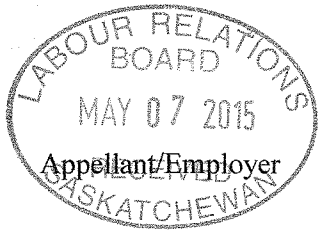
LRB File No. 124-14

IN THE MATTER OF AN ADJUDICATION

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

BETWEEN:



Z.M.

Appellant/Employer

- and –

LONDON DRUGS LIMITED

Respondent/Employee

For the Appellant:	self-represented
For the Respondent:	Meghan R. McCreary, MacPherson Leslie & Tyerman LLP
Adjudicator:	Rusti-Ann Blanke

DECISION

INTRODUCTION

[1] On May 23, 2014, an Officer in the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace (the "Officer") issued a decision (Report Number 252) with respect to a complaint of discriminatory action brought by a worker, Z.M. (the "Appellant") against London Drugs Limited (the "Employer", the "Respondent"). Following an investigation, the Officer concluded that termination of the Appellant's employment by the Employer, was not an unlawful discriminatory action and did not contravene section 3-35 of *The Saskatchewan Employment Act ("the Act")*. The worker appeals the decision on the stated grounds that

a. The purpose of the legislation is to protect employees who report harassment from job action; and

b. The officer displayed bias by repeatedly denying the worker's claim, and refusing to consider the evidence in support of the worker's claim.

Issue

[2] Whether the employer's action against the Respondent is discriminatory in circumstances prohibited by section 3-35 of *The Saskatchewan Employment Act* (the "Act"). The key issue to be determined is whether the Appellant's occupational health and safety activity was a factor in the Employer's decision to impose disciplinary consequences on the Appellant.

RELEVANT LEGISLATION (FRAMEWORK FOR ANALYSIS)

[3] For purposes of this appeal, the relevant provisions of the Act are as follows:

3-1(1)(i) "**discriminatory action**" means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes dismissal, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty but does not include…

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;

…

(b) seeks or has sought the enforcement of:

(i) this Part or the regulations made pursuant to this Part; or

...

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

(2) If an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 3-35, the occupational health officer shall serve a notice of contravention requiring the employer to: (a) cease the discriminatory action; (b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed; (c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and (d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.

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

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

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

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

BACKGROUND AND EVIDENCE

[4] An oral hearing of this appeal was heard on December 10, 2014. Both parties subsequently submitted written argument. I have carefully considered the parties' evidence and written submissions along with the occupational health officer's file and will set out sufficient evidence below to explain the issue before me, and the reasons for my findings.

[5] The Appellant appeared on his own behalf. Ms. Sharlie Niessen testified on behalf of the Employer (Respondent), London Drugs Limited.

[6] The Appellant was hired in August, 2006 to work, originally, in the Photo-Electronics Department of a London Drugs store in Regina, but the Computer Department was thought to be a better fit. The Appellant suggested this change was influenced by his being "up front" about his medical condition, but gave no indication that he was opposed to it, then or now. In any event, until the date of his dismissal, the Appellant was employed by London Drugs Limited as a Computer Technical Specialist. In that position, the Appellant's duties included performing technical services and growing the tech-service sales in the department, as well as selling products and providing support to customers in the computer department as a sales associate when required.

[7] Sharlie Niessen is London Drugs' Manager of Employee Relations, a position she has held since 1991. From London Drugs' head office in Richmond, British Columbia, Ms. Niessen, oversees employee relations in stores from Manitoba to B.C. and manages employee relations issues with the assistance of her team. Ms. Niessen first became involved in matters pertaining to the Appellant in the period mid- to late 2012 and early 2013 when a member of her team advised her of issues pertaining to the Appellant.

[8] The events giving rise to this appeal were precipitated by a computer issue which occurred on July 30, 2013 during the Appellant's last shift before a scheduled week off work. Earlier in July, the Appellant had obtained authorization from the Assistant Manager of the Computer Department ("A.D") to sell a computer system which had been written off and earmarked for disposal, to a student at a substantially reduced price. The computer required some minor upgrades before the student was to pick it up and pay for it on August 2nd, which the Appellant planned to do in the last hour before his shift ended at 4:00 p.m.

[9] At some point before the end of his shift, the Appellant requested approval from a manager other than his own to work past the scheduled end of his shift. His request was denied. When he turned his attention to working on the upgrading the system, he discovered that the computer was missing. After some inquiries, he ascertained that the computer had been sold to another customer by the Manager of the Computer Department (R.K.). The Appellant was upset. He was convinced it had not been a mistake. In that frame of mind, before leaving work, he wrote a long letter of complaint about the computer issue and other workplace issues. He emailed it at 8:30 p.m. to two of London Drugs' managers, with blind copies to London Drugs' CEO (Wynn Powell), and Senior Vice President and COO, Clint Mahlman. By that time, he had remained at work 4.5 hours beyond the end of his shift.

[10] Ms. Niessen received a copy of Appellant's email complaint forwarded to her (Employee Relations) and Jackie Hogue (Human Resources) by London Drugs' COO (Clint Mahlman) who expressed

puzzlement to her as to why he had been blind copied. In the email, the Appellant made serious allegations that various other employees, including four managers he worked with, had engaged in intentional misconduct, and had "used and abused" him. Specifically, the four managers included the Manager and Assistant Manager of the Computer Department, the former being the Appellant's direct manager, as well as the Store Manager and Assistant Store Manager.

[11] Although the Appellant had not made a formal complaint of harassment, the Employer took seriously the allegations raised in the email complaint. Based on the Appellant's lengthy and related disciplinary record, the Employer also had serious concerns about the Appellant's own conduct on July 30 warranted discipline.

[12] Over the course of his employment with London Drugs, the Appellant was coached on numerous occasions respecting the need to follow London Drug's policies and procedures, to follow direction from management, and to follow the proper protocol/chain of command to bring his concerns forward. Ms. Niessen testified that the Appellant had accumulated a lengthy record of progressive discipline since 2008, documented by the Notifications of Counselling (Exhibits R-1 to R-11) as listed below. A number of the exhibited Notifications address cumulative instances of the (mis)conduct:

- September, 2008 – written warning for rude and disrespectful conduct to a London Drugs customer;
- November, 2008 – written warning for improperly claiming a personal benefit;
- February, 2010 – 1 day unpaid suspension for insubordination and an unauthorized product price adjustment;
- October, 2011 (2) – 2 written warnings for repeated issues involving attendance and punctuality;
- February, 2012 (2) – 2 written warnings for attendance and punctuality;
- April, 2012 (2) – 1 day unpaid suspension for repeated issues with attendance and punctuality, including failure to report for a scheduled shift; and
- March, 2013 – staying beyond shift without management approval (note to file; no discipline);
- May, 2013 – written warning for failure to follow policies respecting hours of work.

[13] With further respect to the Employer's serious concerns about the Appellant's behavior on July 30, 2013, Ms. Niessen testified that the Appellant had a history of not following protocol/chain of command and not following the directions of management:

- The Appellant had difficulty leaving work at the scheduled end of his shifts unless he was told or reminded to leave, sometimes repeatedly. On numerous occasions, the Appellant would not take breaks or would work beyond his scheduled shift, without prior approval, resulting in significant amounts of overtime. The Appellant was repeatedly coached that staying beyond the scheduled end of shift required the approval of his manager. It was an on-going problem, further reflected by notes to his personnel file and disciplinary action as recently as May, 2013. On July 30, 2013 the Appellant remained at work 4.5 hours past the end of his shift.
- When the Appellant consulted management and obtained an answer that he did not like, he would often approach other managers in an attempt to obtain a different response, without disclosing that he had already spoken to other managers. As a result, the Appellant had been had been expressly

directed not to take his concerns to managers who did not directly supervise him, and to follow the appropriate chain of command when raising issues. On July 30, 2013, the Appellant asked a manager other than his own for permission to work past the end of his shift. His request was denied. He then phoned his own manager at home with the same request, and was denied permission, although the Appellant claims otherwise.

- The Appellant had been coached and counselled as to the proper protocol of reporting concerns, which followed the chain of command. The chain of command begins with one's own manager, next is the store manager, then to the district manager—or directly to HR. While the Appellant twice asserted in his email that he was attempting to raise issues to the next in the chain of command, he had also blind copied the CEO and COO. Ms. Niessen expressed the Employer's concerns not only about the Appellant not following the employer's express instructions to follow the proper chain of command to report issues, but also about the Appellant's lack of transparency, i.e., blind copying the COO and CEO, who were clearly not next in the chain of command and neither of whom had previously had any contact with the Appellant or any involvement with his job performance.

[14] While not disregarding the seriousness of the Appellant's allegations (even though he had not made a formal complaint of harassment), the Employer was concerned that the Appellant's own conduct, was a culminating incident of insubordinate conduct warranting dismissal. However, the Employer did not immediately take that action. Instead, London Drugs engaged a third party investigator, Hill Advisory Services Inc., to investigate the Appellant's allegations of harassment. Further, because the Appellant had previously disclosed a medical condition to the employer in 2011, and had alluded to it in his email complaint, the Employer invited the Appellant to provide medical information which might support a connection between his conduct and his diagnosed medical condition. Both steps were initiated to determine whether there were any circumstances mitigating against imposing discipline against the Appellant for his own misconduct.

[15] When the Appellant returned to work on August 6, 2013, he was not permitted to resume his duties. The Appellant had one or more telephone conversations with HR to ascertain the reasons. Ms. Niessen testified that correspondence confirming that he was being placed "out of service" and the reasons was subsequently provided to the Appellant (Exhibit R-13, Correspondence from Jackie Hogue, London Drugs' General Manager of Human Resources dated August 9, 2013. In addition to the fact that the Appellant had made serious allegations of misconduct by management and allegations of mistreatment of a harassing nature against his managers (the Manager and the Assistant Manager of the Computer Department) as well as the Store Manager and Assistant Store Manager, Ms. Niessen said that they wanted the Appellant to understand the seriousness, and potentially serious consequences, of his own actions and to understand the Employer would be taking into consideration any mitigating circumstances derived from medical information and/or the findings of the complaint investigation.

[16] In October, 2013, the Employer received the requested medical information which did not suggest a connection between the Appellant's conduct on July 30, 2013 and his medical condition. Because the complaint investigation was still in process, the Appellant was advised by correspondence dated October 28, 2013 [Exhibit R-14] that his out of service status would continue until the investigation process and report were completed.

[17] Ms. Niessen testified that the investigator's 138 page report into the Appellant's harassment allegations was completed in December, 2013. The investigation and report addressed some 52 allegations, and concluded that all of the allegations of harassment were unfounded

[18] The Employer proceeded with disciplinary action based on the Appellant's misconduct. Ms. Niessen testified that from the Employer's perspective, the Appellant's lack of transparency damaged trust and his further incidents of misconduct for which he had been coached, counseled and disciplined irreparably damaged the employment relationship. There were no mitigating factors arising from medical information or from the findings of the complaint investigation. Consequently, the Employer terminated the Appellant's employment on January 9, 2014 for just cause.

[19] Ms. Niessen was cross-examined by the Appellant. As is not uncommon to self-represented parties, there was a tendency for the cross-examination to be permeated by the Appellant's own testimony. In accordance with an adjudicator's authority to determine the procedures by which the appeal is conducted, I allowed that evidence to unfold in that less formal fashion. Given the reason for this practical modification to the order of proceedings, in addition to re-direct examination of Ms. Niessen, counsel for the Respondent was allowed the opportunity to cross-examine the Appellant on the testimonial aspects of his cross-examination.

