LRB 128-15

IN THE MATTER OF: An appeal with respect to the decision of an Occupational Health Officer, in a matter involving harassment or discriminatory action, pursuant to Sections 3-53 and 3-54 of *The Saskatchewan Employment Act,* SS 2013, Chapter S-15.1.

BETWEEN:

MARWIN BRITTO

APPELLANT

-and-

THE UNIVERSITY OF SASKATCHEWAN

RESPONDENT

-and-

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

RESPONDENT

-and-

UNIVERSITY OF SASKATCHEWAN FACULTY ASSOCIATION

RESPONDENT

Representing the Appellant: Gordon D. Hamilton, McDougall Gauley LLP

Representing the University of Saskatchewan: John R. Beckman, McKercher LLP

REASONS FOR DECISION

I Introduction and Background

[1] Dr. Marwin Britto ("Dr. Britto", the "Appellant"), has appealed from the written decision of an Occupational Health Officer dated June 5, 2015 to an adjudicator in a matter involving harassment or discriminatory action pursuant to sections 3-53 and 3-54 of *The Saskatchewan Employment Act* (the "Act").

[2] The Appellant is employed by the University of Saskatchewan. In response to being placed on suspension by the University on April 2, 2015,[1] the Appellant filed a complaint [2] with OH&S on April 8, 2015, alleging discriminatory action by the University of Saskatchewan (the "University") contrary to section 3-35 of the Act. The Appellant had previously filed an internal complaint of discrimination and harassment on December 12, 2014 (the "December complaint") against Dr. Vicki Williamson ("Dean Williamson"), the Dean of the University Library. During the investigation of the December complaint, the Appellant disclosed to the external investigators to having made recordings of ten conversations between himself and Dean Williamson and other colleagues between July 3 and October 16, 2014, without their knowledge or consent, while the Appellant was Associate Dean of the University Library. The University placed the Appellant on suspension with full pay and benefits pending an investigation into the Appellant's conduct. The Appellant alleges that the suspension was imposed by the University in direct retaliation to the Appellant having exercised his rights under the Act by filing a complaint of harassment and discrimination against Dean Williamson on December 12, 2014.

[3] On June 5, 2015, an Occupational Health Officer (the "Officer") issued a Letter Decision[3], the essential content of which is as follows:

(a) That OHS is aware that the University hired external investigators to conduct an investigation into the December 14, 2014 complaint;

(b) That the employer has a mechanism to receive and investigate complaints of harassment as dictated by the Act. In such circumstances, the legislation is being met, and OHS cannot further intervene at this time. Mr. Britto is currently a paid employee of the University of Saskatchewan and a complaint of discriminatory action does not apply;

(c) That OHS cannot intervene nor can they prevent an employer from investigating concerns in their workplace. Regarding the investigation into the conduct of Mr. Britto and the recordings, OHS cannot intervene on concerns of this nature and cannot be further involved; and

(d) That the intention of OHS is not to supersede the employer's efforts to deal with complaints of harassment in the workplace.

[4] Dr. Britto appealed the Officer's decision on the following grounds:

(e) OHS Officer Talmadge misconstrued the scope of what constitutes discriminatory action, by restricting it to loss-of-pay scenarios only, rather than applying the definition set out in Section 3-1(i) of *The Saskatchewan Employment Act;*

---

[1] Tab 3, University's Submissions
[2] Tab 2, Written Submissions on Behalf of the University of Saskatchewan ("University's Submissions")
[3] Tab 1, University's Submissions

(f) OHS Officer Talmadge misconstrued the nature of the reverse onus on the University to prove that no discriminatory action had occurred, as evident from the fact that the University provided no credible or any facts that would support his decision;

(g) The factual circumstance…[meet]…the statutory test for discriminatory action; the "good and sufficient reasons" lacked credibility, arose out of a confidential submission in the harassment investigation, and effectively removed the person who exercised his rights under *The Saskatchewan Employment Act;* and, none of the reasons were urgent enough to warrant suspension, even if valid;

(h) OHS Officer Talmadge either misconstrued the scope of his authorities under *The Saskatchewan Employment Act,* particularly Section 3-36(2), or refused and/or failed to discharge his responsibilities under *The Saskatchewan Employment Act* in the face of clear facts that would support a finding of discriminatory action;

(i) Such further and other grounds as counsel may advise and an adjudicator may consider.

[5] The University submits that the Appellant's in-scope status indicates that the 2014-2017 Collective Agreement between the University and the University of Saskatchewan Faculty Association (the "USFA") governs the employment relationship between the University and the Appellant, of which the disciplinary provisions have been provided.[4]

[6] In the event USFA wished to make submissions on whether the union should have standing in the appeal, counsel for the USFA was invited to participate in the pre-hearing process. Counsel subsequently advised that "the Faculty Association takes no position regarding these proceedings, [and] will not be appearing…". No request was made by, or on behalf of the USFA, to be kept informed of the steps in the appeal.

[7] Pursuant to Section 4-4(2) an adjudicator may determine the procedures by which an appeal or hearing is to be conducted. Through the prehearing process, the parties agreed, and I determined this appeal would proceed by way of the exchange of written submissions, to be followed by final oral argument, in person. Oral argument was heard in Saskatoon, Saskatchewan on November 27, 2015.

