



LRB File No. 152-21

IN THE MATTER OF AN APPEAL TO AN ADJUDICATOR PURSUANT TO SECTIONS
3-53 AND 3-54 OF *THE SASKATCHEWAN EMPLOYMENT ACT*

BETWEEN

NORTHERN VILLAGE OF BUFFALO NARROWS

APPELLANT

- and -

KEVIN HANSON

RESPONDENT

Adjudicator: Larry B. LeBlanc, K.C.
For the Appellant: Sarah Loewen, W Law LLP
For the Respondent: No one appearing

DECISION

I. INTRODUCTION

[1] The Appellant, Northern Village of Buffalo Narrows (the “Village”), appeals pursuant to sections 3-53 and 3-54 of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 (the “Act”) against the decision of an Occupational Health Officer dated October 22, 2021 determining that the termination of employment of the Respondent, Kevin Hanson, by the Village constituted unlawful discriminatory action contrary to section 3-35 of the Act.

[2] The Occupational Health Officer, in the decision, ordered the Village to cease the discriminatory action, reinstate Mr. Hanson to his former employment, pay him wages he would have earned but for the discrimination, and remove any reprimand or other reference to the matter from Mr. Hanson’s employment record.

[3] The Notice of Appeal asserts that the termination of Mr. Hanson’s employment did not constitute unlawful discriminatory action pursuant to section 3-35 of the Act and that the termination of employment was for good and sufficient other reason.

II. PROCEDURAL BACKGROUND

[4] Following my selection as adjudicator for this appeal I took steps to arrange a pre-hearing meeting by conference call with the parties (Ms. Loewen as counsel for the Appellant and Mr. Hanson representing himself at the time) indicating that, among other items that might arise for discussion, the agenda for the meeting would include the following:

- having regard to section 4-5(2) of the Act regarding the encouragement of settlement in an appeal of this nature, whether the parties have made efforts to settle the matter that is the subject of the occupational health officer’s decision and/or whether there is any viable option to pursue in that respect;
- the method of hearing, i.e., whether in-person or by video platform;

- number of hearing days;
- dates for the hearing;
- location for an in-person hearing;
- review of expected order of proceeding at the hearing;
- any preliminary matters (e.g. document/exhibit disclosure in advance of the hearing).

[5] The pre-hearing meeting proceeded by conference call on June 28, 2022. At one point during the call Mr. Hanson indicated that perhaps he needed legal representation. In light of that, the pre-hearing meeting was adjourned to allow Mr. Hanson to consider and potentially secure legal representation. Mr. Hanson was to advise by July 25, 2022 whether counsel had been retained. By email on July 8, 2022, Micheal P. Hudec of Hudec Law Office advised that his office had been retained to represent Mr. Hanson in the matter.

[6] A continuation of the pre-hearing meeting was then scheduled for August 10, 2022. As a result of that call, counsel were to confer with each other (and their respective clients) and get back to me in August or early September regarding the method of hearing (in-person, video conference or a combination of the two), the location for any in-person component, the number of hearing days (counsel were more or less settled on three days) and potential dates for the hearing. It was anticipated that counsel would be able to agree on these matters, which turned out to be the case. Further, as to the order of proceeding, there was agreement that the party appealing (the Village) would present its evidence first and would also proceed first with respect to closing argument and any opening statement, it being noted however that who bears the onus of proof on what issue is another matter.

[7] Eventually, by agreement, the hearing of the appeal was set to proceed on November 15, 16, and 17, 2022 in North Battleford with expected participation of some individuals by video conference.

[8] On November 9, 2022, it appears that counsel for the parties had initial discussion about potential use of November 14, 2022 for an attempt at a negotiated settlement. However, by email on November 10, 2022, counsel for the Village advised that she did not have instructions to participate in a mediation.

[9] Counsel for Mr. Hanson responded on November 10, 2022, stating:

In light of the Village not being prepared to negotiate and the upcoming three day hearing, I have received instructions from Kevin Hanson to withdraw his opposition to the Appeal.

Mr. Hanson has instructed me not to attend the hearing as his legal counsel and he will not present evidence. He has indicated that he will not attend the hearing nor will his witnesses.

