

IN THE MATTER OF an appeal pursuant to subsection 3-53(1) and 3-54(1) with respect to the decision of an Occupational Health and Safety Officer pursuant to *The Saskatchewan Employment Act*.

West Yellowhead Waste Resource Authority Inc.

APPELLANT

-and-

LL

RESPONDENT

-and-

Director of Occupational Health and Safety
Ministry of Labour Relations and Workplace Safety

RESPONDENT

For the Appellant: Self-represented, Ms. Lori Neufeld, General Manager

For the Respondent, LL: Self-represented accompanied by support person



Introduction and Background

1. This is an appeal by West Yellowhead Waste Resource Authority Inc. (WYRA) of the Occupational Health Officers' (OHOs') decision dated March 23, 2016 where the OHOs found the termination of LL on December 31, 2015 to be an unlawful discriminatory action pursuant to section 3-35(f) of *The Saskatchewan Employment Act* (the "Act"). The last paragraph of the decision letter reads as follows: ...

...

It is the decision of these officers, the termination of [LL] prior to exhausting the above mentioned work refusal process, is an unlawful discriminatory action pursuant to section 3-35(f). The employer must cease the discriminatory action, reinstate [LL] to his former employment under the same terms and conditions und which he was formerly employed, pay him any wages he would have earned had he not been wrongfully discriminated against, and remove any reprimand or reference to the matter from any employment records with respect to this worker.

2. LL was hired by WYRA as an Equipment Operator/Driver on November 6, 2015. His first day of employment was November 9, 2015.

3. WYRA terminated LL's employment on December 31, 2015. LL alleges this was because he had raised health and safety concerns in regards to one of the sites he was required to service.
4. WYRA denies this was the reason for LL's termination. WYRA submits LL was still within his probationary period and states he was terminated for reasons unrelated to any health or safety concerns being raised.
5. LL contacted Occupational Health and Safety ("OHO") on or around January 4, 2016 and submitted a Discriminatory Action Complaint (Exhibit L).
6. An investigation was completed by OHO and the decision letter of March 23, 2016 was issued.
7. WYRA appealed this decision by a letter dated March 30, 2016 (Exhibit G).
8. A pre-hearing conference call was held on Friday, June 24, 2016. The hearing was held on July 7, 2016. The parties agreed that the record from OHO be entered as part of the record for the purposes of the appeal.

Issues

- (a) Did the employer take discriminatory action against the worker?
- (b) Did LL act or participate in an activity described in Section 3-35?
- (c) If yes, has WYRA established that the discriminatory action was taken against the worker for good and sufficient reason?

Law and Framework for Analysis

9. Section 3-35 of *The Saskatchewan Employment Act* (the "Act") prohibits an employer from taking discriminatory action against a worker. Section 3-1(1)(i) defines discriminatory action as follows:

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, but does not include:

- (i) the temporary assignment of a worker to alternative work, pursuant to section 3-44, without loss of pay to the worker; or
- (ii) the temporary assignment of a worker to alternative work, without loss of pay to the worker while:
 - (A) steps are being taken for the purposes of clause 3-31(a) to satisfy the worker that any particular act or series of acts that the worker refused to perform pursuant to that clause is not unusually dangerous to the health or safety of the worker or any other person at the place of employment;
 - (B) the occupational health committee is conducting an investigation pursuant to clause 3-31(b) in relation to the worker's refusal to perform any particular act or series of acts; or
 - (C) an occupational health officer is conducting an investigation requested by a worker or an employer pursuant to clause 3-32(a);

10. Section 3-35 limits the prohibition against discriminatory action to actions related to compliance with the Occupational Health and Safety provisions of the Act. Section 3-36 provides for the ability for a worker who believes he has been subject to discriminatory action for a reason listed in section 3-35 to refer the matter to an occupational health officer. These two sections read as follows:

Discriminatory action prohibited

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

Referral to occupational health officer

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 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.
- (5) The amount of money that an occupational health officer may require to be paid pursuant to clause (2)(c) is to be reduced by an amount that the officer is satisfied that the worker earned or should have earned during the period when the employer was required to pay the worker the wages.
- (6) The employer has the onus of establishing the amount of the reduction mentioned in subsection (5).

Analysis and Findings

Did the employer take discriminatory action against the worker?

11. It was established that WYRA terminated the employment of LL on December 31, 2015. Termination clearly falls under the definition of discriminatory action under section 3-1(1)(i) of the Act. I am satisfied on the evidence that the worker was subjected to discriminatory action.

Did LL act or participate in an activity described in Section 3-35 of the Act?

If yes, has WYRA established that the discriminatory action was taken against the worker for good and sufficient reason?