[20] During cross-examination on the chain of command issue, Ms. Niessen acknowledged that the Appellant had spoken to her for about 1.5 hours in May, 2013 in relation to his failure to follow policies respecting hours of work for which he was issued discipline (written warning). It was not clear whether the conversation preceded the discipline or occurred afterward. At any rate, the Appellant contended that he had spoken to her at that time about the "open door policy" and issues he had having with managers. Ms. Niessen's testimony as to the proper chain of command/protocol for reporting concerns was unshaken. Further, Ms. Niessen stated that she committed to following up with the managers, and had done so.

[21] In testimony and written submissions, the Appellant states the following with respect to his alleged failure to follow the chain of command and blind copying the COO and CEO:

- That policies are not posted, which is why he said in his email that he was attempting to follow the chain of command;
- That he had been made aware of London Drugs' "open door policy" early in his employment, to the effect that employees had access to management, right up to the CEO—he thought the policy "gave him leeway to talk to anyone in the company";
- That he had previously discuss his concerns about his manager with Ms. Niessen (May,2013) and felt it was management's responsibility to address them, not his responsibility to follow up;
- That he had previously sought assistance from an Occupational Health Officer with regard to his workplace concerns. He claims that after the Officer spoke to Ms. Niessen, the Officer instructed him to submit his concerns to the Executive. He followed those instructions;
- That blind copying the COO and CEO was an accident, "an honest mistake ", one he did not notice until he printed off a copy of the email for his records before deleting the complaint email from the

workplace computer. He states that at the time, he was frustrated, stressed, upset about the computer issue and tired because he had been at work for 12 hours.

- That he was not made aware that blind copying the COO and CEO was an issue until January 9, 2014, the day his employment was terminated, and was therefore never given a chance to address it. He states that he is still unsure how that is an act of insubordination.

[22] On cross-examination of the Appellant with respect to the suggestion that he was not being made aware until the day he was dismissed that blind copying the COO and CEO was an issue, the Appellant was referred to, and acknowledged receipt of, Ms. Hogue's detailed letter to him dated August 9, 2013, *supra,* which referenced that issue. The Appellant said, without further clarification, that he thought that was a reference was to another issue.

[23] The Appellant acknowledged that he had been coached about following the proper chain of command, and said he felt he had tried to do so. When it was suggested to the Appellant that given the Employer's concerns that he follow the proper chain of command and the coaching he received, if bcc'ing the CEO and COO was mistake, it was a pretty serious mistake. The Appellant's response was "not really, because coaching about chain of command was in regard to following protocol at the store level". It is noted in that regard that Ms. Hogue's letter (August 9) indicates that after being placed out of service (August 6), the Appellant "contacted Human Resources and stated that [he] blind cc d Wynne and Clint out of frustration as you felt your concerns were not being addressed by John and the management team".

[24] As for not having had a chance to address it, the Appellant acknowledged that he had an opportunity to tell his side of the story during the investigation of his complaint, and had been interviewed for 2.5 days for that purpose. He further acknowledged that prior to this, he had he had never told Ms. Hogue or anyone else that bcc'ing the CEO and COO had been an honest mistake. The Appellant added that he did not agree with the investigator's conclusions.

[25] On cross-examination with regard to staying past the end of his shift, the Appellant acknowledged that he had spoken first to another manager who said she could not authorize it, he had to get approval from his own manager. The Appellant said he had asked her because she was the only one there. He then called his manager, R.K., who yelled at him for phoning him at home, but whom the Appellant said gave him permission to stay late. When it was put to the Appellant that Rod said he had not been asked, and had not given approval, the Appellant contended that his manager had done so in the course of their conversation and that his manager had "lied" and "changed his story". The Appellant further implied that Ms. Niessen subsequently condoned his staying 4.5 hours past the end of his shift, contending that when he spoke to her about it later, she said she "understood". On re-direct, Ms. Niessen denied it, saying, in essence that she understood what she was being told by the Appellant, not signifying that she agreed with it, or condoned it.

