

IN THE MATTER OF an appeal pursuant to subsection 3-53(1) and 3-54(1) with respect to the decision of an Occupational Health and Safety Officer pursuant to *The Saskatchewan Employment Act*.

RH

APPLICANT

-and-

Kelsey Trail Health Region

RESPONDENT

-and-

Director of Occupational Health and Safety
Ministry of Labour Relations and Workplace Safety

RESPONDENT

For the Applicant: Self-represented with HSAS union representative, Kevin Glass

For the Respondent, Kelsey Trail Health Region: Tim Hobbins, Manager, Labour Relations, Kelsey Trail Health Region and Renee Claypool, Director, Human Resources, Kelsey Trail Health Region

Introduction and Background

1. This is an appeal by RH of the Occupational Health Officers' decision dated December 11, 2014 (Exhibit P) in regards to a harassment complaint involving her immediate in scope supervisor, GN.
2. RH is employed by the Kelsey Trail Health Region ("KTHR" or the "Employer") as a primary care paramedic. RH filed a complaint of harassment with KTHR against her immediate supervisor in regards to an incident that occurred on August 28, 2014 (Exhibits A and B).
3. KTHR proceeded with an investigation pursuant to the KTHR Harassment Policy (Exhibit R). RH and the alleged harasser were interviewed in respect of the incident on September 12, 2014. In addition, one other witness was interviewed. A decision letter was issued by KTHR on September 22, 2014 with the findings of the investigation (Exhibit M). It reads as follows:

...

This is to inform you that the investigation undertaken by the employer, as a result of the formal written complaint that you recently submitted, has concluded.

We have completed our interviews of individuals involved and a decision has been reached with reference to the Kelsey Trail Health Region OH & S Harassment Policy 4-130. Based on the definitions in the policy and the findings of our investigation, we are unable to support your allegation of harassment.

We recommend that the Director of EMS review the conduct policy with both yourself and [GN], for educational purposes.

We also recommend that mediation take place involving yourself and [GN]. We believe that this would require the agreement of both parties prior to the mediation.

4. On or about September 23, 2014 RH contacted Occupational Health and Safety (“OHO”) in respect of the harassment complaint. A Harassment Questionnaire was provided to and completed by RH and was submitted to OHO on or about September 25, 2014 (Exhibit O).
5. By a letter dated October 9, 2014 addressed to Pam McKay at KTHR, RH filed an internal appeal of the findings of the investigation done by KTHR (Exhibit E).
6. In regards to the internal appeal a meeting was scheduled for December 7, 2014 with Pam McKay the responsible V.P., and Lyle Bittman, VP, Health, Safety and Culture in respect of this internal appeal process. By a letter dated December 10, 2014 RH was advised that her appeal was unsuccessful. The letter states in part that KTHR:

...will be upholding the initial decision that we cannot support your allegation of harassment. Regarding the allegation of misconduct, a comprehensive review of the investigation notes does not provide clear evidence to support that misconduct in the workplace did or did not occur and cannot be supported.

... (Exhibit N)

7. On or about December 11, 2014 the occupational health officers (the “OHOs”) assigned to the file issued an Occupational Health Officer Report dated December 11, 2014 (Exhibit P). The OHOs’ report states in part:

...

On October 8, 2014 Occupational Health Officers Shawn Tallmadge and Tammy Duncan, called [RH] to discuss the questionnaire submitted. At the time of the discussion [RH] stated that the employer is ensuring that she does not have to work with the alleged harasser. [RH] also stated that she is appealing the decision of the investigation through the internal process. On October 22 and October 27 telephone calls were placed to Mr. Hobbins, Manager of Labour Relations, to discuss the investigation;

however these officers were not able to reach Mr. Hobbins until November 4, 2014. During the conversation with Mr. Hobbins, he stated that the investigation determined that [RH's] complaint did not meet the definition of harassment.

These officers also contacted Rene Simineau (sic), Director, on November 8, 2014, for further information. Ms. Simineau (sic) stated that Mr. Hobbins ran the interviews and the investigation, and no concerns of the investigative process were raised throughout the investigation by RH. Ms. Simineau (sic) stated that the employer has accommodated RH so she does not have to work with the alleged harasser, the employer has offered mediation to RH.

On November 20, 2014 Occupational Health and Safety requested a copy of the investigation report from the employer and any other relevant documentation pertaining to the investigation. All of the requested information was received later in the day on November 20, 2014.

Be advised that we have reviewed the investigative report regarding your allegations of harassment and have determined the report to be impartial, procedurally fair and thorough.

Occupational Health and Safety's mandate is to enforce the employer's legal obligation to do due diligence – to take reasonably practicable steps to deal with the complaint and ensure the employee is not exposed to harassment. The key things to look for when reviewing the report itself are whether, on its face, the investigation was impartial, thorough and procedurally fair and conducted by a knowledgeable, competent investigator.

...

As long as the employer is meeting the legislative standard of workplace health and safety as defined in the Act and Regulations, which require employers to take reasonable action to address the concerns raised, it is not our role to supersede their efforts to manage and utilize their policies and procedures.

It is our determination that the employer is meeting its duties under The Saskatchewan Employment Act and *The Occupational Health and Safety Regulations*. From the information provided, we believe that your concerns have been addressed and that any further concerns you may have will also be addressed by your employer. Therefore, there is no reason for further involvement of Occupational Health and Safety in the investigative or complaint process.

8. RH filed an appeal of this decision on January 2, 2015 (Exhibit Q). RH's notice of appeal reads in part as follows:

...

I found throughout the report inconsistencies to what I reported, and what was written. First off the report states that "no concerns of the investigative process were raised throughout the investigation by Ms. [H]". This is inaccurate as I did state that there was a bias present with my manager, and that I was not comfortable having her be part of the process. I declared this after the initial meeting, as I was unaware she would be present, and was unaware at that time that I was able to declare bias. This was one of the reasons that I filed the appeal with my employer. My LRO with HSAS had discussions surrounding this bias, but was met by deaf ears. Second, I was told by Shawn Tallmadge during a phone discussion that he would be contacting all parties involved in the complaint to schedule meetings as part of their investigation, and that this would occur over the following week. This phone conversation occurred in October. After that point, I was never contacted for an interview, neither were the other parties. The only two people contacted where (sic) Renee Simoneau my manager (and source of the bias), and Tim Hobbins the KTHR employee who ran the internal investigation. I felt that they unfairly represented my case, leading to the decision by OH&S. I also asked for a different

investigator from KTHR, but this was not granted, again I was met by deaf ears. I felt that the OH&S investigation was not done to its fullest potential, and that the internal appeal also fell short. Flags I raised regarding current work difficulties stemming from the incident have gone ignored and key information that should have caused concern was brushed off in a concerning manner. Third, I do not believe that KTHR followed their own harassment policy. If they did I believe they would have found that the incident that occurred would have fit the policy. Below is the section of the policy which pertains. The incident that has occurred has left me humiliated, scared, and intimidated. I was left in a state which has required me to go to counselling over many months, and I am still battling issues related to this event many months later.

“Harassment that adversely affects the worker’s psychological or physical well-being and that the person knows or ought to reasonably know would cause worker to be humiliated or intimidated. Under this category the harassment must:

- Involve repeated action or display, OR
- Involve a single, serious occurrence that has been established to have caused a lasting harmful effect on a worker, AND
- Not be any reasonable action that is taken by an employer or supervisor relating to the management or direction of the employer’s workers or the place of employment.”

...

9. A pre-hearing conference via conference call was held on February 2, 2016 and the hearing was held on March 24, 2016. RH was accompanied by her union representative, Kevin Glass, as a support person.

Issues

10. The primary issue raised by RH is that there was an issue of bias raise by her in regards to composition of the investigation team that was ignored and not properly dealt with. In addition, RH questions how the investigation team could reasonably come to the conclusion that her complaint of harassment was not supported in light of her evidence of how the incident has personally affected her.

Law and Analysis

11. The relevant provisions of the *The Saskatchewan Employment Act* (the “Act”) are as follows:

3-1(1) In this Part and in Part IV:

...

(l) “**harassment**” means any inappropriate conduct, comment, display, action or gesture by a person:

(i) that either:

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

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

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

...

(4) To constitute harassment for the purposes of paragraph (1)(l)(i)(B), either of the following must be established:

(a) repeated conduct, comments, displays, actions or gestures; or

(b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, that has a lasting, harmful effect on the worker.

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

Section 3-1(1)(o) of the Act states that “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.

12. Section 3-8 of the Act states in part that:

3-8 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 co-operate 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;
- ...
- (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) co-operate with any other person exercising a duty imposed by this Part or the regulations made pursuant to this Part;
- ...
- (i) comply with this Part and the regulations made pursuant to this Part.

13. Section 36(1) of *The Occupational Health and Safety Regulations, 1996* requires an employer to develop a harassment policy that includes the matters described in subsections (a) to (j) and section 36(2) of the regulations require an employer to implement the policy.

Analysis and Review of the Investigation Process in this case

14. In this case the investigation process unfolded as follows:

- (a) RH submitted her written complaint.
- (b) There were some delays in having it acknowledged as being received due to RH's manager being on holidays.
- (c) The complaint made its way to the Human Resources and at that point it was decided who would be on the investigation team. The investigation team consisted of Tim Hobbins, Manager, Labour Relations of KTHR, Joanne Penner, Regional Safety Officer, and Renee Simoneau, Director Diagnostics/Imaging/EMS/Emergency Preparedness and RH's manager.
- (d) The interviews were then arranged. The order of interviews was that the complainant was interviewed first, then the alleged harasser, and then one witness.

- (e) After the interview was completed the investigation team reviewed all of the information gathered. According to Tim Hobbins, the investigation team after hearing all of the evidence could not confirm or deny the allegations and felt it was inappropriate to find harassment when it could not be backed up.

Issue #1 - Bias

- 15. RH stated she was surprised to see Ms. Simoneau as part of the investigation team when she arrived for her interview. RH states she thought it was inappropriate as the alleged harasser, GN had previously informed RH that he knew Ms. Simoneau prior to her being employed by KTHR as they were from the same hometown, and that this was known around the workplace. RH also submitted it was inappropriate because GN was her immediate supervisor and directly reported to Ms. Simoneau and that this creates the potential of the manager sticking by the supervisor
- 16. RH states she raised the concern of bias with her LRO, Russ Dixon who attended the investigation interviews with her. She believes this conversation with Mr. Dixon took place after the interviews were completed. According to RH Mr. Dixon told her it was standard practice for the manager to be involved in these processes but that he would talk to Mr. Hobbins in regards to RH's concern and belief of bias. RH stated she was not aware that it was something that was within her rights to call. RH understood there was more than one conversation that Mr. Dixon had with KTHR regarding this matter and that KTHR stood firm in having Ms. Simoneau as part of the investigation team regardless of RH's insistence that she not be on the team.
- 17. At the hearing RH asked Mr. Hobbins whether he considered having an outside source investigate or reorganizing the investigation when Mr. Dixon brought up this issue of bias. Mr. Hobbins stated he does not recollect it being brought up and if it was he does not know whether they would have changed course in terms of the investigation. Mr. Hobbins stated he was not aware of any potential biases prior to the investigation. Mr. Hobbins stated the usual protocol is to have the manager of the department as part of the investigation team.
- 18. Ms. Simoneau acknowledged that her parents know GN's parents and that both families are from the same home town, but states prior to her becoming the director of EMS she had

never spoken to GN. She left home when she was 17 and at that time GN would have been a little boy. Ms. Simoneau had only recently become director of the department prior to the incident and in that time frame only had occasion to meet with GN over the phone. At the hearing RH asked Ms. Simoneau how the issue of bias was handled when it was brought forward by Mr. Dixon to the investigation team. Ms. Simoneau stated she actually was not aware an issue of bias was brought forward when they were investigating and did not know anything in regards to this at the time.

19. Generally, a legitimate issue of bias on the part of the investigator can affect the integrity of the investigation. Bias includes actual bias and perceived bias. Each investigation must be assessed to determine who should conduct the investigation. The investigation will be more credible the more independent the investigators are. Any issues raised of bias should be considered seriously and carefully and decisions made based upon what is reasonable and practical in the circumstances. If at all possible, if an allegation of bias is made, better to address it than be faced with allegations that any of the investigators had a conflict of interest or was biased.
20. In this case, Ms. Simoneau acknowledged that they were from the same home town and that their parents were acquaintances, but stated she personally did not know GN prior to the employment relationship as she was much older than GN and had moved away when GN was still very young. In addition, Ms. Simoneau was a new manager in the department and had not yet even had the opportunity to speak with GN in person in the workplace before this incident occurred.
21. I accept RH was uncomfortable with Ms. Simoneau being part of the investigation team because of a perceived bias, as a result of both Ms. Simoneau and GN being from the same town.
22. I accept the evidence of Ms. Simoneau that her prior personal connection to GN was limited to being from the same home town and that their respective parents were acquaintances. I am satisfied that the personal connection was not much more than this. I am not satisfied that it has been established that there was some obligation on Ms. Simoneau's part to declare that there may be a reasonable apprehension of bias if she was part of the investigation team. Further, I do not find the fact that GN reported to Ms. Simoneau in and

of itself to be a reason for Ms. Simoneau to not be part of the investigation team in regards to the alleged incident.

23. In addition, there was insufficient evidence to establish that KTHR was made aware of RH's concern about bias during the investigation process. While I accept RH made her LRO aware of the issue, the evidence is lacking that this concern was brought forward to the investigation team at the time of the investigation. Mr. Hobbins did not recollect it being raised, although he was not prepared to go so far and say it didn't happen. In addition, I accept Ms. Simoneau's evidence that she was not made aware of the issue of bias being brought up by Mr. Dixon. It appears to me most likely that the issue of bias was made more of an issue by RH after the investigation was completed.
24. Further, there is evidence that Mr. Hobbins took the lead role in the investigation. Ms. Simoneau was not the sole investigator which lessens the possibility of bias or perceived bias tainting the investigation results in this case.
25. Weighing all of these factors, and having regards to all of the facts and circumstances, I am satisfied that at the time, the employer's actions in having Ms. Simoneau as part of the investigation team was reasonable and in compliance with its duty under the Act.

Issue #2 – The finding of the Investigation Team – Was it reasonably supported?

26. The second major concern of RH concerned the conclusion of KTHR that the harassment policy did not apply given the impact she claims that the incident had on her. RH testified that her life changed after the incident and that it was an incident that left her scared, worried, and insecure.
27. RH attended at a physician's office on the date of the incident and returned with a doctor's note stating she was unable to work. Following are the doctors' notes tendered into evidence by RH:
 - (a) Note dated on the date of the incident, 28/08/16 (Exhibit C), which states:

To Whom It May Concern:

The above is unfit for duty for 28/08/14.

(b) Note dated Sept 05, 2014 (Exhibit D) which states:

To Whom It May Concern:

[RH] has been, or will be, off work for medical reasons between the following dates: 7/9/14-10/9/14 inclusive.

...

(c) Note dated Jun 29, 2015 (Exhibit G):

To Whom it May Concern:

It is recommended that [RH] stay off work from 29/06/2015 – 17/07/2015 due to the unresolved conflict at the workplace.

...

(d) Note dated Jul 13, 2015 (Exhibit F) which states:

To Whom It May Concern:

Due to unresolved workplace conflict, it is recommended that [R] should not be schedule on the same shift with Mr. [GN].

...

28. The Employer accommodated RH and did not schedule shifts such that she would have to work with GN so this has not been an issue. In addition, the parties attended mediation, and by the time of the hearing there was evidence some progress was being made towards repairing the working relationship. Follow up mediation was pending.
29. There are two types of harassment outlined in *The Saskatchewan Employment Act*, personal harassment and harassment based upon a prohibited ground such as race, creed, religion, colour sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin. There was no suggestion in this case that the alleged harassment was based upon one of these prohibited grounds.
30. In the case of personal harassment, the determination of whether or not harassment has occurred begins with an assessment of whether or not there was any inappropriate conduct, comment display, action or gesture by the alleged harasser towards the complainant. The second part of the test is whether such inappropriate conduct, comment, display, action or gesture adversely affects a worker's psychological or physical well-being, and that the

alleged harasser knew or ought reasonably to have known would cause a worker to be humiliated or intimidated, that constitutes a threat to the health and safety of worker.

31. For personal harassment the conduct, comments, displays, actions or gestures must be repeated although a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, can constitute harassment if it is established that it has a lasting, harmful effect on the worker. In the case of a single incident, the threshold for finding harassment is higher than for repeated conduct, comments, displays or gestures.
32. For harassment to be found the lasting harmful effect on a worker, such as for example, lasting stress and anxiety, must be established to have been caused by harassing behaviour. Evidence of an employee suffering from stress and anxiety does not automatically lead to a conclusion that harassment occurred.
33. Following is an excerpt from the decision in **Joss v. Treasury Board (Agriculture & Agri-Food Canada)** [2001] C.P.S.S.R.B. No. 17 which has some helpful commentary in regards to consideration of what will constitute harassment in the workplace. At paragraphs 61 to 64 it states:

61 Germane to the issue of what constitutes harassment are Arbitrator Laing's comments in Re British Columbia and B.C.G.E.U. (1995), 14 L.A.C. (4th) 193, at pages 242-243:

I do not think that every act of workplace foolishness was intended to be captured by the word "harassment". This is a serious word, to be used seriously and applied vigorously when the occasion warrants its use. It should not be trivialized, cheapened or devalued by using it as a loose label to cover petty acts or foolish words, where the harm, by any objective standard, is fleeting.

62 A similar comment is contained in Skelly and Quebec Human Rights Commission, (supra) at paragraph 57:

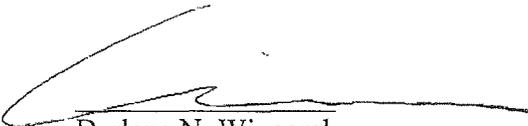
Few people would dispute that the task of having to work with people who are inconsiderate, disagreeable and ill-tempered represents a very painful burden. By the same token, most people would agree that the privilege of working with people who are kind, considerate and amiable represents one of life's greatest joys. What we must bear in mind in dealing with this case is that such a privilege is not a fundamental right protected under the Charter nor is it even a right protected by law.

63 More importantly it must be clearly understood that harassment is not a weapon to be placed at the disposal of people in the workplace. It does not belong in disputes or disagreements that frequently arise between employees, or between managers and employees. Nor should it be used as a tool to resolve such disagreements or disputes – although the discussion and mediation approach contained in harassment policies is a constructive way of addressing personal, or authority based, disputes in the workplace.

64 Harassment may consist of one significant act; however, it is more often comprised of continuous conduct or a series of acts, which when regarded in totality are objectionable or offensive to the person to whom they are directed, and which have a detrimental effect on that person in the workplace. In addition, harassing conduct requires some intent or alternatively, that the objectionable or offensive nature of the conduct be reasonably apparent.

34. Harassment does not include reasonable action taken by an employer, manager or supervisor relating to the management and direction of the employer's workers or the place of employment. There is evidence that part of the communications between GN and RH on the day in question pertained to GN acting in a supervisory capacity and confronting RH about the appropriateness of RH calling a co-worker, who was the witness that was interviewed as part of the investigation process, about work that was (or was not completed) on the previous shifts, and that this was not her place to do so.
35. From the statements that were filed as part of the record following are a couple of examples of conflicting evidence respecting what exactly transpired that day. RH alleged GN "yelled at her", stated she was the perfect PCP, started throwing stuff around and slammed the filing door and yelled down the hall "I quit". In GN's written statements GN admitted making a couple of heated remarks, admitted stating "clearly you're the perfect PCP", but denied yelling, denied stating "I quit", and denied throwing papers or slamming a filing cabinet drawer. GN admitted using a firm tone.
36. In the case of a he said/she said scenario, in the absence of corroborative evidence the investigation team was faced with needing to make a credibility determination. The investigation team did not specifically set out that they accepted one version of events over the other, which would have been preferable, but only stated that the claim of harassment could not be supported. In the result, however, I am satisfied from the record there was a reasonable basis for dismissing the harassment complaint. In coming to his conclusion, I have considered that for a single incident to constitute harassment, the threshold is high, and in this case, given the conflicting evidence on the record, there was a reasonable basis for the investigation team to find harassment had not been substantiated in the circumstances.
37. KTHR did respond to the harassment complaint in a timely fashion and conducted a harassment investigation as it was required to do under its policy. The investigative team came to a decision and communicated it to the parties. KTHR took reasonable appropriate

steps to accommodate RH's request that she not be scheduled on the same shift as GN. The mediation process was engaged in, as suggested by RH to assist working on the relationship between RH and GN in the workplace. Overall I am satisfied KTHR took reasonable steps to implement its harassment policy as it was required to do under the Act and regulations. In the result, this appeal is dismissed.



Darlene N. Wingerak
Adjudicator
April 26, 2016

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.