IN THE MATTER OF AN ADJUDICATION

PURSUANT TO SECTION 3-54 OF *THE SASKATCHEWAN EMPLOYMENT ACT*

BETWEEN:

Child Find Saskatchewan Inc.

Appellant/Employer

- and –

M.K.

Respondent/Employer

For the Appellants: Jay Watson, Cuelenaere, Kendall, Katzman & Watson

For the Respondent: Andrew Heinrichs, Koskie Helms

DECISION

This Decision is edited to protect the personal information of individual workers by removing personal identifiers.

INTRODUCTION

[1] On October 12, 2012, an Officer in the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace (the "Officer") issued OR-ADU-2013 with respect to a complaint of discriminatory action brought by M.K. (the "Respondent"), against Child Find Saskatchewan Inc. (the "Appellant" , "CFS", the "employer"). Following an investigation, the Officer determined that that CFS took discriminatory action against the Respondent, in contravention of section 3-35 of *The Saskatchewan Employment Act (*"the "Act")[1]. The Officer issued a Notice of Contravention to the employer (NC-ADU-0015) providing guidance and instruction to the employer regarding the remedial requirements of section 3-36(2) of the Act.

[1] This appeal was commenced pursuant to the provisions of *The Occupational Health and Safety Act, 1993,* since repealed. With minimal changes, provisions of the repealed Act are now found in Part III and Part IV of *The Saskatchewan Employment Act.* Unless otherwise indicated, references herein to "the Act" are references to The *Saskatchewan Employment Act* and references to various sections of the *Act* reflect the numbering system therein.

[2] The employer appealed the Officer's decision, requesting that it be overturned in its entirety. The stated grounds of appeal are:

a. The OHO mistakenly found the Appellant did not have good and sufficient other reason for dismissing the Respondent. As stated in the initial letter from CFS [in response to the OHO's request for the provision of good and sufficient reason], there were numerous events involving the Respondent. that lead to the decision to terminate her employment...including that the Appellant was not able or willing to abide by certain office policies or work well in a team setting.

b. The OHO mistakenly found that there was harassment in the CFS workplace and/or that M.K.'s employment was terminated as a result of the alleged harassment.

[3] The appeal was heard in Saskatoon on March 3, 2014. Mr. Gordon Page, of the CFS Board of Directors was called as witness on behalf of the Appellant. The Respondent testified and two CFS staff members were called as witnesses for the Respondent.

Issue(s)

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

RELEVANT LEGISLATION

[5] For purposes of this appeal the relevant provisions of the Act begin 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...

[6] Section 3-35 of the Act sets out the reasons an employer may be found to have taken discriminatory action against a worker:

> 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;

(c) assists or has assisted with the activities of an occupational health committee or occupational health and safety representative;

(d) seeks or has sought the establishment of an occupational health committee or the designation of an occupational health and safety representative;

(e) performs or has performed the function of an occupational health committee member or occupational health and safety representative; (

f) refuses or has refused to perform an act or series of acts pursuant to section 3-31;

(g) is about to testify or has testified in any proceeding or inquiry pursuant to: (i) this Part or the regulations made pursuant to this Part; or (ii) Part V or the regulations made pursuant to that Part; (h) gives or has given information to an occupational health committee, an occupational health and safety representative, an occupational health officer or other person responsible for the administration of this Part or the regulations made pursuant to this Part with respect to the health and safety of workers at a place of employment;

(i) gives or has given information to a radiation health officer within the meaning of Part V or to any other person responsible for the administration of that Part or the regulations made pursuant to that Part;

(j) is or has been prevented from working because a notice of contravention with respect to the worker's work has been served on the employer; or

(k) has been prevented from working because an order has been served pursuant to Part V or the regulations made pursuant to that Part on an owner, vendor or operator within the meaning of that Part.

[7] 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.

3-1(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.

EVIDENCE

[8] The Appellant, Child Find Saskatchewan Inc. is a non-profit organization in Saskatchewan that educates and advocates for the protection and rights of youth and children. The organization is dedicated to finding missing children. The organization is funded largely by donations.