ISSUE

[8] The issue to be determined is whether the suspension of the Appellant constituted a discriminatory action prohibited by section 3-35 of *The Saskatchewan Employment Act.*

[4] Tab 5, University's Submissions

II Relevant Legislation

[9] The relevant provisions of the Act and Regulations are as follows:

3-1(1)(i) "discriminatory action" means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes termination, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty ...

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

(b) seeks or has sought the enforcement of:

(i) this Part or the regulations made pursuant to this Part; or

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

...

(h) gives or has given information to an occupational health committee, an occupational health and safety representative, an occupational health officer or other person responsible for the administration of this Part or the regulations made pursuant to this Part with respect to the health and safety of workers at a place of employment;

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

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

(a) cease the discriminatory action;

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

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

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

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

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

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

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

From *The Occupational Health and Safety Regulations, 1996*:

36(1) An employer, in consultation with the committee, shall develop a policy in writing to prevent harassment that includes:

(a) a definition of harassment that includes the definition in the Act;
(b) a statement that every worker is entitled to employment free of harassment;
(c) a commitment that the employer will make every reasonably practicable effort to ensure that no worker is subjected to harassment;
(d) a commitment that the employer will take corrective action respecting any person under the employer's direction who subjects any worker to harassment;
(e) an explanation of how complaints of harassment may be brought to the attention of the employer;
(f) a statement that the employer will not disclose the name of a complainant or an alleged harasser or the circumstances related to the complaint to any person except where disclosure is:
  (i) necessary for the purposes of investigating the complaint or taking corrective action with respect to the complaint; or
  (ii) required by law;
(g) a reference to the provisions of the Act respecting harassment and the worker's right to request the assistance of an occupational health officer to resolve a complaint of harassment;
(h) a reference to the provisions of The Saskatchewan Human Rights Code respecting discriminatory practices and the worker's right to file a complaint with the Saskatchewan Human Rights Commission;
(i) a description of the procedure that the employer will follow to inform the complainant and the alleged harasser of the results of the investigation; and
(j) a statement that the employer's harassment policy is not intended to discourage or prevent the complainant from exercising any other legal rights pursuant to any other law.

(2) An employer shall:

(a) implement the policy developed pursuant to subsection (1); and
(b) post a copy of the policy in a conspicuous place that is readily available for reference by workers.

REASONS FOR DECISION

Background Facts

[10] Though the facts are largely undisputed, the parties' respective interpretations of the facts militated against a single Agreed Statement of Facts. To the extent that the pre-hearing exchange of written submissions brought to the forefront certain fundamental interpretive differences, the need to call *viva voce* evidence was raised. However, through further discussion and agreement, counsel subsequently eliminated the need for oral testimony by the submission of a mutually agreeable Additional Statement of Facts to which I will make specific reference in the recitation of facts which follow.

[11] The Appellant ("Dr. Britto") joined the University in an out-of-scope position as Associate Dean of the University Library starting on September 23, 2013. His offer of employment included tenure in an in-scope academic position (Librarian IV) after the end a renewable five-year term as Associate Dean.

[12] The position of Associate Dean reports to the Dean of the University Library, Vicki Williamson. When Dr. Britto commenced his employment as Associate Dean, Dean Williamson was on a sabbatical scheduled to end on June 30, 2014. In the interim, from September 23, 2013 to June 30, 2014, Dr. Britto reported to the Acting Dean. There was some interaction between Dean Williamson and the Appellant in the months leading up to the Dean's return from sabbatical culminating in a "current state of assessment meeting" on June 9, 2014. According to the Appellant's complaint, he was informed by Dean Williamson at that time, that if he did not improve his performance within a few months, he would be removed from his position as Associate Dean.[5]

[13] On her return, Dean Williamson met regularly with Dr. Britto between July 3, 2014 and October 16, 2014 to discuss her expectations for an improvement of his work performance. On October 16, 2014, Dr. Britto was advised by Dean Williamson that on her recommendation, the Interim Provost and Vice President Academic ended his term as Associate Dean. Dr. Britto remained part of the University Library as a tenured, in-scope employee in the position of Head of Library Services, Information and Technology. (LS&IT) In this capacity, Dr. Britto continued to report to Dean Williamson.

[14] It appears that Dr. Britto was subsequently on medical leave for a period of time, returning from his medical leave on or about November 28, 2014. It further appears that during his absence, Dr. Britto was reassigned from his position as Head of LS&IT to the position of Project Librarian, reporting to Dean Williamson.

---

[5] Tab 4, University's submissions, page 7 second full paragraph

[15] On or about December 12, 2014, Dr. Britto filed a complaint pursuant to the University's Discrimination and Harassment Prevention Policy (the "December 2014 Complaint")[6] alleging discrimination and harassment by Dean Williamson.

[16] On January 16, 2015, the Appellant met with Officers of the Occupational Health and Safety Division to discuss the OH&S procedure.

[17] On January 21, 2015, the Appellant was advised by the employer, via Human Resources, that a formal investigation of his complaint was to be conducted by external investigators. The Appellant was further advised that, in the interim, he would not be reporting to Dean Williamson (as Dr. Britto had also requested).

