LRB File No. 030-15

IN THE MATTER OF:

An appeal pursuant to Section 3-53 with respect to the decision of an Occupational Health Officer, in a matter involving harassment or discriminatory action, pursuant to *The Saskatchewan Employment Act.*

BETWEEN:

JR

Appellant/Worker

-and-

CHIP AND DALE HOMES INC.

Respondent/Employer

-and-

DIRECTOR OF OCCUPATIONAL HEALTH AND SAFETY
MINISTRY OF LABOUR RELATIONS AND WORKPLACE SAFETY

Respondent

For the Appellant: Greg Fingas, Gerrand Rath Johnson

For the Respondent: Janna M. Linner, Mac Pherson, Leslie & Tyerman, LLP

DECISION

INTRODUCTION

[1] Chip and Dale Housing Inc. (the "Employer") terminated Ms. JR's ("JR") employment on December 29, 2011. JR complained to the Occupational Health and Safety branch of the Ministry of Labour Relations and Workplace Safety, alleging that her dismissal was a discriminatory action taken against her in retaliation for raising health and safety concerns with her Employer, contrary to section 27 of *The Occupational Health and Safety Act, 1993*[1].

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[1] This appeal deals with rights that were vested prior to the proclamation of *The Saskatchewan Employment Act, SS 2013, c. S-15-1* was proclaimed in force on April 29, 2014. As such, for consistency and convenience, my references to the Act herein are references to *The Occupational Health and Safety Act, 1993,* now repealed.

[2] On February 15, 2012, an Occupational Health Officer issued a decision dismissing the discriminatory action complaint, having determined the termination of JR's employment "was not connected to her harassment complaint" and "(t)here were good and sufficient other reasons for the termination of her employment".

[3] JR appealed the Officer's decision on the grounds that

1. The OHS Officer did not provide a fair hearing because he did not provide [JR] with a fair opportunity to respond to the Employer Chip and Dale Housing Inc.'s submissions to the OHS Officer; and

2. The OHS Officer failed to put the onus on the Employer to prove good and sufficient other reasons for the termination of [JR's] employment or at least he didn't provide adequate reasons for deciding that good and sufficient other reasons exist.

[4] Pursuant to the Act, the appointed adjudicator met with the parties with a view to encouraging settlement. On or about March 10, 2013, a Consent Order was issued by the adjudicator remitting JR's complaint to OHS for a further and "full investigation" and, *inter alia,* directing the assigned OHS Officer "to provide reasons for the decision, such reasons to reflect how the OHS Officer applied sections 27 and 28 of *The Occupational Health and Safety Act, 1993,* as amended or any other provisions of the said *Act"*.

[5] The matter was reinvestigated by two Occupational Health Officers, who issued Report Number 1088 dated October 22, 2014. The Officers concluded "the termination of [JR's employment] was not an unlawful act as per section 27(b) of the Act". On November 7, 2014, JR appealed the Officer's decision.

[6] By Order dated April 24, 2015, I was appointed by the Saskatchewan Labour Relations Board to hear the appeal. The appeal was set down for hearing in Regina, Saskatchewan on September 1 and 2 and adjourned for completion to November 22, 23 and 24, 2015.

ISSUE

[7] Did the Employer take discriminatory action against the worker, as contemplated by sections 27 and 28of the Act?

RELEVANT LAW

[8] The relevant provisions of *The Occupational Health and Safety Act, 1993* are as follows:

2(1) In this Act:

...

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

3 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;

(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);

27 No Employer shall take discriminatory action against a worker because the worker:

...

(b) seeks or has sought the enforcement of:
(i) this Act or the regulations; or

...

(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 Act or the regulations with respect to the health and safety of workers at a place of employment;

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.

(2) Where an occupational health officer decides that an Employer has taken discriminatory action against a worker for a reason mentioned in section 27, the occupational health officer shall issue 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) 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) Where an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 27, the occupational health officer shall advise the worker of the reasons for that decision in writing.

(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.

[9] Notwithstanding my references throughout this decision to the applicable sections of *The Occupational Health and Safety Act, 1993,* I am also guided in terms of procedure by *The Interpretation Act, 1995* which, dealing with repeal and replacement, provides, in part, that:

35(1) Where an enactment is repealed and a new enactment is substituted for it:

...

(d) a proceeding commenced pursuant to the repealed enactment shall be continued pursuant to and in conformity with the new enactment as far as is consistent with the new enactment;

...

(f) if any penalty, forfeiture or punishment is reduced or mitigated by the new enactment, the penalty, forfeiture or punishment, if imposed or adjudged after the repeal, shall be reduced or mitigated accordingly;

(g) all regulations made pursuant to a repealed Act remain in force and shall be deemed to have been made pursuant to the new Act, insofar as they are not inconsistent with the new Act;

Credibility and Reliability

[10] Where the witnesses' evidence is in conflict with each other's and from other general evidence, 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.) which counsel for the Respondent has quoted at length, with emphasis added:

> 11 The credibility of interested witness, 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. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> 12 The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case. [emphasis added per Respondent]

[11] In *F.H. v. McDougall,* [2008] 3 S.C.R. 41, 2008 SCC 53, the Supreme Court of Canada cited with approval, Rowles J.A. in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1, at paras. 28-29, dealing with the reliability and credibility of witnesses in the case of inconsistencies and an absence of supporting evidence:

> In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here.

Initial Matters

[12] The Employer made an unopposed request to have the names of individuals residing at its 7th Avenue residential care home anonymized. I have not found it necessary to particularize references to any resident except one, whom I will refer to as Resident A. Other identified or identifiable individuals who were not called as witnesses will be referred to by initials, as is the Appellant JR

[13] At the outset of its case, counsel for the Employer provided opposing counsel and the Tribunal with two "roadmaps" to the Employer's case. Chart 1 summarizes meetings/coaching sessions (21 entries) and Chart 2 summarizes allegations made by JR (28 entries). Each entry is cross-referenced with its corresponding exhibit(s). With regard to Chart 2 counsel noted that the chart outlines the Employer's response to communication from JR with regard to concerns raised, including gossiping, regardless whether harassment was alleged or not. The roadmaps were not entered as exhibits and are not reproduced here. However, both charts are found in the Employer's Written Argument at paragraph 13, p. 3 and paragraph 28, p.9 respectively, and I have found them to be a most useful guide.

Facts

[14] Chip and Dale Homes Inc. ("CDHI", "the Employer", the "Agency") is a non-profit organization providing residential care for adults with physical and intellectual disabilities. The agency operates twelve group homes and a Supported Living Program in the City of Regina. The homes are located in neighbourhoods throughout the city. The Employer's administrative offices are located away from the homes.

[15] The operational philosophy of the agency is that a group home is, in fact, the resident's home, wherein the resident has the same rights as each of us would have in our own homes. In their home environment, the Employer takes a person-centred approach, aimed at providing individualized care, services and programs meeting each resident's special needs in a home environment, and enriched by outside activities. Quality of life is paramount. The Agency strives to provide the best possible quality of life which provides opportunity for choice, freedom and general well-being.

[16] The Executive Director, Lucy Mazden, ("Mazden") is responsible for the overall operations of the business, Chip and Dale Homes Inc. (the "Employer").

[17] The Executive Director and a team of Program Coordinators who report to the her, work out the administrative offices. Each Program Coordinator is responsible for the supervision of 3 to 4 group homes, 7-8 Team Leaders and the well-being of 12-14 residents.

[18] The Team Leaders are staff hired to oversee the operations of each group home. They have the authority to supervise the team of Direct Care Workers and are responsible to ensure the resident's quality of life in all areas is achieved. Direct Care Workers are responsible for the care and support of the residents.

[19] In a staffing model governed largely by the number of residents in the home, the majority of the group homes operate on a Co-Team Leader model, meaning that two Team Leaders work opposite each other on alternating shifts. On duty, each Team Leader has equal authority to manage the home. Each Team Leader is assigned key responsibilities for some residents. However, while on duty, they are responsible for the care and quality of life of all residents in the home. To ensure the Team Leader opposite is fully informed, each Team Leader is expected to document important events occurring during their shift in a communications logbook.

7th Avenue Group Home

[20] Mazden testified that the 7th Avenue Group Home ("7Th Avenue) is home to six residents with physical and intellectual disabilities. Five, including Resident A, are non-ambulatory. Resident A has lived at the 7th Avenue Group Home since it opened 27 years ago, in 1989. Resident A has physical and cognitive disabilities, and is confined to a wheelchair. Resident A has no control over her muscles and is either rigid or spastic. She is totally dependent on staff for every façet of daily living, including personal care, nutrition, ambulation and transfers. Resident A can nod, blink or move her head to indicate yes or no, and to 'point' but she is largely non-verbal. She can say approximately 10-20 understandable words. Staff who have worked with Resident A for a long time may understand a few more than others.

[21] With the assistance of staff, Resident A communicates with a "bliss board" [Exhibit 9] which involves staff pointing sequentially to letters of the alphabet and symbols on the board. Resident A indicates by a grunt when staff points at the correct letter(s) or the symbol that represents what she is trying to communicate, but the meaning is subject to interpretation by the staff assisting her. Mazden stated that Resident A has good receptive language. That is, she understands more than she is able to express. She has acute hearing and listens intently to what is going on around her. However, her cognitive abilities may limit her understanding and interpretation of the context of what she overhears and, in turn, what she may then attempt to communicate about what she hears. As events unfolded over the months, it became necessary

for Mazden to instruct staff not to have discussions in Resident A's presence that could be misinterpreted by Resident A.

[22] Program Coordinator Kathy Fuchs ("Fuchs") is responsible for the 7th Avenue Group Home and the supervision of its Team Leaders. Fuchs has worked for the Employer for 24 years. She started as a Direct Care Worker and worked as a Team Leader and in the Supported Living Program before becoming a Program Coordinator ten years ago.

[23] 7th Avenue operates on the Co-Team Leader model.

Employment History

[24] The Appellant JR was initially hired by the Employer in June 2010 as a Direct Care Worker, working at 7th Avenue Group Home on a casual, part-time basis. JR has a Bachelor's degree in Health Studies and a Bachelor of Social Work degree. She has been working toward the completion of her Master's in Social Work.

[25] During the first few months that JR worked as a Direct Care Worker, team leadership at the 7th Avenue home was restructured, setting in motion events which led to JR being offered the position of a Team Leader on December 14, 2010. Vestiges of those events had an on-going significance which warranting a brief recounting.

[26] Both (prior) Team Leaders working at 7th Avenue in the summer of 2010 had worked for the agency for about 18 years. How long they had worked together, as Co-Team Leaders at 7th Avenue was not mentioned. Restructuring of the team leadership appears to have been precipitated by concerns brought to the attention of the Employer by one Team Leader which were said to be impacting the atmosphere in the home and her working relationship with the other Co-Team Leader (Team Leader "X"). It further appears that the source of the tension was one-sided, and arose from one Team Leader's disapproval of a personal relationship which had developed between Team Leader "X" and Resident A's sister. The Employer's concern was the extent to which the situation might be impacting the care and quality of life of the residents. In that regard, the Employer was also sensitive to the importance of the new relationship between Resident A and her sister, whom Resident A had only recently come to know. With those concerns in mind, the Employer conducted a review of the home, and interviewed all the 7th Avenue staff. Mazden's uncontested testimony was that when JR was interviewed she stated if she had not been told [during the interview] about the conflict between the two team leaders she would not have seen it. In other words, said Mazden, JR did

not perceive tension between the two team leaders. The Employer's suggested resolution was that both Team Leaders transfer to other, separate group homes. Both Team Leaders apparently agreed.

