In the Matter of an Appeal to a Special Adjudicator / Adjudicator
pursuant to s. 56.3 of *The Occupational Health and Safety Act, 1993*
and *The Saskatchewan Employment Act, 2014*

BETWEEN:

SASKATCHEWAN INDIAN GAMING AUTHORITY INC.

Appellant/|Employer

- and –

KARYN TAYPOTAT

Respondent/Worker

For the Appellant: Shannon G. Whyley, MacPherson, Leslie & Tyerman, LLP

For the Respondent: Kirk Goodtrack, Goodtrack Law

Decision

I INTRODUCTION & BACKGROUND

[1] This is an appeal of a letter decision and Notice of Contravention by Officers of the Occupational Health and Safety branch of the Ministry of Labour Relations and Workplace Safety issued on May 23, 2014 wherein Officers determined the Saskatchewan Indian Gaming Commission's ("SIGA") dismissal of Karen Taypotat on November 1, 2013, constituted discriminatory action against Ms. Taypotat in contravention of Section 3-35 of *The Saskatchewan Employment Act,* (the "Act").

[2] Concurrent with a letter decision, the Officers issued a Notice of Contravention (Report Number 209) 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] On November 26, 2013, Occupational Health and Safety received a discriminatory action complaint from the Respondent (Discriminatory Action Confidential Questionnaire). The protected health and safety activity asserted involved harassment.

[4] On February 7, 2014, Occupational Health Officers requested SIGA to provide reasons for the termination as well as information regarding Ms. Taypotat's complaint of harassment and findings and a copy of SIGA's current harassment policy by February 21, 2014. After an investigation, the Officers issued their decision as aforesaid, on May 23, 2014.

[5] On June 2, 2014, SIGA filed a Notice of Appeal June 2, 2014, on the following grounds:

a) The officers erred in finding that SIGA bore the onus of providing a "good and sufficient other reason for SIGA's disciplinary action against Ms. Taypotat, as Ms. Taypotat was not exercising any rights under the Act;

b) In the event that Ms.Taypotat was at one time exercising rights under the Act, she was not at the time of termination. The officers erred by not recognizing that the matter was being held in abeyance at the request of Ms. Taypotat.

c) The officers erred by failing to consider relevant evidence in determining whether a "good and sufficient other reason" existed for SIGA's disciplinary action against Ms. Taypotat. Ms. Taypotat was given several warnings regarding her inappropriate behaviour and conduct throughout the disciplinary process, including the potential for termination if her actions continued.

d) The officers erred in law and fact and arrived at a decision that is incorrect and wholly unreasonable. Pursuant to sections 3-35 and 3-36 of the Act, SIGA provided good and sufficient reasons for Ms. Taypotat's termination. Ms. Taypotat's disciplinary record combined with her further demonstration of insubordination and uncooperative behaviour towards SIGA's management demonstrated that her dismissal was warranted.

[6] Further to a preliminary issue being raised in the course of setting hearing dates on September 24, 204, and after an oral hearing on the issue at the request of the parties, I issued a decision on February 15, 2015, that the Notice of Contravention was stayed on an interim basis pursuant to section 3-57(3) of the Act, pending a hearing of the appeal on its merits.

[7] The appeal hearing set for three days was held in Yorkton was held on March 3, 4 and 5, 2015 at which the evidentiary portion of the Appellant's case was completed. Continuation of the hearing was scheduled and held for additional three days in Regina, on April 21, 22 and 23, 2015.

[8] Immediately prior to the commencement of the hearing in March, counsel for the Respondent requested that the proceedings be recorded and transcribed, neither of which an adjudicator is resourced to provide. Counsel for the Respondent proposed to incur the cost of a court reporter and transcription, and to provide copies to opposing counsel and the adjudicator.

[9] The hearing continued in Regina on the April dates aforesaid. Upon completion of the Respondent's case on April 23, 2015, counsel for the Appellant presented oral and written argument. The Respondent waived the right to present oral argument, seeking instead the opportunity to submit written argument in response. Allowing for time to obtain transcripts of the final three hearing days, Counsel mutually agreed to dates for the submission of written argument by the Respondent (May 14, 2015) and the Appellant's Reply (May 28, 2015), concluding the hearing.

II ISSUES

[10] Whether the employer's action against the Respondent is discriminatory, in circumstances prohibited by section 3-35 of *The Saskatchewan Employment Act.*

[11] Pursuant to its Notice of Appeal, SIGA submits the issues arising this hearing are:

1) Did the Occupational Health and Safety Officers err in law by violating the principles of procedural fairness and natural justice?

   (i) By not interviewing key individuals specifically named in the Discriminatory [Action] Complaint?

   (ii) By not providing sufficient reasons?

2) If there have been breaches of procedural fairness and natural justice, should the Notice of Contravention be revoked in its entirety?

3) Did the Occupational Health and Safety Officers err by finding that SIGA took discriminatory action against Ms. Taypotat?

   (i) Was Ms. Taypotat seeking enforcement of the Act?

   (ii) Did SIGA take discriminatory action against Ms. Taypotat because she was seeking enforcement of the Act?

   (iii) Did SIGA have good and sufficient other reason to terminate Ms. Taypotat's employment?

4) If Ms. Taypotat is to be reinstated, has she properly mitigated her damages?

III RELEVANT LEGISLATION

[12] For purposes of this appeal the relevant provisions of the Act begin with Section 3-1(1)(i) of *The Saskatchewan Employment Act,* which defines discriminatory action to mean:

> "**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...

Section 3-35 of the Act sets out the reasons an employer may be found to have taken discriminatory action against a worker: In matters involving harassment, the relevant provisions are:

> 3-35 No employer shall take discriminatory action against a worker because the worker:
>
> (a) acts or has acted in compliance with:
>
> (i) this Part or the regulations made pursuant to this Part;
>
> (ii) Part V or the regulations made pursuant to that Part;
>
> (iii) a code of practice issued pursuant to section 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;

Section 3-36 of the Act describes the process on referral of a discriminatory action to an occupational health officer and provides a framework for analysis:

> 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 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.

Section 3-1 defines harassment:

> (1)(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.

IV FACTS AND EVIDENCE

[13] By and large, the facts set out below are supported by documentary evidence and undisputed (unless otherwise indicated), although there are differences in the parties' interpretation, application and/or significance attributed to certain facts. Where material to my decision, such instances will be addressed in my reasons. Quotations from documents filed as exhibits are reproduced as in the originals, with the exception of text in square brackets which I have added for clarification.

[14] SIGA called five witnesses: Shauna Bear and Amulya Mohan from SIGA's Central Office and Gale Pelletier, Dale St. Pierre and Lyndon Watson from Painted Hand Casino. SIGA called as rebuttal witnesses: Garry (Gale) Prediger, a consultant employed by Penney Murphy & Associates, who conducted the investigation of the Respondent's 2011 harassment complaint and re-called Shauna Bear.

[15] Five witnesses were called by the Respondent, who testified on her own behalf. The Respondent called Shawna Cote, a former employee at PHC and Elizabeth Swain, a current employee at PHC. Ms. Swain testified by telephone, on speaker. The two investigating Occupational Health Officers, Shawn Tallmadge and Tammy Duncan, were subpoenaed to attend called as witnesses, as was their supervisor, Susan Boan.

[16] The Saskatchewan Indian Gaming Authority ("the Appellant", "SIGA") operates several casinos in Saskatchewan, including the Painted Hand Casino in Yorkton. The Respondent, Karyn Taypotat was employed by the SIGA at the Painted Hand Casino ("PHC") in Yorkton. She began her employment as a casual employee in May, 2000 as a Customer Service Representative in Guest Services. In 2006, Ms. Taypotat was successful in gaining a position as one of several Customer Services Supervisors in Guest Services, where she remained until the termination of her employment on November 1, 2013.

[17] In 2013, the relevant organizational structure at the Painted Hand Casino ("PHC) which applied to Ms. Taypotat was as follows:

- Karyn Taypotat was a supervisor of guest services employees at PHC;
- Lyndon Watson was the Guest Services Manager, directly above Ms. Taypotat;
- Gale Pelletier was the Senior Operations Manager, directly above Mr. Watson;
- Jonathan Pasap was the General Manager, directly above Mr. Pelletier;
- SIGA's corporate office ("Central Office") in Saskatoon, was directly above Mr. Pasap.
- Dale St. Pierre was the Human Resources Manager at Painted Hand Casino;

[18] Through its Central Office in Saskatoon, SIGA also provides additional support and resource services to management to the Painted Hand Casino (and its other casinos). The additional individuals from Central Office involved in this case in a material way are:

- Shauna Montgrand Bear, Vice-President of Human Resources at Central Office;
- Amulya Mohan, Senior Employee Relations Consultant; and
- Bonnie Missens, in-house legal counsel at SIGA

Termination of Employment

[19] SIGA ended Taypotat's employment on November 1, 2013. The termination decision was made collectively, by senior management at PHC (Gale Pelletier and Dale St. Pierre) in consultation with Central Office (Shauna Bear). Mr. Watson testified that he was not directly involved in the decision. However, as Ms. Taypotat's immediate supervisor, and in accordance with SIGA's standard practice, he carried out the termination in the presence a representative from Central Office's Human Resources/Employee Relations staff, Ken Bitternose.

[20] The letter terminating Ms. Taypotat's employment stated the grounds as follows:

> - Unacceptable behavioural conduct during your latter years of your employment with Painted Hand Casino (PHC)
> - Failure to co-operate with the employer's effort to improve the employment relationship
> - Failure to comply with the SIGA's policies and procedures
>
> As a result of your insubordination and uncooperative behaviour, the employment relationship has become incompatible and this incompatibility is irreparable.

[21] Mr. Pelletier testified that in and after August, 2009, SIGA took the following disciplinary actions against Ms. Taypotat, documented by Disciplinary Forms:

a) Poisoning the work environment in August of 2009, for which she received a 3-day suspension starting on August 31, 2009;

b) Poisoning the work environment in September of 2009, for which she received a 5-day suspension starting on October 14, 2009;

c) Failing to provide accurate and complete information when requested to do so in January of 2011, for which she was issued a verbal warning and a one day suspension on March 11, 2011 for failure to conduct herself with integrity and in the best interests of the Casino, and breach of agreement dated October 8, 2010 to follow the chain of command and address issues through proper protocol;

d) Making false and malicious statements about her managers for which she received a 5-day suspension on August 19, 2011 and entered into a Last Chance Agreement for one year commencing August 17, 2011;

e) Neglecting her duties in January of 2013, for which she was issued a verbal warning on February 27, 2013;

f) Refusing to carry out her duties in April of 2013, for which she was issued (April 30, 2013) a 3-day suspension for three occurrences; the three occurrences were: refusal to carry out duties and being disrespectful to manager; failure to provide accurate information where such information is requested or is requested by an authorized person; and failure to be courteous when dealing with fellow employees and the general public (x5). [sic]

g) Insubordination in July of 2013, for which she received a written warning on September 15, 2013;

[22] The Employee Acknowledgement section of each Disciplinary Form expressly states a warning that any further or continued misconduct will result in further disciplinary measures up to and including termination of her employment. Ms. Taypotat acknowledged receipt of these warnings, as well as her acknowledgement of her right of appeal, by her signature(s).

[23] Ms. Taypotat appealed much of her discipline utilizing SIGA's internal appeal process. The appeal process involves a review by the General Manager of the Casino who is not her direct supervisor. Ms. Taypotat also appealed discipline [informally] to Ms. Bear, Vice President of Human Resources. All of the discipline that Ms. Taypotat appealed was upheld on appeal.

2011 Allegations of Harassment

[24] In March, 2011, Ms. Taypotat made harassment allegations to SIGA (the **"2011 Allegations"**). The allegations focused primarily on Rob Bear, the Operations Manager (Ms. Taypotat's manager at the time) but included allegations against Laurie-Ann Rusnak (a human resources employee) and Mr. Watson whom she claimed had not been supportive when she raised her concerns about Mr. Bear.

[25] SIGA arranged for an independent investigation of the 2011 Allegations through the firm Penney Murphy & Associates – Registered Counsellors and Consultants. The investigation was conducted by Garry Prediger. Upon conclusion of his investigation, Mr. Prediger prepared a report to SIGA dated June 27, 2011. The independent report concluded, among other things, that

a) Ms. Taypotat's allegations against Mr. Bear were unfounded and substantiated;

b) There was no evidence to support or suggest that Mr. Watson or Ms. Rusnak had been complicit in any harassing behaviour, including abuse of authority, poisoning the workplace, and bullying in the workplace;

c) Given Ms. Taypotat's pattern of behaviour and difficulty accepting responsibility for her behaviour, it is unlikely that she will cease unfounded allegations of harassment and bullying; and

d) Given Ms. Taypotat's unwillingness to meet with Management and Human Resources to resolve issues, it will be challenging or impossible to engage with her positively in the future.

[26] On August 17, 2011, General Manager Jonathon Pasap imposed discipline on the Respondent [See 25(d)]. SIGA's evidence is that the discipline was not imposed *because* the Respondent filed a good faith harassment complaint. Rather, the discipline was imposed for *"Making false or malicious statements concerning managers, breaching SIGA's code of conduct, failure to accept responsibility for your action: see attached letter"*. Concurrent with the imposition of discipline, SIGA and the Respondent signed a Last Chance Agreement for a term of one year, the conditions of which were included in an attached letter from Mr. Pasap dated July 28, 2011

2013 Allegations of Harassment

[27] The April 30, 2013 discipline mentioned at paragraph 25 (f) precipitated the sequence of events which led to Ms. Taypotat's dismissal and, ultimately, to this appeal.

[28] In a same-day response to the above-mentioned discipline, Ms. Taypotat requested Human Resources to facilitate a meeting between herself and her supervisor (Watson) who had issued the discipline.

[29] On May 8 and May 10, 2013, Ms. Taypotat appealed the discipline she received April 30, 2013, raising the issue of harassment. As it pertains to harassment, the content of the two documents is much the same. The May 8, 2013 letter states in part:

> I have been a faithful employee for the past (13) thirteen years....I feel that I have **not been treated** professionally and the communication breakdown between my manager, Lyndon Watson and myself has increased over the years[...]
>
> For example, in one of my meetings with management I was told that I was stupid by my manager.
> [. . .]
> It is the countless Occurrence Reports that I am being requested to do by a specific time.....

> In a recent discipline, a discipline from 2009 was mentioned...I feel that Mr. Watson's behavior is intended to embarrass, humiliate and demean me. ...
> [. . .]
> I loved my job and felt honored to hold this position as Supervisor but I have distanced myself from this place, now when I come to work I experience: my heart races, I tremble and shake, a feeling of dread overcomes me, my chest gets heavy and I feel that I can't breathe, I am nauseated.
> [. . .]
> It stops here and now. I just want to be left alone any work performance issues I would like my Manager to address and talk with me. I want this harassment to stop. I just want to come here and do my job.

[30] Ms. Taypotat's earlier April 30, 2013 request for a meeting occurred on May 10, 2013, attended by Ms. Taypotat , and her support person, Elder Louie Taypotat, Gale Pelletier, Lyndon Watson and Ms. Kimberley Stone from Human Resources. Ms. Taypotat had prepared a short speech which she read at the beginning of the meeting;

> The purpose that I have requested this meeting with Lyndon Watson is to address the harassment complaints that I have submitted many times; "Stop Harassing me". under the circumstances these complaints have not been addressed in a professional manner and have fallen on deaf ears. "Stop harassing me" With Mr. Watson's presence I feel like I am walking on egg shells, trying my best to be very cautious so that I do not upset him in any way or form. "Stop Harassing me". I am very intimidated by Mr. Watson. He makes me feel like I can't do any of my duties proper, he also questioned my work ethics when he demands me to fulfill a task, he gives me last minutes email to do within 5 minutes before my shift end. "Stop Harassing me". When Guest Service is busy such as on senior days, draw days, ladies night, men's night and special occasions we are required to assist Marketing, Lyndon finds the time to have us address last minute tasks. It's does get overwhelming and I still get the job done. Its hard to work with a manager who is unpredictable with their mood, unaware if they are happy, angry, upset this type of behaviour causes a poisons work environment. Please stop harassing me!
>
> Due to this matter I am wondering what the solution will be on your behalf to better our working relationship on a professional manner.
>
> [Sic throughout]

[31] On May 15, 2013, Ms. Taypotat's legal counsel wrote to Painted Hand's General Manager ("Pasap") informing him Ms. Taypotat has prepared and filed a complaint of harassment under The *Occupational Health and Safety Act, 1993,* to investigate the harassment allegation against her supervisor.

> Based on my preliminary investigation, it is my opinion that the PHC has contravened, its *Personnel Policy,* the *Occupational Health and Safety Act* [sic], 1993 SS, c O-1 (the "Act") as well as the common law. Although Ms. Taypotat has prepared and filed a complaint under the Act to investigate the harassment allegation against her supervisor [. . .] should you be interested in setting aside a half a day to mediate this matter [. . .] I would certainly recommend that she agree to participate.

[32] The letter did not provide particulars of the harassment allegations, but proposed mediation, subject to an agreed mediator and other acceptable terms.

[33] SIGA acknowledged receipt and subsequently replied to counsel on May 30 and June 13, 2013. In the first reply, SIGA expressed a willingness to engage in mediation and asked for input on the selection of a mediator and location. On June 13, 2013, SIGA requested a copy of Ms. Taypotat's complaint and reiterated its inquiry regarding selection of a mediator. Neither Ms. Taypotat nor her legal counsel responded to either of SIGA's correspondence.

[34] On September 10, 2013, SIGA followed up again with Ms. Taypotat's legal counsel to determine if Ms. Taypotat still wished to proceed to mediation, and desired to have input on mediator selection and location. On September 21, 2013, Ms. Taypotat's legal counsel responded advising SIGA that he would contact his client as to her intentions and to place the matter in abeyance until further advised.

[35] The evidence reflects that at Ms. Taypotat and Ms. Bear spoke on the telephone occasionally. At some point, likely in the late summer or early fall, there was a telephone conversation in which Ms. Taypotat indicated to Ms. Bear that "things were going good and they" were leaving her alone. Neither could recall when the conversation occurred.

[36] In the meantime, Ms. Taypotat had received a written warning on September 15, 2014. She appealed the discipline on September 23, 2013. The appeal was denied by the General Manager, Jonathan Pasap, on September 26, 2013. Ms. Taypotat did not receive Mr. Pasap's letter until October 4, 2013, and complained to Ms. Bear that no one informed her that it had been placed in her mail slot.

[37] Further on September 15, Ms. Taypotat complained about Mr. Watson to Ms. Bear. Ms. Taypotat had received an email from Mr. Watson in which it appears he is coaching her with regard to issues she had documented in a recent shift report. Ms. Taypotat felt he had concluded she didn't know what she was doing, and complained to Ms. Bear that he hadn't asked her about the situation or gathered all the facts before reaching his conclusion. Ms. Bear replied reminding Ms. Taypotat about the plan of action they had discussed for going forward, and indicating she had spoken to Mr. Watson and Mr. St. Pierre who were on "on board" with it. Ms. Bear stated in her email:

> Hi Karyn
>
> Hang in there and be as professional as you can be even in difficult circumstances.
>
> On Tuesday, I did talk to with both Lyndon and Dale St. Pierre about our plan as we had discussed, and they are both on board. I have the email started I said I was going to send – too many interruptions and days away from the office – I will try to get this email sent out today with a plan of action to address concerns of all involved and plan going forward.
>
> Remember that Lyndon has a responsibility to follow up where there are issues; as he will with others as well. When we meet as a group, we will come up with an agreement as to how issues will be addressed going forward, including having one on one discussions and fact finding prior to decisions being made.

[38] In October, 2013, further to the "plan of action [...] to meet as a group", referred to by Ms. Bear in her September 20. 2013 email, SIGA scheduled a "meeting to discuss expectations" with Ms. Taypotat for October 28, 2013.

[39] On October 21, 2013, Mr. Watson emailed Ms. Taypotat requesting her to submit an Occurrence Report in response to a reported infraction on October 15, 2013: chewing gum while on the gaming floor.

[40] Mr. Pelletier testified that he had issued the directive banning gum chewing several years prior. In cross-examination, Mr. Pelletier testified that Surveillance watches everything in the Casino, including guests and staff, and sends reports of any observed infractions by staff to their managers for follow up. Usually, the manager would ask for an Occurrence Report which gives the employee an opportunity to provide an explanation. For example, an employee might have had permission to chew Hall's. When asked, Mr. Pelletier provided other examples of infractions reported by Surveillance, ranging from inappropriate attire, such as not wearing black shoes or spending more than 10 minutes talking to a patron, to not handling money properly. Mr. Pelletier explained that employees would receive a warning unless there had been repeated infractions and warnings.

[41] Mr. Watson testified that he receives surveillance audits periodically. Mr. Watson testified that in accordance with standard practice, he followed up on Ms. Taypotat's reported infraction up by asking her to submit an Occurrence Report, giving her an opportunity to provide an explanation. Ms. Taypotat provided the Occurrence Report, indicating that she usually has Halls or a soft chewy and needed a sugar fix for personal reasons.

[42] Ms. Taypotat's testimony establishes that she was aware of the directive issued some time ago, and that she had been verbally warned for chewing gum once before, in 2011, by Mr. Watson.

[43] Ms. Taypotat testified that she was always disciplined, every time she was asked to fill out an occurrence report, and that she asked Mr. Watson what she was going to get for this one. She stated Mr. Watson always laughed when she asked questions. He did not answer her question directly, but she knew he would discipline her.

[44] Upon being asked whether Occurrence reports always result in discipline, Mr. Watson testified that they did not. Both Mr. Watson and Mr. Pelletier testified to the effect that, where appropriate, an employee could obtain permission or accommodation to have Halls or some form of candy. With that in mind, on October 22, 2013, Mr. Watson requested Ms. Taypotat to provide additional information. His email stated:

> Surveillance reported (by audit) that you were chewing gum. To prevent further infractions regarding this matter, I will need information from you as to why you need a sugar fix (halls, soft chewy candy, gum): personal reasons. Once you provide the information to me, I will then advise Surveillance to stop auditing you in this manner.

[45] Ms. Taypotat did not immediately respond.

Expectations Meeting

[46] On Ms. Bear's recommendation to discuss expectations, a meeting was scheduled for October 28, 2013 to meet as a group consisting of Gale Pelletier, Dale St. Pierre, Lyndon Watson, Karyn Taypotat and Amulya Mohan, a Senior Employee Relations Consultant from Central Office. The meeting was not intended to be disciplinary in nature. Rather, it was for the purpose of trying to manage workplace expectations going forward. Ms. Mohan had prepared a draft agenda and draft plan of action for purposes of the meeting.

[47] Ms. Taypotat indicated that she needed a support person with her for the meeting and was informed by Mr. St. Pierre on October 23rd that she did not need one.

[48] An inadvertent error had been made on the first Outlook invitation such that the meeting appeared to be scheduled for 24 hours from Monday to Tuesday. The cancellation of the first invitation causes some initial confusion as to whether the meeting itself had been cancelled, and Ms. Taypotat had not immediate replied accepting the corrected invitation.

[49] In the meantime, on Saturday, October 26, 2013, Ms. Taypotat's legal counsel, Mr. Goodtrack, wrote to SIGA's in-house counsel, Ms. Missens, indicating, among other things

> [...] I understand that Ms. Taypotat is scheduled to meet with her supervisor (and others) on Monday, October 28, 2103 [...] to discuss issues with her employment.
>
> Ms. Taypotat has provided me with several documents including disciplinary actions taken against her including a finding by SIGA that she has been caught chewing gum. Ms. Taypotat has denied she was chewing gum and although she made an attempt to explain what occurred, it appears to have gone without success.
>
> Although it appeared to me that the issues set out in my May 15, 2013 resolved themselves, it has clearly not. [sic]
>
> I am hereby providing you with notice that I will be attending as her support person on October 28, 2013 and assessing the steps Ms. Taypotat is required to take in order to protect and preserve her rights. I strongly urge you or external counsel to attend the meeting.

[50] In cross-examination, Ms. Taypotat agreed she was aware that the purpose of the October 28, 2013 meeting was to discuss expectations, but was scared it was going to be disciplinary. On further questioning, and with reference to Ms. Bear's email [*infra,* Paragraph 62], Ms. Taypotat agreed that she trusted Ms. Bear's assurances that the meeting was not to be disciplinary, that the purpose of the meeting was to see how things could be fixed.

[51] On October 27, 2013, Ms. Taypotat acknowledged that she would be attending the meeting, with her lawyer. Ms. Taypotat indicated that *"for any other meetings, My Lawyer will be attending."* [sic]

[52] The evening of October 27, 2013, Mr. Goodtrack wrote to Ms. Missens:

> Since SIGA is arranging the meeting, can you please set out what the issues are?
>
> I can advise that the issues and proposal to have an independent investigator investigate what is occurring at Painted Hand Casino, is Ms. Taypotat's main concern.

[53] In the morning of Monday, October 28, 2013, Ms. Missens replied:

> Kirk we have our own internal processes that should be utilized. If you have any specific concerns after today's meeting please call me and we can discuss them.

[54] Shortly thereafter, Ms. Missens advised Mr. Goodtrack that the meeting had been cancelled and indicated SIGA would advise Ms. Taypotat of the issues to be discussed at a rescheduled meeting.

[55] An attempt was made by SIGA to reschedule the expectations meeting for November 4, 2013; however, Ms. Taypotat simply responded *"Not a good time for me. I'll be out of town and will get back to you."*

[56] On October 28, 2013, Mr. Watson followed up on his October 22, 2013 email seeking further information in re: the "chewing gum" infraction, by sending a "friendly reminder" to Ms. Taypotat requesting a reply. Ms. Taypotat responded:

> Lyndon, I have spoken to my lawyer. He advised me that this matter together with other matters will form part of my complaint of. [*sic* as to truncated sentence]

[57] In separate emails to Ms. Missens the evening of October 28, 2013, Mr. Goodtrack first questioned SIGA's practice in re: not setting out the issues before the meeting to allow employees the opportunity to know the case he or she has to meet and requested all documentation SIGA is relying on surrounding the chewing gum incident. Then, in a second email, Ms. Taypotat's counsel states:

> I understand that SIGA has its own internal process, but that does not foreclose my client's right to fully examine the issues. Or are you saying that my client would ONLY be able to exercise her right to examine the decision to discipline her because SIGA made a (improper) finding that she was chewing gum, AFTER SIGA has reconsidered its decision?
>
> I beg to differ. **My client has alleged that she is being harassed by her supervisor**. On behalf on my client, I am requesting copies of all documentation (including video tapes SIGA allegedly relied upon) surrounding the chewing gum incident. If SIGA declines my request, please state the reasons and authority. [my emphasis]

[58] In the late evening of October 28, 2013, Ms. Bear wrote to Ms. Taypotat on behalf of SIGA. The email included an explanation that the meeting was rescheduled because Ms. Taypotat intended to bring her lawyer, and SIGA would therefore need to make similar arrangements to have a lawyer attend. The email also included an explanation that the expectations meeting was never intended to be disciplinary nor an investigation. Ms. Bear wrote:

> Do you have time for a call tomorrow?

...

As discussed with you awhile back and provided to you in an email update, I had conversations with Lyndon, Dale, Gale and Employee Relations at CO. My direction never changed since we had discussion on the phone and site management were very willing to engage in the process we had talked about (similar to a mediation session a meeting with you individually would occur and similarly with Lyndon & Dale and then we would bring all parties together). The goal of the meetings would be to layout expectations of all parties involved and this is not an investigation. I had directed the ER team to work with site management to make this happen and I have confirmed that the direction has not changed.

When I heard from the team today and the notice we got from your lawyer today I was disappointed to hear that you have communicated to him that the meeting was scheduled to investigate a recent allegation of you chewing gum, which is not the case. As mentioned in the above paragraph and in a discussion with you had with Dale last week, the purpose of the meeting was to communicate expectations of all parties.

Karyn, we have the best intentions, we are trying to work with you and support you during your employment at SIGA/PHC. Your actions are making it difficult to manage and get this situation on track. As discussed with you in the past, Lyndon is required to follow up on any deviations from policy and procedure with any one of his team members and only if there is a fair and proper finding of deviation from policy than (sic) corrective measures will be implemented. He is bound by policy to adhere to the principles of correction action.

[59] In her correspondence, Ms. Bear expressed the hope that Ms. Taypotat could make some time a re-scheduled meeting on November 4, 2013. *("It's important that the meeting be held sooner as I don't want things to get worse")* and said she was available to the next or on Wednesday morning [October 30, 2013] to discuss the expectations meeting.

[60] Ms. Taypotat did not respond to the email.

[61] The evidence of SIGA is that, following these attempts to reach out to Ms. Taypotat it was felt that Ms. Taypotat was not making the effort to work with her employer. SIGA decided the situation had reached a level of frustration in which there was no likelihood that things would improve with Ms. Taypotat. A decision was made, one to two days prior to November 1, 2013, to terminate Ms. Taypotat's employment.

2013 Complaint to OH&S

[62] Ms. Taypotat testified that she prepared a complaint (OH&S's Harassment Confidential Questionnaire) which she mailed before going to work on November 1, 2013 for her 5:00 p.m. shift where, upon arrival, her employment was terminated.

[63] SIGA's evidence is that SIGA was not aware of the Respondent's complaint to OH&S at the time of the termination and did not see a copy of the Harassment Confidential Questionnaire dated November 1, 2013 until the these proceedings.

IV ANALYSIS, FINDINGS AND REASONS

Framework for Analysis of Discriminatory Action

[64] I am mindful that the underlying philosophy and foundation of occupational health and safety legislation is the internal responsibility system. Fundamental to that concept is the principle that employers and employees alike are personally and directly responsible for health and safety as part of their job—everyone has a role to play. Within the scope of their ability to do so, workers have the responsibility to 'fix' health and safety issues or exercise their right to and responsibility to report their concerns(s) to the employer or supervisors to fulfill their duty to comply with the Act and Regulations. To that end, employees must be able to bring health and safety related issues to the attention of the employer without fear of reprisal. Accordingly, employees who raise health and safety concerns in the circumstances described in section 3-35 are protected by the prohibition against retaliation for having done so.

[65] Section 3-36 of the Act *supra* provides a framework for analysis of a discriminatory action complaint.

[66] Pursuant to section 3-36(1), the initial onus is on the worker (Appellant) to establish, *prima facie*, that the employer has taken discriminatory action against him or her for one or more of the reasons mentioned in section 3-35 of the *Act.*

[67] The protection of section 3-35 is reinforced by the imposition of a reverse onus in section 3-36(4). A decision by an Officer that the worker has established a *prima facie* case gives rise to a presumption in favour of the worker that the action was taken *because* of the worker's health and safety related activity, and the onus shifts to the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason. By the reverse onus, the legislators imposed the ultimate burden on the employer to establish, on a balance of probabilities, that there was good and sufficient reason for the discriminatory action other than the worker's protected health and safety activity.

[68] In this case, SIGA contests *inter alia,* the Officers' *prima facie* findings as well as the determination that SIGA did not have good and sufficient other reason for the termination of Ms. Taypotat's employment.

[69] My analysis and reasons are in two parts.

Part 1 - Initial Issues

[70] Two issues have been raised, not as preliminary issues, *per se,* one having been raised in argument, the other raised as a ground of appeal. Both call for preliminary consideration. The first issue, raised in argument, pertains to the scope of this adjudication and the standard of review. The second issue, raised as a ground of appeal, invites me to revoke the Notice of Contravention due to flaws in the Officers' investigation and decision, and breaches of procedural fairness and natural justice. In the alternative to the SIGA invites me to disregard the Officers' findings from forming any factual determinations in this adjudication. It is to those issue I first turn.

Scope of the Adjudication and Standard of Review

[71] SIGA submits that the nature of this adjudication, and the appropriate standard of review of SIGA's management decision is analogous to approaches taken in the labour relations context[1] in the sense that the issue is not what the adjudicator night have done if they were the employer. Rather, the issue in this appeal is solely whether discriminatory action was taken against Ms. Taypotat within the meaning of the Act as set out in sections 3-35 and 3-36.

[72] Counsel for the Respondent submits, in essence, that this appeal hearing is akin to a broader version of a judicial review. The Respondent submits that section 3-53(1) proceedings are framed as an appeal and not an application for judicial review or a trial *de novo,* and argues, therefore, appeals are broader than judicial review. An adjudicator is clearly entitled to look behind the Notice of Contravention, but deference is at play. Counsel argues the Occupational Health Officers' decision is subject to a standard of review. Counsel submits the importance of defining the standard of review to establish the intensity with which this Tribunal will scrutinize the OH&S Officers' decision—that the standard of review establishes the level of deference that this Tribunal will give the OH&S Officers' decision. Citing case law[2], counsel submits that the applicable standard is reasonableness for findings of fact and mixed fact and law, correctness for questions of law.

[73] In Reply, SIGA argues per *Lundrigan v. Claude Resources Inc.*, 2004 SKQB 239, that the adjudicator performs a function analogous to that of a trial judge in criminal proceedings, in that police officers investigate and lay charges in the criminal context, and then the merits of those charges are subject to a trial where the charges must be established in court with evidence (and with no deference or standard of review applicable to the decision to lay charges). Similarly, occupational health officers investigate and issue notices of contravention, but if those notices are appealed, the merits of the charges must be established before an adjudicator (with no deference or standard of review).

[74] With respect, I disagree with the position advanced by the Respondent.

[75] An adjudicator is a creature of statute. The relevant provisions of the Act are as follows:

> **Procedures on appeals**
>
> **4-4**(1) After selecting an adjudicator pursuant to section 4-3, the board shall:
>
> (a) in consultation with the adjudicator and the parties, set a time, day and place for the hearing of the appeal or the hearing; and
>
> (b) give written notice of the time, day and place for the appeal or the hearing to:
>
> (ii) in the case of an appeal or hearing pursuant to Part III:
>
> (A) the director of occupational health and safety; and
>
> (B) all persons who are directly affected by the decision being appealed.
>
> . . .

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[1] *In Re Health Labour Relations Association and British Columbia Nurse's Union*, (1985) 21 L.A.C. (3d) 114

[2] *Bell Canada* v. *Canadian Radio-Television & Telecommunications Commission* [1989] 1 S.C.R. 1722; Dunsmuir v. *New Brunswick* [2008] 1 S.C.R. 190; *Pezim* v. *British Columbia (Superintendent of Brokers)*, [1994] S.C.R. 557; *Canada (Director of Investigation and Research, Competition Act)* v. *Southam Inc.*, [1997 1 S.C.R. 748 *B.R.E.S.T. Transportation Ltd.* v. *Noon*, 2009 FC 630 (CanLII), [2009] F.C.J. No 805 (QL) at para 5

(3) An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.

(4) An adjudicator may determine any question of fact that is necessary to the adjudicator's jurisdiction.

. . .

Powers of adjudicator

4-5(1) In conducting an appeal or a hearing pursuant to this Part, an adjudicator has the following powers:

(a) to require any party to provide particulars before or during an appeal or a hearing;

(b) to require any party to produce documents or things that may be relevant to a matter before the adjudicator and to do so before or during an appeal or a hearing;

(c) to do all or any of the following to the same extent as those powers are vested in the Court of Queen's Bench for the trial of civil actions:

(i) to summon and enforce the attendance of witnesses;

(ii) to compel witnesses to give evidence on oath or otherwise;

(iii) to compel witnesses to produce documents or things;

(d) to administer oaths and affirmations;

(e) to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the adjudicator considers appropriate, whether admissible in a court of law or not;

[76] Had the legislators intended appeals to an adjudicator to be akin to a judicial review of the Officer's decision —"broader" than judicial review"— one would expect it to have been reflected in the statute. In my view, nothing in the enabling provisions give rise to such a presumption. Neither is it expressly stated that the appeal hearing is be a trial *de novo*, perhaps raising the presumption that the hearing is to be a true appeal on the record. Instead, the statute refers expressly to the setting of a time, day and place for a hearing which bears the trappings of a trial. Read as a whole, the enabling section of the statute contains language indicative that on appeal to an adjudicator, the nature and scope the hearing extends beyond the confines of an appeal on the record, to be a "trial" wherein the adjudicator is empowered to hear evidence under oath or affirmation, as well as by affidavit or otherwise as the adjudicator considers appropriate.

[77] I am further guided by Justice Chicoine who considered the nature of an appeal to an Adjudicator under *The Occupational Health and Safety Act, 1993* in *Lundrigan, infra*. With reference to paragraph 23, SIGA submits that the Court in *Lundrigan* made it clear that Adjudicators are not subject to a standard of review when assessing an Occupational Health Officer's decision, because the appeal is akin to a first hearing:

> **A major distinguishing factor is that the appeal to the adjudicator in accordance with subsection 50(1) is not an appeal on the record nor a trial *de novo*. It is, for all intents and purposes, the first trial, and not a new trial.** The initial investigation by the occupational health officer under subsection 28(1) does not require a hearing or the calling of witnesses, but simply an investigation and a decision whether to issue a notice of contravention or not. This is akin to a policeman receiving a complaint and deciding whether or not to lay a charge. [emphasis added]

And at paragraph 33

> The adjudicator will not be so much interested in whether the occupational health officer or director made a mistake as in whether the employer is guilty of the discriminatory conduct alleged by the employees.

[78] While the expertise residing in the Occupational Health and Safety Division, its Director and Officers, is acknowledged, for the reasons stated above, I agree with SIGA that the issue before me is whether the Act has been contravened, to be determined on the merits of the evidence, as opposed to identifying reviewable errors of the Occupational Health and Safety Officer (the "Officer(s)".

Procedural Fairness and Natural Justice

[79] SIGA submits that the investigating officers violated principles of procedural fairness and natural justice and invites me to revoke the Notice of Contravention in its entirety on the grounds that (a) the Officers failed to interview key individuals named in the Discriminatory Action complaint or any other current employee of the Paint Hand Casino; and (b) the Officers failed to provide sufficient reasons.

[80] Both counsel submitted thoughtful and thorough written argument,[3] briefly stated below.

[81] SIGA submits it is well established that procedural fairness, or the duty to be fair, applies to every public authority making an administrative decision which affects the rights, privileges or interests of an individual which are not of a legislative nature. SIGA argues that the Supreme Court of Canada has recognized that the principles of natural justice and procedural fairness are flexible to the specific right at interest and to the specific administrative tribunal and provided a non-exhaustive list of factors to consider what level of procedural fairness and natural justice applies in the circumstances.[4] SIGA takes the position that discriminatory action complaints are significant complaints with substantive remedies, and Occupational Health Officers owed a significant degree of procedural fairness. The failure to interview key individuals undermined the procedural fairness of the Officers' investigation, resulting in significant legal and factual errors.

[82] As to the insufficiency of the Officers' reasons, SIGA submits that while the reasons do not need to deal with every argument and position put forward, the principle, and the corresponding test is that the reasons need to be sufficient enough so that the parties impacted by the decision know how and why the decision maker reached such a decision. The reasons provided by the Officers are wholly insufficient in that the employer had no way of determining why the Officer preferred the Respondent's evidence to the point where they ignored significant conflicting evidence in the Respondent's personnel file and deemed it unnecessary to interview key witnesses.[5],

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[3] Appellant's written argument, pp. 13-21, para 47-80; Respondent's written argument, pages 18-28.paras 55 – 80, and Appellant's Reply paras 10-19.

[4] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

[5] *Canadian Linen and Uniform Service Co. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2005 SKQB 264

[83] The Respondent addresses each of the *Baker* factors. The Respondent argues that the Act does not prescribe [investigative] procedures to be followed by the Occupational Health Officers, who are "masters of their own investigation. Occupational health and safety legislation is an issue of substantial public policy embodying statutory rights in favour of the worker[6]. Officers have the right to choose the process to be followed and have established a relatively informal process. The procedural fairness owed by the Officers is minimal. Fairness does not mean a trial *de novo*. No promises were made [as to whom would be interviewed] and there is no basis for a claim of legitimate expectation.[7]

[84] The Respondent argues that save for the right to receive notice of the charge and the opportunity to provide good and sufficient other reason for the action that has been taken, the procedural rights are minimal.

[85] Regarding the allegation that the H&S Officers failed to provide sufficient reasons for their decision, the Respondent argues that nowhere in the Act did the Saskatchewan legislature prescribe that Officers must provide written reasons.

[86] There is no dispute that SIGA received notice of the Respondent's Discriminatory Action complaint and was provided with an opportunity to respond. In my view, the duty of fairness does not necessarily begin and end there. Clearly, a presumption in favour of the worker arises once the Officers decide the worker has established a *prima facie* case. While I do not disagree in principle with the Respondent's assertion that the investigating Officers are masters of their own investigation that does not forestall procedural fairness. In my view, when an investigation continues after receipt of the employer's response, so should the duty of procedural fairness to both parties.

[87] There is no dispute that the Officers interviewed employees from Central Office Human Resources and Employee Relations (Shauna Bear, and Ken Bitternose, who was present during Ms. Taypotat's dismissal)) , but did not interview other key individuals mentioned in the Discriminatory Action complaint or any employees from the Painted Hand Casino. The question remains whether the investigation was procedurally fair.

[88] As for the sufficiency of the Officers' reasons, the Respondent is, with respect, clearly mistaken in asserting that there is no statutory obligation on OH&S Officers to provide reasons. Section 3-38(3)(b)(ii) makes it unequivocally clear that Notices of Contravention must include reasons.

[89] An adjudicator's authority under the Act is to hear and decide appeals and to dismiss or allow the appeal or vary the decisions being appealed. Both the issues, the fairness (thoroughness) of the Officers' investigation and the sufficiency of the Officers' reasons are classic judicial review questions. While I do have concerns, particularly with regard to the latter, in light of my reasons *supra,* in relation to the standard of review, it would be inconsistent to now assume the jurisdiction to conduct a "judicial" review of the Officers' decision. In my view, the scope of an adjudicator's authority does not extend to conducting a "judicial" review, and doing so would be in excess of jurisdiction.

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[6] *Saskatchewan (Occupational Health and Safety) v. Prince Albert District Health Board* 173 DLR (4th) 588; [1999] 9 WWR 101; 16 Admin LR (3d) 1; 177 Sask R 97

[7] *Ng v. Attorney General of Hong Kong* [1983] 2 All ER 346

[90] Short of a judicial review, SIGA'[s redress regarding procedural fairness is to be found, if at all, in its evidence and arguments in these proceedings. It is to those matters I now return, beginning with the position of the parties.

Part II - Analysis and Reasons

Position of the Parties

For the Appellant, SIGA

[91] SIGA takes the position that Ms. Taypotat was not seeking enforcement of the Act. SIGA submits Ms. Taypotat is unable to establish a *prima facie* case of discriminatory action because she was not seeking enforcement of the Act or exercising rights under the Act. Alternatively, if she was at one time seeking the enforcement of the Act, she was no longer doing so at the time the decision to terminate her employment was made.

[92] SIGA argues there are no substantiated allegations and no active good faith complaint:

No substantiated allegations

- Ms. Taypotat raised bare allegations of harassment in the workplace in May of 2013 which were not substantiated in any way and were not pursued further by Ms. Taypotat or her legal counsel.

- SIGA argues that in order to establish a *prima facie* case, Ms. Taypotat must do more than simply say she is being harassed. SIGA submits that the relevant issue is whether Ms. Taypotat was seeking to stop harassment in the workplace, as defined by the Act. SIGA submits that any actions taken by Ms. Taypotat in response to discipline do not constitute steps taken to stop "harassment" as defined by the Act. Further, even if Ms. Taypotat was at one time seeking to stop harassment, she had abandoned her complaint or, at the very least, suspended it indefinitely by communicating to SIGA that her complaint was being held in abeyance.

[93] Citing the relevant provisions of the Act dealing with harassment, SIGA submits that section 3-1(5) does not prevent reasonable, normal functions of management like discipline and discharge, even though those functions are inherently unpleasant to workers. SIGA submits Ms. Taypotat conflates the word "harassment" with normal managerial functions and discipline. Taking into consideration the totality of the circumstances, had Ms. Taypotat been actively pursuing a complaint, it would have been a complaint about normal and reasonable managerial functions and not harassment.

[94] SIGA submits the evidence establishes Ms. Taypotat was an employee who had difficulty complying with SIGA policies and taking direction from management. Her harassment allegations arose in the context of an appeal of discipline she had received. Further, Ms. Taypotat was an employee who struggled with taking responsibility for her misconduct, and often sought to justify her own actions by blaming others. Ms. Taypotat's reaction to being disciplined for her misconduct does not amount to an attempt to exercise rights to stop harassment as defined by the Act.

[95] SIGA submits that even if Ms. Taypotat was making a valid complaint about harassment at one time, which is denied, the complaint had been abandoned, and there was no active good faith complaint at time of her dismissal.

No active good faith complaint

- SIGA agreed to the Respondent's request for mediation (through counsel) and took steps toward setting up that mediation. Ms. Taypotat's counsel failed to respond to attempts by SIGA to mutually agree on a mediator and choose a location. When SIGA asked, in September, 2013 whether counsel still represented Ms. Taypotat, and wanted to proceed with the mediation, counsel requested the matter be held in abeyance. During this time frame (summer or fall of 2013), Ms. Taypotat advised Ms. Bear during a telephone conversation that "things were good now" and "they were leaving her alone".

- In the meantime, in October, SIGA scheduled a non-disciplinary expectations meeting with Ms. Taypotat for October 28, 2013, Mr. Watson, Mr. St. Pierre, Mr. Pelletier and, from Central Office Employee Relations, Ms. Mohan.

- SIGA submits that Ms. Taypotat derailed the entire situation by apparently misleading her legal counsel that the meeting was to be disciplinary and in relation to a minor occurrence involving a situation where Ms. Taypotat may have been chewing gum (or cough drops or soft candy) on the Casino floor. This was not the case.

- SIGA submits that any attempt to "re-activate" or pursue the previous harassment allegations in October, 2013 were minimal and certainly not sufficient to satisfy the requirements of a *prima facie* case.

- SIGA submits that the only reference by Ms. Taypotat or her counsel which could possibly be interpreted as an attempt to somehow reactivate her allegations is found in an email from Mr. Goodtrack to Ms. Missens dated October 26, 2013. That statement, below, is cryptic and hardly amounts to an indication that Ms. Taypotat was actively pursuing some exercise of rights under the Act:

  > Although it appeared to me that the issues set out in my May 13, 2013 [sic] resolved themselves it [sic] has clearly not.

- Ms. Taypotat knew or ought to have known the expectations meeting was not to be disciplinary. The purpose of the meeting had been explained to her by managers at Painted Hand Casino. Following the initial cancellation of the meeting, Ms. Bear reached out to Ms. Taypotat to provide further assurances.

  > When I heard from the team today and the notice we got from your lawyer today I was disappointed to hear that you have communicated to him that the meeting was scheduled to investigate a recent allegation of you chewing gum, which is not the case. As mentioned in the

> above paragraph and in a discussion with you had with Dale last week, the purpose of the meeting was to communicate expectations of all parties
>
> Karyn, we have the best intentions, we are trying to work with you and support you during your employment at SIGA/PHC. Your actions are making it difficult to manage and get this situation on track. As discussed with you in the past, Lyndon is required to follow up on any deviations from policy and procedure with any one of his team members and only if there is a fair and proper finding of deviation from policy than (sic) corrective measures will be implemented. He is bound by policy to adhere to the principles of correction action.

- In the totality of the circumstances, it is clear that Ms. Taypotat was not pursuing any complaint in good faith at the time her employment was terminated. She has therefor failed to establish a *prima facie* case.

[96] Finally, SIGA submits that Ms. Taypotat did not file any complaint of harassment with Occupational Health and Safety ("OH&S) until November 1, 2013 following the termination of her employment earlier that day. SIGA argues that whether it was filed before or after the termination makes little difference, since it abundantly clear from the evidence that SIGA was unaware of the complaint at the time at the time of the termination.

[97] SIGA argues that it did not terminate the Respondent because she was seeking enforcement of the Act, as the Respondent was simply not trying to enforce the Act. SIGA has demonstrated a pattern of taking harassment allegations seriously by having a workplace anti-harassment policy in place that includes a number of options for dealing with complaints of harassment. At the time SIGA terminated Ms. Taypotat's employment, there were no valid or good faith attempts to enforce the Act. Further, to the extent that Ms. Taypotat argues that she was in contact with Occupational Health and Safety prior to the termination of her employment, SIGA had no way of knowing that. The evidence established that neither Ms. Taypotat nor her legal counsel ever clearly communicated it to SIGA.

Good and Sufficient Other Reason

[98] If the Respondent is found to have established a *prima facie* case, SIGA submits it had good and sufficient other reason for terminating Ms. Taypotat, who had a significant discipline record and has demonstrated that she is a difficult employee to manage. SIGA submits Ms. Taypotat struggles with authority and direction in the workplace.

[99] SIGA worked extensively and in good faith to try and rectify the situation, and get the employment relationship back on track with a facilitated expectations meeting. Ms. Taypotat apparently misconstrued the purpose of the expectations and interfered with SIGA's attempts to manage the situation. Further, SIGA again tried to get the situation back on track and schedule a call with Ms. Taypotat, however, this was completely ignored. The insubordinate and uncooperative behaviour of Ms. Taypotat, in combination with her lengthy discipline record, made it clear to SIGA that the employment relationship was no longer feasible, and was good and sufficient other reason for her termination on November 1, 2013.

For the Respondent, Ms. Taypotat

[100] The Respondent acknowledges that it is not the object of these proceedings to prove "harassment", but that the Respondent must show a *prima facie* case of harassment. To that end, counsel reviews the statutory and policy definitions of harassment, the employer's obligations pursuant to the section 36 of the Regulations to the Act, and. the application of SIGA's Anti-Harassment Policy, with regard to both the (informal) complaint resolution process and the formal complaint process. The Respondent submits the allegations in letters dated May 8, 2013 (to St. Pierre) and May 10, 2013 (to Pasap) and speech on May 10, 2013 to Watson, in the presence of St. Pierre and Pelletier et al.

[101] Counsel submits that pursuant to the employer's Anti-Harassment Policy, a complainant may choose to formalize the complaint and SIGA's policy sets out the process. ["The Complainant shall have the right to submit a formal complaint (or a signed verbal statement recorded by a Human Resource Officer. The formal complaint shall include shall include details of the allegations of harassment, including name(s), date(s), time(s), particulars of the nature of the harassment, and witnesses (if any)"].

[102] At paragraph 124 a chart cross-referencing exhibits to events from September 20, 2013 to October 28, 2013, is advanced as "meets the SIGA's formal complaint" [sic]. It is further submitted on behalf of the Respondent regarding her "formal written complaint" [counsel's quotes] that the information contained in the exhibits listed in the chart which were under the care and control of SIGA would meet the *prima facie* threshold [for a formal complaint of harassment].

[103] With regard to whether the formal complaint was communicated to SIGA, the Respondent submits that an employee has the option to choose whether to use the organization's internal process, in which case, the harassment complaint would be communicated to the organization. Alternatively, the employee can request the assistance of an Occupational Health Officer. It is submitted that nowhere does section 3-35 impose a requirement on the employee to notify the employer that she filed the harassment complaint with OH&S.

[104] The Respondent submits that regarding harassment, SIGA was placed on notice that SIGA's internal process was not the only process open to Ms. Taypotat and on November 1, 2013 Ms. Taypotat completed OH&S's questionnaire and mailed it to the Regina office prior to attending work on November 1, 2013.

[105] The Respondent argues that his October 28, 2013 email [*supra,* Paragraph 61] made it clear to Ms. Missens, SIGA's in-house counsel, that Ms. Taypotat is exercising her right to examine the disciplines taken against her. The Respondent takes the position that together, the October 28, 2013 email and the mailing of the complaint to OH&S on November 1, 2013 meet the *prima facie* "harassment" threshold.

[106] The Respondent argues at some length[8] that SIGA's witnesses gave varying testimony as to whether they knew of Ms. Taypotat's harassment complaint against Watson. Pages 49 – 57 are devoted

[8] Brief on Behalf of the Respondent, pp 49-57

to an analysis in that regard of the testimony of Mr. Pelletier, Ms. Mohan and Ms. Bear and his correspondence by letter and email with Ms. Missens.

[107] The Respondent submits that the evidence is overwhelming that Ms. Taypotat only wanted to deal with Central Office because her harassment complaint against Mr. Watson [within PHC] had "fallen on deaf ears".

[108] The Respondent submits that the employer's policy encourages workers to confront their harasser and this is exactly what Ms. Taypotat did. At this point, the Respondent contends, it is undeniable that Stone, Pelletier, Pasap, Watson and Mohan are aware of Ms. Taypotat's allegation that Watson is harassing her and she wants the harassment to stop.

[109] The Respondent submits that the May 2013 harassment complaint fell within the word "seeks" for the period May 8, 2013 to September 21, 2013, and when it was placed in abeyance on September 21, 2013, it falls within the meaning of "has sought". Finally, when it was reactivated on October 26, 2013 the harassment complaint fell within the "seeks" provision. In either instance, it was not abandoned.

[110] Finally, as to whether Ms. Taypotat's protected activity under section 3-35 of the Act activity is directly linked to the discriminatory action, the Respondent points to the testimony of Mr. St Pierre and Ms. Bear. When asked to explain his understanding as to how Ms. Taypotat was being uncooperative, Mr. St. Pierre explained:

> At the time we felt she was being uncooperative because we were unable to actually meet with her without her getting a lawyer involved and it made things difficult with regards to being able to just have a simple discussion with her.

[111] Ms. Bear gave a similar response to the OH&S Officers during her April 17, 2014 interview with them. As reflected in Ms. Duncan's notes state, in part:

> Termination was based on Karyn's comment of "*don't talk to me talk to my lawyer*".

[112] The Respondent takes the position that a timely link between the events beginning October 26, 2013 (being a protected activity under section 3-35 of the Act) and the dismissal is evidence on the face of the record of discriminatory action. The conduct is directly linked to the discriminatory action.

Good and Sufficient Other Reason

[113] As to the dismissal was for good and sufficient other reasons, the Respondent submits SIGA must provide substantive and true reasons for the dismissal, as opposed to a pretext to mask an unlawful one. Further, the Respondent argues there is no good and sufficient reason if the penalty of dismissal was disproportionate to the reason provided by the employer.

[114] The Respondent recites the reasons for termination as stated in the letter of termination and reiterates the testimony of Mr. Pelletier and Ms. Bear as to their understanding of how Ms. Taypotat was being uncooperative. [*supra,* Paragraphs 130 and 131].

[115] The Respondent submits that in response the question as to her understanding of the reasons for the dismissal, Ms. Bear testified that there were a number of issues. The Respondent submits that Ms.

Bear's testimony listed three reasons: (i) lengthy disciplinary record, and the disciplines were upheld [on appeal] by the General Manager; (ii) performance evaluations, and (iii) training.

[116] The Respondent submits that when one examines the workplace record of disciplines which were upheld on appeal, the record [see Paragraph 25(a) to (g) is neither extensive nor bona fide. Further, the Respondent argues :

- Reliance on disciplines from 2009 and 2011 offends the rule against double jeopardy or double discipline;[9]
- The March 10, 2011 discipline speaks to SIGA's lack of understanding of what constitutes harassment;
- The August 17 , 2011 discipline and Last Chance agreement imposed by the General Manager pursuant to his letter dated was punishment for the Respondent having filed a complaint of harassment against her managers; and
- The Respondent "drew a line in the sand" regarding the April 30, 2013 discipline such that the three day suspension on that date, and disciplines thereafter fall within the protected activity and cannot be used by SIGA in support of "good and sufficient reasons".
- There is no mention of performance evaluations in the termination letter dated November 1, 2013, and SIGA provided no evidence to the Officers regarding the Respondent's performance evaluations.
- The Respondent submits Ms. Bear did not elaborate on "training", and that there are only two options: (i) that Ms. Taypotat took too much training; or (ii) refused to take training. There is no reference to the Respondent refusing to take training in the letter of dismissal and SIGA provided no evidence to the Officers to support such an allegation.

[117] The Respondent submits that SIGA's position that *"Ms. Taypotat did not file any complaint of harassment with Occupational Health and Safety until November 1, 2013 following the termination of her employment earlier that day"* is an incorrect statement of the facts. The Respondent testified that she mailed the Harassment complaint [to Occupational Health and Safety] in the morning of November 1, 2013 and was dismissed at 5:00 that afternoon.

[118] Both parties presented argument with regard to mitigation of damages in the event Ms. Taypotat is reinstated, which I will address later in my reasons.

SIGA's Reply

[119] SIGA submitted a detailed Reply to the Respondent's written argument. I have not reproduced it here. Where Reply argument is material to my reasoning, I will incorporate SIGA's argument in my reasons.

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[9] *United Steelworkers, Local 5480 v. Torngait Services Inc. (Saunders)* (2008), 172 L.A.C. (4th) 43, at para 28

Credibility

[120] In regard to credibility I take guidance from the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.). It held

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour 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 a 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

[121] I found SIGA's witnesses to be credible. Ms. Bear, Mr. Pelletier, Mr. St. Pierre, Mr. Watson, Ms. Mohan and Mr. Prediger were each forthright in their testimony and responsive to questioning in cross-examination.

[122] Though I found each of the three Occupational Health Officers subpoenaed by the Respondent to be credible, in my view, their testimony was neither necessary nor relevant to the issues at hand.

[123] Likewise, the testimony of the Respondent's witness Elizabeth Swain was largely irrelevant to these proceedings. Ms. Swain testified (by telephone) as to a comment that had been made (and acknowledged) by the Respondent to Ms. Swain and witnessed by Mr. Watson to the effect of "cracking her around", in the context of 'getting to work'. The Respondent testified that she and Ms. Swain were friends and the comment was made jokingly. Mr. Watson asked Ms. Swain to write up an Occurrence Report. Ms. Swain testified that she complied, but testified that she had not taken offence at the comment and had not wanted to submit an Occurrence Report. These events occurred in 2011. There is no evidence that the Respondent was disciplined as a result. Though it is not material to my decision, I make the observation that both the Respondent and this witness appear to have missed the point.

[124] I did not find the Respondent's witness Shawna Cote to be a credible witness. Ms. Cote was a former member of the Human Resources team at Painted Hand Casino. The Respondent relies on her testimony to support an argument that the allegation raised in the May 8 and May 10, 2013 letters appealing the discipline imposed on April 30,. 2013, that Mr. Watson called her "stupid" (which Watson denied in testimony) was an allegation "based on a disability". As will be addressed later in my reasons, the allegations of harassment are, at best, peripheral to the issues to be addressed in these proceedings. In other respects, I found Ms. Cote's testimony to be less than objective, and I have attached no weight to it, particularly as Ms. Cote was not employed at the Painted Hand Casino at all in 2013, during the time material to these proceedings.

[125] In many respects, I did not find the Respondent to be a credible witness. I would say without hesitation that I found her to be absolutely sincere in her belief that disciplinary actions taken against her, constituted harassment. The Respondent believes her previous manager's disciplinary actions against her were also harassment (as evidenced by the 2011 complaint) and that her previous manager poisoned Mr. Watson's mind against her such that he continued to harassed her by imposing discipline, requiring her

to submit "countless" Occurrence Reports which "always" led to discipline and "coaching, coaching, coaching" which would also lead up to discipline. At times, the Respondent's testimony was exaggerated, such as the aforesaid references to Occurrence Reports leading to discipline, which were not borne out the evidence, and the repeated refrain that Mr. Watson "kept coming after" her. At the same time, the Respondent testimony was often vague and, at times equivocal. For example, on being cross-examined at about the difference between coaching versus discipline, the Respondent rather grudgingly acknowledged that coaching was short of discipline "So [Lyndon Watson] says" but added shortly thereafter that "it still goes in your file folder". In re-direct examination, the Respondent was asked:

Q: Do you consider coaching a form of discipline?
A: Yes.
Q: Why?
A: Because it leads up to it. You get a coaching, coaching, coaching, and then it just escalates from there.

Turning to the main issues:

[126] To begin, it is important to point out that the adverse employment action alleged by the Respondent in her discriminatory action complaint is the termination of her employment on November 1, 2013, and not any other adverse employment action(s) or consequence(s).

[127] In these proceedings, more particularly in argument, there has been considerable focus on the Respondent's 2011 complaint of harassment against Rob Bear, the former Operations Manager at PHC, the investigation of the complaint and its outcome, and the subsequent disciplinary action (and a Last Chance Agreement) against the Respondent. In argument, it is at least implied that the disciplinary imposed on the Respondent in August, 2011 following the issuance of the investigator's report in July, was a discriminatory action. That is not the issue before me in this adjudication.

[128] It is also important to point out that the focus of this appeal is not on the underlying allegation of harassment. A concise and apt statement in this regard is cited in a decision of the Ontario Labour Relations Board in *Jennifer Ford* v *Anne Anderson*, 2015 CanLII 27353 (ON LRB), in a recent decision of the Ontario Labour Relations Board:

> ...the focus of the Board's inquiry will almost never be upon the underlying allegations of harassment. Those allegations are, at the very best, peripheral to the issues that the Board must address, which are exclusively whether a workplace harassment complaint was made, whether the worker suffered some detrimental impact and whether there is a causal connection between the two. This latter issue will, in most cases, be focused on the employer's explanation and rationale for its actions. In the usual case, the only inquiry that the Board will make into the underlying allegations of harassment is whether the employer terminated, or otherwise penalized, the worker for having filed the harassment complaint. Beyond that, in virtually all such proceedings, the nature, extent and details of the underlying harassment allegation will be irrelevant to the issues before the Board. The Board is not the appropriate forum to adjudicate upon the issues that lead to the filing of the harassment complaint or the substantive outcome of the employer's

investigation. *Ljuboja v.A.I.M. Group Inc.*, [2013] OLRB Rep. November/December 1298; 2013 CanLII 26528 (ON GSB), .

[129] At the same time, in this case, the underlying *theme* of the Respondent's testimony and argument, is that disciplinary actions taken against her, which are among the reasons SIGA gave for terminating her employment, *is* the harassing behaviour, as are Occurrence Reports and coaching.

[130] Though both parties acknowledge that the underlying allegations are not the focus of these proceedings, both parties devote considerable initial attention to the allegations in argument. The Respondent argues that the content of the May 8[10] and May 10, 2013[11] letters appealing the discipline imposed on April 30, 2013 is sufficient to meet the *prima facie* threshold of "harassment" as defined in SIGA's Anti-Harassment Policy and in the Act.

[131] SIGA's initial argument is that the Respondent made only bare allegations of harassment which were not substantiated in any way, and not pursued further by the Respondent or her legal counsel. Further, SIGA argues that steps taken by the Respondent in response to discipline do not constitute steps taken to stop "harassment" as defined by the Act.

[132] Whether SIGA's policy definition of harassment grants greater rights than those provided under the Act and regulations is not relevant to this adjudication. This adjudication is to be made pursuant to the occupational health and safety provisions of the Act, and not SIGA's internal Anti-Harassment Policy. Neither is the foundation for the Respondent's case dependent on whether the Respondent established a *prima facie* case of harassment. The initial question for determination by the Occupational Health Officer(s) is whether the Respondent established a *prima facie* case of discriminatory action. The underpinning of that determination is whether the Respondent raised a health and safety concern involving harassment (in this case), thereby seeking enforcement of the Act or regulations. Under the occupational health and safety regime in Saskatchewan, harassment is health and safety concern, and raising a complaint of harassment is, on its face, an attempt to enforce the Act.

[133] The legislation does not dictate the process for raising harassment as a health and safety concern. Instead, that procedural responsibility is placed squarely on the employer by prescribing, in section 36(e) of *The Occupational Health and Safety Regulations, 1996,* that the employer must include in its policy, an "explanation of how complaints of harassment may be brought to the attention of the employer". SIGA's policy includes such an "explanation" in its Employee Handbook [Ex.67, Appendix E, Part II, G, pp. 90-93] where an employee's options in the complaint resolution process are first outlined then discussed in more detail.

[134] To SIGA's initial argument, for purposes of discriminatory action, it is not necessary for a worker to substantiate the allegations, bare though the allegations might have been. As above, the threshold question in a discriminatory action is whether the worker *raised* a health and safety complaint—in this case, harassment—which the Officers clearly determined in the affirmative.

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[10] Exhibit 20
[11] Exhibit 22

than whether, *prima facie*, the allegations are true and provable. It is the employer's responsibility to address that issue in the context of its own harassment prevention policy.

[134] On the other hand, the employer's policy is not wholly irrelevant. For example, the legislation does not dictate the process for raising harassment as a health and safety concern. Instead, that procedural responsibility is placed squarely on the employer by prescribing, in section 36(e) of *The Occupational Health and Safety Regulations, 1996,* that the employer must include in its policy, an "explanation of how complaints of harassment may be brought to the attention of the employer". SIGA's policy includes such an "explanation" in its Employee Handbook [Ex.67, Appendix E, Part II, G, pp. 90-93] where an employee's options in the Complaint Resolution Process are outlined.

[135] To SIGA's initial argument, it is not necessary for a worker to substantiate the allegations in order to establish discriminatory action in a *prima facie* manner. As above, the threshold question as to whether the worker sought enforcement of the Act or regulations is whether the worker *made* a complaint of harassment.

[136] I do not disagree with the essence of SIGA's argument that the Respondent must do more than simply say she was harassed effective. That said, SIGA acknowledges that the Respondent raised harassment in the May 8 and May 10, 2013 letters appealing the discipline imposed on April 30, 2013 and expressly stated she wanted the harassment to stop in her speech to Watson, Pelletier, St. Pierre et al, at the meeting on May 10, 2013. It is clear on the face of both the letters and the speech that the Respondent wanted the alleged "harassment" to stop.

[137] In my view, if SIGA took issue with the manner in which the complaint was brought forward, or the insufficiency of the allegations, SIGA had every right—and in my view, the responsibility—to advise the Respondent that she had not followed the proper protocol and/or met the requirements of a formal complaint set out in its Anti-Harassment Policy. There is no indication that SIGA did so. Further, SIGA argues later that it took the Respondent's complaint seriously, and, further to correspondence received from the Respondent's counsel dated May 15, 2013, SIGA agreed to mediation and took steps toward setting up that mediation.

[138] The aforementioned correspondence from the Respondent's legal counsel, indicated that the Respondent had prepared and filed a complaint under *The Occupational Health and Safety Act, 1993*. Thus, it would appear that the Respondent was seeking enforcement of the Act, first by utilizing the internal responsibility system to raise her complaint internally and by seeking the assistance of an Officer to enforce the Act, by filing a complaint (Harassment Confidential Questionnaire) under the Act.

[139] I must weigh the foregoing with both testimony and other evidence reflecting that when, at the May 10, 2013 meeting, having raised her concerns, the Respondent was asked what she wanted to do, the Respondent indicated she was exploring her options. Further, at Paragraph 123 of the Respondent's brief, the Respondent characterizes the May 8 and May 10 letter and May 10 speech not as a formal complaint of harassment, but as a part of the informal process of confronting one's alleged harasser with the admonition to stop, i.e., not a formal complaint of harassment. Throughout, the Respondent relies heavily on the May 15, 2013 letter from counsel as the complaint of harassment.

[140] I must also weigh the factor that there is no evidence whatsoever that the Respondent filed a complaint to OH&S as referred to in the May 15, 2015 letter to SIGA from the Respondent's legal counsel. Indeed, based on an editorial comment made by the Respondent's counsel on the record, it appears that counsel was referring in his letter to a complaint to OH&S prepared and filed by the Respondent in 2011. In so observing, I am mindful of SIGA's general "lawyer as witness" concerns with regard to the editorial comments in the Respondent's brief and that counsel's comment, while on the record, is unsworn. I am mindful as well, of section 4-5(1)(e) which provides that an adjudicator is empowered to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the adjudicator considers appropriate, whether admissible in a court of law or not;

[141] In this instance, it is not necessary to rely on counsel's unsworn comment. As at May 15, 2013, there is no evidence before me of a complaint of harassment (Harassment Confidential Questionnaire) to OH&S apart from a copy of one dated March 29, 2011 which the Respondent claims to have mailed to OH&S on or about that date, but received no response from OH&S. The evidence establishes that SIGA was unaware of the complaint to OH&S, filed or unfiled, prior to these proceedings.

[142] I have not overlooked SIGA's argument based on section 3-1(5), that harassment does not include reasonable managerial action or, as SIGA stated, does not prevent discipline or discharge even though such functions are inherently unpleasant to workers. Nor do I discount SIGA's argument that the Respondent has conflated the word "harassment" with normal managerial functions. SIGA's position in that regard is properly considered in the context of SIGA's complaint resolution process, through an investigation, or perhaps through the pre-investigation mediation contemplated by SIGA's policy.

[143] More significant, is SIGA's argument that the Respondent did not actively pursue the May, 2013 complaint. I agree that SIGA took seriously the Respondent's May, 2013 complaint, including the May 15, 2013 letter from her counsel, agreed to the request for mediation and took steps toward setting up mediation. The Respondent's legal counsel failed to respond to attempts by SIGA to follow up on the allegations and schedule a mediation. When SIGA wrote the Respondent's counsel on September 15, 2013 with a further inquiry about mediation, counsel responded by letter dated September 21, 2013 requesting the matter be placed in abeyance.

[144] On a careful review of the evidence in these proceedings, it is noted in the Respondent's Harassment Confidential Questionnaire (dated November 1, 2013) and in the Discriminatory Action complaint, the Respondent indicated that she received the June 28, 2013 letter from SIGA that they were upholding the suspension [imposed via the April 30, 2013 disciplinary action], she felt the harassment would stop. In the summer or fall of 2013, the Respondent represented to Ms. Bear that "things [were] good now...they were leaving her alone". However, the Respondent alleged (in her complaint) that Mr. Watson continued to write her up for "everything and anything". As noted, the Respondent's counsel requested the matter be placed in abeyance. In terms of being written up for "anything and everything", the evidence reflects that between May, 2013 and September 21, 2013, the Respondent received one written warning for insubordination (failure to provide complete information where such information is requested) which was upheld on appeal.

[145] SIGA submits in Reply argument that it has never been made clear what the alleged complaint [of harassment] consists of, and lists the possibilities that have been raised in the course of these proceedings:

- The May 8[12] and May 10, 2013[13] letters appealing disciplinary action submitted by the Respondent to SIGA;
- A statement by the Respondent which contained only bald accusations of harassment with no particulars which she read at a meeting with SIGA on May 10, 2013; [14]
- The May 15, 2013 letter from Respondent's counsel to SIGA[15] which contains various broad allegations and only makes reference to the elusive "complaint";
- The Respondent's 2011 complaint of harassment against Rob Bear and others, which was the subject of investigation by Penney Murphy & Associates;[16]
- The collection of documents and allegations raised at paragraph 124 of the Respondent's written argument;
- The complaint of harassment filed by the Respondent with Occupational Health and Safety on November 1, 2013,[17] which SIGA had no knowledge of before these proceedings.

[146] SIGA argues that none of the possibilities raised in the hearing amount to the credible existence of an active, good faith complaint of harassment at the time SIGA decided to end the Respondent's employment.

[147] Having carefully reviewed the evidence, I make the following initial findings:

- The Respondent's 2011 complaint of harassment against Rob Bear and others, which was the subject of investigation by an external consultant engaged by SIGA for that purpose, is not relevant to the question whether the Respondent sought enforcement of the Act in 2013;
- The submission of a complaint of harassment (Harassment Confidential Questionnaire) to Occupational Health and Safety is a clear expression of seeking to enforce the Act. The Respondent testified that she mailed a completed Questionnaire to OH&S on November 1, 2013, prior to the termination of her employment later that day. Even if the Harassment Confidential Questionnaire was mailed earlier in the day prior to her dismissal on Friday, November 1, 2013, it would not have been received by OH&S prior to her termination. In fact, there is no evidence that the November 1, 2013 Harassment Confidential Questionnaire was ever received at all by OH&S prior to the Officers' investigation of the Discriminatory Action complaint filed on November 16 and 28, 2013. I agree with SIGA that

[12] Exhibit 20
[13] Exhibit 22
[14] Exhibit 21
[15] Exhibit 24
[16] Exhibit 11
[17] Exhibit 25

the OH&S complaint cannot be the basis for discriminatory action if SIGA can establish it was unaware of it. I am satisfied that SIGA was not aware of the November 1, 2013 complaint (Harassment Confidential Questionnaire) at the time of the termination.

- I reject the Respondent's argument that the various statements, events and documents charted at Paragraph 124 of the Respondent's brief constitute a formal complaint in accordance with SIGA's Anti-Harassment Policy.

- The bald accusations made in the Respondent's speech to Watson and others in the meeting and May 10, 2013 do not weigh heavily. I accept the Respondent's characterization of the speech as an informal

[148] I have not overlooked the Respondent's argument, vigorously asserted, that a worker has a choice to use the employer's internal processes, in which case the harassment complaint would be communicated to the employer, or to file a complaint with OH&S. The Respondent argues that there is no requirement in the discriminatory action provisions that the employer be notified of the complaint. In my view, counsel for the Respondent conflates two separate processes. A Harassment Confidential Questionnaire typically (but not always) involves a worker who is seeking the assistance of an Officer to ensure the employer is fulfilling its obligations under the Act and regulations, which, stated broadly, is to take reasonable steps to address complaints of harassment brought to its attention. The guide on the first page of the Harassment Confidential Questionnaire indicates that if the matters complained of fall within the scope of the [statutory definition of harassment] the employer will be notified. Page 9 of the Questionnaire indicates that if the worker does not provide OH&S with permission to contact the employer with regard to the complaint, OH&S cannot proceed with the complaint.

[149] All of that said, it is argued at length in the Respondent's Brief, and with equal vigor, citing testimony in an attempt to establish that various key SIGA and PHC managers were aware of the Respondent's complaint. While much emphasis was placed on an awareness of "allegations" versus a "complaint", I am satisfied that the employer was aware the Respondent had raised harassment on May 8 and May 10, 2013, whether or not a formal complaint had been perfected.

[150] I do not draw the inference that the Respondent's complaint was abandoned. Correspondence from the Respondent's counsel on September 21, 2013, is in response to an inquiry about mediation. Counsel requests that "the matter" be placed in abeyance. On its face, it is reasonable to infer that counsel requested the mediation be held in abeyance. It is not uncommon for a formal complaint process to be suspended pending efforts to resolve the matter in a manner other than formal investigation. Indeed, even in the course of these appeal proceedings, the parties may agree to engage in resolution discussions at any time prior to the conclusion of the hearing. In neither case do such efforts constitute abandonment of the original complaint, absent an express withdrawal.

[151] SIGA argues that the Respondent's attempts to "re-activate" the May, 2013 complaint were minimal and cryptic. The evidence reflects the following, drawn from email to SIGA from the Respondent's counsel:

- On October 26, 2013: My client has provided me with several documents including disciplinary action including a finding by SIGA that she has been caught chewing gum. Ms. Taypotat has denied that she was chewing gum and although she made an attempt to explain what occurred, it appears to have gone without success.
    - **Although it appears to that issues set out in my May 15, 2013 [sic] resolved themselves it [sic] has clearly not.**
    - I am hereby providing you with notice that I will be attending as her support person on October 28, 2013 and **assessing the steps Ms. Taypotat is required to take in order to protect and preserve her rights**. I strongly urge you or external counsel to attend the meeting.
- October 27, 2013: Since SIGA is arranging the meeting [of October 28, 2-013], can you please set out what the issues are?
    - I can advise that the issues and proposal to have an **independent investigator investigate what is occurring at the Painted Hand Casino,** is Ms. Taypotat's main concern.
- October 28, 2013: **My client has alleged that she is being harassed by her supervisor**. On behalf of my client, I am requesting copies of all documentation...surrounding the chewing gum incident. If SIGA declines my request, please state the reasons and authority.

[152] Minimal and somewhat cryptic though the emails might have been, there is no evidence that SIGA did not understand that the Respondent was alleging harassment, whether in "reactivation" of the original allegations or anew. In short, I find that "harassment" was brought to the attention of the employer, with the express intention by counsel for the Respondent to assess the necessary steps at or after the October 28, 2013. The October 28, 2013 email, in particular, was cc:d to Ms. Bear.

[153] I find it reasonable to conclude, on balance, that the foregoing are steps taken pursuant to the Complaint Resolution Process in SIGA's Anti-Harassment Policy and, as such, they are attempts to enforce the Act, utilizing internal processes.

Good and Sufficient Other Reasons

[154] The Respondent submits that the employer's reasons are not significant enough to warrant dismissal, or, stated another way, that there is no "good and sufficient other reason" if the penalty of dismissal was disproportionate to the reason(s) provided by the employer. I disagree.

[155] In assessing whether reasons given for termination can and do constitute "good and sufficient other reasons", I have been guided by the meaning of that term as expressed by the Supreme Court of Canada in *LaFrance* v. *Commercial Photo Service Inc.* (1980), 111 D.L.R. (3d) 310 which states.

> "From the outset it has been held that this phrase means that the investigation commissioner (the person who decides the issue) must be satisfied that the other reason relied on by the employer is of a substantial nature and not a pretext, and that it constitutes the true reason for the dismissal. Under this interpretation, it is not for the investigation commissioner to rule on the severity of the penalty as

> compared with the seriousness of the wrongful act in question, in other words, to substitute his judgment for that of the employer."

[156] Stated another way, on appeal, an adjudicator does not sit in review of the merits of the employer's decision as to whether it the Respondent ought to have been terminated or whether the criteria used to reach its decision were fair and reasonable. If the employer sincerely acted for the reasons given—reasons *other than* the worker's protected health and safety related activity—even though in the circumstances it may unfair or unreasonable for it to have done so, then I cannot conclude the employer had contravened section 3-35 of the Act. The worker may still have cause for complaint and may have legal recourse in other forums (about which I take no position), but my remedial jurisdiction is limited to the question whether the employer's actions were in contravention of the Act or regulations, i.e., whether the employer's reasons were discriminatory.

[157] The Respondent argues that SIGA's reasons, particularly the history of discipline are neither significant nor *bona fide*. The former is addressed above. As to the latter, there was no effective cross-examination challenging the bona fides of the disciplinary actions taken against the Respondent.

[158] The Appellant submits that upon a close examination of the facts, it is clear that SIGA had good and sufficient other reason to terminate Ms. Taypotat's employment. The Appellant submits that Ms. Taypotat was a long term employee with a significant disciplinary record. SIGA attempted in good faith to get the situation back on track with an expectations meeting. Ms. Taypotat apparently misconstrued the purpose of the expectations meeting and interfered with SIGA's attempts to manage the situation. Further, SIGA attempted again to get the situation back on track and schedule a call with Ms. Taypotat, however, this was completely ignored. The insubordinate and uncooperative behaviour of Ms. Taypotat, in combination with her lengthy disciplinary record was good and sufficient other reason for her termination on November 1, 2013.

[159] The Appellant further submits that the Respondent's actions in inserting her lawyer into the employment relationship and frustrating the ability of SIGA to manage her performance without the presence of her lawyer were indicative of uncooperative and insubordinate behaviour. The testimony of Mr. Dale St. Pierre summarized and captured this problem. When asked, in cross-examination, to explain his understanding of how Ms. Taypotat was being uncooperative, Mr. St. Pierre explained:

> At the time we felt she was being uncooperative because we were unable to actually meet with her without getting her lawyer involved and it made things difficult with regards to being able to just have a simple discussion with her.[18]

[160] I am satisfied that the dominant reason for termination of the Respondent's employment was SIGA's frustration that the Respondent refused to be managed without the presence or participation of her lawyer and its sincerely held belief that the Respondent' pattern of conflating discipline and harassment was unlikely to improve. I am **not** satisfied that was the only reason.

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[18] Testimony of Dale St. Pierre, pages 23-24

[161] With knowledge that the Respondent intended to bring counsel to the "expectations meeting", SIGA *and* knowledge of counsel's email on October 28th raising an allegation of harassment, SIGA attempted October 28th to re-schedule the expectations meeting for November 4, 2013. While the Respondent's same day response that it was not a good day for her could be characterized as an example of uncooperativeness, it is my understanding on the evidence, that November 4 was a day off or vacation day for the Respondent. On all the evidence, particularly Ms. Bear's email close to midnight on October 28, 2013, the inference can reasonably be drawn that had the Respondent signified an intention to attend or had attended the meeting on November 4, 2013, her employment would not have been terminated, notwithstanding the eventual reference to insubordination and uncooperativeness in the letter of termination.

[162] At the heart of SIGA's reasons for termination of the Respondent is the conclusion that her conduct was unlikely to improve. The conduct at issue was, primarily, an established pattern of conflating discipline with harassment, her unshakeable belief Occurrence Reports and coaching also led to discipline and were harassing, her failure to take responsibility for her own actions, and the likelihood that together this pattern would continue to play out in groundless complaints of harassment. In light of the overtures of counsel for the Respondent on October 26, 27 and 28, 2013, and on the totality of the evidence, I find it more likely than not that the decision to terminate the Respondent was influenced, at least in part, by the re-surfacing of alleged harassment prior to the expectations meeting. As such, I must find in favour of the Respondent.

Decision

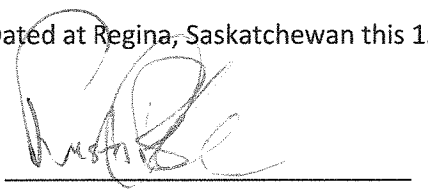
[163] For all of the foregoing reasons, I uphold the Officer's decision as reflected in Notice of Contravention 209 and dismiss SIGA's appeal.

Damages

[164] The Respondent admitted in cross-examination that she did not even begin to work until after she finished collecting Employment Insurance. In light of the admission, and the fact that it the Respondent was able to find new employment shortly after she started looking for work, I do not require SIGA to establish the availability of alternative work during that period of approximately six months.

[165] An adjudicator has no jurisdiction under the Act to award costs to either party, regardless of the outcome.

Dated at Regina, Saskatchewan this 15th day of September, 2015.



Rusti-Ann Blanke
Special Adjudicator/Adjudicator

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 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 persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

. . .

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.