

**LRB File No. 116-17**



**IN THE MATTER OF:**

An appeal with respect to the decision of April 27, 2017, pursuant  
*The Saskatchewan Employment Act.*

**BETWEEN:**

**TAMMY YOUNG**

Appellant

-and-

**SASKPOWER**

Respondent

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

Respondent

For the Appellant:	Self-represented with assistance of Christy Best, President of Unifor 649
For the Respondent, SaskPower:	Susan Barber, Q.C., McDougall Gauley LLP

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**DECISION**

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**I. Introduction**

1. The Appellant, Tammy Young, alleged that she had been subjected to harassment in the course of her employment with the Respondent, SaskPower. An investigation of her allegations was conducted in the Fall of 2016, which concluded that her claim of harassment could not be substantiated.

2. Ms. Young, by letter dated January 20, 2017, requested a review of the investigation by the Harassment Prevention Unit of the Occupational Health and Safety Division ("OHS"). This was undertaken by Mr. Shawn Tallmadge and Mr. Mike Luciak. SaskPower provided to them a copy of the investigation report and other supporting documentation. Ms. Young also provided a

large binder of materials in support of her view that harassment had indeed been occurring and that the initial investigation had been inadequate.

3. By their decision of April 27, 2017, OHS Officers Tallmadge and Luciak concluded that the Respondent employer, SaskPower, had complied with the requirements of the applicable legislation in its response to Ms. Young's allegations of harassment in the workplace. They also stated:

The purpose of OHS harassment legislation is not to supersede an employer's ability to receive and deal with internal complaints of harassment. In this circumstance OHS addressed Ms. Young's request for OHS to be involved in her complaint process by requesting a copy of the investigation report. After a review of the information and documentation provided, the employer has complied with legislation, by investigating Ms. Young's complaint in an unbiased and thorough process and will continue to address concerns brought forward. It was also determined that the concerns raised by Ms. Young are those of conflict and internal labour relations matters.

4. Ms. Young appealed the April 27, 2017 decision and ultimately a hearing was conducted on April 16 -17, 2018, following multiple pre-hearing case management teleconferences and several preliminary applications, which will be discussed further, commencing at paragraph eight.

5. At the outset of the hearing on April 16, 2018, the procedures for the conduct of the hearing were reviewed and the parties confirmed, as they had done previously, that I had jurisdiction to hear the appeal and that mediation was not a viable option. An order for exclusion of witnesses was made, such that witnesses other than the Appellant, Ms. Young, were required to remain outside the hearing room until called to testify. I then heard testimony, either sworn or affirmed, from five witnesses:

- i) Wendy Love, Assistant to the President of Unifor 649;
- ii) Tammy Young;
- iii) Michelle Reid, investigator with Internal Audit;
- iv) Bev Balon, previous Senior Human Resource Business Partner with SaskPower; and
- v) Katherine Potts, Lead Specialist Health and Wellness Services with SaskPower.

6. In addition, the following exhibits were filed:

- ADJ-1: Notice of Hearing;
- ADJ-2: August 26, 2017 Decision on Preliminary Issue Regarding Document Disclosure;

- ADJ-3: February 5, 2018 Preliminary Issue Regarding Pre-Hearing Questioning Decision and Process Direction;
- A-1: 1 page entitled CRSP-The Purpose of Certification and 3 page application materials dated February 12, 2009 for Tammy Young to become certified as a Canadian Registered Safety Professional;
- A-2: Nine documents under the heading "Pressing Necessity" consisting of:
1. April 21, 2016 emails with Janelle Gareau and Kathy Potts
  2. April 14, 2016 email re BSS consistency
  3. April 25, 2016 notes of meeting
  4. April 27, 2016 email from Bev Balon re Next Steps
  5. April 27, 2016 email from Kathy Potts re use of Pressing Necessity
  6. April 29, 2016 email to Bev Balon and Janelle Garneau
  7. May 3, 2016 email from Kevin Lalonde
  8. May 10, 2016 email to Janelle Garneau re Action Plan, with attached letter from physician
  9. May 13, 2016 typewritten notes about emails and meetings;
- A-3: Four page Executive Summary;
- R-1: Cover Memo dated December 20, 2016 and ten-page Investigation Report by Michellee Reid;
- R-2: Email from Wanda Knisley at 11:46 a.m. December 13, 2016 and response from Tammy Young dated December 13, 2016 at 12:25 p.m.;
- R-3: Two-page letter dated December 13, 2016 from Wanda Knisley to Tammy Young, with attached article entitled "Building Sustainable Trust";
- R-4: Letter dated April 27, 2017 from Shawn Tallmadge and Mike Luciak to Tammy Young and Wanda Knisley;
- R-5: Five-page appeal document;
- R-6: Binder of documents provided to Michellee Reid by the Director Internal Audit, including Executive Summary, article "Retaliation—A Guide for Vindictive Bosses," 38 typewritten pages by Tammy Young, Respectful Workplace Complaint Form, and Appendix with documents at tabs A through Q;
- R-7: SaskPower Respectful Workplace Policy with Effective Date of April 1, 2016;
- R-8: Letter dated October 20, 2017 to Tammy Young from Kathy Potts; and
- R-9: Letter dated February 28, 2018 to Tammy Young from Great West Life

7. Following conclusion of the evidence, oral argument was heard from both parties, albeit the Appellant was very brief, indicating that she "still feels" Michellee Reid's investigation was biased and not thorough. Both parties were permitted to submit written argument by close of business on April 24, 2018, and both did so on that date. Ms. Young made considerably more

submissions in written argument than she had at the time of the hearing, a matter which was of some concern to counsel for SaskPower, as will be discussed further at paragraphs 27 and 28.

## **II. Preliminary Applications and Post-Hearing Matters**

8. Prior to the April 2018 hearing, written decisions had been rendered on two preliminary applications. The first decision, rendered August 26, 2017, is attached as Appendix "A", and was also marked as Exhibit ADJ-2 in these proceedings. By that decision, the application by SaskPower for an order that pages 8 – 10 of Michelle Reid's Investigation Report (Exhibit R-1) as well as the four page document entitled Executive Summary (Exhibit A-3) not be disclosed to Ms. Young was dismissed for the reasons outlined in appendix "A." These documents, which had previously been provided by SaskPower to OHS, were therefore forwarded to Ms. Young, with the direction that they, like other materials disclosed in the conduct of the hearing, not be circulated, copied or disclosed to anyone other than the parties and their respective legal counsel, if any.

9. Ms. Young then brought an application for an order that SaskPower provide detailed information regarding the preparation of the Executive Summary (Exhibit A-3). A Preliminary Issue Regarding Pre-Hearing Questioning Decision and Process Direction was rendered February 5, 2018, in which I denied her application. It is attached as Appendix B and was also marked as Exhibit ADJ-3.

10. In the intervening period, in relation to the timing of disclosure of materials, Ms. Young requested and obtained an extension on the due date for disclosure of recordings to SaskPower. In a case management teleconference on October 10, 2017, the Appellant had undertaken to provide to Ms. Barber a copy of the actual recordings, which she had previously transcribed for inclusion in her binder of materials, by no later than November 10, 2017. On October 25, 2017, Ms. Young contacted me by email to say:

In light of me losing my position at SaskPower I find myself in an unhealthy situation. I'm working with a counsellor and psychologist to work through this process but I'm still struggling even getting up in the morning. I'm not sure I can get the energy to get the tape recordings for the timeline set. Is there a request or process I can make to have the recordings handed over at the same time as the rest of the documents in February?

11. In response, I informed Ms. Young that she would either require the consent of counsel for SaskPower or would need to make application to me, with notice to Ms. Barber. I noted that this request for an extension could be considered by way of a conference call and also informed Ms. Barber that Ms. Young had contacted me. Ms. Young elected the application route and a teleconference was arranged for the afternoon of Thursday, November 9, 2017.

12. During the teleconference, the decision was made to grant the Appellant an extension until December 15, 2017 for provision of the recordings. At that time, it was still the anticipation of the parties that the hearing in this matter could be two weeks in length. My email of November 15, 2017 confirmed our discussions:

Further to our teleconference of last Thursday, November 9<sup>th</sup>, I confirm that Ms. Young has been granted an extension until December 15, 2017 for provision of the recordings of the conversations transcribed in her materials to SaskPower's counsel, Ms. Barber.

By way of reminder, the hearing has been set for two weeks in Prince Albert, commencing April 9, 2018. Documents are to be exchanged by February 15, 2018, with Ms. Young providing her witness list to Ms. Barber by February 28, 2018 and SaskPower providing its witness list by March 5, 2018.

13. In the ensuing weeks, there was again correspondence and discussion relating to the scope of the inquiry and therefore the number of witnesses who would provide evidence pertinent to the issues. The scope of inquiry will be addressed below in section IV, commencing at paragraph 38. However, the upshot of these discussions was that the parties determined that fewer witnesses were required and the hearing could be shortened, with a start date of April 16, 2018.

14. On April 9, 2018, one week prior to commencement of the hearing, a further teleconference was held with the parties, as Ms. Young had raised several issues and Ms. Barber, on behalf of SaskPower, was seeking preliminary rulings regarding the admissibility of certain evidence Ms. Young was intending to call. After hearing the submissions by both parties, I made rulings verbally during the call, indicating that written confirmation of my direction would be included in this decision.

