LRB File No. 077-18

In the matter of an appeal to an adjudicator pursuant to ss. 3-53 and 3-54 of *The Saskatchewan Employment Act*

BETWEEN

Saskatchewan Polytechnic Students' Association Inc.	**Appellant**
-and-	
Ryan Benard	**Respondent**

Adjudicator: Gerald Tegart
Counsel for the appellant: Richard K. Gabruch
Counsel for the respondent: Adam R. Touet
Hearing conducted in-person November 19 and 20, 2019, at Saskatoon

DECISION

I. INTRODUCTION

[1] This is an appeal pursuant to ss. 3-53(1) and 3-54(1) of *The Saskatchewan Employment Act* ("the Act") from a decision of occupational health officers dated February 28, 2018, regarding a complaint of discriminatory action brought by Ryan Benard ("the employee") against the Saskatchewan Polytechnic Students' Association Inc. ("the SPSA" or "the employer"). The employee was dismissed on October 3, 2017, following a written complaint he made against the general manager of the SPSA on August 18, 2017.

[2] The occupational health officers' decision (along with a Notice of Contravention) found the termination of employment constituted an unlawful discriminatory action contrary to s. 3-35 of the Act and ordered the employer to cease the discriminatory action, reinstate the employee and pay him any wages he would have earned but for being discriminated against.

[3] The appeal is taken against the entire decision.

[4] No objections were made with respect to my appointment or my jurisdiction to hear and determine the appeal.

II. EVIDENCE

[5] In addition to the oral testimony of three witnesses, there were multiple documents presented in evidence.

[6] The SPSA called two witnesses. Carol Tetrault has been the general manager of the SPSA for roughly twenty years. She was the manager of all of the operations of the organization. She reported to the SPSA board. The employee reported directly to her.

[7] Vann Cortez ("the president") was the president of the SPSA from May of 2017 until April of 2018. Prior to that he was a vice-president on the board for one year.

[8] Ryan Benard gave evidence on his own behalf. Prior to accepting employment with the SPSA, he was employed in a number of jobs involving management responsibilities.

[9] All three witnesses presented as intelligent, thoughtful individuals who were willing to answer the questions posed to them in both direct and cross-examination to the best of their abilities. Insofar as they were recalling the events that are relevant to this appeal, their evidence did not present many, if any, significant contradictions.

[10] The facts central to the determination of the appeal have their beginning with an email sent by the employee to the president and the three other members of the executive council of the employer's board of directors on August 18, 2017. That email contained a formal complaint against the general manager. However, a complete understanding of those facts requires some additional background and context.

[11] The SPSA is a not-for profit membership corporation that represents the interests of students and provides student services at the campuses of Saskatchewan Polytechnic, which is an educational institution in Saskatchewan with campuses in Regina, Saskatoon, Moose Jaw and Prince Albert. The events relevant to this appeal took place primarily at the Prince Albert campus.

[12] The SPSA is governed by a board of directors called a General Council with representation from the four campuses. The bylaws also establish what is called an Executive Council, which, according to Bylaw 9, is to be comprised of the President, the VP Finance & Internal Operations and one VP Campus from each member campus. The executive council carries out the function of a board executive committee to a large extent, with specific responsibilities assigned by the bylaws.

[13] The general council operates principally as a policy or governance board, with responsibility for operations being assigned to a general manager who is responsible for the day-to-day operations of the SPSA. As noted earlier, Ms. Tetreault has been the general manager for approximately twenty years. The executive council also sees itself as a policy or governance

body, although the members of the executive council, in particular the president, are more closely connected to operational issues than the rest of the board.

[14] The employee was hired as the Campus Manager for Prince Albert through a selection process run by the general manager in 2016. He assumed his duties August 19. As campus manager he reported directly to the general manager. His main responsibilities were to manage the activities of the SPSA on the Prince Albert campus, which included two buildings. The SPSA operated ATMs, a coffee shop and a canteen, and provided orientations for students. He supervised three employees. His relationship with the SPSA head office in Saskatoon was maintained largely by phone and email.

[15] Prior to joining the SPSA, he had worked in various jobs, mainly in management positions. He has worked as an operations manager and has experience as a manager on construction sites, including responsibility for matters involving employee issues, occupational health and safety and harassment. He has been a management representative on occupational health and safety committees.

[16] From the perspective of the general manager, she and the employee had a manageable relationship. There were several instances where she indicated concerns over his performance, or perhaps over his conduct, but she also recounted several examples of good performance on his part. The employee had no prior discipline history with this employer before his termination.

[17] The employee's formal complaint on August 18, 2017, does not appear to have been the product of a precipitating event. The employee testified to the concerns he had experienced over the roughly one year he had been employed with the SPSA, focussed mainly on operational and governance issues. However, he also stated that he felt he had been manipulated and bullied by the general manager, although it appears he never made that known to her.

[18] The complaint came as a surprise to the president and, once she was aware of it, to the general manager.

[19] The email containing the complaint was addressed to the president, although it was sent to the entire executive council. In the opening paragraph the employee explained that he was sending the complaint to the entire group because the SPSA did not have a whistleblower policy and its complaint policy (HR-7), which governed complaints against the general manager, was "blatantly…unfair and one-sided". He stated: "I feel that my only option to express my concerns without reprisal is to contact the entire Executive Council as a whole."

[20] The second paragraph essentially listed a series of characteristics of the SPSA that the employee was concerned by: the continued division and segregation of the staff from the board, a lack of transparency and trust, a culture of blatant dishonesty, a continued effort at limited information sharing and segregation tactics, a poisonous culture, an unhealthy work environment, a line drawn between operations and governance, an overall decline in morale

among certain staff members including him, the dismissal of many of his concerns and being belittled for initiating such questions of management. These were largely, if not entirely, concerns about the management and governance of SPSA.

[21] The introductory portion of the third paragraph read:

> The intent of letter is to register an official complaint against Carol Tetreault, General Manager-SPSA, for the following reasons:
>
> > -The mistreatment, manipulation and overall unfair treatment of staff, past and present. Over the last 12 months I have witnessed the use of various bullying and manipulation tactics on multiple staff members including myself. These include the abuse of power, intimidation tactics, limited information sharing (especially in regards to budgets), deceptive behaviours and behaviours bordering on harassment.

[22] The remainder of that paragraph described what the employee saw as managerial shortcomings and inappropriate conduct on the part of the general manager, including blatant dishonesty, the possible contravention of SPSA policies, favouritism among certain staff members, staffing inequalities and conduct around salary increases.

[23] The fourth paragraph read:

> After experiencing this blatant dishonesty on many occasions it has become increasingly difficult to ask any questions about any potential 'red flags' in term of what I would deem questionable business practices. In fear of wrongly accusing anyone, but due to the lack of a reliable source of honest information, I would like to request the opportunity to personally meet. My intent would be to provide detailed specifics of the aforementioned, share more concerns and/or 'red-flags' that I have witnessed over the course of my employment, and to ask some detailed questions to expose or dismiss these concerns.

[24] The employee closed the email by repeating his desire for a conversation about his experience with SPSA.

[25] Counsel for SPSA took both the president and general manager through the details of the complaint in direct examination. Both of them maintained that there was little if any validity in any aspect of the complaint.

[26] The president acknowledge receipt by email dated August 24, 2017, at 3:28 p.m.: "This email is to confirm receipt the formal letter of complaint towards Carol Tetreault, SPSA General Manager, that you have sent. Would you be available to meet personally next week?"

[27] The employee emailed back at 4:13 p.m.:

> Thanks Vann, I fully agree that this is absolutely necessary and I do appreciate you taking the time to address this. Are you aware of which day Carol is coming up to PA next week? I can definitely make myself available on Tuesday for this, providing it does not overlap with Carol

being on-site, and will schedule the 10am-2pm time slot with the hopes that it won't last the entirety. I very much look forward to the opportunity to discuss in detail, this extremely convoluted situation.

[28] The president testified he believed he had responded to this email, although there is no copy of that. He indicated in testimony that he believed it to be vital to have the meeting and was prepared to find a date that would work for both of them to meet. The employee does not recall receiving a reply.

[29] The employee sent a further email on August 26, 2017, to the president and the vice-president finance asking whether the entire executive council had received his complaint and whether the general manager had also been made aware of the complaint and its specifics.

[30] The president sent an email in reply on August 27, 2017, at 12:33 p.m.:

> As per the HR-7 Policy, "…the employee will raise the issue with the President who will convene a meeting with the General Manager, auditor and legal counsel." The lawyer and the auditor has been notified and a meeting is being set.
>
> Let it be reiterated that to grasp of the situation is vital on moving this issue forward. To accomplish this, I have requested, through email last August 25, 2017, a documented narrative of specific events pertaining to the reasons of complaint and agreed to meet you personally in Price Albert. You have indicated in your emails that the situation is convoluted, however it is vital that specific events are brought to light as the reasons stated on the letter are general in nature (i.e. mistreatment, manipulation, contravention of policies and favoritism to name a few). Please site examples and have them sent to myself tomorrow, August 28, 2017 by 4:30 p.m.

[31] The president testified that he didn't think it unreasonable to ask that the details be provided the next day because he assumed the employee had them and was ready to provide them. The August 25 email referred to may be the email the president believes he sent, that the employee doesn't recall receiving and that wasn't introduced in evidence.

[32] The SPSA policy HR-7 referred to in the email and repeatedly in the remainder of this decision is a policy governing formal complaints. It provides in part:

> <u>Policy</u>
>
> The [SPSA] is committed to dealing with employee complaints in a fair and timely manner. All employees shall be given an opportunity to discuss their complaints with management without a fear or reprisal. Employees and supervisors are expected to make every reasonable effort to work together in resolving problems in a respectful and fair manner.
>
> <u>Procedure</u>
>
> Employees shall informally discuss their complaints with their immediate supervisors. If the complaint is not resolved to the employee's satisfaction, the employee may formally raise the problem with the General Manager.

Should the employee's concern be directed at the General Manager, the employee will raise the issue with the President who will convene a meeting with the General Manager, auditor and legal counsel.

[33] At 3:35 p.m. on August 27, the employee sent a further email:

Thank you for your reply however, it did not address the question that was asked. Due to the serious nature of the first complaint I listed, and the fact that I have been requested to provide specifics in an electronic format prior to a face to face meeting; It is imperative to the confidentiality that I am entitled to under such circumstances, to know if Carol Tetreault has been made aware of the details of this complaint prior to disclosing anything further. Please advise, and I look forward to an open and honest face to face discussion regarding, not only the harassing behaviours that I feel I am being subject to, but also the other serious items that I detailed in my complaint.

[34] The president promptly responded by email at 4:29 p.m.:

To clarify my response, Carol has not been notified due to incomplete information that I have about the issue. Further, notification and meeting request will be done after all the complaints are specified.

I understand your concern on providing the written examples prior to our face to face meeting. To address that, would you be more comfortable to hand a copy during our face to face meeting? A heads up, I will make notes during our meeting that I could use for reference. Either way, I will have something in writing and it would be easier for us to have you submit one, as it is your firsthand experience. Please confirm whether you agree to hand in documented specific example during our face to face meeting.

[35] The next day, August 28, at 12:37 p.m., the employee sent a lengthy further email to the president and two of the vice-presidents on the executive council:

Good Afternoon All,

I am writing this email to re-iterate my commitment to handling this serious issue internally; however, I am very concerned with how this has all progressed. As indicated in the below email thread, the recent reply from the President makes reference to policy HR-7 and how it is being progressed as per policy, and then the statement is changed when clarification is requested as to who may be aware of this situation.

I am definitely concerned that there may be some type of misunderstanding that the policies and bylaws of this organization somehow supersede Saskatchewan Labour Law and my entitlement (and that of every other SPSA employee) to a harassment-free workplace. I feel that there is a lack of clarity in the aforementioned reply from the President, an obvious lack of a mandated Harassment policy that would protect my confidentiality by law and initiate a proper investigation/procedure for this type of situation, and I feel there is a legitimate concern for my confidentiality in this specific situation. I feel as though my only option is to seek advice from a harassment officer (in lieu of incurring personal expenses to seek out legal counsel) with the Saskatchewan Labour board, prior to any further disclosure of information, and to protect my rights as a worker. Further to this, I believe that there is an unhealthy and inappropriate access to staff email accounts and personal calendars (without just cause) within the @spsa.ca domain, and

feel that there could be a potential for privacy issues with this, including this entire correspondence that has been shared via this domain, thus far.

Due to the lack of this provincially mandated Harassment policy, and unfortunately through no fault of your own, this organization is in direct contravention of this important labour law to protect the rights of all of your workers. It may be advisable to determine who is potentially liable for contravention of Saskatchewan Labour Law. Should the entire Executive Council be willing to meet me in person to discuss these harassment-related concerns, with specifics provided only in complete trust of confidentiality; I would still prefer to address this internally prior to pursuing the options available to protect my rights as a worker that are currently not being protected, as well as the reputation of the SPSA as a whole.

Please advise how the Executive Council would prefer to proceed with this serious matter.

[36] The president responded by email the next day, August 29, with copies to the other members of the executive council:

> On behalf of the Executive Council, we share your commitment to handling this issue internally. The council recognizes that SPSA is bound by all the applicable Saskatchewan laws and acts and as such, following the receipt of your letter August 23, 2017, the council has sought the advice of the Legal Counsel to ensure that we are fully informed and cognizant of the rights of SPSA employee as they relate to Saskatchewan legislation. The council is still waiting for the advice of the Legal Counsel as of the writing of this email.
>
> We sincerely appreciate your continued correspondence, as well as our shared desire to address these concerns internally. At this time, given that we have not yet heard back from our Legal Counsel, the President continues to be open to meeting with you to discuss the issues and concerns that you have brought forward. We believe that such a meeting is necessary to work towards a mutual understanding of the concerns that have been brought forward and look forward to connecting with you to accomplish this.

[37] On August 30, 2017, at 11:39 p.m. the employee replied to the president and the other members of the executive council:

> I appreciate your reply, however I feel that there is not a full understanding of the gravity of this situation. It is clear that this Executive Council does not have the experience, background, or appropriate training to handle a situation of such serious nature. This had been demonstrated by the string of events that have unfolded over the past 10 days.
>
> I maintain that I would be open to meeting with the entire EC to discuss any of the other elements of my formal complaint, outside of the harassment aspect, as this will undoubtedly require outside assistance. As a gesture of your commitment to a harassment-free workplace for ALL of your employees, who are a part of the SaskPolytech Community, might I suggest contacting Val Morrissey – Harassment Consultant for SaskPolytech.
>
> When the entire EC is prepared to meet as a group to discuss the other SPSA business concerns, I would be happy to make myself available. As per previously detailed concerns, I believe that such a meeting is the only way to work towards a mutual and full understanding of the seriousness of the concerns I am eager to bring forth.

[38] On September 8, 2017, the president emailed the employee and the general manager, with a copy to the SPSA lawyer, referring to the employee's complaint against the general manager and advising the president would be following what he considered the requirements in SPSA policy HR-7. In pursuance of that, he indicated he was scheduling a meeting in the lawyer's offices in Saskatoon on September 13 at 10:00 a.m. for the employee, the general manager, the president and the SPSA lawyer. The email added:

> Ryan, please provide me with dates and details of the particular issues you are alleging against Carol no later than Tuesday, September 12, 2017, at noon. I will then circulate the information to the attendees such that they can review same in advance.

[39] This appears to be when the general manager was first informed of the complaint.

[40] The employee did not provide the requested information. Late in the morning of September 12, 2017, he sent an email to the president with copies to two of the vice-presidents:

> I will not be available for this meeting. I have been advised that due to the nature of my first complaint (of harassing behaviours towards multiple SPSA staff members) listed in the official complaint registered against Carol Tetrault, that this meeting demand is completely inappropriate and therefore I will not attend. I will also reserve all documentation for my full co-operation in a complete and proper harassment investigation, when that time comes.
>
> Further to this, I am extremely concerned that your lawyer is advising you that SPSA policies & bylaws supersede Saskatchewan Labour Law and my right to confidentiality under such circumstances. You have confirmed in your email below that my confidentiality has been breached. I am in the process of seeking my own legal advice in this situation.

[41] He closed by advising he would be absent from work until September 18, 2019, and attached a medical certificate in support of that.

[42] On September 17, 2017, at 3:55 p.m. the president emailed to the employee, with copies to the SPSA lawyer and two of the vice-presidents, calling another meeting on September 19 at 10:00 a.m., adding:

> I have received your email declining the meeting last September 12, 2017 and the doctor's note. The meeting has transpired with myself, Rich and Carol as scheduled. In order to move forward, please provide me with dates and details of the particular issues you are alleging against Carol no later than Monday, September 18, 2017, at noon. I will then circulate the information to the attendees such that they can review same in advance.

[43] The employee sent an email in reply on September 18 at 2:43 p.m. indicating he would not be attending the meeting because he was still waiting for legal advice.

[44] On September 19, 2017, the president sent an email headed "Final Call to Meeting", with copies to the SPSA lawyer and the other members of the executive council:

I write to advise that the meeting previously scheduled for today has, due to your communicated non-participation, been set over to next Wednesday, September 27, 2017, commencing at 10:30 a.m. at Gabruch Legal Group….

You must send me full particulars of your complaint not later than noon on Monday, September 25, 2017. The material will be distributed to the other attendees of the meeting in advance of the meeting.

Please note the following:

1. We are complying with our organization's policies in proceeding as we have to date; your non-participation is contrary to what policy would obligate.

2. We will not reschedule this meeting again; if you fail to attend then your actions will be considered insubordination and you may be terminated from your employment for same without any further notice.

3. Our organization expects business as usual in the interim.

Please confirm receipt of this email by email reply.

[45] The employee replied by email to the president the next day, September 20, with copies to the other three members of the executive council:

I am writing to inform you that due to the unnecessary stress incurred not only over the last month's events (or lack thereof), but also due to the bullying and harassment that I have been subject to over the last 10+ months while working for the SPSA under Carol Tetreault; I have been advised by my doctor that I need to take some time away from work, for my own personal well-being. As per the attached doctor's note, I will be away from work for the next two weeks.

On Monday, Sept 18th, I had advised EC that I am in the process of seeking my own legal advice for this situation, as I'm sure you all can appreciate, since it took approximately 2 weeks to receive a reply from your lawyer. Less than 24 hours later, another meeting demand has been issued, except this time with a tone of intimidation and a threat of termination due to insubordination. The fact that I am not being asked to schedule a meeting to confidentially discuss the details of my complaint, but rather told to attend a meeting with the alleged harasser (and someone that I have never met, but have only heard Carol describe as "a close personal friend that would do pretty much anything for me, or the SPSA"; and to provide detailed proof beforehand in order to be scrutinized at the meeting), would seem highly inappropriate and should be concerning to all of EC. Further to this, there has never been any sort of investigation into the claims that I have made, I am simply being told to provide all my documentation of these allegations to the accused, and her lawyer without the aid of a neutral party or external mediator.

….

I look forward to an eventual open, honest and productive discussion about the basis of my complaint, however I will not do so in the presence of Carol Tetreault or your lawyer. Please contact me anytime…should you want to schedule such a meeting.

[46] A medical certificate was attached, indicating the employee should be off duty up to and including October 2, 2017.

[47] On the afternoon of October 2, the president phoned the general manager and advised her that the executive council had met and had made the determination to dismiss the employee. He instructed her to prepare a letter of dismissal on behalf of the executive council and deliver it to the employee. She drove to Prince Albert on October 3 and met with the employee to deliver the letter of dismissal, dated that same date, over her signature. It read, in part:

> The Saskatchewan Polytechnic Students' Association (SPSA) Inc. Executive Council has voted to terminate your employment effective immediately. As per Article 5.1.3 of your Employment Contract you have been terminated for cause due to your continuous refusal to comply with SPSA HR 7 – Employee Complaints Policy.

[48] In oral testimony, the president stated that the executive council as a whole made the termination decision. On cross-examination he was referred by counsel to the reference in the letter of dismissal indicating the dismissal was "…due to your continuous refusal to comply with SPSA HR 7". When asked in what way the employee had failed to comply with the policy, the president explained (and I am paraphrasing) that the whole intention of the policy is to address, in this case, the complaint against the general manager. The employer can't process that complaint without specifics and therefore can't implement the policy. Therefore, the employee's refusal to cooperate in the investigation in the manner directed by the employer is essentially non-compliance with the policy.

[49] Why the parties took the steps they took between the time the complaint was made and the employee was dismissed is answered in large part by the emails themselves. However, oral evidence, in particular from the president and the employee, provided further insights.

[50] The employee testified he understood he was complaining of harassment, among other things. The president testified he wasn't certain whether the complaint did include allegations of harassment. He recognized the complaint contained words suggestive of harassment but he didn't believe it was specific enough to categorize the complaint as a harassment complaint. Consequently, he asked the employee for more details. He acknowledged that the complaint itself indicated the employee's desire to meet and provide detailed specifics of his complaint. He also acknowledged that the employee's subsequent emails reinforced the employee's assertion that the complaint included harassment, although he still didn't feel he could reach a conclusion without getting further details from the employee.

[51] He also understood from the complaint that the employee feared reprisal for bringing the complaint. He agreed the early email exchange with the employee made it clear the employee was prepared to meet but did not want the general manager to be present and that he subsequently repeated his concerns around confidentiality.

[52] The president continued to press the employee for details despite the employee's repeated concerns about the process and his desire to speak with a harassment officer and to seek legal advice because he felt he was bound by SPSA policy to pursue the complaint and he needed specifics from the employee to do that.

[53] He advised the general manager of the complaint on September 8, 2017. This was the first time the general manager was aware of the complaint. To this point he had protected the employee's confidentiality. He informed the general manager because he concluded he had to have a meeting that included both the general manager and the employee in order to comply with policy HR-7 and the employee had indicated he was not prepared to provide further details. He had to move the matter forward and the next step was to call a meeting in accordance with the policy.

[54] When asked why he didn't simply dismiss the complaint at this point, since the employee wasn't willing to provide specifics, the president indicated that the complaint involved serious allegations and he had an obligation to obtain further details, as a matter of due diligence, in order to carry out his responsibilities. He needed to address the situation and couldn't dismiss the complaint without knowing the specifics and having a process to pursue the complaint.

[55] With respect to the employee's attendance at a meeting called pursuant to the policy, the president said he viewed the employee's attendance at the meeting as mandatory according to the policy. In order to discuss the complaint, the employee must be in attendance. He acknowledged the policy doesn't specifically require the employee to provide specifics of the complaint but believes it is implied. Similarly, although the policy doesn't specifically require the employee to attend the meeting, in the words of the president, "he needs to be there".

[56] When asked why a lesser form of discipline wasn't imposed, the president indicated the executive council decided termination was the only way they could proceed. They had advised the employee through the September 19 email that the provision of specifics and his participation in the meeting required by policy HR-7 was necessary and that his failure to attend would be considered insubordination and would have consequences including the possibility of termination. When the employee failed to provide the requested information and failed to attend the meeting, that constituted insubordination justifying his dismissal.

III. LEGISLATIVE FRAMEWORK

[57] The Act includes several relevant provisions related to discriminatory actions by an employer:

> 3-1(1) In this part…:
>
> …

(i) "discriminatory action" means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes termination….

3-35 No employer shall take discriminatory action against a worker because the worker:

(a) acts or has acted in compliance with:

(i) this Part or the regulations made pursuant to this Part;

(b) seeks or has sought the enforcement of:

(i) this Part or the regulations made pursuant to this Part;…

(f) refuses or has refused to perform an act or series of acts pursuant to

section 3-31….

S. 3-36…(2) If an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 3-35, the occupational health officer shall serve a notice of contravention requiring the employer to:

(a) cease the discriminatory action;

(b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;

(c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and

(d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.…

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

(a) in any prosecution or other proceeding taken pursuant to this Part, there is a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 3-35; and

(b) the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason.

[58] S. 36 of *The Occupational Health and Safety Regulations, 1996* ("the regulations") place requirements on employers to develop and implement harassment policies:

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

(a) a definition of harassment that includes the definition in the Act;

(b) a statement that every worker is entitled to employment free of harassment;

(c) a commitment that the employer will make every reasonably practicable effort to ensure that no worker is subjected to harassment;

(d) a commitment that the employer will take corrective action respecting any person under the employer's direction who subjects any worker to harassment;

(e) an explanation of how complaints of harassment may be brought to the attention of the employer;

(f) a statement that the employer will not disclose the name of a complainant or an alleged harasser or the circumstances related to the complaint to any person except where disclosure is:

(i) necessary for the purposes of investigating the complaint or taking corrective action with respect to the complaint; or

(ii) required by law;

(g) a reference to the provisions of the Act respecting harassment and the worker's right to request the assistance of an occupational health officer to resolve a complaint of harassment;

(h) a reference to the provisions of The Saskatchewan Human Rights Code respecting discriminatory practices and the worker's right to file a complaint with the Saskatchewan Human Rights Commission;

(i) a description of the procedure that the employer will follow to inform the complainant and the alleged harasser of the results of the investigation; and

(j) a statement that the employer's harassment policy is not intended to discourage or prevent the complainant from exercising any other legal rights pursuant to any other law.

(2) An employer shall:

(a) implement the policy developed pursuant to subsection (1); and

(b) post a copy of the policy in a conspicuous place that is readily available for reference by workers.

IV. ISSUES

1. Did the employee engage in activities that come within the ambit of s. 3-35 and that could be the reason for his termination?

2. Did the employer take discriminatory action against the employee?

3. Was the termination for good and sufficient other reason within the meaning of s. 3-36(4)?

V. ANALYSIS AND REASONS

1. Did the employee engage in activities that come within the ambit of s. 3-35 and that could be the reason for his termination?

[59] In answering this question in the affirmative, I adopt the reasoning of Adjudicator Wallace in *Re Calow and Cypress Health Region*, 2017 Carswell Sask 719, at para. 43:

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

[60] Applying this reasoning assumes, of course, that the complaint made by the employee in the instant case constituted a complaint of harassment, which the employer disputes.

[61] The employer points to the fact that much of the complaint relates to operational or management issues not related to harassment. Insofar as the employee has used words consistent with allegations of harassment, the employer says there was insufficient detail to determine whether the complaint was one of harassment.

[62] The written complaint contained in the August 18, 2017, email contained language that, at the very least, suggested some of the conduct complained of constituted harassment. This should, on its own, have prompted the employer to treat the complaint as one of harassment until it could determine it was not. That the employee meant to make a harassment complaint was repeatedly confirmed by the employee in his subsequent emails to the employer. His August 27 email indicates he considered his complaint to deal with "harassing behaviours that I am being subject to" as well as "the other serious items that I detailed in my complaint". His August 28 email spoke of his entitlement to a harassment-free workplace and the lack of a "mandated Harassment policy". He stated his intention to seek advice from a harassment officer with the labour board and his willingness to meet with the executive council to "discuss these harassment-related concerns with specifics provided only in complete trust of confidentiality". On August 30 he suggested a meeting with the executive council to discuss "any of the other elements of my formal complaint, outside of the harassment aspect" and suggested they contact a named "Harassment Consultant for SaskPolytech". His September 12 email referred to his complaint "of harassing behaviours towards multiple SPSA staff members" and indicated his intention to "reserve all documentation for my full co-operation in a complete and proper harassment investigation, when the time comes". Finally, his September 20 email referenced "the bullying

and harassment that I have been subject to over the last 10+ months" and his unwillingness to meet "with the alleged harasser".

[63] It is entirely clear the employee meant to complain of harassment and that he made that intention clear to the employer, first in the initial written complaint, but more emphatically in the subsequent correspondence during the period prior to his termination.

[64] In conclusion on this issue, when the employee made his complaint in August of 2017, he was, in the words of the adjudicator in *Calow*, engaging the employer's statutorily required harassment policy and asking the employer to deal with what the employee considered to be harassment. In doing so, the employee was seeking enforcement of the Act and regulations.

2. Did the employer take discriminatory action against the employee?

[65] The term" discriminatory action" is normally thought of as pejorative. As defined in s. 3-1(1)(i) of the Act, it is merely descriptive of an employer action. The definition specifically includes termination. Therefore, the termination of the employee constituted discriminatory action within the meaning of s. 3-35.

3. Was the termination for good and sufficient other reason within the meaning of s. 3-36(4)?

[66] Given the affirmative answers to the first two issues, the onus is on the employer to establish that the employee was terminated for good and sufficient other reason. The employer argues the evidence establishes this.

[67] The original letter of termination dated October 3, 2017, advised the employee his termination was "due to your continuous refusal to comply with SPSA HR 7 – Employee Complaints Policy". In his testimony on cross-examination, the president explained the executive council reached its decision to dismiss the employee based on his insubordination. It would appear the insubordination consisted of his unwillingness to comply with the demands from the executive council, delivered through the president, that the employee provide particulars supporting his complaint and attend a meeting to be held in compliance with policy HR-7.

[68] In its written argument, the SPSA asserted:

> The SPSA had a duty to investigate the complaint and acknowledged that duty, however, the Complainant's actions made it impossible for it to follow its own policy and/or to carry out its legislated duty to investigate the complaint and attempt to resolve the situation. The repeated failure by the Complainant amounted to insubordination.
>
> The Complainant was warned that his refusal to cooperate with the investigation constituted insubordination and that as he continued to refuse to cooperate, SPSA had and still has sufficient

> reasons for terminating his employment. The insubordination and subsequent termination was not related to him having made the complaint.

[69] The written argument references s. 3-10(c) of the Act, which requires every worker while at work to "cooperate with any other person exercising a duty imposed by this Part or the regulations made pursuant to this Part":

> The Complainant was in breach of his duties under s. 3-10(c) of the Act in that he was required to cooperate to allow the SPSA to exercise its duties in investigating and attempting to resolve the complaint and he repeatedly refused to do so. Both the SPSA President and the Complainant confirmed that several requests were made for specific incidents and that none were ever provided. If he claims that he was pursuing the matter under the Act, then he was obliged to cooperate: he failed.
>
> The Complainant's actions were not justified as he was not entitled to dictate or direct the investigation process.

[70] The written argument continues with assertions that the employee's concerns over reprisal and confidentiality were unjustified. It relies as well on the employer's oft-repeated position that it was never established that the complaint was a harassment complaint:

> At the time of the receipt of the Complainant's complaint, harassment was not specifically alleged…. The SPSA had the right to seek additional information in order to attempt to determine … the true nature of the complaints and how to best deal with the complaint. The Act or Regulations did not yet apply – as it was unknown to the SPSA that actual harassment had been complained of.

[71] I do not find these arguments persuasive. The general sentiment of the employer's position is that it was genuinely and reasonably pursuing a process for considering the employee's complaint, while the employee was unreasonably resisting participation in that process. That position is not supported by the evidence.

[72] As indicated in the analysis respecting the first issue, the evidence establishes that the employee meant to complain of harassment and that he made that intention clear to the employer through the initial written complaint and his subsequent email correspondence with the employer.

[73] Once that complaint was made, the employer had an obligation to establish an objectively reasonable process to investigate the complaint. While I agree with the employer's assertion that the employee had an obligation to participate in the investigation, and that it was not the employee's prerogative to dictate the manner in which the investigation should proceed, the employee was entitled to expect his reasonable needs would factor into the employer's management of the investigation.

[74] The relationship between employer and employee in this process is not the direct equivalent of the relationship between management and worker in relation to the worker's daily responsibilities in the workplace. In those circumstances the manager can expect the specific

direction it gives to the worker to be followed, and failure to do so may be grounds for discipline. However, where a harassment complaint is being investigated, the interests of the worker making the complaint must be considered and, within reasonable boundaries, respected.

[75] This employee expressed his needs in relation to the investigation very clearly.

[76] The employer could have conducted a meaningful investigation through other processes. For example, if it had engaged the support of an independent investigator, the conflict that developed with the employee may have been avoided. Instead, the employer rigidly followed what it determined its complaints policy required.

[77] The complaints policy (HR-7) begins with a statement of the employer's commitment to "dealing with employee complaints in a fair and timely manner". Fairness here surely means fairness for everyone concerned, including the employee making the complaint.

[78] Presumably because all other complaints would, in the ordinary course, come to the general manager if not informally resolved, the policy specifies that an employee complaining against the general manager "will raise the issue with the President who will convene a meeting with the General Manager, auditor and legal counsel". The employer considered this meeting to be an essential step in the investigation and interpreted it in a way that came under scrutiny in the hearing. First, there is nothing in the policy saying the employee must attend the meeting. There is also nothing stating the employee must provide written details of his complaint prior to the meeting for consideration at the meeting. Yet, both of these were considered mandatory requirements by the employer and factored directly into the decision to terminate the employee.

[79] There is no question the employee presented a challenge for the employer in the management of his complaint. However, by and large, his requests and the positions he took were not unreasonable. Among other things, he asked for a process that would give him a degree of comfort with respect to his concerns over confidentiality and reprisal. He asked the executive committee to consider the advice and participation of an independent third party. He requested time to do his own consultations with a lawyer and individuals knowledgeable about harassment. When he became stressed by the process, he sought medical advice and took the advice of his physician to spend time away from work.

[80] Perhaps as significantly, when he was pressed by the employer to participate in the investigation in a manner he disagreed with, he explained why he disagreed.

[81] This is not to say that it is not ultimately the employer's responsibility to determine how it will investigate, provided it complies with the legislative requirements. But the employer did not take sufficient steps here to at least attempt to provide an appropriate process that would meet the employee's needs as well as those of the employer.

[82] The president stated in his evidence that the complaint involved serious allegations that the employer needed to examine. The employer argues that the employee's failure to participate in that examination was insubordination that justified his termination. Yet, in taking the action to terminate the employee rather than working to find the means to continue the investigation in a manner that met both the needs of the employer and those of the employee, the employer itself effectively brought an end to an investigation that, according to its own assessment, it needed to conduct.

[83] Considering the entire series of exchanges between the employer and the employee from the time the complaint was made on August 18, 2017, until the employee was terminated on October 3, I conclude that the employee met the reasonable expectations of him in the investigation of his complaint and the employer's decision to terminate him was, in contrast, unreasonable. I therefore cannot find that the employer's reasons for terminating the employee amounted to "good and sufficient other reason".

[84] Therefore, the appeal is to be dismissed, subject to the consideration of the principles of mitigation set out in the Act.

VI. MITIGATION

[85] Having found the termination was not for good and sufficient other reason, I turn to consider s. 4-6 of the Act, and subss. (2) and (3) in particular:

> 4-6(1) Subject to subsections (2) to (5), the adjudicator shall:
>
> (a) do one of the following:
>
> (i) dismiss the appeal;
>
> (ii) allow the appeal;
>
> (iii) vary the decision being appealed; and
>
> (b) provide written reasons for the decision to the board, the director of employment standards or the director of occupational health and safety, as the case may be, and any other party to the appeal.
>
> (2) If, after conducting a hearing, the adjudicator concludes that an employer or corporate director is liable to an employee or worker for wages or pay instead of notice, the amount of any award to the employee or worker is to be reduced by an amount that the adjudicator is satisfied that the employee earned or should have earned:
>
> (a) during the period when the employer or corporate director was required to pay the employee the wages; or
>
> (b) for the period with respect to which the employer or corporate director is required to make a payment instead of notice.

(3) The employer or corporate director has the onus of establishing the amount by which an award should be reduced in accordance with subsection (2).

[86] Counsel for the union referred me to *City of Regina v Regina Civic Middle Management Association*, 2014 CanLII 86901 (SKLA). That decision involved an arbitration respecting a grievance under a collective agreement and the calculation of damages in lieu of reinstatement. The principles that apply in such cases are based on the case law created by arbitrators and courts considering similar situations. In the instant case I must make a determination based first on the rights and obligations set out in the Act, and in circumstances where the employee is entitled to be reinstated.

[87] The employee's termination was effective October 3, 2017. The evidence establishes that he earned $18,308 in 2018 and had no income in 2019 up to the point of the hearing, as he returned to school and provided services to his spouse's company without receiving compensation for those services.

[88] Subs. (2) requires me to reduce the award of wages by both the amount the employee earned plus what he "should have earned". Subs. (3) places the onus on the employer to establish those amounts. To meet this onus, it is not enough for the employer to point to the apparent employability of the employee and ask me to conclude that he should have found appropriate employment. This is particularly so because there is a continuing order requiring the employer to reinstate the employee. The employer is effectively asking me to determine that the employee should have concluded the order would never be given effect and should have treated his separation from the SPSA workplace as permanent. With that knowledge, the employee should (according to what I assume is the employer's position) have sought to re-establish himself in a different employment situation.

[89] This ignores the legal reality established by the order of the occupational health officers. Under that order, the employee was entitled to be reinstated. By dismissing the appeal, I am reinforcing and continuing that order for reinstatement. While one might reasonably expect an employee in circumstances such as these to find ways to earn other income, it is also reasonable to expect the employee to organize his affairs based on the assumption the order for reinstatement would eventually be given effect. By exercising its right of appeal, which it clearly was entitled to do, the employer has increased the amount it will have to pay to the employee pursuant to the original order as confirmed on the appeal, and that amount will continue to increase until the employee is reinstated or the parties reach an agreement to resolve the matter. While that may seem unfair to the employer, it reflects the framework of rights and responsibilities established by the applicable legislation.

VI. ORDER

[90] This order is issued pursuant to s. 4-6 of the Act.

[91] Subject to the following variation concerning the mitigation of damages, the appeal is dismissed. The amount of the award of wages to the employee as set out in the February 28, 2018, decision of the occupational health and safety officers is reduced by $18,308.

"G. Tegart"	"April 13, 2020"
_____	_____
Gerald Tegart, Adjudicator	Date