LRB File No. 006-20

In the matter of an appeal to an adjudicator pursuant to ss. 3-53 and 3-54 of *The Saskatchewan Employment Act*

BETWEEN

Gregory Simonson **Appellant**

-and-

Finning Canada and the Cat Rental Store **Respondent**

Adjudicator: Gerald Tegart
Appellant represented himself
Counsel for the respondent: Brent Matkowski
Hearing conducted by teleconference June 3, 2020

DECISION

I. INTRODUCTION

[1] This is an appeal pursuant to ss. 3-53(1) and 3-54(1) of *The Saskatchewan Employment Act* ("the Act") from a decision of an occupational health officer dated December 31, 2019, regarding a complaint of discriminatory action brought by Gregory Simonson ("the employee") against Finning Canada and the Cat Rental Store ("Finning" or "the employer"). The employee's employment was terminated on August 23, 2019, subsequent to a meeting on July 24, 2019, where the employee raised concerns about the conduct of several Finning employees, including his supervisor.

[2] The employee believed his dismissal constituted discriminatory action on the part of the employer and referred the matter to an occupational health officer as provided for by s. 3-36(1) of the Act. An investigation was conducted.

[3] The occupational health officer's December 31, 2019, decision determined that the termination was not discriminatory. The employee appealed that decision and the parties agreed to have the appeal heard by way of a teleconference hearing on June 3, 2020. Prior to the hearing, the parties were allowed to file written evidence and argument. Those materials were considered as part of the hearing along with the material provided by the Director of Occupational Health and Safety pursuant to s. 3-55(b) of the Act, which was previously provided to both parties.

[4] The employee's notice of appeal asks for the following relief:

"-Acknowledgement from Finning Canada and the CAT Rental Store that I was the victim of harassment and that according to what is mandated in their own policy, this was not adequately investigated or resolved by the Human Resources Department.

"-Reinstatement to Finning Canada and The CAT Rental Store

"-Lost Wages"

[5] No objections were made with respect to my appointment or my jurisdiction to hear and determine the appeal.

II. EVIDENCE AND FINDINGS OF FACT

[6] The evidence provided through the materials considered at the hearing and supplemented to a limited extent orally during the hearing is largely undisputed. Where there are differences, I will deal with those as they arise during this recital of the evidence.

[7] Finning operates a Caterpiller dealership located in Regina. The employee commenced employment with Finning on April 26, 2019 as a Yard/Warehouseperson. His responsibilities required him to operate a variety of heavy machinery at what the employer described as an industrial work site and his position there was a "safety sensitive position".

[8] According to the employer, safe workplaces are a priority and it has policies consistent with that priority. One such policy is its overhead door policy. Its purpose, as stated in the policy, is "to prevent incidents caused by overhead doors and overhead door failures". S. 5.1 of the policy states:

5.1 Specific Requirements

5.1.1. All overhead doors must contain an internal or external stopping mechanism (failsafe locking system or cable brake) that prevents the door from free-falling if the cable or springs fail (see details/examples in section 8).

5.1.2. Entrance and exit to any Finning facility must be through a people access door. If those doors do not exist and cannot be built, employees will be exceptionally allowed to walk underneath an overhead door, only if a specifically engineered mitigation control is in place to block the door in its open position, (see details/examples in section 8). This exception must be approved in writing by both Regional Facilities and EHS management.

5.1.3. Employees must never drive a machine that doesn't have overhead protection underneath an overhead door, unless a specifically engineered mitigation control is in place to block the door in its open position, (see details/examples in section 8). This exception must be approved in writing by both Facilities and EHS management.

5.1.4. The floor that is in directly beneath the overhead door must be painted to identify a hazardous area as to prevent employees and visitors standing underneath when the door is open (see details/examples in section 8).

5.1.5. A retractable belt or chain must be in place as to prevent employees and visitors from passing underneath an open door (see details/examples in section 8).

5.1.6. Door controls must be located and positioned in such a manner as to prevent the operator being positioned in the hazardous area while operating the controls.

5.1.7. Hazards and controls associated with overhead doors must be reinforced regularly through toolbox talks and other communication means.

[9] S. 5.1.2 speaks directly to the requirement that employees enter and exit the facility through a "people access door", i.e. a door specifically intended primarily for individuals on foot.

