LABOUR RELATIONS FILE NO. 135-24

IN THE MATTER OF AN APPEAL TO AN ADJUDICATOR PURSUANT TO

s. 3-53 and 3-54* of *The Saskatchewan Employment Act

BETWEEN

Waboshi Nakihimba **APPELLANT**

AND

Victoria's Tavern Inc. **RESPONDENT**

ADJUDICATOR: Terrance Chinn

APPELLANT SELF REPRESENTED: Waboshi Nakihimba

RESPONDENT SELF REPRESENTED : Matt Pinch, Chris Cole

DECISION

BACKGROUND

[1] This matter is an appeal of a decision dated June 5, 2024 made by Karla Kobayashi and Iheanyi Ajomiwe, Occupational Health Officers, Harassment and Discriminatory Action Prevention Unit, Occupational Health and Safety Branch. In that decision it was found that Waboshi Nakihimba (hereinafter referred to as WN) had "...raised a health and safety concern to Brandon Sweet on April 14, 2024 via text message". It will be quite evident from the evidence that this should have been April 14, 2023 and not 2024. The decision went on further to find that the reasons for termination of WN's employment with Victoria's Tavern Inc., (hereinafter referred to as VT) "was a result of many factors, including his poor attitude, habitual tardiness for shifts, his inability to accept and implement coaching and feedback, and for walking out on his shift". The officers found that VT provided good and sufficient other reason for WN's dismissal and that his termination was not an unlawful discriminatory action contrary to section 3-35 of *The Saskatchewan Employment Act*.

[2] The parties have agreed to my being the Adjudicator in this appeal. Numerous emails were passed with the parties and myself in preparation for a hearing. A date for the hearing was agreed and WN was to appear in person and VT's representatives were allowed to appear by video conference and any of their witnesses could appear in person or by video conference. The parties were requested to provide a list of any documents and witnesses for the hearing.

[3] This dispute was the subject matter of a previous appeal between the parties found in *LRB 078-23*. That case stemmed from the same complaints by WN as found in this appeal. The same Occupational Health and Safety Officers were also involved in both *LRB 078-23* and this appeal. The Officers were under the impression that WN did not want to pursue his desire to return to his employment and closed the file. WN appealed that finding and the Adjudicator in *LRB 078-23* found that there was a misunderstanding of WN's wanting to return to work or not. As a matter of procedural fairness the matter was referred back to Occupational Health and Safety for a redetermination of the complaint. The decision in the redetermination was in favour of VT and has led to the present appeal.

[4] VT owns and operates restaurants and they are managed by Leo's Group. WN was hired by VT as kitchen staff, a line cook, in their Regina location, on February 27, 2023. He started work the following day. WN's last day of work at VT was April 16, 2023.

[5] The applicable legislation for this appeal is found in *The Saskatchewan Employment Act*, sections 3-53, 54 and 35 and 36 set out below:

> Discriminatory action prohibited
> 3-35 worker:
> No employer shall take discriminatory action against a worker because the
> (a) acts or has acted in compliance with:
> (i) this Part or the regulations made pursuant to this Part;
> (ii) Part V or the regulations made pursuant to that Part;
> (iii) a code of practice issued pursuant to section 3-84; or
> (iv) a notice of contravention or a requirement or prohibition contained in a notice of contravention;
> (b) seeks or has sought the enforcement of:
> (i) this Part or the regulations made pursuant to this Part; or

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

3-36(1) A worker who, on reasonable grounds, believes that the employer has taken discriminatory action against him or her for a reason mentioned in section 3-35 may refer the matter to an occupational health officer.
(2) If an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 3-35, the occupational health officer shall serve a notice of contravention requiring the employer to:
(a) cease the discriminatory action;
(b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;
(c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and
(d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.
(3) If an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 3-35, the occupational health officer shall advise the worker of the reasons for that decision in writing.
(4) If discriminatory action has been taken against a worker who has acted or participated in an activity described in section 3-35:
(a) in any prosecution or other proceeding taken pursuant to this Part, there is a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 3-35; and

(b) the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason.
(5) The amount of money that an occupational health officer may require to be paid pursuant to clause (2)(c) is to be reduced by an amount that the officer is satisfied that the worker earned or should have earned during the period when the employer was required to pay the worker the wages.
(6) The employer has the onus of establishing the amount of the reduction mentioned in subsection (5).

PRELIMINARY MATTERS

[6] WN made a request by email that the hearing be recorded. His reasoning was that a record is necessary for any potential appeal of my decision. My reply and decision on this point to WN was as follows:

"Administrative tribunals, such as our forum, are not required to record the proceedings, unless required to do so by statute, see: *Canadian Union of Public Employees, Local 301 v. Montreal (City), [1997] 1 S.C.R. 793.* Tribunals traditionally are not permitted to record hearings. This preserves the informality of proceedings. There is a long tradition in labour law that can be traced back to a decision issued by the Canada Labour Relations Board. The following decision dealt with recording proceedings (*Canadian Merchant Service Guild and Canadian Pacific Limited, [1983] 3 Can LRBR 87).*"

Further, any appeal must be based on any error in law and not on findings of fact. The Adjudicator finds the facts which normally would not be challenged and only the law applied to the facts can be up for review on appeal. Accordingly, I ruled that the hearing was not to be recorded.

EVIDENCE

[7] The following decision in *Veldman* v. *Rural Municipality of Hazel Dell #335*, LRB 042-24 is applicable to this matter:

> 42. An appeal such as the present involves a de novo consideration of the matter by the adjudicator. The matter is heard anew or afresh as in a hearing of first instance. The appeal is based on the evidence introduced by the parties at the hearing and, as may be determined by the adjudicator, the material provided by the director pursuant to sections 3-53(10) or 3-55 of the Act. The adjudicator's decision is not limited by the reasons or decision of the Occupational Health Officer. See in that regard: Nicholson v. Domsask Holdings Ltd., LRB File No. 220-14, May 13, 2015 (Sask. LRB) at para 25

A hearing was held on June 4, 2025 in Regina, Saskatchewan. WN appeared in person, Matt Pinch and Chris Cole appeared on behalf of VT by video conference. All of these persons were affirmed. They were representing their respective parties but also giving evidence at the same time. WN made the valid point that as he is self represented there must be a certain leeway given to him in his presentation. Matt Pinch and Chris Cole represent a corporate entity but are not lawyers and VT is also considered as being self represented. It is not for me to tell either party how to present their case.

[8] The appeal of the Occupational Health and Safety Decision is conducted on a *trial de novo* basis. In keeping with the informality of these types of hearings and the parties being self represented, the following portions of the *Saskatchewan Employment Act* are also noted:

Section 4-4
[1]....
(2) Subject to the regulations, an adjudicator may determine the procedures by which the appeal or hearing is to be conducted.
(3) An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.
(4) An adjudicator may determine any *question* of fact that is necessary to the adjudicator's jurisdiction.
(5) A technical irregularity does not invalidate a proceeding before or by an adjudicator.

[9] Hearsay evidence is an important rule of law but as stated I am not bound by the rule. Nevertheless, the weight given to any hearsay evidence should still be carefully considered. There must be reliability and fairness in determining whether the hearsay evidence is accepted. The party who the hearsay statement is attributed to cannot be questioned as to detail and veracity. What can be important is whether the hearsay evidence is either corroborated or more importantly contradicted by first hand information provided by the other party. At the same time, any business records and medical records can be considered as reliable. *See: L. (B.) v. Saskatchewan (Ministry of Social Services), 2012 SKCA at paragraph 24.* I would also suggest that an email can be taken as at least proof that it and its contents were made.

[10] It was acknowledged by VT and WN that the first day of work was February 28, 2023 and the last day of work March 16, 2023. VT also acknowledged that they mistakenly had WN as quitting rather than being terminated on the Record of Employment.

[11] It is noted that WN was a probationary employee. You can terminate a probationary employee without a specific reason, but you cannot do so unfairly or in a discriminatory manner. The following decision assists in a consideration of termination for probationary employees. See: *Canadian Union of Public Employees, Local 726 v. Estevan (City), 2011 CanLII 11357 (SK LA),218:*

> "Notwithstanding that an employer has a "fairly broad latitude in determining the suitability of a "probationary employee", Arbitrator Kaufman noted at paragraph 111 that:
>
> ...the legal and arbitral jurisprudence establishes that the right of an employer to exercise its judgment or discretion in this regard is accompanied by the duty or obligation to exercise it in a manner that is not in bad faith (or, put otherwise, in good faith), not arbitrary, and not in violation of any of the provisions of the collective agreement."

