



LRB 015-22

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

**HOLIDAY INN EXPRESS & SUITES, YORKTON
(the Appellant or Holiday Inn)**

AND

**BARRY STROCEN
(the Respondent or Mr. Strocen)**

**Decision appealed from: Occupational Health Officer Stephen Moorgen,
dated January 6, 2022**

Date of Hearing: Tuesday, January 17th, 2023 - via Zoom Video

Adjudicator: Marlene Weston

**For the Appellant: Steve Seiferling
Gillian Fortlage
Seiferling Law
200-306 Ontario Avenue
Saskatoon, SK**

For the Respondent: Self Represented

DECISION

I Introduction and Background

1. On July 18th, 2022 I was selected as the Adjudicator for the appeal of the Decision of the Occupational Health & Safety Officer Stephen Moorgen, dated January 6th, 2022. The Notice of Appeal had been filed by Holiday Inn Express & Suites (hereinafter referred to as "Holiday Inn") on January 20th, 2022.
2. The decision by OHO Moorgen had been rendered in response to a complaint filed by Barry Strocen (hereinafter referred to as "Mr. Strocen") with the Occupational Health & Safety Branch on November 17th, 2022 against the Holiday Inn. The complaint was regarding alleged discriminatory action arising from Mr. Strocen's termination from employment with Holiday Inn on or about November 1, 2021.
3. In OHO Moorgen's decision dated January 6, 2022 the Officer stated that Mr. Strocen "believes his termination was the result of him raising health and safety concerns to his Employer. These concerns were related to the use and storage of certain chemicals by the Employer".

4. OHO Moorgen then asked the Holiday Inn to provide good and sufficient reasons for Mr. Strocen's termination other than what he was alleging. On December 9th, 2021, Holiday Inn did respond and provide the requested information.
5. In OHO Moorgen's decision he reviewed Section 3-36(4)(a) of *The Saskatchewan Employment Act* (the Act) regarding the rights of a worker in regards to discriminatory action taken by an employer because of a health and safety related activity and the onus on the employer to provide good and sufficient reason(s) for the discriminatory action if the discriminatory action is for other than the health and safety related activity. In his decision, OHO Moorgen considered the following three questions/issues:

"Based on the legislation, the decision of an occupational health officer in a complaint of discriminatory action requires consideration of the following questions: ...

1. Did the worker engage or participate in one of the activities described in section 3-35 that on its face could be the reason even in part for the discriminatory action?

Yes. Strocen did make the Employer aware that he had identified some safety issues related to the use of certain chemicals and the storage therein. ...

2. Did the employer take discriminatory action against the worker?

Yes. The Employer terminated the employment of Barry Strocen on or about November 1, 2021.

3. Is it more likely than not that the good and sufficient other reason provided by the employer is the real and only reason for the discriminatory action?

No. ... the Employer has not provided good and sufficient reasons for the termination of Strocen. The Employer alleged, in their response to OHS that Strocen was terminated within his probationary period as *he was not working out for the position that he was hired for.*"

6. OHO Moorgen's Decision read on Page 4as follows:

"Based on the foregoing it is my decision that the termination of Barry Strocen's employment is an unlawful discriminatory action contrary to section 3-35 of The Saskatchewan Employment Act.

The employer must cease the discriminatory action, reinstate Strocen to his former employment under the same terms and conditions under which Strocen was formerly employed, pay him any wages he would have earned had he not been wrongfully discriminated against and remove any reprimand or reference to this matter from any employment records with respect to this worker. ..."

7. Subsequent to the above decision, Kimberley O'Connor, General Manager of the Holiday Inn, filed a Notice of Appeal dated January 20, 2022. In the document, the Holiday Inn responded to the questions/issues listed in the OHO's Decision. The allegations that Mr. Strocen's termination was due to occupational health & safety issues were denied and the reasons for Mr. Strocen's termination listed. Ms. O'Connor stated in summation at Item 4) in the Notice that "we terminated Mr. Strocen, as he was not working out for the position that he was hired for, and he was within his 3 months probationary period."

8. Following my appointment as Adjudicator in accordance with section 3-54 and 4-3 of *The Saskatchewan Employment Act* on July 22, 2022, I provided both parties with copies of the OH&S Branch's file and contacted them to arrange for a Pre-Hearing Zoom call. I asked that the parties advise whether or not they would be represented by Counsel. Mr. Strocen advised that he would be self-representing. I received an email on October 5, 2022 that Seiferling Law would be representing the Holiday Inn.
9. A Pre-Hearing meeting was held October 31, 2022 with parties in attendance via Zoom. Holiday Inn raised a point of process regarding whether the hearing would be conducted as a trial de novo. I withheld a decision on that matter for further consideration. Dates for the hearing were agreed upon. A second preliminary matter was raised by the Holiday Inn. They asked that there be a Stay of the Order issued by OHO Moorgen in his Decision. A Stay of Decision was subsequently ordered by me and filed with the Registrar on October 31, 2022.
10. On November 8th, 2022, I had distributed Process Directions to the parties in relation to the upcoming hearing. On November 29th, 2022 I determined that the hearing would not be conducted as a trial de novo, and would follow the Process Directions I had previously established. I ruled that if Mr Seiferling still wished to pursue this issue, he could present his arguments in his Opening Statement.
11. The Hearing had been set for December 6th and 7th, 2022 at the Pre-Hearing meeting; however, Mr. Strocen had not provided information for the issuance of subpoenas to me in sufficient time for the witnesses to have adequate notice to appear. With the consent of the parties, the hearing date was then moved to January 17th, 2022.
12. The Hearing was held on January 17, 2022 via ZOOM platform.

II Facts

Agreed Facts

13. At the Pre-Hearing Zoom meeting, it was agreed that neither party would submit an Agreed Statement of Facts. As previously indicated I had provided each of the parties with a copy of the Occupational Health & Safety Officer's file. The parties agreed that the file would form part of the Record.
14. The OHO's file provides the following progression of events:
 - a. Mr. Strocen was hired as a maintenance employee by Holiday Inn on September 2nd, 2021. The hiring was conducted by Kim O'Connor, the General Manager. On hiring Mr. Strocen Ms. O'Connor advised him verbally that there was a 90-day probationary period before Mr. Strocen would be hired as a permanent employee. In three weeks from date of hire, Mr. Strocen was promoted to the position of Chief Engineer.
 - b. Mr. Strocen was terminated from his position at Holiday Inn on November 1, 2021.
 - c. Mr. Strocen filed a Complaint of Discriminatory Action with the Occupational Health

Safety Branch dated November 17, 2021. In the Discriminatory Action Questionnaire, that was completed by Mr. Strocen his responses to Questions 1 through 5 in the Complaint were (copied directly from Discriminatory Questionnaire):

“Question 1 – What was the alleged discriminatory action taken against you?

The first thing was telling me I had one warning for having my mask slightly below my nose while I was trying to grab garbage in front of her that was on the grounds made my mask drop she knew that. The next occurrence was praising me at the meeting Friday October 29th. she said she had no problems with maintenance the most improved department since i became manager. mentioned cleaning the board room was a concern of housekeeping and other than one thing she said let's move on from maintenance and spenc the meeetmng on other areas maintenance is my least worry as it is most improved. Then on Monday November 1st she wanted me to clean a toilet and unclog it which i did for over an hour the last attempt at 3 pm she wanted me to do so but the cleaners I tried were not working the last thing we tried was a Zep bowl acid cleaner which was supposed to be removed from our inventory as we spoke about it at the meeting on Friday October 29. Carol the housekeeping supervisor spoke about how it was toxic and unsafe and i mentioned i have seen it smoke as you pour the chemical it was obviously old product that was toxic and they don't even supply chemical gloves there only have a box of thin disposable gloves which burns right through. I showed Kim my manager that i had already got chemical burns from shampooin earlier she made me shampoo over 29 rooms gtaht day without proper gloves and was trying to make me quit. Anyways at 3 she wanted me to remove the toilet to unclog it i had already poured 5 different chemical inside and they were all stuck in the bowl of the toilet i said call a plumber but she wanted me to do it. Next staff member came on at 3 pm I left him instructuns oin how to remove a toilet as I didn't think we had time enough time to do this job in one hour without a respirator with gas cartridges. They have a painting repserator at work but not a gas cartridge so liquid vaooours seep in and make you more sick when you use the mask. She made me do pool reads and chnge chemical to the pool one was hydrochloric acid and no proper gas mask and no proper gloves and no course training it wasn't available for another year she said because of covid. So she made me change chemicals and tthe hydrochloric acid empties just stick around there is nowhere to dispose of them and the water chemical when you read them i was told by kim o just dump the chemicals on the ground outside I mentioned in a letter we need to change the policy of dumping chemicals on tghe ground and was fired. I had monday november 1st off and was called and fired after not staying late to change the toilet.

Question 2. On what date was this action taken against you?

011/22/21

Question 3. What was the health and safety concern/complaint that you raised prior to the action taken against you?

Over a month. I actua;ly got the manager of maintenance position after my first 3 weeks working there and it was in my proposal of plan of action of how to change the fire hazards in the furnace room which I cleaned up and saved but the chemical issues i never got to chmge i was fired first.

Question 4. On what date, and to whom, did you raise your health and safety concern/complaint prior to the action taken against you? (Provide a chronological timeline of events if appropriate.)

I raised my concerns with Kim.

Question 5. What reasons were provided to you for the action taken against you?

She said yeah I agree we have to change that but a lot of the time she would say she would look into it but never did.

Along with the Questionnaire, Mr. Strocen provided copies to the OHO of text messages between Mrs. O'Connor and himself.

d. In a letter dated November 25, 2021, OHO Moorgen informed the Holiday Inn:

"Barry Strocen, a worker, has made allegations of discriminatory action against Holiday Inn Express. Barry Strocen informed Occupational Health and Safety ("OHS") that he had reported several health and safety issues to his employer. In the documentation provided, Barry Strocen indicated that he raised his health and safety concerns with Kim who was his manager at the time."

The employer was asked to provide documentation identifying the reasons for the discriminatory action taken against Barry Strocen (termination of employment relationship) by December 9th, 2021.

e. Ms. O'Connor advised the Occupational Health & Safety Branch in a letter dated December 6, 2021:

"Mr. Strocen was dismissed from his position as Chief Engineer within his probationary period... He was not working out for the position that he was hired for. Staff from other departments had issues with working with Mr. Strocen as their issue was that he could not be located for tasks that need completion in a timely manner."

There was no discriminatory action in any way with his dismissal. He did not pass his 90-day probationary period."

Along with the written response, Ms. O'Connor provided the OHO with text messages sent to Mr. Strocen regarding his job duties and his responses to her efforts to locate him regarding tasks to be performed. There was also a Record Notice of Discipline dated November 1, 2021 regarding an incident with a clogged toilet in the file. The Notice of Discipline is dated the same day that Mr. Strocen's position was terminated.

f. As a result of his investigation, OHO Moorgen issued his decision on the Complaint to the parties in a letter dated January 6th, 2022. The resulting decision read as follows:

"... it is my decision that the termination of Barry Strocen's employment is an unlawful discriminatory action contrary to section 3-35 of *The Saskatchewan Employment Act*.

The Employer must cease the discriminatory action, reinstate Strocen to his former employment under the same terms and conditions under which Strocen was formerly employed, pay him any wages he would have earned had he not been wrongfully

discriminated against and remove and reprimand or reference to this matter from any employment record with respect to this worker.”

15. In response to the Decision rendered by OHO Moorgen, the Holiday Inn filed an Appeal of the Decision dated January 20th, 2022. The Appeal was prepared and filed by Kim O'Connor on behalf of the Holiday Inn. The following are excerpts from the Appeal document filed:

“1) Mr. Strocen did clean up the area in the boiler room and maintenance office during his tenor as he mentioned that there could be some items that possibly be a fire hazard and did remove items and cleaned the area in the boiler room. Regarding the training that was discussed, this was in regards to the Pool Operators course which is usually held annually and at that time I could not find a date for an upcoming course in 2021. Regarding having a chemical burn the first I learned of this is reading the forms from Stephen Moorgen's letter dated January 6, 2022. If there was any injury he would have been provided WCB Papers and our Accident Report to be filled out and returned within 5 days. We do provide gloves, masks, and respiratory masks for this department.

2) Please see below items of issues that

a) During his time as a worker with us there were numerous times that I would have other staff and members of the maintenance team that would be looking for Barry during work hours. There were times that I would have to call him to the office as it had been awhile since I had seen him and items were starting to pile up. There were times I did have to go physically looking for him and he would inform me that he didn't hear his phone. ...

b) There were times that I would go outside and notice him in the car on the phone. ...

c) Employees kept coming to me asking me if I had seen Barry as they could not find him.

d) The Executive HSK could come to me at least every few hours asking if I had seen Barry.

e) It was brought to my attention by staff if I knew that Barry was no longer on the property. ...They mentioned that his car was gone. ...he informed me that he felt he was being watched and would move his car around the parking lot...

f) There was an instance of Barry showing up to work and then completely disappeared during a Saturday morning shift. I was contacted by phone regarding this and messaged Barry and it was hour later or the next day that he said he apologized and would explain everything and then on Monday he contacted me that he had the flu (This was not mentioned when he came back to work almost a week later).

g) I had a conversation with another maintenance member who was working with Barry and another manager informed me that Rey was very upset so I went to speak with Rey to see if I could understand why he was so upset. He informed me that he is tired of when he is working with Barry he is never around always on a coffee break. ... I went outside 30 minutes earlier and found Barry in his car and went to speak with him about a couple of things and a new uniform and let him know to go help and learn the pool cleaning with Rey.

h) On November 1, Mr. Strocen was asked about a toilet clog in one of our guest rooms and he was using different chemicals to unclog the toilet. When I was speaking to him in the maintenance office regarding this issue, he mentioned that he wanted to leave early and I asked him if the issue with the clogged toilet was fixed, he said he had used chemicals and I responded by asking if we may need to remove the toilet and check and then place a new seal on their once we can confirm if that will fix the issue. He informed me that he

left instructions for Shaun who was arriving at 3pm on how to remove the toilet and change seal. I informed him that he should be there with Shaun (please note that Shaun had only been working with us 2 weeks maximum at the time). Barry clocked out before the end of his shift at 4pm. The next morning the issue was still not corrected as Shaun was not 100% sure to do the fix. Once Mr. Strocen had left without helping with the possible toilet change I filled out the notice of discipline I was going to issue him. I contacted my owner on November 2 regarding this issue and the other compounding issues and we felt it best to terminate him instead.

- 3) Concerning the proof of myself saying it was the most improved department. In no way was it the most improved department. ...After his promotion to the position of Chief Engineer, I started to notice a decline in working conditions.
- 4) With regard to the decision of Mr. Moorgen we do not agree that Mr. Strocen was wrongfully discriminated against. ...we terminated Mr. Strocen as he was not working out for the position that he was hired for, and he was within his 3 months probationary period. We do not feel that he is entitled to any compensation of lost wages. "

16. The parties moved to presenting of evidence.

II Evidence

17. Opening Statements

a. Holiday Inn's Opening Statement: Presented by Ms. Fortlage

In this case both sides have to prove their arguments. Holiday Inn has to prove that the OHO's decision was incorrect. If there was no protective action taken by the employer under Part 2 of The Act - did the employer take discriminatory action as defined under the Act?

Discriminatory action includes any action taken by the employer that affects the employee. The onus falls on the employee to prove that the action falls within the definition in the Act and that there has to be some connection between the protection taken, and the employee. There is a nexus between Part 1 and Part 2 of the test. As Mr. Strocen did not properly report the OH&S concerns; therefore, a prima facie case has not been established and this action should not continue. However, if there was a finding that Mr. Strocen did not engage in a protected action then Part 3 applies.

Therefore under Part 3 in regards to Mr. Strocen's termination, there were other good and sufficient reasons for the discriminatory act. Those were:

- He failed to report for shifts;
- He failed to remain at the workplace for the duration of his shift;
- His behaviour resulted in complaints from other staff members; and
- He failed to complete tasks assigned to him by management.

Termination of Mr. Strocen's employment within his probationary period does not require just cause but only analysis of a worker's suitability for workplace and occupation. Evidence of these reasons will be provided in our witness' testimony.

We will prove failure to complete tasks is why Mr. Strocen was terminated. He left another employee to complete replacement of a toilet after the employee had only been 2 weeks on the job. He did not complete the task properly. That is why he was terminated, not because of reporting OH&S issues to management. It was his inability to complete tasks that fell within his job description. Termination was on job performance. He could not adequately perform tasks assigned.

b. Mr. Strocen's Opening Statement

This is a case of harassment to avoid a safety regarded issue and an incident that happened on the last shift. I stressed some safety issues and I was let go, I received chemical burns from cleaning 42 rooms. I did report it to Kim but did not have a chance to file the report because I was let go.

It must be noted that there was failure to complete tasks but I could not do the tasks assigned in an 8 hour shift. I had told Kim that the chemical had to sit for an hour to work. I provided all the supplies necessary to complete the task by the new employee.

There was no evaluation system in place. I was not told about my work performance. There should be some system to evaluate performance in place.

I am asking that the Decision by the Occupational Health & Safety Officer be reinstated, and that any reprimand should be removed from my file. I did not know the reprimand had even been given.

18. Kim O'Connor's Testimony

- a. Ms. O'Connor testified that her role was General Manager of the Holiday Inn Express & Suites in Yorkton. She started with the Holiday Inn in April 2014 and became the General Manager in February 2019. She reports to Brent Wilychinski – Operations Manager.
- b. Mr. Strocen was an employee of Holiday Inn. Ms. O'Connor was involved in hiring Mr. Strocen. Ms. O'Connor was asked if there was an Employment Agreement in writing. She answered no, just a verbal agreement. She informed Mr. Strocen of the 3-month probationary period. The Employee's start date was September 23, 2021 and the last day of work was November 1, 2021. He was hired to work in maintenance to start and later they offered him the Chief of Engineering position. He reported directly to her.
- c. Ms. O'Connor was asked if in the 8 weeks Mr. Strocen had raised any issues. Not that she was aware. Mr. Strocen said he had emailed a 3-months plan for maintenance but she never received it. Exhibit A 1 –Maintenance Plan 3 pages was entered and filed. She said she saw it for the first time when documents were sent out, Ms. O'Connor was asked if there was ever a leak in the pool. She responded no. Did Mr. Strocen raise any of the items in the report with you? No. Did he show you the chemical burns? No.
- d. Ms. O'Connor was asked if there were any performance concerns. She responded that she :
 - Could not find him when he was at work.
 - Received complaints from other staff.
 - Could not find him and would have to go looking for him.

- Received 3 to 5 complaints about him from other staff. She reviewed them,
 - Was looking for him to do a task and then she would have to phone or text him to find him. Holiday Inn entered Exhibits A2 – Responses to texts between her and Mr. Strocen. She said she often asked if Mr. Strocen could come and meet her. She was asked, “How many times did have to text Mr. Strocen to locate him?” Response - 24 to 25 times.
 - Testified Mr. Strocen asked to leave work early –1 to 2 times per week.
- e. Ms. O'Connor testified Mr. Strocen's work hours were 8 am to 4 pm for a regular shift but sometimes a 3 pm to 11 pm shift in there.
- f. The last issue was he was working on a toilet clog. Mr. Strocen told Ms. O'Connor that he many have to remove the toilet and the seal. He had left instructions for Shaun to do it. Ms. O'Connor said she told Mr. Strocen he should stay with the task when he told her he was going to leave early. But he left Instructions to remove the seal and did not do it himself. Mr. Strocen assigned another employee who did not have the experience to change a toilet seal then logged out at 3 pm. He was insubordinate. She was asked if he was within his probationary period. Yes, he was.
- g. Brent and she decided to let him go. She said that she can't find him, and him not doing assigned tasks. She was asked if she met with Mr. Strocen. She responded that she did not meet with Mr. Strocen. The termination was delivered over the telephone. Did Mr. Strocen say anything? She did not recall. She was asked if there were any other factors. Not that she could recall.

19. Cross Examination of Kim O'Connor:

- a. Does she recall that on the last day she told him there was a room that needed to be ready for guests by 4:00 pm. He said they did not have the proper respiratory masks for the chemicals they were using. No, she does not recall that conversation.
- b. Did he show her that he had chemical burns on his hands in the hallway? Does she remember that? Her response was no.
- c. About the 3 month plan, Ms. O'Connor said she would have to have a plan to give to Brent before Mr. Strocen would get a promotion to Chief Engineer. Mr. Strocen said he sent the plan but the first email was blank. Did she receive the document the second time he sent it? Ms. O'Connor replied no.
- d. Mr. Strocen submitted a list of tasks. The Holiday Inn objected to the introduction of the list as it did not relate to the OH&S Discriminatory Action. The Holiday Inn argued that the number of tasks is not relevant. The Adjudicator did not allow the Exhibit to be entered into the file.
- e. Holiday Inn objected to Mr. Strocen's question regarding Thunder and Root Beer. The Adjudicator did not allow the question.
- f. Mr. Strocen asked Ms. O'Connor to state why Mr. Strocen did not have pool training. She testified it was because the training was suspended due to covid. It was not available. Ms. O'Connor was asked “Do you remember about disposing of chemicals.

Do you remember about telling staff to dump chemicals on the ground?" Her response was no. She had no awareness of dumping chemicals on the ground.

- g. Mr. Strocen said that he made a recycling bin. She told him that there was a policy not to have one.
- h. Ms. O'Connor was asked if she recalled her reason for letting him go. She said his services were no longer required. He asked if it related to the toilet? She said she does not recall.

20. There was no redirect of Ms. O'Connor.

21. Brent Wilchynski's Testimony

- a. Mr. Wilchynski testified that he was the Operations Manager for the Holiday Inn Express Hotel in Yorkton. He was the Construction Manager when the hotel was built. He is responsible for 7 Hotels in the Holiday Inn Express chain. He has been with the company since 2007 when the Hotel was built. Mr. Wilchynski was asked if there were regular set dates for his visits to the hotel. He replied there was no set schedule for visits.
- b. When Mr. Strocen was hired Kim brought his name forward. Kim reports to him. All of the General Managers of the seven properties report to him. From September to November, 2022 he visited the Holiday Inn several times. For the full month of October, 2021, he visited every week. He was not able to meet with Mr. Strocen because every time he visited, Mr. Strocen was not present during work hours. He made 5 visits between 10:00 am to 5:00 pm.
- c. Mr. Wilchynski had concerns that he could not meet with Mr. Strocen because he had to discuss what needed to be done. He spoke to Ms. O'Connor about Mr. Strocen. The discussion between Ms. O'Connor and him was about tasks not getting done. They listed things that needed to be done. They talked regularly about Mr. Strocen. They like to know where staff are at all times; for example a diabetic staff member had passed out, They needed to have plans to address things that needed to be done. They discussed Mr. Strocen's inability to be present and get things done.
- d. The termination of Mr. Strocen's employment was a joint decision. Brent was in Kim's office. The termination was not in person. It was on the phone.

22. Cross Examination of Brent Wilchynski

- a. Mr. Strocen asked Mr. Wilchynski if Mr. Strocen had improved the property since he started. Mr. Wilchynski said yes, the grass overall was better.
- b. Mr. Strocen asked if Mr. Wilchynski remembered meeting Mr. Strocen in the hallway and telling Mr. Strocen that Ms. O'Connor said Mr. Strocen was responsible for the improvement in the grass cutting. Mr. Wilchynski's response was, no he did not.
- c. Mr. Strocen had no more questions.

23. Barry Strocen's Testimony

- a. Mr. Strocen testified that when he was hired he was told he would be working with the Quore app. Everyone follows it. But he was continually being contacted personally. He was an isolated employee. He had to be on his cell phone. He was told to be on cell phone all the time to follow the Quore app. He still had to look at the Quore app doubling the information for no reason, It was psychological and power harassment. He objected to comments by a third party. That was harassment by the Housekeeper.
- b. As for the 3-month probation period, there should have been at least one or two performance reviews at this time but were none. The main ground for discriminatory action was the harassment by Kim.
- c. He was fired before he was able to file his complaints. He had chemical burns on his hands. He got burns because the chemicals go through the gloves. He got burns on his wrists as well. He asked if there were sufficient number of gloves to change them.
- d. Mr. Strocen quoted The Act regarding filing a complaint:

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.

Once Mr. Strocen had been told he was fired, he made a complaint to OHO Moorgen.

- d. He asked Kim O'Connor to provide sufficient reasons over the phone when he was fired. But she did not.
- e. With Kim and Brent not saying the truth about reading things and meeting him Mr. Strocen said that shows discrimination.

24. Cross Examination of Barry Strocen

- a. Mr. Seiferling said he entered the text exchanges into the shared program this morning so that they could be brought up on the shared screen. Mr. Seiferling stated in response to Paragraph 3, Mr. Strocen said Kim was harassing him with texts. However, Mr. Strocen said in one of his texts that Ms. O'Connor is the best manager he has every had.
- b. Mr. Seiferling said that in the texts in the OHO's file Ms. O'Connor asked 24 times where Mr. Strocen was. Why was she looking for him outside of the building? Mr. Strocen said it was all about the tone in the messages. Mr. Seiferling asked about where Kim was generally when she sent the texts. Mr. Strocen responded that she was in her office. Mr. Seiferling asked, "You reported directly to Kim?" He said yes. Mr. Seiferling was looking for the messages that would constitute harassment. Mr. Strocen said she made it personal. There were many messages. He testified that he was not doing the tasks because he was busy answering the texts.
- c. Mr. Seiferling asked where the text message was about him providing a 3-month plan before he would be hired as a Chief Engineer. It was not found by Mr. Seiferling. Mr. Strocen said that on Sept 13th he sent the 3-month plan. Mrs. O'Connor says she did

not receive it. Mr. Strocen said that she did get the 3-month plan because he would not have been hired as Chief Engineer without it. Mr. Seiferling asked if he followed up with her that she did receive the 3-month plan. Mr. Strocen said Kim also said that he would have gotten \$16.00/hr more a week before if she had gotten in his plan.

- d. Mr. Seiferling asked about the reporting structure. "Ms. O'Connor could assign you tasks because she was your boss." Mr. Strocen answered it was an understanding that tasks had to be recorded in the QUORE app. Mr. Seiferling asked if sometimes the tasks came through the app, but they could be verbal, could be by text. Mr. Strocen replied yes.
- e. Mr. Seiferling said, "You were assigned the task to fix the toilet." Mr. Strocen said yes, but Kim did not know what needed to be done. Chemicals needed to sit for an hour but he had to leave 4 minutes early. Mr. Seiferling said Mr. Strocen left a worker in charge of the task. Mr. Strocen said that he left the worker all the equipment to do the job. The toilet was not heavy. Mr. Strocen said he was not needed. Mr. Strocen said he told Kim that they should hire a plumber to do this. He then googled it and the job seemed easy. He did not verify that the task had not been done.
- f. Mr. Strocen said he had so many tasks to do he couldn't get them all done. He had 42 rooms to shampoo which he did and got the chemical burns. The list was so full that he could not get the tasks done. Mr. Seiferling commented that normally 4 rooms would be shampooed in a day. No one would be assigned 42 rooms in one day. Mr. Seiferling asked is that what you actually reported to the company?
- g. Mr. Seiferling asked, "You never got the chance to raise issues?" Mr. Strocen said no. He was fired the day he got the burns. The next shift he would have filled out the forms. He showed Ms. O'Connor his hands in the hallway and she walked on. She says no he did not. Mr. Seiferling said that the Employee's position was that the 3-month plan was received by Kim O'Connor. Mr. Strocen's testimony was that she pulled it up on her computer while he was in the office. Mr. Strocen answered yes.
- h. Mr. Seiferling said there were chemical issues with the pool. Testing is done by putting a strip in the water and then in the chemical. Is that correct? Mr. Strocen said that you have to add drops of chemical to the water. Mr. Seiferling said that the chemical was adjusted by auto feed; that staff never come into contact with the chemical. Is that right? Mr. Strocen said, "no you have to handle the chemicals to add them. Water cannot be dumped into the pool."
- i. Mr. Seiferling said that Mr. Strocen had testified that he had to have his cell phone on him at all times. Mr. Strocen replied yes.
- j. Mr. Seiferling said that Mr. Strocen commented there should be performance reviews during the probationary period. Mr. Seiferling asked, "Are you management? Do you set the rules?" Mr. Strocen said no. Mr. Seiferling commented that there is no rule that there has to be performance reviews.

25. Shauna Rushlau's Testimony

- a. Mr. Strocen had subpoenaed Mr. Rushlau to testify for the Respondent. Mr. Strocen asked Mr. Rushlau if he had been an employee of Holiday Inn. Mr. Rushlau responded

that he had but he was no longer an employee.

- b. Mr. Strocen asked that the pictures Mr. Strocen had taken of his hands be entered into evidence and be displayed on the shared screen so that Mr. Rushlau would be able to view them. Mr. Strocen asked if Mr. Rushlau remembered Mr. Strocen showing his hands to Mr. Rushlau in the hallway at the Hotel. Mr. Rushlau confirmed that Mr. Strocen had stopped him in the hallway and showed him his hands.
- c. Mr. Strocen had asked Mr. Rushlau to confirm that Mr. Strocen's hands had chemical burns. Mr. Rushlau said that the skin looked damaged but he could not confirm that the skin condition was caused by chemical burns.

26. Cross examination of Mr. Rushlau

Mr. Seiferling declined cross examination.

III. Positions

Holiday Inn

- 27. Holiday Inn's position is set out in the document, Brief of Law on Behalf of the Appellant Holiday Inn Express & Suites Yorkton, submitted subsequent to the adjournment of the hearing of this matter on January 17th, 2023. The issues identified in the Overview Section of the Brief were in summary the reason or reasons for the termination of Mr. Strocen's employment.
- 28. The main tenants of the Holiday Inn's position are in summary:
 - The employer had the right to, and chose to, rely on the use of termination without notice during a probationary period;
 - The employee, during the course of his employment, failed to raise concerns to management regarding alleged health and safety issues.Therefore the termination of Mr. Strocen's employment was not an unlawful discriminatory action contrary to section 3-35 of *The Saskatchewan Employment Act*.
- 29. In the Brief of Law the Holiday Inn outlined the test for discriminatory action on Page 4 of the document based on the following legal precedents:

"12. The following issues address the test for discriminatory action as originally set out in Britto. LRB File No 099-16, 2016 CanLII 74280 (SK LRB) ["Britto"]. This test has been revised and the requirement of a "nexus or connection" between the worker's protected action and employer's action was minimized in *Re Banff Constructors Ltd and Arcand* LRB File No 184-19, 2020 CarswellSask 696 ["Arcand"]. This revision was affirmed by the Labour Relations Board in *Clarke v AgraCity Crop & Nutrition Ltd.* LRB File No 184-20 2021 CanLII 23402 ["AgraCity"]. Ibid at para 10.

The Labour Relations Board in *AgraCity* recited the test as follows.

[10] 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)?

13. As determined by the Adjudicator in *Britto* and affirmed in the decisions noted above, the initial onus is on the employee to establish the prima facie case of discriminatory action.

[46] 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).

[47] 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; ...

14. This means that the onus is on Mr. Strocen to establish part one of the test, that he was engaging in a protected activity, and part two of the test, that Holiday Inn took discriminatory action. Once Mr. Strocen has established the prima facie case of discriminatory action then a presumption falls in his favour, as codified in s. 3-36(4)(a) of the Act and explained in *Britto* (*Supra* note 2 at para. 49):

[49] 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 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."

30. The Holiday Inn then addressed the three stages of the test set out by the Labour Relations Board in *Clark vs. AgraCity Crop & Nutrition Ltd.* (*supra*) in the Brief of Law:

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

"18. The action(s) which Mr. Strocen purported to have engaged in included:

- a. The reporting of health and safety issues regarding the use and storage of chemicals;
- b. Requesting training regarding occupational health and safety;
- c. Requesting proper protective equipment for the use of chemicals; and
- d. Reporting a workplace injury due to the use of chemicals and lack of adequate safety equipment for the tasks under his purview.

19. ... The Holiday Inn recognizes that section 3-35(a) is broad, but Mr. Strocen needs to do more than simply state that he has engaged in a protected activity — he needs to show how his claimed activities fall within section 3-35. In this case, Holiday Inn submits that Mr. Strocen has failed to do so.

20. If Mr. Strocen can show that his claimed activities fall within the scope of section 3-35, then Holiday Inn submits that Mr. Strocen's claim fails because the issues were not raised with his supervisor — Ms. O'Connor — who made the ultimate termination decision during Mr. Strocen's probationary period.

21. What we do know is that Mr. Strocen did not raise any of these purported issues with his supervisor — Ms. O'Connor. In doing so, Mr. Strocen did not raise the issues (whether or not the amount to protected acts) through proper channels. Holiday Inn categorically denies that any concerns or reports were made to Ms. O'Connor, as Mr. Strocen's direct supervisor.

22. If these complaints were made to other staff, then Mr. Strocen did not raise them through the proper channels. It is clearly outlined in the Holiday Inn workplace policy, which Mr. Strocen received and was required to review on his first day, that issues are to be raised to supervisors, and then management to be addressed. If Mr. Strocen did note these health and safety issues on the premises, then he did have a duty to raise them through proper channels, as an employee who does not raise these safety concerns can be a safety risk to other employees. ...

25 ... if Ms. O'Connor and Mr. Wilchynski, the individuals who made the termination decision, had no knowledge of any health and safety claims or concerns from Mr. Strocen, then how could his termination have been affected or influenced by any such reporting? As Ms. O'Connor and Mr. Wilchynski did not know about any health and safety concerns, and they were the ones making the probationary termination decision, then the decision simply could not have been affected by the concerns."

b. *Did Holiday Inn take discriminatory action?*

The Holiday Inn in its Brief of Law at para. 27 noted that the second part of the test addresses the substance of the action taken by employers, absent the reasoning for such action. At Page 9 the Brief of Law Holiday Inn states:

27. This stage relies on the definition of "discriminatory action" as outlined in s. 3-1(1)(i) of the Act which reads as follows:

(i) "discriminatory action" means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes termination, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty.

28. It is clear that termination falls within the broad definition of discriminatory action as provided by the Act. Holiday Inn does not contest the fact that Mr. Strocen was terminated, and therefore under the definition in the Act, they took discriminatory action.

30. However, the Holiday Inn submits that the analysis and the obligations on Mr. Strocen must go a bit further. Based on the Britto decision, the Holiday Inn believes that Mr. Strocen needs to show at least a minimal connection between the claimed protected action, and the discriminatory action. In this case, because there is no evidence that any protected action was raised with Ms. O'Connor, and she did not know about any alleged protected actions, there cannot be a nexus between the protected action and the discriminatory action."

c. *Holiday Inn had good and sufficient other reasons.*

The Holiday Inn's Brief addressed the third stage of the Test starting on Page 10. Under section 3-36(4)(b) of the Act if an employer can show there were **good and sufficient other reasons** for taking the discriminatory action, then the termination will stand. The onus is on the employer to establish that the action was taken for good and sufficient reasons which they listed in their Brief:

"34. Holliday Inn had many good and sufficient other reasons for Mr. Strocen's dismissal any of which are sufficient to satisfy the employer's burden under this stage of the test including:

- a. Mr. Strocen failed to report to work for his scheduled shifts. There were numerous occasions on which Mr. Strocen attempted to switch shifts with other employees on short notice, on a number of other occasions Mr. Strocen claimed he could not report to work due to family emergencies.
- b. Mr. Strocen also failed to remain at the workplace for the duration of his scheduled shifts. Management and other staff often reported being unable to find Mr. Strocen on the premise during his scheduled work hours, sometimes finding him out in his vehicle, other times reporting that once he returned his vehicle had moved as if he had left the property. Mr. Strocen regularly asked to leave early from his shifts and on one such

occasion left early even after he was instructed by the general manager to remain on site.

- c. Mr. Strocen's repeated failures to report to work and remain on the premise during his scheduled shifts lead to issues for other employees. These behaviours led to complaints from other employees about their ability to access and work with Mr. Strocen. Often management would be alerted by housekeeping that they were unable to locate Mr. Strocen, this ultimately took time and effort away from other tasks as management had to investigate and determine his whereabouts.
 - d. Mr. Strocen failed to complete tasks that were assigned to him by management. On one such occasion, Mr. Strocen was told to remain on the property for the remainder of his shift and attend to a time sensitive issue, the replacement of a toilet seal. Mr. Strocen did not remain on site and did not replace the toilet seal, instead leaving the task to a maintenance employee who had only worked for Holiday Inn for two and a half weeks and did not have sufficient experience or knowledge to complete the task.
 - e. Mr. Strocen was in his probationary period at the time of his dismissal and so Holiday Inn was entitled to dismiss him without notice for failure to pass his probationary period. Because of Mr. Strocen's performance issues, Holiday Inn determined that Mr. Strocen did not meet the standards required of him and thus he failed to pass his probationary period.
35. Of particular importance to this case is the fact that Mr. Strocen was on probation at the time of his dismissal. The probationary period needs to be the lens through which the good and sufficient other reasons are reviewed, since probationary periods create a low standard for the removal of a worker from a workplace — general unsuitability. ...

Probationary Periods and Terminations

36. When Mr. Strocen was hired he became bound by the contract of employment and was informed that the first three (3) months of his employment would be a probationary period. During a probationary period, an employee can be terminated without notice due to their general unsuitability for the work to be performed. LRB File No 181-04; 227-04; 255-04; 257-04; 2005 CanLii 63093 (SK LRB) ["Varsity Common Garden Market"]
37. There is a strong rationale which supports the use of probationary periods to determine the suitability of a worker. The probationary period is designed to determine whether someone is a fit with a particular workplace or position. In this case, Mr. Strocen was unsuitable, and Holiday Inn made a determination, that maintaining Mr. Strocen's employment would not be beneficial.
38. It has been found that where an employee has performance issues including where the employee is not compatible with the employer, or has interpersonal conflict issues with other workers there is good and sufficient other reason for the employer to dismiss the employee.
39. Adjudicators have considered issues involving the dismissal of probationary employees in a number of cases. ...In another case Crescent Point (supra) the employee was

terminated in his probationary period because he was deemed not to be a suitable fit for work with the employer. The adjudicator review the cases law on probationary terminations and layoffs, and concluded that the employer had good and sufficient other reason to lay off the employee based on the fact that he was in his probationary period .

40. The adjudicator in Crescent Point at paragraph 49 relied on a decision by the Saskatchewan Court of Queen's Bench to assess the standard to apply to probationary employees (Ibid at para 49 Montgrand v Amok Ltd. 1987 CanLII 4474 (SK LRB) 57 Sask 147.

Thus where such an employee is fired, it seems to me that the only onus that rests on an employer to justify the dismissal, is that he show the Court that he acted fairly and with reasonable diligence in determining whether or not the proposed employee is suitable for the job for which he was being tested. So long as the probationary employee is given a reasonable opportunity to demonstrate his ability to meet the standards the employer sets out when he is hired including not only a testing of his skills but also his ability to work in harmony with others, his potential usefulness to the employer in the future and such other factors as the employer deems essential to the viable performance of the position then he has no complaint. As for the employer he cannot be held liable if his assessment of the probationary employee's suitability for the job is based on such criteria and a fair and reasonable determination of the question. In my opinion the law does not require the employer to do anything more."

