Barbara Wieler, Applicant v. Saskatoon Convalescent Home, Respondent

LRB File No.: 115-14: November 7, 2014

Chairperson, Kenneth G. Love, Q.C., (sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*)

For the Appellant: Ms. Elke Churchman
For the Respondent: Mr. Markel Chernenkoff

> **Section 4-8 of *The Saskatchewan Employment Act* – Appeal of a decision by an Adjudicator under the provisions of *The Occupational Health and Safety Act, 1993* (since repealed and replaced by provisions of *The Saskatchewan Employment Act, Part III*).**
>
> **Standard of Review – Board considers jurisdiction and standard of review of decisions of Adjudicators under relevant legislation.**
>
> **Release given by Appellant – Adjudicator and Labour Standards Officer found that release given by Appellant precluded further claim under the provisions of *The Occupational Health and Safety Act, 1993*. Board reviews decision made by Adjudicator and determines that Adjudicator correct in her determination of questions of law.**

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** This is an appeal by Ms. Barbara Wieler (the "Appellant") from the decision of an Adjudicator made pursuant to Part IV of *The Saskatchewan Employment Act* (the "*Act*"). By her decision dated May 28, 2014, the Adjudicator dismissed the Appellant's appeal from a decision of an Occupational Health and Safety Officer ("OHS officer") dated May 29, 2013.

[2] The OHS officer based his decision on the fact that the Appellant had executed a form of general release in favour of the Respondent on February 24, 2013. The Adjudicator supported the OHS officer's view that the release precluded the Appellant from seeking further remedy under *The Occupational Health and Safety Act, 1993* (the "*OHS Act*").

[3] The Appellant raised the following grounds in her Notice of Appeal:

> *The adjudicator erred in law as follows:*
>
> 1. *The adjudicator asked the question "did the Occupational Health Officer properly consider the release and make a correct determination that he was without jurisdiction to consider Ms. Wieler's claim of discriminatory action under the Act?"*
>
>   *Under Section 28 The Occupational Health & Safety Act, 1993 (The Act) the Officer must decide if there was discriminatory action taken against the worker as described in Section 27 of The Act. The only determination that the officer can make is whether or not discriminatory action has taken place. If the officer decides that discriminatory action has taken place the officer must investigate. The officer cannot decide that there is "no jurisdiction" or that a complaint is "barred".*
>
> 2. *The adjudicator stated that there is no requirement for a representative from Occupational Health and Safety (OH & S) to attend the hearing.*
>
>   a) *This is an error in law as the adjudicator cannot make a determination as to what, if any determinations the officer made or what the correct procedure under Section 27 and 218 of OH & S Act is, since OH & S did not present any evidence nor did they call as a witness the Officer in question to give such evidence.*
>
>   b) *The only evidence as to the correct OH & S procedure was given by Ms. Dunkle, a former Occupational Health Officer. This evidence stands uncontroverted. The adjudicator ignored this evidence.*
>
> 3. *The adjudicator held that since the Appellant signed a release she was barred from bring a complaint under the OH & S legislation.*
>
>   *This is an error of law as a complaint under the OH & S legislation is within a class of rights that cannot be waived or varied by a general or specific release. Once a complaint is made under the OH & S legislation it must be investigated if there is a prima facie case for the complaint. A complaint under the OH & S legislation cannot be barred by the signing of a release.*

[4] For the reasons which follow, the appeal is dismissed. An Order dismissing the appeal will accompany these reasons.

Facts:

[5] The facts, as found by the Adjudicator are contained in paragraphs 1 to 9 of the decision under appeal. They were as follows:

1. Ms. Wieler was employed by the Saskatoon Convalescent Home as an RN in casual and part-time positions since June of 2008. On August 27, 2012 became Assistant Director of Care. Ms. Wieler was terminated from this position with Saskatoon Convalescent Home on January 29, 2013.

2. On or about March 12, 2013 Ms. Wieler filed a complaint to the Harassment Prevention Unit of Occupational Health and Safety re: Discriminatory Action.

3. By a letter dated May 29, 2013 the Occupational Health Officer in charge of the file rendered a decision letter (hereinafter referred to as the “Decision”) which read as follows:

> *Dear Ms. Wieler:*
>
> *I have been assigned to deal with your file. As you know, your file was previously dealt with by Occupational health Officer, Andrea Dunkle. I have reviewed the contents of your file, including the Discriminatory Action questionnaire regarding your employment termination.*
>
> *Normally, where an employee has been fired from their place of employment, after raising health and safety concerns, Occupational Health and Safety (OHS) can investigate the situation. During my review of your file I noted that you signed an agreement with the Saskatoon Convalescent Home, your previous employer. As you know in this agreement, signed on February 24, 2103, you have agreed not make any claim or commence any action or proceeding against your previous employer.*
>
> *Based on the above information it is my decision that your situation is outside of the jurisdiction of OHS. You have the option of seeking legal counsel.*
>
> *I appreciate that this may be upsetting for you at this point. I encourage you to take good care of yourself.*

4. Ms. Wieler appealed the Decision by a letter dated May 31, 2013. The grounds for the appeal were set out as follows:

   1. Occupational Health and Safety chose to ignore serious health and safety concerns taking place at the Saskatoon Convalescent Home.

   2. Occupational Health and Safety chose not to proceed with harassment and discriminatory action claims against Saskatoon Convalescent Home.

   3. Ms. Wieler signed a release with respect to her termination. She was unaware of her rights under the Occupational Health and Safety legislation.

   4. Ms. Wieler cannot waive rights that she is unaware of and that are not specifically set out in a release.

   5. Furthermore, Occupational Health and Safety is not bound at all by any release signed by a third party and should have investigated potential serious breaches of the Occupational Health and Safety legislation.

5. A case conference was held with the parties on December 5, 2013. At the case conference the parties agreed that Occupational Health and Safety file materials would be part of the record for the purpose of the hearing. The hearing was scheduled for and was held on January 30, 2014.

