Saskatchewan
Labour Relations Board

I.G., Appellant v INTERNATIONAL WOMEN OF SASKATOON INC., Respondent and GOVERNMENT OF SASKATCHEWAN, EXECUTIVE DIRECTOR, OCCUPATIONAL HEALTH AND SAFETY, Respondent

LRB File No. 086-20; March 31, 2021
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

The Appellant, I.G.:	Self-Represented
Counsel for the Respondent, International Women of Saskatoon Inc.:	Andrew M. Mason
For the Executive Director, Occupational Health and Safety:	No one appearing

Section 4-8 of *The Saskatchewan Employment Act* – Complaint of discriminatory action – Notice of Contravention issued by occupational health officer – Appeal of Decision of occupational health officer – Appeal allowed by Adjudicator – Employer demonstrated good and sufficient other reason.

Appeal from Decision of Adjudicator – Termination of Employment – Retaliation for alleging harassment – Adjudicator did not address a relevant fact – Remit to adjudicator to address the error.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an appeal of an adjudicator's decision, dated May 6, 2020, filed by the appellant on May 27, 2020, pursuant to section 4-8 of *The Saskatchewan Employment Act* [Act].[1] The respondent employer is International Women of Saskatoon Inc.

[2] The appellant had been hired in September 2018 as a term replacement for a permanent employee in the position of Acting Human Resources/Policy Manager. The term of employment was from September 19, 2018 to March 31, 2019. After working with the employer for almost 3.5 months, the appellant's employment was terminated on December 31, 2018. The appellant asserts that she was terminated contrary to the prohibition against discriminatory action contained in section 3-35 of the Act, after raising concerns of harassment in the workplace.

[1] LRB File No. 203-19.

[3] The occupational health and safety officer investigated the matter and issued a notice of contravention against the employer pursuant to subsection 3-36(2) of the Act, dated August 14, 2019. In the notice and accompanying letter, the officer noted his findings that the employer had failed to provide sufficient information or evidence that the appellant was terminated for performance issues, and concluded that the employer took discriminatory action against the appellant, contrary to the Act. The employer was to cease the discriminatory action, reinstate the appellant, pay to her any wages owing, and remove any reprimand or other reference to the matter from the employment records.

[4] The employer appealed the notice of contravention pursuant to section 3-52 of the Act, by Notice of Appeal filed August 30, 2019. The adjudicator was selected for the appeal of the officer's decision on September 17, 2019. The hearing took place on January 23 and 24, 2020. By written decision, the adjudicator allowed the appeal and set aside the notice of contravention.

[5] The appellant brings the appeal of the adjudicator's decision on the following four bases:

(1) The adjudicator erred in law by concluding that there is evidence that the employer terminated the appellant for good and sufficient reason;

(2) The adjudicator seriously misunderstood the evidence when he stated that the question before him was whether the appellant was terminated for going to the board of directors around concerns of mistreatment;

(3) The adjudicator omitted material evidence in the decision; further, there was no determination on a key issue; and

(4) The adjudicator is not an expert in human resources.

[6] The appellant asks that the adjudicator's decision be set aside and that the officer's decision be upheld. The appellant further seeks an order that the employer cease any further discriminatory action against her, reinstate the appellant to her former employment, pay any wages she would have earned if she had not been wrongfully discriminated against, and remove any reprimand or other reference to this matter from her employment record.

[7] The employer filed a reply on June 8, 2020. In the reply, the employer states that all of the grounds of appeal allege errors of fact, and therefore fall outside this Board's jurisdiction to hear appeals on a question of law.

[8] The hearing of this matter was held via Webex on November 23, 2020, pursuant to the Board's Covid-19 Guidelines.

Facts:

[9] The following is a brief summary of the background to the officer's decision.

[10] The appellant was hired in September 2018 on a term basis, with a twelve-month probationary period and a possibility of renewal.

[11] Early on, the appellant and the executive director began to experience conflict with one another. On December 14, 2018, the appellant spoke with the president of the board of directors about her concerns with respect to the executive director's treatment of employees in the workplace. Later on, the appellant emailed the president indicating that she had decided that the best course of action was to manage the issues within the organization. The president responded to advise that she had already raised the issue with the other board members and requested further updates. The appellant replied that she had planned to request a meeting with the executive director that week. The president then wrote to the remaining board members requesting a meeting without the executive director on January 14.

[12] The appellant explains that on December 18 she asked the executive director to meet with her regarding her concerns. On December 19, the executive director emailed the appellant and proposed a performance meeting be held on December 31. Apparently, she did not specifically respond to the appellant's request. Then, on December 21, they had another disagreement. That evening the executive director called the president to discuss the situation. She advised the president that she could no longer work with or trust the appellant. Later that same evening the executive director sent another email to the appellant changing the time of the meeting that was to be held on December 31 and extending it to two hours.

[13] On the following day, December 22, the appellant emailed the executive director expressing concern over the executive director's conduct. The executive director replied later that day, disagreeing with the appellant's version of events. Later that night, the appellant emailed the president with information about the previous day's events. The next day, the president replied

offering to have board members attend the appellant's meeting with the executive director, but the appellant replied that this was not necessary.

[14] On December 23, the president emailed the board to provide an update on the situation, during which she explained that she was concerned and worried that the executive director wished to fire the appellant, and indicated her belief that this would not be the proper course of action. In another email on December 30, the president emailed the board to indicate that she had not received an update about the status of the upcoming meeting.

[15] On December 31, the meeting proceeded and at the meeting, the executive director presented the appellant with a probationary review report, complete with many pages of exhibits. She left the room to provide the appellant with time to review the report, and then returned to the room and presented the appellant with a termination letter. The executive director then left the room.

[16] The appellant brought a complaint of discriminatory action and filled out a discriminatory action questionnaire, dated March 31, 2019.

[17] The officer conducted an investigation after which he issued the notice of contravention. In the letter outlining the reasons for the finding of contravention, the officer made the following observations:

> *…[The appellant] stated in addition to the aforementioned that [the executive director] spoke harshly to her about her in the workplace to other workers, intentionally created information "roadblocks" for her for no other reason than to undermine her credibility in the workplace, direct* [sic] *unwarranted blame toward her, and subsequently bring* [sic] *negative attention and harassing comments upon [her]. [She] stated that through the month of December 2018, she brought her concerns directly to [the executive director] of what she believed to be harassment/mistreatment … in hopes to deal with the concerns and the situation did not improve. On December 18, 2019, [the appellant] requested a meeting with [the executive director] to discuss her concerns. On December 19, 2019, [the executive director] requested a meeting with [the appellant] regarding her performance. In December 2018, [the appellant] again requests a meeting with [the executive director] to discuss her concerns. [The executive director] responded stating she will meet on December 31, 2018. On December 31, 2018, [the appellant] was terminated by [the executive director].*[2]

[18] The officer's letter stated that, in addition to the appellant's complaints to the executive director, the appellant also made complaints to the president of the board. The officer indicated that, prior to December 31, the appellant had reported the harassment verbally. The officer reviewed the employer's document package, which included emails and the executive director's

[2] Letter at 1-2.

recollections about instances of verbal, in-person coaching without corresponding email evidence. The officer observed that at no time did the appellant receive formal, written coaching or discipline related to her performance. He considered the evidence and determined that the employer had not provided sufficient evidence that the appellant was terminated for performance issues.

Decision of the Adjudicator:

[19] The adjudicator allowed the appeal and set aside the notice of contravention. In his reasons, the adjudicator relied for the applicable analytical framework on *Banff Constructors Ltd. v Arcand*, LRB File No 184-19 (April 28, 2020). He then outlined the applicable test on an appeal of a decision finding discriminatory action, and concluded that there are three elements to be established:

> *[48] …To state the obvious, there are three elements that must be established – that the employer took the discriminatory action, that the employee engaged in protected activities, and that the discriminatory action was taken because the employee engaged in those activities.*
>
> *[49] S. 3-36(4) contains a presumption and a reverse onus. Once the first two elements are established, the third is presumed, i.e. "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 s. 3-35". The onus then shifts to "the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason".*
>
> *[50] Consequently, there are generally three broad issues to be determined in appeals of this kind:*
>
> > *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)?*
>
> *[51] The employee will bear the onus of proving the first two. Because of the presumption and reverse onus, the employer will bear the onus of establishing the discriminatory action was taken for a reason other than because the employee engaged in the protected activities, i.e. for good and sufficient other reason.*

[20] The adjudicator identified two communications that potentially formed the basis for the exercise of a protected right. The first communication consisted of the appellant's verbal complaint to the president, as outlined in the December 14 meeting, and the appellant's subsequent emails to the president. He observed that the evidence and argument presented at the hearing had

focused on this complaint. The adjudicator concluded that it constituted the exercise of a protected right:

> *[59] For the conduct alleged here to constitute a complaint of harassment, it must meet the definition of harassment in s. 3-1(1)(l) as qualified by subss. (4) and (5). I conclude the conduct complained of is potentially "inappropriate conduct, comment [or] action that…adversely affects the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated…and…that constitutes a threat to the health or safety of the worker". I also conclude the conduct complained of qualified as "repeated conduct" and meets the requirements of subs. (4). Finally, I find that the allegations do not amount to a "reasonable action" by an employer as set out in subs. (5).*

[21] The second communication involved the appellant's email dated December 22 to the executive director following their discussions on the previous day. The adjudicator found that this communication did not constitute an allegation of harassment:

> *[61] …The email itself states the "yelling" only occurred on two occasions, which does not in these circumstances amount to the "repeated conduct" required by s. 3-1(4)(a) and also doesn't meet the clause (b) requirement of "a single, serious occurrence of conduct, or a single, serious comment…that has a lasting harmful effect on the worker". The employee's email suggests her concerns were for the employees and the organization as a whole, rather than the personal impact she felt from the yelling. As she said in the email: "After last night's incident I was upset because I can see a pattern of behavior that appears to have gone unchecked for so long. I am not sure if you are fully aware of how unacceptable this is in a workplace."*

[22] As for the second branch of the test, the employer acknowledged and the adjudicator found that the employer took discriminatory action against the employee within the meaning of that term as defined by clause 3-1(1)(i) of the Act.

[23] Given that the employee exercised protected rights in complaining to the president, the question was whether the discriminatory action was taken *"because* the employee engaged in the protected activity, subject to the comments below concerning the phrase 'good and sufficient other reason'" (para 65). However, the executive director was not aware that the employee had complained to the president when she terminated the employee, and therefore, the termination could not have been caused by the employee having engaged in the protected activity. Furthermore, the executive director had decided to terminate the employee because the employee did not meet performance expectations.

[24] In the alternative event that the December 22 email did contain an allegation of harassment and therefore constituted an exercise of a protected right, the adjudicator would still have found that the employer had met the onus. He explained, at paragraph 67, that "[t]he email

may have served to confirm for the executive director that it was time for her to act; however, I accept the executive director's evidence that she made the decision to dismiss the employee for the reasons set out in the previous paragraph."

[25] The adjudicator described the test for establishing good and sufficient other reason:

> *[71] 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. This is not to say the decision made by the employer must be the same decision the adjudicator (or the occupational health officer in the original decision) would have made if placed in the employer's position at that time. 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.*

[26] He summarized the factual basis for finding that the employer had satisfied the onus of establishing that the employee was terminated for good and sufficient other reason:

> *[72] I find that the termination based on the considerations advanced by the employer was a reasonable option and therefore good and sufficient reason within the meaning of the reverse onus. The performance issues cited by the director could reasonably justify her decision. They were set out in significant detail in the probationary review report and expanded on in the executive director's oral evidence. I need not assess each element of the executive director's explanation to determine that her decision could be a reasonable option. Additionally, the apparent failure in the relationship between the executive director, established by the executive director's testimony and corroborated by evidence from the president and several of the emails exchanged among the various players, explains an additional reasonable reason for the decision to terminate.*

[27] He concluded by observing that, although the employee had communicated her concerns to the board of directors, the employee's termination was not a decision for the board to make, and the board members' concerns were not communicated to the executive director prior to the dismissal being effected.

Arguments of the Parties:

[28] The appellant's arguments are captured in the Notice of Appeal, which elaborates on the grounds of appeal, as follows:

> ***Erred in law - No jurisdiction re: harassment determination***
>
> *The adjudicator erred in law when he concluded there is evidence that the employer terminated I.G. for any other good and sufficient reason. The adjudicator's conclusion was based on an erroneous legal conclusion that I.G. had not experienced harassment at the point when she raised her concerns directly with the ED. The statute did not give the adjudicator the jurisdiction or authority to determine whether what constitutes harassment was or was not experienced by I.G., thus his conclusion is unreasonable. I.G. met the elements that must be established regarding discriminatory action. The employer took the*

discriminatory action, I.G. engaged in a protected activity, and that the discriminatory action was taken because the I.G. engaged in those activities. Therefore, there is "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 relevant legislation (SEA, OH&S).

Serious misunderstanding of the evidence re: I.G. said she was terminated b/c went to the board was a plain and obvious error

There was a serious misunderstanding of the evidence at the outset when the adjudicator submitted in his decision that the question before him is whether I.G. was terminated for going to the board regarding concerns of mistreatment of I.G. and other staff. The evidence clearly supports that this case centers around the fact that I.G. raised concerns directly to the ED. I.G. let the ED know that her pattern of behaviour is unacceptable in a work place and further requested to meet regarding those concerns. I.G. was led to believe there would be a meeting and at that meeting was terminated.

Omission of key evidence and not making a determination on material facts in the decision analysis

The adjudicator omitted material evidence. During the hearing I.G. had submitted that the information provided to the board as the basis for her termination was a mischaracterization of facts and in some instances overt falsehoods. This evidence was provided and supported during the hearing yet there was no mention or determination of this key fact within the adjudicator's analysis. As well, there was no determination on the fact that I.G. request to meet with the E.D. after speaking with the board, and before the E.D. requested to meet with her regarding her performance. I.G. requested to meet first, then was asked to meet regarding performance.

Not an expert in Human Resources

Because the adjudicator is a not an expert in Human Resources, he mistakenly concludes that because the ED is in a position power in the workplace, disagreements regarding compliance are personality conflicts and fails to recognize the weight of the job description explicitly stating that I.G.'s job was to ensure the organization was compliant and was met with aggression when bringing compliance issues to the forefront. As well, failed to see the significance of I.G.'s 12-month probationary period which in Human Resources there are guidelines as how this managed. Being terminated after 3.5 months with out being told there are any concerns is discriminatory if others are given feedback and given time to improve as was the case, as well as not receiving the support and guidance I.G. was promised during her job interview. As well, not recognizing the workplace legal principles of "condonation" and "duty to investigate" in the workplace. The board condones the ED's behaviour by letting the termination stand and fails as the employer to investigate concerns even if post termination.

[reproduced without corrections]

[29] At the appeal hearing, the appellant stated that, in her view, the adjudicator's decision fails to mention any of the arguments that she had made at the original hearing, and fails to mention her December 18 request for a meeting with the executive director. With respect to the latter, the appellant had asked to meet with the executive director first, and then was asked to meet to

discuss her performance. She was terminated in retaliation for raising concerns about harassment.

[30] The appellant also asserted that at the hearing she had “never once argued” that she was terminated because she had gone to the board of directors.

[31] The employer responds separately to each of the issues raised in the Notice of Appeal.

[32] With respect to the first issue, the employer argues that the premise of the appellant’s argument is false. The adjudicator did not find that she had not experienced harassment; he did not decide that issue because it was not before him. The issue was whether the appellant was terminated because she had exercised her right to complain of workplace harassment. The adjudicator concluded that the appellant was terminated for a good and sufficient reason other than the exercise of a protected right. That issue was a factual matter within the adjudicator’s jurisdiction to decide.

[33] With respect to the second issue, the employer again argues that the premise of the appellant’s argument is false. The adjudicator directly addressed the appellant’s email to the executive director dated December 22, 2018. He found that the appellant in this email was not complaining of harassment. He found, alternatively, that the employer had established good and sufficient other reason related to job performance. Therefore, the presumption arising from subsection 3-36(4) was rebutted.

[34] Next, the employer argues that the third ground of appeal is not clearly and sufficiently particularized. The appellant has not identified the specific error that forms the basis for this ground of appeal or the specific evidence in support of the alleged error. If, in this ground of appeal, the appellant is suggesting that the executive director provided false information to the board of directors after the termination, this allegation does not raise an error of law. The adjudicator did not make such a finding, and even if he did, such a finding would be irrelevant or immaterial to the conclusions he reached.

[35] The employer asserts that the fourth ground, that the adjudicator is not an expert in human resources and therefore did not appreciate the relevance of the appellant’s job description or the significance of her probationary period, does not raise an error of law that is in issue in this matter. This is not a case involving a question of just cause.

[36] Lastly, the employer says that, contrary to the appellant's assertion, the adjudicator's decision refers to many of the positions taken by the appellant.

[37] Overall, the employer asks the Board to follow the Court of Appeal's decision in *Chinichian v Mamawetan Churchill River (Health Region)*, 2016 SKCA 89 (CanLII) [*Chinichian*], and find that the appellant has failed to raise a material error of law.

Applicable Statutory Provisions:

[38] The following provisions of the Act are applicable:

> ***3-1****(1) In this Part and in Part IV:*
>
> *. . .*
>
> *(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:*
>
> *(i) the temporary assignment of a worker to alternative work, pursuant to section 3-44, without loss of pay to the worker; or*
>
> *(ii) the temporary assignment of a worker to alternative work, without loss of pay to the worker, while:*
>
> *…*
>
> *. . .*
>
> *(l) **"harassment"** means any inappropriate conduct, comment, display, action or gesture by a person:*
>
> *(i) that either:*
>
> *(A) is based on race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; or*
>
> *(B) subject to subsections (4) and (5), adversely affects the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated; and*
>
> *(ii) that constitutes a threat to the health or safety of the worker;*
>
> *. . .*
>
> *(4) To constitute harassment for the purposes of paragraph (1)(l)(i)(B), either of the following must be established:*
>
> *(a) repeated conduct, comments, displays, actions or gestures;*
>
> *(b) a single, serious occurrence of conduct, or a single, serious comment, display,*

action or gesture, that has a lasting, harmful effect on the worker.

(5) For the purposes of paragraph (1)(l)(i)(B), harassment does not include any reasonable action that is taken by an employer, or a manager or supervisor employed or engaged by an employer, relating to the management and direction of the employer's workers or the place of employment.

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 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;

…

3-36*(1) A worker who, on reasonable grounds, believes that the employer has taken discriminatory action against him or her for a reason mentioned in section 3-35 may refer the matter to an occupational health officer.*

(2) If an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 3-35, the occupational health officer shall serve a notice of contravention requiring the employer to:

(a) cease the discriminatory action;

(b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;

(c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and

(d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.

…

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

(a) in any prosecution or other proceeding taken pursuant to this Part, there is a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 3-35; and

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

. . .

> ***4-8****(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.*
>
> *…*
>
> *(6) The board may:*
> *(a) affirm, amend or cancel the decision or order of the adjudicator; or*
> *(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.*

Analysis:

[39] Pursuant to section 4-8, a decision of an adjudicator may be appealed to the Board on a question of law. The Board has a narrow jurisdiction to review a question of fact where it is found to be a question of law. For this to occur, the question of fact must be alleged to be based on no evidence, made on the basis of irrelevant evidence or in disregard of relevant evidence, or based on an irrational inference of fact: *Wieler v Saskatoon Convalescent Home*, 2014 CanLII 76051 (SK LRB).

[40] The standard of review on a question of law is correctness.

[41] The Board will proceed to consider each of the grounds of appeal, in turn. Before doing so, a quick word of explanation is necessary. The appellant is self-represented. The Board has carefully considered her arguments so as to understand the essence of her complaints. In a similar situation in *Chinichian*, the Court of Appeal made the following, relevant observation:

> *[34] Since the proposed appellant is self-represented, some allowances must be made, but they can only take one so far. The proposed appeal must be from the Board Decision and not the adjudicator's decision; the grounds of appeal and any questions of law flowing therefrom must be cast in terms of whether the Board erred in law. In that regard, I have extracted from the proposed appellant's brief the following possible questions of law:*
> *…*

[42] In making these allowances, the Board has taken care to consider the arguments before the Board and, therefore, the arguments to which the employer has had an opportunity to reply.

First Ground of Appeal: No Jurisdiction re harassment determination

[43] The essence of this argument is that the adjudicator was wrong to decide whether harassment occurred and should have instead found that the employer had taken discriminatory action against the appellant and then failed to rebut the presumption.

[44] The employer says that the issue was not whether the appellant experienced harassment. The issue was whether she was terminated because she exercised a protected right to complain of harassment. The adjudicator found that the employee had engaged in a protected right in respect of the first communication and that the employer then took discriminatory action against her. His decision turned on whether the employer had good and sufficient other reason. His conclusion was based on an assessment of the facts, and cannot form the basis for an appeal on a question of law.

[45] In support of its argument, the employer relies on *Western Grocers v Stokalko*, [2002] SJ No 109, 2002 SKQB 67, which involved an appeal by an employer from a decision of an arbitrator under *The Occupational Health and Safety Act*. There, Ball J. stated at paragraph 35:

> *Section 28(4) of the OHS Act places the onus on the employer to prove that discipline was imposed for good and sufficient reason other than the employee's refusal to do work. Western Grocers failed to do so. That issue was a factual matter within the adjudicator's jurisdiction to decide and cannot form the basis of this appeal, which is confined to questions of law or jurisdiction.*

[46] The appellant's argument reveals a misunderstanding of the test before the adjudicator and the approach taken by the adjudicator in applying that test. The issue was not whether the appellant had experienced harassment in the workplace. The issue was whether the appellant had exercised a protected right. Contrary to the appellant's assertions, the adjudicator did not decide whether she had experienced harassment; rather, he considered the appellant's communications and assessed whether those communications were complaints of harassment.

[47] At paragraphs 47 to 51 of the decision, the adjudicator correctly outlined the test on an appeal to an adjudicator from a decision of an occupational health officer based on sections 3-35 and 3-36 of the Act. He listed the three elements that must be established – "that the employer took the discriminatory action, that the employee engaged in protected activities, and that the discriminatory action was taken because the employee engaged in those activities". He then described the presumption and reverse onus, the three issues to be determined, and the onus of proof.

[48] As he identified, the first question was whether the appellant had engaged in protected activities, that is, activities that fell within the scope of section 3-35. For the appellant to complain of harassment, she would be seeking enforcement of the Act and the regulations, and in doing so she would be exercising an activity protected by section 3-35.

[49] The adjudicator found that there were two communications that had the potential to form the basis for protected action. The first communication was a complaint of harassment, and therefore the appellant can take no issue with this specific finding. The focus of the appeal, instead, is and should be on the appellant's second communication – the email to the executive director on December 22.

[50] The adjudicator applied the definition of harassment to the conduct about which the appellant complained - an exercise that was not only within his jurisdiction but necessary. In performing this analysis, he was limited to the contents of the complaint; this is because he was required to consider whether the appellant was terminated because she was seeking the enforcement of Part III of the Act, not whether she was terminated after experiencing harassment. The adjudicator's assessment of the complaints can be found, in particular, at paragraphs 59 and 61 of the decision.

[51] The adjudicator assessed the contents of the email against the definition of harassment contained in clause 3-1(1)(l), as qualified by subsections (4) and (5), and concluded that the email did not contain a complaint of harassment. He assessed the email against both categories of harassment, outlined in clauses (4)(a) and (b). The appellant does not raise specific issues with respect to the relevant tests under clauses (a) and (b).

[52] Given his conclusion, it was not necessary to consider whether the action was reasonable, relating to the management and direction of the employer's workers, pursuant to subsection (5). In concluding that the email did not constitute a complaint of harassment, the adjudicator was not making a comment about whether harassment had occurred. He was simply stating that the contents of the complaint did not describe harassment.

[53] In the appellant's oral argument, she commented on the adjudicator's reference to "two" instances of yelling on the part of the executive director. According to the appellant, her reference to a "pattern of behavior" in the December 22 email, went beyond "me and what I saw with

everything". Therefore, it was not the adjudicator's "place" to find whether the executive director's conduct was harassment.

[54] The issue was whether the appellant made it clear to the executive director that she was complaining of harassment or otherwise exercising a protected right. It was not a question of whether harassment had occurred, but rather, whether the discriminatory action was taken *because* of the exercise of a protected right. If the executive director did not know that the employee was exercising that protected right, then the termination was not wrongful in the context of these proceedings. Unfortunately, it appeared, based on the appellant's submissions, that she did not fully appreciate this nuance.

[55] Next, the adjudicator accepted that the termination constituted discriminatory action. At paragraph 63, he correctly observed that termination is one of the actions that is specifically mentioned in the definition of discriminatory action contained in clause 3-1(1)(i). Furthermore, the employer had acknowledged, as might be expected, that termination is discriminatory action.

[56] Finally, to the extent that the adjudicator found that the appellant exercised a protected right, he was then required to consider whether the presumption was rebutted. This aspect of the analysis will be considered in combination with the second and third grounds of appeal.

Second Ground of Appeal: Serious misunderstanding of the evidence re: I.G. said she was terminated b/c went to the board was a plain and obvious error

[57] The appellant says that this case revolves around the fact that she had raised concerns directly to the executive director, that she had informed the executive director that her behavior was unacceptable in a workplace, and had requested to meet with her with respect to those concerns. She was then led to believe that there would be a meeting but instead was terminated. The adjudicator demonstrated that he had misunderstood the case by identifying the central issue as being whether she was terminated for voicing her concerns to the board of directors.

[58] In response, the employer says that the adjudicator appropriately addressed the very issue about which the appellant complains. The adjudicator found that the second communication was not a complaint of harassment, and then found that if he was wrong in that determination, the appellant had been terminated for good and sufficient other reason. The adjudicator's conclusions were correct. The appellant has failed to establish a reason for overturning these conclusions.

[59] The second ground of appeal raises a question about whether the adjudicator disregarded relevant evidence. The appellant expands on this assertion by outlining additional, related facts within the third ground of appeal.

Third Ground of Appeal: Omission of key evidence and not making a determination on material facts in the decision analysis

[60] The appellant says that, at the hearing, she had argued that the executive director's written rationalizations for terminating her, which were provided to the board of directors and relied upon at the hearing, were based on mischaracterizations of the facts and overt falsehoods. Furthermore, the adjudicator failed to mention key facts and failed to make a determination about the fact that she had requested to meet with the executive director. She requested to meet first and *then* was asked to meet about her performance.

[61] The employer says that the appellant has not identified the "key facts" to which she refers. Furthermore, if the appellant is alleging that the executive director provided false information to the board of directors after dismissing the appellant, then the employer responds as follows: the adjudicator did not make such a finding; such a finding would be irrelevant or immaterial to the adjudicator's conclusions; the argument is speculative at best; and the issue does not raise an issue of law.

[62] In the appeal hearing, the appellant spoke at length about various concerns that she had about the executive director's characterization of the events that had allegedly formed the basis for her termination. In her view, the adjudicator's failure to describe his view of the accuracy of the details of these events, as they were described by either the executive director or the appellant, was an error.

[63] This argument discloses two concerns. First, the employer did not have just cause to terminate the appellant's employment. To the extent that the appellant suggests that she was unjustly terminated, this reflects a misunderstanding of the test before the adjudicator. At paragraph 69, the adjudicator correctly states that the reverse onus "is not to be equated with 'just cause' in relation to wrongful dismissal".

[64] The second concern is this. The adjudicator did not fully assess the executive director's credibility by reviewing what the appellant believes are inconsistencies in her accounts, and therefore erroneously relied on the executive director's misrepresentations and overt falsehoods.

In the appeal hearing, the appellant provided many examples of circumstances that, in her view, demonstrated the material inconsistencies.

[65] The employer says that it is not for the adjudicator to decide whether the executive director was justified in terminating the appellant; nor is it for the adjudicator to decide whether the executive director had a correct understanding of the various events upon which she relied. The question was not whether the executive director's perceptions of the appellant were accurate, only whether the employer had good and sufficient other reason. Two different people will perceive the same situation in unique ways.

[66] In assessing whether there was good and sufficient other reason, the adjudicator relied on the report prepared by the executive director as well as the president's description of her conversation with the executive director on December 21 (para 66). He also relied on the executive director's oral evidence (para 72).

[67] At paragraph 67, he stated, "I accept the executive director's evidence that she made the decision to dismiss the employee for the reasons set out in the previous paragraph". At paragraph 66, he explained that the executive director had "explained in detail, both in her oral testimony, but also in the probationary review report" her reasons. Although he did not explicitly state that he found the employer's witnesses credible, it is clear that the adjudicator believed the executive director's evidence with respect to the central issue. He believed that she made the decision to terminate for the reasons she had provided.

[68] The adjudicator did not have to decide whether he agreed with the executive director's perception of each of the events underlying the various disagreements. As mentioned by the employer, two different people will perceive a situation in unique ways. Moreover, it is not always possible to precisely articulate the reasons for believing the testimony of a witness. The adjudicator believed that the executive director made the decision for the reasons set out, that the termination was not arbitrary or objectively unreasonable, and that the reasons provided by the executive director were good and sufficient. Given the foregoing analysis, the issue of the credibility assessment does not raise a material error of law.

[69] Next, it is necessary to address the appellant's argument that the adjudicator failed to consider the timing of her request to meet with the executive director. According to the appellant, she requested to meet with the executive director on December 18 and the executive director sent her an email the following day setting up a performance meeting. She says that she raised

concerns directly with the executive director, and expected to have a discussion about those concerns, but instead of having that discussion, she was terminated. Again, this argument suggests that the adjudicator disregarded relevant facts in arriving at his conclusion.

[70] The alleged December 18 request is mentioned in the initial Discriminatory Action Questionnaire, filled out by the appellant, and included in the director's file:

> ***2. What was the alleged discriminatory action taken against you?***
>
> *…*
> *-Misusing the performance review process as well as misusing the intention of the probationary period*
> *…*
>
> ***3. What was the health and safety concern/complaint that you raised prior to the action taken against you?***
>
> *I let her know that her behavior was unacceptable in the workplace. I also requested to meet with her regarding the concerns I was having with her*
>
> ***4. On what date, and to whom, did you raise your health and safety concern/complaint prior to the action taken against you? …***
>
> *Dec. 14/18 I went to the IWS Board President …to convey my concerns….I let her know that I would try to address the concerns with the [executive director] but I wanted her to know that I was going to request a meeting.*
> *Dec. 17/18 [executive director] not in the office this day, so I did not request the meeting*
> *Dec. 18/18 I requested to meet with [the executive director] regarding concerns I was having*
> *Dec. 19/18 [executive director] requested to meet with me regarding my performance (first time mention of performance review)*
> *…*

[71] It is also mentioned in the December 22 email from the appellant:

> *The reason I had asked if you had time to meet earlier this past week (when I asked to meet to over a few things), was to discuss some of my concerns with the intention of clearing the air because things have been so unnecessary tense for the last while. You said that you had meetings throughout the day and I said that is fine we will see how the day goes. I know that you were physically away a lot this past week so I know when you were here everyone wanted to touch base with you, so we did not end up meeting. I had no issue with this. I also know the reminder of the week was extremely busy for all staff. I knew I would try again when we had a moment to catch our breath.*
>
> *[…]*
>
> *I would still like to have this discussion/meeting regarding my concerns prior to my performance review so you cannot say that I only raised my concerns due to whatever transpires in this meeting.*
>
> [reproduced without corrections]

[72] The adjudicator does not mention the request in the recitation of the facts, except in reference to the employee's earlier conversation with the president:

> *[26] The employee replied saying she'd be asking for a meeting with the executive director that week.*
>
> *[27] The president sent an email to the board on December 16 proposing a meeting of the board without the executive director on January 14.*
>
> *[28] On December 19, the executive director emailed the employee and proposed a meeting between the two of them on December 31 at 2:15 p.m. "to go over your performance for the period, Sept. 19 to Dec. 31, which is about 3 and half months". The email suggested this "would be an opportunity for you to self assess where you are with your assigned tasks, what else you need to perform your tasks and for me to provide feedback based on my observations".*
>
> *[29] In the late afternoon on December 21…*

[73] The adjudicator found that there were two circumstances in which a complaint could be said to have been made. The alleged December 18 request was not included within these two circumstances.

[74] The executive director's email on December 19 states: "The meeting would be an opportunity for you to self assess where you are with your assigned tasks, what else you need to perform your tasks and for me to provide feedback based on my observations."

[75] There is no indication on the record whether the adjudicator considered the significance of the earlier request for a meeting, that is, prior to the December 22 email. The decision does not address whether the request did or did not constitute an exercise of a protected right on its own or in combination with any other such exercise. The documentary evidence provides some insight into whether it could be so characterized, but it is not possible to fully assess this question and resolve the issue without regard for the full evidentiary record, including the testimony of the witnesses.

[76] If by making the earlier request, the appellant was exercising a protected right, then this has the potential to materially affect the outcome of the underlying appeal. The adjudicator has found that the employer rebutted the presumption by demonstrating that the executive director had good and sufficient other reason for the termination. However, it is necessary to establish the nature of the protected activities undertaken by the appellant before assessing the "other" reason.

In this case in particular, the appellant argues that the earlier request was a part of the context within which the discriminatory action occurred.

[77] In *Chinichian*, the potential for error arose in the adjudicator's finding that the onus rested with the appellant employee, but the adjudicator had allowed for error, finding that the respondent employer had established, on a balance of probabilities, good and sufficient other reason. In this case, the adjudicator has allowed for error in finding the complaint was not of harassment, but has not addressed the earlier request. The sequence of events is the basis for the appellant's assertion that the executive director's decision was retaliatory. In particular, the appellant asserts that her request for a meeting was the trigger for the ensuing events, including the executive director's request for a performance meeting. What the executive director knew or did not know prior to scheduling the performance meeting is potentially significant.

Fourth Ground of Appeal: Not an expert in Human Resources

[78] With respect to the fourth ground of appeal, the appellant says that the adjudicator failed to place sufficient weight on her responsibility for organizational compliance; failed to recognize the significance of the probationary period; and failed to recognize the legal principles of condonation and duty to investigate.

[79] The employer states that the adjudicator correctly determined that his function on an appeal pursuant to Part III was not to determine whether the employee was terminated for just cause, but to determine whether there was a good and sufficient other reason. The employer did not allege just cause for the termination, but instead provided wages in lieu of notice.

[80] The appellant's argument on this ground reveals a misunderstanding of the adjudicator's role. It was not the adjudicator's task to determine whether the executive director's reasons for terminating the appellant's employment constituted just cause in the context of the appellant's job responsibilities. It is clear that the adjudicator understood the nature of the job and considered the scope of work as outlined in the job description. The job description formed part of the context within which he assessed the various conflicts that occurred between the appellant and the executive director. He did not disregard the job description in his assessment of whether the employer had good and sufficient other reason.

[81] Nor did the adjudicator fail to recognize the significance of the probationary period. Clearly, the adjudicator was aware of the probationary period and it formed part of the overall context

within which he assessed the executive director's reasons (para 15). This issue does not give rise to a material error of law.

[82] Next, the appellant states that "[b]eing terminated after 3.5 months [without] being told there are any concerns is discriminatory if others are given feedback and given time to improve as was the case". The issue before the adjudicator was not whether the appellant was treated differently than other employees. The issue was whether she was subject to discriminatory action for exercising a protected right. The existence of differential treatment might be part of the overall factual context, but the implication that the adjudicator overlooked such treatment in drawing his conclusions is not apparent or sufficiently material to raise an error of law.

[83] Finally, the "legal principles of condonation and duty to investigate" are not relevant on this appeal. The appellant appears to be arguing that the board of directors was responsible for the executive director's failings and should have taken action to investigate the executive director's conduct and possibly overturn her decision to terminate. However, as the adjudicator pointed out, the board of directors was not responsible for making the decision to terminate (para 74). While the board of directors is responsible for its employee, the executive director, the appellant seems to be questioning the board of director's sincerity in siding with the executive director and in not intervening after the termination. This issue does not raise a material error of law.

[84] Accordingly, pursuant to clause 4-8(6)(b) of the Act, the matter is remitted to the adjudicator for amendment of the decision to address the issue related to the alleged December 18 request and any matter arising therefrom.

DATED at Regina, Saskatchewan, this **31st** day of **March, 2021.**

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