



LRB File No. 050 - 18

IN THE MATTER OF:

An appeal with respect to the decision of February 1, 2018, pursuant
The Saskatchewan Employment Act.

BETWEEN:

Priya Menon

Appellant

-and-

Saskatoon Open Door Society Inc.

Respondent

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

Respondent

For the Appellant, Priya Menon:

Greg Eyre acting as advocate

For the Respondent, Saskatoon Open Door Society Inc:

Steve Seiferling, Seiferling Law

DECISION

I. Introduction

1. The Appellant, Priya Menon, commenced employment with the Respondent, Saskatoon Open Door Society ("SODS") on April 9, 2015. Ms. Menon alleges that she has been subjected to harassment in the course of her employment with SODS. Her allegations have been ongoing, as she considers there to have been discrimination and workplace harassment since October 2016, with what she describes as the "real issue" commencing in the summer 2017. At that time, Ms. Menon was placed on a performance improvement plan. Her formal complaint was submitted to Mr. Ali Abukar, Executive Director of SODS, in a letter dated September 15, 2017.

2. Mr. Abukar requested further information from Ms. Menon and, following review of the documentation she provided, provided her with a letter dated February 27, 2018 indicating that, based on the evidence available, her allegations of harassment were not substantiated.

3. In the interim, Ms. Menon, also on September 15, 2017, launched a complaint with the Harassment and Discriminatory Action Prevention Unit of the Occupational Health and Safety Division (“OHS”) regarding the alleged harassment in the workplace. Multiple emails were exchanged between Ms. Menon and Mr. Shawn Tallmadge of OHS. On October 31, 2017 Ms. Menon informed Mr. Tallmadge that an investigation by Mr. Abukar was underway. Mr. Tallmadge, on January 23, 2018, met with Mr. Abukar as well as SODS Human Resource personnel to ascertain what steps the employer had taken to address the complaints raised by Ms. Menon.

4. By his decision of February 1, 2018, Mr. Tallmadge concluded that the Respondent employer, SODS, had complied with the requirements of the applicable legislation in its response to Ms. Menon’s allegations of harassment in the workplace. Mr. Tallmadge further recommended that the Labour Relations and Mediation office be contacted to assist with conflict resolution and working toward a more successful workplace. He 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. Menon’s request for OHS to be involved in her complaint process. After a review of the information and documentation provided, the employer has complied with legislation, has received and investigated Ms. Menon’s complaint, and it is determined that the concerns raised by Ms. Menon are those of conflict and internal labour relations matters.

5. Ms. Menon, by email dated February 13, 2018, filed a notice of appeal dated February 9, 2018 regarding Mr. Tallmadge’s decision and ultimately a hearing was conducted on August 8, 2018.

6. At the hearing on August 8, 2018, Ms. Menon was assisted by Mr. Greg Eyre, Labour Relations Officer with the Saskatchewan Government and General Employee’s Union. Although the Union was neither a party to, nor involved with, Ms. Menon’s appeal, Mr. Eyre, had agreed to assist. Previously, in the course of the case management teleconference of June 25, 2018, Ms. Menon had been self-represented. Similarly, it was only after June 25, 2018 when SODS retained legal counsel.

7. At the outset of the hearing on August 8, 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. With the consent of both Mr. Eyre and counsel for SODS, an order for exclusion of witnesses, “one side at a time,”¹ was made. I then heard testimony from only Ms. Menon.

6. In addition to her testimony, the following exhibits were filed:

- ADJ-1: Notice of Hearing;
- ADJ-2: Process Direction dated July 11, 2018;
- ADJ-3: Decision of Shawn Tallmadge dated February 1, 2018;

- A-1: Series of emails between Ms. Menon and Mr. Abukar for the period August 1, 2017 to September 29, 2017, consisting of six pages;
- A-2: Phone Contact Information Sheet dated October 3, 2017 referencing a telephone call with Ali Abukar;
- A-3: Series of emails between Shawn Tallmadge and Ali Abukar dated January 11, 2018, consisting of three pages;
- A-4: Three pages entitled ESU Program Support Counsellor;