The present situation is not governed by a collective agreement as in the aforementioned case but the basic principles still apply. There will be more comment on probationary employees later in this decision.

[12] The legislation we are considering sets out that on the face of it, that if a complaint about health and safety conditions is made and followed by termination, what follows is a presumption of a discriminatory action or bad faith. The onus then falls on the employer to disprove discrimination as set out in the legislation. I should add that the complaint does not have to be proven, only that a complaint was made. In the circumstances, VT acknowledged that WN was terminated, VT presented their case first.

VICTORIA'S TAVERN INC. PRESENTATION

[13] Matt Pinch represented VT. He is a co-founder and co-owner of VT and also a co-owner and CEO of Leo's Group, which manages VT. Chris Cole is the Director of Growth and Wellness for Leo's Group, responsible for human resource issues. WN objected to these representatives but I do not find anything untoward in these individuals acting on behalf of VT. They represent vested interests in this matter.

[14] VT'S presentation provided by Matt Pinch and Chris Cole followed the Document VT provided to the Occupational Health and Safety Officers. The Document was provided by me to WN at his request by email attachment dated well before the hearing. WN acknowledged by email that he received the Document and was able to open it. The Document was the response on behalf of VT to the Occupational Health and Safety Officers to provide why WN's employment was terminated. It is part of the appeal record. VT also provided the Document to WN and myself before the hearing.

[15] WN has questioned whether any documents provided by VT at the hearing should be considered because it was not appropriately provided before the hearing. WN argues that there was a request for this information by me to provide any documents and witnesses before the hearing. My email of April 2, 2025 to the parties in preparation for a hearing stated, in part, as follows:

> "I should also add that when the time comes for the hearing, any documents that the parties intend to produce should be shared electronically or otherwise to the opposite party and myself before the hearing if possible. In addition, please advise as to what witnesses, if any will be called for the hearing. Again, I will allow them to attend by video conference."

It was not mandatory and a request only. As well, WN was privy to this information well before the hearing. The Document and its contents are allowed to be considered. I also have considered section 4-4 of *The Saskatchewan Employment Act* that was previously set out. The Adjudicator sets the procedure and technical irregularities do not invalidate the proceedings. The aim I have is to give some leeway to both parties and allow a full consideration of what has or has not happened. At the same time the issue of hearsay evidence hangs over the presentation on behalf of VT.

[16] The Document provided by and referred to by Matt Pinch show business records evidencing shifts worked by WN. There are also copies of email texts between WN and his supervisor, Brandon Sweet, at VT. The business records show shifts that WN worked from February 28, 2023 to April 16, 2023. They also show sick days and late days for WN. The texts between WN and Brandon Sweet indicate that WN was cautioned by Sweet about being late.

[17] The other evidence given by Matt Pinch referred to incidents found in the Document. There were descriptions of workplace issues with co-workers. As well, it stated that Brandon Sweet told WN the reasons for his termination.

[18] Matt Pinch related that WN was hired as a probationary employee and as such his permanent employment would be evaluated based on such things as attitude and being a team player.

[19] Matt Pinch said in the business the hours can vary each day and may not necessarily be eight hour shifts. He pointed out that the Document indicates varying hours for shifts for WN.

[20] The Document indicated no issues with WN for the first pay period. The Document alludes to an incident in the second pay period with a co-worker where WN stated he knew what he was doing when the co-worker tried to give instructions and WN threatened to walk out.

[21] The third pay period records shows three late days of five to ten minutes each time. WN was warned about being late, as shown in an email text. WN had also booked off sick for two days during this pay period, which is shown in the records. There are also texts between WN and Brandon Sweet where WN advised he couldn't make work because he was sick. There is also a text where Brandon Sweet cautioned WN about being late stating "starting to become a habit, let's change that". The Document also referred to an incident with a co-worker about a broken coffee mug and WN refusing to clean up.

[22] The records show the number of shifts that WN was receiving in these pay periods. There were five shifts in the first pay period when he was training. The second pay period shows ten shifts The third pay period indicates nine shifts. The fourth pay period twelve shifts but included the abbreviated last two days of employment.

[23] Matt Pinch then reiterated what was describe in the document about incidents in the kitchen on April 15, 2023. This was in the fourth and last pay period. The document comments that WN was working with other co-workers and one of them asked a question of WN and when there was no response he then moved over to assist WN. In doing so the co-worker splashed hot oil on WN but apologized. The co-worker then started telling WN to work quicker. WN walked out after this. The email texts found in the documents from WN to Brandon Sweet acknowledges that there was an incident of being splashed with oil and confrontations with other workers. The text from WN then stated that he was sent home by one of the co-workers. He stated that he was also doing his job properly and there was no apology for the hot oil splash. WN further complained in the email text about how other workers talked down to him.

[24] Matt Pinch submitted that WN was terminated because of his walking out in the last kitchen incident, poor attitude, tardiness and inability to work with other co-workers without confrontation.

NAKIHIMBA PRESENTATION

[25] WN's evidence reiterated and referred to the comments made in his original complaint form with Occupational Health and Safety for much of his presentation. The complaint form was received by Occupational Health and Safety on April 28, 2023 for *LRB 078-23*. The document had been placed into evidence by WN and is part of the appeal record.

[26] WN also provided a number of articles on what a cook does, bullying in the workplace, information on urinary tract infections, anger and smoking, a medical record about his urinary tract infection, Worker's Compensation documents concerning injuries to WN at a previous restaurant, and documents concerning his claim to Employment Standards for outstanding wages owing to WN from VT. He was awarded outstanding wages. The documents for the most part, do not add to the appeal.

[27] WN in his complaint form alleges a supervisor and another line cook were the persons alleged to have discriminated against him. WN's gave evidence, first hand, about how certain co-workers yelled at him for not finishing tasks on time when he thought he was completing his tasks and following food and safety guidelines. As well, he said he was given different instructions by other workers about how to complete certain tasks. He also thought a co-worker was talking behind the back of other workers in a different language. WN continued that he was cut down on shifts during his first few week of works after complaining he had worked a seven hour shift without a break.

[28] WN gave evidence about the incident on April 15, 2023 where he said he was burned and then blamed for this happening. His evidence was that the co-worker caused the hot oil splashing on him and said there was no apology forthcoming. WN said he was told to leave the workplace by one of his co-

workers after the the burn incident. He was also asked to clean kitchen equipment when it was not safe because the gas was still on and he refused to do so. WN said he was then tasked to do cleaning chores during service time. He also thought his hours were cut down after this last incident.

[29] The Complaint form asked WN when any health and safety concerns were brought to the attention to his employer. WN stated he made a complaint in an email to Brandon Sweet on April 14, 2023. He said he had made verbal complaints to Sweet about bullying on previous occasions but they were never acted upon. He thought he handled any bullying quite well and put up with any yelling, profanity, criticism or belittling thrown at him. He said he did feel some stress. WN stated he suffered from a urinary tract infection and this caused him to be late for work.

[30] WN went on further to say he was not given a reason for his termination. I am adding that one of the questions in the complaint form asked whether he was given reasons for the actions taken against him. His response was that there were:

> "Discriminating reasons. They expected me to be tolerant of their illegal and reckless behaviour. They expected me to remain silent regarding the abuses at the workplace".

ISSUES

[31] WN commented in his written submission about his dissatisfaction with the delay and fairness in this process with Occupational Health and Safety to determine his complaint. He complained about what he considers an improper investigation by the Occupational Health and Safety Officers. I do not pass judgement on those concerns one way or the other. My role and duty is to re-examine and determine whether or not VT has violated the rights of WN according to the *Saskatchewan Employment Act,* as found in found in sections 3-53 and 54, and sections 35 and 36.

[32] The parties were allowed, after the hearing, to provide any submissions, summaries of evidence or arguments as to their case by June 25, 2025. The other party would then have ten days for any reply. They were advised that no new evidence can be considered. Both parties provided submissions by June 25, 2025 and as well replies by July 5, 2025. Both parties provided some new facts in their submissions and only evidence adduced at the hearing can be considered by me. WN in his reply to VT's submission also requested that I also impose punitive damages of $25,000 against VT. There is nothing in the previously mentioned sections of the *Saskatchewan Employment Act* that allows me to make such an award. The case mentioned by WN, LRB263-16, deals with a situation and applicable legislation far different from the matter before me.

[33] 1.What can I consider as admissible evidence?

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

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

4. 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) and not in retaliation of the complaint by WN on health and safety concerns?

5. What is the standard for termination of a probationary employee and its applicability to this case when considering *Sherwood Co-operative Association Limited v. Retail, Wholesale and Department Store Union, Local 539, 2010 SKQB*?