[18] On January 29, 2015, in the course of an investigative interview, the Appellant revealed to the external investigators that he had recorded meetings and conversations between he and Dean Williamson on 10 separate occasions from July 3, 2014, up to and including October 16, 2014. The recordings also included conversation between colleagues of the Appellant in which the Appellant was not a party to the conversation. Dr. Britto made the recordings using his mobile phone, without Dean Williamson's or the other colleagues' knowledge or consent. Through the Additional Statement of Facts, the Appellant indicates that in two or three instances persons who were not the target of the recording were picked up by the recording microphone [on his mobile smart phone] on an incidental basis. For the purposes of this hearing and only for the purposes of this hearing, this statement, while not admitted by the University, is not contested.[7]

[19] On or around February 9, 2015, the Appellant provided the electronic audio recordings to the investigators, after which the investigators ordered transcripts.

[20] On February 25, 2015, in the course of the investigation, the Appellant signed a confidentiality agreement which "requires all participants in an investigation to keep the matters confidential and not retaliate against anyone who participates in an investigation". The Appellant was advised that this was a new requirement for harassment investigations with the Respondent.

[21] On February 27, 2015, the Appellant sought the assistance of an Occupational Health Officer by submitting a completed Harassment Confidential Questionnaire, detailing the same allegations of discrimination and harassment brought to the attention of the employer in his December 2014 Complaint.

---

[6] Tab 4, University's Submissions

[7] Additional Statements of Facts, paragraph 2

[22] On or around March 5, 2015, the Appellant was presented with an Undertaking of Confidentiality and Retaliation Protection agreement which is said to have stated: "No one involved will discuss or share information outside the investigator for [sic] corrective process. Information will be kept confidential and is to be shared on a "need to know" basis only. Failure to maintain confidentiality of information acquired and shared during the process, except as noted, may result in disciplinary action, up to and including dismissal".

[23] On March 10, 2015, the investigators provided the recordings and transcripts to human resource representatives at the University which were, in turn, provided to Dean Williamson. A Human Resources representative brought the issue of the recordings to the attention of the Interim President of the University, and recommended the Interim President take action with respect to the Appellant [8].

[24] On April 2, 2015, the Interim President, notified the Appellant by letter stating the Appellant was relieved of his regular duties and suspended from his position with pay pending a separate investigation into the matter of the "surreptitious recordings".[9] The Appellant was assigned new office space at the University and permitted to continue research and scholarly work during the period of suspension. In the letter, Dr. Barnhart noted that the suspension was not intended to be punitive or disciplinary and was intended to allow time for the University to investigate the circumstances of the surreptitious recordings and to consider the necessary steps to take.

[25] On April 8, 2015, the Appellant filed a Discriminatory Action complaint[10] with OH&S alleging at Paragraph 1, page 4 that the suspension was in direct retaliation for exercising a right under the Act, with reference, at Paragraph 3 to the December, 2014 complaint against Dean Williamson.

[26] On June 5, 2015, the investigating Occupational Health Officer issued a written decision *supra,* which Dr. Britto now appeals.

[27] For the reasons which follow, the appeal is dismissed.

---

[8] Agreed Statement of Facts, Paragraph 3
[9] Tab 3, University's Submissions
[10] Tab 2, University's Submissions

PARTIES' POSITIONS

[28] Counsel have provided the Tribunal with thorough written submissions and Books of Authorities, which are received with gratitude. My task is not to reproduce all the submissions made by the parties and I do not intend to do so. Further, I will address in my reasons, those arguments relevant to points that I consider to require analysis. To the extent that my reasons may not directly answer some of the submissions put to me, those submissions were, with respect, inconsequential to the path of my reasoning. Nonetheless, I assure the parties that I have reviewed and considered the entirety of their written submissions and the authorities cited.

POSITION OF THE APPELLANT

[29] The Appellant takes the position that Section 3-1(1)(i) of the Act describing "discriminatory action" specifically includes "suspension" without stipulating whether or not the suspension must be disciplinary in nature. The definition includes any action by the employer "that does or would adversely affect an employee with respect to any terms or conditions of employment", "discontinuation or elimination of a job", and a "change of job location".

[30] The Appellant submits the facts satisfy the definition of a discriminatory action. The Appellant was no longer permitted to work in the Library. His office was relocated elsewhere. His job duties were removed and he was advised to do scholarly work and research activities, none of which were assigned to him. He was suspended with pay. The Appellant submits that clearly, the terms and conditions of the Appellant's employment were adversely affected.

[31] The Appellant further argues that the discriminatory action was precipitated by the University's breach of section 36(1) of *The Occupational Health and Safety Regulations, 1996*, which prohibits the disclosure of circumstances relating to the harassment complaint.

[32] The Appellant argues he was engaged in activities described in section 3-35 (b) and 3-35(h). The Appellant submits he sought to enforce his rights under the Occupational Health and Safety provisions of *The Saskatchewan Employment Act* by filing a complaint of harassment under the employer's harassment and discrimination policy. In the course of seeking to enforce his statutory rights, he gave the investigators information about the recording of conversations which could prove his allegations. As a direct result of providing the information to persons responsible for administering the harassment investigation process, the Appellant was suspended with pay pending an investigation into the information that he provided the investigators.

[33] The Appellant submits that the Act mandates a presumption in favour of the Appellant, rebuttable only by "good and sufficient other reason". The Appellant submits that in assessing the goodness and sufficiency of the other reason(s), both the nature of the alleged discriminatory action and the severity of the alleged discriminatory action must be considered. In this case, the nature of the discriminatory action was a suspension with onerous conditions tantamount to dismissal, before any investigation was conducted, in the midst of a harassment investigation, before either the Dean or all of the witnesses had been interviewed.