[27] The foregoing events created two vacant Team Leader positions at 7th Avenue. Other team leaders filled in temporarily, while the positions were advertised internally. One vacancy was filled from within, but after a short time the worker decided being a team leader was not the job for her, and asked to return to her former role as a direct care worker. The positions remained vacant into the fall. The Acting Team Leader was anxious to return to her own home position. Fuchs and others encouraged JR to take on the role as one of the Co-Team Leaders at 7th Avenue.

[28] JR testified that she did not apply for the job, and had not interviewed for it. Fuchs testified that she interviewed JR on November 4, 2011. The Employer's Interview Format. [Exhibit 84] documenting the interview was produced in evidence. JR stated that she had not seen the interview form before the hearing. Nonetheless, six weeks from that date, on December 14, 2010, JR was offered the permanent, full-time position of Team Leader at 7th Avenue which she accepted without expressing any reservations.

[29] JR characterized herself as a reluctant Team Leader. She stated that she took on the job reluctantly, on the assurance that she would receive training and support. JR testified that she *"was not set up to fail, but was not trained to succeed"*.

[30] JR was oriented to the position and mentored for a number of months by long-term Team Leader ["DW"], who was assigned to the home on a term basis to facilitate the transition. JR also received additional training and mentoring from the Executive Director, Lucy Mazden, Program Coordinators Kathy Fuchs and Tamara Jackson, Book-keeper NT, who trained JR with regard to the Team Leader's financial duties, such as the administration of the home's petty cash, and KL who provided the agency's in-house TLR training (Transfer, Lift and Repositioning).

[31] Throughout her employment, JR received extensive support from her Program Coordinator, Fuchs, and frequent mentoring and coaching, primarily from Mazden and Fuchs, but also from Jackson and KL. In addition, JR received extra supervisory training (external training), including Behaviour Management training (April 2011) and Great Supervisor Training, Level 2 (June 2011) and Level 3 (Conflict Resolution training) (September 2011) [Exhibits 16, 23, and 44]. (JR had already taken Supervisory Training Level 1).

[32] At about the same time JR began her employment as Team Leader, the Employer hired Ms. JS as a Co-Team Leader for the 7th Avenue Group Home. JS was a long-time 7th Avenue Group Home staff.

[33] In describing JR as a Team Leader, Mazden testified that JR struggled with making decisions, following lines of communication, supervising staff, e.g., providing constructive feedback or administering discipline, and developing harmonious working relationships with her Co-Team Leader and staff.

[34] Mazden testified that as a new Team Leader it was to be expected that JR would have many questions. However, in time, it became apparent that Fuchs was indecisive and unable to make decisions she ought to have been able to make without first consulting others. JR did so without regard for the proper lines of communication whereby the assigned Program Coordinator is the Team Leaders' resource for guidance and assistance. Mazden testified that JR would call, email and text multiple times a day and at all hours, including calls to the Executive Director's personal cell phone. She would drop in unannounced at the administrative offices to ask questions or have conversations with her own, and other Program Coordinators. It became difficult for Fuchs as her supervisor, because JR would go to other Program Coordinators with the same questions, as though looking for different answers. If JR had an issue with Fuchs' answer(s), the proper recourse was to take the issue to the Executive Director. Though JR was repeatedly reminded both verbally and in writing to follow proper lines of communication, i.e., to discuss the question/issue first with her Co-Team Leader and if still unresolved, to speak to their Program Coordinator, then to the Executive Director, the issue persisted throughout the entire year of JR's employment as a Team Leader. As time went on, Mazden said that she and Fuchs were "consumed" by daily concerns and complaints about 7th Avenue from JR.

[35] Mazden testified at length about the numerous meetings/coaching sessions she and Fuchs had with JR between January and December 14, 2011, which, as noted, are summarized in a chart found at Paragraph 13 of the Employer's Written Argument. Fuchs provided on-going support and guidance to JR. In her absence, Program Coordinator Tamara Jackson ("Jackson") provided back-up coverage, and coached and mentored JR on several occasions. Jackson has worked for the Employer for 17 years and has been a Program Coordinator since 2005. Like Fuchs, Jackson had started as a Direct Care Worker, became a Team Leader within the years, and worked as supported employment supervisor before becoming a Program Coordinator.

[36] Jackson also testified to having had occasion to provide additional coaching to JR about supervisory duties, and strategies for dealing with challenging residents and documentation.

[37] Shortly after starting as Team Leader, In January 2011, JR raised a number of concerns about "MW", one of the workers under her supervision. MW had been complaining and gossiping to other staff, undermining operational changes and staffing decisions made by the office (Executive Director/Program

Coordinator), talking about the supervisor, disregarding directions of the Program Coordinator and making comments in front of residents.

[38] On further inquiry, MW denied the allegations. The Employer determined that JR's allegations that MW was talking about her behind her back was not based on her own personal knowledge, but on her interpretation of what Resident A had communicated via Bliss Board. As a result, the Employer addressed the matter as a conflict between MW and JR. Since other staff had been drawn in, the Employer held a meeting to reinforce with all staff the importance of respectful communication and not participating in gossip. [Exhibits 12-15]

[39] In conjunction with the foregoing, JR had been directed initially to administer progressive discipline, but did not do so. As a result, the Employer addressed MW's behaviour, and gave directions for her to apologize. When MW failed to follow the Employer's directions, she was given a verbal warning for insubordination. As a further result, JR was coached on administering the progressive discipline process.

[40] I pause here to say that on the evidence as a whole, I infer that the phrase 'administering progressive discipline' as used by this Employer, refers to the process, not the disciplinary action itself. That is, it is a process which begins with ensuring that expectations are clearly stated by the Team Leaders and, if not met, a verbal reminder (constructive feedback) is given before the next step—the first disciplinary step—is taken (verbal warning). The date and details are to be noted in the Team Leaders' communication logbook. If further disciplinary action is warranted, the Team Leader engages the Program Coordinator, to confirm the prior steps were taken before the next disciplinary step (written warning) is taken.

[41] Mazden testified that she and each of the Program Coordinators are "on call" on a rotational basis to provide coverage for each other's absences. In one such instance, Jackson had occasion to speak with JR in early April about an issue between JR and her fellow team leader. Jackson testified that she offered guidance, and offered to assist further by meeting with both team leaders together, but JR never took her up on the officer. JR also raised Resident A's behaviour, and Jackson advised JR to document all contact with Resident A, her family and friend. [Exhibit 18]. Jackson testified that she had not received any documentation or written complaint from JR.

[42] Apart from the aforementioned issue, the first few months of JR's employment as a Team Leader were uneventful. Mazden testified that it is not common for the Executive Director to have as many conversations with a Team Leader as she had with JR during that time. She didn't mind at first because she felt it necessary to help JR succeed.

[43] Mazden testified that at the time JR and JS were hired as Co-Team Leaders, the Employer had implemented 4 additional hours a week for the Co-Team Leaders to attend to things away from the house and resident care. Essentially, it was four paid hours a week to facilitate uninterrupted communication between the two team leaders. Nonetheless, Mazden and Fuchs were hearing that the tension between the two team leaders was visible to staff and residents. As a result, Mazden and Fuchs met with the Co-Team Leaders on May 13, 2011. [Exhibit 20]. Staff had told them each of the team leaders, in different ways, was not pulling her weight. As between the two Team Leaders, each felt intimidated by the other. JR felt intimidated by JS's years of experience at 7th Avenue and long-time relationships with other staff; JS felt intimidated by JR's education. I infer there was no positive outcome as JR emailed Mazden a few days later to say, in part, that she was not comfortable meeting alone with Fuchs and JS anymore because she thought Fuchs told her one thing and told JS another, and talked about her to JS behind her back. Mazden replied that it was in her best interest to meet with all three of them present to ensure the same information is received, and suggested that JR may want to insist on it.

[44] In June 2011, JR's Co-Team Leader resigned her position citing conflict with JR as one of the reasons for her resignation. [Exhibit 25].

[45] Mazden testified that JR did not work well in a Co-Team Leader staffing model, and she saw the resignation of JR's Co-Team Leader as an opportunity for JR to "blossom" as the sole Team Leader at 7th Avenue. JR accepted the Employer's offer to be the only Team Leader on a full-time basis and at a higher pay scale.

[46] On June 13, 2011, JR alleged that staff was working against her. In response, both Fuchs and Mazden offered support, but said she needed a day or two to learn to cope. When JR complained again on June 15 that "staff are out to get me", she was requested to provide more specific information, but did not do so. [Exhibits 26-29]

[47] In emails to Fuchs dated July 9 and July 14, 2011, JR made allegations that she was uncomfortable when Resident A's family and friends were at the house, and that Resident A laughed at her and a staff participated in related gossip. Two staff has also raised concerns similar to those raised in January. In addition to requesting JR to provide specific information about her concerns, the Employer scheduled a meeting with all staff on July 15, in an effort to address the broader issues. Based on the matters discussed at the meeting, Fuchs generated the "Lines of Communication and reporting issues" document [Exhibits 31-33] which summarized the Employer's expectations with regard to the lines of communication.

[48] The single team leader staffing model was not a successful model for the home or JR. As a result, the Employer hired a new Co-Team Leader, "SD" in early August. SD had worked for the agency on and off for about 12 years, both as a Direct Care Worker and as a Co-Team Leader.

[49] In the late afternoon of August 25, 2011, Mazden received a text from JR which said "There are spiders the size of a mountain lion: is that OH&S complaint.?", and indicating that she and a staff were "terrified". Mazden called the house to ask if this was for real, and JR said it was. Mazden drove to the house to see for herself. On her arrival, she found one tiny spider which she swept away. When she went in the house, JR was laughing. On the way back, Fuchs received a text which said "afraid of spiders yah right but at least you got to visit with the residents". On August 26, Mazden asked JR to come to her office with regard to this event. On arrival, JR continued to behave as though it was a very funny event. Mazden explained to her that she had used bad judgment, inappropriately used agency resources, wasted agency time and breached the lines of communication, i.e. that the protocol is for her to contact her Program Coordinator, not the Executive Director). Mazden stated that actually having to tell JR "this isn't funny, it's serious misconduct" really affected her relationship with JR, causing her to question whether she could take JR seriously. [Exhibits 38 and 39]

[50] On September 6, 2011, via email [Exhibit 40] copied to Mazden, Fuchs and Jackson, JR explained why she had not put into writing her concerns about the manner in which she was being treated by Resident A, her family and friends, despite having been requested to do so numerous times by all three of them. JR indicated she was scared to put anything in writing because a worker had told her Resident A would make a complaint or could be manipulated by others to make a complaint about her in retaliation. JR acknowledged in her email that she had been informed by Jackson about the Employer's Harassment Policy (which she acknowledged having read at time of hire) and that all issues would be dealt with when submitted in writing, echoing the same information Fuchs had given her a week earlier, assuring JR that staff had the support and protection of the office. Fuchs stated:

> I don't have any concerns with Chip and Dale and how things have been dealt with things [sic], I am concerned with other people and how Resident A has been behaving...Chip and Dale office staff have provided continuous support for everything we have gone through at 7th, willing to address concerns with appropriate documentation. My issue is NOT disclosing things to you; I am terrified of people outside the Chip and Dale office...and [want to] see how my professional organization will protect me.
>
> Please do not think or feel Chip and Dale has not done enough to help address concerns, you have addressed every issue brought forward and have asked for me to put things in writing so situations can be dealt with...

