

LRB 284-19



**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:

ANITA FULLER

Appellant

AND

GREAT WESTERN BREWING COMPANY LTD.

Respondent

Decision appealed from: Occupational Health Officer dated November 27, 2019.

Date of Hearing: October 27 and 28, November 6 and December 2, 2020.

Adjudicator:

Marlene Weston

For the Appellant:

Marcus Davies
#209 – 1012 Lansdowne Ave,
Saskatoon, SK S7K 1X2

For the Respondent:

Brent Matkowski
MLT Aikins LLP
1500 410 22nd St. East
Saskatoon, SK S7K 5T6

DECISION

I INTRODUCTION

1. Anita Fuller has appealed the Decision of Occupational Health & Safety Officers dated November 27, 2019 pursuant to section 3-35 of *The Saskatchewan Employment Act* (hereinafter referred to as '*the Act*'). The Labour Relations Board appointed me as Adjudicator to hear the appeal.
2. Subsequent to the receipt of the Decision from the Occupational Health & Safety Officers, the Appellant filed an Appeal in writing with Ray Anthony, Executive Director of the Occupational Health & Safety Division of the Ministry of Labour Relations dated December 9, 2019. The grounds of appeal are:
 - The investigation officers failed to recognize Ms. Fuller's complaints of discriminatory action and then failed to interpret the statutory definition of discriminatory action correctly.
 - The investigation failed in law and in process.

3. The relief sought in the Appeal is:
- A proper and complete investigation of her complaints of discriminatory action;
 - Reinstatement to her former position on the same terms and conditions under which she was employed in November 2017;
 - The discriminatory action to cease;
 - All wages (deemed to include benefits) the worker would have earned had the worker not been discriminated against;
 - The removal of any reference to this matter from her employment records.
4. Pursuant to section 3-35(1) and 3-54(1) of the *Act* the appeal was referred to the Registrar of the Labour Relations Board, and the Board appointed me hear the appeal.

II BACKGROUND

5. The Appellant's Counsel, Marcus Davies, and the Respondent's Counsel, Brent Matkowski, provided an Agreed Statement of Facts dated October 23, 2020. It reads:

a. Agreed Statement of Facts:

For the purposes of the appeal in LRB File No. 284-19, the parties, Anita Fuller ("Ms. Fuller") and Great Western Brewing Company Limited ("GWBC"), agreed to the following facts for the purpose of the hearing. The parties agree that either party may call evidence to supplement the facts agreed to, as long as the evidence is relevant to the question of discriminatory action under appeal. To the extent that the parties have attached documents to this agreed statement of facts, the parties have agreed that such documents are admissible as exhibits in the hearing, but reserve all rights to comment on the documents in legal argument. The parties agreed that the Agreed Statement of Facts can be provided to witnesses for reference during the hearing.

Harassment Complaint and Investigation

1. Ms. Fuller is the Manager of Corporate Quality Assurance for GWBC, and has been employed since 2002.
2. On December 13, 2018, Ms. Fuller submitted two harassment complaints against her co-workers to GWBC. The complaints were dated December 12, 2018, but received by GWBC; on December 13, 2018.
3. On December 14, 2018, GWBC met with Ms. Fuller. GWBC provided Ms. Fuller with notice of paid administrative leave by letter dated December 14, 2018. In attendance for GWBC was Lynn Eberle (Director of People, Culture and Administration) and Brendon Halbgewachs (Finance Officer).
4. On December 14, 2018, Ms. Fuller provided GWBC with an e-mail and letter acknowledging the paid administrative leave. Ms. Fuller's last day of work was December 14, 2018.
5. GWBC hired a third-party investigator, D.C. Strategic Management, to investigate Ms. Fuller's complaints.

6. The first investigation report from the third-party investigator was completed on March 29, 2019. The second investigation report from the third-party investigator was completed on April 1, 2019. The reports found, among other things, that while Ms. Fuller's complaints were made in good faith, the underlying harassment complaint was not substantiated.

7. The outcome of the investigations was presented to Ms. Fuller by GWBC on April 8, 2019. The meeting was in person and included a letter dated April 8, 2019. Lynn Eberle and Brendon Halbgewachs attended on behalf of GWBC. Ms. Fuller's brother, Jay Fuller, was also in attendance.

8. An additional letter was provided to the Complainant on April 11, 2019 that reflected a change in confidentiality requirements.

9. During the meeting on April 8th, 2019 GWBC and Ms. Fuller discussed return to work.

Medical Leave

10. On or about April 29, 2019 GWBC received (through Ms. Fuller's counsel) a medical note dated April 29, 2019.

11. On April 29th, 2019 GWBC requested by e-mail that Ms. Fuller complete a functional capabilities form.

12. On May 13, 2019 Ms. Fuller provided a completed functional capabilities form. The completed form indicated that Ms. Fuller would be unable to work for an estimated period of one year.

13. On May 27, 2019 GWBC notified Ms. Fuller that her paid administrative leave would be changed to unpaid leave of absence effective May 27, 2019.

14. As of the time of the hearing, Ms. Fuller remains on unpaid medical leave.

Review and Appeal of Harassment Investigations

15. On or about May 15, 2019, Ms. Fuller requested that Occupational Health & Safety review the harassment investigations that had been completed.

16. On July 11, 2019, the Occupational Health and Safety completed its review and determined that the investigations were compliant with the legislation.

17. Ms. Fuller appealed the Occupational Health and Safety review; however, subsequently withdrew the appeal.

Claim to Co-operators

18. GWBC has an insurance policy through The Co-operators.

19. On May 9, 2019, GWBC was notified by The Co-operators that Ms. Fuller had made a disability claim.

20. On July 12 and 17, 2019 GWBC had internal correspondence regarding Ms. Fuller's premiums.

21. On July 18, 2019, The Co-operators provided a letter to GWBC .
22. On July 18, 2019 The Co-operators provided a letter to Ms. Fuller.
23. On September 4th, 2019 The Cooperators provided a further letter to Ms. Fuller.

Discriminatory Action Complaint

24. On July 30, 2019, Ms. Fuller submitted a discriminatory action complaint to Occupational Health and Safety.
25. On November 27, 2019, Occupational Health & Safety dismissed Ms. Fuller's discriminatory action complaint.
26. On December 9th, 2019, Ms. Fuller appealed Occupational Health and Safety's decision to dismiss Ms. Fuller's discriminatory action complaint.

III EVIDENCE

a. Appellant's Witnesses

i) Jay Fuller

6. *In Examination in Chief*

- a. Mr. Jay Fuller testified that he is a Human Resources Professional. He is currently serving as a consultant for Morris Interactive. He has been at Morris for 5 years. He has been in Human Resources for 25 years. He is the Human Resources lead for the company. He works for a huge range of clients who do not have Human Resource (HR) services including setting up HR programs and management training. He is the HR Consultant of Record for clients who have no other human resources.
- b. Objection: The Respondent's Counsel, Brent Matkowski, raised an objection to the background of the witness being introduced into evidence.
Ruling: I overruled the objection as Mr. Fuller's background as an HR Professional and a confidant was relevant regarding how he viewed the meetings held.
- c. The Appellant's Counsel, Marcus Davies, asked how Mr. Fuller was related to Ms. Fuller. He replied that Ms. Fuller is his sister. She asked him to attend the meetings with GWBC. His role has been as a brother to listen to her, and confidant. His expertise in Human Resources was incidental.
- d. Mr. Fuller said he had attended one meeting with the Investigator on November 30th, 2018.
- e. Objection: Mr. Matkowski raised an objection. He argued that the merits of the harassment investigation and whether or not the investigation was correct in its decision should not be questioned. Whether the investigation process was correct it cannot be used. But they can talk about the OH&S process.

Ruling: I sustained the objection as the decision of the OH&S Officers regarding the harassment investigation previously filed was not the subject of this appeal.

- f. Mr. Fuller was asked, "Did your sister raise the idea of taking a leave of absence?" He responded she was never planning to take a leave of absence from work. She wanted to get into the situation until it was resolved. However, as she got into the situation, her mental health became an issue.
- g. Mr. Davies asked, "Did you attend another meeting?" They gave us the results of the investigations on April 19th 2019. It was Ms Fuller and him and Lynn Eberle and Brandon Halbgewachs as a witness. Ms. Eberle pushed the Reports to them, and required that they sign Confidentiality Agreements. Ms. Eberle insisted that they take the reports home and read them. The meeting took half an hour. Mr. Fuller raised the question, what are the plans to return to work? He asked multiple times because he did not get an answer. Either they did not have an answer or were not willing to share the answer with her. There was no follow up on the investigation. They did not give them an answer other than go home and read the report. Nothing concrete given. It was Interpreted by the Fullers that GWBC had no plan B. Mr. Fuller was asked if at that point would Anita have returned to work? Response was that she has not returned to work. He was asked was there any discussion about what it would take for her to come back to work? None.

7. In Cross Examination

- a. Mr. Matkowski stated that Mr. Fuller testified he was in a meeting April 8th, 2019, and that he knew that the meeting was to get the results of the reports. Was it correct that at the meeting, there was 2 options to review the reports: 1) read them there or 2) take them home to read them but you both had to sign a confidentiality agreement. Yes. Mr. Matkowski asked if the Confidentiality Agreement was amended so that it could be shared with others. Mr. Fuller replied "Yes".
- b. Mr. Matkowski asked if it was fair to say that Mr. Fuller was a bit emotional in the meeting. Mr. Fuller responded that the emotion was shock! Mr. Matkowski asked if he was a bit forceful. Mr. Fuller responded he was determined, and perhaps argumentative. He felt other parties were being evasive. "At no time did we scream or be abusive. We were not being given the responses I was asking for."
- c. Mr. Matkowski stated that he testified about a return-to-work discussion. Mr. Fuller responded Ms. Eberly said that they were prepared to discuss next steps once Ms. Fuller had read the reports. Mr. Matkowski stated when you asked if she could return to work tomorrow, Ms. Eberly said the company would need a few days to reorganize the work. Mr. Fuller responded she probably said that. Mr. Matkowski asked again, do you recall that Ms. Eberle said she would reach out by Friday that week? No, Mr. Fuller said he did not recall that. Mr. Matkowski asked, "Did you remember saying that you would be looking into your own next steps and that the reports are irrelevant." Mr. Fuller said, "Yes I said that, but I did not share what the next steps were." He added they were so completely shocked by the results of the report that Ms. Fuller and he had to discuss and regroup.

8. In ReExamination

- a. Mr. Davies asked Mr. Fuller, "What did you mean about next steps?" Mr. Fuller responded that it related to the Reports. "We did not expect the results that we got. We were concerned about bias because the Investigators were hired by GWBC. We were not sure what to do about the harassment complaint."

- b. Mr. Davies asked, "What was the reason you asked about her return to work?" Mr. Fuller said that Ms. Fuller needed to know what was happening.

ii) Anita Fuller

9. In Examination in Chief

- a. Mr. Davies asked Ms. Fuller to state her credentials. She responded that she has a Bachelor's Degree in Microbiology, quality brewing and auditing. She was working at the University of Regina and working at Molson's brewing in the summers. She became a full time worker for Molson's. She was in charge of getting samples of ingredients from start to finish. She would analyze for off flavours and organisms that could off flavour the brew.
- b. There was then a merger between Carlings and Molson. Molson hired her. She was in charge of trouble shooting and corrective action. She went to temporary lab manager and then to full time lab manager. The brewery closed in 2002. She was the last to leave until the last beer was out of the tank. She was living in Regina at that time.
- c. Mr. Davies continued that at the end of summer of 2001, Molson got a call from the Brewmaster at GWBC. They recommend her to the Brewmaster for a Quality Assurance position. Following the call from the Brewmaster who was a previous Carling Brewmaster, she was offered the position. She wanted to take the position but had signed a contract with Molson to stay until the last beer was out, Jim Fitzpatrick got back to her the same day she had to decide if she was taking a transfer to Toronto. Her hiring at GWBC was approved and they would wait until she was done at Molson's.
- d. The Molson's Brewery closed at the end of March and she started with GWBC on April 2, 2002. She was hired as a Quality Services Manager. Her job has gone through several iterations. She supervises two analysts and a summer student. She has her own budget which she manages. She manages capital expenditures. It means that there are certain specifications that had to be met in the federal regulations: % of alcohol, maintaining quality, consistency of batches, colour, dissolved oxygen, etc. Very little of this monitoring was done when she started. She was to bring in best practices e.g. specifications, troubleshooting. She was also the OH&S Co-chair for management from 2002 – 2005. In 2005 GWBC hired a separate person for OH&S. She was in this role for 16 plus years.
- e. Mr. Davies asked if there had been changes to her job? Ms. Fuller replied that there had been the following:
- In 2009 an Operations Supervisor was hired. He had two bad experiences with keg beer. The company was changing the title to Corporate Quality Assurance. She would be in liaison with sales to check for presentations, that the lines were cleaned, and the beer was oxygenated properly. She developed a procedure and a brochure for the accounts that used keg beer.
 - She had 30 years of experience. She was the only female manager at Regina. She was the only female Quality Assurance manager in the Molson's system in production. She was the only female manager overseeing brewing process. There was a bet among the staff as to how long she would last at Molson and she won.
 - She investigated process failure, to help the process owner to find the problem, and fix it. She was bringing up exceptions from the previous day to trouble shoot, and ensure the quality of the product going out. It was not her job to manage process. She would have looked at incoming molds, syrups, brewing water, hop quality, wort (brew in the

- kettle) fermentation analysis, storage analysis, etc. She also checked fill volume on the bottles, whether beer was pasturized enough or not, and pasturizing temperature.
- In 2010 when her title was changed the company expanded her role. She had been reporting to the Director of Operations. There was a conflict of interest. The Chief Executive Officer (CEO) then determined that she would report to him.
- f. Ms. Fuller was asked if she had performance reviews. She replied yes. They started in 2013. They were not very robust. In 2016, Greg Churneski had a goal to implement a very standardized performance appraisal system. She had one in 2016 and 2017. She also had one in 2018, on March 23 and on March 28. The CEO was gone and it was never finished.
 - g. Mr. Davies asked if Ms. Fuller was familiar with OH&S policies. She replied that she was. They would have surprise visitors from OH&S. The Officer came in March 2003. She suspected that they must have received a complaint. By the end of the day, everything was non-compliant. The OH&S Officer gave them 2 weeks to become compliant. She asked for more time. It took her 18 months but she did the corrections needed and they were all done. She did this as well as her job. After this was done, they hired someone else to handle OH&S. She was not allowed to attend OH&S meetings unless there was no quorum.
 - h. Ms. Eberle gave Ms. Fuller a copy of the OH&S Manual in 2018 in regards to the Complaint process. She wasn't sure if she wanted a formal or informal complaint. The following events occurred:
 - o There were 3 incidents in October that broke the camel's back. She read the manual to see how she would go forward with the complaint process – formal or informal. She ultimately decided that she would go with the formal process.
 - o She was told that they would have a meeting to discuss her complaints. By that time she had 18 complaints against Mr. Genest and 11 for Ms. Butts. They had the meeting and she wrote down how she had been abused at the meeting. In the policy manual a mediator should be called in. There was a respectful workplace advisory team. The complaint would go to them. Then a mediator would be decided upon. At the end there would be a mediation.
 - i. In 2016, policies and procedures re workplace bullying, exclusion, scapegoating were put in the Manual. Kathy Glazer had been hired to revise the policies.
 - j. Ms. Fuller had been seeing a counsellor starting in 2016.
 - k. Ms. Butt started employment at GWBC in 2016. Ms. Fuller thought she would be a mentor to Ms. Butts. Ms. Fuller tried, but Ms. Butt started to exclude her from meetings, from communication. Ms. Fuller went to see a Human Resources consultant to see what she should do.
 - l. November 17, 2018 Ms. Fuller had a meeting with Mr. Brennon, President and CEO of GWBC. She had written up the last three incidents and took them in with her to discuss them with him. Mr. Brennon wanted to see the speaking notes she had written over the weekend. She declined. These were only some of the incidents but she had more. However, she felt compelled to hand the over to him. She was advised by a friend to write on them the date and sign it and only give a copy.
 - m. Ms. Fuller phoned to talk to the OH&S Officer after that meeting. He advised if the company has a complaint process, that is how she would be proceeding. There was a huge

miscommunication. She thought that OH&S would investigate the harassment, but they did not.

- n. When Ms. Fuller decided to file a formal complaint, where did she find the form? Reply - It was in the manual. Ms. Eberle gave them to her after the meeting on December 3rd, 2018. Ms. Eberle advised that going the Informal route would be utilizing a mediator, and they used Rod Nickel. The formal route would be to use investigators, BC Strategic Management Investigating. Ms. Fuller tried to submit her formal complaints on December 12, but it was late. She submitted them on December 13 to Ms. Eberle.
- o. Ms. Fuller had a call that her brother was not doing well and the family was called to Edmonton. Ms. Eberle said she was sorry about Ms. Fuller's brother but they had waited too long for the forms already. However, Ms. Fuller noted that according to policies and procedures, employees had one year to submit a complaint.
- p. Ms. Eberle told Ms. Fuller that she was going to have to show the speaking notes to the other employees involved. There was a meeting scheduled for a one-on-one meeting with Mr Genest. Ms. Eberle refused to cancel it. At request from Mr. Genest the meeting was scheduled for 1:00 pm. It was a very weird meeting. It was the first time that they spoke. He was not hammering Ms. Fuller, but the situation.
- q. On December 14, Ms. Fuller met with the Employer's representatives. She had a phone call from Mr. Ron Cunningham on December. 13. He wanted a list of complainants. The meeting on December 14 was in Mr. Brennon's office but the CEO wasn't there. Ms. Eberle was there and the Chief Operations Officer (COO) was there. She was given a letter that she was on paid admin leave. The portion of the letter relating to the paid administrative leave are:

"December 14, 2018

Re: Notice of Paid Administrative Leave

Dear Anita,

Thank you for bringing forward your formal complaint yesterday. As we have said to you, we take all such complaints seriously and have engaged an independent third party to investigate the concerns that you have raised.

Given the two employees named in your complaint, the nature of the complaints and the close working relationship that is required between your and their roles, we think this may be difficult for you and them to continue to work together while we fully investigate the claims. We also want to protect your wellbeing while the investigation is underway given the concerns you have raised. Considering those facts and to protect your state of health and wellness (in addition to recognizing your brother's health circumstances) we believe it is best to provide you with a leave from your responsibilities during the process of the investigation. For these reasons we are placing you on a fully paid administrative leave effective immediately. We anticipate the leave to last the duration of the formal investigation.

... Other than those meetings related to the investigation we do not expect you to perform work for the brewery during this time, and would ask you to take this opportunity to concentrate on your personal well-being and your family's."

After receiving the letter, Ms. Fuller asked Brendon about continuing benefits – pension accrual, vacation accrual. She also asked would this show up on the next performance appraisal. They assured her that it would not. Ms. Fuller said she appreciated that they were taking this seriously.

- r. Ms. Fuller was told that starting December 16, interviews would be conducted. She was asked to leave at 12:00 noon. She was not told why she had to leave. Mr. Davies asked if the administrative leave caught her by surprise? Ms. Fuller replied Yes. She hasn't seen this before. Ms. Fuller said she manages stress by going to work. Did she feel that she was asked about leave or was she being told? She was 'voluntold'!
- s. Mr. Davies asked if there was any idea of length of time that the leave would be? Ms. Fuller said that the policies in the Policy Manual said that the results of the investigation would be returned in 30 days. She thought she would get a call in February saying that the reports were in, and giving the decision and she would be going back to work. The next word she got from GWBC was January 31, 2019 for her to put on her auto reply that she was not returning. She received a bouquet on Dec 27, 2018 before her brother's funeral.
- t. Ms. Fuller was asked about the Policies and Procedures for complaints at GWBC. She outlined the process:
 - o On Page 24 – Respectful Workplace Advisors are supposed to review complaints. There were none at the time of the complaint.
 - o Question - At any time did you request mediation? Reply - No. Question - Was it ever offered? Reply - Only suggestion of mediation was when Ms. Eberle explained about formal and informal complaints. Ms. Fuller spoke to Rod Nickel by phone, and then she decided not to go that direction. She did consider it but decided against it.
- u. Marcus Davies reviewed the letter that Ms. Fuller sent to Ms. Eberle on December 14th, 2018 about the admin leave and thanking her. The letter read:

"December 14th, 2018

Dear Lynn,

As per your letter of today, December 14, whereby I am being given Administrative Leave, I will endeavor to be available Monday to Friday 8:30-4:30 by phone or email as requested, however should my brother die, I will be attending to family matters and will be unavailable, if need be, until those matters are settled.

By way of this letter, I am also thanking the Company for its understanding of the seriousness of the situations regarding my complaints of harassment and also the critical illness of my brother, Cam."

Ms. Fuller explained that she tried to be as cooperative as possible.

- v. The investigation was started on December 18th. Ms. Fuller got a call about her brother being taken off life support. She wanted to finish her complaint. She left for Edmonton. Her brother died on December 20th, 2018.

- w. Mr. Davies introduced the Speaking Notes. Ms. Fuller was asked if at the meeting on December 10, 2018 was she disabled at that time? Reply was no. Was she disabled on December 12? Reply was No. Mr. Davies asked, "what about after the admin leave notice?" Reply was no.
- x. On April 8 2019, Ms. Fuller was in a meeting where Ms. Eberle said that the Reports would go on the personnel file. Ms. Fuller protested that it was 'against the law'. The Appellant asked if they are on her personnel file. Ms. Fuller replied that she doesn't know if they are on her personnel file.
- y. Mr. Davies asked if prior to December 1, 2018 had she ever looked at The Cooperators' Benefit Plan? Ms. Fuller replied that she had never seen the policy. She got the membership card and had a website she could use. She had been on Blue Cross while at Molson's. She has never missed other than a few days of sick leave, but not disability leave. Mr. Davies asked if anyone had ever gone over the plan with her? Ms. Fuller replied No. She was having premiums deducted from December, 2018 to May, 2019. She did not know she should be making payments herself. At that time she had crashed. Her doctor had suggested she should see a psychiatrist. As of the end of July, her prescriptions for anti-depressants were still being paid by The Cooperators.
- z. Ms. Fuller had been seeing a psychiatrist since February, 2019. Dr. Laura Tanyi - Remarck filled in the form for the Cooperators. She did not hear back from the Cooperators re disability leave. Dr. Laura gave her a two-week sick leave note until the middle of May. Ms. Fuller thought she would hear from The Cooperators but still did not, so she asked for vacation leave to be paid.
- aa. At the end of May, 2019 she received a registered letter from GWBC that she was being put on an unpaid leave.
- bb. On July 18th, The Cooperators sent her a letter denying her claim. The letter read:

"Dear Anita Fuller:

**Re: Short Term Disability (STD) Group 41301
Account 1
Certificate 498606
Date of Disability 15/12/2018**

We are writing to inform you that we have determined you are not eligible for Short Term Disability benefits.

Based on your policy, you are not eligible for benefits because Co-operators Life Insurance Company did not receive a request for extension of benefits as required by the policy provision provided below.

2.5 Termination of an Employee's Insurance

Automatic Termination

The insurance of any Employee under this Policy shall automatically terminate on the earliest of the following:

- **On the day the Employee ceases to be Actively at Work, except
If an Employee ceases to be Actively at Work due to temporary Approved Leave of Absence, the Employer may request an extension of coverage for a period not exceeding 90 Days from the date the Employee ceased to be Actively at Work, provided premiums are paid and this is no individual selection.**

In addition, the medical on file does not support total disability (see appendix A for definition) as of December 15, 2018. "

- cc. Ms. Fuller was asked did she know if a claim for disability was submitted by GWBC? The Cooperators said it was not. She understood this was to cover all her medical benefits. The policy says that it is the responsibility of the Employer to apply for disability leave.
- dd. The Cooperators sent a second letter dated September 4, 2019. Tannis from The Cooperators phoned to say that the Employer did not put in an application for extension of the leave within the 90 days. The letter from The Cooperators read:

" September 4, 2019

DEAR ANITA FULLER:

Re: Short Term Disability (STD) Group 41301

Account 1

Certificate 498606

Date of Disability 15/12/2018

Please be advised we have received and reviewed the submitted medical information. As outlined in our letter of July 18th, 2019 letter, you are not eligible for benefits because Cooperators Life Insurance Company did not receive a request for extension of benefits as required by the policy provision provided below:

(Quoted Sec. 2.5 Termination of an Employee's Insurance as set out in letter of July 18, 2019.)

We have correspondence on file indicating you were on administrative leave beginning December 15, 2018 through to April 26, 2019. In order to be eligible for benefit, while on a temporary approved leave of absence, we must receive a request for extension of coverage however this can not exceed 90 days. You were on approved leave of absence for a period of over 90 days.

Further we do not have medical on file to support total disability (see Appendix A for definition) as of your date of disability, December 15th, 2018.

Appendix A

"Total Disability" or "Totally Disabled" for Employees with Long Term Disability Benefits shall mean that the Employee is, as a result of a Medically Diagnosed Condition:

- (i) unable to perform the usual and customary duties of the Employee's occupation during the own occupation period indicated in the Schedule of Benefits, and
- (ii) thereafter is prevented from engaging in any occupation or performing work of any sort (whether on a full-time or part-time basis) for which the Employee is or may reasonably become qualified by education, training or experience which would provide the Employee with an income equal to or greater than the Employee's gross Monthly Benefit, and
- (iii) is not engaged in any occupation or performing work of any sort for wage, remuneration or profit other than an approved Rehabilitation Program. ..."

She asked if the Comptroller would send her a copy of the relevant parts of the policy. In order to be on benefits, they must receive a claim from the Employer and it cannot last longer than 90 days. She was off on 114 days so she was outside the time limit.

- ee. Ms. Fuller was asked did she contact GWBC? She replied Yes. She asked for a copy of the Benefit package but did not pick it up on the following Friday. She went in on Sunday to pick it up but it was not there. She advised Ms. Eberle that she would have to come in another day. Ms. Eberle said OK but she would have to be there and would need a request. Also, Ms. Eberle asked would the Employee bring in her cell phone, office door keys and perimeter keys. The keys would be returned to her upon her return to work. Monday, July 22 Ms. Fuller received an email from Ms. Eberle confirming the request. Mr. Davies asked if she knew if anyone else was asked for their keys before? Ms. Fuller did not know if anyone was put on leave before.
- ff. Ms. Fuller called Mr. Marcus Davies. He suggested instead of filing a complaint for harassment that they file a complaint for discriminatory action.
- gg. Ms. Fuller was asked if she had been without a paycheck since May 2019. She replied she has taken a loan from her former husband and her sister. She was asked that she cash out the GWBC shares. Mr. Davies asked how this whole process has affected her? She feels that she is worth nothing to GWBC. Does not know why they started feeling this way? Ms. Fuller does not know why. Performance Appraisals were good. Ratings were 4.5 for first one, and 4.0.
- hh. Mr. Davies asked what has this done to her? Ms. Fuller replied she has been on antidepressants since 2019. She can't drive down 2nd Ave. past the Brewery. She is on Blue Cross but it does not cover her prescriptions. She has lost hair. She has had a heart attack. Her self-confidence was second guessed. She was isolated from former colleagues. She doesn't know if she can get another job. She wanted to retire at age 67. The Company betrayed her, demoralized her and scapegoated her. It has taken a long time of antidepressants and professionals. These are the effects of workplace harassment and bullying.
- ii. Ms. Fuller was asked, what is her coping strategy? She replied – working on my yard, going to church, going for walks, making a lot of soup because it is cheap. She has not been getting professional help because she cannot afford it.

10. In Cross Examination

- a. Mr. Matkowski asked, "You said that on December 10 you had a meeting with Lynn and you had described the situation with your brother. Ms. Eberle had said that she had waited too long for the forms already." Mr. Matkowski said, "Her comments are not the same – one is telling the truth and the other is not."
- b. Mr. Matkowski stated that on the same day, it was discussed about the one-on-one meeting with Mr. Genest. Ms. Fuller told Ms. Eberle that she had chosen to make a formal complaint. The meeting with Mr. Genest was scheduled at 1:00 but was rescheduled to 2:30. There were multiple meetings with Ms. Eberle on December 10 – one in the morning, and one at 3:30. Ms. Eberle asked her to come down before she left. Ms. Fuller said she would agree to come down in the afternoon.
- c. The Respondent commented one of her requests was of the CEO. Ms. Fuller testified that she did not want to keep her one-on-one meeting with Mr. Genest. Why would she then say 'Sure I will have one'? The meeting with Mr. Genest was supposed to be at 9:30 am but postponed until the afternoon. The meeting in the morning was when Ms. Fuller said Ms. Eberle told her they would inform Mr. Genest of the nature of the complaint. At the meeting at 2:30 pm Mr. Genest finally said he had reflected on the incident and he was not hammering on her but on the process. He ended almost with he was sorry but Ms. Eberle stopped him.

- d. Mr. Matkowski continued to ask Ms. Fuller, again December 10, at the 3:30 meeting, if Ms. Eberle says that was not the correct time what would she say? Ms. Fuller replied, "The meeting was at just before 5:00. And one of us is lying and one is telling the truth".
- e. In regards to The Cooperators Application, Mr. Matkowski asked, "Did you have a discussion with Ms. Eberle on December 11 about the forms?" Reply was "I don't think so. I had them prepared by December 12 late at night, and I submitted them to Ms. Eberle the morning of December 13."
- f. Mr. Matkowski commented that Ms. Fuller had testified that on December 14, she was told to go home by noon. Mr. Matkowski asked Ms. Fuller If Lynn Eberle testifies that the Employee was told to go home by noon, what would you say? Ms. Fuller replied she had lots of work to do and said she probably wouldn't be able to get all her work done.
- g. Regarding the meetings on April 8 and April 11, 2019, Mr. Matkowski remarked that the April 11 meeting was a very quick trip into the entrance of Ms. Eberle's office, two minutes. April 8th was a meeting where her brother Jay was present. In the third paragraph there is a statement, "Given that you directed our client to absent herself from the workplace..." Mr. Matkowski asked, " Were you not asking for an extension of the paid administrative leave?" Ms. Fuller answered that the process had not been completed or ended. She wanted to remain on paid admin leave during the process as nothing had been resolved. She wanted to be back to work. She also wanted a decision.
- h. Mr. Matkowski commented that nowhere in the April 12 letter is there a request to return to work. The first suggestion in the letter is to remain on administrative leave. This follows from the paragraph above where the appeal is part of the process. Ms. Fuller responded that from the end of April to the end of May when she got the registered letter, they did not pay her admin leave.
- i. In the April 8th meeting, specifically brother's testimony, Mr. Fuller said that when he asked if Ms. Fuller could return tomorrow, Ms. Eberle said that the company would need a few days to get reorganized. Mr. Matkowski asked why then did Ms. Fuller not have a suggested plan to return to work. Ms. Fuller responded that there would have to be a plan to return to work made by the Employer. She would have taken it and shown it to her doctor, her lawyer, and her support people. There was nothing to share. No plan.
- j. Mr. Matkowski introduced a text message between Ms. Fuller and Ms. Eberle to be added to the additional documents. The text message was dated Sunday April 28. It read:

MMS A. I am sick and have a doctor appointment tomorrow. I will not be in to work tomorrow.

Ms. Fuller said there was no indication if she was supposed to return to work so she took a sick day. Ms. Fuller said she couldn't go in to work because of being sick. This was the only written indication that she was not well. She did have a quick meeting with Ms. Eberle on April 11th when Ms. Eberle asked if Ms. Fuller was feeling OK. Ms. Fuller replied, "No I am not. I will drive back home". Ms. Eberle knew Ms. Fuller was a mess, but the text was the first indication of a written medical leave.

- k. Mr. Matkowski noted that Ms. Fuller was contacted on January 31, by Ms. Eberle who asked about Ms. Fuller's brother. Ms. Fuller commented that it was a short conversation. Ms. Eberle

reminded her about the (Employee and Family Assistance Plan (EFAP) on the call. Ms. Fuller said she had already been going to EFAP since the previous March, 2018. Ms. Fuller should have started a new program of 6 paid sessions in the new year, but it was cut off. She had months to come to the realization that her brother would die so she was not devastated by his condition.

- l. Mr. Matkowski noted that Ms. Fuller got one week of paid bereavement leave like the other employees. Was it not reasonable for a Human Resource person to suggest EFAP as a potential resource? Ms. Fuller said she was not sure what she would say with other employees. Mr. Matkowski asked if it was a reasonable course of action to suggest it. Ms. Fuller answered, it had been the first time she was not well. Other than the flowers, there was no communication between her and Ms. Eberle as to how she was doing. There was nothing in the letter as to what she was entitled to other than the one-week payout for vacation.
- m. In the July 22 email Ms. Eberle said she had taken the pamphlet back to her office when Ms. Fuller did not come in on Friday. She did not expect an unannounced attendance on Sunday.
- n. Mr. Matkowski noted that the Workers' Compensation Board (WCB) claim filed by Ms. Fuller was denied from the 'get go'. There had to be a psychiatric diagnosis. Mr. Matkowski noted that the WCB Letter dated June 11 read:

June 11, 2019

Dear Ms. Fuller:

Re: Claim #20756448

I have reviewed your claim submission for a psychological injury while working as a Manager of Quality Assurance with Great Western Brewing Company Limited.

I have based my decision on Section 28.1 of The Worker's Compensation Act, 2013 and WCB Policy POL 02/2017, Injuries – Psychological. The policy states that a psychological injury is presumed to be an injury that arose out of the course of employment when all the following criteria is met:

- a. The worker is, or former worker was, exposed to a traumatic event.**
- b. The traumatic event arose out of and in the course of employment.**
- c. The traumatic event has caused the worker or former worker to suffer a psychological disorder that is diagnosed in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM), and**
- d. The psychological disorder is diagnosed by a psychologist or psychiatrist licensed to practice and make diagnoses.**

Your claim has been denied as a work-related injury because the circumstances do not meet the required criteria as per our Act and policy.

You submitted information that you feel that you have been harassed by your coworkers. Specifically, you have had your reporting structure changed, subjected to derogatory remarks and comments, had your ability to supervise questioned, had your authority as a manager questioned, had your assignments reassigned to others, been removed from courses and board meetings and information has been withheld from you.

The criteria was not under Incidents – Workload and Interpersonal. The daily pressure and stressor of the work are normal expectations for maintaining employment.

Any reasonable actions taken by an employer related to management is considered a normal part of employment and is not considered a traumatic event. Normal employment expectations include, but are not limited to the following:

- Staff assignments, transfers or restructuring.
- Periodic work flow fluctuations and/or assignment changes; and
- On review of the information submitted your job duties do not exceed the normal scope of the work or job you were performing.

It has also not met under Interpersonal Incidents between a worker and coworker, management or customers are not generally considered traumatic events, unless the incidents results in behaviour that is considered aggressive, threatening or discriminatory. I do not find this is the case.

In view of the above, I am unable to accept your mental health injury as work related under our criteria. No wage loss entitlement benefits or medical treatment costs will be issued regarding this claim.

Ana Brcic
Claims Entitlement Specialist III

Ms. Fuller answered that the WCB denied the claim even though the psychiatrist had not been contacted. Mr. Matkowski noted that part of the case is for a disability claim. It is relevant because her claim was denied.

- o. Mr. Matkowski asked Ms. Fuller to confirm that she had also applied with The Cooperators for disability benefits. Ms. Fuller responded that on July 18th The Cooperators denied her claim for a couple of reasons:
 - She was advised that the reason had been that there had not been an extension claim letter filed by GWBC.
 - In addition it says that the medical report does not support that she was totally disabled. At that time she wasn't. September 4th The Cooperators stated that they did not have a medical on file to support total disability. "Is it correct that you provided all the medical information that you thought was relevant to the Cooperators, gave them everything you can to support it?" Ms. Fuller replied yes.
- Mr. Matkowski asked Ms. Fuller, was it her opinion that the Company. intended by putting her on admin leave to deny her application for benefits? Ms. Fuller replied that the CEO told her that her benefits would not be affected. She had no reason to think otherwise.
- p. Mr. Matkowski said that he wanted to clarify dates. There was a call on July 18th from The Cooperators. Is that when Ms. Fuller decided to withdraw the appeal regarding the harassment complaint? Ms. Fuller replied that they did not do anything to withdraw the harassment appeal as such. They did not send a letter.
- q. Mr. Matkowski commented that evidence is that Ms. Fuller did not want to pursue the harassment case. Ms. Fuller replied that Mr. Davies told her to contact OH&S and ask for a complaint number to start the process for the discriminatory action. She talked to OH&S Officer.

- r. On August 2, there is a letter from Marcus Davies to OH&S. It is a letter stating grounds of appeal. Mr. Matkowski noted that this was after July 18. Ms. Fuller responded that on July 18, Mr. Davies had advised her to go down the discriminatory action path. The Letter dated August 2, 2019 was screen shared. It read:

"2 August 2019,
Occupational Health & Safety Division
ATTN: Ray Anthony, Executive Director

Dear Sir:

This letter is to serve as notice that we are herein appealing the decision of Jon Paradowski and Shawn Tallmadge in the matter of Anita Fuller and Great Western Brewing, as articulated in their July 11, 2019 correspondence, received by my client July 16.

The grounds of the appeal are as follows;

- The OHOs incorrectly determined that the impugned actions of the employer were "internal labour relations matters"; and
- The OHOs incorrectly determined that the investigation undertaken by M. Fuller's employer was "fair, through and unbiased" despite the fact that the investigation failed to meet the most basic standards for investigation, including the standards of the Occupational Health and Safety Division itself

Ms. Fuller seeks to have the decision of the OHOs quashed and further seeks direction that a proper and thorough review of the impugned investigation be undertaken.

Sincerely,

Marcus R. Davies"

- s. Mr. Matkowski also screen shared an email from the employee as part of email chain from May 7, 2019 This email was sent by Ms. Fuller regarding sick leave and reads:

From: alfuller@sasktel.net
Sent: May 7, 2019 4:06 PM
To: Lynn Eberle lynn@gwbc.ca
Subject: Re: Functional Capabilities From

Lynn: Good afternoon. I will see my specialist on Friday, May 10 and my family doctor on Monday, May 13. I will bring the form to my family doctor at that appointment and get it back to you on May 13.

I phoned Cooperators today and they do not have the Pan Sponsor Group Benefits Early Intervention Form for me yet, along with the require job description so my claim cannot be processed.

1) When will you send you send the Cooperators the GWBC form with the attached job description. Please send me a copy for my files.

2) Am I still on Company sick leave until May 13 (my doctor gave me 2 week sick leave note attached again to this email)?

3) If I am not still on sick leave and because the Cooperators benefits are delayed, I would like to have this week off May 6-10 inclusive as vacation time.

Please reply at your earliest convenience.

Sincerely,

Anita

Ms. Eberle sent a reply that she did not know that Ms. Fuller had applied for benefits.

- t. Mr. Matkowski had a question about the Employee and Family Assistance Plan (EFAP). Ms. Fuller says it was never raised, but Ms. Eberle says that it was raised in December in the meeting with Ms. Eberle. Ms. Fuller replied that Ms. Eberle let her know about the formal and informal routes she could choose. Ms. Eberle gave her both phone numbers: one for Mr. Rod Nickel and one for Mr. Cunningham. Mr. Nickel was a phone call where he explained the mediation process. She decided to go with the formal process, and she asked for the forms.
- u. Mr. Matkowski asked about the meetings on November 20, 21 and 27. Ms. Fuller had no recollection of meetings (phone calls) on those dates. She did not have forms on November 30.
- v. Mr. Matkowski asked, "Have you done any work since you have been on leave? Any employed work?" Ms. Fuller replied No. She has just done manual labour and volunteering. She gave up her truck license so she could not go anywhere. She volunteered at Royal University Hospital gift shop and Luther Homes.
- w. Mr. Matkowski asked when Ms. Fuller got the results of the Harassment Investigations she sought to have them reviewed by OH&S. He asked for the Request to be introduced as an Exhibit.

Objection: Mr. Davies raised an Objection to the introduction of the Request to OH&S as an Exhibit.

I ordered that the Witnesses be excluded.

Arguments:

- Mr. Davies argued that we are not getting into the merits of the harassment issues. Mr. Matkowski is trying to enter the document to put it to the witness. Mr. Davies had tried yesterday not to enter the realm of the harassment. But now Mr. Matkowski wants to enter documents relating to the harassment.
- Mr. Matkowski stated that this demonstrates the abuse of process. There are two distinct issues: 1) he discriminatory action taking place on December 18th 2) the harassment complaint.
- Mr. Davies argued the relevance of the ruling from OH&S about the review of the investigation reports. This is an entirely different case and the OH&S letter re the harassment file decision should not be brought into this argument.
- Mr. Matkowski is saying that Ms. Fuller got a negative ruling on one file, and then decided to go to another file. The OH&S letter is to show what has been decided already.
- Mr. Davies position is that the decision was made on the basis of harassment, not on the discriminatory action. This is an entirely different LRB file No. 188-19.

Ruling: I ruled that there be a compromise. The document showing the Request will not be put to the witness but will be marked for identification. The Counsellors can argue its relevance in the closing arguments.

- x. To close the loop on timelines Mr. Matkowski introduced the withdrawal of appeal in a letter dated February 10th, 2020 letter from Mr. Davies. Ms. Fuller had not has not seen this before. The letter was addressed to the Adjudicator assigned to the file, Anne Wallace:

10 February, 2020

Anne M. Wallace, Q.C.

Dear Ms. Wallace:

Re: LRB File No. 188-19; Fuller & Great Western Brewing Company

I apologize for the delay in providing this formal notice to you and to the Board.

I am writing to confirm that my client, Anita Fuller, has decided to withdraw the above-captioned OH&S complaint against hr employer.

Thank you for your consideration and patience throughout.

Sincerely,

Marcus R. Davies

Ms. Fuller advised that she had not seen the letter

11. In Re-Examination

- a. Mr. Davies asked Ms. Fuller for clarification on the relevant dates in this matter. He wanted to be clear about the following dates so he asked Ms. Fuller:
- o When did you become aware that you did not have benefits under the plan? She replied in October she was not reimbursed for her medical expenses. She was told on July 18th that she was denied her benefits.
 - o Did you receive the Investigation Report on April 8? Did you understand that it was your responsibility to provide a plan for a return to work? She responded No. The Employer put her on administrative leave, and they should be the ones to ask her to return to work.
 - o Did you ever apply for total disability coverage, and make reference to the denial of the application? No. She replied that she filled out The Cooperators' forms for the Employee portion and the doctor filled out the physician's form. There was nothing on the forms as to what was being applied for. The forms were just applying for benefits.

b. Respondent's Witness

i) Lynn Eberle

12. In Examination in Chief

- a. Mr. Matkowski asked Ms. Eberle her occupation. Ms. Eberle replied that she was employed by Great Western Brewery Company. Her title is Director of People and Culture. Mr. Matkowski asked how long she had been with the Company. She had been employed there since May 2015. She had worked in other positions as Office Manager at Great Western from

2016 to October 2018. Mr. Matkowski asked if she had a Human Resources role as the Office Manager. She replied yes, when she became Director of People and Culture in October 2018. He asked if she performed an HR function in that role. The answer was Yes.

- b. Mr. Matkowski asked about her employment history. Ms. Eberle said she was executive assistant to the Board of Directors and CEO at Sask. Polytechnique. She was also the Executive Assistant at the Saskatchewan Health Research Foundation. Mr. Matkowski asked Ms. Eberle what her current duties with GWBC were. She answered that she was responsible for employee relations management: on boarding, off boarding, payroll admin, liaising with unions for bargaining. Ms. Eberle was asked how many employees are there at GWBC. Her response was 94 currently. She reported to the CEO, Michael Brennon. She was asked, "Do any employees report to you?" She said No.
- c. Ms. Eberle was asked if she played any role in harassment and other complaints. Ms. Eberle said she receives complaints, and then decides on the next steps for complaint. Mr. Matkowski asked if she recalled the first time that she heard of a harassment issue, Ms. Eberle said it was Nov. 16, 2018 at a meeting, the initial meeting with Ms. Fuller. Ms. Fuller had requested meeting with the CEO. Ms. Eberle sat in on the meeting. Ms. Fuller wanted to pursue a harassment complaint,
- d. Ms. Eberle was asked if she took notes during the meeting. She replied, Yes, handwritten notes. They were taken on November 16, 2018. Ms. Fuller reviewed some of the incidents.
- e. There was further discussion on November 20, 2018. Ms. Fuller had a few more questions. She was wanting to review her personnel file. Ms. Eberle told Ms. Fuller she would look into reviewing the file. Ms. Fuller also asked for the Personnel Manual and Ms. Eberle photocopied it and gave her a copy. They talked about mediation or formal complaint. The notes of the meeting will be an Exhibit in the documents to come. At the second meeting on November 20, Ms. Eberle said she forgot to give Ms. Fuller one of the documents. She forgot to give her the formal complaint form so she would have both to use when she decided how she wanted to proceed.
- f. On November 21 Ms. Fuller reviewed her personnel file in Ms. Eberle's office. Ms. Fuller made a copy of a couple of items in the file – doctors' notes from years before. Ms. Fuller asked Ms. Eberle why her performance plan was not in her file. Ms. Eberle said she did not know. On November 21, Ms. Eberle had located the performance plan and told Ms. Fuller she could sign it and have it in her file. Also there were notes of a June 16, 2017 meeting that were in the previous CEO's file.
- g. At the meeting November. 27, 2018 Ms. Fuller had not completed the forms. Ms. Eberle advised that she was setting up the meetings for both formal and informal complaints: November 30 was a meeting with Rob Cunningham who is with DC Strategic and manages investigations. Also there was a meeting planned with Tim Nickel for mediations. Meetings were set up.
- h. During the meeting December 10, Ms. Eberle couldn't remember the contents. She had two meetings that day: one at 9:00 am and one about 5:pm. Ms. Eberle was allowed to refreshed her memory from her notes.
 - In the first meeting Ms. Fuller and they talked about Ms. Fuller's brother's condition. She had gone to be with family and him. Ms. Fuller said she was not able to fill out the complaint forms because she had been travelling. Ms. Eberle offered her condolences. She talked about the form. Ms. Eberle said she could use Ms. Fuller's speaking notes but Ms. Fuller wanted to fill out the forms as there was more times. Ms. Eberle asked about accessing EFAP. Ms. Fuller said she had used her six sessions and Ms. Eberle said Ms. Fuller could

- get more if she needed them. Mr. Matkowski asked if Ms. Fuller mentioned about the company having already waited for these forms. Ms. Eberle replied that she asked what Ms. Fuller had decided. Ms. Fuller said she did not want mediation. She was going for the formal complaint. Ms. Eberle told Ms. Fuller that she was going to tell those involved about the complaint; that she would inform Al Genest verbally. She would not be providing the notes. There was discussion about setting up a one-on-one meeting with Mr. Genest. Ms. Eberle would not want to raise suspicion that something was going on.
- In the meeting with Ms. Fuller on December 10 at 3:30pm Ms. Eberle advised Ms. Fuller that there would be a meeting with Mr. Genest the next morning so he could have a meeting with Rob Cunningham.
- i. On December 11, Ms. Eberle said that she did tell Mr. Genest about the harassment complaint in Mr. Brennon's office. She told him that she would be setting up meeting with Rob Cunningham for the investigation. Mr. Genest was taken off guard and he was upset. Ms. Eberle said she did not provide Mr. Genest with Ms. Fuller's speaking notes. Ms. Eberle said she had not as yet received the formal written forms. When she got the forms, she provided Mr. Genest with a copy on December 13.
 - j. On December 14, 2018 Ms. Eberle met with Ms. Fuller to put her on admin leave. Brendan Halbgewachs was in the meeting room as well. They told Ms. Fuller GWBC would be putting her on a paid leave pending the end of the investigation and provided Ms. Fuller with a letter (supra, para. 9 q) that Ms. Eberle gave to Ms. Fuller. Ms. Eberle said the rationale was that they felt given the close working relationships and to protect Ms. Fuller's state of health and recognizing that her brother was ill, it was best to put her on a fully paid admin leave lasting the duration of the investigation. Mr. Matkowski asked, who made the decision. Ms. Eberle said it was she and the CEO. Mr. Matkowski also asked, if either she or the CEO were respondents in the harassment complaints? The response was No.
 - k. Mr. Matkowski asked what was her knowledge surrounding Ms. Fuller's brother's health. Ms. Eberle said that he was now in a coma and they were testing family for a liver match. Mr. Matkowski asked if at the time the paid leave was provided, did she have any medical notes? Ms. Eberle said No.
 - l. In the meeting on December 10 were Ms. Fuller, Ms. Eberle, and the Chief Operating Officer (COO). Meeting went well given the circumstances. Ms. Fuller seemed grateful for the leave. Mr. Matkowski asked if she recalled Ms. Fuller asking about any impact that the leave would have on her vacation leave, pension plan, etc. Ms. Eberle said that she and the COO felt there would not be any. Ms. Eberle was asked if they thought there was an adverse impact on giving her leave? She replied No. they did not feel so. Ms. Eberle was asked how long she had been in the HR role? She replied, about 4 weeks. Ms Eberle asked Ms. Fuller to finish up anything she was working on and let her know when she was departing the building. Mr. Matkowski asked if she said Ms. Fuller had to leave by noon? Ms. Eberle said, not that she recalled, no.
 - m. Mr. Matkowski introduced a letter from Ms. Fuller to Ms. Eberle given to her when she was departing the building (supra para. 9 u.) A followup email included that she would be available if required for meetings. Ms. Eberle said she construed the letter as Ms. Fuller's gratitude for admin leave and the opportunity to focus on her family.
 - n. Mr. Matkowski asked about a phone call on January 31 from Ms. Eberle to Ms. Fuller. Ms. Eberle said the phone call was to:
 - 1) check in to see how she was doing and

- 2) ask how things were after her brother's death.
 - 3) to ask if she reached out to a counsellor. Ms. Fuller said she had already.
 - 4) request that she put her out-of-office on her email at work.
 - 5) talk about various things at the brewery.
- o. In late March 2019 or early April when the Investigation Reports were completed Ms. Eberle testified that she reached out on April 4 to arrange a meeting with Ms. Fuller to review the findings of the Report. Ms. Fuller said her brother, Jay would join her for meeting on April 8th.
 - p. On April 8, Ms. Eberle testified that the meeting took place. Those present were Ms. Eberle, the Chief of Finance, Ms. Fuller, and her brother. Ms. Eberle gave Ms. Fuller the results. She also gave the option to Ms. Fuller and Mr. Fuller to read the reports there or to sign a confidentiality agreement so Ms. Fuller could take them with her. Ms. Fuller asked if her brother could be added to the signatories so he could read it too. Ms. Eberle did agree to add Mr. Fuller with a handwritten note.
 - q. Mr. Fuller asked about next steps. Ms. Eberle said that they were giving her a few days to review the reports. Once she did, they would be open to discuss next steps with Ms. Fuller but would need a couple of days for reorganization if she wanted to return. Mr Matkowski asked if there were any medical notes provided. Ms. Eberle said No.
 - r. April 10th Ms. Fuller asked Ms. Eberle to amend the Confidentiality Agreement to allow Jane Herslip to review the Reports. There was a discussion about signing a new letter and picking it up. Mr. Matkowski asked what was changed on the new letter. Ms. Eberle replied that since they were amending the letter to include Ms. Herslip, they were also including Mr. Fuller in typewriting on the letter. She wrote an addendum about the previous letter and why it was amended. Mr. Matkowski asked if the information contained in her notes were accurate to the best of her knowledge. She replied Yes.
 - s. Mr. Matkowski raised a number of issues:
 - o *Transition from paid admin leave to unpaid medical leave -*
 - The Administrative Leave was moved from paid leave to unpaid medical leave on May 27th. Ms. Eberle said the investigation was completed. When GWBC received the functional disabilities form, it said Ms. Fuller would be off for 1 year.
 - Mr. Matkowski asked why the paid leave continued until May 27. Ms. Eberle recounted that on April 11, Ms. Fuller said that she would be meeting with her doctor and she would be sending a medical report.
 - o *Return to Work:*
 - Ms. Eberle said they had not had any further discussion on her return to work. They were waiting for the Reports to determine what was happening re return to work provided that they had received Ms. Fuller's functional analysis.
 - On May 7, Ms. Eberle requested that a Functional Disabilities form be completed. Also Ms. Fuller advised that she was applying to Cooperators for disability leave. Ms. Eberle said that usually an employee will let her know that they plan to apply for disability. Ms. Eberle told Ms. Fuller that she was not aware that Ms. Fuller was applying for benefits, but she would submit the forms. Ms. Eberle hadn't received the form yet.
 - Ms. Eberle was asked if she had requested Ms. Fuller's work phone back at one point. Ms. Eberle said they were looking at hiring a temporary for one-year term to fill her position. She was going to collect the phone back to see if they could

use it for another reasons. Ms. Eberle also asked for keys back to use them for other employees.

- t. Mr. Matkowski asked about The Cooperators Policy:
 - o He asked who administers the policy. Ms. Eberle replied, The Cooperators. Mr. Matkowski asked if GWBC has any say in whether claims are accepted or denied? Ms. Eberle said None. The Cooperators makes those decisions.
 - o There is a letter from the Cooperators stating that they have a claim from Ms. Fuller and she would have to send in Employer's form and a job description. Mr Matkowski asked if Ms. Eberle sent them in. He asked if at that time did she think Ms. Fuller was eligible to apply for benefits. Yes Ms. Eberle thought her benefits were still active.
 - o Mr. Matkowski said that short term and long term disability premiums were paid by the Employer. Other benefits were paid from Employee's paycheck. Mr. Matkowski asked what happened to the premiums when Ms. Fuller went on unpaid leave. Ms. Eberle said they were paid by GWBC until October, 2019. She would figure out what was owing and was looking at recovery of the premiums from Ms. Fuller by post-dated cheques.
 - o On July 12, The Cooperators notified GWBC that they had declined Ms. Fuller's short term disability claim. Did Ms. Eberle follow up with Cooperators regarding the denial of the claim? She replied Yes, because the reason was very vague. They said that the information was confidential and shared with Ms. Fuller. Mr. Matkowski asked if the employer could have provided any further information to assist with the claim? There was no response.
 - o Mr. Matkowski stated that GWBC did then receive a letter with the details. The letter states that GWBC should have requested the 90-day extension of coverage, and they don't have a medical to support the claim. Ms. Eberle was asked if she had any knowledge of the 90-day extension provision before she received the letter? She replied No she did not. Her reaction to Clause 2.5 was that she looked into more information about that clause in the policy. If there had been an extension how long would it have been for. It could not exceed 90 days. Ms. Fuller would have been off longer than the 90 days.
 - o The Respondent asked if Ms. Eberle intended to interfere with Ms. Fuller's benefits by providing a paid leave? She replied No. Did she think the paid leave interfered with Ms. Fuller's disability benefits? Yes, it did interfere with her disability benefits. Mr. Matkowski asked if it was her understanding that Ms. Fuller would have satisfied the requirements for disability? Ms. Eberle answered that she did not know. It was not her decision.
 - o Mr. Matkowski asked if this has changed her practice going forward? She replied Yes. She has had a recent occurrence and has asked for the extension benefits.
 - o Ms. Eberle was asked if The Cooperators have an EFAP? Is it part of The Cooperators insurance or separate? The reply was that it is separate. It offers counselling for everything – gambling, debt, alcohol issues, marital troubles. It is offered to all Employees at GWBC.

12. In Cross Examination

- a. Mr. Davies asked Ms. Eberle to confirm her role at Great Western. She explained that her current role was Director of Employees and Culture. She looked after union dealings,

general employee relations, administration of policies and procedures, benefits, etc. She has been at GWBC since 2016 and in the Director position since October 2018.

- b. She deals with complaints. She had only dealt with Ms. Fuller's complaint at GWBC. She hadn't dealt with a harassment complaint. She had dealt with employee complaints in previous positions. She had expressed interest in the position when the previous HR Director left.
- c. Mr. Davies asked about The Employee Manual. Ms. Eberle stated it was in effect prior to her coming to the position. Mr. Davies asked if she knew if Ms. Fuller was involved in drafting it. Ms. Eberle was asked if they followed the salary range. She said Yes. She had provided the Manual to Ms. Fuller in a meeting when she asked for it. Mr. Davies quoted from the Manual:
 - o Page 3, ss 5 Rights - you have a right to a workplace free of violence and harassment and then explains harassment.
 - o Page 4 explains the right of protection from Discriminatory Action. "Not being discriminated against is a fundamental right in your organization".
- d. Mr. Davies asked Ms. Eberle if she was familiar with *The Saskatchewan Employment Act*? Ms. Eberle said she refers to it from time to time. The Manual refers to *the Act* re discriminatory action. She was not sure if the Manual is verbatim from *the Act*.
- e. Mr. Davies referred to the Respectful Workplace Procedure which starts on page 22 and 23. Page 25 sets out the resolution process – informal and formal resolution described on 27, 28 29. He asked if this was what she was following.

Objection: Mr. Matkowski raised an objection to quoting the Respectful Workplace provisions in the Employee Manual. Mr. Matkowski argued that it was relevant to establishing the context under which Ms. Fuller suffered the discriminatory action. This is the process that she had gone through that made her ill. The quote of page 24 was questioned by Mr. Matkowski.

Ruling – Mr. Davies can refer to the provisions of the Employee Manual as it was part of the evidence led. However, Mr. Davies cannot attack the decision of the OH&S Officer regarding harassment as it is not the subject of this appeal, or the investigations relating to harassment. The Objection was overruled.

- f. Mr. Davies asked about Respectful Workplace Advisers (and how many were in place when this was taking place. Ms. Eberle said there could only have been one. She was not sure if he was trained specifically in that capacity. Mr. Davies asked if that person was involved in the initial process of the complaint. Ms. Eberle responded that Ms. Fuller did not bring her initial complaint to the Respectful Workplace Advisers.
- g. Regarding the resolution process, Mr. Davies asked when Ms. Fuller first raised matters, did she do that informally? Ms. Eberle said the difference between formal and informal was not discussed at the time. Ms. Eberle raised the issue with the CEO. Mr. Davies asked if she raised the issue prior to the meeting with the three of them. Ms. Eberle said she provided Ms. Fuller with the forms for formal and informal so she could decide what procedure she wanted to follow.
- h. The Appellant noted that on Page 26 – Formal Resolution Process – if informal process was unsuccessful, the Employee may file a formal complaint. It looks as though the Employee has to pursue an informal process before the formal process. Ms. Eberle said Ms. Fuller was provided with both forms and she wanted to go with the formal process.

- i. Mr. Davies asked when was the harassment investigator contacted? Ms. Eberle did not know the exact date. He was contacted shortly after she got the notice of the complaint – between November 16 meeting and shortly thereafter. A complaint had yet to be received. Mr. Davies asked what was the thinking for contacting the investigator? She contacted both a mediator and an investigator to give Ms. Fuller information to make the choice. November 30 meeting she was not at that meeting. Mr. Davies asked, "When did the investigator meet with Mr. Genest?" She replied, possibly December 12.
- j. Ms. Eberle was asked when GWBC received the formal complaint. She believes December 13. December 10 Ms. Fuller came to her office saying that she had not had time to fill the forms out. The Appellant asked, if she recalled why she said that was. Ms. Eberle thinks it was in regards to her brother being ill. Ms. Eberle referred to Page 13 of her handwritten notes and quoted – "she plans to have the form done by end of week." Ms. Fuller wanted to fill out the form as it included the specific information that she did not include in her typed notes. Mr. Davies asked if she asked Ms. Eberle not to use the typed notes? She replied that these are the notes that Ms. Fuller had provided to Mr. Brennon. Mike and she were both in the meeting where Ms. Fuller provided them so that is how she got a copy.
- k. Mr. Davies referred to Page 15 of notes for December 10. He asked if she told Ms. Fuller that the company had been waiting too long for this complaint. Ms. Eberle didn't recall. Mr. Davies asked if she recalled that Ms. Fuller said she was not to use the typed (speaking) notes? Reply was Yes, it says so in her notes.
- l. Ms. Eberle was asked when she makes notes into a running log, does she compile them immediately after the meeting. Ms. Eberle responded that it depends on the meeting. Sometimes she makes jot notes and then does them after. Sometimes she makes them during the meeting. Mr. Davies asked if they are written contemporaneously? Ms. Eberle replied Yes, she tries to keep her notes as current as possible.
- m. Mr. Davies asked, if Ms. Eberle met with Mr. Brennon a couples of times on December 10 between her meetings with the employee? Did Mr. Brennon provide any guidance re going forward with this matter on that day? Ms. Eberle said she may have met with him to provide him with an update. But she doesn't recall. Mr. Davies asked if she remembers him providing her with any specific instructions about the case. Ms. Eberle didn't recall. She probably would have updated him at some point about where the process was going.
- n. Back to Page 15 of Ms. Eberle's notes, about the December meeting, Ms. Eberle said that nothing had changed, she should still move forward as discussed. What had changed was that they were going to tell Mr. Genest about the complaint. Mr. Davies commented that it would appear she had discussed the information with Mr. Brennon as there was a decision about telling Al Genest about the complaint.
- o. Mr. Davies asked why there was such urgency to inform Mr. Genest about the complaint. Ms. Eberle said so he would be aware of what was happening. Mr. Davies commented, that at that point, she did not have a formal complaint so he asked if it was GWBC's policy to proceed with the complaint even before the Company had a formal complaint. There was no response.
- p. On Page 15 of Ms. Eberle's notes dated December 11 it is noted that Ms. Eberle met with Mr. Genest to provide him with a letter informing that there was a complaint. That letter not in evidence. Ms. Eberle said Mr. Genest was deflated and apologetic. He said, "Sorry that they had to deal with this." Mr. Davies asked if she met with Ms. Fuller to tell her that the matter

was proceeding. Ms. Eberle suggested Ms. Fuller meet with Mr. Genest. She suggested that she could sit in on the meeting. All parties were aware of the matter by that time. Mr. Davies asked if she remembered at any time when she met with Ms. Fuller, that she was pressuring her or rushing her. Response was no.

- q. Mr. Davies asked if she was aware if there any mention of administrative leave in the Employee Manual. At any time before did Ms. Fuller request administrative leave? Ms. Eberle said No, The Appellant asked when the decision was made? Ms. Eberle replied on or before December 14. The decision was made by Ms. Eberle and Mr Brennon. Ms. Eberle was asked what was the thinking behind the decision? She replied: given the situation and close working relationship, state of Ms. Fuller's health and her brother's health.
- r. Mr. Davies asked Ms. Eberle what had changed between December 11 and December 14 that she went from sitting in on meetings to deciding that Ms. Fuller should go home? Ms. Eberle replied, as each day proceeded we considered what was happening and decided sending her home would be the best process.
- s. Ms. Eberle was asked if she was at the meeting when Ms. Fuller was informed she was being put on administrative leave. Ms. Eberle said she and Mr. Brennon CEO were present. "Do you recall Ms. Fuller asking if her sick leave or pension would be affected by this leave?" She only asked once. We said that we didn't think so. Ms. Fuller asked if there would be any repercussions. We assured her there would not. On the last line on page 15 of her notes she noted Ms. Fuller asked about an effect on performance evaluation. They said no.
- t. Mr. Davies asked if Ms. Fuller asked who her staff would be reporting to while she was away? Who would manage the department? Ms. Eberle said they said Mr. Genest would.
- u. Ms. Eberle was asked if prior to December 14 had she ever reviewed the Benefit Plan to see how leaves would be treated. When Ms. Fuller was put on administrative leave, did she review the Benefit Plan with her? She replied No. She was also asked who administers the policy. Her response was GWBC administers the policy. On Page 1 of the Manual, the Employer receives the right to amend ... at any time." Would you agree that the Employer has the right to change the policy. Ms. Eberle said Yes, correct.
- v. Mr. Davies referred to on May 27, a letter changing Ms. Fuller's status regarding medical leave. "The following deductions will occur this week..." Ms. Eberle was asked does this paragraph explain what the 48 hours will be about. Ms. Eberle explained that Ms. Fuller had taken sick leave but didn't have any left so she paid for it with her vacation pay. Mr. Davies asked when was the 48 hours of sick leave taken deducted. Explanation from Ms. Eberle was that Ms. Fuller was on leave until April 29th, these sick leave/vacation days must have been taken at the beginning of May. Mr. Davies commented that it was not out of the goodness of its heart that she was given sick leave, but it was taken back. So she was not on paid leave until the end of May as previously testified.
- w. Mr. Davies recounted the situation regarding The Cooperators Disability Plan. On July 12 and 17 there was an email exchange. Ms. Eberle received an email from Christine Rye who is in accounting department at GWBC saying GWBC had been deducting benefit premiums for the Benefit Plans from Ms. Fuller's pay cheques. The email says she was on unpaid leave. There is a letter from The Cooperators dated July 18 to Anita Fuller that she was denied her claim because the Employer had not filed a form (supra 9 bb.) The letter says It was GWBC's responsibility to request an extension. *The letter does not say that it was the Employee's responsibility to request an extension.* Ms. Eberle was asked if at any time if she applied for

an extension. She said No. Mr. Davies asked If she was on an 'approved leave of absence', if Ms. Fuller asked for the leave of absence. Ms. Eberle replied No. Is there any definition in the Employee Manual for the 'approved leave of absence'? Not that she knows. Ms. Eberle was asked if she ever explained to The Cooperators that this was an Employer's leave of absence, not requested by the Employee. Response was no.

- x. On September 4 (supra 9 dd.) is a letter from Cooperators to Anita Fuller of which GWBC received a copy. The Letter explains that her benefits had been terminated because they did not receive an extension of benefits application from GWBC. Also, they did not have medical information on file. Even if they had extended it, would she not have been beyond the 90 days – he counts 120. Ms. Eberle responded Yes.
- y. Mr. Davies asked if either of the other individuals involved in the harassment investigation was placed on administrative leave. Ms. Eberle responded No. Ms. Fuller was the only one on administrative leave. Regarding the letter dated December 14 (supra 9 u.) Mr. Davies asked who wrote the letter. Ms. Eberle said that it was written by her in collaboration with CEO and legal advice. Mr. Davies asked if Ms. Fuller was asked to leave the building by noon. Ms. Eberle said No, she doesn't believe so.
- z. Ms. Eberle was asked if in July did Ms. Fuller contact her about the letters she had received from The Cooperators. Ms. Eberle asked if Ms. Fuller contacted her about getting a Benefit booklet. Ms. Eberle did provide her with one but left it at reception. Sunday, July 15 Ms. Fuller said she would be in between 12:15 pm and 12:45 pm but did not come in at that time. Mr. Davies asked if when Ms. Fuller did attend the Workplace, did she have any reason to think that Ms. Fuller did anything inappropriate when she was in the office. Ms. Eberle was asked why she retrieved the brochure from the Front Counter when Ms. Fuller did not show. Ms. Eberle thought they would make new arrangements for the pickup.
- aa. In the email July 22, Ms. Eberle asked that Ms. Fuller make arrangements when coming into the building. Ms Eberle asked also that she return her keys for perimeter and office keys. Ms. Eberle answered that Ms. Fuller is salaried not union. Mr. Davies asked if when senior management staff are on leave, does she ask for their keys. Ms. Eberle said she was not sure what they have done in the past. This was her first experience. Ms. Fuller's first words were "I am sorry that I misunderstood ..." Did it seem that Ms. Fuller was feeling chastised? No response.
- bb. Originally Ms. Eberle had said that to place Ms. Fuller on paid administrative leave was a good decision. Mr. Davies asked if that is still her opinion. Response was Yes, it was at the time. Mr. Davies pointed out that in Examination in Chief, Ms. Eberle said GWBC should have requested an extension. Mr. Davies commented If they were supposed to request an extension they should have applied for it. He asked if she has changed her practice going forward as she said in her testimony. Ms. Eberle said yes.
- cc. Mr. Davies asked if Ms. Fuller could have refused the administrative leave. Ms. Eberle's response was they would have had to discuss it if it had come up. Mr Davies asked if we can make the statement that because of the administrative leave Ms. Fuller lost her benefits. Ms. Eberle said No, it was based on the failure to request the extension. The Appellant commented whose responsibility was it to request the leave? There was no response.

13. ReExamination

- a. Ms. Eberle was asked by Mr. Matkowski if she had reviewed The Cooperators' Policy Manual with Ms. Fuller. She said no. She was asked when the Policy Manual was dated. She replied January 1, 2019.
- b. There was a Letter provided to Mr. Genest regarding the formal complaint. Ms. Eberle was asked if she recalled what was in the letter. Ms. Eberle responded she believes that it said there was a formal complaint, the next steps regarding the process and that he would be meeting with Rob Cunningham.
- c. Ms. Eberle had been asked what had changed between July 17 and December 14 when the paid leave was provided regarding Ms. Eberle sitting in on meetings and then providing administrative leave. Mr. Matkowski asked when was the formal complaint received. She replied December 13. Mr. Matkowski then asked if the formal complaint contained additional details beyond Ms. Fuller's speaking notes. Ms. Eberle added one thing that did change was that Ms. Fuller put forth two complaints in the formal complaint which were different. Also they were in the form of a formal complaint using the forms. That's all. Mr. Matkowski asked if the respondents were the same in both sets of documents. Ms. Eberle replied that she was not sure if there were two respondents in the speaking notes, but there were two respondents in the formal complaint.
- d. Ms. Eberle was asked about Ms. Fuller coming into the brewery. At that time was the harassment complaint completed? Ms. Eberle said yes

IV SUMMARY OF ARGUMENTS

The Appellant's Counsel and Respondent's Counsel provided written Briefs of Law in support of their positions to me prior to their Oral Arguments. This summary is a combination of the contents of both the Briefs of Law and the Oral Arguments.

a. Brief of Law and Oral Argument on behalf of the Appellant

14. Introduction

- a. Mr. Davies opened his Brief by stating that this is not a complicated matter. It is a straight forward litigation. He stated that as a result of seeking the protection of *The Saskatchewan Employment Act*, Anita Fuller was subjected to discriminatory action by her employer and experienced significant damages to her financial, emotional and physical well-being.
- b. Mr. Davies argues that the employer's position is:
 - o He has tried to conflate Ms. Fuller's earlier complaint about the inadequacies of the harassment investigation with the within complaint, despite the fact that the statute makes it clear that harassment and discriminatory action are distinct and very different things.
 - o He has claimed that the absence of bad intentions protects the employer from responsibility for the adverse effects suffered by Ms. Fuller.
- c. The summation of the Appellant's position is that this is a straight line:
 - o Ms. Fuller filed a complaint of harassment under her employer's policies and the provincial statute;

- Her employer singled her out and she was placed on administrative leave by her employer;
- As a result of being placed on administrative leave by her employer, Anita Fuller experienced extensive financial loss and suffered significant damage to her emotional, mental and physical health.

15. Issues

- a. The Appellant argues that there is only one issue before this adjudication: did GWBC decision to isolate Ms. Fuller from her workplace, which resulted in her losing access to her benefits and short-term disability, constitute a discriminatory action.

16. Discussion

Abuse of Process

- a. GWBC has alleged that Ms. Fuller is participating in an abuse of legal process by bringing the disciplinary action complaint. They allege that this appeal had already been rendered and asked me to dismiss the appeal on those grounds Mr Davies contends that GWBC is confusing two separate yet equally important statutory protections available to workers set out in *The Act*.
- b. Mr. Davies states that Harassment and Discriminatory Action are two separate protections under *The Act*.

1) Harassment:

Sec. 3-1(1)(l) of *The Act* defines as:

(l) "harassment" means any inappropriate conduct, comment, display, action or gesture by a person:

(i) that either:

(A) is based on race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age nationality, ancestry or place of origin; or

(B) subject to ss (4) and (5), adversely affects the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated; and

(ii) that constitutes a threat to the health or safety of the worker.

Ms. Fuller's complaint was against two workers in the workplace. Under *The Act*,

Sec. 3-8 Every employer shall:

- (d) ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment with respect to any matter or circumstance arising out of the worker's employment;

Mr. Davies states his position: "The evidence demonstrates that Ms. Fuller brought her complaint to the attention of her employer and then in good faith followed the instructions of her employer while she sought assistance with her concerns and the enforcement of the legislation and workplace policies."

2) Discriminatory Action

Sec. 3-1(1)(i) of *The Act* defines discriminatory action as:

- (i) ...any action or threat of action by an employer that does or would adversely

affect a worker with respect to any terms or conditions of employment or opportunity for promotion and includes termination, layoff, 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...

- c. Mr. Davies states Ms. Fuller submits that when she brought the complaints of harassment to her superiors in the workplace, she was seeking the enforcement of the legislation. That action is a protected activity under sec. 3-36 of *the Act*. When Ms. Fuller filed her harassment complaint with OH&S Division it was regarding the Investigation. The Brief states that Ms. Fuller believed the investigation to be biased as none of the witnesses she provided to the investigator were interviewed.

3) Difference between Harassment and Discriminatory Action

- d. Mr. Davies states in his Brief that *The Act* "... defines and separates harassment from discriminatory action for good reason; they are not the same thing. Protection from discriminatory action is the inherent protection of a worker for voicing concerns in their workplace. ... In either case the issue of discriminatory action was not raised by the initial filing of the complaint. It is only in the employer's response to the complaint that a discriminatory action can be found."
- e. Mr. Davies has argued "While GWBC has argued that allowing Ms. Fuller to bring her complaint of discriminatory action is an abuse of process, Ms. Fuller argues that the employer is mixing a Statutory Right – the right not to be harassed at work – with a Statutory Protection, which is the protection offered to worker who has engaged a Statutory Right."
- f. Mr. Davies quotes the Saskatchewan Court of Appeal in *Chinichian v Mamawetan Churchill River (Health Region)*, 2016 SKCA 89 at para. 6:

"Section 3-36 permits a worker who believes that the employer has taken discriminatory action against him or her for a reason mentioned in s. 3-35 to refer the matter to an occupational health officer. ...there is a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in s. 3-35 and the onus is on the employer that the discriminatory action was taken against the worker "for good and sufficient other reason."

- g. Mr. Davies argues that GWBC claims this discriminatory action complaint is an abuse of the legal process because "the same fundamental issue has already been answered". He continues Ms. Fuller could not disagree more because the same issue has not and, in fact, could not have, been answered.

4) Res Judicata

- h. He cited *Danyluk vs Ainsworth Technologies Inc.* [2001] 2 S.C.R. 460 2001 SCC 44 where the Supreme Court laid out three elements that must be met in order to invoke the doctrine at para. 25:

"Issue estoppel is a branch of *res judicata* ... which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: 1) the issue must be the same as the one

decided in the prior decision; 2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same or their privies.”

Mr. Davies contends that the issue of discriminatory action was never answered prior to her submission of such a complaint to OHS in July, 2019. In fact, it was impossible for the OHS Officer decision issued July 11, to address a matter of which even Ms. Fuller was unaware of until July 18.

There was no final or binding decision on the issue made. This could not be a relitigation of discriminatory action because the issues were never heard prior to this appeal process and no final decision on the issue was never made.

- i. Mr. Davies argued that in paragraphs 28 & 29 of the Respondent's Brief sets out a request for a review of the investigation. On July 29, Ms. Fuller appealed the OH&S review and then withdrew her harassment complaint. Ms. Fuller had to file the request because of deadline. She had to then make a decision about whether to appeal the harassment decision. She had to preserve her rights to appeal. One does not overlap the other. The Act makes a clear distinction between a harassment complaint, and a discretionary action. She filed a complaint to protect her rights. On May 26, she did not know that she would be cut off administrative leave in July, 2020. Para 49 says it is within her rights to file the complaint to preserve her right to file. Ms. Fuller was entirely credible. She took a choice and picked Discriminatory Action. She did not have the resources to pursue both Harassment and Discriminatory Action complaints in two separate forums.
- j. Mr. Davies stated that Mr. Matkowski argued that this matter should not be before the Adjudicator, but then did not comment why the OH&S Officers allowed a review of the material. The OH&S officers had already looked at harassment, but then decided they would allow her to file a complaint about the discretionary action because it was not the same thing. A harassment investigation is not a discriminatory action. A discussion with OH&S Officers about harassment is not the same as a complaint about discriminatory action.

The Respondent had not intended for Ms. Fuller to Lose Benefits

- k. Mr. Davies stated that Mr. Matkowski had argued that GWBC is protected from a finding of discriminatory action in this matter because the financial, physical and emotional damage suffered by Ms. Fuller was incidental and unintended. Because the Company Director of People and Culture was unaware of the fact that Ms. Fuller's benefits would lapse as a result of her administrative leave, Mr. Matkowski argued that such accidental discrimination did not count.
- l. Mr. Davies quoted *Ont. Human Rights Comm. V. Simpson -Sears* [1985] 2 S.C.R. 536 (O'Malley) at para. 12:

“It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties or restrictive conditions not imposed on other members of the community, it is discriminatory.”
- m. According to the first page of The Cooperators policy booklet for GWBC, “...the employer reserves the right to amend, modify, qualify, reduce, suspend or terminate any of the benefits provided under the mater group policy...” Mr. Davies argues that the terms, conditions and management of the benefit plan, including any and all aspect of coverage are the sole responsibility and jurisdiction of the employer. It was up to GWBC to inform The Cooperators

of Ms. Fuller's leave and to make arrangements to ensure that their decisions did not discriminate against Ms. Fuller.

- n. Mr. Matkowski argued that intention has nothing to do with discriminatory action. Did your action do harm to the Employee? The Employer learned from this process that they should have done better so changed their process. They had other alternatives. They could have put others on leave, but did not. They singled Ms. Fuller out. Now they are saying it was accidental and should not have mattered. Our position is yes it does because Ms. Fuller suffered harm.
- o. Although Mr. Matkowski claimed it, Ms. Fuller's letter is not thanking GWBC for the leave, but for taking her complaint seriously. She was not thanking them for singling her out and isolating her.
- p. Mr. Davies argued that placing Ms. Fuller on a paid admin leave that day and for 30 days may not have an adverse effect, but extending the leave, cutting off her prescriptions and other benefit is an adverse effect. Ms. Fuller discovered this on July 11 when she was denied benefits.
- q. Mr. Davies comments that Mr. Matkowski is what is required is actual intent to retaliate against an employee. Ms. Fuller was told there would be a face-to-face with Mr. Genest then it was cancelled. She was shut out. She was asked for her phone to be returned. She got treated very differently from the other Employees. She had to use up all of her sick leave and vacation. What were the motivations for GWBC's actions? While she was gone, the organization was changed so she was reporting to the person she had complaint about.
- r. Mr. Davies argued that Ms. Fuller's application for benefits to The Cooperators was not denied because she did not meet the disability provisions. On February 1, 2020 she should have been covered because she got her diagnosis. It was because the Employer had not filed the correct form.
- s. There is nothing surprising about the medical leave Ms. Fuller took on April 28th. On April 29th she submitted a medical leave with a diagnosis. The employer had said that leave was denied because there was no diagnosis.
- t. Mr. Davies argued that Ms. Fuller was disabled. Regarding the Letter from The Cooperators dated July 18, 2019 it says the leave was denied because they did not receive the necessary form. Also when Ms. Fuller left work, the insurer said she was no longer an active worker. Does that not mean that she was not disabled? It provides only one reason for disqualification, that she was no longer an active worker. In regards to the disqualification:
 - o There are two different things: 1) The Cooperators did not receive a request for extension of coverage, and 2) she was not disabled. She should have known what was going to happen between December 18, 2018 and March, 2019. She asked several times in the meeting with Ms. Eberle, et al would this affect her benefits. They said no.
 - o Mr. Matkowski says that GWBC had no control over what a 3rd party does. However, in paragraph 79 we are told that it was at GWBC's discretion whether to apply for the 90 day extension.
 - o After sitting at home for 115 days, Mr. Matkowski says Ms. Fuller is to blame. GWBC had the right all along to amend, modify, and quality for benefits on Page 1 of the Policy. We had to believe that GWBC could not pick up the phone to amend the policy. The Employer's position is that even though they could have done something earlier, her

benefits would have expired anyway so there is no point. It says right there in the policy that the Employer has the right to amend the policy. It makes no sense to say that it was in The Cooperators' court when it was the Employer.

GWBC's failure to follow procedural matters

- u. Mr. Davies argued that Ms. Fuller's complaints had been mismanaged starting in June 2017 when she first filed an informal complaint against Al Genest as Respondent. The complaints were not dealt with. The reporting structure was changed so that she reported to the person she complained about.
- v. In November 2018 Ms. Fuller brought her concerns to the CEO Michael Brennan. When she referred to the speaking notes she had prepared, Mr. Brennan asked for a copy and she eventually relented after him promising to keep them confidential. Ms. Fuller later learned that he had given a copy to Ms. Eberle, and she suspected to Mr. Genest as well. The Investigator, Mr. Rob Cunningham, also advised her that he had a copy of her notes.
- w. Mr. Davies argued that from the time she raised concerns with Mr. Brennan, she was under constant pressure to formalize her complaint. GWBC policy says that an employee has up to a year to file a complaint, but Ms. Fuller was told that the company had been waiting too long for her to formalize her complaint. She filed the formal complaint on December 13, 2018 and was placed on administrative leave the next day.
- x. Issues that related to Ms. Fuller's anxiety and deteriorating health which led to being diagnosed with Post Traumatic Stress Disorder were:
 - The breach of trust regarding the sharing of her notes.
 - The delay in the investigation which took 90 days when it was supposed to take 30 days according to the GWBC Manual.
 - None of the witnesses she had listed had been contacted by the investigator.
 - She was ignored by her employer except for a single housekeeping phone call in January, 2019.

All of these actions played a role in either causing or adding to the damages suffered by Ms. Fuller.

- y. Mr. Davies argues that the letters from The Cooperators received in July and September, 2019, denying Ms. Fuller's application for short-term disability stated the reason for the denial being the following provision of the Policy:

2.5 Termination of an Employee's Insurance

Automatic Termination

The insurance of any Employee under this Policy shall automatically terminate on the earliest of the following:

- On the day the Employee ceases to be Actively at Work, except:
If an Employee ceases to be Actively at Work due to a temporary Approved Leave of Absence, the Employer may request an extension of coverage for a period not exceeding 90 days from the date the Employee ceased to be Actively at Work, provided premiums are paid and there is no individual selection.

- z. Mr. Davies stated that Mr. Matkowski had failed to apply for an extension of coverage for Ms. Fuller or otherwise amend the disability plan, and as a result Ms. Fuller lost her coverage the moment she was handed the letter placing her on leave.
- aa. Mr. Davies argues that The Cooperators' letter further states that Ms. Fuller's medical file did not support total disability. "At no time did Ms. Fuller claim that she was disabled on her last day." Mr. Davies' position is that there was nothing confusing about the date GWBC's actions ended Ms. Fuller's access to disability benefits. It was when they put her on administrative leave.

A Straight Line

- bb. This case involves three Steps:
 - 1. she filed a complaint
 - 2. the Respondent put her on leave, and
 - 3. as a result of GWBC actions, she lost access to the benefits and the support she needed to return to work.
 As a result, she suffered physical, emotional and financial damages.
- cc. Further, the Appellant says *The Act* establishes the threshold and the two questions which must be answered for Ms. Fuller's claim to succeed:
 - a. Has a discriminatory action been taken against her; and
 - b. Has the Respondent provided 'good and sufficient other reason' for the discriminatory action?
- dd. When Ms. Fuller was put on administrative leave, it took away the very source of income and support she would need. Mr. Davies argues that "the legislation makes no distinction as to whether the Respondent's actions were intentional or not, and the Courts have made it clear that the law is intended to protect against unintended adverse effects."
- ee. In regards to the threshold, the onus now shifts to the Respondent to establish that they had 'good and sufficient reason' for depriving Ms. Fuller of her source of income and support. The test is the employer has to clear is not that it had good and sufficient other reason for placing Ms. Fuller on leave, but that it had good and sufficient other reason for the effect the action had on her. Mr. Davies quotes McIntyre J. for the Supreme Court in the *Simpson – Sears* case O'Malley (supra): "It is the result or the effect of the action complained of which is significant."
- ff. Mr. Davies states that "the Respondent has indirectly acknowledged responsibility for the damages suffered by Ms. Fuller." Ms. Eberle gave evidence during the hearing that subsequent to Ms. Fuller's experiences, GWBC has now taken steps to ensure that other employees do not suffer the same outcome when they go on leave. ...in *Cominco Ltd. vs. Phillips Cables Ltd.*, [1987] 3 W.W.R. 562, 54 Sask. R. 134 in which the Court of Appeal ruled that "a decision-maker is free to consider post-incident conduct when assessing liability." By changing the way they put employees on leave, the Respondent has implicitly admitted that they did it wrong in Ms. Fuller's case.

Conclusion

- gg. In concluding, Mr. Davies states, the Respondent has failed to meet the two step test established in *the Act*. It has provided no justification for Ms. Fuller's damages other than its

claim that they were unintended, a reason which fails to meet the test of 'good and sufficient reason'.

- hh. Harassment and discriminatory action are not the same thing. The OH&S officers did work on the new claim because they felt it was a new process, not a duplication.
- ii. It is the result of the action complained of that is significant. Discriminatory action is seldom planned, but occurs unintentionally. The Employer argues that accidental action gets a free pass. Accidental discrimination does not get a free pass. Ms. Fuller was the only one sent home in December. What are the reasons for her only? It must be because she filed a harassment complaint. On July 11, she discovered that she had been cut off and thus suffered loss
- jj. About the notes that Ms. Fuller made and brought to the meeting, they were supposed to be confidential, but were circulated to three other people. There was a letter that was sent to Mr. Genest which was not entered in evidence. Ms. Fuller's trust was broken several times.
- kk. It was 30, 60, 90 days that went by and there is no contact from GWBC. At 120 days, then a letter was given to Ms. Fuller in response to her request to return to work. "Read this first before you decide to come back to work." GWBC is trying to say that during this time she was well. When she turned to The Cooperators she was denied coverage because of a mistake by the Employer. She did not know until July 18th, 2019 that she was not covered.
- ll. The Appellant is arguing that putting Ms. Fuller on admin. Leave on December 14th, 2018 was a discriminatory action under the definition of *the Act*. Therefore, according to the Test for Discriminatory Action Ms. Fuller does fit in Steps 1 and 2 as previously presented. She falls within section 3-35(b). The issue was Test should take place in Step 3, Yes it was discriminatory and then on the test was there good and sufficient reason for the action.
- mm. As of December 14, she had not suffered any actions. The Employer argued that there were good and sufficient reasons, but at that point she was treated differently from the other employees. Is there a good and sufficient reason that she was treated differently? There was a discriminatory action on December 14. What there is not, there is no good and sufficient reason to submit her to continue loss of pay. The Employer says that this case should be tossed out, and there should be no remedy.

17. Relief Requested

- ll. Mr. Davies states that Ms. Fuller is entitled to be made whole which is to be put in the same position she would have been in had the discriminatory action not taken place. That means:
 - 1. entitled to be returned to her job,
 - 2. to be compensated for any financial losses she has suffered as a result of being put on leave by GWBC. The Appellant is asking for back wages with the mitigation of what she received as paid administration leave. The back wages would commence on the last date she was on paid leave.

18. List of Authorities Cited by the Appellant

Legislation

The Saskatchewan Employment Act, SS 2013, c S-15.1 (SEA)

Case Law

Chinichian v Mamawetan Churchill River (Health Region) 2016 SKCA 89

Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63

Danyluk v Ainsworth Technologies Inc. [2001] 2 S.C.R. 460

Ont. Human Rights Comm. V. Simpsons-Sears [1985] 2 S.C.R. 536

Quebec (Attorney-General) v. A, 2013 SCC 5

Murray v. City of Saskatoon (1952), 2 D.L. R. 499 (Sask. Q.B.)

Cominco Ltd. V. Phillips Cables Ltd. [1987] 3 W.W.R. 562

b. Argument on behalf of the Respondent

19. Introduction

- a. The Respondent's appeal arises from the November 27th, 2019 decision of Occupational Health & Safety (OH&S) to deny Ms. Fuller's complaint of discriminatory action. The complaint of discriminatory action against GWBC alleged that GWBC placed Ms. Fuller on an administrative leave pending the investigation of a harassment complaint and that this prevented her from qualifying for benefits from a third-party insurer.
- b. Mr. Matkowski stated that the harassment complaint was investigated by a third-party investigator and the complaints were unsubstantiated. Ms. Fuller sought a review of the investigation by OH&S which upheld the investigation and found no further action was warranted by OH&S. Ms. Fuller exhausted and abandoned her appeals of that decision.
- c. The Respondent's position is that Ms. Fuller's discriminatory action complaint amounts to an abuse of process. The discriminatory action complaint is intertwined with the harassment appeal and this appeal constitutes a collateral attack and is an abuse of process. Ms. Fuller brought the paid administrative leave to OH&S and they determined that no further action by OH&S was warranted.
- d. Mr. Matkowski stated that on December 14, 2018, GWBC placed Ms. Fuller on administrative leave after she made a harassment complaint. Ms. Fuller expressed appreciation for the paid administrative leave.
- e. Regarding the application for benefits to the third-party insurer, at para. 7 the Respondent argues that the application was denied for multiple reasons, one being she did not meet the definition of disability. Also, GWBC had no control over whether a third-party insurer will provide benefits to an applicant.
- f. In regards to the discriminatory action provisions, Mr. Matkowski argues that they are about a guilty intention to harm someone in retaliation for filing a harassment complaint. GWBC's conduct was reasonable and in no way retaliatory. The denial of her claim from the third-party insurer was entirely independent and innocent from any actions of GWBC.

20. Issues

- a. The Respondent submits that the appeal raises the following issues:
 - a) Is the discriminatory action complaint an abuse of process?
 - b) What is the scope of the appeal?
 - c) What is the discriminatory action test?
 - d) Was an occupational health and safety issue raised?
 - e) Was discriminatory action taken?
 - f) If discriminatory action was taken, was there good and sufficient cause?
 - g) In the alternative what is the remedy?

21. Discussion

Is the Discriminatory Action Complaint an Abuse of Process?

- a. The Respondent's position is that Ms. Fuller is relitigating the review of her harassment complaint by OH&S. A final decision was made by OH&S and all appeals have been exhausted and abandoned (LRB File No 188-19). Ms. Fuller seeks to revisit many of the areas she raised with OH&S in the harassment review in the Discriminatory Action complaint: (Those portions of the OH&S Complaint filed by Ms. Fuller shown in bold in the Respondent's Brief have been included.)

- **"B. Concerns regarding the Process Surrounding the Initiation of My Formal Complaint**

...

- e) **Lack of Support during time off Work on Paid Administrative Leave** –I was caught off guard with the notice of a paid administrative leave that was to begin immediately and end once the formal investigation into my complaint had been completed.

- 2) **Would I receive benefits while on this leave. I directed this question to Mr. Halbgewachs and was assured by him that all benefits, pension accrual, vacation accrual, etc. would remain in place.**

- 3) I asked if on my next performance appraisal this leave or my complaint would be added.

- 4) I asked who my lab staff would report to and who would carry out the work I normally did while I was away and I was told to inform my staff that all concerns normally direct to me be directly to Mr Allen Genest. ..."

"D. Concerns Regarding Receipt of the Decision Regarding my Complaint and the Lack of Support I have Received Regarding My Options Going Forward.

...

- b) **lack of Clear Communication Pathways following My Receipt of the Investigators Reports.** The Company had communicated only once with me since my administrative leave until April 4th phone call by that time I had been on leave for a total of 111 days. ... **No attempt was made by Ms. Eberle to understand my situation since she had advised me that I would immediately be placed on administrative leave on December 14, 2018. No**

options about how I should move forward were given to me. I did consult a lawyer who determined that the best line of communication would be between him and the lawyer for GWBC, who had been fully informed about my case. My Lawyer advised me that I should consider elevating my complaint to the Harassment and Discriminatory Prevention Unit, Occupational Health & Safety Division of the Ministry of Labour Relations and Workplace Safety. Hence this submission of these, my concerns. ...”

- b. Mr. Matkowski stated that Ms. Fuller’s testimony in the hearing largely repeated almost all of the same areas and issues she raised in the May 6, 2019 letter to OH& S which was reviewed by OHOs.
- c. Mr. Matkowski noted that on July 11, 2019 the OHOs completed their review on the harassment investigation and determined that the investigations were compliant with the legislation. They found:

“It is determined that the investigation was fair, thorough, and unbiased and after review of the investigation report these officers do not believe the investigation was flawed **nor would any further action from OHS regarding this investigation be required.**”
[emphasis added]
- d. Mr. Matkowski also argued that the issues surrounding Ms. Fuller’s paid administrative leave, and many of the other aspects of Ms. Fuller’s testimony were part of OH&S’ review and clearly put to OH&S in the May 6, 2019 request for review. Ms. Fuller appealed the July 11, 2019 finding on August 2, 2019 but subsequently withdrew her appeal without explanation on February, 2020.
- e. Mr. Matkowski challenged Ms. Fuller’s testimony on the reasons for withdrawing her appeal as not being consistent or credible. Ms. Fuller had testified that she had received a call from The Cooperators and that call brought her to pursue the Discriminatory Action Complaint and withdraw the harassment appeal. Mr. Matkowski argues that Ms. Fuller did not even file her appeal until August 2, 2019 and did not withdraw it until February 10, 2020. Ms. Fuller testified that on July 18, 2019 she decided to pursue only the discriminatory action complaint when her actions show she also pursued the harassment appeal until February 10, 2020. What Ms. Fuller really wanted to do was pursue the same issue in two forums, which is exactly what she did.
- f. Mr. Matkowski points out that only 14 days after OH&S concluded its review of the harassment complaint, Ms. Fuller filed a discriminatory action complaint on July 26, 2019. The discriminatory action complaint alleges that the discriminatory action took place on December 14, 2018 when Ms. Fuller was placed on administrative leave pending the outcome of the harassment complaint.
- g. Mr. Matkowski argues that Ms. Fuller has already put to OH&S a variety of issues with the harassment investigation including the ones surrounding her paid administrative leave. It appears that Ms. Fuller filed the discriminatory action complaint in response to receiving a decision from OH&S that was not in her favour, seeking a ‘redo’. She brought all the same issues from the harassment review to this hearing.
- h. Mr. Matkowski quoted the Supreme Court of Canada in *British Columbia (Workers’ Compensation Board) vs. Figliola*, 2011 SCC 52 at paras. 34-35:

At their heart, the foregoing doctrines exist to prevent unfairness by presenting “abuse of the decision-making process” (*Danyluk*, at para. 20 see also *Garland*, at para. 72 and

Toronto (City), at para 37). Their common underlying principles can be summarized as follows;

- "It is in the interests of the public and the parties that the finality of a decision can be relied on." (*Danyluk*, at para. 18; *Boucher*, at para. 35)
- "... relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings." (*Toronto (City)*, at para. 38 and 51)
- "The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanism that are intended by the legislature." (*Boucher*, at para. 35; *Danyluk* at para. 74)
- "Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision." (*Telezone*, at para. 61, *Boucher* at para. 35, *Garland* at para. 72.).
- "Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources." (*Toronto (City)* at para. 37 and 51.)

These are the principles which underlie s. 27 (1)(f). Singly and together they are a rebuke to the theory that access to justice means serial access to multiple forums or that more adjudication necessarily means more justice.

- i. Mr. Matkowski raised the considerations identified by the Supreme Court of Canada in *Figliola* (supra) which is submitted, apply in this case:
 - It is in the interest of the parties that the finality of the OH&S decision dated July 11, 2019 can be relief upon. LRB File No. 188-19 is concluded and collateral attacks against it are inappropriate.
 - OH&S specifically found in LRB File No. 188-19 that no further action from OH&S was required. A finding of discriminatory action in relation to the same investigation would be inconsistent.
 - The appropriate method of challenging the OH&S Decision dated July 11, 2019 is through the appeal process. Ms. Fuller abandoned her appeal. It is inappropriate to seek to restart the process afresh simply because a decision was not in her favour.
- j. Mr. Matkowski asks that the appeal be dismissed as an abuse of process and for being *res judicata*. The appeal is a clear collateral attack on the final decision of OH&S in LRB File No, 188-19, the core issue being placed on a paid administrative leave upon filing a harassment complaint.

What is the Scope of the Appeal?

- k. Mr. Matkowski argues that the scope of the hearing is only to determine whether or not GWBC took discriminatory action against Ms. Fuller as a result of her filing a harassment complaint by placing her on a paid administrative leave during the investigation.
- l. Mr. Matkowski argues that Ms. Fuller has exhausted her right of appeal of the harassment issue and it would be an inappropriate collateral attach to challenge the harassment investigation finding of OH&S in these proceedings.

What is the Discriminatory Action Test?

m. Mr. Matkowski outlines the Discriminatory Action Test set out in *Banff Constructors Ltd. v Lance Arcand*, 2019 LRB File No. 194-19 by Adjudicator Tegart:

- 1) Did the employee engage in protected activities within the ambit of s. 3-35?
 - 2) Did the employer take discriminatory action against the employee within the meaning of that term as defined in s. 3-1(1)(i)?
 - 3) If the first two questions are answered in the affirmative, was the discriminatory action taken for good and sufficient other reason within the meaning of s. 3-36(4)?
- n. Continuing with the test Adjudicator Tegart outlined that the onus is on the worker for the first two components of the test (engaging in a protected activity and establishing that discriminatory action was taken) and the onus is on the employer for establishing good and sufficient other reason.
- o. In regards to establishing good and sufficient other reason, the Respondent referred to *Simonson* (supra) where Adjudicator Tegart ruled on 'good and sufficient reason' being not what the Adjudicator would have done, but rather whether the employer's actions are within the range of reasonable options in the circumstances.
- p. The Respondent concludes the argument by stating that good and sufficient reason means a non-retaliatory rationale or explanation for the impugned actions.

Was an Occupational Health and Safety Issue was Raised?

- q. Mr. Matkowski argues that even though the complaints filed by Ms. Fuller were unsubstantiated, making the complaints satisfies the first component of the discriminatory action test.

Was Discriminatory Action was Taken?

- r. Mr. Matkowski states that the basis for providing the leave was that the complaints were against individuals with whom Ms. Fuller would have to work closely, and GWBC was aware that Ms. Fuller's brother was critically ill and it wanted to provide her time with her family. These reasons were set out in the letter given to Ms. Fuller on December 14, 2018 explaining the rationale for placing her on paid leave.
- s. Mr. Matkowski introduced a letter written by Ms. Fuller to GWBC on December 14th, 2018 thanking GWBC for the paid leave and thanking the Company for its understanding of the seriousness of the situation regarding her complaints and the critical illness of her brother. (supra)
- t. Mr. Matkowski argues that a finding of discriminatory action pursuant to sec. 3-1(1)(i) of *The Act* requires two conditions be met, that;
- the action does or would have an adverse affect on a worker with respect to any terms and conditions of employment; and
 - the employer took or threatened action.

His argument is that neither of these conditions were met.

1) No Adverse Effect:

- u. The Respondent claims that the action of placing Ms. Fuller on paid administrative leave had no adverse effect on her. It is often best practice to separate complainant and respondent by putting one of them on leave to provide protection, safeguards their wellness and avoids the risk of further allegations or incident occurring.
- v. Mr. Matkowski submits Ms. Fuller had paid leave so she had no income loss from December 14, 2018 to May 27, 2019, approximately 5.5 months. GWBC submits that the paid leave benefited Ms. Fuller. Further she implicitly suggested through her lawyer that it should continue on April 12, 2019.

"12 April 2019

Great Western Brewing Company Ltd.

ATTN. Lynn Eberle, Director of People, Culture and Administration

Dear Madam:

.... Given that you directed our client to absent herself from the workplace while the initial investigation was ongoing, we presume that you will want Ms. Fuller to remain on paid administrative leave while this process moves forward. ...

Yours truly,

BAINBRIDGE JODOUIN CHEECHAM

Marcus R. Davies

Solicitors for Anita Fuller"

- w. Mr. Matkowski contends that the intention of the Legislature in enacting the discriminatory action provision was to ensure that nobody was punished for trying to enforce their rights. GWBC submits that there is no way that the paid leave provided to Ms. Fuller could be viewed as a punishment. Rather it was provided with the best of intentions.
- x. In regards to the paid leave adversely impacting Ms. Fuller's ability to qualify for insurance benefits from a third-party insurer, the Respondent clarifies that Ms. Fuller's benefits were denied for multiple reasons:
 - The paid leave had no impact on whether or not she would be provided disability benefits by The Cooperators because she did not qualify, not having a disability.
 - Ms. Fuller was not an active employee in accordance with its policy and GWBC did not request a 90-day extension. The Respondent says this point is moot as she did not qualify in any event. GWBC did consider her an active employee and was paying the premiums.
 - GWBC was not required to seek the 90-day extension. It was a discretionary decision.

Even if GWBC had applied for the 90-day extension this would have extended the coverage from December 14, 2018 until March 14, 2019. There is no further extension under the policy. The first time GWBC became aware of the medical issue was April 28, 2019 well after any possible extension period. The benefit would have been exhausted at the time that Ms. Fuller applied for benefits.

2) No Action by Employer

y. Mr. Matkowski is arguing that GWBC has no control over what claims The Cooperators allow or deny or why. Discriminatory Action requires the employer to take some kind of action. It cannot be taken by a third-party such as The Cooperators.

z. Mr. Matkowski cited *Potash Corp. of Saskatchewan v Oppenlander*, 2009 SKQB 112 where the Court was dealing with the predecessor of the current *Act*. Justice Currie outlined that only an employee's employer could be liable for discriminatory action at para. 39:

"No reason presents itself for concluding that the Legislature intended s. 27 to apply as between an employer and a worker who was not in the service of that employer."

aa. Ms. Fuller is complaining of an action taken by The Cooperators which is not her employer. GWBC has no control over what The Cooperators do.

bb. Was the action taken by GWBC Discriminatory Action in regards to intent:

- The *SEA* is about whistleblower legislation and this is about raising the harassment complaint.
- Was the action retaliatory or not? This is a distinct concept from discrimination within the meaning of *The Human Rights Act*. The Appellant has not brought the difference to the Respondent's attention. He has an ethical duty to bring this to the Adjudicator's attention.
- The *Simpson-Sears* (supra) case but does not clarify this is a different framework. It is unfair to suggest this is the law. In the Human Rights legislative framework, the remedial purpose is to promote equality. The legislation tries to prevent discrimination. Discrimination is a breach.
- OH&S framework is to prevent retaliation. If an action was accidentally taken, there is no breach in the legislation. If it was an accident it could not have been retaliatory.
- To constitute prohibited discriminatory action, however, the action by the employer must be for one of the reasons set out in sec. 27 of *The Act*. The court went on not to accept the argument. The action of the Employer could not have taken the discriminatory action unknowingly or innocently. This is clear. It shuts down the Appellant's argument on this point.

If Discriminatory Action Taken, was there Good and Sufficient cause?

cc. Mr. Matkowski submits that we don't even get to the good and sufficient other reasons. That has to be looked at in context. On December 14, what did the Employer want to do? The Employer could not determine what the Employee was going to do, never mind how it would react to negatively impact the Employee. The Employer paid the admin leave on December 14 with the best of intentions. Employer had no idea that the Employee is not considered an active worker. They were still paying premiums. Even if we get to this, the Employer has other non- retaliatory reasons for its actions.

dd. Mr. Matkowski contends that GWBC did not 'retaliate against Ms. Fuller. Rather, placing Ms. Fuller on paid leave was done on a gratuitous and compassionate basis. GWBC could not have anticipated that Ms. Fuller would seek to apply for disability benefits when it provided the

paid administrative leave. GWBC was under the impression that Ms. Fuller was an active employee under the policy and was taking steps to ensure premiums were paid.

- ee. Mr. Matkowski submits that the caselaw supports that an employer cannot accidentally or innocently take discriminatory action. What is required is actual intent to retaliate against an employee. The Respondent cited *Lewis v Regina School Division No. 4*, 2003 SKQB 344 at paras 41-43:

"To be a prohibited discriminatory action as set out in s. 27, not only must the action have adversely affected the worker but also have been taken because the worker has done one or more of the listed acts. If it is established that the employer engaged in discriminatory action against a worker, it must also have been established that the reason therefore was because the worker sought to enforce the Act or the Regulations or refused to work. Under such circumstances the employer could not have taken the discriminatory action unknowingly or innocently. "

GWBC had no indication or reason to think that there would be a future medical leave or that her eligibility for insurance may be impacted. This constitutes good and sufficient other reason.

In the alternative, what is the Remedy?

- ff. The Respondent's position is that there is no basis to provide any remedy to Ms. Fuller. Even besides any of the alleged discriminatory actions Ms. Fuller would not have qualified for disability benefits under the plan according to the insurer. There is a key difference between being *eligible* to apply for coverage and *qualifying* for coverage.
- gg. Mr. Matkowski commented that Mr. Davies stated the employer is free to amend the policy. This view is incorrect. The wording in the policy is Boiler Plate. It does not give the employer an all encompassing power. The Booklet given to employees is to provide a shortened version of the policy. You have to look at the insurer having the right to amend in the policy itself.
- hh. Further, pursuant to sec. 3-36(2) and sec. 4-6 of *The Act* the Adjudicator has no authority to award lost benefits from a third party. Those are clearly not 'back wages'.

22. Conclusion

The Respondent is asking that the appeal must be dismissed.

23. List of Authorities Cited by Respondent

Legislation

The Saskatchewan Employment Act, SS 2013, c S-15.1

Jurisprudence

British Columbia (Workers' Compensation Board) v Figliola, 2011 SCC 52
Simonson v Finning Canada and the Cat Rental Store, LRB File 006-20
Banff Constructors Ltd. v Lance Arcand, 2019, LRB File No. 184-19
Potash Corp of Saskatchewan v Oppenlander, 2009 SKQB 112
Lewis v Regina School Division No. 4, 2003 SKQB 344

V ANALYSIS

Decision Being Appealed

24. In a letter dated November 27, 2019, Occupational Health Officers (OHOs), Mike Luciak and Susan Boan, delivered their decision re the Complaint of Discriminatory Action filed by Anita Fuller. The decision read as follows:

"Based on the information received from both parties, it is determined that Great Western Brewing Company has provided good and sufficient other reason for the claims of discriminatory action brought forward by Anita Fuller. In the circumstance of paid administrative leave of Anita Fuller, the action was not malicious or punitive or as a result of filing a harassment complaint. The employer in good faith based on the circumstances at the time, placed Anita Fuller on paid leave until such time as her complaint of harassment was investigated and this action was appreciated by Anita Fuller at the time.

Great Western Brewing Company had anticipated Anita Fuller's return to work following the completion of the harassment investigation. **The termination of Anita Fuller's benefits was not administered by GWBC and the decision to cut off or deny benefits is solely the decision of the insurance company.** Based on information received by the Cooperators, Anita Fuller's medical claims did not support disability. Great Western Brewing Company could not have anticipated that Anita Fuller would not be returning to work following the investigation and could not have had the foresight to fill out the forms required. In speaking with the Cooperators regarding this policy, **it was determined that an employer may apply for an extension of benefits and this is not a requirement by the employer and is at their discretion.**

As a result, this complaint is not deemed an *unlawful* discriminatory action contrary to section 3-35 of *The Saskatchewan Employment Act*."

Facts and Evidence

25. An Agreed Statement of Facts was filed by the Parties and are set out in paragraphs 5 through 26 of this Decision. I will not repeat them here.
26. The majority of evidence in this case comes from the testimony of three witnesses. I found all three witnesses to be credible. Each witness related the events relating to the two complaints filed by Ms. Fuller as they recalled them. However, there was a discrepancy in some of the events between Ms. Fuller's recollections and Ms. Eberle's relating of events. Ms. Eberle did have notes of most of the meetings held and was able to refer to them to refresh her memory. The interpretation of some of the interactions varied between the two witnesses in regards to date and time; however I do not believe there was an malevolent intent by either party to provide misleading information.

Issues

27. I have determined that the issues before me to be adjudicated are:
1. Is this appeal an abuse of process / *res judicata*?

2. Was there Discriminatory Action taken by GWBC against Ms. Fuller as defined by Section 3-1(1)(i) of *The Saskatchewan Employment Act*?
3. If Discriminatory Action was taken by GWBC against Ms. Fuller, were there good and sufficient other reasons within the meaning of section 3-36(4) of the Act?
4. Is Ms. Fuller entitled 'to be made whole', i.e. returned to her work, and paid damages and back wages for losses incurred due to the Discriminatory Action?

Issue 1 - Is this appeal an abuse of process / *res judicata*?

Appellant's Submission

27. The Appellant's position is that Harassment and Disciplinary Action are two separate provisions under *The Act*.

1) *Harassment*

The definition of 'harassment' is set out in *The Act* as follows:

Section 3-1(1)(i) defines 'harassment' as follows:

(i) "harassment" means any inappropriate conduct, comment, display, action or gesture by a person

(i) that either:

(A) is based on race, creed, religion, colour, sex, sexual orientation marital status, family status disability, physical size or weight, age, nationality, ancestry or place of origin; or

(B) subject to ss (4) and (5), adversely affect the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated; and

(ii) that constitutes a threat to the health or safety of the worker.

2) *Disciplinary Action*

The definition of 'disciplinary action' is set out in *The Act* as follows:

Section 3-1(1)(i) defines 'discriminatory action' as

(i) any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment...

3) *The difference between 'harassment' and 'disciplinary action'*

The Appellant's position states that *The Act* "...defines and separates harassment from disciplinary action for good reason; they are not the same thing." The Appellant argued that "the Employer is mixing a Statutory Right - the right not to be harassed at work - with a Statutory Protection which is the protection offered to worker who has engaged a Statutory Right."

4) *Res Judicata*

Marcus Davies cited *Danyluk vs. Ainsworth Technologies Inc.* (supra) which sets out three elements which must be met in order to invoke the doctrine of *res judicata*:

"For issue estoppel to be successfully invoked, three preconditions must be met: 1) the issue must be the same as the one decided in the prior decision; 2) the prior judicial decision must have been final; and 3) the parties to both proceedings must be the same or their privies."

28. Mr. Davies contends that the issue of harassment was never answered prior to Ms. Fuller's submission of a complaint of discriminatory action to OH&S in July, 2019. Also there was no final binding decision on the issue of harassment as Ms. Fuller's appeal was still open so this could not be a relitigation of the matter.

In regards to the disciplinary action complaint, Mr. Davies contends that the OH&S Officers allowed Ms. Fuller to file the complaint because they did not consider the harassment complaint and the discriminatory action complaint to be the same thing.

Respondent's Submission

29. The Respondent's position is that Ms. Fuller in filing this Appeal is relitigating the review of her harassment complaint. A final decision was made by OH&S and all appeals have been exhausted and abandoned in LRB File No 188-19. Ms. Fuller is seeking to revisit many of the areas she raised with OH&S in the Harassment Review in this Disciplinary Action Complaint.
30. Mr. Matkowski stated that Ms. Fuller's testimony in the hearing largely repeated almost all of the same areas and issues she raised in the May 6, 2019 letter to OH&S.
31. When the OHOs completed their review of the harassment complaint on July 10th, they determined that the investigation was fair, thorough, and unbiased and they did not believe the investigation was flawed "...nor would any further action from OHS regarding this investigation be required."
32. Mr. Davies notes that Ms. Fuller appealed the OHOs decision on August 2nd, 2019 but subsequently withdrew her appeal without explanation in February, 2020. Ms. Fuller filed the Disciplinary action complaint on July 26th, 2019, but she did not withdraw her appeal on the harassment complaint until the following February.
33. Mr. Matkowski alleges that what Ms. Fuller really wanted to do was to pursue the same issue in two forums, which is exactly what she did. "It appears that Ms. Fuller filed the discriminatory action complaint in response to receiving a decision from OH&S that was not in her favour seeking a 'redo'. She brought all the same issues from the harassment review to this hearing."
34. Mr. Matkowski quotes a number of cases which relate to the principles underlying *res judicata* and the reasons behind those principles relating to relitigation. Mr. Matkowski applied the principles in *Figiola* (supra) stating that "the appeal is a clear collateral attack on the final decision of OH&S in LRB File No. 188-19, the core issue being placed on a paid administrative leave upon filing a harassment complaint."

Analysis

35. What is to be decided is whether this is a case of *Res Judicata*. If *Res Judicata* is proven then there is an abuse of process. If the elements of *Res Judicata* there is no abuse of process as argued by the Respondent.

36. I refer to the case *Danyluk vs. Ainsworth Technologies Inc.* (supra) which sets out **three elements which must be met in order to invoke the doctrine of res judicata:**

1) the issue must be the same as the one decided in the prior decision;

2) the prior judicial decision must have been final;

3) the parties to both proceedings must be the same or their privies.

37. The Respondent did not meet the first element of the doctrine of *Res Judicata* set out in the *Danyluk* case, that the issues dealt with must be the same. The first complaint ruled on by the OHOs was a harassment complaint and the second one they adjudicated dealt with the complaint of discriminatory action. **As all three elements must be met for Res Judicata to apply the case of Res Judicata fails.**

Finding

38. I find that in consideration of the arguments above, the Respondent's arguments of 1) Abuse of Process and 2) Res Judicata are not proven.

Issue 2 - Was there Discriminatory Action taken by GWBC against Ms. Fuller as defined by Section 3-1(1)(i) of *The Saskatchewan Employment Act*?

Appellant's Submission

39. Mr. Davies contends that GWBC did take discriminatory action against Ms. Fuller. Mr. Davies stated 'that there is only one issue before this adjudication. Did GWBC's decision to isolate Ms. Fuller from her workplace, which resulted in her losing access to her benefits and short-term disability, constitute a discriminatory action?

40. With the filing of the harassment complaint with the Employer and then with OH&S, Ms. Fuller was engaging in a protected activity.

41. Mr. Davies contends that when Ms. Fuller was put on administrative leave, it took away her source of income, her benefits and the support she would need. It also isolated her from her colleagues. She was the subject of disciplinary action when those who had been accused of harassment were not subject to the same action.

42. Mr. Davies quoted *Ont. Human Rights Comm. V Simpson-Sears (O'Malley)* (supra):

"It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties or restrictive conditions not imposed on other members of the community, it is discriminatory."

43. Therefore, the Appellant's position is that the action fell within the definition of disciplinary action in Section 3-(1)(1)(i) of *The Act*.

Respondent's Submission

44. Mr Matkowski sought to apply the Discriminatory Action test as set out in *Constructors Ltd. v Lance Arcand*, (supra) laid out by Adjudicator Tegart where the onus is on the employee to establish:
- 1) that the employee engaged in protected activities under Section 3-35, and
 - 2) that the employer took discriminatory action against the Employee within the meaning of the definition set out in section 3-1(1)(i).
45. Mr. Matkowski argues that the Appellant has not satisfied the two conditions in the definition set out in *the Act*:
- 1) the action does or would have an adverse effect on a worker with respect to any terms and conditions of employment, and
 - 2) the employer took or threatened action.

No Adverse Effect

Mr. Matkowski claims that when Ms. Fuller was put on administrative leave it had no adverse effect on her. She had no income loss for 5.5 months.

In regards to the loss of benefits from the third-party insurer, the Employer had no control over what claims The Cooperators allow or deny. Although the Appellant argued that the Employer was free to amend the policy and could have contacted the insurer to have the error corrected and the claim accepted. That is not the case. The provisions in the Policy are 'boiler plate' provisions. The Employer had no ability to affect whether the claim by Ms. Fuller was by the accepted or not.

In regards to the 90 day extension under the policy that provision was discretionary on the part of the Employer, and was not applied for. However, it would not have been approved as the time limitations had expired.

No. Action by Employer

Ms. Fuller's issue regarding the loss of benefits through The Cooperators does not apply. The definition of discriminatory action under *The Act* does not apply to a worker who is not in service of that employer. GWBC had no control over what The Cooperators do.

Analysis

46. The definition of 'discriminatory action' in Section 3-1(1)(i) of *The Act* sets out two conditions for discriminatory action to be met:
- 1) *any action or threat of action by an employer that*
 - 2) *does or would adversely affect a worker with respect of any terms or condition of employment*
47. The onus is on the Employee to prove establish that the Employer did engage in a discriminatory action based on these two conditions. In this case the Employee's position was:
- 1) The action taken by GWBC was to put Ms. Fuller on paid administrative leave and remove her from the workplace
 - 2) One of the terms and conditions of Ms. Fuller's employment was to have access to the disability plan. That access to The Cooperators' benefit plan was terminated when Ms. Fuller was placed on leave on December 14th, 2018. According to the terms of The Cooperators' policy she was no longer an 'active worker', and she no longer had coverage

for the cost of prescriptions and medical services that would have been paid had she still been an active worker.

Finding

48. My Finding is that GWBC did commit a discriminatory action within the definition of Section 3-1(1)(i) of *The Act*. The action by GWBC to place Ms. Fuller on administrative leave. That action adversely affected Ms. Fuller's terms and conditions of her employment by changing her status under The Cooperators' policy to make her ineligible for benefits.

Issue 3 - If Discriminatory Action was taken by GWBC against Ms. Fuller, was there good and sufficient other reason within the meaning of section 3-36(4) of the Act?

Appellant's Submission

49. Mr Davies argued that once the employee has established that the employer committed a discriminatory action, the onus shift to the employer to establish that there was good and sufficient other reason within the meaning of section 3-36(4) of *the Act*. In this case, Mr. Davies argued that Ms. Fuller had proven that GWBC had committed a discriminatory action. Therefore, the onus shifted to GWBC to establish there was good and sufficient other reasons for its action.
50. Mr. Davies argued that the legislation makes no distinction as to whether the Respondent's actions were intentional or not, and the Courts have made it clear that the law is intended to protect against unintended adverse effects. Justice McIntyre's decision in *Simpson-Sears (O'Malley)* states that "It is the result or the effect of the action complained of which is significant." The loss of benefits which Ms. Fuller experienced was the result of the action taken by GWBC, even if they were unintended.
51. In the evidence presented at the Hearing, Mr. Davies states that GWBC has indirectly acknowledged responsibility for the damages suffered by Ms. Fuller due to the loss of benefits. Ms. Eberle testified that subsequent to the experiences by Ms. Fuller, GWBC has changed its process to ensure that other employees do not suffer the same outcome when they go on leave.

Respondent's Submission

52. Mr. Matkowski submits that there was no discriminatory action taken, but in the alternative, if there is a finding that a discriminatory action occurred, there was good and sufficient other reason for that action set out in Section 3-36(4).
53. Mr. Matkowski contends that GWBC did not retaliate against Ms. Fuller, but instead, putting Ms. Fuller on paid administrative leave was done on a gratuitous and compassionate basis. It is contended that removing the complainant from the workplace in the case of investigations is a common business practice. It was made to remove Ms. Fuller from an uncomfortable work environment while the investigation was being conducted. Also Ms. Fuller's brother was critically ill and the leave was also on a compassionate basis.
54. When Ms. Fuller was put on paid leave, Mr. Matkowski argues GWBC could not have anticipated that Ms. Fuller would seek to apply for disability benefits when it provided the paid administrative

leave. GWBC had no indication or reason to think that there would be a future medical leave or that her eligibility for insurance may be impacted.

Analysis

55. The issue here is that now that I have determined GWBC committed a discriminatory action as defined in Section 3-1(1)(i) of *the Act*, the onus shifted to GWBC to prove that they had *good and sufficient other reason* within the meaning of section 3-36(4)(b) of *the Act* for that action. Section 3-36(4) reads:

3-36(4) If discriminatory action has been taken against a worker who has acted or participated in an activity described in section 3-35:

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

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

56. There are two parts to the above section that must be met:

- 1) Was Ms. Fuller 'a worker who has acted or participated in an activity described in section 3-35'?

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

- 2) Did GWBC have good and sufficient other reason for the discriminatory action that it took?

57. Ms. Fuller was seeking the enforcement of the discriminatory action of this Part of *The Act* when she filed the discriminatory action complaint against GWBC with OH&S. Therefore I find she was protected under section 3-35 of *The Act*.

58. Once the Employee is found to be engaged in a protected activity, under section 3-35(1) (b) the onus moves to GWBC in regards to whether GWBC had 'good and sufficient other reason' for the discriminatory action it took. Mr. Matkowski made the following points:

1) *The GWBC was not acting in a retaliatory manner.* The paid administration leave was given on a gratuitous basis in consideration of Ms. Fuller's welfare to remove her from an uncomfortable workplace situation.

2) *GWBC also gave the paid administrative leave to Ms. Fuller on a compassionate basis* because her brother was critically ill.

59. The provisions in section 35 prohibiting discriminatory action were enacted to prevent the Employer from taking *punitive action* against a worker who was seeking protection for action taken in compliance with Part III of *the Act*. The question here is whether the action taken by GWBC in removing Ms. Fuller from the workplace was punitive.

60. In reviewing the testimony given by Ms. Eberle in regards to the reasons I find that she was a credible witness. I believe her recounting of events that GWBC was not acting in a retaliatory manner. This incident was the first one of its nature that she and GWBC had experienced. I find that the motive for the removal of Ms. Fuller from an uncomfortable workplace while the Harassment Investigation was proceeding were genuine. The intent to safeguard Ms. Fuller's emotional and physical health I find was genuine.

61. The procedure of removing the employee from the workplace in a like situation is a business practice used by corporations in similar situations. There is precedent for this action being taken. As well, GWBC had a duty to Ms. Fuller established in *The Act*:

Sec. 3-8 Every employer shall:

(d) ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment with respect to any matter or circumstance arising out of the worker's employment;

By removing Ms. Fuller from the workplace Ms. Fuller would no longer be exposed to the harassment she alleged was occurring in the workplace.

62. The second reason for the paid administrative leave given by Ms. Eberle was that Ms. Fuller's brother was critically ill so the leave was granted on a compassionate basis. I believe that the CEO and Ms. Eberle were acting on a compassionate basis as Ms. Fuller's brother was terminally ill and the leave allowed Ms. Fuller to be with her family.

63. Regarding Ms. Fuller's Thank You note given to Ms. Eberle on the day that the administrative leave commenced, I do not believe Ms. Fuller's position that the Thank You note was meant only as a Thank You for Ms. Eberle taking the complaint seriously. I believe from the testimony that Ms. Fuller also thought at the time that the action of putting her on paid leave was for her wellbeing.

Findings

64. I find that GWBC has met the onus placed upon it by Section 36-4(b) and proven that the Company had 'good and sufficient other reason' for the action they took in putting Ms. Fuller on paid administrative leave. I agree with the Occupational Health & Safety Officer in his letter of November 27, 2019 Page 2 (supra) that "The employer acted in good faith and based on the circumstances at the time, placed Anita Fuller on paid leave until such time as her complaint of harassment was investigated and this action was appreciated by Anita Fuller at the time. "

Issue 4 Is Ms. Fuller entitled 'to be made whole', i.e. returned to her work, and paid damages for losses incurred due to the Discriminatory Action?

Appellant's Submission

65. Mr. Davies is asking that Ms. Fuller is entitled to be 'made whole' by which he means as to be put in the same position she would have been in had the discriminatory action not taken place which is:

- 1) to be entitled to be returned to her job
- 2) to be compensated for any financial losses she has suffered as a result of being put on administrative leave.

66. Included in the financial losses, the Appellant's position is that Ms. Fuller was denied coverage for a 90 day extension in benefits that GWBC should have applied for, but did not. The losses also include medical expenses for prescriptions and specialist appointments.

Respondent's Submission

67. In regards to the remedy being sought, the Respondent argues that Ms. Fuller would not have been eligible for the 90 day extension of benefits through The Cooperators for the following reasons:
- There was no evidence led that if Ms. Fuller had been an active worker she would have qualified for benefits from the Cooperators. The Respondent's position is that she would not have met the disability provisions in the Policy in Appendix A.
 - The Cooperators 90 day extension would have started on December 18th, 2018 when Ms. Fuller was no longer an active worker and would have expired before the paid administrative leave was over 5.5 months later.
68. The power to award a remedy of damages resulting from the acts of a third party that the Adjudicator can award are set out in *The Act*. What the Appellant is seeking is not set out in those powers.

Analysis

69. The authority that the Adjudicator has in regards to Decisions is set out in Section 4-6(1) and (2) of *The Act*:

- 4- 6(1) Subject to subsections (2) and (5) the adjudicator shall:
- (a) do one of the following:
- (i) dismiss the appeal;
 - (ii) allow the appeal;
 - (iii) vary the decision being appealed; ...

70. The Appellant's Notice of Appeal contained in the letter dated December 9, 2019 from Marcus Davies to the Director of OH&S seeks the following remedies:
- A proper and complete investigation of Ms. Fuller's complaints of discriminatory action;
 - Reinstatement to her former position on the same terms and conditions under which she was employed in November 2017;
 - The discriminatory action to cease;
 - All wages (deemed to include benefits) the worker would have earned had the worker not been discriminated against; and
 - The removal of any reference to this matter from her employment records.

Investigation of Ms. Fuller's complaints of Discriminatory Action.

71. In regards to the remedies sought above, the powers of the Adjudicator extend only to those that are set out in *The Act*. The Adjudicator has no authority to order a proper and complete investigation of Ms. Fuller's complaints of discriminatory action outside the scope of this hearing.

Return to Work

72. In regards to the Appellant's appeal that Ms. Fuller be returned to her former position I find that the employment contract between GWBC and Ms. Fuller is still intact. There was no evidence led that

the contract was terminated. Therefore, Ms. Fuller should be returned to her former position on the same terms and conditions under which she was employed in November, 2017 provided that Ms. Fuller provides evidence to GWBC that she is medically and physical fit to return to the position.

Claim for Reimbursement of Benefits

73. The provisions of Section 4-6(1) and (2) do not provide the Adjudicator to award reimbursement of benefits.
74. The claim for reimbursement of benefits lost, i.e. expenses that were incurred for prescriptions and medical services, claimed by the Appellant are for losses incurred by a decision made by a third party, The Cooperators. GWBC had no authority over decisions made by The Cooperators regarding the claim Ms. Fuller made to them. They determined whether payment was within the scope of their policy. They determined that Ms. Fuller did not meet the definition of disability and therefore denied her claim for benefits.
75. I agree with the Decision of the OHOs in their letter dated November 27, 2019 on Page 2 where they stated:

"The Termination of Anita Fuller's benefits was not administered by GWBC and the decision to cut off or deny benefits is solely the decision of the insurance company. Based on the information received by the Cooperators, Anita Fuller's medical claims did not support disability."

76. In regards to the application for the 90-day extension of a leave to the Cooperators that was in dispute, I also agree with the OHOs that "it was determined that an employer may apply for an extension of benefits and this is not a requirement by the employer and is at their discretion."

Claim for Wages

77. The Appellant is seeking in the Notice of Appeal *all wages the worker would have earned had the worker not been discriminated against*. As I have found that the discriminatory action was for 'good and sufficient other reason' within the meaning of Section 3-36(4) of *The Act*; therefore, GWBC is not liable for wages that Ms. Fuller would have earned subsequent to the end of the paid administrative leave other than those accumulated by Ms. Fuller through vacation and sick leave accrual.

Findings

78. In regard to the Appellant's position that Ms. Fuller be made 'whole', I find the following:
1. That Ms. Fuller be returned to work under the same terms and conditions as prior to the discriminatory action on December 17, 2018 as her employment contract was never terminated;
 2. That *The Act* does not allow the Adjudicator to award damages due to Ms. Fuller's loss of benefits during the period of the discriminatory action; and
 3. That GWBC is not liable for paying to Ms. Fuller wages that she would have earned during the time between the end of her medical leave when she was able and available to work and now.

V CONCLUSION

79. With respect to the four issues before me as set out in the Analysis, my findings are:

1. The Respondent's claims of 1) Abuse of Process and 2) Res Judicata are not proven.
2. The Respondent, Great Western Brewing Company Ltd., did commit a discriminatory action within the definition of Section 3-1(1)(i) of *The Act*.
3. The Respondent, Great Western Brewing Company Ltd., did have 'good and sufficient other reason' for taking the discriminatory action they took in putting Ms. Fuller on paid administrative leave.
4. In respect to remedies:
 - (a) Ms. Fuller be returned to work provided that she is medically fit to resume her duties;
 - (b) There is no award for damages due to loss of benefits;
 - (c) Great Western Brewing Company Ltd. is not liable for wages that Ms. Fuller would have earned after the paid administrative leave ended.

VI ORDER

80. As to the appeal by Anita Fuller of the Decision rendered by Mike Luziak and Susan Boan, Occupational Health Officers, dated November 27, 2019 **I hereby order that:**

- Anita Fuller be returned to work at Great Western Brewing Company Ltd. on the same terms and conditions of employment that were in place on December 14th, 2018 provided that she is medically fit to return to work;
- The balance of the appeal be dismissed.

DATED at Gull Lake, Saskatchewan, this 11th day of March, A.D. 2021.

ME Weston

Marlene Weston - Adjudicator