15. The first issue pertained to Ms. Young's desire to submit into evidence a video of her son in hospital. She stated that the video was part of her story. When questioned on how such might be relevant to the issues to be determined at the hearing, she said that when an action plan was

being considered she was not sure that some people within SaskPower were understanding the degree of suffering her son experiences. They were, however, aware he was ill and that she would leave her workplace on short notice to attend on him. This issue surrounding the action plan was one of the many included in the investigation conducted by Ms. Reid.

16. In response, Ms. Barber on behalf of SaskPower noted the limited scope of inquiry of an adjudicator in cases of this nature, submitting that the only relevant inquiry was whether the investigation had been thorough, adequate and unbiased. This is not an opportunity to re-visit the original allegations of harassment.

17. In my view the video is not relevant to the issue of whether SaskPower had responded appropriately to the complaint of harassment and ensured the conduct of a proper investigation. Further, it could be viewed as an attempt to incite sympathy and thus be prejudicial to the Respondent, with no probative value to assist in considering the issues before me. Therefore I made a preliminary ruling that the video would not be admissible.

18. The second objection raised by SaskPower was to Ms. Young's proposed submission into evidence of communications with Brian Ketcheson, Vice President, Human Resources, Safety & Stakeholder Relations. Ms. Barber noted that these communications occurred at a time after the appeal had been launched and had no bearing on the issues to be determined. Ms. Young, in response, argued that the recordings and notes of meetings demonstrated that harassment had not only occurred but was ongoing.

19. While I cautioned the Appellant that such communications would likely have little weight, even if they were ultimately ruled as admissible, I was not prepared to make a preliminary ruling that they could not be considered at all. Depending on the context of the evidence provided at the hearing, they might be shown to have some relevance. As such, I directed that a determination on admissibility would only be made at that time.

20. Given that the Appellant was alleging bias in the investigation, if a proper foundation was established to demonstrate such an ongoing pattern, these communications with Mr. Ketcheson could, in my view, have been relevant. However, during the course of the hearing on April 16 – 17, 2018, no such foundation was laid. Thus, when Ms. Young sought to tender the meeting notes as evidence, I accepted Ms. Barber's objections and ruled them inadmissible.

21. The third issue raised in the April 9, 2018 teleconference related to the calling of Janelle Gareau as a witness. Ms. Gareau is the Business Support Manager at the Prince Albert office of SaskPower, and one of the individuals whom Ms. Young alleges harassed her. Ms. Young wanted opportunity to question Ms. Gareau "just to see where she was coming from." However, it was not the intent of SaskPower to call Ms. Gareau as a witness, particularly given its view of the limited scope of the hearing.
22. I reviewed the hearing procedures with the parties, noting that the onus is on the Appellant to demonstrate that the investigation was not adequate. I also noted that it is not my role to re-investigate the details of the original complaint of harassment. I further indicated that if Ms. Young still wished to question Ms. Gareau, she could subpoena her as a witness. However, the evidence Ms. Gareau provided would, in such circumstances, be part of Ms. Young's case. Therefore, I left it to Ms. Young to determine whether such was advantageous to her or not. When the hearing proceeded the following week, Ms. Gareau was not called as a witness.
23. As noted above, at the outset of the hearing on April 16, 2018, a general order for exclusion of witnesses was made. There was initially some objection to this by counsel for SaskPower, as the Respondent's desire was for Ms. Reid, Ms. Balon and Ms. Potts to hear the testimony called on behalf of Ms. Young. SaskPower did, however, have another of its employees, Ms. Rebecca McLellan, Specialist, Labour Relations and Human Resources, in attendance, to observe and instruct its counsel, Ms. Barber.
24. Although counsel for SaskPower did not pursue the objection, acknowledging the discretion afforded to an adjudicator by section 4-4(2) of *The Saskatchewan Employment Act* to determine the procedure on appeal, she did note that in *University Employees' Union (CUPE, Local 1975) v University of Saskatchewan*, 2005 CanLII 78434 (SK LA), the majority in the arbitration followed what they described as the "usual practice" in Saskatchewan and only ordered exclusion of witnesses "one side at a time."
25. Mr. Pelton, in writing for the majority in the *CUPE* case, did however acknowledge the discretionary nature of such an order. He further recognized that the Saskatchewan practice seems to have developed differently from that elsewhere in Canada.

26. In the case at hand, given the issues to be determined, considerable focus in the testimony would necessarily be on what occurred during the investigation. I anticipated conflicting testimony. To better assess such evidence, ensuring that it was not catered to address earlier testimony, I exercised the discretion to make a general order for exclusion of witnesses. This decision was further supported very shortly following my ruling when it became apparent that Ms. Young becomes extremely anxious when there are more than a very few people in the room. Thus, reducing the number in attendance on behalf of SaskPower helped to facilitate proceeding with the conduct of the hearing.

27. As noted above, following the oral argument, both parties were permitted to file argument in written form by April 24, 2018. On behalf of SaskPower, Ms. Barber provided an 8-page Brief of Law which summarized the argument she had provided at the close of the hearing and appended copies of pertinent cases. Ms. Young, on the other hand, provided 34 pages, which contained considerable information which cannot be classified as argument. Accordingly, by email that evening, Ms. Barber noted her objection, stating:

I am not entirely sure how to respond to Ms. Young's submission. Although I appreciate that she is self-represented and has been afforded what I would suggest is significant latitude throughout the process, there are certain rules and practices to be followed. To the extent the written submission contains Ms. Young's recitation of evidence or presentation of new evidence in response to evidence led at the hearing, I object to it being considered by the adjudicator. I am content to simply register my objection for the record and leave it to the adjudicator to exercise her discretion accordingly in reviewing the document. If we need to discuss the matter I can make myself available next week. Thank you.

28. To the extent that Ms. Young's written submission contains information which is in the nature of evidence, but which cannot be considered as evidence in this proceeding as it is unsworn, was not subject to cross-examination, and was submitted after the hearing had closed, such has not been taken into account in my decision. This is in keeping with the response I provided to the parties by email on April 24, 2018:

Thank you, Ms. Young for providing your submissions.

As indicated in Ms. Barber's email, she has noted her objections to portions of your written submission which appear to be in the nature of evidence.

I am mindful of the process we established for the hearing, which recognized that the evidence to be considered had all been presented, and which also included the



opportunity for both parties to provide written argument by close of business today. The materials provided by both parties will be reviewed in that light. I do not believe that a teleconference is necessary.

29. The final post-hearing issue was raised by Ms. Young in an email of May 6, 2018. In what was effectively a request to re-open the hearing, she stated:

I've received my freedom of information request this week. There is evidence that is vital to the hearing and which contradicts the SaskPower's witness statements. Is there a process that I could go through to bring these documents to light?

30. My response, provided by email May 7, 2018, reiterated that the hearing had been concluded and "no further evidence may be submitted in relation to this hearing." I also stated:

As you will recall, just prior to the close of your case, as the Appellant, in the hearing in this matter, you were given opportunity to consider if you had further evidence to proffer. At that time, you mentioned the freedom of information request, and it was noted that, given your knowledge that the response from that office was going to be delayed, you could potentially have requested an adjournment of the hearing. Such a request would, as we discussed, have had to be considered in light of any objections by SaskPower. However, no such application was made, and the hearing proceeded on April 16<sup>th</sup> and 17<sup>th</sup>. As well, you elected to close your case, indicating that you had tendered all of the evidence in relation to your position. The Respondent then fully presented its case.

Mention of the freedom of information request had also been made by Ms. Young earlier in the hearing, just prior to her testimony. She explained that she had requested a waiver of the fee and/or extension of the time to pay. At that time I had also indicated that she could have requested an adjournment, particularly if she was of the view the information would be pertinent to the appeal, stating "otherwise your case ends with the evidence you put in at this hearing."

31. A final matter, which was the subject of considerable discussion both prior to and at the hearing, was the scope of the review in the hearing. As this drives the issues in this case, it will be further discussed in section IV, commencing at paragraph 38, of this decision.

### **III. Factual Background**

32. Periodically throughout the hearing and, as noted above, in what the Appellant labelled as her written argument, Ms. Young sought to introduce allegations of conduct which gave rise to her complaint of harassment. Such, however, are not pertinent to the scope of inquiry in this

appeal. Accordingly, the factual background to the appeal may be briefly summarized in the following.

33. The Appellant is a long-time employee of SaskPower, having commenced work with the corporation on October 16, 1991. She most recently held the position of Coordinator, Business Support, in Prince Albert, Saskatchewan, reporting to the Manager, Ms. Janelle Gareau.

34. In August of 2016, Ms. Young filed a formal complaint of harassment with her employer, SaskPower, in relation to her work unit in Prince Albert. In support of her complaint, in September of 2016, the Appellant provided a binder of over 200 pages of material to the SaskPower Human Resources division.

35. As Ms. Young had expressed concerns regarding a lack of impartiality on the part of the Human Resources division of SaskPower, the Respondent referred the matter to the Internal Audit division for investigation. Ms. Michellee Reid, a consultant within the Internal Audit division of SaskPower was assigned to undertake the investigation into the allegations of harassment.

36. The results of Ms. Reid's investigation were provided in her report of December 20, 2016 (Exhibit "R-1"). Her conclusion was that the Appellant's claim of harassment had not been substantiated in accordance with SaskPower's Respectful Workplace Policy. She noted, however, that there were opportunities for improvement in the management of workplace issues within the Business Support unit.

37. On January 20, 2017, the Appellant requested a review of the investigation by OHS. Following that review, the decision letter of April 27, 2017, currently under appeal, was issued by OHS Officers Tallmadge and Luciak. As noted above, they concluded that SaskPower had investigated the Appellant's allegations in "an unbiased and thorough process."

#### **IV. The Issues**

38. I turn now to an outline of the issues in this case, two of which were also the subject of considerable pre-hearing discussion. Such background is of assistance in determining the issues in light of the evidence presented.

39. As noted in the April 27, 2017 decision of OHS Officers Tallmadge and Luciak, Exhibit R-4, the Harassment Prevention Unit of OHS has received a request for a "review of investigation" from Ms. Young on January 20, 2017. It is apparent from Exhibit R-4 that this was the nature of the review undertaken.

40. By her notice of appeal, filed pursuant to section 3-53 of *The Saskatchewan Employment Act*, Ms. Young summarized her concerns as follows:

- i) Thorough investigation was not completed
- ii) My claims were not addressed
- iii) Myself and the union were not kept updated and left out of communication

41. Despite this summary, it became evident, both during the several pre-hearing teleconferences and at the hearing, that Ms. Young's desire was that a complete re-investigation of her allegations of harassment be undertaken.

42. In a case management teleconference on July 18, 2017, there was discussion about the issues to be considered on appeal. At that time, SaskPower had not yet engaged counsel. Shortly after that meeting, Ms. Barber was retained and in her letter of July 21, 2017 she expressed the understanding of SaskPower that the scope of the adjudicator was merely:

to determine whether the Ministry complied with the Occupational Health and Safety provisions of the *Employment Standards Act* (the "Act") in its assessment of SaskPower's response to the initial complaint and the conclusion by the occupational health officers that SaskPower itself complied with the provisions of the *Act* and the regulations to the Act.

43. In a response to the parties dated July 25, 2017, I endeavoured to clarify the scope of review, as in my view neither party's view was accurate. Along with noting the October 28, 2016 decision of Adjudicator Blanke in *K.O. v Prairie North Health Region*, LRB No. 138-15, I stated:

As to the issues to be addressed at any potential hearing, while such may be refined either through direct discussion between the parties or in a future case management teleconference, as indicated during the July 18<sup>th</sup> conference call, they do not involve the Adjudicator conducting an entirely new investigation into the original allegations of harassment. . . . The ultimate question is whether SaskPower, as the employer, complied

with its obligations under the applicable legislation. It was the conclusion of the OH&S officers that SaskPower had so complied. But that conclusion is subject to the appeal.

44. These comments were reiterated in my decision on the Preliminary Issue Regarding Document Disclosure, marked as Exhibit ADJ-2 and attached as Appendix "A" to this decision.

45. The scope of my review remained a matter of contention between the parties throughout the pre-hearing stage and, indeed, even during the hearing. Thus, counsel for the Respondent is correct in indicating that the first issue to be determined on this appeal is:

a) What is the scope of the adjudicator's jurisdiction?

46. The second issue, as expressed by counsel for SaskPower is:

b) Was the investigation fair?

47. This issue was also considered on several occasions in the pre-hearing stage, to clarify the grounds on which Ms. Young was objecting to the investigation process undertaken by SaskPower. In the January 17, 2018 teleconference, she indicated that she viewed the investigation as having been inadequate, incomplete and biased.

48. Although it was clear that the Appellant had been away from the workplace on approved medical leave since May 5, 2016 and that her position had been posted in the Fall of 2017,<sup>1</sup> the details of the disability income plan benefits and their impact on any return to work plan had not been the subject of pre-hearing discussion. Nonetheless, as SaskPower had recently learned that Ms. Young's benefits would be terminated effective April 30, 2018, based on independent determinations made by Great West Life, the Respondent led evidence regarding this matter without objection from the Appellant. In so doing, SaskPower raised a third issue, relating to the Appellant's return to work status.

49. As outlined in the Brief of Law submitted on behalf of SaskPower, the issues to be determined on this appeal are three-fold:

a) What is the scope of the adjudicator's jurisdiction?

b) Was the investigation fair?

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<sup>1</sup> See paragraph 10 of this decision. Ms. Young's October 25, 2017 request for an extension in providing the recordings was based on the alleged impact the loss of her position at that time had had on her.

- c) What is the impact of the Appellant's return to work status?

## V. Analysis

### a) *What is the scope of the adjudicator's jurisdiction?*

50. In the October 28, 2016 decision of *K.O. v Prairie North Health Region*, LRB No. 138-15 ("*K.O.*"), Adjudicator Blanke considered the scope of review by OHS and an adjudicator where an investigation of alleged harassment is under consideration. While there are some factual distinctions between *K.O.* and the case before me—the most notable being that, unlike in *K.O.*, SaskPower has concluded its investigation of Ms. Young's allegations of harassment as she was available and participated in the investigation—the comments of Adjudicator Blanke are instructive.

51. She suggests a two-step process,<sup>2</sup> which I will apply in this case:

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

52. To answer the first question does not require a "determination whether the evidence is sufficient to establish whether there is a *prima facie* case of harassment." Rather, it just considers whether the conduct which is the subject of the complaint could fall within the definition.

53. On behalf of SaskPower, it is submitted that this initial question need not be asked in this case as, unlike in *K.O.*, there are no "open" complaints. The process of review is complete in Ms. Young's case. Further, reliance is place upon Adjudicator Blanke's comments, at paragraph 61 of *K.O.*, where she finds it unnecessary to consider whether two of *K.O.*'s complaints "concerned harassment" as the employer in that case addressed the complaint and notified *K.O.* of the outcome.

54. Adjudicator Blanke's comments may be taken as a practical conclusion rather than an abandonment of the threshold question in the two-step process. While I agree that the answer to

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<sup>22</sup> *K.O.*, *supra*, at paragraphs 5 and 57

the first question is also easily determined in this case given SaskPower's receipt and investigation of the allegations, I am not prepared to say that the threshold question is of no relevance where an investigation is undertaken.

55. Just by way of example, in a bundle of complaints there may be some which are not at all "concerning harassment" while others are. An employer in such circumstances may elect to only proceed with an investigation on those matters which it views as passing the threshold question. An OHS officer or an adjudicator reviewing the matter later may categorize the individual complaints in a different manner.

56. In the case at hand, the evidence demonstrates that SaskPower elected to accept the nature of Ms. Young's complaints as generally falling within the purview of its Respectful Workplace Policy<sup>3</sup> and the investigator, Ms. Michelle Reid, considered every aspect of the concerns raised by Ms. Young.

57. However, from a review of the complaints submitted by Ms. Young to SaskPower, included in Exhibit R-6,<sup>4</sup> one might reasonably have concluded that not all are even in the nature of harassment<sup>5</sup> so may not have passed the first test. From a practical perspective, though, as the Respondent has accepted and investigated the complaint in its entirety, the first question is answered in the affirmative and we turn now to a consideration of whether SaskPower met its statutory obligations.

58. This second question, being the ultimate question before me, was also within the purview of the OHS Officers. Their decision of April 27, 2017 reflected this:

At this time, **the employer provided specific information indicating the steps they have taken to address each complaint brought forward by Ms. Young.** Furthermore the employer stated a plan moving forward in the workplace to ensure everyone can work better together and make the workplace better. This was noted in Ms. Young's response to the employer when asked what are you looking for as an outcome, Ms. Young stated "an improved working relationship." The employer has offered training and mediation services to the parties involved.

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<sup>3</sup> Exhibit R-7

<sup>4</sup> Binder of documents which included an article "Retaliation—A Guide for Vindictive Bosses", 38 typewritten pages, the Respectful Workplace Complaint Form and appendices A through Q, all provided by the Appellant, Ms. Young

<sup>5</sup> One example of this would be in relation to the communications with "Ted" in Appendix K.

**The purpose of OHS harassment legislation is not to supersede an employer's ability to receive and deal with internal complaints of harassment.** In this circumstance, OHS addressed Ms. Young's request for OHS to be involved in her complaint process by requesting a copy of the investigation report. After a review of the information and documentation provided, **the employer has complied with legislation, by investigating Ms. Young's complaint in an unbiased and thorough process and will continue to address concerns brought forward.** It was also determined that the concerns raised by Ms. Young are those of conflict and internal labour relations matters.

Based on all the forgoing, the employer has complied with the requirements of OHS legislation and this file is deemed closed. (emphasis added)

59. Neither the OHS Officers nor I sit in appeal of the Respondent's investigation. We are not called upon to re-investigate specific allegations of harassment. As noted in *K.O.*<sup>6</sup>:

The provisions of the Act pertaining to harassment are not a mechanism to appeal the Employer's decision.

60. This view is further supported in *M.F. v Blessed Sacrament Parish*, LRB No. 184 – 14, where the allegation was that an alleged discriminatory action of constructive dismissal had occurred as a result of the employee having filed a complaint of harassment. In her June 26, 2015 decision, Special Adjudicator Blanke said:<sup>7</sup>

At the outset, it is important to point out that the focus of this appeal is not on the underlying allegations of bullying and harassment or the employer's investigation. A concise and apt statement in this regard is cited *Jennifer Ford v Anne Anderson*, 2015 CanLII 27353 (ON LRB), in a recent decision of the Ontario Labour Relations Board:

... the focus of the Board's inquiry will almost never be upon the underlying allegations of harassment. Those allegations are, at the very best, peripheral to the issues that the Board must address, which are exclusively whether a workplace harassment complaint was made, whether the worker suffered some detrimental impact and whether there is a causal connection between the two. This latter issue will, in most cases, be focused on the employer's explanation and rationale for its actions. In the usual case, the only inquiry that the Board will make into the underlying allegations of harassment is whether the employer terminated, or otherwise penalized, the worker for having filed the harassment complaint. Beyond that, in virtually all such proceedings, the nature, extent and details of the underlying harassment allegation will be irrelevant to the issues before the Board. **The Board is not the appropriate forum to adjudicate upon the issues that lead to the filing of the harassment complaint or the**

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<sup>6</sup> *K.O.*, *supra*, at paragraph 61

<sup>7</sup> *M.F.*, *supra*, at paragraph 29

**substantive outcome of the employer's investigation.** *Aim Group Inc.*, [2013] OLRB Rep. November/December 1298 (emphasis added)

61. In the current appeal, there is no allegation of discriminatory action and it is apparent that SaskPower was willing to continue to work with Ms. Young. However, the principle is still applicable that this is not the forum to re-investigate the underlying allegations of harassment.

62. Section 36 of *The Occupational Health and Safety Regulations, 1996*, made pursuant to *The Saskatchewan Employment Act*, requires an employer to develop and implement a written policy designed to prevent harassment in the workplace. Subsection 36(1)(i) implies an investigation process, as the policy is required to include:

a description of the procedure that the employer will follow to inform the complainant and the alleged harasser of the results of the investigation.

63. A review of Exhibit R-7, SaskPower's Respectful Workplace Policy (the "Policy"), reveals a robust policy which meets the requirements of the Act and Regulations.

64. The policy was also implemented. Under the heading "Respectful Workplace Procedure" it states, in the second paragraph, that "All concerns raised shall be taken seriously." Ms. Young's concerns clearly were. For instance, pursuant to section 2.2 of the Policy, the Director of Human Resource Business Services is to decide whether the process will be through alternative dispute resolution, an internal investigation, or an external investigation. Such decision is based on the "circumstances of the situation." These circumstances included Ms. Young's expressed misgivings regarding the independence of the Human Resources division. These were clearly taken into account and the election made to engage an investigator external to Human Resources.

65. The investigator, Ms. Michelle Reid, reports to the Director of Internal Audit and that division reports to the Audit and Finance Committee of the Board. It is entirely separate from Human Resources. Further, when asked about the relationship between Internal Audit and the Respondent corporation, Ms. Reid testified that "the standards require us to be independent and objective." Further, "no one within the corporation should be able to influence us." "We have all access to records, etc., and can ask to speak to anyone."



66. Additional review of the evidence provided at the hearing will be undertaken in assessing the issue of whether the investigation was fair. However, at this juncture suffice it to say that Ms. Reid reviewed the materials provided by Ms. Young, met at length with her, and interviewed other witnesses. She exhibited the “confidentiality and objectivity” required by the policy.<sup>8</sup>

67. Ms. Reid also provided a ten-page written decision, Exhibit R-1, which after outlining her conclusions also noted recommendations in keeping with the “restorative workplace action plan and other corrective action as appropriate” required by section 2.5 of the Policy.

68. Regarding the investigator’s conclusions, it is evident that the conduct alleged in Ms. Young’s complaints was considered in the context of the definition of “harassment” as outlined in the Policy and the legislation.

69. In light of the foregoing, and consistent with the information provided in Exhibit ADJ-2, which is Appendix “A” to this decision, I have employed the two-step process utilized in *K.O.* and have concluded that at least some of the allegations raised by Ms. Young were those which could be regarded as “concerning harassment.” To be clear, this is not a finding that the conduct complained of constituted harassment as defined in the legislation and policy. Indeed, such a consideration of the underlying conduct is beyond the scope of this appeal.

70. Regarding the second part of the inquiry, I note that the Respondent considered the complaints as a bundle of allegations of harassment and initiated the investigation process in keeping with its Respectful Workplace Policy, all of which is in compliance with *The Saskatchewan Employment Act* and *The Occupational Health and Safety Regulations, 1996* made thereunder.

***b) Was the investigation fair?***

71. In concluding that the investigation process utilized by SaskPower was in keeping with its Respectful Workplace Policy and the legislative requirements, the implication is that the process was objective, as required by section 2.4 of the Policy, and hence fair. However, in the instant case, Ms. Young, when pressed to particularize her concerns with the investigation, indicated in the January 17, 2018 case management teleconference that she viewed the

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<sup>8</sup> Exhibit R-7, section 2.4

investigation as having been inadequate, incomplete and biased. Accordingly, the investigation process will be examined further.

72. Regarding the allegation that the investigation was inadequate and incomplete, the conclusion of the OHS Officers was that the process was a thorough one. Exhibit R-1, the Investigation Report by Michelle Reid, outlines her methodology in section B. She conducted interviews with the complainant and one other in-scope employee, as well as “seven out-of-scope personnel who were either named in the supporting documentation or who Internal Audit believed would be able to provide relevant and objective information related to the complaint.” The out-of-scope interviewees held the following positions, all of which are pertinent to the complaints lodged by Ms. Young, as Ms. Reid confirmed by her testimony that the choice of “who to interview was based on the complaint”:

- a) manager, Business Support North;
- b) director, Business Support Services;
- c) director, Advanced Metering Infrastructure (AMI) and Metering Operations (formerly director, Safety);
- d) consultant, Human Resource Business Partners—QEPS, Saskatoon;
- e) consultant, Human Resource Business Partners—Fletcher Road, Saskatoon;
- f) specialist, Return to Work; and
- g) director, Health and Safety (formerly director, Distribution North).

73. The interview with the Appellant, Ms. Young, was considerably longer than she initially recalled. In the Appellant’s direct testimony, she stated, “When I was interviewed by Michelle Reid, I thought it was about a half hour.” Ms. Reid, on the other hand, testified that her interview of Ms. Young was nearly three hours, running from 8:15 a.m. to 11:15 a.m., with an eight minute break from 9:37 to 9:45 a.m.

74. I find the evidence of Ms. Reid to be more reliable on this point for several reasons. Firstly, Ms. Young’s own witness, Ms. Wendy Love, confirmed that she was present and sat through the interview with Ms. Reid. Ms. Love’s initial estimate was that the meeting was one hour to one and a half hours in length, but she acknowledged that she “didn’t record the time.” Ms. Reid, on the other hand, clearly had recorded the time. Ms. Love’s testimony demonstrates that Ms. Young’s recollection was incorrect.

75. Further, in her cross-examination of the Appellant, counsel for SaskPower reviewed the list of complaints, included as items a) through u) in Section C of the Investigation Report,<sup>9</sup> and ultimately Ms. Young acknowledged that these had all been discussed with the investigator, Ms. Reid. In light of this, Ms. Young agreed that the meeting had to have been longer than the half hour she initially estimated and was “about an hour and a half meeting, at least” and “maybe longer.” Ultimately, she agreed with Ms. Barber’s suggestion that although she might be “surprised” by it, she had to “accept the meeting with the investigator was three hours” in length.

76. Following a further review of items a) through u) in the Investigation Report, Ms. Young under cross-examination did agree that “yes, these points” were covered in the interview with Ms. Reid. While she remained of the view that it “wasn’t an open discussion” the Appellant reluctantly acknowledged that it appeared all aspects of her complaint had been covered in the interview. This speaks to the thoroughness of the investigation.

77. A final exchange between Ms. Barber and Ms. Young during cross-examination further confirms that all aspects of her complaint were addressed:

Q. Are there any other complaints beyond what is outlined?

A. I don’t think so.

78. Ms. Reid also testified that all of the incidents of alleged harassment listed in her report were discussed with Ms. Young during the interview. She further noted that the other interviews were not brief either as, for example, she also met with Janelle Gareau, one of the respondents to the complaint of harassment, for three hours.

79. One other area of dispute between the parties regarding the thoroughness of the investigation relates to the additional information and/or witness lists that the Appellant could have provided to Ms. Reid. Ms. Reid testified: “I don’t recall Ms. Young telling me names of people to speak to.” She also did not recall Ms. Young suggesting other information for her to consider. Indeed, Ms. Reid testified:

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<sup>9</sup> Exhibit R-1

I asked questions. She answered. At the end, I asked if she had anything else to say. She said "yes," but it was something she'd already said. There was nothing left open, nothing to get back to her on.

80. Ms. Young, on the other hand, testified that she "actually gave [Ms. Reid] names" of people to contact. On cross-examination, Ms. Barber asked her if it was possible that she had not done so. Ms. Young responded, "I can't see that . . . I don't know."

81. Given this testimony, I accept Ms. Reid's testimony that opportunity was given to Ms. Young to provide additional information, had she wished to do so. Such information was, however, not provided. Further, all of the incidents included in Ms. Young's complaint were addressed and neither the interview of the Appellant, nor those of the other pertinent witnesses, were brief. Accordingly, the investigation cannot be described as inadequate or incomplete.

82. The Appellant's final ground of criticism of the investigation is her belief that it was biased. On this point, Ms. Young appears to have become fixated with the Executive Summary which was included in Exhibit R-6, the binder of documents provided to Michelle Reid by the Director Internal Audit, and also marked separately as Exhibit A-3. The balance of the binder contents are materials received from Ms. Young, in support of her allegations of harassment. The Executive Summary was prepared by Ms. Bev Balon, who testified after Ms. Reid. Ms. Balon explained that the Executive Summary was prepared and provided merely as "background history" as "where respectful workplace issues come up, we look at what's been done."

83. On cross-examination, Ms. Young indicated that the investigation process was "biased because of the executive summary," adding that "it created bias in the mind of the investigator." Ms. Young did, however, acknowledge that Ms. Reid had acted in a professional manner in conducting the interview.

84. When asked about the allegations of the Appellant that the investigation was biased and not thorough, Michelle Reid responded:

If anything, I was more biased toward her. I tried to dig into the other side to see what could support her.

As to thorough, I went through the full complaint. I picked every issue, even if I didn't think it was relevant as an issue. I'm known for being thorough. I'm very detailed, don't leave a stone unturned.

86. Under cross-examination by Ms. Young, who asked what the mandate was, Ms. Reid answered: "Do an independent review of the harassment case." Later, when Ms. Young focused on the Executive Summary, Ms. Reid responded:

As I said before, information in the Executive Summary did not form part of the investigation.

87. I accept Ms. Reid's testimony that her conclusions were not influenced by the Executive Summary. She presents in a forthright manner and the methodology employed in the investigation substantiates that she is thorough and examines all sides to an issue.

88. Most importantly, however, in reading her Investigation Report, Exhibit R-1, it is evident that she does not present a biased or one-sided view. While she concludes that the incidents complained of did not constitute "harassment" as defined in the Respectful Workplace Policy, she does not shy away from noting the role that other SaskPower employees played in creating the workplace conflict. For example, in section E. 2. b), Ms. Reid notes that the manner in which the manager, Business Support North managed/directed Ms. Young's work was "inconsistent, *ad hoc* and at times, contrary to SaskPower practice." In section E. 2. c), the investigator notes that other SaskPower management "did not always extend the courtesy of notifying the manger, Business Support North what would be required of the complainant in terms of time commitment and workload." Section E. 3. States that "there were opportunities for the improvement of Human Resources systems."

89. Indeed, the Conclusion section is comprised of two paragraphs. Together, they demonstrate that the investigation was thorough, unbiased and fair:

We concluded that:

- 1) the claim of harassment could not be substantiated according to the criteria contained in the SaskPower Respectful Workplace Policy (Procedures Appendix II). Internal Audit was unable to verify a number of the statements made by the complainant as a result of conflicting stories of some of the occurrences; and
- 2) there were opportunities for HR Business Services to improve the way workplace issues were managed including providing additional guidance, clarifying procedures and clarifying documentation expectations.

90. Within my appropriate scope of review, it is my conclusion, like that of OHS Officers Tallmadge and Luciak in their April 27, 2017 decision that SaskPower has complied with its own

policy and the applicable legislation and regulations, by investigating Ms. Young's complaint "in an unbiased and thorough process." Accordingly, the appeal by Ms. Young must be dismissed.

*c) What is the impact of the Appellant's return to work status?*

91. The findings set out in the foregoing are sufficient to dispose of this appeal. However, on behalf of SaskPower, this third issue was raised. It appears that this was out of the abundance of caution, to address the possibility that the matter might be sent back for further investigation. At paragraph 48 of the Brief of Law, counsel for SaskPower writes:

In light of the fact that the Appellant will not be returning to the workplace in Prince Albert, coupled with the evidence that there is no environment of harassment in the workplace, it is respectfully submitted that, even if the adjudicator should find that the investigation was flawed, no interest will be served in sending the matter back for another or a further investigation.

92. Evidence regarding the information received by SaskPower from Great West Life, the independent adjudicator of SaskPower's disability claims, was provided by Ms. Katherine Potts. She explained that SaskPower does not adjudicate long term disability claims. She further described how during the first 20 months after an employee is eligible for long term disability benefits these are considered one's "own occupation disability benefits." The goal is to get the employee back to her own job, and the benefit payment reflects this. She distinguished these from the findings and benefits where an employee is totally disabled for any position.

93. Ms. Young has been away from the workplace since May of 2016. By letter dated October 20, 2017,<sup>10</sup> Ms. Potts was inquiring as to the Appellant's prognosis. The letter had been prompted by the Vice President, who had been looking at the Business unit. If the prognosis was poor, the business decision was that Ms. Young's position would be posted. Otherwise, it was still being held for her. Given the information that the prognosis was guarded, the position was posted and filled.

94. By letter dated February 28, 2018, from Great West Life to Tammy Young,<sup>11</sup> the Appellant was informed that her Disability Income Plan benefits would be terminated effective April 30, 2018. The letter states:

While the information on file supports that you [*sic*] unable to return to your pre-disability job with SaskPower, you would not be prevented from working as a business

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<sup>10</sup> Exhibit R-8

<sup>11</sup> Exhibit R-9

support coordination [*sic*] with another employer. The definition of disability is no longer supported at the change of definition. Therefore benefits will be terminated effective April 30, 2018.

95. In light of the confirmation that Ms. Young will not be returning to the workplace, SaskPower relies upon the decision in *E.B. and Saskatoon Public Library*, LRB No. 084 – 15 to argue that the within appeal is moot. While, as here, that case concerned investigation into allegations of harassment—albeit more serious allegations of sexual harassment—prior to the hearing the employer made a preliminary application to dismiss the appeal on several grounds, including that the appellant was no longer an employee. The Adjudicator agreed and dismissed the appeal summarily, without a hearing, as the employee no longer met an essential jurisdictional requirement. This jurisdictional requirement of ongoing employment was upheld on appeal to the Saskatchewan Labour Relations Board.<sup>12</sup>

96. The *E.B.* case would perhaps have been instructive had the timing of the cessation of Ms. Young's employment with SaskPower been different and an application brought for summary dismissal prior to the hearing. However, the matter has been heard in its entirety and, as outlined in the foregoing, I have determined that the investigation undertaken by Ms. Reid was conducted in a fair manner and in keeping with the legislative and regulatory requirements and therefore the appeal ought to be dismissed. As such, there is no need to address the argument that the within appeal was/is moot.

### ***Conclusion***

97. In light of all of the foregoing, I confirm that the scope of review by OHS, and an adjudicator in this context, is in assessing whether the Respondent employer has complied with *The Saskatchewan Employment Act* and regulations made thereunder in investigating allegations which could be regarded as “concerning harassment.” I further conclude that the investigation process employed by SaskPower was fair, thorough and unbiased. Accordingly, the appeal must be dismissed.

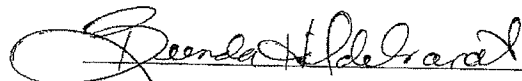
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<sup>12</sup> *Baltulis v Saskatoon Public Library, et al* (2015) LRB No. 090-15

## VI. Order

98. The appeal by Tammy Young of the April 27, 2017 decision of the OH&S Officers is dismissed.

Dated at Saskatoon, Saskatchewan this 11<sup>th</sup> day of October, 2018.

  
Brenda Hildebrandt, Q.C., Adjudicator

### *Right to appeal adjudicator's decision to board*

#### **s. 4-8**

- (2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III may appeal the decision to the board on a question of law.
- (3) A person who intends to appeal pursuant to this section shall:
- (a) File a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and
  - (b) Serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.
- (5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.



Appendix "A"

LRB File No. 116-17

**IN THE MATTER OF:**

An appeal with respect to the decision of April 27, 2017, pursuant  
*The Saskatchewan Employment Act.*

**BETWEEN:**

**TAMMY YOUNG**

Appellant/Respondent

-and-

**SASKPOWER**

Respondent/Applicant

**Director of Occupational Health and Safety**

**Ministry of Labour Relations and Workplace Safety**

Respondent

For the Appellant/Respondent: Self-represented

For the Respondent/Applicant, SaskPower: Susan Barber, Q.C., McDougall Gauley LLP

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**PRELIMINARY ISSUE REGARDING DOCUMENT DISCLOSURE**

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**I. Introduction and Background**

1. The Appellant, Tammy Young, has appealed the April 27, 2017 decision of Occupational Health and Safety ("OH&S") Officers, Mr. Shawn Tallmadge and Mr. Mike Luciak. Their

investigation had been conducted in response to Ms. Young's request for a review of the investigation conducted following her allegations of harassment in the workplace. The conclusion of the officers was that the employer, SaskPower, had complied with the requirements of the applicable legislation. Ms. Young's notice of appeal summarizes her concerns as:

- a. Thorough investigation was not followed
- b. My claims were not addressed
- c. Myself and the union were not kept updated and left out of communication

2. Following my appointment as Adjudicator in accordance with sections 3-54 and 4-3 of *The Saskatchewan Employment Act*, a pre-hearing conference call was arranged for July 18, 2017 to discuss the hearing process and address preliminary issues with the parties. During the discussion, I noted that I had received materials from the OH&S Division of the Ministry of Labour Relations and Workplace Safety.

3. The practice of OH&S is that upon an adjudicator being appointed, the Notice of Appeal as well as a copy of "all information" in the possession of OH&S concerning the matter is provided to the adjudicator. Indeed, this is required by section 3-55 of the Act. This includes the OH&S officer's file and materials received from any and all parties during the course of the investigation. In the interests of transparency and procedural fairness, the adjudicator then provides copies of the materials to the parties to the appeal.

4. In the case at hand, the materials I had received included the file of the OH&S Officer as well as two binders of materials, one of which was provided to the Officer by Ms. Young and one of which was provided by SaskPower.

5. Following the conference call, each of the parties had further questions about the documents and it was apparent that focus centered on a portion of the Investigation Report dated November 29, 2016. SaskPower then retained Ms. Barber as its counsel. By her letter of July 21, 2017, SaskPower gave notice of this preliminary application for an order that pages 8 – 10 of that Investigation Report as well as a four-page document entitled "Executive Summary" not be provided to Ms. Young. These materials had all previously been provided to the OH&S officer and were therefore forwarded to me as adjudicator.

6. A conference call was set for August 10, 2017 to hear SaskPower's application and direction was provided that any materials or written submissions in relation to the application be filed in advance. Neither party provided written materials and the matter proceeded by way of oral argument.

7. Other than the seven pages of documents which are the subject of this preliminary application, copies of the materials remitted to me from OH&S, including the Officer's Decision and Appeal, the Officer's File, the Young Binder, and the SaskPower Binder, were enclosed in a letter dated July 28, 2017 to the parties.

## **II. The Applicant's Submissions**

8. On behalf of SaskPower it was submitted that this appeal is somewhat unusual, at least in SaskPower's experience, as it relates to a review of the employer's response and investigation into an allegation of harassment, rather than an allegation of discriminatory action. In responding to the OH&S Officer's request for "any other relevant information," SaskPower erred by providing more information than was required. SaskPower assumed that the information would be retained by the Officer and not shared with others. Had SaskPower known of the possibility that the materials would be remitted to an adjudicator and then to the Appellant, it would not have shared the information.

9. Ms. Barber further submitted that the two documents in question are not relevant to the issues to be considered on appeal. Regarding the latter portion of the Investigation Report, pages 8 – 10, SaskPower considers these to be confidential, internal matters. Although the comments there flow from the investigation into Ms. Young's complaint, they are not central to the investigation of her complaint.

10. On behalf of SaskPower, Ms. Barber submitted that the nature of the appeal and the jurisdiction of the adjudicator should be the driving influence regarding what is considered relevant and therefore required to be disclosed. The adjudicator considers whether the Appellant's complaint is a matter concerning harassment, in that it could fall within the definition of harassment. If that is decided in the affirmative, the adjudicator then considers whether the employer has complied with its obligations in responding to a complaint of

harassment. In light of this, Ms. Barber indicated that these particular pages of the Investigation Report would not be of assistance in making such determinations.

11. Regarding the four-page Executive Summary, it is the position of SaskPower that it is “almost akin to a privileged document.” Its primary creation was for labour relations purposes internal to SaskPower. Taking into account the nature of the appeal, the Executive Summary is not relevant, would not have formed part of the investigation process, and is somewhat prejudicial.

### **III. The Respondent’s Submissions**

12. In responding to the application by SaskPower, Ms. Young noted that section 3-55 of the Act requires all materials in the possession of the director of occupational health and safety to be forwarded to the adjudicator. She further noted my previous indication of the usual process whereby “in the interests of transparency and procedural fairness, the Adjudicator then provides copies of the materials to the parties to the appeal—in this case the Appellant and Respondent.” She emphasized the need for procedural fairness and transparency in the conduct of her appeal.

13. Ms. Young asked why, if the documentation was not relevant, would it be sent by SaskPower to the OH&S Officer to consider. She added that we do not know if it impacted his decision or not, but it seems it was remitted to sway his decision. Further, if the information has something to do with her, Ms. Young believes she has the right to see it.

### **IV. Analysis**

14. Regarding the issues to be addressed at any potential hearing, while such may be refined either through direct discussion between the parties or in the context of case management teleconferences, they do not involve the adjudicator conducting an entirely new investigation into the original allegations of harassment. The ultimate question is whether SaskPower, as the employer, complied with its obligations under the applicable legislation.

15. In the October 28, 2016 decision of *K.O. v. Prairie North Health Region*, LRB No. 138-15, Adjudicator Blanke comments on this. She notes, at paragraph 57, that the threshold issue for the OH&S Officers is the same as that for the adjudicator: That is, could the conduct

complained of fall within the definition of harassment?" This is further reflected in her initial statement of the issue on appeal, at paragraph 5, where she also notes the issue which must be determined if it is decided that the complaint could fall within the definition of harassment:

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

16. This latter question, being the ultimate question for the adjudicator, is also within the purview of the OH&S Officer. In the case at hand, the decision of April 27, 2017, which is the subject of this appeal, reflected this:

At this time, the employer provided specific information indicating the steps they have taken to address each complaint brought forward by Ms. Young. Furthermore the employer stated a plan moving forward in the workplace to ensure everyone can work better together and make the workplace better. This was noted in Ms. Young's response to the employer when asked what are you looking for as an outcome, Ms. Young stated "an improved working relationship." The employer has offered training and mediation services to the parties involved.

The purpose of OHS harassment legislation is not to supersede an employer's ability to receive and deal with internal complaints of harassment. In this circumstance, OHS addressed Ms. Young's request for OHS to be involved in her complaint process by requesting a copy of the investigation report. After a review of the information and documentation provided, the employer has complied with legislation, by investigating Ms. Young's complaint in an unbiased and thorough process and will continue to address concerns brought forward. It was also determined that the concerns raised by Ms. Young are those of conflict and internal labour relations matters.

Based on all the forgoing, the employer has complied with the requirements of OHS legislation and this file is deemed closed.

17. In conducting the investigation, the materials on the OH&S Officer's file reveal a letter dated March 2, 2017 to SaskPower in which the following is noted:

On January 20, 2017, the Harassment and Discriminatory Action Prevention Unit of the Occupational Health and Safety Division (OHS) in Saskatoon, SK received a review of investigation request from one of your employees, Tammy Young. Ms. Young stated she filed a formal complaint of harassment in August 2016 and the complaint was investigated by Michelle Reid.

As noted previously, SaskPower included the seven pages now in dispute in its provision of relevant materials.

23. In considering pages 8 – 10 of the Investigation Report, it is clear that the recommendations contained therein are not specific to Michelle Reid's conclusion that Ms. Young's complaint of harassment had not been substantiated. Page 7 of the Investigation Report, which has already been forwarded on to Ms. Young, clearly sets out Ms. Reid's conclusion on that issue. However, her conclusion also references opportunities for improvement on the part of SaskPower Human Resources. She states:

We concluded that:

- 1) the claim of harassment could not be substantiated according to the criteria contained in the SaskPower Respectful Workplace Policy (Procedures Appendix II). Internal Audit was unable to verify a number of statements made by the complainant as a result of conflicting stories of some of the occurrences; and
- 2) there were opportunities for HR Business Services to improve the way workplace issues were managed including providing additional guidance, clarifying procedures and clarifying documentation expectations.

24. Effectively, pages 8 – 10 provide examples of the opportunities referenced in the second part of Ms. Reid's conclusions. They also appear to fulfill the third and fourth objectives set out on page 1 of the Investigation Report, which include "identifying any opportunities for improvement in systems and procedures" and "recommending a course of action." Ms. Barber was candid when she indicated that although they are not central to the investigation of Ms. Young's complaint, the comments included on pages 8 – 10 "flow from the investigation into Ms. Young's complaint." Thus, they have some connection with, and thus relevance to, a consideration of the response SaskPower undertook to Ms. Young's allegation of harassment.

25. Given that they have some relevance to the issues on appeal, I do not see grounds on which they ought to be excluded now. In this regard, I am mindful that counsel for SaskPower suggested that these pages were for internal purposes only and had been provided to the OH&S Officer in error. However, such objection was not supported by, for example, affidavit evidence explaining the error. Nor was there any other objection to disclosure presented, such as a claim of privilege or the like.

On January 31, 2017, Occupational Health Officer Shawn Tallmadge met with Ms. Young to discuss the particulars of her concerns and to provide further information as to her formal complaint of harassment she submitted to SaskPower.

Based on the information provided, OHS is requesting further information pertaining to the complaint of harassment from worker Tammy Young. Please provide a copy of the completed harassment investigation and *any other relevant information* regarding Ms. Young's complaint.  
(italics added)

18. In providing the documentation, one must assume that SaskPower considered the materials, including the four-page Executive Summary and pages 8 – 10 of the Investigation Report to be relevant, even if in a broad sense.
19. In considering relevance, the comments of Grotsky, J. in *St Marie v St Marie*, [1995] 2 WWR 388; 172 Sask R 81 (QB), an application for the production of documents in the course of a dispute regarding spousal support, are of assistance. He noted:

In determining if documents are to be produced the test is whether the documents may contain information which directly or indirectly enables the party requiring production either to advance his own case or to damage the case of his adversary . . . This is consistent with the prevalent view that in litigation there should be full disclosure of all relevant matters. On an application for production of documents their relevancy to an issue in dispute, not their admissibility, is the governing principle.

20. While the *St Marie* case was decided in a forum different than an adjudication under *The Saskatchewan Employment Act*, the concept of relevance is analogous.
21. SaskPower is not an unsophisticated party. Its human resource personnel have considerable experience and the ability to access to legal counsel. While the corporation may not have dealt with a request for review of an investigation into a complaint of harassment, as Ms. Barber suggests, it most certainly has dealt with the OH&S Division of the Ministry of Labour Relations and Workplace Safety. In responding to a request to provide "any other relevant information" along with a copy of the completed harassment investigation, SaskPower deemed the seven pages now in dispute to be relevant.
22. Further, the OH&S Officers' request, quoted above, was for "further information pertaining to the complaint of harassment." The context was Ms. Young's request for a review of the investigation and the ultimate issue of whether SaskPower had met its obligations was, in my view, clear in the circumstances. As such, the request was for materials relevant to that issue.

26. In concluding that these documents have at least broad relevance and therefore ought to be disclosed in the usual course, I am not making a finding that they ought to be given any particular weight should they be tendered in evidence at the contemplated appeal hearing. That is a matter for consideration at that time.
27. Turning to the four-page Executive Summary, counsel for SaskPower submitted that this document was created for labour relations purposes internal to the organization and that its confidential nature was “analogous to privilege.” Appropriately, counsel confirmed that she was not seeking to establish a new category of privilege.
28. In reviewing this document, there is no indication on the face of it as to who prepared it or for whom it was prepared. There is no notation that it is to be confidential or only subject to limited circulation.
29. While, again, there was no evidence presented, counsel for SaskPower submitted that it had been prepared in a process “akin” to that in which documents are “prepared in contemplation of litigation.” She indicated that it was a document “which prompted SaskPower to send [the matter] to investigation.”
30. Although undated, the document was clearly prepared in consideration of Ms. Young’s complaint of harassment lodged in September of 2016. It appears to be part of SaskPower’s determination to utilize the internal audit investigation process. As such, it is relevant, at least in the broad sense. Thus, the question is whether there is any other factor which would prevent its disclosure.
31. It does not fall within any of the established categories of privilege and, again, SaskPower is not seeking to expand such categories. Therefore, I am not required to consider issues of waiver and/or limited waiver of privilege.
32. The title “Executive Summary” also does not confirm that it was prepared for those in senior management. Indeed, executive summaries are often used in businesses and other organizations to summarize longer reports, proposals, or related documents. They are the condensed version of larger bodies of material, enabling readers to become acquainted with the



information without having to research volumes of materials themselves. Thus, its title does not assist in giving this document any special confidential status.

33. Further, there was no attempt to segregate this document from others provided to the OH&S Officer, indicating a limited purpose for production. Rather, in providing the entire binder of materials to OH&S, SaskPower noted on the Table of Contents:

CONFIDENTIAL—the attached documents are strictly confidential and not to be shared with Ms. Young

34. Thus, this Executive Summary had no special status distinct from the other documents. Those other documents include, for example, SaskPower's Respectful Workplace policy and procedure, Code of Conduct and Corrective Discipline Policy. There is no reason to exclude disclosure of these documents. Thus, the intention in marking the binder as confidential is unclear, and such a general indication cannot be seen as conferring a protected status on the Executive Summary.

35. The final objection raised on behalf of SaskPower to disclosure of the Executive Summary was that it could be prejudicial. Whether this is prejudicial to SaskPower as Respondent in the appeal or prejudicial to the parties seeking a resolution is unclear. However, that materials may be prejudicial does not alter their relevance nor does it confer a status "akin to privilege." Further, the OH&S Officer had access to this document and despite this concluded that SaskPower had "complied with the requirements of OHS legislation." While that decision is subject to my findings on appeal, which will only be made following the hearing, it is difficult for SaskPower to claim prejudice in such circumstances.

36. In light of all of the foregoing, I find that the Applicant, SaskPower, has not demonstrated grounds on which disclosure to Ms. Young of pages 8 – 10 of the Investigation Report and the four-page Executive Summary ought to be denied.

37. During the application hearing, there was some discussion of any limitations on use of the materials. Ms. Barber noted the assumption of an implied undertaking by the parties that such are only for the purpose of the within hearing. While I concur with her view, I am inclined to provide an express reminder that the materials are not to be copied or distributed to non-

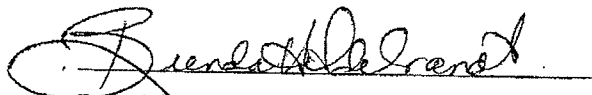
parties. They may well form part of the record, should the matter be appealed further; however, they are not to be circulated to others.

**V. Order**

38. The application by SaskPower for an order that pages 8 – 10 of Ms. Reid's Investigation Report as well as the four-page document entitled "Executive Summary" not be provided to Ms. Young is dismissed for the reasons set out above.

29. These seven pages, as well as all of the materials previously provided to the parties through me as Adjudicator from the OH&S office, and any other materials disclosed by the parties in the conduct of this hearing, shall not be circulated, copied or disclosed to anyone other than the parties and their respective legal counsel, if any.

Dated at Saskatoon, Saskatchewan this 26<sup>th</sup> day of August, 2017.

  
Brenda Hildebrandt, Q.C., Adjudicator

***Right to appeal adjudicator's decision to board***

**s. 4-8**

- (2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III may appeal the decision to the board on a question of law.
- (3) A person who intends to appeal pursuant to this section shall:
- (a) File a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and
  - (b) Serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.
- (5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

Appendix "B"

LRB File No. 116-17

**IN THE MATTER OF:**

An appeal with respect to the decision of April 27, 2017, pursuant  
*The Saskatchewan Employment Act.*

**BETWEEN:**

**TAMMY YOUNG**

Appellant/Applicant

-and-

**SASKPOWER**

Respondent

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

Respondent

For the Appellant/Respondent: Self-represented

For the Respondent/Applicant, SaskPower: Susan Barber, Q.C., McDougall Gauley LLP

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**PRELIMINARY ISSUE REGARDING PRE-HEARING QUESTIONING  
DECISION AND PROCESS DIRECTION**

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**I. Introduction and Background**

1. Tammy Young, the Appellant, has appealed the April 27, 2017 decision of Occupational Health and Safety ("OH&S") Officers, Mr. Shawn Tallmadge and Mr. Mike Luciak. The OH&S Officers had concluded that the Respondent employer, SaskPower, had complied with the requirements of the applicable legislation in responding to Ms. Young's allegations of harassment in the workplace.

2. Following my appointment as Adjudicator in accordance with section 3-54 and 4-3 of *The Saskatchewan Employment Act*, several pre-hearing conference calls have been conducted

with the parties. In connection with the August 10, 2017 call, which was set to hear SaskPower's preliminary application regarding document disclosure, a decision was rendered on August 26, 2017. By that decision, pages 8 – 10 of Ms. Reid's Investigation Report as well as the four-page document entitled "Executive Summary", all of which had been provided to OH&S in the course of its investigation, were permitted to be disclosed to Ms. Young. It was further noted that these seven pages, as well as all of the materials previously provided through me as Adjudicator from the OH&S office, and any other materials disclosed by the parties in the conduct of this appeal, shall not be circulated, copied or disclosed to anyone other than the parties and their respective legal counsel, if any.

3. In subsequent conference calls, the scope of the matters to be determined on appeal have been discussed, as well as issues pertaining to the number of witnesses to be called and additional document disclosure. It was agreed that the hearing be held in Prince Albert, Saskatchewan and is currently scheduled for two weeks, commencing April 9, 2018.

4. During the teleconference of November 9, 2017, Ms. Young was granted an extension until December 15, 2017 for provision to counsel for SaskPower of the recordings of the conversations which had been transcribed in the materials Ms. Young had provided to OH&S. It was also confirmed that any additional documents were to be exchanged between the parties by February 15, 2018, with the Appellant providing her witness list to counsel for SaskPower by February 28, 2018 and SaskPower providing its witness list to her by March 5, 2018. As noted below, at paragraph 11, the dates regarding witness information were later modified by consent of the parties.

5. The recordings in question were provided by Ms. Young to SaskPower's counsel prior to the December 15, 2017 deadline and it is evident that the parties have had some communication between themselves regarding witness lists since late Fall 2017. In the course of such communications, Ms. Young has been requesting information from SaskPower regarding the preparation of the Executive Summary, which was one of the documents disclosed pursuant to the Preliminary Decision rendered August 26, 2017. Ultimately, by email dated January 18, 2018, Ms. Young's requests were turned into a preliminary application, which was considered in a teleconference on January 24, 2018, and will be addressed further below, commencing at paragraph 20.

6. SaskPower had also requested information of Ms. Young regarding the nature of the testimony to be provided by the approximately 23 witnesses she proposes to call at the hearing. Brief summaries, or "can say statements," were sought, as SaskPower's concern is that a number of the witnesses may be called to provide evidence that is not relevant to the issues to be determined, thereby extending the hearing needlessly. This was discussed at length in a teleconference with the parties on January 17, 2018 and Ms. Young was given opportunity to consider her position further.
7. During the conference call of January 24, 2018, Ms. Young indicated that she was willing to provide SaskPower's counsel with brief summaries of the testimony anticipated for each of her proposed witnesses. Ms. Barber, on behalf of SaskPower, will do likewise. Ms. Barber further indicated that, depending upon the contents of the statements provided by the Appellant regarding her witnesses, SaskPower may seek application to challenge the relevance and admissibility of certain witness testimony in advance of the hearing, and/or may raise objections at the hearing.
8. In considering the relevance of such testimony, Ms. Barber emphasized SaskPower's view of the narrow scope of the hearing, whereby there is no jurisdiction to revisit Ms. Young's original allegations of harassment. However, as the issue of whether SaskPower complied with its obligations in the face of such allegations is clearly within the scope of the appeal, Ms. Barber also confirmed that it is her intention to call Ms. Michelle Reid, the author of the Investigation Report, as a witness at the hearing. Ms. Young will then have opportunity to cross-examine Ms. Reid.
9. Regarding the scope of the hearing, some guidance has previously been provided to the parties in the Preliminary Decision of August 26, 2017, at paragraphs 14 -16:
  14. Regarding the issues to be addressed at any potential hearing, while such may be refined either through direct discussion between the parties or in the context of case management teleconferences, they do not involve the adjudicator conducting an entirely new investigation into the original allegations of harassment. The ultimate question is whether SaskPower, as the employer, complied with its obligations under the applicable legislation.
  15. In the October 28, 2016 decision of *K.O. v. Prairie North Health Region*, LRB No. 138-15, Adjudicator Blanke comments on this. She notes, at paragraph 57, that the

threshold issue for the OH&S Officers is the same as that for the adjudicator: That is, could the conduct complained of fall within the definition of harassment?" This is further reflected in her initial statement of the issue on appeal, at paragraph 5, where she also notes the issue which must be determined if it is decided that the complaint could fall within the definition of harassment:

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

16. This latter question, being the ultimate question for the adjudicator, is also within the purview of the OH&S Officer . . .

10. As to refinement of the issues, such has been raised with the parties in most, if not all, of the teleconferences. During the January 17, 2018 teleconference, Ms. Young gave some general indication that her concern was with the inadequacy and incompleteness of the investigation, as well as its biased nature. She, however, declined to confirm that such were her only concerns.

11. Given the desire to narrow the issues and focus the hearing on those issues properly before me as an Adjudicator, the parties, during the January 24, 2018 teleconference, agreed that witness lists and summaries of the proposed testimony could be exchanged earlier than had previously been agreed. Ms. Young undertook to provide hers by February 15, 2018 and Ms. Barber will provide those on behalf of SaskPower by February 22, 2018.

## **II. Process Direction**

12. There was further review of the hearing process during the January 24, 2018 conference call and, in the circumstances, I have determined that this Process Direction is in order.

13. Regarding pre-hearing matters, as noted above, are to be exchanged between the parties by February 15, 2018. Witness lists and "can say" statements are also to be provided to Ms. Barber by the Appellant by February 15, 2018. Ms. Barber, on behalf of SaskPower, will provide witness lists and summaries of the proposed testimony to Ms. Young by February 22, 2018.

14. Should they elect to, each of the parties, or counsel on their behalf, may make an opening statement. Any witnesses other than the parties themselves will be excluded from the hearing prior to providing testimony.

15. Documents, recordings or other materials either party wishes to have considered must be presented in evidence as exhibits, either by consent between the parties, or as established through a witness. Any 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. If a recording is to be considered in evidence, a copy must also be available for the Adjudicator and the other party, and the party wishing to play such recording is responsible to arrange in advance for a mechanism to do so.
16. In keeping with Labour Relations Board practices concerning appeals under Part III of *The Saskatchewan Employment Act*, a court reporter is not present. Parties and witnesses are asked to speak clearly and not too quickly to enable note-taking.
17. The Appellant, who bears the onus in relation to the appeal, will present evidence first. Any witness called on her behalf, including herself, may be cross-examined by counsel for SaskPower.
18. The Respondent, SaskPower, will present evidence after the Appellant concludes the presentation of her case. Any witnesses called on behalf of SaskPower may be cross-examined by Ms. Young, or by her counsel, if she engages counsel.
19. After all of the evidence is in, each of the parties will have opportunity to present closing argument.

### **III. The Appellant's Application for Pre-Hearing Questioning**

20. In communication between the parties, Ms. Young had requested information regarding the preparation of the Executive Summary. As SaskPower had declined to provide this information, Ms. Young, by email dated January 18, 2018 stated:

I would like to submit an application for an order that SaskPower divulge the following information of the Executive Summary:

- Date written
- Content owner
- **Any and all** parties that contributed information in the document

I had previously requested this information from SaskPower and was informed that it this information is not relevant to the hearing.

The Executive Summary does note in the Recommendation by client group HRBP section:

"Although I do not feel the situation is one of harassment but rather escalated interpersonal conflict, *it is my recommendation that an investigative team (including a member of the Unifor union if possible) be assigned to formally review Ms Young's harassment complaint.* The reasons for the recommendation are as follows:

1. I do not believe Ms Young will accept anything less.
2. This is the last internal avenue of escalation Ms. Young has to pursue this and so this is the only way we will be able to bring this situation to an end.
3. I do not believe that even a formal investigation will satisfy Ms. Young, however it will enable business to finally address the situation without outside interference and further tactics from Ms. Young

The highlighted section above indicates that this document drove the investigation. If I am to prove that SaskPower and OH&S did not conduct a fair and unbiased investigation the executive summary will play a large role and therefore highly relevant to the hearing.

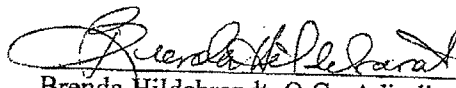
21. During the January 24, 2018 teleconference, Ms. Young, in support of her application, indicated her belief that two people against whom she had made complaints of harassment had contributed to the preparation of the Executive Summary. As the document had been provided to OH&S, Ms. Young is of the view that in both that investigation, as well as the earlier investigation conducted by Ms. Reid, the investigators were influenced by the Executive Summary. She considers the document to be libelous and questions the alleged lack of transparency on the part of SaskPower. Ms. Young further submitted that having details about the document would impact, and likely change, her witness list.
22. In response, counsel for SaskPower noted that allegations of libel may be met by qualified privilege; however, these are not matters on which an adjudicator in the current context is required to rule. If Ms. Young truly intends to pursue such allegations, the proper forum is a civil action in the Court of Queen's Bench. Ms. Barber further noted that any pre-hearing processes in adjudications under Part III of *The Saskatchewan Employment Act* are not intended to facilitate "fishing expeditions." Ms. Young will have opportunity to hear Ms. Reid's testimony and to cross-examine her and may at that time ask her about the process followed.



#### IV. Decision

23. At the close of the January 24, 2018 teleconference, I provided my ruling verbally, recognizing the time frames under which the parties are operating in connection with exchange of documents and witness statements. I indicated that SaskPower was not required to provide further information regarding the Executive Summary in advance of the hearing and that my decision would be confirmed in writing.
24. Unlike Queen's Bench trials, for example, which are conducted in accordance with the Queen's Bench Rules of Court, adjudications under Part III of *The Saskatchewan Employment Act* are not subject to detailed pre-hearing processes. While, pursuant to section 4-4(2) of the Act, an adjudicator, subject to the regulations, "may determine the procedures by which the appeal or hearing is to be conducted," such ought to be done in keeping with the scope of the issues to be determined and the expedient nature of the process, as recognized, for example, in the condensed time frame in which decisions are to be rendered, by section 4-7 of the Act.
25. In the instant case, while there may yet be some refinement of the issues, the case law previously noted focuses on questions pertaining to whether the employer has met its obligations under the Act and regulations. These are issues which can readily be addressed in witness testimony, including cross-examination, and do not require a further degree of process. Given the indication that counsel for SaskPower intends to call the investigator, Ms. Reid, as a witness, Ms. Young will have opportunity to question her on what, if any, knowledge she had of the Executive Summary and its influence on the investigation.
26. For these reasons, Ms. Young's application for disclosure of information regarding the preparation of the Executive Summary in advance of the hearing is denied.

Dated at Saskatoon, Saskatchewan this 5<sup>th</sup> day of February, 2018.

  
Brenda Hildebrandt, Q.C., Adjudicator

*Right to appeal adjudicator's decision to board*

s. 4-8

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