Christine Racic, Appellant v. Moose Jaw Family Services Inc. Respondent & Government of Saskatchewan, Director of Occupational Health and Safety

LRB File No. 141-15; September 21, 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:	Ms. Idowu Adetogun
For the Executive Director of Occupational Health and Safety	No one appearing

Appeal from decision of Adjudicator – Section 4-8 of *The Saskatchewan Employment Act* – Appellant appeals decision from Adjudicator which overturned decision of Occupational Health and Safety Officer who determined that Appellant had been discriminated against contrary to the provisions of *The Saskatchewan Employment Act.*

Procedural Fairness – Natural Justice – Appellant argues that hearing was not conducted fairly by Adjudicator – Appellant argues that Adjudicator advised her not to call OH & S officer to testify and limited her time in which to present her case – Board determines that hearing was fairly conducted. Hearing is a *de novo* hearing and testimony from OH & S officer would not be first hand evidence. Furthermore, Appellant did not request an adjournment of hearing if she felt that she had insufficient time to present her case.

Standard of Review - Board confirms the standard of review of Adjudicator's decisions enunciated in previous Board decisions.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., 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 ("O H & 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 was brought under Section 4-8 of the SEA, which provision permits appeals, from decisions of adjudicators, to this Board on questions of law. The Appellant's grounds of appeal were:

1. *The Adjudicator erred in law and arrived at a decision which is unsupported and wholly unreasonable by incorrectly applying the legal test to the facts. After stating in paragraph 150 that the "jurisdiction of the Act limits focus of this inquiry as to whether a complaint was made, whether the worker suffered an adverse consequence and whether there is a causal connection between the two", the Adjudicator goes on to establish that the Appellant did make a complaint of harassment during the May 22, 2014 meeting (para 155), that a discriminatory action resulting in an adverse consequence to the Appellant occurred according to the Act 9para 148) and that the timing of the disclosure of harassment and the termination of the Appellant established a sufficient causal connection (para 151). Despite finding in Ms. Racic's favour on all of the elements outlined above, the Adjudicator unreasonably concluded that the legal test established by Section 3-35 was not met.*

2. *Furthermore, the Adjudicator erred in law by drawing an incorrect and unreasonable conclusion from her own finding of fact when she held that Ms. Racic failed to establish a prima facie case as a result of an alleged lack of supporting evidence of harassment. The Adjudicator held that she was "satisfied that the Respondent did say that she was 'harassed and belittled' " (para 155) and noted that "[i]n assessing whether the Respondent [Ms. Racic] has succeeded or failed to establish a prima facie case, an adjudicator must accept the allegations as true and provable" (para 157). Consequently, the Adjudicator's finding that a "bare, unsupported allegation is not sufficient" (para 157) is contradictory and unsupported by the Act.*

3. *The Adjudicator erred in concluding that had she found that a prima facie case was established, the Employer had discharged the presumption found in Section 3-36(4) OF THE Act (para 161). In reaching this conclusion, the Adjudicator failed to consider evidence demonstrating that the Executive Director had never made the Appellant aware of the alleged issues nor completed any progressive discipline steps, as expressly required by MJFS' policy manual. The sole reasons relied upon by the Employer for the Appellants' termination were given after the fact and included reasons dating back to 2009, none of which has ever been brought to the attention of the Appellant until the Employer disputed these proceedings. None of these issues were documented prior to the Adjudication. Further, the reasons submitted cannot constitute good and sufficient reasons as no progressive discipline or coaching was done to bring the issues to the employee's attention. Without progressive discipline, the employee had no way of knowing the reason for her termination, other than the disclosure of harassment. Moreover, the Appellant provided evidence from Ms. S.D., a Family Support Worker, confirming that, at the time she was dismissed, it was because of the May 22, 2014 meeting (para 112), and P.C., a clinical therapist with MJFS,*

testified that the reasons for the Appellant's termination included the May 22, 2014 meeting in which the Appellant made a complaint of harassment to her employer (para 98).

