ONTARIO LABOUR RELATIONS BOARD

0852-13-OH Peter Ljuboja, Applicant v. **The Aim Group Inc. and General Motors of Canada Limited**, Responding Parties.

BEFORE: Jesse M. Nyman, Vice-Chair.

SUBMISSIONS: Wade Poziomka for the applicant; David Bannon for the responding party, General Motors of Canada Limited and Alan Riddell for the responding party, The Aim Group Inc.

DECISION OF THE BOARD: November 22, 2013

1. In this matter the applicant, Mr. Peter Ljuboja ("Mr. Ljuboja") alleges that the responding parties, The Aim Group Inc. ("AIM") and General Motors of Canada Limited ("GM") violated subsection 50(1) of the *Occupational Health and Safety Act* R.S.O. 1990, c O.1 as amended (the "Act") when Mr. Ljuboja's employment was terminated at the end of December, 2012.

2. AIM and GM deny they have violated the Act or that Mr. Ljuboja's termination was in any way related to the exercise of rights under the Act. Without prejudice to these positions, both GM and AIM submit the application should be dismissed without a hearing because it fails to plead a *prima facie* case and/or the Board lacks the jurisdiction to adjudicate the application.

3. The Registrar referred this file to me to determine the preliminary issues raised by AIM and GM. By decision dated August 22, 2013 the Board directed the parties to file written submissions with respect to the preliminary issues raised by the responding parties. The Board also advised the parties that it appeared the hearing with respect to the preliminary issues could be held in writing pursuant to Rule 38.4 of the Board's Rules of Procedure. The parties filed detailed and comprehensive submissions and no party suggested that the hearing on the preliminary issues could not be conducted in writing.

4. The Board concludes that this is not an appropriate application to dismiss for failing to plead a *prima facie* case and therefore it ought to proceed to consultation. The Board's reasons are as follows.

ASSUMED FACTS

5. For the purpose of this preliminary motion the Board has presumed that all of the facts alleged by Mr. Ljuboja are true and provable. The Board has not had regard to facts that are alleged in the responses filed by the parties. The facts below are therefore

just that, unproven allegations that are presumed to be true solely for the purpose of this preliminary determination. Both AIM and GM have denied many of these allegations and have pleaded detailed additional facts in response to the application.

6. Mr. Ljuboja asserts he was employed by AIM and was placed in a managerial position at a GM plant pursuant to a contract between AIM and GM. He was employed through that arrangement under a series of fixed term contracts. At some point in the weeks prior to his termination, Mr. Mario DiFelice, an employee who reported to Mr. Ljuboja, was injured in a non-work related accident. Mr. DiFelice returned to work on modified duties which permitted him, at least initially, to perform his normal duties on the assembly line for four hours of his regular eight hour shift.

7. Mr. Ljuboja alleges that once Mr. DiFelice had completed his four hours of work, Mr. DiFelice stopped working on the line and Mr. Nelson Graham, an employee whose responsibilities included performing stocking functions and covering washroom relief for employees working on the line, was assigned to fill Mr. DiFelice's position. While not specifically alleged in the application, the inference from what is alleged is that this did not leave any person assigned specifically to cover washroom breaks. It appears that, as a result, Mr. Ljuboja permitted employees working on the line to take washroom breaks without having any person available to relieve them.

8. Mr. Ljuboja alleges that following a shift where Mr. Graham replaced Mr. DiFelice, Mr. Vince Diliello, one of Mr. Ljuboja's two direct superiors, conducted an end of shift meeting where he praised Mr. Ljuboja's shift for exceeding the shift production quota and reducing defects. In his application Mr. Ljuboja alleges that, Mr. Jamie Rice, Mr. Ljuboja's other direct superior, entered the meeting and said "I'm so fucking hot right now, I don't want to talk to anyone" and that nothing bothered Mr. Rice more than Mr. Graham complaining about his work team being short and then providing washroom relief.

9. Mr. Ljuboja alleges that he responded to Mr. Rice's comments by saying that he had spoken to human resources about eliminating or restricting washroom breaks but had been told to grant washroom breaks as required. Mr. Ljuboja asserts that Mr. Rice responded by screaming and swearing at Mr. Ljuboja. Mr. Ljuboja alleged in his submissions that Mr. Rice told him to "shut the fuck up", " if you don't like your fucking job then get the fuck out of here" and "manage your fucking business". There is no allegation that Mr. Rice threatened any physical force against Mr. Ljuboja or any other person or exercised or attempted to exercise any physical force against any person. Mr. Ljuboja alleges however that he feared for his safety and for the safety of the work environment due to Mr. Rice's comments.

10. Mr. Ljuboja alleges that the next day he was summoned into a meeting with Mr. Rice and Mr. Diliello where he was accused of having an attitude problem and "causing the fight".

11. Mr. Ljuboja alleges he reported the incident to human resources at GM and that he told human resources he feared for his safety and the safety of others in the

workplace. Mr. Ljuboja alleges that Mr. Matthew Yorke, GM's Human Resources Manager assured Mr. Ljuboja that reporting the incident would not result in a reprisal against him. Mr. Ljuboja alleges that thereafter he filed a formal written complaint to human resources.

12. Mr. Ljuboja alleges that Mr. Rice apologized to him a couple of days later and that he was assured the matter was concluded.

13. Mr. Ljuboja alleges that his contract was up for renewal shortly after the incident but that two weeks prior to the contract renewal date he was informed that he was being terminated. He was not permitted to complete the two weeks remaining on his contract. Mr. Ljuboja alleges that Mr. Todd Bailey, a representative of AIM, advised him in writing that he was not terminated as a result of performance issues.

14. Mr. Ljuboja alleges that he was terminated, at least in part, as a result of making a complaint about Mr. Rice's conduct and that this violates subsection 50(1) of the Act. In particular it is alleged that he made a complaint of workplace violence and workplace harassment under the Act and was terminated as a result. Mr. Ljuboja asserts this violates subsection 50(1) of the Act which prohibits reprisals by employers and persons acting on behalf of employers against workers for, *inter alia*, exercising rights under the Act.

POSITIONS OF THE PARTIES

15. AIM and GM assert the Board is without jurisdiction to hear this complaint and/or that the application fails to plead a *prima facie* case. They rely on *Conforti v. Investia Financial Services Inc.*, 2011 CanLII 60897 ("*Investia*"), *Walters v. PPL Aquatic, Fitness and Spa Group Inc.*, 2012 CanLII 77 ("*PPL*"), *Harper v. Ludlow Technical Products Canada Ltd.*, 2011 CanLII 73172 ("*Ludlow*"), *Barton v. Commissionaires (Great Lakes)*, 2011 CanLII 18985 ("*Barton*"), *Nunes v. AGF Albrecht*, 2012 CanLII 67903 ("*AGF*"), *Keeprite Refrigeration (National Refrigeration Air Conditioning Canada Corp)*, [2012] O.L.R.D. No. 220 ("*Keeprite*") and *Simcoe County District School Board*, [2012] O.L.R.D. No. 39 ("*Simcoe*"). They submit that these cases stand for the proposition that the Board has no jurisdiction under the Act to hear a complaint that a worker was terminated for filing a harassment complaint with their employer. They submit that the facts pleaded by Mr. Ljuboja therefore do not make out a case for relief under the Act.

16. Mr. Ljuboja submits that a worker has a right under the Act to a harassment free workplace and that workplace harassment can cause psychological harm to workers and thus failing to take precautions to prevent workplace harassment is a violation of section 25(2)(h) of the Act. Section 25(2)(h) is a catch-all provision requiring employers to take every precaution reasonable in the circumstances for the protection of the worker. Mr. Ljuboja argues that the pleadings make out a case of workplace violence and harassment and that the complaint to human resources was a report of unsafe working conditions and workplace violence.

17. With respect to the case law relied upon by the responding parties, Mr. Ljuboja asserts there are conflicting decisions on whether workplace harassment is contrary to the Act. Mr. Ljuboja relies on *Murphy v. The Carpenters' District Council of Ontario*, 2011 CanLII 83015 ("*Murphy*"), *Kazenel v. Citi Cards Canada Inc.*, 2012 CanLII 9582 and *Ashworth v. Boston Pizza*, 2013 CanLII 20917 ("*Kazenel*") which he asserts either expressly or impliedly stand for the proposition that whether the Board has jurisdiction over an allegation of reprisal for filing a harassment complaint is an issue that has not been decisively determined. Mr. Ljuboja argues the reasoning in *Investia*, *supra* and *Ludlow*, *supra* is *obiter dicta* and is flawed.

18. Mr. Ljuboja made detailed submissions as to what he argues is the correct interpretation of the Act. In particular, he argues that it is untenable to interpret the Act as requiring employers to implement a policy permitting workers to make harassment complaints and detailing how the employer will respond to such complaints but also as allowing employers to engage in reprisals for making such complaints.

19. In reply, AIM and GM deny that there is any factual allegation that supports a finding of workplace violence and that the only issue in this case is an allegation of workplace harassment. The responding parties argue that there is no conflicting jurisprudence as to whether the Board has jurisdiction over alleged reprisals for harassment complaints. They point out that Mr. Ljuboja has been unable to produce a case which stands for the proposition that the Board has jurisdiction over an alleged reprisal for filing a harassment complaint. They also argue forcefully that the reasoning in *Investia* is sound.

DECISION

20. When the Board will dismiss an application for failure to plead a *prima facie* case is well established. In *Murphy*, *supra*, the Board, at paragraph 6, put it this way:

> In assessing whether the application should be dismissed for failing to raise a *prima facie* case, the Board must accept the allegations made in the application as true and provable and determine whether there are sufficient facts pleaded, when taken together with the reverse onus under section 50(5) of the Act, to establish a *prima facie* case of a violation of section 50(1). As the Board has repeatedly indicated, the test that a responding party must meet in order to persuade the Board to dismiss an application on a *prima facie* basis is a strict one, and the discretion to do so should only be exercised in the clearest of cases. An applicant should not be deprived of the opportunity to have a hearing on the merits simply because the argument is novel or the circumstances giving rise to it are unusual. (*International Union of Bricklayers and Allied Craftworkers*, [1999] O.L.R.D. No. 1492)

I agree with and adopt this approach.

21. This case involves an allegation of reprisal pursuant to section 50 of the Act. The relevant portions of section 50 read:

> **50.** (1) No employer or person acting on behalf of an employer shall,
>
> (a) dismiss or threaten to dismiss a worker;
>
> (b) discipline or suspend or threaten to discipline or suspend a worker;
>
> (c) impose any penalty upon a worker; or
>
> (d) intimidate or coerce a worker,
>
> because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the Coroners Act.
>
> …
>
> (3) The Board may inquire into any complaint filed under subsection (2) or referral made under subsection (2.1) and section 96 of the *Labour Relations Act, 1995*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act
>
> …
>
> (5) On an inquiry by the Board into a complaint filed under subsection (2) or a referral made under subsection (2.1), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

22. In *Barton*, *supra*, the Board explained what is required to make out a violation of section 50 as follows:

> 20. The combined effect of these provisions is that, for the Board to find that there was a reprisal in this matter, it must be satisfied that Mr. Barton was engaged in the exercise of his statutory rights, and that the exercise of those rights was a motivating factor, no matter how small, for Commissionaires' decision to terminate Mr. Barton's employment. Even if the employer has what would otherwise be legitimate reasons for termination, if one factor in the decision is the applicant having exercised his rights under the OHSA, the termination will be found to be a violation of section 50 of the OHSA (see for example, *MLG Enterprises Limited*, [1994] OLRB Rep. Nov. 1550).

…

> 22. In order to engage the reverse onus of s. 50, the application must fall within the parameters of the Act. At a minimum two conditions must be met: first some adverse impact (dismissal, discipline). Second that the reprisal was the result of seeking to enforce rights under the Act (see *E.C. King Contracting (a division of Miller Paving Ltd.)*, 2010 CanLII 8391 (ON L.R.B.).

23. The focus in this case is therefore on whether Mr. Ljuboja was complying with the Act, seeking to enforce the Act or giving evidence in a proceeding under the Act and whether he was penalized or retaliated against by his employer, or person acting on behalf of his employer, as a result. This requires the following elements:

a. alleged compliance with the Act, attempt to enforce the Act or testimony in a proceeding under the Act;

b. an alleged reprisal; and,

c. some basis for drawing a reasonable inference of a nexus between the two.