[9] The Respondent commenced her employment with CFS on June 6, 2011. She understood that her employment status was probationary for a period of three months. No reference was made to a specific job title, but the position for which she was hired appears to have encompassed research, program development and casework. Additional duties were assigned to the Respondent related to maintenance of the CFS web site and other computer-related assistance.

[10] The Respondent has a Psychology degree and specializes in addiction. She does volunteer work with the Saskatoon Sexual Assault and Information Centre. The Respondent is also an experienced family counsellor and, at the material time, operated private in-home counseling services.

[11] The issue(s) in this appeal arise from largely from events which occurred on June 17, 2011. For purposes of background, suffice it to say here that on the date aforesaid, events occurred with regard to the alleged conduct of a male co-worker ("Worker A") who had attended the Respondent's home for purpose of receiving her counselling services.

[12] The Respondent did not immediately report the incident to CFS, but upon learning on August 24, 2011 that the male co-worker was to be promoted to office manager, soonto be her supervisor, she felt it was important to bring the matter to the attention of the Appellant employer. Her meeting with CFS' President ("Ms. H") was brief and awkward. Ms. H subsequently coordinated the attendance of a Board member for a meeting on August 26, 2011 at which the Respondent reiterated her concerns. Ms. H and Mr. Page then met briefly with Worker A before convening a meeting with all four of them.

[13] A few days later, on August 31, 2011, and a few days before the expiry of her probationary period, the Respondent was rejected on probation (dismissed) by Ms. H in the presence of Mr. Page. The Respondent was told that she was not a good fit and that the organization no longer required her services.

[14] T subsequently submitted a completed harassment questionnaire and discriminatory action complaint dated September 4, 2011. The officer proceeded with an investigation, rendering her decision *supra* October 3, 2012. The employer appealed the decision leading to the within hearing

EVIDENCE

[15] In the traditional order of proceedings, the Appellant's case is presented first. In this case, a *prima facie* case not being wholly admitted, the Respondent's case was presented first. The evidence is summarized in the traditional order here, in keeping with format used by counsel for the Respondent in written argument submitted after the oral hearing.

Appellant's Evidence

[16] Mr. Geoff Page testified on behalf of CFS in his capacity as a member of its Board of Directors at the material time. Mr. Page's history with the CFS organization began first as a volunteer, then as a member of the Board. With an educational background in Police Technology Mr. Page is a former 20 year member of the Montréal police. He has since continued apply his background and experience in a contractual and/or volunteer capacity, e.g., Military Police, Scouts Canada, regional school boards.

[17] On examination, Mr. Page testified that:

a. He had been introduced to the Respondent at one time, but had no direct involvement with her in the workplace prior to August 24, 2011.

b. His direct involvement in the within matters began on August 24, 2011 when Ms. H asked him to be present at meeting with the Respondent who had raised an issue with regard to a Worker becoming the office manager. On cross-examination, Mr. Page said that [whether harassment had been raised with her or not] when Ms. H asked him to be participate on the 26th he did not mention harassment to him.

c. On August 26, 2011, he and Ms. H met with the Respondent who expressed concern that as the office manager, her co-worker would become her supervisor. As the basis for her concern, the Respondent described to them a meeting she had with the co-worker at her residence, after working hours, on June 17, 2011 and told them what had (allegedly) transpired there. The Respondent told them she could work with the co-worker as an equal, but she was worried about her co-worker as her superior, and how that might affect her negatively due to the events of June 17, 2011.

d. The Respondent was asked what she wanted CFS to do. The Respondent said she did not want Worker A to be written up. On cross-examination, counsel queried whether the Respondent had asked for there to be a note to Worker A's file. Mr. Pages said no, reiterating that she had asked that Worker A not be written up.

e. Mr. Page felt the next logical thing to do was to talk to the male co-worker, but the Respondent did not want them to—she wanted to be present so she could have some control. First Mr. Page and Ms. H. met with the male co-worker whose account was similar to that of the Respondent, confirming the events which had occurred. Then they met with the Respondent and the co-worker together. The meeting quickly deteriorated as the Respondent and her co-worker disagreed with each other about about the details of what happened June 17—what was said/asked by whom, what was shown/asked to be shown.

