LRB File No. 203-19

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

BETWEEN

International Women of Saskatoon Inc. **Appellant**

-and-

Ivette Gonzalez **Respondent**

Adjudicator: Gerald Tegart
Counsel for the appellant: Andrew Mason
Respondent represented herself
Hearing conducted in-person January 23 and 24, 2020, 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 an occupational health officer dated August 14, 2019, regarding a complaint of discriminatory action brought by Ivette Gonzalez ("the employee") against International Women of Saskatoon Inc. ("IWS" or "the employer"). The employee's employment was terminated on December 31, 2018, following communications she had with the IWS president (i.e. board chair) concerning the conduct of the executive director.

[2] The occupational health officer's decision (along with a Notice of Contravention) found the employee's termination 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 her any wages she would have earned had she not been wrongfully discriminated against.

[3] The employer's notice of appeal asks for an order setting aside the findings and conclusions of the officer, the notice of contravention and the order for relief made by the officer.

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

II. EVIDENCE

[5] The employer called three witnesses and introduced several documents in evidence. The first witness was Ijeoma Nwamuo, who has been the IWS executive director since 2008. She is the chief executive of the IWS and, as such, has overall responsibility for the operation of the organization. She reports to the IWS board of directors. All employees of the IWS report ultimately to her. The employee reported directly to her. She was responsible for hiring the employee in September of 2018 and she made the decision to terminate the employee on December 31, 2018.

[6] The second employer witness was Aasa Marshall, who was the IWS volunteer president and chair of its board of directors during the relevant period.

[7] The third employer witness was Wei Zhang, who also goes by Daisy. She was a member of the IWS board during the relevant period.

[8] The employee gave evidence on her own behalf. She also called Kamrul Huda, who is and was the Manager Skills Development & Community Connection Programs. He gave evidence of his observations and experience working with the executive director and certain events that occurred during the relevant period.

[9] Her final witness was Grant Zhang. Mr. Zhang was hired by IWS as a bookkeeper in early 2018 and promoted to Acting Account Manager later that year, a position he occupied during the relevant period. There were numerous points of contact between him and the employee because of their particular responsibilities.

[10] IWS is a not-for-profit settlement and immigration agency headquartered in Saskatoon. It employs roughly forty people, although that number fluctuates depending on funding and other factors. The organization's operations are entirely dependent on outside funding, most of it from the provincial and federal governments. It has a small number of managers and as of September of 2018 was in the process of negotiating its first collective bargaining agreement.

[11] Like most such organizations, IWS operates with a board of directors that has responsibility for policy and governance, with a chief executive, in this case the executive director, who is responsible for the operations of the organization under the governance of the board.

[12] The events material to this appeal occurred primarily in 2018, commencing with the process to hire the employee in late August and September and ending with the employee's termination on December 31. There were some follow-up activities in early 2019 that provide some additional explanation and context.

[13] The executive director hired the employee as the Acting Human Resources/Policy Manager in September to backfill a maternity leave. The "scope of the work" for which the position was responsible was described in the job description attached to her offer of employment:

> Reporting to the Executive Director, the HR/Policy Manager is a key member of the Management team who holds accountability for the administration of the HR Policies, Procedures, Programs and Practices including: staffing; recruitment and retention; employee compensation and benefits; employee and labour relations; learning, training and development; occupational health/safety and wellness; sustainability plans and other policies and regulatory compliance requirements.
>
> The incumbent is responsible for overseeing all the HR/Policy Management strategies, driving improvement in employee satisfaction, formulating policies that are consistent with the Organization's overall goals and direction, ensuring compliance with legal and government reporting regulations and promoting organizational effectiveness.

[14] The executive director and the manager whose position was being backfilled interviewed the employee for the position in late August. She was identified as a likely candidate and her reference checks were carried out. At that point they had concerns about the employee's suitability for the position based on the input from the references. They decided to raise that directly with the employee and, being sufficiently satisfied with her response, made an offer on September 7, which she accepted that same day. She commenced work on September 19.

[15] The term of the employment offered and accepted was September 19, 2018, to March 31, 2019, with the possibility of "renewal based on performance and availability of funding". A probationary period of twelve months was stipulated.

[16] The executive director developed concerns about the employee's performance early on. One of the first significant tasks she wanted performed was the development of a workplan and the employee seemed to find it difficult to accomplish that. She did provide a workplan for the month in early November that the executive director approved. However, according to the executive director's testimony, the work in the plan was never carried out.

[17] She also wanted the employee to begin developing the policies required to support the new relationship the organization needed to develop with the union as they negotiated their first collective agreement, and the employee didn't appear to be moving that forward.

[18] They began to have disagreements over specific work issues. One such disagreement involved the use of sick time. Another involved the use of the organization's vehicle. Another related to deductions on another employee's pay cheque. Another to an error in attributing an employee's work to the wrong funder. Another respecting a conversation with a union representative.

[19] The executive director had a background in human resources and, according to her testimony, she began to take on some of the employee's tasks that weren't otherwise getting done. She also felt she needed to re-do or correct the employee's work too often.

[20] The employee's perspective on this was different. She acknowledged she didn't do everything perfectly but attributed some of that to insufficient training. She didn't feel overwhelmed or that she couldn't do the work required of her.

[21] The executive director came to believe the employee wasn't listening to her and was resistant to receiving advice or criticism. She felt the employee was sometimes behaving in a passive aggressive manner.

[22] On December 14, the employee visited the president's office and expressed a number of concerns to the president concerning the executive director's treatment of employees. The meeting was summarized in an email from the president to the other board members dated December 15 at 8:05 a.m.:

> I'm writing to let you know that I had a concerning meeting yesterday with the HR manager (Ivette) that has taken over during Katie's maternity leave. Grant brought some cheques by my office (as usual) for me to sign, and she came with him because she wanted to talk to me, and wasn't sure how else to contact me.
>
> Once Grant was out of the room, Ivette brought up a number of concerns about Ijeoma's treatment of employees. She said since she started three months ago, she has observed behaviour that she thinks is unprofessional and unacceptable. This includes yelling at and intimidating staff, and speaking about former staff that have left the organization in front of remaining employees (she gave the example of hearing her say she wanted to "destroy" and "finish" an employee who had left the organization). She described some of Ijeoma's actions as "textbook" workplace intimidation. Though she said none of this behaviour has been directed at her personally, she felt she needed to speak up on behalf of other employees.
>
> Ivette said that in her HR career she's never found herself in the situation where she felt she had a "duty to report", but in this case it was warranted. Because she is a manager and the only person she reports to is Ijeoma, she felt that the only place she could raise her concerns was with the board.
>
> She was very sincere, nervous, and at times in tears while she was telling me her concerns. She acknowledged that Ijeoma (of course) doesn't always act this way, and that she knows that she is good at her job and works hard for the organization, but these types of things have happened enough in a short amount of time that she felt it needed to be addressed. She said she has no desire to see Ijeoma leave the organization, but thinks it is very important that this sort of behaviour stop, for the health and best interests of IWS employees.
>
> She also said that she has documented some behaviours, and that she wants to speak to Ijeoma herself about these things to bring them to her attention in the hopes of working them out. She was nervous, though, about how that meeting might go, and so wanted to disclose her intentions to the board (via me) before going to Ijeoma so we were aware of her concerns and her intentions. She said she would send me an email outlining the behaviour that is causing her concern, and would let me know once she has spoken to Ijeoma.
>
> I feel Ivette was being honest with me, and I'm grateful that she brought this to my attention. I told her that I would pass her information onto the rest of the board, and that we would discuss how we want to address this. I, too, know how hard Ijeoma works and how vital she is to the organization; however, we will certainly need to talk to her about this and make it clear that certain ways of dealing with employees are unacceptable. Of course, we will also need to hear Ijeoma's side, but I feel Yvonne (sic) would have no reason to come forward if she didn't have legitimate concerns.
>
> Please keep this confidential (as always) for now until we can talk as a group about how we'd like to go forward with this. I know we weren't planning to meet again until the end of January, but we

may need to discuss this as a group without Ijeoma present early in the new year to decide how best to approach it with her, and what some possible solutions might be.

I welcome any and all of your thoughts about this and how we should move forward.

[23] Two of the board members sent emails in reply later that day, indicating their support for a serious examination of the issues raised by the employee.

[24] On December 15 at 10:05 a.m., the employee emailed the president:

Upon further reflection (I have given this much thought), I have decided the best course of action is to manage this at our level within the organization. I believe it is possible. If you could hold off on any action that would be appreciated. I will definitely reach out if need be.

[25] The president replied within minutes:

… I need to inform you that I have already passed along information about our discussion to the rest of the board, and we have begun discussions about meeting to talk about possible solutions.

If you would prefer that we not bring this up with Ijeoma currently I will pass that along to the other board members. Regardless, I think it is good that you have informed us of the issues so we are aware. We will not take this to Ijeoma immediately – please let me know when you have spoken to her, how the meeting goes, and any suggestions you have for us going forward. Can you give me an idea of when you plan to have this discussion with her?

Thank you again for coming forward about this; we are here to ensure the health of the organization as a whole, and will do what we can to make sure that it is a healthy environment for everyone.

[26] The employee replied saying she'd be asking for a meeting with the executive director that week.

[27] The president sent an email to the board on December 16 proposing a meeting of the board without the executive director on January 14.

[28] On December 19, the executive director emailed the employee and proposed a meeting between the two of them on December 31 at 2:15 p.m. "to go over your performance for the period, Sept. 19 to Dec. 31, which is about 3 and half months". The email suggested this "would be an opportunity for you to self assess where you are with your assigned tasks, what else you need to perform your tasks and for me to provide feedback based on my observations".

[29] In the late afternoon on December 21, the employee and executive director had a disagreement at work concerning the pay a part-time employee was entitled to. The executive director had agreed to allow her to split one of her shifts to accommodate other personal needs, such that she worked just two hours on one particular day. The employee believed this was not in compliance with the labour laws. They disagreed and argued about it.

[30] The executive director testified that she phoned the president that evening to discuss the employee. According to an email from the president to other board members on December 23,

which is included below, the executive director advised the president that she could no longer "work with or trust Ivette". The executive director testified she suggested to the president that someone from the board should attend the planned meeting with the employee on December 31, but that the president suggested she should go ahead on her own.

[31] The executive director testified that, at the time of the telephone conversation with the president, she had decided the employee was not a good fit and would have to be dismissed. She did not communicate that to the president.

[32] At 7:46 that same evening, the executive director sent a further email to the employee changing the time for the December 31 meeting to 10:00 a.m. and expanding it to a two-hour meeting.

[33] The next day, December 22, at 9:43 a.m., the employee sent an email to the executive director expressing her concern about the executive director's conduct in relation to this interaction and other previous interactions. She criticized the executive director for comments the executive director had made to her and said the executive director had yelled at her. The email read, in part:

> This is now the second time you have raised your voice/yelled at me when we have had a disagreement, and I have clearly told you that yelling does not work for me.
>
> The first time this occurred it was pretty serious. I know you must have realized this because you apologized to me for that twice in the following conversation we had…. When I stated that I am all about passion and strength (which you clearly have) but yelling doesn't work for me, I also stated that going forward if we have a disagreement I would like to discuss things instead.
>
> The comments you said yesterday that are upsetting to me are as follows:
>
> > There were other people in this job before you and we never had this problem
> > You're not being flexible and I need you to be flexible in this position
> > You need to have an open mind and you do not
> > You are preventing managers from doing their job
> > Why don't you ever bring up if someone has more hours than they are supposed to
> > You are being passive
> > I don't have time for this
>
> I stated that you were raising your voice and escalating matters and I asked you to stop.
> …
> After last night's incident I was upset because I can see a pattern of behavior that appears to have gone unchecked for so long, I am not sure if you are fully aware of how unacceptable this is in a work place.
>
> When we have a negative interaction like we did yesterday, and I go home feeling disappointed and frustrated and then I see that the very next email I receive from you the same evening is referring to my upcoming performance review, I can't help feel that it is an attempt to intimidate me.
> …
> I would still like to have this discussion/meeting regarding my concerns prior to my performance review so you cannot say that I only raised my concerns due to whatever transpires in this meeting.

[34] The executive director replied by email within about 90 minutes. She commended the employee for setting out her concerns in writing, but indicated her disagreement with the employee's version of what had occurred. She said the employee had been disrespectful toward her in the presence of other employees and was being passive aggressive and dishonest. The executive director's email included the following:

> Ivette, as long as you continue to undermine me, refuse to do your job properly and be passive aggressive in your interactions with me, I shall call you out on it and be emphatic about it. You have no basis to cry wolf when all you have done since you started this position is not add much value to the Organization and yet you refuse to take feedback on how you can do better. Your behaviours frustrate me too and so I go home, upset and trying my best to ignore the things you do.
>
> I had sent you an email about your performance review and it took you 3 days to respond, or even acknowledge that email; I had to send a reminder yesterday and what do you? You want to cause a distraction with these allegations. It is possible that if you did your job well and performed to the standard of a Manager, in the true sense of the expectations for the position and that includes having an open mind and a more balanced approach to solving issues that impact on the organization's well being, may be, you and I would work well.
> …
> PS: I had done and continue to do a lot of the tasks that you should have been doing as the Acting HR/Policy and that means, doing my own job and your job at the same time, while all you do is add to our workload by refusing to be an effective support system to the other Managers. IWS pays in full for not doing nearly half of the work that you are hired to do and so when I refuse to continue to accept that, you turn the story around.
>
> Yes, we will meet as scheduled and I shall lay out all my observations so that the record is set straight.

[35] At 11:50 that evening the employee emailed the president to advise her about the interaction the previous afternoon:

> As promised I wanted to give you an update as to what has happened since we last spoke/emailed. Things have escalated. Yesterday, there was an interaction between Ijeoma and I that was very upsetting. I sent her an email to convey how I was feeling about this interaction and she subsequently responded. Her response is very disconcerting.
>
> I have attached the documents for your review and to provide context.
>
> I am not going to counter her email as there are serious allegations/claims against me (about things I said and/or did that are not true) and she has made some very hurtful comments. I do not feel comfortable meeting with her at this point in time after reading her response.
>
> I just want to make clear that I asked her for a meeting before her initial email regarding a performance review with me, as well I came to see you before I ever knew she was going to request to meet with me regarding my performance.
>
> I am open to any questions, and discussions regarding how to proceed with this.

[36] Her email attached the email exchange between her and executive director earlier in the day.

[37] The president replied the next day offering to have some of the board members attend the meeting between the employee and executive director. The employee replied, thanking her for the offer, but saying she would go ahead on her own. She indicated the meeting was scheduled for December 31.

[38] On December 23, the president sent an update to the board by email. She apparently attached the email exchange between the employee and executive director, referred to her call from the executive director two nights previous and related the executive director's description of the interaction on the afternoon of the 21st. She said the executive director had said multiple times that "she can't work with her". The remainder of the president's email read, in large part:

> She also said that Ivette accused her of yelling, but from Ijeoma's perspective she is being "emphatic" – I also understand that people's perspectives can shape their interpretation of a situation, but it's clear the communication between them has broken down. Ijeoma said she asked Ivette to have a meeting on December 31st to talk about her performance and some of the concerns she has…. On the phone with Ijeoma I had encouraged her to sit down with Ivette to have an open conversation about the disagreements they've had and to clear the air and get on the same page – I told her that it was important to do this with an open mind and without some of the assumptions she has about Ivette and her motivations. The way she was speaking about her however (saying she doesn't listen, puts up walls, refuses to understand how the organization works) makes she (sic) think that it wouldn't be possible for that meeting to be productive without some kind of third party there to mediate.
>
> I'm very concerned about this situation, and I'm not sure where to go from here. I'm worried that Ijeoma simply wants to fire Ivette, and I don't feel that is warranted nor the proper course of action.
>
> In her email, Ivette says she's open to any discussions about how to proceed, and I have to admit I'm not sure what to tell her. If anyone has suggestions please let me know! I will keep you up to date if I hear from either of them over the next few days.

[39] Several of the board members replied. It was the general consensus that the matter needed to be treated seriously. They also agreed with the president that the employee should not be dismissed at this time.

[40] The president emailed the board on December 30, indicating she hadn't heard an update as to whether the December 31 meeting was going ahead.

[41] The December 31 meeting between the executive director and the employee did proceed, in a classroom at the IWS offices. At that meeting, the executive director provided the employee with a 21-page Probationary Review Report plus 128 pages of exhibits to the report. She left the employee for more than an hour to read through the report. When she returned to the room where the meeting was taking place, she delivered a termination letter. The executive director stated in giving her evidence that the employee wanted to talk to her at that point but that she didn't remain in the room because she didn't feel safe with the employee.

[42] In her testimony at the hearing, she stated that, on December 31, when she delivered the termination notice, she was not aware that the employee had made any complaint to the board. She said she made the decision to terminate based on performance issues.

[43] According to the president's testimony, the employee phoned her on January 1 and told her she'd been dismissed. She asked to meet with the board. The president and Daisy Zhang subsequently met with her in a coffee shop and "mostly listened". According to Ms. Zhang, they thought it was important for the board to be open to advice, including from the employee.

[44] The board considered whether to intervene in the termination decision. After hearing from the executive director, they determined not to. The president said the board agreed with her decision, and that it was important that the executive director be able to work with the other managers.

III. LEGISLATIVE FRAMEWORK

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

> 3-1(1) In this part…:
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> …
>
> (i) "discriminatory action" means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes termination, layoff….
>
> (l) "harassment" means any inappropriate conduct, comment, display, action or gesture by a person:
>
> (i) that either:
>
> (A) is based on race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; or
>
> (B) subject to subsections (4) and (5), adversely affects the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated; and
>
> (ii) that constitutes a threat to the health or safety of the worker….
>
> (4) To constitute harassment for the purposes of paragraph (1)(l)(i)(B), either of the following must be established:
>
> (a) repeated conduct, comments, displays, actions or gestures;
>
> (b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, that has a lasting, harmful effect on the worker.

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

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….

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

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

(a) cease the discriminatory action;

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

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

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

(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.

[46] S. 36 of *The Occupational Health and Safety Regulations, 1996* ("the regulations") places 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. ANALYTICAL FRAMEWORK

[47] In the recent decision of *Banff Constructors Ltd. v Arcand*, LRB File No. 184-19, dated April 28, 2020, I outlined fairly extensive reasons for an analytical framework for this type of appeal. I won't repeat those reasons here, other than to provide a brief explanation.

[48] An appeal that comes to an adjudicator from a decision of an occupational health officer, where that decision is based on ss. 3-35 and 3-36 of the Act, will be determined in large part by

the specific wording of those sections. In order to find a contravention of s. 3-35, the adjudicator must be satisfied that the employer took discriminatory action against the employee - "worker" within the language of these provisions" - because the employee engaged in protected activities, i.e. the activities described in that section. To state the obvious, there are three elements that must be established – that the employer took the discriminatory action, that the employee engaged in protected activities, and that the discriminatory action was taken because the employee engaged in those activities.

[49] S. 3-36(4) contains a presumption and a reverse onus. Once the first two elements are established, the third is presumed, i.e. "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 s. 3-35". The onus then shifts to "the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason".

[50] Consequently, there are generally three broad issues to be determined in appeals of this kind:

1. Did the employee engage in protected activities, i.e. activities that come within the ambit of s. 3-35?

2. Did the employer take discriminatory action against the employee within the meaning of that term as defined in s. 3-1(1)(i)?

3. If the first two questions are answered in the affirmative, was the discriminatory action taken for good and sufficient other reason within the meaning of s. 3-36(4)?

[51] The employee will bear the onus of proving the first two. Because of the presumption and reverse onus, the employer will bear the onus of establishing the discriminatory action was taken for a reason other than because the employee engaged in the protected activities, i.e. for good and sufficient other reason.

V. ANALYSIS AND REASONS

1. Did the employee engage in protected activities, i.e. activities that come within the ambit of s. 3-35?

[52] The answer to this question in the instant case is not as obvious as it commonly is in appeals of this type.

[53] The evidence and argument presented at the hearing focussed primarily on the employee's complaint to the president concerning the executive director's conduct as a possible exercise of a protected activity. That complaint, insofar as it was articulated prior to the employee's dismissal on December 31, was set out by the employee in the meeting on December 14 and the subsequent emails she sent to the president.

[54] The second communication from the employee that may be considered an exercise of a protected activity is the employee's December 22 email to the executive director following their discussions on December 21.

[55] I find it necessary to consider the two independent of one another because I find, as a fact, that the executive director was not aware of the complaint to the president when she dismissed the employee on December 31. The executive director testified to this effect at the hearing and this is supported by the president's testimony and the various emails sent by the employee, the executive director and members of the board during the relevant period. The employee asked, or at least intimated, that she did not want the executive director to know of her complaint yet and the board was willing to maintain that confidentiality.

[56] Not every complaint constitutes the exercise of a protected right. However, a complaint of harassment does. In complaining of harassment, an employee is seeking enforcement of the Act and the regulations pertaining to harassment, which is an activity protected by s. 3-35.

[57] The complaint to the president dealt with a variety of matters concerning the executive director's conduct. Much of it relates to operational or management matters that would not constitute harassment. However, there is sufficient detail in the complaint pertaining to conduct that could constitute harassment to lead to a conclusion that the complaint can be characterized as a complaint of harassment, thereby engaging the protections provided by s. 3-35 of the Act.

[58] In particular, the president's December 15 email summary of the initial discussion with the employee includes allegations that the executive director's conduct included "yelling at and intimidating staff", actions that she characterized as "textbook workplace intimidation". She apparently stated that the behaviour had to stop "for the health and best interests of IWS employees".

[59] For the conduct alleged here to constitute a complaint of harassment, it must meet the definition of harassment in s. 3-1(1)(l) as qualified by subss. (4) and (5). I conclude the conduct complained of is potentially "inappropriate conduct, comment [or] action that…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…that constitutes a threat to the health or safety of the worker". I also conclude the conduct complained of qualified as "repeated conduct" and meets the requirements of subs. (4). Finally, I find that the allegations do not amount to a "reasonable action" by an employer as set out in subs. (5).

[60] Consequently, I find that the complaint to the president constituted the exercise of a protected right.

[61] Moving now to the December 22 email to the executive director, I find that this communication did not constitute an allegation of harassment. The email itself states the "yelling" only occurred on two occasions, which does not in these circumstances amount to the "repeated conduct" required by s. 3-1(4)(a) and also doesn't meet the clause (b) requirement of "a single, serious occurrence of conduct, or a single, serious comment…that has a lasting harmful effect on the worker". The employee's email suggests her concerns were for the

employees and the organization as a whole, rather than the personal impact she felt from the yelling. As she said in the email: "After last night's incident I was upset because I can see a pattern of behavior that appears to have gone unchecked for so long, I am not sure if you are fully aware of how unacceptable this is in a work place."

2. Did the employer take discriminatory action against the employee within the meaning of that term as defined in s. 3-1(1)(i)?

[62] Yes, and this was acknowledged by the employer.

[63] 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. Termination is one of the actions specifically included in the definition.

3. If the first two questions are answered in the affirmative, was the discriminatory action taken for good and sufficient other reason within the meaning of s. 3-36(4)?

[64] The issue I am called upon to determine on this appeal is not whether the executive director's actions constituted harassment. Having found that the employee exercise protected rights in complaining to the president, I must now consider whether the employer dismissed the employee for "good and sufficient other reason".

[65] The fact an employee makes a complaint pursuant to s. 3-36(1) of the Act, even where it's established that he or she had engaged in a protected activity and the presumption and reverse onus kick in, does not insulate the employee from the possibility of termination. The employee is only protected from discriminatory action where that action is taken *because* the employee engaged in the protected activity, subject to the comments below concerning the phrase "good and sufficient other reason".

[66] As set out earlier, I have found that the executive director was not aware the employee had complained to the president when she dismissed the employee on December 31. Consequently, the dismissal cannot have been because the employee engaged in the protected activity of complaining to the president. Furthermore, the executive director explained in detail, both in her oral testimony, but also in the probationary review report prepared for the December 31 meeting, that she made her decision to terminate the employee because of her determination that the employee did not meet performance expectations. In the words of the report, "[the employee] has shown that she is unable to meet the desired outcomes of the position and as such, she is not the right fit for the position". She also concluded she and the employee were essentially not compatible. The president spoke of the executive director's repeated statements in their phone call the evening of December 21 to the effect that she could not work with the employee.

[67] As noted earlier, I found the December 22 email from the employee to the executive director did not constitute an allegation of harassment and therefore did not meet the first

requirement. However, if I had found that the email did constitute an allegation of harassment, and therefore an exercise of a protected right, I would have additionally found that the employer had met the onus to establish the executive director did not dismiss the employee because of the exercise of that right. The email may have served to confirm for the executive director that it was time for her to act; however, I accept the executive director's evidence that she made the decision to dismiss the employee for the reasons set out in the previous paragraph.

[68] The reverse onus in s. 3-36(4) doesn't simply require the employer to rebut the presumption, but to do so by establishing "that the discriminatory action was taken against the worker for good and sufficient other reason". What is "good and sufficient other reason"?

[69] It is not to be equated with "just cause" in relation to wrongful dismissal, although I suggest a dismissal for just cause would meet the test of good and sufficient other reason. However, I am not required to determine that here.

[70] The rights granted to employees by ss. 3-35 and 3-36 are in addition to the rights employees normally enjoy based on a contract of employment and the common law principles related to wrongful dismissal. One of the important additional rights is the right to reinstatement set out in s. 3-36(2).

[71] For a discriminatory action, including termination, to have been taken for good and sufficient other reason, the action must not be arbitrary and must be objectively reasonable. This is not to say the decision made by the employer must be the same decision the adjudicator (or the occupational health officer in the original decision) would have made if placed in the employer's position at that time. There may have been several options for action when the termination decision was taken that would have been objectively reasonable. The question is whether this is one of those options.

[72] I find that the termination based on the considerations advanced by the employer was a reasonable option and therefore good and sufficient reason within the meaning of the reverse onus. The performance issues cited by the director could reasonably justify her decision. They were set out in significant detail in the probationary review report and expanded on in the executive director's oral evidence. I need not assess each element of the executive director's explanation to determine that her decision could be a reasonable option. Additionally, the apparent failure in the relationship between the executive director, established by the executive director's testimony and corroborated by evidence from the president and several of the emails exchanged among the various players, explains an additional reasonable reason for the decision to terminate.

[73] For the foregoing reasons, I find the employer has satisfied the onus of establishing the termination of the employee was not because she had engaged in protected rights, but was an action taken for good and sufficient other reason. The appeal will be allowed.

[74] Before concluding, I should comment on the fact the president and other members of the board were apparently not in favour of a decision to dismiss the employee at the time the executive director took that action. I would simply observe that it was not their decision, and

that their wishes were not communicated to the executive director. In her testimony, the president stated that, while she became concerned about the possibility the executive director would terminate the employee when they spoke by phone on December 21, she did not tell the executive director that the employee had complained to her and she did not ask the executive director not to fire her. She also stated that the concerns expressed by the other board members who did not want the employee dismissed were not communicated to the executive director. It was the executive director's decision to make.

VI. ORDER

[75] This order is made pursuant to s. 4-6 of the Act. The appeal is allowed. The decision of the occupational health officer and the notice of contravention are quashed and set aside.

Dated at Regina this 6th day of May, 2020.

"Gerald Tegart"
Gerald Tegart, Adjudicator