12. The next question is whether this termination was because LL acted or participated in an activity described in section 3-35 and if so whether WYRA has met the onus of establishing that the discriminatory action was taken against LL for good and sufficient other reason.
13. LL submits his termination was a direct result of him raising safety concerns about the servicing of a specific bin for one WYRA's customer, being the Delta Co-Op in Unity, Saskatchewan.
14. It was established that LL serviced the bins on two occasions, once on or about November 27, 2015 and then again on or about December 18, 2015.
15. In the Discriminatory Action questionnaire (marked as Exhibit L) LL stated that he brought this to the attention of both Lori (his supervisor) and Pat (the route coordinator).
16. At the hearing LL testified that he brought this safety concern to the attention of Ms. Foley, the route coordinator, and Ms. Lori Neufeld, the general manager prior to December 31, 2015. LL submits that this was the reason he was terminated.
17. LL stated that he showed pictures of the site to Ms. Foley as well as a video and that he expressed concern about servicing the bin given the proximity of the bin to the overhead power lines.
18. LL stated that Ms. Foley said he should tell Lori, being Ms. Lori Neufeld, the general manager. LL stated that he expected Ms. Foley would have spoken to Ms. Neufeld about this. LL also testified that Ms. Foley told him Ms. Neufeld wouldn't do anything.
19. Ms. Foley was called as a witness by the employer and admitted that LL did bring this concern to her attention. Ms. Foley was unable to recollect exactly when she was shown the pictures but did acknowledge LL expressed safety concerns and showed her the pictures and the video. Ms. Foley confirmed that she told LL that he needed to bring this to the attention of the general manager, Ms. Neufeld.

20. I accept LL did raise his concerns with Ms. Foley prior to servicing the bin the second time as it was established that he asked not to be put on the route to service this location again after attending at the location the first time, although he later agreed to do so and did in fact service the bin on December 18, 2015.
21. It was established that LL did not specifically speak with Ms. Neufeld about his concerns or otherwise bring it to her attention prior to the meeting on December 31, 2015. LL submitted however that the general manager, Ms. Neufeld was made aware of his safety concerns about servicing the bin located at the Unity Co-Op. LL testified that Ms. Neufeld was present in the back shop on November 27, 2015 when there was a discussion about this location. LL stated he said in the presence of others, including Ms. Neufeld, that the bin really had him worried and that he did not think it was safe.
22. Ms. Neufeld denied being part of this discussion and provided evidence to show she was out of town in Edmonton on November 27, 2015 therefore making it impossible for her to be present at this meeting.
23. I accept Ms. Neufeld's evidence over LL's on this point and that Ms. Neufeld was not present during the general discussion LL stated occurred on November 27th. I am satisfied that LL never had any direct conversations with Ms. Neufeld about his safety concerns with the Delta Co-Op location until during the meeting on December 31, 2015 when Ms. Neufeld informed LL that he was being terminated from his employment.
24. Ms. Neufeld provided evidence of the circumstances leading up to the dismissal of LL. Ms. Neufeld testified that on November 18th she experienced verbal mistreatment from LL. According to Ms. Neufeld LL returned from driving unit 1026 and stated to Ms. Neufeld that it was the worst piece of s*** that he has ever had to drive. Ms. Neufeld stated that she never really responded other than stated "Oh our equipment doesn't meet your standards." Ms. Neufeld testified that she made a note on LL's file dated November 19th, 2015 which was marked as Exhibit A. It reads as follows:

LL – Personnel File

On November 18, 2015, General Manager experienced verbal mistreatment from LL. [LL] came into the front door of WYRWA and greeted the GM – Lori Neufeld by saying “That truck is the worst piece of S*** that he has ever had to drive’ (Referring to Unit 1026 as there was ongoing emissions problems where it needs a forced computerized regen). GM – Lori was very taken back by this type language and the continuous insults towards WYRA’s equipment especially being LL was very new to the organization. It was apparent that he had very little tolerance for equipment issues which is a part of operating equipment. LL proceeded to inform the GM that because that particular unit (1026) is a Peterbilt – I should be taking it to Peterbilt so the problem could get fixed. GM responded to LL that in fact that particular unit had been to Peterbilt in the past but emissions issues continue to be a problem with the unit. GM did not further comment to his verbal insults.

25. Ms. Neufeld testified that a second incident of abusive behaviour 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”. Ms. Neufeld stated that he swore at her. Ms. Neufeld tendered into evidence a note she made to LL’s personnel file about this exchange (marked as Exhibit B) which reads as follows:

On December 2, 2015, at 7:20 a.m., General Manager – Lori Neufeld was in the shop with the drivers ensuring that there were no problems. LL came up to GM and started swearing about how unit 1029 came back from Wilton yesterday and the check engine light was on. He ranted and swore at the GM (in front of other drivers – Doug Potter and Larry Farrell) stating that how WYRA does things here is bulls*** and that real mechanics need to look at the equipment. I responded to LL by stating real mechanics do look at the equipment and that my hands were tied as to who I can authorize to do the work on WYRA’s fleet. He continued to say that WYRA (assuming he meant me the GM) does not know how to run and organization and on and on. I was very annoyed by this time and stated to LL that maybe he needs to go home until he can learn to address management in an appropriate fashion. LL responded that he was not made at me personally but at the situation. I stated that regardless, there is no need to speak to management in that fashion and insult me and that will not be tolerated period. LL proceeded to carry on his duties for the remainder of the day.