f. Mr. Page characterized the events described by the Respondent and Worker A as an after-hours "adult" conversation between mutually consenting adults. On a personal level, he felt he had heard more personal information than he wanted to hear. He didn't think any it was any of his business or that involved CFS. He noted that the events had transpired outside of working hours at the Respondent's residence. When asked whether the Respondent expressed complaints about the co-worker's behaviour in the workplace, Mr. Page said she had not, that the meeting on August 26, 2011 pertained only to what had happened at the Respondent's home on June 17, 2011.

g. When asked about any prior discussions with the President of CPS (Ms. H) pertaining to dismissal, he said that Ms. H had complained to him about the Respondent a few times, saying that the Respondent was not working out. Mr. Page summarized the reasons therefor, including the Respondent wanting the office area rearranged on her

first day at work, being unhappy with it a short time later, wanting more changes, and being upset when she was denied, dress code violations, a negative attitude, teamwork and communication issues and issues pertaining to web design. He provided the details to the occupational health officer in response to the request for good and sufficient other reasons for the dismissal.

h. Mr. Page testified that there had been no complaint of harassment and the Worker A issue had nothing to do with the reasons for dismissal of the Respondent.

i. On cross-examination, Mr. Page said that in terms of his involvement, he was not aware of alleged workplace behavior such as the food issue or any concern or complaint raised in relation to workplace behaviours. In response to further questioning, he stated that he had no knowledge of when or whether the CFS harassment policy had been circulated for employees to sign. Apart from some awareness of the CFS on-boarding process, he had no knowledge when those types of things were done and had no specific knowledge about the policy being circulated on August 25, 2011 for employees to sign.

Worker A

The Appellant submitted a statement by Worker A (Ex. A-3) dated October 7, 2012 which was not included in the Appellant's written response. In fact, the statement appears to post-date the Officer's Report dated October 3, 2012. The argument as to dates is puzzling.

Counsel for the Respondent invites me to draw an adverse inference from the fact that Worker A was not called as a witness and therefor, there was no opportunity for cross-examination. Drawing an adverse inference is at an adjudicator's discretion, which I decline to exercise. Not only was there no opportunity for cross-examination, there was no need for it.

It is important to point out that it is not within the jurisdiction of an adjudication or, for that matter, of the occupational health officer, to determine whether harassment did or did not occur. Further, it makes no difference in the context of a discriminatory action whether or not harassment is, or could be substantiated. It follows that it makes no difference, as between Worker A and the Respondent, whose version of events is the more credible.

It is within the scope of an adjudicator's authority to accept evidence which might otherwise be inadmissible, subject to relevance, which is arguable. No submissions as to relevance were made. There being no reason to weigh the evidence, no weight whatsoever has been attached to it.

Respondent Evidence

[18] In addition to the Respondent's testimony, two witnesses were called, hereinafter referred to as "Ms. W" and "Ms. S".

Respondent

[19] The Respondent testified that

a. With regard to how she was treated before and after coming forward with her concerns to Ms. H on August 24, 2011 and to Mr. Page and Ms. H on August 26, 2011, the Respondent said that prior to coming forward it was "uneventful". Whenever the Respondent consulted Ms. H, she would laugh and walk away, but was otherwise pleasant. After she came forward with her concerns on the 24th and 26th of August, Ms. H was "avoidant" and the only time she talked to Ms. H was when others were around. She said there was not much contract between them at all.

b. When the Respondent was interviewed by Ms. H for the position with CFS, Worker A, whom she said had been hired three weeks earlier, sat in with on the interviews. During the interview, there was interest in, and discussion about, the in-home private counselling business she operated. Worker A was very curious about her counselling background. On June 17, 2011, about two weeks after she started work, Worker A expressed interest in receiving her counselling services to address his personal difficulties. The Respondent suggested that it would be convenient to stay late after work, but Worker A insisted that he was not comfortable talking about his personal difficulties in the workplace. The Respondent agreed to meet with him early that evening at her residence.

