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 Section 3-53 and 3-54 *The Saskatchewan Employment Act.*

BETWEEN:

SASKATCHEWAN POWER CORPORATION

Appellant/Applicant
(Employer)

-and-

MASOOMEH NAZARISI

Respondent

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

Respondent

For the Appellant: Susan B. Barber, Q.C. McDougall Gauley, LLP

For the Respondent: Gerald Heinrichs, Merchant Law Group LLP

PRELIMINARY ISSUE OF INTERIM RELIEF

I Introduction and Background

[1] Saskatchewan Power Corporation ("SaskPower) has made an application for interim relief pursuant to s. 3-57 of *The Saskatchewan Employment Act* which provides:

> **Decisions not stayed by appeals**
> **3-57**(1) Subject to subsections (2) and (3), the commencement of an appeal pursuant to section 3-53 or 3-56 does not stay the effect of a decision that is being appealed.
> (2) The director of occupational health and safety may, on the director's own motion, stay the effect of all or any portion of a decision if an appeal from that

decision is to be heard by the director.
(3) An adjudicator may, on the adjudicator's own motion, stay the effect of all or any portion of a decision if an appeal from that decision is to be heard by the adjudicator.

[2] SaskPower terminated the employment of Masoomeh ("Macy") Nazarisi on May 21, 2015.

[3] In November, 2015, Ms. Nazarisi made a complaint to the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace Safety, alleging that discriminatory action had been taken against her for raising health and safety concerns on a number of occasions regarding harassment in the workplace. In particular, according to a letter from an Occupational Health Officer ("the OHO") to SaskPower dated November 19, 2015, Ms. Nazarisi wrote in her "Discriminatory Action Questionnaire that she was experiencing bullying, isolation, sexual harassment, manipulation and work sabotage, purportedly by her manager.

[4] An Occupational Health Officer (the "Officer") investigated Ms. Nazarisi's complaint and, on February 10, 2016, the Officer issued a written decision letter and Notice of Contravention (Report Number and Case Number 5976), in which the Officer determined that SaskPower had taken discriminatory action against Ms. Nazarisi because she "sought enforcement of the Act or regulations". The Officer found that that the Employer had provided "conflicting information" regarding the reasons for termination and determined that the Employer had not provided good and sufficient other reason for terminating Ms. Nazarisi's employment.

[5] The Employer has appealed the Officer's decision. The appeal process is proceeding expeditiously toward a hearing currently set, by mutual agreement of the parties, for Wednesday, June 1 and Thursday, June 2, 2016.

[6] Concurrent with its Notice of Appeal, the Employer requested the Director to suspend the operation of the decision resulting from the Notice of Contravention until the appeal has been disposed of, pursuant to section 3-57(2) of the Act.

[7] Counsel for both parties submitted written submissions, and oral argument was heard on March 31, 2016.

[8] For the reasons stated herein, I grant a stay of the decision and Notice of Contravention.

Applicant's submissions:

[9] SaskPower submits that the appropriate test to determine whether interim relief is appropriate was laid out by the Supreme Court of Canada *in RJR-MacDonald Inc.* V. *Canada (Attorney General)*, [1994, 1 SCR 311 ("*RJR-MacDonald*"), whereby the following three factors were considered:

i) Whether there is a serious question to be considered (in other words the claim is not frivolous or vexatious

ii) Whether irreparable harm will result if interim relief in the form of a stay is not granted; and

iii) Whether the balance of convenience favours the interim relief sought.

[10] SaskPower submits the factors in RJR all weigh in favour of the interim relief being granted:

- SaskPower's claim is not frivolous or vexatious, and the reasons for Ms. Nazarisi's termination is a serious issue to be determined.

- The fact that Ms. Nazarisi's employment was terminated "without cause" does not preclude a finding that she was terminated for "good and sufficient other reason" under the Act.

