LAB FILE NO. 111-15

In the Matter of an Appeal with respect to the decision of an Occupational Health Officer to an Adjudicator Pursuant to Section 3-53 of *The Saskatchewan Employment Act*, SS. 2013, Chapter S-15.1

BETWEEN:

CRESCENT POINT ENERGY CORP.

Appellant/Employer

AND:

TYSON KOCHAN

Respondent/Employee

Appearing:

SCOTT WICKENDEN for the Appellant
~~**BRENT McRUVIE**~~ PATRICK J. McKenna. for the Respondent

Adjudicator:

TIMOTHY RICKARD

Appeal Decision

I. INTRODUCTION AND BACKGROUND

[1] Crescent Point Energy Corp. ("Crescent Point") appeals Occupational Health and Safety Decision Report #2897 dated May 14th, 2015 (the "Report") to an adjudicator pursuant to ss. 3-53 and 3-54 of *The Saskatchewan Employment Act* (the "*Act*") and I am that adjudicator.

[2] The Report addressed a complaint of alleged discriminatory action against Mr. Kochan with respect to his employer, Crescent Point. In short, the Report determined the following:

a.) that Mr. Kochan likely engaged or participated in one of the activities described in section 3-35 of the *Act* that could be the reason, even in part, for the discriminatory action;
b.) that Crescent Point took discriminatory action against Mr. Kochan by terminating his employment; and
c.) that Crescent Point could not provide good and sufficient other reason for the discriminatory action.

[3] Crescent Point appeals the order issued by the OH&S Officers as a result of their findings which ordered that Mr. Kochan be reinstated as an employee by June 5th, 2015 and paid any lost wages.

[4] For the reasons which follow, I grant the appeal, set aside the decision of the OH&S Officers and find that the Crescent Point had good and sufficient reason for the discriminatory action.

II. THE COMPLAINT, THE REPORT AND THE APPEAL

[5] Mr. Kochan was an employee of Crescent Point for less than three months. He interviewed for the Lead Operator's position in May 2014 but was instead offered a position with the company as a Level II Operator.

[6] Mr. Kochan's employment started on or about June 27th, 2014 and he was dismissed from his duties on or about September 23rd, 2014. The Letter of Termination cites the reason for his dismissal as follows:

> "Dear Tyson:
>
> Further to our conversation today, this letter confirms the termination of your employment with Crescent Point Energy Corp. (the "Company') effective **September 23, 2014** due to the unsatisfactory completion of your probationary period. As per the terms of the Saskatchewan Labour Standards, the first three months of your employment are probationary. Probationary employment implies that during the first three months of your employment with the Company, if either you or the Company determines that the position is not a suitable fit, either party is entitled to terminate employment without notice or severance in lieu of notice.
>
> ..."

[7] Mr. Kochan thereafter filed a complaint with OH&S alleging discriminatory action and on October 23rd, 2014 OH&S sent a letter to Crescent Point advising of the complaint and seeking a response. He alleged he was actually dismissed for raising health and safety concerns about the employer's practices.

[8] By letter dated May 7th, 2015 and by Decision Report dated May 14th, 2015 OH&S found that Crescent Point had taken discriminatory action against Mr. Kochan and the employer was ordered to pay Mr. Kochan for lost wages and to re-instate Mr. Kochan as an employee by June 5th, 2015.

[9] Crescent Point appealed the decision and pending this decision, on September 30th, 2015 I issued an order staying the original order.

[10] A hearing was held at Saskatoon, Saskatchewan on June 6th and 7th, 2016. Each party was represented by counsel.

[11] At the hearing, the OH&S file was entered into the record. Additionally, emails, letters and various other communications pertaining to the matter were entered into the record.

[12] Several witnesses were called to present evidence at the hearing including Lawrence (Hoss) Malek, Sasha Staick, Norm Vongrad, Lyle Brad, Lee Walz, and Tyson Kochan.