c. The Respondent stated that she and Worker A discussed his personal issues, but their conversation took an unexpected turn which surprised her. It became clear to her that Worker A found her very attractive and wanted to have a sexual relationship with her. The Respondent testified that she explained to Worker A that it's not appropriate to mix business and personal and she was not interested. She said he "seemed receptive", but in the course of their conversation, she kept going back to it. Because it was raining heavily, she offered him a ride home. When she dropped him off, he tried to kiss her but she pushed him away.

d. The Respondent said with regard to Worker A's behaviour in the workplace that he suggested she wear button down shirts and different kinds of bras, asked her out to lunch several times (which she declined) and there were multiple instances where Worker A would make comments about or attempt to take away snacks or candies, saying they would make her fat.

e. Without disclosing The Respondent subsequently asked Ms. H for office equipment be moved and further rearrangement of her office space. The first time she had asked for rearrangement of the office space (on her first day of work), it was to minimize distractions due to diagnosed disorders, so that she could be more productive. She said Ms. H and Worker A had been incredibly accommodating. The Respondent testified that the reasons she gave to Ms. H for this request was that she didn't think her office area was arranged well given the nature of the discussions she had with clients and that she also wanted to move the file cabinet to block Worker A's view. She told Ms. H that she was uncomfortable sitting where she felt watched by Worker A. Ms. H denied her request, but she was not reprimanded for asking, nor was there any other comment made about it.

f. The Respondent testified that the events of June 17, 2011 affected her health. She was anxious and depressed, and was prescribed medication for it. She didn't feel comfortable going to Ms. H about it, because she had no ability to find another job.

g. She learned on August 24, 2011 that Worker A would be promoted to office manager, as her superior/supervisor. She testified that she felt then it was important to bring the June 17 incident to the attention of Ms. H. She said she hadn't wanted to cause waves by bringing it up until her three month probation expired. On cross-examination, the Respondent said that she felt she could bring up sexual harassment if she and Worker A were still equals, and she had every intention of taking it to Ms. H after the expiry of her probation. When she learned Worker A would be her superior/supervisor, it became more urgent to bring it up sooner. Ms. H said she would bring her concern to the attention of a Board member.

h. On August 26, 2011, Ms. H convened a series of meetings first with the Respondent with a Board member (Mr. Page) present. Ms. H and Mr. Page then met briefly with Worker A, and then convened a meeting with all four of them. The Respondent said that during the joint meeting Worker A was allowed to question her and did so in such a way that she felt attacked. Mr. Page intervened and ended the meeting.

i. On August 31, 2011, the Respondent was dismissed. She was told that she was not a good fit and CFS no longer required her services. During the course of the meeting, her computer had already been turned off by Worker A.

j. Through the discriminatory action complaint process, the Respondent later learned the reasons CFS had given to the occupational health officer as good and sufficient other reasons for her dismissal. The Respondent testified that she had been spoken to about some of the reasons identified by CFS, but not reprimanded or disciplined. For example

- One day she wore a strappy silk sun dress to work. Ms. H made a comment to her about violating the dress code. The Respondent said she thought she was following it. Ms. H just laughed. The dress was not backless, and as per the dress code when she came into the office from outside, she would wear a sweater or shawl. Her typical business attire was business appropriate. She did not wear low cut blouses and short skirts to work. She noted that the air conditioning in the office was problematic, and the vent over her desk would have made it impossibly cold. She tended to dress in layers. The air conditioning made it impossibly cold otherwise. She re-read the dress code policy and queried Ms. H via email saying that she still didn't understand how she might have violated the dress code, Ms. H did not respond.

- The Respondent acknowledged that she had brought her dog into the office for a short time one Sunday. She had not wanted to leave the dog in a hot car and had not expected anyone to be in the office. When Ms. H raised it, she apologized and said she wouldn't do it again. Worker A mentioned the next day that he could smell dog in the office and she apologized to him as well.

- Managing the CFS website changes and updates and other computer related work were additions to her regular role and duties. She had some computer and related experience, but she was not a web designer. She was only interested in doing casework and related duties, not the technology side and had said so during her interviews. Worker A would give her instructions which she would follow, then Ms. H would contradict them or be unhappy that she had not been consulted. She implemented a ticket process to ensure Ms. H's approval was obtained in advance, but Ms. H did not like getting so many emails.