4. *The Adjudicator ignored relevant evidence in failing to consider the numerous examples of harassment and belittlement endured by the Appellant while employed by MJFS and brought to her employer's attention in concluding that the Appellant failed to establish a prima facie case pursuant to Section 3-35 of the Act (para 158) and holding that "there is no evidence before me that the concerns were brought to the attention of the employer prior to the meeting on May 22, 2014" (para 159). Such examples include, but are not limited to, the following:…*

5. *The Adjudicator made a number of unreasonable findings of fact in the sense that they ignored relevant evidence, took into account irrelevant evidence, mischaracterized relevant evidence, and/or made irrational inferences on the facts. These errors, which make it difficult for a reasonable person to understand how she reached her decision due to a lack of material and detail, include, but are not limited to, the following…*

6. *Finally, the Adjudication was conducted in an unfair manner resulting in Ms. Racic, as a self-represented litigant, being denied her rights to procedural fairness, as outlined below:…*

7. *Such further grounds, as Ms. Racic may advise.*

[3] The Appellant was employed by the Respondent, a non-profit organization which provides counselling and supportive information programs to residents of the City of Moose Jaw and the surrounding area as the Coordinator of the Family Support Program. She was terminated from that position, without cause, on May 30, 2014. She filed a complaint with the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace Safety ("OH & S") alleging that she had been dismissed as a result of a "discriminatory action" taken against her by the Respondent.

[4] OH & S investigated the complaint and issued report No. 872 supporting the Appellant's complaint. The Respondent appealed this determination to an Adjudicator appointed pursuant to the *SEA*. That adjudicator, by her decision dated June 20, 2015, accepted the appeal and revoked the decision of the Officer. The Appellant then appealed to the Board. For the reasons which follow, the Adjudicator's decision is affirmed.

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 evidence, as necessary, during these reasons.

Relevant statutory provision:

[6] Relevant statutory provisions are as follows:

> ***Right to appeal adjudicator's decision to board***
>
> ***. . .***
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> *(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.*
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> *. . .*
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> *(6) The board may:*
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> > *(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:

[7] The Appellant argued that the Adjudicator erred in law when she determined that, even though the facts established a *prima facie* case of discrimination, there was no causal connection between any allegations of harassment and any alleged discriminatory action. The Appellant argued that the adjudicator had reached numerous erroneous conclusions in her interpretation of the facts. In so doing, the Appellant argued that the Adjudicator made an error in applying the law to the facts in the case. The Appellant also argued that the Adjudicator had failed to consider relevant evidence and made unreasonable findings of fact.

[8] The Appellant also argued that the Adjudicator had ignored relevant evidence of the harassment complaint. Alternatively, the Appellant argued that the Adjudicator had ignored

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

relevant evidence in failing to consider the examples of harassment and belittlement endured by the Appellant while in the Respondent's employ.

[9] The Appellant also argued that the Adjudicator had failed to consider relevant evidence when the Adjudicator determined that there were good and sufficient reasons for the Appellant's termination.

[10] The Appellant argued that the Adjudicator made numerous unreasonable findings of fact, ignoring relevant evidence, took into account irrelevant evidence, mischaracterized relevant evidence and/or made irrational references on the facts.

[11] Finally, the Appellant argued that she had been denied procedural fairness and natural justice in the manner in which the adjudication was conducted. She argued that she was prevented from calling evidence from the OH & S officer who made the initial determination of the matter. She argued that she was denied the right to present her case fully and fairly. She also argued that the Adjudicator erred in not permitting her to file an affidavit from a witness who was unable to attend the hearing.

Respondent's arguments:

[12] The Respondent argued that the Adjudicator had not erred insofar as she had correctly applied the legal test to the facts of the case. The Respondent also argued that the Appellant, in her arguments, misinterpreted the Adjudicator's decision.

[13] The Respondent argued that the Adjudicator had drawn correct and reasonable conclusions from the findings of fact in respect of the determination by the Adjudicator concerning the establishment of a *prima facie* case. The Respondent argued that there was no evidence of harassment other than the Adjudicator determined that the Appellant had uttered the words "harassment" and "belittlement", but that there were no supporting facts for these assertions.

[14] The Respondent also argued that the Adjudicator did not err in her conclusion that even if she had found a *prima facie* case, that the Respondent had discharged any presumption under Section 3-36(4) of the *SEA*.

[15] The Respondent argued that the Adjudicator had considered all relevant evidence in reaching her conclusion that the Appellant failed to establish a *prima facie* case. The Respondent argued that the Adjudicator was confined by the provisions of the *SEA* in respect to her jurisdiction.

[16] Finally, the Respondent argued that the Adjudicator had not ignored relevant evidence, had taken into account irrelevant evidence, mischaracterize relevant evidence, and/or had not made irrational inferences on the facts.

