LRB File No. 091-16

IN THE MATTER OF:

An appeal with respect to the decision of Occupational Health and Safety Officers dated February 23, 2016, pursuant to Section 3-53 of *The Saskatchewan Employment Act.*

BETWEEN:

COLIN BROOKS-PRESCOTT

Appellant

-and-

NORTHERN LIGHTS SCHOOL DIVISION #113

Respondent

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

Respondent

For the Appellant, Colin Brooks-Prescott: Self-Represented (did not appear)

For the Respondent, Northern Lights School Division #113: Ms. Geraldine Knudsen

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DECISION

I. Introduction

1. The Appellant, Colin Brooks-Prescott ("Brooks-Prescott"), by letter dated March 24, 2016, initiated an appeal of the decision of Occupational Health and Safety Officers, Mike Luciak and Shawn Tallmadge, dated February 23, 2016. That decision found that, pursuant to the governing legislation, *The Saskatchewan Employment Act,* the Occupational Health and

Safety division ("OHS") is unable to order apologies or financial compensation and, as such, the concerns raised by the Appellant are not within its purview. The file was therefore deemed to be closed.

2. Following my appointment as Adjudicator, pre-hearing case management teleconferences were arranged for November 17, 2016 and January 23, 2017. The Appellant declined to participate in either of these conferences, despite having received notice. The hearing was set for Tuesday, February 14 and Wednesday, February 15, 2017 in La Ronge, Saskatchewan, given the location of the witnesses anticipated to be called by both parties. The Notice of Hearing was served on Brooks-Prescott on December 13, 2016. However, he did not attend.

3. At the outset of the hearing on February 14, 2017, it was noted that, given the absence of Brooks-Prescott, mediation was not a viable option. While the Respondent, Northern Lights School Division #113 ("Northern Lights") had no objections to me hearing the matter, the question of jurisdiction was raised by counsel for Northern Lights. She noted, as had Officers Luciak and Tallmadge, that OHS is not authorized by the Act to order an apology or financial compensation, as is sought by the Appellant. Further, the Appellant has couched his appeal as being one for denial of pay in lieu of notice. Whether the Appellant did or did not receive the right notice is not something for this forum to consider. Thus, on behalf of Northern Lights, it was submitted that the appeal ought to be dismissed for lack of jurisdiction.

4. Further, the Appellant had declined to participate in any of the pre-hearing conference calls, had failed to respond to correspondence regarding his appeal, and had taken no further steps in pursuing his appeal beyond the letter of March 24, 2017. As such, it may be considered that the Appellant has abandoned his appeal, giving further grounds for its dismissal.

5. In the alternative, Ms. Knudsen on behalf of Northern Lights noted that, while the grounds for appeal are not really articulated in Brooks-Prescott's letter of March 24, 2016, it seems that he may possibly be alleging that Northern Lights:

a) failed to have a harassment policy;

b) failed to investigate a complaint of harassment; and/or

c) in a discriminatory fashion fired an employee because a complaint was made.

Such allegations, she noted, are not accurate, as can be readily demonstrated in the documents and through the testimony of the individual couched with the task of conducting workplace investigations for Northern Lights. Thus, even if OHS had jurisdiction in this matter, the appeal ought to be dismissed on substantive grounds.

6. The Notice of Hearing served on the Appellant stated: "Should you fail to attend the above noted time and place, the Hearing may proceed in your absence." This is in keeping with the provisions of section 4-4(6) of the Act. Accordingly, the hearing proceeded on February 14, 2017.

7. While the parties had previously been provided with the OHS file, some additional documents were filed as exhibits at the hearing, and sworn testimony was provided by the Superintendent of Human Resources for Northern Lights. The exhibits filed were:

AD-1:	Notice of Appeal letter dated March 24, 2016
AD-2:	Decision letter of February 23, 2016 from Mike Luciak and Shawn Tallmadge to the Appellant
AD-3:	Notice of Hearing
AD-4:	Affidavit of Service
R-1:	Report dated December 9, 2015 Re: Investigation into allegation of racial slur (consisting of three pages)
R-2:	Letter dated September 23, 2015 to the Appellant from the Vice-Principal of Churchill Community High School
R-3:	Letter dated November 25, 2015 to the Appellant from the Respondent, Northern Lights
R-4:	Email from the Appellant to the Superintendent of Human Resources for Northern Lights dated September 24, 2015, and the response of the same date
R-5:	Report dated December 9, 2015 Re: Colin Brooks-Prescott—Assault allegation November 10, 2015 (consisting of five pages)
R-5a:	Two-page document "Recounting of the incident" by the Appellant

R-6:	Note from the Appellant to the Superintendent of Human Resources for Northern Lights
R-7:	Report dated December 15, 2015 Re: Termination of Mr. Colin Brooks-Prescott (consisting of two pages)
R-8:	Letter dated December 16, 2015 to the Appellant from Northern Lights
R-9:	Letter dated December 15, 2015 to the Appellant from Northern Lights
R-10:	Northern Lights Administrative Procedure 176 "Harassment"

II. Factual Background

8. Brooks-Prescott had commenced employment with Northern Lights as an Education Assistant at Churchill Community High School in La Ronge, Saskatchewan August 26, 2014. As concerns regarding the Appellant's attendance and punctuality had been raised during his first year of employment, on September 23, 2015, he received a written notice from the Vice-Principal (Exhibit R-2). The first paragraph stated:

> I am writing this letter as follow up to the several meetings we have had last school year and since the beginning of this school year, August 26, 2015. At our meetings I stressed the importance of arriving to work on time and contacting your immediate supervisor prior to 8am, if you will not be at work due to medical or any other reason. An expectation as an employee of Churchill Community High School and Northern Lights School Division is for staff to not only arrive to work on time but to report to work when scheduled.

The letter further noted:

> I would also like to remind you of the importance of attending to meetings with your immediate supervisor when you are requested. Failure to comply may result in disciplinary measures up to and including termination of employment.

The closing comment was:

> If we can offer our support in any way or you have questions regarding this letter please come and talk to me.

9. By email dated September 24, 2015 (Exhibit R-4), the Appellant alleged that at no time during the previous school year had attendance been discussed. He further alleged that the Vice-

Principal had said "the next one, you're fired" and uttered a racial slur under her breath. He requested an investigation by Northern Lights.

10. The Superintendent of Human Resources for Northern Lights responded the same day to the Appellant's email (Exhibit R-4), indicating that she would look into his complaint. Over the next several weeks she repeatedly attempted to reach the Appellant to obtain further details of his allegations, but he declined to meet with her. Ultimately, he attended a meeting on December 4, 2015, but said he was not prepared to answer any questions about the matter. The details of the Superintendent's efforts are outlined in the Report of December 9, 2015 (Exhibit R-1).

11. Although Brooks-Prescott did not cooperate with the investigation which he had requested, the Superintendent did proceed with questioning the Vice-Principal regarding the allegations, and ascertaining what previous discussions there had been regarding attendance issues. The details of her inquiries are set out in Exhibit R-1. The conclusion was "that allegations made by Mr. Brooks-Prescott were completely unfounded. There was no racial slur." The Vice-Principal had "conducted herself appropriately and with due diligence by meeting with Mr. Brooks-Prescott numerous times to provide the expectations of employment."

12. Prior to completion of this investigation, however, Brooks-Prescott was involved in another incident. On November 10, 2015, the Superintendent in charge of the Churchill Community High School was called to the school as Brooks-Prescott had exhibited overt defiance and aggression toward the Vice-Principal. To defuse the situation and enable time for an investigation, Brooks-Prescott was ordered home with pay.

13. The Superintendent of Human Resources also investigated this matter, interviewing seven individuals and receiving written statements from three others. The Appellant, who had raised an allegation that he had been assaulted during the incident, again was uncooperative with the investigation.

14. Details of the investigation are set out in the Report of December 9, 2015 (Exhibit R-5), which concluded "that Mr. Brooks-Prescott himself was the aggressor in the situation and that he deliberately fabricated the facts concerning the alleged assault."

15. By letter dated December 16, 2015 (Exhibit R-8), the Appellant was notified that his employment with Northern Lights had been terminated for cause effective December 15, 2016. The reasons for termination were noted as including:

a) bringing forward serious, but unfounded, allegations;

b) lying with the intention of damaging the reputation of others;

c) refusing or neglecting to follow lawful directives;

d) failing to maintain the trust of the employer that the Appellant could meet the expectations of the position, including acting as a role model for students; and

e) demonstrating significant lapses in judgement including but not limited to acting in an aggressive and threatening manner to colleagues.

16. On January 22, 2016 the Appellant contacted OHS and requested a Discriminatory Action Questionnaire. He then completed the form, alleging that he had been harassed by Northern Lights administration and subsequently terminated in a discriminatory action. The Appellant further indicated that he did not want to return to the workplace, but wanted an apology and financial compensation.

III. Jurisdiction

17. Section 3-1(1)(i) of the Act defines "discriminatory action" as follows:

> "**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, but does not include:
>
> (i) the temporary assignment of a worker to alternative work, pursuant to section 3-44, without loss of pay to the worker; or

(ii) the temporary assignment of a worker to alternative work, without loss of pay to the worker, while:

(A) steps are being taken for the purposes of clause 3-31(a) to satisfy the worker that any particular act or series of acts that the worker refused to perform pursuant to that clause is not unusually dangerous to the health or safety of the worker or any other person at the place of employment;
(B) the occupational health committee is conducting an investigation pursuant to clause 3-31(b) in relation to the worker's refusal to perform any particular act or series of acts; or
(C) an occupational health officer is conducting an investigation requested by a worker or an employer pursuant to clause 3-32(a).

(emphasis added)

18. Where a worker believes that discriminatory action has been taken against them, section 3-36 of the Act permits them to refer a claim to an OHS Officer:

(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.

(5) The amount of money that an occupational health officer may require to be paid pursuant to clause (2)(c) is to be reduced by an amount that the officer is satisfied that the

worker earned or should have earned during the period when the employer was required to pay the worker the wages.
(6) The employer has the onus of establishing the amount of the reduction mentioned in subsection (5).

(emphasis added)

19. Subsection 3-36(2) does not authorize the OHS Officers to order apologies or direct financial compensation to the employee. The Appellant, however, had indicated that he wanted both of these measures and he did not want to return to the workplace. These measures are outside the purview of OHS. Accordingly, the OHS Officers were correct in advising the Appellant in their letter of February 23, 2016 that they were not able to assist him with his claims.

20. In his letter of appeal (Exhibit AD-1), Brooks-Prescott indicates that it is an "Appeal for the denial of Pay Instead of Notice." This, too, is outside the jurisdiction of the OHS Officers and this adjudicator. In light of this, counsel on behalf of Northern Lights was correct in indicating that this is not the right forum for the issues raised by the Appellant.

21. While I am of the view that this finding is sufficient to dismiss the appeal, there are additional reasons for its dismissal. Such reasons would operate even in the event I am wrong in my conclusions regarding jurisdiction.

IV. Termination for Cause

22. As noted above, discriminatory action includes termination of employment. Brooks-Prescott's employment with Northern Lights was terminated effective December 15, 2015.

23. However, it is only where a worker alleges that discriminatory action has been taken for a reason mentioned in section 3-35 that the matter may be referred to an OHS officer [see s. 3-36(1)]. Section 3-35 states:

No employer shall take discriminatory action against a worker because the worker:
(a) acts or has acted in compliance with:
(i) this Part or the regulations made pursuant to this Part;
(ii) Part V or the regulations made pursuant to that Part;

(iii) a code of practice issued pursuant to section 3-84; or
(iv) a notice of contravention or a requirement or prohibition contained in a notice of contravention;
(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;
(c) assists or has assisted with the activities of an occupational health committee or occupational health and safety representative;
(d) seeks or has sought the establishment of an occupational health committee or the designation of an occupational health and safety representative;
(e) performs or has performed the function of an occupational health committee member or occupational health and safety representative;
(f) refuses or has refused to perform an act or series of acts pursuant to section 3-31;
(g) is about to testify or has testified in any proceeding or inquiry pursuant to:
(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;
(i) gives or has given information to a radiation health officer within the meaning of Part V or to any other person responsible for the administration of that Part or the regulations made pursuant to that Part;
(j) is or has been prevented from working because a notice of contravention with respect to the worker's work has been served on the employer; or
(k) has been prevented from working because an order has been served pursuant to Part V or the regulations made pursuant to that Part on an owner, vendor or operator within the meaning of that Part.

24. The Appellant has not alleged that his termination was for any reason outlined in section 3-35. Rather, he has simply repeated his allegations of "racial harassment" and "physical assault violations" [see Exhibit AD-1]. As outlined above, both of these allegations were fully investigated by Northern Lights and determined to be unfounded and, indeed, fabricated. Thus, the OHS Officers had no grounds to make any order pursuant to section 3-36(2). His termination was for cause, as outlined in the letter of December 16, 2015 (Exhibit R-8) and was not as a result of any activities listed in section 3-35.

25. Both counsel for Northern Lights and I are conscious that the Appellant did not have representation in relation to the hearing of this matter. Why he chose not to participate is not known. However, considerable efforts were made to ensure he was aware of the processes and

notice was provided of all conference calls and the hearing dates. Further, Ms. Knudsen, as noted above, sought to address what might have been intended as grounds for appeal in the Appellant's letter of March 24, 2016 (Exhibit AD-1), even though the wording is unclear.

26. Although somewhat speculative, the Appellant may have been trying to suggest that Northern Lights:

a) failed to have a harassment policy;

b) failed to investigate a complaint of harassment; and/or

c) in a discriminatory fashion fired an employee because a complaint was made.

27. Based on the evidence provided, none of these potential grounds of appeal would have been made out. Firstly, Northern Lights clearly had, and followed, a harassment policy. Exhibit R-10 is the policy which would have been in effect at the time of the incidents in question. This policy is updated periodically. Investigations are done by the Superintendent of Human Resources in keeping with section 1.4 of Exhibit R-10, which states:

> Upon receipt of a complaint, the supervisor shall follow regular procedures for dealing with complaints regarding the behaviour of an employee, including investigation of the circumstances relevant to the complaint. The person whose behaviour is alleged to be unacceptable shall be notified of the complaint.

28. This process was clearly followed in relation to both the September 24, 2015 and November 10, 2015 incidents, as outlined in the sworn testimony of the Superintendent and Exhibits R-1 and R-5. Multiple interviews were undertaken and documents obtained. Although the Appellant did not cooperate with either investigation, considerable efforts were made to communicate with him and obtain the details of his version of events. There is, therefore, no basis for any suggestion that the matters were not investigated.

29. Finally, the Appellant was not terminated because he made any complaint. The problem was that the complaints he made, alleging a racial slur and a physical assault, were entirely fabricated. This conduct, taken together with his other behaviours, which were disruptive to the workplace and jeopardized student safety, gave rise to the termination. As noted above, the letter of December 16, 2015 (Exhibit R-8), outlines the reasons for the termination. Just cause has been demonstrated by Northern Lights.

V. Conclusion

30. For all of the reasons set out above, the appeal is denied. The OHS Officers correctly noted that they had no jurisdiction to direct the relief requested by the Appellant. Further, termination of the employment of the Appellant was for just cause and not for any of the reasons set out in section 3-35 of *The Saskatchewan Employment Act*.

Dated at Saskatoon, Saskatchewan this 13th day of April, 2017.

Brenda Hildebrandt, Q.C., Adjudicator

Right to appeal adjudicator's decision to board

s. 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.