6. Ms. Wieler's written complaint was detailed in a six page document with attachments. In regards to the alleged discriminatory action, page 4 of the complaint, under the heading "The Complaint" reads as follows:

UThe Complaint:

1. On January 29, 2013, I was terminated effective immediately from my position as Assistant Director of Care (and soon to be Director of Care) of Saskatoon Convalescent Home within minutes of entering the workplace on my return from vacation. I was told "you are not a fit for the organization." I had completed 5 months of my 6-month probationary period in an out-of-scope position. On January 15th, 2013, prior to leaving on vacation on the 21st, I had been told by Melanie Woods, Administrator/Director of Care, that she wanted to decide on my vacation whether I was able to do the job and whether I even wanted to do the job – and she specifically stated that she wanted me to continue on in the position at the meeting on Jan 15th. I asked about the casual RN position I still held at the Home, and I was told I was terminated from that also – no reason was given. I was given two letters which I was to sign and return, and told I would be given one month severance in lieu of notice. What was not said and which I found particularly malicious, was that although I had been a continuous employee of the Saskatoon Health Region & Affiliates, since March, 1999, my benefits were also terminated at the end of that business day, January 29th, 2013.

2. These are the Health and Safety concerns I raised prior to my termination:

    A. Long-standing bullying and intimidation by the management team

    B. Risk for staff injury due to unsafe staffing levels in the nursing department.

7. The narrow issue considered in this appeal is the jurisdictional issue raised in the Decision that Ms. Wieler's claim is outside the jurisdiction of Occupational Health and Safety (OHS) based upon an agreement dated February 24, 2013 signed by Ms. Wieler with her employer, Saskatoon Convalescent Home (the "Release").

8. The full text of the termination letter and Release form provided to Ms. Wieler at the meeting on January 29, 2013 read as follows:

> *January 24, 2013*
>
> *Barbara Wieler*
> *507 Duke Street*
> *Saskatoon, Saskatchewan*
> *S7K 0P4*
>
> *Dear Barbara:*
>
> *The purpose of this letter is to confirm that your employment with Saskatoon Convalescent Home is terminated effective immediately, January 29, 2012.*
>
> *Saskatoon Convalescent Home will provide notice and pay in lieu of notice equal to one (1) months' salary plus any vacation credits outstanding, less all lawful deductions.*
>
> *All property of the Saskatoon Convalescent Home in your possession shall be returned to me as of this date.*
>
> *Coverage under all benefits shall cease as at close of business on January 29, 2012.*
>
> *In order to effect the terms of this letter, your signature is requested below and on the attached release. The signed letter and release should be returned to me for processing. Should you have any questions please feel free to contact Karen Newman, Director-Employment and Workforce Planning, Saskatoon Health Region at 655-7715.*
>
> *Barbara, I wish to thank you on behalf of your colleagues and staff of the region for your contribution to health and health care.*
>
> *Sincerely,*
>
> *"Melanie Woods"*

Administrator/DOC
Saskatoon Convalescent Home

"BWieler"

Barbara Wieler

"February 24, 2013"

RELEASE FORM

Severance Payment

I, Barbara Wieler, of the City of Saskatoon in the Province of Saskatchewan, in consideration of the payment of the equivalent of one (1) months salary and other valuable consideration, receipt of which is hereby acknowledged, on behalf of myself, my heirs, administrators and assigns, hereby remise, release and forever discharge Saskatoon Convalescent Home, its predecessors and affiliates including their officers, directions, employees, servants, agents, successor and assigns (collectively the "releasees") jointly and severally from any and all actions, causes of action, claims and demands of every nature or kind arising out of, or in any way related to, or connected with my employment or termination thereof with the Releasees, including, but not limited to, any claims for notice of termination, pay in lieu of such notice, bonuses, overtime pay, benefits or benefit coverage or any other compensation or benefit whatsoever.

For the consideration aforesaid, I hereby covenant and agree not to make any claim or to commence or maintain any action or proceeding against the Releasees arising out of my employment or termination thereof or against any person or corporation in which any claim could arise against the Releasees for contribution or indemnity in respect of any incident during the period of my employment with the Releasees including the termination of my employment.

I further agree to indemnify the Releasee against all claims, charges, taxes, penalties or demands which may be made by any person or entity regarding income tax, unemployment insurance, pension contribution or any other statutory withholding requirement.

In witness whereof I have hereunder executed this release by affixing my hand and seal this 24 day of February, 2013 the presence of the witness whose name is subscribed below.
"BWieler"

9. Ms. Wieler did not sign the Release at the time of the meeting. It is dated February 24, 2013 and was returned to Saskatoon Convalescent Home some time after the January 29, 2013 meeting.

Relevant statutory provision:

[6] The Board's authority to hear and determine this matter is contained in Section 4-8(2) of the *Act*. It provides as follows:

> *4-8(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III may appeal to the board on a question of law.*

[7] Prior to the coming into force of this provision on April 28, 2014, an appeal from a determination by an adjudicator under the *OHS Act* would have been made to Her Majesty's Court of Queen's Bench.

The Adjudicator's Decision:

[8] In her decision the Adjudicator identified the principle issue raised in the appeal as follows:

> *The narrow issue considered in this appeal is the jurisdictional issue raised in the Decision [of the OHS Officer] that Ms. Wieler's claim is outside the jurisdiction of the Occupational Health and Safety (OHS) based upon an agreement dated February 24, 2013 signed by Ms. Wieler with her employer, Saskatoon Convalescent Home (the "Release").*

[9] Notwithstanding her identification of this principle issue, the Adjudicator went on to consider (3) three issues upon which she was required to adjudicate. These were:

(a) Does Saskatoon Convalescent Home have standing to be a party to this proceeding?

(b) Is there a requirement for a representative from Occupational Health and Safety to be present at the hearing?

(c) Did the Occupational Health Officer properly consider the Release and make a correct determination that he was without jurisdiction to consider Ms. Wieler's claim of discriminatory action under the *Act*?

[10] Grounds #1 and #3 of the Appellant's Notice of Appeal deal with item (c) above and ground #2 deals with item (b) above. No appeal was taken with respect to the determination by the Adjudicator's determination of point (a) above.

[11] The majority of the decision dealt with Issue #3. The Adjudicator concluded that the Release signed by Ms. Wieler barred her from making the OHS complaint. She further concluded that she did "not find this to be a matter of OHS lacking jurisdiction, but the result is the same". [1]

Standard of Review:

[12] The first question for the Board to consider is what the applicable standard of review in this matter is. For the reasons which follow, we find the applicable standard of review of questions of law is correctness, for questions of mixed fact and law, reasonableness, and for questions of fact which may be considered errors of law, reasonableness.

