LRB File No. 184-19

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

BETWEEN

Banff Constructors Ltd. **Appellant**

-and-

Lance Arcand **Respondent**

Adjudicator: Gerald Tegart
Counsel for the appellant: Steven J. Seiferling
Respondent represented himself
Hearing conducted in-person November 25, 2019, at Saskatoon

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 July 24, 2019, regarding a complaint of discriminatory action brought by Lance Arcand ("the employee") against Banff Constructors Ltd. ("Banff" or "the employer"). The employee was laid off October 26, 2018, following a complaint of harassment he made to the employer.

[2] The occupational health officer's decision (along with a Notice of Contravention dated July 23, 2018) found the layoff constituted an unlawful discriminatory action contrary to s. 3-35 of the Act and ordered the employer to cease the discriminatory action, reinstate the employee and pay him any wages he would have earned, but for being discriminated against, between the date of his layoff and December 20, 2018.

[3] The notice of appeal asks for an order quashing both the decision and the notice of contravention and, in the alternative, a reduction in the amount of wages awarded to the employee based on any amounts he earned or should have earned during the stated period.

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

II. EVIDENCE

[5] Each party called one witness and introduced several documents in evidence.

[6] The employer's sole witness was Braden Rea. He presently works for an Edmonton-based construction company but worked for Banff as a workforce advisor for about seven years, including the time material to this appeal. As a workforce advisor with the employer, his responsibilities included general field support for Banff employees, including matters related to pensions and other labour relations matters, recruiting, workforce planning, on-boarding and off-boarding. His early experience with the employer included working on construction projects.

[7] Banff staffs construction projects with trades people. They recruit individual workers to work on projects depending on what's required on each specific job site. Once workers are on the job, Banff provides assistance and support to them.

[8] The construction work the employer staffs is cyclical and seasonal. There are busy times and there are down-times. The down-times are most common in winter in Saskatchewan, where construction work peaks in the summer months. Layoffs are common. Banff provides its workers on a project-by-project basis. A project will request workers and Banff will recruit and provide the workers for as long as the project requires them, after which they will normally be laid off. Banff does not employ many long-term employees, and most of those would be foremen or higher.

[9] Banff was providing workers to several projects in Saskatchewan in 2018. One of them was the Regina bypass project ("the project"), a very large construction project under the overall management of Regina Bypass Design Builders. The employee was hired to work as a track hoe operator on the project on August 22, 2018. He referred to himself as an excavator operator. His primary task was to load soil and other materials on trucks that would haul those materials.

[10] At the time the employee was hired in August, Banff knew their work on the project was coming to an end. They began reducing their workforce on the project in September, when they had roughly 100 workers in play. By the end of December there remained roughly 25 or 30. At the same time, Banff was downsizing on its other projects in Saskatchewan.

[11] Mr. Rea never personally met the employee, although he communicated with him on numerous occasions by phone, text and email.

[12] The employee was laid off on October 26, 2018, just over two months after he was hired. The notice of termination form, which is the written notice to the employee Mr. Rea completed on behalf of the employer, specifies "shortage of work" as the reason the employee's services

were no longer required. However, Mr. Rea, who made the decision on behalf of the employer, elaborated on the reasons for the layoff in his testimony.

[13] First, the employee was still on probation. When he was hired, he accepted a written list of conditions of employment by signing his acceptance of those conditions. One of the conditions was that all new employees were subject to a three-month probationary period.

[14] Secondly, because the employee did not reside in the Regina area, he was entitled to an allowance referred to as a "living away allowance" or "LOA". This was an unusual arrangement, as Banff tried to use local workers as much as possible to avoid the additional cost of the allowance. However, the employer was having trouble recruiting workers in August when the employee was hired, in part because of competition for their services and in part because this project was coming to an end. They had made an exception in relation to this hire in order to fill the position. Mr. Rea estimated that roughly 10% of the project workers were on an LOA.

[15] At the time the employee was laid off, the services of another hoe operator were available. He was a longer-term Banff employee who was currently working on another project, lived locally, had good skills and worked at a lower hourly rate than the employee. According to Mr. Rea, the company determined it was a fiscally sound decision to replace the employee with that local worker, whom they moved from the other project.

[16] Finally, the specific work the employee was doing was coming to an end. In fact, the local worker who replaced him worked only one shift before he, too, was laid off on October 29. Mr. Rea stated that, even had they not replaced the employee with the other local employee, the employee would have been laid off on October 29 due to a shortage of work. The position filled by the employee and then the local employee wasn't filled again.

[17] According to Mr. Rea, these factors were not unique to the layoff decision regarding the employee, but would have factored into any layoff decision on this project or any other.

[18] Mr. Rea testified that, shortly after the employee was hired, he advised him that his employment would be short-term and he believed he mentioned December as the latest.

[19] On cross-examination, Mr. Rea stated that there were no new hires to the crew the employee worked on after the layoff, other than the local employee who briefly replaced him.

[20] The employee testified that he believed he was being harassed by his supervisor as early as two weeks after he began working with Banff. In early October he decided he wanted to make a complaint. After inquiring as to how he should do that, he was told by Mr. Rea to write down his concerns, which he did in a three-page document dated October 4 that was apparently sent to Mr. Rea as an attachment to a text message the same day, and which Mr. Rea acknowledged receiving. The employee regarded this as a formal harassment complaint.

[21] The contents of the complaint related to a series of incidents that caused concern on the part of the employee and mostly involved contact with his immediate supervisor, Grant. The complaint detailed several incidents where the supervisor yelled at him, at times using profane language, in circumstances that the employee didn't feel justified that behaviour on the part of the supervisor. The complaint said this caused the employee to come to work stressed out and nervous. The complaint also described what the employee felt were safety concerns, for example working without adequate supervision. It said the employee was made to feel incompetent in his life and his work. He was nervous and afraid to ask questions because of what he perceived as daily harassment.

[22] Once the employee submitted his complaint, he expected it would lead to an investigation. He tried to contact Mr. Rea the next day but they did not connect. He stated that he reached out to Mr. Rea on numerous occasions after that, to see how his complaint was being processed, but that Mr. Rea didn't reply in substance and they never met. The employee felt his complaint was being "swept underneath the table". From the limited responses he was getting from Mr. Rea, the employee understood Mr. Rea was too busy to investigate his complaint.

[23] On October 23, the employee sent an email to Mr. Rea providing a report on a further incident involving his supervisor. This involved what the employee considered a safety situation related to work near a power line on a windy day and the supervisor's treatment of him in relation to his safety concerns. According to the employee, the supervisor told him to fill his bucket, notwithstanding the high wind and proximity to the power line, or go home. The employee had refused to work in those circumstances and went home. He said he also felt humiliated by this treatment, in part because he believed other employees had overheard the supervisor's remarks. Mr. Rea sent a text acknowledging he had received that email.

[24] On October 26 the employee was laid off.

[25] Mr. Rea's perception of how the October 4 complaint was handled differs from that of the employee. According to Mr. Rae, how you were to handle a complaint varied with the circumstances. He understood the employee and his immediate supervisor weren't getting along and was trying to gauge how serious the situation was. He considered separating the parties and said that he offered to move the employee to a different crew but that the employee didn't want to.

[26] He said he was prepared to meet with the parties and considered an investigation. However, he believed the employee didn't want a meeting or an investigation. He said he offered the same options to the employee when he received the October 23 email.

[27] When asked directly whether the fact of the employee's complaint was relevant in the determination to lay him off, Mr. Rea replied without hesitation that it was not, and that the decision to lay off was due to shortage or work. The project was nearing completion.

[28] Mr. Rea said he didn't have concerns about the quality of the employee's work and would have kept him on had there been work for him.

[29] The occupational health officer found one of the text messages sent by Mr. Rea to the employee to be of particular importance, as described on the second page of his decision:

> Occupational Health and Safety also pointed to a text message dated October 15, 2018, where Lance Arcand reached out to Braden Rea to provide an update on his complaint. Braden Rea responded with two text messages. The first one stated *"Hi Lance. I will call you this afternoon. In meetings for a bit here"*. The second one stating *"I know. I've talked to him almost every day last week. Working on a graceful exit from Banff for him. I'll call him this afternoon"*. A third text was sent to an individual name "Ray" who Braden was in conversation with to depart Banff for a job in Alberta. Braden Rea stated that the second text was not about Lance Arcand but was about "Ray". However, Braden Rea never stated who this text was intended for nor did he provide any evidence of an ongoing conversation that this text may have fit into. Despite numerous queries from OHS, where it was requested that Banff provide the text conversation with "Ray" on that date, only a conversation with "Ray" five days prior was presented and no evidence has been provided to indicate who Braden Rea was speaking with when he sent the text message referring to an individual in 3rd person. The fact that he stated in the previous text message to Lance Arcand that he would also call Lance Arcand that afternoon, indicates a likelihood that Braden Rea mistakenly sent a text to Lance Arcand while speaking about him to an unknow individual.

III. LEGISLATIVE FRAMEWORK

[30] 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, layoff….
>
> 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;…

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

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.

[31] 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. ANALYSIS AND REASONS

A. Analytical framework

[32] The employer proposes a three-step process to determine the appeal:

> I should first consider whether the employee engaged in a protected activity, i.e. an activity described in s. 3-35 of the Act, and, if so, determine whether there is a sufficient link between the employee's actions and his subsequent layoff.
>
> If I answer these questions in the affirmative, I must determine whether the lay-off constituted a "discriminatory action" within the meaning of this Part of the Act.
>
> Finally, if I answer that in the affirmative, I must determine whether the employer had "good and sufficient other reason" for the layoff within the meaning of s. 3-36(4)(b) of the Act.

[33] The employer referred me to the decision of the adjudicator in *Britto v University of Saskatchewan*, LRB File No. 128-15 ("*Britto*"), decided April 14, 2016, where she described the steps to be taken by an adjudicator in considering a complaint arising in similar circumstances (at paras. 44 to 49):

> [T]he Adjudicator deals with the same questions faced by the OHS Officer whose handling of the complaints of OHS is governed, in this case, largely by sections 3-35 and 3-36 of *The Saskatchewan Employment Act* and *The Occupational Health and Safety Regulations, 1996*.
>
> The framework for analysis begins with Section 3-36(1) which provides that the worker must have reasonable grounds to believe that the employer took discriminatory action against him or her for a reason mentioned in section 3-35. In other words, the initial onus is on the worker to establish a *prima facie* case of discriminatory action.
>
> The initial burden on the worker to establish a *prima facie* case of discriminatory action is not a particularly onerous one. To achieve the objects of the Act and its important purpose of encouraging occupational health safety, workers must be secure in the knowledge that they may exercise rights or obligations – raise health and safety concerns – without fear of reprisal. For that reason, where a worker establishes a *prima facie* case of discriminatory action, the reverse onus is triggered and the employer bears the heavier burden of disproving the presumption imposed in Section 3-36(4).
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> To establish a prima facie case of discriminatory action, requires the worker to establish the following:
>
> > (a) That the employer took action against the worker falling within the scope of Section 3-1(1)(i) of the Act describing "discriminatory action"
> >
> > (b) That the worker was engaged in one or more health and safety activities protected by Section 3-35 of the Act; and
>
> That there is some basis to believe that the employer took discriminatory action against the worker "for a reason" mentioned in section 3-35. In other words, there must be a *prima facie* linkage or *nexus* between the worker's protected activity and the employer's action. [Note that this "paragraph" appears to be formatted incorrectly in the published decision. I take it to be intended as clause (c) – the third requirement to establish a *prima facie* case.]
>
> A determination that a *prima facie* case of discriminatory action has been established raises 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 triggers a reverse onus, wherein it 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.

[34] In considering whether the required "*prima facie* linkage or *nexus* between the worker's protected activity and the employer's action" existed, she stated (at para. 68):

> In some cases, a temporal link between the discriminatory action and one or more of the types of health and safety related activities protected by section 3-35 is evident on the face of the material, such as when a discriminatory action occurs shortly after an employee engages in a protected activity. While the length of time is not, in itself, determinative, it is a factor to be considered when deciding whether a prima facie case of discriminatory action has been established. Clearly, a temporal link requires more than the mere fact the action taken by the employer followed the protected safety activity.

[35] The employer referred me as well to the decision of Matheson J. in *Lewis v Board of Education of Regina School Division No. 4*, 2003 SKQB 344 ("*Lewis*"), which was an appeal to the Court of Queen's Bench from the decision of an adjudicator under the provisions in *The Occupational Health and Safety Act, 1993*, the predecessor statute to the Act insofar as the Act applies to occupational health and safety matters. The reverse onus provision in that statute read:

> 28…(4) Where discriminatory action has been taken against a worker <u>who has acted or participated in an activity</u> described in section 27, there is, in any prosecution or other proceeding taken pursuant to this Act, 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 27, and the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason. [emphasis added]

[36] Matheson J. concluded (at para. 48):

> The reverse onus provision never came into play in this instance; the Board did not take any discriminatory action against Ms. Lewis <u>because she acted or participated in an activity</u> described in s. 27. [emphasis added]

[37] How "who has acted…" can be interpreted as "<u>because</u> she acted…" is not explained. It should be noted that the court, prior to considering the application of the presumption and reverse onus, went through an analysis of the facts surrounding the complainant's actions and the discriminatory action taken by the employer and concluded the employer's decision was not made because of the complainant's actions: see para. 45. Consequently, the court may well have concluded the employer had met the onus had it applied the presumption and gone through the process apparently required by the legislation.

[38] I find myself in agreement with much of the *Britto* adjudicator's description of the framework, with a couple of significant areas of disagreement.

[39] S. 3-36(1) requires "reasonable grounds" for a worker's belief that the employer has taken discriminatory action against him or her for a reason mentioned in s. 3-35, i.e. a protected action, before the worker can make a complaint to an occupational health officer. I disagree with the statement in *Britto* that this subsection imposes an "initial onus … on the worker to establish a *prima facie* case of discriminatory action". This provision is simply the formal commencement of the complaint, much like an information in a criminal proceeding is the formal commencement there, where a person, normally a police officer, has reasonable grounds to believe an accused has committed an offence. It does not provide a test for what the worker must prove to substantiate the complaint. It simply sets out what the worker must believe before he or she can file a complaint. What must be proven is established by s. 3-35, which requires the employer to have taken discriminatory action because the worker engaged in a protected activity. Who must prove each element is determined by s. 3-36(4).

[40] It's important to note here that, although the framework established by ss. 3-35 and 3-36 has application on an appeal to an adjudicator, that framework deals firstly with the steps an

occupational health officer must go through in considering and resolving a complaint. To speak of an onus on the worker in that context means little, since the officer conducts an investigation and reaches a determination, potentially one set out in s. 3-36(2). In doing so, the officer is required to apply the presumption and reverse onus in subs. (4). That is, if the officer's investigation leads the officer to conclude that discriminatory action has been taken against a worker, and that the worker participated in a protected activity, there is a legal presumption that the discriminatory action was taken because the worker engaged in the protected activity. The onus is then on the employer to establish that the discriminatory action was taken for "good and sufficient other reason".

[41] On appeal, the matter of onus becomes more generally a live issue because of the adversarial nature of the appeal process. I agree with the *Britto* adjudicator that the employee, on the appeal, will bear the onus to establish the two elements that give rise to the presumption and the reverse onus. Where we part company is with respect to her imposition of a third requirement that the employee must establish a *prima face* case that the discriminatory action was taken *because* the employee engaged in the protected activity. I reach my conclusion on this point for the simple reason s. 3-36(4) cannot be read as requiring that third element as a precondition to the application of the presumption, despite the contrary conclusion reached without explanation by the court in the *Lewis* case.

[42] I believe my interpretation of subs. (4) is reinforced when we consider how the provision would read if we were to impose that additional requirement. Paraphrased, it would read something like this: if discriminatory action has been taken against a worker because the worker has engaged in protected activities, there is a presumption that the discriminatory action has been taken against the worker because the worker has engaged in protected activities. This makes nonsense of the presumption.

[43] To say the worker need only establish a *prima facie* case with respect to the causal connection does not make the presumption less nonsensical. Once a *prima facie* case was established with respect to the required elements, the onus would necessarily shift to the employer without the need for a statutorily imposed presumption and reverse onus.

[44] While it isn't necessary, in interpreting these provisions, to approve the public policy that underlies them, the creation of a presumption and reverse onus as set out in subs. (4) does not seem unusual. The worker is required to establish he or she was engaged in protected activities and that the employer took a discriminatory action. Both of these are within the knowledge of the worker and can readily be proven by the worker if the facts exist. While the worker may believe, on reasonable grounds, that there is a causal connection between the two, proving that is potentially far more difficult. Consequently, the onus shifts to the employer, who has knowledge of why the discriminatory action was taken and is required to establish that it was taken for good and sufficient other reason.

[45] One might argue there should, as a practical matter, be a requirement for a *nexus* (adopting the term from the adjudicator in *Britto*) between the protected activity and the discriminatory action to the extent it can logically be concluded, based on the evidence, that the discriminatory action *may* have been taken because the employee engaged in the protected activity. However, this is unnecessary, since the evidence required to rebut the presumption against the employer and satisfy the onus will depend on the circumstances. In some instances, for example where there is a clear causal connection established between the two actions, the presumption will be difficult to overcome. However, in other instances, for example where there is no indication of a causal connection between the two actions, including a temporal connection as discussed by the adjudicator in *Britto*, it might require little from the employer to meet the onus and rebut the presumption. In some cases, the presumption will be rebutted by the worker's own evidence.

B. Issues

[46] Having reached this conclusion on the interpretation of s. 3-36(4), the broad issues to be determined in the instant case are:

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)?

[47] I will now deal with each in turn.

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

[48] Yes. The employee made a complaint to the employer related to conduct on the part of his supervisor that the employee believed was harassment. In doing so, he was seeking enforcement of the Act and the regulations pertaining to harassment, which is an activity protected by 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)?

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

[50] 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. Layoff 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)?

[51] The issue I am called upon to determine on this appeal is not whether the complaints made by the employee while he was employed by the employer would have been substantiated had a complete investigation been conducted, nor whether he was in fact subjected to harassment. I must determine whether he was laid off because he complained about what he believed to be harassment. Having answered the first two questions set out above in the affirmative, I must now consider whether the employer laid the employee off for "good and sufficient other reason".

[52] In *Lewis*, *supra*, Matheson J. pointed out some of the other reasons an employer might have for taking what constitutes a discriminatory action against an employee (at para. 42):

> Innumerable examples could be recited of actions by an employer which have an adverse effect on employees, but are entirely unrelated to occupational health and safety, such as sanctions for tardiness; realignment of work schedules; salary adjustments because of economic factors; etc. To constitute a prohibited discriminatory action, however, the action by the employer must be for one of the reasons set out in [what is now s. 3-35 of the Act].

[53] The employer takes the position it did not lay off the employee because he made his complaints. Determining whether the employer has met the onus on it to support that position depends on all of the evidence relevant to the determination, not just what the employer advances in support of its position.

[54] As noted earlier in this decision, the occupational health officer appears to have placed considerable significance on the October 15 text messages, in particular the one the officer concluded Mr. Rea had intended as a comment concerning the employee that he meant to send to an unknown third party but mistakenly sent to the employee. That message read: "I know. I've talked to him almost everyday last week. Working on a graceful exit from Banff for him. I'll call him this afternoon."

[55] While the occupational health officer did not accept Mr. Rea's explanation of the misdirected text, the text in itself is not conclusive of anything. It does raise additional concerns that could have been more completely addressed during the investigation and on this appeal, but those concerns must be placed within the wider context of the employer's handling of the employee's complaints and Mr. Rea's evidence addressing the specific question of the reason for the layoff.

[56] Mr. Rea stated directly and unequivocally that the complaint was not relevant in the employer's determination (which was his decision) to lay off the employee. He stated further that the decision was due to the shortage of work, as the project was coming to an end. The occupational health and safety officer, in reaching his conclusions, observed that the remainder of the same crew worked for at least a month after the employee was laid off. Evidence to that effect didn't directly emerge in the hearing of the appeal, and the employer provided evidence that the winding down of its project was a process, running roughly from September to December. Since not every employee was doing the same job, it may well have been that certain jobs were winding down sooner than others.

[57] Furthermore, the more complete explanation of the reasons for the layoff shows that the employer was also mindful of the difference in cost between this employee and the other local employee who briefly replaced him on the crew. Mr. Rea said this was a factor at the time, and said he would have kept the employee on until the same time that the local employee was laid off, but for concluding he should replace the employee with the local employee to reduce costs during whatever limited time the position was required on that crew. It's also noteworthy that the position occupied by the employee and then the local employee wasn't subsequently filled. According to Mr. Rea, there were no new hires on the employee's crew after his lay off.

[58] The employee believed, and likely still believes, he was laid off because he complained. However, what determines the appeal is not what the employee believed, however genuinely that belief was held. While I am not entirely comfortable with the circumstances leading to the layoff, I accept Mr. Rea's sworn testimony that he made the layoff decision based on business considerations, and that the employee's complaint was not a factor in his decision. In the words of s. 3-36(4)(b), it was done for good and sufficient other reason. Mr. Rea's testimony in this regard was not directly contradicted and there isn't sufficient other evidence to raise concerns about the veracity of his statement that would justify rejecting it.

[59] Consequently, the appeal will be allowed.

C. Costs

[60] The employer asked for an order for costs of the appeal, presumably against the employee. I don't believe the Act gives an adjudicator the authority to award costs. If it did, I wouldn't be inclined to order costs in these circumstances.

V. ORDER

[61] This order is issued pursuant to s. 4-6 of the Act. The appeal is allowed. The decision of the occupational health officer and the notice of contravention are quashed.

Dated at Regina this 28th day of April, 2020.

"Gerald Tegart"

Gerald Tegart, Adjudicator