- Irreparable harm will result if the decision is not stayed pending the determination of the appeal. The position Ms. Nazarisi previously occupied has been abolished. As a result, it is no longer possible for SaskPower to comply with the reinstatement order under s. 3-37(1)(b) which requires Ms. Nazarisi to be returned to her former employment on the same terms and conditions under which the worker was formerly employed" without significant up-front hardship and expense in terms of re-organizing its business and re-creating the position for Ms. Nazarisi. Further, for the decision to remain in effect would defeat one of the purposes for the appeal itself. Also, should the eventual decision on the merits favour it, SaskPower would have accommodated an unnecessary and significant burden for which there would be no remedy, as SaskPower cannot recover damages from Ms. Nazarisi in these proceedings.

- In contrast, the harm to Ms. Nazarisi is quantifiable and wholly compensable. SaskPower will provide an undertaking as to damages so that if the Decision is upheld after SaskPower exhausts the remedies available to it, it is prepared to make good on any back pay or other benefits or payments to which Ms,. Nazarisi might be entitled. This would reduce, if not eliminate altogether, any prejudice to Ms. Nazarisi of the Decision being suspended in the interim.

- The balance of convenience favours staying the Decision pending appeal. While significant prejudice to SaskPower's operations and the appeal proper would result if the Decision remains in effect pending the appeal, in contrast there would be minimal, if any, prejudice to Ms. Nazarisi if the decision was suspended in the interim.

- The nature of Ms. Nazarisi's allegations, which include harassment by her manager and the work environment contributing to her health problems, are also indicative that the balance of convenience favours staying the decision pending the appeal. It would be best for both parties is Ms. Nazarisi was not reinstated during the appeal period, as reinstatement could further exacerbate issues alleged by Ms. Nazarisi, and further complicate the very issues under appeal, should further allegations accumulate while the appeal is pending.:

Respondent's submissions:

[11] Ms. Nazarisi's last working day was May 20, 2015 and her last pay cheque from SaskPower was June 15, 2015. Since her termination, Ms. Nazarisi has been subject to a drastic drop in income of about 77%. She has been advised that her EI benefits will end in June, 2016. On Ms. Nazarisi's behalf, it is submitted that:

- SaskPower offered the Respondent severance, said to be "consistent with common requirements". The offer, also noted in the Officer's decision as 4-5 month's salary, came with an attached "poison pill" that she end any and all claims against SaskPower, including the discriminatory action claim which has now been substantiated by [the Officer].

- It is shameful and dishonourable that SaskPower has withheld all money from Ms. Nazarisi even when they fully admit it is due.

- The mathematical answer that any eventual monetary award will be retroactive avoids the very human and real financial problem that exists for Ms. Nazarisi today. Ms. Nazarisi must tolerate a diminished standard of living, while she nobly presses forward with her discriminatory action claim.

- Given the determination in Ms. Nazarisi's favour by the Officer's decision that SaskPower has committed an "unlawful discriminatory action" and is entitled to a "return to the workplace", the claim by SaskPower for a continuing stay adds insult to injury.

- In considering the jurisprudence on stay of proceedings pending appeal and the balance of convenience factor, the inconvenience of a stay on Ms. Nazarisi is far greater than any possible inconvenience to SaskPower. Each passing week is its own self-evidence "irreparable harm" for Ms. Nazarisi, who, unlike other individuals at SaskPower, needs to cut back on their budget for food, entertainment, clothing, postpone holidays and car repairs—problems Ms. Nazarisi faces each and every day.

- SaskPower's offer to provide an undertaking as to damages is of no value. This and SaskPower's claim that Ms. Nazarisi will not suffer any prejudice by not being returned to the workplace, indicates SaskPower's insensitivity to the real and human issues at hand.

- With reference to the inconsistent stories provided by SaskPower about Ms. Nazarisi's dismissal, the findings by [the Officer] provide some ammunition that SaskPower's appeal is frivolous.

- It is offensive and condescending that SaskPower would claim that Ms. Nazarisi cannot come back to work because of some illogical and prejudicial fear that she would make other "similar allegations"

- The allegation that Ms. Nazarisi's position has been abolished is nonsensical. The Standards Group department had six engineers, all with varying and rotating and shared tasks. SaskPower's claim of an abolished position is a shell game, showing perhaps the extent to which SaskPower is prepared to go in this matter.

- Regarding the principles of a stay pending appeal, Lane J.A.., in *Ochapowace First Nations* v. *Arayaas [sic]*[1] (1994) 123 Sask. R. 31, stated, "The underlying principle is to prevent injustice and to ensure that the result is fair and equitable to all sides." A total stay of proceedings gives SaskPower everything, and Ms. Nazarisi nothing. Such a result is not "fair and equitable to all sides".

- In *Horseshoe Creek Farms Ltd. v. Sterling Structures Co. Ltd. (No. 1)* (1982), 15 Sask R. 54, Bayda, C.J.S., described the broad discretion and latitude available in determining the best terms for any stay. The court stated, "The answer depends on the circumstances of each case. In some situations, a partial lifting of the stay would be a solution; in others, the granting by the plaintiff of security or the imposition of some other terms, and in still others, a combination of such or similar devices.

- The legal maxim "justice delayed is justice denied" is of some consideration in determining fairness.

- To give effect to the Officer's decision, the two "portions" of the Officer's decision are a return to the workplace such that Ms. Nazarisi resumes her job and duties as an engineer and payment to Ms. Nazarisi of due and proper wages for that work. The adjudicator has broad discretion to balance them under s. 3-57.

[1] *Ochapowace First Nation v. Araya*

- The stay should be lifted in full and Ms. Nazarisi should return to work. Alternatively, if the stay is sustained, the fairness of this situation demands that wages should not be stayed.

REASONS FOR DECISION

[12] SaskPower takes the position that the appropriate test to determine whether interim relief is to be granted was laid out by the Supreme Court of Canada in *RJR-MacDonald, supra,* the application of which was not disputed. In my view, it is helpful to

(i) Whether there is a serious question to be considered (in other words the claim is not frivolous or vexatious

(ii) Whether irreparable harm will result if interim relief in the form of a stay is not granted; and

(iii) Whether the balance of convenience favours the interim relief sought.

A serious question to be considered? Is the Applicant's appeal frivolous or vexatious?

[13] With reference to the inconsistent stories provided by SaskPower about Ms. Nazarisi's dismissal, the Respondent submits the findings by [the Officer] provide some ammunition that SaskPower's appeal is frivolous. The Officer's decision is, of course, a relevant consideration but is not conclusive. In its Notice of Appeal, SaskPower has submitted a detailed discussion to support the grounds of appeal. On the basis of common sense and an extremely limited review of the case on the merits, I am satisfied that the appeal is not frivolous or vexatious, and that the reason for Ms. Nazarisi's termination is a serious issue to be considered.

Irreparable Harm

[14] SaskPower argues that it is sufficient to establish a meaningful risk of irreparable harm, rather than a certainty of irreparable harm.[2] Even though the position Ms. Nazarisi once occupied has been abolished, I am not convinced that it would be necessary for SaskPower to re-organize its business or re-create the exact position in order to comply with section 3-37(1)(b) to reinstate Ms. Nazarisi to her former employment on the same terms and conditions under which she was formerly employed. That being said, I do accept that a plain reading of s. 3-37(1)(2) gives rise to a meaningful risk of a significant unrecoverable cost to SaskPower to comply. More compelling, in my view, is SaskPower's argument that should the

[2] *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 12

eventual decision on the merits of the appeal favour it, SaskPower would have accommodated an unnecessary and significant burden for which there would be no remedy, as SaskPower cannot recover damages from Ms. Nazarisi in these proceedings.

[15] I am not impervious to the Respondent's submissions about the harm to Ms. Nazarisi—the "very human and financial problem" that exists for Ms. Nazarisi today, and every day that this matter remains unresolved. I appreciate that she has been living in significantly reduced circumstances on an income from Employment Insurance, the expiry of which is imminent. There is no evidence before me as to Ms. Nazarisi's efforts, if any, to mitigate her circumstances.

