

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

BETWEEN:

WABOSHI NAKIHIMBA



APPELLANT

– and –

VICTORIA'S TAVERN INC.

RESPONDENT

ADJUDICATOR: **LESLIE BELLOC-PINDER, K.C.**

COUNSEL FOR THE APPELLANT: **SELF-REPRESENTED**

COUNSEL FOR THE RESPONDENT: **JANA M. LINNER, K.C. and JIANNA G. RIEDER**

DATE OF DECISION: **JANUARY 23, 2024**

DECISION

Overview

[1] This matter concerns an appeal of a decision made by two Occupational Health and Safety (OHS) Officers not to investigate a complaint of discriminatory action brought by Waboshi Nakihimba (Appellant/Employee) against Victoria's Tavern Inc. (Respondent/Employer). The complaint was initiated in April 2023 and the officers' decision was made in May. I was appointed in July to adjudicate the appeal pursuant to s. 3-53 and 3-54 of *The Saskatchewan Employment Act* (the *Act*).¹

[2] Several pre-hearing conference calls were held to discuss how the appeal would proceed and to afford the parties time to consider their positions. In November, I determined that a paper hearing would be the most appropriate way to determine this appeal. The Appellant filed his first Brief on December 4 and the Respondent filed its Brief on December 22. The Appellant provided a Reply to the Respondent's material on January 5, 2024, at which time I considered submissions closed. It was not necessary for me to receive oral submissions or any other information from the parties.

[3] For the reasons set out below, this appeal is allowed and the Appellant's complaint shall be remitted back to the OHS office for redetermination.

Background

[4] The Appellant completed a Discriminatory Action Questionnaire provided by the OHS office in which he described several unwelcome, upsetting, and potentially unsafe experiences he had while working in the kitchen of Victoria's Tavern in Regina. The Appellant filed the complaint because he believed his treatment at work and the subsequent termination of his employment constituted discriminatory actions against him.

[5] Two OHS officers reviewed the Questionnaire and interviewed the Appellant. They decided not to undertake an investigation or even advise the Respondent that the complaint had been made because they believed and relied upon the Appellant's statement(s) that he did not

¹ *The Saskatchewan Employment Act*, SS 2023, c S-13.1

wish to work at Victoria's Taven any longer. As such, the officers determined the Appellant was not seeking to be reinstated to his former position. For this reason, they decided his complaint could neither be investigated nor remedied within the legislative regime they are mandated to enforce.

Analysis

[6] The relevant sections at issue in this appeal are s. 3-35 of the *Act* which describes the kinds of discriminatory actions taken by an employer against an employee that could give rise to sanctions. If an investigation establishes an employer has taken one or more of these specified discriminatory actions, then officers are required to serve a Notice of Contravention upon the employer in accordance with s. 3-36(2). This sub-section lists the remedies a notice shall contain and reads as follows:

(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) 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.

[7] The Appellant was incensed that his complaint was dispatched without an investigation, especially because the *Act* expressly prohibits employers from taking "discriminatory action" against workers, which includes any actions which adversely affect a worker's terms or conditions of employment, including termination. The Appellant alleged he had been mistreated at work and, after he complained, the mistreatment escalated, and his employment was eventually terminated. He expected that, even if his complaint was not ultimately sustained, the officers would investigate his concerns and launch an investigation by speaking to his employer and co-workers.

[8] Even though this appeal focuses solely on the actions of the OHS officers, the OHS Director (through counsel) declined to provide representations. Evidence was not tendered to explain the rationale for the OHS officers' practice or demonstrate whether there is a policy and

procedures document which guides their decision making in circumstances such as the ones the Appellant presented. That said, the statute itself establishes the complaint, investigation, and remedy process and jurisprudence interpreting the scope and effect of the sections at issue in this case is available.

[9] Counsel for the Respondent filed a comprehensive Brief of Law accompanied by a Book of Authorities which I carefully reviewed. The Appellant filed two written Briefs, which contain not only legal arguments but also other statements about the substance of his complaint and the remedies he hopes for. I consider these latter statements evidence in this appeal, as are the statements the Appellant wrote in his Questionnaire and spoke during his interview with the officers.

[10] Sub-section 3-36(2)(b) has been considered in some decisions filed by the Respondent in this matter. In *Colin Brooks-Prescott v Northern Lights School Division #113*², Adjudicator Hildebrandt (as she then was) held that OHS officers have no jurisdiction to consider a discriminatory action complaint if the employee is seeking relief outside of what is authorized in s. 3-36(2). In that case, the Complainant confirmed he did not want to return to the workplace and, like the instant case, the OHS officers closed his file.

[11] On the other hand, Adjudicator Wallace in *Cara Banks v Saskatchewan Federation of Labour*³, held that an OHS officer does not lose jurisdiction to investigate a discriminatory action complaint even if the Complainant is not seeking reinstatement as a remedy.

[12] There is some merit to Respondent's submission that Adjudicator Wallace's interpretation of s. 3-36(2) does not adequately recognize the context within which the impugned sections exist in the *Act*. There is no doubt that one of the overarching objectives of the legislation is to protect workers who are in an ongoing employment relationship. As a result, the existence and continuation of that relationship girds the statutory remedies. That said, the *Act's* scope is broadly remedial, which is difficult to reconcile with such a restrictive practice as providing access to an investigation only in cases where reinstatement is sought, without exception.

² *Colin Brooks-Prescott v Northern Lights School Division #113*, LRB File No. 091-16.

³ *Cara Banks v Saskatchewan Federation of Labour*, (unreported; 31 March, 2015).

[13] These divergent cases illustrate an interesting legal question, but I need not resolve it here because this appeal turns on facts rather than statutory interpretation.

[14] It is understandable that the OHS officers who interviewed the Appellant (and read his Questionnaire) concluded, as they did, that he was unwilling to return to the workplace. The OHS officers may have been correct to close the Appellant's file based on a lack of jurisdiction given the information they received from the Appellant on April 28 and May 10, 2023. However, the Appellant has provided additional, clarifying, information since that time which also warrants consideration.

[15] The Appellant's Brief and Reply state that he seeks the remedies set out in s. 3-58(2) of the *Act*. Substantively, these remedies are like those listed in s. 3-36(2). In his initial Brief, the Appellant submitted that he "explicitly stated in writing that he was willing to go back to work" albeit on a condition that could not reasonably be satisfied (i.e.) an officer accompanying him. In his Reply, the Appellant added additional information including that some of the officers' notes from their interview with him are illegible, that he believes the officers' notes do not accurately reflect what he told them, and that he said he "didn't want to return to work without any remedies. I didn't say that I didn't want to return to work in an absolute sense."

[16] While he has obtained some informal pro-bono legal advice, the Appellant has made a determined effort to represent himself in this proceeding. In doing so, the Appellant has periodically communicated in a blunt and forceful way. He has expressed his frustration with the process and people he believes have presented obstacles for him. For example, while I was endeavoring to set this matter for a pre-hearing conference call and arrange other procedural steps, the Appellant used intemperate language and unfairly chastised the Respondent's counsel. I do not mention this to shame or criticize the Appellant, but to support my observation that the way the Appellant communicates sometimes undermines his objectives and interests.

[17] The principles of natural justice and rules relating to procedural fairness require that I take the Appellant's circumstances into account, which include his approach and disposition, and that he is unrepresented in this matter. I do not quarrel with the OHS officers' interpretation of the Appellant's words and position regarding whether he was seeking reinstatement at Victoria's

Tavern in April and May 2023. However, fairness requires that I also consider the Appellant's words, desires, and statement of his expectations since then.

[18] The Respondent's Brief acknowledges that he does seek reinstatement. The Appellant argues that he has always been willing to go back to work, but the Respondent disagrees. The Respondent submits that the Appellant's interest in reinstatement is a recent development, prompted by his desire to solve the jurisdictional problem he may have inadvertently created due to his Questionnaire and interview answers.

[19] The Respondent may be skeptical about the timing of the Appellant's assertions, but I am neither inclined nor required to make a finding regarding his motives. As it stands, the Appellant has presented evidence that he is open to all four remedies set out in s.3-36(2) should an OHS investigation result in a finding that discriminatory action was taken against him and a Notice of Contravention issued.

CONCLUSION

[20] I find that procedural fairness requires that the Appellant's complaint be remitted back to the OHS office for redetermination. It may be assigned to the same officers who dealt with the Appellant's complaint in 2023 or new officers may be assigned. There is new evidence for the OHS office to consider, given that the Appellant submits he is interested in reinstatement. As a result, the initial jurisdictional obstacle which stood in the way of investigating the Appellant's complaint has been addressed.

[21] This decision is not endorsement of the Appellant's choice of forum within which to raise his employment concerns, nor does it relate to the substance of the Appellant's complaint or the employer's potential response.

[22] I also find there is no evidence to support the Appellant's allegations that the two OHS officers who decided to close the Appellant's file were biased, prejudiced, or negligent. This latter ground of appeal is entirely without merit.

[23] The appeal is allowed and the Appellant's complaint shall be remitted back to the OHS office for redetermination.

A handwritten signature in black ink, appearing to read 'L. Belloc-Pinder', written in a cursive style.

Leslie Belloc-Pinder, K.C.
Adjudicator