[10] The employer's submission states that overhead doors in Finning facilities pose a serious safety risk, given their size and weight, and that there have been safety issues in Finning facilities related to overhead doors, including the death of an employee in a Finning affiliate in 2013.

[11] The employee agreed to comply with all employer policies as a condition of his employment.

[12] All of the events relevant to this matter arose during the period the employee was employed at Finning's Regina facility from April 26 to August 23 in 2019.

[13] On July 24, at the employee's request, he met with three Finning management representatives, including two human resources officials and Tom Hill, the branch manager. The employee raised a range of concerns alleging he had been improperly treated by co-workers, including Mr. Hill, and that an unsafe work environment existed at the Regina facility. At the close of that meeting, the employee was asked to provide his concerns in writing, which he did the following day, with the heading "Employee Grievances"

[14] The grievances document ran to approximately two and a half pages. In relation to Mr. Hill, it alleged he had reported an oil spill on the facility site to Mr. Hill in May, who had not reported it to provincial authorities. It also alleged Mr. Hill had declined to address the conduct of another employee who Mr. Simonson believed was engaged in unsafe conduct. It complained of what the employee saw as unfair treatment with respect to his breaks, allowing another employee to be present during a discussion that violated his privacy, suggesting he not talk to human resources officials, failing to conduct safety meetings, and other minor matters.

[15] The document contained a number of complaints related to the conduct of employee Jeff Hall, including concerns he was preventing the employee from doing his job safely, causing the employee to operate equipment he wasn't certified for, loading platforms without fall protection, smoking in the shop, derogatory remarks, inadequate training, and declining to answer questions.

[16] It also alleged that employee Kyle Lawson had left an alcohol flask in a service truck.

[17] The covering note in the email sent by the employee included the following:

> I am sending this information to you to ensure further progress in the investigation into the matters at hand. I had previously voiced these concerns to Allison in the HR department and to date have had no update as to the findings or potential outcome.

> Since the commencement of my employment with Finning, I have experienced intimidation, harassment, exclusion, and at times, an unsafe work environment. I have been asked to compromise my work ethic and character, to be dishonest and allow unprofessional conduct to continue. This has been difficult on me psychologically.
>
> It is imperative that these grievances be viewed as a collective picture. They are not vexatious in nature as was previously suggested by my management team. These issues directly correspond to my health and safety in the workplace as well as a possible contravention of provincial environmental legislation.

[18] The employer completed an investigation of the complaints and determined that some of the concerns raised by the employee were well founded while others weren't. As a result of the investigation, Mr. Hill's employment was terminated.

[19] A four-page detailed report of the investigation and its outcomes dated July 16 was included in the evidence. In addition to termination of Mr. Hill, the report recommended a letter of expectations be given to Mr. Hall. It also recommended updating safety training for all employees by August 26 and respectful teams training by October 3.

[20] In the course of conducting the investigation and doing interviews, complaints against the employee made by several co-workers were received. The investigation determined some of these to be well-founded and recommended a letter of discipline. A letter dated August 14 was hand delivered to the employee indicating three areas of concern – taking photos and voice recordings of co-workers without their permission, taking photos and video recordings of Finning equipment and yard for purposes outside regular duties, and embarrassing a manager by imitating a hand tremor and mocking his instructions. The letter stated that this violated the company's code of conduct and violence, harassment and bullying policy, and posed a safety threat. It warned that further violations would result in disciplinary action up to and including termination.

[21] According to the employer's submissions, Finning considered the investigation closed and the matter concluded at this point. However, on August 14 the employee made inquiries about filing an appeal with respect to the disciplinary letter and on August 19 an email was sent to the employee advising him a meeting would be arranged between him and the director of human resources services. Before that meeting was arranged, the employee was dismissed.

[22] On August 20, a co-worker indicated he had seen the employee walk under an overhead door contrary to the overhead door policy. The co-worker indicated he didn't intervene with the employee. Management at Finning scheduled a refresher course of the policy for employees for the next morning, August 21, which the employee attended. At another safety refresher course the following morning, August 22, another co-worker advised Ryan Pilbeam, the customer service manager, that he had observed the employee walk under overhead door A-3 the previous afternoon and had yelled at him not to do that. Mr. Pilbeam's notes from the time indicate the conversation with the co-worker took place at 9:00. Mr. Pilbeam and another manager spoke with the employee about this around 9:30. The employee initially denied walking under the door

but then admitted it, indicating he didn't think it was an "incident". Mr. Pilbeam explained this was very serious.

