In the Matter of an Appeal to the Special Adjudicator Pursuant to Section 3-53 of *The Saskatchewan Employment Act, SS. 2013, Chapter S-15.1*

Decision Appealed from: Occupational Health Officer Report 382 June 27, 2014.

Appellant:	Cara Banks
Respondent:	Saskatchewan Federation of Labour
Representing the Appellant:	Larry Kowalchuk
Representing the Respondent:	Ronni Nordal
Representing Canadian Union of Public Employees:	Juliana Saxberg
Representing the Occupational Health and Safety Division:	Joel Bender
Decision Date:	March 31, 2015

Appeal Decision

Introduction

1. Cara Banks ("Banks) has appealed Occupational Health and Safety Report 382 dated June 27, 2014 (the "Report") to an adjudicator pursuant to s. 3-53 and s. 3-54of *The Saskatchewan Employment Act* (the "Act").

2. Banks was an employee of the Saskatchewan Federation of the Labour (the "SFL") for a number of years. The SFL terminated Banks' employment on December 1, 2013. In May 2014, Banks contacted the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace Safety (the "Division") and completed a Discriminatory Action Questionnaire in which she claims the termination of her employment to be "discriminatory action" against her under the Act.

3. On June 27, 2014, an Occupational Health Officer (an "Officer") issued the Report which reads:

> The Occupational Health and Safety Harassment and Discriminatory Action Prevention Unit received your completed questionnaire/complaint on or about May 10, 2014.
>
> You had initially contacted OHS back in September 2012 seeking an investigation into your complaint of harassment while working at the Saskatchewan Federation of Labor. On October 2, 2012 OHS contacted the Vice Presidents of the Saskatchewan Federation of Labor and required that a review of your complaint be conducted. An external investigator was contracted and an investigation into your complaint was conducted.
>
> In May 2014, you submitted a completed Discriminatory Action Questionnaire, as you had been terminated from your position for "Position Abandonment" on December 1, 2013. In this questionnaire the question was asked whether or not you wish to return to this workplace. You answered "no". On May 22, 2014, you were contacted by Officer

McKay advising that OHS could not proceed with your complaint of discriminatory action if you did not wish to return to the workplace. At this time you stated that you would return. Mr. McKay then asked for an email from you stating this.

On June 2, 2014, OHS received correspondence from your legal counsel Kowalchuk Law Office, stating the following: "please be informed that, pursuant to the sections of the S.E.A. as cited below, Ms. Banks is not formally seeking the reinstatement element of the remedy".

Please be advised that an OHS Officer does not have the ability to select a remedy that differs from the legislation. The complainant must be willing to return to the workplace and her former position if the discriminatory action complaint investigation is ruled in her favor. As Ms. Banks is not seeking the reinstatement element of the remedy OHS cannot be further involved and the file is deemed closed.

4. By letter of July 24, 2014, Larry Kowalchuk submitted an appeal (the "Notice of Appeal") on Ms. Banks' behalf:

> The letter to Ms. Banks was received via registered mail on July 7, 2014. Please accept this as formal notice of appeal of the letter which has a date of June 27, 2014 listed as the "Date of Inspection" and therefore a request to appoint an adjudicator in accordance with Part IV.
>
> It is unclear as to who the persons are that are directly affected by the decision since we are unaware of who this letter was sent to and/or copied on. It is also not within our knowledge whether or not the employer was contacted as part of the 'investigation'.
>
> The employer is the Saskatchewan Federation of Labour as stated in your letter.
>
> The decision was [sic] that the OH&S department does not have authority to grant a remedy for a discriminatory action unless all aspects of the remedy are being sought by the complainant is contrary to law and the principles of natural justice. This concept would require that even those who suffer discriminatory action for filing a complaint under the OH&S Act and who are partially and/or permanently disabled by that action and are in fact medically unable to return to work in the exact work location under the exact supervisor who engaged in that action are not entitled to any remedy under the OH&S Act.
>
> The corollary is that an employer can punish an employee to the point of medical harm like that stated above if they file an OH&S complaint that is in fact valid (as was the case with Ms. Banks) and therefore avoid the statute. They can in fact terminate an employee as a consequence of filing a valid complaint (the facts of Ms. Banks's case) and avoid the OH&S Act all together.
>
> Additionally, the impact of this letter decision is such that it would remove the right of all employees to seek remedies for discriminatory action up to and including termination for filing a valid complaint unless they agree to all possible remedies, therefore removing choices which serve their natural justice rights and is potentially contrary to their medical and real interests.
>
> We request that an order be issued requiring the employer to offer the remedies available to Ms. Banks pursuant to the OH&S Act.
>
> If you require any additional information please do not hesitate to contact our office.

5. I am the adjudicator assigned to the appeal. Initially there was a preliminary issue about whether the appeal was filed in time. The Division could not locate the Notice of Appeal or any record of having received the document dated July 24, 2014. This issue was later resolved when, after further inquiry, the Division located the July 24, 2014 Notice of Appeal letter stamped to show it had been delivered to

the Division on July 24, 2014. Everyone now agrees the appeal was indeed filed within statutory timelines.

6. The Canadian Union of Public Employees ("CUPE") is the bargaining agent for the employees of the SFL and Banks was a member of the bargaining unit. CUPE has been involved in other proceedings with respect to Banks' employment with the SFL. I advised CUPE of the appeal in the event CUPE wished to make submissions on whether the union should have standing in the appeal. Ms. Saxberg, for CUPE, asked that CUPE be kept informed of steps in the appeal but advised that at this stage of the proceeding, CUPE was not interested in seeking standing. I have kept CUPE informed of steps in the process. CUPE has not made any submissions.

7. Through the prehearing process, the parties agreed to the following question for determination:

> **Was the occupational health officer correct in concluding that under s. 3-36 of the Saskatchewan Employment Act an occupational health officer does not have jurisdiction to investigate a claim of discriminatory action or make a finding that discriminatory action has taken place if the worker claiming discriminatory action is not seeking reinstatement as a remedy?**

8. Since this is a question of interpretation of the legislation, the parties agreed I could refer to the Division's file for the background to the case and that otherwise there was no need to call evidence. The parties agreed to prepare and exchange written briefs and I then held a telephone conference call for final oral submissions. Banks and the Division each filed a written brief. The SFL advised me that they would not be filing a brief on this question but would otherwise reserve the right, should I determine the Officer was obliged to investigate the complaint, to challenge the Officer's jurisdiction to investigate at that level on other grounds. CUPE asked to receive notice of the steps in the process. Banks reserved the right, in the event I determined the Officer was not obliged to investigate the complaint, to call evidence to establish she was indeed seeking the reinstatement remedy. The appeal proceeded on that basis.

Standard of Review

9. In *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, the Supreme Court of Canada merged the deferential standards of review of administrative tribunals into one unified standard of reasonableness, leaving a reviewing tribunal or court to determine whether the standard of review in any particular situation attracts the reasonableness standard or the correctness standard. The question here is one of interpretation of the legislation. The parties agreed that in these circumstances, where the answer to the interpretative question determines whether the Officer has jurisdiction to undertake a discriminatory action complaint, the standard of review is correctness. I agree.

Division's Position

10. The Division's brief consists of a letter to provide clarification about the manner in which the Division administers complaints of discriminatory action. The letter reads:

> Further to the direction contained within your January 18, 2015 email, this correspondence is submitted to provide clarification as to the manner in which the Occupational Health and Safety Division administers complaints of discriminatory action where a complainant indicates an unwillingness to return to employment and workplace.
>
> Subsection 3-36(2) of *The Saskatchewan Employment Act* provides that where an Occupational Health Officer (OHO) has determined that employer has taken a discriminatory action against a worker, a notice of contravention is to be issued that orders:
>
> a) a cessation of the discriminatory action;
>
> b) reinstatement of the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;
>
> c) payment of wages that would have been earned had the discriminatory action not occurred; and
>
> d) removal of any reprimand or other reference to the matter from any employment record maintained by the employer regarding the subject worker.
>
> The OHO cannot award damages. The legislation provides for a particular set of instructions that the OHO can give to employer. One of these instructions cannot be given in the absence of the other. For example, payment of lost wages cannot be ordered in the absence of an order to return to employment. As such, if a worker does not wish to return to the workplace, the notice of contravention noted above cannot be used as the OHO is unable to properly apply the mandatory provisions of the Act.
>
> Attached for your reference is a recently issued decision of an adjudicator appointed pursuant to occupational health and safety legislation that considers this issue.

11. The decision attached is a decision of a Special Adjudicator in *L.B. v. Sunrise Health Region* dated September 12, 2014.

Banks' Position

12. Banks' counsel submits:

- The interpretation of a statute requires that each provision be interpreted in the context of the statute as a whole, and to promote its purposes, intentions and consistency. The definition of "occupational health and safety" in s. 3-1(1)(o) and the general duties of employers in s. 3-8 reflect the statutory purpose and obligations on employers to protect and promote the occupational health and safety of workers. The Division is charged with those obligations as well.
- The Act's purpose is to promote voluntary compliance and peaceful resolution using mediation as opposed to punitive measures. For example, the obligation of the Officer to consider mediation before issuing a notice of contravention (similar to an adjudicator's obligation to mediate before convening a hearing pursuant to s. 4-5(2)(a)(b)) is reflected in s. 3-29(4).

