LRB File No. 138-15

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:

K.O.

Appellant (Worker)

- and -

Prairie North Health Region

Respondent (Employer)

- and -

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

Respondent

For the Appellant:	Self-Represented
For the Respondent:	Self-Represented, Tracie Neilsen appearing for the Employer
For CUPE:	Gary Day, CUPE National Representative
Hearing by Teleconference:	April 30, 2016

DECISION and REASONS

Introduction

[1] On or about May 29, 2015, the Appellant sought the assistance of an Occupational Health Officer to resolve a complaint of harassment by submitting, to the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace Safety ("OH&S"), a completed copy of the OH&S Harassment Confidential Questionnaire dated April 5, 2015 [Exhibit 1]. The complaint alleged on-going bullying and harassment based on a disability by the Director of Saskatchewan Hospital North Battleford ("L.S". "the Director".) and a Nurse Manager ("S.N".) The Appellant claimed she submitted a harassment complaint to the Employer two years earlier, in 2013, which had not been addressed by the Employer and that her union (CUPE Local 5111) had done nothing about the past or present harassment.

[2] An Occupational Health Officer ("Officer", "OHO") reviewed the Appellant's Harassment Confidential Questionnaire and supplementary information provided. By letter dated June 3, 2015, the Officer stated his conclusion as follows:

> The Occupational Health and Safety (OHS) Harassment Prevention and Discriminatory Action Unit received your completed harassment questionnaire on May 29, 2015. After reviewing all of the information it is determined that your complaint is mainly regarding your workplace injury and the subsequent WCB claim.

The harassment concern you raised does not meet the requirements of *The Saskatchewan Employment Act* and OHS legislation.

It is noted that you do not wish to return to work at your former workplace, but I will ensure that your concerns regarding safety in that workplace are forwarded to the officer in that area for inspection.

Please be advised that OHS cannot become further involved with your case, and your file is deemed closed.

[3] The Appellant has appealed the Officer's decision. The Notice of Appeal is reproduced below, with privacy redactions.

From: [redacted]
Sent: Saturday, June 27, 2015 12:57 PM
To: OHS Executive Office LRWS
Subject: RE:

First of all that information should of been sent to me with their decision stating the time frame I had as well that I can appeal the decision which was not. The letter states " please be advised that OH &S cannot become future involved with this case and my file has been deemed closed. As well my words in this harassment I filed has been turned around and in this letter was written that it's noted I Do not want to return to work their, which is not what is in my documentation in my harassment. It's was told to me by my doctor that she advises I do not return to work there as it would not be good for me mentally.
I am informing you with this email that I am appealing this decision and the parties affected are myself, [redacted]
The decision that is being appealed is the decision by Ron Duckworth stating that my harrassent I filed is not considered harrassent and only has to do with my injury which I feel is very much wrong.
I'm asking for a suspension of this decision as if this harassment is not dealt with in a proper manner myself and others will suffer the same harassment. The evidence I provided in my letter of harassment has cause myself harm mentally and physically. I have been bullied and now have to consult a phychologist and a psychiatrist once every month. My evidence was not looked into nor where any of my witnesses interviewed. This matter has left me with myself having anxiety attacks and stuttering when I talk about going back to work there.

Thank you,
[redacted]

[4] By consent, the appeal proceeded on the basis of the record of information previously submitted to the Occupational Health Officer by the Appellant, consisting of the complaint (Harassment Confidential Questionnaire), handwritten narratives of events from 2010 to 2015, and assorted documents. Both the Appellant and the Employer were afforded the opportunity to provide further information and written submissions. The Appellant provided some additional documentary information. The Appellant also provided written submissions to which the Employer responded. Both parties had the opportunity to present oral argument via teleconference, in a hearing convened on April 30, 2015 for that purpose. The Appellant and the Employer, represented by Tracie Nielsen, participated in the hearing which was also attended by Gary Day, CUPE National Representative, as an observer.

Issue(s)

[5] Does the Appellant's complaint(s) concern harassment as defined by *The Saskatchewan Employment Act, 1993?* If so, has the Employer failed to comply with its obligation under the Act or regulations?

Applicable Legislation

[6] The relevant provisions of *The Saskatchewan Employment Act, 1993* are as follows:

3-1(1) In this Act:

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

(i) that either:

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

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

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

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

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

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

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

3-8 Every employer shall:

(a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers;

. . .

(d) ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment with respect to any matter or circumstance arising out of the workers' employment;

[7] The relevant provisions of *The Occupational Health and Safety Regulations, 1996* are as follows:

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

(c) a commitment that the employer will make every reasonably practicable effort to ensure that no worker is subjected to harassment;

. . .

(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;

Background and Evidence

[8] The Appellant has worked for the Prairie North Health Region ("PNHR", the "Employer") since 2005. In 2010, she was employed as a Continuing Care Assistant at the Saskatchewan Hospital in North Battleford ("SHNB").

[9] The Appellant was injured at work in September and in October, 2010. She says that following her return to work after the 2010 injuries, she was subjected to on-going bullying and harassment based on a disability by the Director, L.S., Nurse Manager S.N. and other management regarding which she submitted a number of complaints to the Employer, as listed in the Appellant's written submissions[1] and as follows:

1. July 31, 2012 submitted harassment/bullying claim. Felling threatened, belittled, demeaned, pressured into doing things, disrespected,
2. Aug 15 2012. I had submitted a harassment against Linda to Glennys Uzelman VP primary health services. Felling threatened, belittled, demeaned, pressured into doing things, and disrespected. This complaint was send to Glennys by myself as I had no response from previous claim.
3. Oct 2/2013, submitted an inquiry asking why I've been denied all positions applied for. No response.
4. April 2013 harassment/bullying claim submitted against Linda and management. Felling threatened, belittled, demeaned, pressured into doing things, disrespected,
5. Oct 10/2013 Submitted a harassment and bullying against Linda and Sylvia. Feeling threatened, belittled, demeaned, pressured into doing things, disrespected,
6. Jan 14/2014. Submitted harassment and bullying. Feeling threatened, belittled, demeaned, pressured into doing things, disrespected, No response.

On a careful review, the record reflects a complaint of harassment was not included in the Appellant's list, as well as two other inquiries (see #3 above) dated October 2 and October 10, 2013:

7. October 10, 2013, a complaint of harassment against S.S., an employee in PNHR's Claims Department. The complaint alleges that S.S. made comments about her in an email that were unprofessional, unnecessary, degrading and a breach of confidence.

[10] The Appellant's account (handwritten and other narratives and written submissions), is predominated by information pertaining to the Appellant's accommodation (and related issues) in various positions after each of her workplace injuries and in light of both on-going intermittent and extended absences over a period of more than four years. The Appellant submits that this information provides the context for her complaints of bullying and harassment.

[11] In September, 2010, the Appellant suffered a back strain during a patient assist. Less than a month later, the Appellant was re-injured when she was grabbed by a patient. The Appellant stated that she was off work for six months. Later, through its Human Resource Management provider, PNHR sought cost recovery on the basis that that the Appellant's prolonged recovery period suggested a pre-existing condition, and not solely an workplace injury. The WCB determined that the typical recovery period for type of lumbar strain the Appellant suffered was three months. PNHR was allowed three months' cost recovery.

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[1] Appellant's written submissions, p.1, 2

[12] It is not clear when the Appellant returned to work. Six months from the September and October injuries suggests a return to work in March/April, 2011. However, in January 2011, the Appellant was removed from the Continuing Care Assistant classification due to failure to obtain the qualifications within the prescribed time. The Appellant grieved and, in the result, she was granted an additional three months to meet the qualifications [Exhibit 2]. On her return to work, it appears that the Appellant was accommodated in a position as a temporary, full-time, Special Care Aide, subject to medical restrictions. The limitation specifically mentioned by the Appellant was that she was not to assist with Code White situations involving the physical interventions or restraint of violent or potentially violent patients.

[13] It appears that the Appellant's attendance was a recurring issue in 2011. There was uncertainty, at times, whether the Appellant's absences were due to her migraines or on-going back problems. The Appellant stated after working full-time hours for a time, her back would begin to flare up, and her doctor would take her off work. It is not clear whether the Appellant had been providing medical certificates to support her absences, or whether she had even been asked to do so. Management suggested to the Appellant that she consider going back to a casual position or a part-time position. The Appellant would not consider it. Management advised that her sick time would be monitored and re-visited every three months, and if her attendance did not improve, she may be subject to termination.

[14] In addition to absenteeism, there were issues and uncertainties that the Appellant was not performing her job duties, which was upsetting to the Appellant who felt the performance of her job duties were subject to medical restrictions. The Employer attempted to remedy the situation by posting a notice that the Appellant's duties were subject to medical restrictions and she was not to be involved in physical interventions, particularly those involving physical restraint. The Appellant later claimed as an incident of harassment that the Employer's remedy was a breach of confidentiality.

[15] Uncertainty about the scope of the Appellant's limitations and restrictions continued, as in, for example, her ability to push a patient in a wheelchair as a Special Care Aide was periodically required to do. It had been reported to management that the Appellant would not even push the nutrition cart. Management was concerned about the Appellant's fitness for work and her ability to perform the role of a Special Care Aide. In light of the Appellant's restrictions and the uncertainty about the scope of her restrictions and limitations, the Employer was concerned about the safety of the Appellant and her co-workers. and others. It appears that it is in this context that the Appellant's Nurse Manager referred to the Appellant as a "lame duck", which the Appellant alleges as one incident of harassment (name-calling). It appears that the Appellant learned about the lame duck reference from material disclosed to her during the course of her WCB appeal(s).

[16] Both these issues, attendance and restrictions, came to a head in December 2011 and January/February 2012. The Appellant was notified on January 18, 2012, that the temporary position as a Special Care Aide with SHNB ended on January 8, 2012. Between January and July, 2012, the Appellant continued to be accommodated (position unknown) pending a suitable position being found. In July, 2012, the Appellant became aware of a vacant position and with the assistance of CUPE she was accommodated in the position of a full-time Ward Clerk, also referred to as a Unit Clerk, to fill the temporary vacancy [Exhibit 3].

[17] On July 31, 2012, the Appellant submitted a complaint of harassment to the Employer against the Director (L.S.) and Nurse Manager (S.N.), citing incidents on February 16, May 17, June 25, July 11 and

July 19, 2012. The Appellant claims that the Employer did not respond, and when she followed up on it with "Derrick", the new HR Consultant, he found no record of a July 31 complaint. He suggested that she re-submit her complaint, which the Appellant declined to do. Instead, the Appellant submitted a complaint against L.S. to the VP of Primary Health Services. Evidently, the July 31 complaint re-surfaced, as a copy is on the record [Exhibit 4].

[18] By letter(s) from the Appellant addressed to the V.P. of Primary Health Services dated October 1, 2012, the Appellant advised the VP that she was not satisfied with the employer's September 10th decision. [Exhibit 5].[2]

[19] The Appellant claims to have submitted a complaint of harassment against L.S. and management in April, 2013. In her complaint to OH&S, she stated that "Derrick" [a new HR Consultant] told her there was "nothing there". Unlike the July 31, 2012 complaint, and at least one complaint after April 2013, a workplace Harassment Complaint Form alleging harassment in or around April 2013 is not in evidence. It is noted, however, that the Appellant submitted correspondence from a CUPE representative dated February 22, 2016 [Exhibit 2] obtained for purposes of the hearing that refers to an April 2013 claim of harassment against "several management". The union representative's correspondence further states: "Result—meetings scheduled. All cancelled by member due to family issues. Case still open".

[20] There is no evidence as to the nature or particulars of the allegations Contextually, there is no clear information on the record or in the Appellant's written submissions pertaining to events between the effective conclusion of her July/August complaint on October 1, 2012 and mid-February, 2013. However, the Appellant submitted Exhibit 6, a timeline of events between February 17, 2013 and mid-May, 2013 written by S.S. an employee of PNHR's Claims Management Department in an email to the WCB dated May 16, 2016. It is noted that the Appellant takes exception to the email and filed a complaint of harassment dated October 10, 2013 [Exhibit 11] alleging that S.S.'s email was unprofessional, unnecessary, degrading and a breach of confidentiality. This complaint did not appear on the Appellant's list [see Paragraph 9] and has been added as a 7th entry to the list.

[21] The timeline [Exhibit 6] indicates that on February 17, 2013, the WCB closed the Appellant's claim and the Appellant returned to pre-injury status. In 2013, the only injuries in evidence are those which occurred in 2010. From February 17 to April 3, 2013, the Appellant continued to work as a full-time Unit Clerk, filling a temporary vacancy, as an accommodation. Effective April 4, 2013, HR placed the Appellant in a sedentary position as a casual staff scheduler. Between those dates on March 19, 2013, the Appellant went to see her doctor regarding *"the mental and psychological abuse by my employers, L.S. and S.N., as well as my chronic pain.* Her doctor asked the Employer to give her the day off.

[22] It appears that the Appellant lodged an appeal of the WCB decision which was acknowledged by the WCB on May 10, 2013. The timeline indicates that the Appellant's stated goal was to receive wage loss benefits for any sick days since her claim was closed in February. Shortly thereafter, on May 15, 2013, the Appellant produced medical to her manager to be off work up to and including May 18, 2013. The Appellant's next scheduled work date was May 21, 2013. However, the Appellant did not return to work on that May 21, 2013. The Appellant's information is that she was off work for the month of June, 2013

[2] Exhibit 5 – 2 versions of a letter addressed to the VP of Primary Health Services dated October 1, 2012. It is not clear which version, if any was delivered to the addressee.

without income. She further states that her doctor *"booked [her] off work for a few months as he felt it wouldn't be good for [her] mental health to return there for a while"*. In written submissions, the Appellant recounts that she was *"pressured to return to work sick and injured"* on August 18, 2013. Further evidence indicates that the Appellant did not work for some or all of September, 2013.

[23] The Appellant indicated that on September 13, 2013, she was informed by letter that the Employer could no longer accommodate her in the position she had been in. On September 27, 2013, the Appellant was offered a relief Security Officer opportunity. It seems the Appellant was placed in the position immediately thereafter, but was requested by the Employer to obtain information from her medical practitioner before October 11th to verify that that her current limitations would allow her to perform the job as per the Security Officer job description. Exhibit 12A[3]

[24] On Employee Enquiry Forms dated October 2 and October 10, 2013, [Exhibits 9 and 10], the Appellant asked for written reasons why she was denied all the positions that she had asked to be accommodated in, particularly those that came available in the month of September in which she did not work [and therefore was not paid]. The Appellant stated in her written submissions that she felt L.S. was *"purposely not finding me employment..."*

[25] On an Employee Enquiry Form also dated October 2, 2013, [Exhibit 8], The Appellant inquired about the status of a complaint of harassment against the Director L.S. and Nurse Manager S.N. and another manager, D.B. to which the Employer had allegedly not responded. Apart from this inquiry, and the list submitted by the Appellant (see Paragraph 9, #5), there is no documentary or other evidence on the record of an October complaint against all or any of these individuals. However, the record does reflect a complaint of harassment dated October 10, 2013 against S.S., the Claims Department employee who provided the timeline [Exhibit 6] to the WCB referred at Paragraph 20. In addition to the allegations stated on the complaint form [Exhibit 11], in the Appellant's narrative account, she states that *"[S.S.] was out of line of work duties to send a letter like that"*.

[26] The Employer's written submission indicates (Page 1) that numerous attempts were made by the LR [Labour Relations] Consultants to set up a meeting to review the Appellant's complaint submissions which were cancelled by the Appellant for various reasons. A meeting was scheduled for October 21, 2013 but the Appellant called in sick that day. According to the Employer's information, three previous attempts were made, and those meetings were cancelled as well. Further, the Employer's information included an email from the Appellant dated December 4, 2013 indicating she had requested her Union representative to reschedule a meeting due to her own and her daughter's illness. A further email was sent to the Appellant's union representative on October 17, 2014, asking when the union representative and the Appellant could meet with the two North Battleford LR Consultants.

[27] It appears that the position of Unit Clerk that the Appellant had temporarily filled from July 2012 to April 3, 2013 had become vacant. On November 18, 2013, the Appellant was provided with a letter from the Employer confirming her temporary workplace accommodation into a temporary full-time Unit Clerk position with SHNB effective November 25, 2013. The letter states that CUPE Local 5111 had agreed to waive the posting of the (permanent) position and PNHR agreed to place her in the position without the

[3] See Exhibit 12 overleaf

necessary qualifications for a trial period of three months (to February 25, 2014) or 320 hours whichever first occurred. [Exhibit 12]

[28] On January 14, 2014, the Appellant submitted a workplace Harassment Complaint Form [Exhibit 13] to her Employer. The allege offender is not named on the form, but the narrative suggests that it is a complaint against the Director, L.S. The Appellant alleged she had not been paid for sick time on December 30, 31 and January 2, or her absence on January 6, 2014 where she claimed pressing necessity when her car would not start. On January 17, 2014, the Appellant submitted a grievance with regard to the same issues [Exhibit 14]. The outcome is not in evidence.

[29] As of January 30, 2014, the Appellant had completed slightly less than half the 320 hours contemplated by the initial three- month trial period in her accommodated trial position. On February 3, 2014, the above-mentioned trial period was extended for an additional three months, effective from February 26, 2014 to May 25, 2014, and included required areas for improvement [Exhibit 15]. The Appellant was subsequently off work on "approved disability" from February 10 – 22, 2014 and from March 20 to August 17, 2014. [Exhibit 16] It is reasonable to infer that the extended time period remained incomplete.

[30] On October 14, 2014, the Appellant received notification from the Employer that the temporary full-time Unit Assist [sic] position ended on October 28, 2014. The evidence indicates that the Appellant had been informed the position in which she had been temporarily accommodated was a permanent position that needed to be posted, and that she would have to bid on other positions, as she did not meet the educational qualifications for the permanent posting. [Exhibit 17]

[31] The record reflects that October 16, 2014 SHNB Management requested the Appellant to attend a disciplinary meeting to be held on October 22, 2014 [Exhibit 18]

[32] On October 17, 2014, the Appellant reported an unwitnessed workplace injury after she fell going up a flight of stairs. The Appellant submitted in evidence a copy of a completed a Worker's Initial Report of Injury (W1) dated October 17, 2014. The Appellant informed the WCB that she reported the incident to S.N., but that no managers were there to see her work on October 17th or 20th. [Exhibits 18 and 19]

[33] S.N. completed the Employer's (E1) Initial Report of Injury (Exhibit 16, *supra*) with attached notes, both dated October 21, 2014. S.N.'s notes indicated there was "no physical evidence of injury apparent from the time the incident was reported to the end of the work day on 20/10/14 as directly witnessed by [S.N.]."

[34] On October 21, the Appellant had called SHNB prior to her shift saying she would not be attending work that day, due to her reported injury of October 17, 2014. She stated that she would be seeing her physician. The Appellant later notified the Employer she would be off work until October 28th. No medical certificate was provided at that time. When a medical note dated October 21 was provided to the Appellant to confirm the return to work date of October 28, 2014, it was not on the proper form. The Appellant obtained another medical certificate, in the proper form, from the same physician, also dated October 21, 2014 which indicated a return date of November 11, 2014 rather than October 28, 2014. Both were provided to the Employer at the same time. Exhibit 19A]

[35] The Appellant did not return to work on November 11, 2014 and has, in fact, continued to be off work since October 21, 2014.

[36] By letter dated November 13, 2014, the Appellant was notified by WCB that her claim was accepted for the October 17 incident, but the WCB would not be responsible for any time loss or covering the cost of any medical treatment. [Exhibit 20] The Appellant appealed the claims entitlement department's decision that her back symptoms were unrelated to the October 17, 2014 incident.

[37] It appears that on November 13, 2014, CUPE 5111 had requested that PNHR specify the medical information needed to realize a potential accommodation for the Appellant. The Employer's Labour Relations Consultant responded on November 17, requesting an objective Functional Abilities Evaluation (FAE) be completed to provide the specified information to assist in outlining the Appellant's limitations and restrictions and the anticipated duration thereof. [Exhibit 21]

[38] The Appellant submitted a medical note from her physician—not on PNHR's Medical Certificate Form—dated December 16, 2014, indicating the Appellant could return to work with restrictions. The note included a brief recitation of restrictions. [Exhibit 22]

[39] By letter dated January 15, 2015, the Appellant received the Decision of the Appeals Department from the WCB on the issue whether her back symptoms related to the October 17, 2014 injury. The Appellant's appeal was denied. [Exhibit 23]

[40] By letter dated January 16, 2015, the Appellant's claim for Disability Income Plan benefits was denied on the basis that she did not meet the definition of "totally disabled" and therefore did not qualify. [Exhibit 24]

[41] In written submissions, the Appellant claimed that her physician had extended her medical absence for three months effective January 1, 2015. The Appellant submitted a further Medical Certificate dated March 5, 2015 indicating that the Appellant's illness was non-work related and she was waiting to see a psychiatrist. The Certificate appears to allow for a further 15 days leave. [Exhibit 25] Though there is no supporting evidence on the record for the three-month extension of the Appellant's medical absence or the reasons therefor, this may explain, at least in part, why there was no further inquiry by the Employer until March 11, 2015 regarding the Employer's request for an FAE referred to in Paragraph 37.

[42] In a letter to the Appellant dated March 11, 2015, [Exhibit 25], the Employer's Labour Relations Consultant noted that the Appellant's CUPE representative had pointed out that the December 16, 2014 medical note contained typographical errors in the restrictions. In addition to it being unacceptable for that reason, the Consultant noted that the information provided was not the result of objective testing attained from an FAE. The letter indicated that in view of the Appellant's apparent interest in returning to work as a Continuing Care Assistant after being medically restricted for some time, an FAE was once again requested. The correspondence provided additional information as well as the name of a local providers. [Exhibit 26]

[43] There is no indication that the requested FAE has been provided to the Employer. In the course of these proceedings, the Appellant has claimed that she could not afford the $300.00 fee to obtain one. The

Appellant states that she told her union to tell the Employer she would have the assessment done as long as the Employer pays for it and says she was told the Employer would not pay.

