LRB File No. 259-19

IN THE MATTER OF AN APPEAL TO AN ADJUDICATOR PURSUANT TO SECTION 3-54 OF *THE SASKATCHEWAN EMPLOYMENT ACT*, SS.2013 Chapter S-15-1

BETWEEN:

NU LINE AUTO SALES & SERVICE INC.

Appellant

AND

CHRISTINE IRELAND

Respondent

Decision appealed from: Occupational Health Officer Decision dated October 25, 2019.

Date of Hearing: October 6, 7 and 21, 2020

Adjudicator:	**Marlene Weston**
For the Appellant, Nu Line Auto Sales & Service Inc.	**Brent Matkowksi** MLT Aikens LLP 1201 – 409 3rd Avenue South Saskatoon, Saskatchewan
For the Respondent, Christine Ireland	**William R. Vavra** Seiferling Law 200 – 306 Ontario Ave. Saskatoon, Saskatchewan

DECISION

I INTRODUCTION

1. Nu Line Auto Sales & Service Inc. (referred to as 'Nu Line') has appealed the Decision of an Occupational Health & Safety Officer dated October 25, 2019, including Notice of Contravention Report Number 1-00007918 pursuant to sections 3-35 and 3-36 (2) (3) (4) (5) and (6) of *The Saskatchewan Employment Act* (hereinafter referred to as 'the Act'). This matter has been referred to an Adjudicator. Marlene Weston has been appointed as Adjudicator to hear this matter.

2. Nu Line Auto Sales & Service Inc., hereinafter referred to as 'The Appellant' is appealing the conclusion reached by the Occupational Health & Safety and stated in the Notice of Contravention, that 'Based on the investigation, the Employer has taken discriminatory action against Christine Ireland."

3. The Occupational Health & Safety Officer, Ian Gardner, set out the reasons for the conclusion that he had reached in the letter accompanying the Notice of Contravention addressed to the employer, Brad Huziak, dated October 25, 2019. At the conclusion of the letter he stated:

> "It is the decision of this officer, the dismissal of Christine Ireland, is an unlawful discriminatory action pursuant to section 3-35(f) of the Act. The Employer must therefore:
> - Cease the discriminatory action;
> - Reinstate Christine Ireland to her former employment on the same terms and conditions under which she was formerly employed;
> - Pay Christine Ireland any wages she would have earned had he (she) not been wrongfully discriminated against; and
> - Remove any reprimand or reference to the matter from any employment records with respect to this worker."

4. Subsequent to the receipt of the Decision letter and Notice of Contravention outlined above, the Appellant filed a Notice of Appeal of Mr. Gardner's decision in writing with the Director and the Executive Director of the Occupational Health & Safety Division of the Ministry of Labour Relations in November 12, 2019. The grounds of the appeal were set out as follows:
   - "Nu Line appeals the Decisions on the basis that it has not taken any discriminatory action against Christine Ireland. Nu Line did not terminate Christine Ireland's employment as implicitly suggested in the Decisions. ...
   - Contrary to the implicit findings of Officer Gardiner, Nu Line did not terminate Christine Ireland's employment on August 27, 2019s or otherwise. Nu Line has continued to pay Christine Ireland's employee benefits."

   Relief request in the appeal was that the Decisions be "overturned in their entirety".

5. Pursuant to action 3-53(1) and 3-54(1) of the Act, the appeal was referred to the Registrar of the Labour Relations Board and an Adjudicator was appointed to hear the appeal.

II BACKGROUND

6. The Respondent, Ms. Ireland, began her employment with the Respondent, Nu Line Auto Sales & Service Inc., on March 1, 2018.

7. Brad Huziak is the owner and operation of Nu Line Auto sales & Service Inc., hereinafter referred to as Nu Line. Bonnie Rookes is the Office Manager.

8. Ms. Ireland was hired as General Sales Manager. She reported directly to Mr. Huziak. The sales department consisted of herself and one other employee working beneath her. She was provided with a cell phone and a laptop to use in the conducting of business.

9. During her working history at Nu Line Ms. Ireland requested from Br. Huziak clarification of her role within the company. On multiple occasions throughout 2018 -2019 she informed Mr. Huziak that the work environment and atmosphere were untenable and she was considering resigning, but did not do so.

10. On June 27th, 2019 in an email to Mr. Huziak Ms. Ireland requested that she be laid off so that she could obtain employment insurance and pursue a different career. Mr. Huziak declined to lay off Ms. Ireland as there was no basis for the layoff. There was no shortage of work or any other basis for issuing the layoff.

11. In early June, 2019, Ms. Ireland was put on medical leave by her doctor. She was at home for 2 weeks, but felt she could then return to work of her own volition. Her doctor provided a medical note dated June 28th, 2019 indicating that Ms. Ireland would be off work for medical reasons between June 26 and August 6, 2019. Ms. Ireland began her leave on June 27th, 2019.

12. Nu Line did not issue a Record of Employment for the medical leave from June 26 to August 6th, 2019.

13. Shortly after providing the medical note, Ms. Ireland made a claim to the Benefit Plan which Nu Line had engaged for staff. Nu Line provided the Employer's form to the insurer. Ms. Ireland's claim was denied on August 8, 2019. She also made a workers' injury claim to the Workers' Compensation Board which was also denied.

14. In July 2019, Ms. Ireland filed a harassment complaint with the Occupational Health & Safety Division. The complaint was investigated however the officer made no findings with respect to the complaint.

15. On July 26, 2019, Ms. Ireland attended her doctor who extended her leave from August 6th to October. On August 6th, Ms. Ireland remained at home because her leave had been extended to October.

16. At the expiry of Ms. Ireland's medical leave on August 6th, 2019, Nu Line had not heard from Ms. Ireland. Ms. Ireland had not provided a new medical note to Nu Line. Nu Line did not take any action regarding Ms. Ireland's employment at that time. She did receive notification on her company cell phone that she no longer had administrative access to Nu Line's Facebook page.

17. On or about August 13 2019, Nu Line's office was broken into and some cash was stolen. The matter was reported to the RCMP. Approximately one week before the security codes

for the building had been changed. All employees had been issued the new code except for Ms. Ireland. The old code had been the one used to break into the building. When investigating the matter, the RCMP officer had used the term 'former employee". He said the 911 operator had reported that the caller had reported an 'ex employee' may have been involved. The RCMP went to Ms. Ireland's home and questioned her. No charges were laid and the RCMP ultimately closed its file on November 26, 2019.

18. Later on August 14, 2020, Ms. Ireland's work phone had been cut off. Ms. Ireland was not contacted on that day.

19. On August 27, 2020, Bonnie Rookes, the Office Manager for Nu Line, received a call from Service Canada indicating that Ms. Ireland had been in touch with Service Canada to inform that a record of employment (ROE) had not been completed by Nu Line for Ms. Ireland. With assistance from Service Canada staff, Ms. Rookes filled out a ROE dated August 27, 2020:
    - Occupation was listed as Finance Manager.
    - The code used under 'Reason for Issuing this ROE" was Code K (Other).
    - The comments were:
        "Christine was absent from work with a Dr. note from Jun 27 return date of Aug. 6. She has not returned as of today – we assume she quit as we have not heard from her."
    - Under "Expected Date of Recall" Nu Line checked 'Not Returning".

    Nu Line did not contact Ms. Ireland.

20. After receiving the August 27, 2020 ROE, Service Canada contacted Ms. Ireland and informed her that she was not eligible for Employment Insurance sickness benefits because she had according to the ROE quit her job. To Ms. Ireland's knowledge, the medical leave note from her doctor on July 26 extending her leave until October had been properly submitted to Nu Line.

21. On September 2, 2019, Ms. Ireland submitted an updated complaint to OHS alleging discriminatory action. Ms. Ireland checked the box indicating that she did not wish to return to the workplace.

22. On September 5, 2020, Ms. Ireland sent an email to Ms. Rookes and Mr. Huziak advising that Service Canada had brought to her attention that the ROE issued by Nu Line was improperly filled out. That she had been on medical leave since June 27th but there had been a mishap at the Meadow Lake Clinic. The doctor's letter of July 26 was not sent, but would now be sent by fax. Ms. Ireland requested that the ROE be corrected and resubmitted to Service Canada. She also sent a new doctor's letter dated September 4 stating that Ms. Ireland would need to remain off work from August 7 until October 6, 2019.

23. Later September 5, Ms. Rookes filed an amended ROE with Service Canada. The sections amended were:

- "Expected Date of Recall" was changed from "Not Returning" to "Unknown" and
- Reasons for issuing the ROE was changed from Code K (Other) to Code D – Illness or injury.
- There was no change to the Comments section.

Nu Line did not contact Ms. Ireland on September 5, 2019.

24. On September 6, 2019, Ms. Ireland submitted an amended discriminatory action complaint form to OHS. In the amended submission, she checked the box indicating she wished to return to that workplace.

25. On September 10, 2019, Ms. Ireland received notice from Service Canada that due to the contents of her ROE as filled out by Ms. Rookes, she was not eligible for sickness benefits because she had, according to the ROE, quit her job.

26. On October 17, 2019 Nu Line canceled Ireland's benefits. Nu Line had continued to pay benefit premiums, both the employer and employee's premiums because Ms. Ireland was not earning any benefits. Nu Line did not seek reimbursement of the premiums from Ms. Ireland.

27. On October 25, 2019, the Occupational Health & Safety Officer Gardner issued a decision in a letter addressed to Brad Huziak:

"It is the decision of this offer, the dismissal of Christine Ireland, is an unlawful discriminatory action pursuant to section 3-35(f) of the Act. The employer must therefore:

- Cease the discriminatory action;
- Reinstate Christine Ireland to her former employment on the same terms and conditions under which she was formerly employed;
- Pay Christine Ireland any wages she would have earned had he not been wrongfully discriminated against; and
- Remove any reprimand or reference to the matter from any employment records with respect to this worker. "

The Notice of Contravention issued by the OH&S Office that accompanied the letter stated:

- "Observation – The onus is on the employer to establish that the discriminatory action taken against the worker was for good and sufficient other reasons. Based on the investigation, the employer has taken discriminatory action against Christine Ireland.
- Shall be remedied by – October 25, 2019

- Compliance Required – Reinstate Christine Ireland pursuant to Act 3-36 Subsection (2), (3), (4), (5), and (6). "

28. Subsequent to the Decisions, Nu Line did not move to comply.

29. On November 12, 2019 in accordance with section 3-53 of the Act, Nu Line appealed the written Decision and Notice of Contravention issued by the OH&S Officer. The grounds of appeal were set out in part as:

- "Nu Line appeals the Decisions on the basis that is has not taken any discriminatory action against Christine Ireland. Nu Line did not terminate Christine Ireland's employment as implicitly suggested in the Decisions. ..."
- "... Contrary to the implicit findings of Officer Gardner, Nu Line did not terminate Christine Ireland's employment on August 27, 2019 or otherwise."

30. The relief requested was that the Decisions be overturned in their entirety.

III EVIDENCE

31. The Hearing of this matter proceeded on Tuesday October 6, 2020 by ZOOM with the representatives for the Appellant and Respondent in attendance. The Adjudicator's authority was confirmed by the parties.

32. After introductions, the Adjudicator referred to the Process Direction document that she had sent to the parties. Both parties acknowledged receipt of and agreement to the contents of the document. The Adjudicator also entered the documents contained in Document Book A and Document Book C – Respondent Documents Objected To as Exhibits in this hearing.

33. The Adjudicator asked if there were any preliminary objections to raise. The Appellant stated that he had a preliminary objection that he wished to raise and asked for a ruling on the objection.

a. Preliminary Objection

34. The Appellant asked the Adjudicator to rule on the scope of the appeal regarding context. The parties had agreed it was not disputed that Ms. Ireland had filed a harassment complaint. The Appellant shared the Notes of the Feb 13th, 2020 Prehearing Conference Call meeting that recorded '... it was confirmed that the appeal will be dealing with the Notice of Contravention where the Occupational Health & Safety Officer required that Ms. Ireland be reinstated in her position . There was no Notice issued regarding the original complaint of harassment filed by the Respondent so evidence in that regard

would not be part of the matters being heard." The sole basis for discriminatory action was contained in the Notice of Contravention issued by the OH&S Officer the issued being is the issuing of an ROE a deemed termination? The Appellant expressed concern that the Respondent by entering the documents in Document Book C may enter evidence about the break in at Nu Line's office as that was the basis for termination.

35. The Respondent argued that in regards to the break -in the only reason they needed to refer to the break in was that the RCMP report showed the Respondent had been referred to as an 'ex-employee'. The Report was in Document Book C to show evidence that this is part of the discriminatory act, not a piece of evidence that would lead to a harassment hearing. Is an ROE was a deemed termination? if it is discriminatory action was there good and sufficient cause. In the alternative what are damages/mitigation efforts of the respondent?

36. The Appellant argued that referring to the letter of appeal, the appeal is on the basis that the Appellant has not taken any discriminatory action.

37. The Adjudicator ruled that she would allow the Exhibits in Document Book C to be entered into evidence, and that she would hear all evidence regarding discriminatory action. However there would be no evidence entered by exhibit or verbal evidence regarding the harassment complaint.

b. Opening Statements

i) Appellant's Opening Statement

38. The Appellant's started his arguments by enumerating the issues it will be based on:
    1) Scope of appeal
    2) Discriminatory action test
    3) Was an OH&s issue raised?
    4) Was discriminatory action taken?
    5) If Discriminatory Action was taken was there good and sufficient reason?
    6) Was there mitigation of the damages?

39. 1) ***Scope of Appeal***

The Appellant stating that he still did not agree with the ruling regarding the scope of the appeal. He pointed out that in the Decision and the Notice of Contravention issued by the OH&S Officer dated October 25, 2019 stated that the Respondent's employment was terminated by the Record of Employment (ROE) issued by the Employer to Service Canada.