ANALYSIS

[34] The relevant legislation has placed a reverse onus on VT to show that WN was not terminated because of his health and safety complaint of April 15, 2023. VT chose not to produce any first hand witnesses for the hearing. Rather there is hearsay evidence as to various incidents. VT attempted to strength their witnesses by providing what they termed "affidavits" where the various individuals signed the document beside the incident that they were involved. These are not proper affidavits and in any event do not hold the same reliability as first hand evidence because the makers cannot be questioned.. Still, there might be incidents that can be considered as I am not bound by the hearsay rule. VT has made their case much more difficult without first hand witnesses.

[35] Most of the presentation of VT is hearsay evidence as the individuals who were parts of incidents were not called as witnesses. The situations they were involved in were simply referred to in the Document by VT's representatives. Their information was also referred to and found in the six page Document. In other words, Matt Pinch and Chris Cole were not present in the various situations but heard about the incidents second hand.

[36] There are business records in the form of attendance records provided in VT's Document. As well, there were copies of email texts between an employee of VT and WN. The Document provided by VT can be relied on at least as it related to time records and emails. The time records are valid business records and the emails are viewed as being unaltered and reliable at face value.

[37] In reviewing the emails between WN and Brandon Sweet, which I accept as evidence, WN in his email of April 13, 2023 at 11:03 PM stated that he wanted to bring a matter to Sweet's attention either the next day or Saturday. Sweet asked WN in a reply email dated April 14 at 10:44 AM what the issue was. Then on April 15 at 12:32 PM, WN responded about how he was splashed with oil with no apology and that his co-worker was rude and talked down to him. Sweet replied to this by email on April 15 at 12:41 PM saying it was accidental, he isn't being talked down to and no one is out to get him and they everyone just want him to do his job properly. The emails from the parties are admissible but whether or not they are factually correct are not proven. WN had also sent copies of the emails to the Occupational Health and Safety officers and they are more readable than found in VT's Document. They show the dates and times of the emails between WN and Sweet. It is part of the appeal record.

[38] It hasn't been challenged that WN made a health and safety complaint by way of an email to Brandon Sweet. This would have been by WN's email of April 15, 2023. It is also unchallenged and found that WN had his employment terminated on April 16, 2023. It then squarely falls within the legislative requirements to place the onus on VT to show that WN was not terminated because of his complaint about health and safety issues. VT has to show that WN was terminated for other reasons.

[39] The business records show the days and hours that WN worked and also show the days late and sick. The records indicate that WN was late for work during his third and fourth pay periods a total of five times and sick for two days in the third pay period. There are emails from WN to Brandon Sweet that confirm this. As well, there is an email where Brandon Sweet cautions WN about being late. The emails from WN to Sweet do not indicate any reasons for his being late or why sick. The business records

and emails are acceptable evidence. WN provided first hand evidence and by an admissible medical record that he had a urinary tract infection that caused his late issues. There was no evidence that he passed on his medical issues to VT. WN thought he was cut down in shifts because he had complained about working a long shift. The records show fairly consistent work shifts during the second, third and fourth pay periods. The emails also shows Sweet had at one time agreeing to a replacement shift after missing a few days.

[40] There is hearsay evidence found in VT's document about incidents between WN and coworkers. In particular In the second payroll one of the coworkers was attempting to show WN how to prepare a dish but WN responded that he knew how to prepare the dish and threatened to walk. In the third payroll period a coffee mug feel and broke and WN refused to clean up. Then on April 15, 2023, the kitchen was busy and a coworker tried to assist WN with his work as WN did not provide any response when asked how he was progressing. While assisting the coworker accidentally splashed a little hot oil on WN's arm and when pointed out the coworker apologized. The coworker was asking WN to hurry up and this seemed to upset WN who then walked out and said he is not being sent home. Again all of this is hearsay evidence which on the face of it may not be admissible for my consideration.

[41] WN's first hand evidence confirms the incident with the coworker arguing about how to prepare a dish. WN though had a different slant about how he was in the right. This is also the same when reviewing the broken coffee mug scenario. WN also confirmed the kitchen incident where he said he was splashed with oil and that there was no apology. WN thought he was being sent home by someone who had the authority to do so. Without any first hand evidence provided by VT, WN's version of the events are preferred.

[42] The original April 13th email from WN does not indicate what the issue is that he wanted to bring up with Sweet. It was not until April 15th, towards the end of the evening, that the burning incident was brought to the attention of Sweet, and by association VT. Both parties agreed that WN saw Sweet on April 16, 2023 and his employment was terminated. The hearsay evidence of VT stated that the reasons were because he walked out the previous day along with, tardiness, attitude and not being part of the team. WN referred to his complaint form and stated that the reasons given to him for termination were that "they expected him to be tolerant of their illegal and reckless behaviour. They expected of me to remain silent regarding the abuses at the workplace". In WN's testimony he said that he was not given any written termination. I accept that the complaint form shows that there were reasons given to him for his termination but the actual incidents were not stated.

[43] Brandon Sweet was the one who actually fired WN. Without his direct, first hand evidence, I cannot accept second-hand evidence when it is contradicted by WN's first hand evidence. To put it very simply, incidents happened with co-workers who then reported this to Sweet, who in turn passed on the information to Pinch and Cole. We are not even talking about second-hand information but one more step beyond. The reliability factor diminishes along each turn.

[44] It is acknowledged that WN's termination came the day after the April 15th complaint. That raises some question of whether this was simply a reaction to the Complaint. What other possible reasons have been raised that can be recognized that it wasn't just because of the Complaint?

[45] There is also a question raised about reasons because WN was a probationary employee. VT took the position that no reason is necessary to terminate a probationary employee. "Suitability" of a probationary employee, or lack thereof, is the standard found by Mr. Justice Zarzeczny in *Sherwood Co-operative Association Limited v. Retail, Wholesale and Department Store Union, Local 539, 2010 SKQB* when terminating a probationary employee. Mr. Justice Zarzeczny concluded at paragraph 31:

"I have concluded that under the provisions of this agreement, and the law generally applicable to the right of an employer to terminate a probationary employee, "unsuitability" is the appropriate standard to be applied.....".

when letting go a probationary employee. This is a less onerous standard then for regular employees but still calls for a reason. The following parts of the decision assist in finding what grounds must be found to terminate a probationary employee:

> [15] The board's inquiry on this issue was informed by its review of the thorough discussion of "probationary employee rights" considered by arbitrator Pelton in his recent January 5, 2009 award in the case of Health Sciences Assn. of Saskatchewan v. Regina Qu'Appelle Health Region (Levett Grievance). In that decision, arbitrator Pelton referred to and in turn relied upon the decision of arbitrator Weiler in the case of British Columbia Telephone Co. v. Federation of Telephone Workers of British Columbia (1977), 1977 CanLII 2867 (BC LA), 15 L.A.C. (2d) 310; specifically paras. 18 and 28. In paras. 18 and 28, arbitrator Weiler outlined the "suitability" standard which he applied to the issue of "cause" for dismissal of a probationary employee. The B.C. Telephone decision, and the subsequent references in that arbitration award at paras. 8 to 10 to well-recognized authorities such as the authors Donald J. M. Brown, David M. Beatty and Christine E. Deacon, Canadian Labour Arbitration, looseleaf. 4th ed. (Aurora, ON: Canada Law Book, 2006) at p. 7-196, supports the conclusion quoted in the B.C. Telephone case that:
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> "...although an onus does lie on management to prove there is cause for the discharge of a probationary employee, that cause need not be of the same form or weight which would be required to justify the discharge of a seniority-rated employee". ... [emphasis added]
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> The Board in this case further referred to the statement of principle adopted in the B.C. Telephone case that:
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> ...an employer is entitled "to examine the suitability of [probationary] employees on the broadest of grounds ...". Suitability would appear to encompass such notions as the character and compatibility of the probationary employee, ... as well as a determination that such an employee is not likely to meet either the present or future standards and requirements demanded by the company ....
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> [16] At para. 6 of the award, the arbitrators relied upon the following statement of principle to guide them:
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> ... arbitrators must not overrule management's decisions in this regard unless the decision is arbitrary, discriminatory or in bad faith. This approach recognizes that a probationary employee has no tenure, and yet ensures that he is given a fair opportunity to demonstrate his ability to perform the requirements of the job and meet the standards for regular employment as set by management. [emphasis added]
>
> [17] Finally, the arbitration board recognized that when one considers the test of "suitability" the "onus lies with the employer to establish on a balance of probabilities that the employee is unsatisfactory or unsuitable for the position."

[46] The other important point in this situation is that the legislation imposes the duty on the employer to show that the employee was not terminated because of their health and safety complaint. It causes the employer to have to show a reason for termination other than because of the complaint. The employer then has the task of providing appropriate evidence to justify the termination. "Suitability" is the threshold.

[47] What other reasons could be found? There is documented evidence from business records and confirmed by emails of late days, a warning and then sick days, without reasons coming from WN at the time. There are various incidents in the kitchen between WN and other co-workers. The situations according to WN were not of his making and that is accepted, contrary to VT's hearsay evidence. Nevertheless, there were incontrovertible incidents of confrontation. Sweet did indicate in an email to WN that he was concerned about tardiness. There is nothing else provided by VT to substantiate their side or reasons except for evidence that is simply hearsay. It would have been very easy for VT to at least provide Brandon Sweet as a witness to tell first hand why he decided to terminate WN. They chose not to do so and all I have is WN's first hand accounts. The timing of the complaint to Brandon Sweet followed by termination the next day is more indicative of the reason for termination being because of the health and safety complaint by WN. There isn't sufficient acceptable evidence from VT to show otherwise. If the only acceptable evidence is first hand accounts from WN, he cannot be taken to be unsuitable because of any the incidents when he describes them as not his fault.

DECISION

[48] It has been found that WN gave a complaint about health and safety concerns. Further, WN's employment was terminated, which is considered a discriminatory act under the *Saskatchewan Employment Act*. VT did not provide any acceptable evidence to rebut the presumption that WN's termination was not as a result of the complaint. It then follows that WN is entitled to remedies provided in sections 32 of the *Saskatchewan Employment Act*.

In *Collier v. Village of Hawarden, LRB061-24*:

> [28] Collier's testimony was clear and unchallenged: she was terminated shortly after raising her concerns and contacting the OHS, and no alternative reason was provided for the termination. Her testimony, combined with the absence of any employer explanation, supports the inference that her termination was a direct result of her protected activities.
>
> [29] include:
>
> Section 3-36(2) of the SEA specifies the remedies for discriminatory action, which
>
> a) b) ordering the employer to cease the discriminatory action;
>
> reinstatement of the worker to her former position on the same terms and conditions;
>
> c) payment of any lost wages; and
>
> removal of any reprimand or other references to the matter from the worker's employment records.

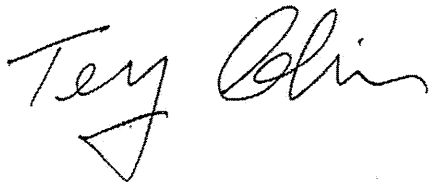
[30] Pursuant to section 4-6(1)(a)(ii) of the SEA, I have the authority to allow the appeal and make the appropriate order.

[31] Given the circumstances and the absence of any reason to believe reinstatement is impracticable, I find that Collier is entitled to be reinstated with back pay.

[49] I allow WN's appeal of the decision of June 5, 2024 made by Karla Kobayashi and Iheanyi Ajomiwe, Occupational Health and Safety Officers. This was a probationary employment situation for a 90 day period. WN started employment on February 28, 2023 and was terminated on April 16, 2023. I think it is impractical to order that WN return to his position. The remaining time is too short before he could possibly be terminated for being unsuitable. The bar to find this, with proper documentation and first hand information, is not high. WN from his own words did not seem to enjoy or accept the workplace environment and his last time working at VT's restaurant goes back in time to 2023.

[50] I order that VT should pay WN wages for the balance of the probationary period as lost wages. During the third and fourth pay periods WN was working about ten shifts each two-week pay period and at an average of seven hours most shifts. Working for the probationary period of 90 days beginning on February 28, 2023 would take probationary employment to the end of May 2023. It would be reasonable to expect WN to have three more two-week pay periods past March 16, 2023, when he was terminated, to the end of May 2023. There would have been ten shifts for each of these two-week pay periods at seven hours each shift. VT is ordered to pay WN the equivalent of 30 shifts at seven hours each shift, or 210 hours. This is to be paid at the same hourly wages as he was being paid before termination. There will also be deductions for income tax, CPP, EI and any other normal deductions that were being taken from wages.

Dated August 7, 2025 at Regina, Saskatchewan.



Terrance Chinn, Adjudicator

Right to appeal adjudicator's decision to board

Section 4-8 of the *Saskatchewan Employment Act*

(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III or Part V may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and (b) serve the notice of appeal on all parties to the appeal.