[10] There was follow-up correspondence between counsel concerning the production of documents from Mr. Hanson with respect to lost wages and mitigation, given that Mr. Hanson would not be present at the hearing and with counsel likely having in mind the onus regarding mitigation spelled out in section 3-36(6) of the Act, but it becomes unnecessary to move to a consideration of damages given my determination of the merits.

[11] The hearing of the appeal proceeded on November 15, 2022 in the absence of Mr. Hanson or anyone attending on his behalf or at his request.

III. ISSUE

[12] The Village acknowledges that Mr. Hanson engaged in a protected activity within the ambit of section 3-35 of the Act by making a complaint of harassment against the Chief Administrative Officer of the Village on June 17, 2021. The Village further acknowledges that the termination of Mr. Hanson's employment by the Village on June 28, 2021 fell within the definition of "discriminatory action" in section 3-1(1)(i) of the Act. Those aspects are not in issue.

[13] The crux of the matter is whether the Village has satisfied the onus under section 3-36(4) of the Act of establishing good and sufficient other reason for the termination of employment.

[14] In support of its position that the onus is satisfied, the Village says that the decision to terminate was made by Council of the Village on June 8, 2021, which was before the complaint of harassment was made (and thus with no temporal connection between the two), and that there were ample grounds substantiating a termination for good and sufficient other reason.

IV. EVIDENCE

[15] The Village called three witnesses at the hearing, namely:

- Patricia Young – Chief Administrative Officer of the Village since February 2, 2021
- Ron Laliberte – Municipal maintenance worker employed by the Village for many years and currently a lead hand
- Tracy Tinker – Member of the Village Council since mid-November 2020 and currently Deputy Mayor

The witnesses testified in person, in the above order, and were excluded until called.

[16] Patricia Young commenced employment with the Village on February 2, 2021, as Chief Administrative Officer (CAO), reporting to Council of the Village. Born and raised in the community, Ms. Young's previous employment was with the University of Saskatchewan.

[17] When Ms. Young became CAO, Mr. Hanson was the Public Works Foreman of the Village. He had been employed by the Village in that position since July 24, 2018. Under the terms of his contract of employment, Mr. Hanson was required to take direction, directives, and instructions from the CAO. Regular staff of the Public Works Department (the "Department") consisted of Mr. Hanson, as Public Works Foreman, and four or five employees reporting to him (sometimes referred to as the maintenance crew).

[18] From the outset, according to the evidence of Ms. Young, Mr. Hanson had trouble communicating with her, and soon became largely unresponsive, consistently ignoring her.

[19] The communication problem as experienced in the first couple weeks, along with concerns on the part of Ms. Young with respect to the absence of records and processes she considered important for the Department (work schedules, timelines, and maintenance logs), were identified in Ms. Young's first CAO Report to Village Council, which was on February 16, 2021. She stated in the report:

Maintenance Crew: After observing operations for the past three weeks there are concerned with the operations and expenses in this department as well. I have arranged a meeting with the town Foreman to implement the following (March 1, 2021):

- Town Forman Kevin, has trouble communicating with me. I would like to build a strong working relationship and hope he can overcome this obstacle. We have set up time between the two of us to cover the following:
- Monthly work schedule, for all employees working under Kevin:
 - Create schedule, implement
 - Timelines: annual, month, weekly
- Accountability & Transparency on budget
 - Planning annually, monthly, weekly budget
 - Maintain and record, Employee time in Lou/vacation leave/sick time
- Create Maintained logs, required for insurance
- Create Vehicle logs, required for insurance

[20] Mr. Hanson was away on leave from March 1 to 15, 2021. It was not until after his return on March 15, 2021 that Ms. Young was able to speak with him (rather than on March 1, 2021 as anticipated in the report).

[21] Ms. Young testified that at a point when she felt she needed an understanding of the circumstances of the employees in the Department, she met with those staff members. In her CAO Report to Village Council on March 17, 2021, Ms. Young stated:

- Sewer & Water: Met with all employees (Ron, Jason, Dale, Nathan, Geraldine) individually and together, we discussed current needs for each position:
- Supplies
 - Mental Health issues
 - Schedules
 - Town Forman Kevin and I met March 15th, 2021 rather than March 1, 2021. Kevin was on an unforeseen leave from March 1 – 15.
 - Kevin has NOT provided me with, Monthly work schedule, for all employees working under Kevin.
 - Forman to provide in writing: Schedule
 - Forman to provide: Sewer & water timelines for annual, month, weekly “Jobs”
 - Forman to provide, current maintained logs, required for insurance
 - These logs have never been implemented and I will need to create Vehicle logs required for insurance

[22] Ms. Young testified that the concerns noted in the February 16, 2021 and March 17, 2021 reports were raised by her verbally with Mr. Hanson but to no avail. It was her evidence that:

- she asked Mr. Hanson to create work schedules for employees working under him, but he never did;
- she requested Mr. Hanson to prepare timelines showing the different tasks performed by the Department, but these were never provided;
- with a view to controlling maintenance costs she considered excessive and for insurance purposes, she requested the preparation and implementation by Mr. Hanson of maintenance logs (in particular logs recording visual walk-around checks and fuel checks of equipment when taken out and returned) which Mr. Hanson never attended to.

[23] As one example of not scheduling work in a timely way, Ms. Young testified about a project involving the installation of a culvert, for which the Village had received a grant three or

four years before and acquired the necessary materials and supplies. Nothing had been done on the project, in part because of Covid-related delay, and Ms. Young wanted the Department to get on with it. She would ask Mr. Hanson when the work could be scheduled, and his response was along the lines “I don’t know”. Ms. Young could not recall the exact words (probably not an outright “no”) but in any event, according to her evidence, Mr. Hanson never scheduled the work.

[24] On March 26, 2021 Ms. Young sent an email to Mr. Hanson stating:

I am confirming our regular monthly check in on April 1st, 2021 @ 10:00 a.m. to 10:30 a.m.
Item to discuss are:

- Employee schedule
- Maintenance logs
- Asset Inventory
- Inspections
- Incident Reports
- Feedback

[25] In relation to this email, Ms. Young testified that she was trying to get Mr. Hanson to participate in fixed monthly meetings with her, but that Mr. Hanson declined to attend the meeting set for April 1, 2021 or any formally arranged meeting of that sort. According to her evidence, Ms. Young was left to provide face-to-face direction to Mr. Hanson as and when she could by meeting with Mr. Hanson upon encountering him in the workplace.

[26] With respect to record keeping and process shortcomings, Ms. Young described Mr. Hanson’s attitude as “make these reports if you want but they will not be implemented” – that he laughed it off and would walk away from her.

[27] Mr. Hanson did, however, implement a system of recorded “toolbox talks”, based on a template provided by Ms. Young, but as it turned out only for three days when the expectation was for this to be part of the daily routine.

[28] One of Mr. Hanson’s responsibilities was to provide monthly written reports to Village Council concerning the operations and activities of the Department. In her CAO report to Council on April 13, 2021, for Council’s meeting on that date, Ms. Young stated as follows:

Kevin Hansen: Has not submitted monitory monthly report. This is the second time in 3 months Kevin has not provided a report.

After failing to provide monthly reports for meetings of Village Council in February 2021 and/or March 2021(the evidence is not entirely clear whether one or both), Mr. Hanson failed to submit a monthly report for the April 2021 meeting of Village Council. That report was submitted late however according to Ms. Young. Tracy Tinker testified that Village Council needed written monthly reports from Mr. Hanson in order to make informed decisions but received a report from Mr. Hanson only after some number of requests (“but it took how many meetings, how many requests”) having previously received just pieces of information which, from her evidence, were meager and which she stated were not reports.

[29] Deficiencies in other reporting are then noted in the April 13, 2012 CAO report to Village Council:

... receiving staffing updates, maintains reports, safety report, inventory, incident reports orally is not acceptable. I have asked Kevin on numerous occasion to provide the information in writing via email or text.

[30] The CAO Report of April 13, 2021 continues by covering other issues:

I have met with Kevin on several occasions since starting the CAO position in February 2021. Our meeting consist of updates on his staff, scheduled work, Future “jobs” to schedule, and prepares for upcoming season. Kevin has push back to all request! (*Refer to “Kevin’s Contract”, Section 1 – Employment Status, Sentence 1.1, 2*) This is a direct Breach of Kevin’s Contract.