- R-1: Formal complaint by Priya Menon dated September 15, 2017;
- R-2: Email from Priya Menon to Ali Abukar dated February 27, 2017, consisting of two pages;
- R-3: Email exchange between Priya Menon and Ashraf Mirmontahai during the period July 5 – July 6, 2017, consisting of two pages;
- R-4: Employment Services Unit: General Performance Evaluation for Priya Menon, consisting of six pages;
- R-4a: Conclusion and Recommendations on Marginal Performance with Priya Menon’s handwritten notes;
- R-5: Performance Improvement Plan dated July 11, 2017, consisting of two pages;
- R-6: Saskatoon Open Door Society Inc. Employee Handbook and HR Policy Manual Acknowledgement of Receipt and Commitment to Comply dated April 9, 2015, consisting of one page;
- R-7: Excerpts from Saskatoon Open Door Society Inc. Human Resources Manual dated September 2016, consisting of pages 1- 10 and pages 49 - 52;
- R-8: Email from Ali Abukar to Priya Menon dated October 27, 2017;
- R-9: Letter dated February 27, 2018 to Priya Menon from Ali Abukar, consisting of two pages; and
- R-10: Email from Priya Menon to Ali Abukar dated May 1, 2018, consisting of two pages.

¹ In keeping with the practice described in *University Employees’ Union (CUPE, Local 1975) v University of Saskatchewan*, 2005 CanLII 78434 (SK LA)

7. Following Ms. Menon's direct testimony, cross-examination and re-direct examination, she elected to call no further witnesses and closed her case. At that time, counsel for SODS advised that he was bringing a non-suit application, alleging that the appellant had failed through her evidence to establish the requisite elements for a successful appeal. While this would generally require a preliminary ruling by the adjudicator, counsel was candid in indicating that, whether a non-suit was granted or not, no evidence would be called on behalf of SODS. Accordingly, a separate ruling on the non-suit application became unnecessary and closing arguments proceeded.

II. The Issues

8. I turn now to the issues in this case, which were also the subject of pre-hearing discussion. They are:

- a) What is the scope of the adjudicator's jurisdiction?
- b) Was the employer's investigation into the allegations of harassment adequate and in compliance with the applicable statutory requirements?

9. The Process Direction dated July 11, 2018, marked as Exhibit ADJ-2, included, at paragraph 3, the pre-hearing discussions regarding the issues:

In contemplation of the hearing, pre-hearing teleconferences were held with the parties on May 30, 2018 and June 25, 2018, at which times the hearing process was discussed. As well, the parties have been provided with the file materials received from OHS. Further, the parties agree that the issue to be determined at the hearing pertains to the adequacy and suitability of the employer's investigation into the allegations of harassment, and does not constitute a re-investigation.

10. However, it was evident during the hearing that Ms. Menon desired a full re-investigation, as she remained of the view that neither the employer nor OHS had conducted a full investigation. This placed Mr. Eyre in a difficult position regarding how best to present the evidence on her behalf. Accordingly, some consideration must be given to the scope of the adjudicator's jurisdiction, as will be discussed in Part III of this decision.

11. Before turning to the analysis of the appeal, a word regarding the notice of appeal is in order. At paragraph 9, Ms. Menon claims a suspension of the February 1, 2018 decision of Mr. Tallmadge. This was not pursued either in pre-hearing teleconferences or at the hearing.

However, had it been, there is nothing to suspend. Mr. Tallmadge concluded that there had been compliance by SODS with the applicable legislation. He also encouraged mediation and conflict resolution, with a view to repairing the working relationship between the parties. Finally, he offered the assistance of the Labour Relations and Mediation office, providing contact information and noting this service is free of charge.

12. Further, to suspend the February 1, 2018 decision could theoretically involve requiring SODS to investigate further. In the circumstances, Mr. Abukar remained open to receiving further information from Ms. Menon, as demonstrated in his letter to her of February 27, 2018, Exhibit R-9. Accordingly, the request for a suspension is immaterial.

III. Analysis

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

13. 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. I applied her analysis in LRB No. 116 of 17, *Young v SaskPower*, albeit noting that, unlike in *K.O.*, SaskPower had concluded its investigation into the employee’s allegations of harassment. In the current case, SODS has proceeded with as much investigation as feasible, given its request for further information from Ms. Menon.

14. Adjudicator Blanke suggests a two-step process, at paragraphs 5 and 57 of *K.O.*:

[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?

15. She notes that 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.

16. In Ms. Menon's case, SODS elected to accept the nature of her complaints as generally falling within the purview of its Harassment Policy, included in Exhibit R-7, and Mr. Abukar investigated accordingly.

17. However, counsel for SODS argued that, in reviewing Ms. Menon's complaints, one might reasonably conclude that not all are even in the nature of harassment so may not have passed the first test. He emphasizes that many of Ms. Menon's concerns related to attempts by her employer to manage her performance. Mr. Eyre, on the other hand, disagrees, arguing that "if one uses power as a manager to create an intimidating or threatening workplace," whether through performance reviews or performance improvement plans, "it looks like a set-up and becomes harassment." While it does appear that several of Ms. Menon's concerns relate to performance management, from a practical perspective, as SODS has accepted and investigated Ms. Menon's complaint, the first question in the *K.O.* test is answered in the affirmative and a consideration of whether the employer has met its statutory obligations may proceed.

18. The second question, being the ultimate question on the appeal, relates to whether SODS has complied with its statutory obligation. This question was also within the purview of the OHS Officer. His decision of February 1, 2018 reflected this:

On January 23, 2018, Officer Mike Luciak and I met with Brooks Norton, Human Resource Coordinator, Sultan Ali Sadat, Human Resource Manager and Ali Abukar, Executive Director. During this meeting we were provided specific information and shown documentation indicating the steps the employer has taken to address each complaint brought forward by Ms. Menon over her employment including the harassment complaint. Information was provided regarding worker complaints about Ms. Menon as well as concerns with her performance. Coaching session was held and options to transfer to other work areas within the Open Door Society were also provided to Ms. Menon. Also discussed was a time line and sequence of events that led up to Ms. Menon's October 3, 2017 complaint.

Further to the meeting, the employer stated they have requested specific information from Ms. Menon to continue with the investigation into her complaint. Mr. Abukar also stated the employer has and will continue to address any concerns brought forward by any worker. The employer has attempted to address Ms. Menon's concerns and make changes to the work environment to ensure all workers are happy and successful.

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. Menon's request for OHS to be involved in her complaint process. After a review of the information and documentation provided, **the employer has**

complied with legislation, has received and investigated Ms. Menon's complaint, and it is determined that the concerns raised by Ms. Menon are those of conflict and internal labour relations matters.

It is strongly suggested that Labour Relations and Mediation (LRM) be contacted to provide the service of conflict resolution to assist parties regarding a successful workplace. This service is provided free of charge and would be beneficial to both parties in repairing the working relationship and moving forward . . .

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

(emphasis added)

19. 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 at paragraph 61 of in *K.O.*:

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

20. This view is further supported in *M.F. v Blessed Sacrament Parish*, LRB No. 184 – 14. There, in her June 26, 2015 decision, Special Adjudicator Blanke quoted a recent decision of the Ontario Labour Relations Board, *Jennifer Ford v Anne Anderson*, 2015 CanLII 27353 (ON LRB) which emphasized that the Labour Relations Board "is not the appropriate forum to adjudicate upon the issues that lead to the filing of the harassment complaint or the substantive outcome of the employer's investigation."

21. An appeal of the decision of the OHS officer is therefore not a forum for re-investigation of the underlying allegations of harassment. Like the OHS officer, the adjudicator is called upon to consider whether the employer, SODS, has complied with the applicable legislation. An adjudicator may reach a different conclusion than the OHS officer on the compliance question. Nonetheless a review of the substantive elements of each allegation of harassment is beyond the scope of the adjudicator.

22. I now turn to consideration of the second issue on the appeal.

b) *Was the employer's investigation into the allegations of harassment adequate and in compliance with the applicable statutory requirements?*

23. 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.

24. A review of Exhibit R-7, which contains excerpts from Saskatoon Open Door Society Inc. Human Resources Manual dated September 2016, including the Harassment Policy (the “Policy”), reveals a policy which meets the requirements of the Act and Regulations, although there is room for improvement in its wording and procedures.

25. The policy was also implemented. However, it is evident that SODS was struggling with its application in this case, in part due to Ms. Menon’s own lack of cooperation. Exhibit A-3 includes Mr. Abukar’s email to Shawn Tallmadge of January 11, 2018, wherein Mr. Abukar notes that SODS had not found sufficient evidence to support Ms. Menon’s allegations of harassment. The executive director goes on to note a concern that Ms. Menon had not complied with procedures regarding complaint resolution and had failed a complaint against her manager after having been reprimanded. Finally, Mr. Abukar states:

We are non-profit organization with over 200 staff and have limited resources and time to investigate and resolved [sic] complicated issues like this. Given your role, is it possible to have someone from your office to come in and investigate these issues and help us resolve?

26. This led to Mr. Tallmadge’s request for a meeting to look at the process SODS has in place to address harassment complaints. However, Mr. Tallmadge made it clear, in his reply email of the same day also found within Exhibit A-3, that OHS does not conduct harassment investigations.

27. On behalf of Ms. Menon, it was argued that there was no evidence that Mr. Tallmadge did any kind of investigation, as he only had two conversations with Ms. Menon. As noted, however, it was not Mr. Tallmadge’s role to conduct an investigation for the employer regarding

the underlying allegations of harassment. He did, though, investigate whether SODS had complied with its statutory requirements.

28. In looking at how SODS addressed Ms. Menon's complaint, we note firstly the communication outlined in Exhibit A-1. Ms. Menon emailed Mr. Abukar on August 1, 2017 requesting a meeting to "resolve serious unit issues." On August 4, 2017, he responded, indicating a willingness to meet, and suggested that the Human Resource manager as well as Ms. Menon's union representative be present. Mr. Abukar also requested information regarding the issues.

29. Further emails within Exhibit A-1 reveal that Ms. Menon considers "the human resource unit is part of the issue." She then submits a formal written complaint to Mr. Abukar on September 15, 2017, not having brought the matter to the attention of the human resource unit as had been requested of her and as is required under the Policy procedures, at page 51 of Exhibit R-7. Why Ms. Menon bypassed the human resource manager in the complaint process is unclear, although she claims to be following the "Special Circumstances" section of the Policy, found at page 52 of Exhibit R-7, indicating her "issue is with the unit manager."

30. The Policy encourages mediation to "reach a mutually beneficial agreement" but where that is not feasible, there are several steps:

1. The employee complainant is to make clear to the alleged harasser(s) that the behaviour/language is unwelcome and must stop.
2. The employee is to speak to her manager and the human resources manager.
3. The employee is to put the complaint in writing, with precision and detail.
4. If the complaint is not resolved by the manager or the human resources manager, the complaint is to be addressed to the executive director for a final determination.

31. Ms. Menon's complaint, Exhibit R-1, was submitted directly to the executive director. The complaint alleges six grounds of discrimination and six grounds of harassment against her by the Employment Services Manager, Ms. Ashraf Mirmontahai. Ms. Menon describes the discrimination as follows:

1. Discontinue and eliminate from the tasks and duties as an Employment Counselor

2. Provide a feeling of demotion by making me perform as a support staff for the other Employment Counselors
3. Deny access to Simple CTS client software, and there by [sic] preventing me from performing my duties efficiently as an Employment Counselor
4. Announce performance review to the entire staff two weeks after initiating my performance review, there by [sic] excluding me in the process
5. Provide reprimand letter for requesting to follow organizational policy for performance review
6. Force my presence while allowing other staff exemptions from attending in the Employer appreciation evening gala after normal work hours causing stress which led me to suffer a motor accident on the same day

32. As to the harassment, Ms. Menon says the following caused her humiliation and distress:

- a. Continue to support the Team Leads (TL) when they threaten verbally or in writing, record one-on-one meeting conversations and support them when they twist and tweak facts
- b. Direct a group of staff to encourage clients to make false complaints about me and send them to the manager's email account, and compelling staff to send false complaints against me
- c. Gang up along with 2 Team Leads to create a threatening environment to force compliance to the manager's view
- d. Use power to punish/discipline on the grounds of insubordination to discourage alternative views and prevent discussions when organizational policies are not followed
- e. Threaten to demote in an administrative position using the grounds of accommodation while undergoing treatment for the motor accident
- f. Exclusively directed to move programs 6 times and asked me to change work stations 6 times in 24 months under the guise of operational needs

33. While it would have been beneficial to have direct evidence from Mr. Abukar as to what precise steps he took in investigating Ms. Menon's complaints—evidence which it appears Mr. Tallmadge gathered in the meeting of January 23, 2018 as outlined at page 2 of Exhibit ADJ-3—considerable information can be derived from both the exhibits and the cross-examination of Ms. Menon.

34. Further, although there were relatively few documents marked as exhibits, and Ms. Menon testified that she had been reluctant to send much documentation to Mr. Tallmadge at

OHS, she had documents with her at the hearing and it is evident that she had provided documents to Mr. Abukar which allegedly supported her allegations. These documents were available to Mr. Tallmadge and form part of the disclosure from OHS through the adjudicator to the parties. Indeed, in Mr. Abukar's letter of February 27, 2018, marked as Exhibit R-9, he references considerable documentation, which was clearly reviewed. This supports the conclusion of Mr. Tallmadge that an investigation was conducted by the employer.

35. Also pertinent are the definitions of harassment found in the Policy and *The Saskatchewan Employment Act*, SS 2013, c. S- 15.1. Section 3-1(1)(l) of *The Saskatchewan Employment Act* defines harassment as:

...any inappropriate conduct, comment, display, action or gesture by a person:

(i) that either:

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

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

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

36. Subsection 3-1(5) then provides:

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

37. The Policy definition of harassment states:

Harassment refers to any objectionable visual or verbal conduct, comment, proposition or display that is directed at an individual that the person knew or reasonably ought to have known would be offensive. The offence may have been on the basis of race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry, place of origin, financial ability or language. This is not an exhaustive list. In the Society, harassment will refer to any of the above carried out by an employee, volunteer, client or supplier of the Society that is directed at any individual or group.

38. The SODS Policy also includes a definition of abuse of power, a concept alluded to in Mr. Eyre's closing argument:

Abuse of power happens whenever a Society employee/volunteer abuses or misuses power and discretion for personal benefit, or in benefit of another person.

- Abuse of power includes situations involving a minor, situations that involve a reporting relationship, or any situation that includes an accusation from a client against an employee or volunteer who is providing a service upon which the client depends. Incidents that involve an abuse of power are considered by the Society as being, generally, of a more serious nature than peer-to-peer situations.

39. Bearing these definitions and qualifiers in mind, a review of Ms. Menon's complaint indicates that the six allegations of discrimination, and two of the allegations of harassment (noted in paragraph 30a. and 30f. above), could relate to employee management. The remaining four (noted at paragraph 30b. through 30d.) are large issues expressed in general terms, for which Mr. Abukar understandably requested further information.

40. Exhibit R-8 contains Mr. Abukar's email to Ms. Menon of October 27, 2017 requesting the additional information. He notes these are "serious allegations" and accordingly desires any "objective evidence" that she may be able to share with him.

41. This approach by Mr. Abukar, in seeking further information, demonstrates that he was indeed investigating Ms. Menon's complaints. Thus, it is difficult to understand how she could conclude that her concerns were being ignored. Under cross-examination, Ms. Menon was asked, "Did they [SODS] refuse to investigate?" She replied, "Good question. Through their actions, I thought they were refusing." Such a conclusion by Ms. Menon is not substantiated when one considers what Mr. Abukar was communicating to her. Also significant is that Mr. Abukar's request to Ms. Menon was in writing, which she testified was her preferred form of communication.

42. Equally difficult to understand is Ms. Menon's testimony that Mr. Abukar "never gave me a chance to tell my side of the story." She suggests, "My side was never heard" both in relation to the internal investigation by SODS and regarding Mr. Tallmadge's review of the matter.

43. Ms. Menon was the complainant. It was open to her, and arguably incumbent upon her, to present to Mr. Abukar and/or Mr. Tallmadge whatever documentation and information she considered pertinent. Yet she elected to hold information back.

44. For instance, regarding Mr. Tallmadge's review, Ms. Menon testified:

I didn't send him any documents, just policy and emails from Ali Abukar about some questions I had, not about the case itself. . .

I didn't send any documents because that was the arrangement. I didn't want documents outside the Open Door Society.

45. In her notice of appeal, Ms. Menon claims that the error of law made by Mr. Tallmadge was:

Complaint was closed without hearing my side or giving me a chance to personally meet with the OHS officials, while the same was given to the employer. Also, after hearing the employer's side, chance was not given to rebut or produce documentary evidence that will support my complaint. I believe employer's version of documents and events need to be verified in my presence giving me a chance to respond.

46. These two positions appear inconsistent. Ms. Menon, on the one hand, seems to have elected not to provide documentation. Now, perhaps because things did not go entirely in her favour, she is suggesting that she was not given the opportunity to provide documents. Given her apparent pattern of not being forthcoming in producing documentation or other supporting evidence, it seems far more likely that she elected not to do remit materials to Mr. Tallmadge.

47. While Mr. Tallmadge's letter of February 1, 2018, Exhibit ADJ-3, seems to have an error in the date in the second paragraph, it is apparent that he had contact with Ms. Menon through email exchanges on several occasions following receipt of her complaint. During the hearing, Ms. Menon testified that on October 2, 2017 she heard from Mr. Tallmadge and they talked "maybe ten minutes" by telephone. While Mr. Tallmadge is free to conduct his inquiry into whether SODS complied with its statutory obligations in whatever manner is most effective, had Ms. Menon requested a meeting, it is unlikely such would have been denied.

48. What was important for Mr. Tallmadge was assessing SODS's response to Ms. Menon's complaint. As such, his letter of February 1, 2018, Exhibit ADJ-1, outlines who he spoke with and the nature of the information gleaned from the meeting of January 23, 2018. He was not

conducting a hearing. He had no obligation to report to Ms. Menon. He had only to satisfy himself that SODS was meeting its statutory obligations.

49. Regarding the investigation by Mr. Abukar, Ms. Menon indicates that in early August, when she was already expressing concerns, she advised him that she wanted to bring a witness who would help to explain her concerns. She said, "I especially told him I would bring a witness—did not give the name." She then says that after he written complaint was filed, September 15, 2017, the witness received a reprimand on September 20, 2017. She says:

"Mr. Abukar never talked to my witness. Instead he was given a letter of reprimand."

50. Ms. Menon's conclusion appears to be that the reprimand somehow related to the willingness of the witness to assist her. There is, however, no evidence of that and I am not prepared to draw that inference.

51. With respect to several of the events about which Ms. Menon is concerned, these include having been moved from program to program, having at one point being declined access to software, and having required attendance at a gala. When it was suggested to her under cross-examination that these were complaints about "working conditions," Ms. Menon responded "No, they were targeted to me. It was not for everybody. It was targeted to me." However, evidence was not presented at the hearing in support of her conclusion.

52. Further, the immediate follow-up question, "Is this related to work and work conditions?" yielded no response from Ms. Menon. She was silent.

53. Regarding her move to a newly created floating position within SODS in early 2017, which relates to the first three items of concern, as well as the last item (quoted at paragraph 32 f), in her September 15, 2017 complaint, Ms. Menon indicated that she had "grave concerns" about this. This is reflected in her email of February 27, 2017 to Mr. Abukar, marked as Exhibit R-2. She testified that she felt there had only been direction given to her in meetings, not an "open conversation." She also felt there was an "imbalance of power" as the Employment Services Unit in which she worked now had two Team Leads, not just one like when she commenced work with SODS.

54. Yet Ms. Menon is not in management. She does not make decisions regarding the organizational structure. That being said, a review of Exhibit R-2 reveals she is able to enunciate concerns, including her view that the new position will leave her skillset under-utilized.

55. However, Exhibit R-2 also reveals that Ms. Menon may not merely let things go if a decision is not to her liking. She “escalated” her concerns to Mr. Abukar, the executive director, and requested opportunity to make a thirty-minute presentation. Whether this was granted or declined is unclear from the evidence. However, the decision regarding the position was unchanged. That this is not to Ms. Menon’s liking does not mean it constitutes harassment. Nor does it make it unreasonable.

56. While not specifically mentioned in the SODS policy, the *Act*, as quoted previously, does note that reasonable actions by an employer relating to management and direction of employees are not harassment.

57. Exhibit R-3 includes email exchanges between Ms. Menon and Ashraf Mirmontahai regarding the scheduling of her performance review. Ms. Menon was given the choice of July 11th or 12th, which enabled six or seven days of preparation given that the email from Ms. Mirmontahai was sent July 5, 2017. Ms. Menon, however, wanted it re-scheduled for July 17, 2017. Ms. Mirmontahai did not permit such a re-scheduling.

58. This performance review scheduling matter, which gave rise to the fourth and fifth items in Ms. Menon’s complaint of September 15, 2017, is also one relating to the management and direction of an employee. As such, it is not included within the definition of harassment and does not constitute harassment.

59. With respect to Ms. Menon’s complaint that she was threatened with demotion due to a need to accommodate her recovery from a motor vehicle accident, quoted at paragraph 32 e, Ms. Menon testified she took two weeks off following the accident, which occurred in mid-March 2017. She then returned to work on a part-time basis and was later offered a different role, an administrative position. While she initially suggested that the offer of the administrative position came with lower pay, she acknowledged that it involved no loss of pay and no loss of benefits.

60. Ms. Menon declined the offer of the administration position, as she felt it would involve too much sitting. She also did not file any grievance regarding the alleged failure to accommodate.

61. If accommodation had been declined, a process under the collective bargaining agreement was available to Ms. Menon. She did not avail herself of this. Further, it appears that SODS was seeking to find a way to support her recovery in the return to work context. Thus, it is difficult to imagine how the offer of an administrative position, with no reduction in pay or benefits, could be considered harassment.

62. From Exhibit R-4, Employment Services Unit: General Performance Evaluation forms for Priya Menon, it is apparent that SODS was needing to see improvement in Ms. Menon's work performance. Ms. Menon testified that a performance improvement plan was provided to her. While she acknowledged receipt of it on July 25, 2017, she felt she had not been given opportunity to express her views on it.

63. This is a recurring pattern. Ms. Menon felt she had not been provided sufficient opportunity for input regarding the organizational structure and the assigned floating position. She felt she had not been given sufficient time to prepare for the performance review. She felt Mr. Abukar had not given her opportunity to address her complaint. She felt Mr. Tallmadge had not provided her with sufficient opportunity to present her concerns.

64. Yet it appears that Ms. Menon is neither hearing, nor taking advantage of, the opportunities that are being given to her. The performance improvement plan is just such an opportunity. So is the invitation extended by Mr. Abukar to provide additional information in relation to the investigation of her complaints.

65. An email to Mr. Abukar from Ms. Menon dated May 1, 2018, marked as Exhibit R-10, assists in explaining why additional information has not been provided. Ms. Menon states, in the closing paragraph:

Ali, I am trying to prove discrimination and harassment where there will not be a direct witness. This is a grey area where an investigator has to infer complainant's day-to-day experiences from different incidents and the pattern of behavior of the person who is discriminating the complainant.

66. Ms. Menon has concluded that she has been subjected to discrimination and harassment. But, an objective consideration of the actions of those in supervisory positions over her, as demonstrated in the exhibits filed, do not substantiate such allegations. In both the policy definition of harassment and that found in the *Act*, there is an objective element required to at least some degree. That is, whether there is harassment includes a consideration of what the alleged harasser knows or ought reasonably to have known. In circumstances such as the present, where attempts were apparently being made to adjust the organizational structure and have Ms. Menon improve in the areas requiring attention, while also enabling her to have a graduated return to work program following the accident, SODS management would not have known, nor could they reasonably have known, that such actions would be regarded as offensive. Further, matters of the management and direction of employees are outside the definition of harassment.

67. An investigator cannot “infer the complainant’s day-to-day experiences” as Ms. Menon is requiring of Mr. Abukar.

68. Based on the somewhat limited evidence before me, it is apparent that the bulk of the concerns raised by Ms. Menon in her complaint of September 15, 2017 are not in the nature of harassment, but rather matters of management and direction of an employee. As such, Mr. Abukar’s focus on four concerns, as outlined in his request for further information (Exhibit R-8) as well as his letter of February 27, 2018 (Exhibit R-9) is appropriate.

69. Unfortunately, the letter of February 27, 2018 does not expressly indicate that the other elements of Ms. Menon’s complaint are outside the realm of harassment. Thus there may well have been some grounds for confusion on her part, leading to her suggestion that she has not received a “final decision” regarding the investigation. However, Mr. Tallmadge’s letter of February 1, 2018, particularly in the first paragraph of the second page, assists in clarifying what occurred.

70. Mr. Tallmadge also notes that additional information had been requested of Ms. Menon by Mr. Abukar. This presumably refers to Exhibit R-8.

71. The February 27, 2018 letter, Exhibit R-9, provides the conclusion that, on the four issues which Mr. Abukar considered to be outstanding as potential claims of harassment, he did not

have evidence which substantiated her complaint. Yet on three of them, he leaves it open to Ms. Menon to provide additional documents or witnesses. It is only on the fourth, the allegation that there was a threat to demote her to an administrative position under the guise of accommodation, is his conclusion firmly stated. He says, "There is nowhere it says you will be demoted or paid less."

72. Mr. Abukar took Ms. Menon's complaint seriously. He investigated, as was required by the policy. He requested further documents and witnesses from her. The four issues referenced in both Exhibits R-8 and R-9 he regarded as particularly serious. It may be implied that he regarded the balance of the issues in her September 15, 2017 letter as those related to performance management and direction to an employee, and thus outside the realm of harassment. It would, of course, have been helpful if he had clearly stated this in his concluding correspondence to her. However, I cannot accept the argument made on behalf of Ms. Menon that she has not received any decision letter from SODS.

73. While a letter more clearly structured than Exhibit R-9 would have been preferable, and Mr. Abukar's testimony at the hearing would have assisted in confirming all that the investigation process entailed, I am of the view that there is sufficient evidence before me to conclude that the respondent, SODS, complied with the applicable legislation.

71. As Mr. Tallmadge had additional documentation available to him, and had the opportunity to hear from Mr. Abukar and others from SODS, the decision letter of February 1, 2018 indicating compliance with OHS legislation, is reasonable and appropriate. The appellant, Ms. Menon, has not met the onus of demonstrating that the appeal should be granted.

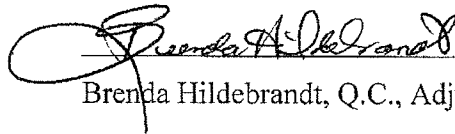
Conclusion

72. 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 determine that Mr. Tallmadge correctly concluded that the policy and investigation process employed by Saskatoon Open Door Society complied with the applicable legislation. Accordingly, the appeal must be dismissed.

VI. Order

73. The appeal by Priya Menon of the February 1, 2018 decision of the OH&S Officer is dismissed.

Dated at Saskatoon, Saskatchewan this 30th 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.