- The Respondent testified that being 'on call' was for emergencies and it was always Ms. H who was on call. CFS was aware of her occasional volunteerism after-hours and on weekends at the Saskatoon Sexual Assault and Information Centre, but she was never asked to be on call or queried about her availability to be on call for CFS.

- The Respondent stated that during her employment, she was never made aware that there were problems with her attitude.

- She was not asked by Ms. H to take down her artwork. Worker A had said something to her to the effect that he viewed the picture as sexual. She didn't think her artwork, which has won awards, was provocative, but she took it down of her own accord.

- When asked whether she was late to work or left early at times, the Respondent said she did not recall, but was not disciplined.

- The Respondent stated that she had never received a verbal or written reprimand.

[20] Ms. C' is a CFS staff member. Her testimony said:

a. That the working environment at CFS is abusive and negative.

b. That the working environment at CFS does not allow for any employee to work as part of a team.

[21] Ms. S is a CFS staff member. After the Respondent was dismissed, Ms. S took on her former role at CFS. Ms. S's testimony said:

a. That the working environment at CFS is abusive and negative.

b. That the working environment at CFS does not allow for any employee to work as part of a team.

c. To illustrate her impression of the CFS work environment, Ms. S noted that in the preceding 10 months, 15 employees had left. In her opinion, Ms. H micromanaged obsessively, and bullied and demeaned staff. She stated that "no one ever made the three months—the vast majority are gone quickly.

ARGUMENT

[22] I received written argument from the Appellant (Appendix I) and the Respondent (Appendix II). Although I have not summarized the appended Arguments here, I have read and carefully considered the submissions for purposes of this decision.

ANALYSIS/REASONS

Credibility

[23] Where, and to the extent that it may be necessary to assess credibility, I have been guided by the frequently cited seminal decision of 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 demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing

conditions. In short, the real test of the truth of the story of 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.

Framework for Analysis

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

[25] I am mindful that the foundation of occupational health and safety legislation is the internal responsibility system. Fundamental to that concept is the principle that employers and employees have a shared responsibility to identify and address health and safety issues. To that end, employees must be encouraged 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.

[26] The protection of section 3-35 is reinforced by the imposition of a reverse onus in section 3-36(4) such that if a *prima facie* case is established by the worker, the burden of proof shifts to the employer to discharge the presumption that the action was taken *because* of the worker's health and safety related activity. By the reverse onus, the legislators impose the heavier 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.

[27] While the foregoing considerations point to the conclusion that the initial burden of proof on the worker is a less onerous one, it does not relieve the Respondent from the requirement to establish a *prima* facie case: the reverse onus is not triggered unless a *prima facie* case is established. Stated another way, if a worker fails to establish a *prima facie* case, the employer is not called upon for an answer, i.e., to provide good and sufficient other reason for the action taken.

[28] To summarize, the Respondent must establish a reasonable *prima facie* case that

(1) the employer took, or threatened to take, adverse action against her which falls within the scope of the definition of a discriminatory action, for a reason protected by the Act.

(2) the discriminatory action was taken *for* a reason mentioned in section in 3-35 of the Act. In other words, the worker must establish, *prima facie*, that she was engaged in an activity protected by section 3-35 *and* that there is a *nexus* or causal connection ("for a reason") between the discriminatory action and the protected activity such that the protected activity could have been the reason, or one of the reasons for the employer's actions.

Discriminatory Action

[29] Section 3-1(1)(i) *infra,* describes as "discriminatory", actions or threats of action adversely affecting the terms and conditions of employment, including termination of employment. The Act does not shield a worker from every negative workplace consequence or from every adverse employment action described as a "discriminatory action" taken against him or her by the employer. A discriminatory action is an unlawful contravention of section 35 of the Act when action is taken in circumstances for one or more of the reasons described in section 3-35 of the Act. Thus, the threshold for referral of a discriminator action to an occupational safety officer is a worker's reasonable belief that employer has taken discriminatory harassment against him or her for one of the reasons set out in clauses (a) to (k) of section 3-35.

