

IN THE MATTER OF AN ADJUDICATION
PURSUANT TO SECTION 3-54 OF *THE SASKATCHEWAN EMPLOYMENT ACT*

BETWEEN:

MOOSE JAW FAMILY SERVICES INC.

Appellant/Employer

- and -

C.R.



Respondent/Employee

For the Appellant: Ken Cornea, Grayson & Company

For the Respondent: self-represented

DECISION

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

INTRODUCTION

[1] On September 25, 2014, Officers in the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace (the “Officers”) issued Report No. 872 with respect to a complaint of discriminatory action brought by Ms. C.R. (the “Respondent”), against Moose Jaw Family Services Inc. (the “Appellant”, “MJFS”, the “employer”). Following an investigation, the Officers determined that MJFS had taken discriminatory action against the Appellant by terminating her employment on May 30, 2014, in contravention of section 3-35 of *The Saskatchewan Employment Act* (“the “Act”). Pursuant to the decision in Report No. 872 and section 36(2) of the Act, the Officers concurrently issued Notice of Contravention No. 858 which required 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.

[2] On October 14, 2014, the Respondent contacted the employer seeking reinstatement pursuant to the Officer's order.

[3] On October 15, 2015, MJFS, by counsel, appealed the Officers' decision on the grounds summarized as follows:

- (a) The Officers improperly equated the employer's decision to terminate without cause as being the equivalent of dismissal without good and sufficient reasons;
- (b) The Officers failed to consider the good and sufficient reasons provided by the employer for the decision to terminate the Respondent's contract of employment;
- (c) The Officers misinterpreted Minutes of a meeting held on May 22, 2014 when they determined the Respondent raised concerns of harassment with her employer during the meeting when no such concerns were raised and the Minutes of the meeting are incapable of supporting the suggestion that such concerns were raised;
- (d) The Officers investigation was biased and violated the rules of natural justice in that the employer was not provided, or made aware of the contents of witness statements and notarized statements obtained in the course of their investigation and therefore had no opportunity to provide either direct evidence or documentary evidence in response;
- (e) The Officers failed to properly apply the onus of proof placed upon the Employer to establish their good and sufficient reasons for termination of the employment contract on a balance of probabilities and proceeded as if the matter was one of strict liability once the employee had alleged harassment with minimal corroborating support for such allegation.

The employer requested that all of the decision being appealed be suspended.

[4] A teleconference was convened on November 24, 2014 to set dates for a hearing, during which the Respondent raised the matter of enforcing the Officer's Order for reinstatement and payment of wages. On my motion, I suspended the application of the Notice of Contravention pending the hearing of the appeal.

[5] The appeal was heard in Moose Jaw Saskatchewan on February 10 and 11, 2015.

ISSUE:

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

[7] **ELEVANT LEGISLATION**

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

"**discriminatory action**" means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes termination, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty...

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

3-35 No employer shall take discriminatory action against a worker because the worker:

(a) acts or has acted in compliance with:

- (i) this Part or the regulations made pursuant to this Part;
- (ii) Part V or the regulations made pursuant to that Part;
- (iii) a code of practice issued pursuant to section 3-84; or
- (iv) a notice of contravention or a requirement or prohibition contained in a notice of contravention;

(b) seeks or has sought the enforcement of:

- (i) this Part or the regulations made pursuant to this Part; or
- (ii) Part V or the regulations made pursuant to that Part;

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

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

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

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

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

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

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

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

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

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

(2) If an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 3-35, the occupational health officer shall serve a notice of contravention requiring the employer to:

(a) cease the discriminatory action;

(b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;

(c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and

(d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.

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

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

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

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

...

BACKGROUND and EVIDENCE

[11] In the course of this appeal, I heard *viva voce* testimony from ten witnesses, four called by the Appellant and five witnesses called by the Respondent, as well as the Respondent who testified on her own behalf. I have not reproduced all the evidence from every witness, but only the evidence on which I rely in coming to my conclusion, along with sufficient (and considerable) detail so as to provide context.

Background

[12] The Appellant, Moose Jaw Family Services (“MJFS”) is a non-profit organization, funded primarily through the Ministry of Social Services and the Five Hills Health Region, which funds two programs. Additional revenue is obtained from donations and generated through fundraising efforts.

[13] MJFS provides counselling and supportive information programs to the community of Moose Jaw and surrounding area. Counseling is provided by two registered counsellors, namely the

Executive Director, who carries a clinical counselling case load in addition to her role as Executive Director, and by Mr. P.C., a clinical therapist. MJFS's programs include a Young Parent Program, Diversion, Living Independent Skills, Care for the Caregiver and a Family Support Program. It is the latter Program which features largely in this appeal.

[14] The Family Support Program is MJFS's largest program. It is funded by the Ministry of Social Services. Under the supervision of a Coordinator, MJFS employs 4 full-time and 2 casual "FSWs" or Family Support Workers who provide teaching and support for the healthy development of families and their children. The Family Support Program is only accessible through the Ministry of Social Services via referral from Family and Youth Services at the Ministry's Moose Jaw Service Centre (referred to herein as "MJSS"). It appears, in essence, that each referral is sub-contracted to MJFS, for the delivery of specified services by a Family Support Worker, whose contracted hours are then payable through Program funding from the Ministry.

[15] Apart from executive level management, i.e., the Executive Director, who reports directly to the Board, there are no other formal levels of management at MJFS. However, both the Executive Assistant and the Coordinator of the Family Support Program supervise staff, and are regarded by the Executive Director to be akin to mid-level managers. At the material time, the Respondent was the Coordinator of the Family Support Program. Together, the Executive Director, the Executive Assistant and the Respondent comprised what the Executive Director called the Senior Leadership Team. In total, at the time of the hearing, MJFS employed 15 staff. Not all are full

[16] On May 22, 2014, a meeting was convened at MJFS that had been called at the direction of Ms. J.K., the South Region Manager of Service Delivery for the Ministry of Social Services ("MSS"). On behalf of the Ministry, Mr. M.P., had contacted the Executive Director of MJFS to schedule the meeting. Mr. M.P. is the Manager of Community Development responsible for oversight of the Ministry's funding agreement with MJFS—his role is to ensure that services are delivered in accordance with the terms of the funding contract.

[17] An uncontradicted fact in evidence is that the meeting was precipitated by concerns expressed in an internal Ministry meeting. About a month earlier, the Ministry's A/Executive Director, of the Community Services Division of Child and Family Programs and J.K., South Regional Manager of Service Delivery met with managers and supervisors from Moose Jaw Social Services and heard their expressions of concern about MJFS' reputation in the community, and their the Family Support Program, including dissatisfaction with service delivery.

[18] It is worthy of note that at about the same point in time, i.e. about one month prior to the May 22nd meeting, the Respondent happened to meet Ms. JK at an FASD training session, whereupon she and two FSW's shared their concerns about internal disharmony at MJFS. It appears that the Respondent, if not the FSWs, was aware at that time of the pending May 22nd meeting.

