

**In the Matter of an Appeal to an Adjudicator Pursuant to Section 3-53 of The  
Saskatchewan Employment Act, SS. 2013, Chapter S-15.1**

Decision Appealed from: Occupational Health Officer Decision  
August 26, 2016



LRB File 221-16	
Appellant:	Michelle Calow
Respondent:	Cypress Health Region  Director, Occupational Health and Safety, Ministry of Labour Relations and Workplace Safety
Adjudicator	Anne M. Wallace, QC
Representing Calow	Elke Churchman
Representing Cypress	Eileen Libby, QC

**Process Direction**

**Introduction and Background**

1. Michelle Calow ("Calow") seeks to appeal an Occupational Health and Safety Decision dated August 26, 2016 (the "Decision") to an adjudicator pursuant to s. 3-53 and s. 3-54 of *The Saskatchewan Employment Act* (the "Act"). I have been appointed as Adjudicator to hear this case.
2. The Report deals with a complaint of discriminatory action by Calow against her former employer, Cypress Health Region ("Cypress").
3. Upon receipt of the appointment, I confirmed with the parties that they would be represented by counsel. Since then, I have communicated with counsel. The Director of Occupational Health and Safety confirmed the Director will not be attending or making representations in this appeal. As an employee at Cypress, Calow was a member of a Saskatchewan Union of Nurses ("SUN") bargaining unit. SUN is not participating in this case.
4. Through counsel, I arranged a pre-hearing conference by telephone to discuss the following matters:
  1. What efforts, if any, have been made to resolve the situation and what efforts might still be made for settlement? This is required by Subsection 4-5(2) of the *Saskatchewan Employment Act*.
  2. Confirmation of my jurisdiction as the appeal adjudicator in this case.
  3. In relation to the hearing:
    1. The process that will be used for the hearing. In particular, to what extent can the appeal be "on the record" of the OHS File?

2. Can the issues can be refined/defined?
  3. Are there matters on which the parties agree?
  4. How long will it take to conduct the hearing?
  5. The date(s) and location for the hearing.
  6. Any other preliminary matter that may usefully be discussed before the hearing.
5. The pre-hearing conference took place on January 23, 2017. Before the pre-hearing conference, I provided each party with a complete copy of the file I received from the Director of Occupational Health and Safety (the "OHS File").
  6. I discussed the possibility of settlement with counsel and left it with them to let me know if they would like me to assist them with settlement discussions.
  7. Counsel confirmed the parties' agreement that I have jurisdiction to hear this appeal.
  8. The parties agreed to July 13, 2017 in Saskatoon as the date and place for the appeal hearing, but were unable to agree on the process for the appeal. It was also apparent that the OHS file might not have complete information about the history of this matter and I advised counsel I would follow up with OHS to clarify what had occurred in relation to another complaint Calow had made to an Occupational Health and Safety Officer on October 29, 2014 (the "First Complaint").
  9. On January 23, 2017, I sent this email to counsel:
    - Further to our conference call this afternoon, this will confirm the following:
      1. Before the appeal proceeds, I will need to provide directions on the process we will follow. I will need to decide the extent to which the appeal can proceed "on the record" of the OHS File and the extent to which I might hear evidence from witnesses. As we discussed, this is dependent on the issues I need to decide under the legislation. On reviewing the file to prepare this email., I note Ms. Calow has appealed the August 26, 2016 decision letter dismissing her discriminatory action complaint. I also see on the OHS file there is a copy of a letter of March 1, 2016 to Ms Calow dealing with Mr. Calow's original complaint. In that letter, the Occupational Health and Safety investigators found the employer had met the legislative requirements around Ms. Calow's harassment complaint. I am going to follow up with the Occupational Health and Safety Division to find out when they delivered this letter to Ms. Calow and whether Ms. Calow appealed the decision in this letter. I will advise you both of the results of that inquiry.
      2. In any event, with respect to process for this appeal:
        - a. Ms. Churchman will provide me and Ms. Libby, with her client's suggestions for process and her rationale for the suggestions by February 22, 2017;
        - b. Ms. Libby will respond to me and Ms. Churchman by March 15, 2017, with her client's response to the suggested process and with any additional suggestions and the rationale for them;
        - c. Ms. Churchman will then have until March 21, 2017 to respond to Ms. Libby's submissions.
        - d. You may send all your communications by email.

- e. Once I have all your submissions, I will issue directions on how the process will proceed.
  3. We have set July 13, 2017 in Saskatoon for the appeal hearing. I will make the detailed arrangements closer to the date and after I have issued directions on the process.
10. I made the inquiries with OHS. The response says:

The March 1, 2016 correspondence is the ultimate decision in the original complaint of harassment. I am advised a signed letter on letterhead was sent to Ms. Calow on March 2, 2016, and the registered mail receipt for this correspondence indicates it was received on March 10, 2016. A copy of the signed letter and receipt are attached. This decision was not appealed by Ms. Calow.
11. I forwarded the response and attached documents to counsel. Due to personal circumstances of both counsel, it took a bit longer than anticipated for counsel to provide me with their submissions which were concluded on April 7, 2017.

### **Calow's Position**

12. Calow's counsel submits:
  - a. The appeal should proceed via the "normal quasi-judicial process" which I take to mean the appeal should be a hearing *de novo*. Each party should call their witnesses and OHS should merely provide the record of their decision. After the evidence the parties should present their arguments.
  - b. Calow must first make a prima facie case that the discriminatory action (change of position) was a result of Calow invoking the occupational health and safety legislation. Once the prima facie case has been established, Cypress must present its case to show why the discriminatory action did not relate to occupational health and safety legislation.
  - c. The OHS File is simply the record of Occupational Health and Safety. Occupational Health and Safety does not do an extensive investigation and did not interview available witnesses. The OHS File can only be a record of OHS's position, not Calow's position. Calow has a right to be heard and to have her witnesses heard in this process. OHS did not do an independent investigation. It appears they took the word of the Employer and did not interview witnesses.
  - d. Calow is entitled to call any and all evidence which shows she was exercising her rights under the *Act* with respect to the discriminatory action.

### **Cypress's Position**

13. Cypress's counsel submits:
  - a. The issue before the adjudicator is a narrow one -- whether there was discriminatory action taken against Calow by Cypress under s. 3-35 of the *Act*, recognizing that if there was discriminatory action taken against Calow who has acted or participated in an activity under s. 3-35 of the *Act*

that the onus is on Cypress to establish that the action was taken for good and sufficient other reason under s. 35(4)(b).

- b. Although the appeal could be on the record in that the OHS decision notes that a harassment investigation and disposition was effected by Cypress (the issue of harassment is not within the jurisdiction of the present appeal), in the event that any evidence is permitted to be called it should be restricted to the issue of evidence that touches on whether Cypress engaged in discriminatory action by reason of Calow purporting to exercise her rights under the *Act*. If such evidence is called, Cypress could then call evidence on the rationale (i.e. the good and sufficient other reason) for the letter of expectation provided to Calow.

### **Analysis and Directions**

14. In this appeal, Calow disagrees with the Occupational Health Officer's decision to dismiss her complaint of discriminatory action. Calow claims she sought enforcement of the *Act* when she filed a complaint of harassment in her workplace and that she was subjected to discriminatory action in two ways: First, that she initiated a demotion of herself because harassment she suffered continued; and secondly, that the employer provided her with a disciplinary letter.
15. The issues include:
  - a. Was Calow seeking enforcement of the *Act* or Regulations or participating in activities involving occupational health and safety as set out in s. 3-35 of the *Act*?
  - b. Did Cypress take discriminatory action against Calow as defined in s. 3-1(1)(i) of the *Act*?
  - c. If Cypress did take discriminatory action against Calow, pursuant to s. 3-36(4) of the *Act*, did Cypress have good and sufficient other reason for taking the discriminatory action against Calow?
16. In this appeal, I do not have jurisdiction to revisit the First Complaint. An Occupational Health and Safety Officer investigated the First Complaint and issued a decision dated March 1, 2016. Calow did not appeal that decision and it therefore stands.
17. The onus is on Calow to establish she was engaged in activities described in s. 3-35 of the *Act* and to establish that Cypress took discriminatory action against her. If Calow establishes these two things, then the onus is on Cypress to establish good and sufficient other reason for the discriminatory action. It is, however, necessary that in the hearing itself, someone present their evidence first and that I set a process that will permit both parties to present their case with respect to all three issues.
18. The process for the hearing will be as follows:
  - a. The OHS File will be entered as part of the record for the appeal. The additional documents provided by OHS which include the decision letter of

March 1, 2016 in the First Complaint and the Canada Post receipt for that letter. Either party may refer to this information as they see fit.

- b. I will ask each party to make opening comments. Calow will go first, followed by Cypress.
  - c. In the first instance, Calow will call any additional evidence she sees fit to call to supplement the record. Witnesses will testify and bring all relevant documents Calow wishes to put in evidence. Witnesses will be sworn or affirmed and Cypress will have the right to cross-examine them. Calow will have the right to re-examine witnesses on new matters raised by Cypress. If I have questions, I will also ask my questions.
  - d. Once Calow has called all her witnesses, then Cypress will present its evidence through witnesses who will testify and bring all relevant documents Cypress wishes to put in evidence. Witnesses will be sworn or affirmed and Calow will have the right to cross-examine them. Cypress will have the right to re-examine witnesses on new matters raised by Calow. If I have questions, I will also ask my questions.
  - e. Calow will then have the right to call reply evidence, if any, to respond to any new evidence Cypress raises in its case.
  - f. Once both parties have presented all their evidence, I will ask each party to make final arguments in support of their positions.
  - g. Following the close of the hearing, I will make and write a decision.
19. The hearing is now scheduled as follows:

**Thursday, July 13, 2017**  
**Commencing at 9:00 a.m.**  
**Location To Be Confirmed**  
**Saskatoon, SK**

20. I hereby direct the parties, through their counsel, to exchange with each other copies of all relevant documents on or before June 9, 2017. If any issue arises with respect to disclosure of documents, either party may contact me and I will set a process to deal with the issue.
21. A party wishing to enter a document in evidence shall bring a copy of that document for the adjudicator and a copy for the other party.
22. If either party finds it necessary to compel a witness to attend the hearing to give evidence, on request of the party I will issue a subpoena to that witness. The party is then responsible to deliver the subpoena to the witness.

Issued on April 22, 2017.



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Anne M. Wallace, Q.C., Adjudicator