- The purpose of the Act is to enforce its provisions to protect against discriminatory action (see section 3-35) and it is an offense under the Act enforceable through an investigation and in fact, court proceedings.
- Section 3-37 is identical to section 3-36 as it relates to the Court of Queen's Bench and the jurisdiction of a judge to order the same remedies. The position of OH&S in this matter would suggest that a judge of the Court of Queen's Bench could refuse to convict an employer for contravening section 3-35 if a complainant is medically unable to accept reinstatement.
- Section 3-38 requires a notice of contravention to be issued and contains no discretion on issuing that order; therefore to read this in a manner that is consistent with section 3-36, the Officer must issue the order to comply with 3-38.
- The onus is on the Officer to serve a notice of contravention. The Officer has the authority to order the employer to reinstate, and if the Officer does issue a Notice of Contravention to that effect, the employer is legally obliged to do so.
- Nowhere does the statute state that the complainant is required to request reinstatement, nor to accept it, should it be ordered. The Act does not suggest that a complaint is invalid because the complainant is not seeking all of the remedies available.
- If the Officer is required to order reinstatement as a remedy, it is presumptive to assume that the worker and employer would necessarily implement the reinstatement proper, particularly in light of the circumstances that could be said to typically accompany terminations for exercising one's rights under the Act (i.e., complaining of workplace harassment). Furthermore, whether or not the complainant wishes to return to the workplace at the time she files the complaint is not necessarily indicative of how she will feel by the end of an investigation into the matter.
- That the Officer does not have authority to grant a remedy for a discriminatory action unless all aspects of the remedy are being sought by the complainant is contrary to law and the principles of natural justice. This concept would require that even those who suffer discriminatory action for filing a complaint under the Act and whom are partially and/or permanently disabled by that action and are in fact medically unable to return to work in the exact work location under the exact supervisor who engaged in that action are not entitled to any remedy under the Act.
- The corollary is that an employer can punish a worker to the point of medical harm like that stated above if the worker files a valid complaint (as was the case with Ms. Banks) and therefore avoid the statute. The employer can terminate a worker as a consequence of filing a valid complaint (the facts of Ms. Bank's case) and avoid the Act all together.

- Removing the right of all workers to seek remedies for discriminatory action up to and including termination for filing a valid complaint unless they agree to all possible remedies before the investigation even begins, removes choices which serve their natural justice rights and could potentially be contrary to their medical and health and safety interests.
- Section 3-39 and 3-40 indicate that, once a notice of contravention has been issued, the Officer "if practicable" give the employer a choice of different ways of remedying the contravention, i.e. as mentioned above an alternative to reinstatement that is acceptable to the complainant and the employer.
- Section 3-78(e) makes it an offense for an employer to take discriminatory action against a worker contrary to section 3-35. The Division's position would say they could add an amendment which essentially says "only unless the complainant enforces a reinstatement order". There is no authority to amend the Act.
- The Discriminatory Action Complaint Questionnaire the Division requires the complainant to fill out asks, "If you are no longer working at this workplace, do you want to return to this workplace? Yes or No". It does state that the complaint becomes null and void should you answer that you do not want to return.
- The Questionnaire then asks: "What do you view as an appropriate resolution to this situation?" indicating that there is a great deal of flexibility in how complaints might be resolved under the Act. Note that the complainant in this case answered: "I want all of the remedies available to me under the Act, including but not limited to: ...mediation to discuss rectification and restitution". It is from this remedy that a decision about reinstatement proper had to occur so that the complainant could assess whether the possibility that a return to work was within her health and safety interest and whether or not the employer was prepared to have her back under the circumstances.
- Forcing a worker back into a workplace which she has consistently complained is toxic and damaging to her health, and when she has requested mediation at the Department's invitation to ask for desired remedies, appears contradictory to the Act's objectives.
- At this stage of the proceeding we have to assume the employer has terminated the complainant for exercising rights under the Act, therefore constituting a discriminatory action. The effect of the Division's argument would be to reward or encourage employers to take discriminatory action in such a way as to make it, even if medically determined not to be in the best interests of the complainant's health and safety, acceptable to do so. It also suggests that workers who are terminated contrary to law, including a collective agreement, who rightfully seek an order for reinstatement and monetary loss (which is one of the other remedies) cannot change their

minds and instead negotiate with the employer a settlement in lieu of reinstatement. It also removes the ability of the employer to propose a settlement that they consider to be in their best interests in not having the worker reinstated. This is a very common resolution to reinstatement orders in the labour relations field. The Division's position, if adopted would have the effect of establishing a legal principle that unless you take the remedies ordered by an adjudicator or court of law in any proceedings, all remedies become null and void and the jurisdiction to award them on the premise that you will enforce them is ousted.

Analysis

13. The question before me is this:

> **Was the occupational health officer correct in concluding that under s. 3-36 of the Saskatchewan Employment Act an occupational health officer does not have jurisdiction to investigate a claim of discriminatory action or make a finding that discriminatory action has taken place if the worker claiming discriminatory action is not seeking reinstatement as a remedy?**

14. This is a question of statutory interpretation. Today Driedger's "modern principle of interpretation" (as stated in *The Construction of Statutes, 2nd ed.,* 1974 at 67) is the starting point in any interpretative exercise:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

15. At page 105, Driedger elaborates on the steps in the interpretive exercise which may be drawn from the Supreme Court of Canada decisions adopting what is now referred to as "the modern method of interpretation":

> The decisions examined thus far indicate that the provisions of an enactment relevant to a particular case are to be read in the following way:
>
> 1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
> 2. The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.
> 3. If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them.
> 4. If, notwithstanding that the words are clear and unambiguous when read in their grammatical and ordinary sense, there is disharmony within the statute, statutes in pari materia, or the general law, then an unordinary meaning that will produce harmony is to be given the words, if they are reasonably capable of bearing that meaning.

5. If obscurity, ambiguity or disharmony cannot be resolved objectively by reference to the intention of Parliament, the object of the Act or the scheme of the Act, then a meaning that appears to be the most reasonable may be selected.

16. Beginning with the first step, the provisions in question are found in Part III of the recently enacted (April 29, 2014) *Saskatchewan Employment Act, 2013.* They replace the former *Occupational Health and Safety Act, 1993.* Part III contains a full array of provisions intended to promote and protect "occupational health and safety" which is defined in s. 3-1(1)(o) as:

> "occupational health and safety" means:
>
> (i) the promotion and maintenance of the highest degree of physical, mental and social well being of workers;
>
> (ii) the prevention among workers of ill health caused by their working conditions;
>
> (iii) the protection of workers in their employment from factors adverse to their health;
>
> (iv) the placing and maintenance of workers in working environments that are adapted to their individual physiological and psychological conditions; and
>
> (v) the promotion and maintenance of a working environment that is free of harassment;

17. s. 3-1(1)(gg) defines "worker" as

> (i) an individual, including a supervisor, who is engaged in the service of an employer; or
>
> (ii) a member of a prescribed category of individuals;
>
> ...

18. s. 3-1(1)(j) defines "employer" as

> Subject to section 3-29, a person, firm, association or body that has, in connection with the operation of a place of employment, one or more workers in the service of the person, firm, association or body;

19. The SFL was a body operating a place of employment with one or more workers in its service. Banks was a worker under the Act. She was engaged in the service of the SFL.

20. s. 3-8 of the Act imposes general duties on employers:

> Every employer shall:
>
> (a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers;
>
> (b) consult and cooperate in a timely manner with any occupational health committee or the occupational health and safety representative at the place of employment for the purpose of resolving concerns on matters of health, safety and welfare at work;
>
> (c) make a reasonable attempt to resolve, in a timely manner, concerns raised by an occupational health committee or occupational health and safety representative pursuant to clause (b);
>
> (d) ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment with respect to any matter or circumstance arising out of the workers' employment;
>
> (e) cooperate with any other person exercising a duty imposed by this Part or the regulations made pursuant to this Part;

(f) ensure that:

(i) the employer's workers are trained in all matters that are necessary to protect their health, safety and welfare; and

(ii) all work at the place of employment is sufficiently and competently supervised;

(g) if the employer is required to designate an occupational health and safety representative for a place of employment, ensure that written records of meetings with the occupational health and safety representative are kept and are readily available at the place of employment;

(h) ensure, insofar as is reasonably practicable, that the activities of the employer's workers at a place of employment do not negatively affect the health, safety or welfare at work of the employer, other workers or any self employed person at the place of employment; and

(i) comply with this Part and the regulations made pursuant to this Part.

21. Section 3-9 imposes similar duties on supervisors and s. 3-10 imposes general duties on workers:

Every worker while at work shall:

(a) take reasonable care to protect his or her health and safety and the health and safety of other workers who may be affected by his or her acts or omissions;

(b) refrain from causing or participating in the harassment of another worker;

(c) cooperate with any other person exercising a duty imposed by this Part or the regulations made pursuant to this Part; and

(d) comply with this Part and the regulations made pursuant to this Part.

22. Part III also requires the creation of occupational health committees and the designation of occupational health and safety representatives. It includes the worker's right to refuse dangerous work and prohibits discriminatory action. It covers circumstances where Officers are authorized to and required to undertake investigations and issue notices of contravention.

23. This overview of the legislation signals the overall intention of the legislature to ensure the health and safety of all workers in all workplaces. The specific words in this case must now be examined with this intention in mind. Bank's complaint of discriminatory action was brought under Section 3-35 of the *Act,* which protects a worker from discriminatory action because the worker seeks or has sought the enforcement of the Act:

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.

24. "discriminatory action" is defined in s. 3-1(1)(i):

"discriminatory action" means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes 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, but does not include:

...

25. s. 3-36 sets out the process where a worker believes the employer has taken discriminatory action:

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 of the reasons for that decision in writing.

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

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

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

(5) The amount of money that an occupational health officer may require to be paid pursuant to clause (2)(c) is to be reduced by an amount that the officer is satisfied that the worker earned or should have earned during the period when the employer was required to pay the worker the wages.

(6) The employer has the onus of establishing the amount of the reduction mentioned in subsection (5). [emphasis added]

26. There is no dispute that Banks brought a complaint of discriminatory action under s. 3-35 of the Act. The SFL terminated her employment and she claims the termination is discriminatory action. Under s. 3-35, an Officer is required to investigate the complaint of discriminatory action.

27. The Division interprets s. 3-36(2) to require that a worker may not avail themselves of the complaint process unless the Officer is able to give **all** the instructions in the subsection to the employer. In the case of a termination, the Division says the worker cannot avail themselves of the complaint process unless the worker asks for reinstatement because the Officer cannot grant the other remedies and not grant reinstatement.

28. The Division refers to *L.B. v. Sunrise Health Region,* where the Special Adjudicator said this about the predecessor to s. 3-36(2) in the former *Occupational Health and Safety Act, 1993:*

> The remedial relief in section 28(2) of the Act is mandatory. That is, where an Officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 27, the Officer is required to issue a Notice of Contravention requiring all of the remedial relief in section 28(2) (a) to (d). Where a worker has resigned or does not seek reinstatement to their former position, not only are the mandatory remedies rendered redundant, the Officer is, in effect, unable to properly apply the mandatory provisions of the Act. In such circumstances, it would have been counter-productive for the Officer to proceed with an investigation of the discriminatory action complaint, nor would it have served the remedial purpose and intend of the legislation for the Officer to have done so.

