LRB File No. 066-21

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

BETWEEN

**JONATHAN ASHENBRENER** Appellant

-AND-

**SASKATCHEWAN HEALTH AUTHORITY** Respondent

Adjudicator – Tiffany M. Paulsen Q.C.
Appellant represented himself
Counsel for the Respondent – Paul Clemens
Hearing conducted virtually March 17, May 13 and June 8, 2022

## DECISION

## INTRODUCTION

1. This is an appeal pursuant to ss. 3-53 and 3-54 of *The Saskatchewan Employment Act* ('the *Act*') from a decision of an occupational health and safety officer dated May 10, 2021, regarding a complaint of discriminatory action brought by Jonathan Ashenbrener against his employer, Saskatchewan Health Authority ('SHA'). SHA terminated Mr. Ashenbrener's employment on February 25, 2021, following Mr. Ashenbrener's failure to attend work on February 25, 2021.

2. The occupational health and safety officer's decision found the termination of Mr. Ashenbrener's employment was not an unlawful discriminatory action contrary to section 3-35 of the *Act*.

3. The Notice of Appeal asks for an order quashing the decision and the employer be directed to pay Mr. Ashenbrener any wages he would have earned had he not been terminated, for SHA to cease the discriminatory action and to reinstate Mr. Ashenbrener and to remove any reprimand, if same exists, or other reference to the matter from Mr. Ashenbrener's employment records.

4. No objections were raised with respect to my appointment or my jurisdiction to hear, and determine, the appeal.

5. With agreement of the parties, on November 30, 2021, I convened a pre-hearing meeting via Microsoft Teams. Mr. Ashenbrener confirmed he would not be represented by legal counsel during this process. The parties advised that mediation was a viable option they wished to pursue.

6. Accordingly, on December 14, 2021, via Microsoft Teams, the parties, Mr. Clemens as legal counsel for SHA and myself, held a without prejudice mediation session. Matters were not resolved at mediation.

7. Hearing dates of March 17 and 18, 2022, were set.

8. During the course of cross-examination of Mr. Ashenbrener on March 17, 2022, Mr. Ashenbrener advised that he was having difficulty following, and hearing, questions put to him by Mr. Clemens. No such difficulties were raised during the pre-hearing meeting, the mediation or discussions that took place during Mr. Ashenbrener's evidence in chief. Mr. Ashenbrener asked for accommodation. Mr. Clemens offered to locate a note taking service, cost shared between the SHA and the union, to assist Mr. Ashenbrener. This suggestion was graciously received by all parties involved on the call.

9. Accordingly, the hearing date of March 18, 2022 was cancelled, and note takers were arranged to assist Mr. Ashenbrener for the next scheduled arbitration date of May 13, 2022.

10. Mr. Ashenbrener entered his evidence over the course of the first two days of the hearing, March 17 and May 13, 2022. He concluded his evidence on the second day. Counsel for the SHA then advised that his client wished to bring a non-suit motion.

11. The non-suit motion was heard on June 8, 2022. Both parties provided me with written materials, in advance, as well as provided oral submissions. The submissions were well-done and I appreciated the efforts by everyone. At the conclusion of the hearing of the motion, the parties agreed I would render a decision with respect to the non-suit motion in the coming weeks. In the event the non-suit motion was not successful, SHA would enter its evidence at a future hearing date.

12. Accordingly, this decision addresses the issue of the non-suit motion.

## EVIDENCE

13. Mr. Ashenbrener was the only person who testified on his behalf. Below is a summary of his evidence.

14. Mr. Ashenbrener was hired by the SHA in October, 2013. He worked exclusively at SHA Wascana location as an Environmental Service Worker. At various times, Mr. Ashenbrener worked as a supervisor.

15. The evidence was not clear when Mr. Ashenbrener last attended at SHA. However, in June, 2020, Mr. Ashenbrener's physician wrote a letter recommending some medical accommodation, related to Mr. Ashenbrener's return to work. It appears safe to assume that Mr. Ashenbrener's last day of work attendance was prior to June, 2020.

16. Mr. Ashenbrener entered a report from the Ministry of Labour Relations and Workplace Safety, dated December 10, 2020, which was a dismissal of a complaint of disciplinary action by Mr. Ashenbrener against the SHA. (Exhibit A-7)

17. On June 23, 2020, Mr. Ashenbrener's physician, Dr. Mohamed, wrote a 'Statement of Medical Restrictions', which referred to Mr. Ashenbrener needing accommodation to be 'able to do better work'. (Exhibit A-2)

18. On June 24, 2020, Dr. Mohamed wrote a 'To whom it may concern' letter, advising Mr. Ashenbrener had a 'medical need' and provided a list of accommodations. (Exhibit A-3)

19. In cross examination, Mr. Ashenbrener testified that the list of accommodation items detailed in his doctor's letter of June 24, 2020, came from an insurance benefit booklet provided to Mr. Ashenbrener by SHA. Further, it was the doctor who chose which items to list on her letter of June 24, 2020, not Mr. Ashenbrener. Mr. Ashenbrener testified there was room for interpretation as to how one could achieve some of the accommodations on the list.

