IN THE MATTER OF AN ADJUDICATION

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

BETWEEN:

S.C.

Appellant/Employee

- and –

Mamawetan Churchill River Regional Health Authority

Respondent/Employer

For the Appellant: self-represented/with counsel Michael Krawchuk

For the Respondent: Evert van Olst, Q.C., Counsel, Saskatoon Regional Health Authority

DECISION

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

INTRODUCTION

[1] On August 15, 2013, an Officer in the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace (the "Officer") issued OR-TMC-0227 with respect to a complaint of discriminatory action brought by Ms. S.C. (the "Appellant"), against Mamawetan Churchill River Regional Health Authority (the "Respondent" , "MCRRHA", "MCR Health Region", the "employer") for the termination of her employment on May 2, 2012. Following an investigation, the Officer determined that MCR had not taken discriminatory action against the Appellant in contravention of section 3-35 of *The Saskatchewan Employment Act (*"the "Act")[1]. Ms. S.C.. Appeals the Officer's decision.

[1] This appeal was commenced pursuant to the provisions of *The Occupational Health and Safety Act, 1993,* since repealed. With minimal changes, provisions of the repealed Act are now found in Part III and Part IV of *The Saskatchewan Employment Act.* Unless otherwise indicated, references herein to "the Act" are references to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 Respondent employer, Mamawetan Churchill River Regional Health Authority (Health Region) is responsible for health services in far north eastern Saskatchewan, with facilities in the communities of La Ronge, Creighton,, Pinehouse, Sandy Bay and Weyakwin.

[3] The Appellant, Ms. S. C., commenced employment with the MCRRHA on June 20, 2011 as the Manager of Primary Care. Her employment status was probationary for a period of one year.

[4] On May 2, 2012, prior to the expiry of the probationary period, the Appellant's employment was terminated without cause, as being unsuitable for continued employment with MCRRHA. It appears the Appellant was paid two months' salary as severance.

[5] On January 25, 2013, an Occupational Health Officer received the Appellant's completed Discriminatory Action Complaint form with supporting material attached, and commenced an investigation.

[6] On March 12, 2013, the Occupational Health Officer notified the Respondent employer (Board Chair, Roy Woytowich) of the Discriminatory Action complaint, and requested the employer to cease the Discriminatory Action and return Ms. S.C. to her former position and duties in accordance with the requirements of (then) section 28 OR to provide "good and sufficient other reason" for her termination by March 27, 2013. [Appeal Book, Tab 4]. The Respondent's Chief Executive Officer, Andrew McLetchie, complied by letter dated March 22, 2013 [Appeal Book, Tab 5].

[7] In June/July, 2013, the Appellant's discriminatory action file was assigned to another Officer who requested and received further information from the Respondent who responded on or about August 8, 2013. [Appeal Book, Tab 9]. The Officer completed his investigation and rendered the August 15, 2013 decision under appeal.

[8] The appeal was heard in Saskatoon on March 24 and 25, 2014, concluding with final oral argument, via teleconference, on July 21, 2014.

ISSUE:

[9] Whether the employer's action against the Respondent is discriminatory in circumstances prohibited by section 3-35[2] of *The Saskatchewan Employment Act* (the "Act").

[2] Section 27 of *The Occupational Health and Safety Act, 1993 (repealed)*

RELEVANT LEGISLATION

[10] For purposes of this appeal the relevant provisions of the Act begin with Section 3-1(1)(i)[3] 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…

[11] Section 3-35 [4]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;
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> (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.

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[3] Section 2(1)(g) of *The Occupational Health and Safety Act, 1993 ("OHSA")*
[4] Section 27 ibid

[12] Section 3-36[5] 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.

. . .

BACKGROUND and EVIDENCE

[13] As a procedural matter addressed prior to the commencement of the hearing, it was agreed that the Respondent would present its case first.

[14] The Respondent called one witness, Andrew McLetchie. Mr. McLetchie is, and was at the material time, Chief Executive Officer of the Mamawetan Churchill River Regional Health Authority, otherwise known as the Mamawetan Churchill River Health Region.

[15] Notwithstanding the actual order of proceedings, for greater clarity, I propose to set out further background and the evidence for the Appellant first, as per the standard order of proceedings.

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[5] Formerly section 28, OHSA

Background

[16] As previously noted, the Appellant was hired into the position of Director of Primary Care, and commenced her employment on June 20, 2011. The Appellant introduced her extensive educational background: a diploma and a degree in Nursing, a degree in Cell and Molecular Biology, a certificate in Pediatric Critical Care and a degree in Midwifery (Iran). At the material time, the Appellant had one course remaining in an MN-ANP program. I understand that to be a Master of Nursing—Adult Nursing Practitioner program, which it appears the Appellant completed prior to the hearing date. Finally, the Appellant was working on a combined Law and MBA degree (online/distance learning, *Juris Doctor* Program, recognized in the state of California) which she has since completed.

[17] As Director of Primary Care, the Appellant was responsible for health services programs throughout the MCR Health Region, including La Ronge and outpost health centres in four northern communities. She and her team of three managers and two supervisors directed the work of about 120-130 staff throughout the region.

[18] The Director's position reports to MCRRHA's Chief Executive Officer. At the time of the Appellant's hire, the Chief Executive Officer, Kathy Chisholm, was due to retire in September. Ms. Chisholm oriented the Appellant to the primary care programs and outpost clinics that would be under her supervision. In particular, Ms. Chisholm drew the Appellant's attention to the Sandy Bay Health Centre and its manager, TN. The Sandy Bay Budget had apparently grown progressively worse over a period of several years, and showed a significant deficit in the preceding year. Ms. Chisholm expressed concern about Manager TN's spending habits as well. The Appellant was instructed that Sandy Bay's budget deficit was to be at the top of her 'to do' list.

[19] Over the course of the summer, the Appellant worked on the Sandy Bay budget. She reported to the CEO that about half of the deficit could be linked to nurses' overtime and callbacks, but the other half was inexplicable and would take more time to decipher. In the meantime, the Appellant implemented a Budgetary Risk Management Strategy "to uncover possible fraudulent activities". In order to control "wild spending" in Sandy Bay, the Appellant "confiscated" a few people's purchase orders who did not, in the Appellant's opinion, need such access.