24. In this case there is a clear allegation of a reprisal, specifically the termination of Mr. Ljuboja's employment contract. It is not disputed by any of the responding parties that Mr. Ljuboja is no longer working at the GM plant. Where the parties join issue is with respect to whether the application makes out that the alleged reprisal was the result of Mr. Ljuboja complying with the Act or seeking to enforce some right under the Act. First, the responding parties (primarily for the purpose of this motion) assert that Mr. Ljuboja has not made an allegation of the exercise of some right under the Act. Second, the responding parties (primarily for the purpose of the merits of this application) assert that the reason Mr. Ljuboja is no longer working at the GM plant is entirely unrelated to his complaint about Mr. Rice's conduct.

25. Mr. Ljuboja's submits that he has raised allegations of workplace violence and workplace harassment. Part III.0.1 of the Act, Violence and Harassment ("Part III.0.1") are relatively new provisions of the Act that deal specifically with workplace harassment and workplace violence. Part III.0.1 reads:

> **32.0.1** (1) An employer shall,
>
> (a) prepare a policy with respect to workplace violence;
>
> (b) prepare a policy with respect to workplace harassment; and
>
> (c) review the policies as often as is necessary, but at least annually.

(2) The policies shall be in written form and shall be posted at a conspicuous place in the workplace.

(3) Subsection (2) does not apply if the number of workers regularly employed at the workplace is five or fewer, unless an inspector orders otherwise.

32.0.2 (1) An employer shall develop and maintain a program to implement the policy with respect to workplace violence required under clause 32.0.1(1)(a).

(2) Without limiting the generality of subsection (1), the program shall,

(a) include measures and procedures to control the risks identified in the assessment required under subsection 32.0.3(1) as likely to expose a worker to physical injury;

(b) include measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur;

(c) include measures and procedures for workers to report incidents of workplace violence to the employer or supervisor;

(d) set out how the employer will investigate and deal with incidents or complaints of workplace violence; and

(e) include any prescribed elements.

32.0.3 (1)An employer shall assess the risks of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work.

(2) The assessment shall take into account,

(a) circumstances that would be common to similar workplaces;

(b) circumstances specific to the workplace; and

(c) any other prescribed elements.

(3) An employer shall,

(a) advise the committee or a health and safety representative, if any, of the results of the assessment, and provide a copy if the assessment is in writing; and

(b) if there is no committee or health and safety representative, advise the workers of the results of the assessment and, if the assessment is in writing, provide copies on request or advise the workers how to obtain copies.

(4) An employer shall reassess the risks of workplace violence as often as is necessary to ensure that the related policy under clause 32.0.1(1)(a) and the related program under subsection 32.0.2(1) continue to protect workers from workplace violence.

(5) Subsection (3) also applies with respect to the results of the reassessment.

32.0.4 If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker.

32.0.5 (1) For greater certainty, the employer duties set out in section 25, the supervisor duties set out in section 27, and the worker duties set out in section 28 apply, as appropriate, with respect to workplace violence.

(2) An employer shall provide a worker with,

(a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace violence; and

(b) any other prescribed information or instruction.

(3) An employer's duty to provide information to a worker under clause 25(2)(a) and a supervisor's duty to advise a worker under clause 27(2)(a) include the duty to provide information, including personal information, related to a risk of workplace violence from a person with a history of violent behaviour if,

(a) the worker can be expected to encounter that person in the course of his or her work; and

(b) the risk of workplace violence is likely to expose the worker to physical injury.

(4) No employer or supervisor shall disclose more personal information in the circumstances described in subsection (3) than is reasonably necessary to protect the worker from physical injury.

> **32.0.6** (1) An employer shall develop and maintain a program to implement the policy with respect to workplace harassment required under clause 32.0.1(1)(b).
>
> (2) Without limiting the generality of subsection (1), the program shall,
>
> (a) include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;
>
> (b) set out how the employer will investigate and deal with incidents and complaints of workplace harassment; and
>
> (c) include any prescribed elements.
>
> **32.0.7** An employer shall provide a worker with,
>
> (a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment; and
>
> (b) any other prescribed information.

26. Workplace harassment and workplace violence are defined in section 1 of the Act as follows:

> "workplace harassment" means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.
>
> "workplace violence" means,
>
> (a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
>
> (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
>
> (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

27. While Mr. Ljuboja argues that his complaint raises allegations of workplace violence, the Board finds that they do not. Workplace violence is defined in section 1 of the Act. In order to meet that definition there must be actual physical force, an attempt to exercise physical force or a statement or behaviour that it is reasonable for a worker to

interpret as a threat to exercise physical force. Nothing that has been alleged by Mr. Ljuboja meets this definition. There is no allegation of any physical force or attempted physical force. Nor are the allegations concerning Mr. Rice's conduct objectively capable of being interpreted as a threat to use physical force. While they may have been unwelcome, rude, belittling or unprofessional, Mr. Rice's alleged comments and conduct do not amount to any reasonably perceived threat of physical force.

28. The resolution of the instant motion therefore turns specifically on whether an employer has any obligation under the Act to allow a worker to report incidents of workplace harassment. Put in slightly different terms, the issue for the Board is whether a worker who is making a complaint of workplace harassment to his or her employer is seeking enforcement of the Act or acting in compliance with the Act.

29. The parties differ significantly on whether the Board has determined that there is no jurisdiction to inquire into alleged reprisals against workers for making harassment complaints under the program that employers must develop and maintain to implement the workplace harassment policy and that must include measures and procedures for making, investigating and dealing with harassment complaints pursuant to section 32.0.1 of the Act. The responding parties rely heavily on *Investia*, *supra*, and submit that in that case the Board determined that there is no obligation on employers to allow workers to make harassment complaints under the Act. If there is in fact no such obligation, then Mr. Ljuboja's termination was unconnected to the exercise of rights under the Act or, more specifically, was unconnected to complying with or seeking the enforcement of the Act. If there is such an obligation, Mr. Ljuboja may be successful if all of the other elements of his claim can be established and the responding parties cannot establish that his termination was unconnected to his workplace harassment complaint.