Credibility

46. Mr. Strocen's testimony was rife with absolutes, inconsistencies, omissions, and implausibilities. He was also evasive, and resistant to providing straight answers throughout his cross-examination, often telling stories, and bringing up past irrelevant events instead of answering the question put to him. Due to this erratic behaviour he cannot be considered a credible witness and his testimony is highly suspect.
49. One method of looking at credibility is to examine the evidence for three factors (SivipaucarAyquipa v. Canada (Citizenship and Immigration), 2013 FC 1019 (CanLII at para 16 & 19):
- a. Inconsistencies and fabrications;
 - b. Omissions; and
 - c. Implausibility
50. Holliday Inn submits that Mr. Strocen's demeanor while testifying, as well as his testimony which included many contradictions, omissions and implausibilities, should lead to the conclusion that Mr Strocen was not a credible witness, and his testimony should be approached with caution, if not completely discarded. We will provide an illustrative, non exhaustive list of examples of issues with Mr. Strocen's testimony, under each of the four categories. ...

Demeanor

52. Mr. Strocen's demeanor also showed in his evidence and cross-examination. When asked about the reporting structure in the workplace, Mr. Strocen because argumentative, his answers inconsistent and evasive. First, claiming that he reported to no one as he held a management position and that his taskings came from the Quore application. Before ultimately admitting exasperatedly that he did in fact report to Ms. O'Connor, the General Manager of Holiday Inn.

Omissions

55. At the hearing, Mr. Strocen alleged that he had been harassed by Ms. O'Connor. He stated that he had been the victim of psychological harassment, power harassment, and third-party harassment. He claimed that Mr. O'Connor had done so through constant text messages checking in with him and assigning him impossible tasks, as he was required to have his cell phone on him. On cross examination Mr. Strocen was presented with evidence of text messages between himself and Ms. O'Connor [Exhibit "A2"]. On October 26th, 2021 at 7:35 a.m. Mr. Strocen texted Ms. O'Connor:

"Thanks for being understanding Kim. You are the most understanding manager ive worked for in along time."

56. After being presented with this text Mr. Strocen then claimed that was still the victim of harassment, but that it wasn't the text's themselves, but the number of text's he received from Ms. O'Connor which was harassment. After addressing the purpose of the text messages, attempting to locate Mr. Strocen and alerting him to urgent tasks within the duties of his position, he then claimed it was the tone of the text messaged which constituted harassment. In response, Mr. Strocen was shown the same evidence which included messages such as:

"Good morning Barry, Feel better this flue kicks everyone good right now"

"Sounds good rest up"

"Can u unlock 3rd floor stock room PIZ" (Plz being a short form version of please)

"Ty" (Ty being a short form version of Thank you)

"Can u come to office after PIZ"

"Np 101" (Short form versions of No problem laughing out loud)

"Morning Barry. Just wanted to let u know that I told Mark to put air filters on the top of the air unit for now"

"Yw" (Yw being a short form version of Your welcome)

"Hi Barry can u call me PIZ"

57. Mr. Strocen continued to claim he was harassed and again changed what was the basis of harassment in regard to the text messages, stating that it was the requests to come to the office which were harassment. In this case, Mr. Strocen was making baseless

accusations against Ms. O'Connor, and against Holiday Inn, which were contradicted, by his own evidence.

58. When we look at all of the documents from the OH&S complaint, including Mr. Strocen's own witness statement, there is no suggestion that he intended to make a harassment complaint. His omission of a harassment complaint when filing his discriminatory action complaint with OH&S calls into question whether harassment was ever an issue to begin with. If Mr. Strocen believed his harassment "claim" to be valid and a live issue, then it would need to be included in his complaint to OH&S. Therefore, Mr. Strocen was inconsistent on what his complaint to OH&S was about and what was actually important.

Implausibility

60. There are also numerous occurrences of implausible testimony coming from Mr. Strocen. One notable occurrence related to the number of rooms Mr. Strocen was assigned and shampooed during his last shift on November 1st, 2021.
61. In the initial complaint to OH&S Mr. Strocen claimed to have shampooed over 29 rooms, in his testimony at the hearing this number jumped to 40 rooms.
62. In response to these claims, Ms. O'Connor testified that it would be impossible for someone to shampoo more than 4-5 rooms during a shift, due to the time it took to complete the task, drying time which put the room out of use, and the need to address other urgent issues which would arise throughout a regular shift.
63. Mr. Strocen claimed that he had completed the shampooing for 40 rooms that day despite Ms. O'Connor's testimony. However, Mr. Strocen himself admitted that being assigned to shampoo 40 rooms was an impossible task, but he was a hard worker, and he tried his best to accomplish it. It is implausible that Mr. Strocen was expected to complete the shampooing 40 rooms that day, and it is also implausible that Mr. Strocen completed the task of shampooing 40 rooms that day.

Inconsistencies and Fabrications

66. Most significantly, Mr. Strocen testified in absolutes about having reported numerous health and safety concerns to Ms. O'Connor. These reports included the use of unsafe chemicals, lack of proper PPE (Personal Protective Equipment), improper storage of chemicals, improper disposal of chemicals, fire hazards, lack of proper ventilation, and a workplace injury he sustained. He claimed that none of these concerns were ever recorded or investigated, no reports were filed, and that rather than addressing his concerns Holiday Inn found it more convenient to fire him.
67. Ms. O'Connor testified that Mr. Strocen had never relayed or reported any health or safety concerns, or reported any workplace injuries. In fact, the Holiday Inn showed that, there was only one incident in which Mr. Strocen actually identified his possible health and

safety concerns, this was in the email and document entitled "3 Month Plan" [Exhibit "A1"].

68. However, the text messages provided by Mr. Strocen, in the Original OH&S file documents, show that on September 13th, 2021 Ms. O'Connor notified Mr. Strocen that she had not received the document, but rather a blank email. Ms. O'Connor confirmed this in her testimony at the hearing, also stating that she had never seen the document until she received the OH&S file documents in preparation for this hearing.
69. Following Ms. O'Connor's testimony, Mr. Strocen claimed he remembered that he had in fact followed up with Ms. O'Connor, and she confirmed receiving it. Later, Mr. Strocen then claimed that he remembered meeting with Ms. O'Connor in her office and reviewing the document together. A claim Ms. O'Connor categorically denied. The inconsistent testimony of Mr. Strocen was shown when the statements he made were all directly contradicted by the actual evidence presented at the hearing, including evidence he submitted.

IV. CONCLUSION

75. Holiday Inn submits that the appeal should be allowed for a number of reasons. First, that the evidence does not clearly support that Mr. Strocen engaged in a protected activity. Mr. Strocen did not file a complaint or report his safety concerns or workplace injury to management at Holiday Inn. It was not until following his termination that management at Holiday Inn became aware of any of the safety concerns Mr. Strocen had allegedly reported. In addition, many of his safety concerns were either work tasks for the maintenance crew he was a member of or management was already aware and working toward solutions, majority of which have been resolved as of today. As Mr. Strocen never reported his concerns, at least not through proper channels, he did not establish a prima facie case and thus the appeal should be allowed.
76. If the analysis does get to the final stage of good and sufficient other reasons, which Holiday Inn denies is necessary, then Holiday Inn submits that there was no discriminatory action taken against Mr. Strocen. The basis of Mr. Strocen's termination was based on his inability to perform the duties required of his position with Holiday Inn, a perfectly acceptable ground upon which to consider a probationary employee's suitability for a position. That is, Mr. Strocen's failure to report for scheduled shifts, his failure to remain at the workplace for the duration of his scheduled shifts, his failure to complete tasks assigned to him by management, and these behaviours which lead to complaints from other employees proved that he was simply not suitable for the position with Holiday Inn. The standard for termination during a probationary period is suitability, and that's the standard that should apply here in determining whether Holiday Inn had a valid reason to remove Mr. Strocen from the workplace. Given that Mr. Strocen repeatedly showed that he was unable to perform the duties required of his position with Holiday Inn, it is perfectly understandable that Holiday Inn would dismiss him for failing to pass probation."