[13] Courts have determined that there are three categories of issues that may confront an Adjudicator in hearing and determining a case before them. These are questions of fact; questions of law; and questions of mixed law and fact.

[14] In *Housen v. Nikolaisen*[2] the Supreme Court of Canada described the different categories as follows:

> *101 Although the distinctions are not always clear, the issues that confront a trial court fall generally into three categories: questions of law, questions of fact, and questions of mixed law and fact. Put briefly, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.*

[15] It was identified in the *Housen* case, *supra*, that in appropriate circumstances, a question of mixed fact and law can actually prove to be a question of law.[3] Accordingly, in addition to appeals on questions of fact, in appropriate circumstances, the Board may also be required to deal with issues of mixed fact and law which can be shown to involve an error in law. To illustrate this issue, we can draw on an example provided by the Supreme Court in the

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[1] See paragraph 62 of the Adjudicator's decision
[2] [2002] SCC 33, 2 S.C.R. 235, at para. 101 per Bastarache J.
[3] See the majority decision at paragraph 27.

Housen case. At paragraph 27, the Court provided this example drawn from its decision in *Canada (Director of Investigation and Research v. Southam Inc.:*[4]

> *…if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.*

[16] The Courts have also noted that in appropriate circumstances, findings of fact may be reviewable as questions of law where the findings are unreasonable in the sense that they ignore relevant evidence, take into account irrelevant evidence, mischaracterize relevant evidence, or make irrational inferences on the facts.

Questions of Law:

[17] Under the provisions of the *OHS Act* an appeal on a question of law or jurisdiction was previously made to the Court of Queen's Bench. In its decision in *DJB Transportation Services Inc. v. Bolen,*[5] the Saskatchewan Court of Appeal analyzed the standard of review in respect of appeals made to the Court of Queen's Bench from the provisions of the former *Labour Standards Act.*[6] which *Act* contained provisions for appeal which were identical to the provisions in the *OHS Act*. The Court of Appeal in that case determined the standard of review to be correctness. We will apply that standard of review to questions of law in appeals pursuant to the provisions of the *Act*.

Questions of Mixed Fact and Law:

[18] In *Canada (Director of Investigation and Research v. Southam Inc.:*[7] the Court described an example of an error of law which was a case of a mixed fact and law. In that case, it postulated that to apply an incorrect law to the facts would amount to an error of law.

[19] The standard of review of errors of mixed fact and law was considered by Mr. Justice Smith in *Director of Labour Standards v. Acanac Inc. et al.*[8] In that case, the Court was

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[4] [1997] CanLII 385 (SCC)
[5] [2010] SKCA 50 (CanLII), See also the Decision in *Housen v. Nikolaisen* @ Note 4
[6] R.S.S. 1978 c. L-1

again dealing with the provisions for appeal of a decision of an adjudicator under *The Labour Standards Act*.

[20] In his decision, Mr. Justice Smith canvassed the standard of review of errors of mixed fact and law and concluded that the standard of review of such errors should be reasonableness. At paragraph [37] he says:

> *[37] Taken together, I must decline the Director's counsel's invitation to impose a standard of review of correctness. Respectfully, I regard the case law, as well settled that in debates concerning employer-employee relationship, the standard of review is one of reasonableness.*

[21] Accordingly, we will apply that standard of review to questions of mixed fact and law in appeals pursuant to the provisions of the *Act*.

Questions of Fact:

[22] In its decision in *P.S.S. Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission),*[9] the Court of Appeal stated that "findings of fact may be reviewable as questions of law where the findings are unreasonable in the sense that they ignore relevant evidence, take into account irrelevant evidence, mischaracterize relevant evidence, or make irrational inferences on the facts."[10]

[23] In *Whiterock Gas and Confectionary v. Swindler*, Mr. Justice Chicoine quoted extensively from the decision of the Court of Appeal in *P.S.S. Professional Salon Services Inc.* in support of the above noted conclusion regarding review of questions of fact. At paragraphs 34 – [39] he says:

> *[34] While The Labour Standards Act limits appeals to this Court to questions of law or jurisdiction, findings of fact may be reviewable as questions of law where the findings are unreasonable in the sense that they ignore relevant evidence, take into account irrelevant evidence, mischaracterize relevant evidence, or make irrational inferences on the facts. In P.S.S. Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission), 2007 SKCA 149 (CanLII),*

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[7] [1997] CanLII 385 (SCC)
[8] [2013] SKQB 21 (CanLII)
[9] [2007] SKCA 149 (CanLII)
[10] [2014] SKQB 300 (CanLII) at para [34]

302 Sask. R. 161, (P.S.S.) Cameron J. explained how findings of fact may be subject to review as errors of law. He stated (at paras. 60-61):

> ***60*** *It is clear that the appeal against the decision of the tribunal comes down to its findings of fact. This is not to say that there is, therefore, no tenable ground for review of the decision, but it must be understood that the decision is only reviewable to the extent the findings of fact upon which it rests are attended by error of law.*
>
> ***61*** *The import of this was remarked upon in City of Regina et al. v. Kivela, 2006 SKCA 38 (CanLII), (2006), 266 D.L.R. (4th) 319 (Sask. C.A.), a case involving an appeal from the decision of a human rights tribunal. Speaking for the Court, Smith J.A. said:*
>
> *The traditional view, in these circumstances, is that the tribunal's factual determinations are subject to review only if and to the extent that findings constitute errors of law, as when there was no evidence before the tribunal that, viewed reasonably, was capable of supporting the tribunal's finding. (p. 343)*
>
> ***62*** *This ties in with the notion that "an unreasonable finding of fact" falls to be categorized as an error of law for the purposes of judicial review in the classical sense, and with the associated notion that when errors of law are open to judicial review unhindered by a privative clause then "unreasonable errors of fact", though no others, are subject to review: Blanchard v. Control Data Canada Ltd., 1984 CanLII 27 (SCC), [1984] 2 S.C.R. 476 at 494-95. It also ties in with the further notion that a tribunal "errs in law" if it ignores relevant evidence or evidence it is required to consider: Woolaston v. Minister of Manpower and Immigration, 1972 CanLII 3 (SCC), [1973] S.C.R. 102; Canada (Director of Investigation and Research, Competition Act) v. Southam, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748 at para. 41: "If the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law." (Underlining added)*

[35] Cameron J. also referred to the case of Metropolitan Entertainment Group v. Nova Scotia (Workers Compensation Appeals Tribunal), 2007 NSCA 30 (CanLII), (2007), 278 D.L.R. (4th) 674, where the right of appeal, as in this case, was confined to questions of law or jurisdiction, and the appeal was based on a challenge to findings of fact. In that case, the Nova Scotia Court of Appeal also concluded (at para. 15) that there are situations where mis-stating or making egregious factual errors will amount to an error in law.