30. It is important therefore to clarify what the Board said in *Investia*, *supra*. The relevant paragraphs of that decision are as follows:

> 9. I turn next to the issues which caused me to issue the May 19, 2011 decision: whether the application discloses a breach of the OHSA on its face and, if it does, whether the Board should inquire into the application.
>
> 10. With respect to the first issue, it is not at all clear that the conduct complained of here – being discharged for making a harassment complaint – is a violation of the OHSA. In this regard, the Board must find its jurisdiction with respect to an application in the legislation, in this case the OHSA. The Board's authority to deal with a matter under s.50 of the OHSA arises when a worker complains that he or she has been subject to dismissal or discipline, threat of dismissal or discipline, intimidated or threatened or coerced by employer's because the worker has "acted in compliance with the Act"; when a worker has given evidence, or when a worker "has sought the enforcement of the Act or regulations". The Board cannot take jurisdiction over something unless the OHSA or another piece of legislation says it can. Section 50 of the OHSA tells the Board when

it can take jurisdiction over health and safety reprisal complaints. There are three bases upon which the Board can take jurisdiction under section 50 of the OHSA: - when a worker has "acted in compliance with the Act"; when a worker has "given evidence"; or when a worker "has sought the enforcement" of the Act or the regulations. In my view, the latter basis is the only one that applies in the "typical" harassment complaint situation as in this case.

11. In this regard, section 32.0.1(b) of the OHSA requires an employer to create a policy with respect to workplace harassment. Sections 32.0.6 and 32.0.7 of the OHSA require an employer to develop and maintain a program to implement the policy with respect to workplace harassment, and to provide a worker with information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment. The Applicant makes no allegations that the Respondent has not fulfilled these obligations or that he was discharged for seeking to enforce these provisions of the OHSA.

12. The OHSA provides no further duties or obligations with respect to workplace harassment. Harassment and workplace violence provisions were only recently added to the OHSA. The language of the new amendments to the OHSA appears to specifically omit an obligation to prevent workplace harassment from further duties and obligations where new obligations were created with respect to workplace violence issues:

(a) Section 32.0.3, which addresses the requirement for a risk assessment in respect of workplace violence, states in subsection (4):

> "An employer shall reassess the risks of workplace violence as often as is necessary to ensure that the related policy under clause 32.0.1 (1) (a) and the related program under subsection 32.0.2 (1) continue to protect workers from workplace violence."

(b) Section 32.0.5(1) states: "For greater certainty, the employer duties set out in section 25, the supervisor duties set out in section 27, and the worker duties set out in section 28 apply, as appropriate, with respect to workplace violence."

(c) Section 43, which addresses the right of a worker to refuse unsafe work, states at subsection (3)(b.1): "A worker may refuse to work or do particular work where he or she has reason to believe that, (b. 1) workplace violence is likely to endanger himself or herself."

13. Therefore, it appears the OHSA only requires an employer to put a workplace harassment policy and program in place and to provide a worker with information and instruction as appropriate. The OHSA does not provide any further requirements and, in particular, does not provide that the duties under ss. 25, 27, and 28 apply with respect to workplace harassment. Further, the OHSA provides no specific rights to a worker with respect to workplace harassment.

14. To look at it another way, the OHSA specifically gives the Board the power to enquire into the situation where an employee is fired for complaining about a missing guard on a machine but does not specifically give the Board the power to enquire into the situation where an employee is fired for complaining about harassment. In the case of an employee who claims that the workplace is unsafe because a machine is lacking a guard, the employee is, when complaining, seeking to force the employer to comply with the statutory obligation to ensure protective devices as prescribed in the Act are provided (section 25(1)(a)) or take every precaution reasonable in the circumstances for the protection of a worker (section 25(2)(h)).

15. In the case of an employee who complains that he has been harassed, there is no provision in the OHSA that says an employer has an obligation to keep the workplace harassment free. The only obligation set out in the Act is that an employer have a policy for dealing with harassment complaints. The legislature could very easily have said an employer has an obligation to provide a harassment free workplace but it did not.

16. If the employer simply ignores its obligations and doesn't create a policy, and a worker asks the employer to do so, and the employer penalizes the worker, then that worker can apply to the Board under section 50 on the basis that he was seeking enforcement under the Act. He or she seeks enforcement of the Act by asking the employer to comply with its obligation. In response to that request, the employee was penalized. A similar argument can be made for the worker who points out to the employer that a specified portion of the statutory requirement has been omitted. If, for example, an employer's policy had no measures and procedures for workers to report incidents of workplace harassment to the employer, and an employee was fired by insisting that the policy be changed to accord with the Act, that person can apply under section 50 on the same basis.

17. What it appears the Board does not have the authority to do is to adjudicate upon the practical application of a policy that otherwise complies with the Act. If an individual complains under an employer's workplace harassment policy and doesn't like the way the employer handled the investigation (i.e. it didn't interview anyone), and then that person complains to the employer about its poor investigation and is fired, the Board appears not to have the authority under section 50 to deal with that situation. The discharge is not a

reprisal as defined under section 50, because the Act does not dictate how an employer will actually investigate a harassment complaint and protect a worker who complains about that practical task not being performed properly. The Act just does not give us the authority to deal with this situation.

18. The issue comes back to the rules of delegated statutory power. The Board only has the ability to adjudicate on matters that the Legislature, through the Act, tells us we have the authority to adjudicate upon and all powers which are practically necessary for the accomplishment of the statutory objective. Our authority to deal with reprisal complaints is set out in section 50 of the Act. With respect to the new harassment provisions, the Board's authority appears very limited. The Legislature could have very clearly opened up the Board's authority beyond what is there, but it chose not to. The Board has no power to decide otherwise. Individuals who find themselves in situations that the Board cannot remedy will usually have other options, via a grievance or a court action. But if for some reason they don't, the Board does not have the authority to create some free-standing jurisdiction in order to help them.

19. The history of harassment as a health and safety issue also supports this conclusion. Prior to Bill 168 (the Bill which brought the workplace violence and harassment sections into the OHSA), the Board frequently found that there was no protection in the OHSA for workplace harassment, or at least that the Board should not inquire into such complaints. (See *Meridian Magnesium* [1996] OLRB Rep. Nov/Dec 964, *Centro Donne Inc*. [1997] O.L.R.D. No. 309, and *Amdahl Canada 2000* CanLII 11966. *Ten Star Financial Services* 2009 CanLII 28174).

20. Given that history, in my view the Legislature would have been much more clear had it intended to make complaining about harassment a protected right under the Act. This is especially true given the fact that such an interpretation would likely significantly increase the Board's caseload.

21. *However, it is unnecessary for me to determine in this case whether the Board has jurisdiction over alleged reprisal for harassment complaints. That is because if the Board does have jurisdiction over this kind of complaint, the Board ought to carefully scrutinize applications at the outset. The risk is that the Board's resources will be overwhelmed by employee complaints arising out of routine disciplinary matters. This is just such a case. It is not a case the Board should exercise its discretion to inquire with* [*sic*] *having regard to s.50(3).*

[emphasis added]

31. The Board did not dismiss the application in *Investia, supra,* because it had no jurisdiction to inquire into the complaint, but rather on the basis that the applicant's termination was the result of his abusive and insubordinate behaviour, regardless of the fact that that behaviour may have been in the context of making a "complaint" to his employer. The Board therefore exercised its discretion to decline to inquire into the complaint. Given this, the Board's comments quoted above are, strictly speaking, *obiter dicta*. To this end, at paragraph 21, the Board expressly refrained from determining whether the Board has jurisdiction over reprisals for harassment complaints. Therefore, it cannot be said that the Board conclusively determined this issue. Having said this, and as elaborated below, I agree with much of the Board's reasoning in the passages quoted above and in *Investia, supra,* generally.

32. The resolution of instant issue turns largely on the interpretation of the Act. The general rule of statutory interpretation was set out by Iacobucci, J., in *Re Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837 (SCC), [1998], 1 S.C.R. 27 at p. 41, where quoting from Dreidger on Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at p. 87, he wrote:

> Today, there is only one principle or approach, namely, the words of 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 Parliament.

33. In *Blue Mountain Resorts Limited v. Ontario (Labour)*, 2013 ONCA 75 (CanLII) the Ontario Court of Appeal discussed the interpretation of the Act specifically and held, at paragraphs 24 and 25, as follows:

> [24] Public welfare legislation is often drafted in very broad, general terms, precisely because it is remedial and designed to promote public safety and to prevent harm in a wide variety of circumstances. For that reason, such legislation is to be interpreted liberally in a manner that will give effect to its broad purpose and objective: *R. v. Timminco Ltd*. 2001 CanLII 3494 (ON CA), (2001), 54 O.R. (3d) 21, [2001] O.J. No. 1443 (C.A.), at para. 22. [page328]
>
> [25] In *Ontario (Ministry of Labour) v. Hamilton (City)* 2002 CanLII 16893 (ON CA), (2002), 58 O.R. (3d) 37, [2002] O.J. No. 283 (C.A.), at para. 16, Sharpe J.A. reinforced that notion:
>
> > The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. *Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purpose and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided*.

[emphasis added]

The Court of Appeal went on to caution at paragraph 26, however, that:

> [26] This generous approach to the interpretation of public welfare statutes does not call for a limitless interpretation of their provisions, however.

34. I agree with reasoning in *Investia*, *supra*, that the Board must find its jurisdiction in the Act and that there are three grounds upon which the Board can take jurisdiction under section 50 of the Act: when a worker has "acted in compliance with the Act"; when a worker has "given evidence"; or, when a worker "has sought the enforcement" of the Act or the regulations and as a consequence of doing so has been subject to a reprisal.

35. I also agree that the Act does not provide workers with a right to a harassment free workplace. With the passage of Part III.0.1 the Legislature imposed substantial obligations on employers with respect to the prevention of workplace violence that do not exist with respect to workplace harassment. These include implementing measures and procedures to control the risk of workplace violence and summoning immediate assistance if workplace violence is even likely to occur (subsection 32.0.2(2)(a) and (b)); conducting a workplace violence risk assessment and subsequent reassessments (subsection 32.0.3); taking steps with respect to preventing domestic violence in the workplace (subsection 32.0.4); and, expressly clarifying that the employer duties in section 25 (including subsection 25(2)(h)), the supervisor duties in section 27 and the worker duties in section 28 all apply as appropriate with respect to workplace violence (subsection 32.0.5).

36. None of these obligations appear with respect to workplace harassment and nowhere in Part III.0.1 or elsewhere in the Act are employers explicitly obligated to provide a harassment free workplace, at least with respect to how broadly that term is defined in section 1 of the Act. Given the clear obligations the Legislature placed on employers with respect to workplace violence at the same time that the workplace harassment provisions were enacted, the omission of these obligations with respect to workplace harassment cannot be attributed to legislative oversight. Rather, the Legislature's omission of these obligations must have been deliberate.

37. What then are the obligations placed on employers with respect to workplace harassment? An employer must:

a. Prepare a policy about workplace harassment (section 32.0.1(b));

b. Review the policy annually (section 32.0.1(3));

c. Post a written copy of the policy in the workplace (section 32.0.1(2));

d. Develop and maintain a program to implement the policy (section 32.0.6(1)) that must:

   i. Ensure that the program includes measures and procedures for reporting incidents of workplace harassment to the employer or supervisor (section 32.0.6(2)(a));

   ii. Ensure that the program sets out how the employer will investigate and deal with incidents and complaints of workplace harassment (section 32.0.6(2)(b)); and,

e. Provide workers with information on the contents of the policy and the program (section 32.0.7(a) and (b)).

38. Reading these provisions as a whole, the obligation on employers with respect to workplace harassment is entirely procedural. There is an obligation on an employer to develop and implement an internal process for reporting, investigating and dealing with workplace harassment issues. There is, however, no obligation on an employer to provide any substantive result and thus no ability for a worker to insist on any particular outcome. Moreover, employers are provided with significant leeway in determining the process that they will adopt by which workers may make complaints and those complaints will be investigated and dealt with. There are in fact no specific procedural criteria set out in the Act that must be adopted by employers other than including measures and procedures for reporting incidents of harassment to the employer or supervisor and requiring the employer to set out how it will investigate and deal with incidents and complaints of workplace harassment. While the Legislature has authorized the prescription of other elements by regulation, no such regulation has yet come into being.

39. The wisdom of legislatively mandating a process with minimal explicit procedural requirements and no obligation with respect to outcomes is not an issue for the Board to comment on. Arguments for and against such an approach can easily be made. Given the wide spectrum of activity that is potentially captured by the definition of workplace harassment, not every complaint will likely justify the highest level of investigation or resolution. Add to this the wide range of workplaces and it would be both impractical and impossible to attempt to prescribe a "one size fits all" approach to investigating and resolving workplace harassment complaints.

40. With respect to outcomes, employers cannot reasonably be expected to ensure that their entire operation is run in a manner that avoids offending every individual's subjective sensibilities. While I need not determine the ultimate reaches of the term "workplace harassment" under the Act, it potentially captures a broad range of conduct. It therefore may simply be impossible to go further and provide an absolute prohibition on any conduct that could fall within that definition. The potential burden and implication for employers may be impossible to manage or meet.

41. On the other side, having imposed minimal explicit procedural requirements and no requirements regarding outcomes, some argue that the Legislature placed an unnecessary burden on employers and granted a hollow right to workers.

42. The Board's role however is not to critique the policy choices of the drafters but to interpret the language used within the established approaches to statutory construction. To this end, with respect to workplace harassment, the Legislature appears to have struck a middle ground, leaving it to employers to determine what to do about vexatious and unwelcome workplace conduct and how to investigate and address complaints about vexatious and unwelcome workplace conduct, while ensuring that workers have a mechanism available to them to bring forward concerns they may have about such workplace conduct.

43. Ensuring such a process exists serves a health and safety objective in that, at the very least, it provides a mechanism for harassment issues to be raised; issues which sometimes may, if left unresolved and unaddressed, potentially evolve into more harmful conduct. Two well-known examples of "harassment" that did not involve physical force but that led to or caused significant psychological and other harm are the workplace harassment at O.C. Transpo that ultimately led to the murder of four workers and the harassment suffered by the grievor at the hands of his supervisor detailed in *Toronto Transit Commission v. ATU* (2004), 132 L.A.C. (4th) 225. Ensuring workers have a procedure to bring forth complaints about such behaviour has a clear occupational health and safety purpose in that employers are put on notice of this type of behaviour and can take reasonable steps to deal with it before it escalates into tragic results. Moreover, being able to voice one's concerns can be cathartic in much the same way as an apology protected by the *Apology Act, 2009*, S.O. 2009, c. 3 can have value and was seen fit by the Legislature to be protected. Ultimately, while arguments can be made for and against this approach, it is the approach the Legislature has adopted and the one the Board must apply.

44. I therefore agree with the reasoning in *Investia*, *supra*, that if an employer refuses to create a workplace harassment policy and a worker complains and demands the employer create such a policy, subsection 50(1) of the Act prohibits the employer from penalizing or retaliating against that worker for making that complaint. In such a circumstance, the employer would not have complied with its obligation to create a policy to deal with workplace harassment and the worker would have been seeking the enforcement of the Act by requiring the employer to develop such a policy.

45. I also agree if the worker complains that the policy is not posted, that the policy does not contain measures and procedures for complaining, that the policy does not set out how the employer will investigate and deal with complaints of workplace harassment or that he or she was not given sufficient information on the policy, subsection 50(1) would likewise prohibit the employer from reprising against the worker. These are all clear obligations Part III.0.1 places on the employer and the employer cannot engage in a reprisal against a worker for seeking to have the Act enforced by having the employer comply with these obligations.

46. I likewise agree an application complaining about the method by which an employer investigated a complaint or the determination an employer made with respect to the outcome of a complaint is unlikely to be successful. This is because the Act places no obligations on employers with respect to substantive outcomes, nor does it prescribe any explicit method by which complaints will be investigated or determined other than requiring employers to "set out how" a complaint will be investigated and dealt with.

47. Notwithstanding the foregoing, the applicant argues that if an employer has an obligation to create and implement a policy that provides for a mechanism for workers to make harassment complaints and for employers to "investigate and deal" with such complaints, it must be that employers cannot penalize or retaliate against (in this case terminate) workers for making that complaint without completely undermining the creation and implementation of the policy. The applicant argues on this basis that the analysis in *Investia*, *supra*, goes too far and is flawed.

48. In paragraphs 14 and 15 of *Investia*, *supra*, the Board reasons that because the Act does not obligate employers to provide a harassment free workplace the Board has no jurisdiction or ability to inquire into an allegation that a worker was terminated because he or she made a harassment complaint to their employer. With the greatest respect, I accept the applicant's argument that this analysis is flawed because it fails to consider the distinction between, on the one hand, complaining that the employer has failed to provide a harassment free workplace and insisting on that substantive outcome and, on the other hand, complaining that the employer has failed to comply with its obligation to provide a policy through which workers may make complaints about workplace harassment. While employers are not obligated to provide the former, employers are obligated to provide the latter. It appears from the reasons in *Investia*, *supra*, that this argument was not made to the Board in that case and therefore was not considered as part of the Board's reasons.

49. Accepting, as I do, that the Act requires employers to have an internal process for addressing instances and complaints of workplace harassment, it would entirely undermine that process if an employer is free to terminate a worker because he or she brought forward a complaint of workplace harassment in compliance with that process. An interpretation of the Act that finds employers are obligated to create and maintain a policy by which workers may bring forward complaints of harassment but are nevertheless free to terminate, or otherwise penalize or retaliate against, any worker for having actually made a complaint under that policy is, in my view, untenable. To interpret the Act in this manner would be to strip the employer's obligation to have a program to implement their workplace harassment policy through which workers may make a complaint of any meaning. Surely the Legislature did not intend in subsection 32.06(2) to spell out the obligation on employers to include measures and procedures for workers to report incidents of harassment *at their own peril*? Surely the Legislature did not envision that, in requiring employers to describe how they will "deal with" complaints of workplace harassment in subsection 32.02(2)(b), employers would be free to terminate the complainant merely because he or she had the temerity to complain about a course of unwelcome and vexatious comment or conduct?

50. An interpretation that allows employers to penalize or retaliate against workers who make a workplace harassment complaint would entirely undermine the procedural mechanism that the Act creates through which harassment issues can be brought forward in the workplace. If workers can be terminated for making a complaint that the employer's legislatively imposed policy enables them to do, then only the most intrepid or foolish worker would ever complain. In practical terms, there would be no measure or procedure for making a complaint of harassment. Moreover, the occupational health and safety value, whatever it may be (and I have speculated above as to some of the possible values of requiring such a process), that caused the Legislature to impose this obligation on employers would be eviscerated.

51. The corollary to this is that a worker who makes a workplace harassment complaint to his or her employer is seeking the enforcement of the Act because the worker is seeking to have the employer comply with its obligation to enable the worker to make the complaint. Alternatively the worker is acting in compliance with the Act by accessing the statutorily prescribed mechanism by which they are able to bring forward complaints of workplace harassment to their employer. Either way, the worker is seeking enforcement of the Act or acting in compliance with the Act, thereby bringing them within the ambit of the protection of subsection 50(1) of the Act.

52. The alternative is to interpret the Act as requiring employers to do no more than create a workplace harassment policy and post it in the workplace. I am unable to find that that is all Part III.0.1 obligates employers to do. First, such an interpretation is entirely devoid of any health and safety purpose and thus does not accord with the general rule of statutory interpretation. Putting a paper on the wall with an illusory policy has no utility or effect in the establishment of minimum occupational health and safety standards. Second, such an interpretation effectively gives no meaning to subsection 32.0.6 because subsection 32.0.1(b) already requires the employer to prepare a policy and subsections 32.0.1(2) and 32.0.7(a) require the policy to be posted and the employer to communicate information about the policy to the workers. Interpreting the obligation to develop and maintain a program to implement the policy as obligating an employer to do nothing more than develop, post and communicate the policy renders subsection 32.0.6 entirely redundant and meaningless. It therefore fails to read the subsection within the scheme of the section and Act in which it appears.

53. What the Act obligates employers to do is to develop and maintain a *program to implement the policy* with respect to workplace harassment (subsection 32.0.6). It is that program that must include the measures and procedures for workers to report incidents of harassment (subsection 32.0.6(a)). The question this raises is what does it mean to "develop and maintain a program to implement the policy"? First, it must mean more than simply developing and updating the policy. The Legislature could have said that but did not. Instead, it obligates employers to develop and maintain a *program* to *implement* the policy. The program must therefore be something more than just the policy and thus must be something more than merely creating and posting the policy; in my opinion it must include some active steps in carrying out the policy or giving effect to it.

54. Second, the concept of developing and maintaining a program to implement a policy appears elsewhere in the Act. Subsection 25(2) of the Act, which imposes a number of duties on employers, includes subsections 25(2)(j) and (k). Those provisions read:

> Without limiting the strict duty imposed by subsection (1), an employer shall,
>
> …
>
> (j) prepare and review at least annually a written occupational health and safety policy and develop and maintain a program to implement that policy;
>
> (k) post at a conspicuous location in the workplace a copy of the occupational health and safety policy;
>
> …

55. The concept of developing and maintaining a program to implement the written occupational health and safety policy means more in this context than simply creating and posting the policy because those obligations are imposed elsewhere in these provisions. Rather, the meaning of "develop and maintain a program to implement the policy" in this context must be to ensure that the policy is carried out and complied with.

56. Finally, in addition to developing and maintaining a program to implement the harassment policy, an employer must also develop and maintain a program to implement the workplace violence policy (subsection 32.0.2(1)). Pursuant to subsection 32.0.2(2), that program must include the following:

> (a) measures and procedures to control the risks identified in the assessment required under subsection 32.0.3 (1) as likely to expose a worker to physical injury;
>
> (b) include measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur;
>
> (c) include measures and procedures for workers to report incidents of workplace violence to the employer or supervisor;
>
> (d) set out how the employer will investigate and deal with incidents or complaints of workplace violence; and
>
> (e) include any prescribed elements.

57. In order to give real effect to an employer's obligation to minimize or eliminate risks of workplace violence, the program that the employer must develop and maintain to implement workplace violence policy must be more than merely recording

these measures and procedures in writing. If it were so limited, then there would be no obligation on an employer to actually carry out the measures and procedures that are to control the risks of workplace violence or are to be used for summoning immediate assistance when workplace violence occurs. Such an interpretation cannot be correct. Rather it must mean something more, which must be an obligation to actually take steps to have the policy carried out.

58. The same words, "develop and maintain a program to implement the policy" were chosen by the Legislature with respect to the harassment policy. Developing and maintaining a program to implement the policy must be more than merely recording the elements of the policy in writing. It must mean there is an obligation to actively carry out that policy. If this is correct, there is an obligation on an employer to enable workers to make complaints about incidents of workplace harassment. Terminating a worker because they made such a complaint would therefore be terminating the worker because they sought enforcement of the Act or were acting in compliance with the Act; namely, seeking to have their employer comply with its obligation to enable the worker to make the workplace harassment complaint or accessing the statutory mechanism by which they are able to make a complaint.

59. For these reasons, I decline to follow *Investia*, *supra*, to the extent that it stands for the proposition that the Act does not prohibit employers from penalizing or retaliating against workers for making a complaint about workplace harassment under the employer's mandatory policy. In my view, the reasoning in *Investia*, *supra*, on which that portion of the decision is founded is based on a view that if there is no right to a harassment free workplace then there is no right to make a complaint about harassment without considering the distinction between the two or the basis on which the latter may be part of the scheme of the Act.

60. I also accept that the cases relied upon by the responding parties that refer to *Investia*, *supra*, do not definitively define the Board's jurisdiction. In *Ludlow*, *supra*, the Board simply accepted the Board's *obiter dicta* comments in *Investia*, *supra*, without any further analysis or examination of the issue above. The same can be said about *AGF*, *supra* and *Barton*, *supra*. In *PPL*, *supra*, the Board expressly declined to determine the issue of its jurisdiction and dismissed the application because the employer had terminated the applicant for reasons unconnected to his harassment complaint. In *Keeprite*, *supra*, the Board recognized that *Investia*, *supra*, had not determined the issue of the Board's jurisdiction and simply found that there was a real issue as to whether making a complaint of harassment to an employer was a right under the Act. Ultimately, the Board had other reasons to dismiss the application. In *Simcoe*, *supra*, the Board reached a similar conclusion.

61. Having said all of the foregoing, it must be underscored that I accept nearly all of the reasoning in *Investia*, *supra*. In particular, the Act places no obligation on employers to provide a harassment free workplace or to provide any specific type of investigation or outcome of a harassment complaint. While the Board need not entirely decide the issue in this case, applications that allege only that an employer failed to

provide a harassment free workplace or that simply take issue with the employer's determination following a complaint are unlikely to succeed or be heard.

62. To this end, even when the Board determines that it will inquire into any given application, the focus of the Board's inquiry will almost never be upon the underlying allegations of harassment. Those allegations are, at the very best, peripheral to the issues that the Board must address, which are exclusively whether a workplace harassment complaint was made, whether the worker suffered some detrimental impact and whether there is a causal connection between the two. This latter issue will, in most cases, be focused on the employer's explanation and rationale for its actions. In the usual case, the only inquiry that the Board will make into the underlying allegations of harassment is whether the employer terminated, or otherwise penalized, the worker for having filed the harassment complaint. Beyond that, in virtually all such proceedings, the nature, extent and details of the underlying harassment allegation will be irrelevant to the issues before the Board. The Board is not the appropriate forum to adjudicate upon the issues that lead to the filing of the harassment complaint or the substantive outcome of the employer's investigation.

63. In this respect, the Board considers it important to reiterate that remedies for complaints about workplace harassment and the harm caused by that harassment will have to be found elsewhere, such as at common law or, if the harassment is based upon a protected ground of discrimination, at the Human Rights Tribunal of Ontario. While the Act obligates employers to have a policy that enables workers to bring complaints forward, and the Board has the authority under section 50 to protect individuals who invoke that procedural right, the Board does not have any general authority to remedy the underlying workplace harassment that gave rise to the complaint in the first place.

64. Finally, given the restricted scope of the inquiry in these cases and the relative need for expedition, the Board will virtually always litigate the merits of such an application, at least initially, by way of consultation. The extent to which the Board may permit oral examination of witnesses will depend upon the specific case before the Board and the issues raised by the application and response. In most cases, however, a full hearing will be the rare exception rather than the general rule. In this regard, applicants must appreciate that the Board will in all cases act judiciously to conserve the Board's and the parties' limited resources and keep the issues and evidence focused upon the narrow issue that is properly before the Board.

65. By way of final comment, what cases like *Investia*, *supra*, *Keeprite*, *supra*, and *Simcoe*, *supra*, also make clear, and what I agree with, is that the Board has the discretion under subsection 50(3) of the Act to inquire, or not inquire, into applications that allege a violation of subsection 50(1) of the Act and that the Board may exercise its discretion and decline to inquire into applications even when it is alleged that an applicant was terminated following the filing of a harassment complaint. In *Investia*, *supra*, the Board did just that because the applicant was in fact abusive and insubordinate, grounds which may well justify termination.

66. In *Keeprite*, *supra*, the Board dismissed the application because it was not clear on the pleadings filed by the applicant that his supervisor had engaged in workplace harassment and it appeared that the termination was unconnected to the applicant's harassment complaint in any event. In *Simcoe*, *supra*, the Board concluded that while the applicant had filed a formal harassment complaint, most of the allegations were not allegations of harassment and the remaining allegations were of a trivial nature that amounted to a personality clash between coworkers. On those facts the Board found that there was no nexus between the complaint and the employer's actions and, in the exercise of its discretion, refused to inquire further.

67. When the Board will exercise its discretion to inquire into an alleged reprisal for filing a workplace harassment complaint will be determined on a case-by-case basis. While it would be unwise to attempt to assert any strict test to be followed, the Board has over the years identified a number of grounds upon which it will decline to inquire into an application alleging a violation of subsection 50(1) of the Act. These include cases where there is a significant delay (see for example *Georgian Bay General Hospital*, [2011] O.L.R.D. No. 1367); where subsequent events have rendered an application moot or there is no useful remedial purpose to be served by inquiring (see for example *Complex Services Inc. (c.o.b. Casino Niagara)*, [2003] O.L.R.D. No. 2670); and, where a complaint does not, at its core, raise occupational health and safety concerns and/or is more appropriately be dealt with in another forum (see for example *Chubb Security Systems, a division of CSG Security Inc.*, [2006] O.L.R.D. No. 214, *Ten Star Financial Services*, [2009] O.L.R.D. No. 2019 which was decided prior to the enactment of Part III.0.1; and, *Meridian Magnesium Products Limited*, [1996] OLRB Rep. Dec. 964 which dealt with an allegation of workplace sexual harassment). Other forums can include an application pursuant to the Human Rights Code or a civil claim seeking compensation in lieu of reasonable notice, and possibly other remedies, for termination without cause. This list is not exhaustive, but rather contains examples of some of the grounds on which the Board has exercised its discretion in this manner in the past.

68. I turn now to the instant proceeding. Accepting, as I do, that an employer may not penalize or retaliate against a worker for making a harassment complaint under the employer's legislatively prescribed workplace harassment policy, the question becomes whether the Board ought to dismiss Mr. Ljuboja's application because it fails to make out a *prima facie* case. In my view, this is not an appropriate case to dismiss on a preliminary basis for failure to make out a *prima facie* case. The essence of Mr. Ljuboja's application is that he made a formal written complaint (which the Board understands to be a complaint under the GM's workplace harassment policy). In making that complaint he was seeking to have GM comply with its obligations under the Act, namely providing a policy through which harassment complaints can be made. Mr. Ljuboja's employment contract was terminated shortly thereafter. Moreover, Mr. Ljuboja alleges that he was told that his termination from employment was unrelated to performance issues. In the circumstances, Mr. Ljuboja has pleaded facts which call for an explanation from GM and AIM. Given this, and in light of the reverse onus provisions of subsection 50(5), I do not find that this is an appropriate case to dismiss on a preliminary basis for failing to plead a *prima facie* case.

69. Moreover, the allegations, if they are made out, are more than a disagreement over Mr. Rice's management style or assessment of Mr. Ljuboja's performance. Rather they involve management belittling Mr. Ljuboja in front of coworkers and then again at a subsequent meeting. As this case is one of the first few such cases to have proceeded this far, the Board is not prepared to exercise its discretion and decline to inquire into this application.

70. Notwithstanding the fact that the Board is not prepared to dismiss the application at this stage, the responding parties made a number of allegations in their responses which, if true, raise some doubt as to whether Mr. Ljuboja could be successful. In order to ensure the consultation remains focused and efficient, these allegations require an answer by Mr. Ljuboja. Therefore, Mr. Ljuboja is directed to file with the Board and deliver to the responding parties by December 13, 2013 all material facts upon which he relies in reply to the responding parties' allegations which have not already been pleaded by him. To this end the responding parties have asserted that Mr. Ljuboja was an independent contractor and not an employee of either of them and that in any event there is no nexus between the ending of his work and his harassment complaint. These are the issues that will be before the Board when the consultation proceeds.

71. For the foregoing reasons the Board declines to exercise its jurisdiction and dismiss this application for failing to plead a *prima facie* case or because the Board has no jurisdiction to inquire into the complaint. The Registrar is directed to set this matter down for a one day consultation which may be converted into a hearing if the Board so directs.

72. I am seized.

"Jesse M. Nyman"
for the Board