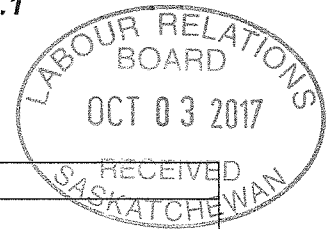


In the Matter of an Appeal to an Adjudicator Pursuant to Section 3-53 of *The Saskatchewan Employment Act, SS. 2013, Chapter S-15.1*

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 and Andrea Buettner
Representing Cypress	Eileen Libby, QC

Decision

I. Introduction and Background

1. Michelle Calow ("Calow") has appealed 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 (the "Current Complaint") 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. The Director of Occupational Health and Safety confirmed the Director would 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 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").
5. 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. They did not request assistance.
6. Counsel confirmed the parties' agreement that I have jurisdiction to hear this appeal.

7. 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 did not have complete information about the history of this matter and I undertook to follow up with OHS to clarify what had occurred in relation to an earlier complaint Calow had made to an Occupational Health and Safety Officer on October 29, 2014 (the "First Complaint").
8. I made inquiries with OHS and they provided a letter of March 1, 2016 which is the final decision in the First Complaint, together with a Canada Post mail receipt showing Ms. Calow received the March 1, 2016 decision on March 10, 2016.
9. Since the parties disagreed on process, I permitted each of them to provide submissions with respect to process. On April 22, 2017, I issued a Process Direction which includes the following:

Analysis and Directions

1. 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.
2. 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?
3. 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.
4. 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.
5. 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.
6. The hearing is now scheduled as follows:

Thursday, July 13, 2017
Commencing at 9:00 a.m.
Location To Be Confirmed
Saskatoon, SK
7. 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.
8. 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.
9. 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.
10. The hearing proceeded on July 13, 2017. The OHS File, the March 1, 2016 letter and the Canada Post mail receipt were entered into the record of the appeal. Michelle Calow testified on her own behalf. Cypress called its Director of Acute Care Anita Sagadah.
11. During Calow's testimony, it became apparent that, while I had directed the parties to exchange copies of all relevant documents, Calow was seeking to put documents in evidence which had not been previously exchanged. Cypress's counsel objected to the documents. After hearing from both counsel on this point, I ruled that I would consider the relevance, admissibility and weight of each document as and when the document was tendered in evidence through a witness. In the end, the documents Calow tendered included December 2007 Cypress Health Region policies entitled *Harassment in the Workplace* and *Code of Conduct* and a letter dated July 31, 2014 from Anita Sagadah to Michelle Calow. I allowed these documents into evidence. Several other documents in Calow's folder were already in evidence in the OHS File and the parties agreed

those didn't need to be entered again. Otherwise, as the hearing progressed, Calow's counsel did not seek to introduce any additional documents.

II. Evidence

10. Michelle Calow testified:

- a. Calow started working for Cypress in October of 2007. She received her B.Sc. in Nursing and from 2011 to 2013 she was a nurse's aide in Critical Care. From November 2013 until June 2014, she worked as a Nursing Unit Coordinator on the Medical Surgical Unit (MSU) at the hospital in Swift Current. She obtained the position through a competition. The last shift she worked was May 14, 2014. She held the position until the beginning of June 2014, but didn't work any shifts as Nursing Unit Coordinator after May 14. In June 2010, Calow took a temporary full-time position back in Critical Care. "I had to remove myself from the toxic environment I was working in." Calow believed she was harassed and bullied by the other Nursing Unit Coordinator, Nicole Vance, as well as the MSU Program Manager Raquel Roche.
- b. The harassment by Vance began October 30, 2013 even before Calow's first shift in the MSU on November 5, 2013. With Roche, the harassment began on March 13, 2014. Calow raised her concerns about Vance with Roche several times. Calow also spoke with Saskatchewan Union of Nurses Local Union President Rachael Hyatt-Hiebert.
- c. While Calow is sure she received a copy of the Cypress *Harassment Policy* during her orientation in 2007, she never had a hard copy of it. She obtained a copy of the policy herself from the Human Resources Manual in May 2014. She wanted to follow the Policy for her complaint. She never saw the Code of Conduct until after her complaint. She wasn't given these policies when she took the Nursing Unit Coordinator position. She wasn't provided with these policies when she made her concerns known to management. She thinks she might have taken some harassment training at one point, but she was not trained in harassment as a Coordinator.
- d. In May 2014, Calow contacted the Occupational Health and Safety office for the Cypress Region about her issues and she believes she filed her complaint in June. She followed process. No one from management ever told Calow that her complaint did not fall within harassment under the policy. Calow spoke with Joanne Therrien in management because the Occupational Health & Safety nurse was away. Calow provided her documentation of the incidents which occurred. Calow didn't know whether to follow the formal or informal process. She asked for guidance. After Therrien consulted with Director of Occupational Health and Infection Control Jeff Schwann, Therrien told Calow that Schwann directed that Calow file a separate formal complaint against each

individual. Calow did this. She did not meet with anyone to review the complaint when she filed it. She gave her complaint to Therrien. Calow understood that Schwann would be "doing the harassment investigation piece". "I was told later on that Anita would be looking into the operational issues."

- e. Calow says she never received any written or verbal explanation as to why her complaint would fall outside the Harassment Policy. She felt there was harassment and there were operational issues. Schwann should have dealt with the harassment and Sagadahl should have dealt with the operational issues.
- f. Sagadahl interviewed Calow, Calow believes on June 24, 2014. Calow was on day shift. Sagadahl called and asked Calow to pop by Sagadahl's office when Calow had time. "I said fine, but let me get a hold of a union rep." Sagadahl said, "I didn't think it was going to be that way. I am going to have to get a hold of HR." Calow met with Sagadahl in the afternoon together with her union rep, Angie Achter. Linda Kennedy from Human Resources was also present. Calow said she was surprised Sagadahl was doing a harassment investigation and Sagadahl responded that she was looking at operational issues. Sagadahl said Vance and Roche were provided with Calow's documentation and were asked to review and respond. Sagadahl went through the responses at the meeting. Calow was allowed to respond to their responses.
- g. Calow had provided the names of witnesses. At the meeting she asked Sagadahl if any of her witnesses were interviewed. One of Calow's witnesses told Calow that Sagadahl had contacted her and said she sent an email to Sagadahl, but otherwise no one told Calow anything about the investigation. Calow was never provided with the investigator's conclusions or recommendations. She was never informed of any corrective action taken. No one informed Calow that the offenders had been cautioned or removed from work. No one offered Calow the option or ability to move to another unit. "No, I did that on my own. I removed myself. I went back to Critical Care. I went from Nurse B Supervisor to frontline staff."
- h. On the morning of September 5, 2014, Sagadahl delivered an unsealed envelope to Calow. It said "Michelle" on it. "And she handed me this letter. I said we were short and I was here all day and she said have a look at it and if you want we can talk." The letter is dated July 31, 2014 and it says:

Dear Michelle,

Confidential

The following is a summary of a Report of Harassment sent to me from the OH&S Department. I would like to begin this summary by stating that this was a complex situation, to which I have spent countless hours poring over the information provided to me, including but not limited to reviewing investigative meetings and other documents/policies to try to come to conclusions/recommendations.

My main goal as the Director of Acute Care/LTC Swift Current is to ensure the safety of those we care for and then to ensure that staff working in any environment feel safe to perform to jobs they are asked to do. When an environment becomes stressed by working relationships with colleagues it causes me to pause. I worry not only about the patients; that they may receive less from staff caring for them because of such distractions but I am also concerned about the impressions and impact those strained relationships have on front line staff who look to those in leadership to manage, guide and often look to those in leadership to support them in their growth and development stage of their careers.

Upon review of all of the documents and conversations around this situation it is very clear to me that the relationship between you, Nicole and Racquel is fractured and without some substantial changes in behaviour; I worry about how we move forward. There exist no trust between this group and trust is vital in order to provide direction/mentoring and leadership to everyone in a work environment.

I feel strongly that the following recommendations are sound and must be adhered to:

- You will work on resolving issues or conflicts as they arise.
- You will treat and communicate to colleagues, patients, families and other health care workers in a respectful, professional manner recognizing you all are part of the team.
- You will be aware of how such things as tone of voice and body language can be perceived differently by different people and incorporate that into your daily practice.
- You will review the values and code of conduct of the Cypress Health Region and encompass them into your daily practice. (Policy-Human Resource Manual – 2-20)

Finally each of us must reflect often, and decide whether the role and the position we hold, is a place where we can be most effective as members of the leadership team. I would strongly encourage the use of EFAP to assist in situations where you feel that you are requiring support or just a resource for your own growth and development. (See attached)

- i. When Calow was not busy, she opened the envelope and read the letter and was very angry. She was angry because she was being blamed for filing a complaint of harassment. She was being penalized and her complaint, which she had filed in good faith, was not being taken seriously. She was being blamed. Calow viewed Sagadah's letter to be disciplinary. She felt that in the last paragraph of the letter Sagadah was subtly saying Calow was not fit for the position and should not be in a supervisor position. Calow felt the employer was taking discriminatory action against her for filing a good faith complaint. Calow felt disrespected and unimportant and she felt she was in trouble.
- j. Calow left the MSU and obtained the front line position in Critical Care to get away from the harassment. The Union knew why Calow transferred, but Calow did not tell her Manager because she did not trust her manager. Calow understood from an email exchange she had with Jeff

Schwann, that she would not be pulled back into the MSU, and yet she was pulled back into the unit on one occasion.

- k. After she received the letter, Calow became quite paranoid and anxious. She was not well. On September 9, 2014, Calow called EFAP and told them she was having thoughts of self-harm and that she was not coping. They offered to send the crisis van and also suggested if Calow didn't feel comfortable with that, she should go to the closest emergency which was at the Cypress Regional Hospital. Calow then called a colleague to see which psychiatrist was on call because Calow had previously been sexually assaulted by one of the psychiatrists. That psychiatrist was not on call, so Calow drove herself to the hospital where she saw an emergency doctor and a psychiatrist. She was then admitted to the mental health unit. Calow spent four days in hospital. She was afraid, anxious, and paranoid. She was not sleeping. Calow could not be in the hospital with Sagadah, Vance and Roche. Calow then went off work for several months.
- l. Calow and her family relocated to Lloydminster in January 2015. Calow's husband at the time was working for a business located in Lloydminster. He had been coming back home on his days off. Calow felt she could not return to work in Swift Current, so after lengthy discussion they decided the best option was for them to move to Lloydminster.
- m. No one with the employer ever told Calow about her right to bring a complaint of discriminatory action. The only thing Calow ever received from her employer about her harassment complaint was the letter that was dated July 31, 2014. No one ever told Calow she had the right to seek assistance from the Occupational Health and Safety Division as set out in the employer's policy. The first time Calow heard about her right to complain about discriminatory action was when she went to see her lawyer.
- n. Calow knew about the Occupational Health and Safety Division because she had been on an occupational health and safety committee in the past. She contacted them around the end of September 2014 and they communicated through phone and emails. Calow told the officer she had filed a grievance through the Union. The officer said he would wait until the Union process was finished and then he would meet with management. The officer did not tell Calow about discriminatory action.
- o. Calow never told anyone in management at Cypress that she felt she was being disciplined for complaining. She didn't trust "any single one of them".
- p. Eventually, with her lawyer's assistance, Calow filed the Complaint in June of 2016. OHS sent her a letter dated August 16, 2016. She still doesn't understand the letter.

11. In cross-examination:

- a. Calow confirmed that she began work with Prairie North Health Region on April 13, 2015. By email of April 10, 2015, Calow said this to Linda Kennedy at Cypress:

Good afternoon Linda. I am sending notification to the Cypress Health Region of my intent to relocate under Article 48.01 (a) effective immediately. After speaking to the Union, I have decided that it would be in the best interest of both the region and myself that my part-time position in Critical Care at the Cypress Regional Hospital be posted as a permanent position. If you have any questions or concerns, please feel free to contact me. Thank you for your time.

- b. Calow confirmed that Article 48.01(a) allowed her to take along her seniority and benefits if she obtained employment in another health region. Calow confirmed that when she left Cypress for Prairie North, she was no longer an employee of Cypress.
- c. Calow confirmed that it was her choice, on April 23, 2014, to apply for the front line position in Critical Care and leave her Coordinator position in the MSU. No one in management told Calow to apply for the position. Calow was the most senior qualified candidate and she was offered the Critical Care position and accepted as of May 6, 2014. She acknowledged that she applied for, was offered and accepted the position well in advance of her filing her harassment complaint. Calow claims the Critical Care position was a demotion, but she acknowledges Cypress did not require her to apply for that position and that she made the decision to apply on her own. She didn't tell anyone in management why she was applying. She told the Union and the Union said she didn't have to tell the manager. Calow repeated several times that she contacted her Union President and asked if she needed to tell the manager she had applied for another position and the Union President said Calow did not have to tell the manager.
- d. Calow agreed Cypress did not terminate her employment and that no one in Cypress demoted Calow, laid her off or transferred her. Cypress didn't eliminate Calow's job or discontinue her job. The reduction in pay in Calow's new position was because Calow chose to bid on that position. The wages for the position are dictated by the Collective Agreement between the employer and SUN.
- e. Calow confirmed that she originally made harassment complaints against Vance and Roche in May of 2014. When Calow received the July 31, 2014 letter from Sagadah, she felt Cypress didn't follow policy and legislation, so she complained to provincial Occupational Health and Safety. After much questioning, Calow finally acknowledged that she filed the First Complaint with OHS because she was not happy with the July 31, 2014 letter from the employer. Calow acknowledged the March 1, 2016 decision letter from OHS was the conclusion to the First Complaint. Calow claimed she didn't recall whether she had appealed the March 1, 2016 decision. She acknowledged there are no records of any appeal.

- f. Calow acknowledged that when she spoke with Joanne Therrien about her issues with Vance and Roche, Therrien told Calow that if she felt she had a complaint she should advance it, but that the question was which way to go – formal or informal. Calow acknowledged that Therrien was helpful to her in deciding which process to follow.
- g. Calow claimed that even though the July 31, 2014 letter begins with a reference to a complaint of harassment, it was not clear to her that the letter dealt with her claims of harassment. Calow confirmed the only harassment complaints she made were those against Vance and Roche.
- h. Calow said she believes she first made contact with OHS about her Complaint in about November 2015 and that Calow's lawyer, with Calow's approval, finally filed all the complaint material dated June 21, 2016 on June 23, 2016. Calow acknowledged that at the time she filed the Complaint she had no employment relationship with Cypress. Calow acknowledged that she wrote the section of the complaint that asks *What was the alleged discriminatory action taken against you?* That section reads:

I was subjected to harassment in the form of bullying, intimidation, derogatory comments, veiled threats, exclusion/isolation, and emotional abuse from October 30, 2013 to April 2014 by Nicole Vance, my co-Nursing Supervisor. I repeatedly approached the Program Manager, Racquel Roche with my concerns regarding the whole bullying behaviour, the first being November 6, 2013. Racquel did not take any action in addressing the bullying behaviours or stopping the behaviours from continuing. In fact, Racquel Roche began harassing me (intimidation, veiled threats, exclusion/isolation, and derogatory comments) from the date of March 13, 2014 until I had no option but to demote myself to a non-supervisory position in a different department. My last shift and a Nursing Unit Coordinator/Supervisor was May 15, 2014. I sought direction from the Cypress Health Region Occupational Health and Safety Department. I met with JoAnne Therrien on May 10, 2014 to discuss my concerns and the incidents of harassing behaviour of both, Nicole Vance and Racquel Roche. At this time Joanne informed me that she would take the documentation that I provided and speak with Jeff Schwann, the Director of Occupational Health and Safety for the Cypress Health Region. On May 13, 2013 JoAnne Therrien informed me that she had spoken to Jeff Schwann, and they were in agreement that I had a legitimate harassment complaint. I was then directed to file a formal complaint with the employer against Nicole Vance and Racquel Roche which I did on May 15, 2014. On June 9, 2014, Joanne informed me that the harassment investigation would be conducted by Anita Sagadah. On September 5, 2014 I received a "Summary of a Report of Harassment" which read as a letter of expectation, from Anita Sagadah. The Saskatchewan Union of Nurses (Rachel Hyatt-Hiebert and Jan Murdock), as well as Mary Anderson, Occupational Health Nurse for the Cypress Health Region, agreed that this letter was disciplinary in nature. In addition to receiving the disciplinary letter, I was asked by Racquel Roche if I was quitting and heard rumors I was being fired. Combined with the continuing harassment I felt pressured to demote myself to a non-supervisory position.

- i. Calow acknowledged that the harassment complaints against Vance and Roche to which she refers in the Complaint are the only harassment complaints she made. She acknowledged that in her

original harassment complaints she did not claim that she demoted herself because of the alleged harassment.

- j. Calow continued to maintain that the July 31, 2014 letter was a disciplinary letter. She said the tone of the letter is disciplinary. To Calow the letter meant that she was in trouble and therefore she took it to be disciplinary. The Union said it read like a letter of expectation. Calow acknowledged that the letter did not contain any formal discipline such as a warning, suspension or termination.
- k. Calow confirmed that her husband went to the Lloydminster area to work at some point earlier in 2014. When away working, he stayed in a camper trailer.
- l. Calow said that even though she was not formally required to work with Vance or Roche once she moved back to Critical Care, Roche was a manager and could possibly be called to deal with something in Critical Care, and Vance was on a committee with the Nurse Educator in Critical Care, so Vance was down in the Critical Care Unit quite often. Calow acknowledged, however, that she did not work with either Roche or Vance and did not intersect with either of them on a daily basis.

12. Anita Sagadahl testified:

- a. Sagadahl has been the Director of Acute Care and Diagnostic Services for Cypress since 2011.
- b. Jeff Schwann brought Calow's harassment complaints against Vance and Roche to Sagadahl. Schwann told Sagadahl he had reviewed the complaints and concluded that the issues were operational. Because Roche fell under Sagadahl's umbrella, Sagadahl needed to perform an operational review because operational matters are her responsibility.
- c. Any time a concern is brought forward, it is Sagadahl's job to investigate, speak to the parties involved and consider all the information available. In this case, once Sagadahl had spoken to all three of the persons involved, she concluded there were relationships that were fractured, there was other conflict, and everyone had some responsibility in it. Sagadahl wrote a letter which she provided to each of Calow, Vance and Roche. The letter was the culmination of her thoughts and feelings with respect to the conflict.
- d. Sagadahl personally delivered the letter each of the three employees. She delivered the letter to Calow on September 5 and the letters to Vance and Roche within three or four days before that. Sagadahl had completed the letter on July 31, 2014, and the only reason for the delay in delivery of the letter was other operational concerns which required her to prioritize. Sagadahl put each letter in an envelope with the person's name on it and personally delivered the letter. She told

each of them, including Calow, if they wanted to discuss the letter they could meet with her at any time. None of the three came to talk to her.

- e. Sagadah! said the letter was not disciplinary. At the end of any kind of investigative process there has to be some communication. The purpose of the letter was to set out Sagadah!'s conclusions after she had time to reflect on what she had heard. She wanted all three to move forward and learn to work as team members. She wanted each of them to take a look at the role and be responsible in their position.
- f. Sagadah! confirmed that she did not, and to her knowledge nor did anyone else at Cypress, tell Calow she had to move to a position in Critical Care or apply for such position. No one ever suggested to Calow that she would be suspended, demoted, laid off or terminated.
- g. Sagadah! confirmed that after Calow moved to Critical Care in May 2014, Calow would not have to work with Vance or Roche.

13. In cross-examination:

- a. Sagadah! confirmed that the communication from Jeff Schwann that he determined the issues were operational was a verbal communication. The discussion with Schwann was the first indication Sagadah! had that Calow had made a complaint.
- b. When challenged on the length of time between the date of the letter (July 31, 2014) and the date of delivery of the letter (September 5, 2014), Sagadah! said she is extremely busy running a hospital and has to prioritize. Sagadah! confirmed that she met with Calow on June 24, 2014 at 13:30 hrs. At that time, Sagadah! told Calow that she would make every attempt to be done the investigation by the end of July or the first two weeks of August.
- c. Sagadah! confirmed the July 31 letter was about how the employees manage themselves in their leadership roles. Sagadah! agreed that she gave direction on what people should do. She did not know whether the letters were placed on the employees' personnel files, but acknowledged that the letter to Calow says "cc: Personnel File".
- d. Sagadah! confirmed that she did not give Calow a copy of the Human Resources Manual when Calow became a Nursing Unit Coordinator.
- e. Sagadah! confirmed that she did not use the process in the *Harassment Policy* when she did her investigation because the issues she was dealing with were operational, including the *Code of Conduct*. Sagadah! would not normally hand out the *Harassment Policy* on an operational issue.
- f. When asked if she or anyone else in management informed Calow that her complaint did not fall within the definition of harassment and was operational, Sagadah! said that at the outset of the meeting on June 24, 2014, she told Calow that Cypress had determined that Calow's

complaint did not involve harassment but rather involved operational issues. Sagadahh investigated the operational issues which were brought to her attention. Those included conflict between individuals in the work environment. Schwann provided Sagadahh with copies of the documents Calow had submitted. Sagadahh spoke to Calow and the individuals named in the complaints. She came to her conclusions on the operational issues and issued the July 31 letter. That letter was the only piece of paper she gave to Calow.

- g. Sagadahh confirmed that there is an on-call manager and that Roche would have participated in that program. However, to Sagadahh's knowledge, Roche would never have worked in Critical Care because Roche did not have the knowledge or abilities to work in that environment.

- 14. In re-examination, Sagadahh confirmed that as Director of Occupational Health and Infection Control, Jeff Schwann vets harassment complaints to determine whether they fit within the *Harassment Policy*. If, when she investigated the operational issues, Sagadahh had thought something that occurred was harassment, she would have raised that with Schwann. She did not see anything that concerned her in that respect. The issues were operational.

III. The OHS Decision Appealed

- 15. Calow filed the Complaint on June 23, 2016. In the complaint, Calow alleges that:
 - a. Her May 2014 harassment complaint was not properly addressed, and as a result she demoted herself to a non-supervisory position; and
 - b. Cypress looked into the complaint internally and gave her a letter of expectation which she viewed as disciplinary.

Calow asked that she be returned to her former supervisory position with Cypress.

- 16. The Harassment and Discriminatory Action Prevention Unit investigated the Complaint and found that:
 - a. The letter of expectation was not discriminatory action under the *Act*. It was an action on the part of Cypress that was set down as a rule or guide and was not disciplinary in nature as a result of filing a complaint of harassment, but rather reaffirming of expectations of the workplace;
 - b. The absence of a finding of harassment by Cypress in favour of Calow does not mean Calow's harassment allegations were not looked into or that they were not fairly dealt with;
 - c. Calow voluntarily demoted herself and also requested a transfer to another health district;
 - d. Since the complaint did not fit the legislative definition of *discriminatory action*, no further investigation was required.

IV. Positions

Calow

17. In her *Discriminatory Action Confidential Questionnaire* filed June 21, 2016, Calow alleges that the discriminatory action against her was that "... I had no option but to demote myself to a non-supervisory position in a different department." She also refers to receiving the letter of expectation on September 5, 2014, and refers to that letter as the "disciplinary letter".

18. In the letter of appeal dated September 25, 2016, Calow's counsel stated the grounds as follows:

Ms. Calow formally reported harassment at her place of work. The harassment was not addressed. As a result, Ms. Calow had no option but to take a demotion to a lower position in a different department in order to be away from the harassment. While Ms. Calow initiated the demotion, she did so under duress as the harassment she suffered continued and was not addressed adequately by her employer. This would be considered a constructive demotion. A demotion and reduction in wages falls within the definition of "Discriminatory Action".

Ms. Calow was given a summary of the report which was actually a disciplinary letter. The Union agrees that it was a disciplinary letter. The imposition of any discipline or other penalty squarely falls within the above definition of "Discriminatory Action." Mike Luciak found the letter to be one of guidance, rather than one of discipline, but did not provide reasons for the finding.

19. In this appeal, Calow submits:

- a. Calow was seeking enforcement of the *Act* and *The Occupational Health and Safety Regulations, 1996*, and she was participating in protected activities involving occupational health and safety and her rights as outlined in s. 3-36 of the *Act*.
- b. Calow had reasonable grounds to assume that she had been discriminated against with the disciplinary letter provided to her by the Director of Care on September 5, 2014. Cypress created an environment where the worker was not protected from harassment and unable to complain for fear of reprisal. The letter, dated July 31, 2014, was clearly a disciplinary letter. Therefore, Calow was discriminated against because she brought forward a formal complaint of harassment to her employer.
- c. Calow expected to receive a Harassment Report from the harassment investigation, not a letter with the words "The following is a summary of a Report of Harassment sent to me by the OH&S Department."
- d. Cypress did take discriminatory action against Calow as defined in s. 3-1(1)(i) of the *Act*. The action was discriminatory, not for good and sufficient other reason. The Occupational Health and Safety Investigator never asked Cypress to provide good and sufficient other reason for the action taken against Calow.

- e. Cypress did not properly investigate Calow's harassment complaint. They did not assign an investigator, and they did not notify Calow of the outcome of their "investigation".
- f. Cypress should have removed Calow from her work unit during the investigation.
- g. Calow seeks the cessation of the alleged discriminatory action against her, reinstatement to her previous position on the same terms and conditions that she was employed, payment of all lost wages which she would have received had she not been wrongfully discriminated against including those lost through her voluntary demotion, and removal of a disciplinary notice on her personnel file that relates to the material events including but not limited to the July 31, 2014 letter from Sagadahp.
- h. Calow also takes issue with the following:
 - 1. The Occupational Health and Safety Officer ("OHO") who investigated Calow's First Complaint in 2014 failed to recognize that Calow had a valid discriminatory action complaint.
 - 2. In October 2014 the OHO told Calow he intended to let the union process (grievance on the disciplinary letter) take its course before he interjected with statutory enforcement.
 - 3. In the OHO's decision of December 4, 2014, there is no mention of discriminatory action; however the OHO does refer to the existence of the "letter of expectation". Calow appealed this decision.
 - 4. The OHO in the original investigation was wrong in presuming that Sagadahp's meeting with Calow was an interview when in fact it was a discipline meeting.
 - 5. There is nothing in the March 1, 2016 OHO decision to suggest that the issue of discriminatory action was investigated or even mentioned with the employer. The OHO assumed the word "operational" was sufficient notification to Calow of the outcome of the harassment investigation and that it was reasonable for Calow to know what that word entailed. Calow did not appeal that decision because she had already begun the discriminatory action route with her counsel.
 - 6. Calow says it was inappropriate for the OHOs, in June 2016, to say they would not proceed with Calow's discriminatory action complaint and to say if they didn't receive the information requested, they would proceed to issue a decision based on the information that was provided.
 - 7. It was wrong for the OHOs to ask Calow how she felt the definition of discriminatory action applied to her case.

8. With respect to the Complaint, the OHO did not perform an investigation of a discriminatory action complaint; rather, he decided Calow's claim did not satisfy the definition of discriminatory action and dismissed her complaint. The OHO erred in fact and law, and OHS has still not answered the question posed of them because they are confusing the definition of harassment with the definition of discriminatory action.
9. At law, the OHO is presuming to state that the disciplinary letter Calow received on September 5, 2014 cannot be construed as discriminatory action because pursuant to section 3-1(5) of the *Act* an employer can take reasonable managerial action against a worker in order to operate the workplace as they see fit without it being construed as personal harassment. Harassment does not equate to discriminatory action and vice versa. Calow would have had to claim that the disciplinary letter given to her on September 5, 2014 was personal harassment in her formal harassment complaint for the officer to stand on this interpretation. She did not because the letter did not exist when she submitted her complaint; it was generated because, and only because of her harassment complaint. The disciplinary letter was discriminatory action after the harassment, not during.
10. An OHO is bound to answer that discriminatory action has taken place or not taken place with respect to section 3-35 only. Personal harassment may exempt reasonable managerial action; discriminatory action does not. Managerial action is the essence of employment discrimination. By its very definition, every discriminatory action stems directly from some kind of managerial action; it doesn't even need to be reasonable, it just cannot be as a result of the worker's protected activity. Not all managerial action is discriminatory and protected by the *Act*, but under the realm of a discriminatory action complaint, the employer must establish the action was taken for "good and sufficient other reason" to eliminate the presumption in favour of a worker. The OHO is charged with the legislative duty to investigate and decide.
11. Calow was never informed in writing or verbally, as per the employer's harassment policy and section 36 of the *Regulations*, whether there was an absence of a finding of harassment or the outcome or even if a harassment investigation was in fact carried out. Rather, Calow was left to guess at the employer's undisclosed meaning of "operational".
12. The OHO in the Decision, said Calow voluntarily demoted herself and also requested a transfer to another health district. Calow should not be taken to have lost her statutory protection

against discriminatory action because she removed herself from a toxic, retaliatory and harassing environment.

20. In argument at the hearing, Calow's counsel also raised a claim of reasonable apprehension of bias because of an email from Ron Duckworth (the primary decision-maker) to co-workers and fellow investigating officers, Shawn Tallmadge and Mike Luciak.
21. Calow refers to the following case authorities:
 - a. *Flint Energy Services Ltd. v. Robert Thomas*, NC-KAR-0127;
 - b. *Lewis v. Regina School Division No. 4*, 2003 SKQB 344;
 - c. *Monique Koskie v. Child Find Sask. Inc.*, 2015 LRB File No. 119-15.

Cypress

22. Cypress submits:
 - a. Calow bears the burden of establishing she was engaged in activities described in s. 3-35 and that Cypress took discriminatory action against her.
 - b. The *Act* is meant to protect workers at work. This appeal involves a complaint and that was not advanced by a worker at work. By June 2016 when Calow advanced her complaint, she had not worked for Cypress for over 14 months, having elected to resign in April 2015. Since Calow was not a worker, her assertion that Cypress engaged in discriminatory action is beyond the scope of a s. 3-35 complaint.
 - c. The issues with respect to the Current Complaint are unrelated to any new matters. The foundational grounds of the appeal state that "Ms. Calow formally reported harassment at her place of work. The harassment was not addressed." This ground was asserted previously and was the subject of the March 1, 2016 decision. The net result of advancing the foundational grounds for this appeal is a collateral attack on the March 1, 2016 decision and an attempt to have the adjudicator assigned to this appeal reconsider the March 1, 2016 decision.
 - d. The allegation that Calow had "no option but to take a demotion to a lower paying position in a different department in order to be away from the harassment" is an alleged consequence of the March 1, 2016 decision, a decision with respect to which Calow continues to take issue but which Calow never appealed. Calow cannot seek to use the current appeal as a means to get reconsideration of the March 1, 2016 decision.
 - e. Calow acknowledges that she "initiated the demotion". While Cypress disputes that there was any demotion at any point during Calow's employment, it is also clear that Cypress never effected any employment-related actions (demotion, suspension, termination, etc.) as defined in s. 3-1(1)(i). The legislation requires discriminatory action

to be an action or threat of action by the employer. The fact Cypress did not engage in any action or threat of action is fatal to Calow's claim.

- f. Cypress did not engage in any of the activities outlined in the definition of discriminatory action.

V. Legislative Provisions

12. Calow's claim is one of discriminatory action under s. 3-35 of the *Act* which reads:

3-35 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.

13. *Harassment* is defined in s. 3-1 of the *Act*:

"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;

14. ss. (4) and (5) of the *Act* say:

(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.

15. *Discriminatory action* is defined in s. 3-1 of the *Act*:

3-1(1) In this Part and in Part IV:

...

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

16. s. 3-36 permits a worker to refer a claim of discriminatory action to an occupational health officer ("OHO"):

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

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

- (a) cease the discriminatory action;
- (b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;
- (c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and
- (d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.

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

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

- (a) in any prosecution or other proceeding taken pursuant to this Part, there is a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 3-35; and
- (b) the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason.

(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).

23. s. 36 of the *Occupational Health and Safety Regulations, 1996* (the "Regulations") contains requirements with respect to harassment policies:

Harassment

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

- (a) a definition of harassment that includes the definition in the Act;
- (b) a statement that every worker is entitled to employment free of harassment;
- (c) a commitment that the employer will make every reasonably practicable effort to ensure that no worker is subjected to harassment;
- (d) a commitment that the employer will take corrective action respecting any person under the employer's direction who subjects any worker to harassment;

- (e) an explanation of how complaints of harassment may be brought to the attention of the employer;
 - (f) a statement that the employer will not disclose the name of a complainant or an alleged harasser or the circumstances related to the complaint to any person except where disclosure is:
 - (i) necessary for the purposes of investigating the complaint or taking corrective action with respect to the complaint; or
 - (ii) required by law;
 - (g) a reference to the provisions of the Act respecting harassment and the worker's right to request the assistance of an occupational health officer to resolve a complaint of harassment;
 - (h) a reference to the provisions of *The Saskatchewan Human Rights Code* respecting discriminatory practices and the worker's right to file a complaint with the Saskatchewan Human Rights Commission;
 - (i) a description of the procedure that the employer will follow to inform the complainant and the alleged harasser of the results of the investigation; and
 - (j) a statement that the employer's harassment policy is not intended to discourage or prevent the complainant from exercising any other legal rights pursuant to any other law.
- (2) An employer shall:
- (a) implement the policy developed pursuant to subsection (1); and
 - (b) post a copy of the policy in a conspicuous place that is readily available for reference by workers.

VI. The Issues

24. The issues are:

- a. Are there circumstances that establish a reasonable apprehension of bias on the part of the OHO who investigated the Current Complaint?
- b. Did OHS and/or the OHOs otherwise improperly handle the Current Complaint?
- c. Is the Current Complaint beyond the scope of a complaint of discriminatory action under s. 3-35 of the *Act*?
- d. If the Current Complaint is not beyond the scope of s. 3-35, is it nevertheless a collateral attack on, and an attempt to get reconsideration of the March 1, 2016 OHO decision?
- e. If the Current Complaint is properly before me as a discriminatory action complaint (see *Flint Energy, supra*, at [7]):
 - 1. Was Calow seeking to 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*?
 - 2. Did Cypress take discriminatory action against Calow as defined in s. 3-1(1)(i) of the *Act*?

3. Is there a link between Calow engaging in an activity set out in s. 3-35 and discriminatory action by Cypress?
4. 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?

VII. Analysis

25. Before addressing each issue in turn, I would be useful to set out a summary of the sequence of events relevant to this appeal:

- Michelle Calow made harassment complaints against two of her co-workers, Vance and Roche, in June 2014.
- Jeff Schwann reviewed the complaints and decided they did not engage the harassment application of the harassment policy. They were complaints, but they were operational in nature. Schwann passed the complaints to Anita Sagadahil as the relevant manager.
- Sagadahil met with Calow on June 24, 2014 about the operational issues. She also met with Vance and Roche. At the meeting with Calow, Sagadahil explained to Calow that the complaints had been determined not to be harassment but that they engaged operational issues.
- On September 5, 2014, Sagadahil delivered the July 31, 2014 letter to Calow. Vance and Roche got the same letter.
- Calow considered the letter to be disciplinary. The Union grieved but ultimately did not pursue a grievance with respect to the letter. Sagadahil was clear the letter was not disciplinary.
- On October 29, 2014, Calow made a complaint (the "First Complaint") to the Occupational Health and Safety Division ("OHS").
- The OHO made a decision in the First Complaint on December 4, 2014. Calow appealed that decision.
- On November 16, 2015, I referred the First Complaint back to OHS for a *de novo* investigation.
- The OHO issued the final decision in the First Complaint on March 1, 2016. In that decision, the OHO concluded that the Cypress did look into Calow's harassment complaints and that Cypress did inform Calow that the alleged harassment was an operational matter. He concluded that it is reasonable to believe that an individual working in a hospital setting would have understood what Sagadahil meant when she said Calow's complaints were "operational" and therefore not harassment. He also found that Sagadahil was justified in her

assumption that everyone understood that the matter was not harassment but was an operational concern.

- Calow did not appeal the March 1, 2016 decision.
- Calow filed the Current Complaint with OHS on June 21, 2016.
- OHS issued its decision respect to the Current Complaint on August 26, 2016.

A. Are there circumstances that establish a reasonable apprehension of bias on the part of the OHO who investigated the Current Complaint?

26. On December 21, 2015 Duckworth sent an email to Calow:

In order to comply with the decision on your appeal, we need to arrange for the Saskatoon office to contact you. I understand you have moved from Swift Current and I am hoping this email address is good. Could you please confirm this address by your response and provide us with your telephone and mailing address should they be necessary. Thank you for your cooperation.

27. Calow responded to Duckworth on December 23, 2015 and provided her address and telephone number. Duckworth then forwarded Calow's email to Shawn Tallmadge and Mike Luciak with this message:

This the new address and phone of Michelle Calow. Susan felt she should be contacted either personally or by phone to see if she had anything to add. I leave it to you, but I hope she is not under the impression that this is an investigation into her harassment complaint. That was dealt with by the employer. My review of their investigation is the subject of the appeal or at least should be.

Good luck and thanks

Ron

PS She has a discriminatory action form not completed or at least not received by us. I believe she and her lawyer could be contemplating going after Cypress Health Region on her leaving Swift Current. They believe that she Quit and her lawyer thinks it may be Discriminatory action. Nothing to do with us but may set thre [sic] tone for you guys.

28. Calow claims the "PS" in Duckworth's email creates an apprehension of bias. Calow's counsel points us to the following passages from the *Koskie* case, *supra* [40 – 42]:

[40] The Appellant argues that there was a reasonable apprehension of bias on the part of the Adjudicator resultant from the fact that the Appellant made an application to the Court of Queen's Bench to compel the Adjudicator to issue her decision. The Appellant cited Justice De Grandpre's dissent in *Committee for Justice and Liberty v. Canada* (National Energy Board)²⁵, where he said:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.'

...

[42] In *Agrium Vanscoy Potash Operations v. United Steel Workers Local 7552 and Francine Chad Smith*²⁶, the Court of Appeal, after confirming that the test for bias was as set out 25 [1978] SCR 369 at 394, 1976, [1976] CanLII 2 (SCC) 26 [2014] SKCA 79 (CanLII) 13 above by Mr. Justice de Grandpre, the Court went on to consider three other points which emerge from the case law. At paragraph [42], the Court said:

[42] In making that assessment, it is necessary to bear in mind three other points which emerge from the case law. The first point is that, as is typical in the administrative law field, the question of bias is contextual and will depend, among other things, on the nature of the decision-maker. See: *Committee for Justice and Liberty v. National Energy Board*, supra at p. 395; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623 at pp. 638-639. Second, a mere suspicion of bias, or a mere concern about bias, is not enough to satisfy the test. Bias must be "more likely than not" (*Committee for Justice and Liberty v. National Energy Board*, supra at p. 394). There must be "a real likelihood or probability of bias" (*R. v. S. (R.D.)*, supra at para. 112). Third, the "reasonable person" contemplated by the test is an informed person, with knowledge of all of the relevant circumstances, including relevant traditions of integrity and impartiality. See: *R. v. S. (R.D.)*, supra at paras. 48 and 111.

29. Calow contends it is more likely than not OHS is biased, given the treatment Calow has received by the statutory enforcement officers in that she was never notified of the provisions of the legislation with respect to discriminatory action and when she found out through her counsel about her rights, she still wasn't allowed through the gate to access the rights of a fair, unbiased investigation. A reasonable person reading that email would question the impartiality of the primary decision-maker and his influence on his co-workers. Further, there is no other agency or person responsible for receiving, investigating and deciding a discriminatory action complaint pursuant to s. 3-35 other than OHS and its officers and it does have something to do with OHS.
30. It is trite law that anyone wishing to raise an allegation of bias must do so as soon as the circumstances giving rise to the allegation are known. The email is part of the OHS File which I sent to each of the parties before the January 23, 2017 pre-hearing conference. Calow never raised this allegation at any time between January 23 and July 13, and indeed only raised the bias allegation during argument after the close of the July 13 appeal hearing. In these circumstances, Calow should not be permitted to raise this bias allegation at such a late date.
31. In any event, there is no merit to the bias allegation. The circumstances of the email must be viewed in the entire context of events at the time. Calow had appealed the OHO decision in her First Complaint. On November 15, 2015, the First Complaint was referred back to OHS for the new investigation. As part of that new investigation, Duckworth made arrangements for a Saskatoon OHO to contact Calow to see if Calow had anything to add to the investigation. Duckworth's comment that he hoped that Calow was not under the impression that this was an investigation into her harassment complaint is an appropriate one. The OHO's role was not to investigate Calow's harassment complaint but rather to investigate whether Cypress as the employer had complied with the *Act*.

Duckworth is correct when he says his review of Cypress' investigation is the subject of the appeal.

32. The PS portion of the email is informational only and contains nothing that would concern a reasonable person. A reasonable person would conclude Duckworth is merely noting there might be a discriminatory action complaint coming, but that it didn't have anything to do with the complaint he was investigating. The bias allegation, therefore, also fails on the merits.

B. Did OHS and/or the OHOs otherwise improperly handle the Current Complaint?

33. In argument, Calow raised a number of issues about the OHSs' handling of her First Complaint and the Current Complaint.
34. To the extent the issues relate to the issues with the First Complaint, Calow did not appeal the decision in the First Complaint and those issues are not properly before me. I will therefore not address Calow's challenged to how the OHO handled the First Complaint or about the decision in the First Complaint.
35. To the extent the issues relate to the Current Complaint, s. 3-53(3) of the Act requires that the notice of appeal "must" set out the grounds of appeal. Calow did not set out any of these issues in the grounds for appeal in this Current Complaint. For this reason alone Calow's claims should be dismissed; however, in any event, the claims have no merit.
36. For example:
 - a. Calow says it was inappropriate for the OHOs to tell her they would not proceed with her complaint and then say if they didn't receive the information requested, they would issue a decision based on the information provided. A review of the record shows that on June 16, 2016, the OHOs wrote to Calow's counsel to advise her that the questionnaire that had been submitted did not include answers to some of the questions. The letter set a deadline for Calow to provide the missing information, failing which they would issue a decision based on the information provided. Far from being inappropriate, the OHOs were actually attempting to ensure that Calow had provided all the relevant information. If they intended to prejudice Calow in any way, they could have just dismissed her claim for lack of information. Instead, they invited Calow to provide the information and listed the specific information that was missing. There was nothing wrong with proceeding in this fashion.
 - b. Calow says it was wrong for the OHOs to ask her how she felt the definition of discriminatory action applied to her case. OHOs are responsible in their investigations to understand the claims made by those who bring issues forward and to make decisions based on full information. There is nothing at all wrong with an OHO asking a complainant how she feels the legislation applies to her case.

C. Is the Current Complaint beyond the scope of a complaint of discriminatory action under s. 3-35 of the Act?

37. Cypress's counsel argues the *Act* is meant to protect workers at work. This appeal involves a complaint that was not advanced by a worker at work. By June 2016 when Calow advanced the Current Complaint, she had not worked for Cypress for over 14 months, having elected to resign in April 2015. Since Calow was not a worker, her assertion that Cypress engaged in discriminatory action is beyond the scope of a complaint under s. 3-35.
38. s. 3-1(gg) defines "worker" to include an individual who is engaged in the service of an employer. Calow's complaint of discriminatory action was brought under Section 3-35 of the *Act*, which protects a worker from discriminatory action because the worker seeks or has sought the enforcement of the *Act*. While she was no longer an employee of Cypress when she brought the Current Complaint, Calow was an employee of Cypress at the time most of the events she claims amount to discriminatory action occurred. I am satisfied the legislature did not intend to preclude a person who was a worker at the time of the events in question from making a complaint because that person may no longer be in the service of the employer at the time the complaint is made.

D. If the Current Complaint is not beyond the scope of s. 3-35, is it nevertheless a collateral attack on, and an attempt to get reconsideration of, the March 1, 2016 OHO decision?

39. In the March 1, 2016 decision with respect to the First Complaint, the OHOs confirm that Calow contacted OHS in October 2014 with concerns that Cypress had not properly dealt with her complaint of harassment and with a claim that she had never been informed of the results of the investigation. The OHOs conducted a review of Cypress' original investigation to ensure the investigation complied with legislation. The March 1, 2016 decision concludes with:

The conclusions from this investigation were;

1. The employer did look into the complaint of harassment raised by Michelle Calow.
2. The employer had in fact informed Calow that the alleged harassment was an operational matter. It is reasonable to believe that an individual working in a hospital setting would have understood what the Director of Care meant when she said the complaints Calow raised were "operational" and therefore not harassment. Ms Calow is a nurse with sufficient experience to successfully bid and win a supervisor role in a hospital setting. The assumption of the Director of Care that all at that meeting understood that the matter was not harassment but was an operational concern is justified.
3. The employer's revised Harassment policy has been updated and now meets the requirements of section 3 of the *Occupational Health and Safety Regulations, 1996*.

Decision

It is our decision that the employer has met the legislative requirements around receiving and dealing with Michelle Calow's complaint. Ms. Calow's complaint was deemed

operational in nature, she was informed of this determination and the policy has been updated in accordance with Regulation 36.

40. This decision was never appealed and the conclusions in the decision stand. It is obvious, however, from all aspects of the Current Complaint that Calow is unwilling to accept the findings in the decision on the First Complaint and is attempting to have this adjudicator revisit those issues. Calow's answer to the question, "*What was the alleged discriminatory action taken against you?*", in the discriminatory action complaint form includes the claim that she was "subjected to bullying, intimidation, derogatory comments..." In the grounds of appeal in the notice of appeal letter, Calow's counsel says:

Ms. Calow formally reported harassment at her place of work. The harassment was not addressed.

41. Throughout the hearing and in argument, Calow and her lawyer continued to challenge the OHO's findings in the First Complaint and invite me to make different findings. In this respect, I agree with Cypress's counsel that the appeal, at least in part, is an attempt to get reconsideration of the March 1, 2016 decision. I have no power to reconsider that decision, nor would I be inclined to do so. It is a proper decision that has not been challenged on appeal. The decision stands. That means it is not open to Calow to again try to challenge the OHO's findings that Cypress did properly address Calow's harassment complaints and that Cypress did inform Calow they had decided the complaints were not harassment, but rather operational in nature.
42. That does not, however, end the matter. The First Complaint dealt with Calow's claims that her complaint of harassment to Cypress had not been properly dealt with and that she had never been informed of the results of the investigation. It was not a claim is discriminatory action. To the extent Calow's claim in the Current Complaint is of discriminatory action, the Current Complaint is properly before me and I must decide the appeal in relation to that matter.

E-1. Was Calow seeking to 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*?

43. s. 3-35 prohibits an employer from taking discriminatory action against a worker if they have sought enforcement of the occupational health and safety provisions of the *Act* or the *Regulations*. Under s. 36 of the *Regulations*, an employer must have a harassment policy that provides, among other things, a procedure for dealing with complaints. When Calow made her harassment complaint to Cypress, she was engaging that statutorily required policy to ask her employer to deal with what she considered to be harassment. Calow was seeking enforcement of the *Act* and *Regulations*.

E-2. Did Cypress take discriminatory action against Calow as defined in s. 3-1(1)(i) of the Act?

44. In the discriminatory action questionnaire, Calow claimed that, "I had no option but to demote myself to a non-supervisory position in a different department." She also claimed the July 31, 2014 letter was disciplinary in nature. There was no mention in the questionnaire about the move to Lloydminster amounting to discriminatory action.
45. The OHO investigated the Current Complaint and found that:
- a. Calow filed a complaint of harassment with Cypress, the complaint was investigated internally and as a result Calow and two others received letters of expectation regarding workplace conflict.
 - b. In April 10, 2015, Calow relocated to another position in another health region. At no time did Calow state that her relocation was done under duress.
46. After quoting the definition of discriminatory action, the OHO said:
- In this circumstance, the prescribed action (letter of expectation) was an action that was set down as a rule or guide and was not disciplinary in nature as a result of filing a complaint of harassment, but rather was reaffirming the expectations of the workplace.
- 3-1 sub 5 of the *Saskatchewan Employment Act* states 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 a supervisor employed or engaged by an employer, relating to the management and direction of the employer's workers or the place of employment. The absence of a finding of harassment in favor of the complainant does not conclude that the allegations brought forth were not looked into nor dealt with fairly. Further, Ms. Calow voluntarily demoted herself and also requested a transfer to another health district.
- Be advised this complaint of discriminatory action does not fit the above legislative definition of discriminatory action and as a result OHS will not proceed with an investigation into the allegation of discriminatory action. This file is deemed closed.
47. Calow claims the OHO misapplied the legislation. While, for reasons which follow, I am satisfied the OHO's ultimate decision was the correct one, I agree with Calow that the OHO did misapply the legislation in two respects. First, the definition of discriminatory action includes a statement that discriminatory action does not include *any other prescribed action*. The OHO went on to consider the letter of expectation to be a *prescribed action*. This is an incorrect application of the legislation. The word *prescribed* in the legislation means *prescribed in regulations*. Therefore, any *prescribed action* that would not be included in discriminatory action would need to be set out in regulations.
48. Secondly, the definition of harassment is irrelevant to this claim of discriminatory action. The issue before the OHO was not whether the letter of expectation amounted to harassment. The issue was whether the letter of expectation fell within the definition of discriminatory action.
49. I am satisfied, however, that had the OHO properly applied the legislation, the result would have been the same, i.e., what occurred did not meet the definition of discriminatory action.

50. Turning, then to the question of whether discriminatory action has been established, Calow challenges the factual conclusions in the OHO's Decision and claims discriminatory action occurred because:
- a. She was forced to demote herself to a lower paying position because of the harassment in her workplace;
 - b. Cypress gave her a letter of discipline (July 31, 2014 delivered on September 5, 2014) in retaliation for Calow having filed harassment complaints; and
 - c. Calow was forced to move to a nursing position at Prairie North Health Region in Lloydminster.
51. Calow claims that she was forced to demote herself to a lower paying position because of the harassment in her workplace. She claims this was a "constructive demotion" and therefore Cypress engaged in discriminatory action. s. 3-35 of the *Act*, applied to this case, prohibits an employer from taking discriminatory action against a worker because the worker has sought enforcement of the *Act*. Calow applied for the position in the Critical Care Unit on April 23, 2014 and was offered and accepted the position on May 6, 2014. These events occurred **before** Calow made her complaints of harassment to Cypress. It defies logic, therefore, to suggest Cypress forced Calow to "demote herself" because she had filed harassment complaints when the harassment complaints weren't even made before she applied for the Critical Care position.
52. With respect to the letter of expectation, Calow's counsel refers to *Lewis v. Regina School Division* where this appears at [42-43]:
- 42 Innumerable examples could be recited of actions by an employer which have an adverse effect on employees, but are entirely unrelated to occupational health and safety, such as sanctions for tardiness, realignment of work schedules, salary adjustments because of economic factors, etc. To constitute a prohibited discriminatory action, however, the action by the employer must be for one of the reasons set out in s. 27.
 - 43 To be a prohibited discriminatory action, as set out in s. 27, not only must the action have adversely affected the worker but also have been taken because the worker has done one or more of the listed acts. If it is established that the employer engaged in discriminatory action against a worker, it must also have been established that the reason therefor was because the worker sought to enforce the *Act* or the Regulations or refused to work. Under such circumstances, the employer could not have taken the discriminatory action unknowingly or innocently.
53. Calow maintains that the July 31, 2014 letter was a disciplinary letter, a clear active reprimand. She claims that letter and Cypress's treatment of her started her on the path to the door of this workplace. Calow believes that path was predetermined for her by Cypress after she lodged her harassment complaint.
54. The OHO was correct that Calow filed a complaint of harassment with Cypress, the complaint was investigated internally and as a result Calow and two others received letters of expectation regarding workplace conflict. As I have already said, the decision in the First Complaint covers this ground. Cypress considered Calow's harassment complaints, found the issues to be operational (workplace conflict involving the three nurses) and investigated the issues as operational

issues. The result was a letter of expectation to each of the three employees, including Calow.

55. Calow claims the letter of expectation is a letter of discipline and therefore was discriminatory action. A detailed review of the letter, however, reveals no discipline of any kind. Discipline includes such measures as a verbal warning, written warning, suspension or termination. Discipline up to the final step of termination usually includes a threat that repeated conduct of a similar nature will result in further discipline or termination. Sagadah's letter sets out her concern that the conflict involving Calow and her co-workers is affecting patient care and other staff. She makes a series of recommendation and makes it clear she expects them to be followed. The letter is not a letter of discipline. It is a letter of expectation with respect to a legitimate workplace issue.
56. The letter of expectation was not an action or threat by the employer that affected Calow with respect to the terms and conditions of her employment. The letter merely raises legitimate concerns the employer had about the conflict between co-workers and makes recommendations for future conduct. It even invites Calow to get help if she needs it. The letter of expectation does not fall within the definition of discriminatory action.
57. With respect to Calow's third claim of discriminatory action, I note this claim was not raised on the notice of appeal. In any event, the OHO was also correct in finding that Calow never said her relocation to Lloydminster was done under duress. There is also nothing in the evidence before me to suggest the move to Lloydminster was anything but a family move because Calow's spouse was working there. There is no objective evidence to suggest otherwise.

E-3. Is there a link established between Calow engaging in an activity set out in s. 3-35 and discriminatory action by Cypress?

58. In light of my finding that there was no discriminatory action, I need not address this point.
59. In any event, Cypress did not provide Calow with the letter of expectation because Calow made a harassment complaint. Cypress provided Calow with the letter because investigation of operational issues showed there were difficulties in the working relationship involving Calow, Vance and Roche, there was a lack of trust, and there was conflict. Calow's harassment complaint did not cause the letter of expectation. The workplace conflict caused the letter of expectation.

E-4. 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?

60. In light of my finding that there was no discriminatory action, I need not address this point.

VIII. Conclusion and Remedy

61. In summary:

- a. Calow's bias allegation is dismissed;
- b. Calow's claims that OHS or the OHOs improperly handled her Current Complaint are dismissed?
- c. As a worker at the time of the alleged incidents, Calow was entitled to bring a discriminatory action complaint under s. 3-35 of the *Act*.
- d. Calow's Current Complaint is in part a collateral attack on and an attempt to rehear her First Complaint. It is not open to Calow to again try to challenge the findings of the decision on the First Complaint that Cypress did not properly address Calow's harassment complaints and that Cypress did not inform Calow they had decided the complaints were not harassment, but rather operational in nature. Calow might disagree with those findings, but they stand.
- e. Calow was seeking enforcement of the *Act* and *Regulations* when she made her original harassment complaints.
- f. Cypress did not take discriminatory action against Calow.

62. After investigation of Calow's discriminatory action complaint, the OHO concluded that Cypress had not taken discriminatory action against Calow because Calow's claims of discriminatory action did not meet the statutory definition of the term. In accordance with s. 3-36(3) of the *Act*, on August 26, 2016, the OHO advised Calow of his reasons in writing.

63. Section 4-6(1) of the *Act* sets out the adjudicator's powers on appeal:

4-6(1) Subject to subsections (2) to (5), the adjudicator shall:

(a) do one of the following:

- (i) dismiss the appeal;
- (ii) allow the appeal;
- (iii) vary the decision being appealed; and

(b) provide written reasons for the decision to the board, the director of employment standards or the director of occupational health and safety, as the case may be, and any other party to the appeal.

Subsections (2) to (5) are not relevant to this case.

64. I have found that that the OHO was correct in finding that Calow did not establish Cypress engaged in discriminatory action as defined in subsection 3-1(1)(i), but that the OHO's reasons in that respect are flawed.

65. In conclusion, I therefore vary the decision appealed by substituting my reasons herein for the OHO's reasons in the decision appealed. Otherwise the OHO's decision stands and in effect, Calow's appeal is dismissed.

Issued on October 3 2017.



Anne M. Wallace, Q.C., Adjudicator