[36] Cameron J. further explained the rational for the proposition that findings of fact are capable of amounting to errors of law as follows, at para. 65:

> ***65*** *In any event, it is evident from the foregoing that findings of fact are capable of giving rise to a question of law for the purposes of a right of appeal so confined. It is instructive in this regard to recall that the facts as found are one thing, the process by which they are found is another, and it is here where a decision is most apt to be seen as giving rise to a question of law. Why? Because the fact-finding process, or method by which facts in dispute are determined in judicial and quasi-judicial settings, is underpinned by principle, as supplied by both statutory implication and common law. …*

[37] Cameron J. went on to describe the parameters of a hearing under The Saskatchewan Human Rights Code, S.S. 1979, c. S. 24.1 in the following terms, at para. 66:

> ***66*** *The Code provides for a hearing of disputed complaints by a tribunal, namely a lawyer in good standing with at least five years experience, or a person having experience and expertise in human rights law. A tribunal charged with the duty of inquiring into such a complaint is required by the Code to afford the parties the full opportunity to present evidence and make representations through counsel or otherwise. Subject to the power in the tribunal to receive and accept evidence and information on oath, affidavit, or otherwise as it considers appropriate, whether admissible in a court of law, there is little to distinguish the hearing from a trial. Similarly, there is little to distinguish the function of the tribunal from the function of a judge, for the tribunal is to hear the complaint and decide it on the basis of the evidence before it, dismissing the complaint if unsubstantiated or, if substantiated, giving effect to it by way of order. Indeed, the orders of the tribunal are subject to entry in the Court of Queen's Bench as orders of that Court.*

[38] In my opinion, the function of an adjudicator under The Labour Standards Act closely mirrors the function of tribunal established pursuant to The Saskatchewan Human Rights Code. It therefore follows that the conclusions reached by Cameron J. in P.S.S. at paras. 67 and 68 are applicable to this case. He stated:

> ***67*** *As a matter of statutory implication, then, persons fastened with the duties and exercising the powers of a human rights tribunal when called upon to hear a complaint, are required as a matter of principle (much as judges are), to determine the facts in controversy on the basis of the relevant evidence before them (leaving aside matters of fact in relation to which they may take judicial notice). Hence, they are required in principle to consider and weigh the relevant evidence as the faculty of judgment commends when exercised impartially, fairly, in good faith, and in accordance with reason, bearing in mind the governing standard of proof and the location of the onus of proof.*
>
> ***68*** *It follows, that a tribunal cannot reasonably make a valid finding of fact on the basis of no evidence or irrelevant evidence. Nor can it reasonably make a valid finding of fact in disregard of relevant evidence or upon a mischaracterization of relevant evidence. To do so is to err in principle or, in other words, to commit an error of law. (In addition to the cases referred to above, see Toneguzzo-Norvell v. Burnaby Hospital, 1994 CanLII 106 (SCC), [1994] 1 S.C.R. 114 at p. 121; Wade & Forsyth, Administrative Law (7th ed.) (Oxford: Clarendon Press, 1994) at pp. 316-320; Jones & de Villars, Principles of Administrative Law (4th ed.) (Toronto: Thomson Carswell, 2004) at pp. 244-43 and 431-436; and Hartwig and Senger v. Wright (Commissioner of Inquiry), et al., [2007] S.J. No. 337, 2007 SKCA 74 (Sask. C.A.) (CanLII)). Nor can a tribunal reasonably make a valid finding of fact based on an unfounded or irrational inference of fact. (Underling added.)*

[39] As regards the standard of review related to findings of fact, Cameron J. decided in P.S.S. that the reasonable simpliciter standard of review applied in

> *that case. He stated, at para. 83, that "the issue whether a tribunal overlooked, disregarded or mischaracterized relevant material to the findings upon which its decision rests falls to be subjected to a 'significant searching or testing'." I intend to apply the standard of reasonableness in relation to the Adjudicator's finding of fact in this case also.*

[24] The decision of the Court of Appeal in *P.S.S. Professional Salon Services Inc.* predated the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*[11] which replaced the reasonable *simpliciter* standard with the standard of reasonableness as adopted by Mr. Justice Chicone in *Whiterock Gas*. The standard of review by the Board of errors of fact will be reasonableness.

Analysis and Decision:

[25] The Notice of Appeal alleges that the adjudicator committed 3 errors of law. No errors of mixed fact and law or errors of fact were alleged. I will first deal with the questions of law set forth in Grounds numbers 1 & 3 as they are both related to the signing of the release by the Appellant.

1. **Did the Occupational Health Officer properly consider the release and make a correct determination that he was without jurisdiction to consider Ms. Wieler's claim…?**
2. **The Adjudicator made an error of law in her determination that since the Appellant signed a release she was barred from bringing a complaint under the OHS legislation.**

[26] In respect of ground #1 in this appeal, the Adjudicator found at paragraph 62 of her decision as follows:

> *In conclusion, I find that Ms. Wieler's complaint to OHS was barred by the Release signed by her on February 24, 2013. I do not find that this to be a matter of OHS lacking jurisdiction, but the result is the same.*

[27] In her argument, the Appellant took the view that the Adjudicator committed an error of law in stating or implying that the [Occupational Health] officer had jurisdictional discretion. She argued that Section 28 of the *OHS Act* the officer must accept jurisdiction regarding a complaint, and the only determination that he/she is allowed to make, is whether or

not discriminatory action has taken place. The appellant argued that "[I]f the officer decides that discriminatory action has taken place the officer must investigate. The officer cannot decide that there is "no jurisdiction" to investigate".

[28] Section 28 of the *OHS Act* provided as follows:

> *Referral to officer*
>
> *28(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 27, may refer the matter to an occupational health officer.*
>
> *(2) Where an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 27, the occupational health officer shall issue 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.*
>
> *(3) Where an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 27, the occupational health officer shall advise the worker of the reasons for that decision in writing.*
>
> *(4) Where discriminatory action has been taken against a worker who has acted or participated in an activity described in section 27, there is, in any prosecution or other proceeding taken pursuant to this Act, 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 27, and the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason.*

[29] Section 27 of the *OHS Act* sets out what may be found to be discriminatory action against a worker

> *27 No employer shall take discriminatory action against a worker because the worker:*
> > *(a) acts or has acted in compliance with:*
> > > *(i) this Act or the regulations;*

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[11] [2008] SCC 9 (CanLII), 1 SCR 190

> *(i.1) The Radiation Health and Safety Act, 1985 or the regulations made pursuant to that Act;*
> *(ii) a code of practice; or*
> *(iii) a notice of contravention or a requirement or prohibition contained in a notice of contravention;*
>
> *(b) seeks or has sought the enforcement of:*
> *(i) this Act or the regulations; or*
> *(ii) The Radiation Health and Safety Act, 1985 or the regulations made pursuant to that Act;*
>
> *(c) assists or has assisted with the activities of an occupational health committee or occupational health and safety representative;*
>
> *(d) seeks or has sought the establishment of an occupational health committee or the designation of an occupational health and safety representative;*
>
> *(e) performs or has performed the function of an occupational health committee member or occupational health and safety representative;*
>
> *(f) refuses or has refused to work pursuant to section 23;*
>
> *(g) is about to testify or has testified in any proceeding or inquiry pursuant to:*
> *(i) this Act or the regulations; or*
> *(ii) The Radiation Health and Safety Act, 1985 or the regulations made pursuant to that Act;*
>
> *(h) gives or has given information to an occupational health committee, an occupational health and safety representative, an occupational health officer or other person responsible for the administration of this Act or the regulations with respect to the health and safety of workers at a place of employment;*
>
> *(h.1) gives or has given information to an officer within the meaning of The Radiation Health and Safety Act, 1985 or to any other person responsible for the administration of that Act or the regulations made pursuant to that Act;*
>
> *(i) is or has been prevented from working because a notice of contravention issued pursuant to section 33 with respect to the worker's work has been served on the employer;*
>
> *(j) has been prevented from working because an order has been served pursuant to The Radiation Health and Safety Act, 1985 or the regulations made pursuant to that Act on an owner, vendor or operator within the meaning of that Act.*

Did the Occupational Health Officer properly consider the release and make a correct determination that he was without jurisdiction to consider Ms. Wieler's claim…?

[30] This question relates to the jurisdiction of the OHS officer and his duties under the *OHS Act*. It is a question of law which will be reviewed on the standard of correctness.

[31] The decision of the Occupational Health Officer provided a letter dated May 29, 2013. That letter provided, in part, as follows:

> ...

> *Normally, where an employee has been fired from their place of employment, after raising health and safety concerns, Occupational Health and Safety (OHS) can investigate the situation. During my review of your file, I noted that you signed an agreement with the Saskatoon Convalescent Home, your previous employer. As you know, in this agreement, signed on February 24, 2013, you have agreed not to make any claim or commence any action or proceeding against your previous employer.*

[32] No complaint was made by the Appellant regarding the extent of the reasons given by the OHS officer in this letter, but rather, the Appellant objected to the fact that the OHS officer, by this letter, declined to take jurisdiction over the complaint and failed to make a determination as to whether or not discriminatory action had taken place. In short, the Appellant argued that the "officer cannot decide that there is 'no jurisdiction' to investigate".

[33] The Appellant argued that in *Prince Albert District Health Board v. Saskatchewan (Executive Director of Occupational Health and Safety,*[12] the Court went on to say at paragraph 18:

> *An occupational health officer does not have any discretion under s. 28 of The Occupational Health and Safety Act. He must issue a notice of contravention if there is a violation of that Act. Any person affected by a notice of contravention can appeal the decision in accordance with s. 49 of the Act.*

[34] The effect and impact of the signed release was the same issue identified to and in respect of which the Adjudicator based her decision. Her conclusion was that the OHS officer may have had jurisdiction, but was precluded from entering into an investigation because the Appellant had released the Respondent from any liability in respect of her employment. That determination, of necessity involved an interpretation of the provisions of the *OHS Act* and the general law related to releases. The same question that faced the OHS officer was considered and dealt with by the Adjudicator on the appeal taken by the Appellant.

[35] As such, this argument is subsumed by the second ground of appeal wherein the Appellant argues that the Adjudicator made the same error of law that the OHS officer made in declining the Appellant's appeal. It all comes down to whether or not the release signed by the Appellant precluded her from seeking additional relief under the *OHS Act* after she had settled, by accepting consideration and signing a release, her claims against the Employer.

[12] [1999] CanLII 12260 (SKCA)

The Adjudicator made an error of law in her determination that since the Appellant signed a Release she was barred from bringing a complaint under the OHS legislation.

[36] This question also raises a question of law which will be reviewed on the correctness standard.

[37] In her determination, the Adjudicator found:

> *In conclusion, I find that Ms. Wieler's complaint to OHS was barred by the Release signed by her on February 24, 2013. I do not find that this to be a matter of OHS lacking jurisdiction, but the result is the same.*

[38] The Appellant argued that the rights provided to an employee under the *OHS Act* fell within a class of rights that cannot be waived or varied by a general or specific release. She argued that "[O]nce a complaint is made under the OH&S legislation it must be investigated if there is a *prima facie* case for the complaint. Therefore, a complaint under the OH&S legislation cannot be barred by the signing of a release".