- Notice was sent out to all NVBN Employees: Only Northern Village of Buffalo Narrows Administration staff and Mayor can have access to the office area in the Municipality Office. This is to prevent cross contamination and to protect all staff.
- Refuses to follow Covid-19 safety guidelines.
 - Monday, April 12, 2021, Kevin came into the office area without permission then preceded to commented on a customer to whom was paying a bill. This is a beach of confidentiality and it makes customers uncomfortable and is unprofessional.
- Refused to provide Mayor & Council with written reports.
- During Work hours on March 25th, 2021 from 3-4:30pm Kevin was at Kenotic Auto for 1.5 hours, this was a working day, Kevin was on the scheduled to work, and there was no equipment for repair. (*Section 3 – Duties, 3.1*) *Written Warning 2*
- When given direct direction from myself CAO, Kevin flat-out refuses. (*Refer to “Kevin’s Contract”, Section 1 – Employment Status, Sentence 1.1, 2*)
- *According to the contract between the Village Foreman and the Northern Village of Buffalo Narrows cause for termination can be found (Section 6 – Termination) Insubordination, misconduct, disobedience, neglect of duty, absenteeism, Notice of breach of contract, grounds for dismissal.*

(Emphasis in original)

[31] Elaborating on some of those items, Ms. Young testified as follows:

- Covid-19 safety guidelines / confidentiality issue – In order to limit interactions among groups of staff, members of the public works crew including Mr. Hanson were directed not to enter the office area of the Village Office (they had their own space for coffee). Mr. Hanson did so anyway on April 12, 2021. The community was experiencing an outbreak of Covid-19 at the time. When he entered the office area, a customer was in the process of talking to a receptionist about a tax payment. Mr. Hanson “chimed in” with a comment on the matter. Ms. Young asked Mr. Hanson to step into her office to discuss what had happened, but Mr. Hanson refused to acknowledge her at all. Previously there had been discussion with public works staff including Mr. Hanson about the confidentiality associated with customers attending to pay bills or conduct other business.
- 1-1/2 hours at repair shop – In a phone call to Mr. Hanson, Ms. Young conveyed the same information that is contained in her report on this matter (1.5 hours spent by Mr. Hanson on March 25, 2021 during working hours at a local repair shop at which the Village had no equipment). Mr. Hanson provided no explanation. He did not respond.
- Refusal of direction – Mr. Hanson would consistently “brush me off” as Ms. Young put it (for example, laugh and say good luck) or simply refuse to accept direction.

[32] At an in-camera portion of the meeting of Village Council on April 13, 2021, at which Ms. Young was present, the option of termination of employment was considered. However, after discussion, Village Council decided on a verbal warning instead. From the perspective of Ms. Tinker (present as a member of Council), this was with the aim that by Ms. Young meeting with Mr. Hanson the problems that led to the warning might be brought to an end.

[33] The motion as carried and recorded in the meeting minutes of April 13, 2021 states: "*Staffing discipline*, verbal warning to Town Foreman".

[34] The verbal warning was delivered the next day. According to Ms. Young, Mr. Hanson came into her office and initiated a conversation that led to him complaining with raised voice about various work circumstances (that he was "sick of this, sick of that" as Ms. Young put it in her evidence). Ms. Young asked that his issues be discussed in a scheduled meeting. Mr. Hanson carried on instead and Ms. Young testified she felt she had no choice but to proceed with the verbal warning at that time (even though it was not her plan to do so that day). After Mr. Hanson asked two others to join the meeting to observe, Ms. Young informed Mr. Hanson that he was receiving a verbal warning for his absenteeism (at the auto repair shop), for not reporting to Ms. Young as required, and for not providing monthly reports to Council.

[35] Ms. Young testified that in the period following the verbal warning she tried to help Mr. Hanson become more productive and organized. She complimented Mr. Hanson on the monthly report that he did prepare and reported positively to Council on Mr. Hanson's implementation of the toolbox talk system (being unaware at that point that the documented process was followed for only three days). However, the relationship did not improve.

[36] On May 26, 2021 Ms. Young sent Mr. Hanson an email raising a number of items of concern. These included a request by Ms. Young for a timeline on the completion of a sewer and waterline repair at a local residence. The background, as described by Ms. Young, is that the maintenance crew had attended at the premises approximately two years before and at that time discovered (or caused) a broken sewer line. Rather than replace the broken pipe that day, the pipe was covered up and buried, as it was raining and Mr. Hanson determined that it was not safe to proceed. (Mr. Laliberte, who was on that crew, spoke to these same facts in his evidence, but with a different view on whether and how, in the conditions as he recalled them, the work could have proceeded.)

[37] The broken sewer line was then left in place underground with no action by Mr. Hanson to rectify the situation or flag it for action. Eventually the matter came to the attention of the CAO and Village Council through Facebook posts by a community member. Ms. Young testified that she then asked Mr. Hanson approximately seven times to deal with the repair, but that whenever she raised the issue and asked Mr. Hanson to schedule the work, he did not see it as a priority.

[38] In response to the May 26, 2021 email, Mr. Hanson raised an issue of approval for the removal of trees on the lot. Expressing frustration with this response at this time concerning what had been an ongoing topic, Ms. Young testified that the Village already had the approval.

[39] The May 26, 2021 email in another item stated "Get quotes for Gravel 2021 (ASAP)" which was in reference to quotes for the gravelling of roads in the community. Mr. Hanson responded by referring to the price from a single contractor. However, Ms. Young testified that

she had wanted quotes from more than one contractor and that arrangements should have been concluded by this time.

[40] The May 26, 2021 email also requested a timeline for completion of culvert projects. Regarding the reporting of damage to equipment, Ms. Young reiterated in the email that equipment damage must be reported through the completion of an incident report, which she testified was not being done.

[41] Further, in the May 26, 2021 email, Ms. Young raised the matter of hostility within the public works crew (termed "lateral violence" in the email) having in mind observations by her of some crew members being pitted against others. With respect generally to Mr. Hanson's dealings with employees on the maintenance crew, Mr. Laliberte testified that he worked under Mr. Hanson for the entire time Mr. Hanson was the Public Works Foreman. Mr. Laliberte described Mr. Hanson as a supervisor who lacked respect for those under his supervision and who would look down on and laugh at a crew member who was not on his good side on a given day. He testified that crew members would show up for morning coffee not knowing who Mr. Hanson might pick on. Mr. Laliberte also described a time when Mr. Hanson cleared snow off the roads in the early morning and, knowing where Mr. Laliberte lives, left a pile of snow in front of Mr. Laliberte's driveway even though there was no house on either side.

[42] There was an interaction between Ms. Young and Mr. Hanson on May 31, 2021 about which Ms. Young provided the following evidence. Throughout the workday Ms. Young attempted to contact Mr. Hanson by cell phone to update him on the delivery of a garbage truck but her calls were not returned. As a result, Ms. Young drove to the shop location to speak with Mr. Hanson in person. In the conversation Mr. Hanson indicated that he wanted to train a particular employee (a landfill attendant) on the new truck. Ms. Young responded that that did not make much sense given that the individual was a temporary employee and that instead a full-time employee should receive the training. Although the conversation had not been confrontational to that point, it ended with an "explosion", as Ms. Young put it, specifically with Mr. Hanson getting in his truck and "peeling away" which, Ms. Young testified, threw up gravel toward her.

[43] On June 8, 2021 Ms. Young provided Village Council with her CAO report for consideration at Council's meeting on that date which covered a number of matters:

- Attached to the report was Ms. Young's email of May 26, 2021 to Mr. Hanson (and his response) identifying concerns with Mr. Hanson's work including failure to provide quotes for gravel and, in particular, failure to fix the broken sewer line.
- The report referred to Ms. Young's interaction with Mr. Hanson on May 31, 2021 including Mr. Hanson's "peeling away" in his truck (without written mention however of gravel being thrown up in her direction) after what had been a non-confrontational discussion necessitated by Mr. Hanson's refusal to answer her phone calls.
- Concerning Mr. Hanson's performance and conduct more broadly, she stated in the report:

Kevin's blatant disregard to my authority is now becoming a problem which is effecting both work environments.

Week of May 31-June 4th, 2021 Kevin refused to answer my calls, has not come to meet with me in regard to Priority's ...

The Town Foreman receives direction from the CAO, not answering my phone calls, emails, or handing in daily/weekly reports is insubordination and grounds to be terminated.

[44] Ms. Young made the following recommendation in the June 8, 2021 report:

I would recommend upon Kevin's return we revisit his terms. I am writing Kevin a verbal warning based on the above action or inaction toward the NVBN.

[45] Village Council, however, rather than proceeding with Ms. Young's recommended action (essentially a written warning) decided on June 8, 2021 to terminate Mr. Hanson's employment. This was the evidence of both Ms. Tinker and Ms. Young.

[46] Ms. Tinker testified that Council members at their meeting on June 8, 2021 had lengthy conversation with respect to the matters raised in the CAO report of that date including the May 31 interaction. In the discussion there was concern that Mr. Hanson had not provided Council with information and reports they required and with his failure to remedy the broken sewer pipe (in respect of which Council wondered how Mr. Hanson could let the broken sewer pipe go on so long without fixing it in a timely fashion).

[47] More generally, describing an overall concern for Village Council, Ms. Tinker testified that Mr. Hanson "showed over time that he would not work with or take direction from the CAO", stating that this was apparent.

[48] The motion as carried and recorded in meeting minutes of June 8, 2021 states: "*Move forward with staffing issue, contact Lawyer (W Law Group – Kim Osemlak)*".

[49] When asked about the wording of the motion, Ms. Tinker testified that contact with the lawyer was to make sure the Village "crossed its t's and dotted its i's" in respect of a termination of employment and that proper process was followed. She was very clear in her evidence that the decision to terminate had been made and that the motion was meant to capture this.

[50] Ms. Tinker further testified that at the time of the decision to terminate, on June 8, 2021, she and other members Village Council were unaware and had no knowledge of any harassment complaint from Mr. Hanson.

[51] Ms. Young was present during the meeting of Village Council and confirmed in her evidence that Council decided on June 8, 2021 to terminate Mr. Hanson's employment. It was her evidence that the motion without doubt was a direction to move forward with the termination of employment.

[52] Ms. Young further testified that prior to June 17, 2021, when Mr. Hanson delivered a complaint of harassment to her, Mr. Hanson had not raised the issue of harassment with her or anyone else to her knowledge. She testified that the first she heard of Mr. Hanson complaining of harassment was on June 17, 2021.

[53] Ms. Young contacted the law firm as directed in the motion. Termination documents (letter of termination from the Village to Mr. Hanson and form of release) were prepared by the firm.

[54] The letter of termination, dated and presented to Mr. Hanson by Ms. Young on June 28, 2021, informs Mr. Hanson that Village "has made the decision to terminate your contract of employment with the Village effective immediately" and states that there is cause for termination without notice:

The Village believes it has sufficient cause to terminate you without notice for reasons including, but not limited to, failing to disclose the sewer line breach which occurred in May, 2019 and which was discovered by Village Council through a third-party in February 2021; failing to remedy the sewer line breach despite repeated directions to do so; attending to personal business during working hours on March 25, 2021; failing to submit monthly reports despite numerous requests to do so; failing to follow the Village's Covid-19 policies, including your attendance at the Village office without authorization; and refusing to answer phone calls or emails from the Chief Administrative Officer.

[55] The letter goes on to advise that, notwithstanding the grounds for cause, the Village would be providing statutory pay in lieu of notice to Mr. Hanson; and, further, conditional on Mr. Hanson signing an enclosed form of release, that the Village would pay the lump sum equivalent of an additional four weeks' earnings.

V. ANALYSIS

A. Legislative Provisions

[56] The provisions of the Act relevant to this matter include the following:

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 ...

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; ...

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).

B. Three-Part Test

[57] As interpreted in recent case law, particularly *Banff Constructors Ltd. v. Arcand*, LRB File No. 149-19, April 28, 2020 (Tegart), the above provisions give rise to the following three-part test:

- (1) Did the employee engage in protected activities that come within the ambit of s. 3-35 of the Act?
- (2) Did the employer take discriminatory action against the employee within the meaning of s. 3-1(1)(i) of the Act?
- (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)?

The onus is on the employee to establish the first two stages of the test and, if established, the onus shifts to the employer to establish the third stage of the test.

[58] The adjudicator in *Banff Constructors* disagreed with an interpretation under which an employee, in order to trigger the presumption and reverse onus, must establish an initial *prima facie* causal connection between the exercise of a protected activity and the discriminatory action (as had been the approach in *Britto v. University of Saskatchewan*, LRB File No. 128-15, April 16, 2016 (Blanke)).

[59] However, while holding that there is no such requirement, the adjudicator in *Banff Constructors* explained that the requirement is unnecessary in practical terms, in that where there is no indication of a causal connection between the two actions, it may require little from the employer to establish good and sufficient other reason (at para. 45):

One might argue that 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 arbitrator 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.

(Emphasis added)

[60] In both *Britto* and *Banff Constructors* the discriminatory action by the employer (suspension in one case, termination in the other) followed the protected activity of the employee. There may still be room for consideration, in light of the wording of the relevant provisions of the Act including subsection 3-36(4), as to whether the triggering of the presumption and reverse onus will necessarily occur without more in a case where the discriminatory action by the employer occurs *before*, rather than after or during, the protected activity by the employee. It is not necessary to explore that here.

[61] Notably, the words "good and sufficient other reason" do not require an employer, in the case of dismissal, to establish that the termination was for just cause. In *AgraCity Crop & Nutrition Ltd. v. Clarke*, LRB File No. 229-18, November 30, 2020 (Erhardt) the adjudicator determined the employer was not required to establish that the termination was for just cause (para. 378) and that "My inquiry and determination need not consider whether or not Janet Clarke ought to have been dismissed, but whether the termination was made for good and sufficient other reason – and not for the reason of having reported harassment and bullying in the workplace" (para. 379).

[62] In *Andritz Hydro Canada Inc. v. Lalonde*, LRB File No. 257-19, December 21, 2020 (Erhardt) the adjudicator said at paras 339 and 340:

I also note that the Appellant is not required to establish that the layoff of the Respondent was for just cause. A correct characterization is set out by Adjudicator Tegart in *International Women of Saskatoon and Ivette Gonzalez*, SK LRB File No. 203-19, where he wrote the following at paragraph 65:

The fact an employee makes a complaint pursuant to s.3-36(1) of the Act, even where it's established that he or she engaged in a protected activity and the presumption and reverse onus kick in, does not insulate the employee from the possibility of a termination. The employee is only protected from discriminatory action where that action is taken *because* the employee engaged in protected activity, subject to the comments below concerning the phrase "good and sufficient other reason".

Adjudicator Tegart appropriately directs the assessment to whether good and sufficient other reasons existed for termination or layoff. This interpretation is consistent with the Act, and serves to preclude a worker from making complaints, whether valid or not, as a shield to protect her or him from a layoff that may be forecast or forthcoming for other valid reasons.

[63] In the *Gonzalez* decision, quoted in the above passage from *Andritz Hydro*, the adjudicator went on to suggest that "For discriminatory action, including termination, to be taken for good and sufficient other reason, the action must not be arbitrary and must be objectively reasonable" (para. 71) or, put another way, "a reasonable option" (para. 72). I would be disinclined, however, to adopt any fixed definition of the standard in that, as recognized in *Banff Constructors*, "the evidence required to rebut the presumption against the employer and satisfy the onus will depend on the circumstances". In fact, while the approach in the *Gonzalez* decision provides a sensible and

workable reasonableness formulation that I will adopt for application here, it may in fact set the “other reason” bar somewhat higher than required in a case where there is clearly no causal connection.

C. Application

[64] In the factual sequence before me, the complaint of harassment was presented on June 17, 2021 and the termination of employment occurred on June 28, 2021. The Village says, however, that the decision to terminate Mr. Hanson’s employment was made on June 8, 2021 – which was before Mr. Hanson made his complaint of harassment on June 17, 2021 – and that there is no temporal connection between the two (indeed, that it is not even possible that a complaint of harassment, yet to be raised with the Village, had any bearing on the decision to terminate).

[65] It is therefore necessary to determine when the Village decided to terminate Mr. Hanson’s employment.

[66] On consideration of the evidence, as reviewed above, I find that the termination decision was made by Village Council at its meeting on June 8, 2021. Ms. Young and Ms. Tinker were questioned closely regarding the June 8, 2021 meeting and the discussion that occurred at it, as well as on the wording of the motion to “Move forward with staffing issue, contact Lawyer ...” which they unequivocally testified was a record of the termination decision (the meaning was clear to them, having participated in the meeting). I accept their evidence in this regard.