[23] During the teleconference hearing, the employee stated that there was no people access door located at overhead door A-3 through which he could enter and exit to avoid going under the overhead door. Mr. Pilbeam was in attendance on the teleconference call and I allowed him to respond. He stated that, while there isn't a people access door immediately adjacent to overhead door A-3, there is one approximately 30 feet away in the adjacent bay.

[24] The employee also stated at the hearing that employees commonly walk under overhead doors without being disciplined. Mr. Pilbeam stated that he was not aware of that. He said walking under overhead doors in these circumstances simply wasn't allowed in this facility.

[25] After discussions with a human resources official, a decision was made to send the employee home pending an investigation. The employee was informed of this around 2:35 on August 22.

[26] The next day, August 23, a hand-delivered letter to the employee signed by Mr. Pilbeam advised that his employment with Finning was terminated. It stated, in part:

> On August 21, 2019 at approximately 4:00 pm you were observed walking underneath an overhead door while exiting bay A3 at Regina General Line Construction. After a thorough review of the incident, it has been established that you violated Finning's Global Overhead Door Standard and Finning (Canada)'s Life Saving Rule for Energy Isolation.
>
> As an employee at Finning (Canada), we expect you to make decisions with regard to the safety of not only yourself but the safety of those around you by adhering to any and all of Finning (Canada)'s policies and procedures. Your conduct has broken Finning (Canada)'s trust in your ability to perform your role and irreparably damaged the employment relationship.
>
> As a result this letter serves as formal notice that Finning (Canada) has made the decision to terminate your employment for cause effective immediately.

III. LEGISLATIVE FRAMEWORK

[27] The Act includes several relevant provisions related to discriminatory actions by an employer:

> 3-1(1) In this part...:
>
> ...
>
> (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....
>
> (l) "harassment" means any inappropriate conduct, comment, display, action or gesture by a person:

(i) that either:

(A) is based on race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; or

(B) subject to subsections (4) and (5), adversely affects the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated; and

(ii) that constitutes a threat to the health or safety of the worker....

(4) To constitute harassment for the purposes of paragraph (1)(l)(i)(B), either of the following must be established:

(a) repeated conduct, comments, displays, actions or gestures;

(b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, that has a lasting, harmful effect on the worker.

(5) For the purposes of paragraph (1)(l)(i)(B), harassment does not include any reasonable action that is taken by an employer, or a manager or supervisor employed or engaged by an employer, relating to the management and direction of the employer's workers or the place of employment.
...

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....

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

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

(a) cease the discriminatory action;

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

(c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and

(d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker....

(4) If discriminatory action has been taken against a worker who has acted or participated in an activity described in section 3-35:

(a) in any prosecution or other proceeding taken pursuant to this Part, there is a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 3-35; and

(b) the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason.

[28] S. 36 of *The Occupational Health and Safety Regulations, 1996* ("the regulations") places requirements on employers to develop and implement harassment policies:

36(1) An employer, in consultation with the committee, shall develop a policy in writing to prevent harassment that includes:

(a) a definition of harassment that includes the definition in the Act;

(b) a statement that every worker is entitled to employment free of harassment;

(c) a commitment that the employer will make every reasonably practicable effort to ensure that no worker is subjected to harassment;

(d) a commitment that the employer will take corrective action respecting any person under the employer's direction who subjects any worker to harassment;

(e) an explanation of how complaints of harassment may be brought to the attention of the employer;

(f) a statement that the employer will not disclose the name of a complainant or an alleged harasser or the circumstances related to the complaint to any person except where disclosure is:

(i) necessary for the purposes of investigating the complaint or taking corrective action with respect to the complaint; or

(ii) required by law;

(g) a reference to the provisions of the Act respecting harassment and the worker's right to request the assistance of an occupational health officer to resolve a complaint of harassment;

(h) a reference to the provisions of The Saskatchewan Human Rights Code respecting discriminatory practices and the worker's right to file a complaint with the Saskatchewan Human Rights Commission;

(i) a description of the procedure that the employer will follow to inform the complainant and the alleged harasser of the results of the investigation; and

(j) a statement that the employer's harassment policy is not intended to discourage or prevent the complainant from exercising any other legal rights pursuant to any other law.