[26] The Appellant questioned Ms. Niessen rhetorically as to whether he was being treated differently—going on to a number of examples of situations in which he felt he had been treated differently in the application of various workplace policies and practices. He alluded to situations where he had not been allowed the same discounts as other staff, and that he was disciplined for being 1 or 2 minutes late,

while the tardiness of others was overlooked. With regard to the latter, the Appellant later produced a brief handwritten statement from one co-worker [Exhibit A-6] who was allegedly told that because the Appellant was receiving notifications of counselling for tardiness, his tardiness could no longer be overlooked. The Appellant expressed the belief that it was only while he was "on a break", that the Employer began exercising the rule on "everybody".

[27] After cross-examination(s), the Appellant proceeded with direct testimony. He referenced various Personnel Policies (Whistleblower, Respectful Workplace, Employee Relations Philosophy, Employee Counselling Policy and Employee Complaint Procedure) which were marked, respectively, as Exhibits A1-A5, and read into the record the definition of harassment and reference to the prohibition against retaliation from the Respectful Workplace Policy (Exhibit A-2). He stated that Exhibit A-5 (Personnel Policy) refers to the Employer's "open door policy" which he thought gave him leeway to contact anyone in the company with his concerns, including the COO and CEO.

[28] Exhibit A-5 states that *"(m)ost employee problems are successfully resolved through informal discussions with Management. This informal approach has come to be known as the "Open Door Policy..."* The Policy states the protocol for a formal approach is to start with one's supervisor, then to the next level of management, usually the Unit Manager, then the District Manager or the Manager, Employee Relations. It is noted that Exhibit A-1 (Whistleblower Policy) also makes reference to the open door policy: *"London Drugs has an open door policy and encourages employees to share their questions, concerns, suggestions or complaints with someone who can address them properly"*. The stated reporting procedure begins with one's supervisor, or to an Employee Relations Advisor in Human Resources.

[29] Further oral testimony from the Appellant was unhelpful, being reiterative and focused on irrelevant matters having no probative value to the issues at hand. I determined it to be unnecessary to hear further testimony of this nature from the Appellant. Both parties were given the opportunity to make closing oral arguments. Counsel for the Respondent spoke briefly, to summarize a prepared written argument, supported by a Book of Authorities. As a matter of procedure, I determined that the interests of the Appellant in arguing his case would be best served by providing him a reasonable time to prepare and submit written argument in response. The Appellant submitted his written argument in accordance with the agreed timeline (December 31, 2014) to which the Respondent replied on January 8, 2015.

[30] While not reproduced in full detail below, I have reviewed and considered each parties' written submission in its entirety.

Appellant's Submissions

- He followed the chain of command as laid out by London Drugs own policies [notably the open door policy which he thought allowed him to contact any member of the company above him];
- He was instructed to do by the Occupational Health Officer to send his concerns in writing to the Executive and he followed those instructions;
- He was told directly that he was being put offline during the investigation for his own protection as the investigation involved several members of his management. He was put on an administrative leave without reimbursement for lost earnings. The act was retaliatory, as the managers who were

named in the email [complaint] were allowed to continue their employment. He requested, instead, to taken training or to work from home, but was not allowed to do so. He was left on the schedule as an active employee but was forbidden from working, as he was not allowed in any of the secured areas of the store. An occupational health officer told him this was discriminatory behaviour. The Appellant submits that it is also a violation of the Employer's own policies which prohibit retaliation.

- He obtained updated medical information with additional accommodations requested as the result of the behaviour of several members of management, and how they were exploiting his disabilities. [The Appellant suggests that the Employer rejected the accommodation information, and remarks on the omission of this information in the Employer's testimony. Implicit in the reference to the Employer's rejection of this information, is that the Employer's reasons for rejection is/are unknown.
- The [July 30] email was sent in good faith as it was a request to correct the issues/problems which were so very pervasive. In the process of sending, the email was accidentally sent to two recipients by bcc. He did not notice the mistake until he printed a copy for his records. He never thought to bring it up as he honestly did not believe it was such a contentious issue, and he was never given the ability to properly answer any concerns regarding it.