[67] There was a gap of approximately 14 business days between Village Council’s motion and delivery of the letter of termination (and release) prepared by the law firm, but it is evident from the face of the letter that significant work went into its preparation including a description of grounds and considerations around how to structure the termination.

[68] Ms. Young and Ms. Tinker further testified that on June 8, 2021 they had no knowledge of any harassment complaint from Mr. Hanson and, to their knowledge, neither did any of the other Councillors who were present. According to their testimony, it was on June 17, 2021 that Ms. Young first heard of a complaint of harassment from Mr. Hanson, and it appears some time after that in the case of Ms. Tinker. Further, to their knowledge and having participated in the discussions on June 8, 2021, it did not appear that any of the other Councillors was aware.

[69] I accept this testimony and find that Mr. Hanson’s complaint of harassment, or any impending complaint of harassment, was not a consideration in relation to the June 8, 2021 decision to terminate.

[70] Previously in these reasons I queried whether the presumption and reverse onus should necessarily come into play without more where the employer action precedes the employee action. However, the present case is not in that category. Although the termination decision was made on June 8, 2021, it was not implemented until June 28, 2021 and thus was not “taken” against the employee until after the employee had engaged in a protected activity.

[71] To satisfy the reverse onus, the Village relied on the absence of a temporal connection between the decision and the termination and the fact that the complaint of harassment had no bearing on the decision. The Village’s case did not end there. The Village presented evidence concerning Mr. Hanson’s work performance and conduct which it argued “further substantiate a finding that the Village had good and sufficient other reason for the termination”.

[72] As previously noted, Mr. Hanson instructed legal counsel not to attend the hearing and advised that he (Mr. Hanson) would not present evidence, further indicating that he would not attend the hearing and neither would his witnesses.

[73] Evidence that was adduced by the Village through witnesses at the hearing established, in broad terms, that Mr. Hanson continued to be unwilling to take direction from Ms. Young, often disregarding her authority as CAO, and that his job performance fell below the Village's expectations in other respects as well.

[74] In addition to this broad concern, specific matters to which the witnesses testified included the following:

- ongoing unwillingness to comply with direction from the CAO regarding work schedules, timelines, maintenance logs, incident reports, and for the most part toolbox talks
- failure to consistently provide Village Council with monthly reports as required
- failure to schedule and execute work in a timely way with respect to a culvert project that had not been proceeded with, but of greatest concern, a broken sewer line that was allowed to remain in place underground for approximately two years with no action until the matter came to the attention of Council and the CAO through the complaint of a member of the public
- attending to apparent non-work matters for approximately 1.5 hours on work time for which Mr. Hanson offered no explanation
- non-observance of Covid-19 safety guidelines in respect of an occasion on which Mr. Hanson also failed to respect customer confidentiality by commenting on a customer's personal business in the Village office
- failing to secure gravel quotes as required
- disrespect toward staff on the maintenance crew including through comments during morning coffee breaks
- failure to respond to phone calls or emails from the CAO
- on several occasions laughing at, walking away from, or ignoring the CAO

[75] It is not necessary for me to make any finding in this case as to whether the Village had just cause for termination of employment. That is not the applicable standard.

[76] As for whether the Village had good and sufficient reason other than the protected activity, which is the requirement, the absence of any causal connection between the decision to terminate and the complaint is a key consideration. More than that, however, the Village presented substantial evidence regarding the basis for termination of employment.

[77] I am satisfied that the termination of employment was not in fact taken because of any protected activity (or anticipated protected activity) on the part of Mr. Hanson. Such activity had no bearing on the decision to terminate. Further, on the whole of the evidence, I find that the Village, acting in good faith and not in an arbitrary fashion, reached a reasonable conclusion and

proceeded with a reasonable option in terminating Mr. Hanson's employment. Accordingly, the Village has established that the discriminatory action (termination of employment) was taken against Mr. Hanson for good and sufficient reason other than his acting or participating in a protected activity.

VI. ORDER

[78] Pursuant to section 4-6(1) of the Act, the appeal is allowed. The decision of the Occupational Health Officer dated October 22, 2021 is set aside.

Dated this 29 day of November, 2022.

Larry LeBlanc

Larry B. LeBlanc, K.C., Adjudicator