Standard of Review:

[17] 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 *Weiler 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:

Issues to be reviewed on the Standard of Correctness:

[18] The Appellant raises six (6) issues in her notice of appeal. Of these issues, only one, issue No. 6, which raises a question of procedural fairness (or natural justice), attracts the correctness standard of review. However, procedural error which is purely technical and occasions no substantial wrong or miscarriage of justice may not warrant any relief.[3]

[19] In her submissions to the Board, the Appellant raised four (4) matters in relation to this issue. They were:

[2] [2014] CanLII 76051 (SKLRB)
[3] See *Canada (Minister of Citizenship and Immigration) v. Khosa* [2009] 1 SCR 339 at para 43.

1. That she alleged that she was advised by the Adjudicator that it was not necessary for the OH & S officer to testify at the hearing. Further, she alleged that the Adjudicator suggested that she reduce her proposed witness list due to the time frame of the hearing.
2. The Appellant argued that she was limited by the time allowed for the hearing. She argued that she was presented only one half day to call all five of her witnesses at the hearing.
3. She argued that the Adjudicator denied her the request to file an affidavit from a witness who was unable to attend the hearing.
4. She argued that the Adjudicator erred in requesting that she stop asking each witness for documentation to validate that progressive discipline occurred and further prevented the Appellant from asking reasonable questions of the witnesses generally.

[20] The Board does not have a transcript of the hearing before the Adjudicator to refer to. Nor does it have access to documents referenced by the Appellant in her written argument. We do note, however, that the Respondent made no challenge to the matters raised by the Appellant in this regard. For the purposes of this review, I have, therefore, presumed that the matters raised by the Applicant are factual. Even with this presumption, I do not see any reviewable error on the part of the Adjudicator.

[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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[4] See *Nicholson v. Domsask Holdings Ltd.* [2015] CanLII 43711, *Barry Strange, operating under the trade name of Middle Lake Hotel, 2002 and Saskatchewan Ministry of Advanced Education, Labour and Employment and Labour Standards Branch* [2008] SKQB 481 (CanLII) and *Whiterock Gas and Confectionary and Bernadette Thomas (also known as Bernadette Gopher) operating as Whiterock Gas and Confectionary and The Director of Labour Standards,* [2014] SKQB 300.

[5] [2014] SKQB 266 (CanLII) at paras. 88 & 89

[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.

[23] The Appellant argued before me that she was not permitted sufficient time to present her case to the Adjudicator. However, in her submissions, she did not make any suggestion that she requested the hearing be adjourned to permit her additional time nor does the record disclose any such request. The Federal Court of Canada in *Benitez v. Canada (Minister of Citizenship and Immigration*[6] held that an applicant must raise an allegation of bias or other violation of natural justice at the earliest practical opportunity (para. 213), which is when the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection (para. 220). If it is not raised, there is an implied waiver of rights.

[24] There is no suggestion that crucial relevant evidence could not be presented by the Appellant through her cross-examination of witnesses or through the Appellant's witnesses that she called. The evidence, as presented in the decision, appears to be both thorough and complete and provides sufficient ground for the Adjudicator to come to the conclusions and decisions she did.

[25] Furthermore, the presence of defects in an Adjudicator's decision is not necessarily fatal, so long as the reasons as a whole read together with the outcome demonstrate the result is reasonable[7]. I will, of course, deal with the issue of reasonableness later.

[26] The Appellant also argued that she was prevented from filing affidavit evidence from a witness who was unable to attend. The conduct of the hearing and the determination of what evidence will be both admissible and relevant is in the hands of the Adjudicator. There was no argument that the evidence from this witness was so crucial that it should have been admitted. The Adjudicator was satisfied with the evidence before her and, presumably found no need to supplement that evidence with affidavit evidence, particularly when such evidence could

[6] 2006 FC 461 (CanLII), [2007] 1 F.C.R. 107

not be subjected to cross-examination by the Respondent. It would have been necessary to balance the sufficiency of the evidence provided with the relevance of the evidence sought to be produced and the disadvantage to the Respondent being unable to cross-examine the deponent.