[34] The Appellant takes the position that in spite of the suggested need of the University to investigate the circumstances surrounding the recording of conversations in the workplace, there was no policy prohibition on the Appellant's activity and it was entirely legal. Even if an investigation was appropriate, which the Appellant argues it was not, there was no good and sufficient basis to respond in the manner that the Respondent did. The Appellant argues that the manner and severity of the alleged discriminatory actions are indicative of the true intentions of the Respondents.

[35] The Appellant submits the University did not rebut the presumption. The Appellant argues the facts confirm the suspension was directly related to the exercising of rights under the Act, by filing a complaint and by disclosing information to the investigators during the course of the investigation. Confidentiality was not maintained by the Dean or the University and the University retaliated against the Appellant through his immediate suspension, followed by an orchestrated complaint and lengthy investigation under another University Policy, and finally, with a recommendation for his dismissal in September, 2015. The Appellant argues that the tell-tale evidence of the retaliatory nature of the University's action is found in the severity of the action itself. If the real concern was how the Appellant's actions would impact the workplace's "principles of collegiality, trust and candor", a measured response would have been to direct the Appellant to cease and desist any and all further recording of conversations in the workplace.

[36] Finally, the Appellant argues that the severity and the immediacy of the suspension clearly conveyed the reasons of the Respondent. The Appellant submits that the Dean realized she could not argue with a transcript that contained many unflattering comments. She wanted the Appellant removed from the Library, never to return because he challenged her by filing the discrimination and harassment complaint. The first and most immediate step was suspension in order to provide her with time to respond to the actions brought against her and the University.

POSITION OF THE RESPONDENT

[37] The University takes the position that it had good and sufficient reason to impose a suspension with pay on the Appellant. The University submits it is necessary to separate the employees who are parties' primary to the dispute to carry out an investigation into the surreptitious recordings as part of the due process of the University's disciplinary proceedings into the matter of the surreptitious recordings. Further, removing the Appellant from the University Library is necessary to mitigate the potential damage to the trust, collegiality and candor in the University Library Department until the extent of the surreptitious recordings is known and the conduct assessed.

[38] The University takes the position that the suspension was made in response to the University being made aware that the Appellant had surreptitiously made the recordings and that the suspension was not imposed in retaliation to the Appellant having filed the December, 2014 complaint, as is apparent from the timeline of events, with the complaint having been filed by the Appellant on December 12, 2014, while the suspension was made on April 2, 2015, after the University had been made aware of the surreptitious recordings.

[39] The University further submits that the suspension is clearly non-disciplinary in nature, as it was not imposed with a view to punish or correct deficient behaviour of the Appellant, but was imposed to remove the Appellant from his position in the University pending an investigation into the matter of the surreptitious recordings, while the University continues to pay the full salary and benefits of the Appellant and permit the Appellant to pursue research and scholarly work.

[40] The University submits that given the circumstances, the surrounding the Surreptitious Recordings, the decision of the University to impose the suspension is both reasonable and justified. The suspension imposed on the Appellant was an administrative suspension that was taken pending an investigation into the surreptitious recordings. The University submits that it is justified in removing the Appellant from the University Library Department on the basis that the surreptitious recordings represented a breach of trust that could have detrimental effects on the functioning of the Department. The suspension is reasonable, as the Appellant has had minimal inconvenience in that he was suspended with full salary and benefits and is permitted to continue scholarly and research work at the University.

[41] The University submits that the principles of collegiality, trust and candor are hallmarks of academia. The Appellant has admitted to surreptitiously making the surreptitious recordings of Dean Williamson and other colleagues, which represents a serious breach of these core values. The University

submits that the principles which the Appellant was expected to follow as an academic are found in the University of Saskatchewan's Guidelines for Academic Conduct. [11]

[42] The University submits the Appellant was not authorized to collect the data of the surreptitious recordings and upon discovery that the violated University policy related to institutional data, the University was authorized to investigate the matter which may also have been a violation of the *Criminal Code*.

[43] The University submits that the suspension with pay of the Appellant is a reasonable and justified response by the University to the University becoming aware that the Appellant had been surreptitiously recording the conversations of his colleagues while the Appellant was Associate Dean of the University Library. The Appellant had a responsibility to not secretly hold information against other colleagues. The loss of trust between colleagues upon such a secretive action has the potential to be highly detrimental to the duties and functions that are required to be carried out in a university department. Upon the University begin made aware of the Surreptitious Recordings it was necessary for the University to separate the employees that are the primary parties to this dispute and to mitigate the potential damage from a breach of the core values of trust, collegiality and candor in the University Library Department.

ANALYSIS & REASONS

[44] On the appeal taken by the Appellant, the Adjudicator deals with the same questions faced by the OHS Officer whose handling of the complaints to OHS is governed, in this case, largely by sections 3-35 and 3-36 of *The Saskatchewan Employment Act* and *The Occupational Health and Safety Regulations, 1996.*

[45] The framework for analysis begins with Section 3-36(1) which provides that the worker must have reasonable grounds to believe that the employer took discriminatory action against him or her for a reason mentioned in section 3-35. In other words, the initial onus is on the worker to establish a *prima facie* case of discriminatory action.

[46] The initial burden on the worker to establish a *prima facie* case of discriminatory action is not a particularly onerous one. To achieve the objects of the Act and its important purpose of encouraging occupational health safety, workers must be secure in the knowledge that they may exercise rights or obligations--raise health and safety concerns--without fear of reprisal. For that reason, where a worker

[11] Tab 7, University's Submissions

establishes a *prima facie* case of discriminatory action, the reverse onus is triggered and the employer bears the heavier burden of disproving the presumption imposed in Section 3-36(4).

[47] To establish a *prima facie* case of discriminatory action, requires the worker to establish to following:

(a) That the employer took action against the worker falling with the scope of Section 3-1(1)(i) of the Act describing "discriminatory action"

(b) That the worker was engaged in one or more health and safety activities protected by Section 3-35 of the Act; and

[48] That there is some basis to believe that the employer took discriminatory action against the worker "for a reason" mentioned in section 3-35. In other words, there must be a *prima facie* linkage or *nexus* between the worker's protected activity and the employer's action.

[49] A determination that a *prima facie* case of discriminatory action has been established raises a presumption in favour of the worker that the discriminatory action was taken against the worker *because* the worker acted or participated in an activity described in section 3-35 and triggers a reverse onus, wherein it falls to the employer to establish, on a balance of probabilities, that discriminatory action was taken against the worker for good and sufficient other reason.

Did the employer take action against the Appellant falling within the scope of Section 3-1(1)(i)?

[50] In many cases, it is clear on the face of the material, and undisputed, that the action taken by the employer falls within the scope of a "discriminatory action", as described in Section 3-1(1)(i) of the Act. In this case, the Respondent submits that the suspension of the Appellant on April 2, 2015, which is admitted, does not constitute a discriminatory action under Section 3-1(1)(i) of the Act.

[51] The Respondent submits that the suspension of the Appellant is administrative in nature, clearly non-disciplinary and minimally inconvenient to the Appellant. Consistent with the University's correspondence notifying the Appellant of the suspension[12], the Respondent submits the suspension is not, and was not intended to be, punitive or disciplinary. It was not imposed to punish or correct deficient behaviour but to remove the Appellant from his position in the University Library pending an investigation into the Appellant's conduct, namely the recordings the Appellant made of his conversations with Dean Williamson and other colleagues, without her, or their, knowledge and consent.

---

[12] Tab 2, University's Submissions

[52] The Respondent cites *Potter* v *New Brunswick Legal Aid Services Commission*, [2015] 1 SCR 500, 2015 SCC 10 (CanLII)[13] in support of the proposition that an employer can validly impose an "administrative" suspension, which is a suspension for non-disciplinary reasons, provided the employer has a good faith business justification for doing so.

[53] The Respondent further refers to internal jurisprudence between the University and the University of Saskatchewan Faculty Association where, in the "*Floyd Arbitration*"[14], Arbitrator Sheila Denysiuk found that the University imposing an administrative suspension on a faculty member was not a disciplinary action. The arbitral decision was upheld by the Court of Queen's Bench[15] and further sustained by the Saskatchewan Court of Appeal.[16]

[54] The Respondent submits that the investigation by the University necessitated that an administrative suspension be imposed on the Appellant to properly determine the action to be taken by the University on the allegation that the Appellant had not performed his duties to an acceptable standard. The University submits its right to perform due process and investigate the allegation of breach of trust surrounding the Recording as being comparable to the University having discovered that an employee had committed some other action that was inconsistent with the standard of behaviour required of an employee, such as theft. The fact that the alleged breach of the employment standard of the Appellant was discovered by the University in the course of an investigation initiated by the employee does not prevent the University from conducting an investigation into the matter, with reasonable due process, under the University's disciplinary procedures.

[55] The Appellant argues that definition of discriminatory action in Section 3-1(1)(i) refers specifically to "suspension" without stipulating whether or not the suspension must be disciplinary in nature. The Appellant further submits the scope of the definition includes "any action [or threat of action] that does or would adversely affect an employee with respect to any terms or conditions of employment…". The Appellant submits that "suspension" clearly falls within the scope of Section 3-1(1)(i).

---

[13] Tab 11, University's Submissions

[14] Tab 12A, University's Submissions. University of Saskatchewan Faculty Association v. University of Saskatchewan, unreported decision referred to as the "Floyd Arbitration" dated May 2, 1995

[15] Tab 13, University's Submissions. *University of Saskatchewan Faculty Assn.* v. *University of Saskatchewan*, [1995] SJ No 752, 139 Sask. R 145

[16] Tab 14, University's Submissions. *University of Saskatchewan Faculty Assn.* v. University of *Saskatchewan* (20 February, 1997) Saskatoon CA No 2332 (Sask CA)

[56] In light of the University's position, it warrants stating that the nature of the suspension, whether it be a non-disciplinary administrative action or a disciplinary one, is a labour relations issue determinable, where necessary, in the context of the University's Collective Agreement, through the grievance and arbitration processes.

[57] I agree with the Appellant. Clearly, "suspension" is included in the description of a discriminatory action, specifically and without qualification as to the nature of the suspension. Further, on a plain reading, section 3-1(1)(i) "...includes termination, layoff, suspension [etc.] ...**or** the imposition of any discipline or other penalty" [emphasis added] which is expressly indicative that the described actions taken by the employer need not be disciplinary or punitive to have an adverse impact on the terms and conditions of employment.