[44] In the meantime, the Appellant claims that she applied for numerous posted positions (30 since November 14, 2014) without success, and without reasons being provided. As noted above, the Appellant was not cleared for a return to work until December 16, 2014 and her absence on medical leave was extended for a further three months due to non-work-related and non-physical reasons, which was extended a further 15 days while she awaited an appointment with a psychiatrist.

[45] The Employer indicated that the Appellant applied for a number of jobs between October 2014 and December 2014 and again between March 2015 and June 2015. Of the more recent opportunities, the Appellant withdrew her application for one position as a Continuing Care Aide and declined the offer of a position she had applied for as an Environmental Services Worker.

[46] The Employer further indicated that the Appellant is on a re-employment to be considered for jobs that might come up that would accommodate her limitations.

Analysis and Reasons

Preliminary Issue—Remedial jurisdiction

[47] The Appellant raised the issue as to whether the remedial jurisdiction of this tribunal extends to quashing the decision made by the Officer on June 3, 2015 and remitting the original complaint seeking the assistance of an Occupational Health Officer to OH&S.

[48] The role of an adjudicator is a statutory one, created—and limited—by the enabling legislation. That is, the grant of powers and authority to an adjudicator is limited to those expressly granted under the Act or that are reasonably necessary to carry out those powers. An adjudicator does not have the inherent power to quash a decision that has already been made at the earlier level, and send it back to the original decision-maker. If the legislature had intended adjudicators to have this power, it would be necessary to express it clearly in the legislation.

[49] In accordance with the Act, an adjudicator is empowered to conduct a hearing which is a new, or *de novo,* hearing in which the adjudicator may receive and accept any evidence and information that the adjudicator considers appropriate, whether admissible in a court of law or not, including the previous record and new or additional evidence, where appropriate. As each appeal hearing is a new hearing, there is no need for the adjudicator to look at how the original decision was made. Any errors which may have been made at the previous decision-making level may be corrected on appeal.

[50] Section 4-6(1)(a) clearly limits the power of an adjudicator on hearing an appeal to dismiss, allow or vary the decision being appealed. In varying the decision being appealed, an adjudicator has the authority to make any order or decision which could have been made in the first instance.

What order or decision could have been made in the first instance?

[51] In this province, harassment is an occupational health and safety concern. Section 3-8 of *The Saskatchewan Employment Act,* provides, in part, that employers have a general duty to ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment with respect to any matter or circumstance arising out of the workers' employment. Specific guidance is provided in Section 36(1) of *The Occupational Health and Safety Regulations, 1996 which*) requires the employer to develop and implement (administer) a written policy to prevent harassment that includes, *inter alia*:

> (c) a commitment that the employer will make every reasonably practicable effort to ensure that no worker is subjected to harassment;
>
> . . .
>
> (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;

[52] The Occupational Health and Safety Division (OHS Division) of the Ministry of Labour Relations and Workplace Safety (LRWS) administers the legislation. The OHS Division provides information to workers and employers about harassment and can assist in addressing harassment through enforcement of the OHS legislation. The role of OHS Division is to help the parties carry out their responsibilities. It is the employer's responsibility to address complaints brought to its attention and take reasonable steps to ensure that no worker is subjected to harassment. With the objectives of the Act in mind, the OHS mandate is to ensure the employer implements or administers a written harassment prevention policy when a complaint is raised, and takes reasonably practicable steps to provide a work environment free of harassment.

[53] In this case, the Appellant exercised her right to request the assistance of an Officer to resolve a complaint of harassment by submitting to OH&S, as required, a completed Harassment Confidential Questionnaire. In it, the Appellant alleged the Employer had not addressed her complaint(s) of harassment.

[54] Based on the objectives of the legislation, plain language guidelines are set out in the first two pages of the Questionnaire detailing an OH&S Officer's involvement and, in my view, the Officer's authority or jurisdiction, in the resolution of complaints [Exhibit 1].

[55] Occupational Health and Safety attempts to resolve harassment complaints where the worker is still employed. In this case, there is no dispute that at the material times, the Appellant was employed by the Prairie North Health Region (PNHR) and worked as the Saskatchewan Hospital North Battleford (SHNB). There is more to be said about the Appellant's employment status that I will address elsewhere.

[56] The threshold determination to be made by the Officer is whether the conduct complained of is a matter concerning harassment. If so, and the complaint is specific in nature, the Officer may direct the Employer conduct an investigation—in effect, to administer its harassment policy and take reasonably practicable steps to provide a work environment free of harassment.

[57] The same threshold question obtains here. That is, could the conduct complained of fall within the definition of harassment? I now turn to that question.

Did the Appellant's complaint(s) concern harassment as defined by the Act?

[58] The Appellant's original complaint (Harassment Confidential Questionnaire) to OH&S dated April 5, 2015 (received by OHS on May 29, 2015) alleges on-going harassment from 2010 by L.S, Director, Saskatchewan Hospital and S.N., a Nurse Manager. The complaint to OH&S refers specifically to a complaint of harassment put in "two years ago"] which the Appellant claims has not been addressed by the Employer.

[59] The Appellant also referred in her complaint Questionnaire to "past and present" complaints to the Employer that her Union has done nothing about. Though there are a variety of ways in which a union may be involved, the question whether the Appellant's Union 'did anything' is not a matter within the scope of this appeal or my jurisdiction. Under the Act, it is the Employer's responsibility to administer its harassment prevention policy.

[60] As to "past and present" harassment complaints, the Appellant has listed the complaints submitted to the Employer in her written submissions (reproduced above at Paragraph 9) dated as follows: (1) July 31, 2012 and (2) August 15, 2012 against L.S. and S.N; (3) April 2013 against L.S. and S.N; (4) October 10, 2013 against L.S., S.N and D.B; .and (5) January 14, 2014 against L.S. The Appellant also listed one of three Employee Inquiries on the record. The record discloses a further complaint dated October 10, 2013 against S.S., a Claims Department employee, which was not included on the Appellant's list.

