

**LRB File No. 282-19**

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

**BETWEEN**

**Ryan Ross**

**Appellant**

**-and-**

**Saskatchewan Indian Gaming Authority**

**Respondent**

**Adjudicator: Gerald Tegart**

**Appellant represented himself**

**Respondent represented by Sarah Bridgette**

**Hearing conducted by Zoom November 19, 2020**



## **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 November 27, 2019, regarding a complaint of discriminatory action brought by Ryan Ross ("the employee") against the Saskatchewan Indian Gaming Authority ("SIGA" or "the employer"). The employee's allegations of discrimination arise from disciplinary measures and a performance evaluation following a complaint made by the employee on October 30, 2018.

[2] The employee believed the disciplinary measures and what he perceives as an unsatisfactory performance evaluation constituted discriminatory action on the part of the employer and referred the matter to an occupational health officer as provided for by s. 3-36(1) of the Act. An investigation was conducted.

[3] The occupational health officer's November 27, 2019, decision determined that the measures imposed by the employer were not due to the employee's complaint but were instead based on his conduct in the workplace. It also determined that a review of the employer's investigation into the employee's complaint wasn't warranted.

[4] The employee appealed that decision and the parties agreed to have the appeal heard by way of a Zoom hearing on November 19, 2020. The evidence considered at the hearing included the material provided by the Director of Occupational Health and Safety pursuant to s. 3-55(b) of

the Act, which was previously provided to both parties, plus the employee's 2018-19 performance evaluation and oral testimony introduced by the parties at the hearing.

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

## **II. BACKGROUND, EVIDENCE AND FINDINGS OF FACT**

[6] The employee, Ryan Ross, testified on his own behalf. Sarah Bridgette, who is the Director of Employee Relations at SIGA, testified on behalf of the employer.

[7] The facts giving rise to the employee's decision to refer this matter to an occupational health officer pursuant to s. 3-36(1) of the Act began in the late morning of September 8, 2018, when the employee was working his 11:00 a.m. to 7:00 p.m. shift as a bartender at SIGA's Dakota Dunes Casino south of Saskatoon. A bit before noon, the employee noticed what he described as an older man pacing back and forth. He asked after the man and was told he had arrived with a friend and the friend had apparently left with the vehicle the two had arrived in. The employee suggested the man should call someone.

[8] About an hour later the employee encountered the man again and was told he wasn't able to make a long-distance call because his wallet was in the friend's car and he had no identification or money. The employee arranged for him to make a call from the casino's front desk and suggested he take the casino's shuttle to Saskatoon.

[9] Another hour passed and the employee again encountered the man, who told the employee the shuttle wouldn't take him because he had no identification and no casino player's card. The employee found this unacceptable and phoned to the manager on duty ("MOD"), Michelle Kristoff, to engage her help. The employee told Ms. Kristoff the situation and said the decision to not allow the man to ride the shuttle was wrong. Ms. Kristoff disagreed with his assessment of the casino's responsibility for the man. He hung up on her, according to him because the man was again wanting his attention.

[10] Ms. Kristoff contacted Senior Operations Manager Bryce Cameron and explained what had transpired. Mr. Cameron came to the employee's work area and led the employee into a private room along with Ms. Kristoff and the employee's supervisor, Teresa Hards. Mr. Cameron was critical of the employee's conduct and his treatment of Ms. Kristoff. According to the employee, he intimidated the employee and told him he needed to "know his role". Mr. Cameron sent the employee home.

[11] The employee ultimately complained to the employer through an October 30, 2018, email to Michele Wuttunee, an employee relations consultant. The email read (without editing):

On September 8th I was working 11 a.m to 7 p.m. I noticed a man pacing back and forth and asked him if he was alright. He told he he was looking for a younger man and after he explained who it was I told him i haven't seen him for at least an hours time. He told me the younger man was his friend and that he lived in Humbolt and that his friend drove away with his wallet. It was about

1145 when he told me this. I told him he could use our phones to call a friend he said ok and left to the front phones on the wall for customers.

About 12:45 I see him again and he tells me they don't call long distance so I called the front desk for him and asked them to let him use there phone which they said alright. I also told him that he could probably get on the 1:15 shuttle to get back to the city which he said that would be perfect because it would be easier to get a ride home from the city because he lived in Humbolt .. so he went on his way. About an hour later I again see this man wandering around so I ask him what's going on. He said that he wEnt up front and tried to get on the shuttle but because he didn't have a players card and that he couldn't get on and because he didn't have any I.D at all that they couldn't let him get a new card. So I called front desk again and they told me the same thing that he didn't have I.d so they couldn't get him a card. So I called MOD which was Michelle K at the time and told him about the man. Which she replied yes Ryan me and Bryce already know about him and have talked to him and that Bryce gave him another option that would allow him to get back into the city. "Which was to call the RCMP so that he could charge his friend with theft and that they would give him a ride back" the man said he didn't want to charge his friend ....Bryce refused to let him on the shuttle because he didn't have a PC Card or photo I.D and that our policy states he wasn't allowed on.. I asked why? And Michelle told me that it's not our responsibility because he didn't come here on the shuttle and that he found his own way out there. I told her that he's a paying customer that spent money on alcohol and gambled and they I thought he were responsible for him which she quickly said no we are not responsible so I said alright " well you need to come deal with this guy" and I hung up the phone.

Well no longer than 5 minutes later I see Bryce and Michelle walking towards the bar and Bryce snaps his fingers at me and tells me to follow him into the MPR room. So I followed and as we were going in he saw Teresa and told her to follow.

Once inside he started visibly shaking because he was upset and started telling me that I should never have talked to Michelle like that and told her that she needed to come deal with this man. Well at that point he made everyone stop and made me look at him and flexed his arms up at his side and started shaking them with closed fists and said "You need to know your roll" I said ok Bryce and I started to ask why we weren't letting this man who spent money here on the shuttle. He and Michelle again told me that we weren't responsible for him because he didn't catch the shuttle out to the casino. and I again mentioned that he was a paying customer and Bryce started getting upset again visible upset and told me t stop and look at him and again he told me while squeezing his fists and shaking his arms at his side that I needed to "slow my roll and That I needed to know my roll". I again said alright ok Bryce and he started to get mad about another incident that occurred a week earlier where a customer was verbally attacking me and I told the customer that I'm human too and that he has no right to talk to me that he way he was. Bryce then told me that I wasn't allowed or shouldn't be calling MOD which Michelle said no I can still call MOD if I needed too. Then after that Bryce told me that he was upset and wanted me to go home, and again he made everyone stop and look at his and he squeezed his fists lifted his arms up to his side and said "You need to know your roll" and then told me if I did this again that he would have me fired for insubordination. I said alright and he said the main reason was because I asked why!

Well I have a few things to point out here. First off this man tried to intimidate me 3 times by squeezing his fists and lifting his arms up and telling me that I need to know my roll. He made us all stop so he could do this... There was no Human Resources involved in this.

He broke Sigas code of ethics about fair treatment of customers as this man was a paying customer who spent money at our Casino.

He did knowingly break the law to uphold a policy in which I have seen him break before by letting people on the shuttle who didn't have proper I.D or a PC Card..

He broke when he made this man stay at the Casino with no photo I.D at all until around 9 pm when someone finally came to pick this man up...

And to top this off about 1 week later this older man and his friend came to the Casino again and the older man told me he was upset stilll about what the Casino did to him and about an hour later the older man was removed from the casino because he was name calling at the poker tables and didn't want to listen to security about it. 30min after that he started a garbage can on fire and security had to subdue the man until RCMP arrived to take him away...

I am absolutely disgusted in the way and manor in which Bryce handed this situation and lost all respect for him. He for whatever reason should discrimination and unfair treatment against this man and could have easily solved this before it got out of hand by simply letting the man on the shuttle in the first place... There are many people involved in this that think Bryce should be shamed of himself for the way he treated this man.

I look forward to a response about this and would hope an investigation would follow given that Bryce is held to the same code of ethics and the Law as we alll are.

[12] The employer launched an internal investigation into the employee's allegations. Ms. Bridgette testified that the employee was reluctant to participate, and the employee explained he was reluctant to do so because he was afraid of the influence Mr. Cameron had in the workplace.

[13] James MacGowan, who is a Security and Surveillance Investigator at SIGA, conducted the investigation, which included interviews with Mr. Cameron, Ms. Kristoff and Ms. Hards, a review of a video and a review of the employee's corrective action file. He prepared a written report dated December 14, 2018. The report included the following conclusions and recommendations:

Conclusion:

Ross may or may not have deserved to be sent home. However, when an employee is disciplined by being sent home there has to be more paper work than a note in Kronos.

There is no excuse for three Managers/Supervisors to pull an employee off the floor for a meeting.

Recommendation:

I do not believe it is good practice to have an angry employee cash out.

Employee Relations Recommendations:

1. It is recommended that both James and Sarah meet with Ryan to review the complaint (occurring December 27, 2018 @ 1500hrs) and the concerns brought to Employee Relations with respect to Ryan not returning calls or e-mails regarding the complaint he brought forward.
2. It is recommended that Ryan reviews the Employee Code of Conduct policy and the expectations towards respectful workplaces and reviewing the definition of insubordination in the workplace.
3. It is recommended that Ryan's Kronos schedule be adjusted to return the four hours of LWOP to him.
4. It is recommended that Bryce Cameron receive a verbal/written warning on file to include:
  - o Inappropriate use of positional influence - the conversation should have occurred between Ryan's Food & Beverage Coordinator, or the Manager on Duty, but not all three positions. This has been viewed as intimidation towards a front-line employee. The interaction also had no specific purpose, and resulted in Bryce using his authoritative powers to send an employee home with no paperwork to support the action.
  - o Failure to follow SIGA's corrective action guide - no paperwork, no Human Resource Representative

[14] Ms. Bridgette testified that she and Mr. MacGowan met with the employee in January of 2019. Based on the investigation and their interview with the employee, Mr. Cameron was disciplined, but was not dismissed. Mr. Ross testified that he believed Mr. Cameron's employment should have been terminated.

[15] The employer determined that the employee's conduct on September 8, 2018, also warranted discipline. Ms. Bridgette testified that the employee remained accountable for his own conduct, despite having made a complaint against Mr. Cameron.

[16] On April 11, 2019, two letters were delivered to the employee. One was from Ms. Bridgette, advising him that the investigation into his complaint had been completed. It stated, in part:

Re: Conclusion to Investigation

This letter is to inform you that an investigation has been completed through Employee Relations at Central Office into the complaint that you made against a conversation between yourself and the Senior Operations Manager at the Dakota Dunes Casino in September 2018.

Based on the investigation, your complaint has been reviewed, and a conclusion has been made that there was inappropriate conduct between yourself, and the Senior Operations Manager. Through the investigation, It was determined that your complaint was in violation of SIGA's Employee Code of Conduct Policy A04-601 which states the following:

Employee Code of Conduct Policy (A04-601)

Strive for professional excellence in performing jobs, with skill, honesty, care and diligence;  
Treat all individuals with dignity and respect; and  
Undertake appropriate and professional conduct in the workplace.

Guiding Principle - Miyo-wicéhtowin

The value of getting along with others is embodied in the word Miyo-wicéhtowin. By conducting our business in a manner that reflects our First Nations hospitality, traditions and customs, we are able to foster good relations with others.

Ryan, I would like to advise you that as a result of the investigation, appropriate recommendations have been made to address this complaint, and we now consider this complaint closed. I would also like to thank you for bringing your complaint forward, but would like to remind you for future, that participation is required once a complaint is received, and your lack of response to my communications sent to you significantly delayed the complaint process, and delayed the organizations opportunity to respond to the complaint in a timely manner.

...

I would like to thank you for bringing these matters to my attention and I trust that you will advise your Department Manager, Human Resources, or myself if you have any questions or any further concerns.

[17] The second letter was signed by Reid Gibson, the Food & Beverage Manager at the casino. It issued a formal written warning. The letter in its entirety read:

RE: Written Warning

I am meeting with you today to go over a code of conduct concern that I feel needs to be addressed at this time. As you are a valued team member within the Food & Beverage Department, I am here to support you in correcting the concerns identified below. Today, I am formally issuing you a written warning for your behavior and professionalism during a patron inquiry on September 8, 2018.

I find that you have neglected the expectations for your position in the following ways:

Code of Conduct Violation — Insubordination

- September 8, 2018 — You were called to the MPR to discuss the circumstances surrounding a patron who was denied entry onto the Shuttle. During this discussion with the Senior Operations Manager, it has been identified that your behaviour within this meeting was unacceptable. Ryan, your impolite behavior and disrespect violates SIGA's Code of Conduct Policy and Guiding Principles.

Failure to participate in the investigation process:

- You failed to respond to the Director of Employee Relations' requests for contact and further clarification during the investigation process which ultimately delayed the investigation timelines.

Employee Code of Conduct Policy (A04-601)

- Strict adherence to the policy;
- Strive for professional excellence in performing jobs, with skill, honesty, care and diligence;
- Treat all individuals with dignity and respect; and
- Undertake appropriate and professional conduct in the workplace.

Guiding Principle - Miyo-wicéhtowin

The value of getting along with others is embodied in the word Miyo-wicéhtowin. By conducting our business in a manner that reflects our First Nations hospitality, traditions and customs, we are able to foster good relations with others.

Ryan, I take this concern seriously and I need to impress upon you the importance of ensuring policies and procedures are adhered to in order to run a successful department. Failure to correct these behaviours for your position will result in further corrective action, up to and including termination of employment.

Should you wish to appeal this corrective action, you must submit your appeal in writing to Gary Daniels, General Manager via e-mail or fax within seven (7) days of receiving this letter. Your appeal must state the reasons why you deem this written warning unfair or unjust. Your appeal can be submitted by fax or email to [gary.daniels@sigask.ca](mailto:gary.daniels@sigask.ca).

If there are any personal matters you are dealing with, which are impacting your ability to perform your job duties with care, I strongly encourage you to make use of our Employee & Family Assistance Program to obtain assistance. Please contact Shepell directly at 1.800.387.4765; [www.workhealthlife.com](http://www.workhealthlife.com); or on their APP: My EAP.

Ryan, I want you to understand the seriousness of this situation; being able to make informed decisions in a positive way and respecting those that are there to support you is of the upmost importance for a healthy work environment. If there is anything else I can do to assist you, please let me know.

[18] On April 17, 2019, the employer issued a "Corrective Action Form" to the employee. It cited September 8, 2018, as the date of the incident and described the incident as "inappropriate conduct and communication between Mr. Ross and Senior Operations Manager".

[19] In his testimony during the hearing, the employee argued that his conduct on September 8 was justified because of his concern for and responsibilities to the casino patron who had been refused a ride on the shuttle. He said this was in part because of the duty he understands a bartender owes to patrons to whom he serves alcohol. He denies treating either Ms. Kristoff or Mr. Cameron in an inappropriate manner.

[20] SIGA managers do annual performance evaluations on the employees for whom they are responsible. The evaluations are based on the organization's fiscal year, which is April 1 to March 31. The employee's formal written evaluation for fiscal year 2018-19 was signed by Teresa Hards, the Restaurant Bar Coordinator at the casino, on April 13, 2019. He received a total weighted score of 3.5. The employee was dissatisfied with the evaluation, believing he should have had higher ratings in several of the categories included in the evaluation. He attributes what he perceives as inappropriately low scores to the fact he made his complaint



concerning Mr. Cameron's conduct. In support of this, he says he was told by Lindsay Zorn, who he says did the actual performance evaluation and is listed on the written evaluation form as the "Delegate", that his ratings should have been higher but that she wasn't allowed to do that.

[21] The written evaluation is, on its face, largely positive, although it identifies some areas for improvement. Under the heading "Organizational Knowledge" the evaluation states:

Ryan has lost his tags. Your tags are a very important form of identification and they need to be kept safe. Ryan needs to respect the chain of command, MOD has the final say.

[22] Under the heading "Interpersonal Skills" the evaluation states:

Ryan would benefit from the saying "Know Thyself". Ryan has the potential to be a straight fours across the board. Understand and accept decisions made by management. Accept that some decisions are not yours to make, whether you like them or not they are out of your control. "No Thyself." You do not always have to weigh in. Weighing in on decisions that are not within your chain of command are not yours to make. Accept it and move on.

[23] Ms. Bridgette described the performance evaluation system. She pointed out that the employee's 2018-19 total weighted score of 3.5 was actually higher than his score in 2017-18, which was 3.0. This resulted in a salary increase of 2.0 percent compared to 1.5 percent in the previous year. She also referenced the broader process SIGA managers participate in when conducting performance evaluations that ensured consistency across the organization. It was her opinion that nothing in the circumstances of the employee's evaluation indicated it was done inappropriately.

[24] In late March of 2019, the employee was disciplined for 3 days (March 30, 31, April 1) because he had forgotten his "SIGA tags" at home.

[25] In July of 2019, the employee contacted Occupational Health and Safety to complain about the investigation conducted by the employer. He completed a Review of Investigation Form dated July 10. On August 12 he completed and signed the ministry's Discriminatory Action Questionnaire, which is intended to focus a complaint of discriminatory action in order to identify the alleged discriminatory actions and the surrounding circumstances. In that form the employee identified three actions by the employer – the written warning (along with the corrective action form), the performance evaluation and the suspension related to SIGA tags.

[26] The November 27, 2019, decision letter from the occupational health officer dealt with both the investigation conducted by the employer and the employee's allegations of discriminatory action. The letter reads, in part:

It appears that when Ryan Ross brought forward his concerns pertaining to Bryce Cameron and ultimately leading to a disagreement of process, that this carried on to a situation where a complaint was filed by Ryan Ross. In this circumstance the employer did receive a complaint from Ryan Ross and subsequently did conduct a formal investigation into the complaint. The results of the investigation found some conduct concerns with each party and these errors were addressed by the employer.



There is insufficient evidence to determine that the investigation conducted by the employer warrants a review of investigation process from OHS. Based on the information provided, the disciplinary letter placed on Ryan Ross's file following the investigation, is not a because of the complaint put forward by Ryan Ross on October 30, 2019, against Bryce Cameron, but rather, were a result of his conduct in the workplace. Any concerns brought forward by Ryan Ross were dealt with by the employer. In this circumstance, the parties disagree on the stated events and there is no substantive evidence to substantiate this claim.

Based on all the forgoing, the employer has not taken discriminatory action against Ryan Ross as per section 3-35 of *The Saskatchewan Employment Act*, nor is it warranted to conduct a review of investigation.

[27] The employee's written notice of appeal commencing the present appeal reads in its entirety:

This is my written appeal to the Director (Occupational Health and safety) in which Sarah Bridgette, Bryce Cameron, Tereasa Hards, Michele Wuttunee and Lindsay Zorn may be directly affected by. I am appealing the following,

"Based on the information provided, the disciplinary letter placed on Ryan Ross's file following the investigation, is not a because of the complaint put forward by Ryan Ross on October 30th 2019, against Bryce Cameron, but rather, were a result of his conduct in the workplace. Any concern brought forward by Ryan Ross were felt with by the employer. In this circumstance, the parties disagree on the stated events and there is no substantive evidence to substantiate this Claim"

Further more there was a second incident of retaliation against me that i requested looked into and that was my yearly review for a pay increase which was carried out by Lindsay Zorn a Supervisor on request of Tereasa Hards the F & B Coordinator.

You can see that the Investigation was concluded on April 11th 2019 the same day I was issued my corrective action form which is dated for April 11th 2019 and then the date was changed to April 17th 2019.

Siga/DDC has fully admitted in writing on the "Conclusion to Investigation" letter that I received the disciplinary letter because my complaint was in violation of Sigas Employee Code of Conduct policy A04-601.

"through the investigation it was determined that your complaint was in violation of Siga's Employee Code of Conduct Policy A04-601 which states"

Based on the Sequence of events there is a presumption that the corrective action form was retaliation and if it has not been rebutted with evidence from Siga/DDC the presumption stands! Siga was fully admitted on the form that it was because of the complaint put forward and the dates match up exactly.

As this stands it will have a "chilling effect" by discouraging employees from coming forward with legitimate safety issues and concerns.

I would like any wages I would have earned from Oct 5th "start date of my leave due to this" until my return to work which would be approved by my doctor. I would also like the cost of any therapy related to my injuries paid for by DDC not my medical insurance. I would also like to not

be retaliated against once I return to work. I have included scanned copies of the letter concluding the investigation as well as the Corrective Actions form.

[28] The appeal on its face is limited to the disciplinary letter and the performance evaluation. However, the employee led evidence and presented argument concerning his dissatisfaction with the employer's investigation of his complaint and the treatment of this by the occupational health officer. He also led evidence concerning the suspension related to his SIGA tags, although he stated specifically that he did not intend the appeal to encompass a consideration of the suspension as a discriminatory action. Nonetheless, I will address these matters later in this decision.

[29] The employee is no longer employed by SIGA. In October of 2019 he commenced medical leave, which he attributes to his treatment by the employer and Mr. Cameron. In early 2020 he resigned from SIGA effective the end of February. He worked for another employer as a bartender for a period of time after that but is now at home because his wife is continuing her schooling.

## **II. LEGISLATIVE FRAMEWORK**

[30] 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....

(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.

...

3-52(1) In this Division: ...

(b) "decision" includes:

- (i) a decision to grant an exemption;
- (ii) a decision to issue, affirm, amend or cancel a notice of contravention or to not issue a notice of contravention; and
- (iii) any other determination or action of an occupational health officer that is authorized by this Part.

...  
3-53(1) A person who is directly affected by the decision of an occupational health officer may appeal the decision.

[31] 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**

[32] In *Banff Constructors Ltd. v Arcand*, LRB File No. 184-19, dated April 28, 2020, I outlined fairly extensive reasons for an analytical framework for appeals based on alleged discriminatory actions. I won't repeat those reasons here, other than to provide a brief explanation.

[33] 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.

[34] 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".

[35] 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)?

[36] 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.

[37] Before proceeding to a consideration of these issues, it is important to observe that the resolution of the appeal does not depend on whether the employee's initial engagement in the protected activities was based on legitimate concerns or whether the employer met its responsibilities to respond to the employee's concerns. The appeal is limited to determining whether the employer took discriminatory action against the employee because the employee engaged in the activities.

[38] However, as noted earlier, the decision letter of the occupational health officer dealt as well with the employee's request to have the employer's internal investigation into his complaint reviewed. The occupational health officer determined a review wasn't warranted.

[39] The notice of appeal doesn't address the decision concerning the review of the investigation. Furthermore, it isn't clear that the occupational health officer's decision to not review the investigation is an appealable decision within the meaning of s. 3-53(1) of the Act. The definition of "decision" for the purposes of this appeal provision contained in s. 3-52(1)(b) includes "any other determination or action of an occupational health officer that is authorized by this Part". However, there does not appear to be any explicit authority in Part III for an occupational health officer to review an employer investigation into a harassment complaint. I address this further in the analysis and reasons below.

## **V. ANALYSIS AND REASONS**

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

[40] Yes. The employee made a complaint to the employer related to conduct on the part of a supervisor that can appropriately be characterized as harassment. In doing so, he was seeking enforcement of the Act and the regulations pertaining to harassment, which is an activity protected by 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)?**

[41] Yes. 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 "imposition of any discipline" is one of the actions specifically included in the definition. Consequently, the written warning and the suspension related to the SIGA tags would both constitute discriminatory action.

[42] The employee's argument that his performance evaluation was a discriminatory action is more difficult to resolve. The introductory portion of the definition of "discriminatory action" states that it "means any 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..." For the performance evaluation to "adversely" affect the employee, it would have to be shown it rated the employee lower than the employee should have been rated. The employee gave evidence that he believes that was the case and that he was told by Ms. Zorn that he deserved a higher rating. However, Ms. Bridgette's evidence shows that the rating the employee received was an increase over the previous year's rating and that she believes it was done appropriately. The onus is on the employee to show his rating was lower than it should have been, which he has not done. Consequently, I find that the performance evaluation does not constitute a discriminatory action.

**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)?**

[43] Having found that the employee engaged in protected activities in making his complaint, I must now consider whether the employer disciplined the employee for "good and sufficient other reason". I'll deal first with the written warning.

[44] The fact an employee engages in a protected activity does not insulate the employee from the possibility of discipline. The employee is only protected from discriminatory action where that action is taken *because* the employee engaged in the protected activity.

[45] However, 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"?

[46] For a discriminatory action 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 employer's decision was taken that would have been objectively reasonable. The question is whether this is one of those options.

[47] Ms. Bridgette was directly involved in the management of the investigation and the determination of what, if any, discipline should be imposed on either Mr. Cameron or the employee. She explained why there was a delay in completing the investigation and the process the employer followed. I accept her evidence that the written warning given to the employee was not because he had made a complaint to the employer regarding the conduct of Mr. Cameron on September 8, 2018. The evidence respecting the employee's conduct during that event and in his phone call with Ms. Kristoff immediately prior to that reasonably support a determination by the employer that the employee's conduct warranted a level of discipline.



[48] The employee made specific reference in his notice of appeal, which he repeated in the hearing, to the fact that Ms. Bridgette's April 1, 2019, letter to him concerning the completion of the investigation contains the following statement: "It was determined that your complaint was in violation of SIGA's Employee Code of Conduct Policy...." He asserts that this is a clear indication he was disciplined because he complained to the employer, i.e. that he exercised a protected right.

[49] However, this statement has to be considered in the wider context of the remainder of that letter, along with Mr. Gibson's letter of the same date providing the written warning, and the corrective action form. Ms. Bridgette's letter goes on to thank the employee for bringing forward the complaint, and that expression of thanks is repeated in the closing paragraph. Mr. Gibson's letter makes clear the written warning is being given because of the employee's insubordination on September 8, 2019, and his failure to respond to the employer's requests to participate in the investigation. Finally, the corrective action form states clearly that the written warning is in relation to the "inappropriate conduct and communication between Mr. Ross and Senior Operations Manager". Based on the evidence as a whole, I am satisfied that the employer's decision to impose the written warning was not because of the complaint but, as the occupational health officer concluded, as a result of the employee's conduct in the workplace.

[50] I am also satisfied that a written warning of the type given was a reasonable option for the employer to choose.

[51] I will deal briefly with the suspension related to the SIGA tags. As noted earlier, the notice of appeal does not mention the suspension and the employee indicated during the appeal hearing that he didn't intend the appeal to encompass the suspension. I would say, however, that, while there was not extensive evidence of the details around the suspension, the totality of the evidence I did hear indicates the suspensions bore no relationship to the incident giving rise to the employee's complaint or the management of the complaint.

[52] Finally, although I concluded that the employee's performance evaluation does not constitute a discriminatory action, if it did, I would conclude that the ratings and comments provided on the evaluation were not related to the fact the employee made a complaint, although the employee's overall conduct during the period beginning September 8, 2018, and continuing through the processing of his complaint, would have had a bearing on the evaluation.

#### **4. Should the internal investigation the employer conducted into the employee's complaint have been reviewed?**

[53] As noted earlier, it's not clear that the notice of appeal lays a foundation for me to consider the occupational health officer's decision to not review the employer's investigation of the complaint, or whether this is in fact an appealable decision. However, there is extensive evidence from the hearing pertaining to this. It's clear the employer conducted a thorough investigation. Ms. Bridgette acknowledged the delay in completing the investigation, with a complete explanation for that delay. I am satisfied that the employer treated the complaint in an appropriately serious manner and carried it out in a thorough and thoughtful manner. It's

noteworthy that one of the consequences of the investigation was the discipline meted out to Mr. Cameron. Consequently, I agree with the decision of the occupational health officer that there wasn't a need to revisit the investigation.

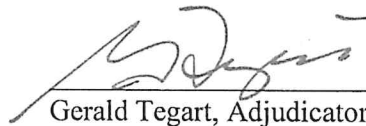
### **5. Remedies – damages and reinstatement**

[54] The notice of appeal asks implicitly that I order the reinstatement of the employee and the payment of wages he would have earned from the date of his leave to his return to work. Since I have determined that the employer's actions were for "good and sufficient other reason" I am not required to determine a remedy. However, I would add here that, even had I found that the employer disciplined the employee because he complained, reinstatement would not have been an appropriate remedy. The employee resigned his position with SIGA in early 2020 and the employer is not accountable for that decision by the employee.

### **VI. ORDER**

[55] For the reasons set out above, the appeal is dismissed. This order is made pursuant to s. 4-6 of the Act.

Dated at Regina, Saskatchewan, this 23rd day of November, 2020.

  
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Gerald Tegart, Adjudicator