29. The special adjudicator in the *L.B.* case took a literal approach to interpretation of s. 3-36(2). The Division takes the same approach. On a literal reading of s. 3-36(2), if the Officer decides an employer has taken discriminatory action, the

officer "shall serve a notice of contravention". In its grammatical and ordinary sense, this language would suggest the Officer must service a notice of contravention if there has been discriminatory action. The section then goes on to require that the notice of contravention so served require the employer to do a list of things. The word "and" appears between (c) and (d) in this list. In its grammatical and ordinary sense, the word "and" suggests the notice of contravention must include all four items in the list. If the analysis were left at this grammatical level, then, no matter what the circumstances, the Officer finding discriminatory action would be forced to issue a notice of contravention containing all four items listed in s. 3-36(2). This is the Division's approach. Indeed, the Division goes even further and suggests that if the Officer would not be able to grant all four remedies listed, then the Officer is not authorized to even investigate the complaint of discriminatory action.

30. Viewed in isolation without reference to the remainder of the Act, the words of s. 3-36(2) are clear and unambiguous and in isolation would mean that if an Officer finds discriminatory action, the Officer must issue a notice of contravention that includes all four remedies listed. This interpretation, however, creates disharmony within the Act, ignores the legislative intention to ensure healthy and safe workplaces and leads to absurd results.

31. "discriminatory action" is defined to include:

> ...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.

If all four of the remedies must be possible before an Officer will investigate discriminatory action, then an Officer will never be able to investigate many forms of discriminatory action because the worker will not be seeking reinstatement or payment of wages. For example, if a worker received a written reprimand, reinstatement and payment of wages would not be remedies the worker would be seeking. If the Division's interpretation is accepted, then the Officer to whom the worker complains under s. 3-36(1) would be precluded from investigating the complaint because the Officer could not grant all four of the required remedies. This would apply equally to the other circumstances included in "discriminatory action". This cannot have been the legislature's intention because it would mean numerous instances of discriminatory action would never be investigated and remedies would never be available to numerous workers.

32. Another absurd result if the Division's interpretation is accepted is that employers could breach the Act through occupational health and safety violations including harassment under the Act and when the worker complains, the employer could terminate the worker with impunity. To force a worker to ask for reinstatement as a prerequisite to investigation of a discriminatory action complaint would mean the worse an employer treated a worker, the less likely the employer would ever be held accountable for breaches of the Act because the workers would never want to return to that workplace. That cannot have been the legislative intention. I am also mindful here of Mr. Kowalchuk's point that there may also be circumstances

where, because of workplace bullying or otherwise, a worker is not medically able to return to the workplace. Again, the legislature cannot have intended that a worker be deprived of the right to complain and, if discriminatory action is found, the right to a remedy, because the worker cannot return to the workplace.

33. With the enactment of s. 3-35 and s. 3-36, the legislature signaled its intention to protect workers from discriminatory action for having done any of the things listed in s. 3-35(1) which contains a long list of possible reasons why an employer might take discriminatory action against a worker. Likewise, the definition of discriminatory action is detailed and wide reaching and also signals the legislature intended to capture a wide-ranging list of possible activities of the employer. The legislature having thoroughly listed the possible reasons for discriminatory action and the actions that constitute discriminatory action, it is incongruous to suggest that the legislature intended the only time an Officer could ever investigate a complaint of discriminatory action is where the worker is seeking and can be granted all four remedies listed in s. 3-36(2). To suggest this is the proper interpretation creates disharmony within the Act because much of s. 3-35 and s. 3-36 would be rendered ineffective. This cannot have been the legislative intention.

34. In accordance with the Driedger approach then, in the face of clear words that create disharmony with the Act, fly in the face of the legislative intent and lead to absurd results, one must look for an unordinary meaning that will produce harmony.

35. Considering the objective intention of the legislature as determined from a review of the whole Act, in particular Part III and again in particular ss. 3-35 and 3-36, the only reasonable interpretation of s. 3-36(2) is that the legislature intended to list the possible remedies available in circumstances where an Officer has found discriminatory action. If a worker refers a matter to an Officer under s. 3-36(1), the threshold for investigation by the Officer is whether the worker has reasonable grounds to believe the employer has taken discriminatory action for a reason mentioned in s. 3-35. The Officer must then investigate the matter and decide whether discriminatory action has occurred. The section does not say the Officer is required to investigate only those matters where the worker is asking for all four remedies or only those matters where the Officer can say at the outset that all four remedies will be available to the worker if the complaint is successful. The section does not say that unless a worker who has been terminated is seeking reinstatement, they are not entitled to the protection of the Act. Had such a significant exception from protection of the Act been intended, the legislature would have said so. It does not say the Officer is restricted to investigating only those cases where a worker is seeking reinstatement or only those cases where if discriminatory action is found the Officer will be in a positon to order all four remedies.