III. THE APPLICABLE LEGISLATION AND TESTS

[13] Mr. Kochan alleges he was subject to discriminatory action by his employer under section 3-35 of the *Act* which says:

> **"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;
> (ii) Part V or the regulations made pursuant to that Part;
> (iii) a code of practice issued pursuant to section 3-84; or
> (iv) a notice of contravention or a requirement or prohibition contained in a notice of contravention;
>
> (b) seeks or has sought the enforcement of:
>
> (i) this Part or the regulations made pursuant to this Part; or
> (ii) Part V or the regulations made pursuant to that Part;
>
> (c) assists or has assisted with the activities of an occupational health committee or occupational health and safety representative;
>
> (d) seeks or has sought the establishment of an occupational health committee or the designation of an occupational health and safety representative;
>
> (e) performs or has performed the function of an occupational health committee member or occupational health and safety representative;
>
> (f) refuses or has refused to perform an act or series of acts pursuant to section 3-31;
>
> (g) is about to testify or has testified in any proceeding or inquiry pursuant to:
>
> (i) this Part or the regulations made pursuant to this Part; or
> (ii) Part V or the regulations made pursuant to that Part;
>
> (h) gives or has given information to an occupational health committee, an occupational health and safety representative, an occupational health officer or other person responsible for the administration of this Part or the regulations made pursuant to this Part with respect to the health and safety of workers at a place of employment;
>
> (i) gives or has given information to a radiation health officer within the meaning of Part V or to any other person responsible for the administration of that Part or the regulations made pursuant to that Part;
>
> (j) is or has been prevented from working because a notice of contravention with respect to the worker's work has been served on the employer; or

(k) has been prevented from working because an order has been served pursuant to Part V or the regulations made pursuant to that Part on an owner, vendor or operator within the meaning of that Part."

[14] The definition for discriminatory action is found at section 3-1 of the *Act*:

"Interpretation of Part
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);"

[15] A worker has the statutory right to refuse dangerous work in accordance with section 3-31:

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

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

(b) the occupational health committee has investigated the matter and advised the worker otherwise."

[16] Section 3-36 of the *Act* permits a claim of discriminatory action to be referred to an occupational health officer:

> **"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)."

[17] Based on this legislative framework, I must ask these specific questions:

1.) Did Mr. Kochan engage in or participate in one of the activities described in section 3-35 of the *Act* that on its face could be the reason or a reason for discriminatory action?

2.) Did Crescent Point take discriminatory action against Mr. Kochan?

3.) If the first two questions are answered in the affirmative, has Crescent Point met the onus found in subsection 3-36(4) to establish that the discriminatory action was taken against Mr. Kochan for good and sufficient other reason?

[18] Mr. Kochan bears the onus or responsibility of proving questions 1 and 2 in the affirmative, and assuming he is successful, then Crescent Point bears the onus or responsibility of proving in question 3 that it took the discriminatory action for good and sufficient cause. The legal standard in these cases is on a "balance of probabilities".

[19] In *Hamilton v. Turner*, 2018 SKQB 140 (CanLII), Chief Justice M.D. Popescul described this standard as follows:

> "[20] The standard of proof is a "balance of probabilities" which is the "normal civil standard of proof". The balance of probabilities test requires the trial judge to scrutinize the evidence with care in order to determine whether the evidence is sufficiently clear, convincing and cogent to determine if it is more likely than not that the alleged event occurred. See *F.H. v McDougall*, 2008 SCC 53 (CanLII), [2008] 3 SCR 41..."

[20] Mr. Justice Klebuc expressed this standard in another way in *Westfair Foods Ltd. (Superstore)* v. *United Food and Commercial Workers, Local 1400*, 1998 CanLII 14051 (SK QB), at paragraph 45:

> "... The following analogy is often used to describe the term: Imagine if you will a scale with two pans, one on each side. If the evidence in favour of a proposition is put in one pan and the evidence against it on the other and the two pans remain evenly balanced, in the sense that the evidence does not preponderate on one side or the other, then the person who has the burden of proof has failed. Or, if the scale is tipped the wrong way, i.e. the evidence weighs in favour of the person who does not have the onus of proof, again the person who has the burden of proof fails. The scale must be tipped in favour of the person who has the burden of proof in order for the onus to be satisfied."

IV. THE EVIDENCE

[21] Crescent Point is an oil producer with operations in the province of Saskatchewan. In 2014, it was active in the Kindersley/Dodsland area. It determined that it needed to add five to six people to handle the increasing workload in and around the area, including a number of new operators.

[22] Mr. Kochan interviewed for a position as a Lead Operator with Crescent Point on May 22nd, 2014. Mr. Kochan's resume is on file as part of the materials filed in the hearing. He completed high school in 2001 and subsequently pursued a number of tickets and certifications in the oil and gas industry in the years that followed.

[23] The initial impression of Mr. Kochan was that he was "cocky", "assertive", "abrasive" and a bit "arrogant". Notwithstanding, Crescent Point was prepared to offer Mr. Kochan an opportunity to work for them and assess his performance in the field.

[24] Mr. Kochan was instead offered a position as a Level II Operator for Crescent Point and he accepted. His position started June 27th, 2014 but was subject to a three month probationary period to assess his performance. The purpose of the probationary period was to assess the skills, abilities and attitude of the new worker and to identify any deficiencies or issues. Mr. Kochan also was instructed to report to Mr. Norm Vongrad, Production Foreman. Mr. Kochan's Letter of Employment dated June 12th, 2014 is on file as part of the record of proceedings.

[25] Level II Operators were expected to ensure the safety and maintenance of wells in the area, to look after proper bookkeeping and documentation associated with their duties, to mentor and coach their subordinates on approved practices and engage with suppliers and vendors on a regular basis.

[26] Safety is important in the oil and gas sector as operators may become exposed to noxious gas and fumes such as hydrogen sulfide which can be fatal with sufficient exposure. This gas is colorless, flammable, poisonous and corrosive and can cause severe respiratory and pulmonary damage.

[27] Crescent Point supplies its workers with health, safety and personal protective equipment. It also provides orientation to new workers about safety equipment and procedures through its online employee portal. Notwithstanding, Mr. Kochan advised he preferred using some of his own equipment and supplemented his own equipment with some purchased on Crescent Point's account.

[28] Mr. Kochan was never fitted with a respirator or provided a personal gas monitor by Crescent Point and Crescent Point assumed Mr. Kochan had sufficient protective gear of this nature from his previous employment. Crescent Point's records also confirm Mr. Kochan picked up a respiratory half mask on September 8th, 2014 after an incident in the field.

[29] Before the end of the probationary period, Crescent Report received complaints from several of its suppliers and vendors regarding Mr. Kochan's attitude and conduct. It was reported he threatened parties with termination of their services for Crescent Point's projects and implied he had the authority to allocate business to satisfactory suppliers and vendors of his choosing. Crescent Point says these comments jeopardized their local partnerships and business arrangements and was inconsistent with its business practices. A decision was internally reached by Crescent Point to terminate Mr. Kochan rather than extend his probation period.

[30] Mr. Kochan was advised he was terminated after receiving a ride home from a colleague. His Letter of Termination dated September 23rd, 2014 followed which says:

> "Dear Tyson:
>
> Further to our conversation today, this letter confirms the termination of your employment with Crescent Point Energy Corp. (the "Company') effective **September 23, 2014** due to the unsatisfactory completion of your probationary period. As per the terms of the Saskatchewan Labour Standards, the first three months of your employment are probationary. Probationary employment implies that during the first three months of your employment with the Company, if either you or the Company determines that the position is not a suitable fit, either party is entitled to terminate employment without notice or severance in lieu of notice.

..."

[31] Crescent Point, seeking to protect the privacy of its suppliers and vendors, believed it did not have to specify a reason for terminating Mr. Kochan and simply terminated him relying on his probationary status.

[32] Crescent Point has no record of Mr. Kochan expressing any health or safety concerns to them during his employment and no record of him asking to be fit tested for a respirator.

[33] Mr. Kochan recalls events differently. He says he was never provided a respirator or any associated training by Crescent Point and asked for it several times during his employment as he was exposed to noxious gas and fumes regularly.

[34] Mr. Kochan believes he completed his duties reliably and professionally throughout his service to Crescent Point and attributes his termination to issuing a stop work order on September 4th, 2014 when he was exposed to noxious gasses from a well and asked for a respirator from Crescent Point.

[35] On September 9th, 2014, Mr. Kochan also filed a "near miss" report arising from an incident at a second site.

[36] After the work stoppage and the near miss, Mr. Kochan reports that his supervisors became distant and hostile to him which he attributed to the stop work order. Prior to his dismissal, Crescent Point did not provide him with any performance reviews, cautions or reprimands, or an opportunity to respond to the allegations of the suppliers and vendors in any meaningful way.

[37] Mr. Kochan also reports suffering from headaches as a result of emissions from the wells and says he reported these issues to Norm Vongrad and Lyle Brad around September 8th and 9th, 2015. He also requested additional personal protection devices be provided to him.

[38] Mr. Kochan filed a medical report dated December 23rd, 2015 which forms part of the record of these proceedings. His doctor observes that Mr. Kochan reports a neuropathic cough often triggered by cold air and various fumes, and also shows signs of traumatic laryngitis.

V. ANALYSIS

[39] The issues before me are as follows:

1.) Did Mr. Kochan engage in or participate in one of the activities described in section 3-35 of the *Act* that on its face could be the reason or a reason for discriminatory action?

2.) Did Crescent Point take discriminatory action against Mr. Kochan?

3.) If the first two questions are answered in the affirmative, has Crescent Point met the onus found in subsection 3-36(4) to establish that the discriminatory action was taken against Mr. Kochan for good and sufficient other reason?

Issue 1 - Did Mr. Kochan engage in or participate in one of the activities described in section 3-35 of the *Act* that on its face could be the reason or a reason for discriminatory action?

[40] Mr. Kochan's position required regular daily potential exposure to harmful and noxious gasses and substances.

[41] Mr. Kochan is an experienced operator with significant experience in the field including with well safety and maintenance.

[42] There is a temporal link between the stop work order issued September 4th, 2014 and when Mr. Kochan picked up the respirator on September 8th, 2014 indicating he was concerned about the conditions under which he was expected to perform his duties and inadequately supplied.

[43] Based on the foregoing, my assessment is that the answer to question #1 is "yes".

Issue 2 - Did Crescent Point take discriminatory action against Mr. Kochan?

[44] It is settled law that termination of a worker constitutes a "discriminatory action", even if the worker is on probationary status (see: *Moose Mountain Health District v. Galloway*, 2000 SKQB 56 (CanLii)).

[45] Based on the foregoing, my assessment is that the answer to question #2 is also "yes".

Issue 3 - If the first two questions are answered in the affirmative, has Crescent Point met the onus found in subsection 3-36(4) to establish that the discriminatory action was taken against Mr. Kochan for good and sufficient other reason?

[46] Here, I disagree with the OH&S officers and find that Crescent Point had good and sufficient other reason for its conduct.

[47] First, I find that the original OH&S officers conducted an inadequate investigation of the matter. The interviews with the representatives of Crescent Point was brief and limited—often 10 minutes or less contact with the representatives. On file as part of the record of these proceedings is the Witness Statements of Lee Walz and Norman Vongrad provided to the OH&S officers. Their responses are short and to the point and in their oral evidence, I am satisfied there was little investigation as to whether there was evidence or records justifying Crescent Point's position for undertaking the discriminatory action.

[48] Second, I find there is evidence that Crescent Point had concerns about Mr. Kochan's attitude, behavior and demeanor as early as his first interview and this was a live issue for Crescent Point as they monitored his performance. His status (and recommendation to familiarize himself with the use of respirators) is also reflected in his Letter of Employment dated June 12th, 2014 which says:

> "Dear Tyson:
>
> **<u>Re: Offer of Employment – Crescent Point Energy Corp.</u>**
>
> Tyson, further to our recent discussions, Crescent Point Energy Corp. ("Crescent Point" or "the Company") is pleased to offer you employment... As you may be may be required to wear a respirator in the course of your employment, this offer is also

conditional upon you providing us with the Respirator User Screening Form report confirming your ability to wear a respirator, as required by Occupational Health and Safety legislation. This form will be included in the new employee orientation package you receive from Human Resources.

...

Performance Probation: You will be on probation for 3 months. During this time the company may terminate your employment for any reason without notice, pay in lieu of notice or damages.

..."

[49] Satisfactory worker performance can include the ability to work in harmony with others. Walker J. in *Montgrand v. Amok Ltd.* 1987 CanLii 4774 (SKQB), 57 Sask R 147, had to consider the status of independent contractors being dismissed during a probationary period and cited the following authorities:

> "[12] I have not found an authority on the probationary period in the context of a probationary independent contractor. There are several in the context of master and servant. Out of this court, there is *Ritchie v. Intercontinental Packers Ltd.* (1982), 1982 CanLII 2538 (SK QB), 14 Sask. R. 206. At pp. 211-212 Noble, J., dealt with "probationary employee" so:
>
> > "In Mitchell *(Mitchell v. The Queen* (1979), 1979 CanLII 1922 (ON SC), 23 O.R.(2d) 65). Van Camp, J. (while describing probationary civil servant), described the term probationary employee in these words at p. 83:
> >
> > '... the term is well understood in business and industry as an employee, who is being tested to enable the employer to ascertain the suitability of the employee for its purposes. Probation is a period when the employee may prove that he is suitable for regular employment as a permanent employee and will meet the standards set by the employer.'
> >
> > "I adopt this definition as a workable and sensible description of an employee on probation. Thus where such an employee is fired, it seems to me that the only onus that rests on an employer to justify the dismissal, is that he show the Court that he acted fairly and with reasonable diligence in determining whether or not the proposed employee is suitable in the job for which he was being tested. So long as the probationary employee is given a reasonable opportunity to demonstrate his ability to meet the standards the employer sets out when he is hired, including not only a testing of his skills, but also his ability to work-in harmony with others, his potential usefulness to the employer in the future, and such other factors as the employer deems essential to the viable performance of the position, then he has no complaint. As for the employer, he cannot be held liable if his assessment of the probationary employees' suitability for the job is based on such criteria and a fair and reasonable determination of the question. In my opinion the law does not require the employer to do anything more."

I agree with what Noble, J., said. It reflects the common law. See also the authorities referred to by Noble, J., *Benson v. Co. of Atlantic* (1985), 53 Nfld. & P.E.I.R. 210; 156 A.P.R. 210; *Truman v. Ford Motor Co. of Canada Ltd.*, 1926 CanLII 372 (ON CA), [1926] 1 D.L.R. 960, and *Wrongful Dismissal* by David Harris (1984), para. 3.17.

> [13] *In Greenberg v. Meffert et al.*, (1985), 1985 CanLII 1975 (ON CA), 9 O.A.C. 69; 18 D.L.R.(4th) 548 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused, Robins, J.A., speaking for the court, at p. 554, said:
>
> > "... In my opinion, the company's discretion in this matter is not unbridled, firstly, because the nature of this contract and the subject-matter of the discretion are such that the company's decision should be construed as being controlled by objective standards; and secondly, because the exercise of the discretion, whether measured by subjective or objective standards, is subject to a requirement of honesty and good faith.
> >
> > "Provisions in agreements making payment or performance subject to 'the discretion', 'the opinion' or 'the satisfaction' of a party to the agreement or a third party, broadly speaking, fall into two general categories. In contracts in which the matter to be decided or approved is not readily susceptible of objective measurement -- matters involving taste, sensibility, personal compatibility or judgment of the party for whose benefit the authority was given -- such provisions are more likely construed as imposing only a subjective standard. On the other hand, in contracts relating to such matters as operative fitness, structural completion, mechanical utility or marketability, these provisions are generally construed as imposing an objective standard of reasonableness: see, generally, 4 *Hals.*, 4th ed., p. 612, paras. 1198-9; *Corbin on Contracts* (1960), vol. 3A, ss. 644-48; *Williston on Contracts*, 3rd ed. (1957), ss. 675A and 765B; Hudson, *Building and Engineering Contracts*, 10th ed. (1970), chapter 7.
> >
> > "In any given transaction, the category into which such a provision falls will depend upon the intention of the parties as disclosed by their contract. In the absence of explicit language or a clear indication from the tenor of the contract or the nature of the subject-matter, the tendency of the cases is to require the discretion or the dissatisfaction to be reasonable: *Minster Trust Ltd. v. Traps Tractors, Ltd. et al.*, [1954] 3 All E.R. 136 at p. 145. This construction imposes the least hardship in that it produces a result that cannot be said to be unfair or unjust to either of the parties. Other things being equal, I think it preferable that provisions of this kind be construed as implying the less arbitrary standards of the objective test: American Law Institute, *Restatement of the Law, Second: Contracts* 2d (1981), s. 228."

That law is helpful. The defendant cannot act capriciously or arbitrarily. It must act bona fide and reasonably. The one-sided agreement is not that one-sided. *Stadhart v. Lee*, 32 L.J.Q.B. 75, in its strictness, will not often find application."

[50] Based on the evidence before me, I am satisfied that Crescent Point did not act capriciously or arbitrarily in the dismissal of Mr. Kochan. Its concerns were noted from the first point of contact with Mr. Kochan and the employment contract with Mr. Kochan indicated he could be dismissed "for any reason" indicating a subjective performance standard. It subsequently received reports about Mr. Kochan's disruptive behavior from its suppliers and vendors consistent with the behavioral issues displayed early in the employment relationship and Mr.

Kochan's actions jeopardized these relationships with third parties. Accordingly, I find that Crescent Point exercised its right to terminate Mr. Kochan for "good and sufficient other reason."

ORDER:

[51] I order that the appeal be allowed and the Decision Report #2897 dated May 14th, 2015 OH&S be forthwith cancelled and vacated.

Dated at **Saskatoon, Saskatchewan** this 29th day of **April, 2019**.

Timothy J. Rickard