[39] In support of her arguments, the Appellant relied upon the New Brunswick Court of Appeal decision in *Brunswick Mining and Smelting Corp. v. Savoie*[13] and *Prince Albert District Health Board v. Saskatchewan (Executive Director of Occupational Health and Safety.*[14] In *Prince Albert District Health Board,* Justice Vancise says at paragraph 10:

> *Occupational health and safety is an issue of substantial public policy. The responsibility to provide a safe workplace is by virtue of The Occupational Health and Safety Act, 1993 the responsibility of the employer. Section 3 provides that every employer (which I take to mean union and non-union employer) shall ensure the health, safety and welfare of every worker in the workplace. It is a right owed to all employees by law and is not something an employee or his bargaining agent need bargain. As Professor K. Swinton notes, "the responsibility to provide a safe workplace is the employer's and no worker should be required to exchange his or her wages for increased protection of his or her health. The Health Board, in this case, sought to make much of the fact that the parties had bargained for the specific occupational health and safety provisions and agreed to include them in Article 23 of the collective agreement as part of the quid pro quo of bargaining. In fact, a comparison between the terms of Article 23 of the collective agreement and the relevant statutory provisions reveals that while the agreement tracks the statute, the provisions are not identical to those contained in The Occupational Health and Safety Act. Regardless, I agree with the comments of Professor Swinton that the rights involved are rights which exist independent of the bargaining process and do not*

[13] 83 DLR (4th) 521, NBCA
[14] [1999] CanLII 12260 (SKCA)

> *need to be exchanged for other benefits such as higher wages. They are public interest rights and are independent of any provision in the collective bargaining agreement. Simply put the employer has an obligation to his employees to ensure the workplace is safe whether the obligation is contained in the collective bargaining agreement or not.* [references omitted]

[40] In this decision, the Court of Appeal adopted the reasoning in *Brunswick Mining (supra) a*nd *Ontario Human Rights Commission et al. v. The Borough of Etobicoke.*[15]

[41] In the *Ontario Human Rights Commission* case, the Supreme Court was dealing with a discrimination complaint by firefighters who were required to retire at age 60 in accordance with the terms of a collective agreement. At page 213 *et seq.* Mr. Justice McIntryre says:

> *Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy. In Halsbury's Laws of England, 3rd ed., vol. 36, p. 444, para. 673, the following appears:*
>
> ***673. Waiver of statutory rights.*** *Individuals for whose benefit statutory duties have been imposed may by contract waive their right to the performance of those duties, unless to do so would be contrary to public policy or to the provisions or general policy of the statute imposing the particular duty or the duties are imposed in the public interest.*
>
> *And in the fourth edition of the same work the following is to be found in vol. 9, p. 289, para. 421:*
>
>> ***421. Contracting out.*** *As a general rule, any person can enter into a binding contract to waive the benefits conferred on him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that it would be contrary to public policy to allow such an agreement. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement; and, in certain circumstances, it is expressly provided that any such agreement shall be void.*
>>
>> *By way of example of an exception to the general rule, an agreement between an employer and employee whereby the latter agrees to waive a statutory duty imposed on the former in the interests of safety is generally not binding on the employee.*
>
> *English authority expressing this principle is to be found in Equitable Life Assurance Society of the United States v. Reed, [1914] A.C. 587. The question of the enforcement of a contract contrary to public policy is generally dealt with by Duff C.J. in Re Estate of Charles Millar, Deceased, 1937 CanLII 10 (SCC), [1938] S.C.R. 1, where reference is made to Fender v. Mildmay, [1937] 3 All*

[15] [1982] CanLII 15 (SCC), 1 S.C.R. 718

> *E.R. 402, and other authorities. Examples of the application of the principle are such cases as R. v. Roma, [1942] 3 W.W.R. 525; Outen v. Stewart and Grant and City of Winnipeg, [1932] 3 W.W.R. 193, and Dunn v. Malone (1903), 6 O.L.R. 484. The Ontario Human Rights Code has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract; therefore this argument cannot receive effect.*

[42] From the decision in *Prince Albert District Health Board*, it is clear that the *OHS Act* falls within the class of legislation which is public interest legislation which may not be waived or varied by private contract.

[43] The Respondent argued that this restriction against contracting out of the benefits of the *OHS Act* should not apply with respect to "backward looking rights" that is rights which were not prospective and owed to workers generally, rather than rights which had already accrued to a particular person due to an incident which had already occurred.

[44] The Respondent argued that the interpretation espoused by the Appellant would mean that no employer would ever be able to settle a potential violation of rights under the *OHS* legislation (or similar legislation) absent a hearing before an OHS officer and a determination by him or her, which could then be appealed.

[45] In support of its position, the Respondent relied upon the Alberta Court of Queen's Bench decision in *Chow v. Mobil Oil Canada.*[16] In that case, an Alberta Human Rights panel stated a special case to the Alberta Court of Queen's Bench for its opinion on a question of law.

[46] The questions posed to the Court in *Chow* were as follows:

> *(a) whether one can release a current or future complaint for an alleged past act of discrimination under the Act;*
>
> *(b) whether the Human Rights, Citizenship and Multiculturalism Commission and its officers and officials (the Commission[1]) has jurisdiction to determine a complaint where a release has been executed, and to determine whether it is a valid and enforceable release; and*

[16] [1999] ABQB 1026 (CanLII), [1999] 12 W.W.R. 373, 17 Admin L.R. (3rd) 108

(c) whether the Commission has any remaining jurisdiction to determine any other issue, if the release is valid and enforceable?

[47] Mr. Justice Rooke delivered the opinion of the Court. The facts in that case were very similar to the facts here. In that case, Chow (and other intervenors) had all been terminated from their employment, had been offered and accepted a severance package, and executed a release in favour of their employer. Ms. Chow, in her case, alleged that she had signed the release because her lawyer had "informed me to go ahead and sign the release form as I could still pursue the matter under the Act as I could not sign away my human rights".

[48] The Court in *Chow* answered the questions posed as follows:

1. *The Commission does **not** have jurisdiction to deal with the complaint brought by an employee alleging discrimination who, following his or her dismissal from employment, executes a valid and enforceable release as part of a severance package, which releases the employer from further liability. However, the Commission **does** have jurisdiction until the release is determined to be valid and enforceable release.*

2. *In the event a dispute arises over the validity or enforceability of a release, the Panel, but not the Commission, has jurisdiction to determine whether the release is valid and enforceable. The criteria which the Panel should use in determining the validity or enforceability of the release is the same criteria that would be applied in law by a court of competent jurisdiction.*

3. *As a valid and enforceable release **does** oust the jurisdiction of the Commission from that point, neither the Commission nor a Panel has any further jurisdiction to consider the merits of the complaint or any remedy.* [sic]

[49] In summary, the Court in *Chow* gave the following as its reasons for the answers given above at paragraphs 41 to 43:

> *[41] The simple reason for my opinion on question #1 is that the whole Act is premised around the settlement of issues of alleged discrimination and the right of a complainant to unilaterally stop the process under the Act where there has been a settlement. Thus, a settlement that includes a matter of alleged discrimination and a continuing complaint are incompatible.*
>
> *[42] In answering question # 2, issues of duress, prior legal advice, the precise language of the release, the timing of the complaint, and others, may be considered by the Panel in determining the validity and enforceability of a release. While I will list some of the elements that might be considered, I will not set out an exhaustive or definitive set of applicable criteria and guidelines, as those may differ based upon findings of fact and law which will be specific to each case.*

> *[43] Question # 3 is premised upon the Commission retaining its jurisdiction where a valid and enforceable release has been executed. As I do not accept that presumption, and given my opinion on question #1, question #3 must be answered in the negative. However, if there is **not** a valid and enforceable release and there is a meritorious complaint, any terms of severance must be considered by the Panel in determining an appropriate remedy.*

[50] Mr. Justice Rooke made it clear that one cannot contract out of future rights under human rights legislation unless the result is to advance or improve on the rights provided by the Act. However, he concluded that "this Special Case does not, in the main, relate to situations where those principles directly apply".

[51] However, he concluded that a release, was not a contracting out of social legislation (in this case the *Human Rights Act*), but rather was related to past acts of alleged discrimination and merely "constitutes the settlement of an actual or potential complaint, specifically within the intent of the Act".

[52] Mr. Justice Rooke also held that the release is simply an agreement to abandon a right to pursue a complaint in exchange for money or other consideration. He found this to amount to an accord and satisfaction where this is the purchase, for valuable consideration, of a release from an alleged past act of discrimination.

[53] He also held that the giving of a release does not offend the provisions of the Human Rights Act because it does not have the prospective effect of limiting or reducing rights during the course of future employment and does not deal with the rights of employees generally.

[54] In his opinion, Mr. Justice Rooke concluded at paragraph [67] as follows:

> *As should be clear from the above, I acknowledge that parties are prohibited from contracting out of the Act where such a contract does not effect a greater protection of human rights than that which is enshrined in the legislation. However, I am of the view that a release of past alleged acts of discrimination is not a contracting out, as that term has been used by the Supreme Court. The fundamental difference is that the type of release I have been referencing has no application to future discriminatory acts and is a settlement concerning only an alleged past breach of the Act. Additionally, a release applies exclusively to the signatory, not to employees generally.*

[55] He went on to conclude,[17] that the giving of a valid release ousts the jurisdiction of the commission to proceed further. He says: " [F]or the reasons set out herein, I am of the opinion that a final and valid release of a past alleged act of discrimination ends the right to have a complaint under the Act determined on its merits".

[56] He stated his final conclusions at paragraphs [107] to [109] of opinion as follows:

> *[107] In summary, I find that contracting out of human rights legislation is generally prohibited, excepting those instances where it would result in greater protection than that which is afforded under the Act. This principle has developed largely to protect parties who have unequal bargaining power, which is frequently the situation between employers and employees. However, where a release only relates to past acts of alleged discrimination, and does not seek to limit or suspend prospective rights, I find that many of the same considerations do not apply. Thus, where a valid release has been executed between the complainant and respondent to a human rights complaint, I am of the opinion that the Commission will have no jurisdiction to determine the matter on the merits.*
>
> *[108] Where there is a release, the validity of which is not reasonably in dispute or is conceded, I am of the opinion that the Director has the jurisdiction to dismiss the complaint for lack of merit. However, where the complainant reasonably objects to the validity of a purported release, I am of the opinion that only a Panel has the jurisdiction to determine the matter. In making its determination a Panel must consider the same factors which would be considered by a court of competent jurisdiction.*
>
> *[109] I am of the opinion that the Commission has no jurisdiction to consider the merits of a complaint if there is a valid and enforceable release. However, if a release is not valid and enforceable, but there has been some settlement, the Commission or a Panel, assuming a meritorious complaint, must consider the terms of the settlement.*

[57] Madam Justice Schwann considered the *Chow* decision in *Patricia Horner v. Saskatchewan Workers' Compensation Board*[18]. This case involved the execution of a release by the surviving widow of a former recipient of workers' compensation benefits. Upon passage of legislation which provided for the payment of a lump sum benefit for certain widows who had lost benefits due to subsequent remarriage, Ms. Horner provided a release to the Workers' Compensation Board and received a lump sum payment of $80,000.00.

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[17] At paragraph [68]
[18] [2013] SKQB 340, [2014] 2 W.W.R. 369, 429 Sask. R. 280

[58] Madam Justice Schwann considered *Chow*, in addition to other authorities, and concluded[19] that the release estopped or barred any claim that Ms. Horner may have had for discrimination under the *Canadian Charter of Rights and Freedoms.*[20]

[59] However, in *Brunswick Mining (supra),* the New Brunswick Court of Appeal concluded that a general form of release could not bar a future complaint under OH & S legislation in New Brunswick. In that case, Savoie had been terminated along with a number of other employees. He claimed his termination was as a result of discriminatory treatment by his employer arising out of a workplace injury and the accommodation provided to him which resulted in his termination. In the decision, Ryan J., speaking for the Court said:

> *The release is a general release but makes specific reference to the termination of Savoie's employment. Does it encompass claims by employees who allege that there has been a violation of the Act? I think not. Under s. 25 of the Act, an employee may file a complaint within one year of any alleged violation of discriminatory action against the employee. "Discriminatory action" in this context is described in s. 24 as discriminatory action of the threat of it "because the employee has sought the enforcement of the Act". The right to lay a complaint under the Act and to have it resolved comes, in my opinion, within the class of rights that may not be waived or varied by the general or specific terms of a release.*

[60] Mr. Justice Ryan drew a distinction between a release in respect of a complaint which had been lodged at the time the release was given versus a release which was given prior to an incident which gave rise to the rights granted by the Act.

[61] From these cases, we can distill 4 principles. They are:

1. *Legislation, such as Occupational Health and Safety legislation is for the general benefit of workers and the benefit thereof may not be bargained away. As pointed out by Mr. Justice Vancise in Prince Albert District Health Board:*[21]

   [10] Occupational health and safety is an issue of substantial public policy. The responsibility to provide a safe workplace is by virtue of The Occupational Health and Safety Act, 1993 the responsibility of the employer. Section 3 provides that every employer (which I take to mean union and non-union employer) shall ensure the health, safety and welfare of every worker in the workplace. It is a right owed to all employees by law and is not something an employee or his bargaining agent need bargain. As Professor K. Swinton notes, "the responsibility to provide a safe workplace is the employer's and no worker should

[19] At paragraph [68]
[20] *The Constitution Act, 1982, being Schedule B to The Canada Act 1982 (UK), 1982, c 11*
[21] See paragraph 36 *supra*

be required to exchange his or her wages for increased protection of his or her health.

2. *However, once a "triggering event" occurs which provides an individual with the right to make a complaint under such legislation, that right becomes personal to the individual. As such, the individual may:*

(b) *ignore the incident and make no application under public benefit legislation;*
(c) *make an application, but withdraw it after it has been filed;*
(d) *negotiate and reach a resolution of the issue without a hearing; or*
(e) *resolve the issue through a hearing and/or appeals in accordance with the legislative scheme.*

3. *Where a release is given in respect to a personal right which has occurred under legislation such as the OHS Act, the validity of that release must be reviewed.*

4. *In addition to consideration of the validity of the release, consideration must be given to the timing of the "triggering incident" and the timing of the release.*

The Adjudicator's Decision:

[59] The Adjudicator considered both of the cases relied upon by the Appellant in this hearing and those cases relied upon by the Respondent in this hearing. At paragraph 56 of her decision, she says:

> *The Court will give effect to the terms of a release, including the covenant not to bring an action in respect of acts which occur prior to the signing of the release Chow and Horner stand for the proposition that yes, it is possible to execute a release for <u>past</u> claims that are "public interest rights" such as those protected in human rights and worker's [sic] compensation legislation, provided that the terms of the release are clear and unequivocal, and that there is no evidence that it should be found to be invalid on the basis of other contract law principles such as duress or unconscionability.*

[60] She went on at paragraph 57 to consider the policy implications of a finding that the release was not binding on Ms. Horner. In paragraph 59, she concluded that the rights accruing to the Appellant were personal rights, having determined at paragraph 58 that the release signed by the Appellant was "clear and concise", that the Appellant had "plenty of time to read it over and understand it", that the release "specifically refers to and covers any claims arising" from the Appellant's termination. She also noted that the Appellant had had the benefit of legal advice with respect to the release.

[61] There was no challenge to the validity or enforceability of the release either before the Adjudicator or before the Board. We had no evidence before us (nor did the Adjudicator) to

suggest that the release should not be considered to be other than a valid or enforceable release.

[62] However, even if there was not a valid and enforceable release, as noted by Mr. Justice Rooke in *Chow*, the Adjudicator could have looked to the settlement. As noted above, at paragraph 109, he says, in part:

> … *if a release is not valid and enforceable, but there has been some settlement, the Commission or a Panel, assuming a meritorious complaint, must consider the terms of the settlement.*

[63] Good consideration appears to have been given for the release. The law of accord and satisfaction as well as the general prohibition against double recovery support Mr. Justice Rooke's comments in this regard. However, in the facts of this case, we need not consider the question further.

[64] For the reasons set out above, we conclude that the Adjudicator was correct in her determination that the valid and enforceable release precluded the Appellant from seeking additional relief under the *OHS Act* related to her discharge. It would also follow that the OHS officer was similarly correct in declining to proceed with the matter in the face of the valid and enforceable release.

Is there a requirement for a representative from Occupational Health and Safety to be present at the hearing?

[65] This question raises a point of law insofar as it requires an interpretation or application of the provisions of the *OHS Act*. It will be reviewed on a correctness standard.

[66] The Adjudicator dealt with this question at paragraph 22 of her decision. She says:

> *Occupational Health and Safety had notice of the within proceedings. There is no requirement for a representative from Occupational Health and Safety to attend and be present at the hearing.*

[67] Appeals to an Adjudicator (or, as in this case to a Special Adjudicator) are covered by Part VIII of the *OHS Act*. Under the scheme of the Act, a worker may make a complaint with respect to discriminatory action against them as spelled out in Section 27. When

that complaint is filed under Section 28, it is referred to an OH & S officer pursuant to Section 28 who, on investigation, may issue a notice of contravention which requires 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.*

[68] Alternatively, if there is no contravention found, then the OH & S officer is required to advise the worker of the reasons for that decision.[22] Subsection 28(4) invokes a reverse onus upon the employer in the case that discriminatory action is found to have occurred.

[69] A person who is directly affected by a decision[23] is entitled to appeal that decision to the director of occupational health and safety in accordance with Section 50. Under Section 51, the director may, instead of hearing the appeal, forward it to an adjudicator. That is what occurred in this case.

[70] Section 56.2(1) makes the director a party to any appeal taken to an adjudicator pursuant to Section 51, to the Court of Queen's Bench pursuant to Section 56 or to the Court of Appeal under Section 56.1. Pursuant to Section 56.2(2) the role of the director in any of these appeals is limited to "matters concerning the administration or interpretation" of the *OHS Act*.

[71] In her brief, the Appellant argued that the Adjudicator made an error in law under this heading:

> *…"as the adjudicator cannot make a determination as to what if any determinations the officer made or what the correct procedure under Sections 27 and 28 of the Act is, since the OH & S did not present any evidence whatsoever nor was the officer in question called to give evidence".*

[72] She also states, "[S]ince the procedure and jurisdiction of an Occupational Health Officer is at question here it was essential for a representative of OH & S to attend".

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[22] Section 28(3)

[73] These arguments do not, in our opinion, address the question which was posed and answered by the Adjudicator, which was, whether there was a legal requirement for the director or a representative to be present at the hearing. If the Appellant wanted evidence to be provided by the officer who determined that he/she would not proceed with the complaint due to the release, she could have requested that the adjudicator adjourn the proceedings and issue a subpoena to the officer to have him/her attend to give evidence. This was not done.

[74] There is no statutory requirement under the *OHS Act* for the director or a representative to be present at the hearing or to give evidence. The director is given limited standing to appear, but is not required to appear or provide evidence.

[75] The Adjudicator answered the question which was posed to her in paragraph 22 of her decision. That determination was correct.

DATED at Regina, Saskatchewan, this 7th day of November, 2014.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[23] Section 47 defines "decision" to include the issuance of a "notice of contravention"