36. As I have already said, the Division's interpretation would lead to several absurd results and thwart the legislative intention. The proper interpretation of s. 3-36(2) is that if the Officer decides the employer has engaged in discriminatory action, then the Officer must issue a notice of contravention requiring the employer to remedy the matter. The possible remedies available are those listed in s. 3-36(2). If a

remedy is not listed in the section, it will not be available, but those listed are. Not all remedies will be possible or warranted in every case. This is the only reasonable interpretation of the provisions in light of the scheme and object of the Act. To find otherwise would be to render the discriminatory action provisions of the Act virtually meaningless.

Conclusion and Order

37. Applying the correct interpretation of the Act, the Officer was not correct in concluding that under s. 3-36 of the Saskatchewan Employment Act an occupational health officer does not have jurisdiction to investigate a claim of discriminatory action or make a finding that discriminatory action has taken place if the worker claiming discriminatory action is not seeking reinstatement as a remedy. The officer should have investigated Banks' complaint of discriminatory action and if the Officer found discriminatory action occurred, at that point the Officer should have considered which of the possible remedies under s. 3-36(2) was appropriate and included those remedies in the notice of contravention.

38. In the result, I order as follows:

    a. Ms. Banks' appeal is allowed;

    b. Occupational Health Officer Report 382 is hereby set aside;

    c. Ms. Banks' case is remitted to the Division for investigation and decision. It is for the Officer who investigates the case to determine whether discriminatory action has occurred and if so what remedies are available to Ms. Banks.

Anne M. Wallace, Q.C.
Special Adjudicator
March 31, 2015

In the Matter of an Appeal to the Special Adjudicator

Pursuant to Section 56.3(1) of

The Occupational Health and Safety Act, s.s.1993, c.0-1.1, as amended

L.B.

Appellant/Worker

- and –

Sunrise Health Region

Respondent/Employer

For the Appellant/Worker:	Self-represented
For the Respondent/Employer:	Eileen Libby. Q.C., MacPherson Leslie & Tyerman LLP
Decision Appealed:	Occupational Health Officer decision letter dated August 14, 2013
Hearing by teleconference:	July 15, 2014

DECISION

Introduction

[1] The Appellant, submitted a complaint dated June 4, 2013 to the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace Safety against her employer, Sunrise Health Region ("SHR"). In the complaint, the Appellant alleged harassment by the employer's Senior Human Resources Manager, the Manager of Primary Health Care and four named members of SHR's Senior Leadership team. The Appellant also alleged that the employer had taken discriminatory action against her because she had lodged multiple complaints of harassment against the physician and office staff of the Women's Wellness clinic with whom she worked, as well as the aforesaid individuals.

[2] By a decision letter dated August 14, 2013, the investigating occupational health officer (the "Officer") advised, based on two emails received from the Appellant on August 10 and August 11, 2013, that her discriminatory action complaint investigation file would be closed. The Officer stated:

> "Where a worker resigns from their position or does not wish to return to their former position, this removes the ability of the Officer to follow through with a discriminatory action investigation. As a result of this I am required by the legislation to close your file".

[3] The Appellant now appeals the decision of the Officer on the grounds that the file was closed in error, based on miscommunication between herself and the Officer.

Background

[4] The Appellant was (and is) employed by the Sunrise Health Region ("SHR"). The Appellant had been conducting her patient-centred duties as a Nurse Practitioner at the Women's Wellness Centre (the "Clinic") in Yorkton, Saskatchewan since March 5, 2012.

[5] Although this appeal does not concern the merits of the Appellant's discriminatory action complaint itself, an overview of the background and process may be helpful.

[6] The Appellant alleged that after reporting multiple OH&S and patient safety concerns, she was subjected to harassment by the Clinic physician and her office staff. The Clinic physician is contracted to the health region, and the Clinic's office staff were employees of the physician. The Appellant reported the alleged harassment to the employer on or about September 24, 2012.

[7] In response, the employer engaged an external mediator to address interpersonal conflict in the workplace. Some sessions were held with various pairings of those involved in November and December, 2012, but before group sessions were held, the mediation process was deferred. One reason for the deferral appears to have been due to the distraction of the expired physician/office staff contracts for which negotiations were outstanding. It also appears that physician and staff contract negotiation did not begin until January, 2013 and was still outstanding as of May 10, 2013, with mediation 'on hold' in the meantime. However, in the interim, the Manager of Primary Health Care was reassigned to work out of the Women's Wellness clinic essentially acting as a resource and accessible intermediary in the event the Appellant had on-going or future concerns or issues that needed to be conveyed to the clinic physician or her staff.

[8] On March 13, 2013, while on medical leave which commenced on March 8, the Appellant reported to the employer and/or filed a complaint that the harassment had been on-going and escalating. She requested the fulfillment of promises made to her on December 21, 2012 that action would be taken, an investigation and the assignment of temporary support staff until the conflict was resolved. In response, the employer offered to relocate the Appellant pending resolution of her concerns, which the Appellant declined.

[9] Against her physician's recommendation, the Appellant returned to work on April 3rd and resumed her duties on a graduated basis apparently of her own design, until May 6, 2013. At that time, on the basis that her employer had taken no action to discipline the offending persons, the Appellant left work due to severe stress, filed a WCB claim and submitted another harassment complaint (May 9, 2013) against two staff of the Women's Wellness Centre and their employer, the clinic physician.

[10] Two weeks later, the Appellant elected to return to work before her WCB claim had been adjudicated. On May 16, 2013, the Appellant was advised by the Director of Primary Care that she would not be able to return to the Women's Wellness Centre pending the resolution of workplace issues. Arising primarily from this and related events surrounding the Appellant's return to work on May 21, 2013, the Appellant complained of harassment by the Senior Human Resource Manager and the Manager of Primary Health Care. (A formal complaint against the same two individuals was dated August 2, 2013). Upon the Appellant's return to work on May 21, 2013, the employer advised the Appellant that she would be relocated to a different work location in Yorkton, with reassigned duties. It is this action that is the basis for the Appellant's allegation of discriminatory action by the employer.

[11] For purposes of the Appellant's discriminatory action complaint to OH&S, the operative section is section 28(1):

> 28(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 27 may refer the matter to an occupational health officer.

[12] Pursuant to the "reverse onus" clause in section 28(4), in circumstances where an employer has taken discriminatory action for a reason mentioned in section 27, there is a presumption in favour of the worker that the discriminatory action was taken *because* the worker acted or participated in a protected section 27 activity. The onus is on the employer to establish that the discriminatory action was taken for good and sufficient reason other than the worker's section 27 activity. Section 28(4) of the *Act* states:

> 28 (4) Where discriminatory action has been taken against a worker who has acted or participated in an activity described in section 27, there is, in any prosecution or other proceeding taken pursuant to this Act, 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 27, and the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason.

[13] The Officer appears to have satisfied himself that the Appellant sought enforcement of the Act by lodging complaints of harassment and, therefore, had reasonable grounds to believe that the employer had taken discriminatory action against her for a reason mentioned in section 27 of the Act, since he initiated an investigation of the complaint. That is, the Officer initiated contact with the employer and then delivered an Officer's Report (OR-TMC-0229) dated July 5, 2013, attaching sections 27 and 28(4) of the Act, with a formal request that the employer provide good and sufficient reasons for the actions taken against the Appellant. However, the Officer also acknowledged the employer's advice that investigation by an independent third party was underway with anticipated completion date of August 31, 2013. For that reason, the Officer requested a response to his request for "good and sufficient reasons" by September 9, 2013, some two months hence.

[14] On July 24, 2013, the Appellant emailed the Officer expressing disappointment that the Officer had agreed to the aforementioned due date and requesting, in the meantime, that the Officer issue a Notice of Contravention directing the employer to cease the discriminatory action and reinstate her to her previous position. The Officer responded, in effect, that he could not address those issues until he had completed his investigation and was in a position to render his decision, i.e., after the employer completed its investigation and provided their reasons for the actions taken against the Appellant.

[15] On August 10, 2013, the Appellant sent the following email to the Officer:

> Hello,
>
> I am sad to report that due overwhelming [sic] stress associated with the harassment and subsequent employer retaliation, I will be resigning my Nurse Practitioner position at the Women's Wellness Centre…Although I would have liked to continue with my role at the centre, I can no longer tolerate the abuse or the stress that comes with the fight.
>
> I hope you will continue to investigate my complaints.
>
> I can be reached via email or by phone.
>
> Thank you for all that you have done to date.

[16] On August 11, 2011, the Appellant sent a follow-up email to the Officer:

> Sorry, I forgot to mention that I am not leaving the health region yet. I have applied for a transfer to a NP position in Foam Lake.

[17] In a decision letter dated August 14, 2013, the Officer wrote to the Appellant:

I have received your email indicating that you have resigned your position as a Nurse Practitioner with the Sunrise Health Region.

Section 27 of the Act (attached) is the Occupational Health and Safety legislation under which you were enabled to make your complaint of discriminatory action. In this Act there is a statement that allows an Officer to require a complainant reinstated in their position. This can only be done once the Officer has investigated the situation and made a decision in favour of the Appellant by finding the employer in contravention of the legislation.

Where a worker resigns from their position or does not wish to return to their former position, this removes the ability of the Officer to follow through with a discriminatory action investigation. As a result of this, I am required by the legislation, to close your file.

POSITION and SUBMISSIONS OF THE PARTIES

Appellant

[18] The Appellant submits via Notice of Appeal that the Officer did not contact her to clarify or confirm her employment status prior to her file being closed and argues that the Officer had an obligation to do so. The Appellant submitted that she was not aware, nor was she notified that if she sought a change in employment, that her file would be closed. The Appellant confirmed that she applied for a transfer (and ultimately did transfer) to another position within the same health region, but argued that as of the date she filed her Notice of Appeal (August 22, 2013), she maintained her original position as Nurse Practitioner at the Women's Wellness Centre. The Appellant further argued that the applicable legislation doesn't apply only to workers wanting to be reinstated.

Respondent

[19] On behalf of the Respondent, it is argued that the Officer's decision to close the file was based on two factors: the Appellant's express intention to resign her position as a Nurse Practitioner at the Women's Wellness Centre in Yorkton, in favour of a transfer to Nurse Practitioner position in Foam Lake and that the Appellant did not wish to return to the Women's Wellness Centre in Yorkton. The Officer's decision should stand.