[27] Finally, the Appellant argued that the Adjudicator requested "that she stop asking each witness for documentation to validate that progressive discipline occurred and further prevented the Appellant from asking reasonable questions of the witnesses generally". Again, this would be a correct approach by the Adjudicator in attempting to focus the hearing on the issues. Progressive discipline is important only in cases where termination is for cause. In this case, the termination was "without cause" and the issue before the adjudicator had nothing to do with whether or not progressive discipline had occurred. This was not a grievance procedure where the employee was attempting to show that they had been improperly discharged. In this case, the Appellant had been terminated without cause, which would result in her being provided reasonable notice. Whether reasonable notice had been given was well outside the jurisdiction of the Adjudicator who was looking solely at the question of whether the Appellant had been discriminated against by the Employer as a result of her seeking the protections of the Occupational Health and Safety provisions of the *SEA.*

[28] The Appellant has the onus to show that the Adjudicator was incorrect or had failed to provide procedural fairness in the conduct of the hearing. In my opinion, the Appellant has failed to discharge this onus. Furthermore, the objections outlined above, do not satisfy me that the Appellant was not afforded a proper hearing of her complaint or that procedural fairness or natural justice were not afforded by the Adjudicator.

Issues to be reviewed on the Standard of Reasonableness:

[29] The remaining issues attract the standard of reasonableness. Applying *Newfoundland Nurses*[8], I 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 *Newfoundland Nurses*, 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***

[7] See *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador* [2011] SCC 62 (CanLII), 3 S.C.R. 708
[8] *Supra* Note 7

> ***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:*
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> > *"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.]*
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> > *(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 about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful****.*
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> *[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:*
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> > ***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]*
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> > *(Bold emphasis added, underline emphasis in original)*

[30] In ground 1 of her appeal, the Appellant argues that the Adjudicator was wrong in her determination that the mere mention of the words "I'm harassed, I'm belittled, I'm done", at a meeting on May 22, 2014 are sufficient to establish that she was the victim of harassment. However, there are no facts to support this allegation. She testified at the hearing. She did not provide any times, dates, places, or witnesses to the alleged harassment or belittlement[9]. As noted by the Adjudicator:

[9] See paragraph [157] and {158] of the decision

> *There must be more than a mere mention of the word "harassment or "harassment and belittled". A bare unsupported allegation is not sufficient.*

[31] The Adjudicators determination on these points is well supported by the evidence and her analysis is reasonable.

[32] In ground 2 of her appeal, the Appellant argues essentially the same point as ground 1, above. The Adjudicator found, as a fact, that the Appellant had mentioned the words "harassment" and "belittlement" at the May 22, 2014 meeting. She concluded that absent any other evidence of harassment having been provided[10], that this mere mention was insufficient to raise a *prima facie* case of harassment and provide the protections of the *SEA* to the Appellant. As noted above, that determination was reasonable in the context of the evidence, the parties' submissions and the process established by the legislation.

[33] Ground 3 of the Appellant's appeal focuses on the issue of progressive discipline which is not relevant in the context of this appeal. The Adjudicator addressed this issue in paragraph [161] of her decision. The context of the Adjudication was to determine if workplace harassment had occurred and if this harassment caused discriminatory action to be taken against the Appellant. Having found that the Appellant did not raise a *prima facie* case, the Adjudicator, nevertheless, looked to the explanations provided by the employer and found that the reasons provided constituted "good and sufficient reason" for the Appellant's termination. She noted as well, that the Appellant may well have rights in other forums related to her "without cause" termination, but took no position on that issue.[11] The Adjudicator's determination was, in my opinion, reasonable.

[34] In ground 4 of her appeal, the Appellant sought to show that the Adjudicator had ignored relevant evidence or had misapplied relevant evidence. She gave seven (7) examples which she argued showed that she had been "harassed" or "belittled". The adjudicator dealt with each of these examples and came to a conclusion other than that argued for by the Appellant. The determinations made by the Adjudicator based upon her hearing of the evidence, the submissions of the parties, and the process envisioned by the legislation clearly falls within the range of reasonable outcomes. This ground must also fail.

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[10] See also, paragraph [159]
[11] See Paragraph [152]

[35] In ground 5 of her appeal, the Appellant also sought to show that the Adjudicator had ignored relevant evidence or had misapplied relevant evidence. In this case she cited nine (9) examples from the decision. All of these examples are not relevant to the final decision. Those examples included alleged errors in dates of communication, who is on the senior leadership team, etc. None of the alleged errors goes to the heart of the decision or shows the decision to be unreasonable.

[36] For the above reasons, the decision of the Adjudicator is affirmed.

DATED at Regina, Saskatchewan, this **21st** day of **September, 2015.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson