Saskatchewan
Labour Relations Board

Monique Koskie, Appellant v. Child Find Sask. Inc. Respondent & Government of Saskatchewan, Director, Occupational Health and Safety

LRB File No. 119-15; October 6, 2015

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

For the Appellant:	Mr. Andrew Heinrichs
For the Respondent Employer:	Mr. Lane Zabolotney
For the Director of Occupational Health and Safety	No one appearing

Affidavit evidence – Appellant sought to introduce affidavit evidence to amplify and clarify testimony at hearing – Board refuses to accept affidavit evidence – Board's role is not to be finder of fact – facts to be determined by Adjudicator at *de novo* hearing – introduction of affidavit evidence would result in unfairness to Respondent unless Respondent allowed to also introduce affidavit in reply or to cross-examine affiant.

Section 4-8 of *The Saskatchewan Employment Act* – Appeal from an Adjudication under Part III – Harassment – Decision of Occupational Health and Safety Officer that Employer wrongfully terminated overturned by Adjudicator.

Natural Justice – Failure to provide a timely decision – Adjudicator's decision outstanding in excess of 60 days – Board determines failure did not breach the principles of natural justice.

Reasonable Apprehension of Bias – Appellant makes application to Court to compel Adjudicator to issue decision – Decision issued before return date of motion - Appellant argues that Adjudicator's decision biased as a result of Court application – Board determines that fact of Court application would not raise reasonable apprehension of bias.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Chairperson:** This is an appeal against a determination by an Adjudicator appointed to hear an appeal from a decision of an officer in the Occupational Health and Safety Division ("OH&S") of the Ministry of Labour Relations and Workplace Safety. The Adjudicator allowed the appeal against the finding of the OH&S officer. The Appellant then appealed to this Board pursuant to Section 4-8 of *The Saskatchewan Employment Act* ("*SEA")*.

[2] The Applicant's Appeal is under Section 4-8 of the SEA which permits appeals, from decisions of adjudicators to this Board on questions of law. The Appellant's grounds of appeal were:

> a) *That the Adjudicator failed to render a decision within the time-frame prescribed under the Act, and/or within a reasonable time-frame, and that the delay in rendering a decision resulted in a breach of natural justice, and/or an unfairness that is prejudicial to the Appellant;*
> b) *The Appellant has a reasonable apprehensioin of bias of the Adjudicator;*
> c) *That the Adjudicator failed to draw inferences or the proper inferences from the relevant facts and thereby failed to find the true facts or to find all of the facts necessary to arrive at a just and proper decision upon the evidence;*
> d) *That the Adjudicator erred in its interpretation of the Act and the relevant authorities as same applied to the case before it;*
> e) *That the Adjudicator erred by failing to apply, or properly apply, the onus of proof in establishing whether the employer acted in accordance with the requirements under section 3-8 of the Act and/or in establishing whether the employer was engaged in activity protected by section 3-35 of the Act;*
> f) *That the Adjudicator erred by failing to consider, or properly consider, the evidence, inter alia:*
> i) *that in addition to Worker's A inappropriate behavior outside of the workplace, there were multiple and ongoing instances of inappropriate behavior by Worker A in the workplace*
> ii) *That Ms. H received a request by the Appellant to re-arrange her work station for reasons that she was*

uncomfortable sitting within Worker A's view and was uncomfortable with Worker A watching her;

iii) That Ms. H was advised by the Appellant of harassment by Worker A on August 24, 2011;

iv) That Ms. H circulated a harassment policy subsequent to the Appellant's discussions with Ms. H on August 24, 2011;

v) That the Appellant was terminated one week following the Appellant's August 24, 2011 discussion with Ms. H.;

vi) That Ms. H was not present at the hearing of the matter, and therefore provided no evidence in rebuttal to the Appellant's evidence

g) Additionally or alternatively, the Adjudicator erred in finding that the reasons provided by the employer were "good & sufficient" reasons and/or were the only reasons for terminating the Appellant's employment, and therefore erred in finding that the employer did not contravene section 3-36 of the Act; and,

h) Such further grounds as counsel may advise and as may appear from the decision and order of the Adjudicator.

[3] The Appellant was employed by the Respondent to conduct research, program development and casework and other assigned duties, which included website maintenance and other computer-related assistance. She began her employment on June 6, 2011. Her ongoing employment was subject to a three (3) month probationary period. She was terminated on August 31, 2011, a few days prior to the expiry of her probationary period for lack of suitability. On September 4, 2011, the Appellant submitted a completed harassment questionnaire and discriminatory action complaint with OH&S. An officer completed an investigation and her decision dated October 3, 2012, she upheld the Appellant's complaint.

[4] The Respondent appealed the decision of the OH&S officer to the Adjudicator who, by her decision dated June 2, 2015, allowed the Respondent's appeal. The Appellant then appealed to the Board.

Facts:

[5] The Adjudicator's decision sets out in great detail the facts of the case and a summary of the evidence[1] heard from numerous witnesses. It is not necessary from me to repeat that summary. The Appellant takes issue with some of the facts and determinations made within the decision. I will refer to portions of the finding of fact and the evidence, as necessary, during these reasons.

[1] See paragraphs [11] through [141] of the Adjudicator's decision

Application to file Affidavit Evidence

[6] At the hearing of this matter, the Appellant sought leave to introduce affidavit evidence to the Board. The purpose for which the Appellant sought leave to file the affidavit evidence was to clarify portions of the evidence and to supplement the evidence available to the Adjudicator when she made her decision. At the hearing, I declined to permit the affidavit to be introduced. These are the reasons for that decision.

[7] Since the Court of Appeal's decision in *Hartwig and Honourable Mr. Justice D.H. Wright, Commissioner, Inquiry into Matters Relating to the Death of Neil Stonechild, et al.*[2] the scope of material properly before a court on a judicial review application has changed. However, the Court acknowledged that the change was in respect of a judicial review conducted by a superior Court and that specific legislative regimes may be inconsistent with such requirement[3]. Such provisions exist in the *SEA*.

[8] Additionally, the Board is not a superior Court and cannot judicially review a decision by an adjudicator. Rather, we are constrained by our jurisdiction to review "errors of law" which may fall into three distinct categories. Firstly, there are questions of law, secondly there are questions of mixed law and fact, and thirdly, questions of fact which may be reviewed as errors of law.[4]

[9] In *International Brotherhood of Electrical Workers, Local 2038 v. Clean Harbors Industrial Services Canada Inc.*[5], Madam Justice Schwann dealt with some aspects of how findings of fact by a tribunal should be dealt with. She relied, in part, on the decision of Mr. Justice Richards (as he was then) in *Re: Stonechild*[6]. At paragraph [25] Madam Justice Schwann says:

> *[25] This Court cannot simply disregard the tribunal's findings of fact unless they are unreasonable (Mouvement laïque québécois v Saguenay (City), 2015 SCC 16 (CanLII), at para 113, 382 DLR (4th) 385). In Stonechild Re, 2008 SKCA 81 (CanLII), 310 Sask R 263 [Stonechild], where judicial review*

[2] [2007] SKCA 74
[3] *Supra* note 2, at paragraph 21
[4] For greater detail regarding these three areas, see *Weiler v. Saskatoon Convelescent Home* [2014] CanLII 76051 (SKLRB)
[5] [2015] SKQB 232
[6] *Supra* Note 2

was sought in relation to a commissioner's report, Richards J.A. (as he then was) discussed the standard of review in relation to findings of fact. He said:

> ***73*** *The circumstances of this application point unequivocally in the direction of reasonableness as the proper standard to use in reviewing the Commissioner's findings. The nature of the issue here — findings of fact — clearly indicates that the Commissioner's work should be shown a significant amount of deference. He had the great advantage of seeing and hearing the testimony first hand and many of his central findings are rooted in assessments of credibility. Just as an appeal court should not lightly interfere with the findings of fact made by a trial judge, so a court acting in relation to a judicial review application should not lightly interfere with the findings of a commission of inquiry. See: Housen v. Nikolaisen, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235 (S.C.C.).*
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> ***74*** *This self-evident conclusion is fully in line with what the Supreme Court said in Dunsmuir. The majority indicated more than once that factual issues will generally be reviewed on the reasonableness standard…*

[26] Where the impugned findings of fact are interwoven with an assessment of a witnesses' credibility, Stonechild cautions against a fundamental reassessment of the evidence on judicial review. At para. 103, Richards J.A. said:

> ***103*** *In conclusion, I am not persuaded that any of the factual findings contested by Constables Hartwig and Senger are unreasonable in the required sense. It is simply not appropriate for this Court, in the context of a judicial review application, to be drawn into a fundamental reassessment of the evidence. That is particularly so when the Commissioner's findings of fact are so deeply connected to his assessment of the credibility of the key witnesses who appeared before him.*

[10] The purpose for which the affidavit evidence was proposed to be entered was not to provide evidence regarding the alleged failures of the Adjudicator to accord the parties natural justice or to provide evidence concerning the alleged apprehension of bias. Rather, it was brought to supplement the evidence presented at the hearing and to comment upon findings made by the Adjudicator.

[11] The Board sits in review of the Adjudicator's decision. Our hearing is confined to a review on the record on a question of law[7]. It is not a *de novo* hearing where evidence can be presented. It is not for the Board to make findings of fact or to review findings made by the Adjudicator, apart from reviewing those findings for reasonableness. This Board's determination is made based upon whether the decision falls within a range of possible outcomes which are defensible in respect of the facts and law.[8]

[12] Additionally, the acceptance of affidavit evidence which was not uncontroversial or agreed to by the parties would place the Respondent in a difficult position in not being able to rebut that evidence or to subject the affiant to cross-examination. It would not have been fair to the Respondent to accept supplemental evidence or clarification evidence without either the agreement of the Respondent or without providing the Respondent the opportunity to respond to that evidence. However, as noted above, doing so would require this Board to become a fact finding body, something which is not contemplated in the legislation.

[13] For these reasons I declined to accept the additional affidavit evidence.

Relevant statutory provision:

[14] Relevant statutory provisions are as follows:

Right to appeal adjudicator's decision to board

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

.. . .

(6)The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.

Appellant's arguments:

[15] The Appellant argued that the Adjudicator had failed to render her decision within the time frame prescribed under the *SEA*. That failure, the Appellant argued, resulted in a

[7] See Sections 4-8(1), (4) and (6)
[8] See *Dunsmuir v. New Brunswick* [1008] Scc9 (CanLII) *at para. 47*

breach of natural justice and/or unfairness prejudicial to the Appellant. In support, the Appellant cited *Adams v. Crowe*[9] and *Marsh v. Zaccardelli*[10]

[16] The Appellant also argued that the Adjudiator had a reasonable apprehension of bias because of the timing of the late-rendered decision. The Appellant commenced an application in the Court of Queen's Bench to compel the Adjudicator to render her decision. The Appellant argued that upon the Adjudicator being made aware of the application, an adverse decision was promptly rendered. They argued that a reasonable and right minded person would conclude that the Adjudicator, either consciously or more unconsciously was subject to a bias as a result of the pending application to the Courts. In support, the Appellant cited *Labourers' International Union of North America v. J.C.H. Contracting Ltd.*[11]

[17] The Appellant argued that the Adjudicator failed to draw inferences or the proper inferences from the relevant facts and thereby failed to find the true facts or all of the facts necessary to arrive at a just and proper decision upon the evidence. In support the Appellant cited *Dunkle v. Saskatchewan (Advanced Education, Employment and Labour, Occupational Health and Safety Division*[12]

[18] The Appellant also argued that the Adjudicator erred in her interpretation of the *SEA* and the relevant authorities as they were applicable to the case before her. In support, the Appellant relied upon Neumann and Sack's text on employment law[13] and the case of *Higginson v. Rocky Credit Union Ltd. as* referenced therein.

[19] The Appellant argued that the Adjudicator erred in failing to properly apply the onus of proof in establishing whether the Respondent acted in accordance with the requirements of Section 3-8 of the *SEA* and/or in establishing whether the employee was engaged in activity protected by Section 3-8 of the *SEA*.

[20] The Appellant argued that the Adjudicator erred by failing to consider, or properly consider the evidence before her. Additionally, or in the Alternative, the Appellant argued that

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[9] [2010] NSSC 324 (CanLII)
[10] [2006] FC 1466 (CanLII)
[11] [2015] CanLII 35466 (ONLRB)
[12] [2011] SKQB 59 (CanLII)
[13] Peter Neumann and Jeffrey Sack, Text on Wrongful Dismissal and Employment Law 1st ed

the Adjudicator erred in finding that the reasons provided by the employer for the Appellant's dismissal were "good and sufficient" reasons.

Respondent's arguments:

[21] The Respondent argued that the Board had no jurisdiction to overturn findings of fact made by the Adjudicator. The Respondent argued that the Board's jurisdiction was limited to questions of law. In support, the Respondent cited *Dunsmuir v. New Brunswick*[14] and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*[15].

[22] The Respondent argued that the delay in rendering the decision by the Adjudicator does not constitute prejudice against the Appellant. In support, the Respondent cited *Blencoe v. British Columbia (Human Rights Commission)*[16].

[23] The Respondent also argued that there was no reasonable apprehension of bias resultant from the application to the Court of Queen's Bench. In support the Respondent cited Justice De Grandpre's dissent in *Committee for Justice and Liberty v. Canada (National Energy Board)*[17].

[24] The Respondent argued that the Appellant had the burden of proof to establish a *prima facie* case of discrimination. It argued that the evidence showed that no complaint of workplace discrimination occurred during her employment and prior to her dismissal.

Standard of Review:

[25] The Board has outlined the standard of review for questions of law, questions of mixed law and facts, and factual questions which may be reviewable as errors of law in *Wieler v. Saskatoon Convalescent Home*[18]. That decision established the following standards of review:

1. Errors of Law will be reviewed on the "correctness" standard.

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[14] [2008] SCC 9
[15] [2011] SCC 62
[16] [2000] SCC 44
[17] [1978] SCR 369 at 394, 1976, [1976] CanLII 2 (SCC)
[18] [2014] CanLII 76051 (SKLRB) LRB File No. 115-14

2. Errors of Mixed Law and Fact will be reviewed on the "reasonableness" standard.
3. Errors of Fact which may be reviewable as questions of law will be reviewed on the "reasonableness" standard.

Analysis:

Applicable Law:

[26] All of the events in this matter arose during the time when *The Occupational Health and Safety Act, 1993*[19] was in force and effect. The *SEA*, although passed in 2013, was not proclaimed in effect until April 29, 2014, more than a month after the hearing of this matter before the Adjudicator.

[27] No issue was raised before me regarding the Adjudicator's reliance upon the provisions of the *SEA* in her decision. In their arguments before me, both counsel adopted and relied upon the provisions of the *SEA* rather than *The Occupational Health and Safety Act, 1993*.

[28] The effect of procedural amendments versus substantive amendments was dealt with by our Court of Appeal in *United Food and Commercial Workers Union v. Wal-Mart Canada Corp.*[20]. Based upon that decision, the Appellant had acquired or accrued rights under *The Occupational Health and Safety Act, 1993*. As such, those rights should have been adjudicated under the provisions of *The Occupational Health and Safety Act* rather than the *SEA.* .

[29] However, when the former provisions in *The Occupational Health and Safety Act, 1993* are compared to the same provisions now contained in the *SEA*, the provisions are (apart from minor word variations) identical. The interpretation of the provisions of *The Occupational Health and Safety Act, 1993* and the *SEA* would, in my opinion make no difference to the decision of the Adjudicator.

[30] For ease of reference, and because the provisions of both Acts are identical, I will continue (as did the parties and the Adjudicator) to refer to the provisions of the *SEA* with a footnote to reference the comparable provision of *The Occupational Health and Safety Act, 1993*.

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[19] SS. 1993 c. O-1.1
[20] [2010] SKCA 123 (CanLII)

Did the Adjudicator fail to provide a timely decision?

[31] The Appellant argues that the Adjudicator failed to deliver her decision within the 60 day time period set out in the *SEA*[21]. This argument must fail for several reasons.

[32] One major difference between the provisions of *The Occupational Health and Safety Act, 1993* and the *SEA* is that *The Occupational Health and Safety Act, 1993* did not contain any time limitation in which a decision was required to be rendered.

[33] Our Court of Appeal dealt with a delay in the rendering of a decision by this Board in *United Food and Commercial Workers, Local 1400 v. Tora Regina (Tower) Limited (Giant Tiger Regina)*[22]. In that case, a decision of this Board had been outstanding for over 3 years. The Court of Queen's Bench initially quashed the decision due to this lengthy delay. The Union appealed to the Court of Appeal.

[34] The Court of Appeal did not agree with the Court of Queen's Bench and re-instated the Board's Order. At paragraph [20] – [22], the Court said:

> *[20] We do not believe this is sufficient to warrant a finding of procedural unfairness. The Employer knew the certification application was outstanding when it decided to open its second store and it knew the application was for a bargaining unit described in geographic terms, i.e. all of its employees in the City of Regina. It was obvious that, if a certification order was made, the employees in the new store would be included in the bargaining unit. The Employer cannot and does not go so far as to say that it opened the second store believing the facility would not be unionized or that it would not have opened the second store if it had known those operations would be the subject of a certification order. Indeed, there is much to recommend the Union's argument to the effect that the Employer suffered no prejudice at all on the facts at hand. The main impact of the delay was simply that the Employer was able to operate union-free for in excess of three years following the filing of the certification application.*
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> *[21] The Employer also suggests that it has suffered prejudice because it is now required to bargain with a union which is not supported by a majority of employees. There are two obvious difficulties with that submission. Most fundamentally, we do not know one way or the other what level of support is currently*

[21] Section 4-7
[22] [2008] SKCA 38 (CanLII)

> *enjoyed by the Union. It might be low but, on the other hand, it might be very high. Second, we note that, if the Union does not have the support of the Employer's employees, they are free to bring an application to have it decertified. See: The Trade Union Act, s. 5(k).*
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> *[22] In the end, we are not persuaded the Board's delay in rendering a decision resulted in a breach of principles of natural justice or procedural unfairness.*

[35] Because this hearing was heard pursuant to *The Occupational Health and Safety Act, 1993* the time limitation was not in effect. An application was made to the Court of Queen's Bench to require the Adjudicator to produce her decision, which application never proceeded because the decision was issued prior to the Court having to intervene.

[36] Furthermore, even if the provisions of the *SEA* governed this matter, the *SEA* itself provides that the late issuance of a decision does not affect its validity[23]. The *SEA* also contemplates that the Court of Queen's Bench may intervene by ordering an Adjudicator to provide his or her decision if the timeline has not been met. The Court would also have this jurisdiction in the event of a failure to provide a decision within a reasonable time under the *The Occupational Health and Safety Act, 1993*.

[37] The lateness of this Board's decision in *United Food and Commercial Workers, Local 1400 v. Tora Regina (Tower) Limited (Giant Tiger Regina)*[24] was the genesis for the requirements for timely decisions found in the *SEA*. As noted by our Court of Appeal, the failure to issue a decision in a timely fashion will not invalidate that decision unless the delay "resulted in a breach of the principles of natural justice or procedural fairness".

[38] No breach of the principles of natural justice (apart from the issue of bias which was related to the filing of the application to produce the decision, not the delay) or procedural fairness were alleged by the Appellant. Rather than advocating for a rehearing, which would be the normal result of a finding of a breach of natural justice or procedural fairness, the Appellant argued that the Adjudicator's result should be voided and the determination of the OH & S officer re-instated. In support, the Appellant argued that she had been prejudiced by the delay in not being able to seek or accept a permanent position because she was required to maintain the ability to return to work if that relief had been ordered by the Adjudicator.

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[23] Section 6-7(3)
[24] [2008] SKCA 38 (CanLII)

[39] With respect, I cannot agree with this argument. The Appellant was terminated during her probationary period for what the Employer determined to be unsuitability. In these circumstances there would be a positive duty on the part of the Appellant to mitigate any potential loss which she might suffer should the actions of her employer be found to be improper. It is difficult to understand how the Appellant could not engage in temporary or permanent employment while remaining available to return to her former employment if re-instated. Obviously, that may require a choice to remain in her new employ or return to her former employment, but such choice is not impossible or even necessarily difficult.

Was there a Reasonable Apprehension of Bias?

[40] The Appellant argues that there was a reasonable apprehension of bias on the part of the Adjudicator resultant from the fact that the Appellant made an application to the Court of Queen's Bench to compel the Adjudicator to issue her decision. The Appellant cited Justice De Grandpre's dissent in *Committee for Justice and Liberty v. Canada (National Energy Board)*[25], where he said:

> *… the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.'*
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> [Emphasis added]

[41] The Appellant suggests that the Appellant had a reasonable apprehension of bias because of the timing of the adjudicator's decision, that is, shortly after being served with an application to the Court of Queen's Bench to compel her to provide her decision. With respect, I cannot agree that the Court application and the summary issuance of the decision prior to the return date of the motion would lead any informed person, viewing the matter realistically and practically—and having thought the matter through would conclude that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[42] In *Agrium Vanscoy Potash Operations v. United Steel Workers Local 7552 and Francine Chad Smith*[26], the Court of Appeal, after confirming that the test for bias was as set out

[25] [1978] SCR 369 at 394, 1976, [1976] CanLII 2 (SCC)
[26] [2014] SKCA 79 (CanLII)

above by Mr. Justice de Grandpre, the Court went on to consider three other points which emerge from the case law. At paragraph [42], the Court said:

> [42] In making that assessment, it is necessary to bear in mind three other points which emerge from the case law. The first point is that, as is typical in the administrative law field, the question of bias is contextual and will depend, among other things, on the nature of the decision-maker. See: *Committee for Justice and Liberty v. National Energy Board, supra* at p. 395; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623 at pp. 638-639. Second, a mere suspicion of bias, or a mere concern about bias, is not enough to satisfy the test. Bias must be "more likely than not" (*Committee for Justice and Liberty v. National Energy Board, supra* at p. 394). There must be "a real likelihood or probability of bias" (*R. v. S. (R.D.), supra* at para. 112). Third, the "reasonable person" contemplated by the test is an informed person, with knowledge of all of the relevant circumstances, including relevant traditions of integrity and impartiality. See: *R. v. S. (R.D.), supra* at paras. 48 and 111.

[43] In *Elaine Germain v. Saskatchewan Government Insurance*[27], our Court of Appeal dealt with a similar application by Ms. Germain who argued that as a result of an application made by her to the Court of Queen's Bench for an injunction and declaratory relief to prevent publication of a decision by the Automobile Accident Insurance Commission. This application, she argued was grounds for a reasonable apprehension of bias against her. The Court of Appeal disagreed. In that decision at paragraph 11. The Court said:

> *Finally, there must be serious grounds upon which to base a conclusion of bias, given that there is a strong presumption of judicial impartiality: S. (R.D.) supra; Arsenault-Cameron v. Prince Edward Island, 1999 CanLII 641 (SCC),[1999] 3 S.C.R. 851, Terceira v. Labourers International Union of North America, (2014), 122 O.R. (3d) 521 (C.A.).*

[44] There is no other support offered for the alleged apprehension of bias other than the fact that the decision was issued prior to the return of the motion to compel the Adjudicator to provide her decision and that that decision went against the Appellant.

[45] More than a mere suspicion of bias is required. There must be some evidence which would lead "an informed person, viewing the matter realistically and practically—and having thought the matter through" to conclude that the decision maker was biased. None of the indicia to support such a conclusion is present here. There are no serious grounds on which to

base such a conclusion. The Adjudicator, as an administrative officer is performing a quasi-judicial function and therefore deserves a strong presumption of impartiality. There is no real likelihood or probability of bias which arises from the fact that the Appellant made an application to compel the Adjudicator to render her decision.

[46] Had the decision not been ready to be issued, the Adjudicator could have, presumably, appeared before the presiding judge to advise as to the reasons why the decision had not been issued and to request additional time to complete the decision. If the judge happened to agree with her, would that then raise a reasonable apprehension of bias on the part of the judge? The application was contemplated by the *SEA* and required under *The Occupational Health and Safety Act, 1993*. It is difficult to make any connection with the Appellant exercising her legal rights to a conclusion that the use of those rights gave rise to an apprehension of bias.

[47] Adjudicators are sophisticated and knowledgeable persons chosen for their skill and knowledge in this area. It would not, I believe, be reasonable to presume that such a sophisticated and knowledgeable person would in any way be swayed by the exercise of legal rights by the Appellant as occurred here. Accordingly, we find no reasonable apprehension of bias on the part of the Adjudicator in this case.

Did the Adjudicator Fail to Draw Inferences or Proper Inferences?

[48] The Appellant argued that the Adjudicator erred in not drawing a proper inference from the fact that Ms. H was not present at the hearing and did not testify. Ms. H was the President of the Respondent during the period in question. Ms. H. was also involved in the hiring of the Appellant and the alleged harassment issues involving Worker A.

[49] In their written argument, the Appellant argued that Ms. H "had ample opportunity to arrange to appear in person, or alternatively be telephone or video conference. The Appellant argued that an adverse inference should be drawn from her failure to appear in accordance with the rule in *Murray v. The City of Saskatoon*[28].

[27] [2015] SKCA 84 (CanLII)
[28] [1951] CanLII 202 (SKCA)

[50] The principle in *Murray v. The City of Saskatoon* does not assist the Appellant here. As was the case in *Sugarman v. Saskatchewan Association of Optometrists*[29], there is no onus upon the Respondent to call Ms. H. Testimony was provided by Mr. Page, a board member, who's evidence was accepted at the hearing, without challenge from the Appellant or her counsel, concerning the matters on which Ms. H. might have testified. There was no challenge to, or conflict in, the evidence provided by Mr. Page.

[51] If the Appellant was of the belief that Ms. H. could provide evidence that was beneficial to her, and which would assist her case, then the onus fell upon her to call Ms. H. and to subpoena her, if necessary, to provide that evidence. It is not clear what evidence accepted by the Adjudicator that the *Murray* presumption would suggest that Ms. H's testimony would not support. Instead they suggest that Mr. Page's evidence was not "first hand" or hearsay. Nevertheless, that evidence was not challenged at the hearing and was accepted by the Adjudicator.

[52] An Adjudicator has broad discretion with respect to the conduct of the hearing. Nor is an Adjudicator required to follow the admissibility rules practiced by our Courts.[30] An Adjudicator may accept hearsay evidence or "any evidence and information on oath, affirmation, affidavit or otherwise that the adjudicator considers appropriate, whether admissible in a court of law, or not".

[53] The Adjudicator made no error in accepting the evidence which she did, nor in not drawing any adverse inference from the fact that Ms. H did not testify. It was open to the Appellant to object to the fact that Ms. H did not testify at the hearing, which they did not. It was also open to the Appellant to subpoena Ms. H. if she considered that her evidence was essential to her case. The Appellant could have requested an adjournment to accommodate the taking of evidence from Ms. H.

[54] The Appellant did not do any of these things at the hearing. Nor did she raise the adverse inference issue with the Adjudicator at the hearing so that the Adjudicator was not aware of any issue regarding the testimony of Ms. H.

[55] I find no error in this regard.

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[29] [1990] CanLII 7596 (SK QB)
[30] See section 52 of the OH & S Act, 1993 and section 4-5 of the *SEA*

Did the Adjudicator err in her interpretation of the Act?

[56] The Appellant argues that the Adjudicator erred in her determination that no substantive complaint of harassment was made by the Appellant. The Appellant raises section 3-8(b) of the *SEA*[31] in respect of this argument.

[57] It does not appear that the Adjudicator was required, asked, or made any determination regarding the interpretation of subsection 3-8(b). How this provision assists the Appellant is not clear in her submissions either. Nevertheless, the Adjudicator carefully considered the evidence and testimony before her and concluded that no complaint of harassment had been made[32]. In paragraphs [34] – [39] the Adjudicator considered the evidence before her and concluded that "I am not persuaded that the Respondent raised her concerns as a complaint of harassment".

[58] At paragraphs [44] and [45], the Adjudicator addressed the general duty imposed on employers by Section 3-8, citing subsections (a) and (d) thereof as not triggering a general requirement that employers have to ensure the Applicant's health, safety and welfare while at home. Similarly, subsection (b) makes specific reference to "matters of health, safety and welfare **at work**" [emphasis added].

[59] The application of the facts to the law is reviewed on a standard of reasonableness. The decision must be supported if it falls within the range of possible acceptable outcomes. The determination made by the Adjudicator, that the Appellant had not engaged the harassment process by raising her concerns as a complaint of harassment, was reasonable.

Did the Adjudicator err in the Application of the Reverse Onus?

[60] Clause3-36(4)(a)[33] provides a presumption in favour of the worker that "the discriminatory action was taken against the worker because the worker acted or participated in an activity described in Section 3-35"[34]. Subsection (b) then places the onus "on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason".

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[31] Section 3(b) of the OH & S Act, 1993
[32] See paragraph [39]
[33] Subsection 28(4) of the OH & S Act, 1993

[61] The Appellant acknowledges that the Adjudicator correctly identified the onus of proof and the applicable standard of proof, being a balance of probabilities. The Appellant, however, argues that the Adjudicator improperly applied that standard.

[62] The Appellant takes issue with the findings of fact made by the Adjudicator with respect to her finding that there was no complaint of harassment made by the Appellant. Additionally, the Appellant takes issue with the fact that the Adjudicator heard only the Appellant's evidence in respect to prior events and should have placed reliance upon that evidence. With respect, I cannot agree with the Appellant's arguments.

[63] The Board has dealt with a similar argument in *Racic v. Moose Jaw Family Services Inc.*[35] In that case, the Board noted that in the application of the reasonableness standard of review, the Board must consider the Adjudicator's decision in the context of the evidence, the parties submissions, and the process to assess whether it is reasonable. In In *Newfoundland Nurses*[36], the Supreme Court said:

> *[12] It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that* ***the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision****". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:*
>
> > *"Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Underlining added by Abella J.]*
> >
> > *(David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., The Province of Administrative Law (1997), 279, at p. 304)*
>
> *…*
>
> *[17]* ***The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious***

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[34] Section 27 of the OH & S Act, 1993
[35] LRB File No. 141-15, Reasons dated September 21, 2015, unreported
[36] Supra Note 15

> ***about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful****.*
>
> *[18] Evans J.A. in Canada Post Corp. v. Public Service Alliance of Canada, 2010 FCA 56 (CanLII), [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57 (CanLII), [2011] 3 S.C.R. 572) that Dunsmuir seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that* ***"perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision"*** *(para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:*
>
> > ***When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process****. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]*
>
> *(Bold emphasis added, underline emphasis in original)*

[64] The Adjudicator determined at paragraph [50] of her decision that there was no substantive complaint of harassment made by the Appellant. The Adjudicator went on in paragraph [51] to determine that as a result of this finding, there was "no case for the Appellant (Respondent in these proceedings) to answer". Nevertheless, she embarked on an analysis of whether or not; good and sufficient reason existed for the termination. Her determination was that such justification was found.

[65] The Appellant complains about this analysis, suggesting that the Adjudicator erred in her determinations. While I do not agree with the Appellant's arguments, it must be remembered that the Adjudicator's analysis is, *obiter.* I have accepted that the Adjudicator made factual findings that a substantive complaint of harassment, such as to invoke the statutory protections, had not been made out by the Appellant.

[66] The conclusions reached by the Adjudicator regarding the absence of a harassment complaint were reasonable given the process engaged, the evidence presented and the facts as found. The *obiter* analysis that the Adjudicator carried on was merely in the alternative. That analysis did not come to an unreasonable conclusion.

Did the Adjudicator fail to consider or properly consider the evidence?

[67] Findings of fact are reviewable by the Board 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.[37]

[68] The Appellant raises six (6) instances where it argues that the Adjudicator erred in her factual determinations by failing to consider certain evidentiary points or to properly consider other evidence. The instances raised were as follows:

> (a) In addition to Worker's A inappropriate behavior outside of the workplace, there were multiple and ongoing instances of inappropriate behavior by Worker A in the workplace.
> (b) Ms. H received a request by the Appellant to re-arrange her work station for reasons that she was uncomfortable sitting within Worker A's view and was uncomfortable with Worker A watching her.
> (c) That Ms. H circulated a harassment policy subsequent to the Appellant's discussions with Ms. H on August 24, 2011.
> (d) The Appellant was terminated one week following the Appellant's August 24, 20111 discussion with Ms. H.
> (e) That Ms. H was advised by the Appellant of harassment by Worker A on August 24, 2011
> (f) That Ms. H was not present at the hearing of the matter, and therefore provided no evidence in rebuttal to the Appellant's evidence;

[69] In each of these points, the Appellant argues that the Adjudicator could and should have come to a different conclusion, from what she did, based upon the Appellant's view of the evidence. None of this evidence was ignored by the Adjudicator, nor did she fail to take it into account. Nor was the evidence irrelevant or mischaracterized by her. She considered all of these points of evidence raised by the Appellant, but came to a different conclusion based upon her view of the evidence as presented. These points do not constitute a reviewable error by the Adjudicator. Those determinations were for the Adjudicator to make and are not subject to my review.

Did the Adjudicator Err in her finding that the reasons given constituted "good and sufficient reasons"?

[70] The Appellant argues that the findings of the Adjudicator that good and sufficient reason existed for the appellant's termination were unreasonable. Even if I agreed with that

[37] See P.S.S. Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission) [2007] SKCA 149 (CanLII)

position, which I do not, the analysis of those reasons, as noted above, were *obiter* on the part of the Adjudicator.

[71] In making her determinations, the Adjudicator reviewed all of the evidence. She concluded that "good and sufficient" reasons had been provided by the Respondent. That determination is one of the primary functions of an Adjudicator, that is, to determine if discriminatory action has been taken and, if so, if that discriminatory action was taken with "good and sufficient" reasons.

[72] The Adjudicator's analysis contained in paragraphs [51] – [61] falls within the range of acceptable outcomes and is, in my opinion, reasonable.

[73] For the above reasons, the decision of the Adjudicator is affirmed. An appropriate order will accompany these reasons.

DATED at Regina, Saskatchewan, this 6th day of October, 2015.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson