Saskatchewan
Labour Relations Board

JANET CLARKE, Applicant v AGRACITY CROP & NUTRITION LTD., Respondent

LRB File No. 184-20; July 28, 2021
Chairperson, Susan C. Amrud, Q.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

For Janet Clarke: Jared M. McRorie

For AgraCity Crop & Nutrition Ltd.: Peter T. Bergbusch, Q.C.

Appeal from decision of Adjudicator – Adjudicator properly applied three-part test under Part III of *The Saskatchewan Employment Act* – Employee engaged in protected activity – Termination is discriminatory action – Employer had good and sufficient other reason to terminate employee.

Appeal from decision of Adjudicator – Employee did not satisfy Board that Adjudicator made findings of fact that amounted to errors of law – Employee did not satisfy Board that Adjudicator made error of law in finding that Employer had good and sufficient other reason to terminate Employee.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: Janet Clarke was terminated from her employment with AgraCity Crop & Nutrition Ltd. ["Employer"] on July 16, 2018. She filed a complaint of discriminatory action contrary to sections 3-35 and 3-36 of *The Saskatchewan Employment Act* ["Act"]. On October 19, 2018, an Occupational Health Officer issued a Notice of Contravention that concluded:

> *On August 7th, 2018 The Harassment Prevention Unit of Occupational Health and Safety in Saskatoon received a formal complaint of Discriminatory Action from Ms. Janet Clarke. Through the investigation process it has been determined that this employer did take discriminatory action against Janet Clarke pursuant to Section 3-35 of the Saskatchewan Employment Act. The employer shall re-instate the worker pursuant to section 3-36(2)(a)(b)(c)(d). The employer is required to make the necessary arrangements for the worker's re-instatement.*

[2] That decision was appealed by the Employer. On November 30, 2020, a decision was issued by an Adjudicator[1] allowing the appeal and setting aside the decision of the Occupational Health Officer. Clarke has now appealed to the Board from that decision.

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1 *AgraCity Crop & Nutrition Ltd v Janet Clarke*, November 30, 2020, LRB File No. 229-18.

Argument on behalf of Clarke:

[3] Clarke argues that she took medically recommended leave from work because of her hostile and toxic workplace. She complained of harassment and of a hostile and toxic workplace, and was dismissed three days later. She says it was clear on the evidence that Jason Mann (president, chief executive officer and managing director of the Employer) called her supervisor immediately after he was advised of the complaint and the commencement of the medical leave and directed the supervisor to terminate Clarke's employment.

[4] The Adjudicator erred by effectively deciding on the issue of harassment rather than discriminatory action. Clarke argues that the Adjudicator erred in law by importing a determination on harassment into the legal test for discriminatory action. His consideration of the harassment issue, which was not before him, interfered with his assessment of the discriminatory action legal test. The determination that needed to be made was not whether Clarke was harassed but whether the Employer took discriminatory action against Clarke when she was engaged in a protected activity. Whether harassment occurred is irrelevant.[2] Clarke sought the protection of the Act through reporting harassment, and she was terminated for it.

[5] In *Britto v. University of Saskatchewan*[3] the Board adopted the following as the analysis required to be undertaken by an Adjudicator on an appeal pursuant to Part III of the Act:

> *[10] The Adjudicator began her analysis of this issue at paragraph [45] of her decision. At paragraph [45] et seq, she says:*
>
> > *[45] The framework for analysis begins with Section 3-36(1) which provides that the worker must have reasonable grounds to believe that the employer took discriminatory action against him or her for a reason mentioned in section 3-35. In other words, the initial onus is on the worker to establish a prima facie case of discriminatory action.*
> >
> > *[46] The initial burden on the worker to establish a prima facie case of discriminatory action is not a particularly onerous one. To achieve the objects of the Act and its important purpose of encouraging occupational health safety, workers must be secure in the knowledge that they may exercise rights or obligations--raise health and safety concerns--without fear of reprisal. For that reason, where a worker establishes a prima facie case of discriminatory action, the reverse onus is triggered and the employer bears the heavier burden of disproving the presumption imposed in Section 3-36(4).*
> >
> > *[47] To establish a prima facie case of discriminatory action, requires the worker to establish to following:*

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[2] *Calow v Cypress Health Region*, 2017 CanLII 142162 (SK LA); *Banff Constructors Ltd v Lance Arcand*, April 28, 2020, LRB File No. 184-19; *Gregory Simonson v Finning Canada and the Cat Rental Store*, June 22, 2020, LRB File No. 006-20.

[3] 2016 CanLII 74280 (SK LRB).

> *(a) That the employer took action against the worker falling with the scope of Section 3-1(1)(i) of the Act describing "discriminatory action"*
>
> *(b) That the worker was engaged in one or more health and safety activities protected by Section 3-35 of the Act; and*
>
> *[48] That there is some basis to believe that the employer took discriminatory action against the worker "for a reason" mentioned in section 3-35. In other words, there must be a prima facie linkage or nexus between the worker's protected activity and the employer's action.*
>
> *[49] A determination that a prima facie case of discriminatory action has been established raises a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section and triggers a reverse onus, wherein it falls to the employer to establish, on a balance of probabilities, that discriminatory action was taken against the worker for good and sufficient other reason.* [as written throughout]

[6] This finding, Clarke argues, leads to a conclusion that she does not have to prove that there was an objective issue of safety. She only needs to show that she made a complaint or report protected by the Act and was punished for doing so. The complaint or report does not need to be the sole reason for her termination; it merely needs to be a reason.

[7] The Adjudicator erred by failing to consider whether the harassment complaint was a factor in the decision to terminate and by ignoring the crucial issue of proximity. Clarke argues that the proximity of the health and safety complaint to her termination logically leads to a conclusion that the Employer imposed the termination because of the complaint. The complaint was either the reason or a reason for the termination. Even if the complaint was only part of the reason, it did motivate the Employer to terminate Clarke. The Adjudicator erred in law by effectively finding that the Employer simply needed another apparent reason to terminate Clarke to nullify the effect of the fact that the complaint was one of the reasons for her termination.[4]

[8] The Adjudicator erred by ignoring, misapprehending, and misapplying the evidence, in particular, in his assessment of the good and sufficient other reason test. The Adjudicator found that because the Employer had been unhappy with Clarke's performance in the past, the Employer had good and sufficient other reason to terminate her employment. Clarke argues that simply having been displeased with an employee's performance in the past is not sufficient to establish the good and sufficient other reason defence, especially in light of the serious issue in this case around the proximity of Clarke's complaint to Mann's direction to terminate her.[5] The

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[4] *Saskatchewan Indian Gaming Authority v Karyn Taypotat*, September 16, 2015, LRB File No 116-14.
[5] *Oil City Energy Services Ltd v Fadhel and McGowan*, March 31, 2017, LRB File No. 206-16.

Adjudicator failed to correctly apply the law when he ignored the fact that the complaint was the precipitating cause for the termination.

[9] Clarke further argues that to rely on unsatisfactory work performance as a good and sufficient other reason for dismissal, the Employer must have established that there was a history of progressive discipline.[6]

Argument on behalf of Employer:

[10] The Employer argues that the Adjudicator properly identified and applied the three-part test established by the Act, as identified in *Banff Constructors Ltd v Lance Arcand*[7] ["*Arcand*"]:

> *Having reached this conclusion on the interpretation of s. 3-36(4), the broad issues to be determined in the instant case are:*
>
> > *1. Did the employee engage in protected activities, i.e. activities that come within the ambit of s. 3-35?*
> >
> > *2. Did the employer take discriminatory action against the employee within the meaning of that term as defined in s. 3-1(1)(i)?*
> >
> > *3. If the first two questions are answered in the affirmative, was the discriminatory action taken for good and sufficient other reason within the meaning of s. 3-36(4)?*

[11] In answering the first question, the Adjudicator found for Clarke and concluded that she was engaged in a protected activity when she reported health and safety concerns to her Employer. The Adjudicator did not decide the appeal by ruling against Clarke because he thought her harassment complaint itself was unfounded. The Adjudicator specifically rejected the Employer's argument that he should make this finding[8]. On this ground of appeal Clarke has not identified an error of law made by the Adjudicator.

[12] The Employer argues that the Adjudicator did consider whether the harassment complaint was a factor in the decision to terminate. An objective reading of the Adjudicator's reasons shows that he considered the timing and sequence of events that led to the termination of Clarke's employment.

[13] The Adjudicator did not ignore, misapprehend or misapply the evidence at all or, in particular, in relation to his assessment of the good and sufficient other reason test. The Employer

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[6] *Ken Giberson Transport Ltd. v. Stull*, 2010 CarswellNat 1918, [2010] CLAD No. 96.
[7] April 28, 2020, LRB File No. 184-19 at para 46.
[8] At para 368.

is not required to prove cause or progressive discipline.[9] An employee is only protected from discriminatory action if that action is taken because the employee engaged in a protected activity. The Employer does not have to establish that it had cause to dismiss Clarke from her employment to establish that it had good and sufficient other reason to terminate her employment. The lack of a formal progressive discipline process has no bearing on the determination whether the Employer had good and sufficient other reason to terminate Clarke's employment.

Relevant Statutory Provisions:

[14] The following provisions of the Act were considered on this appeal:

> ***Interpretation of Part***
> *3-1(1) In this Part and in Part IV:*
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> *. . .*
>
> *(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:*
>
> *(A) steps are being taken for the purposes of clause 3-31(a) to satisfy the worker that any particular act or series of acts that the worker refused to perform pursuant to that clause is not unusually dangerous to the health or safety of the worker or any other person at the place of employment;*
>
> *(B) the occupational health committee is conducting an investigation pursuant to clause 3-31(b) in relation to the worker's refusal to perform any particular act or series of acts; or*
>
> *(C) an occupational health officer is conducting an investigation requested by a worker or an employer pursuant to clause 3-32(a);*
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> *. . .*
>
> *(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*

[9] *Racic v Moose Jaw Family Services Inc.*, 2015 CanLII 60882 (SK LRB), at para 27.

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.

General duties of employer

3-8 Every employer shall:

. . .

(d) ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment with respect to any matter or circumstance arising out of the workers' employment.

Discriminatory action prohibited

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; . . .

Referral to occupational health officer

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

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

(a) cease the discriminatory action;

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

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

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

(3) If an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 3-35, the occupational health officer shall advise the worker of the reasons for that decision in writing.

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

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

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

> ***Right to appeal adjudicator's decision to board***
> *4-8(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.*
> *. . .*
> *(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 and Decision:

[15] The parties agree that the standard of review applicable to this appeal is the standard of correctness. The Act provides for an appeal from a decision of an Adjudicator to the Board only on a question of law. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, the Supreme Court of Canada recently confirmed the standard of review to be applied to this appeal[10]:

> *Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see Housen, at paras. 10, 19 and 26-3.*

[16] The Board has identified that, in considering an appeal, questions of law may be characterized as questions of law alone; questions of mixed fact and law; or findings of fact that may be reviewable as questions of law.[11] With respect to the third category, *PSS Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*[12] states that findings of fact may be reviewable as questions of law where the findings are unreasonable in the sense that they ignore relevant evidence, take into account irrelevant evidence, mischaracterize relevant evidence, or make irrational inferences on the facts.

[17] Turning to the appeal, the Board finds that the Adjudicator properly identified the legal issues he was to address, as set out in *Arcand*[13]. The Board further finds that the Adjudicator correctly applied the legal tests to the facts as he found them.

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[10] 2019 SCC 65 (CanLII). See also *Arch Transco Ltd. (Regina Cabs, Appellant) v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers)*, 2020 CanLII 100542 (SK LRB), paras 78-90.
[11] *Saskatchewan Polytechnic Students' Association Inc. v Ryan Benard*, 2021 CanLII 31416 (SK LRB).
[12] 2007 SKCA 149 (CanLII) at para 68.
[13] See para [10].

[18] The first issue he addressed was whether Clarke engaged in a protected activity. In considering this issue, the Adjudicator did stray from his assigned task when he stated, at paragraph 375:

> *. . . Ms. Clarke held an honest belief and perceived that she was being bullied and harassed at work. I do not find that it met an objective standard of harassment. Based on the evidence, Janet was not a victim of harassment or bullying. . . .*

[19] However, the Board does not agree with Clarke's suggestion that this comment tainted the Adjudicator's analysis of the case before him. Despite this unnecessary comment, the Adjudicator nonetheless concluded that paragraph by finding that Clarke was engaged in a protected activity: "She cannot be terminated for informing her employer of the offending behaviour thus the matter turns on the analysis and answering of the further questions set out below." The Adjudicator made no error of law in reaching this conclusion.

[20] Next, he properly addressed the issue of whether the Employer took discriminatory action against Clarke, within the meaning of clause 3-1(1)(i) of the Act. He found that her termination was a discriminatory action. Again, no error of law occurred in making this decision.

[21] The Adjudicator then turned to the final issue, whether the Employer had good and sufficient other reason to terminate Clarke's employment. The Adjudicator in *Arcand* correctly described this step as follows:

> *[51] The issue I am called upon to determine on this appeal is not whether the complaints made by the employee while he was employed by the employer would have been substantiated had a complete investigation been conducted, nor whether he was in fact subjected to harassment. I must determine whether he was laid off because he complained about what he believed to be harassment. Having answered the first two questions set out above in the affirmative, I must now consider whether the employer laid the employee off for "good and sufficient other reason".*

[22] The Adjudicator in this matter correctly described this issue at paragraph 379:

> *My inquiry and determination need not consider whether or not Janet Clarke ought to have been dismissed, but whether her termination was made for good and sufficient other reason – and not for the reason of having reported harassment and bullying in the workplace.*

[23] The Adjudicator heard evidence from a number of witnesses and carefully reviewed all of the evidence before him. In the face of conflicting evidence, the Adjudicator made findings of fact on which he relied in arriving at his determination that the Employer had good and sufficient other reason to terminate Clarke. Clarke disagrees with the Adjudicator's interpretation of the facts.

However, Clarke has not satisfied the Board that the Adjudicator ignored relevant evidence, took into account irrelevant evidence, mischaracterized relevant evidence or made irrational inferences on the facts. As a result, the Board is bound by the Adjudicator's findings of fact; no error of law was identified.

[24] The Board does not accept Clarke's argument that the Adjudicator ignored the proximity of Clarke's complaint to her termination. As the Adjudicator noted in *JR v Chip and Dale Homes Inc.*[14]:

> *The adverse employment consequence must do more than merely follow the protected safety activity chronologically. As previously noted, the Employer acknowledges the short interval between the Appellant's protected activity and the discipline levied. While the length of the interval is not in itself determinative of a nexus, it is a relevant factor to be considered. It is also helpful to consider context. . . . I find that the Appellant has established a prima facie connection or nexus which prevails until contradicted or overcome by other evidence.*

[25] In this case, the Employer provided evidence, that was accepted by the Adjudicator, that overcame the *prima facie* connection. See, for example:

> *[34] Mr. Mann testified that he told Dianna Emperingham on July 11, 2018 to terminate Janet Clarke's employment, and that he had previously told her to do the same thing a number of times.*
> *. . .*
>
> *[38] When shown Exhibit A-9, the termination letter to Janet Clarke dated July 16, 2018, he [Mann] testified that Ms. Emperingham was carrying out his direction delivering the termination letter, but he had determined there should be a termination of Ms. Clarke in early May. He testified that "only by ultimatum on July 11" did it finally get completed.*

[26] Clarke's complaint of harassment was made by email dated July 13, 2018. Clarke argues that the evidence described in paragraph 51 of the Adjudicator's decision proves that the protected activity was a factor in Clarke's termination. A more accurate description would be that the filing of the complaint did not dissuade Mann from proceeding with the termination in accordance with his previous decision.

[27] The Board agrees with Clarke that this case is similar to *Oil City Energy Services Ltd v Zeyad Fadhel and Trevor McGowan*[15], in that the outcome depended on a finding of credibility by both Adjudicators with respect to the employers' assertions respecting why the employees were terminated. The difference is that, in that case, the Adjudicator's finding of credibility favoured the employees, while in this case it favoured the Employer. The same can be said with respect to the

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[14] August 19, 2016, LRB File No 030-15 at para 100.
[15] March 31, 2017, LRB File No. 206-16.

applicability of *Taypotat*. In this case the Adjudicator found that Clarke's complaint was not the reason or even a reason for her termination.

[28] The Board does not accept Clarke's argument that the Adjudicator could not rely on unsatisfactory work performance as a good and sufficient other reason for dismissal because there was no evidence of a history of progressive discipline. The decision relied on by Clarke for this argument, *Ken Giberson Transport Ltd v Stull*,[16] was a determination of the amount of termination and severance pay required to be paid pursuant to specific provisions of the *Canada Labour Code*. It is inapplicable to this matter. As the Board held in *Racic v Moose Jaw Family Services Inc.*[17], the absence of progressive discipline does not lead to a conclusion that the Employer did not have good and sufficient other reason for the termination.

[29] The Board finds that the Adjudicator did not make an error of law when he decided that the Employer had good and sufficient other reason to terminate Clarke's employment.

[30] In light of the Board's findings, there is no need to consider the parties' arguments respecting whether the issue of remedy would have been more properly determined by the Board or remitted to the Adjudicator.

[31] The Board thanks the parties for the comprehensive oral and written arguments they provided, which the Board has reviewed and found helpful.

[32] The decision of the Adjudicator is affirmed.

DATED at Regina, Saskatchewan, this **28th** day of **July, 2021.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson

[16] 2010 CarswellNat 1918, [2010] CLAD No. 96.
[17] 2015 CanLII 60882 (SK LRB), at para 27.