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-

I. G. **Respondent**

Adjudicator: Gerald Tegart
Counsel for the appellant: Andrew Mason
Respondent represented herself

SUPPLEMENTARY DECISION

On May 6, 2020, I issued a decision (the "original decision") respecting an appeal by the International Women of Saskatoon Inc. ("the employer") from a decision of an occupational health officer dated August 14, 2019, regarding a complaint of discriminatory action brought by I. G. ("the employee") against the employer. The employee's employment with the employer was terminated on December 31, 2018. She referred her dismissal to an occupational health officer pursuant to s. 3-36(1)(a) of *The Saskatchewan Employment Act* ("the Act"). The occupational health officer's subsequent 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.

My original decision on the appeal brought by the employer found that the employer's dismissal of the employee did not constitute an unlawful discriminatory action. I allowed the employer's appeal and quashed and set aside the decision of the occupational health officer and the notice of contravention.

The employee appealed my original decision to the Labour Relations Board ("the board"). In a decision dated March 31, 2021 (LRB File No. 086-20), the board remitted the matter back to me "for amendment of the decision to address the issue related to the alleged December 18 request and any matter arising therefrom".

An understanding of the board's order can be gleaned from the following paragraphs from the board's written reasons:

[69] Next, it is necessary to address the appellant's argument that the adjudicator failed to consider the timing of her request to meet with the executive director. According to the appellant, she requested to meet with the executive director on December 18 and the executive director sent her an email the following day setting up a performance meeting. She says that she raised 18 concerns directly with the executive director, and expected to have a discussion about those concerns, but instead of having that discussion, she was terminated. Again, this argument suggests that the adjudicator disregarded relevant facts in arriving at his conclusion.

[70] The alleged December 18 request is mentioned in the initial Discriminatory Action Questionnaire, filled out by the appellant, and included in the director's file:

> 2. What was the alleged discriminatory action taken against you? … -Misusing the performance review process as well as misusing the intention of the probationary period …
>
> 3. What was the health and safety concern/complaint that you raised prior to the action taken against you? I let her know that her behavior was unacceptable in the workplace. I also requested to meet with her regarding the concerns I was having with her
>
> 4. On what date, and to whom, did you raise your health and safety concern/complaint prior to the action taken against you? …
>
> Dec. 14/18 I went to the IWS Board President …to convey my concerns….I let her know that I would try to address the concerns with the [executive director] but I wanted her to know that I was going to request a meeting.
> Dec. 17/18 [executive director] not in the office this day, so I did not request the meeting
> Dec. 18/18 I requested to meet with [the executive director] regarding concerns I was having
> Dec. 19/18 [executive director] requested to meet with me regarding my performance (first time mention of performance review) …

[71] It is also mentioned in the December 22 email from the appellant:

> The reason I had asked if you had time to meet earlier this past week (when I asked to meet to over a few things), was to discuss some of my concerns with the intention of clearing the air because things have been so unnecessary tense for the last while. You said that you had meetings throughout the day and I said that is fine we will see how the day goes. I know that you were physically away a lot this past week so I know when you were here everyone wanted to touch base with you, so we did not end up meeting. I had no issue with this. I also know the reminder of the week was extremely busy for all staff. I knew I would try again when we had a moment to catch our breath.
>
> […]
> 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. [reproduced without corrections]

[72] The adjudicator does not mention the request in the recitation of the facts, except in reference to the employee's earlier conversation with the president:

> [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…

[73] The adjudicator found that there were two circumstances in which a complaint could be said to have been made. The alleged December 18 request was not included within these two circumstances.

[74] The executive director's email on December 19 states: "The meeting 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."

[75] There is no indication on the record whether the adjudicator considered the significance of the earlier request for a meeting, that is, prior to the December 22 email. The decision does not address whether the request did or did not constitute an exercise of a protected right on its own or in combination with any other such exercise. The documentary evidence provides some insight into whether it could be so characterized, but it is not possible to fully assess this question and resolve the issue without regard for the full evidentiary record, including the testimony of the witnesses.

[76] If by making the earlier request, the appellant was exercising a protected right, then this has the potential to materially affect the outcome of the underlying appeal. The adjudicator has found that the employer rebutted the presumption by demonstrating that the executive director had good and sufficient other reason for the termination. However, it is necessary to establish the nature of the protected activities undertaken by the appellant before assessing the "other" reason. In this case in particular, the appellant argues that the earlier request was a part of the context within which the discriminatory action occurred.

[77] In *Chinichian*, the potential for error arose in the adjudicator's finding that the onus rested with the appellant employee, but the adjudicator had allowed for error, finding that the respondent employer had established, on a balance of probabilities, good and sufficient other reason. In this case, the adjudicator has allowed for error in finding the complaint was not of harassment, but has not addressed the earlier request. The sequence of events is the basis for the appellant's assertion that the executive director's decision was retaliatory. In particular, the appellant asserts that her request for a meeting was the trigger for the ensuing events, including the executive director's request for a performance meeting. What the executive director knew or did not know prior to scheduling the performance meeting is potentially significant.

The instant decision is intended to carry out the direction from the board. Complying with the direction provided by the board does not involve a re-hearing of the original appeal. The evidence to be considered in fulfilling the direction from the board is the evidence introduced in the original hearing. However, following the issuance of the board's decision, I convened a hearing of the parties to hear their submissions as to what the board's decision required me to do and what effect my further consideration of the matter in light of the board's decision should have on the result of the employer's appeal. That hearing proceeded by Zoom on July 15, 2021.

In providing my reasons here, I do not intend to repeat the recitation of the evidence or all of the reasoning contained in my original decision. Consequently, this decision should be read in the context provided by my original written decision (LRB File No. 203-19 issued May 6, 2020) and the written decision of the board (LRB File No. 086-20 issued March 31, 2021). That context includes the analytical framework set out in the original decision and the board's discussion of that framework.

As noted in the original decision, 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. The dates referred to in the remainder of this decision are from 2018 unless otherwise indicated.

According to para. 69 of the board's decision (quoted above), the employee told the board during the course of its hearing that she had requested a meeting with the executive director on December 18, following which the executive director had informed her the next day that she would be conducting a performance meeting with the employee on December 31. She told the board she had raised eighteen concerns directly with the executive director and expected to have a discussion about those concerns. This, of course, is not evidence on the record of the original appeal proceeding, but caused the board to look for evidence on the record that pertained to this aspect of the employee's submissions to the board. The board identified two references to support the employee's assertion that she had requested a meeting with the executive director. The first is the mention of the December 18 request in a form filled out by the employee in her dealings with the occupational health officers, where she responded to this question:

> On what date, and to whom, did you raise your health and safety concern/complaint prior to the action taken against you?

Part of her answer stated:

> Dec. 14/18 I went to the IWS Board President …to convey my concerns….I let her know that I would try to address the concerns with the [executive director] but I wanted her to know that I was going to request a meeting.
> Dec. 17/18 [executive director] not in the office this day, so I did not request the meeting
> Dec.18/18 I requested to meet with [the executive director] regarding concerns I was having.

The second reference identified by the board is contained in the employee's email to the executive director on the morning of December 22, which makes reference to a requested meeting "earlier this past week":

> The reason I had asked if you had time to meet earlier this past week (when I asked to meet to over a few things), was to discuss some of my concerns with the intention of clearing the air because things have been so unnecessarily tense for the last while. You said that you had meetings throughout the day and I said that is fine we will see how the day goes. I know that you were physically away a lot this past week so I know when you were here everyone wanted to touch base with you, so we did not end up meeting. I had no issue with this. I also know the reminder of the week was extremely busy for all staff. I knew I would try again when we had a moment to catch our breath.
>
> …
> 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.

The latter excerpt was included in para. 33 of my original decision.

In an earlier email exchange on December 15, the employee advised the president she would be asking the executive director for a meeting that week. This is mentioned in para. 26 of my original decision.

This is also consistent with the employee's oral testimony at the hearing in January of 2020, where she indicated she had told the president she would ask for a meeting with the executive director and that she went to the executive director's office on the following Tuesday (which would have been December 18) and asked for a meeting. She pointed to the fact she received an email from the executive director the next day proposing they would meet on December 31 and that they would "go over her performance" at that meeting.

The executive director was asked in cross-examination in the original hearing whether she remembered a face-to-face discussion in her office with the employee on December 18. She said she did not, although she didn't deny that the discussion had occurred.

I find that the evidence establishes that the employee asked the executive director for an opportunity to meet and that this request was made in-person in the director's office on December 18. This finding is not based on new evidence and is not inconsistent with the evidence recounted in my original decision. However, I did not list it specifically in my recitation of the evidence in that decision, other than to include the references to it in the employee's December 15 and 22 emails.

The facts surrounding the employee's request for a meeting are potentially important in two ways, both of which were identified by the board. The first is whether the employee's request for a meeting, when considered in the context of the evidence as a whole, constitutes the exercise of a protected right. The second is whether the fact of the request, again considered in the wider context, sheds doubt on the executive director's evidence that she dismissed the employee for reasons unrelated to the employee's exercise of a protected right, i.e. for good and sufficient other reason.

The employee suggests the evidence related to her request for a meeting with the executive director, when considered in the context of the evidence as a whole, establishes that the meeting

request was for the purpose of raising concerns related to health and safety in the workplace and that the executive director understood this when the request was made. She asks me to conclude that the request for the meeting triggered the executive director's decision to conduct a performance review and ultimately to terminate the employee. She argues that her request to meet therefore constitutes the exercise of a protected right and that the employer has not established that her termination was not due to her exercising that right but was for good and sufficient other reason.

The employer's position is that the evidence does not establish that the employee's request for a meeting was for the purpose of raising concerns with the executive director that amounted to the exercise of a protected right, or that the executive director knew that this was the employee's intention. The employer says the employee's December 22 email to the executive director is the best evidence we have of what the employee intended. In that email she said the reason she had asked for a meeting was "to discuss some of my concerns with the intention of clearing the air because things have been so unnecessarily tense for the last while".

The protected rights are set out in s. 3-35 of the Act, which provides in part:

> 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. 3-8 of the Act provides in part:

> 3-8 Every employer shall:
>
> > (a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers;
> > …
> > (d) ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment with respect to any matter or circumstance arising out of the workers' employment….

S. 3-9 provides in part:

> 3-9 Every supervisor shall:
>
> > (a) ensure, insofar as is reasonably practicable, the health and safety at work of all workers who work under the supervisor's direct supervision and direction;
> > …
> > (c) ensure, insofar as is reasonably practicable, that all workers under the supervisor's direct supervision and direction are not exposed to harassment at the place of employment….

S. 36 of *The Occupational Health and Safety Regulations, 1996* ("the regulations") places requirements on employers to develop and implement harassment policies and prescribes the content for those policies.

While the employee's submission does not specifically refer to these legislative provisions, the evidence she argues would support a finding that the meeting request constituted the exercise of a protected right relates to what she describes as concerns connected to health and safety in the workplace, the employer's failure to provide a safe workplace, and actions constituting harassment on the part of the executive director directed to the employee and other employees. These are all matters that could form a foundation for actions on the part of the employee that would be protected by ss. 3-35 and 3-36. The employee is in effect asking me to conclude that her request for a meeting was for the purpose of conveying to the executive director that she believed the employer was not meeting its obligations as reflected in s. 3-35 and the related sections referred to above, and that the request for a meeting therefore amounted to the exercise of a protected right.

Determining whether this was the exercise of a protected right requires me to consider all of the facts related to the employee's tenure with the employer, but particularly the sequence of events that began with her complaint to the president. In doing so, it is important to recognize that the employee and the executive director apparently did not have an especially effective relationship. In fact, it seems to have developed into a difficult relationship early in the employee's tenure. Nonetheless, they were required to work together, and that included corresponding and meeting together. It would not have been unusual for either of them to ask to meet with the other.

As noted above, the employer asks me to determine the employee's purpose in asking for a meeting by considering her description of the meeting in her December 22 email to the executive director, where she stated that she had asked for a meeting "to discuss some of my concerns with the intention of clearing the air because things have been so unnecessarily tense for the last while". However, according to the president's December 15 email, which summarizes her conversation with the employee the day before, the employee described conduct on the part of the executive director that led me to find in my original decision (at paras 57 to 60) that her December 14 meeting with the president constituted the exercise of a protected right. In part of the email exchange with the president on December 15, the employee indicated she'd be asking for a meeting with the executive director that week. It is not unreasonable to conclude she intended to convey the same information to the executive director in her proposed meeting that she had already conveyed to the president, which would have constituted a further exercise of a protected right.

However, the *intention* to exercise a protected right does not equate with actually exercising a protected right. The fact she *intended* to, in effect, make a complaint that would amount to the exercise of a protected right when she met with the executive director does not mean she exercised a protected right by asking for a meeting. She asked for the meeting on December 18. The December 31 meeting was scheduled on December 19. Her employment was terminated December 31. I'm being asked to conclude that the executive director somehow surmised that the employee intended to make a complaint of conduct or circumstances that she didn't want to

hear from the employee, and took steps to avoid hearing that complaint until December 31 when she could terminate the employee before the complaint could be made. The evidence simply doesn't establish this.

Therefore, I find that the December 18 request for a meeting did not constitute the exercise of a protected right.

However, even assuming I were to find that the December 18 request for a meeting did constitute the exercise of a protected right, I would find that the employer had 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, consistent with my reasoning in the original decision. (See paras. 67 to 73.) I found the executive director to be a credible witness and accepted her explanation for the decision to dismiss the employee based on performance issues and the breakdown in the employer-employee relationship. Consistent with this conclusion, I would observe that her testimony in this respect is not contradicted in any material way by the other evidence. Re-examining the evidence in its totality with additional emphasis on the December 18 request for a meeting does not cause me to reach a different conclusion.

As noted earlier, the additional significance of the meeting request is the possibility it sheds doubt on the executive director's evidence that she dismissed the employee for reasons unrelated to the employee's exercise of a protected right, i.e. for good and sufficient other reason. However, as indicated in the previous paragraph, a reconsideration of the evidence in light of the December 18 meeting request does not alter my original decision to accept the executive director's explanation of her reasons for the termination.

In reaching these conclusions, I have specifically considered the employee's position that the December 18 request for a meeting "triggered" the ensuing events. There is no direct evidence of this. Of course, one could infer from the sequence of the events including the December 18 request that this was so, but that inference would, in my assessment of the evidence, be a stretch. It is more reasonable to conclude that the entire sequence of events, rather than a single triggering event, led to the executive director's insistence on a performance review that in turn led to the employee's termination.

The employee and the executive director were in contact directly and by email as would be expected throughout December and the employee had many opportunities to bring her concerns to the executive director's attention. She showed little reluctance to express her concerns and her disagreement with the executive director's management of the organization, as evidenced by the encounter on the afternoon of December 21 and the employee's email to the executive director on December 22. While she expressed a desire to have a meeting in advance of the December 31 performance review meeting, she didn't pursue this beyond the expression of interest in her December 22 email and she didn't do what she obviously had the option to do, which was to put her concerns in writing and send them to the executive director. Going back to my earlier observation, the employee may have intended to exercise her protected rights, but she didn't give effect to that intention.

In summary, I find that the December 18 meeting request, considered in the wider context of the evidence as a whole, did not constitute the exercise of a protected right. Furthermore, if it did constitute the exercise of a protected right, I am satisfied that the employee's termination was not because she exercised that right, but was for good and sufficient other reason.

For the foregoing reasons, as well as those set out in the original decision, I conclude that my original order should not be amended and I confirm that order as set out in my original reasons for decision dated May 6, 2020.

Dated at Regina, Saskatchewan, this 30th day of July, 2021.

Gerald Tegart, Adjudicator