[20] Against this backdrop, the Appellant began to receive complaints from the community and staff about Manager TN.

Evidence

Though it is not all reproduced here, or is presented in an abbreviated manner, I have thoroughly read, reviewed and considered all of the documentary and *viva voce* evidence and argument put forward by each party in reaching my decision.

For the Appellant

[21] The Appellant took the position on appeal that the Officer would have reached a different conclusion in his decision had he interviewed the 18-23 MCRRHA employees she had identified as witnesses. For purposes of the appeal hearing, the Appellant issued subpoenas to summon the attendance of eight of those witnesses. Seven testified. The eighth witness was not called upon. In cross-examination, the Appellant confirmed that if the Officer had heard from these seven witnesses, he would have come to a different conclusion. The Appellant led with witness evidence from seven MCRRHA employees.

[22] To the extent that the Appellant has relied on witness evidence in her Argument, she has recounted their testimony in her written submission. The Respondent has not challenged the accuracy of her account of it, nor do I , with one relatively minor exception. In that regard, Counsel for the Respondent cross-examined the witness on point. I will address the witness testimony in my **Analysis and Reasons.** For purposes here, I have summarized the witness testimony, which, as a group, was very similar, and addressed the following:

- That the Appellant was never placed in a mentorship program and that there was no mentorship program at the health region; the Appellant's performance was never an issue and she had not ever been disciplined according to the HR staff member who filed such documents;
- Effective management by the Appellant;
- That the decision to terminate the Appellant's employment was not made by the CEO but by a small group of directors whose vote was not unanimous; and
- That the HR Director was incompetent.

The Appellant, Background and Evidence

[23] The Appellant called herself as the last witness. The Appellant's testimony focused primarily on her dealings with TN, the manager of the Sandy Bay Health Centre, and on issues pertaining to the HR Director.

[24] The Appellant's oral testimony was scattered and disorganized. Many abbreviated references were made alluding to events and incidents described in much greater detail in the Appellant's documentary evidence, notably the 45 page statement prepared by the Appellant and

attached to the originating complaint. For clarity, I have relied on that document for the purpose of putting the Appellant's testimony into context.

[25] As noted above, the Appellant began to receive complaints from the community and staff about TN. The first mentioned occurred at the end of August, 2011, when an employee under TN's supervision in Sandy Bay complained that TN was sending her away from Sandy Bay for insignificant reasons so that TN could spend time with the employee's husband. The employee wanted to file a complaint of harassment against TN for abusing her authority. In consultation with the (former) CEO and the employee, the Appellant made a managerial decision to remove the employee from under TN's management. The Appellant said TN took it badly and felt she had been kicked to the curb. The Appellant reassured TN that her intent was to make the work environment safe for both TN and the other employee.

[26] The above-mentioned managerial decision caused TN to become extremely hostile and aggressive toward the Appellant and other staff. For example, she left a message for the Appellant and staff while she was drunk. In reference to her managerial decision, the Appellant informed the new Chief Executive Officer Andrew McLatchie (hereinafter referred to as "the CEO"), who had been appointed on October 1, 2011, that occupational health and safety legislation requires employer to put measures in place to protect a worker from domestic violence that may enter the workplace.

[27] As the Appellant continued working in her new position, she became more familiar with the Sandy Bay deficit and TN's "gross performance issues", many of which were linked to the deficit. Absenteeism/attendance was an on-going problem, with a historical one through TN's seven years of employment with the MCRRHA. TN was often absent, or only at work for a few hours. She was often difficult to find or nowhere to be found, even though she carried a Blackberry for work. Other issues included

- Lying: 1) about the occupancy/availability of the staff apartments in Sandy Bay; and 2) asking for every weekend off to visit her children's sick grandfather in Prince Albert. . The Appellant learned that there was no sick grandfather in Prince Albert;
- A complaint from staff that TN was bringing her boyfriend (her subordinate employee's ex-husband) to the office with comments implying inappropriate behaviour behind closed doors in the office. The Appellant believed this was being done to provoke his wife from whom he was separated or divorced.
- Once TN showed up to work in pajamas and wore sunglasses indoors;

- An altercation between TN and a PBCN[6] employee who then complained of false imprisonment. In the Appellant's opinion this was a health and safety issue (workplace violence) that was swept under the carpet by the MCRRHA's internal OHS officer, the officer's manager and an HR staff.

[28] While the new CEO away (approximately October 15 – November 15, 2011), the Appellant received a suspicious expense claim from TN. The Appellant was not satisfied with TN's explanation, nor was the former CEO who returned from retirement as acting CEO pending the new CEO's return from vacation. The Appellant turned the invoice over to Finance as a suspicious claim. When the new CEO returned, the Appellant told him not to sign the suspicious claim without an investigation. She learned that the CEO had signed it anyway. The Appellant later received a call from Sandy Bay saying that Manager TN had given the funds to her boyfriend and not a local carpenter. The Appellant reported it to the CEO as a fraud, informing him that he had signed/approved a "forged invoice" for an "illegal" expense claim which needed to be investigated pursuant to section 380 of the Criminal Code.

[29] The Appellant testified that she initiated a disciplinary meeting with TN (November 15, 2011) On November 30, 2011, she served TN with an Expectation Letter and a Learning Plan. No particulars were entered in evidence other than the Expectation Letter addressed Manager TN's absenteeism.

[30] In conjunction with the aforementioned meetings, the Appellant cancelled TN's signing authority on the basis of TN's failure to adequately account for, track or support financial transactions. She instructed TN via email that it was necessary for her to obtain the Appellant's pre-approval for all spending including all contracts to local contractors.

[31] On or about December 20, the Appellant paid a site visit to Sandy Bay. While there, she discovered a fire hazard in the staff apartment assigned for her use. In documentary evidence, the Appellant referred to this as "almost losing her life", and in argument, she stated that she "almost lost her life" due to the incompetence of the HR Director. While in Sandy Bay, the Appellant encountered a number of health and safety concerns, which she subsequently reported to the CEO, including concerns that canine vaccine were being stored in a refrigerator at the health centre meant for human vaccines, garbage outside the health centre, an employee's big dogs running at large, the health centre's garage being used by the same employee for the purpose of vaccinating the community's stray dogs.

[32] The Appellant testified that none of the things TN was getting coached and mentored on were working. TN was angry about the change of management the Appellant had directed (para. 25),

[6] It appears this is a reference to a Peter Ballantyne Cree Nation Health Services Inc. employee. PBCN provides ambulance services in the Pelican Narrows area through a funding agreement with the Health Region.

the ongoing monitoring of her performance and budget by the Appellant, and the revocation of her signing authority. Immediately after the Appellant revoked TN's signing authority, TN had a private meeting with the CEO and the HR Director, and subsequently filed a complaint of personal harassment against her.

[33] Though she had not been notified by the employer of a complaint, the Appellant received an email and/or phone call from TN in mid-January, 2012 asking "did I get my signing authority back?" and indicating that she would be filing a complaint against another employee, just like she had already (apparently) filed against the Appellant, 4 days earlier. The Appellant felt it was improper for the CEO and HR Director to have met privately with TN, in her absence, and said so.

[34] The Appellant contends that the CEO and the HR Director influenced TN to file a complaint of harassment in order to regain her signing authority. The Appellant further contends that TN was provided with the support of an HR staff person with regard to her complaint which she felt was procedurally unfair and a conflict of interest. In cross-examination, the Appellant was questioned with regard to a letter in this regard sent to the CEO alleging that the HR staff person was acting as counsel ("incompetent legal counsel") to TN, threatening to file a counter-complaint against both the TN and the HR staff person, and alluding to an action for libel. The Appellant acknowledged that she was a second year law student at the time. She denied that she used "I am a lawyer" in an intimidating or threatening fashion in this or any other context, and had not incorporated the LL.B. designation in her credentials on correspondence for that purpose. She stated that the CEO had never mentioned that it was inappropriate for her do so.

[35] The Appellant was upset the employer had not informed her that TN had filed a complaint. Immediately upon learning of it via TN's email, she commandeered the CEO and went with him to the HR Director's office to get a copy of the complaint. In the course of the discussion that ensued, the HR Director made an inappropriate comment to her, to the effect that she should sleep with TN's boyfriend so they would not have to deal with the problem anymore. A few days later, she told the CEO that the HR Director's comment had been inappropriate and he should be disciplined. The CEO was supposed to arrange a meeting for the HR Director

[36] The Appellant testified that her problems with the HR Director began when the CEO was out of the country between mid-October and mid-November, 2012. He first tried to delegate his projects to her, by asking her to be the health region's representative in SUN negotiations. The Appellant said she did not have time, and complained to the CEO, who agreed with her. Next, the HR Director wanted her to revise 20 job descriptions. The Appellant told him, in the presence of the HR Director, that she did not have the expertise to do it. The HR Director sent them to her anyway, and persisted by re-sending his email 3 more times that week, which the Appellant ignored. The

Appellant testified "[the HR Director] blackmailed me to complete his projects; otherwise he would turn my boss against me". She asserted that the HR Director had a tendency to throw his assignments to other people to do, more so on female employees. In the Respondent's opinion, this was harassment.

[37] The Appellant testified that she had issues with the way the HR Director talked, describing it as belittling. She said that he didn't do anything rude, but an illustrative example was once when she and a male colleague met with the HR Director, he spoke only to her colleague and not to her. She felt that the HR Director put more pressure on some people, i.e. he would find out what your problem was [vulnerability?] and you would feel uncomfortable.

[38] The Appellant received information about TN from an unidentified source that caused her to have concerns for her physical safety due to the "violent, volatile conduct" of Manager TN. She decided then to lodge a counter-complaint of harassment against TN, which she did on February 3, 2012. She reported her concerns for her physical safety to the investigators, who duly conveyed her concerns to the employer by letter dated February 15, 2012.

[39] The Appellant maintains that the employer ignored and otherwise failed to take reasonable, or any, steps to properly address her concerns about her physical safety. She expressed surprise that the CEO subsequently took over the management of the Sandy Bay Health Centre (and TN). When asked on cross-examination, the Appellant acknowledged that the CEO had spoken to her about reporting safety concerns to the RCMP and other precautions. However, the Appellant did not agree removing her as director/manager of Sandy Bay in light of the complaint, cross-complaint and on-going investigation was a precautionary safety measure. The Appellant's opinion was TN was the culpable party. When asked what should have been done, the Appellant indicated that the CEO should have removed the HR Director and brought another Director into the situation (mentioning her mentor by name] and ought to have obtained HR advice. She indicated that in the opinion of the aforesaid director/mentor, he would have fired TN.

[40] The Appellant testified that she had a long, tearful conversation with a co-worker in April about how upset she was that the CEO was not dealing with her issue with the HR Director. She spoke to the Chair of the MCRRHA Board of Directors, saying that she had no complaint against the CEO, her issue was with the HR Director.

[41] On further cross-examination with regard to the grounds of appeal, the Appellant indicated that she believes the third party investigators [of the complaints she and TN brought against each other was not independent. She believes that the HR Director may have influenced the investigation because the investigators because he hired them and he provided them with the

background information. She does not accept the investigator's conclusion that they both contributed to the poisoned work environment

[42] The Appellant testified that she believes what led to her termination was because she was persistent in her efforts to solve the issues pertaining to Manager TN and the HR Director.

[43] On cross-examination the Appellant was unshaken in her belief that the HR Director had recommended her termination, adding that the evidence of her witnesses refutes that the decision was his and his alone.

For the Respondent – Andrew McLetchie

[44] As noted, Mr. McLetchie was appointed the Chief Executive Officer of the MCR health region October 1, 2011. Prior to his appointment he had been employed by MCRRHA for two years as the Director of Integrated Health Services. Prior to that, he managed three hospitals and associated community services in northern British Columbia (Prince Rupert, Smithers, Haida Gwaii). Mr. McLatchie is a Registered Nurse with a Masters of Health Administration degree.

[45] The CEO stated the Appellant was interviewed and hired when Kathy Chisolm was the CEO. He was on the interview panel. When the Appellant started work in La Ronge in June, 2011, he was the Director of Integrated Health Services. As such, he and the Appellant initially worked together at the same management level. In his opinion, the Appellant had a strong background and he formed a positive first impression of her. With his appointment as CEO, their working relationship changed, of course, in the sense that the Appellant's position reported to the CEO.

[46] Prior to his appointment as CEO, he had scheduled a four week vacation from mid-October to mid-November, 2011. Two weeks into his new role as CEO, he departed on his vacation. The former CEO, Ms. Chisholm, came back from retirement as acting CEO pending his return.

[47] To facilitate the CEO transition, Ms. Chisholm had done performance reviews and briefed Mr. McLetchie in that regard. The Appellant's early review, which in the normal course would have been mid-term in her probationary period (December) was positive, noting that some management development was needed, as was the necessity for the Appellant to get out to the community to address, in particular, pre-existing concerns in Sandy Bay. He spoke to the Appellant about the former CEO's concerns.

[48] The CEO testified that because of the timing of his appointment followed by his 4 week absence, he did not do a mid-term review of the Appellant's performance in December, but did one a few months later, in March. He indicated in it, that there was room for improvement in certain areas, notably in terms of concerns that some decisions may result in negative relationship development, that there were some examples of negative relationships based on response to challenging situations and certain challenges in terms of terse, abrupt emails being open to misinterpretation, and comments about the Appellants verbal and non-verbal communication (tone,

directness, high variability of emotions) and the impact on others (positive and negative). Issues with Sandy Bay site manager were noted as an area for ongoing development.

[49] As with the Appellant, there was considerable reliance by the witness on written documentation on the record, prepared and submitted by the witness. In that regard, the CEO made summary observations about his formal evaluation of the Appellant with reference to his full statement of same on the Employee Development Guide itself. His overall comments on the Guide, were comprised of 7 relatively brief paragraphs. The CEO referred specifically to the following paragraph:

> The areas of greatest concern to me in terms of future development are with regard to interpersonal interactions. We have had numerous discussions about the manner and tone of both verbal and written communication. The level of respect in a number of these interactions over the past six months remains an area of concern. Although the majority of these interactions are reflected in communication with a particularly negative relationship with the Sandy Bay Health Centre Manger, enough issues with communication involving other staff that I must suggest this as the primary area for improvement. The focus on developing a broad array of management skills is important.

[50] The CEO noted that the Appellant was performing in the 3-4 range (mid-range). He indicated that the Appellant was not in agreement with his assessment, and would not sign it.

[51] The CEO referred briefly to the investigation of the harassment complaints by Manager TN against the Appellant, and by the Appellant against TN. He stated that the decision to engage external investigators was made by him and the HR Director, who is also the Harassment Officer. Neither claim was found to be malicious or made in bad faith. Neither claim was substantiated. The investigators found strong evidence of a poisoned working relationship between the Appellant and TN, with a wider impact extending to staff both in and beyond Sandy Bay. Both parties were found to be equally responsible contributors.

[52] The CEO said a number of recommendations were provided by the investigators leading off with the participation of both parties in a Mandatory, Mediated, Non-Punitive Action Plan. It was recommended that there be additional training with a focus on personnel management for the Appellant which includes flexibility and diversity training as well as updated management training for Manager TN with a focus on administration of current requirements. Further,, it was recommended the temporary supervision of Manager TN by someone other than the Appellant until the mediated action plan is in place.

[53] The CEO testified that both parties were reluctant about the mediated action plan, each wanting time to process what had come out in the reports. The employer sought, but had not found the type of training recommended for the Appellant. Manager TN's training continued in an effort to improve her performance, but it was ultimately determined that TN was unlikely to achieve a satisfactory level. Manager TN was dismissed in August, 2012.

[54] With regard to the Appellant's safety concerns and the investigator's February 15, 2012 letter in that regard, the CEO says that he spoke with the investigator and understood that one of the

concerns was that the Appellant had complaint TN was organizing and/or seeking support in the community at large. Since that was occurring outside the workplace, the appropriate resource was the RCMP, which is what he said to the Appellant. At the same time, he acknowledged that the Appellant sometimes worked late, and they talked about precautions in that regard as well.

[55] The CEO testified that he was friendly, but not friends with Manager TN. He denies that he was influenced anything other than his efforts to see the issues resolved.

[56] The CEO testified that the decision to terminate the Appellant's employment was his and his alone.

[57] The CEO summarized the reasons for termination of the Appellant as set out in his response to the OH&S Officer's request [Appeal Book, Tab 5]. Mr. McLetchie was subsequently contacted by another Officer to whom the investigation had been recently re-assigned. The Officer requested for further information and evidence that the Appellant had been coached, warned or given directives and consequences for failure to follow.

[58] Mr. McLetchie advised the Officer at that time, that the Appellant had refused to sign the letter of termination, but had been provided with two months' severance. He further indicated that he had not provided the Appellant with letters of discipline prior to termination but had numerous discussions with her about her behaviour and the need for working positively with her employees and fellow managers. Shortly thereafter, Mr. McLetchie provided the Officer with a chronology of his coaching and mentorship of the Appellant, as requested. [Appeal Book, Tab 9] which illustrates the coaching and mentoring of the Appellant on a month by month basis.

ARGUMENT

[59] Both parties submitted written argument which I have appended to my decision, and are addressed in my Reasons.

Appellant's Argument

[60] The Appellant submits that the Respondent cannot use the probationary period as a justification for her dismissal, on the general principle of "unsuitability" for the job". The Appellant submits case law in support of the general proposition that an employer is not relieved of its obligation to act fairly simply because the employee is on probation. She submits that the employer must offer even a probationary employee a fair opportunity to demonstrate ability, and must show just cause pertaining to an employer's obligation to probationary employees: that the dismissal even of a probationary employee must be made in good faith[7], the employer must show just show just cause[8],

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[7] *Longshaw v. Monarch Beauty Supply Co. Ltd.*, [1995] BCJ No. 2362 (BCSC)

[8] Cited as *Mison v. Bank of Nova Scotia, [1994] O.J. No. 2065,* but in actuality is cited by the court in *Mison* from the judgment of Jewers, Co.Ct. J, in Kirby v. *Motor Coach Industries Ltd.* (1980), 6 Man. R. (2d) 395 (Man. Co. Ct.) (reversed (1981), 10 Man. R. (2d) 36 (C.A.) [1 C.C.E.L. 260])

and offer the employee "...a fair opportunity to demonstrate his ability"[9]. She argues that the Respondent failed to establish that she was not a suitable employee or that she was given a reasonable opportunity to meet the standards set out by the employer, and that, through her witnesses, she has established that she was able to work in harmony with others.

[61] Further, the Appellant argues that she was not dismissed without cause. Rather, the employer asserted "just cause" in his letter (March 22, 20123) and email (August 8, 2013) [responses to OH&S Officer's request for good and sufficient reasons] and in testimony, where the Respondent asserted she had been coached and mentored. Specifically, the Appellant argues that the employer does not have a mentorship program, there is no such thing as mentorship and that she was never mentored by anyone, as established by her own testimony and that of her witnesses.

[62] The Appellant further argues that the employer has failed to establish she used derogatory language at work or that she was an ineffective manager, or that she failed to address the Manager TN issues in a timely fashion, pointing to witness testimony to the contrary.

[63] The Appellant submits that she had a respectful working relationship with the CEO, and was friends with him outside the workplace. She argues [Argument, p.9] that it was not he who wanted the Appellant dismissed and that the decision was not his alone. She submits that the decision was made by a small group of MCRRHA directors and/or that the decision to terminate was made or based on the recommendation of the HR Director who was upset that she had reported him to the CEO as an incompetent employee and a harasser.

[64] The Appellant disputes the Respondent's claim that she did not want to meet with the HR Director so that he could apologize [for his inappropriate comment in January, 2012].

[65] The Appellant argues that the Respondent employer despite having received numerous complaints from bullying, to sexual harassment to false imprisonment against Manager TN and the HR Director, the employer failed to take reasonable or any steps to stop or correct their offences, that the HR Director remained the health region's harassment officer, that it failed to provide a mechanism for harassment issues to be raised against an executive director and that the employer, and, in particularly, her immediate supervisor [the CEO] remained "callously indifferent" and "stonewalled"[10] a fair investigation of complaints against Manager TN and the HR Director or to protect her physical safety.

[66] The Appellant argues that the raising of a health and safety concern need not be the motivating factor leading to the discriminatory action, it needs to be a factor. [sic], citing *Merk v. International Brotherhood of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771,* [2005] S.C.R. 425.

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[9] *Mison, supra*

[10] Toronto Transit Commission v. ATU (2004), 132 L.A.C. (4th) 225

Respondent's Argument

[67] The Respondent submits that the Act requires the Appellant to

a. establish that there has been a discriminatory action. The Appellant's employment was terminated on May 2, 2012 and this requirement has clearly been met.

b. establish that she was engaged in some activity caught by section 27[11] of the Act. This requirement has probably been met, though not in the way the Appellant may characterize it.

c. establish that there is a causal connection between a) and b). The Respondent submits that the Appellant entirely fails to establish this requirement

[68] The Respondent acknowledged the reverse onus and submits that the only direct evidence in the appeal, which is also credible, is that the termination was for good and sufficient other reason(s).

[69] The Respondent submits that the employer has submitted cogent, credible and reasonable reasons for the Appellant's dismissal particularized in evidence {Tab 5 and Tab 9} and summarized in the sworn testimony of its Chief Executive Officer, Andrew McLetchie. The Respondent argues that the employer's reasons were not challenged in any meaningful way by the Appellant who chose, instead, to focus her case on appeal on the actions of others, such as Manager TN and the HR Director who were not involved in the decision to terminate and who have both since been terminated by MCRRHA.

[70] The Appellant's grounds of appeal focus primarily on the fact that the investigator did not interview certain witnesses. Those witnesses, for the most part, testified at the appeal at the summons of the Appellant. The Respondent submits that as a group, these witnesses failed to provide evidence relevant to the core issues on the appeal. The Respondent submits that none of the witnesses testified to anything that needed rebuttal or refutation.

[71] The Respondent submits that the evidence as a whole establishes beyond a balance of probabilities that the termination of employment was for good and sufficient other reason than because of protected activity. The termination of employment during the probation was a reasonable exercise of management rights. An employer need only show that the termination was not due or caused by a worker exercising a right under the Act.

[72] The Respondent submits that to the extent the Act was involved in anything related to the Appellant's employment, it was the complaints of harassment investigated pursuant to the MCRRHA Policy and Procedure on Respect and Dignity. The employer used an independent third party for its investigations, whose conclusions were fair and balanced and were not specifically criticized by the Appellant. The conclusions pointed to a poisonous work relationship contributed equally by the respective complainants.

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[11] Section 3-35 of the SEA

[73] The Respondent submits in relation to the round of appeal pertaining to safety concerns raised by the Respondent, and reported to the employer by the investigators, that the Respondent acted reasonably with respect to specific issues raised by the Appellant during the initial investigations.

[74] Finally, the Respondent submits that there is no evidence that the Act played any role in the Appellant's termination of employment. The only credible evidence is that of Mr. McLetchie, who testified as to the Appellant's work performance issues, partially reflected in the performance evaluation tool completed by him and the overall comments he made regarding the Appellant's work performance and particularly her interpersonal skills, a deficiency amply demonstrated by Mr. McLetchie's testimony and the Appellant's testimony at the appeal hearing.

[75] The Respondent submits that Appeal should be dismissed.

ANALYSIS/REASONS

Framework for Analysis

[76] 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.*

[77] 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.

[78] 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 imposed 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.

[79] 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 first establish a *prima* facie case, failing which the reverse onus is not triggered. In other words, there must be some reasonable basis established by the worker on which to conclude that the employer's actions were taken for a reason protected by the Act, or the reverse onus is not triggered. If it is not, there is no case to be met by the Respondent. Stated another way, there is no presumption to be discharged

by the provision of good and sufficient other reason for the action taken unless the worker, the Appellant in this case, first established 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) she was engaged in an activity protected by section 3-35 of the Act; and that there is a *prima facie nexus* or causal connection between the worker's protected activity and the discriminatory action which could be the reason, or one of the reasons for the action taken by the employer.

Discriminatory Action

[80] 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.

[81] The Respondent was rejected on probation on May 2, 2012. 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 the MCRRHA has been established both in a *prima facie* manner and as an objective fact, as a discriminatory action.

Did the worker engage in activity described in section 3-35 which, on the face of it, could be the reason, or one of the reasons for the action taken by the employer?,

[82] To satisfy the second component of a *prima facie* case, the Appellant must establish *prima facie* that she engaged in one or more of the protected health and safety-related activities set out in section 3-35 of the Act, *and* demonstrate that there is a *prima facie nexus* or link between the discriminatory action and the section 35 activity.

[83] The conduct described in evidence does not suggest that any of the protected activity described in clauses (c) through (k) of section 3-35 would apply. Rather, the conduct described in evidence would appear to be captured clauses (a) and (b) such that the question at hand is whether the Appellant (a) acted in compliance with the Act or Regulations; and/or (b) sought enforcement of the Act or Regulations.

[84] The Respondent's position with regard to the Appellant's protected health and safety activity is that the Appellant has "probably" met this part of the requirement, though not in the way the Appellant may characterize it. I find that the Respondent's position falls short of an admission of the first component of this *prima facie* requirement. The Respondent argues, in any event, that the Appellant has not established the necessary *nexus* or link between her health and safety activity and the action taken by the employer. Accordingly, the initial onus remains to be established *prima facie* by the Appellant.

Section 3-35 Activity

[85] The Respondent's reservations as to the Appellant's characterization are somewhat understandable. The Appellant's originating complaint is a 45 page chronology of myriad health and safety issues that came to the attention of, or were experienced by the Appellant during her tenure with the MCRRHA. Health and safety concerns are embedded in a wealth of detail about self-styled complex human resources/performance management issues, questionable or ineffective business management (Sandy Bay), violations of other statutes and guidelines, from the Criminal Code (fraud, obstruction of justice) to the Saskatchewan Human Rights Code and to Infection Control Guidelines and questioning the competence and integrity of other employees with safety-related and/or human resources roles in the organization.

[86] In initial correspondence to the employer, the investigating Officer distilled the Appellant's complaint into two "discriminatory factors": [Appeal Book, Tab 4] which is useful:

> (1) [the Appellant] in her capacity as the Director of Primary Care Health Services, was enforcing occupational health and safety standards within the worksites under her supervision and was attempting to ensure the employer's compliance with the legislation. That included, but was not limited to such issues as dealing with harassment and violence concerns of workers, exposure to infectious materials and zoonotic transmission, and ensuring the competency of the supervisors within the worksites she supervised; and
>
> (2) [the Appellant] came forward with concerns of harassment not only for herself and her experiences, but also for workers under her supervision.

[87] In her own words, the Appellant testified that she believed her employment had been terminated due to her persistence in solving the TN issue and the HR Director issue. The Appellant stated that it was her on-going efforts to enforce the occupational health and safety standards at work sites under her supervision and that her persistence, both in that regard and with regard to pursuing concerns of harassment led to her eventual termination on May 2, 2012.

[88] With respect the "Manager TN issue", the Appellant's evidence focuses on the complaint and/or cross-complaint of harassment that she and TN filed against each other, and her concerns with regard to her physical safety arising therefrom. With regard to the HR Director, the Appellant stated in Argument[12] "[The HR Director] had every reason to [recommend her termination] because he knew that [she] made numerous complaints against him to [the CEO], including his harassment of female employees and incompetent way of handling human resource issues. I also made a complaint against him that he could not handle [Manager TN] issues and I almost lost my life in Sandy Bay because of his incompetence".

[12] Appellant's Closing Argument , page 14, second last full paragraph

[89] The issue at hand is not whether all, or any, of the concerns raised by the Appellant had merit, it is whether the Appellant exercised her rights under the Act, and acted in compliance with, or sought enforcement of the Act.

[90] I am satisfied and find that the Appellant constantly made the CEO aware of health and safety issues of concern within her sphere of responsibility, notably with respect to Sandy Bay and Manager TN. I find that she did so regularly, in the course of monthly meeting and reports, supplemented by weekly meetings and reports on an situational basis, as well as on numerous occasions when the Appellant would be prompted by an occurrence or incident to contact the CEO in real time, via telephone, e.g., from Sandy Bay or in person, by going directly to the CEO's office to discuss it.

[91] Given the nature of the services provided by the MCRRHA health region in general, the particular problems posed by Sandy Bay and Manager TN and the Appellant's role in relation to Sandy Bay, I would expect that in the normal course of business, health and safety matters are the subject of continuous, on-going concern. In any case, the fact that such matters are raised, discussed or even disputed does not, on its own, mean that such concerns were the basis, in whole or in part, for a discriminatory action. To conclude otherwise would defeat the intent and purpose of the internal responsibility system on which the legislation is predicated.

[92] I accept the uncontradicted evidence that the Appellant was persistent in her efforts to enforce health and safety standards in Sandy Bay. I find that virtually without fail, the Appellant reported those health and safety concerns to the CEO. Prima facie, the Appellant was reporting incidents where *she* was enforcing the Act and Regulations, as opposed to being engaged in the protected activity of seeking to enforce the Act or Regulations. I have not overlooked the subtlety of the Appellant's evidence and position that it was her persistence that led to her termination I do not agree. Even though it is possible, perhaps likely, that the Appellant disagreed or was unsatisfied with the way a health and safety concern was addressed, there is no evidence of an anti-safety *animus* on the part of the employer. Nor do I find these day-to-day health and safety concerns to be the Appellant's focal point.

[93] That being said, there is no serious dispute that the Appellant came forward with concerns of harassment, a health and safety issue, with regard to both Manager TN and the HR Director, including the concerns about her physical safety in relation to Manager TN. I find this to be sufficient to establish *prima facie,* that the Appellant was engaged in a protected activity (seeking to enforce the Act) which could have been the reason for her dismissal.

Causal Connection

[94] The Appellant asserts that there is a causal connection or link between her reports to the employer of harassment, a health and safety matter, by Manager TN and by the HR Director, without further evidence or argument.

[95] The Respondent argues that the Appellant has not established *prima facie*, the necessary *nexus* or link between the Appellant's protected safety activities and the action taken by the employer.

[96] A bare assertion of a causal connection is not sufficient to establish a *prima facie* causal connection. In some 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, such as when a discriminatory action occurs within hours or days of a protected activity being taken by the worker. 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. Clearly, a temporal link requires more than the mere fact the action taken by the employer followed the protected safety activity.

[97] In this case, the temporal link is not striking. The issue of an inappropriate comment made by the HR Director was raised in about mid-January, 2012. The Appellant raised her complaint against Manager TN on or about February 3, 2012. The Appellant's complaint against Manager TN was duly investigated by independent third party investigators who found their respective complaints against each other to be unsubstantiated. With regard to the "HR Director" issue, the resolution 'on the table' was a proposed joint meeting between the CEO, the HR Director and the Appellant, during which the HR Director had offered to apologize for the inappropriate comment. Without overlooking the Respondent's testimony that the issue(s) with the HR Director were never dealt with, i.e., the meeting never took place, the Appellant did not cross-examine the Respondent's witness on that point. For that reason, I am not prepared to draw the inference that the meeting did not occur due to an *anti-safety animus.*

[98] Based on the foregoing, I find that the Appellant has not established *prima facie,* a causal connection between her issue with the HR Director and the termination of her employment four months later, on May 2, 2012.

[99] Having reached this conclusion, the presumption in section 3-36 is not triggered. There is therefore no onus on the Respondent to establish good and sufficient other reasons for the action taken against the Appellant. However, if I am wrong I am satisfied, in any event, that the Respondent has established, on a balance of probabilities, good and sufficient reason for the action taken against the Appellant other than her participation in activities protected by section 3-35 of the Act.

Good and Sufficient Reasons

[100] The Respondent employer submits that the termination of the Appellant's employment during the probationary period was a reasonable exercise of managerial rights, and that the termination of employment was for good and sufficient reasons other than because of protected activity. The Respondent's reasons were provided in the course of the Officers' investigation and summarized by the CEO in his testimony. The summary statement appears in the first paragraph of the CEO's response to the Officer's request for good and sufficient other reasons for the termination which is extracted below.

" The Appellant] was terminated during her probationary period for general unsuitability for the Director of Primary Care position and for ongoing negative behaviours that did not reflect the values of the Mamawetan Churchill River Regional Health Authority (MCR). These negative behaviours included, but are not limited to derogatory and abusive language and behaviours in interactions with colleagues and staff, ineffectual management often demonstrated through attacking people instead of dealing with problems, and an ongoing refusal to accept and respond appropriately to redirection and coaching."

[101] The Appellant's written Argument appears to focus largely on this paragraph, which I will return to in due course. Before turning to the critical question at hand, will first address the Appellant's Argument, which encompasses the testimony of the seven witnesses called on her behalf.

[102] The Appellant submits that the Respondent cannot use the probationary period as a justification for her dismissal, on the general principle of "unsuitability" for the job". She submits case law and argument in support of general propositions pertaining to an employer's obligation to probationary employees: that the dismissal even of a probationary employee must be made in good faith[13], the employer must show just show just cause[14], and offer the employee "...a fair opportunity to demonstrate his ability"[15]. It should be noted that "just cause" as the term was used in *Kirby, infra*, not *Mison* was explained by the trial judge, who stated: ""Just cause" may be that the employee is, in the opinion of the employer, unsuitable for a job".

[103] I agree with the Appellant, that probationary status does not disentitle a worker from the protection of the Act. Neither does the Act shield an employee ...provided the decision was not influenced by the appellant engaging in one of the activities protected by section 3-35.

[104] A finding that a dismissal contravenes section 3-35 is similar to a finding that the dismissal was not in good faith. It is important to point out that this Tribunal only has jurisdiction over dismissals which may be contraventions of section 3-35 of the Act. Dismissal for other "bad faith" reasons, if any, are not within the purview of the Part III of the Act pertaining to occupational health and safety.

[105] It is well recognized that the underlying purpose of probationary status is for the employer to have an opportunity to assess the suitability of an employee for continued employment. There are times when an employer simply wishes to end the employment for any number of reasons which have led the employer to conclude the probationary employee is not a good fit for its organization or, as it is commonly stated, "unsuitable for continued employment". Oftentimes, those words or words to that effect, whether verbal or written in a letter of dismissal, are the only reasons given for the dismissal. That may be particularly the case with respect to probationary employees and/or other

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[13] *Longshaw v. Monarch Beauty Supply Co. Ltd.*, [1995] BCJ No. 2362 (BCSC)

[14] Cited as *Mison v. Bank of Nova Scotia, [1994] O.J. No. 2065,* but in actuality is cited by the court in *Mison* from the judgment of Jewers, Co.Ct. J, in Kirby v. *Motor Coach Industries Ltd.* (1980), 6 Man. R. (2d) 395 (Man. Co. Ct.) (reversed (1981), 10 Man. R. (2d) 36 (C.A.) [1 C.C.E.L. 260])

[15] *Mison, supraand pro*

dismissals without cause. While I fully appreciate the body of evolving case law which may be expanding the obligations of employers toward probationary employees to require to show just cause or give reasons for the dismissal, this appeal is not a civil action for wrongful dismissal. Nonetheless, the statute does address that very issue. Regardless whether an employer has an obligation at common to provide reasons for the dismissal of an employee, probationary or otherwise, in a discriminatory action complaint and appeal, the only way an employer can discharge the presumption is to provide "good and sufficient other reasons". Turning to the key aspects of the Appellant's Argument:

[106] Decision to Terminate: The Appellant focuses a great deal of argument on the proposition that the decision to terminate her employment was not made by the CEO alone. She submits that it was not the CEO who wanted her terminated. She states that she had a respectful working relationship with him that extended beyond the workplace. Rather it was the HR Director who wanted her terminated because she had reported him to the CEO as being an incompetent employee and a harasser, and as she testified, he felt she was a danger to him. The Appellant says that it was the HR Director who recommended that she be dismissed. Somewhat inconsistently, the Appellant further contends that the decision to terminate her employment was made by a small groups of directors, whose decision was not unanimous, and led evidence to that effect..

[107] Most of the Appellant's witnesses are, or were, Human Resources staff. Each staff testified to the effect that HR Director announced the Appellant's dismissal to the Human Resources staff, saying that the decision had not been made by the CEO, but by a small group of directors who voted on the question. Allegedly, the vote was not unanimous. Although one of the Appellant's witnesses is a director who presumably could have been, but was not, in attendance at the said meeting, none of the other witnesses were in attendance. Even if I were inclined to accept their hearsay evidence, which I do not, their evidence is irrelevant to the issues in this appeal and I attach no weight to it.