20. In mid to late July, 2020, there was an exchange of emails between Mr. Ashenbrener and the office of Ombudsman Saskatchewan, regarding an OHS issue. The exchange was not fully filed and the outcome is not clear. (Exhibit A-4)

21. On August 17, 2020 (Exhibit A-5), SHA sent Mr. Ashenbrener a letter referring to accommodations that had been implemented in the workplace, for Mr. Ashenbrener, arising out of a meeting between Mr. Ashenbrener, his CUPE representative and the employer on July 27, 2020. The letter also requested further details about specific accommodations. These details were provided by Dr. Mohamed on September 10, 2020. (Exhibit A-5)

22. In cross examination, Mr. Ashenbrener testified that he received a workplace accommodation plan in July, 2020, updated September 25, 2020 (Exhibit R-7) and most of the accommodations requested in Exhibit A-3 were covered by Exhibit R-7.

23. On August 28, 2020 (Exhibit A-6), SHA sent Mr. Ashenbrener a letter requesting further information from his medical provider. The information was provided by Mr. Ashenbrener's physician on September 10, 2020, shown in the body of the letter. In response to the question "is it safe for Mr. Ashenbrener to continue to work in his unit without risk to the safety and care of himself, patients and other staff", Dr. Mohamed wrote "yes he is safe for himself and people around him".

24. Exhibit R-11 shows Mr. Ashenbrener was to return to work on September 15, 2020. SHA took the position that Mr. Ashenbrener had been cleared by his medical professional to return to work. Mr. Ashenbrener continued to ask, 'when he could expect to be accommodated'.

25. On September 25, 2020, SHA sent Mr. Ashenbrener a letter advising that SHA would further accommodate Mr. Ashenbrener by providing him with the nature of meetings held in the workplace with Mr. Ashenbrener, in writing, and Mr. Ashenbrener would be entitled to write down his answers and read them back to the employer. Mr. Ashenbrener would remain in the room to write his answers and meetings would be scheduled for longer to allow extra time for Mr. Ashenbrener to write his answers. (Exhibit R-6)

26. In response to the letter of September 25, 2020, Mr. Ashenbrener sent an email referring to SHA's accommodation plan as a 'refusal to accommodate' and advised he did not believe it was safe for him to attend work. (Exhibit R-12)

27. On October 5, 2020, Mr. Ashenbrener sent an email advising that he was trying to see his doctor as "I have doubts that it's safe for my well being to be at work if the employer is not going to make any effort to accommodate my mental health disability'. He advised that he had an medical appointment on October 19, 2020. (Exhibit R-12)

28. On October 13, 2020, SHA requested that Mr. Ashenbrener have his doctor complete a further report. (Exhibit R-12)

29. Mr. Ashenbrener booked another appointment with his physician on October 23, 2020, so doctor could complete the form requested by SHA.

30. On October 19, 2020, Mr. Ashenbrener sent an email advising SHA he had met with his doctor, who had referred him to a specialist appointment scheduled to take place on December 8, 2020. Mr. Ashenbrener advised that his doctor would not complete any further medical letters until Mr. Ashenbrener met with the specialist. Mr. Ashenbrener further advised that his doctor thought he "should be at work (routine is good), and I should continue to be firm with what I need, and what I can and cannot do'. Mr. Ashenbrener stated he would be at work on October 26, 2020. (Exhibit R-12)

31. On October 23, 2020, SHA sent Mr. Ashenbrener correspondence advising that he should not return to work until he provided a medical note from his doctor that s/he has given clearance to return to work. The deadline for the medical note to be submitted was October 30, 2020. (Exhibit R-12)

32. On October 26, 2020, Mr. Ashenbrener reminded SHA that his doctor took the position that she would not complete any further medical letters or notes until Mr. Ashenbrener saw the specialist. (Exhibit R-12)

33. On October 28, 2020, SHA continued to ask for a 'medical' from Mr. Ashenbrener's health care provider. (Exhibit R-12)

34. On November 12, 2020, SHA asked again for an updated medical note. (Exhibit R-13)

35. On November 24, 2020, SHA extended their deadline for the medical report to be sent to December 9, 2020. (Exhibit R-14)

36. In cross examination, Mr. Ashenbrener confirmed that he met with a psychiatrist on December 9, 2020, however, a medical report was not provided. The reason for the lack of report was not clear in testimony. Mr. Ashenbrener made a vague reference

as to the psychiatrist not wanting to become involved, however, no independent evidence was called by Mr. Ashenbrener.

37. On January 6, 2021, Mr. Ashenbrener's union representative wrote a letter to SHA requesting a meeting to resolve the concerns they had with SHA's accommodation plan for Mr. Ashenbrener. (Exhibit A-8)

38. On January 15, 2021, a letter was sent from SHA to Mr. Ashenbrener's union representative, copied to Mr. Ashenbrener, advising that, largely, all of the accommodations suggested by Mr. Ashenbrener's physician in Exhibit A-3 would be met. There was an additional caveat, with respect to investigation meetings, that Mr. Ashenbrener would be allowed extra time at the meetings to write down his answers, however, he would remain in the room while he wrote his responses. (Exhibit R-15)

39. SHA continued to request medical to support Mr. Ashenbrener's return to work and, upon receipt, the employer, CUPE representatives and Mr. Ashenbrener would meet 'as per the normal accommodation process'.

40. The deadline for this information to be provided was February 1, 2021.

41. On January 22, 2021, Mr. Ashenbrener's physician, Dr. Mohamed advised in writing that Mr. Ashenbrener "can go back to work with limitation sent". (Exhibit A-9)

42. On February 1, 2021, there was a call between SHA, Mr. Ashenbrener and Mr. Ashenbrener's union representatives to discuss his return to work. Mr. Ashenbrener testified that the purpose of the meeting was to discuss accommodation. Both during the call, and in cross examination, Mr. Ashenbrener advised that he agreed to return to the workplace. (Exhibit A-11)

43. Mr. Ashenbrener testified that, it was immediately after this call, when he started to fear for his safety and well being. Until this call, Mr. Ashenbrener testified that he was comfortable returning to work.

44. Mr. Ashenbrener testified that, after the meeting on February 1, 2021, his union was to send a letter to the employer with respect to accommodating Mr. Ashenbrener in the workplace. No representatives from the union gave evidence to confirm same. No letter was sent.

45. On February 8, 2021, SHA sent Mr. Ashenbrener correspondence advising that they expected him to return to work on February 12, 2021. (Exhibit A-13)

46. On February 10, 2021, Mr. Ashenbrener advised the SHA that he did not feel his limitations had been addressed and he would not attend work as he believed that 'attending work without addressing my medical conditions and restrictions poses a significant and unusually dangerous risk to my health'. (Exhibit A-13)

47. On February 17, 2021, SHA advised Mr. Ashenbrener their position was Mr. Ashenbrener had provided medical to clear him to return to work and Mr. Ashenbrener was now considered absent without leave. Mr. Ashenbrener was requested to return to work for his next shift on Saturday, February 20, 2021. (Exhibit A-14)

48. That same day, Mr. Ashenbrener advised he was not attending work on the basis he believed he was refusing dangerous work. (Exhibit A-14)

49. On February 19, 2021, SHA advised Mr. Ashenbrener that he was still considered absent without leave. With respect to Mr. Ashenbrener's position that he was refusing dangerous work, SHA advised that they would consider any new and actual job task that Mr. Ashenbrener suggested was unusually dangerous through the normal OHS channels.

50. SHA requested that Mr. Ashenbrener attend a meeting on February 25, 2021, at 2:00 p.m., at the physical premises of SHA. (Exhibit A-16)

51. On February 22, 2021, Mr. Ashenbrener acknowledged receipt of the letter of February 19, 2021, and further advised that he believed "the employer had not

mitigated the psychological hazards in the workplace, so it is unusually dangerous to my person to attend or "perform the task" of attending". (Exhibit A-17)

52. On February 24, 2021, Mr. Ashenbrener made a request to attend the meeting on February 25, 2021 electronically through Webex, however, SHA required Mr. Ashenbrener to attend in person. (Exhibit A-19)

53. In cross examination, Mr. Ashenbrener acknowledged there were not any investigative meetings scheduled for when Mr. Ashenbrener was scheduled to return to the workplace in February, 2021.

54. Mr. Ashenbrener did not attend the meeting on February 25, 2021.

55. On February 25, 2021, Mr. Ashenbrener was sent a letter from SHA, terminating his employment as a result of his failure to attend the meeting on February 25, 2021. (Exhibit A-20)

56. In cross examination, Mr. Ashenbrener testified that his union had not filed any grievance for improper termination related to Mr. Ashenbrener's termination in February, 2021. The union has filed two grievances after Mr. Ashenbrener's termination related to failure to accommodate Mr. Ashenbrener. (Exhibit R-4/R-5) No further evidence was given with respect to the status of these complaints.

57. In cross examination, the list of accommodation items was specifically reviewed with Mr. Ashenbrener, for his comment:

    (a) <u>More time to attend work requiring attention to detail, considering the problem with focus</u>

        Mr. Ashenbrener testified that SHA told him this was something they would provide.

(b) Permission for short breaks when concentration declines

Mr. Ashenbrener testified that SHA agreed and suggested 5 minutes per hour. Mr. Ashenbrener further testified he did not feel that "5 minutes per hour worked with mental health", however, did not offer any alternative solutions.

(c) Instructions and assignments to be provided in writing, if possible

Mr. Ashenbrener advised that he was very familiar with his job requirements, however, he experienced difficulty determining what was expected of him. No further specifics were provided by Mr. Ashenbrener.

(d) Identification of areas where decisions should be discussed

Mr. Ashenbrener was asked whether this item could be considered abstract and he said it was not, in the context of his employment. However, Mr. Ashenbrener did not provide any details as to the identification of areas where decisions could be discussed.

(e) Develop strategies to deal with stress in the workplace

Neither side offered much on this point, it was difficult to determine whether either party had made efforts in this regard.

(f) When possible, in potential, actual or perceived confrontational discussions or meetings, allow written questions and written answers with enough time to answer successfully.

Mr. Ashenbrener testified he was told by SHA that he could not caucus with his union representative during meetings. Counsel for SHA challenged Mr. Ashenbrener on this point and Mr. Ashenbrener stated that he was told of this rule during the phone call he surreptitiously recorded on February 1, 2021. The recording was entered as Exhibit A-11.

I listened to the recording and did not hear the employer advise Mr. Ashenbrener he was not allowed to caucus with his union during meetings. I heard Mr. Ashenbrener's union representative, Bashir Jalloh, refer, numerous times, to the ability of employees to caucus with their union representatives. The employer representatives on the call did not challenge that position.

In cross-examination, Mr. Ashenbrener was also asked directly whether he had an issue staying in the room while he wrote his answers. While Mr. Ashenbrener stated he thought the union might have had a concern, Mr. Ashenbrener identified no concerns of his own with respect to having to stay in the room with the employer while writing answers to questions provided to him by the employer.

Also, under this point, during cross examination, Mr. Ashenbrener confirmed that he had not provided any medical information to his employer about any difficulties he may face with respect to his ability to hear.

(g) Provide training on managing potentially confrontational situations and the recommended responses and consider how to provide or increase support for the employee in situations that are potentially confrontational.

Questions on these two points melded into one another during cross examination. Mr. Ashenbrener testified there was increased email correspondence between himself and his supervisor, Myria Papalouca, which Mr. Ashenbrener felt was more productive communication. Mr. Ashenbrener also admitted that some of the misconception/frustration was because of his medical condition such that he perceived communication one way and others would perceive it another way.

(h) Provide regular positive feedback acknowledging contributions and value

There was confusion as to whether this really was an accommodation, however, Mr. Ashenbrener testified that positive feedback was helpful when he is stressed out.

## ISSUES

1. Does an adjudicator appointed pursuant to Part III of *The Saskatchewan Employment Act* have jurisdiction to consider a non-suit motion?

2. Does Mr. Aschenbrener have a *prima facie* case such that a trier of fact could find in his favour on the basis of the uncontradicted evidence?

   a. Definition of Unusually Dangerous Work

      Timing of the Complaint

      Definition of Imminent Safety Threat

   b. Reasonable Grounds

   c. Accommodation

## LEGISLATIVE FRAMEWORK

58. The relevant provisions of the *Act* are cited below.

Section 3-1

3-1(1) In this part....:

(i) "discriminatory action" means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes termination, layoff....

Section 3-31

A worker may refuse to perform any particular act or series of acts at a place of employment if the worker has reasonable grounds to believe that the act or series of acts is unusually dangerous to the workers health or safety or the health or safety of any other person at the place of employment until:

(a) sufficient steps have been taken to satisfy the worker otherwise; or

(b) the occupational health committee has investigated the matter and advised the worker otherwise

Section 3-35

3-35 No employer shall take discriminatory action against a worker because the worker:

(a) Acts or has acted in compliance with:

(i) this Part or the regulations made pursuant to this Part;...

(b) seeks or has sought the enforcement of:

(i) this Part or the regulations made pursuant to this Part;...

(f) refuses or has refused to perform an act or series of acts pursuant to 3-31

Section 3-36

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

Section 4-4

4-4(2) subject to the regulations, an adjudicator may determine the procedure which the appeal or hearing is to be conducted.

Section 4-6

Section 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; and

(b) provide written reasons for the decision to the board, the director of employment standards or the director of occupational health and safety, as the case may be, and any other party to the appeal.

## ANALYSIS AND REASONS

**ISSUE ONE:** **Does an adjudicator appointed pursuant to Part III of *The Saskatchewan Employment Act* have jurisdiction to consider a non-suit motion?**

59. Sections 4-4 and 4-6 of the *Act* provide as follows:

> 4-4(2) subject to the regulations, an adjudicator may determine the procedure which the appeal or hearing is to be conducted.
>
> Section 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; and
>
> (b) provide written reasons for the decision to the board, the director of employment standards or the director of occupational health and safety, as the case may be, and any other party to the appeal.

60. Mr. Ashenbrener did not raise any concerns about my jurisdiction to hear, and decide, an application for non-suit.

61. Under Part III of the *Act*, there is broad flexibility provided to adjudicators to administer a fair process with respect to appeals. Along with flexibility of process, broad discretion is also given to adjudicators with respect to the types of decisions

they make. Specifically, section 4-6(1)(a)(i) of the *Act* gives the adjudicator the ability to dismiss an appeal.

62. Essentially, through its application for non-suit, the SHA is asking me to dismiss this appeal on the basis that Mr. Ashenbrener has not made out a *prima facie* case such that I could find in his favour, in consideration of the uncontradicted evidence provided.

63. The outcome of a successful non suit motion is, effectively, a dismissal of the appeal. As section 4-6(1)(a)(i) of the *Act* provides the adjudicator the ability to dismiss the appeal, it is clear the legislative authority exists for me to consider a non suit motion. Accordingly, I have determined that the application for a non-suit is properly before me and jurisdiction exists within the *Act* for me to make the determination.

**ISSUE TWO:** **Does Mr. Aschenbrener have a *prima facie* case such that a trier of fact could find in his favour on the basis of the uncontradicted evidence?**

64. Given the determination that I have the jurisdiction to decide an application for non-suit, has Mr. Ashenbrener made out a *prima facie* case such that I could find in Mr. Ashenbrener's favour on the basis of the uncontradicted evidence? If so, the application for non-suit must be dismissed.

65. In other words, does the uncontradicted evidence led by Mr. Ashenbrener satisfy a reasonable person his case has been made out on a balance of probabilities.

66. There are multiple judicial authorities outlining the legal principles, as they relate to applications for non-suit.

> The general legal test to be applied in determining non-suit applications is well established. It is whether a prima facie case has been made out at the conclusion of the plaintiff's case in the sense that a reasonable trier of fact (a judge or properly instructed jury) could find in the plaintiff's favour on the basis of uncontradicted evidence adduced. Where the nature of the case requires the drawing of

> inferences of fact from other facts established by direct evidence, the test includes the question of whether the inferences that the plaintiffs seek could reasonably be drawn from the direct evidence adduced if the trier of fact chooses to accept the direct evidence as fact.
>
> I used the term prima facie to indicate that the applicants have a lesser onus that having to demonstrate the absence of "any" evidence on a material issue. The case law clearly establishes that the applicants need only demonstrate the absence of "sufficient" evidence, which if left uncontradicted, could satisfy a reasonable trier of fact that the case has been made out on a balance of probabilities. The ruling on a non-suit motion is a question of law. The determination of the credibility or believability of the evidence is a question of fact to be subsequently determined in the action if the non-suit application fails.
>
> *Kvello* v *Miazga* 2003 SKQB 451 as adopted in *Ceapro Inc.* v *Saskatchewan* 2008 SKQB 76 and *Cherkas* v *Richardson Pioneer Ltd.* 2020 SKQB 7

67. Although the evidence has been reviewed above, it is important to note that, in accordance with the jurisprudence on non-suit motions, no findings of fact or assessments of credibility have been made. Further, nothing in this decision should be taken as determinative on a question of law. I have simply examined the legal issues in the context of the uncontradicted evidence to determine whether there is sufficient evidence within the meaning of the non-suit test.

68. I have also considered all of the evidence in a way that is most favourable to Mr. Ashenbrener. (*Kvello*, para 19).

69. To briefly summarize Mr. Ashenbrener's case, Mr. Ashenbrener posits that he was entitled to refuse to attend work because he had reasonable grounds to believe that his attendance at work was a particular act that was unusually dangerous to his health.

70. Mr. Ashenbrener grounds his case in section 3-31 of the *Act*:

> Section 3-31
>
> A worker may refuse to perform any particular act or series of acts at a place of employment if the worker has reasonable grounds to believe that the act or series of acts is unusually dangerous to the workers health or

> safety or the health or safety of any other person at the place of employment until:
>
> (a) sufficient steps have been taken to satisfy the worker otherwise; or
>
> (b) the occupational health committee has investigated the matter and advised the worker otherwise.

71. SHA takes the position that Mr. Ashenbrener's workplace complaints do not meet the definition of "unusually dangerous" to Mr. Ashenbrener's health, or safety, as set out in section 3-31 of the *Act*.

72. While not onerous, the burden is on Mr. Ashenbrener to prove his attendance, at his place of employment, was unusually dangerous to his health or safety.

73. *Britto v University of Saskatchewan*, 2016 CanLII 74280 (SK LRB) confirms the burden of proof:

> [10]
>
> [45] The framework for analysis begins with section 3-36(1) which provides that the worker must have reasonable grounds to believe that the employers took discriminatory action against him or her for a reason mentioned in 3-35. In other words, the initial onus is on the worker to establish a prima facie case of discriminatory action.
>
> [46] The initial burden is on the worker to establish a prima facie case of discriminatory action is not a particularly onerous one. To achieve the objects of the Act and its important purpose of encouraging occupational health safety, workers must be secure in the knowledge that they may exercise rights or obligations—raise health and safety concerns—without fear of reprisal. For that reason, where a worker establishes a prima facie case of discriminatory action, the reverse onus is triggered and the employer bears the heavier burden of disproving the presumption imposed in Section 3-36(4).
>
> [47] to establish the prima facie case of discriminatory action, requires the worker to establish the following: (a) That the employer took action against the worker falling within the scope of Section 3-1(1)(i) of the Act describing

> "discriminatory action" (b) that the worker was engaged in one or more health and safety activities protected by Section 3-35 of the Act; and
>
> [48] that there is some basis to believe that the employer took discriminatory action against the worker "for a reason" mentioned in section 3-35. In other words, there must be a prima facie linkage or nexus between the worker's protected activity and the employer's action.

a. Definition of Unusually Dangerous Work

74. Put plainly, a worker is entitled to refuse work that is unusually dangerous to their health or safety.

75. As per the case of *Pintiliciuc v SaskEnergy*, 2016 CarswellSask 900, where a worker claimed that attendance at an independent medical examination constituted 'dangerous work', Madam Adjudicator Wallace found as follows:

> [52] On examining the wording of this section, it appears the legislature intended to ensure that when a worker is directed to perform tasks in the workplace that may be unusually dangerous, the worker is entitled to refuse that work until the real or perceived danger has been dealt with. Section 3-34 supports this interpretation when it says the employer cannot ask another worker to do the work that is claimed dangerous unless certain conditions are met.

76. In their brief, and oral submissions, SHA states that Mr. Ashenbrener does not fit within the requirements of section 3-31, of the *Act* because:

(a) He made his complaint at a time that he was not working within the workplace; and

(b) There was no imminent safety threat.

Timing of Complaint

77. SHA takes the position that, because Mr. Ashenbrener was not actually in the workplace at the time he made his complaint, he does not fit within section 3-31 of the *Act*. I disagree. If a worker has reasonable grounds to believe that the work they are being asked to perform is unusually dangerous to their health or safety, and they provide advance notice of their reasonable grounds, outside of the workplace, before being placed in a dangerous position, this must necessarily fit within section 3-31. The intent of the legislation cannot be that the worker must actually be placed in danger, to fall within section 3-31 of the *Act*. Advance notice of the unusually dangerous work, off site, will necessarily fit within section 3-31 of the *Act*.

Definition of Imminent Safety Threat

78. Through its written submissions, SHA submits that "[i]n sum, there was no physical or environmental danger present for the employee to attend work, let alone anything that would touch on an unusual danger or emergency safety concern. ...it is completely illogical to suggest that the task alone of attending work is an unusual danger when there is no environmental danger or medical suggesting concrete environmental dangers that need to be eliminated before a return to work".

79. With respect, I suggest SHA tread carefully on this topic as SHA seems to suggest that a danger involving mental health may not meet the definition of imminent safety threat.

80. I find it possible to prove a claim of unusually dangerous work on the basis of psychological damage. Mental health may not fit the more traditional definition of 'dangerous work', as typically being a threat to the workers physical self. However, I find that injury to mental health is no less serious than that of harm to physical health.

b. Reasonable Grounds

81. The analysis is, in plain language, in consideration of the uncontradicted evidence, am I able to find that Mr. Ashenbrener refused to attend work because he had reasonable grounds to believe that his attendance at work was unusually dangerous to his health or safety.

82. The 'lens' from which this question must be answered is whether, in consideration of all of the evidence, a reasonable person would believe that Mr. Ashenbrener's attendance at his place of employment was unusually dangerous to his health or safety. It is not from the personal perspective of Mr. Ashenbrener from which this question is decided, it is that of the reasonable person.

83. As was held in *I.B.E.W. Local 213 v Jim Pattison Sign Co.* 2004 CarswellBC 3348:

> [83] The examination is to determine whether the employee's apprehensions were objectionably reasonable. As a general matter, the question is "whether the average employee at the workplace, having regard to his general training and experience, would, exercising normal and honest judgment, have reason to believe that the circumstances presented an unacceptable degree of hazard."

84. Also, stated in *Inverness County Municipal Housing Corp. v. C.U.P.E., Local 1485,* 1987 CarswellNS 597, paragraph 22:

> In *Pharand v. Inco Metals Co.,* [1980] 2 Can. L.R.B.R. 194 (M.G. Picher) (Ontario), the standard applied under the Ontario Occupational Health and Safety Act was described as follows (at p. 208):
>
> The requirement that an employee "have reasonable cause to believe" that there is a danger imposes an objective standard by which to test the employee's action. The Act does not, by the use of the words "reasonable cause", legislate different standards of protection for the squeamish and the intrepid. Different employees within the same work place may have different views of what constitutes an acceptable risk. Likewise, strangers to a particular trade or industry might view with alarm situations that are not seen as hazardous by the people who work in that field on an every day basis. On a complaint such as this, therefore, in

> considering whether an employee had reasonable cause to refuse work in a given situation, *this Board must ask itself whether the average employee at the work place, having regard to his general training and experience, would, exercising normal and honest judgment, have reason to believe that the circumstances presented an unacceptable degree of hazard to himself or another employee.*

85. While Mr. Ashenbrener individually believed that his workplace was unusually dangerous to his health and safety, the objective evidence does not support this belief. Further, in cross examination Mr. Ashenbrener admitted he was personally making the decision as what was unusually dangerous, as opposed to relying on objective evidence. Mr. Ashenbrener specifically stated as follows:

> "ultimately it's my decision. I need to decide what is unusually dangerous for me. My doctor can't make that decision for me. That's a decision I have to make."

86. Mr. Ashenbrener also stated in cross examination that, after the telephone meeting on February 1, 2021, he agreed to return to work. However, then Mr. Ashenbrener wrote the email of February 10, 2021 (Exhibit A-13) advising he was not returning to work because "I" had to make a decision on what "I" felt safe doing and what "I" felt safe not doing".

87. There was not any objective evidence provided by Mr. Ashenbrener that supported his claim that his workplace was unusually dangerous to his health and safety. Indeed, there was strong evidence to the contrary. Some specifics were as follows:

    a. On June 23, 2020 (Exhibit A-2), although there may be need for accommodation, Mr. Ashenbrener's physician wrote a letter referencing Mr. Ashenbrener continuing in his present employment.

    b. On August 28, 2020 (Exhibit A-6), another letter was provided by Mr. Ashenbrener's physician advising that it was safe for him to return to work.

c. On October 19, 2020 (Exhibit R-12), Mr. Ashenbrener stated that his doctor thought he "should be at work(routine is good), and I should continue to be firm with what I need, and what I can and cannot do".

d. On December 9, 2020, Mr. Ashenbrener had a medical appointment with a psychiatrist. No medical evidence was provided that the psychiatrist believed that a return to work was unusually dangerous to Mr. Ashenbrener's health or safety.

e. On January 22, 2021 (Exhibit A-9), Mr. Ashenbrener's physician, again, advised that Mr. Ashenbrener "can go back to work with limitation sent".

f. On February 1, 2021, Mr. Ashenbrener advised SHA that he would return to work.

88. Mr. Ashenbrener has not provided objective evidence to prove his claim of being asked to perform unusually dangerous work to his health and/or safety. In consideration of all of the evidence, in the most favourable light to Mr. Ashenbrener, I find that a reasonable person would not have reason to believe that Mr. Aschenbrener's attendance at work would be unusually dangerous to his health or safety. The medical evidence is clear that Mr. Ashenbrener's physician recommended that it was appropriate for Mr. Ashenbrener to return to work. (Exhibit A-9)

c. Accommodation

89. There was evidence presented related to workplace accommodation of Mr. Ashenbrener. The issue was whether the accommodations had been met by SHA.

90. The proposed workplace accommodations were set out by Mr. Ashenbrener's physician on June 24, 2020 (Exhibit A-3):

(1) More time to attend work requiring attention to detail, considering the problem with focus

(2) Permission for short breaks when concentration declines

(3) Instructions and assignments to be provided in writing, if possible

(4) Identification of areas where decisions should be discussed

(5) Develop strategies to deal with stress in the workplace

(6) When possible, in potential, actual or perceived confrontational discussions or meetings, allow written questions and written answers with enough time to answer successfully

(7) Provide training on managing potentially confrontational situations and the recommended responses and consider how to provide or increase support for the employee in situations that are potentially confrontational

(8) Provide regular positive feedback acknowledging contributions and value

91. Mr. Ashenbrener continues to believe that not all of the accommodations listed by his health care provider have been met by the employer. SHA says it has met the accommodations. The evidence presented by Mr. Ashenbrener supports the position by SHA.

92. There appeared to be some question about whether Mr. Ashenbrener could caucus with his union representatives during future meetings with his employer. However, in the recording submitted by Mr. Ashenbrener as Exhibit A-11, and during cross examination, it was clear SHA would not object to Mr. Ashenbrener caucusing with his union representatives during these meetings. This issue seems to have largely resolved itself.

93. There was also some dispute about whether it was necessary for Mr. Ashenbrener to stay in the room while writing answers to questions put to him by the employer during investigative meetings. There seemed to be some inference the union took issue with this.

94. However, no direct evidence was called, from the union, on this point by Mr. Ashenbrener. Further, in answer to a question in cross examination, Mr. Ashenbrener advised he had no concerns remaining in the room to write out answers to questions the employer had posed to him. Accordingly, this accommodation has been met.

95. Further, even if SHA had not met all of the accommodations listed in Exhibit A-3, Mr. Ashenbrener still lacks the objective evidence to show that his attendance at the workplace, met the definition of 'dangerous work'.

96. One of the impediments to resolution appears to be the actions, and attitude, of Mr. Ashenbrener such that he believes he is not being fully accommodated by SHA. In an attempt to resolve his complaints regarding his employer, Mr. Ashenbrener has inappropriately attempted to use section 3-31 of the *Act* as a way of resolving his accommodation complaints.

97. Unfortunately, Mr. Ashenbrener became militant, and resolved, in his convictions and did not appear open to resolution.

98. On February 10, 2021, Exhibit A-13, Mr. Ashenbrener sent correspondence to SHA stating that "the limitations have not been addressed and the employer and yourself have refused to discuss them". This is statement is not supported by the evidence. As per the above description of evidence introduced by Mr. Ashenbrener, the limitations were repeatedly discussed. While SHA may not have done everything exactly as Mr. Ashenbrener demanded of them, at no point, could SHA be described as having "refused" to discuss accommodation.

99. In cross examination, while being questioned on the issue of accommodation, Mr. Ashenbrener stated that he was "refused by the employer to discuss accommodation at every turn". Again, this statement is not supported by the evidence. While SHA may not have accommodated Mr. Ashenbrener to the extent that he was demanding, the claim of discussion being denied "at every turn" is not correct. Unfortunately, the statement also seems to be reflective of Mr. Ashenbrener's

dismissive attitude towards his employers' efforts. Ironically, Mr. Ashenbrener's description of SHA's treatment of him, mirrors his same behaviour as against SHA.

100. On February 22, 2021, Exhibit A-17, Mr. Ashenbrener sent correspondence to SHA referring to a December 10, 2020 decision (Exhibit A-7) of the Ministry of Labour Relations which he claimed referred to harassing behaviour that had gone unmitigated. That decision ultimately found that the employer's behaviour, and actions, towards Mr. Ashenbrener were not a discriminatory actions by the SHA. Mr. Ashenbrener's comment "...the Occupational Health Officer identified harassing behaviour which would affect a worker psychologically, which it had (leading to months of time off work)", was not supported by the evidence. I carefully read Exhibit A-7 and find no such statement referred to by Mr. Ashenbrener. I do note the decision refers to Mr. Ashenbrener as "a difficult worker to appease specifically as it pertains to answers surrounding workplace safety issues".

101. Finally, Exhibit A-17, appears to be the first reference, by Mr. Ashenbrener only, of 'psychological harm'. Mr. Ashenbrener's medical evidence refers to medical needs, which may, or may not, be defined as psychological harm. However, that is a conclusion/diagnosis that a medical professional must provide, not Mr. Ashenbrener. Nor is Mr. Ashenbrener entitled to expect the SHA to respond to his claims of psychological harm without supporting medical evidence.

102. Exhibit A-19, correspondence from Mr. Ashenbrener to the SHA, which refers to Mr. Ashenbrener's hearing disabilities. Again, no actual medical evidence was provided to the employer, or through the arbitration process, of a hearing disability by Mr. Ashenbrener. In closing submissions, Mr. Ashenbrener acknowledged that he had not provided any documentation with respect to any hearing issues he may be experiencing and flippantly said "I find it hard to believe that they [the employer] did not know [I] had a hearing issue".

103. There is not an onus on employers to search for the employee's medical information, related to issues that have not been raised by an employee. Nor should Mr. Ashenbrener have any expectation his employer would do so. If Mr. Ashenbrener

has a hearing disability that impacted his ability to perform his job duties, then he has a positive obligation to bring forward medical evidence of that disability and request any necessary accommodation. Mr. Ashenbrener did not do that, so he should not expect any consideration in that regard either.

## CONCLUSION

104. Based on the foregoing description of evidence, and analysis above, I find Mr. Ashenbrener has not proven, on an objective basis, that his attendance at SHA was unusually dangerous to his health or safety. I further find that SHA had sufficiently met the accommodation requests made to them by Mr. Ashenbrener.

105. Accordingly, we are left with an employee who was medically cleared to return to work and an employer who met their duty to accommodate. However, the employee still failed to return to work after an approved leave had expired.

106. The application for non-suit by SHA is successful and the appeal is dismissed.

## ORDER

107. This Order is issued pursuant to section 4-6 of *The Saskatchewan Employment Act*. The application for non-suit is successful and the appeal is dismissed. The decision of the occupational health and safety officer is upheld.

Dated this 26th day of August, 2022.

Tiffany M. Paulsen, Q.C.
Adjudicator