July 31 and August 15, 2012 Complaints

[61] The Appellant's narrative states that when there was no response to her July 31 complaint, she followed up on it with the "new guy" in HR, i.e., a new Human Resources Consultant ("Derrick") who found no record of her complaint. He suggested that she re-submit it. The Appellant indicates that she refused to do so. However, the record shows she did otherwise. The record demonstrates that the Appellant escalated her complaint to the VP of Primary Health Services. It is reasonable to infer that she did so on or about August 15, 2012. Evidently the original July 31 complaint was recovered or re-created, since a copy is on the record as [Exhibit 4. There is no documentary evidence of a separate August 15 complaint. I find it more likely than not that the July 31 and August 15, 2012 complaints are essentially one and the same.

It is not necessary that I consider whether the July 31/August 15 complaint concerned harassment as defined in the Act. The record reflects that the Employer addressed the complaint and notified the Appellant as to the outcome on or about September 10, 2012. The provisions of the Act pertaining to harassment are not a mechanism to appeal the Employer's decision.

April 2013 Complaint

[62] It is reasonable to infer that the Appellant's reference in the April 2015 OH&S Questionnaire to a complaint submitted to the Employer "two years ago" refers to the to the April 2013 complaint listed in the narrative accounts on the record and the written submissions.

[63] In the complaint to OH&S, the Appellant indicates that when she followed up on the April 2013 complaint, the "new guy" in HR ("Derrick") told her that there was "nothing there". It is disturbing that

these are the remarkably similar facts to those alleged by the Appellant in relation to her July 31, 2012 complaint which the "new guy Derrick" could not find. However, in contrast to the July 31, 2012 complaint (and a complaint in October 2013), a workplace Harassment Complaint Form dated in or around April, 2013 has not been submitted in evidence.

[64] But for Exhibit 2, there might be reason to question whether an April, 2013 complaint was submitted to the Employer. However, for purposes of this hearing, the Appellant obtained a letter dated February 22, 2016 [Exhibit 2] from a representative of CUPE Local 5111, documenting the dates she personally represented the Appellant in relation to various workplace issues. The Union representative's list includes reference to an April 2013 harassment claim against "several management" which indicates *"Case still open". Result—meetings scheduled. All cancelled by member due to family issues."*

[65] Even if I accept that an April 2013 complaint of harassment was brought to the attention of the Employer, simply labeling a claim or complaint as harassment is not a sufficient basis on which to determine whether the conduct complained of could fall within the definition of harassment. In this case, the only stated allegations are those reproduced in Paragraph 9. That is, the Appellant was *"feeling threatened, belittled, demeaned, pressured into doing things, disrespected"*. While such terminology is common to many complaints of harassment, Not only are these bare allegations, lacking any specificity or particulars, the same exact phrase has been used as a generic description for each of the five originally listed complaints.

[66] A thorough review of the evidence for context related to an April 2013 complaint has not been particularly helpful. The narratives are virtually silent with respect to any events which might have occurred in the period the conclusion of the Appellant's July 2012 complaint to February 2013. The record reflects that during that period, the Appellant was filling a temporary vacancy in the position of Ward Clerk. On March 19, 2013, the Appellant visited her doctor regarding *"the mental and psychological abuse by my employers, L.S. and S.N., as well as my chronic pain"* and was taken off work for one day. There is no further elucidation of the alleged abuse. The Appellant's temporary placement as a Ward Clerk ended on April 3, 2013 due to the return of the position's incumbent. HR placed the Appellant in the position of Staff Scheduler effective April 4, 2013. As events unfolded (See Exhibit 6 and Paragraphs 20-23), not long afterward, on May 15, 2013, the Appellant went on medical leave from which she did not return until August/September, 2013. There is no medical certificate in evidence to support that the reasons for the absence (for her mental health) were work-related, although on the evidence as a whole it is quite clear that the Appellant attributes her illness to bullying and harassment by L.S. and S.N.

[67] In my view, at this stage of the inquiry, it is not for me to make a determination whether the evidence is sufficient to establish whether there is a *prima facie* case of harassment. Rather, the question is whether the complaint is a matter concerning harassment—whether the conduct complained of *could* fall within the definition of harassment. In this case, even though the stated allegations are decidedly generic, non-specific and lacking in particularized, I find that the complaint is a matter concerning harassment which *could* fall within the definition of harassment.

[68] It falls to the Employer to address the complaints of harassment it receives, even those that have not been perfected, as seems to be the case here. I daresay it is not uncommon for employers to receive complaints such as this one, where the allegations may be buried in a rambling narrative rather than stated in a clear, specific and particularized in a manner sufficient to enable the respondent(s) to make full answer and defence. It is reasonable to suggest that in most cases, reasonable efforts to address such complaints

begin by meeting with the complainant to clarify the issues and allegations in order to determine how best to proceed to resolve the complaint.

[69] In this case, the Appellant complains that the Employer has not addressed her complaint. I disagree. Though the process may be incomplete, correspondence from the Union representative clearly states in relation to the April 2013 that meetings were scheduled which were "all" cancelled by the Appellant. Further the evidence indicates that the Appellant was subsequently off work until August and not 'at work', in effect, until another accommodation position was found for her effective September 27, 2013.

[70] Though I will have more to say relevant to this complaint below and in my conclusions.

Employee Inquiry Form(s) - October 2, 2013 et al

[71] The Appellant submitted two Employee Inquiry Form dated October 2 and 10, 2013 [Exhibits 9 and 10] asking why she had been denied all the positions she had applied for, the earlier of which is included in the Appellant's listed complaints for reasons that remain unclear.

[72] The record also reflects a third such Form, Exhibit 8, dated October 2, 2013, in which the Appellant asks why there was no follow-up or response to her complaint against L.S., S.N. and D.B. The Appellant's inquiry does not mention the date of the referenced complaint.

[73] None of these inquiry forms are substantive complaints of harassment. However, the request for a status update on a harassment complaint has some relevance with regard to the complaints addressed below.

October 10, 2013 Complaint #1 and Complaint #2

[74] Complaint #1: In written submissions, the Appellant claims to have submitted a complaint of harassment and bullying against L.S. and S.N. (but not D.B.) dated October 10, 2013. The Appellant submitted no documentary evidence to support the existence of an October 10, 2013 complaint against all or any of these individuals. The only indication of the complaint's existence and nature is its appearance on the Appellant's list of complaint in written submissions, along with a repetition of the generic statement made in relation to each of her listed complaints that she felt threatened, belittled, pressured into doing things and disrespected.

[75] As noted above, on October 2, 2013, the Appellant's Inquiry dated October 2, 2013 requested a status update on a harassment complaint. Since the Inquiry Form *pre-dates* the alleged complaint dated October 10, 2013, the Appellant is clearly not inquiring about the status of a later complaint dated October 10, 2013. By default, the only outstanding complaint of harassment at that time is the April 2013 complaint.

[76] In the absence of documentary or corroborative evidence, I am unable to conclude that a complaint of harassment was submitted to the Employer dated on or about October 10, 2013. I am inclined to conclude that the "complaint" submitted to the Employer on that date is, more likely than not, the Employee Inquiry Form bearing that date, and the Appellant was requesting an update on the April 2013 complaint.

[77] Complaint #2: Notwithstanding the foregoing, the record does reflect the existence of a workplace Harassment Complaint Form dated October 10, 2013, **not** against L.S. and S.N, but against S.S., the Claims Management Department who provided an emailed timeline dated May 16, 2013 to the WCB [Exhibit 6]. The Appellant alleged that S.S.'s comments in the email that were unprofessional, unnecessary, degrading and a breach of confidentiality and that *"[S.S.] was out of line of work duties to send a letter like that"*.

[78] These allegations are relatively clear in identifying the conduct complained of, if only because they are specific to a single email. The allegations could conceivably be matters falling within the definition, if proven. Again, that is a matter for the Employer's determination. My over-riding concern with regard to this complaint, is that the Appellant's intentions are not clear. In the original complaint to OH&S, the Appellant sought assistance resolving complaints against alleged harassers identified as L.S. and S.N., not S.S. Moreover, the Appellant did not include the complaint against S.S. among the those listed in her written submissions. That said, there is no indication that the complaint has been withdrawn or otherwise resolved. In short, it remains an open complaint for the Employer to address.

[79] To re-cap, not long after the Appellant's return to work after a lengthy absence, and her placement effective September 27, 2013 in a new accommodation position as a Security Officer, the Appellant lodged the above complaint against S.S. dated October 10, 2013. On the same date, she requested an update to her harassment complaint which I have found to be the April 2013 complaint. The Appellant claims that the Employer has not addressed her "past and present" complaints. Again, I disagree for much the same reasons stated in relation to the status of the April 2013 complaint.

[80] In response to the Appellant's written submissions, the Employer submitted the following:

> There were numerous attempts made by the LR Consultants to set up a meeting to review the submission but they were cancelled by Kim for different reasons. My information shows that there was a meeting scheduled for October 21, 2013, but Kim called in sick that day. My information also shows that there were three (3) previous attempts by an LR Consultant that has since changed roles and those meetings were cancelled as well. I have, in my file, an email from Kim to one of my LR Consultants dated December 4, 2013, that says *"... I text Nancy (union rep) and asked if we can reschedule this meeting regarding my complaints. I've been sick with the flu and been in Emergency with my daughter all day and night..."* There was also an email to the Union representative on October 17, 2014, asking when the Union Representative and Kim could meet with the two North Battleford LR Consultants. I can provide copies of what I have if needed for the appeal.

[81] Noting, as above, that the Appellant was not at work from May 15, 2013 to, effectively, late September/early October 2013, it appears that reasonable efforts were made by the Employer to address the Appellant's complaints soon after the Appellant's return to work. It makes no difference whether the Employer's response was taken on its own initiative or in response to the Appellant's October 10, 2013 Inquiry.

[82] The Employer's undisputed evidence demonstrates that attempts to schedule meetings for that purpose between October and December were cancelled by the Appellant.

[83] I have not overlooked a rather significant gap between the Appellant's December 4, 2013 email and the next scheduling effort mentioned by the Employer in October 2014 to which, it appears, the Appellant did not reply. However, on the evidence as a whole, I find it more likely than not that the parties'

focus was on other matters in late 2013 and into early 2014, including issues pertaining to the Appellant's first three-month trial period in the position of Ward Clerk for a second time due to the incumbent having vacated the position, as well as the Appellant's pending surgery. Without reiterating the evidence, suffice it to say for purposes here, that the Appellant was then absent from February 10-22, 2014 (related to the surgery) and then on "depression leave" from March 20 to August 18, 2014.

[84] Though there was a relatively brief period of time from August 19 to mid-October, 2014 within which the Employer (or the Appellant) might have renewed efforts to take initial steps to address her complaint, it appears that neither did so. On the evidence as a whole, again, I am inclined to infer that the focus at the time was on the Appellant's return to work issues pertaining to her ability to successfully complete a three-month trial period in the Unit Clerk position. I recognize that the Appellant believes she ought not to have been subject to a trial or probationary period, even though it appears the terms were made in consultation with the Union, but that is an issue beyond my jurisdiction to address.

[85] In any event, on October 14, 2014, the Appellant was informed that her position as Unit Clerk would end on October 28, 2014. On October 17, 2014, the Appellant reported a workplace injury incurred when she tripped going up some stairs. The Appellant went on medical leave on October 21, 2014 and has not been at work since that date.

[86] Health and safety is a shared responsibility. To some extent, the Appellant did her part on her return to work by using an Employee Inquiry Form to inquire about the status of her harassment complaint, but cancelled the meetings the Employer attempted to arrange. For those reasons I find would find it difficult to place responsibility for the lack of progress solely at the feet of the Employer.

[87] In relation to the Appellant's complaint(s), I can only conclude that by force of circumstance, the Employer has had little opportunity to take even the initial step toward dealing with the complaint—a first meeting with the complainant/Appellant—despite what appears to be reasonable efforts to do so.

January 14, 2014 Complaint

[88] The record reflects that on January 14, 2014, the Appellant submitted a workplace harassment complaint in which the issue or allegation appears to be related primarily to the non-payment of 3 days of sick leave and one day pressing necessity. The Appellant claims there was no response to her harassment complaint. However, the record reflects that on January 17, 2014, the Appellant submitted a grievance on the same issue. The outcome of the grievance is not in evidence. There is no evidence that the Appellant pursued the harassment complaint any further. She did not, for example, escalate the complaint, as she had previously done. I find it reasonable to infer that the Appellant chose, instead, to pursue this labour relations issue via the grievance process.

Has the Employer failed to comply with its obligation under the Act or regulations?

[89] In my view, the question is premature. As my earlier reasons indicate, I am fully satisfied that the Employer made reasonable efforts to take initial, necessary action to meet with the complainant/Appellant, preliminary to determining what reasonable steps needed to be taken to resolve the Appellant's complaint(s). The Employer's efforts were derailed by the circumstances of the Appellant's lengthy absences and her cancellation of all the meetings the Employer attempted to arrange. I am mindful that the Employer duly proceeded and concluded the Appellant's July 31, 2012 complaint, and there is no reason

for me to conclude it would have done otherwise in relation to the Appellant's further complaints had there been sufficient opportunity and cooperation from the Appellant to do so.

Current Status

[90] For all the reasons stated above, I have determined that the April 2013 is a complaint which remains "open". It appears that that the same may be said of the October 10, 2013 complaint against S.S.

[91] Though there is no dispute that the Appellant was an employee of the Prairie North Health Region at the Saskatchewan Hospital North Battleford when the complaints were lodged, that does not appear to be her current status. The Appellant's position as Ward Clerk ended on October 28, 2014. According to the Employer, the Appellant has remained on a re-employment since her last day at work. In the interim, she has bid, unsuccessfully, on a number of jobs. According to the Employer, she declined one opportunity that was offered to her in response to her application. It is not clear whether the Appellant has continued to apply for other positions. It appears that at least one barrier to the Appellant's re-employment is obtaining an FAE or Functional Abilities Evaluation in order to facilitate a successful accommodation.

[92] As suggested above, and demonstrated by the information submitted by the Appellant in relation to events occurring after her last day at work, there are on-going issues pertaining to fitness to return to work and accommodation—matters which are well beyond the scope of this appeal and my jurisdiction. There has been some suggestion by the Appellant that she has taken steps to pursue a complaint with the Human Rights Commission, which is an appropriate forum in which to raise such concerns.

Conclusion and Decision

[93] In light of all of the foregoing, and in particular, the fact that the Appellant is not currently at work or engaged in the service of the Employer, I am reluctant to direct the Employer to move forward with the investigation of the unresolved complaints. The Appellant has made it known that she wants to return to work for PNHR in a location other than the SHNB where one of the alleged harassers is the Director. The other alleged harasser has since retired. Because she is not *at* work, the Appellant is not currently exposed to a harassment. In her absence, I have no cause for concern that an harassment environment exists, which might otherwise warrant an investigation.

[94] For all of the reasons stated herein, I vary the decision of the Officer insofar as the conduct complained of in the April 2013 and October 10, 2013 complaints of harassment could fall within the definition of harassment in the Act. However, in the circumstances of this case, and for stated reasons, I decline to direct the Employer to conduct an investigation, subject to the caveat that when, or if, the Appellant returns to work for PNHR, the Employer has an obligation to administer its policy and take reasonably practicable steps with regard to the Appellant's complaints, should she wish to pursue them, in order to provide a work environment free of harassment.

Dated at Regina, Saskatchewan this 28 day of October, 2016

Rusti-Ann Blanke, Adjudicator

Special 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

*** Note: An appeal to the Board is a prescribed process as contained in** *The Saskatchewan Employment (Labour Relations Board) Regulations* available online at the address below.
http://www.qp.gov.sk.ca/documents/English/Regulations/Regulations/S15-1R1.pdf

The Saskatchewan Employment (Labour Relations Board) Regulations

PART II

Applications and Forms
Notice of appeal, re Parts II and III of the Act

4(1) An employer, employee or corporate director who intends to appeal a decision of an adjudicator on an appeal or hearing pursuant to Part II of the Act or a person who intends to appeal a decision of an adjudicator pursuant to Part III of the Act shall:

(a) file a notice of appeal in Form 1; and

(b) serve a copy of Form 1 on the persons mentioned in clause 4-8(3)(b) of the Act and on the adjudicator.

(2) On being served with a copy of Form 1 pursuant to clause (1)(b), the adjudicator shall, as soon as is reasonably possible, send to the board a certified copy of the record of appeal mentioned in subsection 4-8(4) of the Act.