IN THE MATTER OF AN ADJUDICATION

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

BETWEEN:

M.F.

Appellant/Employee

- and –

Blessed Sacrament Parish

Respondent/Employer

For the Appellants: self-represented

For the Respondent: self-represented

DECISION

For purposes of this Decision, the personal information of individual workers is protected by the removal of personal identifiers.

INTRODUCTION

[1] On January 14, 2014 **Ms. M.F.** (hereinafter referred to as the "Appellant" or "M.F.") complained to the Occupational Health and Safety Division ("OH&S") of the Ministry of Labour Relations and Workplace Safety due to the inaction of her employer **Blessed Sacrament Parish** ("the employer", the "parish") in response to a complaint of harassment made on December 16, 2013.

[2] On January 16, 2014, an Officer directed the employer (OR-TMC-0254) to comply with the Act and regulations by inquiring into the Appellant's complaint and providing H&S with a status update and report by February 28, 2014. No status update was received.

[3] On April 24, 2014, Ms. M.F. brought a complaint alleging that the employer had taken discriminatory action against her by terminating her employment on April 1, 2014.

[4] On July 11, 2014, following an investigation, the Officer issued his decision in Report #393 that Ms. M.F. had vacated her position and, further, it could not reasonably be concluded that

the raising of health and safety concerns (harassment) was the reason for the termination of M.F.'s employment.

[5] On August 7, 2014, Ms. M.F. appealed the Officer's decision. The grounds of her appeal are, in essence, that the Officer erred in his conclusion that she vacated her position, as she did not do so voluntarily.

[6] The Appeal was heard in Regina on December 30, 2014. The Appellant appeared and testified on her own behalf. Father A. testified on behalf of the Respondent employer and was accompanied by a member of the employer's Finance Committee.

ISSUE

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

RELEVANT LEGISLATION

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

> **3-1(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 3-1(i) 3-35:

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

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

3-1(1) (l) "harassment" means any inappropriate conduct, comment, display, action or gesture by a person:

(i) that either:

(A) is based on race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; or

(B) subject to subsections (4) and (5), adversely affects the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated; and

(ii) that constitutes a threat to the health or safety of the worker;

...

(4) To constitute harassment for the purposes of paragraph (1)(l)(i)(B), either of the following must be established: (a) repeated conduct, comments, displays, actions or gestures; (b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, that has a lasting, harmful effect on the worker.

(5) for the purposes of paragraph (1)(l)(i)(B), harassment does not include any reasonable action that is taken by an employer, or a manager or supervisor employed or engaged by an employer, relating to the management and direction of the employer's workers or the place of employment.

FACTS and EVIDENCE

[9] While there was no agreed statement of facts, having read the Officer's investigation materials and heard *viva voce* testimony from both parties, no material dispute has been raised with regard to the following events.

[10] In November, 2004, the Appellant was hired as the assistant parish secretary for Blessed Sacrament Parish (the "parish"), working part-time three days a week. The Appellant also worked part-time elsewhere.

[11] In 2006, the parish was without a caretaker, and the Appellant offered to clean the inside of the church for additional hours. The additional hours allowed the Appellant to quit her other part-

time job. Shortly after, the Appellant was offered additional hours to clean the offices and rectory, and her work week increased from three to five days, working 5 hours each day (mornings from 7:00 a.m.to 12:00 p.m.) for a total of 25 hours per week. For an hour each morning while the church was in use, the Appellant assisted the parish secretary/receptionist, Sister HG in the office, otherwise, the Appellant's job duties were all caretaking duties.

[12] In 2009, the Appellant took on additional duties, including church décor/flowers (seasonal/celebratory decorating) and church-related laundry. By the Appellant's account, she would come back to work after her morning shift and work in the later afternoon or early evening to keep up with her both her regular and the additional duties. By the Appellant's estimation, she was working (and was paid) for 5-10 hours a week over and above her regularly scheduled 25 hour work week, either as overtime or as additional hours at the Appellant's regular hourly wages ($17.39/hour).

[13] Prior to the fall of 2013, Father Crozon, the Vicar General of the Diocese assessed the parish's needs. Effective October 1, 2013, Father A was assigned to the parish with instructions to bring order and direction to the parish, including its finances, guided by the Archiepiscopal Protocol for Responsible Parish Ministry (the "Protocol").

[14] At the end of October, 2013, on receipt of the Appellant's time sheets, Father A learned that the Appellant and her spouse, who was also working a 25 hour work week as a caretaker for the parish, were not salaried employees, as he had thought, but were paid hourly. In a meeting with the Appellant (and her spouse),) with regard to the process for implementing the Protocol, Father A informed the Appellant that there would be no further "overtime" (additional hours) without his prior approval, and that a contract of employment would be implemented in the future.

[15] Shortly thereafter, in the first of three increasingly discordant staff meetings (November 5, 19 and 26, 2013), the Appellant requested approval of additional hours to attend to the church décor for Remembrance Day, with her husband's assistance. Father A denied the request. Despite the Appellant's protestation that there wasn't enough time to do both the décor and her cleaning duties, the Appellant was told to get her priorities straight, and to do the décor during her regular work hours. This pattern repeated itself, and escalated, when the Appellant made a similar request for approval of additional hours at each of the next two meetings on November 19 and November 26, 2013. The third meeting on November 26, culminated with the Appellant taking the position that if no additional hours would be paid she would need to resign from the church décor duties.

[16] The Appellant alleged that during the three meetings, Father A grew increasingly angry with her, from raising his voice to yelling, to screaming (red faced, spittle flying, and hands shaking) at her about whether she wanted to work, and that he would not pay "overtime" for decorating and flowers. Father A denied yelling and screaming and claimed to have spoken loudly because of the Appellant's hearing difficulties. A brief statement from Sister HG who was in attendance at each staff meeting, stated that Father A spoke more loudly than necessary. Each of the meetings ended on more

or less the same basis, with the Appellant upset and crying and Father A ending the meeting because they weren't getting anywhere.

[17] On Tuesday, December 3, 2013, the Appellant took a sick day. Whether a staff meeting was held or not, Father A informed the Appellant's spouse that since the Appellant resigned the church décor duties, he was reducing her regularly scheduled hours from 25 to 20 hours a week. Upon learning this, the Appellant was distressed, and sought advice from Father Crozon, who suggested it might be helpful if she provided Father A with a description of her job duties. The Appellant followed his advice, and prepared a list describing her duties which she left for Father A in the office.

[18] On December 12, 2013, Father A initiated a discussion of job duties (per the Appellant's description) while the Appellant was cleaning. The Appellant invited her spouse listen to their conversation as a witness. Father A listed off his expectations as to the items she was responsible for doing as part of her regular cleaning duties. According to the Appellant she told Father A that if he honestly though she could do all of that work in 20 hours a week, he was "delusional". After challenging Father A to explain why he hadn't had the decency to inform her personally (rather than her spouse) about her reduced hours, the Appellant told Father A that his reason (essentially that he viewed the Appellant and her spouse as "one" caretaking team) was "pathetic". Father A thanked her for the insults.

[19] In her written material, the Appellant stated that in their discussion on December 12, Father A told her that come the New Year, there would be a contract of employment and if she didn't sign it, she would no longer be working at Blessed Sacrament. The Appellant was too upset by the situation to continue working the rest of her shift. She left the workplace and, on her way home, she attended a physician on whose advice she took stress leave.

[20] On December 16, 2013, the Appellant notified the employer in writing that she was taking stress leave due to Father A's bullying, harassment and his dislike of her. The employer responded on December 20, 2013 by requesting that she provide a doctor's certificate with an anticipated return to work date. The Appellant was also advised that the employer was not obligated to pay wages for hours not worked. A doctor's certificate was not provided to the employer, nor was there any further communication by either party regarding the Appellant's return to work.

[21] The Appellant testified that after she complained to OH&S on January 14, 2014 because the employer had not responded to her complaint of harassment made on December 16, 2013, the employer failed to report to OH&S by February 28, 2014 as had been directed by the Officer, and still had not done so when she submitted her discriminatory action complaint on April 24, 2014.

[22] The record indicates that the employer had looked into the Appellant's complaint. A priest (Fr. Abello) who was said to be designated to look into such issues for the Archdiocese of Regina, interviewed the Appellant on or about February 10 2014. According to the Appellant's written submissions, she was told by Father Abello that he had previously interviewed Father A. However,

OHS was not provided with a report or a status update until the Officer assigned to the Appellant's discriminatory action complaint met with the employer's representative, Father Crozon, on May 21, 2014 and delivered Report 196 requesting "reasons for the discriminatory action against [the Appellant], harassment concerns not investigated and reasons for an employment contract".

