LRB File No. 053-22

IN THE MATTER OF AN APPEAL TO AN ADJUDICATOR PURSUANT TO SECTIONS 3-53 AND 3-54 OF *THE SASKATCHEWAN EMPLOYMENT ACT*

BETWEEN

TANSLEY DAOUST

APPELLANT

- and -

ASSOCIATED RADIOLOGISTS LLP

RESPONDENT

Adjudicator: Larry B. LeBlanc, K.C.
For the Appellant: Self-Represented
Counsel for the Respondent: Zeke E. Zimonick

DECISION

I. INTRODUCTION

[1] The Appellant, Tansley Daoust, appeals pursuant to sections 3-53 and 3-54 of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 (the "Act") against a decision of senior occupational health officer, Shawn Tallmadge, contained in a letter dated March 9, 2022, to close the file of the Harassment and Discriminatory Action Prevention Unit of the Occupational Health and Safety Branch (the "OHS Branch") of the Ministry of Labour Relations and Workplace Safety respecting a discriminatory action complaint submitted by the Appellant.

[2] In closing the file Officer Tallmadge stated, in the letter decision, that the concerns and information forward by the Appellant did not fit or fall within the scope of occupational health and safety legislation.

[3] The Appellant contends in the notice of appeal, dated March 22, 2022, that Officer Tallmadge erred in closing the file and requests, as relief, that the case be appropriately reopened by an adjudicator.

[4] I was selected as adjudicator for this appeal by the Registrar of the Labour Relations Board pursuant to section 4-3(3) of the Act on March 15, 2023. An appeal file containing material as described in sections 3-53(1) and 3-55 of the Act (including the notice of appeal and all information related to the appeal in the possession of the Director of Occupational Health and Safety) was provided to me by the Director on April 5, 2023. Copies were then sent to the parties for purposes of the appeal.

[5] The Board Registrar provided formal hearing notice to the parties and the Director of Occupational Health and Safety pursuant to section 4-4 (1)(b) of the Act on August 10, 2023, for

a hearing date of October 11, 2023. Section 4-10(1) of the Act provides that the Director has the right to appear and make representations on any appeal or hearing heard by an adjudicator. There was no appearance from the OHS Branch in this case.

[6] When the matter came on for hearing, it was agreed, given the nature of the appeal, that the parties would make representations based on the content of the appeal file (and three related documents filed by agreement) without the need for evidence on oath or affirmation even if the representations to some extent might supplement facts in the written record.

[7] The appeal file consists of filings and material provided by the Appellant to the OHS Branch and correspondence between the Appellant and the OHS Branch. The three additional items were documents referred to in correspondence in the appeal file but not actually attached to that correspondence. Appendix "A" to this Decision provides a list of the documents entered as exhibits at the hearing.

[8] For the reasons that follow, I have concluded that the appeal must be dismissed.

II. FACTUAL BACKGROUND

[9] The Respondent partnership of radiologists operates clinics at locations in Saskatoon (three at the material time) and one location in Prince Albert. As a substantial part of its practice, the Respondent also provides medical imaging services for various hospitals and facilities of the Saskatchewan Health Authority (SHA).

[10] The Appellant was employed by the Respondent as a medical radiation technologist commencing on September 14, 2010. The Appellant's work spanned all three of the Respondent's Saskatoon clinics.

[11] Effective October 1, 2021, *The Employers' COVID-19 Emergency Regulations*, RRS c. S-15.1, Reg 13, came into force. The regulations as amended (the "COVID-19 regulations") remained in force until February 14, 2022 when they were repealed.

[12] The COVID-19 regulations provided that an employer may require its workers (a) to be fully vaccinated with COVID-19 vaccines, or (b) to provide a valid negative COVID-19 test result to the employer at least every seven days (a PCR test, a point-of-care antigen test, or any other test for the virus approved by the Minister of Health).

[13] On October 18, 2021, the Respondent issued a policy to its employees requiring verification of full COVID-19 vaccination or, if not, proof of twice weekly negative PCR testing. The policy stated:

> Because of the significant health risk to our staff, radiologists, patients, our families and others due to covid 19 and the Delta variant, Associated Radiologists has adopted the following mandatory vaccination policy for all staff:
>
> 1. By October 27, 22021 we will verify the covid 19 vaccination status of all staff. Verification will be completed by the Business Manager to ensure confidentiality. "Full vaccination" is required.

"Full vaccination" is defined as two of any covid 19 vaccinations authorized by Health Canada, and the requisite two weeks post vaccination period. Further, "full vaccination" may also include any future covid 19 booster vaccinations recommended by Health Canada.

Proof of vaccination includes verifying your QR code on the SK Vax Wallet app, or providing a copy of your "MySaskHealth" vaccination record. For those without on-line access to MySaskHealth account we will accept a copy of your vaccination card. Your information will be recorded for compliance, and then destroyed – we will record your name and date of verification only. All information will be kept confidential by the Business Manager or designate.

2. You may choose not to disclose your vaccination status (whether for personal choice, or because you are not fully vaccinated). If you choose not to disclose your vaccination status, or you are not fully vaccinated (for any reason), then commencing Octobe 27, 2021 you will be required to provide proof of a negative PCR covid test taken within the last 72 hours every Monday and Wednesday by 12 noon. Testing cannot be done during work time and is at the expense of the staff member. In the event you later become "fully vaccinated", and on verification, you will not be required to test further.

   Staff members who cannot vaccinate for medical reasons must discuss their circumstances with the Business Manager to determine a course of action.

3. Any staff member who does not comply with the covid 19 policy will face disciplinary action which may include termination of employment.

The safety of our staff is our priority, and we are confident this policy will help us achieve our goal.

We have had to adapt as the pandemic progressed, and we hope these measures are temporary. We have extensively discussed and researched the vaccination question and confirm our policy is in alignment with government health authority directives, as well as occupational health and safety obligations in The Saskatchewan Employment Act.

[14] The Appellant and two other employees, by letter to the Respondent's general manager on October 25, 2021, expressed concern with the policy stating that, being informed, they do not consent and that such mandates are not lawful. The letter further stated that participation in PCR testing would be discriminatory and unfair in the absence of symptoms, would impose an unacceptable financial burden, and was of concern from the standpoint of cumulative exposure to testing products "sterilized with ethylene oxide which is a known carcinogen".

[15] On January 6, 2022, the Respondent's CEO, Cam Broten, met with the Appellant and the two other employees. The three employees all stated that it remained their view that they do not agree with the vaccination mandate and that they would not participate in PCR testing. Mr. Broten raised antigen testing as an option and followed up with an email in that regard.

[16] In the follow up email, sent later on January 6, 2022, Mr. Broten advised that the Respondent's position was to strive for consistency with the SHA vaccination policy, given the integration of the Respondent's patient care with the wider health system, and that the SHA had begun allowing antigen testing as an alternative to PCR testing. He asked in the email, "As I

proposed today, I am wondering if you would be willing to participate with a testing program using antigen tests?"

[17] The January 6, 2022 email contained a link to the updated "SHA Handbook, Monitored Testing Program". Mr. Broten proposed using an approach similar to the SHA's. Testing would be done at home on Sunday with test kits available without charge from libraries and various businesses and would be done at one of the Respondent's locations on Tuesday and Thursday with test kits the CEO would bring. (The email was phrased "I would visit the College Park clinic and conduct the test" which was understood and applied in practice as meaning Mr. Broten would be present.) The SHA Handbook required the use of a specifically identified antigen testing product, available in kits of 25.

[18] The January 6, 2022 email in conclusion gave until 3:00 p.m. the following day for a response and included a reminder as to disciplinary consequences:

> Please let me know by 3pm on Friday, January 7, 2022, if you agree with this proposal. If yes, home testing would commence on Sunday, January 9, 2022.
>
> As communicated in the earlier email dated October 18, 2021, any staff member who does not comply with the COVID-19 policy will face disciplinary action which may include termination of employment.

[19] On January 7, 2022, at 2:40 p.m., the Appellant responded with an email expressing "serious concern with the product being implemented into the workplace under the new SHA Guidelines that Associated Radiologists LLP is choosing to follow" making specific reference to the rapid antigen testing kits identified in the SHA Handbook. The Appellant also cited information obtained from various sources respecting ethylene oxide.

[20] In the email, the Appellant made "an official request to exercise my rights as protected under the Saskatchewan Employment Act (SEA) for a formal investigation of the product" (referring generally to rights to know, to participate, and to refuse) further requesting "during your investigation that you provide associated documentation for review of current studies/research/data" evaluating a range of considerations as outlined in the email. The Appellant also raised an issue of bona fide occupational requirement and asked that this also be addressed in the investigation. The Appellant stated in the email that "During a refusal, the refusing worker is protected from Discriminatory Action through the SEA" and set out the definition of that term in full.[1]

[21] The concern regarding ethylene oxide had previously been expressed by the Appellant in relation to PCR testing (see paragraph 14 above). As for rapid antigen testing using kits other than

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[1] At one point in the email there is a request for an investigation in accordance with an article in a collective agreement. The email states, "Given this identifiable hazard and the above information, I am formally requesting OH&S commence an investigation immediately and provide data on frequent and long-term use of the carcinogen EO into body orifices prior to introduction into the workplace as in accordance with article 61.11 of our CBA and current legislation". However, the Respondent was not unionized employer and had no collective agreement. This portion of the letter appears to have been drawn from material pertaining to another organization.

the product in question, the Appellant indicated at the hearing that the concern would likely apply to other kits as well, in that, in her understanding, nasal swabs from other manufacturers were commonly sterilized with ethylene oxide. The Appellant stated that she wanted an alternative testing method, referring at the hearing to saliva testing as an option, further conveying in that regard a concern with the intrusive nature, in itself, of testing with nasal swabs particularly where the testing would be frequent and could go on and on.

[22] The Respondent at the hearing advised (and it was common ground) that the testing kit product specified in the SHA Handbook was approved by Health Canada and, as would be evident from its use in SHA facilities across the province, also by Saskatchewan Health.

[23] Toward the end of the workday on January 12, 2022 the Appellant's supervisor arranged a meeting attended by the supervisor, Mr. Broten and the Appellant. At the meeting, Mr. Broten asked again if the Appellant was prepared to submit to testing in compliance with the Respondent's COVID-19 policy. The Appellant reiterated her concerns and indicated that she was not prepared to do so.

[24] With this, Mr. Broten, reading aloud from a letter of termination dated January 12, 2022, informed the Appellant that her employment was terminated for cause for failure to comply with the employer's COVID-19 policy. The letter, which was then handed to the Appellant, states in relevant part:

> This letter will serve to confirm that your employment with Associated Radiologists LLP is terminated, effective immediately, for cause, such cause including wilful misconduct and the failure to comply with Associated Radiologists LLP's COVID-19 policy, all of which have irreparably damaged the employment relationship.

[25] On January 14, 2022, the Appellant wrote to the Harassment and Discriminatory Action Prevention Unit within the OHS Branch. The letter contains the following paragraphs:

> I write this letter today to formally report and refer this matter to an Occupational Health Officer in exercising my legal rights to do same as within the Saskatchewan Employment Act (SEA) legislation. I am a victim to discriminatory action in the workplace pursuant to Division 5: section 3-31 of the SEA. Steps for filing a discriminatory action complaint start with informing your division of the violation.
>
> ...
>
> Rather than responding to my safety concern or actively referring my safety concern to an Occupational Health Officer when I exercised my rights within the SEA, I received a termination letter in response, and to date, no recognition or response to my safety concern or investigation pursued as per my exercised right to investigate same.

[26] The Appellant suggested in the letter of January 14, 2022 that, "as there is no Occupational Health and Safety committee in my place of employment", she had been exercising her rights "until an investigation takes place by an Occupational Health Officer". The January 7, 2022 email, however, would more likely be understood as requesting an investigation by the Respondent itself rather than Occupational Health Officer (corresponding with clause 3-31(a) of the Act rather than clause 3-32 (a)); and further, from representations at the hearing, it appears likely that there was

an occupational health committee in existence at the time, of which the Appellant was unaware, perhaps with the same members covering more than one work location. For the purposes of my determination of the present appeal, however, this will not be material.

[27] On February 3, 2022, the Appellant submitted a complaint of discriminatory action to the Harassment and Discriminatory Action Prevention Unit of the OHS Branch as contained in a completed form of questionnaire signed on January 27, 2022 with attached typewritten document dated January 25, 2022. Worthy of note in that regard:

- The form of questionnaire asked, "*What was the alleged discriminatory action taken against you?*" The Appellant in response stated:

  > Termination with cause despite exercising my rights within the Saskatchewan Employment Act (SEA) under Division 5 section 3:31 prior to termination. As I exercised these rights and *"no sufficient steps were taken to satisfy the worker"*[1] prior to being terminated, this constitutes a wrongful/unjust dismissal and a clear case of discriminatory action.
  >
  > [Emphasis in original; footnote refers to the *Saskatchewan Employment Act* generally]

  In further answer to the question, the Appellant referred to section 3-35 of the Act and stated that the section prohibits the employer from taking discriminatory action if the worker "Seeks to have The Saskatchewan Employment Act or regulations enforced" or "Refuses to work pursuant to section 3-31 of The Saskatchewan Employment Act".

  The Appellant also stated that "To make an informed decision about my options given to me by my employer, my request for an investigative report was never acknowledged".

- In response to the question, "*On what date was the action taken against you?*", the Appellant stated "January 12th, 2022 was the date I received my termination letter".

- In response to the question, "*What was the health and safety concern/complaint that you raised prior to action taken against you?*", the Appellant stated:

  > My health and safety concern raised to my employer was in relation to a product used *"in the workplace/at my place of employment"*[1] during working hours. ... In a succinct summation, in order to make an informed decision on whether I submit to the proposed antigen testing versus vaccination (both were presented as an option with the workplace policy as per email communication by Cam Broten), I was erroneously accused of being non-compliant with a policy, despite enacting my legislative rights requesting my safety questions be answered first by an Occupational Health Officer in order to make an informed decision of which option I would choose.
  >
  > [Emphasis in original; footnote refers to the *Saskatchewan Employment Act* generally]

  The response goes on to detail the documentation requested by the Appellant in connection with the requested investigation.

- The form questionnaire asked "*On what date, and to whom, did you raise your health concern and safety concern/complaint prior to the action taken against you? (Provide chronological timeline of event if appropriate)*".

  In this section of the complaint, the Appellant largely repeated information set out previously in the response but with additional comments on testing location as will be referred to later in this decision.

- In response to the question, "*What reasons were provided to you for the action taken against you?*", the Appellant referred to the termination letter advising of termination for cause for willful misconduct and failure to comply with the employer's COVID-19 policy. The Appellant then stated that this was not willful misconduct and that "I exercised my legal rights to refuse to perform a particular act/series of acts at my place of employment within my legislative rights to do so, until an investigation by an Occupational Health Officer was completed". The Appellant went on to say that there were reasonable grounds to believe the safety concern was unusually dangerous to her health.

- In answer to the question, "*If you are no longer working at this workplace, do you want to return to this workplace?*", the Appellant stated, "I cannot return to a work environment that chose to willfully act discriminatorily against me" and that the relationship, as indicated by the employer in the termination letter, was irreparable.

- In answer to the question, "*What do you view as an appropriate resolution to this situation?*", the Appellant requested service of a notice of contravention on the employer and a requirement for the employer to change employment records to indicate without cause/wrongful termination but noting that reinstatement would not be appropriate.

[28] Following receipt of the questionnaire and associated documentation, Officer Susan Boan within the Harassment and Discriminatory Action Prevention Unit contacted the Appellant by telephone and asked if the Appellant would be willing to return to the workplace. This gave rise to an exchange of emails between the Appellant and Officer Tallmadge on February 4, 2022. The Appellant stated that, in relation to a return to the workplace, she had used the words "if it is safe to do so" in her conversation with Officer Boan but was unsure how the tarnished relationship could be repaired and that it is "akin to asking if I am willing to return to a negative workplace relationship/unhealthy work environment". The Appellant further stated that the core of her heath and safety concerns were never addressed. Officer Tallmadge responded that he appreciated the concerns about going back to the workplace, but that that was a decision for the Appellant to make, with the OHS Branch not able to answer the question "if it is safe to do so" and further that: "OHS role is to receive a complaint and look into the matter. Please inform me if you wish to return to the workplace and proceed with your claim".

[29] Not having heard back from the Appellant, Officer Tallmadge wrote to the Appellant, by letter dated February 23, 2022, stating "I require supplementary information or confirmation of

your intentions" and to be contacted by March 2, 2022 failing which the Officer would be closing the Appellant's file.

[30] On March 8, 2022, Officers Tallmadge and Moorgen contacted the Appellant by telephone. In a letter to the Appellant the next day, March 9, 2022, advising of closure of the Appellant's file, Officer Tallmadge stated:

> The Occupational Health and Safety Harassment and Discriminatory Action Prevention Unit (OHS) received your completed questionnaire on February 3, 2022.
>
> On March 8, 2022, Occupational Health Officers Stephen Moorgren and Shawn Tallmadge contacted you to discuss the particulars of your complaint. During this conversation, concerns were discussed regarding your reasons for termination. Further, during this conversation, you stated the concern you brought forward was in regard to the Covid-19 testing that the employer had implemented in the workplace.
>
> Further, during our conversation, it was discussed that the information you provided OHS would not fall within the scope of Occupational Health and Safety Legislation.
>
> As a result of the information provided, the concerns noted do not fit within the scope of Occupational Health and Safety Legislation. As such, OHS cannot become further involved, and hour file is deemed closed.

[31] The Appellant referred to the March 8, 2002 discussion in her notice of appeal dated March 22, 2022. At page 3 of the notice of appeal:

> During my phone conversation with officers Shawn Tallmadge and Stephen Moorgen on March 8th, 2022, it was disclosed to me that the reason they felt my claim did not fall within OH&S legislation was because my safety concern was not considered a "work task". This verbatim term of reference/definition was used repetitively by Shawn and Stephen.

[32] This was confirmed by the Appellant in representations at the hearing. The notice of appeal further states that "work task" is not used in the Act and that the correct words are "any particular act or series of acts at a place of employment".

[33] Notes made by Officer Moorgen of the March 8, 2022 conversation are follows:

- What was the work refusal – testing 3 times per week
- 24 hours to let them know if she was good to go
- She wasn't comfortable doing this (3 times/week)
- Required to do testing and she did not want to
- She understood and will go civil – possibly
- Terminated with cause

Officer Tallmadge's notes are similar:

> Work refusal?
> - Change to policy -> 3 x weekly
> - Wanted to answer about willingness
> - 1 on own, 2 done @ clinic
> - Wasn't comfortable doing that -> wrote up letter

- "raise concerns"
- in regards to "covid policy"
- "pushed all over the place"
- "what qualifies him to administer test?"
- applied for EI
- "understood"
- 1325 hours

[34] The suggestion of civil action by Officers Moorgen and Tallmadge as mentioned in the notes is also reflected in the notice of appeal where the Appellant refers to an attempt to "pass off my safety concerns as civil litigation as was done so by the officer(s) via phone conversing".

III. ISSUE

[35] The issue on this appeal is whether the refusal of the Appellant to participate in antigen testing (or, at the Appellant's option, provide proof of full vaccination or negative PCR testing) amounted to a refusal "to perform any particular act or series of acts at a place of employment" within the meaning of section 3-31 of the Act.

[36] If there was such a refusal, I would direct the OHS Branch to reopen the Appellant's file and deal with the discriminatory action complaint on that basis. If not (and if the record does not disclose any other protected activity on the part of the Appellant) the determination of the Occupational Health Officer to close the file without further investigation will stand.

IV. ANALYSIS

A. Legislative Provisions

[37] The provisions of the Act that are relevant to this appeal include the following:

> **3-1**(1) In this Part and in Part IV:
>
> (i) **"discriminatory action"** means any action or threat of action by an employer that does or would adversely affect an employee with respect to any terms or conditions of employment or opportunity for promotion, and includes termination …;
>
> (n) **"occupation"** means employment, business, calling or pursuit;
>
> (v) **"place of employment"** means any plant in or on which one or more workers or self-employed persons work, usually work or have worked;
>
> (w) **"plant"** includes any premises, site, land, mine, water, structure, fixture or equipment employed or used in the carrying on of an occupation;
>
> **3-8** Every employer shall:
>
> (a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers;
>
> **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 worker's health or safety or the health or safety of any other person

at the place of employment until:

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

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

3-32 If there is no occupational health committee at a place of employment or if the worker or the employer is not satisfied with the decision of the occupational health committee pursuant to clause 3-31(b):

(a) the worker or the employer may request an occupational health officer to investigate the matter; and

(b) the worker is entitled to refuse to perform the act or series of acts pursuant to section 3-31 until the occupational health officer has investigated the matter and advised the worker otherwise pursuant to subsection 3-33(2).

3-33(1) If an occupational health officer decides that the act or series of acts that a worker has refused to perform pursuant to section 3-31 is unusually dangerous to the health or safety of the worker or any other person at the place of employment, the occupational health officer may issue a notice of contravention in writing to the employer requiring the appropriate remedial action.

(2) If an occupational health officer decides that the act or series of acts that a worker has refused to perform pursuant to section 3-31 is not unusually dangerous to the health or safety of the worker or any other person at the place of employment, the occupational health officer shall, in writing:

(a) advise the employer and the worker of that decision; and

(b) advise the worker that he or she is no longer entitled to refuse to perform the act or series of acts pursuant to section 3-31.

3-34 If a worker has refused to perform an act or series of acts pursuant to section 3-31, the employer shall not request or assign another worker to perform that act or series of acts unless that other worker has been advised by the employer, in writing, of:

(a) the refusal and the reasons for the refusal;

(b) the reason or reasons the worker being assigned or requested to perform the act or series of acts may, in the employer's opinion, carry out the act or series of acts in a healthy and safe manner; and

(c) the right of the worker to refuse to perform the act or series of acts pursuant to section 3-31.

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 ...

...

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

3-36(1) A worker who, on reasonable grounds, believes that the employer has taken discriminatory action against him or her for a reason mentioned in section 3-35 may refer the matter to an occupational health officer.

(2) If an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 3-35, the occupational health officer shall serve a notice of contravention requiring the employer to:

(a) cease the discriminatory action;

(b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;

(c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and

(d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.

(3) If an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 3-35, the occupational health officer shall advise the worker of the reasons for that decision in writing.

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

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

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

For purposes of this appeal there was no suggestion that section 9-10.1 of the Act should come into play.

[38] Relevant provisions of the COVID-19 regulations include the following:

2(1) In these regulations:

"Act" means The Saskatchewan Employment Act;

"COVID-19 test" means any of the following tests administered at a testing site approved by the Minister of Health:

(a) a polymerase chain reaction (PCR) test for SARS-CoV-2;

(b) a point-of-care antigen test for SARS-CoV-2;

(c) any other test for SARS-CoV-2 approved by the Minister of Health;

"Fully-vaccinated, with respect to a worker, means that:

(a) the worker has received the recommended number of doses of a COVID-19 vaccine, or combination of COVID-19 vaccines, approved by Health Canada; and

(b) 14 or more days have passed since the worker received the last of the recommended number of doses;

"SARS-CoV-2" means the sever acute respiratory syndrome coronavirus 2, the virus that causes COVID-19.

4(1) On and after October 1, 2021, an employer, for the purposes of clause 3-8(a) of the Act, require all of its workers to comply with one of the following:

(a) to:
  (i) be fully-vaccinated; and
  (ii) if requested by the employer, provide satisfactory evidence to the employer in relation to the worker's vaccinations;

(b) to provide a valid negative COVID-19 test results to the employer at least every 7 days.

(1.1) If an employer requires its workers to comply with one of the requirements set out in subsection (1), the employer shall give each worker the option to comply with either clause 1(a) or (b), but the worker must comply with at least one of those requirements within the period specified by the employer.

B. Determination of Point in Issue

[39] The right under section 3-31 of the Act is a right to refuse "to perform any particular act or series of act at a place of employment" (the narrow issue here) if there are reasonable grounds for the worker to believe that the act or series of acts is unusually dangerous to health or safety (which, if the appeal were allowed and the file re-opened, would be for determination of an Occupational Health Officer and not an adjudicator in first instance).

[40] The exercise of that right is a protected activity. Section 3-35(f) of the Act prohibits discriminatory action against a worker, including termination of employment, because the worker refused or has refused to perform an act or series of acts pursuant to section 3-31.

[41] In the present case, in the March 9, 2022 letter to the Appellant, Officer Tallmadge referred to the Appellant's completed questionnaire and to the conversation with the Appellant on March 8, 2022 relating to the complaint. During the conversation, according to the letter, "concerns were discussed regarding your reasons for termination" and more specifically "the concern you brought forward was in regard to Covid-19 testing that the employer had implemented in the workplace".

[42] The Appellant in describing the conversation in her notice of appeal alludes to repeated references by the two officers to "work task" and says, "it was disclosed to me that the reason they felt my claim did not fall within OH&S legislation was because my safety concern was not considered a 'work task'."

[43] The letter of March 9, 2022 then sets out the determination Officer Tallmadge that "the information you provided OHS would not fall within the scope of the Occupational Health and Safety Legislation" or, stated another way, "the concerns noted do not fit within the scope of the Occupational Health and Safety Legislation".

[44] To put a finer point on it, there was a finding that the concerns did not pertain to a refusal "to perform any particular act or series of acts at a place of employment". After careful consideration, I agree with this finding. On the information provided by the Appellant, a threshold requirement was not satisfied and the process under section 3-31 of the Act could not be engaged.

[45] In the notice of appeal, the Appellant takes issue with statements in Officer Tallmadge's March 9, 2022 letter about not falling or fitting with the scope of Occupational Health and Safety Legislation. The Appellant points out that the COVID-19 regulations themselves specify that the measures an employer may require with respect to vaccination or testing are "for the purposes of clause 3-8(a) of the Act" and that that clause, in turn, requires an employer to ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers.

[46] This line of argument holds out initial attraction. However, as reviewed above, the statements about not falling or fitting within the legislation were made in relation to the information provided and concerns noted by the Appellant, which information and concerns were in connection with an attempt by the Appellant to engage section 3-31 of the Act and related provisions housed in Division 5 of Part III of the Act.

[47] Under the Respondent's COVID-19 vaccination policy as initially issued there were two options for compliance. The first was verification of full vaccination. The second was to provide twice weekly proof of a negative PCR test. The Appellant does not suggest that either of those options, with vaccination or testing administered at the location of an authorized provider, would involve the performance by a worker of an act or series of acts at a place of employment.

[48] The vaccination and PCR testing options remained open to the Appellant, but under a subsequently introduced third option, an employee, rather than proceeding with vaccination or PCR testing, could opt for antigen testing three times per week.

[49] Antigen testing on two of the three occasions would occur at one of the employer's locations. This appears to be the foundation for the Appellant's position. In that regard, the discriminatory action complaint states:

> It's important to note that the proposal, while similar in approach to SHO, is different as all SHA testing is performed outside the workplace. As per my proposal, the "*act/series of acts*"[1] of testing on Sunday was to be performed independently at home, and Tuesday and Thursday testing to be performed by CEO Cam Broten himself in the workplace/"*place of employment*"[1] and those test kits would be provided by him, falling within the guiding language as set forth in section 3.31 of the SEA.
>
> [Emphasis in original; footnotes refer to the *Saskatchewan Employment Act* generally]

The interpretation is further set out in the notice of appeal as follows:

> As with all legislation/regulations/acts, there is power in words and definitions. "*Work task*" is not language used within this section of the SEA that I have contested. The correct words used are "*any particular act or series of acts at a place of employment.*" While "work task" may be a term the aforementioned officer(s) like to use, we must acknowledge the language as written. As such, it is imperative to acknowledge the language of this section of the SEA which broadly recognizes/defines ***"work"*** as ***"ANY particular act or series of acts at a place of employment."***
>
> **This definition within the SEA by far and large clearly and broadly encompasses ANY act or series of acts. This would include the act of Covid 19 testing as it was to be done at my place of employment during working hours, falling within the realm by definition of my working conditions.**

[Emphasis in original]

[50] Even if the third option had been the only option, and focusing just on it, the policy in my view would not be one in which the Appellant, in connection with antigen testing, was required to perform an act or series of acts at a place of employment within the meaning of section 3-31.

[51] Section 2-10 of *The Legislation Act*, S.S. 2019, c. L-10.2 speaks to the interpretation of enactments as follows:

> 2-10(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.
>
> (2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

Commenting on the above provision and its codification of the modern approach to statutory interpretation, the Saskatchewan Court of Appeal in *Koroluk v KPMG Inc.*, 2022 SKCSA 57 stated:

> [48] ... While the modern approach is often invoked to argue for a broad interpretation of a statute, a key feature of it is that the words of a statute must be interpreted harmoniously with the statute in which they appear, that is, in a fashion that is consistent with the broader statutory scheme.

[52] In the present case, reading section 3-31 of the Act in context and, in particular, harmoniously with the scheme of the set of provisions contained in Division 5 of Part III of the Act (sections 3-31 to 3-37), an important consideration is that under section 3-34, an employer, in the case of a refusal under section 3-31, may not request or assign another worker to perform the act or series of acts. Repeated here for convenience of reference:

> 3-34 If a worker has refused to perform an act or series of acts pursuant to section 3-31, the employer shall not request or assign another worker to perform that act or series of acts unless that worker has been advised by the employer, in writing, of ...

From this it is apparent that a work task is contemplated – something that could be assigned to another worker.

[53] I also note that under section 3-31 of the Act, the "place of employment" at which a worker may refuse the performance of an act or series of acts is, by definition, a plant (itself defined) in or on which "workers or self-employed persons work, usually work or have worked". The section thus contemplates that the act or series of acts will be associated with the work carried on at the location.

[54] The Respondent, in supporting the determination of the Occupational Health Officer in the present case, relies on the decision of the adjudicator in *Pintiliciuc v. SaskEnergy Incorporated*, LRB File No. 156-15, September 26, 2016 (Wallace). There, the adjudicator in dealing with certain of the various claims made by the complainant, stated at paragraphs 51 and 52:

> 51. I do not accept, however, that when Pintiliciuc refused to attend the medical appointment on May 12, 2014 or to communicate with SaskEnergy, he was participating in any of the activities

listed in s.3-35 of the *Act*. Pintiliciuc is essentially claiming he was refusing dangerous work when he refused to go to the appointment. In his arguments, Pintiliciuc sometimes claims it was dangerous because it required him to travel and sometimes claims it was dangerous because the medical examination might aggravate his condition. S. 3-31(1) of the *Act* says:

> 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 worker's 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.

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. The section was not intended to cover a situation where the employer directs the employee to undergo an IME under the Collective Agreement. That is a labour relations issue.

[Emphasis added]

[55] Similarly, in my view, the legislature in section 3-31 of the Act had in mind a refusal to perform work (or work tasks in more specific terms) that a worker has reasonable grounds to believe is unusually dangerous. An overall reading of the legislation leads to this conclusion. Section 3-31 is not available to address other employment-related issues.

[56] In the present case, the vaccination policy implemented by the Respondent, in accordance with the Covid-19 regulations, formed part of the employment relationship between the parties. Under the provisions of the policy, employees were required, within the scope of the terms or conditions of their employment, to vaccinate or test. Compliance with the policy did not equate, however, to the performance of an act or series of acts at a place of employment as contemplated by section 3-31 of the Act.

[57] I have also considered whether the discriminatory action complaint and related materials disclose any other protected activity on the part of the Appellant (specifically, the activity of seeking the enforcement of Part III of the Act or the regulations under that Part) that the Occupational Health Officers should have investigated.

[58] In that regard, the Appellant in requesting a formal investigation of the product in her email of January 7, 2022 stated that she was relying on an employee's right to know, right to participate, and right to refuse. With respect to the right to refuse, the Appellant paraphrased portions of sections 3-31 and 3-32 of the Act concerning sufficient steps to satisfy the worker otherwise and an investigation by an occupational health committee or occupational health officer. Quoting the definition of "discriminatory action", the Appellant stated that during the refusal the worker is protected from discriminatory action.

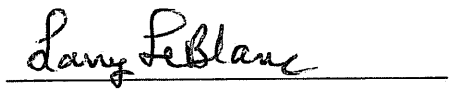
[59] Otherwise, the Appellant's only mention in the email of any provision in Part III of the Act or regulations thereunder was to one of the sections (s. 3-49) within the set of provisions of the Act concerning a workplace hazardous information system. That section requires an employer to provide specified information respecting a "hazardous product" (a specifically defined term) in the place of employment controlled by the employer to a physician or registered nurse who requests the information for certain purposes. The email does not explain how the provision would be applicable nor does it assert that the employer was in contravention.

[60] In my view, the Appellant's request for an investigation is properly characterized as referring to the taking of "sufficient steps", or an investigation, as contemplated by sections 3-31 or 3-32 of the Act, and thus tied to language in the initial portion of section 3-31 including the requirement of a refusal "to perform any particular act or series of acts at a place of employment". The assertions in the complaint and related materials do not disclose that the Appellant by insisting on an investigation as requested was seeking the enforcement of a provision of Part III of the Act or regulations thereunder as would fall within the prohibition in section 3-35(b)(i) of the Act.

V. ORDER

[61] Pursuant to section 4-6(1) of the Act, the appeal is dismissed.

Dated this 7th day of November, 2023.



Larry B. LeBlanc, K.C., Adjudicator

APPENDIX "A" – LIST OF EXHIBITS

- Exhibit 1 – Appeal File from Ministry
    1. March 25, 2022 – Cover email from Appellant, Tansley Daoust, to Bryan Lloyd, Executive Director of OHS Division, attaching four documents:
        a. March 22, 2022 – Letter from Tansley Daoust to Bryan Lloyd (written Notice of Appeal)
        b. January 14, 2022 – Letter from Tansley Daoust to OHS Branch
        c. January 25, 2022 – Typed pages headed up "discriminatory action questionnaire" (submitted February 3, 2022)
        d. March 9, 2022 – Letter from OHS Officer, Shawn Tallmadge, to Tansely Daoust
    2. March 9, 2022 – Letter from Shawn Tallmadge to Tansley Daoust (also item 1(d) above)
    3. March 8, 2022 – Phone Contact Information Sheet with notes prepared by OHS Officer S. Moorgen of discussion with Tansley Daoust
    4. March 8, 2022 – Note prepared by Shawn Tallmadge of discussion with Tansley Daoust
    5. February 23, 2022 – Letter from Shawn Tallmadge to Tansley Daoust
    6. February 4, 2022 – Email exchange between Tansley Daoust and Shawn Tallmadge
    7. January 27, 2022 – Completed form of questionnaire signed by Tansely Daoust (submitted February 3, 2022)
    8. January 25, 2022 – Typed attachment headed up "Discriminatory Action Questionaire" (also item 1(c) above)
    9. January 6, 2022 – Two copies of email from Cam Broten to unidentified recipients (date not shown but with note on one copy confirming email sent on January 6)
    10. January 7, 2022 – Email from Tansley Daoust to Cam Broten
    11. January 12, 2022 – Letter of termination
    12. January 13, 2022 – Record of Employment
    13. January 14, 2022 – Letter from Tansley Daoust to OHS Division (also item 1(b) above)
- Exhibit 2 – Email dated July 26, 2023 from Tansley Daoust with quick links to references contained in paper copy of item 10 above
- Exhibit 3 – Associated Radiologists LLP, Mandatory Covid 19 Vaccination Policy, Effective October 18, 2021 (referred to in item 9 above)
- Exhibit 4 – Saskatchewan Health Authority Handbook, Monitored Testing Program, For SHA Team Members, 2021 (referred to in item 9 above)
- Exhibit 5 – October 25, 2001 letter from Tansley Daoust and two other employees to Kelly (referred to in item 9 above)