Barry Strocen

31. There was no Brief submitted by Mr. Strocen.

V Legislative Provisions

32. The Definition of 'discriminatory action' under sec. 3-1(1) (i) of the Act is:

3-1(1) (i) "discriminatory action" means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes termination, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location reduction in wages change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty, but does not include

(ii) the temporary assignment of a worker to alternative work, without loss of pay to the worker, while:

(A) steps are being taken for the purposes of clause 3031(a) to satisfy the worker that any particular act or series of acts that the worker refused to perform pursuant to that clause is not unusually dangerous to the health or safety of the worker or any other person at the place of employment;

(B) the occupational health committee is conducting an investigation pursuant to clause 3-31(b) in relation to the worker's refusal to perform any particular act or series of acts; or

(C) an occupational health officer is conducting an investigation requested by a worker or an employer pursuant to clause 3-32(a).

33. The provisions in The Act relating to the discriminatory action being taken in this case are:

3-35 No employer shall take discriminatory action against a worker because the worker:

(a) acts or has acted in compliance with:

(i) this Part or the regulations made pursuant to this Part;

(ii) Part V or the regulations made pursuant to that Part;

(iii) a code of practice issued pursuant to section 3084; or

(iv) a notice of contravention or a requirement or prohibition contained in a notice of contravention:

(b) seeks or has sought the enforcement of:

(i) this Part or the regulations made pursuant to this Part; or

(ii) Part V or the regulations made pursuant to that Part; ...

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 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 reasons. ...

VI The Issues

34. From the test in the AgraCity case above the first three issues arise:

A. Was the discriminatory action taken by Hollday Inn because Mr. Strocen was participating in a protected activity described in section 3-35?

B. Was 'discriminatory action' taken against Mr. Strocen that which falls under the definition set out in The Act in section 3-1(1)(i)?

C. If the discriminatory action not taken because Mr. Strocen was participating in a protected activity described in section 3-35, was the discriminatory action taken against him by Holliday Inn for good and sufficient other reasons as set out in section 3-36(4)(b)?

35. As Mr. Strocen's employment was terminated during his probationary period, there is an additional issue raised by Holiday Inn:

D. Should the standards applied to probationary periods in law be used to determine whether Mr. Strocen's employment was terminated appropriately?

VII Analysis

Issue A. Was the discriminatory action taken by the employer because the worker was participating in a protected activity described in section 3-35?

36. In the Decision rendered by the Occupational Health Officer Moorgen, the OHO considered the following question on Page 4:

"1. Did the worker engage or participate in one of the activities described in section 3-35 that on its face could be the reason even in part for the discriminatory action?

Yes, Strocen did make the employer aware that he had identified some safety issues related to the use of certain chemicals and the storage therein Strocen did also ask for training that was not available until a later date to assist in his employment. Further, Strocen did make the Employer aware that he had sustained an injury at work due to the use of certain chemicals and the lack of proper protective equipment for the tasks that were under his purview. Strocen did ask the Employer to provide proper protective equipment. ...

...it is my decision that the termination of Barry Strocen's employment is an unlawful discriminatory action contrary to section 3-35 of *The Saskatchewan Employment Act*. "

37. I disagree with OHO Moorgen's conclusion. Mr. Strocen presented no evidence that he had made complaints directly to management regarding his safety concerns. Mr. Strocen's evidence that he had sustained chemical burns on his hands after shampooing 40 rooms was not filed as a complaint. Mr. Strocen testified that he would have filed the complaint but he was fired before he could. Management became aware of the complaint after his termination, and therefore it could not have been the basis for his termination.
38. Mr. Strocen examined Mr. Rushlau, his only witness, regarding what appeared to be chemical burns on Mr. Strocen's hands. Mr. Rushlau's evidence was that the conversation took place in the hallway of the Holiday Inn, and Mr. Rushlau could not confirm that the condition of the skin on Mr. Strocen's hands was caused by chemical burns. Mr. Strocen did not report these concerns to management before he left the job site. Therefore they could not have been the reason for his termination. Mr. Rushlau's testimony is not evidence of the activity in sec. 3-35 as the conditions were not reported to management which is the crux of this section of The Act.
39. I agree with Holiday Inn's position that the evidence does not support Mr. Strocen's termination being the result of his being engaged in a protected activity under section 3-35 of the Act for the following reasons:
- a. Mr. Strocen did not file a complaint or report his safety concerns through proper channels. Mr. Strocen did not file a complaint or report his safety concerns or workplace to management at Holiday Inn. Ms. O'Connor denied in her testimony that any concerns or reports were made to Ms. O'Connor, as Mr. Strocen's direct supervisor. I believe Ms. O'Connor's testimony.

b. Holiday Inn stipulated in their Brief of Law at Page 21 ‘... many of the safety concerns Mr. Strocen reported were either work tasks for the maintenance crew he was a member of or management was already aware and working toward solutions’.

c. In order for Mr. Strocen to make the case that the discriminatory action taken by the employer was because management believed the worker was participating in a protected activity described in section 3-35, the onus was on Mr. Strocen to not only state that he was engaged in protected activity but demonstrate how his claimed activities fall within section 3-35. I accept Ms. O’Connor’s testimony that Mr. Strocen did not bring his concerns to management directly.

d. Ms. O’Connor was asked if in the 8 weeks Mr. Strocen raised any issues. Her response was that not that she was aware. Mr. Strocen said he had emailed a 3 months plan for the maintenance department but she never received it. She has never seen it. Exhibit A 1 –Maintenance Plan 3 pages was entered and filed. She said she saw it for the first time when documents were sent out, Ms. O’Connor was asked if there was ever a leak in the pool. She responded No. Did Mr. Strocen raise any of the items in the report with you? No. Did he show you the chemical burns? No.

40. I find that as management did not know about the complaints/concerns because Mr. Strocen did not make them known to management Mr. Strocen cannot then claim that his termination was a result of his participating in protected activities falling with section 3-35.

Issue B. - Was ‘discriminatory action’ taken against Mr. Strocen that falls under the definition set out in The Act in section 3-1(1)(i)?

41. The definition of ‘discriminatory action’ is set out in the Act in the following section:

3-1(1)(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 ...

Clearly, the employer did take discriminatory action against Mr. Strocen as defined in The Act. According to the evidence presented in the documentation Holiday Inn terminated Mr. Strocen’s employment on November 1, 2021.

Issue C - Was the discriminatory action taken against the worker for good and sufficient other reasons as set out in section 3-36(4)(b)?

42. In order to decide whether the discriminatory action in this case was taken against the worker ‘for good and sufficient other reasons’ as set out in section 3-36(4)(b) of The Act, I reviewed the precedents in the Brief presented by the Holiday Inn. Holiday Inn in its Brief of Law at Page 11 provided the following precedent:

“In, Finning Canada (LRB File No. 006-20, 2020 CanLII 103929 (SK LRB) [“Finning Canada] (June 22 2020, Adj Tegar.) Adjudicator Tegar clarified that good and sufficient other reasons does not mean “just cause” as the term is known in law. The Adjudicator provided the following commentary.

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 that a dismissal for just cause would meet the test of good and sufficient other reason. However, I am not requested to deal with that here.

[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. [...] 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."

43. Holiday Inn listed what they considered many 'good and sufficient other reasons' for Mr. Strocen's dismissal in their Brief of Law which was borne out by the information contained in the OHO File and the evidence that was provided by witness testimony.

a. *Mr. Strocen failed to report to work for his scheduled shifts.* According to the evidence provided there were a number of family emergencies where Mr. Strocen notified Ms. O'Connor by text that he had to attend. Those were on October 5, October 30 and October 31, 2020. There was no permission sought for these absences. Mr. Strocen also took sick leave on October 25, 26 and 27. He did notify Ms. O'Connor that he would not be able to attend work but only after he had already been absent.

b. *Mr. Strocen also often failed to remain on the worksite for the length of his scheduled shifts.* Mr. Strocen regularly asked to leave early from his shifts and on one such occasion left early even after he was instructed by the general manager to remain on site. Examples from the text messages show on October 21 that he left at 3:00 pm and in the incident on November 1, 2020 he left at 3:15 pm. In both cases, his shift should have been over at 4:00 pm. In the second example, Mr. Strocen left early even after the General Manager had instructed him to assist with a task.

c. *Mr. Strocen failed to be available for duty on the worksite.* Again text messages from the OHO File exhibited that Ms. O'Connor was frequently trying to locate Mr. Strocen. Examples of the text messages sent by Ms. O'Connor to Mr. Strocen are:

- October 14 8:16 am – Can you come to my office
- October 14 11:06 am – Can you come to office please
- October 15 10:15 am – Can you come to office plz
- October 18 10:42 am – Can u come to office plz
- October 19 8:15 am – Can u come to office plz.

Ms. O'Connor's testimony provided explanation of the texts in her testimony. :
Ms. O'Connor was asked if there were any performance concerns. She responded:

- Could not find him when he was at work
- Received complaints from other staff
- Could not find him and would have to go looking for him
- Received 3 to 5 complaints about him. She reviewed them.

- Her personal knowledge was that she was looking for him to do a task and then she would have to phone or text him to find him. Holiday Inn entered Exhibit A2 – Responses to texts between her and Mr. Strocen. She said she often asked if Mr. Strocen could come and meet her. She was asked, “How many times did she have to text Mr. Strocen to locate him?” Response - 24 to 25 times.
- Mr. Strocen asked to leave work early –1 to 2 times per week.

Other staff reported being unable to find Mr. Strocen on the premises during scheduled work hours. The following examples are quotations from the OHO File:

- A text message from one of the staff, Reynaldo Eduria, to Ms. O'Connor on October 20, 2021 regarding Mr. Strocen reads:

“Sorry, Kim I have to leave early today I can’t stand work with him he always run away for coffee take 30 minutes gone always. I can work by my self to do the job hope you understand me today...

I leave already. He always missing around I don’t understand he always busy with his own business, he is not concentrate his job. He spent always outside setting his care using phone there’s job in the hot lots to do.”

- Mr. Enduria followed with a letter dated January 18, 2022 to The Management, Holliday Inn Express. The excerpts from the letter are:

“Back then, Mr. Strocen took breaks more often than the company allowed. He casually sat inside his car during office hours and let me do all the work even the task that was supposedly be done by both of us. Also, he was not paying attention to task and quore request, rather doing chore that was less important. He’s nowhere to be found within the facility anytime you need him.”

- A letter dated January 18, 2022 written by Mark Nino to the Holliday Inn Express, another employee, states:

“When Barry and I was on a same shift there was instances that I cannot find him on his work area instead he was at the parking lot inside his car.

- Lastly, there was a memo signed by Carol Emkita (spelling may not be correct) a Housekeeper at the Hotel. Excerpts from the Memo are as follows:

“Barry would be taking multiples long breaks and sit in his vehicle and and each time move his vehicle to a different spot in parking lot. ...

...Barry was unresponsive when message him to do a task only to notice his vehicle wasn't in the parking lot but comes from outside saying what did you need after hrs has passed. ...

Barry had to compete tasks on a work app call quore. They close the task when done When I did a check on the tasks they were not complete I had to create again to the other maintenance on shift. ...”

- Further, Mr. Wilchinsky testified that he had been attempting during the month of October to meet with Mr. Strocen to discuss work plans for the Hotel. He visited each week with the intent of training Mr. Strocen for his position but each time he attended the Hotel, Mr. Strocen was not found.

44. From the testimony of the witnesses and the documents entered as Exhibits, the failure by Mr. Strocen to be located and available for work assignments took time and effort away from other tasks that staff were trying to complete that had to be assigned to other maintenance staff. Management also had to take time and energy away from their duties as they had devoted to investigating and determining Mr. Strocen's whereabouts.
45. I also find that the witnesses' statement and the documentation prove that Mr. Strocen failed to accomplish tasks that were assigned to him either through the Quore App or through the direction from his supervisor. The evidence shows that Mr. Strocen failed to demonstrate the skills required for his position as Chief Engineer by not completing tasks assigned and not providing supervision to newly hired maintenance staff.
46. In addition, I find that Mr. Strocen was not a credible witness. There were discrepancies in his testimony, in particular regarding how many rooms he had cleaned the last day of work
47. I find that Holiday Inn did have many 'good and sufficient other reasons' for terminating Mr. Strocen's employment set out in section 3-36(4)(b) which was borne out by the information contained in the OHO File and the evidence that was provided by witness' testimony as I have listed above.

Issue D. As Mr. Strocen's employment was terminated during his probationary period, should the standards applied in law to probationary periods be used to determine whether Mr. Strocen's employment was terminated appropriately?

48. Mr. Strocen filed a Complaint with the Occupational Health & Safety Branch that he had been the subject of discriminatory action by his employer under section 3-35 of *The Saskatchewan Employment Act*. His complaint has been filed, investigated and adjudicated using the legislative provisions set out in those sections of the Act that apply to discriminatory action.
49. In the Act, the relevant section regarding the employer's onus in a discriminatory action complaint by a worker is:

3-36(4) If discriminatory action has been taken against a worker who has acted or participated in an activity described in section 3-35:

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

As I have stated in my findings under Issue C that the Holiday Inn did have good and sufficient other reasons for terminating Mr. Strocen's employment, there is no need to analyze whether his employment being terminated during his probationary period has any further bearing on the efficacy of his termination.

VIII Conclusion and Remedy

50. In Summary, employing the test set out in *AgraCity*, supra, with regards to 'discriminatory action', and reviewing the documentation and evidence presented, I find the following:

1. *That the employee did not engage in protected activities*, i.e. activities that come within the ambit of s. 3-35. Management was not aware of any complaints/concerns supposedly held by Mr. Strocen regarding occupational health and safety and therefore the discriminatory action that was taken by the employer did not arise from any protected activities by the employee that fall within s. 3-35 of The Act.
2. *That the employer did take discriminatory action against the employee* within the meaning of that term as defined in s. 3-1(l)(i) by terminating the employment of Mr. Strocen.
3. *That the employer demonstrated there were good and sufficient other reasons for taking the discriminatory action under section 3-36(4)(b) of the Act*; therefore the termination will stand. I find the employer has satisfied the onus required to establish that the action was taken for good and sufficient reasons.

51. Section 4-6(1) of the Act sets out the adjudicator's powers on appeal:

4-6(1) Subject to subsections (2) to (5), the adjudicator shall:

(a) do one of the following:

(i) dismiss the appeal;

(ii) allow the appeal;

(iii) vary the decision being appealed; and

(b) provide written reasons for the decision to the board, the direction of employment standards or the director of occupational health and safety, as the case may be, and any other party to the appeal.

52. I have found that the Appeal by Holiday Inn of the Decision of the OHO in this matter being that the termination of Barry Strocen's employment is an unlawful discriminatory action contrary to section 3-35 of *The Saskatchewan Employment Act* is allowed.

53. I hereby quash the ruling by the OHO Stephen Moorgen in this matter dated January 6, 2022 that "the employer must cease the discriminatory action, reinstate Strocen to his

former employment under the same terms and conditions under which Strocen was formerly employed, pay him any wages he would have earned had he not been wrongfully discriminated against and remove any reprimand or reference to this matter from any employment record with respect to this worker”.

54. The Stay of Decision issued by me on October 31, 2022 is hereby rendered null as the Appeal of the Decision filed by the Applicant in this matter has been heard and a decision has been rendered by me.
55. I deny the Holiday Inn’s request for an order for costs of this appeal. An order for costs is not within the legislative jurisdiction of the Adjudicator.

Issued on April 24, 2023.

ME Weston

Marlene E.K. Weston - Adjudicator