[51] At the same time, JR complained about her difficulty getting staff to follow policy. As an example, she mentioned that staff were not following the policy regarding appropriate footwear despite her repeated attempts to enforce the policy. She recited the range of excuses staff would give her for not wearing proper footwear. JR acknowledged in her email that while Fuchs was away, she met with Jackson, who had "given me specific directions how to deal with this" in accordance with the steps in the process of administering progressive discipline. Jackson testified that when she met with JR to discuss these supervision techniques, she also showed JR how she had done her documentation as a Team Leader. JR testified that another employee, KL, had also shown her how she did documentation as a Team Leader. JR also raised the issue with Jackson about dealing with of challenging resident behaviour and that she was having issues with a family of a resident, and Jackson told her to document all her interactions with them.

[52] JR testified in chief that other than Jackson's involvement, she did not receive any other targeted training about documentation in particular. She recalled attending the Behavioural Support course. She said it helped with how behaviour can be documented. *It was short, but all the info was there*. JR testified she struggled to apply the learning from the Level 2 and 3 Supervisory training

[53] Mazden's reply informed JR that if she felt she had been harassed by family or anyone in the agency, she should put it in writing, describing what happened (who, when, what etc.), so the Employer would be in a position to address the issue. [Exhibit 40].

[54] Mazden also indicated to JR that in the position of Team Leader it was JR's responsibility to enforce agency policy and, if necessary, to use the progressive discipline process to do so. Mazden then outlined the process, beginning with setting expectations, then a verbal reminder (constructive feedback) to staff of the policy that needs to be followed) and documenting the particulars in the Team Leader's communication logbook. Mazden outlined the next steps to be implemented if the reminder was not heeded: a documented verbal warning, if not followed, report situation to supervisor with dates when reminder and warning given, followed by the standard steps in the progressive discipline process: written warning, suspension, dismissal.

[55] JR testified in-chief that Mazden's email reply was the first email that scared her because she had not had training about progressive discipline.

[56] JR testified that she spoke to an OH&S Officer in October 2011 about what documentation was needed [for a harassment complaint]. Mazden was telling her she wasn't documenting, and later indicated to Fuchs that Mazden told her "it wasn't enuf". [Exhibit 76] She claims the Officer told her that a text or

an email is sufficient documentation. JR stated she had no training on that. JR testified that when she brought issues forward in January, she was not told that documentation was needed.

[57] Mazden testified that it was the Employer's "*expectation that within three months a Team Leader should be able to execute the job requirements...certainly, by six months, it should not be an issue*". Mazden testified that JR's inability or unwilling to administer the steps of progressive discipline in September, her ninth month as a Team Leader, was a factor in the termination, as was the fact that she was still not following the proper lines of communication, which Mazden also pointed out to JR in her reply. [Exhibit 40]

[58] At the family picnic, the Chair of the Board had asked Resident A how she enjoyed her summer. Resident A said she had not gone out. The Chair requested Mazden to follow up on the issue as a matter pertaining to Resident A's quality of life. In a series of related email/text messages exchanged, JR offered unsatisfactory reasons why there were no outings for Resident A. In terms of the impact on the eventual decision to terminate, Mazden testified that JR's dislike for Resident A was quite evident to her.

[59] In late September and into October, Fuchs received a number of lengthy emails from JR [Exhibits 49-53]. In the course of talking about 7th Avenue, leaving the Employer to go on her practicum and long accounts of conversations with her colleagues, were various complaints about her treatment by Resident A, her family and friend: comments they might complain about her, that everything JR does is monitored and criticized by them, that everything she does is criticized by the Employer, that JR cannot handle criticism from Resident A's family, that Resident A's family (sister) and friends (former Team Leader transferred out) would not greet her, would glare at her and that they, and Resident A told her a staff (MW) talked "mean" about her. In one, JR made a passing reference to "harassment". Specifically, in Exhibit 49, first full paragraph, JR alludes to the constant "complaints, criticism and walking on egg shells...from Resident A and her friends and family" and that she is "terrified what harassment is next" if she were to put her concerns in writing.

[60] Mazden and Fuchs called a meeting with JR on October 21, 2011.

[61] The notes Fuchs had prepared in advance of the meeting indicated that Fuchs felt overwhelmed by the amount of support and volume of emails and texts from JR at all hours. She wrote that most of the emails were "ranting" and left Fuchs uncertain about what the JR's point was and/or what she was expected to act on. Fuchs stated had provided direction and support, but felt she had nothing left to give.

[62] Fuchs testified that just prior to the October 21 meeting, she received emails from JR in which JR made inappropriate and disrespectful comments about Resident A. [Exhibit 54] JR had made a similarly

disrespectful reference to a resident in earlier email [Exhibit 49]. Fuchs testified that JR had required much more direction and support than was usual for a team leader, but she had thought from the beginning that JR really cared for the residents. Fuchs said JR's attitude towards Resident A (and the previous incident) was a *"big concern"* for her, one that caused her to view JR in a different light with regard to her suitability for their work. To her, that was a factor in the decision to terminate. When she spoke to Mazden about her concerns, she had already written a warning to deliver to JR at the October 21 meeting, but Mazden directed her to start with a written warning instead, with a letter setting out the areas in which JR needed to improve.

[63] Mazden testified in cross-examination that Fuchs was *"ready in October to terminate…to go past the written warning and terminate"* JR's employment. Mazden said she told Fuchs to start with a verbal warning and continue coaching. Both Mazden and Fuchs testified that the suggestion was made to JR on October 21, that she needed to make a choice whether this was the right employment for her. Both were aware, and Fuchs testified that JR had let them know at the end of September that she would be leaving for a three-month practicum, and again on October 11. In the latter, JR stated that she "couldn't handle the hate from [Resident A's friend and family] and when she left, a "letter about everything will be submitted to the Board…" [Exhibits 51-53]

[64] JR testified that by the date of the October 21 meeting, she was at her breaking point with the stress and anxiety of working at 7th Avenue. She did not recall receiving a verbal warning. JR said she had made her own notes of the October 21 meeting. Her meeting notes were not produced in evidence.

[65] On or about October 28, 2011 Resident A complained that JR was ignoring her and giving her the cold shoulder. Mazden emailed JR to give her a "heads up". Mazden indicated in her email that she understood JR may have felt hurt by the conduct of Resident A's friends and family, but as a matter of professional conduct, and staff must treat residents with dignity and respect. Mazden added that if she felt disrespected by Resident A, she should submit an incident report. Mazden's email again encouraged JR to state in writing her concern's regarding Resident A's friends and family, by providing a specific statement about what was said and when, how it impacted her so that she could address her complaint. JR was instructed not to include any other issues with it, saying that so far they had received from JR "a combination of several issues piled together, but not a specific statement of complaint".

[66] Both Mazden and Jackson outlined that the approach to dealing with residents' behavioural issues was to document the problematic behaviour in the Team Leader's logbook or via an Incident Report. JR had received external training in April, 2011 [Exhibit 16] and from Jackson. By doing so, the Program Coordinator would be alerted to the need to revisit the resident's Behaviour Support Plan with a view to

what needed to be done to address the behaviour. In cross-examination, Mazden testified that given the nature of Resident A's physical and intellectual disabilities, she was not in a position to be a harasser.

[67] JR perceived Mazden's email as an accusation and finding of fault. She responded first with a brief email to that effect, and then with a nine- page letter, which largely focused on her views about Resident A. In it, and in redirect examination, JR gave as her reason for not provided her concerns in writing because she was concerned about the repercussions and how she would be protected if Resident A were "set up" by her friends and family to make allegations against her. [Exhibit 59].

[68] In cross-examination, Mazden acknowledged that she had asked JR to put her concerns and her letter, at Exhibit 59 is what she received in response. She stated that these were concerns that had been raised before and investigated or inquired into. They had spoken to Resident A's friends and family who made no complaints about JR. Fuchs offered to make shift changes so that JR would not need to be in the house when Resident A's family and friends visited, but JR didn't take her up on the offer. Specific allegations pertaining to comments made about JR by a staff (MW) were required into and addressed. MW received a verbal warning.

[69] Mazden testified that in late October, an incident occurred with a resident wherein JR overstepped her boundaries. The resident had a cold, was seen by a doctor and was recovering, and was well enough to be sent to the daily activities at the COSMO Learning Centre. Part of the resident's chronic condition is seizure activity. On her own, JR went to the doctor's office and said the resident was not responding to the antibiotics. The doctor recommended taking him to emergency. On her own, JR went directly to COSMO[2], picked up the resident and took him to emergency. To Mazden's knowledge, JR had called staff to confirm where the resident was, but had taken the action without the Program Coordinator's knowledge. It caused confusion and misunderstanding in the home and for the resident's family member until Mazden was able to sort out what happened. In the meantime, the resident was put at risk. Due to the length of time the resident waited with JR in emergency without food or his medication, he suffered a seizure. Normally, the resident is only hospitalized if he has multiple seizures. Because he had a seizure in emergency, he was admitted for testing (MRI). The resident was discharged the next day. There was no change in the diagnosis of his chronic condition or his medications. Afterward, Mazden was taken aback that JR's rationale was that the physician had told her the resident should be taken to emergency and her focus was on obtaining proof from the physician that he had done so.

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[2] Residents attend day programs at the Cosmopolitan Learning Centre. "COSMO" programs include social, learning and recreational activities as well as opportunities to do paid work at the centre, fulfilling contracted projects from the business community, such as folding mail-out material and stuffing envelopes.

[70] On October 31, 2011, in an email to Fuchs, [Exhibit 60] JR recounted issues with residents and staff during the weekend, beginning with picking up the aforementioned resident who was being discharged from the hospital. (Mazden testified the resident was sent to emergency a second time because he had been off his meds and the Program Coordinator decided to have him checked by the EMT's.) As well, Resident A had refused her bath and had threatened suicide (by jumping out the bedroom window). It bears noting that Resident A is physically incapable of controlled body movement. It appears that in JR's absence, the other team leader was notified and MW was called in to deal with Resident A, likely by the Co-Team Leader. JR was upset about that because she was told by other staff that MW said JR was not called because there was, or would be, an investigation about JR. JR said that as she left on Sunday, one staff (MW) was "bashing her to staff".

[71] JR concluded the October 31 email by saying that she was "*beyond ready to go to oh&s and the board about absolutely everything at 7th.*" [sic] JR testified in-chief that this was the first time she mentioned taking issues to OH&S to the Employer. [Exhibit 60]

[72] After midnight, JR sent a follow-up email to Fuchs, [Exhibit 61] beginning with "*Hey there, I can't handle any more of this harassment...I don't know how on earth ppl find the time to sit and chat and gossip about each other...*" to which Fuchs responded the following morning. Fuchs indicated Mazden was off sick but as soon as she was back they would either call her to get more information or call everyone in that is involved. JR replied that she would be ok, but she was worried who put the idea of suicide into Resident A's head. In direct examination, JR was asked whether she ever heard back from Fuchs with respect to her emails. JR said "*yeah, on the phone*". JR testified she told Fuchs that she had heard from her Co-Team Leader and two staff that Fuchs was "*out to get her...that you are going to Lucy, trying to get rid of me*".

[73] A meeting was called for November 3, then postponed to November 18, 2011. In the interim, it appears the Employer determined that Team Leader SD had been drawn into the fray, but was not otherwise involved. The Employer proceeded to address JR's allegations with MW. As a result, MW wrote a letter to JR, received by JR on November 2, 2011.

[74] Mazden testified that on November 16, she was visiting 7th Avenue with trades people when she heard a resident coughing. Upon Mazden's inquiry, JR said it was Resident A who was not really sick, she was just playing games. Mazden observed Resident A, who was in bed, and heard deep coughing., JR attempted to discuss Resident A's behaviour from the weekend in the resident's presence (contrary to policy). Mazden gave JR express directions for Resident A's treatment for sore throat and cough. JR continued to insist that Resident A was playing games, and should not be allowed to stay home from work,

i.e., from the residents' day programs at the Cosmopolitan Learning Centre which staff refer to as COSMO. Mazden testified that despite her clear directions to JR that the resident was to stay home to recover and be seen by a doctor, Resident A was sent to COSMO. COSMO promptly asked that she be picked up and returned home due to her cough. Mazden gave clear directions that the resident was to say home and recover and be seen by a doctor. JR did not like the decision made, and defied it. JR felt her opinion had been disregarded, and threatened to quit because of it.

[75] Mazden testified that this incident was one of the factors that went into the decision to terminate. JR had disregarded Resident A's needs, and raised behavioural issues in front of the resident when health should have been the issue. Mazden expressed concern about JR's attitude toward Resident A.

[76] Mazden's typed notes of the November 18 meeting [Exhibit 66] indicate that Mazden directed Fuchs not to deliver the written warning she had prepared, but to continue coaching. JR had been talking about quitting, and both of them hoped that their discussion of JR's performance weaknesses would result in just that.

[77] In the November 18 meeting, JR's strengths and weaknesses in her role as a team leader were identified. Mazden offered JR support in transitioning to other employment which she declined. JR raised that staff were not doing their jobs, but did not give any names. During the meeting the Employer's expectations regarding administering the progressive discipline process were laid out again. JR had not taken any steps in the process of progressive discipline with staff. Their discussion encompassed the matters set out in an undelivered written warning. Instead, a verbal warning was delivered.

[78] On cross-examination, Mazden denied that the verbal warning related to JR's harassment complaint. Mazden testified that was not what the verbal warning was for. JR had been requested to provide information and she had not done so. They stated their expectation that JR would submit the requested information within two weeks.

[79] JR testified that she did not recall receiving a verbal warning on November 18. She stated that by this time, she would not go to any meetings alone with Mazden and Fuchs, because others were telling her she could trust Mazden, but not Fuchs. After the meeting, JR sent a long email to Mazden and Fuchs indicating that a book she shared with them was one that she only shared with people she trusted and respected.

[80] In direct examination, JR acknowledged that Mazden had said the Employer would support her in a transition to other employment outside the organization. She knew then that her Co-Team Leader, MW

and one other staff were right in telling her that "*they were trying to get her out*". When asked whether she would have been interested in being a direct care worker had it been offered to her, JR replied *"Um, yeah, I would have been interested in being a direct care worker, under a good Team Leader like KL.*"

[81] On November 30, Mazden and Fuchs met with JR and her fellow team leader together. To assist JR in conducting disciplinary meetings, the Team Leaders were given a specific directive to jointly schedule and conduct meetings with each staff to clearly state performance expectations, confirm that staff understand their duties (constructive feedback) and that progressive discipline will follow. Specific instructions were given about one staff matter that required prompt attention. Mazden testified that the Team Leaders were later scheduled to meet with the one staff discussed, but no other meetings were conducted. Two weeks was given for the team leaders to sort things out regarding lines of communication (improving their communication with each other about resident issues, staffing issues and household issues)

[82] On December 6, 2011, Mazden responded to a text message from JR about repairs at the house. In a postscript to her reply Mazden asked JR when she would get the incident report/complaint about Resident A's friend and family. JR replied that she swore she put them in her stuff for Fuchs on Thursday and would email them to Mazden when she got home. [Exhibit 73] Neither Fuchs nor Mazden received the incident report/complaint.

[83] On December 12, Mazden's last day in the office before her medical leave, Mazden emailed JR to say that since JR had not complied with the Employer's request for clear documentation regarding the issues raised, she presumed there was no issue, as her hands were tied to do anything about it. JR responded in the evening, to say that her doctor had recommended that her counsellor contact OH&S to inquire about workplace harassment. Her next step was going to be to meet with OH&S not to lodge a complaint, but to learn how to document a complaint: She wrote:

> "...there are very specific ways OH&S requires of the documentation of harassment and violence (ie: [Resident A attempting to bite staff which once again recently was reported in the comm book) for workplace and personal use.
>
> This isn't to lodge a complaint specifically about 7th Avenue/Chip and Dale Homes Inc.; its to seek specific information and clarification of policies & legislation and documentation standards. There are sessions free of charge for people to attend, which I will book for myself on my own time and individual appointment. [Exhibit 74]

[84] On December 14, 2011, Fuchs held a follow-up meeting with JR and her fellow team leader to clearly identify all the job duties of a team leader, and divide the duties between them, including SD's responsibility for scheduling and JR's responsibility for petty cash. JR got very mad about her responsibility

for petty cash. Fuchs did not understand her strong reaction. Then JR disclosed that it took her 7 hours to do petty cash—a job Fuchs confirmed with their book-keeper should only taken an hour, at most—and that her boyfriend helps her with it at home. Her boyfriend and his friends were also developing a program to help her do it on her own. The bookkeeper told Fuchs that was a confidentiality breach. Fuchs knew that and agreed.

[85] Fuchs waited until later in the day to speak privately with JR about the confidentiality breach. Fuchs told JR that she and the bookkeeper didn't understand why it was taking so long, JR disclosed dyslexia as the reason, about which Fuchs was unaware. Fuchs gave JR a verbal warning for the confidentiality breach and said she would look into how to support JR and talk to Mazden about accommodation.

[86] In the days following the December 14 meeting, JR proceeded to send numerous text messages to her Co-Team Leader who was on-duty Friday and Saturday (December 16 and 17), questioning decisions made by her fellow team leader about staffing and scheduling, which were SD's decision and job duty. Fuchs testified that SD called her on Saturday frustrated and upset, and threatened to quit. Fuchs testified that JR's behaviour contradicted the specific instructions with respect to division of duties received in the December 14 meeting. As a result, she proceeded with the process of termination. Fuchs decided, in consultation with the Personnel Committee, that JR's work performance was not improving, and a decision was made to terminate her employment without cause. Although the decision was made on or about December 21, 2011, JR's employment was not terminated until after Christmas, on December 29, 2011.

[87] At some point on Saturday, December 17, 2011, the following exchange took place between JR and Fuchs

> **Appellant JR:** Hey Kathy, r u able to meet Monday first thing in am? I've got word of more talking behind my back. I need really help with this. I trust u and lucy have and are doing what u can to get to the bottom of this but ppl aren't being truthful w/u and still r doing things at 7th. I trust u & lucy wld do more if u cld but I'm wondering if it is time to go to prov oh&s and ask them to help.
>
> **Ms. Fuchs:** I will look at my schedule when I get in. It is not time for u to go to oh and s seen as you have not put anything in writing for us to deal with or investigate. Lucy ask you to provide that and you did not follow through with that request. Until I have something in writing I will not discuss this any longer.
>
> **Appellant JR:** Lucy does have it and says it wasn't enuf. That's why the dr asked I meet w/oh&s to discuss how things r 2b documented. I'm asking [redacted name] to document what MW told her this morning. [Exhibits 75 and 76]

[88] Fuchs testified in-chief, that JR's employment was terminated because she was not fulfilling her job as a Team Leader. She was not supervising, or administering the process of progressive discipline, and cited JR's attitude toward Resident A and that JR did communicate or work well with her Co-Team Leaders. Fuchs stated that "harassment" was not a factor in the decision to terminate, nor did JR mentioning OH&S have any bearing whatsoever on the decision. JR had mentioned OH&S repeatedly over the months and Fuchs perceived as "just her talking" and never gave it another thought. Mazden had stated that the Employer recognized JR's right to contact OH&S, but the issues they were dealing with were performance-related.

[89] In cross-examination, Fuchs was asked whether she mentioned harassment or OH&S to the Personnel Committee. Fuchs said she talked about JR's inability to perform her job as team leader and *"it wasn't even an issue or a thought in her mind"* about harassment or JR's reference to OH&S.

ANALYSIS, REASONS and FINDINGS

Framework for Analysis

[90] Turning to the substance of this appeal, the issue is whether the Employer engaged in unlawful discriminatory action against the Appellant in retaliation for the Appellant's participation in type of health and safety activities protected by section 27 of the Act. Section 28 provides a framework for analysis.

[91] The initial step, as per section 28(1) requires consideration whether the worker had reasonable grounds for believing that the Employer has taken discriminatory action against her for a reason mentioned in section 27. Thus, the initial onus is on the Appellant to establish that:

(1) the employee suffered an adverse employment consequence within the scope of the description of "discriminatory action" found in section 2(1)(g) of the Act;

(2) the employee engaged in a health and safety activity protected by section 27 of the Act; and

(3) the employer's discriminatory action was taken "for a reason" described in section 27 of the Act. In other words, the worker must establish a connection between the discriminatory action and the worker's protected s. 27 activity.

[92] Where a worker establishes these essential elements s/he may be said to have demonstrated a *prima facie* case of discriminatory action. A presumption then arises 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, triggering a "reverse onus". The reverse onus operates to shift the burden of proof

to the Employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason and to rebut the presumption.

Has the Appellant established a *prima facie* case of discriminatory action?

[93] There is no dispute as to the adverse employment consequence. The Employer dismissed the Appellant on December 29, 2011. The Employer acknowledged the action the action it took against the Appellant falls within the scope of the statutory description of a discriminatory action.

[94] The Employer also acknowledges the Appellant raised allegations with respect to workplace harassment through the course of her employment as a team leader, and mentioned approaching OH&S on several occasions, notably shortly before the time discipline was imposed. In light of the Employer's acknowledgement, I must find that Appellant has established *prima facie* that she was engaged in occupational health activities that are, or could be, protected by section 27 of the Act.

[95] The Employer acknowledges that where an employer suspends or terminates an employee shortly after he/she raises a health and safety concern, the onus rests with the employer, pursuant to section 28(4) of the Act, "to establish that the discriminatory action was taken against the worker for good and sufficient other reason". Although the Employer accepts that it bears the "reverse onus", the Employer also takes the position that if [the Appellant] is to take advantage of the protections of the Act, it must be established that there is a *nexus* between her activities that were purportedly taken in furtherance of her health and safety concerns and the Employer's act of imposing a disciplinary termination on her. The Employer submits that this *nexus* does not exist.

[96] The Employer's position falls short of an admission that the Appellant has established a *prima facie* connection between the protected activity and the discipline which is, therefor, an issue that remains to be determined.

[97] The Employer argues it is not the intention of the legislature that section 27 be used as a tool for employees to challenge legitimate disciplinary action issued against them by the employer. The Employer submits this precise point was noted by the Ontario Labour Relations Board in addressing the appropriate use of its comparable section 50 of the Ontario Occupational Health and Safety Act in *Joannie* v. *Cargill Meat Solution*, 2008 Can LII 37373 (O.L.R.B.) [Tab 2]:

> 4. Section 50 of the OHSA is a "reverse onus" section. That is, on an application under section 50, it is the employer which bears the onus to establish that it did not breach the Act. However, it was not the Legislature's intention that section 50 be used as a tool for employees to challenge all

> employer actions against them. If the employee is to take advantage of section 50, there must be a health and safety nexus alleged with respect to the employer conduct. It is for this reason and despite the reverse onus provision in the section, that the Board requires that applicants at least allege that the employer had an anti-health and safety animus in acting against the employee or at least some connection between health and safety activities engaged in by the employee and the discipline levied by the employer. [Respondent Employer's emphasis]

[98] Though the emphasized portion of the cited extract may be seen as a precursor to the Employer's further argument, at this stage of analysis it is the last sentence and the qualifying clause preceding it which are more applicable here. That is, for purposes here, the Appellant is required to demonstrate a reasonable belief that there is "some connection" between the health and safety activities engaged in by the employee and the discipline levied by the employer. Or, in the language of the applicable statute, a reasonable belief that the employer took action for a reason protected by section 27 of the Act.

[99] In this case, the alleged connection arises from a conversation on Saturday, December 17, 2011 between the Appellant and the Fuchs, who was Acting Executive Director at the time, and the short interval between that conversation and the discipline levied (termination) on Thursday, December 29, 2011. The conversation, via text message was as follows:

> **Appellant JR:** Hey Kathy, r u able to meet Monday first thing in am? I've got word of more talking behind my back. I need really help with this. I trust u and lucy have and are doing what u can to get to the bottom of this but ppl aren't being truthful w/u and still r doing things at 7th. I trust u & lucy wld do more if u cld but I'm wondering if it is time to go to prov oh&s and ask them to help.
>
> **Ms. Fuchs:** I will look at my schedule when I get in. It is not time for u to go to oh and s seen as you have not put anything in writing for us to deal with or investigate. Lucy ask you to provide that and you did not follow through with that request. Until I have something in writing I will not discuss this any longer.
>
> **Appellant JR:** Lucy does have it and says it wasn't enuf. That's why the dr asked I meet w/oh&s to discuss how things r 2b documented. I'm asking [redacted name] to document what MW told her this morning.
>
> [sic throughout]

[100] The adverse employment consequence must do more than merely follow the protected safety activity chronologically. As previously noted, the Employer acknowledges the short interval between the Appellant's protected activity and the discipline levied. While the length of the interval is not in itself determinative of a nexus, it is a relevant factor to be considered. It is also helpful to consider context. Given the timing and the season, the suggestion that one or both of the Appellant Fuchs had seasonal time off work during the interval looms large, with the consequent effect, in a sense, of compressing the interval.

In other words, the interval may be more striking than it first appears. This factor is coupled with the further assertion that the December 17 exchange of text messages in which JR refers to OHS is alleged as the last documented conversation between the Appellant and Fuchs prior to the dismissal on December 29, 2011. With these factors in mind, on its face, the Appellant's belief in a connection between the protected activity and the discipline is not unreasonable. I find that the Appellant has established a *prima facie* connection or *nexus* which prevails until contradicted or overcome by other evidence. It therefore falls to the Employer to establish that its actions against the Appellant were taken for good and sufficient other reason and rebut the causative presumption, i.e., that the action was not taken *because* the Appellant engaged in a protected health and safety activity.

Has the Employer established good and sufficient other reasons for its action? Has the Employer rebutted the presumption in section 28?

[101] The Employer's reasons for terminating the Appellant's employment are summarized in its written submissions at paragraph 21, page 6 and below. Additional detail is set out at Paragraphs 63 and 64:

1) Failure to follow direction to supervise and to discipline staff—this was despite receiving repeated instructions regarding the implementation of progressive discipline;
2) Failure to follow proper lines of communication – this was despite receiving repeated direction and instruction with respect to the proper channels of communication; and
3) Promoting the dislike and rejection of a resident (Resident A).

[102] The testimony of the Employer's two key witnesses, Mazden and Fuchs, provided context and substance to the Appellant's poor performance in each of the above-stated categories, and others. Through these two witnesses, primarily, the Employer submitted a substantive body of evidence demonstrating the time, effort and resources applied to assisting the Appellant to improve her performance. Mazden testified that the Employer's expectation was that within three months a new Team Leader should be able to execute the requirements of the job and, certainly within 6 months it should not be an issue. Despite the Employer's efforts, the Appellant's performance was not meeting expectations at six months (June) or nine months (October). Coaching continued with sessions on November 30 and December 14, 2011. The main purpose of the latter meeting was to address the aforesaid communication issue, and resolve the division of duties between the two team leaders.

[103] On the days following the December 14 coaching session, the Appellant conducted herself in a manner which contradicted specific instructions received at the December 14 meeting with respect to the division of duties between herself and her fellow team leader. Due to the Appellant's intrusion into the on-

duty team leader's performance of her duties, the Co-Team Leader complained to Fuchs and threatened to quit. I am satisfied, on balance, that this incident triggered Fuchs decision to terminate—or, to proceed with the process of termination which required review by the Personnel Committee of the Board.

[104] Counsel for the Appellant argued that choices other than termination could have been made with respect to the discipline levied in this case. Counsel suggested that JR could have been transferred to another group home which would have resolved one of the issues (conflict and communication issues as between JR and her fellow team leader) as had been done with the two previous team leaders at 7th Avenue. Counsel's further argument suggests that JR was not suited for the position of Team Leader, but was otherwise capable of performing the role she had previously held as a Direct Care Worker but was not offered that opportunity or demoted to that position.

[105] Counsel for the Appellant argues that there is no dispute that [the Employer] advanced evidence capable of forming at least a partial basis for termination on a without-cause basis. However, it is further argued that [the Employer's] decision is tainted in multiple respects, such that it cannot satisfy its burden under section under section 28(4) to demonstrate that the termination was free of any consideration of her well-known intentions to pursue relief through OH&S.

[106] Counsel for the Employer submits that although there is almost no analysis of what constitutes good and sufficient other reason in this jurisdiction, comparable statutory provisions in other jurisdictions have clarified the test as similar to the test on Employers when undertaking disciplinary action against employees involved in union activities. As between counsel, it is common ground that the test has been has been defined to include the "taint principle".

[107] In assessing whether the Employer's explanation for the termination 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."

[108] Stated another way, and mindful of counsels' reference to the 'taint' principle, an adjudicator does not sit in review of the merits of the Employers decision. It is not for an adjudicator to second guess or

substitute his or her judgment for that of the Employer unless it can be shown that the decision itself was motivated by anti-health and safety animus. On a balance of probabilities, are the Employer's reasons a pretext disguising the improper motive or reason, in whole or in part, related to a health and safety activity protected by the Act.

[109] I am satisfied that the Employer's explanation was plausible, credible and coherent, and that the Employer demonstrated good and sufficient reason for the dismissal due to the Appellant's substandard work performance. Through its witnesses, the Employer's evidence demonstrated the supports and training provided in the first three months to assist the Appellant to adjust to the transition from the role of a Direct Care Worker to her new position as Team Leader. Though no emphasis was placed on it by either party, the first three months was a probationary period. The Employer provided further testimony supported by a substantive body of documentary evidence demonstrating the efforts invested in coaching and training to address performance issues and deficiencies over a period of the next nine months, the extent of which was beyond the norm for new team leaders, and which was largely undisputed. As aforesaid, there is no dispute on the behalf of the Appellant that the Employer had at least partial cause for termination on a without-cause basis which is, in fact, the basis on which the Employer terminated the Appellant.

[110] That being said, the Appellant takes the position that the Employer's decision is tainted. Thus, the remaining question for my determination, is whether the Employer has rebutted the presumption contained in section 28(4) by showing that its decision was not influenced or "tainted" by anti-health and safety animus.

[111] The Employer cites Appeal Division Decision #2002-0458, 18 Worker's Compensation Reporter, p. 149 wherein the taint principle was explained by John Steeves:

> (83) ...The taint theory stands for the proposition that safety considerations need not be the only or dominant reason for the Employer's action, but rather, it is sufficient if it is one of the reasons for the Employer's action under review. The taint theory goes to the issue of the Employer's motivation and not to the weighing of evidence...
>
> (84) To summarize, it is my opinion that the approach taken by the reviewing officer as to the legal interpretation and application of section 152(3) was correct. The Employer bears the statutory burden of proving that no contravention has occurred. <u>This means that the Board must be satisfied, on a balance of probabilities, that the Employer's actions were not motivated by consideration of the worker's health and safety activities</u>.
>
> [Emphasis added by Respondent]

[112] And, in *Henthorne* v. *British Columbia Ferry Services Inc.*, 2001 BCCA 476 [Tab 8] at paragraph 15, 344 DLR (4th) 292, in which the majority decision of Newbury, J endorsed the Tribunal's characterization of the taint principle.

> The "taint" principle requires that in order to discharge the burden of proof under section 151 (3) of the Act, a respondent must prove that in no part were its actions tainted by anti-safety motivation prohibited under section 151.
>
> [Emphasis added by Respondent]

[113] The Employer argues there is no nexus between the Appellant's exercise of her rights under the Act and the discipline imposed, that the Appellant's poor performance was deserving of discipline, and the quantum of discipline is not an issue in this forum. On the strength of its case, the Employer takes the position that it has provided "clear and cogent evidence" of its reasons for dismissing the Appellant, and that the Appellant's poor work performance was the only reason for imposing discipline on her.

[114] Counsel for the Appellant cited two Saskatchewan Labour Relations Board decisions in which Chairperson Love interpreted analogous provisions of *The Trade Union Act:*

In International Brotherhood of Electrical Workers Local Union 2038 v Magna Electric Corporation, 2013 CanLII 74458 (SK LRB) at para. 58 and 59, Chairperson Love held as follows:

> The reverse onus contained in Section 11(1)(e) requires the Employer to show that its actions were not intended to coerce or intimidate employees from the exercise of their rights under the Act. The Employer must rebut the presumption contained in the reverse onus provided for in Section 11(1)(e) by showing that the decision was not tainted by any element of anti-union animus which would have the effect of intimidating or coercing employees from the exercise of their rights under the Act.

In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sakundiak Equipment*, 2011 CanLII 72774 (SK LRB) at paragraph 102:

> In *United Steelworkers of America v. Eisbrenner Pontiac Asuna Buick Cadillac GMC Ltd.* the Board made this observation about the significance of the reverse onus found in s. 11(1)(e) of the *Act*. In that decision, the Board outlined two elements that the Board must consider as follows:
>
> > When it is alleged that what purports to be a layoff or dismissal of an employee is tainted by anti-union sentiment on the part of an Employer, this Board has consistently held, as have tribunals in other jurisdictions, that it is not sufficient for that Employer to show that there is a plausible reason for the decision. Even if the Employer is able to establish a coherent and credible reason for dismissing or laying off the employee…those reasons will only be acceptable as a defence to an unfair labour practice charge under Section 11(1)(e) if it can be shown that they are not accompanied by anything that indicates that anti-union feeling was a factor in the decision. [Emphasis added by Appellant]

[115] Both counsel referred to case law characterizing the taint principle based on comparable statutory provisions from other jurisdictions in support of the proposition that similar principles apply to the reverse onus provisions in occupational health and safety legislation in this jurisdiction. By way of example, the Appellant cites by way the decision of Vice-Chair MacDonald in *WCAT-2010-01186 (Re)* 2010 CanLII 41437 (BC WCAT):

> A complainant will establish a case of illegal discrimination even if anti-safety attitude provides only a partial motivation for the employer or union action. The "taint" principle requires that in order to discharge the burden of proof under section 152(3) of the Act, a respondent must prove that in no part were its actions tainted by anti-safety motivation prohibited under section 151.

[116] The Appellant argues that the Employer's decision may be tainted in multiple respects, as where:

(a) there is no principled reason for treating the complainant differently from other similarly situated employees *Burtch v. Intek Communications Inc.*, 2014 CIRB 749 at para. 25;

(b) where it takes action against an employee without offering an opportunity to explain the circumstances alleged to justify that action. *Plante v. Trentway-Wagar Inc.*, 2011 CIRB 52 at para.75; and

(c) it changes its explanations, or presents contradictory explanations for its discriminatory actions *WCAT-2010-01299 (Re),* 2010 CanLII 42326 (BC WCAT) at para.22;

(d) treatment of OH&S concerns and conflation of harassment concerns and disciplinary process reflects a tainted employer mindset.

[117] Before turning to an analysis of the arguments on behalf of the Appellant, it is worth stating the truism that adjudicators, as statutory decision-makers, interpret and apply their home legislation to each fact-intensive case, and are not bound by previous decisions (their own or by other tribunals) or by precedent.

Differential Treatment

[118] The Appellant cites *Burtch v. Intek Communications Inc.*, 2014 CIRB 749, in support of the proposition that an Employer's decision may be tainted where there is no principled reason for treating the complainant differently from other similarly situated employees.

[119] In *Burtch*, the complainant and a co-worker were both Quality Assurance Inspectors in a department that was eliminated in a bona fide business reorganization which intersected with a lawful strike.

Both workers had been previously injured at work and required accommodation on their return to work. When the co-worker returned to work, he was offered accommodation in a position coaching new technicians and maintained his pre-injury rate of pay. The employer said it did not need two coaches, and when the complainant returned to work following the strike, the employer unilaterally assigned him to the warehouse in a position that accommodated his medical restrictions but significantly reduced his rate of pay—not only did he receive less that his pre-injury rate of pay, he received less than he had previously been paid as a warehouseman with fewer responsibilities some years earlier.

[120] In the Board's view, there was no principled reason for this differential treatment since, by the employer's own admission, the complainant was the only employee working in an accommodation position who had his pre-injury rate of pay reduced. The Board found the only difference between the two workers was that the complainant had participated in the strike and his co-worker had not. On these facts, the Board drew the inference that the Employer's actions and differential treatment of the complainant were tainted by anti-union animus.

[121] If it were necessary to distinguish *Burtch*, I would do so by re-stating my earlier finding, that I am satisfied by the Employer's explanation for its action and that it had good and sufficient reasons for terminating the Appellant's employment. In short, the Employer had principled reasons for its actions.

[122] In the instant case, the Appellant argues that the Employer's explanation fails to account for the differential treatment of other similarly situated employees, notably employees also seen as unsuited for a team leader position but generally able to fulfill the duties of a direct care worker. Counsel for the Appellant submits that the most likely, and only appropriate, inference based on a conflict in the Employer's evidence is that the option of a direct care position which was provided to other employees in the past was not made available to JR, and that the differential treatment taints the Employer's decision.

[123] I am not persuaded by counsel's path of reasoning, and decline to draw the suggested inference.

[124] Counsel submits that the question whether team leaders seen as unsuited for a team leader position but generally able to fulfill the duties of a direct care worker were generally offered an alternate direct care role was the subject of contradictory evidence: Mazden testified that such offers were made only upon request while Fuchs insisted that Mazden actually made the offer to move her to a direct care worker position at the November 18 meeting, while JR offered uncontested testimony about another employee who had been "knocked down" to a direct care worker position rather than terminated.

[125] I do not agree with counsel's argument for several reasons. My analysis and reasons follow.

[126] To be clear at the outset, but for Fuchs anomalous testimony referenced as contradictory evidence, there is no dispute that JR was **not offered** an alternate position as a direct care worker, nor has the Employer taken a position otherwise. Neither has the Employer taken the position that the Appellant was dismissed, rather than offered an alternate position, only because JR did not request it.

[127] In cross-examination related to the October 21 and November 18, 2011 meetings, both Mazden and Fuchs were asked whether the possibility of a transfer or another position [as a direct care worker] for JR had been considered. When asked, Mazden first took exception to counsel's framing reference to "*before pushing [JR] out the door*", then went on to say that JR had been asked twice to consider whether the job of team leader was working for her, once by Fuchs on October 21, 2011 and again, by Mazden on November 18, 2011. Mazden testified that she didn't discuss other available positions with JR on November 18 but did suggest to JR that the Employer would *support her in a transition to other work*" [or, as reflected in the meeting notes [Ex 66], to 'other employment']. Mazden's evidence in that regard was not challenged, and is in full accord with JR's subsequent testimony in-chief.

[128] In response to counsel's question (whether team leaders seen as unsuited for a team leader position but generally able to fulfill the duties of a direct care worker were generally offered an alternate direct care role), Mazden's complete response was that there *"had not been previous demotions, but others had requested it."* I infer that "it" means that there had been requests for voluntary demotions in the past. Mazden's testimony in that regard was not challenged or pursued further, and I accept it. It is reasonable to infer from Mazden's evidence that the Employer had not demoted "unsuitable" team leaders to direct care worker position in the disciplinary sense, and did not discuss voluntary demotion unless the employee expressed an interest in it. Given that a demotion to the lesser position likely involves a reduction in pay and/or hours of work (the evidence suggest direct care workers are casual employees), such an approach seems prudent. Mazden's response was not challenged, and I accept it.

[129] Counsel concluded cross-examination by questioning Mazden about 'gossip' at 7th Avenue prior to JR becoming team leader and about the transfer of the two previous team leaders from 7th Avenue. Mazden testified that no gossip had been brought to her attention, and reiterated testimony she had given much earlier in cross-examination: the two team leaders at 7th Avenue prior to J.R had been transferred to separate care homes to resolve an issue of personal concern raised by one team leader about her fellow team leader, the details of which need not be repeated here. Mazden testified that she suggested the transfer and both team leaders agreed to it. Neither team leader was demoted.

[130] When Fuchs was asked whether the possibility of a transfer or another position for JR had been considered, she said "*being a team leader was not a good position for [JR]* and that "[JR] *would have been asked about a direct care position by Lucy* [Mazden]". When asked whether she had raised moving JR to another position Fuchs replied, "*Lucy did on November 18. Neither of [them] raised it with her again.*" Therein lies the referenced contradictory testimony.

[131] In my view, the contradiction advanced in argument is illusory and, more importantly, I do not find it to be materially significant. While I do not accept counsel's suggestion derived from Fuchs' very brief response that Fuchs "insisted" Mazden actually made JR an offer to move her to a direct care worker on November 18, on its face, Fuchs' answer is unequivocal. However, in light of the broadly stated question put to Fuchs, her answer is more ambiguous than it would appear. That is, an offer to 'move JR to another position' *was* raised on November 18—a position outside the organization—and it was 'Lucy' who did the offering. Moreover, it is not clear whether, in the meeting, whether Mazden referred to supporting JR in a transition to "other employment" or "other work. As a result, I have some cause for concern whether Fuchs simply misunderstood the scope of what JR was offered. In any case, I can, with good reason, accept all, some or none of any witness' evidence. Whether unequivocal or ambiguous, whether due to misunderstanding or mistake, that portion of Fuchs' testimony advanced as contradictory is not in harmony with the preponderance of evidence, including the Appellant's own testimony, and I do not accept it. My finding with regard to the anomalous testimony does not otherwise diminish my overall assessment of Fuchs' credibility and has no impact whatsoever on the credibility of Mazden's testimony.

[132] Nonetheless, the question remains, whether the Appellant treated differently from other similarly situated employees. In that regard, the evidence is scant. Counsel submits JR offered uncontested testimony about another employee who had been "*knocked down*" to a direct care worker position rather than terminated. Regrettably, my bench notes do not reflect such a statement being made in-chief, nor was there in any cross-examination of JR by the Employer's counsel related thereto. My notes do reflect that counsel for the Appellant recited that phrase in oral argument, attributing it to JR's testimony, which did not elicit an objection or response from the Employer's counsel. With some reservations, the former may be attributable to a note-taking omission on my part.

[133] Whether considered as argument or as evidence, uncontested inasmuch as there was no cross-examination on it, the statement attributed to JR is nonetheless no more than a bare assertion, hearsay and wholly unsupported by any specific facts or particulars. Even if I were to attach some weight to it, it is insufficient. No evidence whatsoever was offered by the Appellant with regard to the unidentified team leader as to any similarity in their situations other than job title and demotion, in circumstances where the

reasons are a key factor. Moreover, based on my inference that "knocked down" means demoted, JR's statement is in conflict with Mazden's testimony, that there had been no previous[involuntary] demotions but others had requested [voluntary demotion], which testimony was not effectively challenged and which I have accepted

[134] Though the evidence is scant, and was offered in a different context, Mazden did offer more detailed testimony about other team leaders, unprompted by questions pertaining to comparative treatment. Mazden testified as to the two team leader who were transferred. Neither was demoted. Mazden testified that the first candidate for one of the two team leader vacancies created by their transfer had requested to return to her position as a direct care worker after a few weeks, saying the role of team leader was not to her liking. Finally, Mazden testified much earlier in cross-examination, in an unrelated context, that in June, 2011, JR's former co-team leader (JS) resigned [Exhibit 25] as team leader, expressing the opinion that JR was making the environment too stressful. JS requested to stay on at the agency as a direct care worker. Even if JS returned to her former role as a direct care worker (there is no clear evidence whether she did), there is no evidence whatsoever that JS resigned as team leader and/or requested to stay on as a direct care worker rather than being terminated.

[135] Assessing the evidence, I find the statement attributed to JR to be woefully insufficient to form the basis for a determination that the unidentified employee was similarly situated. From a credibility perspective, the fact that JR did not even identify the worker who had allegedly been "knocked down" significantly diminishes the credibility of the statement attributed to her. To the extent of the conflict between Mazden's and JR's evidence here, I prefer Mazden's more detailed testimony.

[136] I find no reasonable basis for drawing the inference that there was/were similarly situated employee(s) or that the Appellant was treated differently than other similarly situated employees for an unprincipled reason, i.e. for a reason related to the Appellant's exercise of rights protected by section 27.

Lack of opportunity to explain, Treatment of OHS Concerns?

[137] The Appellant cites *Plante v. Trentway-Wagar Inc.*, 2011 CIRB 52, ("TWI") in support of the proposition that an employer's decisions may be tainted where it takes action against an employee without offering an opportunity to explain the circumstances alleged to justify that action.

[138] Counsel argues that the Employer's failure to take any steps either to discuss alternatives or to hear JR's side signals a gross failure to deal with her fairly, and casts suspicion on Fuchs having a valid motive for termination based on a single incident.

[139] In *Plante,* the worker's unfair labour practice complaints arising from three work refusals were the latest in a number of cases related to a certification application brought by the Syndicat des travailleuses et travailleurs de Coach Canada – CSN. The employer, TWI, had expanded its coach line by purchasing a business in Montreal. Prior to the purchase, CSN sought to be certified as the bargaining agent for the Montreal workers. The Employer and TWI's existing bargaining agent vigorously opposed CSN's certification application, and appealed the Board's certification order. TWI defied the certification order (prompting further action). In relation to a meeting to discuss Plante's first work refusal, the employer informed Plante that he could be represented by ATU representatives but representatives of CSN were only allowed to attend as observers. Plante had been involved in the CSN's organizing efforts and was its Secretary-Treasurer. Against that backdrop, the events giving rise to Plante's ULP complaints unfolded.

[140] In *Plante,* the Board found that in the employer's rush to terminate the worker, the employer had not followed its own three strike rule by attempting to terminate the worker for his second work refusal which was later reduced to a two-week suspension. Then, on the worker's third work refusal, the employer failed to follow Step 2 of the 5 step process it said it applied to work refusals (obtaining the worker's version of events) before terminating the worker. "The rush to terminate was so expeditious that the Board could come to no other conclusion but that his involvement with CSN played a part in the decision to terminate.

[141] Though it is not necessary to do so, *Plante,* it is distinguishable on its facts. Key to the Board's decision in Plante, was that it the employer's rush to terminate Plante, the employer failed to follow its own rules. That is not the case here.

[142] In the instant case, the evidence does not demonstrate a rush to terminate. In my view, Fuchs' desire to terminate JR in October was largely borne of fatigue and frustration. In any event, termination did not ensure, and whether such action would have been reasonable is a non-issue. Mazden directed Fuchs start with the first steps of progressive discipline—a verbal warning instead of the written warning she had prepared. In November, the Employer took a similar approach, but attached a strong and pointed message by offering to support JR in the transition to other employment, hoping that JR would come to the realization that the role of a team leader was not the job for her and quit. Following the December incident, Fuchs took the appropriate steps before proceeding with termination. While it was not necessary for her to do so, she spoke to her fellow Program Coordinators, and to Mazden, who was on medical leave. More importantly, she followed the process to review the matter with the Personnel Committee of the Board before proceeding with the termination, following which the termination was postponed until after the holiday season. Of equal, if not more importance, I find that the decision to terminate was neither arbitrary nor precipitous, notwithstanding that it had been triggered by the December 17 incident. Rather it was one that was preceded

by many months of effort on the part of the Employer to support and assist JR to improve her performance as a team leader and, on the evidence as a whole, I am satisfied that JR was aware after both the October 21 and November18 meetings that her job was at stake.

[143] Though it may have been "unfair" to not give JR an opportunity to explain, unlike the circumstances in *Plante,* there is no evidence that this Employer had an applicable step-by-step process that included obtaining the worker's version of the events. Rather, the Employer had its own process to follow before dismissing an employee, and Fuchs followed it.

[144] For these reasons, I am satisfied, on balance, that the employer's motivation for not providing the Appellant with an opportunity to explain was unrelated to the Appellant raising of health and safety issues protected by section 27 of the Act.

Contradictory Explanations

[145] The Appellant refers to *WCAT-2010-01299* in support of the proposition that an Employer's decision may be tainted where an Employer changes its explanations or presents contradictory explanations.

[146] In ***WCAT-2010-01299***, a key issue was whether the employer terminated the worker or whether the worker had made his own decision to quit. The Tribunal found that a major difficulty for the employer was that at different times, it changed its position about what led to the worker's departure from its workplace. The employer's first explanation suggested that the worker had been terminated for cause. Next, the employer added serious allegations about the worker's misconduct, even criminal misconduct. Then it asserted the worker had quit on his own, knowing that he was about to be dismissed for misconduct but that the employer would have wanted to keep him on because it was their busy season. The employer provided no reasonable evidence linking the worker to the serious misconduct alleged. The Board found that this "internal inconsistency of disparate versions of events damaged the employer's credibility". In the result, the Board found the worker's testimony to be more reasonable in the circumstances.

[147] In the instant case, the Appellant argues that Mazden and Fuchs offered radically different views of the factors which proved decisive in the termination of JR's employment.

[148] Though, admittedly, I am not certain I fully appreciate the path of reasoning in the arguments, as advanced, the cited proposition on which it rests is not an innovative one. Clearly, the Board's decision turned on credibility, and factors such as changing explanations, contradictory explanations and internal inconsistencies are common factors to be considered in assessing credibility and arriving a determination of what is most likely and probable in the circumstances. Although not stated as such, it would appear that

the Appellant's "taint" argument here, challenges the credibility of the Employer's explanation (reasons) for its actions.

[149] The Appellant argues that Mazden's testimony as to the factors leading to JR's termination made no mention of the December 17 incident involving her fellow team leader in December 2011 and that she had stated Fuchs had mentioned other issues, but she had "no concern with those". Mazden testified Fuchs wanted to terminate JR in October but Mazden stopped that. Counsel notes that JR first notified Fuchs of her intention to go to OH&S no later than the end of October.

[150] *Mazden did not mention the December incident as one of the factors leading to termination. Fuchs mentioned "other issues" but Mazden said she had "no concern with those*.

[151] As I have already found, a culminating incident occurred on or around December 17, 2011 which triggered Fuchs' decision to terminate. The evidence demonstrates that when the incident occurred, Mazden was on a planned medical leave. Fuchs was in charge as Acting Executive Director. Nonetheless, Fuchs informed Mazden of her decision to move forward with the process of termination. Mazden testified in cross-examination that she agreed with Fuchs' decision. In the absence of any evidence to the contrary, I have inferred that Fuchs had full authority to make such decisions in Mazden's absence and did not require Mazden's approval.

[152] Mazden stated she was satisfied the Employer had been "*thorough and consistent*" and that Fuchs was following the Employer's process which called for a review of the matter by the Personnel Committee (an Executive Committee of the Board) and a decision made jointly. Mazden and had no first-hand involvement in the December incident or in the decision-making process. It is reasonable to infer these to be the likeliest reasons Mazden did not mention the December incident one of the factors leading to termination.

[153] It is also reasonable to infer that the "other issues" Fuchs attempted to raise in the course of their conversation, were other issues that supported Fuchs' decision to proceed with termination. It is well established in evidence that together, Mazden and Fuchs had been dealing with various aspects of the Appellant's performance for the preceding six months and, in particular, though October and November, up to and including December 12, after which Mazden was on medical leave. I do not infer, as it seems counsel would have me do, that Mazden was unconcerned or no longer concerned with those "other issues" of JR's work performance. I find it to be more likely than not Mazden simply did not need Fuchs to reiterate those well known "other issues" or to otherwise defend a decision with which Mazden agreed, and the Personnel Committee would review.

[154] *Mazden stopped Fuchs from terminating the Appellant's employment in October*. An issue of growing concern to Fuchs was the way in which JR viewed Resident A. Her concern crystalized prior to their scheduled October 21, 2011 meeting with JR, when she received text messages from JR which Fuchs saw as disrespectful and inappropriate toward Resident A. Fuchs testified that at the beginning and during the earlier stage of JR's time as a team leader she had required lots of direction and support, but Fuchs had felt that JR really cared for the residents. Fuchs testified that the way JR viewed Resident A was a "big concern" which caused her to see JR in a different light, and to question her suitability for their work. Fuchs said that when she spoke to Mazden to voice her concern about it, she had already written a (disciplinary) warning in preparation for the meeting. She stated Mazden told her to start with a verbal warning instead, with a letter of areas JR needed to improve. Mazden testified that Fuchs was "*ready in October to terminate—to go past the written warning and terminate*".

[155] Fuchs did not mention in-chief that she had expressed her opinion about terminating JR to Mazden and was not cross-examined about it. However, I accept Mazden's undisputed testimony that she did so. If there was a discussion beyond Fuchs' merely expressing her opinion, there is no evidence of it. On the evidence before me, I infer that Mazden put a stop to any serious discuss of termination at that time by directing Fuchs to start with the first steps of progressive discipline instead.

[156] The evidence demonstrates that by October 2011 Fuchs was overwhelmed by the demands of managing JR, who continued to be a needy, high maintenance employee. Fuchs felt she had nothing left to give. [Exhibit 56] Had it been Fuchs decision to make in October, perhaps the termination of JR's employment would have occurred much earlier than it did. However, I find the fact that Fuchs had already prepared a written warning to deliver at the meeting, demonstrated her practical knowledge of a reasonable step, and I am inclined to think that Fuchs' opinion regarding termination was borne of exhaustion and overwhelm. That does not displace the factors which were decisive in the decision to terminate, and, on balance, do not find Fuchs' and Mazden's views to be different, radically or at all. Importantly, their evidence in that regard was not inconsistent or contradictory, nor did nor the explanation of their reasons for termination change.

[157] I reject the implied connection between Fuch's mention of wanting to terminate JR's employment and the first mention by JR of her intention to go to OH&S. It was established in the JR's examination-in-chief. that she first mentioned OH&S in an email [Exhibit 60] to Fuchs dated October 31, 2011. Fuchs expressed her opinion about termination prior to the October 21 meeting.

[158] *Lack of boundaries of the factors taken into consideration.* The Appellant submits that in the course Fuchs' presentation to the Program Coordinators and the Personnel Committee, Fuchs only made reference to incidents from the "past year" to explain the reasons for termination without clearly defining what those issues were. Further, she gave only a sweeping reference to "meetings, texts and correspondence" in the termination letter as the sole explanation in the termination letter provided to JR.

[159] The Appellant argues that in light of the absolute lack of boundaries as to the factors taken into consideration, there is no basis to conclude that JR's harassment concerns were *not* part of the decision-making process.

[160] I do not accept the Appellant's argument. In cross-examination, Fuchs testified that there was no discussion of JR's harassment concerns with the Personnel Committee, and when she was asked again a short time later, whether there had been any discussion with the Committee about JR saying she was going to OH&S, Fuchs said that it "*was not an issue or thought in her mind that JR had mentioned going to OH&S*". Fuchs was not pressed in cross-examination on either response. I found Fuchs to be a credible witness, and I accept her testimony which was not effectively challenged.

[161] *Fuchs' intention as of December 14, 2011* Finally, within the context of "Contradictory Explanations" it was submitted that as late as December 14, Fuchs' stated intention was to proceed with steps intended to divide work between JR and her fellow team leader, and that there were only two intervening events serving as any explanation whatsoever, for the immediate decision to terminate the Appellant's employment: (1) the exchange of texts in which JR signalled that she might go to OH&S as a result of Mazden's insistence that she lacked enough information to investigate her complaint; and (2) single incident respecting scheduling.

[162] I will say first, for the record, that the characterization of the first intervening event does not accurately reflect JR's test message which said:

> Hey Kathy, r u able to meet Monday first thing in am? I've got word of more talking behind my back. I need really help with this. I trust u and lucy have and are doing what u can to get to the bottom of this but ppl aren't being truthful w/u and still r doing things at 7th. I trust u & lucy wld do more if u cld but I'm wondering if it is time to go to prov oh&s and ask them to help. [sic throughout]

[163] Second, the reference contained therein to hearsay about "more talking behind my back" is not the complaint lacking information referred to in argument. Although JR sporadically raised the issue of

"gossip" and people "talking behind her back", which the Employer endeavoured to address each time it was raised, on balance, the evidence demonstrates that the complaint lacking information referred to in argument was the complaint about Resident A, her family and friend. In any case, the Employer acknowledges that the reference to OH&S as an exercise of the Appellant's right.

[164] Fuchs testified in-chief that 'going to OH&S' was something JR had said *"repeatedly over the months"* and *"it had no bearing whatsoever"* on the reasons why she decided to proceed with termination and, as aforesaid, her testimony that it *"was not an issue or thought in her mind that JR had mentioned going to OH&S"* when she discussed the reasons for termination with the Personnel Committee was not effectively challenged in cross-examination, and I accepted it.

[165] As I have previously stated, I find the reason that triggered the decision to proceed with termination arose from the Appellant's conduct in the days following the December 14, 2011 meeting which, in itself, cannot be viewed in isolation. I find no contradiction in the fact that Fuchs intended to proceed with steps to divide work between the two team leaders. That process arose out of the November 18 meeting to address JR's performance deficiencies which began in the meeting on November 30, and continued in the meeting on December 14, 2011. At that time, among other things, it was confirmed that JR's Co-Team Leader was responsible for scheduling and JR had duties with regard to petty cash. Not two days later, JR's intrusion into the on-duty team leader's performance of her duties, the Co-Team Leader complained to Fuchs and threatened to quit. I am satisfied, on balance, that this incident was the culminating incident that triggered Fuchs decision to terminate—or, more accurately, to proceed with the process of termination.

[166] Rather than a single incident respecting scheduling, the evidence demonstrates an accumulation of incidents and issues over many months, culminating in an incident that contradicted specific instructions JR received in the December 14 meeting which triggered the subsequent process of termination.

[167] Though it is incidental to my decision, based on the evidence as a whole, I find it more likely than not that the manner in which JR conducted herself in relation to the aforesaid intrusion into the authority of the on-duty team leader, instigated the "talking behind her back" that she referred to in her December 17 conversation with Fuchs.

[168] Finally, though it may have been imprudent of Fuchs to take JR's reference to OH&S in a 'boy who cried wolf too many times' manner, I am satisfied that she did so. However, I am also satisfied on the evidence that on December 17, the Appellant simply for Fuchs' opinion whether it was time to go to OH&S

for help resolving the "gossip" issue. I find that she did not express an intention to exercise her right to seek the assistance of OH&S, and in the twelve days between their conversation and the dismissal that JR did not pursue her allegedly well-known intention to seek the assistance of OH&S.

Treatment of OHS Concerns

[169] The Appellant's final argument suggests that the Employer's treatment of OHS concerns in the context of JR's employment demonstrates a desire to avoid review [by OHS] played a part in her termination. On behalf the Appellant it is argued that

- the Appellant's harassment concerns were the subject of a verbal warning at the November 18 meeting, and a further note at the November 30 meeting;
- Mazden and Fuchs relied on these meetings as part of their explanation as to how JR fell short of performance expectations. Their conflation of harassment concerns and performance processes reflects a tainted employer mindset;
- in the last documented conversation between Fuchs and JR before the termination, Fuchs told JR not to got to OHS. The timing lends itself readily to the inference that JR's intention to pursue an OH&S claim was in her mind when she made the decision to terminate.

Verbal Warning & Conflation of Performance and Harassment

[170] Mazden's notes about the November 18 meeting [Exhibit 66] conclude as follows:

> Verbal warning given by Lucy Re; staff supervision, communication with co-team leader and not bringing the required information as requested by three supervisors.
> Two weeks time frame given. [sic]

[171] On balance, I am not satisfied that the Appellant's harassment concerns were the subject of a verbal warning on November 18. As written, the warning appears to encompass "not bringing the required information as requested". I am not prepared to infer an anti-health and safety animus on the basis that the Appellant may have received verbal warning for **not** perfecting her complaint with specific information. Moreover, it was not perceived as a verbal warning by JR, who testified that she did not recall receiving any verbal warning at either the October 21 or the November 18 meetings. Even if I were to accept the argument, which I do not, there is no reasonable basis to infer that it tainted a decision to terminate made more than a month later. However, there was no question or dispute raised that the Appellant was given a two-week deadline to provide the requested information. JR did not comply, as reflected in the November 30 meeting notes. [Exhibit 69]

[172] Counsel for the Employer established in cross-examination and advanced in argument that on nine separate occasions the Employer informed JR of the requirement for a written complaint and/or requested her to submit more specific information so that it could conduct an effective investigation. [Exhibits 33, 40, 56, 66, 69,72,73,74 & 75]. On my review of the evidence, I noted that a tenth request included as part of Exhibit 59.

[173] It is not the focus of my inquiry to assess or determine the adequacy of the steps taken by the Employer to address JR's harassment concerns. However, on the evidence as a whole, it appears that the Employer investigated what it could, took corrective action when it had sufficient information to do so and took other reasonable steps to address JR's concerns, and was constrained from doing more absent further information from JR. As noted above, the Employer went to some lengths to obtain that information, to no avail. Though I do not know what to make of the argument that the Employer's treatment of OH&S concerns demonstrates a "desire to avoid review", I find no reason to infer an improper motive in the Employer's repeated requests for more information, particularly given the stated purpose for their requests was in order for the Employer to conduct an effective investigation of the Appellant's concerns.

[174] As to the conflation of harassment concerns and performance processes, ordinarily, I would tend to agree with counsel for the Appellant that the two issues ought, ideally, to be addressed separately. On balance, the evidence in this case demonstrates that when JR's own performance was at issue she deflected responsibility for her performance shortcomings by making allegations about staff and her Co-Team Leaders. As such, the intermingling of the two issues was, if not unavoidable, certainly not conflation at the instance of the Employer. Furthermore, it seems to me that JR's on-going disregard for the Employer's repeated requests for specific information was, in itself, becoming something of a performance issue, though it was not argued as such.

[175] Having considered the evidence and argument, and for the foregoing reasons, I find no reasonable basis to infer a tainted Employer mindset.

Last documented conversation

[176] The Appellant argues that in the last documented conversation between Fuchs and JR before the termination, Fuchs told JR not to go to OHS. It is further argued that the timing lends itself readily to the inference that JR's intention to pursue an OH&S claim was in Fuchs' mind when she made the decision to terminate. The last documented conversation is reproduced below:

> **Appellant JR:** Hey Kathy, r u able to meet Monday first thing in am? I've got word of more talking behind my back. I need really help with this. I trust u and lucy have and are doing what u can to get to the bottom of this but ppl aren't being truthful w/u and still r doing things at 7th. I trust u & lucy wld do more if u cld but I'm wondering if it is time to go to prov oh&s and ask them to help.
>
> **Ms. Fuchs:** I will look at my schedule when I get in. It is not time for u to go to oh and s seen as you have not put anything in writing for us to deal with or investigate. Lucy ask you to provide that and you did not follow through with that request. Until I have something in writing I will not discuss this any longer.

[177] On a plain reading, JR simply asked a question, one which strikes me as one asking an opinion, not declaring an intention to pursue an OH&S claim'. Nor do I accept as accurate that Fuchs told her to not to go to OH&S. Clearly, Fuchs said "its not time..." and explained why. Though she might have done a better job of it by acknowledging JR's right to seek help from OH&S, the evidence is clear that JR was well of her right to do so. Importantly, Fuchs explanation did not question or challenge the merits of the Appellant's vague allegation. Instead, her explanation was a clear indication that the Employer stood ready to conduct an investigation upon the receipt of a substantive written complaint. Whether she did so knowingly or not, the explanation Fuchs gave is consistent with the Regulations to the Act which impose upon the Employer the obligation to address concerns and complaints brought to its attention in the manner prescribed by its policy.

[178] With respect to timing, that is one of the factors taken into consideration in my finding that the Appellant had established a *prima facie* connection between the alleged protected activity and the action taken by the Employer. On the evidence as a whole, and for reasons previously stated in relation to Fuchs' testimony in that regard, that *prima facie* connection has been overcome by the strength of the Employer's explanation for its actions, and no longer prevails. On a balance of probabilities, I find that the Employer has rebutted the presumption.

Conclusion

[179] Having considered the evidence as a whole, and for all of the reasons stated above, I am satisfied on a balance of probabilities that the Employer did no terminate the Appellant's employment because of her health and safety related activities; rather the Employer's decision to terminate was for good and sufficient other reason. I affirm the decision of the Officer in Report OR-TMC-0121 and the decision of the Officers in Report Number 1088. The Appellant's appeal is hereby dismissed.

Dated at Regina, Saskatchewan this 19 day of August, 2016

"Rusti-Ann Blanke"

_____

Rusti-Ann Blanke, Adjudicator

Addendum:

[180] I am compelled to point out that the Employer's Policy [Exhibit 6] does not appear to be compliant with the legislation which came into effect in 2007, amending the definition of harassment. The Employer would be well advised to review its policy to ensure compliance with the definition of harassment now set out in *The Saskatchewan Employment Act* at section 3-1(1)(l) and subsections (4) and (5) in conjunction with the requirements set out in section 36 of *The Occupational Health and Safety Regulations, 1996.*

[181] In the course of proceedings, counsel referred to the following authorities.

The Employer referred to the following decisions: Tab 1: *Coppola* v. *Extendicare (Canada) Ltd.* (unreported decision dated April 9, 2013); Tab 2: *Joannie* v. *Cargill Meat Solutions*, 2008 CanLII 37373 (O.L.R. B.); Tab 3: *Faryna* v. *Chorney*, (1951), [1952] 2 D.L.R. 354; Tab 4: *F.H.* v. *McDougall*, 2008 SCC 53; Tab 5: *Pieters* v *Toronto Board of Education*, [1997] O.L.R.B. Rep. May/Jun 541; Tab 6: *Western Grocers* v. *Stokalko*, 2002 SKQB 67: Tab 7: Appeal Decision, 2002-0458, 19 Workers' Compensation Reporter, p. 149; Tab 8: *Henthorne* v. *British Columbia Ferry Services Inc.*, 2001 BCCA 476; Tab 9: *Margaret Chan* v. *Ontario Hydro*, [1997] O.L.R.B.; Tab 10 *Reece* v. *Salvation Army, [2005]* O.L.R.B. 4760 (QL)

The Appellant referred to the following decisions: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union* v. *Sakundiak Equipment*, 2011 CanLII 72774 (SK LRB) at para. 102; *International Brotherhood of Electrical Workers Local Union 20138* v. *Magna Electric Corporation*, 2013 CanLII 74458 (SK LRB); *WCAT-2010-01186 (Re)*, 2010 CanLII 41437 (BC WCAT); *Burtch v. Intek Communications Inc.*, 2014 CIRB 749 at para. 25; *Plante v. Trentway-Wagar Inc.*, 2011 CIRB 52 at para.75; *WCAT-2010-01299 (Re)*, 2010 CanLII 42326 (BC WCAT) at para.22

Right to Appeal Adjudicator's Decision to the Board – see attached

Right to appeal adjudicator's decision to board

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

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

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

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

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

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

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

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

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

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

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

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.