REASONS AND FINDINGS

[20] I am unable to assess how, or whether, the Officer explained the discriminatory action complaint investigation process, but it is clear the Appellant made assumptions that led to unmet expectations. For example, based on the Notice of Appeal, it appears that the Appellant expected the Officer to conduct an investigation of the Appellant's harassment complaint. Further, upon

learning (and expressing disappointment) that the Officer had agreed, pending the anticipated completion date of the harassment investigation, to allow the employer two months to provide good and sufficient reason(s), the Appellant requested the Officer to issue a Notice of Contravention and direct the employer to reinstate her to her former position (location).

[21] The Officer's investigative procedures, decisions made and the timing of steps taken are not matters within my jurisdiction, nor are they matters at issue in this appeal. However, in my view, obtaining the harassment investigation report is an important part of the Officer's investigative process, and it is not at all unusual for the investigation of harassment complaints and preparation of an investigative report to take several months. Nor, might I add, is it unusual for an employer to take reasonable, interim, preventative steps pending completion of the investigative process to ensure workers are not exposed to on-going harassment. It is, in fact, the employer's statutory obligation to do so pursuant to section 3(c) of *The Occupational Health and Safety Act, 1993.* While a prudent employer might seek the consent of a worker before making significant changes to job duties or location pending the complaint investigation to avoid the appearance of retaliation, it is not a statutory requirement to do so. However, these are not issues for my determination in this appeal.

[22] Turning to the issue at hand, the Appellant argued that the Officer did not call to clarify or confirm her employment status and had an obligation to do so. I disagree. The Appellant's employment status was not at issue. It is clear from the Appellant's two emails that she had applied for a transfer and that she expressed the intention to resign from the position to which she had sought reinstatement in her complaint to OH&S.

[23] The Appellant further argues that she was not aware, nor was she notified that a change in her employment would result in her file being closed. While it may be implied, it was not submitted that had the Appellant been aware, or been notified, she would not have applied or would have withdrawn her application for a transfer. The Appellant *was* aware that while the transfer was pending (and could potentially be cancelled), she maintained her original position as Nurse Practitioner at the Women's Wellness Centre, albeit in a different location and with different job duties. Although the Appellant subsequently asserted in her Notice of Appeal that she still wished to be returned to her previous position [location and duties], that is not what she stated in her August 10th email: *"Although I would have liked to continue with my role at the centre, I can no longer tolerate the abuse or the stress that comes with the fight"*

[24] It seems clear from the August 14 decision letter that the Officer's conclusion that he was unable to proceed with the Appellant's discriminatory action complaint was based on her advice that she had, in effect, resigned or expressed an intention to resign and, importantly, she had given him reason to believe that she was not longer pursuing reinstatement. Had I any reason to doubt the sufficiency of the Appellant's statement (above) in that regard (and I do not), it would have been removed by the Appellant's submissions on appeal: that "for her health", she didn't think she could ever be returned to her former position and that the legislation doesn't apply only to workers wanting to be reinstated. Yet she "hoped" that the Officer would continue his investigation.

[25] I find that the Appellant did not wish to be reinstated at the time the Officer made his decision and does not now wish to be reinstated. The Appellant chose then to apply for a transfer to another locality within the health region rather than pursue reinstatement to a work environment she regarded as toxic. The Appellant's application for transfer came to fruition after the within appeal was lodged. As a practical matter, the Appellant has been employed in her new Nurse Practitioner position for nearly a year. In my view, on all the evidence, at the core of this appeal is not reinstatement, but the Appellant's desire for an investigation and decision that the employer's discriminatory action against her was wrongful.

[26] The remedial relief in section 28(2) of the Act is mandatory. That is, where an Officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 27, the Officer is required to issue a Notice of Contravention requiring all of the remedial relief in section 28(2)(a) to (d). Where a worker has resigned or does not seek reinstatement to their former position, not only are the mandatory remedies rendered redundant, the Officer is, in effect, unable to properly apply the mandatory provisions of the Act. In such circumstances, it would have been counter-productive for the Officer to proceed with an investigation of the discriminatory action complaint, nor would it have served the remedial purpose and intent of the legislation for the Officer to have done so.

Conclusion

[27] In accordance with the statutory remedies provided to a special adjudicator under section 53(1), I affirm the decision of the Officer for all of the reasons stated above.

Sept 12, 2014

Rusti-Ann Blanke
Special Adjudicator

Right of Appeal

This decision may be appealed to the Court of Queen's Bench subject to section 56(1) of *The Occupational Health and Safety Act, 1993 which states:*

Appeals to Court of Queen's Bench

56 (1) A person who is directly affected by a decision of an adjudicator may appeal to the Court of Queen's Bench:

(a) a decision of an adjudicator on a question of law or a question of jurisdiction; and

(b) a decision of an adjudicator in relation to section 33.

(2) A person who is directly affected by a decision of an adjudicator and who wishes to appeal that decision shall file the appeal within 15 business days after the date of service of the decision of the adjudicator.

(3) A notice of appeal is to be served on:

(a) the director; and

(b) the other parties to the proceedings before the adjudicator.