[58] For the reasons stated above, it is not necessary for me to decide whether or not the University's action to suspend the Appellant was disciplinary in order to determine whether the suspension constituted a discriminatory action under the Act. However, it is common ground that an adverse effect on the terms and conditions of employment is a required element of a discriminatory action. In further support of this proposition, both parties cite *Lewis* v. *Regina School Division No. 4,* 2003 SK QB 344.[17] For that reason, the University's position in that regard is a factor to consider in relation to the questions whether the action taken by the University had an adverse effect on the terms and conditions of the Appellant's employment.

[59] On behalf of the Appellant it has been submitted that the adverse impact on the terms and conditions of the Appellant's employment include, *inter alia,* that the Appellant has been relieved of his regular duties and no longer permitted to work in the library. He has been banished from his workplace, and his office has been relocated elsewhere. He was informed that he could continue research and scholarly work during the period of the suspension, but was assigned none to do and was instructed to refrain from entering the premises of any Library on campus where one would normally make use of resources for scholarly work and research.

[60] The University has submitted that the suspension with pay and benefits, with the on-going opportunity for the Appellant to continue research and scholarly activities from an office relocated outside of the Library facilities, is minimally inconvenient to the Appellant. I note that in addition to there being no qualification as to the nature of the suspension, neither is the significance of the adverse effect on the worker quantified. More importantly, for the purposes of this hearing only, the University has not contested the statements listed in Paragraph 5 of the Additional Statement of Facts itemizing the adverse effect on the

[17] Tab 9, University's Submissions; Tab A Appellant's Submissions

terms and conditions of employment alleged by the Appellant. Though not all of the listed adverse effects necessarily speak to the requisite adverse effect *on the terms and conditions of the Appellant's employment*, I am satisfied some do or would meet the requirement and, as noted, are not contested by the Respondent.

[61] For the reasons stated above, I am satisfied that the Appellant has established, *prima facie,* the adverse effect of the suspension on the terms and conditions of his employment. As such, the suspension falls squarely within the scope of Section 3-1(1)(i) as a discriminatory action.

[62] As noted by Matheson, J. in *Lewis, supra* at paragraph 42:

> Innumerable examples could be recited of actions by an employer which have an adverse effect on employees, but are entirely unrelated to occupational health and safety, such as sanctions for tardiness; realignment of work schedules, salary adjustments because of economic factors; etc. To constitute a prohibited discriminatory action; however, the action by the employer must be for one of the reasons set out in section 27.

Did the Appellant engage in a health or safety activity protected by section 3-35 of the Act that could be the reason or one of the reasons for the employer's action? Is there a prima facie nexus or causal connection between the protected activity and the employer's action?

[63] It is important to make the point that not every discriminatory action is unlawful. As noted, the discriminatory action may have been taken for legitimate business reasons entirely unrelated to occupational health and safety. The Act does not shield a worker from all negative workplace actions or consequences, its protection extends only to circumstances where the worker has participated in one or more of the health and safety activities protected by Section 3-35 of the Act and the worker establishes a *prima facie* connection between the adverse consequence and the protected health and safety activity. Neither can an employer shield itself by pointing to proper cause or legitimate business reasons for its actions where there is also evidence of an anti-safety *animus*.

[64] Here, the Appellant claims to have engaged in two health and safety related activities protected by section 3-35:

> **3-35** No employer shall take discriminatory action against a worker because the worker:
> (b) seeks or has sought the enforcement of:
> (i) this Part or the regulations made pursuant to this Part; or
> (ii) Part V or the regulations made pursuant to that Part;
> ...
> (h) gives or has given information to an occupational health committee, an occupational health and safety representative, an occupational health officer or other person responsible for the administration of this Part or the regulations made pursuant to this Part with respect to the health and safety of workers at a place of employment;

Section 3-35(b) Activity

[65] Initially, the Appellant alleged that he was suspended in in direct retaliation for exercising his rights under the Act. Specifically, he alleged in his Discriminatory Action complaint that he had been suspended for having filed a complaint of discrimination and harassment against Dean Williamson in accordance with the University's Discrimination and Harassment Prevention Policy on December 14, 2014.

[66] Section 36 (1) of *The Occupational Health and Safety Regulations, 1996* requires the employer to develop a written policy to prevent harassment which includes, *inter alia* an explanation of how complaints of harassment may be brought to the attention of the employer[18]. Generally speaking, a worker who makes a complaint of harassment is seeking enforcement of his statutory rights and/or acting in compliance with, the Act or Regulations by accessing the statutorily prescribed "explanation" of the process by which employees are able to bring complaints to the attention of the employer for the employer take reasonable action to address. In this case, in addition to filing a complaint pursuant to the employer's policy, the Appellant also sought enforcement of the Act by submitting the same complaint in the form of a completed Harassment Confidential Questionnaire to Occupational Health and Safety on February 27, 2015. His reasons the latter were not advanced.

[67] There is no dispute that the Appellant raised a health and safety concern by filing a complaint of harassment pursuant to the University's policy. For that reason, and on the reasoning outlined above, I have no difficulty finding that the Appellant has established, *prima facie*, that by filing a complaint, he was engaged in activity protected by section 3-35 (a) and/or (b). However, a finding that the Appellant was engaged in a health and safety-related activity protected by section 3-35 is not, in itself, sufficient to establish a *nexus* between the protected activity and the University's action to suspend the Appellant.