[30] The Respondent was rejected on probation on August 31, 2011. There being no dispute that the Respondent's employment was terminated on that date, and no question that termination of employment falls within the scope of the definition, I find that the action taken by CFS is established both in a *prima facie* manner and as an objective fact, is discriminatory action.

Section 3-35 Activity

[31] To satisfy the second component of a *prima facie* there must be some reasonable evidence that the Respondent engaged in one or more of the protected health and safety-related activities set out in clauses (a) to (k) of section 3-35 and a *prima facie* link between the discriminatory action and the section 35 activity.

[32] The Respondent argues that the Respondent sought to enforce the Act by raising a complaint of harassment with regard to the conduct of her co-worker "A" both as to the events which occurred on June 17, 2011 at her home, and on-going in the workplace thereafter.

[33] In many cases, a temporal link between the discriminatory action and one or more of the types of protected health and safety-related activities in section 3-35 is evident on the face of the material. While the length of time is not determinative, it is a factor to be considered when deciding whether a *prima facie* case has been established.

[34] In this case, the Respondent claims to have made a complaint of harassment to her employer on August 24, 2011 (to Ms. H) which she reiterated to Mr. Page and Ms. H on August 26, 2011. The Respondent's employment was terminated one week later, on August 31, 2011. The essence of the Respondent's position is that immediacy of the dismissal is evident on its face and that the Appellant has not provided a credible, compelling explanation for the coincidental timing. The employer on the other hand, argues that the Respondent's probationary period was about to expire [coincidentally in one week's time] and it had good and sufficient reason for the dismissal. I will return to this later in my decision. At this stage, more importantly, the Appellant calls into question whether the Respondent raised complaint of harassment, and takes the position that she did not do so.

[35] To be clear, there is no dispute that the Respondent brought concerns to the attention of CFS on August 24 and 26, as mentioned above. Likewise, there is no dispute that the Respondent

was rejected on probation six days later, on August 31, 2011. The contentious issue here is whether the Respondent raised a health and safety concern (complaint of harassment) and its corollary, whether the Respondent sought to enforce the Act thereby.

[36] The Respondent described the first meeting with Ms. H as short and awkward. I accept the Respondent's testimony that when she told Ms. H about what had transpired on June 17, Ms. H laughed (awkwardly), saying Worker A was as old as her father. Given the brevity of the meeting, it's reasonable to infer that the Respondent's account focused on Worker A's (alleged) sexual advances—that he wanted to have a casual sexual relationship with her—rather than on the details of what led to the meeting, the counselling and other discussion which led to the "unexpected turn" that led to the alleged sexual advance(s).

[37] On the Respondent's own evidence, which I accept, she was prompted to raise her concerns by the announcement that Worker A was being promoted to Officer Manager. She felt she could work with him as an equal, but not as a superior/supervisor.

[38] I cannot conclude that Ms. H was dismissive of the Respondent's concerns, as put forward by counsel. On the Respondent's evidence, it would seem otherwise. Ms. H listened to the Respondent's account of the June 17 incident, heard her concerns about Worker A's promotion and asked what she wanted done about it. Ms. H also advised the Respondent that she would talk to a Board member about it. Ms. H followed through, which led to the August 26 meeting(s).

[39] On balance, I am not persuaded that the Respondent raised her concerns as a complaint of harassment. In response to Ms. H's question, what the Respondent wanted done was for the incident to be documented in case it every happened again. In my view, such is a mature and reasonable response to an unexpected (alleged) and rejected sexual advance, and pro-active in the event of recurrence.

[40] Counsel for the Respondent argued that an inference should be made the Respondent raised a complaint of harassment from the fact that Ms. H subsequently circulated the CFS harassment policy. I disagree. There are other inferences which could as easily be drawn, including a general preventative reminder to all employees, and Worker A in particular. In any event, the point is not whether the word harassment was mentioned or whether the nature of the conversation triggered circulation of the policy, it is whether there was a substantive complaint of harassment. For the reasons aforesaid, I find that there was not. However, the Respondent's express concern remained unaddressed, i.e., that she could work with Worker A as a peer, but not as her superior. Ms. H did follow through with the advice that she was going to talk with a Board member, which led to the convening of a series of meetings on August 24, 2011.

[41] The employer did its due diligence by meeting independently with the Respondent (a second time) and with the alleged harasser to hear their respective versions of the events of June 17, 2011. The Board representative, Mr. Page, testified that Worker A's account was similar to that of the Respondent. Mr. Page testified that on August 26, there was no mention of "harassment" or a

complaint of harassment, but that the meeting became divisive and emotional.as between Worker A and the Respondent exchanged words of disagreement over who said what on June 17, and he had to intervene. He did so by calling an end to the joint meeting.

[42] On all that he had heard from both parties, Mr. Page characterized the interaction between the Respondent and Worker on June 17 as "adult" conversation between two consenting adults. Given the apparent divisiveness that quickly developed at the August 26 meeting, the inference may reasonably be drawn that the "unexpected turn" the workers' June 17 conversation took into the "adult" realm crossed a personal boundary that prior to that moment in time had not been aired in public. But it is too easy from this vantage point to say that the joint meeting was not the best plan.

[43] That being said, based on the information gleaned from both workers, the employer's conclusion and the related argument are not without merit. The events that transpired on June 17 did not involve CFS in the sense that the events did not occur during working hours or in the workplace, and the purpose for which the Respondent invited Worker A to her residence was not work-related.

[44] Whether the Appellant reached its conclusion from a position of knowledge of the Act or a general sense of off-duty versus 'at work' conduct, or otherwise, the employer's position is in full accord with the employer's general duty in section 3-8 of the Act, as set out below. Again, in terms of the employer's general duty, the June 17 incident did not occur during working hours or "at work" nor was the purpose of the meeting work-related ("arising from employment). On the contrary, the Respondent's testimony, which I accept, is that she operates a home-based counselling business, Worker A requested her services, and she invited him to her home on June 17 to receive counselling. Whether their purpose was business or social or a bit of each makes no difference.

> **3-8** Every employer shall:
>
> (a) ensure, insofar as is reasonably practicable, the health, safety and welfare **at work** of all of the employer's workers;
>
> ...
>
> (d) ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment with respect to any matter or circumstance **arising out of the workers' employment**;
>
> ....

[45] The June 17 incident did not trigger a statutory obligation on the part of the employer who has a generally duty to ensure the Respondent's health, safety and welfare at home, and no right under the Act or Regulations existed for the Respondent to exercise, seeking the enforcement thereof.

[46] For the foregoing reasons, I find that, on balance, the Respondent did not make a substantive complaint of harassment. However, if it had been a substantive complaint of harassment it was not a complaint within the purview of the Act. While it may have been a health and safety concern, it was not an *occupational* health and safety concern.

[47] None of the foregoing is intended to suggest there were not *any* work-related concerns to be addressed. Clearly, as has been said before, the Respondent's express concern was that the June 17 incident would have a negative impact, given the promotion of Worker A to the position of her superior/supervisor. In my view, that concern qualifies the statement made by CFS that the June 17 incident did not involve CFS. Clearly, there would have been issues to manage in order to *prevent*

[48] The Respondent testified that the June 17 incident was having a work-related impact and that she raised those concerns in the meetings on August 24 and 26, 2011. Mr. Page testified that if Ms. H had been made aware, she did not mention it to him and that a complaint of harassment was not raised at all in the August 26 meeting. Specifically, the Respondent that Worker A leered at her, which is why she wanted her work area changed again, that he commented on and/or took away her food/snacks because they would make her get fat, he asked her to lunch several times and that he "wanted her to wear certain things to work" that aroused him.

[49] The Respondent's evidence both with regard to complaining and the allegations themselves are inconsistent, both in terms of content and whether they occurred in the workplace. For example, the Respondent claims to have raised (some of) these concerns to Ms. P on the 24th, but when asked on cross-examination whether she complained that Worker A was bothering her at work, she said she couldn't remember. When asked whether she had complained about the food issue, she said she had not complained. On the evidence, what the Respondent should wear occurred during the June 17 incident, not at work.