Evidence

For the Appellant, MJFS:

[19] The Appellant called four witnesses, Ms. G.K, the Executive Director of MJFS, Ms. D.D., Chair of the MJFS Board of Directors, Ms. S.J.B., Executive Assistant at MJFS and Ms. E.W., a Family Support Worker employed by MJFS who worked under the Respondent's supervision

Executive Director of MJFS (Ms. GK)

[20] The Executive Director is a registered social worker with a BSW degree, experience as Executive Director of a group home in Edmonton, and a background in psychiatric and active nursing, mental health clinical counseling and as an intake worker at Moose Jaw Mental Health. In addition to her role as Executive Director, she carries a clinical caseload (counselling), along with another counsellor, Mr. P.C., a clinical therapist.

[21] The Executive Director testified that organization has evolved since she started in 2005. She was hired as both the Executive Director and as a counsellor, and initially, there was only her and one other counsellor on staff, with a third employee added as an administrative assistant, a position now designated as Executive Assistant.

[22] The Executive Director indicated that the Respondent was initially hired in 2007 as the facilitator of transitional employment programming. As other opportunities came available, the Respondent transitioned into a position as a Family Support Worker, then to a part-time position as Coordinator of the Family Support Program. In 2009, the Respondent applied for, and was awarded the full-time position as Coordinator of the Family Support Program which she held until her dismissal on May 30, 2014.

[23] The Executive Director testified that at first she and the Respondent, the Executive Assistant and Ms. EW (one of the FSW) were all personal friends. They were supportive when the Respondent became unwell at work, was hospitalized and had to take time off for a while—and when she returned, continued to be supportive while she was adjusting to her medication. Lots of things were said about her disorder, which from her perspective, were the comments of caring friends. They all teased each other, with no malice intended. The Executive Director recalled once when she, herself, remarked that it was a good thing she didn't come to work for her self-esteem.

[24] The Executive Director spoke to a number of performance-related issues and other workplace issues on which they disagreed and/or the Respondent would not take her direction, which are documented in Exhibit 2, including making unreasonable demands and demands out the scope of her position, program issues, yelling and verbally abusing the Executive Assistant with regard to a Health Insurance Plan, yelling and verbally abusing a Family Support Worker, not following direction to use in-house professionals to provide training rather than out of town or out of office training, being directed on numerous occasions to conduct individual file reviews with FSW's rather than group

meetings, a memo to staff effectively threatening to fire her (related to on-going progressive discipline), when the Coordinator has no authority to hire or fire, using abusive and unprofessional language, favouritism toward some staff and bullying to another and the information which came to light in the May 22, 2014 meeting with Ministry representatives.

[25] The Executive Director testified that when she was contacted by the Mr. M.P. to set up the May 22, 2014 meeting between the Ministry and MJFS, she was not given any advance notice of what the meeting was about, and no agenda was provided prior to the date of the meeting.

[26] The meeting convened on May 22, 2014 with the MJFS leadership team in attendance (the Executive Director GK, Executive Assistant SJB and the Respondent). The Ministry was represented by Ms. J.K., the South Region Manager of Service Delivery, whom the Executive Director had never met, and Mr. M.P. Also in attendance were three local Moose Jaw Social Services staff: Ms. G.H., the Service Area Manager, a case manager, Ms. SM, and the supervisor of MJSS's case managers, Ms. KMcE.

[27] Ms. JK led the meeting. The Executive Director did not recall the exact words used, but once the meeting got underway, Ms. JK said there were issues in their region and that MJFS was the worst agency she dealt with in her career. Ms. JK said that referrals were way up everywhere else in the province except MJFS. The Executive Director attempted to explain that MJFS does not control the referrals, they take what is assigned [referred by] Moose Jaw Social Services. She said that MJFS had capacity to take more referrals if Moose Jaw CFS would send them. The Executive Director was blindsided to learn at the meeting that the local Social Services from whom they get the referrals/contract hours, had identified concerns to the Ministry about the service delivery by the MJFS Family Service Program. Until the May 22, 2014 meeting, she was unaware that the Ministry viewed as low quality, the services provided by the Family Support Program and unhappy with the service delivery.

[28] The Executive Director recalled that there was some discussion of a policy and that that MP said the Ministry was happy with the financial reporting, before the subject of staff issues was brought up. Up until that time, the Respondent had not been participating in the meeting. The Executive Director said she just assumed that, like her, the Respondent did not know why the meeting had been called either. Then the Respondent spoke up saying that this was her last opportunity to speak and if things didn't get resolved, she was going to quit. She was focused on recent issues arising with regard to one particular FSW. The Executive Director recalled one of the MJSS supervisors asking whether the Respondent had the authority to hire and fire staff. The Executive Director said she was the only person with the authority to hire and fire staff. At any rate, it was made clear that the Ministry was not involving itself in the day-to-day operations and management of MJFS, but the suggestion was made for MJFS to get a mediator to help resolve workplace issues. Some suggestions were made as to whom to call. The mediator suggested by MJSS' Service Area Manager was not a viable option. MP suggested David (Envision) or Pat (Catholic Family Services).

[29] When asked by the Respondent in cross-examination what led to the discussion of internal conflict in MJFS, the Executive Director stated that she recalled it got started when the Respondent stood up and said it was her last opportunity to speak.

[30] The Executive Director testified that she does not remember the Respondent bringing up anything about harassment, but did recall the Respondent saying that the Executive Director should have supported her with regard to a winter transport policy she had written, and with regard to training.

[31] As far as the Executive Director knew, the only minutes of the meeting were those taken by the Executive Assistant. Others may have taken personal notes.

[32] Prior to the May 22, 2014 meeting the Executive Director had been wanting to meet as a leadership team to discuss process changes within the Family Support Program, including the approach to case conferencing. The Senior Leadership Team meetings were not formal or regularly scheduled, but arranged, as needed, at mutually convenient times. Despite her attempts to arrange leadership team meetings, through April and in May after her return from vacation, the Respondent was not responsive to participation in a leadership meeting. Due to the Respondent's inaccessibility, the Executive Director notified the Respondent in writing (May 26, 2014) of her decision to remove the Respondent from the senior leadership team.

[33] The Executive Director testified that until the May 22, 2014, she was unaware that the Ministry was unhappy with the service delivery of the Family Support Program. Had she known in advance that was the Ministry's agenda, she would have asked a member of the Board to attend the meeting too. She reported what had transpired to the Board. On May 26, 2014, it was the Board's decision to terminate the Respondent's employment.

[34] After the dismissal of the Respondent, the Family Support Program was restructured and re-organized. MJFS is no longer sending the Coordinator to the quarterly meetings. As the Executive Director had found, in consultation with other Executive Directors, it was problematic, and not uncommon, for Coordinators to return from the quarterly meetings with things that they believed to be directives or otherwise mandated by MSS which were not always accurate, or able to be implemented.

[35] On cross-examination, the Executive Director confirmed that she had taken no progressive discipline steps with the Respondent. She stated she had spoken to the Respondent many times about what she wanted the Respondent to change, but that there was no paper trail documenting it. She acknowledged the Respondent's contributions to "LIS", writing the material and facilitating the program as well as the Respondent's fund-raising efforts and the policy she had written. With regard to the latter, the Executive Director explained that it was not in the policy and procedure manual because it was a policy within her own Program to which it was applicable. She stated

[36] The Executive Director acknowledged that the senior leadership team meetings were not scheduled ones. Whether the Respondent recalled being asked as to her availability to meet or not, the Executive Director remained unshaken in her testimony as to why she removed the Respondent from the leadership team on May 26, 2014.