[31] The Appellant further submits that the investigator's report should be disregarded in its entirety because the investigator applied the incorrect onus of proof. The investigator's report stated that the onus of proof is on the accuser. The Appellant submits that in this case, the reverse onus applies. The Appellant also takes issue with the investigative process for a number of reasons stated in his written submissions. This may be the most appropriate point to address those submissions:

[32] The Investigator's Report has been entered as an Exhibit (R-15) in these proceedings in support of Ms. Niessen's testimony that an investigation was conducted and that the investigator concluded the Appellant's allegations were unfounded.

[33] The Appellant has left no doubt that he disagrees with the investigator's. Indeed, much of his testimony was a rehash of events giving rise to the 52 allegations therein. It may assist the Appellant, as the Complainant in the investigative process, to understand that the reverse onus has no application in the investigation of a complaint of harassment where the burden of proof *is* on the "accuser". More importantly, this appeal process is not a mechanism for challenging the investigative process or the investigator's conclusions. For purposes of a discriminatory action, a key question—a threshold question—is whether the Appellant attempted to exercise a right protected by the *Act*, such as the right to not be subjected to harassment and sought to enforce that right by making a complaint of harassment. Whether the allegations in the complaint are founded or not is not an issue in these proceedings.

Respondent's Argument and Reply Submissions

[34] While the Employer accepts that it bears a "reverse onus", the Respondent submits that it is not the intention of the legislature that section 3-35 be used as a tool for employees to challenge legitimate disciplinary action against them by an employer. If the Appellant is to take advantage of the protections of the Act, the Respondent submits he must establish that a nexus exists between his occupational health and safety activities, i.e., exercising his right to a harassment-free workplace, and the Employer's act of terminating his employment. It is the Employer's submission that this nexus does not exist.

[35] London Drugs acknowledges that the Appellant raised issues of harassment, thus exercising a right that could be protected by section 3-35 of the Act. The Employer submits that even though the Appellant did not file a formal complaint of harassment, London Drugs undertook a harassment investigation, retaining a third party investigator for that purpose. Both the investigation and the request for medical information by the Employer were steps taken to rule out factors which might have mitigated or negated the Appellant's misconduct on July 30, 2013.

[36] The Employer submits the Appellant was not dismissed because he raised allegations of harassment or because the allegations were found to be without merit, but for just cause, arising from his own misconduct on July 30 and his previous disciplinary record. His misconduct on July 30 included (1) working late without permission on July, despite having been previously coached and disciplined (written warning) for doing so, and, on July 30, expressly denied permission; (2) wrote and sent an insubordinate and insolent email on company time (while working late without permission on July 30), which, apart from allegations of harassment, accused his supervisors of other significant misconduct (lying, conspiring, falsifying records), and was, in part, defamatory; and (3) blind copied senior executives, after having been previously directed to follow proper organizational lines of communication following the chain of command.

[37] The Employer submits that placing the Appellant on administrative leave and not booking him for shifts while his harassment complaint was investigated by the third party investigator was not disciplinary. Rather it was a standard administrative action in response to the Appellant's complaints that all of his supervisors harassed him. In response to the Appellant's complaint, London Drugs' option was to remove the Appellant from the workplace, or to remove four other employees who constituted the entire management component of London Drugs East Regina store. Further, because London Drugs determined that there were no factors (either medical factors or substantiated incidents of harassment which mitigated the seriousness of the Appellant's misconduct, the fact of his suspension between July 30, 2013 and January 9, 2014 was of no effect, and no damages could flow from that suspension, as London Drugs had just cause to dismiss

[38] The Respondent cited arbitral case law[1], to support the submission that there is just cause to discipline an employee who engages in insubordinate and insolent conduct in the workplace. The Respondent submits it is very clear and supported by arbitral authority that the Appellant's conduct on July 30, 2013 was deserving of some type of discipline, emphasizing however, that the quantum of the discipline is not at issue in this forum.

[39] The Respondent submits that the only issue is whether there is a nexus between the Appellant's protected occupational health and safety activity or his exercise of rights under occupational health and safety legislation, and the discipline imposed on him by London Drugs.

POSITIONS OF THE PARTIES

Appellant

[40] The Appellant takes the position that he was mistreated—treated differently, unfairly, harassed and disciplined—because of his medical condition. Immediately following his return to work on August 6, 2013 after having delivered a complaint letter by email to the employer on July 30, 2013, he was placed on unpaid administrative leave ("out of service") effective August 6, 2013 until January 9, 2014 while his complaints were being investigated. On January 9, 2014 his employment was terminated. The Appellant takes the position that both are discriminatory actions imposed by the Employer in retaliation to his July 30, 2013 email complaint.

Respondent

[41] The Respondent's position is that the Appellant's has failed to establish a *nexus*, or causal connection between the disciplinary action imposed by the Employer and the Appellant's health and safety related activity. Rather, the Employer takes the position that the Appellant was dismissed for cause, based on lengthy disciplinary record for attendance and punctuality issues, failure to follow the Employer's policies and insubordination and a culminating incident of insubordinate and insolent misconduct, not as the result of his exercise of his rights under the *Act.*

ANALYSIS

[42] Section 3-36 of the *Act* provides a framework for analysis. 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 for one or more of the reasons mentioned in section 3-35 of the *Act.* Thus, the Appellant worker bears the initial onus to establish on a *prima facie* basis that

(1) The Employer took discriminatory action against him; and
(2) The Appellant was engaged in a health and safety activity protected by section 3-35 of the *Act* and there is a reasonable basis on which to conclude that the Appellant's protected activity was the reason, or one of the reasons, the Employer took discriminatory action against him.

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[1] *British Columbia Ferry Services* (2007), 165 L.A.C. (4th) 28 (McEwan); *Calgary(City)* 2008, 177 L.A.C (4th) (Tettensor); *Canada Post Corp*, [2007] CLAD No. 416 (Lanyon); *Canada Post Corp.* (2012), 216 L.A.C. (4th) (Ponak); *Coppola v. Extendicare (Canada) Ltd.*, unreported, April 9, 2013 (S. Denysiuk, Q.C.); *Finlay Forest Industries*, [1999], BCCAAA No. 481 (Brokenshire); Reece v. Salvation Army, [2005] O.R.L.B. No. 4760 (QL); *Teamsters Local 213 Member Benefit Plans*, [1999] BCCAAA No 283 (McDonald)

[43] Before turning to the analysis, on a number of occasions, the parties gave conflicting testimony with respect to facts. To the extent that it may be necessary to assess credibility in order to making findings, 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.

Discriminatory Action

[44] The Employer submits it took disciplinary, not discriminatory, action against the Appellant.

[45] The scope of the definition of discriminatory in section 3-1(1)(i) of the *Act* is broad. Dismissal falls squarely within the definition. There is no dispute the Employer terminated the Appellant's employment on January 9, 2014. While it is not necessary for purpose of this element, for the Appellant to establish more, the evidence also reflects that upon the Appellant's return to work on August 6, 2013 (after emailing his complaint on July 30, 2013), the Appellant was placed "out of service"—an administrative leave during which time the Appellant was not scheduled for any shifts. Hence, it was an involuntary, unpaid leave. Even if I accept that this was a non-disciplinary measure necessitated by the circumstances of the investigation of the Appellant's complaint, I find it to be *prima facie* a discriminatory action within the broad scope of the definition.

Section 3-35 Activity

[46] Not every discriminatory action is unlawful. To be unlawful, that is, to be in contravention of the prohibition in section 3-35 of the *Act,* the Appellant must establish, *prima facie*, that there is a reasonable basis on which to conclude that the discriminatory action was taken "for" one or more of the reasons mentioned in section 3-35 (a) to (i). Stated another way, the worker must establish in a *prima facie* manner that he was engaged in an activity protected by section 3-35 and that there is a *nexus* or causal connection linking the protected activity and the discriminatory action.