[50] On the whole, I find these concerns, if they were expressed at all, were expressed in support of the Respondent's concerns about Worker A's promotion. I cannot conclude that they were raised as a health and safety concern or substantive complaint of harassment.

Good and Sufficient Reasons

[51] Having determined that the Respondent was not engaged in an activity protected by Section 3-35 of the Act, there is no case for the Appellant to answer. While my determination as to the Appellant's good and sufficient reasons is unnecessary, in the event my prior determination is incorrect, I am satisfied that, on balance, the Appellant has discharged the presumption. My reasons follow.

[52] The Appellant submits that the Respondent was a probationary employee who understood she was on probation for three months and knew that being on probation meant that she could be dismissed without cause during the three months. While acknowledging that the generality of the reason given to the Respondent (not a good fit), CFS dismissed the Respondent for cumulative reasons. The Appellant argued that CFS had good and sufficient reasons for its actions other than the concerns brought to its attention by the Respondent, and produced those reasons when asked to do so by OHS.

[53] The fact that the Respondent was a probationary employee does not disentitle her to the protection of the Act, if it is found to have been contravened. If it has been, the probationary period is relevant to the issue of remedy. A probationary employee has no inherent right to continued employment beyond the then-existing terms and conditions of employment, i.e., the expiry of the probationary period. Further, it is beyond the remedial jurisdiction of an adjudicator to direct the resumption of prior employment status (reinstate) providing wages or rights in excess of the worker's term of probation.

[54] Be that as it may, the underlying purpose of probationary status is to assess suitability an employee for continued employment. There are times when an employer simply wishes to end the employment for a variety of reasons, which are often summed up as "unsuitability", with no other stated reasons. While I appreciate the jurisprudence and related submissions from counsel for the Respondent as to the minimum requirements for a proper assessment of a probationary employee at common law, these are not civil or arbitral proceedings and a discriminatory action is not a wrongful dismissal action or an arbitration.

[55] It is not necessary to seek guidance from jurisprudence to support the proposition that while employers are not required to provide reasons for their decision to continue the employment of probationary employees, they will be required to provide reasons in the face of a harassment complaint. In this regard, there is no void in the Act that needs to be filled. The legislation is perfectly clear that in the context of a discriminatory action—in the face of a health and safety (harassment) complaint—the employer must establish good and sufficient reasons in order to discharge the presumption, if it has been triggered.

[56] The employer has provided reasons.

[57] In assessing whether reasons given for termination can and do constitute "good and sufficient other reasons", I am 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."

[58] Stated another way, an adjudication is not a surrogate arbitrator or board of review upon the employer's decision other than to decide the sincerity of its action. If the employer sincerely acted for the reasons given, even though in the circumstances it may be unfair or unreasonable for it to have done so, then I cannot conclude the employer had contravened section 3-36 of Act. The worker may still have cause for complaint, but the remedy would be found in an action for wrongful dismissal or

other legal recourse. While I recognize that the Respondent explains and/or disputes the employer's reasons, the merits of the employers reasons are not at issue

[59] The Officer's decision with regard to good and sufficient reasons appears to be based solely on there being no investigation or discipline during the probationary period. The same argument is made on the Respondent's behalf. While the existence of either or both might have bolstered the employer's position, their absence does not weaken it. The list of reasons is substantive, and is, on its face cumulative of the reasons the Responded was found to be unsuitable for continued employment.

[60] In my view, the factor on which the balance rests is timing. The Respondent argues that there is no credible or compelling reason for the coincidental dismissal which occurred within a week of the complaint. In other words, that the "reasons" are a pretext. I disagree. The Appellant submits, and I accept, that the probationary period was due to expire in an equally short period of time. The Appellant's actions were not precipitous.

[61] For these reasons, I find that the Appellant has discharged the presumption in section 3-36. Accordingly, I revoke the Officer's decision which is hereby set aside.

[62] The appeal is allowed.

Dated at Regina, Saskatchewan this 2 day of June, 2015

Rusti-Ann Blanke
Special 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.