[37] The Executive Director was questioned as to whether she had informed the Board that M.P. had directed her to obtain a mediator and MSS had authorized the use of surplus funding dollars to pay for it. The Executive Director said the suggested mediator wasn't acceptable. The Respondent did not pursue the question further. On re-direct examination, the Executive Director testified that she was favourable to bringing in a mediator, but not the first one that was suggested at the meeting. Two alternatives were proposed, one from Catholic Family Services and one from Envision, and she did call them. Based on the Board's decision to dismiss the Respondent, the Board effectively overruled that approach and they didn't go ahead with the mediator.

[38] In response to questions about what the Executive Director told the Board to enlist their support, the Executive Director said that she had kept the Board informed all along in her verbal reports about various issues with the Respondent, and had reported the meeting of May 22, 2014 to the Board. She stated that it was the Board's decision to dismiss the Respondent and the Board directed her to do so, accompanied by two Board members.

[39] When questioned, the Executive Director did not recall saying to the Respondent when she was dismissed that it was "due to the May 22nd meeting", nor did she recall saying it when she met with the FSW's on June 2, 2014 to let them know that the Respondent had been let go. She recalled telling the Respondent that she was being "dismissed without cause", and that the Respondent had asked for a letter stating the reason for her dismissal.

[40] In re-direct, counsel directed the Executive Director's attention to the notarized statement of Ms. S.D., dated June 2, 2014 referred to in cross-examination. The statement indicated that the FSW's were called to a meeting with the Executive Director and the Executive Assistant in which they were informed by the Executive Director that the Respondent's termination was "a long time coming". The Executive Director acknowledged that she had said it. She stated her intention in doing so was to reassure the FSWs.

[41] When asked in re-direct examination, the Executive Director said that at no time had the Respondent ever come to her and said "you're harassing me" or "stop harassing me" or that the Executive Director

Chair, MJFS Board of Directors (Ms. JK)

[42] DD has been a member of the MJFS Board of Directors since 1995. She is the current Chair of the Board comprised of 6 other members, a position she has held for the past three years. The Board Chair has an extensive background and many years of service as a member and founding

member of a number of prominent Boards: Sask Development Board, Sask Gaming Commission (now SIGA), and Board of Education for Thunder Creek School Division. She was appointed to the Board of the (then) Moose Jaw Family Services Bureau because of her financial and administrative law experience. Four years ago, the “Bureau” was dropped, and, in alignment with the naming conventions of other agencies, it is now incorporated as Moose Jaw Family Services Inc.

[43] When asked about the process in regard to staff bringing issues to the Board, the Board Chair said that the normal process is for the Executive Director to deal with workplace issues, but some issues are brought before the Board, such as when the Executive Director is named or involved in a complaint. Such was the case when an allegation of harassment was made against the Executive Director by a staff member. The Board Chair testified that the staff member had initially made a presentation to the Board, and the Board honestly thought they had addressed the concerns raised. Apparently, they had not, because the staff member complained to Occupational Health and Safety. As a result, the Board convened an administrative tribunal to investigate. Interviews were conducted, a decision was rendered. As requested, the steps taken were reported to OH&S who closed their file.

[44] In its initial response to information conveyed to the Board by the above-mentioned staff member about allegations of favouritism and bullying in MJFS, a survey had been implemented. In that context, a number of people came forward to complain about the Respondent, but not about the Executive Director or the Executive Assistant. The Board Chair testified that since the termination of the Respondent’s employment, they have had feedback from staff that there has been a reduction in stress, and letters to the Board reflected a change in overall morale.

[45] The Board Chair recalled only one occasion, in early 2013, that the Respondent brought issues to the Board. Neither at that, nor any other time, did the Respondent bring forth to the Board any allegation of harassment or bullying or inappropriate comment or conduct that would fall within the scope of *The Saskatchewan Employment Act*. The Board tried to discern the concerns the Respondent did bring forward. Part of it was that the Respondent felt she should be paid separately for some of the work she did under the Family Support Program. Other issues were raised with regard to the health/benefits plan, and whether certain income was taxable or non-taxable, which she believes was ultimately resolved in the Respondent’s favour. It was the Board’s impression that initially, the Respondent had been paid hourly for her case load for a .5 position, but that when she became full time she went on a straight salary. In any case, the Board simply made a suggestion (that a contract of employment be put into place for greater clarity. As for the health/benefits, a proposal was brought to the Board which was not approved because it only offered the benefits to one sector of the organization and the Board determined it was simply not going to happen in that format.

[46] The Board Chair testified that the Executive Director reports to the Board separately, and keeps them fully informed about issues and issue areas. The Board had been made aware of on-going issues with the Respondent. After the meeting on Thursday, May 22, 2014, the Executive Director reported to the Board Chair and reported to the Board at its meeting the following Monday, May 26th.

What was shared by the Executive Director was comments by Ministry personnel who were unsatisfied with the [Family Support] Program. As far as the Board Chair and the Board were concerned, that was the “last straw” (in the context of their awareness of past issues with the Respondent), and formed the basis for the Board’s decision. The Board made the decision that the Executive Director’s efforts were not working. According to the Ministry’s criteria, the Program was not operating properly. The Board concluded that the Respondent needed to seek other employment options.

[47] The Board Chair testified that she had spoken to, and met with MP, the Manager of Community Development who oversees MJFS’ contract (funding) with the Ministry of Social Services prior to the Board meeting on May 26th. Her purpose was to find out whether termination of the Respondent’s employment would affect MJFS’ funding, which was information the Board would need to know. The Board Chair added that she had the same conversation with their other funding partner, the Five Hills Health Region. When asked in cross-examination if she asked MP whether the Program was in jeopardy, the Board Chair said she had no reason to ask that question, she had been clearly informed by the Executive Director that the Ministry was dissatisfied with the service delivery of the Family Support Program.

[48] The Board Chair was cross-examined by the Respondent. When asked, with reference to the employer’s reasons for dismissal whether the Board received documentation that the Respondent was made aware those accusations [contained in the Notice of Appeal], the Board Chair reiterated that the Executive Director had made the Board of on-going issues with the Respondent in regular, verbal reports to the Board. On further questioning, the Board Chair confirmed that the Ministry’s dissatisfaction with the Program service delivery was the straw that broke the camel’s back (“Said it. Meant it”) and that the Board did not suggest or consider progressive discipline.

[49] When asked whether there was a revised policy manual distributed to staff, the Board Chair did not know. She testified that the policy was a living, breathing document and in that sense was subject to on-going revision as necessary. Until a revised manual was presented and distributed, the existing policy manual applied.

[50] The Respondent stated that she had asked for leave (pressing necessity) on the morning of May 26th and did not return until May 30, 2014, at which time her employment was terminated. When asked by the Respondent whether she was aware that another staff member had been offered the position of interim Coordinator the evening of May 26, 2014, the Board Chair said that would have been a decision made by the Executive Director.

Executive Assistant at MJFS (Ms. SJB)

[51] SJB has been employed by MJFS since 2006. The job title for her position was changed from Administrative Assistant to Executive Assistant. She said it was a change in name only, with no

significant change in her duties except insofar as she had supervision of staff to assist with the handling of reception and other administrative tasks

[52] With regard to the availability of policy manuals, SJB testified that all an employee had to do to get one is ask. She said employees get a new manual whenever the policy manual is revised. The previous policy remains in force until the revised policy is put in its place.

[53] SJB acknowledged that at the request of the Executive Director, she prepared the two page letter [dated July 14, 2014], as a statement of her experience with the Respondent, to be included in the package of documents to be submitted to OH&S.

[54] SJB did not know the Respondent before coming to MJFS. She characterized their relationship as a friendship, or so she thought. Their friendship, which had extended beyond the workplace, had changed in the past few year and SJB did not know why. From her perspective, the Respondent had grown more withdrawn, and just didn't seem to want to talk anymore. There was some conflict between them with regard to budgeting issues and the health program. FSW employees wanted a medical plan. There was some consultation about it with the Ministry (with Mr. M.P.). Suddenly, the Respondent brought her a Blue Cross medical plan—she had gone off on her own and obtained information.

[55] SJB said she tried to explain the issues to the Respondent—that even though there is a benefit line on the budget, MJFS had allocated the funds to a Group RRSP, and they needed to maintain a balance in the budget to cover sick leave. With what was left, MJFS couldn't afford a medical plan like Blue Cross. In any case, they needed to get three proposals and approval by the Board, but the Respondent angry, argumentative and demanding about it. In cross-examination, SJB acknowledged that the Respondent later apologized for her behaviour.

[56] SJB testified that disputes repeatedly arose with the Respondent with regard to what MJFS was supposedly doing wrong, and demands for changes, based on information the Respondent would come back with from her attendance at the quarterly Provincial Coordinator's meetings.

[57] SJB said that that the Respondent made her aware of her [health issue/disorder], but she could not remember the date. From time to time, there was concern about the Respondent's behaviour—*she* was really concerned. The Respondent was living on a farm on her own, and was having some difficulty adjusting to her medication. Both she and the Executive Director were concerned and supportive and SJB gave examples of how they demonstrated it.

[58] SJB testified that could not recall any specific comments made about the Respondent's 'meds' or medical issues. There were expressions of concern when the Respondent looked tired or was not herself and acknowledging that there were challenges to adjusting to her medication. SJB did not think such comments were ever made in a derogatory or inappropriate way.

[59] SJB said the Executive Director is a plain spoken and down-to-earth person. She is also a concerned boss, who cares about and looks after her employees. Other staff go to her for advice. For those reasons, in SJB's opinion, the Executive Director probably would have asked the Respondent, as a concerned friend and concerned boss, whether she was taking her meds and whether the meds were helping. She did not think the inquiries made were inappropriate.

[60] SJB said she would not characterize her relationship with EW (a Family Support Worker) in the same way as she had been friends with the Respondent, but that the Respondent and EW's acquaintance went back a long way, before either of them came to MJFS. In SJB's opinion the Respondent and EW had the same nature and tended to butt heads. SJB wasn't one of the Respondent's team of FSW's, so she did not participate in their meetings but she could sometimes hear them talking loudly. On one occasion, she heard a loud discussion about EW not going to training because of the arthritis in her knees. EW asked her later about the duty to accommodate, and whether there were any specific requirements she needed to meet. SJB said not necessarily, usually a conversation is a sufficient.

[61] She and the Respondent went back and forth for a long time in a difference of opinion and conflicting information about the taxability of mileage as income on T4s. The Respondent kept on harassing her about it, and they had some heated conversations. SJB didn't recall whether the Executive Director directed her to do so or not, but the Respondent took it, and other financial issues to the Board. Eventually, it was determined that T4s for 2010 and 2011 needed to be amended and the Respondent was reimbursed by Central Office. SJB said she wasn't perfect, but the Respondent would often insist on clarification of FSW paycheques, and in most cases, SJB had not made a mistake.

[62] The Respondent cross-examined the Executive Assistant. The Respondent suggested to SJB that it was the Respondent's job to do progressive discipline and asked SJB whether EW had gone to the Executive Director about it. SJB said that she knows that after the part that she overheard, the Executive Director tried to resolve it and there was another loud discussion among the three of them.

[63] On cross-examination, SJB denied saying that the Respondent was dismissed *because* of the May 22nd meeting, it was not only that.

[64] When asked whether she had ever heard the Executive Director verbally abuse the Respondent, SJB stated that when the Respondent and the Executive Director got into arguments they would both raise their voices.

[65] When asked what the Executive Director said to the Board at the May 26th meeting, SJB's response was that the Ministry was not happy with MJFS and that most of the meeting focused on the Family Support Program.

Ms. E.W., Family Support Worker

[66] EW. has been employed by MJFS for six years as a Family Support Worker (FSW).

[67] EW met the Respondent prior to coming to MJFS, through a pilot program at SIAST for people over the age of 50 re-entering the workforce. The Respondent was the instructor, and EW thought she was a good one. They have interests in common, developed a good rapport, became phone friends and kept in touch.

[68] EW testified as to her difficulties with the Respondent as her supervisor. Early on, in 2009, the Respondent had written her up (progressive discipline), in a memo which in which she was reprimanded for having spoken to a client about her own past struggles with addiction in order to gain the client's trust. The memo signed by the Respondent said further discipline would result in immediate termination. EW demanded a retraction of the memo. EW stated that she had once, 30 years ago, attended *training* at a rehabilitation facility and had never personally had an addiction of any sort. In a written response to the memo, EW stated that it was difficult to deal with the Respondent accusing her, yelling and waving her arms. She stated that the offensive documentation was never retracted or corrected.

[69] The main focus of her testimony was with regard to a meeting with the Respondent on April 29, 2014. The Respondent had wanted a closed door meeting to discuss some issues and had a set of questions she was going to ask. EW was not comfortable with a closed door meeting and said so. One of the issues was that EW could not attend a training session because her arthritis flared up, making it difficult for her to sit longer than 20 minutes. EW said her arthritis was a known issue, and the Respondent's tone and attitude (laughing at "wind" as her excuse) flustered her, such that she was unable to clearly articulate that the windy, cold weather had made her arthritis flare up. Afterwards, she went to the Executive Director and expressed that she was upset at having to explain why she couldn't walk or sit on certain days because of her arthritis, and it wasn't a laughing matter. The Executive Director told her not to worry about it because the Respondent's files don't matter, it's not the personnel file. The Respondent must have been close by, as she came into the Executive Director's office very upset about why EW was talking to the Executive Director.

[70] EW testified that the Respondent was loud, yelling that EW should talk to her if she had a problem. EW responded that she could not talk to the Respondent because she "didn't know who was going to show up". EW testified that it may have been an unfortunate choice of words on her part, but she was not always confident that the Respondent would speak to her in an unbiased manner.

[71] EW testified that she later received an email from the Executive Director [Exhibit 5] about the concerns she had brought forward and requesting her to put her concerns in writing. [Exhibit 4]. EW did as requested.

[72] EW testified that she was aware of the Respondent's [medical] disorder because the Respondent had mentioned it to her. Her comment to the Respondent about not knowing who was going to show up was not directed at her disorder. Rather, it was a reflection of not knowing what kind of response she would get. Would it be the woman who had flown across the room at her, hands

on desk, in her face? Or the friend? EW says she has her own issues, and would never pick on someone else's.

[73] EW said that there was a licence on humour at work. The Respondent referred to her disorder as her "sick thing". They were very friendly and relaxed at work. In the kitchen, she didn't feel threatened nor do she ever see or hear anything threatening.

[74] EW testified that she never heard the Executive Director or Executive Assistant make derogatory remarks about the Respondent. The Executive Director cared very much about the Respondent. That's what she saw anyway. EW gave some examples, including that the Respondent's son stayed at the Executive Director's home, helping by taking her mother to the hospital, and staying with the Respondent when she had been hospitalized

[75] On cross-examination as to whether she was asked if accommodation was required [in re: para 69] , it was suggested to EW that it was [the Respondent's] job to know what the law of accommodation is. EW said she did not know what that meant. She went on to say that meeting with the Respondent did not escalate, the Respondent had been very brittle from the outset. There had been no mention of it being a progressive discipline meeting nor was she asked if she minded answering some questions. At first, she thought she was going to be asked questions for a survey she heard was going to be taken.

[76] EW was at the June 2nd meeting, but did not recall whether the Executive Director mentioned the May 22, 2014 meeting as the reason for the Respondent's dismissal.

[77] When asked whether her letter to the Executive Director was a formal complaint, EW said she was no longer able to talk to the Respondent and had no confidence in her. Her letter was a statement as to what was going on. She had sat too long on stuff without speaking up. After the "coaching" session in the basement (another incident where the Respondent had allegedly yelled at her), she decided she would not partake anymore. The Executive Director asked her to put her concerns in writing and she responded as requested.

For the Respondent

[78] MP testified with regard to the genesis of the May 22, 2014 meeting. About a month earlier, the staff at Moose Jaw Social Services had expressed concerns about MJFS Family Support Program to the Ministry of Social Services in a meeting with the A/Executive Director of the Community Services division of Child and Family Programs and Ms. J.K. the South Region Service Delivery Manager. Ms. JK subsequently asked him to set up the May 22nd meeting.

[79] M.P. testified that the reason MJFS was not given an agenda for the meeting in advance is that the Ministry wanted to come in cold. They wanted to get an unbiased response to their concerns, not a rehearsed script.

[80] MP confirmed that OH&S Officers contacted him and requested his “minutes” of the May 22, 2014 meeting. As far as he knows, there was no recorder of minutes at the meeting—at any rate, no minutes were circulated. MP stated that it was not his job to take minutes of the meeting, but he did provide OH&S with a copy of the personal notes that he made at the time. A transcription of his handwritten notes is reproduced below. [Personal identifiers have been replaced with the identifiers used in this decision].

May 22, 2014

[In attendance]

SM, KMCE, GH [Moose Jaw Social Services (MJSS - did not testify)-
Michael, [MP] and Janice, [JK] Ministry of Social Services – JK did not testify]]
Executive Director GK and Executive Assistant SJB.

[Note: the Respondent attended but was not listed as a participant in MP’s notes.]

Background Information

- 2013 – 2014 contract
- 2014 – 2015 contract
- Recoveries
- RIFT – process for referrals [Rapid Intervention for Family Treatment]
- Vibrant FS [Family Support] services
- Respondent’s family support workers are refusing to do work as per [her] direction
- Respondent: “Executive Director/Respondent/Executive Assistant SJB have a disconnect”
- MSS [Ministry of Social Services] contracts fit with tasks outlined in appendix B
- 4 FTE’s and 2 casuals
- [SJB] – family support workers frustration regarding how to do the work
- Respondent - “harassment” and “belittled”
- Respondent - “steal training money”, “not paying overtime”
- Executive Director/SJB fell apart at the seams: When??
- Executive Director– need for referrals in both counselling and family support
- Sandy – internal dynamics of MJFSB need fixing first. Workers frustration in getting contracts signed.
- Need for non-traditional hours.
- Counselling
 - FSW to [The Respondent] emails MSS worker and cc’s both Sandy and Karen.
- Executive Director” – lack of communication
- MJFSB – internal communication
- Internal meeting
- Executive Director – “very serious”
- “JK”[MSS] – “internal tension” - need to build confidence back

- FS mandated 10 families and Diversion 10 families. Currently working with 20 families.
- Need for VST – [SJB] to provide Mr. MP with numbers
- Healthy respectful way to build trust back in order to build a vibrant responsive service
- Immediate steps. MP talked about the need to bring in a mediator to work with [Executive Director/Respondent/Executive Assistant SJB] first and then to bring in the frontline staff. Suggestion of contacting Envision and Catholic Family Services.

[81] MP testified that Ms. JK spoke for the Ministry at the meeting and stated that the Ministry had lost confidence in MJFS' Family Support Program.

[82] When asked, M.P. stated that he did not recall whether one particular FSW was discussed. If the Executive Director's involvement was discussed, that was not reflected in his notes. His notes reflected the process to be followed in the fulfillment of contracted services: the FSW contacts the Coordinator, the Coordinator emails the Social Worker and cc's both supervisors (Karin and Sandy).

[83] When asked whether he directed the Executive Director not to intervene in the Family Support Program, M.P. stated that he could not verify that.

[84] M.P. testified that it was obvious that there was discord between the Executive Director and the Executive Assistant and the Respondent was obvious. The Family Support Program wasn't serving families. There was a need for MJFS to regain their [MSS's] confidence, with the first suggested step being mediation. M.P. did not recall whether the Executive Director agreed or disagreed. The local MSS Manager suggested a Moose Jaw mediator who was not acceptable. MP suggested two other alternatives.

[85] When asked whether there had been a directive or discussion about terminating the Respondent, MP said he didn't have any prior discussion with Board members about whether or not to terminate the Respondent's employment.

[86] MP confirmed a meeting in June, 2013 where there was a discussion of benefits (health plan) for Family Support groups "if there are additional dollars".

[87] MP stated he received two emails from MJFS staff post-termination, one of which suggested that he had counseled the Executive Director to terminate the Respondent, which MP categorically denied.

[88] When asked whether the Respondent disclosed harassment at the May 22, 2014 meeting, MP indicated that he had written down the words "harassment" and "belittled".

[89] On cross-examination, MP confirmed that MJFS is an autonomous entity. It enters into an agreement with MSS to provide services within the parameters of the funding contract and receives payment for services rendered. When it was suggested to MP that MSS does not mandate what benefits are or are not provided by MJFS, MP agreed, saying that it is part of his role to discuss what is available, what can be done within the block funding.

[90] MP confirmed that MSS gave suggestions at the May 22, 2014 meeting, not directives. MSS saw the problem(s), but MSS has no authority to direct how MJFS addresses their problems. MJFS is fully entitled to determine how it handles its internal affairs. MP confirmed that he did have a conversation with the MJFS Board Chair and met with her to address her question about whether termination of the Respondent's employment would affect MSS funding.

[91] In further cross-examination MP that could not recall any context for his notation of "harassment" and "belittled", although recollected that he expected to hear examples.

[92] His next notations documented the "steal training money" about which nothing more was said and "non-payment of overtime" which was not substantiated. MP said there was no apparent misuse of training dollars from his perspective, inasmuch as not all the funds allocated to training were used, and MSS recovered the unused funds. A consultant does a audited financial analysis, and no concerns were identified with regard to financial accountability.

[93] MP said the Ministry was concerned that referrals were down in Moose Jaw, and had lost confidence in the Family Support Program. Since the meeting on May 24, 2014 and subsequent actions taken, there has been a total turnaround—there is good communication, getting service delivery, confidence in MJFS has been restored. Why, he does not know.

Treasurer, MJFS Board of Directors (Mr. GMcD)

[94] The Board member was present, along with another Board member, when the Executive Director terminated the Respondent's employment. He recalled that she had asked for a letter explaining why she had been terminated.

[95] As to the reasons the Respondent was dismissed, Mr. McD indicated that that he had not been in attendance at the board meeting, but he knew it had been building to that. There had been discussions of past issues with the Respondent and her behaviour, including non-compliance with the directions of the Executive Director. He understood there were problems raised by the major stakeholder (MSS).

[96] When asked about a complaint by another FSW, Mr. McD said there had been two complaints. One was withdrawn. The other, the complaint by Ms. MS, was so repetitious it was difficult to tell what she was referring to. He was confused by her complaint, which was a complaint against pretty much everyone.

[97] On cross-examination, Mr. McD confirmed that MS had submitted her complaint to OH&S and that the Board dealt with it by appointing a committee to investigate and prepare a report. OH&S closed the file.

Mr. P.C., Clinical therapist at MJFS

[98] PC is employed as a clinical therapist with MJFS. He asked the Executive Director why the Respondent was fired. He understood that the termination was for a number of reasons, including the May 22, 2014 meeting.

[99] PC said he received and had been aware of MJFS' policy and procedures manual ever since he was hired. He said the Executive Director sat down with him at an orientation meeting and he was made aware of policies/policy manual, the Code of Conduct, expectations, Confidentiality.

[100] PC said he has known the Executive Director for a long time. He has never heard her yell at, or abuse anyone although her normal voice is quite loud. He went on to describe the Executive Director as having a coarse or harsh speaking voice. He said she is very social, relational but is also very direct. No beating around the bush. For an observer who didn't know her, the tone or words spoken might cross the line, sounding disrespectful. In his experience and opinion, the Executive Director is giving and generous, kind-hearted to the point that, at times, she extends herself beyond what he would necessarily call professional.

[101] PC described MJFS as a great place to work. For himself, he felt more restricted now, due to this milestone—alluding to the appeal process having produced a more restricted environment.

[102] PC wrote a supportive letter to the Board. It was not solicited by the Board or by the Executive Director. He was not aware that others had done so.

[103] When asked for his observations on how the Executive Assistant SJB interacted with staff, PC stated that SJB wears her heart on her sleeve. In his opinion, SJB is honest, a person of integrity. Belittling others is not in her nature. She is hard on herself, not others.

[104] PC stated that the Respondent shared information of a personal and health-related nature with others in the workplace which was received without judgment. To his knowledge, people listened with sensitivity. He never heard the Executive Director make comments in a destructive or inappropriate way.

M.S., Coordinator, Young Parent Program

[105] MS said she wrote a respectful letter of complaint to the Board. She wasn't satisfied with the Board's response and took her complaint to OH&S. A committee conducted an investigation, interviewing her, the Executive Director and the Executive Assistant. The committee concluded her concerns were unwarranted [sic] providing 8 reasons. OH&S closed the file.

[106] MS testified that she had never observed the Respondent yell or abuse the Executive Assistant or anyone or threaten to fire, show favouritism, harass or bully anyone. She stated that the Executive Director is rude, dismissive to people. When she or the Respondent would try to explain, the Executive Director would yell and scream and walk out the door. MS didn't speak up for five years. Then she talked to the Executive Director about it. MS referred to clients being spoken about in insulting ways. In her view, the administration failed—no supervision, no appropriate problem-solving mechanism. Decision-making was random, chaotic and unfair.

[107] MS testified that the Respondent was not rude or argumentative. She never heard the Respondent put anyone down. The Respondent was very supportive of MS's program when others have not been. She said the Respondent should not be blamed...nothing should ever go this far. She said that early on, the Executive Director's treatment of the Respondent was quite favourable, and the Executive Director spoke of her in positive terms. In her view, the Respondent is a motivated person and she does not know what happened that the Executive Director would start to treat the Respondent with disrespect. The Respondent was not the only one treated that way. She tried to do something about it [going to the Board] and said it does not work.

[108] When MS asked for a new policy manual, she was told they were "working on it".

[109] On cross-examination, it was clarified that MS took her concerns to the Board, and then to Occupational Health and Safety, after which the Board conducted an investigation. The Board "did not agree with her position", which was further clarified that the allegations in her complaint were not substantiated. OH&S closed their file.

[110] On further cross-examination, MS confirmed, in essence, that she had not suffered any adverse employment consequences for having brought forward a complaint of harassment. That is, she confirmed that she remained in charge of her program, although there were some changes made to it that she did not feel was one of the problems in the first place.

Ms. S.D., Family Support Worker

[111] SD has been a Family Support Worker with MJFS for about 5 years.

[112] The Executive Director informed the FSWs on June 2, 2014 that the Respondent had been dismissed because of the May 22, 2014 meeting.

[113] SD testified that she hasn't observed the Respondent abuse or yell at anyone, and has never observed her threaten staff, show favouritism to, or harass or bully anyone.

[114] SD testified that the Executive Director was friends with one FSW and showed favouritism toward her.

[115] SD said the Executive Assistant had yelled at her for not having followed procedure when she 'called in' sick by texting to the Respondent. SD yelled back, "you're not my supervisor". When SD pointed out that the favoured FSW texted the Executive Assistant when she was sick, she was told it was none of her business, and she was taking it too personally.

[116] Once the Respondent called her in to say that she had the Executive Director had received a received a complaint from two FSW's (non-smokers) about the smell of cigarette smoke coming from SD's office, implying that she had been smoking in there. SD laughed, and denied it, but she was upset that the accusation had been made too. She didn't understand why they had come up that accusation and wanted to be able to talk to everyone. So she and the Respondent met with the three

other FSWs. It turned into a heated, loud and emotional discussion. The Respondent called the Executive Director who, when she finally came in, said it was a “fucking ambush” and slammed out

[117] SD testified that the Executive Director would ridicule the Respondent saying she was anorexic, and “a fucking mental case”, never had anything nice to say about the Respondent’s husband, and said to the Respondent “you’re not taking your meds”, and yelled at another FSW (M.S.).

[118] The Respondent’s method of dealing with yelling, comments was to use her hand a tool, extending it and saying: STOP.

[119] SD had never received a policy manual. When she asked for a copy of the new policy manual, she was asked what she needed it for, to use the old one.

[120] When asked whether the policies and procedures have improved communications, SD said that only a handful of people acknowledge her presence at work. She had been close to one of the other FSWs, but was hurt when the FSW took the Respondent’s position after her dismissal. SD only wanted to take direction from the Executive Director. The Executive Director said SD had to try to have a working relationship with the new Coordinator, and suggested to SD that she and the Coordinator have an off-site discussion. SD followed her advice. It was tense, but fine. She has since been able to have a working relationship with the Coordinator. Since the Appeal Book has come out, she has been treated a little differently—little things.

[121] SD doesn’t have the same opinion as others that comments made to the Respondent came from a caring place. She said it was ugly.

[122] SD was not cross-examined.

The Respondent:

[123] The Respondent testified that she never received any progressive discipline for the situations described in the Appellant’s grounds of appeal as reasons for her termination, and no related documentation. She did not know the reasons for termination until she received the Notice of Appeal and Appeal Book. Her written responses to the employer’s grounds of appeal are an accurate account of events. She stated that there is no documentation pertaining to any of the reasons alleged.

[124] The Respondent testified that the disharmony and conflict started over whether mileage reimbursement was taxable or non-taxable income, and a number of other compensation related issues. The Executive Director supportively said to go to the Board with her issues, which she did. As the Program expanded to include the Diversion Program, further conflicts developed. There was conflict over the requirement to obtain a permit to work overtime, how to obtain it and who would sign it or not sign it.

[125] The Respondent said it was a funding requirement that she attend quarterly meetings. They (Family Support Coordinators) were told at those meetings to “act as one”, not as a unique entity. She would bring information back from the quarterly meetings, to which the Executive Director and Executive Assistant were not always receptive.

[126] It was normalized to hear the Executive Director and Executive Assistant complain about the demands of the Family Support Program. The Executive Director's approach differed from the CFS (MJSS) which the Executive Director would over-ride.

[127] There was obvious favouritism toward EW. Signing permit discussions created more division.

[128] Arguing was normalized. She started to withdraw from relationships at work. Initially she felt lots of support from the Executive Director and Executive Assistant. The Executive Director told an MJSS case manager the nature of the medical reason for which she was off work – then it became office gossip.

[129] She shared these concerns with a Ministry employee at a conference in Elk Ridge in May, 2013, with the understanding her concerns would be conveyed to Mr. MP, in the Ministry.

[130] The Respondent stated that she had never met with Mr. MP alone, but at the provincial table, she learned that MJFS had to increase wages and have benefits the way the government outlined. The Respondent was worried about losing the Program because they weren't meeting requirements.

[131] In December, 2013 there was an influx of files from CFS/MJSS which meant that they would have to hire staff or close files. The Executive Assistant told her there was no money so she closed files. She should have just hired because there apparently was \$30,000.00 in the budget. Then she had to advocate to hire a particular FSW who had been asked to leave by the Executive Director.

[132] CFS/MJFS wanted her to participate, inter-agency, by attending Community Awareness Meetings on Wednesdays. She had enough on her plate. The Executive Director and Executive Assistant supported her non-attendance.

[133] The Executive Director did not hide her dislike for CFS/MJSS.

[134] The progressive discipline meeting with EW was the first one she had done on her own. She documents everything and gives copy to staff. The same day she overheard the Executive Director and EW talking about her multiple personalities. She told them, you need to stop. She referenced her job description that said she was responsible for managing the performance of her staff.

[135] She received two notices of discontinuance of service by MJSS with regard to EW, and was directed by CFS/MJSS to have that meeting with EW.

[136] The personal attacks on her kept happening.

[137] In the meeting on May 22, 2014, she said: "I'm harassed, I'm belittled, I'm done".

[138] She was never given an opportunity to address the concerns about her performance raised in the grounds of appeal. There were no formal or informal complaints.

[139] At the May 22, 2014 meeting, the Executive Director defended the FSW, but not the Respondent. The Respondent did not defend herself. When asked whether she could supervise staff, she pointed to the example with EW on April 29th.

[140] The Respondent says Mr. MP did direct the Executive Director saying: *I think there's a trust relationship that's broken and until the internal issues are dealt with, MJFS is not going to have a good relationship with Social Services.*

[141] After her termination, she was informed that the Executive Director had said the Ministry told them that the Respondent had jeopardized the Program.

POSITION OF THE PARTIES

[142] The Appellant submits there is scant evidence capable of being characterized as the Respondent having sought enforcement of the Act, and takes the position that there was no clear indication that the Respondent did seek enforcement of the Act by alleging conduct that falls within the definition of harassment under the Act. Certain words were used, but no examples were given to give the words substance. Further, the Appellant takes the position that Section 3-36(4) requiring the employer to provide good and sufficient other reason is not the equivalent of requiring the employer to establish just cause for dismissal. In this case, the meeting of May 22, 2014, identifying the Ministry's dissatisfaction with the Family Support Program brought things to a head and resulted in the Board's directive.

Counsel referred to *Canadian Imperial Bank of Commerce v. Boisvert*, [1986] 2 F.C. 431, 68 N.R. 355; and to *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17 as support for the proposition that a dismissal without cause is not, by default, an unjust dismissal and, further, that a just dismissal is one "based on an objective, real and substantial cause...entailing action taken exclusively to ensure the effective operation of the business".

[143] The Respondent relies on the decision of the Occupational Health Officer whom she submits correctly identified that the Respondent was terminated without cause and because she had raised a complaint of harassment. She raised harassment at a meeting with the employer and the Ministry of Social Services on May 22, 2014. She was subsequently dismissed and submits that her dismissal was "because of the meeting". She further submits that the good and sufficient reasons submitted by the employer are after the fact justifications for which there is no documentary evidence, including no evidence of related coaching or disciplinary action. The Respondent further submits that there is evidence to support the argument that she was dismissed due to the May 22, 2014 meeting, and that the employer has failed to meet the burden of proof by demonstrating good and sufficient other reasons for her dismissal.

ANALYSIS, FINDINGS AND REASONS

Framework for Analysis

[144] 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.

[145] 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 able to bring health and safety related issues to the attention of the employer without fear of reprisal. Accordingly, employees who raise health and safety concerns in the circumstances described in section 3-35 are protected by the prohibition against retaliation for having done so.

[146] 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 onus or burden of proof shifts to the employer to discharge the presumption in favour of the worker 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.

[147] While the foregoing points 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. Stated another way, the employer is not called upon for an answer, i.e., to provide good and sufficient other reason for the action taken unless the worker first establishes that:

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

Discriminatory Action and Section 3-35 Activity

[148] There is no dispute that the employer terminated the Respondent's employment on May 30, 2014. Termination falls squarely within the definition of a discriminatory action in Section 3-1(1)(i) of the Act. I find the employer's action in terminating the Respondent's employment is established as a discriminatory action both in a *prima facie* manner and as an objective and undisputed fact.

[149] Not all discriminatory actions are unlawful. There are any number of legitimate reasons for an employer to take action having an adverse impact on an employee. The Act does not shield a

worker from all negative workplace consequences, its protection extends only to circumstances described in section 3-35 of the Act. Neither can an employer shield itself by pointing to proper cause or legitimate business reasons for its actions where there is also evidence of an action prohibited by section 3-35.

[150] It is important to point out at the outset, that the focus of this appeal is not on the underlying workplace and/or interpersonal conflict which appears to abound at MJFS, or whether or when conflict might have risen to the level of harassment and bullying. The jurisdiction of the Act limits the focus of this inquiry exclusively to whether a complaint was made, whether the worker suffered an adverse consequence and whether there is a causal connection between the two.

[151] In some cases, a temporal connection is evident on the face of the material. In this case, a meeting took place on Thursday, May 22, 2014. On Monday, May 26, 2014, the Respondent took a “pressing necessity” leave. Immediately upon her return to the workplace on Friday, May 30, 2014, her employment was terminated. In the slightly more than one week between the said meeting and the Respondent’s dismissal, there lies a rather striking temporal connection which is sufficient to establish, at least circumstantially, a *prima facie* causal connection between the events which transpired at the meeting and her dismissal. The question remains, of course, whether the Respondent engaged in a protected health and safety-related activity during the May 22, 2014 meeting which was, or could have been the reason for the employer’s actions.

[152] Generally speaking, a worker who exercises the right to raise health and safety concerns is acting in compliance with, and/or seeking enforcement of the Act or Regulations. It would defeat the public welfare purpose of requiring employers to have a policy enabling workers to bring complaints of harassment to the attention of the employer, if there was no attendant and protected right to raise a complaint without fear of reprisal. A worker need not use statutory language to do so. Indeed, the a worker might be unaware of his or her rights under the Act, as might an employer. Being unaware of section 3-35 of the Act does not disentitle a worker from its protection.

[153] In this case, the Respondent claims that she raised harassment at the May 22, 2014 meeting, and contends that is the reason for her dismissal.

[154] Her evidence that she spoke out at the meeting is not contradicted. I find it likely that she did so in a defensive response to Ministry’s comments in relation to the failings of the Family Support Program for which she was responsible and the perception that the Executive Director was not rising to her defence. It is reasonable to infer from the evidence that the Respondent seized the opportunity to express her frustrations and concerns, and in that context she claims to have said that she was harassed. As she put it in testimony: “I’m harassed, I’m belittled, I’m done”.

[155] Not everyone at the meeting heard the Respondent use those words. I accept that the Executive Director did not hear “harassment” mentioned. SJB was not asked or cross-examined as to whether she heard it. It appears from the OH&S investigatory materials (Officer’s notes) that neither Ms. J.K. nor the Moose Jaw Social Service manager, G.H. heard “harassment mentioned. As neither

of the aforesaid individuals testified (nor did the Officer or the other two meeting participants from MJSS), I have not attached any weight to that information as to whether the words were said, but it does lend credence to the Executive Director in the sense that it appears she is not the only one who did not hear the Respondent use the word “harassment”. The remaining participant, Mr. M.P. did testify. His personal notes taken at the meeting are on the record. From his notes, the inference can reasonably be drawn that Mr. M.P. *did* hear “harassment” and “belittled” as he noted those words in quotations next to the Respondent’s name in his personal notes, followed by an entry also attributed to the Respondent quoting “steal training money” and “not paying overtime”. Based on his notes and his testimony in that regard, which was not challenged, I am satisfied that the Respondent did say that she was “harassed and belittled”.

[156] Based on the foregoing, the question becomes whether “I’m harassed, I’m belittled, I’m done” is sufficient to establish *prima facie* case, that the Respondent was engaged in a health and safety-related activity by raising a complaint of harassment.

[157] In assessing whether the Respondent has succeeded or failed to establish a *prima facie* case, an adjudicator must accept the allegations as true and provable. In this instance, at the material time of the May 22, 2014, no facts were advanced to support the Respondent’s assertion. When assessing whether a *prima facie* case exists, there must be more than mere mention of the word “harassment” or “harassed and belittled”. A bare, unsupported allegation is not sufficient.

[158] For those reasons, I find that the Respondent has failed to establish a *prima facie* case. As such, the reverse onus is not triggered and the employer is not called upon to provide “good and sufficient other reason(s)” for the terminating the Respondent’s employment.

[159] In reaching this conclusion, I have not overlooked the Respondent’s claim that she raised concerns about the work environment with others in the Ministry, at a conference or retreat in 2013 and, most recently, with Ms. J.K. at a training session in late April, 2014. Whatever the factual underpinnings of those concerns might have been, there is no evidence before me that the concerns were brought to the attention of the employer prior to the meeting on May 22, 2014.

[160] Had I not reached the foregoing conclusion, I am satisfied, as well, that the decision to terminate the Respondent’s employment was not based, in whole or in part, on the Respondent’s claim that she was “harassed and belittled”. In other words, I am satisfied that the Appellant has discharged the presumption in section 3-36(4) for reasons I have set out below.

[161] While it is not necessary to my conclusions with regard to the presumption, I agree with the Appellant’s submission (as per the grounds of appeal) that the Officers’ decision equated a dismissal “without cause” to the Employer not having had good and sufficient reasons for dismissing the Respondent. To be clear, in the context of an appeal hearing, where the parties have now had an opportunity to testify, call and cross-examine witnesses and present argument, the focus is not so much on whether the Officers erred, but rather, on a determination of the core issues. Nonetheless, it is worth noting that the Officer’s decision indicated that the employer “failed to provide” good and

sufficient other reasons for the termination. Clearly, the employer did not “fail” to provide reasons in the literal sense. In fact, the employer, by counsel, submitted a package of documentation (73 pp.) supporting the dismissal, under a covering letter explaining its actions. The Officers’ decision, on its face, provides no reasons or any other indication that the employer’s submissions were weighed and found and found wanting on a balance of probabilities and found wanting.

[162] 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 it the Respondent ought to have been terminated or whether the criteria used to reach its decision were fair and reasonable. If the employer sincerely acted for the reasons given—reasons *other than* the worker’s protected health and safety related activity—even though in the circumstances it may unfair or unreasonable for it to have done so, then I cannot conclude the employer had contravened section 3-35 of the Act. The worker may still have cause for complaint and may have 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.

[163] Where interests and evidence conflict, the issue whether the employer has rebutted the presumption inherently involves an assessment of credibility.

[164] 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.). It held

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

[165] I found the Chair of the Board to be a credible witness. Her demeanour was that of a seasoned, well-qualified and informed member of the Board. Her testimony was clear and forthright, delivered objectively, without embellishment or rancor. She testified that the Board had been apprised, over time, of past and on-going issues involving the Respondent, including those set out in the grounds of appeal. She testified that the Executive Director informed her and the Board about the

May 22, 2014 with regard to the Ministry's dissatisfaction with the Family Support Program. Her testimony that the Board's decision to terminate was based on that information as "the last straw" was clear, unequivocal and unshaken in cross-examination.

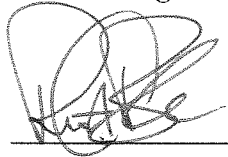
[166] I am fully satisfied that the reasons given for Board's decision to terminate the Respondent's employment are not a pretext, and the decision was not made in whole, or in part for a reason stated in section 3-35 of the Act.

[167] I recognize that the Respondent may feel her dismissal was unfair—that she was unfairly held accountable, and dismissed, for the failings of the Family Support Program, or that the Board behaved improperly in the sense that it reached its decision based on inaccurate or incomplete information. As stated earlier, the jurisdiction of the Act is limited to a determination as to whether the actions taken against the Respondent were discriminatory, in contravention of section 3-35.

CONCLUSION

[168] For the all of the reason stated above, I allow the appeal. The decision of the Officers' in Report 872 dated September 25, 2014 is hereby revoked with the effect that Notice of Contravention 858 dated September 25, 2014 is also revoked.

Dated at Regina, Saskatchewan this 20 day of June, 2015



Rusti-Ann Blanke
Special Adjudicator

Right to appeal adjudicator's decision to board

4-8

(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and

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

...

(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