(2) An employer shall:

(a) implement the policy developed pursuant to subsection (1); and

(b) post a copy of the policy in a conspicuous place that is readily available for reference by workers.

IV. ANALYTICAL FRAMEWORK

[29] In the recent decision of *Banff Constructors Ltd. v Arcand*, LRB File No. 184-19, dated April 28, 2020, I outlined fairly extensive reasons for an analytical framework for this type of appeal. I won't repeat those reasons here, other than to provide a brief explanation.

[30] An appeal that comes to an adjudicator from a decision of an occupational health officer, where that decision is based on ss. 3-35 and 3-36 of the Act, will be determined in large part by the specific wording of those sections. In order to find a contravention of s. 3-35, the adjudicator must be satisfied that the employer took discriminatory action against the employee - "worker" within the language of these provisions" - because the employee engaged in protected activities, i.e. the activities described in that section. To state the obvious, there are three elements that must be established – that the employer took the discriminatory action, that the employee engaged in protected activities, and that the discriminatory action was taken because the employee engaged in those activities.

[31] S. 3-36(4) contains a presumption and a reverse onus. Once the first two elements are established, the third is presumed, i.e. "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 s. 3-35". The onus then shifts to "the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason".

[32] Consequently, there are generally three broad issues to be determined in appeals of this kind:

1. Did the employee engage in protected activities, i.e. activities that come within the ambit of s. 3-35?

2. Did the employer take discriminatory action against the employee within the meaning of that term as defined in s. 3-1(1)(i)?

3. If the first two questions are answered in the affirmative, was the discriminatory action taken for good and sufficient other reason within the meaning of s. 3-36(4)?

[33] The employee will bear the onus of proving the first two. Because of the presumption and reverse onus, the employer will bear the onus of establishing the discriminatory action was taken for a reason other than because the employee engaged in the protected activities, i.e. for good and sufficient other reason.

[34] Before proceeding to a consideration of these issues, it is important to observe that the resolution of the appeal does not depend on whether the employee's initial engagement in the protected activities was based on legitimate concerns or whether the employer met its responsibilities to respond to the employee's concerns. The appeal is limited to determining whether the employer took discriminatory action against the employee because the employee engaged in the activities.

V. ANALYSIS AND REASONS

1. Did the employee engage in protected activities, i.e. activities that come within the ambit of s. 3-35?

[35] There are multiple indications the concerns raised by the employee extended to matters of worker safety and harassment, bringing those concerns within the ambit of s. 3-35. One need only look to the employee's July 25 email and its attached grievances. Raising those concerns with the employer constituted the exercise of a protected activity.

2. Did the employer take discriminatory action against the employee within the meaning of that term as defined in s. 3-1(1)(i)?

[36] Yes, and this was acknowledged by the employer.

[37] The term" discriminatory action" is normally thought of as pejorative. As defined in s. 3-1(1)(i) of the Act, it is merely descriptive of an employer action. Termination is one of the actions specifically included in the definition.

3. If the first two questions are answered in the affirmative, was the discriminatory action taken for good and sufficient other reason within the meaning of s. 3-36(4)?

[38] Having found that the employee engaged in protected activities in raising his concerns, I must now consider whether the employer dismissed the employee for "good and sufficient other reason".

[39] The fact an employee engages in a protected activity does not insulate the employee from the possibility of termination. The employee is only protected from discriminatory action where that action is taken *because* the employee engaged in the protected activity, subject to the comments below concerning the phrase "good and sufficient other reason".

[40] The reverse onus in s. 3-36(4) doesn't simply require the employer to rebut the presumption, but to do so by establishing "that the discriminatory action was taken against the worker for good and sufficient other reason". What is "good and sufficient other reason"?

[41] It is not to be equated with "just cause" in relation to wrongful dismissal, although I suggest a dismissal for just cause would meet the test of good and sufficient other reason. However, I am not required to determine that here.

[42] The rights granted to employees by ss. 3-35 and 3-36 are in addition to the rights employees normally enjoy based on a contract of employment and the common law principles related to wrongful dismissal. One of the important additional rights is the right to reinstatement set out in s. 3-36(2).

[43] For a discriminatory action, including termination, to have been taken for good and sufficient other reason, the action must not be arbitrary and must be objectively reasonable. This is not to say the decision made by the employer must be the same decision the adjudicator (or the occupational health officer in the original decision) would have made if placed in the employer's position at that time. There may have been several options for action when the termination decision was taken that would have been objectively reasonable. The question is whether this is one of those options.

[44] Finning placed a significant emphasis in its evidence and other submissions on the priority the company places on safety. This begins with written policies, including the overhead door policy, that establish strict rules of conduct to ensure safety. It is clear, however, that Finning has also sought to establish a culture of safety through its training programs and other initiatives. It is noteworthy that one response to receiving the report on August 20 that the employee had breached the overhead door policy was to schedule a refresher of the policy with employees for the next morning.

[45] The employer directed me to three cases involving dismissals based on safety violations.

[46] In *Tonolli Canada Ltd. and USW, Local 9042 (Marsiglia)*, 2013 CarswellOnt 3855 2013 CarswellOnt 3855, 114 C.L.A.S. 89, the arbitrator stated (at para. 76):

> Accordingly, even a single serious violation of the OHSA or the employer's reasonable health and safety workplace rules or policies constitutes just cause for significant discipline, up to and including discharge. Similarly, a pattern of health and safety violations which in isolation are relatively minor will properly attract progressive discipline and ultimately in discharge if the employee does not correct his behaviour.

[47] Additional examples of termination based on one serious safety violation can be found in *Richmond Steel Recycling v. I.A.B.S.O.I., Local 712*, 2011 CarswellBC 3152, [2011] B.C.C.A.A.A. No. 132, [2012] B.C.W.L.D. 2009, and *ConAgra Ltd. v. U.S.W.A., Local 6034*, 2008 CarswellAlta 843, [2008] A.W.L.D. 2984.

[48] It might be argued the safety violation in the instant case did not qualify as a single serious violation of the employer's workplace policies. However, it is clear the employer viewed it as

such. That position should be given considerable deference in determining whether termination fell within a range of reasonable options and, therefore, whether the onus is met.

[49] The employee points to his clean discipline record with Finning. While that would be a mitigating factor to be considered by the employer in imposing discipline, and would be an important factor if my task were to determine whether just cause existed for the dismissal, it has little relevance on this appeal. My responsibility is to determine whether the employee's dismissal was due to his exercise of protected rights or was for good and sufficient other reason. The weight the employer chose to give or not give to a mitigating factor is not something an adjudicator should normally consider, unless the employer's unwillingness to adjust the discipline based on the mitigating factor places in doubt the employer's assertion the termination was based on the reasons advanced by the employer. I don't find that to be the case here.

[50] It's also noteworthy that Finning obviously took the concerns raised by the employee in July very seriously and ultimately imposed discipline based on some of those concerns, including the dismissal of Mr. Hill. That the investigation also revealed conduct on the part of the employee that led to a letter of discipline does not detract from the conclusion the company took his concerns seriously.

[51] Finning's position is that it reacted to a serious safety violation by the employee in the same manner it would in relation to any employee, particularly where the violation occurred later the same day the employee was retrained on the safety rule. I accept that and find it was a reasonable option for the employer to terminate the employee. Consequently, I find that the employer's reasons for termination constituted good and sufficient other reason within the meaning of the reverse onus.

[52] For the foregoing reasons, I find the employer has satisfied the onus of establishing the termination of the employee was not because he had engaged in protected activities. The appeal will be dismissed.

[53] Before concluding, I should address several other matters that arise from the employee's notice of appeal and his submissions at the hearing.

[54] The employee expressed concern that the employer had not provided adequate training for him related to the handling of hazardous waste, including the loading and unloading of dangerous goods and the refueling of equipment. This has no bearing on the appeal.

[55] The employee asserts that the employer did not handle the investigation properly, including his concern that it lacked transparency. Again, this has no bearing on the appeal except to the extent it might bring into question the employer's sincerity in conducting the investigation. However, as noted above, the evidence is persuasive that the employer took the employee's concerns seriously and conducted a thorough investigation.

[56] Finally, the employee suggested the investigation conducted by the occupational health officer was inadequate in some respects. This again has no relevance to this appeal, which is not

based on the decision made by the officer but on the evidence and other submissions considered through the appeal hearing process.

VI. ORDER

[57] This order is made pursuant to s. 4-6 of the Act. The appeal is dismissed.

Dated at Regina, Saskatchewan, this 22nd day of June, 2020.

"Gerald Tegart"
Gerald Tegart, Adjudicator