[108] In the interests of thoroughness, the testimony of one witness is stated in terms that the HR Director asked her to help the CEO fire the Appellant. In actuality, the witness testified that she was asked to assist the CEO, and was further clarified in cross-examination that the witness had been asked to attend the termination with the CEO as a third party witness from Human Resources.

[109] In conjunction with the foregoing testimony and related argument, the Appellant presents a summary of the witnesses evidence who attested that the HR Director was incompetent, and made other negative observations about the HR Director which I do not intend to reproduce here. The HR Director's competence is not at issue, and I have disregarded the evidence pertaining to it in its entirety.

[110] Mentorship Program: The Appellant's other principal argument is a challenge to the CEO's testimony as to his coaching and mentoring of the Appellant, expressed summarily in a month by month chronology from pre-October and October, 2011 to April, 2012. The Appellant vigorously argues that there was no mentorship program at the health region, that she was not a participant in a mentorship program and was not mentored, least of all by the HR Director and safety officer and

there was "no such thing as mentorship". Five witnesses testified that the Appellant was not part of a mentorship program. The testimony in this regard, is not an effective, or any, challenge to the employer's reasons for termination. I find no reference to a "mentorship program" in the Respondent's documentary or *vive voce* evidence. None of the witnesses testified as to having knowledge whether the CEO coached and mentored the Appellant. I find it disingenuous of the Appellant to assert that there is no mentorship and she had no mentor, when her own evidence and argument reflects that she was mentored (by one of her witnesses), mentored at least one other employee herself, and assigned one of her employees (who was also a witness) to mentor Manager TN. While not wholly irrelevant in the sense that I would have allowed the testimony as arguably relevant, for the reasons aforesaid, the testimony is, at best marginally relevant and does not approach a meaningful challenge to the Respondent's reasons for dismissal.

The Appellant also argues that the Respondent failed to establish that she was an unsuitable employee, that she had performance issues, that she was an ineffective manager, that she did not want to meet or mediate with Manager TN, the claim that she wanted to terminate a number of her employees or that she unfairly disciplined or terminated any of her staff or that she did not want to meet with the [HR Director] so he could apologize. My reasons which follow encompass these statements made in argument.

Has the employer rebutted the presumption that it took discriminatory action against the Appellant <u>because</u> she acted in compliance with, or sought the protection of the Act?

[111] The onus is on the employer to rebut the presumption that the discriminatory action was taken *because* of the worker's engagement in one or more protected health and safety activities. The applicable standard to be met is that of a balance of probabilities.

[112] Where interests and evidence conflict, the issue whether the employer has rebutted the presumption inherently involves and assessment of credibility. With regard to my assessment of credibility, I have been guided by the seminal decision of the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A) where it was held:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[113] The Respondent employer dismissed the Appellant, without cause and without stating reasons. Through his testimony, the CEO provided a summary of the reasons for termination (as in the prologue to this section *infra* para. 100) which was further elaborated in the balance of a his 5 page letter. Upon request, the CEO prepared and provided an account, organized by month, of some of the workplace situations which prompted him to provide coaching, guidance and redirection to the Appellant.

[114] The CEO readily acknowledged that he had taken no disciplinary action against the Appellant during her probation. He stated that at one point, he had intended, and prepared a draft, disciplinary/expectations letter, but decided not to proceed with it based on promising discussions with the Appellant.

[115] Clearly, the documentation at Tab 5 and Tab 9 of the Appeal Book were made after the Appellant lodged her discriminatory action complaint. It is equally clear, and acknowledged by the CEO, that he did not document his coaching and mentoring of the Appellant. However, the CEO also produced evidence, which was neither contradicted nor challenged, of a documented review of the Appellant's performance that he addressed with the Appellant in approximately March, 2012 which was consistent with the core reasons given in the summary statement/introduction in the letter to the OHS Officer at Tab 5.

[116] "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."

Also instructive is the following drawn from the decision of the Manitoba Labour Board addressing in *BK* v *Director, Workplace Safety and Health*, 2008 CanLII 89125 (MB LB)

> ...The fact an employee feels that a dismissal is unfair, that management behaved improperly or falsely accused the employee, that a dismissal is simply unjust or that the notice provided was insufficient, does not fall within the remedial jurisdiction of the Board under the Act. Issues such as these may well be pursued in other forums but not under the appeal provisions of the Act, applicable to this proceeding. There are occasions when an employer simply wishes to end an employment relationship for a variety of reasons (e.g. attitude or personality difficulties) and, in such circumstances, an employer is entitled to end the relationship. If no reasons which constitute "just cause" at common law exist, then the employer is obliged to give reasonable notice of termination or provide a reasonable monetary settlement in lieu of the notice period. The *Act* does not protect workers from all negative employment consequences (such as dismissal). There must be a *nexus* established between the action taken and one of the protected forms of conduct

[117] The CEO's testimony was clear, and unequivocal that health and safety concerns were not a factor and did not influence his decision to terminate, that it was a decision based predominantly on the Appellant's interpersonal communication and the recognition based on past and ongoing refusal to accept and respond to coaching, that the Appellant's approach would change.

[118] The Appellant's only argument with regard to coaching and mentoring, apart from the mentorship issue addressed earlier) is that it was a fabrication and outrageous lie. In my view, that description exemplified the Appellant's tendency to embellish her evidence, sometimes beyond reasonable measure, such as her repeated statement that she "almost lost her life" in Sandy Bay and her demeanour, which at times, served to confirm the CEO's evidence as to the variability of the Appellant's responses. There was no cross-examination by the Appellant on the point, except to ask whether the coaching and mentoring had bene documented.

[119] I found the CEO to be a credible witness. He gave his testimony in a calm, thoughtful, forthright and sincere manner, without embellishment. Where there is conflict in the evidence, I prefer the evidence of the CEO over that of the Appellant.

[120] I found the reasons given by the CEO for the termination of the Appellant's employment to be sincere, not a pretext, and uninfluenced, in whole or in part by the Appellant's protected safety activity.

[121] For all of the reasons stated above, I affirm the decision of the Occupational Health Officer and dismiss the appeal.

...

Dated at Regina, Saskatchewan this _____ day of _____, 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