

**IN THE MATTER OF AN APPEAL TO AN ADJUDICATOR PURSUANT TO SECTION 3-53 3-54 OF
THE SASKATCHEWAN EMPLOYMENT ACT, SS. 2013, Chapter S-15-1**

BETWEEN:

WILSON'S GREENHOUSE (2005) Ltd.

Appellant

AND

CAROLYN VICZKO

Respondent

AND

**Director, Occupational Health and Safety, Ministry of
Labour Relations**

Respondent

Decision Appealed from: Occupational Health Officer April 6, 2018

Hearing Date: Friday, May 10, 2019 at 8:00 am

Adjudicator -

Marlene Weston

For the Appellant, Wilson's Greenhouse -

Troy Baril, Barrister and Solicitor
Miller Thomson LLP

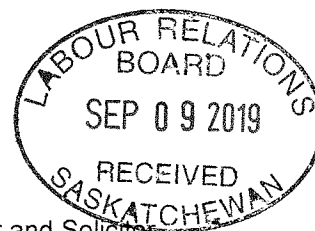
For the Respondent, Carolyn Viczko

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Self Represented

For the Respondent, Director, OH&S -

no representation



DECISION

I Introduction

- 1 Wilson's Greenhouse (2005) Ltd. has appealed the decision of an Occupational Health & Safety Officer dated April 6, 2018 (the "Decision") to an adjudicator pursuant to s. 3-53 and s.3-54 of *The Saskatchewan Employment Act* (the "Act"). I have been appointed as Adjudicator to hear this case.
- 2 The Report dealt with a complaint of discriminatory action from worker, Carolyn Viczko, (The Respondent) made to Occupational Health and Safety (OH&S) in Saskatoon on November 20, 2017 against her employer, Wilson's Greenhouse (2005) Ltd. (the Appellant).
- 3 Upon receipt of my appointment as Adjudicator, I contacted the parties to determine how they would be represented. I was advised that the Appellant would be represented by Jon Danyliw, a solicitor with Miller Thomsen LLP and the Respondent would be self-representing. The Director of Occupational Health and Safety confirmed that the Director would not be attending or making representations in this appeal.

- 4 Through the representatives, a pre-hearing conference by telephone was arranged for February 22, 2019 at 10:30 am. An Agenda was circulated to the parties prior to the conference.
- 5 At the beginning of the call, the parties confirmed my appointment as Adjudicator.
- 6 During the conference call, I asked what efforts if any had been made to resolve the situation, and what efforts might still be made for settlement:
 - The original Adjudicator who had been appointed to adjudicate this matter had filed a Notice of Hearing for September 27, 2018. The parties attended the hearing but with the consent of the parties, the hearing did not proceed. The parties moved to mediation, but could not come to a resolution of the matter.
 - The parties could not come to an agreement to resolve this matter.
 - The parties then indicated to the Registrar of the Labour Relations Board that they wished to proceed by hearing. As the original Adjudicator had participated in the mediation process earlier, she recused herself from hearing the matter.
- 7 The parties discussed the scope of the issues that would be adjudicated. The Appellant indicated that the issues had been defined in the Notice of Appeal filed by the Appellant.
- 8 The parties agreed upon a date for the hearing of Friday March 29, 2019. The location would be arranged by the Adjudicator. Both parties would be calling witnesses.
- 9 The Appellant requested that the application of the decision of the Occupational Health & Safety Officer in the Notice of Contravention be suspended pending the outcome of the appeal. The Adjudicator granted the request and issued an Order continuing a Stay of Proceedings previously ordered until the outcome of the appeal.
- 10 A second Hearing Notice was prepared by the new Adjudicator and filed with the Registrar of the Labour Relations Board, on March 4, 2019. The representatives for the Appellant and Respondent were notified of the Hearing Date and confirmed by email on that the parties would be present.
- 11 On March 19, 2019, I was advised by Daniel Alcorn, an Associate in Miller Thomson LLP that Jon Danyliw had left the firm of Miller Thomson LLP. Troy Baril, a partner in the firm, had assumed the case and would be acting for the Appellant. A rescheduling of the matter was requested as there were a number of conflicts regarding dates. A new date was selected and was agreeable to both parties.
- 12 A new Hearing Notice was issued by me on April 26, 2019. The Hearing was set for May 10th, 2019 at 8:00 am. at the Hilton Garden Inn in Saskatoon, SK.
- 13 The Respondent applied to me for the issuance of two Subpoenas: one for Michael Luciak and one for Kevin Frey. Both Messrs. Luciak and Frey were Occupational Health & Safety Officers involved in this matter. Mr. Luciak was the OH&S Officer who had issued the Notice of Contravention against the Appellant in this matter. I issued the

Subpoenas on April 27, 2018 and provided them to the Respondent on April 29th, 2019 who then served them on the two Officers.