[68] In some cases, a temporal link between the discriminatory action and one or more of the types of health and safety related activities protected by section 3-35 is evident on the face of the material, such as when a discriminatory action occurs shortly after an employee engages in a protected activity. While the length of the time is not, in itself, determinative, it is a factor to be considered when deciding whether a *prima facie* case of discriminatory action has been established. Clearly, a temporal link requires more than the mere fact the action taken by the employer followed the protected safety activity.

[69] In this case, the temporal connection is not a striking one. The University submits that it is apparent from the timeline of events that the suspension was not imposed in retaliation to the Appellant having sought enforcement of the Act or regulations by filing a complaint of harassment. The University

[18] Section 36(1)(e)

submits the complaint was filed on December 12, 2014 and the suspension was imposed almost four months later, on April 2, 2015, after the University had been made aware of the surreptitious recordings.

[70] I agree with the argument advanced by the University. As indicated in the Officer's decision, the University had met the legislative requirements. The University had a written policy for the prevention of harassment which included a mechanism to receive and investigate complaints brought to the employer's attention. There is no evidence that the Appellant's right to file a complaint of harassment was ever questioned or challenged by the University, which acted promptly to engage external investigators to conduct an investigation. It is clear and undisputed that the investigation by external investigators commenced on or about January 29, 2015 with the Appellant's initial interview by the investigators. There was no evidence of an anti-safety *animus*.

[71] Subject to the Appellant's further arguments, the only interim action taken by the University prior to April 2, 2015, was to change the Appellant's reporting relationship (at his request) such that he did not report to Dean Williamson.

[72] For the reasons stated above, I find that the Appellant has not established a *prima facie* connection between his activity protected by section 3-35(b) (the filing of a complaint) and the action taken by the University to impose a suspension with pay four months later, upon becoming aware that the Appellant had recorded conversations between himself and Dean Williamson.

[73] In reaching this conclusion, I have not overlooked the Appellant's argument that the facts here parallel the facts in *Western Grocers* v *Stokalko*, 2002 SKQB 67 (CanLii) [19] . In *Stokalko* the employer argued that the worker was not suspended because he refused to do the work, but because he failed to do the quantity of the work required by the performance standard. The Appellant suggests that the adjudicator in *Stokalko* found that a suspension constituted a [prohibited] discriminatory action where the claimed reason for suspension was very closely related to the worker's protected activity. The parallel drawn by the Appellant is that the Appellant was suspended immediately after the Dean became aware, through the harassment investigation disclosure, that the Appellant had recorded their conversations.

[74] With respect, in *Stokalko*, the adjudicator made a factual determination the employer had failed to discharge the onus to prove that discipline was imposed for good and sufficient reasons other than the employer's refusal to do work. The work required by the performance standard imposed on workers by the employer did not supplant basic rights provided to workers by the Act. Here, the Appellant's right to seek enforcement of the Act by filing a complaint of harassment was not supplanted or challenged by the

[19] Tab B, Appellant's Book of Authorities

University. The matter was, in fact, being investigated. Further, by reason of my conclusions above that the Appellant failed to establish a *prima facie* case of discriminatory action, to paraphrase the words of Matheson, J. in *Lewis, supra, at para 48,* the reverse onus does not come into play in this instance. The University did not taken any discriminatory action against Dr. Britto because he acted or participated in an activity protected by section 3-35 of the Act.

[75] If I am wrong in my conclusion that the Appellant failed to establish a *prima facie* case of discriminatory action for the reasons stated, I would nonetheless have found that, on balance, the University rebutted the presumption that the suspension of the Appellant was taken *because* he filed a complaint of harassment and satisfied the onus to provide good and sufficient other reason. I am satisfied on the evidence and accept the University's submission its decision to suspend the Appellant pending an investigation into his conduct via à vis the surreptitious recordings was the sole reason, and not a pretext.

[76] I agree with the Officer's determination, in his June 5, 2015 decision, that OHS cannot intervene nor can they prevent an employer from investigating concerns in their workplace. Regarding the investigation into the conduct of Mr. Britto and the recordings, OHS cannot intervene on concerns of this nature and cannot be further involved. In my view, the Officer concluded the University's investigation of the Dr. Britto's conduct in re: the recordings were not a health and safety matter. I agree.

[77] Finally, as to the severity of the action taken by the University to suspend the Appellant, as opposed to the measured response suggested by counsel for the Appellant, I would reiterate my reasons in the preceding paragraph. Further, in assessing reasons given for termination can and do constitute "good and sufficient other reasons", I am 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."

Section 3-35(h) Activity

[78] The Appellant further submits that in the course of seeking to enforce his statutory rights, the Appellant gave the investigators information that he had recorded meetings and conversations between he

and Dean Williamson which could prove his allegations. On behalf of the Appellant, it is argued that in so doing, the Appellant was engaged in an activity protected by section 3-35(h) of the Act for giving information to a person responsible for administering the Act and/or regulations:

[79] The Appellant submits that section 3-35(h) makes it an offence for anyone to take discriminatory action against an employee for giving information to a person responsible for administering the Regulations such as pursuant to a workplace harassment policy and its investigation. Section 3-35(h) provides

> (h) gives or has given information to an occupational health committee, an occupational health and safety representative, an occupational health officer or other person responsible for the administration of this Part or the regulations made pursuant to this Part with respect to the health and safety of workers at a place of employment;

[80] The Appellant further submits there was no attempted rebuttal of this subsection which arises out of the general prohibition in subsection 3-35(b). I disagree. The initial onus is on the Appellant to establish, *prima facie*, that he was engaged in the aforementioned protected activity and to establish a *prima facie* link between the protected activity and his suspension. If the Appellant establishes a *prima facie* case of discriminatory action, then the (rebuttable) presumption is raised that the employer took action because the worker acted or participated in the protected activity, and it falls to the employer to establish good and sufficient other reason(s) for its action.

[81] The Appellant admits that during his initial interview in the course of the investigation of the December 2014 complaint, he disclosed to the investigators that he had audio-recorded conversations with Dean Williamson between July and October, 2014. In the context of subsection 3-35(h), the Appellant contends that in so doing, he gave information to a person responsible for administering the Regulations ""such as pursuant to a workplace harassment policy and its investigation". I disagree with the Appellant's interpretation and application of subsection 3-35(h).

[82] Clearly, the Appellant did not give information to an occupational health committee, an occupational health and safety representative or an occupational health officer, he gave information to the investigators in the course of their complaint investigation. The issue, then, is whether the external investigators are "other person(s) responsible for the administration of this Part or the regulations made pursuant to this Part with respect to the health and safety of workers at a place of employment".

[83] The Appellant submits that in *Claude Resources Inc.* v. *Thompson*, 2005 SKQB 403 (CanLII) [20], the Court noted at Paragraph 29, that safety legislation ought to be given a liberal interpretation to ensure its objects are achieved:

> The objects of the Act are clear. Its purpose is to promote safety in the workplace. Therefore, the provisions should be liberally interpreted with the objects of the statute in mind. It is beyond dispute that the Court must give a statute such as this a fair, large and liberal interpretation as will best ensure that its objects are attained.

[84] The principles of statutory interpretation are well-settled. In Driedger's *Construction of Statutes,* 2nd ed., 1983 at page 87, the "modern principle of interpretation" is stated as follows:

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

[85] On a plain reading the parameters of "other persons" referred to in Subsection 3-35(h) are described as those responsible for the administration of the Act and Regulations. On a review of Part I and Part III of the Act and the related Regulations the only contextually relevant reference to the "administration" of the Act and Regulations is found in Part I where the "minister" is defined as a member of the Executive Council to whom for the time being the administration of the Act is assigned. In Part III, Division 2 of the Act, entitled "administration" the legislation addresses the appointment by the minister of a director of occupational health and safety, chief occupational medical officer, chief mines inspector and the appointment of employees of the ministry or categories of employees of the ministry as occupational health officers for the purpose of enforcing Part III of the Act and the regulations. In my view, the legislative intent is that the scheme and objects of the Act are administered and enforced by the employees of the ministry (and others) appointed pursuant to sections 3-3 to 3-6.

[86] The employer is required to have a written policy to prevent harassment that is compliant with section 36 of the Regulations. Administration of the policy is the responsibility of the employer. Though compliance with the Regulations requires an employer's policy to include an explanation how complaints may be brought to the attention of the employer, the legislation does not dictate the mechanics of the employer's complaint or investigative processes. As noted by the Officer in his June 5, 2015 decision, "the intention of OHS is not to supersede the employer's efforts to deal with complaints of harassment in the workplace".

---

[20] Tab C, Appellant's Book of Authorities

[87] For the foregoing reasons, I am unable to conclude that the external investigators hired by the University to investigate the Appellant's complaint against Dean Williamson were, in any way, responsible for the administration of Part III of the Act or the regulations. Further, I am unable to conclude that the action to suspend the Appellant was taken because of the information he gave to investigators to support his allegations. Though the distinction is a subtle one, there is no evidence that the University opposed or obstructed the use of the information derived from the transcribed audio-recordings by the investigators in the course of their investigation or for purposes of their findings. In other words, there was no anti-safety *animus*. Rather, the disclosure raised a concern about the Appellant's conduct that the University needed to investigate conduct (the recordings) unrelated to health and safety except to the extent that the conduct came to light in the course of the investigation of the Appellant's December 2014 complaint against Dean Williamson.

[88] I agree with the Respondent that the University has a right to perform due process and investigate the alleged breach of trust surrounding the surreptitious recordings, as being comparable to the University having discovered an employee had committed some other action that was inconsistent with the standard of behaviour required by an employee such as theft. I agree with the University's submission that the fact the alleged breach was discovered in the course of an investigation [of a health and safety concern] does not prevent the University from conducting an investigation into the matter, with reasonable due process, under the University's disciplinary procedures.

[89] For all of these reasons, I find that the Appellant was not engaged in a protected activity pursuant to subsection 3-35(h) and, as such, the Appellant has failed to establish a *prima facie* case of discriminatory action. For that reason, the reverse onus does not come into play.

Conclusion

[90] I affirm the decision of the Occupational Health Officer and dismiss the appeal.

Dated at Regina, Saskatchewan this 14th day of April, 2016

"Rusti-Ann Blanke"

Rusti-Ann Blanke
Special Adjudicator/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