26. Mr. Larry Farrell was called as a witness by the employer. Mr. Farrell was present during the exchange between Ms. Neufeld and LL on December 2, 2015. Mr. Farrell could not recollect the details but stated he remembered LL mentioning something

about a truck and that Ms. Neufeld said if you don't like it you can go home and that it was a "heated exchange".

27. LL acknowledged that he brought up equipment issues but stated he rarely swears. He acknowledged he may said "sh**" and may have called the truck sh** but usually would call it "junk".
28. According to Ms. Neufeld the final straw that led to the decision to terminate LL occurred later in December, around December 15th. Ms. Neufeld stated she had been informed by Lindsay Kalmakoff, an employee of WYRA's, of a phone call he had received from Marvin Phillips at Delta Co-op. Mr. Phillips stated he was calling because he understood WYRA would no longer be servicing him. According to Ms. Neufeld, Ms. Kalmakoff informed her that he reassured him that they would still be servicing him and not to worry. This was a location that had been serviced by LL.
29. Mr. Kalmakoff was called as a witness and confirmed that he took the call from Marvin Phillips. He could not remember the exact day, but states it was the same day that the unit was serviced. It was established that the unit was serviced on December 18th. Mr. Kalmakoff testified that Mr. Phillips stated that the driver that went there said WYRA would not be servicing the bin after that day and he wanted to know what to do. Mr. Kalmakoff told him that as far as he knows WYRA would be servicing the bin and that he hadn't heard anything differently. A route sheet was tendered into evidence (Exhibit F) showing that it was LL who serviced the bin on the day in question.
30. After this incident Ms. Neufeld testified she phoned the board chairman and informed him that LL had took it upon himself to inform this customer that WYRA would no longer be servicing them. A decision was made with the board chairman, Ray Nolin, that LL would be dismissed but that this would wait until after Christmas. Ms. Neufeld tendered into evidence a handwritten note (Exhibit C) which reads as follows:

Dec. 15, 2015 – 10:30 A.M. RE: LL

Lindsay informed GM - Lori Neufeld that Marvin from Unity Co-Op called to ask what he needed to do now that WYRA will not service his bin. Lindsay asked

Marvin why he thinks that we won't service him & he stated that because the driver said he would not be back to service this bin again. Lindsay informed Marvin not to worry, that there will be no disruption in his service and to continue calling in when he needs the bin serviced.

Upon being told this information, I called Chairman Ray Nolin to explain what happened & I recommended that we terminate LL's employment with WYRWA because we cannot afford to have drivers losing business for WYRWA by telling them we will not provide them service. Ray Nolin agreed that this was not good & that LL is not a good fit with WYRA & to go ahead & let him go.

Due to it being the Christmas season I will wait until after Christmas to let [LL] go.

31. LL did point out a date discrepancy between this note, being dated Dec. 15, 2015 and the date he actually serviced the bin on Dec. 18, 2015. While there is a date discrepancy I do accept Ms. Neufeld's testimony that the conversation followed the reporting of the phone call from Delta Co-op on the day Mr. Lund serviced that location.
32. Ms. Neufeld stated that LL was called into the boardroom on December 31st around 12:30 p.m. to meet with Ms. Neufeld and Ms. Pat Foley. Ms. Neufeld testified LL was advised that WYRA had received a disturbing phone call from one of their customers indicated a driver would no longer service the customer and he was informed that this was outside the scope of his position and that if he had a problem he needed to come to management with the issue so a solution could be implemented.
33. In responding to Ms. Neufeld LL first denied that he told a customer anything. Then he said someone must have been standing there while he was servicing the container and LL responded to the individual saying Sask Power should be moving the lines and he will not service this bin again.
34. Ms. Neufeld stated she advised LL WYRA cannot have drivers telling customers that WYRA would not service them and that they would part ways. Given that LL was still within the 3 month probation period they felt they were doing what was in the best interest of WYRA. Ms. Neufeld testified that they also had another customer complaint about LL which factored into the decision to terminate LL.
35. Ms. Neufeld maintains that the December 31st meeting where LL was dismissed was the first time he ever spoke to her about any concern about the power lines.

Findings

36. 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.
37. I am not satisfied that WYRA terminated LL because of LL acting or participating in an activity described in section 3-35. LL did not communicate to WYRA 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 established procedure i.e. filling out a form and communication with Ms. Neufeld directly.
38. This is not to downplay any concerns that LL has raised regarding the proximity of the power lines at this location. WYRA did not dismiss out of hand the concerns that were raised and did look into this further after December 31st. Whether this follow up was sufficient is not a matter that is before me. The issue before me is whether there was unlawful discriminatory action on the part of the employer.
39. 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 that 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.

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 WYRA by another customer, and the communication to the Delta Co-Op by LL that WYRA 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 his termination versus the reason being that he raised health and safety concerns.

Conclusion

41. For all of the above reasons this appeal is allowed. I find that while termination of LL's employment falls within the definition of a discriminatory action under section 3-1(1)(i) of the Act this did not constitute discriminatory action against a worker under section 3-35 of the Act.



Darlene N. Wingerak
Adjudicator
September 9, 2016

Right to appeal adjudicator's decision to board

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(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.