14 I then prepared and sent to the two parties on May 6th, 2019 a document entitled **Process Direction.** Procedure for Conducting the Hearing was set out in the document as follows:

- i. Documents, recordings or other materials either party wishes to have considered, including any from the Occupational Health and Safety (OH&S) files, must be presented in evidence as exhibits either by consent between the parties, or as established through a witness. Any party wishing to enter a document in evidence shall bring a copy of that document for the Adjudicator and a copy for the other party unless such documents are within the OH&S files provided. If a recording is to be considered in evidence, a copy must also be available for the Adjudicator and the other party, and the party wishing to play such recording is responsible to arrange in advance for a mechanism to do so.
- ii. In keeping with Labour Board practices concerning appeals under Part III of *The Saskatchewan Employment Act*, a court reporter will not be present. Parties and witnesses are asked to speak clearly and not too quickly to enable note taking.
- iii. Should they elect to, each of the parties, or counsel on their behalf may make an opening statement. Any witnesses other than the parties themselves will be excluded from the hearing room prior to providing testimony.
- iv. The Appellant, who bears the onus in relation to the appeal, will present evidence first. Any witness called on its behalf may be cross-examined by the Respondent.
- v. The Respondent will present evidence after the Appellant concludes the presentation of its case. Any witness called on behalf of the Respondent may be cross-examined by the Appellant.
- vi. Parties at any time may request to caucus with their client. After all of the evidence is in, each of the parties will have opportunity to present closing argument.

15 There was a request for production of a witness list by the Respondent to the Appellant. The Appellant advised that the witness list provided by their firm on September 7, 2018 to the Respondent is still the same list to be used for the upcoming hearing. However, as the Respondent indicated that she did not have the list, Mr. Baril provided a witness list with the proviso that they may or may not be calling the witnesses on it.

16 The matter proceeded to hearing.

II Background

17. The Appellant, Wilson's Greenhouse, made a business decision to expand their business to create a new Lifestyle Centre which opened August 21, 2017. Previously, Wilson's business had been seasonal in nature and had often closed in the winter months. With the expansion which was considerably larger and extensive in nature, Wilson's was expected to be a year round business.
18. Staffing was hired in August to work in the new Centre. The Respondent was hired on August 21, 2017. The Job Posting answered by the Respondent and the duties assigned upon hiring included assisting customers, watering and tending to plants in the greenhouse, cleaning and other related duties.
19. Wilson's business was not busy into the fall as was expected. Sales reduced drastically, and the decision was made to reduce staffing. The Respondent was one of the 31 staff that were affected by the decision. Her position was terminated on October 26, 2017.
20. Subsequent to the termination of her position, the Respondent:
 - filed a claim with the Workers' Compensation Board, and
 - laid a complaint of discriminatory action to Occupational Health and Safety. A decision of an Occupational Health & Safety Decision Officer rendered by Mike Luziak, and dated April 6, 2018 (the "Decision") was appealed to an adjudicator pursuant to s. 3-53 and s.3-54 of *The Saskatchewan Employment Act* (the "Act"). I have been appointed as Adjudicator to hear this case.

III EVIDENCE

21. The Hearing proceeded on Friday, May 10th, 2019 in Saskatoon, Saskatchewan with all representatives for the Appellant and Respondent other than the Director of OH&S present. The Adjudicator's authority was confirmed by the parties.
22. After introductions the Adjudicator referred to the Process Direction document that she had sent to the parties to set the process for the hearing. The Adjudicator asked if the parties had any preliminary objections to raise.

a. Preliminary Objection

23. The solicitor for the Appellant, Mr. Baril, raised a Preliminary Objection. The objection raised was to the subpoena issued to compel Michael Luciak to testify at the proceedings.
24. The Adjudicator allowed Mr. Baril to argue his position:
 - Mr. Baril argued that Mr. Luciak was a decision-maker in this instance. Mr. Luciak had issued the Notice of Contravention. For example, this is like questioning a judge on his decision. It is wholly inappropriate for a decision-

maker to be questioned as a witness as it raises a reasonable apprehension of bias as he is testifying on behalf of himself.

- The Adjudicator asked if the Respondent had a rebuttal to present. There was none.
- The Adjudicator called an adjournment to consider the matter.

25. The Adjudicator reconvened the hearing.

26. The Adjudicator ruled that the Occupational Health & Safety Officer who issued the Notice of Contravention in this matter and who had been subpoenaed by the Respondent would not be allowed to testify on behalf of the Respondent. The Adjudicator vacated the subpoena and ruled that the Officer who issued the Notice of Contravention cannot testify on behalf of either party, but he can answer questions by the parties as a friend of the court.

b. Opening Statements

i) Appellant's Opening Statement

27. The Appellant argued that there was no discriminatory action taken against the Respondent by the Appellant under sec. 3-53 and 3-54 of *The Saskatchewan Employment Act*.

- The termination of the Respondent by the Appellant was not a discriminatory action, but rather that she was terminated 'for good and sufficient other reason'.
- Evidence will be presented to illustrate that in making his decision, the OH&S Officer ignored evidence that was presented to him. There were numerous considerations made that Wilson's did not have an opportunity to explain.
- The Appellant will show how business dropped off significantly. Other employees were made redundant at the time for that reason. The Respondent's termination was not a one-off.

ii) Respondent's Opening Statement

28. The Respondent stated that she had been hired for the following:

- She had extensive experience in agriculture.
- Wilson's was moving into a \$10 M building operating year round. It was to include equestrian supplies, home décor, etc. It was supposed to be a Life Style Centre. The concept was different from a seasonal greenhouse. They would be bringing in larger numbers of tropical plants. They would be doing what Dutch Growers was doing. In the interview she was asked to do what she could and couldn't do. She was told that the tropical plants were being compromised by infestations.
- Concept of Wilson's being a Destination Centre was discussed at the interview. There was to be a probationary period. She was told it would be a full time job. She left a full time position to come to work for Wilson's.

c. Questioning of Michael Luciak, OH&S Officer

29. The Adjudicator then called Mr. Luciak to provide information regarding this case. The Appellant and the Respondent would each be given an opportunity to ask questions.

- The Appellant asked Mr Luciak to explain the process he followed in issuing the Notice of Contravention against the Appellant. He explained the standard practice:
 - When he got a complaint from Carolyn Viczko, Ms. Viczko was asked to complete their standard questionnaire. She said she was terminated because she had brought a complaint to OH&S.
 - On the basis of the complaint, Mr. Luciak drafted a letter asking for the Employer to provide 'good and sufficient' reasons for the firing' and a reply was received from the Employer's solicitor.
 - Mr. Luciak discussed the reply with the Employee and she disagreed with the contents and refuted them.
 - As a result Mr. Luciak wrote a decision letter to the Employer advising that in his belief, the actions taken were discriminating, and to reinstate Ms. Viczko and pay her for lost wages.
 - Mr Luciak was asked if he had ever met with the Employer. He said he did not meet with the Employer. He felt he would just get into a figurative 'ping – pong' battle. He based his decision on a balance of probabilities, not beyond a reasonable doubt. He felt that more likely than not this had been a discriminatory action.
 - Other things he took into consideration:
 - Ms. Viczko was fired 2 days after another OH&S Officer attended the business.
 - The Employee was refuting that the winding down of business was the reason for her termination.
 - There was no evidence of an employment contract, no rules in records provided, and what the job was not in writing. There was no record of whether there was an evaluation given of the employee's performance, and there was no letter of violation. There was not much in writing.
 - The Employee had asked about the use of Safer soap. Safer soap is a PCP regulated product. A permit is required if commercially applied.

30. There were no questions from the Respondent. The OH&S Officer was excused.

d. Examination in Chief of Appellant's Witness, Lindsay Wilson

31. Mr. Baril asked the witness, Lindsay Wilson, what she does. She responded that she is responsible for the smooth operation of the business. She is very hands on and deals with the employees. She does the hiring.

- The business became a full time business when she started working there in 1999. They continued adding businesses, but still laid off people in the fall. The greenhouse would reduce the staff's hours in the winter to 9:00 am to 6:00 pm. As of May 1, rentals opened at 8:00 am.
- Staffing levels and hours were affected by changes in seasons: 1) sale of annuals in spring, and 2) Christmas time. They tightened up schedules after the fall season. They had to make difficult decisions – hire students in the summer and then lay off 20 to 30 people in the fall.
- Wilson's started a new venture – to become a Lifestyle Centre. The concept was based on Dutch Growers' concept to stay busy all year round. They started adding new sub-businesses: gourmet foods, barbeques, patio furniture and tropical plants as of August 21, 2018. The new Centre was to open on May 1, 2019. New staff was hired to open the new additions to the business. Ms. Viczko was hired for a position as Retail Sales Associate.
- Ms. Wilson was asked to explain the process for hiring:
 - The Human Resource Person contacted applicants to attend for a 5 minute interview.
 - Successful applicants from the first process were invited to a group interview. Wilson's does not do workshops.
 - The job was posted as a Retail Sales Associate. No degrees were needed. There were full time and part time jobs available.
 - Those selected were asked about flexibility of hours. The job included dusting, sweeping, watering of plants.
- Ms. Wilson said that Ms. Viczko was an average employee. She made herself unapproachable by wearing sunglasses and having her hoodie up. She was never disciplined. Notes were jotted down and thrown into a file. These were just Ms. Wilson's notes. Ms. Wilson said that Ms. Viczko was just spoken to for water on the floor, and doing work instead of serving customers.
- Mr. Baril introduced Exhibit A2 – the Termination Letter. Ms. Wilson commented that although they thought the expansion into other ventures would sustain their business it did not. Long term employees were the only ones who were being kept. Turnover dropped substantially after September. In May their receipts were below \$540,000. In September and October, 2017, 31 positions were made redundant. Lay offs started in September. All were made because of slowed business. The business still has peaks and valleys, but the business did not pan out as a year round business.
- Ms. Wilson was asked about the letter of Complaint made to OH&S. No one told her about the letter until an Occupational Health and Safety Officer called about the letter and the contents:
 - *Spraying insecticides* - Several of the Employees have licences to spray. The spraying is done at night by someone with a licence. The tropical plants that were ordered were infected. Ms. Viczko was asked about spraying. She said she was not comfortable so they asked another employee. Ms. Viczko sprayed the plants with Leaf Shine. Ms. Wilson was not sure how that happened. Ms. Wilson was not party to the discussion. Mr. Baril asked Ms. Wilson if she terminated Ms. Viczko

because of the spraying. She responded 'no'. The spraying was on Sept 17, 2017 and the termination was 6 weeks later.

- *OH&S Committee not in place at first* – Kevin Frey, an Occupational Health & Safety Officer, got an anonymous inquiry and came to the building to see about an OH&S Committee. Kevin gave them information. Ms. Wilson felt that his visit was helpful to the business. As the inquiry was anonymous Ms. Wilson did not know who had called OH&S. Ms. Viczko advised them at her exit interview that she was the one who had made the anonymous complaint.
- *Workers' Compensation Board claim* - Ms. Wilson was asked whether Ms. Viczko was laid off because of the claim she made to Workers' Compensation Board (WCB). Did Ms. Viczko notify you about the complaint? Ms. Wilson responded 'no – never'. The complaint was denied. The response letter complete with documentation was dated February 21, 2018.
- *Waiver* – Ms. Wilson was asked if she was informed about the waiver and allowed to respond. The complaint was about full time employee status. She was not informed by OH&S so she did not respond.
- *Paragraphs on Page 4 of Letter to Employers from Mr. Luciak dated April 6, 2018:*
 - She knew that Ms. Viczko had sprayed Leaf Shine but did not instruct her to do so and was not aware of the incident. She did not talk to Mr. Luciak about it. She also did not instruct Ms. Viczko to spray with Safer Soap. She was not provided with an opportunity to discuss this with the OH&S Officer. Just because they sell it for customers to use, they do not use it themselves.
 - There was no way to know who made the complaint about not having an OH&S Committee.

e. Cross Examination of Lindsay Wilson by Carolyn Viczko

32. Ms. Viczko asked Ms. Wilson why they thought it was a good idea to expand their business? Ms. Wilson replied that they wanted to expand into a year-round business. But they wanted to set up their own touches.

- Ms. Viczko asked about the tropical plants. Ms. Wilson said that the previous greenhouse had tropical plants. With the new tropical plants, concerns about an infestation started in early September. There was a no return policy so customer could not return infected plants.
- Ms. Viczko asked about how many discussions had they had? Ms Viczko was told to spray mineral spray. There was really no discussion about a solution or a decision. Ms. Wilson told Ms Viczko that she would look into it. She was aware that there were concerns.
- Ms. Viczko asked about notes that were in Ms. Wilson's file. Ms. Wilson said that the notes were confidential.
- Ms. Viczko said that it was a total surprise to her when she was being terminated.

Was she fired or laid off? Ms. Wilson advised that she was being terminated. Ms. Viczko had the option to take a larger settlement. There were no notes in the personnel file about the Employee being insubordinate.

f. Examination in Chief of Kevin Frey, Occupational Health & Safety Officer

33. Mr. Kevin Frey, Occupational Health & Safety Officer, had been subpoenaed by the Respondent. Because of pressing work duties, he asked to be examined sooner and the Adjudicator allowed the change in scheduling.
- Ms. Viczko asked Mr Frey what he found when he did his inspection at Wilson's. What was the reception?
 - Mr. Frey advised that he had received an anonymous complaint from a worker. The Officers respond to anonymous complaints to maintain the confidence of workers if they have fears of being disciplined.
 - He did an inquiry and found out that there was no workplace committee. Under legislation, when there are 10 or more employees the workplace needs to establish a Workplace OH&S Committee.
 - Mr. Frey chose to write a Compliance Undertaking. He had the discretion to serve a Notice of Contravention or a Compliance Undertaking depending on the severity of the non-compliance. He gave the Employer two weeks to form the first Committee. He served the Compliance Undertaking that afternoon and suggested that the workplace have an Occupational Health and Safety Act available. It is the general duty of an Employer to ensure that a Committee is established. The change of location was not a defence.
 - During the inspection, he did not give the name of the employee who had complained. He did not divulge the name of the employee who had complained. Identity was entirely anonymous. He was conscious of the worker's concerns that she may be fired if the employer knew.
 - The reception by the staff and management was good.
34. There was no cross examination.

g. Examination in Chief of Appellant's Witness Eyvonne Johnston

35. Mr. Baril asked Ms. Johnston how long she had worked for Wilson's Greenhouse. Ms. Johnston indicated that she had worked for Wilson's for 4 ½ years and had floated from department to department, working in all departments. Currently she is in the seasonal area but cashes as well.
- Ms. Johnston said that spring is the busiest time of year. From May long weekend, they 'go hard'. August is a sharp decline in most plant sales. Extra staff are brought in for May, June and July.
 - Regarding chemicals, Ms. Johnston has had training about the use of chemicals. She had not been asked to spray at work. When she did, she was told no. She uses products at home, but not at work. Carolyn did not talk to her about spraying.
 - Ms. Johnston said that she knew Carolyn, but Carolyn did not seem happy. Her responses were negative and critical. Carolyn did not raise any concerns about safety to her. Nor did she mention a workplace issue.

h. Cross Examination of Eyvonne Johnston

- 36 Ms. Viczko asked Eyvonne Johnston if she remembered a conversation between Ms. Johnston and her wherein Ms. Johnston said to her, 'Don't ask too many questions because you might get fired?' Ms. Johnston did not.

i. Examination in Chief of Appellant's Witness, Tess Kenney

- 37 Mr. Baril asked Ms. Kenney how long she had worked at Wilson's. Ms. Kenney replied that she had worked there 12 ½ years. She worked in Plants in the spring and Troicals in the winter. They started planting the first week in March. Sales of annuals end in July. September is when it closes up. Staff work full time until annuals are done, then part-time.
- In the off season, Trevor Christopher is there on weekends. Trevor has worked there for 11 years. He worked with Carolyn for 2 ½ months. He has never been asked to spray chemicals. Carolyn sprayed the rest of plants that night. Plants that were infested were put on a cart and they let management know.

j. Cross Examination of Witness, Tess Kenney

- 38 Ms. Viczko asked Ms. Kenney if she remembered a conversation about taking winters off? Ms. Kenney said that she did not take winters off, but may have taken a holiday.
- When Ms. Kenney and Ms. Viczko were cleaning the pots on the shelf, does she remember saying she was nervous about standing on ladders. Ms. Kenney said that the shelves had to be cleaned which included the pots.
 - Ms. Viczko said that lists of duties were sent each morning. Did Ms. Kenney remember doing any training on spraying? Ms. Kenney said she showed Ms. Viczko what it said on the can that it can't be used on the wrong plants. The can was Leaf Shine. Ms. Viczko asked if this was a shorter way to get plants clean. The can of Leaf Shine was left on the desk. Ms. Johnston does not remember any of that. She did not say that Trevor sprayed the plants, only washed them.
 - She did not have any problems working with Ms. Viczko.

k. Redirect by Appellant

39. Did Ms. Viczko mention a shoulder injury? Ms. Kenney said that she doesn't remember her saying anything about a shoulder injury. Ms. Kenney did not participate in the WCB inquiry.

I. Examination in Chief of Appellant's witness, Trevor Christopher

- 40 Mr. Baril asked Mr. Christopher how long he had been working at Wilson's. Mr. Christopher said this was his 9th year working at Wilson's. He splits his time between trees and shrubs and tropical plants. He only works on the weekends all year round. He has a degree in HSA with a major in horticulture.
- Wilson's carries an insecticidal soap called Safer Soap used for aphids and spider mites. He wouldn't use this Safer Soap in a greenhouse as it is expensive. Also, you need a licence to spray it in a commercial setting. Horticultural Oil is effective. Leaf Shine is a mineral oil base. It is a quick fix to make plants look better.
 - Mr. Christopher was asked about working with Ms. Viczko. He said she had started to enjoy work, but became unhappy with a general attitude of feelings toward management. If you have any concerns about safety, you bring it to management and they would consider it. Spraying was not her job. Trevor is not licenced to spray.
 - Mr. Christopher was asked if Ms. Viczko had mentioned shoulder soreness. He said no, but he had seen her washing the pots, reaching up. He felt it was not an effective way to clean.

m. Cross Examination of Trevor Christopher

41. Ms. Viczko asked Mr. Christopher if he works at other businesses. He said yes. She asked if he had sprayed for Wilson's? He responded no.

n. Examination in Chief of Appellant's Witness Michelle Hermans

- 42 .Michelle Hermans advised that she is the General Manager of the store. Her duties include making sure all duties get done. She has been at Wilson's for 2 years. Previously she was a manager for a company in the Netherlands. Population there is more dense.
- There are supervisors on the floor, and the Manager gives instructions to the people on the floor. In the fall, business slowed down so much that they had to let people go.
 - They dropped 95% in sales that they did not anticipate. They let go around 30 people between September and October. In the end, they only kept 1 staff member per shift – 2 ½ staff – Tess, Trevor and Eyvonne. They kept employees who had seniority.
 - She talked to Carolyn about spraying. Carolyn said she was uncomfortable. They were going to investigate so told her not to worry about it. Mr. Baril asked if Carolyn was asked to spray insecticides? No. No one pressured Carolyn to spray. Was Carolyn's termination a result of this information? No. Was it helpful? No.
 - Would you fire anyone on the basis of positive results? No. Regarding the Occupational Health & Safety Committee, Mr. Baril asked if they knew they had to have an Occupational Health & Safety Committee. Ms. Hermans said they did not. Before, the business was small and did not have more than 10 employees so they

did not need a committee. Mr. Baril asked if having the Committee was a positive result? Yes.

- Did Kevin Frey tell them who had made the complaint? No. They learned on the day that they let Ms. Viczko go that she had been the one who complained. She told them she had done it. This happened was after the decision had already been made to terminate.
- They got a Notice of Compliance from Mr Frey. Management was happy with Mr. Frey in helping them set up the Committee.
- Ms. Viczko told Ms. Hermans that she had a sore shoulder, but she did not see a doctor.

o. Cross Examination of Michelle Hermans by Respondent

43. Ms Viczko examined Ms. Hermans on the following matters.

- Regarding the WCB claim:
 - Ms. Viczko had a conversation with Leann, one of the employees. Leann's hand was bleeding. Ms. Viczko asked Ms. Hermans if Wilson's had the proper forms to take Leann to the hospital. Leann broke a piece of glass but said she was fine. Ms. Viczko ask if there was a form for filing a WCB claim. She did not get a response.
 - At the time, Ms. Viczko also asked if there was an OH&S Committee.
 - When Ms. Viczko asked about seeing a doctor about her shoulder, Ms Hermans said she did not have time to see her then and that Ms. Viczko may have 'slept funny'! Ms. Viczko said she did not see a doctor as a result. Ms. Hermans did not respond.
- About the OH&S Committee:
 - During the exit interview with Management, Ms. Viczko told them that she had called the Occupational Health & Safety Branch to report that there was no Committee at Wilson's. Ms. Hermans commented that the decision to terminate Ms. Viczko had already been made 6 days before she told Management she had been the one who had reported Wilson's.
- Conversation about spraying insecticide.
 - Ms. Vickzko was uncomfortable about the conversation she had with Management about spraying. Ms. Viczko was feeling that Management thought she was insubordinate. Ms. Hermans was involved in that conversation. Ms. Hermans said that they had told Ms. Viczko that they would take care of it. They wanted to investigate the options themselves.
- Job position status
 - Ms. Viczko asked Ms. Herman why Wilson's would post for 2 positions in August when the season was almost done. Ms. Hermans responded that they had planned to open a new store in August, 2017 but that fell through.
 - In the exit interview, Ms. Lindsay Wilson said that Ms. Viczko may not be recalled because there were some performance issues. Ms. Wilson reviewed the notes, but would not share the notes with Ms. Viczko. ~~Ms Hermans said~~ 'Those are my notes.' Ms. Viczko was told about the notes. Ms. Viczko said

the notes said that they did not want her back next year if they had to make a choice.

- The probationary period was 3 months. Ms. Viczko said that the implication was that this was a full-time job. Ms. Hermans said that it was very clear at the screening and during the group interview that they do not promise anything about full-time employment

p. Redirect by Appellant

44. There was no redirect by Mr. Baril.

45. However, Mr. Baril requested his objection be noted that much of the cross examination of Ms. Hermans was testimony by Ms. Viczko rather than questions addressed to be responded to by Ms. Hermans.

q. Closing Arguments

46. **Respondent's Closing Argument** (The Adjudicator granted the Respondent's request to present her closing arguments before the Appellant.)

- The Respondent said she was relying on the system.
 - There is a social contract. Does the Employer have a right to refuse workers' rights?
 - This is about her standards. She has rights. This is not just about a disgruntled employee defending the system.
 - She did not want to sign the Release at the exit interview. She was pressured into it.
 - She was counting on the Occupational Health & Safety Officer to make a determination, and that it would be upheld.

47. **Appellant's Closing Argument**

- The requirements for an Employer to establish an Occupational Health & Safety Committee did not apply to the Appellant as previous to its planned expansion the 'over 10 employees' did not apply.
- Ms. Viczko responded to the ad that was posted for the job for which she was hired. Nowhere in the ad was 'horticultural specialist' mentioned.
- Although the business was supposed to see an increase in sales, the same trend was experienced – a spike in May, but a 97% decrease in business after that. . Lifestyles of customers were different than predicted.
- The decision to lay off staff was made 5 days before the issues set out in the Complaint Questionnaire :
 - Exhibit A-8 is a Letter from Occupational Health Officer setting out items for Wilson's response. A number of items in the letter were not provided to Wilson's so they did not have an opportunity to respond. There was a lack of procedural fairness.

- Balance of Probabilities – There was a causal relationship between the reduction in the downturn of sales and the termination of the Respondent's employment. The only employees kept were long term Employees.
 - The notes that were referred to that were in Ms. Hermans' file were not used when deciding whether to lay off or to terminate.
 - In regards to the Safer Soap issue, because Wilson's sold the product, they were expecting the staff to use it. Ms. Viczko was not disciplined regarding her research on the product. However, she did do the research with Agriculture Canada after being told that Management would handle the matter. She did not raise issues through the proper channels. If she had been told to spray and was uncomfortable, she could have invoked her right of refusal but she didn't.
- Occupational Health & Safety Committee
 - The Appellant is not denying that Wilson's should have had an Occupational Health & Safety Committee. None of the emails from Occupational Health & Safety disclosed the Respondent's role regarding the Committee. The decision to terminate the Respondent's employment was made 6 days prior to the visit from the OH&S officer.
 - The Employer was never told by OH&S who made the complaint and they did not know until the Exit Interview when the Respondent told them it was her. They even started the process to establish a Committee the same day.
 - There was no causal relationship between the termination and the complaint to the OH&S Committee.

48. Response by Respondent to Appellant's Closing Argument

There was no response by the Respondent to the Appellant's Closing Argument.

IV. Analysis

a. Issues

49. The issues to be determined are as follows:

- a. What is the proper onus and standard of proof in determining whether the termination was a discriminatory action?
- b. Was there good and sufficient other reason to terminate the Respondent's employment?

i) Issue 1. The proper onus and standard of proof

50. Section 3 – 36(4) of *The Saskatchewan Employment Act* (The "Act") states:
If a 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 against the worker for good and sufficient other reason.

51. In *Britto and University of Saskatchewan RE 2016 CarswellSask 688 (SaskLRB)* the initial onus is on the worker to establish a prima facie case of discriminatory action, and then the onus falls to the employer to establish on a balance of probabilities that discriminatory action was taken against the worker for good and sufficient other reason.

52. In this case, the Respondent failed to establish a prima facie case of discriminatory action taken on the part of the part of the Appellant. There was very little evidence that the Appellant had taken action on the events that had transpired which the Respondent alleged had led to her termination.

53. In *Lund v West Yellowhead Waste Resource Authority Inc.*, 2017 CarswellSask 214 (Sask LRB) the decision that was rendered on appeal from the LRB Board decision was that the employee had not established a causal connection between raising safety concerns and his termination and therefore, the presumption in favour of the worker and the onus on the employer to establish good and sufficient cause was not triggered.

54. Here the Respondent raised the following issues as contributing to her termination:

- i. *Spraying of plants* - The Respondent alleged that she had been terminated because of the concern raised by her in the spraying of plants. The evidence provided by the witnesses indicated that there had been a conversation between Management and the Respondent, but the result was that the management staff indicated they would look in to it. There was no pressure for the Respondent to spray the plants and no discipline or reprimand given. There were some concerns expressed by the Respondent about licensure for spraying, but the concerns were not expressed through the proper channels and did not come to the attention of Management until after the termination. Therefore no causal connection in regards to spraying being the cause for termination was established.
- ii. *Reporting Wilson's for failure to have an Occupational Health & Safety Committee* - The Respondent also alleged that she had been terminated because she had reported Wilson's to an Occupational Health & Safety Officer for not having an Occupational Health & Safety Committee on site.
 - o The Respondent had called the OH&S Branch anonymously. The Occupational Health & Safety Officer who responded to the call testified that he had not divulged the name of the person who had called to make the complaint during his subsequent visit to the site or at any other time.
 - o The Respondent, herself, divulged that she had made the complaint during her exit interview. Ms. Hermans testified that the decision to

terminate the Respondent's position was made 6 days prior to the exit interview.

In neither of the instances above did the Respondent meet the onus to establish the causal connection between the concerns she raised and the termination.

ii) Issue 2 Was there good and sufficient reason to terminate the Respondent's Employment

55. The onus is on the Appellant to establish that Wilson's had good and sufficient reason to terminate the employment of the Respondent. The Appellant's position is that the Respondent was terminated for legitimate business reasons – a change in staffing to meet a reduction in business.
56. The Appellant's witness, Ms. Hermans stated that decisions for reductions in staffing were made on the following basis:
- Staff who had worked over the summer were leaving employment as they were students who were returning to school.
 - Extra staff had been hired because Wilson's was expecting business sales to increase and to become a year round business. That plan was not borne out by an increase in sales so staff were laid off.
 - There was a significant reduction in sales in particular in the plant division where the Respondent worked. Managers testified that when the management was deciding which positions would be eliminated, the decisions were made basis of seniority. Only three employees were left, none of whom were employed on a full-time basis.
57. The Appellant has provided sufficient evidence that on the balance of probabilities the Respondent's employment was terminated for good and sufficient other reasons.

V Conclusion

58. In relation to the issues set out in the Analysis Section of the Decision, I conclude that:
- The Respondent did not meet the burden of proof required to support the causal relationship between the actions set out in the testimony regarding spraying and the complaint to the Occupational Health & Safety Officer and the termination of the Respondent's employment.
 - The Appellant proved on a balance of probabilities that there were good and sufficient reasons for the termination of the employment of the Respondent under Section 3-36(4)(b) of the Act.
59. Therefore, the appeal is granted, and the Notice of Contravention issued April 6, 2018 to the Appellant, Wilson Greenhouses Ltd. is hereby quashed. The Stay of Proceedings is also quashed.

Dated at Gull Lake, Saskatchewan this 8th day of September, 2019.

ME Weston

Marlene Weston, Adjudicator