[23] In the interim, on Marche 14, 2014, the Appellant (and her spouse) had received proposed contract of employment (Agreement of Employment) from the employer. The contract offered to the Appellant and her spouse proposed a shared caretaking position with a base salary to be shared between them in such percentages as they saw fit. The offer was open for acceptance until April 1, 2013. The covering letter indicated that if the Appellant (and her spouse) chose not accept it, the employer would consider that to be their resignation. The Appellant (and her spouse) chose not to accept the Agreement for Employment. In the absence of an acceptance, the employer proceeded on the basis that the Appellant (and her spouse) had resigned effective April 1, 2014 and obtained the keys in the possession of the Appellant and her spouse.

[24] The Appellant testified that no person in their right mind would have signed the Agreement. Further, both her lawyer and Labour Standards informed her that the Agreement of Employment amounted to constructive dismissal. The Appellant testified that the Agreement was demeaning. The proposed contract offered annual compensation of $40,995.70 or $3,416.31 a month, to be shared by both the Appellant and her spouse in such percentage as they decided. The Appellant submitted that together, she and her husband had earned more than $56,785.15 the previous year. According to T4's submitted by the Appellant, $31, 356.00 of that total represented her taxable income for the year, illustrative of the additional hours she had worked over and above her 25 hour work week. (At the Appellant's hourly rate, it appears that her annual income for a 25 hour work week would be under $23,000.00 and her spouse, who earned a slightly higher hourly rate, would have earned just over $24,000.00 per year). The Appellant contended that the list of caretaker's duties included with the Agreement exceeded those for which she and her spouse had previously been responsible. She claimed that the extendable one year term contract set her (and her husband) up to fail since the full scope of duties contemplated by the Agreement could not be accomplished by both of them working a 25 hour work week. Alternatively, the Appellant submitted that the employer would be getting two employees for the price of one, both working for less than minimum wage.

The Appellant testified that the employer failed to report to OH&S by February 28, 2014 in order to avoid having to deal with her complaint of harassment and subsequently terminated her employment or constructively terminated her employment when it gave them only two weeks to sign a contract of future employment which changed the terms and conditions of her (their) employment and represented a reduction in wages.

ANALYSIS, FINDINGS & REASONS

Credibility

[25] Where material evidence conflicts, it is necessary that there be an assessment of credibility. Such an assessment is not an exercise where the adjudicator simply listens to the oral testimony of witnesses, observes their demeanour while testifying and decides who appears to be telling the truth. Assessing credibility involves consideration of a variety of factors. Demeanour is but one. In order to making findings of fact, I have been guided by, and applied, where necessary, the frequently cited seminal decision of the British Columbia Court of Appeal in *Faryna v. Chorny*,[1952] 2 D.L.R. 354 (B.C.C.A.). It held

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

Framework for Analysis

[26] 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 or her for one or more of the reasons mentioned in section 3-35 of the *Act*.

[27] I am mindful that the foundation of occupational health and safety legislation is the internal responsibility system. Fundamental to the concept is the principle that employers and employees have a shared responsibility to identify and address health and safety issues. In such a milieu, employees are encouraged to bring health and safety related issues to the attention of the employer. 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. The protection of section 3-35 is reinforced by the imposition of a reverse onus on the employer. By the reverse onus in section 3-35(4), the intent of the legislation is clearly to impose the ultimate, and heavier, burden of proof 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.

[28] While the foregoing considerations point to the conclusion that the initial burden of proof on the Appellants is a less onerous one, it does not relieve the Appellant from the requirement to establish a *prima* facie case. If the Appellant fails to establish a *prima facie* case, the reverse onus is not triggered. Stated another way, if the worker does not establish a *prima facie* case, there is no case to be

met by the employer, who would not then be called upon for an answer, i.e., to provide reasons for the action taken against the worker. To summarize, the Appellant(s) must establish

(1) That the employer took adverse employment action against the worker which falls within the scope of the definition of a discriminatory action in section 3-1(1)(i);

(2) He/she was engaged in a health and safety activity protected by section 3-35 of the *Act* and that there is a *prima facie* causal connection or *nexus* between the protected activity and the discriminatory action.

If a *prima facie* case is established, the onus shifts to the employer to establish

(3) That there was good and sufficient reason for the discriminatory action other than the workers' protected health and safety activity.

Analysis

[29] At the outset, it is important to point out that the focus of this appeal is not on the underlying allegations of bullying and harassment or the employer's investigation. A concise and apt statement in this regard is cited *Jennifer Ford* v *Anne Anderson*, 2015 CanLII 27353 (ON LRB), in a recent decision of the Ontario Labour Relations Board:

> ...the focus of the Board's inquiry will almost never be upon the underlying allegations of harassment. Those allegations are, at the very best, peripheral to the issues that the Board must address, which are exclusively whether a workplace harassment complaint was made, whether the worker suffered some detrimental impact and whether there is a causal connection between the two. This latter issue will, in most cases, be focused on the employer's explanation and rationale for its actions. In the usual case, the only inquiry that the Board will make into the underlying allegations of harassment is whether the employer terminated, or otherwise penalized, the worker for having filed the harassment complaint. Beyond that, in virtually all such proceedings, the nature, extent and details of the underlying harassment allegation will be irrelevant to the issues before the Board. The Board is not the appropriate forum to adjudicate upon the issues that lead to the filing of the harassment complaint or the substantive outcome of the employer's investigation. *Aim Group Inc.*, [2013] OLRB Rep. November/December 1298

Section 3-35 Activity

[30] Workplace harassment is a health and safety issue covered by *The Saskatchewan Employment Act* and the attendant regulations (*The Occupational Health and Safety Regulations, 1996).* Section 36 of the Regulations requires an employer to develop and implement a policy for the prevention of harassment which includes, inter alia, an explanation of how to bring concerns and complaint of harassment to the attention of the employer. Generally speaking, a worker who raises a health and safety (harassment) concern or complaint is invoking a procedural requirement in the regulations, and seeking to have the employer comply with its obligations under the Act and regulations to take

reasonably practicable steps to address the concern or complaint raised. Or stated another way: actin in compliance with, or seeking to enforce the Act and/or Regulations

[31] According to the Officer's report, the Appellant stated that she raised health and safety concerns (harassment) on as many as 41 occasions with various individuals, including Sister HG (19 times) and GS, the Chairman of the Parish Grounds and Maintenance Committee (17 times), whom the Appellant identified as her supervisors, and others, including a member of the parish Finance Committee and the Vicar General of the Diocese, Father Crozon, whom the Appellant identified as Father A's supervisor.

[32] All but a few of the aforesaid 41 conversations are said to have occurred between November 5 and December 11, 2013. There is no testimony from either of the individuals said to be the Appellant's supervisors, or any of the other individuals identified, to confirm or deny that the Appellant made a harassment complaint prior to leaving the workplace on December 12, 2013.

[33] On all the evidence, I am satisfied that there was conflict between the Appellant and Father A over his curtailment of additional hours of work beyond the Appellant's regular 25 hour work week without his prior approval and his subsequent refusal of the Appellant's repeated requests for approval of additional hours (November 5, 19 and 26, 2013). The conflict continued when, on November 26, the Appellant's response to Father A's refusal of additional hours was to resign from the performance of the work she believed to be "extra" to her regular duties and, further, when Father A responded, on December 3, 2013, by reducing the Appellant's regular hours from 25 to 20 hours per week. I am satisfied that the related discussions at each of the three meetings were discordant, with emotions (tears, frustration anger) displayed by both the Appellant and Father A.

[34] I accept that the Appellant had many conversations with numerous identified individuals. Apart from the Appellant's statement, there is no other evidence to support the number of conversations which by an informal reckoning suggest that she complained more than once a day to someone in the parish. Having heard from and observed the Appellant, I do not find it difficult to accept that she did complain. It is more likely than not she complained daily about her work situation and her working relationship with Father A. I am not persuaded that she repeatedly raised a complaint of harassment. The employer would do well to take note that the unaddressed conflict is undoubtedly the genesis of the complaint of harassment which was later made.

[35] Following a divisive conversation with Father A on December 12, 2013, the Appellant left the workplace before the end of her shift. Thereafter, on December 16, 2013, she advised the employer in writing, that she was taking stress leave due to the Father A's bullying and harassment and his dislike of her.

[36] I do not find it necessary to make a determination whether the bare assertion of bullying and harassment made in the Appellant's letter to the employer dated December 16, 2013 is sufficient to establish, *prima facie,* that the worker was engaged in a protected health and safety activity. There is no question that on January 14, 2014, the Appellant submitted a complaint with full particulars to

Occupational Health and Safety due to the inaction by the employer in response to her correspondence of December 16, 2013 and that the employer was subsequently notified of the complaint by an Occupational Health Officer on or about December 16, 2013.

[37] Based on the foregoing, I find that the Appellant has established *prima facie,* that she was engaged in a health and safety activity protected by section 3-35 of the *Act*

[38] Discriminatory Action

[39] Section 3-1(1)(i) *infra,* describes as a broad range of actions or threats of action adversely affecting the terms and conditions of employment, of which "termination", (formerly "dismissal") is but one. The Appellant contends that she was constructively dismissed from her employment for raising a complaint of harassment.

[40] It is not disputed that the Respondent (and her spouse) were presented with a contract for future employment and given two weeks within which to accept or reject its non-negotiable terms. The employer's position was that non-acceptance would be considered a resignation. The Appellant chose not to accept the offer of future employment.

[41] The Officer's decision suggests that he did not find the employer's action to be a dismissal within the meaning of the *Act: "It is my decision that [the Appellant] chose not to sign the new employment contract and vacated her position".* The Officer went on to conclude in his decision: "*Based on the foregoing, it cannot reasonably be concluded that the new contract and change in job duties was a result of section 3-35 activities (the raising of a harassment complaint").* In such circumstances, the reverse onus is not triggered, and it is not necessary for the Officer to consider whether, on balance to establish whether the employer established good and sufficient reason for its actions.

[42] In an appeal of an Officer's decision, I am less concerned with whether the Officer erred than with the core issue of whether the employer has contravened the *Act.* That being said, to the extent that the Officer's decision appears to have rested on a finding that the Appellant was not dismissed, but vacated her position, I disagree with the Officer's conclusion.

[43] "Dismissal" is not defined or qualified in the statutory definition of a discriminatory action. The definition makes no reference to dismissals with or without cause, wrongful dismissal or, constructively dismissal. While dismissal may be cause for complaint for such reasons in other forums, an adjudicator's exclusive focus in on situations where a worker alleges dismissal for a reason mentioned in section 3-35.

[44] In this case, the Appellant now describes the termination of her employment as constructive dismissal, though she did not use that descriptor in her original complaint. The inference can reasonably be drawn from the evidence that her use of that terminology was drawn from having sought legal advice about the contract proposed by the employer and, according to the Appellant, because she was informed by Labour Standards that her situation 'had the makings' of a constructive dismissal.

[45] This is not to suggest that the Officer (or an adjudicator) must necessarily embark on inquiry as to whether the Appellant was constructively dismissed. However, in the Appellant's own words and in her written material, without reference to "constructive" dismissal, the Appellant states that she (and her spouse) chose not to sign the Agreement on short notice (two weeks to decide) because it changed her/their individual position(s) to a job share, the terms of which were less favourable than their individual jobs and non-negotiable, as Father A declined to discuss the expanded scope of duties the shared position entailed. Further, the Appellant submitted that the compensation as per the Agreement amounted to a reduction in wages as illustrated by comparison to previous years' earnings.

[46] For purposes of assessing whether the Appellant has established *prima facie,* that the employer took discriminatory action, the facts alleged by the Appellant, at this stage of the process are assumed to be true and provable. I am satisfied the Appellant has established, in a *prima facie* manner, that the employer unilaterally changed the terms and conditions of her employment and reduced her wages. Bearing in mind that the alleged facts are as yet untested, I find that the actions of the employer fall within the scope of the definition of discriminatory harassment.

[47] In other words, the adverse employment consequences alleged by the Appellant included unilateral

[48] Not all discriminatory actions are unlawful. The *Act* does not protect workers from every adverse employment consequence. The *Act* does not preclude an employer from taking disciplinary action or dismissing an employee or reducing their wages or from the management or direction of its workers, even when the consequences to the employee may be unpleasant. Neither does the Act shield the employer whose actions, even for legitimate business reasons, are influenced by a worker's engagement in a protected health and safety activity. The question therefore remains whether the Appellant has established, *prima facie,* that the employer's actions were taken *for* a reason mentioned in section 3-35 of the Act.