[47] In this instance, even though the Appellant did not file a formal harassment complaint, London Drugs' acknowledges that he did raise issues of harassment in his July 30, 2013 email, thus attempting to exercise a right that could be protected by the Act. However, the Employer argues that the Appellant has failed to establish a *nexus* between the disciplinary action and the protected health and safety activity.

[48] The nature and length of the interval between the protected activity and the discriminatory action, while not conclusive, is a relevant factor in the determination as to whether a *prima facie* case exists. In this case, the Appellant was placed on an unpaid leave on his first day back to work after having emailed his complaint the previous week.

[49] I am mindful that the purpose of legislation is to encourage workers to share responsibility for health and safety by bringing such matters to the attention of the employer to be addressed, and to protect those who do so from retaliatory adverse employment consequences. By the reverse onus, the intent of the legislation is clearly to impose the ultimate, and heavier, burden of proof on the employer. While that does not relieve the worker of the initial onus to establish a *prima* facie case, it does lead to the conclusion that the initial burden is not an onerous one. Bearing in mind that at the *prima facie* stage, the evidence is untested, I find that the temporal and circumstantial evidence, are sufficient to establish, that there is a reasonable *prima facie* basis on which to conclude that, in this case, the Employer took discriminatory action(s) against the Appellant for a reason mentioned in section 3-35 of the *Act.* As such, it falls to the Employer to rebut the presumption.

Has the Employer Rebutted the Presumption in Section 3-36(4)?

[50] The *Act* does not protect workers from all negative employment consequences or otherwise insulate them against all disciplinary actions. In the present case, I am satisfied that the evidence establishes that the Appellant was disciplined—dismissed—for the misconduct related to non-health and safety matters. In light of the counseling and warnings the Appellant acknowledges receiving regarding the proper protocol/chain of command for reporting concerns, his decision to bring his allegations to London Drugs senior Executive by blind copying them, was deceitful and insubordinate.

[51] The Appellant's testimony in that regard was not credible, and not in harmony with his own, or other evidence. It was internally inconsistent and contradictory, most notably in his assertion that blind copying London Drugs COO and CEO was "an honest mistake" and that London Drugs "open door" policy gave him leeway to contact anyone above him in the company, as well as his assertions that he did not know that it was an issue until the date of his dismissal, and had not previously been given a chance to explain.

[52] The fact that the Appellant raised a health and safety concern protected by section 3-35 is not, in itself, sufficient to establish a nexus between the protected activity and the employer's actions. Having carefully considered all of the evidence, I am satisfied on the balance of probabilities that the Appellant was not dismissed for raising allegations of harassment, a health and safety concern. The Appellant's right to raise a complaint of harassment was never questioned or challenged by the Employer, who acted promptly to initiate an investigation. There was no anti-safety animus. Thus, the evidence does not support a *nexus* between the Employer's discriminatory action and the Appellant's protected health and safety activity. But for the delay inherent in the completion of the investigative process to rule out any mitigating factors against it, I am satisfied that the Employer would have proceeded with the dismissal for non-health and safety related reasons on or about August 6, 2013.

[53] I am satisfied that the Employer has rebutted the presumption in section 3-36(4) that it did not take discriminatory action because of the Appellant's protected health and safety related activities. As such, the discriminatory actions taken are not unlawful. I am further satisfied by the Respondent's evidence, and the reasons aforesaid, that on the balance of probabilities the Respondent's discriminatory actions against the Appellant were taken for good and sufficient reasons. In that regard, it is important to state that it is not within the remedial jurisdiction of this Tribunal to assess whether the nature of disciplinary actions taken were fair and reasonable.

Decision

[54] The statutory remedies to affirm, amend or revoke the decision appealed against are provided to me under the Act, are found in section 53(1).

[55] For the reasons set out above, I am satisfied that the Employer did not suspend or dismiss the Appellant because of his health and safety related activities, but for good and sufficient other reasons. I therefore affirm the Officer's decision and dismiss the appeal.

Dated at Regina, Saskatchewan this 10 day of April, 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.

. . .

(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