[16] In contrast, the harm to Ms. Nazarisi, while undoubtedly daunting, is not irreparable. As per the argument advanced by SaskPower, the harm to Ms. Nazarisi is quantifiable and wholly compensable.

[17] Guided by *RJR-MacDonald, supra* "irreparable" refers to the nature of the harm suffered rather than its magnitude. In this instance, there is a meaningful risk of harm to SaskPower than cannot be remedied. I am further guided by *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership* supra. In the passage cited by SaskPower, the Court of Appeal refers to a "meaningful doubt as to the adequacy of damages if the injunction is not granted" as being a "relatively low standard". In this case, the meaningful risk exceeds a meaningful meets and exceeds that low standard inasmuch as the recovery of damages are not a remedy available to the Applicant in these proceedings.

Fairness and Balance of Convenience

[18] The Respondent invites me to consider "fairness, which I will address conjunction with the balance of convenience.

[19] The Respondent submits "justice delayed is justice denied" is of some consideration in determining fairness.

[20] On the facts before me, I note that Ms. Nazarisi's last day of work was on May 20, 2015 and she did not proceed with a discriminatory action complaint until November 15, 2015. The Officer's decision was rendered on February 10, 2016. The Applicant's timely Notice of Appeal was dated and marked received by Occupational Health and Safety on March 7, 2016, on which date SaskPower also requested the Director to grant the stay which is the subject of this application. An Order of the Saskatchewan Labour Relations Board dated March 11, 2016 confirmed my appointment as Adjudicator. The parties agreed to exchange written briefs addressing SaskPower's request for a stay, with oral argument to be heard on March 31, 2016 by teleconference call. At the conclusion of oral argument on that date, the parties mutually agreed

to a hearing date and the matter is currently scheduled to be heard on June 1 and June 2, 2016. In summary, this matter has proceeded expeditiously toward a hearing of the appeal proper.

[21] The Respondent cites *Ochapowace First Nation* v. *Araya* (1994), 123 Sask. R., in support of the proposition that the underlying principle of a stay pending appeal is to prevent injustice and to ensure that the result is fair and equitable to all sides. I did not find *Ochapowace* helpful. The issue to be determined in *Ochapowace* was specific to Rule 15(1) of the *Rules of the Court of Appeal* which provides, subject to exceptions, for an automatic stay of the execution of the judgment appealed from pending the disposition of the appeal. In the context of this appeal, a stay is not automatic. In fact, s. 3-57(1) says the exact opposite: the commencement of an appeal pursuant to sections 3-53 or 3-56 does **not** stay the effect of a decision that is being appealed.

[22] The Respondent submits the stay should be lifted in full. Alternatively, the Respondent submits that if the stay is sustained, it should relate only to the return to work and that pending the outcome of the appeal, SaskPower should be directed to pay Ms. Nazarisi's regular wages to her. Semantically, there is no stay to be lifted or sustained. The issue before me is whether a request for a stay should be granted.

[23] In support of this position, the Respondent has cited *Horseshoe Creek Farms Ltd.* v. *Sterling Structures Co. Ltd. (No. 1)* (1982), 15 Sask R. 54, in which Bayda, C.J.S., described the broad discretion and latitude available in determining the best terms for any stay. The court stated, "The answer depends on the circumstances of each case. In some situations, a partial lifting of the stay would be a solution; in others, the granting by the plaintiff of security or the imposition of some other terms, and in still others, a combination of such or similar devices.

[24] In my view, it is helpful to consider the entirety of the passage partially cited by the Respondent. In *Horseshoe Creek Farms Ltd.,* the position advanced by the Plaintiff was that the operation of the stay—again, the automatic stay in Rule 15(1) of the Rules of the Court of Appeal—in the context of the decreased value of the inflated dollar and the prevailing high interest rates at the time, made it unjust for the plaintiff to be deprived of the fruits of his litigation pending appeal. The Court stated:

> In 1975, interest rates were not as high as they are now and the purchase value of the dollar was not diminishing as rapidly by reason of inflation as it is now. The automatic stay may indeed in some situations create an injustice. There is, thus, some merit to the plaintiff's contention. The problem in those situations, however, is to alleviate the injustice by those conditions without prejudicing the defendant's position should he succeed in his appeal. The answer depends upon the circumstances of each case. In some situations, a partial lifting of the stay would be a solution; in others, the granting by the plaintiff of security or the imposition of some other terms, and in still others, a combination of such or similar devices. **But, does Rule 15 permit the use of those various devices? It was this question that primarily preoccupied the court. [emphasis added]**

[25] Unfortunately, the question that preoccupied the Court was rendered academic as the judgment in the appeal proper was ready to be released. It is, however, a question that I must address here.

[26] The Respondent points to s. 3-57 of the Act and the broad powers of the Adjudicator to "stay the effect of all or any portion of the decision". In my view, the Respondent over-states the Adjudicator's discretion which is limited, by statute, to staying the effect of "all or any portion of the decision". In other words, in my view, an Adjudicator does not have "broad powers" permitting the use of various devices such as the granting of security or the imposition of other terms. Rather, the Adjudicator has the discretion to stay the effect of all, some or none of the decision of the Officer as set out in the Notice of Contravention. An Adjudicator has no remedial jurisdiction to direct SaskPower to pay Ms. Nazarisi her "regular wages" pending the appeal and, therefore, no discretion to impose such a term on SaskPower.

[27] Given the nature of the issues raised on appeal pertaining to the reasons for the Respondent's dismissal, I am inclined to agree with SaskPower that reinstatement of the Respondent pending appeal could re-ignite, if not exacerbate, issues alleged by the Respondent and further complicate the very issues under appeal. Accordingly, I would (and do) grant a stay with regard to that portion of the Officer's decision.

[28] SaskPower has offered to provide an undertaking as to damages which the Respondent contends is of no value. I decline to require SaskPower to give such an undertaking. Though there is a compensatory aspect to an Adjudicator's eventual decision to affirm, amend or revoke the Officer's decision, if the decision is upheld, the employer is ordered to pay 'back wages', rather than damages in the sense that term is used in civil courts. For the reasons set out above, neither do I have the discretion or inherent jurisdiction to require SaskPower to provide such an undertaking. Nor is there any reason to believe such an undertaking is necessary. The enforcement provisions of the Act would protect the Respondent if SaskPower were to fail to comply with any remedy ultimately ordered. There are no similar safeguards in the legislation to assist SaskPower in the event it is successful on appeal and the Respondent was unable or unwilling to reimburse SaskPower. It is for the latter reason, and for the equally compelling reason that the harm to the Respondent is quantifiable and wholly compensable that I grant SaskPower's request to stay the effect of the Officer's decision with regard to the payment of 'back wages'.

[29] To conclude this preliminary matter, it bears mentioning that SaskPower demonstrated it was not insensitive to the Respondent's current financial situation, and in the course of oral submissions, SaskPower renewed its offer to pay the Respondent 4-5 month's wages. Though that sum had been originally offered as severance on the termination of the Respondent's employment (and declined), I understood the offer extended during oral argument to be a sum offered pending the outcome of the appeal. In other words, there

was no "poison pill" (in the words of Respondent's counsel) or condition that the Respondent withdraw the appeal. Some conditions related to Employment Insurance were bandied about, but no agreement was reached.

[30] For all of the reasons mentioned above, I do not have the remedial jurisdiction or the discretion to order SaskPower to pay 4-5 month's wages to the Respondent or to pay her regular wages pending appeal. However, I am mindful that the Employer has stood ready since the date of the Respondent's termination to pay this former amount (albeit as a settlement) as well as the Respondent's fairness argument, in light of which I strongly encourage counsel to re-visit the possibility of an interim agreement pending the hearing of the appeal.

Conclusion

[31] The application for a stay of the effect of the Officer's decision is hereby granted pending the hearing of the appeal proper.

Dated at Regina, Saskatchewan this 21st day of April, 2016

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Rusti-Ann Blanke
Adjudicator

Right to appeal adjudicator's decision to board

4-8

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

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

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

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

. . .

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