Causal connection

[49] I am not convinced the Appellant has established even in a *prima facie* manner, a causal connection between the discriminatory action taken by the employer and the raising of a complaint of harassment.

[50] The Appellant submits that the action by the employer (the delivery of the Agreement of employment on March 14, 2014) was taken two weeks after the date (February 28, 2014) the employer was to have reported to OH&S on the status of its inquiry into her complaint of harassment. She claims that the employer took the discriminatory action to avoid having to deal with her complaint of harassment.

[51] The mere fact that one action with adverse employment consequence (embodied in the contract) follows another in time is not sufficient, on its own, to establish a causal connection, even

on a *prima facie* basis. At times, the temporal connection on the face of the material is sufficiently striking as to amount to circumstantial evidence, as when one action closely follows the other.

[52] The Appellant's position is that it was "coincidental" that she received the Agreement two weeks after the aforementioned due date for a status update on the employer's investigation into her complaint. She claims the purpose of the contract was to "get rid of her" and to avoid having to deal with her harassment complaint. Inconsistent with the latter, the Appellant also testified that she and Father A were interviewed by Father Abello who was assigned to investigate her complaint.

[53] The causal connection to be established is between the raising of a complaint by the worker (December 16, 2013 and January 14, 2014) and the employer's subsequent discriminatory action (March 14 or April 1, 2014). In my view, asserting a process failure on the part of the employer does not advance the Appellant's prima face case to establish a causal connection. As such, the Appellant's evidence in support of a *prima facie* causal connection rests solely on the temporal connection as set out above, which translates into the discriminatory action being taken from 2 months to 3.5 months after the raising of the complaint.

[54] For the reasons aforesaid, I do not find the temporal connection itself to be particularly striking and, in my view, is not in itself, sufficient to establish a *prima facie* causal connection. However, on consideration of the evidence as a whole, there was no other direct interaction between the employer and the Appellant between the raising of her complaint of harassment and the receipt of the contract. The employer initiated an investigation and interviews were conducted, but no outcome was communicated to the Appellant or to OH&S.

Has the employer discharged the presumption that it took discriminatory action against the Appellant because of her section 3-35 activity?

[55] Having carefully considered the written material and viva voce evidence, I find that the employer has rebutted the presumption and that the discriminatory action against the Appellant was not influenced, in whole or in part, because the Appellant raised a health and safety concern (harassment). My reasons are as follows:

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

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

Stated another way, on appeal, an adjudicator does not sit in review of the merits of the employer's decision as to whether the adverse employment consequences ought to have been imposed on the

worker, or whether the criteria used to reach its decision were fair and reasonable. If the employer sincerely acted for the reasons given—reasons *other than* the worker's protected health and safety related activity—even though in the circumstances it may unfair or unreasonable for it to have done so, then I cannot conclude the employer had contravened section 3-35 of the Act. The worker may still have cause for complaint and may have other legal recourse in other forums (about which I take no position), but my remedial jurisdiction is limited to the question whether the employer's actions were in contravention of the Act or regulations.

[57] There is no dispute that the Appellant was employed to work a 25 hours work week. It came to Father A's attention at the end of his first month at the parish that the Appellant was not on salary, but was paid hourly. Further, the Appellant's time sheets reflected additional hours worked beyond her regular 25 hour work week. Whether Father A was aware at the time or learned later, the Appellant had been paid for additional time, on average 5-10 hours a week, for each of the previous two years—increasing her annual salary, by my informal reckoning, by about 35% in 2012 and 2013. At one point, Father A referred it being a "free for all" at Blessed Sacrament. On all the evidence, I have inferred that to be a reference, at least in part, to unconstrained "overtime" (paid, it appears, as additional hours, not overtime) and the absence of job descriptions defining scope of duties.

[58] Father A's mandate on assignment to Blessed Sacrament was "responsible parish ministry", including fiscal responsibility. On the Appellant's evidence, Father A advised the Appellant at the end of October, 2013, that there would be no further "overtime" (additional hours) without his prior approval and that there would be, in the future, a contract of employment. The inference can reasonably be drawn from the undisputed evidence that caretaking services was, or would be, under review and that a future contract would define the scope of duties for a salaried caretaking position, as opposed to an hourly one. Apart from the Appellant's assertion that she (or caretaking services) was singled out, and no other employee's wages were reduced, the foregoing remains uncontradicted.

[59] I find in the first instance, the action taken by the employer (reduction of hour/wages) pre-dated the conflict that ensued and the eventual complaint of harassment. Further, I am satisfied that at the same time, a future contract of employment, if not its terms, was planned. Nothing in the Act precludes an employer from taking such steps to manage its business provided the decision to do so is not influenced by the worker's health and safety related activity. At the time these matters were first raised, the conflict had not emerged and a complaint of harassment did not exist.

[60] It is clear that the Appellant was displeased by the curtailment of additional hours. It is not necessary to reiterate here the dispute that ensued. Suffice it to say that within a few short weeks, the issue remained unresolved—or not resolved to the Appellant's satisfaction—and the Appellant left the workplace, went on stress leave and submitted a complaint of harassment. Initially, the Appellant took the position (and sought the remedy) that she would not return to the workplace if Father A remained in it.

[61] On the day the Appellant left the workplace, December 12, 2013, Father A informed her once again, that there would be a contract "in the New Year". According to the Appellant, Father A said if she would not sign it, she would no longer be working at Blessed Sacrament. Again, I find that the Appellant was alerted to the pending contract prior to having made her complaint of harassment.

[62] The Appellant contends that the timing of the delivery of the contract on March 14, 2014 is linked to the employer's failure to comply with the first Officer's direction to report to OH&S the outcome of its inquiry into the Appellant's complaint of harassment, as a way to avoid dealing with her complaint of harassment. Her argument is not compelling. Despite the employer's failure to report to OH&S as directed, the Appellant also testified that a few weeks prior to receipt of the contract, she had been interviewed by a priest assigned to investigate her complaint, which is inconsistent with avoidance of the issue. Moreover, as I will address again below, the very nature of the contract was to offer the Appellant continued employment with flexible hours. I find that it is more likely than not that the timing of the contract was due to the length of time it took for the Finance Committee to conduct the extensive comparative review of duties and salaries in other parishes and in the Regina Catholic School Division on which the terms of the contract were based, as set out in the cover letter accompanying the proposed Agreement of Employment.

[63] The Appellant has speculated that the contract was designed to "get rid of her" and/or set her (and her spouse) up for failure such the contract would not be extended after the first one year term and/or that it's compensation disadvantaged her (and her spouse) and would benefit the employer who would get two employees for the price of one. Speculation is not evidence.

[64] Most compelling, as alluded to above, is the fact that even though the Appellant had been absent from the workplace for three months, without any medical documentation to support her absence or any response to the inquiry as to when she would be able to return to work, the employer did not hesitate to offer the Agreement of Employment to the Appellant (and her spouse). The shared position was to continue to be accountable to the Pastor (Father A) and the Finance Committee which, in my view, supports my finding that the action taken by the employer was not influence by the complaint of harassment.

[65] On balance, I find that there were legitimate reasons for the terms of the contract, albeit not terms the Appellant found acceptable. I note with some interest that of all the objections raised with regard to the terms of the contract, the Appellant did not express concern that the caretaker position was to be accountable to the Pastor, Father A. More to the point, I find that the employer's reasons were sincere and not related, in whole or in part, to the Appellant's complaint of harassment.

CONCLUSION/DECISION

[66] I find, on a balance of probabilities, that the employer had good and sufficient reason other than the Appellant's protected health and safety activity for the actions taken and has discharged the presumption that it took discriminatory action against the Appellant because she raised a health and safety concern (harassment).

[67] For all of the reasons stated herein, I affirm the decision of the Officer albeit for different reasons and I dismiss the appeal.

Dated at Regina, Saskatchewan this 26 day of June, 2015

Rusti-Ann Blanke
Special Adjudicator

Right to appeal adjudicator's decision to board

4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(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.

(4) The record of an appeal is to consist of the following:

(a) in the case of an appeal or hearing pursuant to Part II, the wage assessment or the notice of hearing;

(b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(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.