", not for shortage of work or performance-related concerns neither of which are, in and of themselves, reasons prohibited by the Act. As suggested at the outset, it is not for me to determine whether there were alternatives other than the Appellants' dismissal. But for my previous findings, the only question for my determination here is whether the elimination of the business unit was the real reason for their dismissal or whether the decision was influenced by their complaints.

[69] For the reasons above and for the additional and compelling reason that the Appellant's co-worker MY was also dismissed on the same date, I am not prepared to conclude that SODCL would make a decision to eliminate a business civil business segment to avoid dealing with the

Appellants' complaint. I find that the decision to eliminate the business segment was taken for legitimate business reasons.

[70] Finally, the Appellants invite me to conclude that the decision to terminate their employment was influenced by their complaints. The Appellants' submit that there is no email or other documentary evidence of Mr. Klees' recommendations or the President's decision to eliminate the business unit, or to establish that the decision was made prior to, and without knowledge of their receipt of their complaints.

[71] Mr. Klees testified that the President's decision was made earlier in the second quarter, prior to and without knowledge of the Appellants' complaints which were not, in any case, understood to be complaints of harassment or discrimination. In short, the decision had already been made. While it is somewhat troubling that Mr. Klees did not specify a date of the decision other than during the "second quarter", he was not cross-examined for more specific information. But for other evidence, I might have departed in this regard from the conclusion of the Officer. Where there is insufficient rebuttal evidence, the presumption favours the worker. However, in this case, Appellant AN's complaint provides evidence which, on balance, tends to bolster the credibility of Mr. Klees' testimony as to timing and support the position of SODCL. In that regard, I refer specifically to the email notes AN made for herself documenting the conversation she had with Mr. Klees' wife at a retirement party on June 29, 2012. It is abundantly clear in AN's subsequent complaint that based on her conversation with Mr. Klees' wife, AN believed she was at risk of being fired which prompted the complaint in which she so stated. From this, I believe the inference can reasonably be drawn that some discussion regarding termination had occurred prior to June 29, 2012. Further, since the recipient of the complaint of JM dated June 28 was on holidays, I find that the President's decision to eliminate the business unit and terminate the Appellants (and Mr. MY) was made prior to, and without knowledge of the complaints.

[72] For all of these reasons, I am satisfied the Respondent SODCL has provided good and sufficient reason for the actions taken against the Appellants and I affirm the decision of the Officer.

Dated at Regina, Saskatchewan this 11 day of May, 2015

Rusti-Ann Blanke
Special Adjudicator

Enc/

Right to appeal adjudicator's decision to board

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.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and

(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

. . .

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise