JUSTIN NICHOLSON, Applicant v. DOMSASK HOLDINGS LTD. and THE DIRECTOR OF EMPLOYMENT STANDARDS, PROVINCE OF SASKATCHEWAN, Respondents

LRB File No. 220-14; May 13, 2015
Chairperson, Kenneth G. Love, Q.C. sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act.*

For the Applicant:	Mr. Marcus Davies
For the Respondent Employer:	No one appearing
For the Director of Employment Standards	No one appearing

***The Saskatchewan Employment Act* – Appeal from a decision of an Adjudicator – Applicant filed complaint under the provisions of Occupational Health and Safety Legislation claiming that he had been dismissed as a result of discriminatory action by his employer – An officer investigated the incident and determined that the complaint was valid. The Employer appealed to an Adjudicator.**

Employer failed to appear at the hearing held by the Adjudicator and filed no materials and provided no evidence. Nevertheless, the Adjudicator took it upon herself to review witness statements and other materials and make determinations concerning the evidence before the Occupational Health and Safety Officer – The Adjudicator overturned the decision of the Occupational Health and Safety Officer. The employee appealed to the Board under the provisions of *The Saskatchewan Employment Act*

At the hearing of the appeal by the Board, no-one appeared except the Applicant. Board reviewed the decision of the Adjudicator and determined that the Adjudicator had erred in law – Adjudicator's decision set aside and the determination by the Occupational Health and Safety Officer re-instated by Board.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Chairperson:** This is an appeal from a decision of an adjudicator appointed pursuant to *The Occupational Health and Safety Act, 1993*[1] (the "*OH & S Act"*). In her decision, the Adjudicator reviewed a determination by an Occupational Health and Safety Officer who had found that the Applicant was acting in compliance with, or was seeking to enforce the *Act*, or the Regulations, and that the Applicant had been improperly dismissed from his employment. The Adjudicator disagreed with the determination of the Occupational Health and Safety Officer, allowed the appeal by the Employer, and determined that the Employer "has provided good and sufficient other reasons for the termination of the employee". The Applicant appeals from this determination.

[2] The decision of the Adjudicator was dated September 5, 2014. The Applicant filed his appeal with this Board on September 30, 2014. During the time the Adjudicator had the matter under consideration, the *OH & S Act* was repealed with the proclamation of *The Saskatchewan Employment Act* (the "*SEA"*). The appeal of this matter was continued under the provisions of the *SEA.*

Facts:

[3] The Applicant was involved in a workplace incident as more particularly described in the Adjudicator's decision. As a result of that incident, the Applicant was fired from his position with the Employer. He took issue with the Employer over his termination and made an application to an Occupational Health and Safety Officer under the *OH & S Act,* claiming that the dismissal constituted a discriminatory action by the Employer.

[4] The Occupational Health and Safety Officer determined that his complaint was well founded. On July 30, 2012, the Occupational Health and Safety Officer issued a report to that effect.

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[1] Now repealed by *The Saskatchewan Employment Act,* S.S. 2013, c. S-15.1

[5] The Employer appealed the decision of the Occupational Health and Safety Officer to an adjudicator pursuant to the *OH & S Act* on August 16, 2012. That appeal asked that the decision of the Occupational Health and Safety Officer be set aside in its entirety.

[6] A hearing before the Adjudicator was scheduled for January 29 and 30, 2014. On December 13, 2014, counsel for the Applicant was informed that counsel for the Employer was withdrawing as counsel of record for the Employer. In her decision, the Adjudicator described this situation as follows:

> *[5] In mid-September, 2013, the hearing was scheduled based on the availability of Counsel, for January 29 and 30, 2014 in Saskatoon, Saskatchewan. Prior to the hearing, on December 13, 2013, Counsel for the Respondent was informed of the withdrawal of the solicitor for Domsask Holdings Ltd. After the requisite passage of time, Counsel for the Respondent contacted the Appellant directly, with notification delivered via facsimile on December 23, 2013 to their registered office, stating the intention to proceed with this matter as scheduled. Counsel included a reminder of the details as to time, date and location of the hearing previous notice having been given to Counsel, and invited the Appellant to feel free to contact him if further information was needed. There was no response.*

[7] When the date for the hearing arrived, no-one appeared at the hearing for the Employer. The Adjudicator waited for a half hour prior to convening the hearing. As noted at paragraph 7 of her decision, no evidence was deduced at the hearing. She did note that written argument was submitted on behalf of the Applicant. No argument was provided to the Adjudicator on behalf of the Employer.

[8] Having heard no evidence and having received only argument from the Appellant (Applicant in this case), the Adjudicator then embarked upon a review of the evidence found in the materials provided by the Director of Occupational Health and Safety in respect of the appeal. It is this review and the conclusions reached by the Adjudicator in overturning the decision of the Occupational Health and Safety Officer that have lead to the Applicant making this appeal to the Board.

[9] For the reasons that follow, the Appeal is allowed and the decision of the Occupational Health and Safety Officer reinstated.

Relevant statutory provision:

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

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

[11] Prior to the coming into force of *The Saskatchewan Employment Act*, an appeal from a determination by an adjudicator would have been made to the Court of Queen's Bench pursuant to the *OH & S Act.*

Union's arguments:

[12] In its Notice of Appeal, the Applicant set forth nineteen (19) grounds of appeal. At the hearing, this number was reduced to six (6) main issues of appeal. As set out in their written argument, they are:

> a. *Did the adjudicator make reversible errors in law and deny the Applicant procedural fairness and natural justice by considering evidence which was not before the tribunal and which was not put to the Applicant, offending the principle of audi alteram partem;*
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> b. *Did the adjudicator make reversible errors at law and deny the Applicant procedural fairness and natural justice by unreasonably and improperly intervening in the matter before her?*
>
> c. *Did the adjudicator make reversible errors at law and deny the Applicant procedural fairness and natural justice by failing to draw an adverse inference from the Respondent's failure to subject its evidence to scrutiny or cross-examination, as directed by the Supreme Court of Canda in Murray v Saskatoon?*
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> d. *Did the adjudicator make reversible errors at law and deny the Applicant procedural fairness and natural justice through her inflammatory and inappropriate reliance upon the Criminal Code of Canada?*
>
> e. *Did the adjudicator make reversible errors at law by improperly interpreting and applying the provisions of The Occupational Health and Safety Act, 1993 and Occupational Health and Safety Regulations, 1996?*
>
> f. *Did the adjudicator make reversible errors in law by failing to consider evidence which was relevant to her inquiry and which was before the tribunal?*

[2] S.S.2013, c. S-15.1

Audi Alteram Partem

[13] Counsel for the Applicant provided an extensive and detailed written Brief to the Board. In that Brief, the Applicant argued that the Adjudicator breached the principle of *audi alteram partem* by relying upon case law not presented at the hearing by either party[3] and in respect of which the Applicant had not had the opportunity to address in the context of the hearing. In support of this argument, the Applicant cited *Canadian Linen and Uniform Service Co. v. RWDSU.*[4]

[14] The Applicant also argued that the Adjudicator compounded the error by conducting an analysis of the term "assault" and embarked upon an analysis of the *Criminal Code* provisions dealing with assault, contrary to the evidence that no criminal assault had been found or charges contemplated against the Applicant.

[15] The Applicant also argued that the Adjudicator was not entitled to place reliance upon the notion that she was merely taking judicial notice of the law. In support, the Applicant cited *R. v. Find.*[5]

[16] The Applicant argued that the Adjudicator was not entitled to deference when a decision of that Adjudicator is being reviewed on the basis of procedural fairness, citing *Sketchley v. Canada (Attorney General)*.[6]

Unreasonable intervention

[17] The Applicant argued that the Adjudicator erred by making the case for the Appellant, which they argued was a breach of procedural fairness. In support, the Applicant cited *Sloboda v. Sloboda.*[7]

Unabandoned Appeal

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[3] *Canada Safeway Ltd. v. United Food and Commercial Workers, Local 401,* [2009] CanLII 90651 (AB GAA)
[4] [2005] S.J. No. 380 , SKQB 264 (CanLII)
[5] [2001] S.C.R. 863, SCC 32 (CanLII)
[6] [2005] F.C.J. No. 2056, FCA 404 (CanLII)
[7] [2007] S.J. No. 29

[18] The Applicant argued that the Adjudicator treated the appeal as not having been abandoned, notwithstanding the failure of the Appellant to appear or provide evidence or argument at the hearing. The Applicant argued that the Adjudicator went so far as to consider evidence which was not before the Adjudicator. The Applicant cited *Murray v. City of Saskatoon*[8] amd *Rollins v. Canada (Customs and Revenue)*[9] in support of its position.

Palpable and Overriding Error

[19] Citing *Housen v. Nikolaisen,*[10] the Applicant argued that the Adjudicator was not permitted to make changes to the facts found by the Occupational Health and Safety Officer, unless it can be established that the finder of fact made a palpable and overriding error it its fact determination. The Applicant argued that the Occupational Health and Safety Officer had the benefit of hearing the witnesses and making inquiries, something that the Adjudicator did not have the benefit of.

Reliance upon the Criminal Code

[20] The Applicant raised an argument regarding the Adjudicator's references to the definition of "assault" as set out in the *Criminal Code*. In so doing, the Applicant argued that the Adjudicator made inflammatory, but unsubstantiated findings regarding the Applicant. The Applicant also argued that the Adjudicator also failed to consider other provisions of the *Criminal Code* which may have been relevant in the fact situation.

[21] The Applicant argued that the Adjudicator also erred by failing to consider the definition of "violence" found within the *O H & S Act*, something the Applicant argued would have been more relevant to this fact situation.

O H & S Legislation turned on its head

[22] The Applicant argued that the Adjudicator misapplied the burden of proof in this matter. The Applicant argued that the statute provided a presumption in favour of the Applicant in the proceedings, which the Adjudicator misapplied by requiring the Applicant to establish a nexus between his/her actions and the Employer's actions. The Applicant argued that the

[8] [1951] 4 W.W.R. 234
[9] [2001] CanLII 26492 (CA CITT)
[10] {2002] 2 S.C.R. 235

legislation provided for only two (2) possible outcomes. Either there was discrimination or there was not. Any connection between the discriminatory action, which is alleged, and the actions of the Employer, the Applicant argued, was to be determined by the initial investigation.

Good and Sufficient other Reason

[23] The Applicant argued that there was no "good and sufficient reason" for the Applicant having been terminated. And the Adjudicator's logic in finding that there was good and sufficient reason resulted from flawed logic. In addition, the Applicant argued that the Adjudicator ignored evidence that should have been considered and dealt with.

Conclusion

[24] In conclusion, the Applicant argued that the Occupational Health and Safety Officer made the correct determination and the Adjudicator's decision should be overturned and the Safety Officer's decision re-instated.

Analysis:

The Nature of the Adjudicator's Review of the Officer's Decision

[25] In two decisions,[11] the Court of Queen's Bench has determined that an adjudicator is to review a wage assessment made by the Director of Labour Standards in a *de novo* hearing. The provisions of the *OH & S Act* concerning appeals are similar to the provisions in the *Labour Standards Act,* which were considered by the Court in these cases. Accordingly, an adjudicator under the *OH & S Act* should also conduct her review of the decision made by the Occupational Health and Safety Officer as a *de novo* hearing.

[26] In *Whiterock Gas and Confectionary*, Mr. Justice Chicoine quoted from Mr. Justice Cameron's decision in *P.P.S. Professional Salon Services Inc. v. Saskatchewan (Human*

[11] *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.

Rights Commission)[12] at paragraphs 60 - 62 in regard to the review of factual decisions by an adjudicator as follows:

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

<u>The Standard of Review</u>

[27] The Board established the Standard of Review for Adjudicator's decisions in *Barbara Weiler v. Saskatoon Convalescent Home.*[13] In that case, at paragraphs [17] – [24], the Board said:

> ***Questions of Law:***
>
> ***[17]*** *Under the provisions of the OHS Act an appeal on a question of law or jurisdiction was previously made to the Court of Queen's Bench. In its decision in DJB Transportation Services Inc. v. Bolen,**[5]**the Saskatchewan Court of Appeal analyzed the standard of review in respect of appeals made to the Court of Queen's Bench from the provisions of the former Labour Standards Act.**[6]**which Act contained provisions for appeal which were identical to the provisions in the*

[12] [2007] SKCA 149 (CanLII)
[13] [2014] CanLII 76051 (SKLRB)

OHS Act. The Court of Appeal in that case determined the standard of review to be correctness. We will apply that standard of review to questions of law in appeals pursuant to the provisions of the Act.

Questions of Mixed Fact and Law:

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

[19] *The standard of review of errors of mixed fact and law was considered by Mr. Justice Smith in Director of Labour Standards v. Acanac Inc. et al.**[8]** In that case, the Court was again dealing with the provisions for appeal of a decision of an adjudicator under The Labour Standards Act.*

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

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

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

Questions of Fact:

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

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

> *[34] While The Labour Standards Act limits appeals to this Court to questions of law or jurisdiction, findings of fact may be reviewable as questions of law where the findings are unreasonable in the sense that they ignore relevant evidence, take into account irrelevant evidence, mischaracterize relevant evidence, or make irrational inferences on the facts. In P.S.S. Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission), 2007 SKCA 149 (CanLII), 302 Sask. R. 161, (P.S.S.) Cameron J. explained how findings of fact may be subject to review as errors of law. He stated (at paras. 60-61):*
>
> > ***60*** *It is clear that the appeal against the decision of the tribunal comes down to its findings of fact. This is not to say that there is, therefore, no tenable ground for review of the decision, but it must be understood that the*

> *decision is only reviewable to the extent the findings of fact upon which it rests are attended by error of law.*
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> ***61*** *The import of this was remarked upon in City of Regina et al. v. Kivela, 2006 SKCA 38 (CanLII), (2006), 266 D.L.R. (4th) 319 (Sask. C.A.), a case involving an appeal from the decision of a human rights tribunal. Speaking for the Court, Smith J.A. said:*
> *The traditional view, in these circumstances, is that the tribunal's factual determinations are subject to review only if and to the extent that findings constitute errors of law, as when there was no evidence before the tribunal that, viewed reasonably, was capable of supporting the tribunal's finding. (p. 343)*
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> ***62*** *This ties in with the notion that "an unreasonable finding of fact" falls to be categorized as an error of law for the purposes of judicial review in the classical sense, and with the associated notion that when errors of law are open to judicial review unhindered by a privative clause then "unreasonable errors of fact", though no others, are subject to review: Blanchard v. Control Data Canada Ltd., 1984 CanLII 27 (SCC), [1984] 2 S.C.R. 476 at 494-95. It also ties in with the further notion that a tribunal "errs in law" if it ignores relevant evidence or evidence it is required to consider: Woolaston v. Minister of Manpower and Immigration,1972 CanLII 3 (SCC), [1973] S.C.R. 102; Canada (Director of Investigation and Research, Competition Act) v. Southam,1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748 at para. 41: "If the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law." (Underlining added)*

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

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

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

> *dispute are determined in judicial and quasi-judicial settings, is underpinned by principle, as supplied by both statutory implication and common law. …*

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

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

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

> ***67** As a matter of statutory implication, then, persons fastened with the duties and exercising the powers of a human rights tribunal when called upon to hear a complaint, are required as a matter of principle (much as judges are), to determine the facts in controversy on the basis of the relevant evidence before them (leaving aside matters of fact in relation to which they may take judicial notice). Hence, they are required in principle to consider and weigh the relevant evidence as the faculty of judgment commends when exercised impartially, fairly, in good faith, and in accordance with reason, bearing in mind the governing standard of proof and the location of the onus of proof.*

> ***68** It follows, that a tribunal cannot reasonably make a valid finding of fact on the basis of no evidence or irrelevant evidence. <u>Nor can it reasonably make a valid finding of fact in disregard of relevant evidence or upon a mischaracterization of relevant evidence.</u> To do so is to*

> *err in principle or, in other words, to commit an error of law. (In addition to the cases referred to above, see Toneguzzo-Norvell v. Burnaby Hospital, 1994 CanLII 106 (SCC), [1994] 1 S.C.R. 114 at p. 121; Wade & Forsyth, Administrative Law (7th ed.) (Oxford: Clarendon Press, 1994) at pp. 316-320; Jones & de Villars, Principles of Administrative Law (4th ed.) (Toronto: Thomson Carswell, 2004) at pp. 244-43 and 431-436; and Hartwig and Senger v. Wright (Commissioner of Inquiry), et al., [2007] S.J. No. 337, 2007 SKCA 74 (Sask. C.A.) (CanLII)). Nor can a tribunal reasonably make a valid finding of fact based on an unfounded or irrational inference of fact. (Underling added.)*
>
> *[39] As regards the standard of review related to findings of fact, Cameron J. decided in P.S.S. that the reasonable simpliciter standard of review applied in that case. He stated, at para. 83, that "the issue whether a tribunal overlooked, disregarded or mischaracterized relevant material to the findings upon which its decision rests falls to be subjected to a 'significant searching or testing'." I intend to apply the standard of reasonableness in relation to the Adjudicator's finding of fact in this case also.*

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

The Decision Appealed from and the Grounds of Appeal

[28] The standard of review in respect of matters relating to the interpretation and interpretation the governing legislation is one of correctness, as are matters related to natural justice and its application by the Adjudicator. Insofar as the alleged errors made by the Adjudicator in her review of relevant evidence, which was submitted to her at the hearing, the standard will be reasonableness.

[29] 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,*[14] the Court of Queen's Bench concluded that

[14] [2014] SKQB 266 (CanLII) at paras. 88 & 89

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.

[30] No evidence was adduced at the hearing before the Adjudicator as confirmed at paragraph [7] of the Adjudicator's decision. All that was provided to the Adjudicator at her hearing was argument by counsel for the Applicant in support of the decision of the Occupational Health and Safety Officer.

[31] Notwithstanding this lack of evidence, the Adjudicator proceeded to review witness statements, made determinations regarding the credibility of witnesses, without having heard their testimony, and overturned the decision of the Occupational Health and Safety Officer. In so doing, she misapplied the legislation that required her to conduct a *de novo* hearing and make her determination on the basis of the evidence heard by her. This is a reviewable error of law.

Audi Alterem Partem

[32] Notwithstanding our findings above, in the alternative, we also find the arguments made by the Applicant compelling. The Applicant alleged that the Adjudicator offended the a*udi alterem partem* rule by reaching conclusions, based solely upon her review of witness statements, without permitting the Applicant to challenge any such statements or to provide *viva voce* evidence, to contradict that evidence In short, the Applicant did not get a fair hearing because at the hearing no evidence was presented, yet the Adjudicator took it upon herself to pass judgment based upon her analysis of the evidence presented elsewhere, without allowing the Applicant to either know what case he was required to meet, or to properly test the evidence with the Adjudicator relied upon to reach her conclusions. This also is a reviewable error of law.

Unreasonable Intervention

[33] The Applicant also argued that the Adjudicator undertook additional research in support of the non-appearing parties' position. In so doing, the Applicant argues that the Adjudicator made an unreasonable intervention in conducting entirely fictitious witness examinations and cross-examinations. This argument goes to the conduct of the hearing and the adjudication by the Adjudicator, which has been dealt with above.

The Unabandoned Appeal

[34] The Applicant contends that the Adjudicator erred in not dismissing the appeal for abandonment. We do not agree with this submission. There was nothing before the Adjudicator to suggest the appeal had been abandoned. While it may have been a conclusion that could have reasonably been drawn from the circumstances surrounding the withdrawal of counsel and the non-appearance at the hearing, an opposite conclusion was also reasonable in those circumstances.

Palpable and Overriding Error

[35] This argument has also been dealt with above.

Reliance upon the Criminal Code of Canada

[36] This argument also deals with the a*udi alterem partem* principle insofar as the Adjudicator took it upon herself to invoke provisions of the *Criminal Code,* to impugn the Applicant's position regarding what the Adjudicator considered to amount to an assault upon the other party to the dispute, that gave rise to this matter. Again, for the reasons set out above, we conclude that the Adjudicator erred in reaching such a conclusion.

The Occupational Health and Safety Act turned on its head

[37] The Applicant argued that the Adjudicator erred by imposing the burden of proof upon the worker rather than on the Employer. It argued that the *OH & S Act* clearly created a presumption in favour of the worker which must be rebutted by the Employer.

[38] Section 28(4) of the *OH & S Act* makes it clear that there is:

> *…a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 27* and *the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason*

[39] At paragraph 28 of her decision, the Adjudicator says:

> *[28] However, before the onus shifts to the employer, section 28(1) requires the worker to establish a prima facie" case that 1) a*

> *discriminatory action was taken against him; and 2) that he was engaged in one of the activities protected by section 27 which is, or could have been the reason for the employer's discriminatory action.*

[40] This analysis, and her analysis that followed, is faulty insofar as it does not provide the Applicant with both the benefit of the statutory presumption that the discriminatory action was taken because the worker acted in an activity described in section 27 **and** the benefit of the reverse onus placed upon the Employer to prove such discriminatory action was "taken for…good and sufficient other reason".

[41] The *prima facie* case requirement which the Adjudicator imposed on the Applicant is already provided by the statute by means of the presumption "that the discriminatory action was taken "…because the worker acted or participated in an activity described in section 27.

[42] Subsection (2) of Section 28 provides that an Occupational Health and Safety Officer may make a determination [decide] if an employer has taken discriminatory action. That determination was made in this case by the Occupational Health and Safety Officer. That determination by the Occupational Health and Safety Officer, establishes that discriminatory action has taken place, which then triggers both the presumption in favour of the employee and the onus on the Employer to establish good and sufficient other reason for the discriminatory action.

[43] In the present case, there was no evidence provided by the Employer to either rebutt the presumption in favour of the employee arising out of the determination by the Occupational Health and Safety Officer, or to satisfy the onus on the Employer that would justify the discriminatory action. Absent any such evidence adduced at the hearing, the Adjudicator erred in finding that the onus had been satisfied by the Employer. Furthermore, while a moot issue in this case, the Adjudicator erred by failing to provide the benefit of the presumption in favour of the employee to the Applicant and requiring that the employee make out a *prima facie* case.

Good and Sufficient other Reason

[44] This argument has been dealt with above.

Decision:

[45] For the reasons outlined above, the decision of the Adjudicator is cancelled and the decision of the Occupational Health and Safety Officer confirmed. An appropriate Order will accompany these Reasons.

DATED at Regina, Saskatchewan, this **13th** day of **April, 2015.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson