ONTARIO LABOUR RELATIONS BOARD

Occupational Health and Safety Act

OLRB Case No: 0987-20-UR
Health and Safety Reprisal

Luis Gabriel Flores Flores, Applicant v Scotlynn Sweetpac Growers Inc., Responding Party

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - November 9, 2020

DATED: November 9, 2020

Catherine Gilbert
Registrar

Website: www.olrb.gov.on.ca

Address all communication to:

The Registrar
Ontario Labour Relations Board
505 University Avenue, 2nd Floor
Toronto, Ontario M5G 2P1
Tel: 416-326-7500
Toll-free: 1-877-339-3335
Fax: 416-326-7531

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0987-20-UR**

Luis Gabriel Flores Flores, Applicant v **Scotlynn Sweetpac Growers Inc.**, Responding Party

BEFORE: Matthew R. Wilson, Alternate Chair

APPEARANCES: John No and Gabriel Flores on behalf of the applicant; R. Paul Hosack and Wendy Carter on behalf of the responding party

DECISION OF THE BOARD: November 9, 2020

1. This is an application filed by Gabriel Flores alleging a reprisal by Scotlynn Sweetpac Growers Inc. ("Scotlynn" or "the employer") under section 50 of the *Occupational Health and Safety Act,* R.S.O. 1990, c. O.1, as amended (the "Act"). Mr. Flores, a migrant worker from Mexico, alleges that he was dismissed after raising concerns about the working and living conditions as it related to the COVID-19 virus.

2. This hearing was conducted by video over the course of two days with the aid of translators. The applicant called Gabriel Flores, Amador Antonio Alcantara Segundo, a coworker who testified remotely from Mexico City, and Susanna Caxaj, a professor at Western University. The responding party called Wendy Carter, Director of Safety and Human Resources, Andreas Amaral Palomares, Supervisor, Jose Solara Uribe, Team Leader, and Robert Biddle, the former owner of Scotlynn.

3. As will be described in further detail, much of the evidence about important conversations was in dispute. I was required to make a determination about the credibility of the witnesses. For the most part, I found the witnesses called on behalf of the applicant to be more credible than the witnesses called on behalf of the employer.

4. For the reasons that follow, the Board grants the application and orders Scotlynn to pay damages as set out in this decision, forthwith.

Facts

5. Gabriel Flores travels each year from Mexico to Canada to work as a seasonal migrant worker. In April 2020, he arrived at Scotlynn along with other migrant workers. The workers were housed in bunkhouses on the farm, which have shared bedrooms and a kitchen.

6. Before detailing the facts of the case, it is important to understand the personal details of Mr. Flores. He was born in 1984 in Mexico City, where he works as a construction worker. In his first trip to Canada in 2015, he worked in Quebec as a seasonal worker picking apples. He completed his work term and returned to Canada in 2016 where he worked in British Columbia picking tomatoes and peppers. He was unable to complete the 8-month contract because his mother was ill and required surgery. He returned to Canada in 2017 to work in Quebec. He returned early because of a major earthquake in Mexico City that caused distress to his family. He was unable to return to Canada in 2018 and 2019 because of his mother's health issues. In 2020, he was assigned to work in Ontario at Scotlynn.

7. Mr. Flores testified that he expected to continue working for Scotlynn until November 30, 2020, which is the end date of his contract provided there is sufficient work.

8. The employer operates a farm with multiple crop fields in southwestern Ontario. Each year, the company hires seasonal workers from Mexico to fulfill its farming needs. The employer signs a contract with the employee that also names the governments of Canada and Mexico as parties. The contract is prepared by government authorities without input from the employer or the migrant workers.

9. Upon arrival, in April 2020, the workers were immediately placed in a 14-day quarantine as required by local public health officials due to the COVID-19 pandemic. Following the quarantine, the workers returned to the bunkhouses on the farm. Mr. Flores testified that the house was divided into 4 apartments, with each apartment housing approximately 13 people. He shared a bedroom with 3 other workers as well as common bathrooms.

10. Mr. Flores described the living conditions as “bad”. He said the beds were “one over the other” with poor quality mattresses. He testified that the walls of the rooms were not finished nor were they painted. On some nights, he had to sleep on the floor because of the poor condition of the mattress and bed. Mr. Segundo, a coworker, testified that there was not enough cutlery or cooking utensils. He agreed with Mr. Flores that there was not enough space to maintain a safe distance from the coworkers. The employer called no evidence to the contrary.

11. As it turns out, some 190 workers at Scotlynn tested positive for COVID-19.

12. Due to positive COVID-19 tests among the workforce, including a positive test for Mr. Flores, the workers were again required to be placed in a 14-day quarantine. This second period of quarantine was spent in a local hotel. While at the hotel, Mr. Flores encountered Susanna Caxaj – a professor at Western University - who ultimately introduced him to the Migrant Workers Alliance for Change, an organization dedicated to assisting migrant workers.

The events of June 17, 2020

13. The second quarantine ended on June 17, 2020 and the workers were bused back to the farm. Ms. Carter testified that she was at the farm to greet the workers, along with officials from the public health unit. As Ms. Carter does not speak Spanish, she relied on Andres Amaral Palomares – a supervisor - for translation. Mr. Palomares testified that the workers were told “the rules of COVID-19”.

14. Ms. Carter said that three workers expressed concerns with continuing to work and sought to return to Mexico. There is a dispute about whether Mr. Flores was one of the individuals. Ms. Carter believes that Mr. Flores was one of the individuals who wanted to return to Mexico, but Mr. Flores denied that he ever expressed an interest in leaving the farm.

15. Mr. Palomares also testified that Mr. Flores asked about returning to Mexico. Mr. Palomares said that he made inquiries with Ms. Carter and informed Mr. Flores that he was permitted to return to Mexico. He also said that Mr. Flores asked the public health doctor whether he could get infected with COVID-19 for a second time.

16. Nothing turns on this dispute as it was undisputed that only two workers (not Mr. Flores) returned to Mexico early as a result of the June 17, 2020 meeting.

The events of June 20, 2020

17. Mr. Flores shared his living quarters with Juan Lopez Chaparro, another worker from Mexico. Mr. Flores noticed that Mr. Chaparro was not feeling well. He and several co-workers approached the supervisors to ask for help, which resulted in Mr. Chaparro being hospitalized for the COVID-19 illness. On June 20, 2020 Mr. Chaparro died from complications related to COVID-19.

18. On that same day, the workers were called out of their bunkhouse around 11:30 pm to be informed of Mr. Chaparro's death. In attendance at this meeting were Dr. Shanker Nesathurai, the Medical Officer of Health for the Haldimand-Norfolk Health Unit, Peter Ciallella, a Roman Catholic priest, as well as Mr. Palomares, who provided translation. There was conflicting evidence as to whether Ms. Carter was in attendance. Mr. Flores asked if there was a treatment for COVID-19 and also asked about the length of time a person is contagious. The answers of Dr. Nesathurai were translated by Mr. Palomares.

19. Shortly after this meeting, Mr. Flores confronted Mr. Palomares and told him that the farm should take better care of the workers. Mr. Flores further asked that "the boss" (meaning Mr. Biddle) provide an explanation to the workers. Mr. Flores then either asked for the day off or told Mr. Palomares that he was taking the day off to mourn his coworker. Mr. Flores testified that Mr. Palomares showed anger in response to the statements and told the workers that they could have the day off on June 21 if they did not want to work.

20. Mr. Segundo testified to many of the same details as Mr. Flores' evidence. He testified that Mr. Flores told Mr. Palomares that he should have done more to assist the workers.

21. Jose Leobardo Solares Uribe – a team leader - who has worked at the farm for 20 years, was called by the employer to testify about the June 20 meeting. He said that Mr. Flores asked to go back to Mexico and that he wanted internet at the bunkhouse. Despite the incongruity of these two requests, Mr. Uribe confirmed these questions in cross-examination. He then stated, in cross examination, that he did not have a complete memory of the meeting of June 20.

The events of June 21, 2020

22. Mr. Flores testified that he awoke around 7:00 a.m. on June 21, 2020. Some of his co-workers were getting ready for work. One coworker – Amador Antonio Alcantara Segundo - was also taking the day off. Mr. Segundo was the nephew of Mr. Chaparro, the worker who died from COVID-19. Mr. Segundo testified at the hearing from Mexico City.

23. Mr. Segundo and Mr. Flores testified that on the morning of June 21, 2020 Robert Biddle (the former owner) and Mr. Palomares came into their bunkhouse and stood in the kitchen. Mr. Biddle held up his cell phone and showed a video of a person speaking with the media. Apparently this video had been circulating on the internet as there had been significant media attention focused on Scotlynn. Through translation provided by Mr. Palomares, Mr. Biddle accused Mr. Flores of being in the video and then told Mr. Flores that he was being sent back to Mexico in the "wee hours of the night".

24. In his testimony, Mr. Flores was able to identify Mr. Biddle as he had previously testified in the hearing. He also stated that a number of other workers identified him after he had left the bunkhouse.

25. Following this discussion, Mr. Flores requested assistance with a money transfer to send money back to his mother in Mexico who needed the money for her medications. It was undisputed that Mr. Palomares assisted Mr. Flores with the money transfer.

26. Mr. Segundo's testimony about the conversation between Mr. Biddle and Mr. Flores was very similar to that of Mr. Flores. He identified Mr. Biddle during the hearing by identifying a picture of him. He explained that he knew Mr. Biddle as "the boss", which he said was how the workers generally referred to him. He explained that he was on the phone with the consulate dealing with issues related to his uncle when Mr. Biddle entered the kitchen. Mr. Segundo testified that Mr. Biddle held up his phone said that Mr. Flores was on the video. There was some discussion and then Mr. Palomares told Mr. Flores that the "boss" does not want you on the farm anymore.

27. Mr. Biddle, the former owner of the employer, testified that he did not speak with Mr. Flores on June 21. He denied attending at the bunkhouse on that day. He testified that he was on his boat on Lake Erie celebrating Father's Day with his family. I will have more to say about why I do not accept this evidence.

28. Ms. Carter testified that she arranged for Mr. Flores to fly back to Mexico on June 21, 2020. The employer had booked and paid for the flight. In cross examination, it was pointed out that a worker was expected to pay for the flight if the worker quit employment before the end of the season. The employer only paid the flight costs if the worker was terminated.

29. When this was put to Ms. Carter, she explained that there was a provision in the contract that required the employer to pay for the flight costs if the departure was related to illness. Ms. Carter testified that since Mr. Flores was concerned about COVID-19, she felt the contract required the employer to pay the flight costs. However, under further questioning, it was apparent that Ms. Carter had treated Mr. Flores as resigning his employment as she took no steps to support her claim that the flight costs were covered due to illness. There is no evidence to support Mr. Carter's explanation that Mr. Flores had resigned or that the flights costs were covered due to illness. Ms. Carter also conceded that she did not require Mr. Flores to sign the customary paperwork when an employee resigned.

The events following June 21

30. Later in the day on June 21, Mr. Flores left the farm.

31. Mr. Flores testified that he understood that he had been fired and was being sent back to Mexico. He received a call from Ms. Caxaj on that day and explained to her what had happened. She arranged for him to be picked up at the farm around 5:00 p.m. Mr. Flores testified that he felt that he had no other option but to leave the farm. He still needed to work to support his sick mother and he could not return to Mexico.

32. Ms. Caxaj's testimony was consistent with that of Mr. Flores. When she contacted him on June 21, he told her what had happened, and she arranged for Mr. Flores to be picked up at the farm through an organization that assisted migrant workers. These arrangements were made by way of text messages. During the course of cross-examination, Ms. Caxaj was asked to produce the text messages. As the hearing was held by video, Ms. Caxaj read the text messages (written in Spanish and translated by Ms. Caxaj). It is not necessary for me to review the detail of those text messages. However, I will remark that the text messages were consistent with the evidence of Mr. Flores with respect to the steps taken to leave the farm.

The offer to return to work

33. On August 4, 2020, counsel for the employer wrote to counsel for Mr. Flores with an offer to return to work. Mr. Flores testified that he was made aware of this offer, but he could not return to the farm because of the poor working conditions and his concerns about exposure to COVID-19. He explained that he felt "very hurt" and could not return to a place where he "…was treated badly".

34. Mr. Flores has not yet obtained other employment. At the time of the hearing, he was still in Ontario without a permit to work.

The positions of the parties

35. The employer argued that the application must be dismissed because Mr. Flores was not engaged in a protected activity under s. 50 of the Act. Although it denies that he was dismissed, it asserts that even if he was dismissed for making comments to the media, it would not engage the protections of the Act.

36. The employer further argued that even if Mr. Flores believed he was dismissed, this was an error that was corrected by the August 4, 2020 return to work offer. Thus, not only did Mr. Flores fail to mitigate his damages by not returning to work, his refusal to attend work demonstrates that he was not dismissed.

37. The applicant argued that the employer had not satisfied its burden under subsection 50(2) of the Act. Counsel relied on the testimony of Mr. Flores and Mr. Segundo as the basis to assert that Mr. Biddle attended at the bunkhouse to confront Mr. Flores about the media video. In response to the employer's argument about engaging the protections of the Act, counsel argued that Mr. Flores was seeking enforcement of the Act by complaining about the working conditions and the lack of COVID-19 protections. In particular, Mr. Flores was asking the employer to take all reasonable precautions in the circumstances, a right that he had under s. 25(2)(h) of the Act.

Analysis

38. The applicant argues that his employment was terminated, contrary to section 50 of the Act, as a reprisal for exercising a right under the Act. Section 50 of the Act reads as follows:

> **50.** (1) No employer or person acting on behalf of an employer shall,
>
> (a) dismiss or threaten to dismiss a worker;
>
> (b) discipline or suspend or threaten to discipline or suspend a worker;
>
> (c) impose any penalty upon a worker; or
>
> (d) intimidate or coerce a worker,
>
> because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.
>
> (2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Board in which case any rules governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

39. In this matter, the onus is on the responding party to establish that it did not contravene the Act. Subsection 50(5) reads as follows:

> (5) On an inquiry by the Board into a complaint filed under subsection (2) or a referral made under subsection (2.1), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

40. The focus of the Board in these types of applications is whether the responding party engaged in the behaviours enunciated in subsection 50(1) of the Act because the worker acted in compliance with the Act, sought enforcement of the Act, or gave evidence in a proceeding under the Act. If any part of the employer's actions are tainted by Mr. Flores' efforts to seek health and safety measures, the Board will find a violation of the Act.

41. There is no dispute that Mr. Flores is a worker under the Act and protected by section 50(1) of the Act. The issue is whether he was dismissed, and if so, whether that dismissal was because he acted in compliance with the Act, sought enforcement of the Act, or gave evidence in a proceeding under the Act.

42. For the reasons that follow, the Board concludes that Mr. Flores was dismissed and that the basis for the dismissal was his efforts to seek enforcement of the Act.

Issues of credibility

43. I start with an analysis of the credibility of the witnesses because the evidence with respect to material discussions was in conflict. It is necessary for me to assess the credibility of the witnesses to determine which version of events more likely occurred.

44. An oft-cited decision offering guidance on the assessment of credibility is *Faryna* v. *Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 DLR 354 (BCCA). At p. 356-357, where the British Columbia Court of Appeal stated:

> … Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions (…) Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken.

45. I have serious concerns with the credibility of the witnesses of the employer.

46. The first witness was Ms. Carter who testified that she made the travel arrangements for Mr. Flores to return to Mexico. The most

glaring omission in the evidence was that there was no documentation supporting Mr. Flores' intention to resign. Mr. Flores testified that in every other experience where he left his work early he was required to complete documentation about his return to Mexico. There were no documents presented to the Board showing that Mr. Flores had resigned or commenced the process to return to Mexico.

47. It is also unclear why Ms. Carter arranged to pay for Mr. Flores' travel back to Mexico. Under Part X of the employment contract, the worker is to pay the travel costs if the worker quits his employment. If the worker is dismissed, the employer is required to pay for the travel. Ms. Carter claims that Mr. Flores quit his employment, yet the employer was willing to incur the travel costs. Ms. Carter testified that the employer was willing to pay the travel costs because Mr. Flores had concerns about COVID-19. Yet, there is no correspondence to Mr. Flores to this effect nor was there any evidence about the employer's decision-making process other than Ms. Carter's testimony. I would have expected Mr. Biddle – the owner at the time – to testify to the reasoning for the employer's decision. Without any other evidence beyond Ms. Carter's explanation, which is something that was only communicated at the hearing, I do not find this explanation to be credible.

48. Mr. Palomares' evidence must be considered carefully as he had an ongoing relationship with the employer that was dependent on the employer continuing to provide him work. He testified that he had been employed by the employer for 18 years as a seasonal worker.

49. During the examination-in-chief of Mr. Palomares, a series of questions were put to him about the allegations being made by Mr. Flores. For the most part, the questions were leading questions that elicited a "yes" or "no" answer. For every question except one, the answer from Mr. Palomares was "No" with no other explanation. For example, when asked if Mr. Flores raised any health and safety issues, the answer was "No". When asked if Mr. Flores stated that the employer should have taken the COVID-related issues more seriously, the answer was "No". A similar leading question was asked about whether the employer could have protected the worker who passed away or whether "the boss" or "El Patron" (as he was referred to by the workers) provided an explanation for what had occurred. All answers were a simple "No" with no explanation. Thus, the evidence given by Mr. Palomares in examination in chief was not persuasive.

50. Mr. Palomares was evasive in cross examination as he continued with a series of "No" answers despite routine questions to confirm his earlier testimony. For example, when reminded by counsel that the witness had been asked a series of questions about June 20, Mr. Palomares answered "No". He was then told that he was "asked an open-ended question about whether there was a discussion at all that night other than the doctor question". Again, he answered "No". This continued with several more questions that were merely repeating the testimony he had previously given.

51. Mr. Palomares confused his dates when he testified that Mr. Flores asked for the day off on June 21. It was undisputed that Mr. Flores had asked on June 20 so that he was off work on June 21. Yet, Mr. Palomares initially denied having any conversation with Mr. Flores on June 20 and then changed his answer when it became apparent that there had to be a conversation on June 20 since Mr. Flores' last day at the farm was June 21.

52. I am sensitive to the fact that Mr. Palomares' first language is not English. However, the evidence was that he provided translation to the workers and employer counsel used a translator for parts of his evidence. Thus, there is no reason for me to consider that a language barrier affected the quality of his evidence.

53. I found Mr. Biddle to be evasive during his brief cross-examination. He was not forthcoming that the company was a family business. When asked if the company was a family business, he said it was a corporate business despite acknowledging that he founded the business and passed it along to his son. He then acknowledged that Wendy Carter was related to him.

54. Mr. Biddle also denied being aware of media attention about working conditions at the farm. This was part of his narrative in denying that he confronted Mr. Flores about the negative media attention. I find it difficult to believe that Mr. Biddle was unaware (or even unconcerned) about the media attention as the evidence established that there was widespread media coverage about the ongoing health issues and working conditions at the farm. With more than 190 workers diagnosed with COVID-19 as covered in the media, it is reasonable to expect that Mr. Biddle was, at the very least, aware of the media attention. Mr. Biddle's denial of any knowledge about the media attention strains credulity and casts a doubt on the rest of his evidence.

55. Mr. Biddle's brief testimony was mostly about his boat trip and tendered to establish that he had an alibi on June 21, 2020. However, there was no corroborating evidence to support this alibi. It would be open to the Board, as argued by the applicant, to draw an adverse inference from the failure to call any evidence in support of this alibi.

56. Finally, with respect to the evidence of Mr. Uribe, I have already observed the incongruent statements that he alleges that Mr. Flores made (an expression to return to Mexico and a demand for internet access in the bunkhouse). In cross-examination, he confirmed that he did not remember much about the June 20 meeting. Thus, his evidence is of little assistance.

57. The witnesses that testified on behalf of the applicant were more credible and their evidence was more in accordance with the preponderance of probabilities.

58. Mr. Flores testified (over the course of two days) in a straight forward manner without any inconsistencies. His description of the working conditions was consistent with Mr. Segundo (who gave his evidence on a separate hearing day from Mexico City through a translator). There was no indication, and certainly no suggestion, that the two individuals colluded in their evidence.

59. At its simplest, Mr. Flores' evidence was that he came to Canada to work to assist his family, particularly his mother, in Mexico. There was no real challenge by the employer about Mr. Flores' circumstances. For him to suddenly want to return to Mexico – at the cost of giving up the work that he needed – would be inconsistent with the purpose of his objective to assist his family. I accept that he worked in close quarters with his coworkers with no ability to distance himself and was sincerely concerned about the risks of COVID-19. The employer presented no evidence to the contrary despite calling several witnesses who could have testified to the working and living conditions.

60. Mr. Segundo, who testified with the aid of an interpreter from Mexico City, was straight forward and concise in his evidence. He was not prone to exaggeration and gave no indication that he had any interest in the matter. His credibility was not seriously challenged by the responding party.

61. On the whole, I found the applicant's witnesses (including the applicant, himself) to be more believable. They resisted the temptation of self-serving evidence, were not evasive even when asked difficult

questions, and provided a consistent narrative that was more in line with the preponderance of probabilities.

Did Mr. Flores engage the protections of the Act?

62. I will now turn to consider the facts as they apply to the sections of the Act. The first inquiry is whether Mr. Flores acted in compliance with the Act, sought enforcement of the Act, or gave evidence in a proceeding under the Act.

63. The employer relied on *Abdulkadir v. Dough Delight Inc.*, 1998 CanLII 18320 (ON LRB) in support of its argument that Mr. Flores has not alleged that his employment was terminated for acting in compliance with the Act or seeking enforcement of the Act. The case offers no assistance because the applicant's conduct and allegations in the instant matter are materially different. The Board summarized the allegation in *Dough Delight Inc.* as follows:

> 15. … the applicant asserts that the company terminated the applicant in reprisal for his efforts to protect his health by seeking income replacement through short term disability benefits, rather than attend at work while still injured, with the risk that he might aggravate his health, and in reprisal for the anticipated or expected request that the applicant would make for accommodation at work, once he was well enough to return to work.

64. That is not what is being alleged in this matter. In the matter before me, Mr. Flores is alleging that his employment was terminated for raising health and safety concerns about the working and living conditions, in particular as it relates to COVID-19. If there was any doubt about these allegations, the pleadings make it clear:

> 53. Scotlynn terminated Mr. Flores' employment the day after Mr. Flores raised concerns about health and safety at Scotlynn to his supervisor.
>
> 54. Scotlynn informed Mr. Flores that his employment was being terminated because they believed he spoke publicly about worker safety concerns.
>
> 55. Whether Scotlynn terminated Mr. Flores' employment due to him raising concerns at the June 20, 2020 meeting, due to the video, or due to both incidents, Mr. Flores submits that the dismiss constituted unlawful reprisal contrary to

> section 50 of the OHSA. Therefore, he is entitled to damages.

65. I accept that Mr. Flores spoke out about the working conditions, the living conditions, and generally about his concerns about COVID-19 at the June 20, 2020 meeting. He had tested positive for COVID-19 and knew that his coworker (whom he lived with) had succumbed to the virus. I accept that he was vocal during the meeting about his concerns about health and safety matters. Mr. Flores denies being in the video shown to him by Mr. Biddle. However, I find that Mr. Biddle attended at the bunkhouse on June 21, 2020 and confronted Mr. Flores about speaking to the media about the safety concerns. Even though Mr. Flores denied speaking to the media, he was perceived as publicizing his complaints.

66. I reject the employer's argument that Mr. Flores did not engage the protections of the Act. There are no magic words to engage the protections of the Act. A worker is not required to cite the Act or specific sections. The evidence is that Mr. Flores was speaking out in an effort to get the employer to improve the workplace conditions. This is indirectly invoking section 25(2)(h) of the Act, which requires the employer to take every precaution reasonable in the circumstances for the protection of a worker.

67. The employer argued that Mr. Flores was complaining about something in the past and that such a complaint is not protected by the provisions of the Act. It argues that the circumstances giving rise to Mr. Flores complaint had come and gone.

68. There is no merit to this argument. The working conditions as they relate to the COVID-19 pandemic were the source of Mr. Flores' complaint and that issue persisted. It did not end at the time of Mr. Flores' complaint on June 20, 2020. Even as the hearing continued in October 2020, the pandemic continued. Mr. Flores was not just complaining about working conditions in the past, he was vocalizing concerns about ongoing health and safety issues.

69. Thus, the Board finds that Mr. Flores attempted to engage the protections of the Act.

Was Mr. Flores dismissed?

70. Subsection 50(5) of the Act places the burden of proof on the responding party. An employer who is alleged to have contravened

section 50 is required to satisfy the Board, on a balance of probabilities, that it did not breach the Act. If it is motivated, even in part, by the reasonable efforts to engage the protections of the Act, the employer will be found to have engaged in an unlawful reprisal.

71. As explained, I prefer the evidence of Mr. Flores over Mr. Biddle with respect to the discussions that took place on June 21, 2020 in the bunkhouse. I find that Mr. Biddle attended the bunkhouse where Mr. Flores resided and confronted him about complaining to the media about the working conditions. I find that Mr. Biddle told Mr. Flores that he was being sent back to Mexico and that this statement is tantamount to a dismissal. This confrontation followed Mr. Flores' comments and questions at the meeting the night before where Mr. Flores suggested that the employer should have done more to protect his co-worker and improve the working conditions.

72. Although I find that Mr. Biddle attended to the bunkhouse and told Mr. Flores that he was being sent back to Mexico and this is sufficient on its own to meet s. 50 of the Act, the employer made the travel arrangements to send Mr. Flores back to Mexico. Even if Mr. Flores had not been directly told that he was being sent back to Mexico, it is reasonable for Mr. Flores to assume that he was being fired when the employer unilaterally arranged for his return to Mexico. Mr. Flores' decision to leave the farm and secure the assistance of a volunteer organization does not change this conclusion.

73. Moreover, if Mr. Flores had resigned, as the employer argues, it is unlikely that the employer would ignore the contractual terms that required Mr. Flores to pay for his own travel arrangements. It is far more likely that the documentary evidence would have shown that Mr. Flores was required to pay for his own travel as required by the contract.

74. The onus is on the employer to prove that it did not act in a manner that violated the Act. It has failed to satisfy this onus. The Board concludes that Mr. Flores was terminated for exercising his rights under the Act.

Remedy

75. I will first address the employer's August 4, 2020 letter to Mr. Flores' counsel inviting Mr. Flores to return to work. The offer to return to work was made after the application had been filed. The employer states that it had no way to contact Mr. Flores and no

knowledge that he believed he had been fired until it received the Board's application. It argues that Mr. Flores ought to have returned to work to mitigate his damages.

76. In my view, it was reasonable for Mr. Flores to refuse to return to work. Mr. Flores had been dismissed after being vocal about the working conditions and the risks associated with COVID-19. After more than 190 workers had been infected (including Mr. Flores) and one coworker who succumbed to the virus, Mr. Flores could not reasonably be expected to return to the workplace and continue living in the bunkhouse without assurances that sufficient health measures had been taken to specifically address the risks of COVID-19. There is no evidence that the employer had taken any steps to improve the working or living conditions or address the issues raised by Mr. Flores.

77. There was no challenge to the Board's authority to issue the damages sought by Mr. Flores. The employer's position was that Mr. Flores was not entitled to any damages because he had not accepted the offer to return to work. I have already rejected this position. I will now address the remedies sought by Mr. Flores.

78. Mr. Flores earned $14.18 per hour. There is a dispute between the parties about the number of hours Mr. Flores worked each week and whether he could reasonably expect to work the same number of hours each week. In Mr. Flores' pleadings, it is estimated that he worked 81 hours per week. I heard no evidence from Mr. Flores about his regular work week. Ms. Carter testified that workers in their first season of employment worked an average of 60 hours per week. This evidence was not challenged by Mr. Flores' counsel and there was no evidence to the contrary. Therefore, I find that Mr. Flores worked (and could reasonably expect to continue working) 60 hours per week.

79. As for the duration of the work, Mr. Flores testified that he expected to continue working until the end of the season. In his view, the employment contract continued until November 30, 2020. The employer disputed that it had any obligation to employ Mr. Flores beyond the minimum 240 hours. Ms. Carter testified that if there is a crop failure or shortage of work, the employer may either transfer the workers to another farm or send the workers back to Mexico. However, during the course of the hearing in September and October 2020, the workers continued working at the farm. There was no evidence about when their work was expected to end.

80. I will now turn to the specific categories of damages sought by Mr. Flores.

Direct Earnings Loss

81. There was no dispute that the employer had not paid Mr. Flores for his final three shifts. Thus, he is owed for 36.5 hours worked from June 18, 2020 to June 20, 2020. This is calculated as 36.5 hours x $14.18 per hour plus 4% vacation pay for a total of $538.27.

Loss of Future Earnings

82. As I have already described, there is a dispute about how long Mr. Flores is likely to have remained working at the farm. The only evidence tendered about this issue is that workers continued to work in October 2020 and that Mr. Flores intended to work until the end of his contract on November 30, 2020.

83. The Board has held that reinstatement is the presumptive remedy if a worker has been dismissed contrary to the Act. Where the worker does not seek reinstatement or the Board finds that reinstatement is not appropriate, the Board has customarily ordered compensation for wage losses to the date of the Board's decision. See *Valthane Inc*., [2000] O.L.R.D. No. 4398, at Paragraph 21; *AMS Diamonds*, [1981] OLRB Rep. Nov. 1534, at Paragraph 24; *Johnson Welding Works (Ottawa) Ltd*., [2002] O.L.R.D. No. 2494, at Paragraph 15; *Whitler Industries Limited*, [1992] OLRB Rep. August 977, at Paragraph 16; *Al's Waste Control Ltd*., [1996] O.L.R.D. No. 2682, at Paragraph 19; and *Barmaid's Arms*, [1995] OLRB Rep. March 229, at Paragraph 11.

84. Mr. Flores does not seek reinstatement. He explained that he had serious concerns about the absence of precautions taken to maintain social distancing and the overcrowding of the bunkhouses. The employer called no evidence to refute this testimony or explain what steps it had taken to address those issues. Given the Board's findings in this matter, and in particular Mr. Flores' concerns about his health, the Board has no hesitation in concluding that reinstatement is not an appropriate remedy in the circumstances of this particular case. Therefore, I calculate the loss of future earnings to the date of the award as follows:

> 60 hours per week x $14.18 per hour plus 4% vacation
> x 19 weeks for a total of $16,811.81.

Loss of Reasonable Expectation of Continued Employment or Loss of Inherent Value of Being Employed

85. The purpose of any remedy is to compensate the applicant for his or her loss. It is not to punish the employer. The cases establish that this head of damages should also reflect the duration of the employment that has been ended by the unlawful reprisal. In *Wyeth-Ayerst Canada Inc.* [1988] OESAD No. 16, the adjudicator wrote:

> This head of damages is commonly referred to as compensation for loss of the job itself. Adjudicator/Referees have long recognized that there is, to the individual who suffers as a result of an employer's breach of the Act, some inherent value in having had the job. This seems obvious: If an employee has a job, has a regular source of income and benefits, and is suddenly and wrongly deprived of that job, the individual has to begin the process of seeking new employment, suffers loss of income, incurs expenses to look for a new job, and must begin over at a new place of employment if s/he is able to find new employment. The individual may have lost opportunities which would have accrued to him/her at the original place of employment, and may also lose future income. There are additional less tangible benefits to having a job, like accruing seniority or length of tenure, building relationships, and strengthening self-esteem through familiarity with the job requirements. All of these are lost when an employee is terminated. [at para.13].

86. In *McLaughlin* v. *Graphite Specialty Products Inc.*, the Board's order was based on 16 weeks' pay awarded to an individual who had been employed for almost two years. In *Barber* v. *LP Services*, 2013 CanLII 9952 (ON LRB) the employee had been employed for only 12 weeks and he was awarded damages based on four weeks' pay.

87. In *L & L McCaw Holdings Ltd. operating as Canadian Tire v Chun Bao Yin*, 2019 CanLII 64732 (ON LRB), the Board fixed the damages at three months' earning as the common calculation using length of service undermined the long term value of the job for the employee. The Board explained:

> 86. The disadvantages of this method of assessing damages, which is based on an employee's length of service, are that it resembles too closely damages for wrongful dismissal which it is clearly not, and that it is not obviously responsive to the loss the Board is trying to compensate for. What the

> Board is trying to do in awarding these damages is to measure the worth of the loss of the job to the individual in the particular circumstances. Here, where the service was short, the employee was considered a good one by the Employer and the relationship would easily have continued but for the Employer's reprisal, the use of one month for every year of service significantly undervalued the long term opportunity for employment of Mr. Yin: while his period of employment was short, he could reasonably have expected many years of further employment. The damages under this head should better reflect that. In cases of short term employment like Mr. Yin's, using a higher multiplier, such as 1/3 of a week for every week of service, does respond to the sense that one month for every year of service is too minimal in his case to reflect what the lost opportunity for employment really entails. However, it would result in an obvious inequity if an employee with approximately 69 weeks of service, like Mr. Yin, received 33 weeks of pay while an employee with three years of service would receive only 13 weeks' pay.
>
> 87. In my view, a fixed amount of damages for short term employees is preferable to a service-related calculation. In this case, I set that amount at three months' earnings or in this case, $3,731.00.

88. Mr. Flores arrived in Canada to work at Scotlynn on April 18, 2020 and was dismissed on June 21, 2020, a period of approximately two months. However, there was significant value in having this job as he travelled to Canada, leaving his family, to earn a basic living and send money back home. It is not clear whether Mr. Flores would have returned to the employer in the following season to enjoy the benefits that accrue to a returning worker. I heard no evidence about loss of opportunities. However, the evidence was that Mr. Flores has been forced to find shelter and accommodation as well as live off the charity of others. Although difficult to quantify, he has lost more than simple wages. While I accept that the damages awarded must be proportionate to his short tenure of employment, the Board is not tied to a specific calculation as explained in *L & L McCaw Holdings Ltd., supra*. In all the circumstances, I find that Mr. Flores would be appropriately compensated with an order of 3 weeks pay. Thus, Mr. Flores is entitled to damages in the amount of $2,654.50 (60 hours per week x $14.18 per hour plus 4% vacation pay x 3 weeks).

Pain and Suffering

89. Mr. Flores seeks $10,000.00 in damages for pain and suffering. In *Shi v. Holcim (Canada) Inc*., 2012 CanLII 59255 (ON LRB), the Board explained that this head of damage is intended to compensate for such things as "the humiliation and real hurt suffered by a person terminated in violation of the Act". In *Sparkling Distribution Inc.* [2009] O.E.S.A.D. No. 32, the Board accepted that a claim for pain and suffering need not necessarily be supported by medical documentation, but that the failure to seek medical assistance may throw doubt upon the credibility of such a claim.

90. The Board referred to the common law principles of awarding damages under this head in *Brenda Bastien v 817775 Ontario Limited (Pro-Hairlines)*, 2014 CanLII 65582 (ON LRB):

> 35. The public policy element underlying the OHSA—enacted to ensure that workers are not exposed to hazardous risk to their health or safety while engaged in the workplace—fortifies and imbues the remedial jurisdiction of the Board on an OSHA s.50 application for relief from retaliatory dismissal for having sought enforcement of the Act. The comments by Chief Justice Dickson in upholding the awarding of costs by an adjudicator in *Slaight Communications, supra* are apposite in this regard:
>
> > It cannot be overemphasized that the adjudicator's remedy in this case was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. Thus, in a general sense, this case falls within a class of cases in which the governmental objective is that of protection of a particularly vulnerable group, or members thereof. [at SCR page 1051].
>
> The awarding of aggravated damages for employer conduct that is unfair and in bad faith in the course of the dismissal of an employee, which is recognized at common law in the context of an employment contract, is called for all the more where that conduct is violative of a statutory norm designed to protect workers—a vulnerable group whose relationship with employers is one of unequal balance of power.

91. In *Leah Podobnik v Society of St. Vincent de Paul Stores (Ottawa) Incorporated*, 2016 CanLII 65109 (ON LRB), the Board cited

Justice Laskin in *Boucher v. Wal-Mart Canada Corp*., 2014 ONCA 419 (CanLII):

> Aggravated damages may be awarded where the manner in which an employee was dismissed was unfair or carried out in bad faith. Aggravated damages may be awarded to compensate the employee for mental distress and or loss of dignity. Such an award is permitted where the plaintiff has experienced injury to her feelings, dignity, pride or self respect. These damages may compensate an employee when the circumstances of dismissal are insensitive, demeaning or humiliating. [at paragraph 67].

92. The evidence of Mr. Flores is that once he was dismissed he could no longer send money to his family in Mexico. He testified that this money is used for food, shoes and medical expenses. He explained that he suffers from stress and anxiety, that he feels sad and has emotional pain as a result of the dismissal. He explained, "I cannot rid myself of these and cannot forget what happened on that farm". While Mr. Flores did not seek medical attention, there was no challenge to his inability to access health care resources. He admitted that he was in Ontario with no family or financial support.

93. All of the foregoing leads the Board to conclude that Mr. Flores is entitled to additional damages for mental distress as a direct result of the manner in which he was dismissed. The Board orders the employer to compensate Mr. Flores the sum of $5,000.00 in damages, which is on the higher end of the spectrum of damages awarded by this Board. I have been careful not to award a sum that is punitive as that is not what damages are for.

94. The power imbalance between the employer and Mr. Flores, as a migrant worker who does not speak English and relies on the employer for wages, shelter and transportation, should have been more carefully managed since a reprisal can strike a far deeper wound than might otherwise occur in the traditional employment relationship. Mr. Flores was particularly vulnerable as a temporary worker from Mexico who did not speak the language. He did not have access to the resources to minimize the pain and suffering, nor was he able to abate the injury suffered because of Scotlynn's reaction to his objections about health and safety at the farm.

Summary of Orders

95. The Board has determined that Scotlynn Farms breached s. 50 of the Act when it dismissed Mr. Flores for raising health and safety concerns at the farm. The Board orders Scotlynn Farms to compensate Mr. Flores for having dismissed him contrary to s. 50(1) of the Act:

i. By way of damages for lost wages in the amount of $538.27;

ii. By way of damages for loss of future earnings in the amount of $16,811.81;

iii. By way of damages for Reasonable Expectation of Continued Employment in the amount of $2,654.50; and

iv. By way of damages for Pain and Suffering in the amount of $5,000.00.

96. The applicant made no request for interest and thus, none is awarded.

97. The application is granted.

"Matthew R. Wilson"
for the Board

APPENDIX A

Parkdale Community Legal Services Inc.
1229 Queen Street W
Toronto ON M6K 1L2
Attention: John No
Lawyer
Tel: 416-531-2411 Ext 254; 416-531-2411 Ext 227
Fax: 416-531-0885
Email: noj@lao.on.ca

Luis Gabriel Flores Flores
1229 Queen Street W
Toronto ON M6K 1L2
Email: floresfloresluisgabriel@gmail.com

MHN Lawyers LLP
39 Colborne Street N
Simcoe ON N3Y 3T8
Attention: R. Paul Hosack
Lawyer
Tel: 519-426-6763
Fax: 519-426-2055
Email: hosack@mhnlawyers.com; wozniak@mhnlawyers.com

Scotlynn Sweetpac Growers Inc.
1150 Vittoria Road
Norfolk ON N0E 1W0
Attention: President/Director/Manager
Tel: 519-900-2221
Fax: 519-426-2212
Email: info@scotlynn.com