Ms. Ireland was absent as of June 2019 and provided a medical note that she would be on leave until Aug 6. Nu Line says that it did not receive an updated medical note until

September, 2019. Nu Line received a call from Service Canada directing it to submit an ROE. ROEs are issued for an interruption of earnings.

40. 2) ***Discriminatory Action Test***

Adjudicator Tegart outlined the discriminatory action test in *Banff Constructors Ltd. vs. Lance Arcand,* 2019, LRB File No. 194-19as being:

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 section 3-36(4)?

41. 3) ***Was an OH&S Issue Raised?***

Yes, in the Appellant's opinion it was. The complaint of harassment which was originally filed in July, 2019. The OH&S Officer did not make any findings on the harassment complaint and that harassment complaint is not within the scope of this appeal. Therefore, it does not qualify under section 3-35:

> Sec 3-35 No employer shall take discriminatory action against a worker because the worker:
>
> (b) seeks or has sought the enforcement of:
>
> (i) this Part or the regulations made pursuant to the Part.

Therefore, Ms. Ireland was not considered to be engaged in a protected activity.

42. 4) ***Was discriminatory action taken?***

The Appellant is arguing that ROEs are issued for all kinds of action and are not a deemed termination. The employment relationship is between the Employer and Employee. Issuing an ROE does not change the relationship. Therefore, there was no discriminatory action taken. Where Employers want to terminate the relationship, they do so directly with the Employee. In this case there was no termination.

43. 5) ***If Discriminatory Action was there good and sufficient other reason for termination?***

The Appellant argued that there was no discriminatory action. The Employer completed the ROE with the knowledge it had. It was required to do so. It was accurate and was not retaliatory.

44. 6) ***Was there mitigation of damages?***

It is the Appellant's position that the Respondent has not suffered any damages. Nu Line says it will show that she did not want to cooperate. Damages are not payable by the Employer if the Employee did not want to come back to work.

Conclusion:

45. Was there Discriminatory Action taken by Nu Line as defined by the Act? If so, the onus is on the Respondent to show that discriminatory action was taken for good and sufficient other reason.

ii. Respondent's Opening Statement

46. On August 6th 2018 Ms. Ireland had been on medical leave because of toxic workplace. She did not arrive at work on August 6th because she thought she was on medical leave and under a protected act. Her employment was terminated on August 6th, 2018. Nu Line immediately took steps to terminate her employment.

47. On October 25, 2018, by a Decision and Notice of Contravention issued on that date by the Occupational Health & Safety Officer, Nu Line was ordered to take her back.

48. Nu Line is alleging that no termination occurred but the evidence says otherwise. No bona fide efforts were made to return her to work. The truth at the centre of the matter was that termination was driven by Nu Line and there was no communication with Ms. Ireland to determine her employment status.

Conclusion

49. Nu Line terminated Ms. Ireland's employment while she was on medical leave and while she was engaged in a protected act. Ms. Ireland's termination is a discriminatory action by Nu Line.

c. Appellant's Witness – Bonnie Rookes

i) Examination in Chief of Bonnie Rookes

50. The Appellant questioned the witness' background. The witness replied:

- She worked for Nu Line for 17 years. She started in August 2003. There are 13 employee's working at Nu Line. Her Job Title is Office Manager. She has had the title since she was hired.
- Her Jo b Duties are payroll and taking payments from customers. She does not do hiring and firing. That is Brad Huziak not her.

51. When did Ms. Ireland start with Nu Line? Ms. Ireland started in March, 2018 – originally hired as Finance Manager. Ms. Ireland went on Medical Leave in 2019. She left a note from her doctor on Bonnie's desk.

52. The Appellant introduced the entire Document Book A as Exhibit A in the hearing. The Adjudicator accepted the Document Book A as Exhibit A.

53. The Appellant questioned the Witness on several of the document in Exhibit A:

- Page 7 is the letter which was left on her desk from Ms. Ireland. She assumed Ms. Ireland would be off for dates on the letter.
- Claim for Disability done up for short term disability and submitted. Page 8 shows the form for disability claim that Ms. Rookes completed. Ms. Ireland made a claim for short term disability as far as she believed. Email received from Group Health that her application for the disability was declined.
- Re WCB got a letter saying that EE has been injured on the job. Brad phoned WCB and EE's claim was denied.

54. The witness testified that prior to August 6th, 2019, no updated medical information had been received by Nu Line.

55. The witness was asked about the break in at Nu Line on August 14th, 2019. The witness testified that she called the RCMP. Brad Huziak and she met with RCMP. They advised the RCMP that the Alarm Code had been disarmed by Ms. Ireland, the door was left open and cash drawer had been emptied. Ms. Rookes testified that she did not describe Ms. Ireland as an ex-employee. There was no discussion about pressing charges. Ms. Rookes was asked was break in solved? She responded no it wasn't.

56. The Witness was asked to identify Page 14 of the Document Book A. She stated that it was an ROE was prepared by her. the writing is hers. She was asked why did she fill out the form? Ms. Rookes stated that she got a call from Service Canada that they needed an ROE for Ms. Ireland. The Worker from Service Canada suggested using Code 'k' and then put the explanation in box 18. She talked to Brad about filling it out. He said as long as Service Canada agreed, it was OK.

57. Page 23 of Exhibit A shows an email from Ms. Ireland that Ms. Rookes had filled out the form improperly. There was an error by Meadow Lake Clinic that they had not sent the new medical form to Nu Line. Page 33 shows another doctor's note attached to above email saying Ms. Ireland will be off until October 6, 2019.

End of Examination in Chief of Bonnie Rookes

ii) Cross Examination of Bonnie Rookes

58. The witness was asked if she could identify the police report that an Exhibit in Document Book C was shown to her. The witness could not identify the document.

The Appellant raised an objection. If the witness cannot identify the document it should not be entered into evidence. Respondent is trying to use the document as truth of the statement. It is hearsay. Basic rule of hearsay is that it is not admissible because the person cannot be cross examined as to the truth of what was said. This is an abuse of process.

There are 2 components that need to be satisfied before the document could be used:

- Each person has to trust that this is reliable and probative. It is not reliable whether officer is taking a statement or his own opinion.
- the document is heavily redacted. Multiple white outs – missing information. There is a large chunk on Page 92 that is redacted.

If it is necessary to let the hearsay in, the Respondent could have called the RCMP officer to testify as in the normal process. There are multiple layers of hearsay – page 91 in the bolded section.

59. The Respondent replied to the objection:

- The point is not what the officer deemed Ms. Ireland to be, but what Bonnie Rookes and Brad Huziak had told the officer she was.
- The first note on the form is that there is a theft by an 'ex-employee'.
- What about the proximity of the break in to the end of the medical leave? We are relying on this because of the proximity to the medical leave. First thing putting pen to paper was to call her an 'ex-employee'.
- The officer attended and spoke with Bonnie and Brad and they identified Ms. Ireland as an 'ex-employee'. Somebody in the room identified her as an ex-employee.

60. Response by Appellant to Respondent's argument:

- There are a lot of assumptions in the Respondent's argument. It is a summary of the officer's own thoughts on the matter. Not made for the purpose of evaluating the issuance of the termination. It is not reliable to be used as evidence of what was said.
- There could have had an affidavit by the officer so we had evidence of the truth of the statement.

61. Ruling: The RCMP Report will not be accepted into evidence due to the issue of layers of hearsay. The Witness had not seen the document and could not testify as to its veracity.

62. The Respondent asked Ms. Rookes if on the morning of August 14th, 2019 in discussion with RCMP reporting the break in did you refer to Ms. Ireland as an 'Ex-employee'? She responded that she did not.

63. Does she keep records specific to the security codes for the building? She suggested that the code used was the one used by Christine, but there were others who had access to the code. She suggested they should talk to Ms. Ireland because there was no one else who had used the code at that time. How many others had the code? 4 – the janitor, Darren, Brad and her. They not give Ms. Ireland a new code in July because they thought she might be coming back. Ms. Rookes was not sure why there was no effort to contact Ms. Ireland to give her a new code.

64. The Respondent asked Ms. Rookes who had access to Ms. Ireland's phone administration? The witness answered Brad. She handled the bills for Ms. Ireland's phone. There was no change as of August 7th.

65. Regarding the August and September ROE's on page 14 and page 16 of Exhibit A, had she changed the Comment section from 'other illness or injury' to 'unknown'? She had received a new medical form from Christine but did not correct the ROE according to the new medical form.

66. Ms. Rookes was asked did you remember the sick leave Ms. Ireland took in June. When she went on sick leave in June why did you not file an ROE? Ms. Rookes answered that she did not think about it. She had never had this situation before. This is the first Employee that had gone on extended sick leave in 18 years.

67. Ms. Rookes was questioned about the Benefit Plan that Nu Line contributes to. She handles the benefits administration but not who is on the plan. That is Mr. Huziak's responsibilities. The Plan has a website that she can go onto to give notice of termination. Last paycheque for Ms. Ireland was the end of June. She and Brad had discussed to take Ms. Ireland off benefits. Discussions began in early October. Nu Line took her off at the end of October, 2019. In the time from Aug 6 onward, there were no other forms for her to complete other than the short-term disability. Long term Disability is determined by the Plan.

iii) Re-Direct of Bonnie Rookes

68. The Appellant asked the witness about the ROE on Page 14 of Exhibit A dated August 27th 2019 re the line stating 'expected date of recall'. It says 'not returning'. The witness testified that she was told to do that by Service Canada when using 'other'. The September 5 amended ROE shows 'unknown' in expected date of recall. The witness stated Yes. We had not had any indication from Ms. Ireland when she would be returning.

d. Appellant's Witness – Brad Huziak

i) Examination in Chief of Brad Huziak

69. The Appellant asked the Witness to provide his background regarding his ownership of Nu Line:

- Mr. Huziak stated he was the owner of Nu Line Auto Sales & Service Ltd. He is an independent auto dealer selling pre-owned vehicles, etc. He started the business in June, 2003, located in Meadow Lake, Saskatchewan.
- His job title is Owner/Manager. He wears different hats. He is also the service manager.
- He is responsible for hiring and firing employees at Nu Line.

70. When did the Employee, Ms. Christine Ireland start employment with Nu Line? She stated in March, 2018. Her role when she was hired was F & I Manager (Finance and Insurance) to facilitate vehicle loans for customers. When did her role change? Her role changed early in 2019. Her title was changed to General Sales Manager to take work off his plate.

71. Referring to Page 6 of Exhibit A, Mr. Huziak testified that this was an email from Ms. Ireland expressing her dissatisfaction. She stated that the Sales Employee was not attending work and that was causing her stress. She wanted him to lay her off so she could pursue other options. His work was busy so did not want to do this. Brad felt this was fraudulent as they had work. Did you lay Ms. Ireland off? No. He had a discussion about not laying her off.

72. Reviewing Page 7 of Exhibit A, Mr. Huziak said that his understanding of the document was that Ms. Ireland would be off from June 6th, to August 6, 2019. It was after the discussion about not laying off.

73. Mr. Huziak was asked, during her medical leave did Ms. Ireland make a harassment complaint to OH&S? Yes, in the middle of July, 2019.

74. Subsequent to June 6th, 2019 did you get any information about her medical leave. They thought she wasn't returning to work. Bonnie asked if she should file an ROE required by Service Canada. He said yes, but to phone them to make sure they do it right. He did not fill out any aspect of the form. Did he instruct Bonnie about filling out the form? No. When the ROE was filed did you issue a termination letter to Ms. Ireland? No. Did you attend to terminate her employment by issuing the ROE? No, that was not the intention.

75. What were the emails on Page 23 and 24 of Exhibit A referring to? Ms. Ireland wrote to OH&S saying that Service Canada had brought it to her attention that the ROE was improperly filled out, that the ROE stated job abandonment.

76. On Page 33 of Exhibit A is a letter from Ms. Ireland's physician. Bonnie brought the email to his attention that Ms. Ireland would be off from August 7th to October 6th, 2019. They were waiting for her to be cleared by her doctor to come back to work.

77. On Page 25 of Exhibit A there is an Amended ROE dated September 5, 2019. He did not fill it out. He instructed Bonnie to phone Service Canada to make sure the paperwork is done correctly. He did not give any instructions about how to fill out any particular box on the form. Did you intend to terminate Ms. Ireland's employment by issuing this ROE: No, I did not.

78. Page 43 to 58 are these invoicing from the Western Financial Group Insurance Solutions, the benefit company, for Employee premiums for October, 2019. Redactions are the info involving other employees is that correct? Were you still making premium payments for Ms. Ireland? Yes

79. Regarding the Break in on August 13 or 14, 2019 what occurred? Mr. Huziak came in to work and the front door was open. Cash drawer was open. We found money missing. Bonnie called it in. I had a meeting with the RCMP Officer and Bonnie in her office. We explained to the officer that there was a break in using the old code that Christine had. Did you say anything else about Christine? No, he did not. Did you ask the RCMP officer to press charges? No. Did you describe Christine Ireland as an 'ex-employee' to the officer? No. Did the officer say what the next steps were? He said he would talk to Ms. Ireland and come back with an update.
Officer later reported that he had a discussion with Ms. Ireland and verified her whereabouts. He said that as far as he was concerned the case was closed. Nothing was said about Ms. Ireland's employment status. Anyone else in the follow-up meeting? No.

80. On Page 39 of Exhibit A is the Notice of Contravention. Mr. Huziak said that at the time he received the Notice, Ms. Ireland's employment was not terminated. She was still on sick leave and unable to return to work. Mr. Huziak was asked if he tried to return Ms. Ireland to work? He responded Yes. The letter written by Mr. Husiak on January 3, 2020 shown on Page 63 of Exhibit A set up next steps for return to work. It had a request for medical information to determine if an when she would be coming back to work.

81. Page 66 shows that Mr. Huziak sent an email that return to work was separate from the appeal process with Ms. Weston. He testified he did not get a response to his letter or

email. On Page 77 dated– Feb. 6th - second request sent to the EE about return to work. Did she provide the information? Response was No.

82. Page 80 is a letter dated May 21, 2020. Mr. Huziak said it was the third letter send to Ms. Ireland requesting an update on her medical condition and any date for return to work. Mr. Huziak said he bolded the part that stated that her employment would be terminated in 7 days if info was not provided. Mr. Huziak said Information was not provided. Ms. Ireland sent an email to Mr. Huziak which is Page 83 that she was not going to reply to any requests until after the hearing. Mr. Huziak that on June 1, 2020 (Page 84 of Exhibit A) he sent notification to Ms. Ireland that her employment was terminated immediately.

83. The Appellant asked Mr. Huziak if the Employee has not been in the workplace since June 2019, who is doing her work? Mr. Huziak testified that he has hired some people part-time to do some of the jobs. Was her position filled? No. Appellant asked If she had provided medical evidence would she have been brought back to work? Mr. Huziak replied yes.

ii) Cross Examination of Brad Huziak

84. The Respondent asked Mr. Huziak how many employees does Nu Line have? He responded that thirteen was typical over the past few years.

85. The Respondent referred to Page 1 of Exhibit A, the letter outlining Ms. Ireland's terms of employment. Mr. Huziak said that sometime in early 2019, her role had changed. Brad doesn't remember when the title was changed. The Respondent questioned that his memory was wrong, and there was a discrepancy in the time.

86. What was Ms. Ireland's role? Mr. Huziak testified that as General Manager, there were only two in her department. Darren was the other person. He was to generate leads and sell product. The Respondent asked, was she a punctual employee? Yes.

87. The Respondent asked on Page 6 of Exhibit A when she asked to be laid off, he told her there was too much work. Were there any other instances that she intended to leave based on the work environment?

- Mr. Huziak said that on Page 5 of Exhibit A Ms. Ireland asked him to set direction and expectations;
- Page 03 of Exhibit an email dated Dec. 5, 2018 EE expressed her intent to leave. She provided 3 weeks notice. The last part of email on Page 4 sets out notice of what should be done if she quits.
- On Page 42 of Exhibit A in the last line of the email to Mr. Huziak, 2 weeks notice is mentioned.

88. The Respondent asked what happens when an employee quits? Mr. Huziak responded that when they quit, they walk away and don't come back. We have had 3 technicians, 2

wash bay attendants leave. We have never had a dismissal. Employees have been long term – 3 technicians in 17 years. Have you ever left an Employee on benefits accidently to your knowledge? Response - No, not to his knowledge.

89. Respondent asked about roles. Mr. Huziak responded that he handles the more functional side of the automobiles – technician and wash bay attendants report to him. Technicians are close to what sales would make.

90. The Respondent asked, do you do sales on social media? Mr. Huziak replied No. Darren handled 90% of them from 2018 until January, 2020. Darren used his own face book page. NuLine has a Facebook page. No one really runs it now. Darren was terminated as of January 2020 for health and other reasons. When Ms. Ireland did not come to work, Brad took over full control in the middle of August. The Facebook system only allowed two administrators. One has to go to let him in.

91. On or around August 6th, 2019 did he get a call from OH&S Ian Gardner? Mr. Huziak replied that he can't remember the exact date.

92. The Respondent questioned, in the meeting with the RCMP officer, did Mr. Huziak refer to Christine as an 'ex-employee'? He replied he definitely did not. Had a new security code system been installed? Did other employees get new card? Mr. Huziak said he had left the code the same so that Ms. Ireland would not get a surprise. He told the RCMP that she had an old card. Mr. Huziak said he did not suggest that the RCMP Officer go talk to Ms. Ireland.

93. The Respondent asked about the last time Mr. Huziak had talked to Ms. Ireland. He said it was June 7th, 2019.

94. The Respondent point out Page 85 of Exhibit A, a screen shot set up by temporary employee, Jaycee MacCallum, of a post on Facebook dated July 15. The post it is submitted is this year even though it does not show the year. Mr. Huziak said he had OKed its submission. He said he reviewed all the posts done by Jaycee.

95. Respondent stated that Ms. Ireland's phone was shut off in August or September. Why? Mr. Huziak replied, to save money because it had not been used for business in some time. Respondent asked if he was aware that was this was Ms. Ireland's only phone line and that she was left without phone service? No, he was not aware.

96. Were there other parts to Ms. Ireland's compensation package? Mr. Huziak said there was not much in writing. Some is accurate:

- Had vacation
- Had a phone
- Had a fuel card

He was not asked to have internet paid for.

97. Mr. Husiak was asked if as of October 25, 2019 did he reach out to Ms. Ireland to determine whether she was returning to work? Response was only in the letters he sent to her. He did not reach out to her until January 3, 2020? No.

98. The Respondent said that there was an order for Nu LIne to pay her salary and take her back to work. Mr. Huziak replied that he has not paid anything in regard to the Notice of Contravention.

99. Mr. Huziak was asked if the environment changed so that she would be accommodated to return to work? Mr. Huziak said he was planning to discuss measures that would be put in place to make the workplace healthier. Objection by Appellant's counsel to the line of questioning.

100. Ruling: The Adjudicator sustained the objection by Appellant's counsel. This hearing is not going to go into whether the environment was good to return to work. We are not looking at the intent of OH&S Officer as to whether or not he would throw her back into an unhealthy work environment. The Letter accompanying the Notice of Contravention does not specify conditions of her return to work, only that she be returned to work. Whether return to work efforts were genuine or not related to the discriminatory action.

101. The Respondent asked, between October 25, 2019 and when letter when out in January, 2020 were you making your best efforts to have her return to the workplace? Mr. Huziak replied, Yes. In Sept. you were not pushing her to come back to work, but in January you were not. What was the difference? He would not like to see her come back to work because of her relationship with Darren.

102. Page 66 is a copy of an email sent on Jan 14, 2020 by Ms. Ireland stated that she had sent an email that had to wait for Adjudicator in this Appeal to respond. Mr. Huziak did not respond. There was no communication between then and February. Why was there no follow up from Mr. Huziak? He responded that it was not a letter that asked for a response. Aside from letters of January and February, and a pending termination notice in May, that was the extent of the communication. Mr. Huziak was asked why was there no communication? He thought it should be on the Employee to tell him her progress and when she could return. It was not NuLine's problem that he did not contact Ms. Ireland when she is on stress leave. It was incorrect information.

103. The Respondent asked Mr. Huziak what was the length of time when other Employee's had walked out that you determined the employees should be terminated. Mr. Husiak replied the first Employee was 3 weeks, the second employee was 2 weeks when they came for their pay. The Respondent asked would taking action the next day to terminate the Employee be reasonable? Not answered. Were any of them on medical leave? No

104. If an Employee does not show up on the day they are supposed to be there, is it reasonable to terminate them? In regards to Ms. Ireland when she realized the Medical Leave Note had not been sent, she phoned the Clinic to rectify it. Should there be an attempt to restore the relationship to what it was before? Under the circumstances was it fair to terminate Ms. Ireland when she was on stress leave?

105. The Respondent asked Mr. Huziak, in the Sales department how many Employees were there – 1 or 2? Mr. Huziak responded if Ms. Ireland had returned to work, Jaycee would not have been helping them out. He had discussed it with Jaycee that if Ms. Ireland came back Jaycee would be out. How did Jaycee and Ms. Ireland get along? Christine disliked Jaycee and told Brad that. Mr. Huziak was asked, did he tell Ms. Ireland that when she came back that Jaycee would not be there? He responded no he didn't.

106. The Respondent asked if it was correct that an ROE was not filed on August 6th, 2019. She was still an employee. She should have had an ROE when she went on leave. Mr. Huziak replied that the assumption was that the benefits package short term leave would have kicked in. Nu Line had not had a lot of leave at their place so it was an oversight on their part. They do not have many Employee's taking leave. They had only on in 6 or 7 weeks.

107. The Respondent said that on page 23 the email from Mr. Huziak to Ms Ireland contained was an apology for the misunderstanding of not issued an ROE. Would it been reasonable that if you thought someone had abandoned their job would you not have wanted back your cell phone, etc. Yes. It was overlooked.

End of Cross Examination.

The Appellant rested his case.

e. Respondent's Witness – RCMP Constable Erin Gonsch

108. Respondent indicated that he had another witness to call, the RCMP officer who had taken the original complaint regarding the Break-in at Nu Line. The Appellant entered an objection and argued that you cannot impeach a witness behind their back when they do not have an opportunity to comment on it. This is against procedural fairness.
The Respondent argued that in the discussion that was had previously the previous day regarding the evidence of the RCMP report was that the evidence should have been entered via the RCMP officer as witness. Otherwise, the evidence was hearsay. Now he had provided a witness. Adjudicator noted that the witness, Brad Huziak was still in the courtroom and could be returned to be cross examined.

109. Ruling: The Adjudicator ruled that the Respondent will be allowed to introduce the RCMP Officer, Constable Erin Gonsch as a witness, and that the Appellant will be provided time to prepare cross examination of the Constable.

i) Examination in Chief of Cst. Gonsch

110. The Witness joined the Zoom call by phone.
The Witness was asked how long he had been stationed in Meadow Lake. He indicated it was 4 years ending last October 2019.

111. CST. Gonsch was asked if he was the officer who attended occurrence on August 13, 2019? He replied yes. After starting shift at 8:00 am he read the original complaint. He arranged a time to have a meeting. The call went through central dispatch. He would have been given the complaint to investigate. Later in the morning, he spoke with the Manager and the Front Counter Person. The Report identified the Manager as male and the other person as female. Names were not included in the Report.
The Respondent asked what did he recall of the conversation? Cst. said not much detail. They explained their security system and the use of codes. They referred to the person as a former employee. That was she was a no show, and was not working.

112. The Constable Reported that when he went to talk to the suspect at her home and she was very distraught. She felt it was another form of harassment. She said she was at home and had an alibi for the time when the break in occurred.

113. The Respondent asked if the Constable had the document that was introduced in Document Book C with him? He replied yes. He had a digital copy and had it with him while he was testifying. He did not look at the document until the Respondent asked him questions at the end. Note marked 'Initial Message'. He was asked, if he was confident that the Narrative in the Report is correct? Is what he had typed? Yes.

ii) Cross Examination of Cst. Gonsch

114. The Appellant asked, when the Respondent was asking questions, you had the report in front of you when you were testifying? The Cst. Replied 'yes'. The Appellant inquired, then your take away is that the dispatcher had put 'ex-employee' on the report. Then you were told that she was on medical leave and had not returned to work when expected. The response was there were no assumptions by him. It was their interpretation that she was an ex-employee at that time. The dispatcher put ex-employee because that is what she was told by the caller. The Constable said that he can't testify today if they said she quit or was terminated from the discussions because of lapse of time.

115. The Appellant objected to the document that was marked for Identification. The officer clearly identified that the dispatcher had told him that. The Appellant said it was like the

officer was reading from a script. The Officer testified so why do we need the document? The Respondent countered that it was good and sound reliable evidence. The Officer did not read the report until the Respondent asked him to refer to it.

116. Ruling: The Adjudicator ruled that the Report was not be treated as an Exhibit but marked for Identification only.

f. Respondent's Witness – Christine Ireland

i) Examination in Chief of Christine Ireland

117. The Respondent asked Ms. Ireland when she had started with Nu Line. She replied March 23rd, 2018 as General Sales Manager. She referred to letter dated June 28th, 2018. The Letter says she was employed as of March 1, 2018. Mr. Huziak offered her the position when she walked into the business on March 22, 2018. The Respondent asked, what were her initial experiences? She said Mr. Huziak was gone.

118. There was a discussion by the Respondent about the remedies.

Witnesses were asked to leave the Zoom hearing.

The Appellant objected to the Respondent introducing discussion about remedies. The Adjudicator stated that she was not bound by the decision of the OH&S officer. She is making her own decision involving whatever remedies can be enforced. The Adjudicator can entertain the option to return her to work, but not as to whether the workplace was healthy or not. A ruling in that regard was made yesterday.

The Respondent stated that he had no intention to talk about the remedies in the context of harassment. He was very clear about this from the start. They are not here to litigate harassment but it will come up as context.

Ruling: The Adjudicator sustained the Objection.

Witnesses were called back and Examination in Chief of Ms. Ireland continued.

119. The Respondent asked Ms. Ireland how many employees were at Nu Line. She replied 12 to 13 employees in the business. When she was hired that was what the employee numbers were. There were two employees in her department – Darren Caron and her. She was the General Manager and he was the salesman.

120. The Respondent asked what were her benefits? Ms. Ireland said she had many discussions about that with Mr. Huziak.. She was given:

- A cell phone under Nu Line auto's plan.
- A vehicle to drive while she was paying off her vehicle's liens
- A fuel card.
- Discounts, but not other payments.

She wasn't aware that there was a benefit plan until she had a hysterectomy. He offered her about getting internet so she could work from home.

121. The Respondent asked what she was responsible for. She replied that she arrived at 8:00 a.m. every morning. She was responsible for financing purchases, making sure the vehicle for sale was in running order. Darren did the handshake pictures with the purchasers.

122. In June 2019 she complained to Mr. Huziak and he had promised to handle issues with Darren Caron. She went to the doctor because she was experiencing symptoms that were not very well. The doctor did tests and said that she needed to go on stress leave. Brad, Darren and I had a meeting. He had said things would be straightened out. When she returned back to work they weren't.

123. The Respondent asked, what was the first day she did not show up to work? Ms. Ireland replied, it was June 27th, 2018. On June 28th she brought a letter from the doctor that she would be on Medical Leave from June 26 to August 6th, 2018. The Respondent asked was anyone else on a similar leave? Bonnie had said no in her testimony yesterday. The Respondent asked when she went on leave, what was she doing for money. She told Brad that she was short for pay.

124. The Appellant raised an objection. He submitted that the Respondent did not put the matter of paid leave by the employer to any other witnesses. He is only allowed to go into alternate forms of payment – Employment Insurance (EI) and Workers' Compensation Board (and those alternate forms of payment only. Objection Sustained.

125. The Respondent advised that he had emailed a notice of a new document he would be introducing re the Facebook entries.

126. The Respondent asked Ms. Ireland what did she do for money? She replied that she received one week's pay for the first 2 weeks of June, 2019. The Group Health sent her a letter saying that she was denied benefits because Brad said she was off on stress leave. She applied for WCB and was denied. She was told she should go through Employment Insurance. When she contacted Service Canada she was then told she should have received an ROE. She did not. They said they would take care of that.

127. Ms. Ireland testified that she was seeing her doctor frequently. There was treatment, tests, etc. Appointment were sent regularly. She had high blood pressure.

128. Ms. Ireland testified that the Service Canada Worker said that the Payroll Admin should have sent in an ROE within 2 business days of when her leave started. They read the

comment section to her. She emailed Brad and Bonnie and asked why the comment on the ROE because she was on medical leave.

129. Ms. Ireland stated that the employer changed the provider for the benefit plan and did not tell her. She found out when she went to submit a claim.

130. Ms. Ireland filed a harassment claim in July, 2019.

131. On August. 7th, 2019 she got an email at 8:06 am. that she had been removed as the Administrator for Facebook for the business. Ms. Ireland stated she called Ian Gardner from OH&S to find out what was going on. Mr. Gardner said not to worry and he would call Brad to find out what happened. She had had no communication with anyone at Nu Line.

132. The Respondent reviewed August 14th, 2019 and the events of the police visit. Ms. Ireland was asked to come to the station and said she was on medical leave so couldn't. The RCMP officer came to her residence and said there was a break in and her security code was used. She said she had the same code as everyone else had. The Officer replied they said the codes had been changed. He said he would investigate further.

133. At noon, the same day Ms. Ireland's cell phone was disconnected. She had not received any notification that her phone would be disconnected. The phone was owned by Nu Line but it was her only phone. She needed to make several phone calls – to her doctor, counsellor and the RCMP.

134. The Group benefit Plan that she had when she went on leave was through Great West Life which allowed payment for the service of a psychiatrist. When she was waiting for psychiatrist to call, she got a call from GWL that her plan had been discontinued. She got information from Green Shield and registered. She had not gotten anything through that plan. When she went in to get her prescriptions, she found out that her plan was cancelled as of October 17th. She had no money for gas and no way to get to Meadow Lake. The doctor sent up a blood pressure monitor and then people in the community gave her rides to her doctor appointments.

135. Ms. Ireland was asked, had she entertained the thought of leaving Nu Line? She replied Yes. Her email dated Oct 25, 2019 says that she would be giving 2 weeks' notice. March 25, 2019 she wrote an email saying that she would have to seek employment elsewhere. In the June 27, 2019 email, she asked about Mr. Huziak laying her off so that she could get her license. The message she was conveying to Brad was that she was going to go if he didn't change things. This was a possibility. The trigger to leave Nu Line would have been if Mr. Huziak would have said he was not doing anything in regards Darren.

136. Ms. Ireland was asked if when it became a discriminatory action from a harassment complaint, did anyone from Nu Line contact her. When the decision was sent to Nu Line

from Mr. Gardner, did they contact you? She said no. On Page 59 of Exhibit A dated November 4th, 2019 what was to happen from then? Ms. Ireland responded the OH&S Officer emailed that Nu Line had 15 days to appeal.

137. On Page 63 of Exhibit A, there is a Letter to Christine Ireland from Nu Line dated January 3, 2020 talking about return to work. The letter does not say what position she is to return to. The ROE of September 5, 2019 says she is the Finance Manager. What was her response? She responded with an email on Page 70 of Exhibit A. Her take was that she would have to wait to hear back from Nu Line and their counsel. She did not know what to do with the letter of January 3, 2020. She had no one to turn to. Were there doctor's visits for the same medical issue all along? Yes.

138. Page 71 of Exhibit A shows Nu Line's Facebook page. Ms. Ireland said that Brad and Jaycee McCallum had an association. They worked together but Brad said Jaycee had nothing to do with Nu Line. When she saw Jaycee in the photo, she assumed he had taken her job. Regarding Page 72 Jaycee's post was on the Facebook page and again she assumed he was working in her job as Darren could not do financing.

139. Page 76 of Exhibit A shows a letter from Saskatchewan Health Authority clearing up a mistake by the doctor's clinic not sending a medical leave letter to Nu Line. The letter was sent February 6th2020.

140. Page 77 of Exhibit A is a letter from Nu Line about return to work. Ms. Ireland noted that there was no position mentioned in the letter that she was returning to. As far as she was concerned, nothing had been rectified. What was your doctor's opinion about her returning to work? Ms. Ireland responded he said she should not. Her Blood Pressure was still high.

141. Ms. Ireland was asked, had Nu Line contacted you about back pay? She said No. On Page 80 of Exhibit A, a letter from Nu Line in the last paragraph was a statement if she did not provide information within 7 days, she would be automatically terminated for failure to respond. She was asked had she received any money? Was her phone reinstated? She replied No. In the Facebook posts Jaycee was still in Facebook posts. She did not know what she was returning to. It seemed that Darren was gone and it was just Jaycee.

142. On Page 83 of Exhibit A is a letter to Mr. Huziak that she did herself without benefit of legal counsel. She had not received payment from Nu Line. She was asked if she had any indications that Nu Line had a place for you there? No. She was asked, do you think it is safe for you to return to work? Response was no. Would you want to return to work? Response was no because nothing has changed.

143. Regarding the T4 for 2018, how much of the calendar year does it cover? Response was three quarters of the year or 9 months. It does not show any medical leave or hits in pay. T-4, 2019 is until end of June which was 5 ½ months. Question was what is the difference

between the two years? Ms. Ireland replied 2019 was predicted to be a better year, but it did not happen.

144. Question was what is happening now? Ms. Ireland's reply was she is not working. She is in school. She was asked, have you worked since? Reply was yes with the Dorintoch Bar as a bartender. She worked for minimum wage.

ii. Cross Examination of Christine Ireland

145. The Appellant asked Ms. Ireland, re the Facebook administration, could there only be one person doing the administration and that was Brad? Yes. The Appellant asked when she was on medical leave she was not doing the Facebook ads? Response was No.

146. The Appellant questioned, on Page 6 of Exhibit A you were requesting a layoff if there was no change to be made. Ms. Ireland responded that she did not demand the layoff, but put it on the table as an opportunity. She was communicating and that hoping Brad would see that there were problems. The Appellant asked what the License referred to. Ms. Ireland responded that it was for a different occupation.

147. The Appellant asked if she had raised issues and threatened to quit before? Had she said "If this doesn't change I am quitting?" Ms. Ireland said all those times he told her he was going to fix things. Appellant asked in 2018 and 2019 if she had said numerous times that unless things changed she was going to quit. Ms. Ireland said that at no time did she say, "fix things, or I quit."

148. The Appellant asked on Page 42 of Exhibit A in an email to Brad didn't you say either Sharon gets her act together or I quit. M. Ireland said that it was only through desperation that she would have to give her notice. The email was about 'office issues'.

149. The Appellant asked, "Who did you think would do your work while you were on Medical Leave?" Ms. Ireland responded that Brad would. He gave her a lap top so she could do work at home.

150. The Appellant asked if she did get Employment Insurance sickness benefits eventually in October, 2019? Yes. Has Nu Line tried to recover any disability premiums from you? No. There has been no communication from them. The Medical Note delayed them.

151. The Appellant questioned how did she come to know that the ROE for August 26 was filed? Ms. Ireland said that there were confusing dates. On Page 16 of Exhibit A she had said Sept 2 the filing of the ROE was told her by Employment Insurance. The Appellant asked, if on Page 20 of Exhibit A, the Disciplinary Action Questionnaire, on the 6th question, 'do you want to return to this workplace?' She checked 'No'. Ms. Ireland said she spoke with Service Canada on August 28, 2019 and they told her about the derogatory comments on the ROE. She then reviewed the OH&S questionnaire and had amended Section 6 to read 'yes'. She amended it because that is how she has feeling at the time.

152. On Page 31 the Appellant asked if she posted on her personal Facebook on October 8th, 2019 about her days of being used and abused in the auto industry. This seems to show some inconsistency. Ms. Ireland said it was part of her 'healing journey'. She says that she meant that everyone in that business would be interviewed and investigated.

153. The Appellant said that the Medical Leave form stated she would not return until after October 6th, 2019. She did not return on October 6. Ms. Ireland said Ian Gardner told her she did not have to contact Nu Line. Question from the Appellant, Is not October 17th after October 6th? Medical Leave letter on October 22 was incorrect because it says Dec. 31, 2019 instead of October.

154. The Appellant asked did Nu Line ask for the laptop or phone back? Ms. Ireland said she had not heard anything from them from June 27, 2019. They did not ask for her laptop back then – she repeated she had not heard anything.

155. When she received a letter on January 3, 2020, she asked the Adjudicator of this Hearing what to do. The Adjudicator explained the process of the appeal, but could not provide legal advice. On page 66 of Exhibit A Ms. Ireland received Mr. Huziak's letter and she replied back that she was to wait for a reply from the Adjudicator.

156. Regarding the letter from Mr. Huziak on Page 77 of Exhibit A, she was asked did she provide the medical information requested in the letter? Did she try to return to work? Ms. Ireland responded No.

157. The Appellant referred to the Minutes of the Pre Hearing Conference Call held February 13 2020. Although this was not in the Document Book, the Adjudicator allowed the document to be reviewed by the Respondent. The point at issue was whether the return to work would not be an issue. The response on page 69 of Exhibit A was that the Adjudicator would be contacting the Appellant about the return-to-work issue. Minutes for the February meeting list the matters that do not have to be part of the hearing. Return-to-Work issues are in reference to the medical information. No. She did not understand point 3 so she did not understand anything that was happening.

158. The Appellant asked, after Ms. Ireland received the letter from Mr. Huziak which is Page 80 in Exhibit A, she did not return to work, nor did not she provide the medical information requested. The response was no. On May 26, 2020 Page 83 of Exhibit A she responded she is not providing any further information because she does not have to as the matter is going to a hearing.

159. The Appellant asked, did she look for work from June 21 19 to June 2020? Ms. Ireland's response was No.

iii. Redirect by Respondent of Christine Ireland

160. The Respondent asked Ms. Ireland is there a difference between providing notice and quitting? Ms. Ireland said notice is when you provide a period of time. You have to wait the notice period. Quitting you can do immediately.

161. The Respondent asked if Ms. Ireland had seen the ROE on the Service Canada website on Sept. 5, 2019 but she said she got information about the ROE directly from a worker at Service Canada.

162. Ms. Ireland was asked what medications she was on? Lorazepam, salbutamol. and blood pressure medication.

163. Ms. Ireland was asked about Page 31 in Exhibit A. She responded that it was a Personal Facebook post that she was on a whole new journey. It was a healing journey. She was going to help people on a grander scale. It was about emotional help. After the investigation she would not be abused or used again.

164. She was questioned, had she ever submitted a doctor's note to any place that she was employed before? Response was No.

165. In the February 6, 2020 letter to her from Brad Huziak, in the 2nd paragraph, she said she did not understand why nothing was being done because Ian Gardner had said Brad was supposed to pay her. What advice was she operating on when reading this? Response was that she did not have any legal advice at this time. She was acting on her own.

166. The Respondent asked, had you looked for work from June 17, 2019 to June 1, 2020? Ms. Ireland responded No, The Respondent asked why not. Ms. Ireland said she thought she still had a job. She was on Medical Leave. Question, "Had your medical circumstances changed during that period?" Response was No. Respondent asked did she and her doctor have a discussion that her diagnosis had changed? Response was symptoms and underlying condition had not changed. She could not afford her medications and gas money to go to the doctor's. Why did the medical leave notes cease as of October 31, 2019? She could not get to the doctor. When she sent in the decision letter she was not medically fit to work.

End of Re-Direct.

IV SUMMARY OF ARGUMENTS

The Appellant and Respondent provided written Briefs of Law containing their arguments in support of their positions to the Adjudicator prior to their oral arguments. This summary is a combination of the contents of the Briefs of Law and the Oral Arguments supporting the briefs.

Brief of Law and Arguments on Behalf of the Appellant

167. The Appellant expanded on the issues he had submitted in his Brief that the Appeal raises the following issues:

A. What is the scope of the appeal?
B. What is the discriminatory action test?
C. Was an occupational health and safety issue raised?
D. Was discriminatory action taken?
E. If discriminatory action was taken was there good and sufficient cause?
F. In the alternative, what are the damages / mitigation?

A. Scope of Appeal

168. The Appellant submits that the scope of the appeal is whether or not issuing a record of employment amounts to a deemed termination of employment as found by the Occupational Health and Safety Officer in his Decision and Notice of Contravention. In the Preliminary Objection, the Adjudicator ruled that the scope has been determined to be whether discriminatory action was taken. The Appellant argues that the proper scope of the appeal is only whether an ROE amounts to a deemed termination for the record.

169. At the outset of the hearing, the parties had agreed that the harassment which was the basis of a claim of harassment filed by the Respondent earlier was not within the scope of the appeal. As a result the Adjudicator had made a procedural ruling that the work environment and whether or not it was healthy to return to work was outside the scope of the appeal.

170. The Appellant also argued that the Adjudicators are not reviewing the decisions or Notice of Contravention made by the Occupational Health and Safety Officers, and therefore do not owe them any deference as decided in *Lundrigan v Weir,* 2004 SKQB at paragraph 23. The Adjudicator has to rely on the evidence presented at the hearing.

B. Discriminatory Action Test

i) *Legislation*

171. The definition of "discriminatory action" is set out in the Saskatchewan Employment Act at Section 3-1(1)(i) as follows:

> ... any action of threat of action by an employer that does or world adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion and includes termination, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand coercion, intimidation or the imposition of any discipline or other penalty...

172. Section 3-35 of the Saskatchewan Employment Act enumerates the situations where no employer shall take discriminatory action against a worker engaged in the activities set out in the section unless the action is taken for a good and sufficient other reason. The purpose of this section is to protect the worker from retaliation. Once it is proven that the worker was engaged in a protected activity, the onus shifts to the employer to prove that there were good and sufficient reasons for taken the discriminatory action.

173. The Appellant argued in his Brief that the discriminatory action test as outlined by Adjudicator Tegart in *Banff Constructors Ltd. V Lance Arcand,* 2019 LRB File No. 194-19 should apply:

> 1) Did the employee engage in protected 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 with the meaning of section 3-36(4)?

ii) *Application of the Test*

1) ***Did the employee engage in protected activities,* i.e. activities that come within the ambit of s 3-35?** The Appellant stated that it is not an issue whether she engaged in a protected activity as the harassment complaint that she filed prior to the complaint re discriminatory action is not within the scope of this appeal.

2) ***Did the employer take discriminatory action against the employee within the meaning of the term as defined in 3-1(1)(i)?*** The Appellant argued that there was no discriminatory action as defined in that section taken because the Respondent's employment was not terminated. His argument was as follows:

- The sole reason that the Officer issued the Notice of Contravention was the ROE issued on August 27, 2019. In fact, the ROE was issued for an interruption of earnings not a termination. Employment was not terminated because an ROE was issued. Service Canada had requested the ROE be issued.
- The Respondent has argued that the ROE was issued for abandonment of position. That is nowhere in the ROE. The Code used was code K which is used where an employee has quit as opposed to being terminated.
- Employment relations are between the Employer and the Employee and are not determined by Service Canada.
- The Employer must communicate the termination directly to the Employee. There was no letter given to the Employee during this time

- The Employer continued to pay the Employee's disability premiums.
- The Employee received sickness benefits from Service Canada so clearly they interpreted the ROE to be a continuation of employment.
- The Notice of Contravention issued by the OH&S Officer was fundamentally flawed. It is clear that the Employee was on medical leave and was not terminated.
- No other actions taken by the Employer at this time amount to termination:
    - There was a business reason for cancelling the Appellant as an administrator on Facebook as she was no longer at work.
    - The work cell phone was disconnected because it was to be used for work and the Appellant was on leave and it was disconnected to save money.
- There have to be clear actions of termination and there were none.

3) ***If the Employee did engage in a protected activity were there good and sufficient reasons for the steps the Employer took?*** The onus is on the Employer to show that he had good and sufficient reasons for the action it took.

- There was nothing retaliatory about the action that was taken in filing out the ROE on the basis that the employer had at the time. The request came from Service Canada.
- There was nothing retaliatory about adjusting the Facebook account where the business needs to use it. It was a business decision.
- The Employer amended the ROE as soon as it received the medical leave note, and that resulted in the Appellant receiving sickness benefits.

C. Damages

174. The parties agree that the Appellant was unable to work from June 17, 2019 and remains unable to work today. There were medical notes dated June 27 to August 5, August 6th to October 7th, October 7 to December 31, 2019. The final note dated September 27th, 2019 was that her high blood pressure was not resolved and she remained medically unable to return to work.

175. The Principle of Remedy is to put the person back into the position they would have been had it not been for the breach. Even if the August 27th ROE was considered a termination, the Respondent would be in the same position as now as she is unable to work. The Respondent is absolutely not entitled to wages. She would have been on a continuous medical leave through out the entire period. There are no wages if you are not at work.

176. The Respondent repeatedly failed to respond to return to work requests. Upon receipt of the last Doctor's note that covered the medical leave to Dec. 31, 2019, the Appellant asked 3 questions:

- When the return to work was expected?

- What accommodations would be necessary for a return to work?
- If a return to work was not expected in the short term, was a return expected in 6 to 12 months?

The Appellant offered to pay the costs of obtaining the information, but said they did not want any diagnostic information. A response was requested in 14 days. The Respondent did not provide the requested information. On February 6, 2020, the request was repeated and the Appellant stated that failure to provide same could result in discipline up to and including termination. The Appellant again sent the same request on May 21, 2020 and still no response. On May 26, the Respondent made it clear that no medical information or any other information would be provided to the Employer.

177. During this time, the Appellant did not permanently fill the position. The Appellant testified that he had a conversation with the employee filling her position that when the Appellant returned the Employee would no longer work at Nu Line. The Appellant communicated that the Respondent would be returned to her position.

178. The Appellant tried for 5 months to get information. The Appellant finally terminated the Respondent for failure to return to work. Although she had a medical note at the time she did not give it to the Employer. She was seeing her doctor on a regular basis so she could have provided an update on the medical information but that was never done.

179. The Appellant tried to return the Respondent to work according to the Notice of Contravention, but she did not respond to the attempts. Had she responded she would have been medically unable to return to work so there would be no earnings, and therefore she would not be entitled to damages.

180. It was clear that the Respondent had no intention to return to work. The Appellant has referred to the case of *Saskatchewan (Ministry of Labour Relations and Workplace Safety) vs. SGEU (Dunkle), 2015 CarswellSask 10* which he asserts has many similarities regarding the issue of refusing to provide medical information and frustrating the return-to-work process. In *Dunkle* Arbitrator Ish outlined a number of accepted principles regarding the employer's right to medical information at paragraph 58:

> A number of other generally accepted principles were outlined by Arbitrator Bob Pelton in the *SaskTel case, supra* and include:
>
> - Even in the absence of a medical certificate provision in the collective bargaining agreement employers have a continuing right to inquire into absence from work and employees have a continuing obligation to account for any absence, including an absence due to sickness. *(SaskTel,* para. 89)
>
> - Expediency does not trump privacy rights of employees but an employer has a interest in receiving information to properly administer sick leave

policies and to encourage early return to work and accommodation initiatives. *(SaskTel,* Para 96)

- The focus is on information necessary to assist management in determining whether illness or disability is bona fide and what impact it will have on the presence and attendance of the employee. *(SaskTel,* para. 101

- Although generally an employer will not be entitled to a diagnosis of an employee's condition, there are instances where an employer will be entitled to a diagnosis, such as where reasonable concerns arise about abuse, where a diagnosis is required to deal properly with fitness for return to work and where there may be a communicable disease involved. *(SaskTel,* para. 104)

- Generally an employer's right to information increases the longer a leave endures. A more intrusive investigation at a later stage, going beyond routine information, may be justified on a case-by-case basis. *(SaskTel,* para. 105)

- An Employer is entitled to know the expected or estimated return-to-work date. *(SaskTel. 109)*

The Appellant argued that the Employer in this case is entirely compliant with the principles set out by Arbitrator Ish.

181. In *Dunkle*, Arbitrator Ish found that the employee could not 'veto' the decision to try to return the employee to work or accommodate an employee in the workplace while still claiming salary or sick leave benefits at para. 68. The Appellant argues that the exact same analysis applies in this case. The Respondent cannot veto that process by not responding to return-to-work requests yet still claim entitlement to salary or benefits. Her unequivocal testimony at the hearing was that she does not want to return to work (separate and apart from whether she is medically able to return to work, which she also testified she was not able to).

182. Arbitrator Ish's comment at para. 68 in *Dunkle* were: "It appears from the onset ... the Grievor had decided to leave her job with the Employer but wanted monetary compensation for doing so." The Appellant argues that this also applies in this case. It appears from the Respondent's actions that she had no intention of returning to work in any capacity and desired to leave her employment but wanted monetary compensation for doing to. There are a number of reasons facts that support the conclusion:

- The Respondent testified at the hearing that she does not want to return to work.

- On June 27, 2019, immediately before providing a doctor's note dated June 28, 2019, she requested to be laid off in an email.
- She also threatened to quit in 2018.
- On September 2, 2019, the Respondent submitted a discriminatory action complaint to OH&S where she checked "No" to the question about whether she wanted to return work.
- On October 2, 2019 the Respondent posted on her Facebook that she did not want to work in the auto industry any longer and was starting on a whole new journey.
- The Respondent's response to the May 21, 2020 request for information stated that she would only accept correspondence from the Appellant with a full settlement amount.
- On May 26, 2020 her only response to the return-to-work request is that she would accept her full settlement.

183. The Appellant argues that the Respondent was medically unable to return to work for the majority of time between the Notice of Contravention and the current time. This is supported by Ms. Ireland's testimony, and the medical notes which she provided. As she was medically unable to return to work, she would not have earned any wages during that same period. The Respondent had exhausted her sick leave benefits through employment, through Service Canada, and had been denied application for benefits through WCB and the Employer's private insurance benefit plan. The Applicant argues that employers are not responsible for paying wages where someone is medically unable to work and the individual has exhausted all other insurance options.

184. The Applicant contends that the Respondent failed to mitigate by not participating in the return-to-work process with the Employer. Also, the Respondent provided no supporting documentation that she sought alternative employment which also indicates a failure to mitigate.

Summation

185. The Appellant closed his oral argument by summarizing its position as follows:

- The Applicant did not take discriminatory action against the Respondent in any form. There were good and sufficient reasons for providing the ROE.
- There are two reasons for disqualifying damages:
    - The Respondent was not able to work during the entire time.
    - The Respondent failed to participate in the return-to-work process. The Respondent cannot veto the process and still claim back wages.

186. The Parties disagree on some fundamental issues:

If a document is not in evidence and not in the documents then it isn't to be considered. Reference was made to items in the OH&S letter which document is not in evidence.

- In regards to mitigation and remedy, the mitigation that the Respondent is talking about is in a wrongful dismissal situation. That is a different set of principles. This situation is governed by legislation. The law of wrongful dismissal does not apply. In wrongful dismissal the Employee does not have the right of reinstatement. in that case. There is no right of reinstatement like we are dealing with here.
- In caselaw, the Employer could offer the position back to mitigate damages. It is a choice by the Employer as to whether they want to do this. However, in this case it is a requirement that the Employee be returned to work.
- In the *Act*, Section 3 (36) an OH&S Officer can only do four things if he finds discrimination. Remedies limited by the statute are:
    - Return Employee to work,
    - pay the back wages. The pay is based on what she would have earned, but she was not willing to come back to work and she was not medically able to do so.
    - remove reprimand.
- Severance is not part of the powers of the Adjudicator. Wrongful Dismissal is fundamentally different. In the case of wrongful dismissal in court there is a defined notice period. Here the Employee shall be reinstated immediately. There is no choice about it. Adjudicator has no authority to delve into the reasons why.
- Discriminatory Action entitles Employees to wages they would have earned. The employee would not have come back because of medical issues and personal choice.
- The Employee said there was no back pay paid. That is because she was not working so no back pay would have been awarded. Generally, put in the position she was in – she would not have been able to work. The Employee wants the best of both worlds – not to come back to work, and to be paid. The *Act* would be turned on its head. Every employee would take the option not to come back to work.
- The Respondent says that the ROE states 'job abandonment'. It does not say that. It does say that she was away from work and supposed to return, but they have not heard from her. The ROE could be that it says 'Quit'.
- The Respondent says that the mistake on the ROE was continued. Ms. Rookes did make several changes to the ROE. She admitted she had mistakenly not adjusted the comment box. It did not make sense that it would have been intentional because it did not.
- When the EE went on a medical leave on June 27th, 2019 the Employee stated that the Employer would have been obligated to issue an ROE. Pre-harassment complaint would not be relevant, but it was not within the scope of disciplinary action.
- Nu Line changed insurance provider, so it affected all the employees, not just Ms. Ireland with the hiccup. This could have been pre- harassment claim.

- Before the updated medical leave vast number of things happened before Sept. 5, and after September 5. The Employer did not have the updated medical information then. Facebook before, cell phone before and Aug 27 ROE. In the meantime the Employer had filled out the Disability forms and the WCB forms. Updated Sept 5 – send letter of apology to CI and applied for benefits.

187. The Appellant concluded that Nu Line requests that the Occupational Health and Safety Officer's Decision and Notice of Contravention be overturned, and in the alternative that the Adjudicator confirm that no back wages have accrued pursuant to the Notice of Contravention.

Brief of Law and Oral Arguments on Behalf of Respondent

188. The Respondent states in his Brief at para. [55] that there are four issues to be considered "but the crux of the matter is whether the Appellant can prove on a balance of probabilities that Ireland was dismissed for good and sufficient other reason. "

189. The four issues are set out at para. [55] as follows:

> a. Was Ireland engaged in a protected activity, as set out in section 3-35 of the *Saskatchewan Employment Act?*
> b. Was there a discriminatory action taken by the Appellant falling within 3-1(1)(i) of the Act?
> c. Did the Appellant have good and sufficient other reason for the dismissal?
> d. What is the appropriate amount of compensation for the Appellant to pay to Ireland?

a. Was Ireland engaged in a protected activity?

190. It is argued that Ms. Ireland was engaged in a protected activity:

1*) taking medical leave from the workplace.*

The Act under the relevant subsections of section 3-38 establishes requirement of an employer with respect to occupational health and safety:

> 3-38 The 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 circumstances arising out of the workers' employment;

(e) cooperate with any other person exercising a duty imposed by this Part or the regulations made pursuant to this Part;
(h) ensure, insofar as is reasonably practicable that the activities of the workers at a place of employment do not negatively affect the health, safety or welfare at work of the employer, other workers or any self-employed person at the place of employment;
(h) comply with this Part and the regulations made pursuant to this Part.

191. The Respondent argued at para 61 of the Respondent's Brief of Law that Ms. Ireland was on medically recommended leave from Nu Line due to extreme stress caused by the work environment, and attempts to return prematurely from previous leaves were unsuccessful. It was a work environment she was powerless to correct herself, and her only option was for her doctor to remove her from it before she incurred catastrophic health consequences.

2) reporting harassment within the workplace.

192. By filing a Harassment Complaint in July, 2019, Ms. Ireland was engaged in a protected activity.

b. Was there discriminatory action taken against the employee?

Protected activities are set out in section 3-35 of the Act. The relevant portions of the section in relation to reporting harassment are:

> 3.35 No employer shall take discriminatory action against a worker because the worker:
> (b) seeks or has sought the enforcement of:
> (i) this Part or the regulations made pursuant to this Part;

193. The Respondent quoted *Britto vs. University of Saskatchewan* 2016 CanLII 74280 (SKLRB) in which the Adjudicator stated at paragraph {45} of her decision:

> [45] *The framework for analysis begins with Section3-36(1) which provides that the worker must have reasonable grounds to believe that the employer took discriminatory action against him or her for a reason mentioned in section 3-35. In other words, the initial onus is on the worker to establish a prima facie case of discriminatory action.*
>
> [46] *The initial burden on the worker to establish a prima facie case of discriminatory action is not a particularly onerous one. To achieve the objects of the Act and its important purpose of encouraging occupational health safety, workers must be secure in the knowledge that they may exercise rights or obligations – raise health and safety concerns without fear of reprisal. For that*

reason where a worker establishes a prima facie case of discriminatory action, the reverse onus is triggered and the employer bears the heavier burden of disproving the presumption *imposed in Section 3-36(4).*

[47] *To establish a prima facie case of discriminatory action, require the worker to establish the following:*

> *(a) that the employer took action against the worker falling within the scope of Section 3-1 (1) (i) of the Act describing 'discriminatory action";*
>
> *(b) that the worker was engaged in one or more health and safety activities protected by Section 3-35 of the Act and*

[48] *That there is some basis to believe that the employer took discriminatory action against the worker "for a reason" mentioned in section 3-35. In other words, there must be a prima facie linkage or nexus between the worker's protected activity and the employer's action.*

[49] *A determination that a prima facie case of discriminatory action has been established raises 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 section3-35 and triggers a reverse onus, wherein it falls to the employer to establish on a balance of probabilities, that the discriminatory action was taken against the worker for good and sufficient other reason.*

194. In *JR v. Chip and Dale Home Inc.* (Rusti-Anne Blanke). Arbitration Award, August 19th, 2016 the Respondent pointed out that where an employer terminates an employee shortly after he/she raises a health and safety concern, the onus rests with the employer " to establish that the discriminatory action was taken against the worker for good and sufficient other reason".

195. The Respondent has included in his Brief, *Beggs vs. Westport Foods Ltd.,* 2010 BCSC 833 where the employee was away from work due a fire at her home. The employer and the employee did not have any contact for one month. When the employee returned to work to submit a doctor's note indicating that she was unable to work she found that the company had submitted an ROE indicating that she had quit. The employee took that as a dismissal. When she later retained counsel, the employee was successful in a finding of wrongful dismissal without any pre-existing finding of a discriminatory action.

196. In his oral argument, the Respondent argued that the *Beggs* case was similar to the current case:

- In the *Beggs* case, the court found that two attempts to contact the Employee were insufficient. In this case, the Employer did not reach out to the Employee.

Here failure to contact her regarding employee benefits resulted in a loss of those benefits and her psychiatrist appointment not being covered.

- In this case
  - The employee was not contacted regarding why she did not return to work.
  - The employee was not contacted about the alarm system.
  - The employer was not contacted by the employer about the break in at the shop. The police officer gleaned that she was a former employee from Brad and Bonnie.
  - The employee learned from a note on her screen that the cell phone was being cut off. The employer knew that was her only phone.
  - There was no attempt to contact the Employee when Service Canada requested an ROE. The employee had to contact Service Canada to find out why she was not getting payments. There were several errors, but there was no communication by the Employer to say they would be corrected. In *Beggs* a single inaccurate ROE and the employer's refusal to correct the ROE was sufficient for the Employer to be seen to be taking discriminatory action. An inaccurate ROE and a refusal to change the ROE were enough to be classed as a discriminatory act. There were other indicators in this case.

- In *Beggs* the employer was not aware that the employee was on medical leave or they would have taken appropriate action. Here the employer was aware of the employee being on medical leave.

197. The Respondent stated in his oral argument that there were multiple actions that could be considered as discriminatory action as listed above – benefits cancelled, ROE not amended properly which together are enough to be weighted to find discriminatory action.

198. There are two pieces of evidence that show discriminatory action:

- The employee was investigated for theft as an 'ex-employee';
- Inaccurate ROE was not amended and still showed abandonment of her position.

At no point did she indicate she was no longer an employee.

c. Was there good and sufficient reason for the discriminatory action?

199. The Respondent argued that the ruling in *Oil City Energy Services Ltd. vs. Zeyad Fadhel and Trevor McGowan* (Hildebrandt), Arbitration Award March 30, 2-17 is pertinent to this case. The employees in that case were terminated but the Adjudicator found that the employees were subjected to a discriminatory action. The onus is on the employer to attempt to establish that there were good and sufficient other reasons for their dismissal.

The employer argued in that case that the dismissal of the employees in question was on account of inappropriate use of their cell phones. The Arbitrator dismissed the appeal as the Employer failed to establish that there were good and sufficient reasons to dismiss the employees.

200. At para. 75 of his Brief of Law, the Respondent argues that the Appellant would argue that Ms. Ireland had abandoned her position, at least as far as their information was concerned, entitling them to dismiss her. The argument must fail for several reasons:

1) Ms. Ireland's dismissal was immediate upon her not showing up for work at the expected time;
2) Ms. Ireland's dismissal was immediate upon her not showing up for work with no attempt by Nu Line to communicate with her about her leave status;.
3) Ms. Ireland's dismissal was almost immediate after OHS advised the Appellant of her harassment complaint against them;
4) Ms. Ireland's dismissal was only weeks after beginning her medically recommended long-term leave of absence;
5) Ms. Ireland's need of medical leave of absence was enacted by her doctor in response to her direct reaction to the work environment at Nu Line;
6) Ms. Ireland had no record of prior discipline, nor was there the required progressive discipline supporting a just-care dismissal;
7) Nu Line did not update Ireland's inaccurate ROE ... in the wake of the discovery of the missing doctor's medical reports. Even when all third-party information gaps were cleared up about Ireland's continuing medical issues and related leave, Nu Line continued treating her as a former employee.

201. At para. 77 of his Brief, the Respondent argued that Nu Line received reliable information that Ms. Ireland believed she was and indeed had remained on medical leave as instructed by her doctor, continuing from when she left work at the end of June, yet Nu Line did nothing to restore her Facebook administrative access, her cell phone access, or her employment status on her ROE so she could receive support. The only continuing thread to Ms. Ireland's former employment was her possession of the cell phone and work computer, her person effects yet at the office uncollected and unsent, and her inclusion on a group plan that ended October 17, 2019 – shortly before the conclusion of the OHS discriminatory action investigation.

202. At para. 78, the Respondent argued that at no point did Nu Line reach out to Ms. Ireland to ask about her condition about her medical leave status, about her timeline for return, about her desire to return – or about any of the changes being unilaterally being made. Nu Line unilaterally made the aforementioned changes to her employment, effectively dismissing her.

203. In order to rely upon abandonment as a good and sufficient other reason for dismissal, the Respondent stated at para. 82 of his Brief that "the Appellant must establish that the

employee did in fact abandon her job. ... It is clear from the facts that Ms. Ireland did not at any point abandon her job. There is no evidence to that effect".

204. The Respondent referred to the case *Betts v. IBM Canada Ltd.,* 2015 ONSC 5298 in which the Ontario Superior Court provided a useful summary of abandonment as follows:

> [57] While an actual resignation must be clear and unequivocal, the test for abandonment is similar to the test for registration, do the statement of actions or the employee, viewed objectively by a reasonable person, clearly and unequivocally indicate an intention to no longer be bound by the employment contract (See *Piereira vs. Business Depot Lts. (c.o.b. Staples Business Depot).* [2009] B.C.J. No. 1731 varied on other grounds 2011 BCAA 361).

205. The Respondent argued that Ms. Ireland's actions did not amount to abandonment as:

- Nu Line terminated the Employee without reaching out to her being aware that she was on medical leave due to the environment;
- The employee communicated to the Employer that she was at risk of resigning due to the work environment, believing in communicative, up-front and ample notice.
- The Employer did not restore her employment status after being informed that she had not abandoned her job and had medical documentation to that effect.
- Immediately upon seeing her ROE that Nu Line considered her as abandoned her job, she reached out to Nu Line to clarify that was not the case.
- Even if Nu Line believed in good faith that Ms. Ireland abandoned her job, they did not make this belief known to her.

206. At para. 91 of his Brief, the Respondent argues that in order to rely upon absenteeism as a good and sufficient other reason for dismissal, the Appellant must establish that there was a history of progressive discipline. The concept of progressive discipline requires that the employee be notified of the problem and be provided with the opportunity and resources to remedy the problem. No progressive discipline was taken against Ms. Ireland.
At para. 95, the Respondent stated that ... even if the employer can establish that absenteeism issues were on reason why Ms. Ireland was dismissed, the Appellant must fail if the protected activity was simply one of the reasons for dismissal.

207. In his oral arguments, the Respondent argued that there were no good and sufficient reasons for the discriminatory action:

- If the Employee had abandoned her position that would be good and sufficient reason, but she did not. There was a mix-up regarding medical leave which was immediately corrected by the employee.
- There was no argument of progressive discipline being taken. There was no dismissal for cause or grounds in this case.

- There was a medical note that was uncontroverted evidence that the employee had gone to the doctor. It is also uncontroverted that the medical certificate was not sent to Nu Line. When the employee realized it had not been sent she immediately took action to get the Medical Certificate to the employer.
- There was an imbalance of communication between the employer and the employee. The employer still did not contact the Employee when they received the note.

d. What is the appropriate amount of compensation for the* Appellant *to pay to Ms. Ireland?"

208. In para. 98 of his Brief of Law, the Respondent states: "Ireland is entitled to compensation from the date of the discriminatory act, which took place on:

a. the dismissal on August 6, 2019, upon Facebook administrative access being unilaterally removed; or in the alternative,

b. the dismissal on August 14, 2019 upon indicating to police that Ireland was an ex-employee and her work phone plan unilaterally cancelled; or in the alternative

c. the dismissal on August 27, 2019 upon submission of the ROE indicating abandonment; or in the alternative

d. the dismissal on September 5, 2019 upon submission of a new ROE indicating abandonment; or in the alternative,

e. the dismissal on October 17, 2019 upon her insurance being cancelled

to the date of the decision in question plus backpay to the date of her leave (and the last time she received any compensation from Nu Line) beginning June 27, 2019. In this case, the decision in question is this arbitrator's ruling on the appeal filed by Nu Line.

209. Returning to *Beggs* regarding the issue of mitigation at paragraph [102] in the Respondent's Brief, the case's decision states that Ms. Beggs felt she had been treated in a cruel and heartless way by the employer she no longer trusted the employer, and she felt the relationship was irreparably harmed. ... Her refusal to return to work under those circumstances did not amount to failure to mitigate her damages."

210. The Judge in *Beggs* also states in paragraph [102] that there should be "damages for the conduct of the defendant in the manner of the dismissal. The employer did not act in good faith and with a sense of fair dealing with this employee. Given that she was a long-term employee with a good record there should have been a genuine attempt by the employer to contact the employee, knowing that she was in a very emotional state when she called the morning after the fire."

211. In regards to this case, the Respondent's Brief, at Tab 3, paragraphs 94 and 95, the letter that the Employer provided to Ms. Ireland was not an appropriate letter saying what she was returning to. The Employer's attitude in the letter did not help. With the unequal bargaining positions between the employer and the employee she did not know what she was returning to. On Paragraph 97 of the Brief the Employer make no attempt to apologize or make things right. She was vulnerable emotionally and financially. Her refusal to work did not mitigate damages.

212. The Employee could not find equivalent work in her area. Within the decision by BCCA – *Evan vs. Teamsters Local Union No 31* 2008 SCC 20, the employer has the onus of demonstrating that the EE could have found work, para. 30. Where the Employer offers the opportunity to mitigate damages, the test is whether the reasonable person would accept that opportunity:

- Salary being offered.
- Working conditions being demeaning.
- Where the personal relationships are not acrimonious.
- Whether or not the Employee has commenced litigation.
- Whether the offer of restored employment was only after the previous employment has ended.
- Employee is not obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation.

213. There was a lack of bona fide efforts by the Employer:

- Why submit medical leave documents to a former employee?
- The Employee cannot return to a job where there is no job to return to. It was filled.
- The ER must make genuine efforts to return Employee to work under the same terms and conditions as before.
- Employee had not received a penny of back pay since the decision by the Occupational Health and Safety Officer.
- A letter from the Employer was received after 11 weeks from the decision. The letters were received
- She did not receive any benefits from the benefit plan to date.

Letters were received by the Employee over seven to eight months. What is not clearly and equivalently stated was what she is returning to: - income, position, benefits, etc. There were vague letters, not bona fide attempts to return her to work. Evidence presented does not appear to a reasonable statement of return to work. She was not required to work in a hostile environment.

214. The Respondent states that termination is explicitly cited under section 3-1(1) of the Act as a "discriminatory action" and that Ms. Ireland was terminated from her employment so the test is satisfied. But at no point was his communicated to Ms. Ireland. The

Respondent argued at para. 69 that 'the determination that needs to be made by the Arbitrator is not whether the employee was harassed but , rather simply whether the employer took discriminatory action against the employee when the employee was engaged in a protected activity. At para. 72, it is argued that "the onus is on the employer to attempt to establish that there were 'good and sufficient other reasons' for Ireland's dismissal."

i) *Decisions not stayed by appeals*

215. Section 3-57(1) of the *Act,* subject to subsections (2) and (3), the commencement of an appeal does not stay the effect of a decision that is being appealed.

The Respondent states that the Appellant has not sought a stay of the Decision and no stay is in place. At para. 100 of his Brief, the Respondent states that "without a stay, the Appellant was obligated to comply with the entirety of the Decision despite the appeal. The Appellant ignored, refused, and neglected to comply with any aspect of the Decision."

216. In para. 101 of his Brief. the Respondent stated that the Decision of October 25, 2019 ordered Nu Line to reinstate Ms. Ireland to her former employment on the same terms and pay any wages she would have earned but for the discriminatory action.

217. In para. 112 of the Brief, the Respondent quoted *Oil City Energy Services Ltd. v Zeyad Fadhel and Trevor McGowan* (Hildebrandt), Arbitration Award, July 10, 2017 [*Oil City Energy*] in "a situation where the employer ignored, refused and neglected to comply with the previous standing order despite there being no stay of proceedings in place. The arbitrator in *Oil City Energy (Supra)* found that such circumstances entitled the employee to compensation for ongoing damages even after the date of the decision. This means that the damages continue to increase until the day the order is complied with in its entirety."

218. Given the *Oil City Energy* decision, the Respondent claims at para. [121] of his Brief that "Nu Line should be required to pay to Ms. Ireland the sum of $140,000 as of the date of the hearing which is to be increased by her hourly rate with Nu Line of $25 for each and every day following the hearing until Ms. Ireland is paid in full. The ongoing damages suffered by Ms. Ireland amount to $1,250 each and every week.

ii) A*ward for Damages*

219. The Respondent stated a number of cases starting at para. 104 of his Brief that discuss damages that were awarded to employees:

- *Wallace vs United Grain Growers Ltd.* 1997 CanLii3332 (SCC), [1997] 3 S.C.R. 701. At para. 88 and 98 said damages are available where an employer engages in conduct that is 'unfair or is in bad faith by being for example, untruthful, misleading or unduly insensitive'.

- *Keays v. Honda Canada Inc.* 2008 SCC 39 (CanLII), [2008] 2 S.C.R. 362, at para 59 the Court did away with the distinction between aggravated damages and moral damages and held these damages should be recognized through a fixed monetary award rather than through an extension of the notice period."
- *Morrison v Ergo-Industrial Seating Systems Inc.* 2016 ONSC 6725 [Tab 9] found at para 43 that the Defendant did not act fairly or in good faith in the matter of the dismissal of Mr. Morison as the defendant was not candid, reasonably honest, nor forthright with Mr. Morison.

220. At para 107 of his Brief, the Respondent quoted that in *Beggs,* the employee was granted significant severance pay as the matter had been one of wrongful dismissal by the trial judge but the decision was reversed on appeal. The Respondent stated "What distinguishes the immediate case is the employer's multiple incorrect ROE issuances and failure to correct the inaccuracy, harmful to Ireland, that she had allegedly abandoned her job, even after being told this was objectively untrue by both Ireland and her doctor. The ROE has still not been updated as of this date."

221. The Respondent is also claiming in para.]120] that Ms. Ireland is "also entitled to vacation accrual pursuant to the Act between June 27, 2019 and June 1, 2020. Further she is entitled to $25,000 compensatory damages for the bad faith actions by Nu Line leading up to her termination, subsequent to her termination, and the lack of genuine efforts to return her to work."

Summation

222. The Respondent made the following points during his summation:

- The Employee was recuperating at home. The Employer took discriminatory actions but she was not aware of them.
- The Employer did not have any good and sufficient reasons for discriminatory action.
- There was not a bona fide offer of return to work. The offer had to be to the same job and work. The Employer did not take bona fide efforts to get her back to work. The only thing conveyed to Employee were the ingenuous letters that were vague proposals.
- The three letters received during the 7 months were a bluff. They were being sent because of the ongoing appeal.
- Because of the Employee's fragile health these actions could have caused her fatal harm. An employer cannot cause harm and then benefit from it. The Employer's attitude did not help the situation.
- Appellant wants to believe that there were many mistakes made but they were not responsible for some of them:
    - Multiple ROE's were issued but mistakes were innocent.

- Benefits were cut off but not in the same manner the Employer alleged.
- There was a person in the Employee's position. We are supposed to believe that this is not because of genuine effort to keep her position open.
- Every single effort to convey profound information was not their fault.
- Any mistakes were innocent.
- Service Canada is not instructive of what should be put on the ROE. Contents were the responsibility of the Employer.
- We are asked to believe that at no point could Brad or Bonnie pick up the phone to talk to the Employee.
- It is clear Brad is a bad communicator not a bad person. Mistakes were not made out of legal malice. It may be a good business move but not the right one legally.
- The Employee is a known communicator and she would have communicated had she known what was going on.

This case is amazing similarly to the Beggs case. There is a lack of bona fide evidence of genuine return to work efforts on the part of the Employer.

The Employer bears the burden of proving there was no discriminatory action.

223. The Respondent is claiming the following remedies:

- $115,000 in backpay is reasonable on the basis of previous year's sales. On June 18 2019 the Employee was proposed to be taking over business responsibilities. Regarding mitigation she did work and mitigating amount would be $2400, only if the larger amount is awarded. Time is ticking so it will continue until the Adjudicator makes a decision.
- Ancillary costs for phone, fuel card, etc.
- Employee is returned to work.
- The Adjudicator has the power to assign severance. Exploring that would be appropriate.

V Analysis

224. I have determined that the issues before me to be adjudicated are:

1. Was Ms. Ireland engaged in a 'protected activity' as set out in Sec. 3-35 of the *Act*?
2. Was there Discriminatory Action taken by Nu Line against Ms. Ireland as defined by Section 3-1(1)(i) of *the Act?*
3. If discriminatory action was taken against Ms. Ireland was there good and sufficient other reasons within the meaning of section 3-36(4) of the *Act*?
4. Are there any damages or ancillary costs to be paid to Ms. Ireland?

In determining the first three issues to be adjudicated I have followed the Discriminatory Action Test as outlined by Adjudicator Tegart in *Banff Constructors Ltd. v Lance Arcand,* 2019 LRB File No. 194-19 set out in para. 173 of this Decision.

Issue #1 Did Ms. Ireland engage in a 'Protected Activity' within the ambit of Sec. 3-35?

Appellant's Submission

225. The Appellant's position is that Ms. Ireland was not engaged in a protected activity as set out in Section 3 – 35. Ms. Ireland had filed a Harassment Complaint in July, 2020. The Harassment Complaint was not investigated. The Harassment Complaint was then changed to a Discriminatory Action complaint.

226. In para. 168 of this Decision, the Applicant submitted that the Harassment Complaint was not within the Scope of this Appeal. The parties had agreed in the Pre-Hearing Conference Call that there would be no reference to the Harassment Complaint in this Adjudication.

227. As the Protected Activity that Ms. Ireland would have been engaged in under sec. 3-35 was the Harassment Complaint, and as it is no longer within the scope of the appeal; therefore, the Appellant argued Ms. Ireland was not engaged in a protected activity.

Respondent's Submission

228. The Respondent argued that Ms. Ireland was engaged in a protected activity under section 3 – 38 of the *Act:*

> 3-38 The 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 circumstances arising of the workers' employment.
>
> (h) ensure, insofar as is reasonably practicable that the activities of the workers at a place of employment do not negatively affect the health, safety or welfare at the work of the employer, other workers...

229. The Respondent argued that Ms. Ireland was on a medically recommended leave from Nu Line due to extreme stress and under the protection of sec. 3-38.

230. The Respondent also argued that Ms. Ireland was engaged in a protected activity under sec. 3-35 due to the harassment complaint which she had filed.

Analysis

231. Even though the Harassment Complaint filed by Ms. Ireland in July, 2019 was not investigated by the OH&S Officer, the filing of the Complaint in itself is a protected activity within the parameters of Sec. 3-35. Therefore, at the time that the Harassment Complaint was filed, Ms. Ireland was engaging in a protected activity.

232. When the Harassment Complaint was changed to a Discriminatory Action complaint, it was agreed by the parties hereto that the Harassment Complaint was out of the scope of the appeal. The appeal would only deal with whether there was discriminatory action taken against Ms. Ireland.

233. Mr. Ian Gardner, the OH&S Officer stated in the letter accompanying the Notice of Contravention dated October 25, 2019 in which he said on Page 3, "With the issuance of Christine Ireland's ROE on August 27, 2019 stating job abandonment, this complaint was shifted to a complaint of discriminatory action by Christine Ireland. ... It is the decision of this Officer the dismissal of Christine Ireland is an unlawful discriminatory action pursuant to section 3-35(f) of the *Act. ...*"

234. I find that with the shifting of the Harassment Complaint to a Discriminatory Action Complaint, Ms. Ireland was still engaged in a protected activity within the meaning of section 3-35. It is an action listed within section3-35(a)(i).

Issue #2 Was there 'Discriminatory Action' taken by the Employer against Ms. Ireland as defined by Sec. 3-1(1)(i)?

225. The decision in this case in large part hinges on the determination of whether or not Nu Line, the employer, committed an unlawful discriminatory action under the *Act*. 'discriminatory action' is defined in the *Act* in section 3-1(1)(i).

Appellant's Submission

226. The Appellant argued that the issuance of the ROE did not amount to a deemed termination and therefore was not a discriminatory action. At para. 53 of his Brief, the Appellant stated:

> "Employers are required by *The Employment Insurance Act, SC 1996 c. 23* and the related regulations to complete an ROE whenever there is an interruption of earnings.
> Regulation 19(2) Every employer shall complete a record of employment, on a form supplied by the Commission, in respect of a person employed by the employer in insurable employment who has an interruption of earnings."

His argument was that an ROE is issued for all kinds of actions such as illness or injury, pregnancy, parental leave, etc. and is not a deemed termination. The relationship between the Employer and Employee is not changed by the ROE but by direct contact between the Employer and the Employee. There was no letter of termination accompanying the ROE as a clear indication that the relationship was terminated.

227. In para. 173 of this decision, I referred to the Appellant's oral argument that no discriminatory action was taken because the Respondent's employment was not terminated. The Appellant's oral arguments supported by the facts in the Background of this decision are as follows:

- The sole reason that the Officer issued the Notice of Contravention was the ROE issued on August 27, 2019 by the Employer. In fact, the ROE was issued for an interruption of earnings not a termination. Employment was not terminated because an ROE was issued. Service Canada had requested the ROE be issued.
- The Respondent has argued that the ROE was issued for abandonment of position. That notation is nowhere in the ROE. The Code used was code K which is used where an employee has quit as opposed to being terminated.
- Employment relations are between the Employer and the Employee and are not determined by Service Canada.
- The Employer must communicate the termination directly to the Employee. There was no letter given to the Employee during this time.
- The Employer continued to pay the Employee's disability premiums.
- The Employee received sickness benefits from Service Canada so clearly Service Canada interpreted the ROE to be a continuation of employment.

228. Once the ROE was corrected Ms. Ireland received sickness benefits from Service Canada so clearly Service Canada interpreted the ROE to be a continuation of employment and not a termination. Therefore, in regards to the ROE, a discriminatory action to terminate her employment was not taken.

Respondent's Submission

229. The Respondent has argued that *Beggs vs Westport Foods Ltd.* 2010 BSCS 833 was a similar case. In that case, the ROE issued by the Employer was considered by the Court to be termination of the employment relationship as there was no expectation that the employee would return to work. The Respondent made the following points in his oral argument regarding the similarities of this case to *Beggs:*

- There was no attempt to contact the Employee when Service Canada requested an ROE. The employee had to contact Service Canada to find out why she was not getting payments. There were several errors made by Ms. Rookes in completing the ROE, but there was no communication by Mr. Huziak t Ms. Ireland to say they

would be corrected. In *Beggs* a single inaccurate ROE and the employer's refusal to correct the ROE were sufficient for the Employer to be seen to be taking discriminatory action. An inaccurate ROE and a refusal to change the ROE were enough to be classed as a discriminatory action.

- In the *Beggs* case, the court found that two attempts to contact the Employee regarding whether she was returning to work were insufficient. In this case, the Employer did not reach out to the Employee at all so this should be a discriminatory action.
- aUnlike the *Beggs* case in this case, there was an expectation of return to work as Ms. Ireland was submitting medical leave notes from her Doctor.

230. The Respondent has argued that the ROE was issued for abandonment of position. The term 'job abandonment' is nowhere in the ROE. The Code used was code K which is used where an employee has quit as opposed to being terminated. The notation made by Ms. Rookes in the comment section was "Christine was absent from work with a Dr. note from June 27 return date of Aug 6. She has not returned as of today – we assume she quit as we have not heard from her." The ROE does not indicate that this was a termination of Ms. Ireland's employment by Nu Line, but a constructive resignation by Ms. Ireland

Analysis

231. In *Britto vs. University of Saskatchewan* 2016 CanLII 74290 (SKLRB) the Arbitrator in that case sets out the framework for a test of a discriminatory action at para. [45]. It begins with section 3-36(1) which provides that "the worker must have reasonable grounds to believe that the employer took discriminatory action against her for a reason mentioned in section 3-35. In other words, the initial onus is on the worker to establish a prima facie case of discriminatory action." At para. [47] the Adjudicator states "to establish a prima facie case of discriminatory action, requires the worker to establish the following:

> (a) that the employer took action against the worker falling within the scope of section 3-1(1)(i) of the *Act* describing 'discriminatory action';
>
> (b) that the worker was engaged in one or more health and safety activities protected by Section 3-35 of the *Act*.

Para. [48[states that there must be some prima facie linkage or nexus between the worker's protected activity and the employer's action.

232. In considering the *Britto* case, I find that the Respondent has not established a prima facie case of discriminatory action, although I did find that the worker was engaged in a protected activity, the second part of the framework proving that the Employer took action against the worker falling within the scope of section 3-1(1)(i) was not established.

233. In considering the *Beggs* case I find that this case was not similar to the *Beggs* case as argued by the Respondent. The issuing of the Record of Employment by Nu Line was not a discriminatory action as defined in Section 3-1(1)(i). The ROE was not completed as a termination of employment, but as a requirement of an Employer to complete when there has been an interruption of earnings as per *The Employment Insurance Act*. The fact that the form was not completed correctly was not a discriminatory action as the submission of the ROE when amendments were made did result in Ms. Ireland receiving benefits from Service Canada.

234. In regards to the issuance of the ROE the relationship is between the Employer and Service Canada. In order for termination of an Employee to occur there must be direct communication of that fact to the Employee from the Employer. There was no such communication at the time the ROE was issued in the evidence that was presented.

235. The Appellant argued that the letter from the OH&S Officer was not brought into evidence during the hearing. The letter is an adjunct to the Notice of Contravention, and I am accepting it for consideration in order to provide context for the Officer's decision to issue the Notice of Contravention. I am considering it on the basis of section 4-4(3) of the *Act*:

> 4-4(3) An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.

The letter was provided to me by the OH&S Branch in their file.

Issue #3 If discriminatory action was taken against Ms. Ireland was there good and sufficient reasons within the meaning of section 3-36(4)?

236. As I have found that the completing of the ROE was not a discriminatory action within the definition of Sec. 3-1(1)(i) of the *Act,* there is no need to determine whether the Employer had good and sufficient reasons for taking discriminatory action.

Were there other actions taken that could be determined to be Discriminatory Actions and if so were there good and sufficient reasons within the meaning of section 3-36(4)?

Appellant's Sumission

237. The Appellant stated at para. 68 of his Brief of Law that, "Nu Line also submits that no other actions it took amounted to a deemed termination of employment to provide any other basis for discriminatory action. "

238. In the alternative, the Appellant contends that if discriminatory actions were taken they were for good and sufficient reasons.

- In para. 78 in his Brief of Law, he refers to the changes made to the Nu Line Facebook administrator status in mid- August "were made to ensure it was still being utilized during Ms. Ireland's leave."
- In para. 78, the Appellant argued that "The change to the work cellphone was to save Nu Line money when it was not being used for work."

Respondent's Submission

239. The Respondent argued that there were other actions taken by Nu Line that fell within the definition of discriminatory action under Section 2(1)(d) of the *Act* being:

> Sec. 2(1)(d) any action or threat of action by an employer that does or would adversely affect an employee with respect to any terms or conditions of employment...

They were enumerated by the Respondent as follows:

a) *change of position* - The Respondent argued that the ROE had listed Ms. Ireland's occupation as Finance Manager. Ms. Ireland's position when she went on medical leave was General Manager. In her testimony, Ms. Rookes stated that the incorrect title was an error on the part of Ms. Rookes who prepared the form. There was no letter from Nu Line directly to Ms. Ireland stating that she was no longer the General Manager.

b) *removal of Ms. Ireland as administrator of Nu Line's* Face Book *page* - Ms. Ireland found that one of her job duties was to administer the Face Book page established for Nu Line's advertising. She noted by visiting Nu Line's Face Book page that the duty to maintain the page had been delegated to another employee. The Employer explained in his testimony that only two individuals could be the administrator of the page and in Ms. Ireland's absence he had to appoint another individual so that advertising on Face Book could continue as a valuable advertising tool for the business.

c) *cancellation of cell phone* – Ms. Ireland testified that Nu Line had cancelled her cell phone leaving her without a phone as she utilized the phone as her personal phone as well as for work purposes. The Respondent argued that this case is similar to *Oil City Energy Services Ltd.*v *Fadhel* (supra, para. 217) where the employer dismissed the employees for inappropriate use of their cell phones as good and sufficient reasons to dismiss the employees.

Analysis

240. I find that that the actions taken by Nu Line set out by the Respondent above were not actions that did adversely affected Ms. Ireland with respect to any terms or conditions of employment and therefore were not discriminatory actions. The rationale is as follows:

a) Change of position – Ms. Ireland did not receive any communication from Nu Line that her position had been changed from General Manager to Finance Manager directly. The incorrect designation was an error, and did not adversely affect Ms. Ireland's terms or conditions of employment.

b) Removal of Ms. Ireland as Face Book Administrator - This action was a business decision by Nu Line as the Employer needed to have someone to administer the Face Book page in Ms. Ireland's absence as she was not able to perform the duties being on medical leave.

c) Cancellation of cell phone plan – Ms. Ireland was provided with a cellphone in order to conduct Nu Line's business as General Manager. When Ms. Ireland's cell phone plan was cancelled by Nu Line, I agree with the Appellant that this was a business decision as Ms. Ireland was not conducting Nu Line's business. The fact that Ms. Ireland did not have another cell phone to conduct her personal business was not the responsibility of Nu Line. As Nu Line did not require Ms. Ireland to return the cell phone itself, the terms and conditions of employment were not affected.

241. In consideration of my findings set out above Nu Line did not take any actions that adversely affected the terms and conditions of employment. The actions above taken by the Employer were business decisions necessitated by Ms. Ireland's medical leave. Her employment was not terminated by any of these actions.

Issue #4 Are there any damages or ancillary costs to be paid to Ms. Ireland by Nu Line?

Appellant's Submission

242. In para. 8 of his Brief of Law, the Appellant submitted that if "... Ms. Ireland is to be reinstated with any wages she would have earned had the discriminatory action not been taken, Ms. Ireland has no damages and/or has failed to mitigate her damages by not returning to work when offered."

243. At para. 99, "Nu Line submits that it attempted to return Ms. Ireland to work as per the Notice of Contravention but it was Ms. Ireland's own actions and choices which prevented a return to work and prevented her from earning a wage. ...There can be no back wages where the employee choses not to return to work or was medically unable to earn wages."

244. During testimony, it was acknowledged that Ms. Ireland had not continued to provide medical information as requested by Nu Line. She had not responded to several requests for information, the latest being the letter of May 21, 2020. Ms. Ireland had continued to frustrate the return-to- work process. The Appellant referred to the decision by Arbitrator

Ish in *Saskatchewan (Ministry of Labour Relations and Workplace Safety) vs. SGEU (Dunkle) 2015 Carswell 10* at para 68:

> An employee does not have a veto over the decision to accommodate and yet still claim salary or sick leave benefits.

The Appellant argued at para. 110 of his Brief that this case was similar to the *Dunkle* Case. "Ms. Ireland cannot veto that process by not responding to return-to-work requests and yet still claim entitlement to salary or benefits". And at para 112. "She cannot claim damages where her own conduct prevented the return to work."

245. At para. 114, the Appellant sets out the instances where Ms. Ireland communicated that she did not want to return to work. In her testimony at the hearing, Ms. Ireland stated that she did not want to return to work. On June 27th, 2019, Ms. Ireland had requested by email that Mr. Huziak lay her off. She also threatened to quit in an email in 2018. On September 2, 2019, Ms. Ireland completed a Discriminatory Action Complaint form and checked 'No" in the return-to-work section which she later changed to 'yes'. It was obvious that she did not want to return to work. As in Arbitrator Ish's finding in *Dunkle* in this case it would appear that Ms. Ireland had no intention of returning to work, but wanted monetary compensation for not doing so.

246. From Ms. Ireland's testimony at the hearing she was medically unable to work between June 27, 2019 to this day. Her testimony was that there was no period of time where she was medically capable of working with Nu Line after June 27, 2019. The Appellant argued in para 188 of his Brief "As Ms. Ireland was medically unable to return to work, it follows that she would not have earned any wages at Nu Line during the same time period she was medically unfit for work."

247. At para. 119 in his Brief, the Appellant argues "... if an individual is medically unable to work, they are not paid by the employer for their absence except in accordance with any paid sick leave policies which may exist. ... Employers are not responsible for paying wages where someone is medically unable to work and the individual has exhausted all other insurance options (be it private insurance, WCB or employment insurance)."

Respondent's Submission

248. The Respondent argues that Ms. Ireland is entitled to compensation from the dates of a number of discriminatory acts which he enumerated starting with various dismissals:

- on August 6, 2019 with the removal of Facebook administrative access, then
- on August 14, 2019 upon indicating to police that Ireland was an ex-employee and her work phone plan was cancelled; and
- the submission of the new ROE indicating abandonment on August 27, 2019; or
- on October 17, 2019 upon her insurance being cancelled.

249. The Respondent has referred to the following section of the *Act:*

> 3-57(1) Subject to subsections (2) and (3), the commencement of an appeal pursuant to section 3-53 or 3-56 does not stay the effect of a decision that is being appealed.

The Appellant has not sought a stay of the Decision and no stay is in place. Therefore the Appellant is obligated to comply with the entirety of the Decision despite the appeal. The Decision ordered Nu Line to reinstate Ms. Ireland to her former employment on the same terms and pay any wages she would have earned but for the discriminatory action.

250. The Respondent quoted a number of cases where damages or compensation for wages lost were paid to employees:

- *Wallace v. United Grain Growers Ltd.* 1997 CanLII 332 (SCC), [1997] 701 where the Supreme Court specified that damages are available where an employer engages in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.
- *Morrison v. Ergo-Industrial Seating Systems Inc* 2016 ONSC 6725 the Court found that the defendant did not act fairly or in good faith in the manner of dismissal of Mr. Morison as the defendant was not candid, reasonably honest, nor forthright with Mr. Morison.
- *Oil City Energy Ltd. v Fadhel 2018 CanLII 3820(Sask LRB)* two employees were awarded compensation for discriminatory conduct by the employer covering the period starting from the first date of dismissal and ending on the date of the arbitrator's decision. The employees were also granted compensation for vacation pay. The arbitrator in *Oil City Energy* found that the circumstances entitled the employee to compensation for ongoing damages even after the date of the decision. This means that the damages continue to increase until the day the order is complied with in its entirety.

251. The Respondent is therefore requesting the following relief in regards to compensation:

1) Claim for Back Wages
   that Nu Line be required to pay to Ms. Ireland her wages at the hourly rate she was receiving for each and every week from June 27, 2019 until such time as the Notice of Contravention Order has been complied with in full.
2) Compensatory Damages
   that Ms. Ireland be paid compensatory damages for the bad faith actions by Nu Line leading up to her termination, subsequent to her termination and in the lack of genuine efforts to return her to work.

Analysis

i) Claim for Back Wages

252. In para. 241 of this Decision, I found that there was no discriminatory action taken against Ms. Ireland as set out by the Letter accompanying the Notice of Contravention.

253. Therefore, because I found there was no discriminatory action taken against Ms. Ireland regarding the issuance of the ROE, in respect of the requirements contained in the Letter issued by Ian Gardner, the Occupational Health & Safety Office dated October 25, 2019 attached to the Notice of Contravention at Page 5, there is no requirement by Nu Line to "pay Christine Ms. Ireland any wages that she would have earned had she not been wrongfully discriminated against;..."

254. I agree with the submission by the Appellant in para. 99 of his Brief that there can be no back wages where the employee choses not to return to work or was medically unable to earn wages. In this case Ms. Ireland had provided medical notes from her Doctor up to December 31, 2019 that she was not able to return to work. Therefore she was on medical leave and was unable to earn wages. From that time on, there were no medical notes provided and Ms. Ireland did not return to work so she earned no wages for that period.

255. The Respondent argued that there had been several instances of discriminatory action against Ms. Ireland by Nu Line. I found that the actions by Nu Line were not discriminatory actions, and therefore, Ms. Ireland is not entitled to back wages in those instances either.

256. The Respondent also claimed that Ms. Ireland should be awarded back wages from her last date of work, June 27, 2019 until such time as the Notice of Contravention has been complied with in full as in *Oil City Energy Ltd. vs. Fadhel (supra).*

257. As Ms. Ireland has not earned wages during her medical leave, she is not entitled to back wages for any period.

ii) Claim for Compensatory Damages

257. The Respondent has claimed that Ms. Ireland is entitled to compensatory damages in the amount of $25,000 against Nu Line for engaging in conduct that is unfair or is in bad faith by being untruthful, misleading or unduly insensitive.

258. In regards to the sections of the *Act* governing the decision of the Adjudicator, Section 4-6(5) sets out the following:

4-6(5) If after conducting a hearing concerned with section 2-42, the adjudicator concludes that the employer has breached section 2-42, the adjudicator may issue an order requiring the employer to do any or all of the following:

(b) subject to subsections (2) and (3), to pay any wages that the employee has lost as a result of the employer's failure to comply with section 2-42;...

There is no provision in the *Act* for the Adjudicator to pay compensatory damages. The Adjudicator can only award payment of back wages or payment instead of notice (section 4-6(2)).

259. I find that the claim for compensatory damages be dismissed.

VI Conclusion

261. With respect to the four issues before me as set out at the commencement of the Analysis, my findings are:

1. That Ms. Ireland was engaged in a protected activity.
2. However, the issuance of a Record of Employment by Service Canada did not constitute Discriminatory Action taken by Nu Line against Ms. Ireland as defined by Section 3-1(1)(ii) of *The Saskatchewan Employment Act.* Nor did any other actions by the Employer raised by the Respondent constitute discriminatory actions.
3. As there were no discriminatory actions taken by Nu Line against Ms. Ireland Ms. Ireland's employment was not terminated or affected
4. In respect to damages:
   1) As Ms. Ireland was not earning wages while she was on medical leave, she would not be entitled to any back wages.
   2) Nor is she entitled to compensatory damages.

VII Order

262. I hereby order that:

- The appeal by Nu Line Auto Sales & Service Inc. be allowed.
- The Notice of Contravention, Report No. 1-00007918, issued by the Occupational Health & Safety against Nu Line Auto Sales & Services Inc. be quashed.

Dated at Gull Lake, Saskatchewan this 22th day of January, 2021.

MEWeston

Marlene Weston - Adjudicator