S.C., Appellant v. MAMAWETAN CHURCHILL RIVER REGIONAL HEALTH AUTHORITY & GOVERNMENT OF SASKATCHEWAN, Director, Occupational Health and Safety, Respondents

LRB File No. 135-15; November 3, 2015

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

For the Appellant:	Self Represented
For the Respondent Employer:	Mr. Evert Van Olst
For the Director of Occupational Health and Safety	No one appearing

Section 4-8 of *The Saskatchewan Employment Act* – Appeal from a decision by an Adjudicator pursuant to the Part III – Discriminatory Action – Harassment

Employee alleges that her termination during probationary period was the result of discriminatory action against her related to her reliance upon rights under the provisions of *The Occupational Health and Safety Act, 1993* – Adjudicator appointed pursuant to *The Saskatchewan Employment Act* denies claim.

Natural Justice – Appellant alleges that she was denied natural justice due to delay in issuance of decision by Adjudicator – Board reviews previous jurisprudence and finds no denial of natural justice.

Bias – Appellant alleges that the Adjudicator exhibited a reasonable apprehension of bias in the conduct of the hearing – Appellant argues that adjudicator wrongfully quashed subpoenas issued to witnesses – Board reviews facts and finds no reasonable apprehension of bias.

Appellant alleges that the Adjudicator made gross and palpable overriding errors – Board reviews jurisprudence and finds that gross and palpable overriding error is not the governing standard of review.

Reasonableness of Decision – Board reviews decision – Finds Adjudicator failed to find causal connection in respect of one element of matter – Board remits decision to Adjudicator to determine missing causal connection.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** This is an appeal from a determination of 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 OH&S officer rejected the Appellant's claim that she had been terminated as a result of discriminatory action on the part of her employer. The Adjudicator affirmed the findings of the OH&S officer. The Appellant appealed to this Board pursuant to Section 4-8 of *The Saskatchewan Employment Act* ("*SEA")*.

[2] The Appellant'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 can be summarized as follows:

> 1. *That the Adjudicator had failed to render her decision for a period of 14 months which the Appellant alleged constituted a breach of natural justice;*
> 2. *That the Adjudicator was biased;*
> 3. *That the Adjudicator had erred in granting a motion to quash subpoenas issued by the Appellant to witnesses; and*
> 4. *By making errors in fact and making palpable and overriding errors.*

Facts:

[3] 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 for 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 evidence, as necessary, during these reasons.

Relevant statutory provision:

[4] Relevant statutory provisions are as follows:

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[1] See paragraphs [13] through [75] of the Adjudicator's decision

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.

Summary of Appellant's arguments:

[5] In her notice of appeal, the Appellant raised the following arguments as questions of law:

1. *That the Adjudicator had committed a breach of natural justice by taking 15 months to reach and issue her decision and by misquoting witnesses and failing to notice the importance and relevancy of testimony of witnesses;*
2. *That the Adjudicator was biased against the Appellant primarily as a result of her mischaracterization of evidence and by summarizing evidence improperly;*
3. *That the Adjudicator erred in granting a motion to quash subpoenas issued by the Appellant to prospective witnesses;*
4. *That the Adjudicator erred in reaching her determination that one witness testimony should be given greater weight due to her finding that that witness was more credible and that this determination was a palpable and overriding error.*

Summary of Respondent Employer's arguments:

[6] The Respondent denied that there was a breach of natural justice resultant from the lengthy delay in the Adjudicator reaching her decision. The Respondent also argued that the Appellant had not been prejudiced by the delay.

[7] The Respondent denied that the Adjudicator showed any reasonable apprehension of bias against the Appellant. The Respondent asserted that there was no evidence of improper communications or other matters to support any allegation of bias.

[8] The Respondent denied that the Adjudicator made any procedural error in quashing the subpoena issued to one party whose testimony, it argued, would not be relevant to the proceedings. Secondly, the Respondent admitted to be confused by the allegation that a witness who testified was not permitted to testify.

[9] The Respondent argued that the "gross and palpable" error standard alleged by the Appellant was not a proper standard of review.

Standard of Review:

[10] 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*[2]. That decision established the following standards of review:

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

Delay in issuing Decision:

[11] The natural justice argument is to be determined on a correctness standard. For the reasons that follow, I have concluded that the Adjudicator did not err.

[12] The Board has dealt with the issue of delay in issuing a decision in *Monique Koskie v. Child Find Sask. Inc.*[3]. In that case, the issue was raised as an issue of bias based upon a similar lengthy delay. In *Koskie*, an application had been made to the Court of Queen's Bench to compel the issuance of a decision, but the decision was issued prior to the return date of the application.

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[2] [2014] CanLII 76051 (SKLRB) LRB File No. 115-14

[13] In *Koskie*, the Board ruled against the Appellant. The reasoning in that case is applicable here. At paragraphs [31] – [37] the Board said:

> *[31] The Appellant argues that the Adjudicator failed to deliver her decision within the 60 day time period set out in the SEA[4]. This argument must fail for several reasons.*
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> *[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.*
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> *[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)[5]. 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.*
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> *[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:*
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>> *[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 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*

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[3] LRB File No. 119-15 Decision dated October 6, 2015

[4] Section 4-7

[5] [2008] SKCA 38 (CanLII)

> *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[6]. 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 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)[7] 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".

[14] This reasoning is also applicable because the Appellant made no argument or demonstrated no prejudice resultant from the delay. This case was also begun and the facts arose under the provisions of *The Occupational Health and Safety Act, 1993*[8].

[15] I find no error by the Adjudictor in respect of this argument.

Was there a reasonable apprehension of bias?

[16] Allegations of bias must also be determined on the standard of correctness. For the reasons that follow, I have concluded that the Adjudicator did not exhibit a reasonable apprehension of bias against the Appellant.

[17] The Board also dealt with issues of bias in *Koskie*. In *Koskie,* the allegations of bias were different from the allegations of bias in this case, but the legal principles behind the

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6 Section 6-7(3)
7 [2008] SKCA 38 (CanLII)
8 SS 1993 c. O-11

concept of bias are applicable. At paragraphs [40] - [42] of *Koskie*, the Board set out the applicable test for allegations of bias as follows:

> *[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)*[9]*, where he said:*
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> > *… 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 '<u>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.</u>'*
> >
> > *[Emphasis added]*
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> *[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.*
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> *[42] In <u>Agrium Vanscoy Potash Operations v. United Steel Workers Local 7552 and Francine Chad Smith</u>*[10]*, the Court of Appeal, after confirming that the test for bias was as set out 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:*
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> > *[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: <u>Committee for Justice and Liberty v. National Energy Board</u>, supra at p. 395; <u>Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)</u>, 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" (<u>Committee for Justice and Liberty v. National Energy Board</u>, supra at p. 394). There must be "a real likelihood or probability of*

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[9] [1978] SCR 369 at 394, 1976, [1976] CanLII 2 (SCC)
[10] [2014] SKCA 79 (CanLII)

> *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.*

[18] In this case, the Appellant argued that the bias of the Adjudicator was evident from the fact of the delay in the rendering of her decision without any proper record of the testimony heard which resulted in her finding as fact "whatever" the Adjudicator remembered of the testimony. With respect, this argument is disingenuous insofar as it is clear from the decision that the Adjudicator clearly presented the evidence which she found to be relevant and also relied upon written submissions and written arguments presented by both parties.

[19] The Appellant also complained that the Adjudicator summarized her testimony and that of her witnesses in four (4) points. It is true that the Adjudicator summarized the evidence at paragraph [22]. However, she then went on to discuss and consider relevant evidence heard at the proceeding. There is no error in performing such a summary and such summary is necessary since a decision is not a *verbatim* regurgitation of the evidence and touches only on those points which are relevant to the issue under consideration.

[20] Contradicting her own argument, the Appellant then contends later in her arguments that the Adjudicator erred when she then quoted and relied upon evidence which fell outside her four (4) point summary.

[21] The Appellant also argued that there was reference to an *ex parte* conversation between herself and the Chair of the Board of the Respondent which the Adjudicator should not have been aware of. With respect, there is nothing in the Adjudicator's decision relative to any such conversation.

[22] I can find no error in the Adjudicator's decision as alleged by the Appellant.

Did the Adjudicator err in quashing subpoenas issued to witnesses?

[23] This issue raises a question of procedural fairness and will be reviewed on the correctness standard. The Appellant alleges that the Adjudicator denied her ability to present relevant evidence due to the Adjudicator quashing a subpoena issued to the person who had

conducted the investigation of the cross harassment complaints concerning the Appellant and a co-worker, TN. The Adjudicator ruled that the conclusions of the investigation were not relevant to her adjudication.

[24] In *Chrisine Racic v. Moose Jaw Family Services*[11], the Board confirmed that a hearing before an Adjudicator is a *de novo* hearing. In that case, the appellant sought to have testimony from the OH&S officer who investigated the complaint. The appellant in that case argued that the adjudicator had advised her not to call the officer as a witness. The Board agreed with the Adjudicator, saying at paragraphs [21] and [22]:

> ***[21]*** *The Adjudicator is required to conduct a de novo hearing[4]. A de novo hearing, as the name suggests, requires that the person hearing the matter, must hear it afresh and consider only evidence presented to her at that hearing. In Saskatoon Regional Health Authority and Johnson**[5]**, the Court of Queen's Bench concluded that a de novo hearing required that such a hearing is a fresh hearing, to be determined on the basis of the new record put before the party hearing the matter, which in this case is the Adjudicator.*
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> ***[22]*** *The OH & S officer had no first hand evidence to provide to the hearing. His knowledge consisted of information which he had obtained as a part of his initial investigation into the question of harassment and retaliation by the Respondent. That evidence, in a de novo hearing would have to be provided by those persons who had personal knowledge of the facts involved. The Adjudicator did not err when she advised the Appellant that testimony by the OH & S officer was not necessary.*

[25] Evidence from the investigator would not be first hand evidence and would for the most part be presumably, hearsay. The Appellant also brought forward testimony from many of those persons who would have been interviewed by the investigator.

[26] The Adjudicator did not err in quashing the subpoena for the investigator.

[27] In the case of witness UJP, the adjudicator limited that witness to providing evidence relevant to the proceedings before her. That was not a procedural error. Nor was the fact that the adjudicator did not necessarily produce UJP's evidence verbatim, in her decision, an error.

[11] [2015] CanLII 60882 (SKLRB)

Did the Adjudicator commit a gross and palpable overriding error?

[28] This ground of appeal flows from a misunderstanding by the Appellant as to the relevant standards of review. The law relied upon has been altered by the Supreme Court of Canada decisions in *Dunsmuir v. New Brunswick*[12] *and Newfoundland Nurses v. Newfoundland*[13].

Was the Adjudicator's decision reasonable?

[29] I am guided by the Supreme Court decisions in both *Dunsmuir* and *Newfoundland Nurses* that decisions of Adjudicators should be reviewed on a reasonableness standard with deference given to Adjudicators where their determinations fall within the realm of their special expertise. Apart from one exception in the reasoning and fact finding of the Adjudicator, the decision is reasonable.

[30] However, at paragraph [93] of her decision, the Adjudicator says:

> *[93] That being said, there is no serious dispute that the Appellant came forward with concerns of harassment, a health and safety issue, 'with regard to both Manager TN and the HR Director, including the concerns about her physical safety in relation to Manager TN. I find this to be sufficient to establish prima facie that the Appellant was engaged in a protected activity (seeking to enforce the Act) which could have been the reason for her dismissal.*

[31] This corresponds to the determination at paragraph [86] of the impugned decision, that there were two (2) issues. The first was a complaint under the *Act* made by the Appellant regarding employee TN, and secondly concerns regarding harassment brought forward by the Appellant not only for herself and for workers under her supervision regarding the HR director.

[32] However, at paragraph [98], the Adjudicator makes a determination regarding only the causal connection between one (1) of the two (2) issues, that is, the complaint regarding the HR Director. There is no finding with respect to the causal connection regarding the complaint involving TN.

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[12] [2008] SCC 9 (CanLII), [2008] 1 SCR 190
[13] [2011] SCC 62 (CanLII), [2011] SCC 62 (CanLII), 3 S.C.R. 708

[33] While the Adjudicator then goes on to also determine that even if there had been a causal connection, the Respondent had demonstrated "good and sufficient" reason to terminate the Appellant. While that determination is helpful, it ignores that the Adjudicator failed to consider one (1) crucial element in the analysis, that being the causal connection between the Appellant's termination and her dismissal.

[34] While this may have been an oversight on the part of the Adjudicator, it is clearly unreasonable for her to reach her conclusion without addressing the necessary finding regarding the causal link between the one (1) complaint, which she identified, and the termination.

Decision:

[35] For the above reasons, the decision is remitted back to the Adjudicator to consider the causal connection between the complaint against TN and the Appellant's termination and to provide the Board and the parties with a corrigendum outlining her rationale for that decision. Consideration of that issue may be done based upon the record currently before the Adjudicator, or based upon submissions from the parties, on that issue alone, should the Adjudicator request them. The decision of the Adjudicator is otherwise confirmed.

DATED at Regina, Saskatchewan, this **3rd** day of **November**, **2015.**

LABOUR RELATIONS BOARD

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Kenneth G. Love, Q.C.
Chairperson