JAMES BUECKERT, Applicant v. GERANSKY BROTHERS CONSTRUCTION LTD., Respondent and GOVERNMENT OF SASKATCHEWAN, EXECUTIVE DIRECTOR, EMPLOYMENT STANDARDS, Respondent

LRB File No. 245-14; May 21, 2015

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

For the Applicant:	Sharmon Trimble
For the Respondent Employer:	Mr. Geoff Brand
For the Respondent Government of Saskatchewan, Executive Director Employment Standards:	Ms. Lee Anne Schienbein

Appeal from a determination of an Adjudicator under The Saskatchewan Employment Act – Adjudicator finds that Appellant quit his job and was not terminated or laid off. Appellant appeals that decision to the Labour Relations Board.

Question of Law – Appellant alleges that the Adjudicator erred in misconstruing facts concerning the creation of a Record of Employment which was issued showing that the Appellant had been dismissed rather than having quit. Adjudicator reviewed Record of Employment and did not ignore relevant evidence. Her decision was reasonable.

Bias of Adjudicator – Appellant raised issue of bias on the part of the Adjudicator before the Board, but did not raise the issue with the Adjudicator. Board unable to deal with question absent it having been raised with the Adjudicator or absent an evidentiary basis for the allegation.

Failure to comply with statutory authority – Director alleges that Adjudicator failed to fulfil her mandate under the statute. On review, it is clear that the Adjudicator dismissed the wage assessment and allowed the appeal.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Chairperson:** This is an appeal taken by Mr. James Buekert (the "Applicant") from a decision of an Adjudicator appointed pursuant to *The Saskatchewan Employment Act* (the *"Act"*) and in respect of a wage assessment # 6646 issued by the Executive Director of Employment Standards on June 13, 2014.

[2] A notice of Appeal was received by the Ministry of Labour Relations and Workplace Safety on June 9, 2014, with the required deposit being received on June 23, 2014. The matter was referred to an Adjudicator in accordance with the *Act.* The Adjudicator heard the matter on September 10, 2014 and rendered her decision on October 6, 2014.[1] The Adjudicator held that the Applicant had not been terminated, but had quit his employment with Geransky Brothers Construction Ltd. (the "Employer"), and allowed the appeal.

[3] The Adjudicator's decision was appealed to this Board by the Applicant on November 4, 2014. The grounds of appeal as set out in the Notice of Appeal were:

> *The issue by law of the complaint has not been addressed, [sic] the matter at hand was to determine wrongfull [sic] dismissal. As per attached, the ROE filed by Geransky Brothers Const. cleary [sic] state dismissed. When confronted on that code, Geranskys [sic] stated they stood by that desicion,[sic] (Also attached). Section 19 of the Employment Insurance Regulations clearly states that an Employer must certify that the informaiton [sic] that they provide in the form is complete and accurate. (See attached ROE) Further more, [sic] the Regulations go on to cover that what the employer say in the ROE about the termination is the version of events that they are stuck in the lawsuit. [sic]*
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> *Further more [sic] as by law I would be allowed to defend myself on the "quit / dismissal" matter. However, this issue never arose during the entire process of the RCMP, or the Labour Standards Board investigation or any appeal made by Geransky Brothers Construction. The adjudication process was on the matter or [sic] wrongful dismissal. If the issue was about what form was taken for me to no longer be employeed [sic] by Geransky Brother Construction then a hearing should be held on that matter for me to apply my evidence.*

[4] In a submission to the Board on March 27, 2015, the Employer raised a preliminary issue regarding service of the Notice of Appeal. It stated that the Applicant had never served them with a copy of the Notice of Appeal and that they had only had notice of the

[1] LRB File No. 138-14

appeal when a copy was forwarded to them by the Board's Registrar. Counsel for the Executive Director of Employment Standards also noted that the Executive Director (the "Director") had not been served with a copy of the Notice of Appeal, but waived any deficiencies in service.

Facts:

[5] The Applicant was employed by the Employer from June 6, 2007 to November 13, 2013. In addition to his employment with the Employer, he also did mobile welding on a contract basis for the Employer through a business which he operated in addition to his employment known as "CRAZYJS".

[6] The Applicant was accused by his Employer of having stolen welding supplies from his place of employment for use in his CRAZYJS business. Video surveillance records showed the Applicant taking two (2) rolls of flux core welding wire, removing the packaging, disposing the packaging in the disposal area of the work bay at his employment, and then loading the two (2) rolls of wire onto the Applicant's welding truck that he used in his KRAZYJS business.

[7] The Adjudicator noted that when accused of the theft of this wire by one of the principles of the business, Ryan Geransky, the Applicant testified that he got mad, stormed out and returned with two (2) rolls of wire. According to the decision, he then "took off" and went home. He returned later that day to retrieve his tools. He did not work for the Employer again, nor do any contract mobile welding for the Employer.

[8] The Adjudicator concluded that the Applicant had not been discharged, but had quit his employment with the Employer.

Relevant statutory provision:

[9] 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.*

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

Applicant's arguments:

[10] The Applicant argued that the Adjudicator erred in her finding that he had quit his employment rather than having been fired. In support of that contention, he submitted that on Record of Employment ("ROE") provided by the Employer to Employment Insurance (Canada) the Employer had entered code "M" in the Reason for issuing box, which code was for a dismissal, not code "E" which was to be used if the Applicant had quit.

[11] The Applicant also argued that the initial appeal by the Employer was improper in that the notice of appeal had been filed and accepted on June 9, 2014, but the notice of assessment which was being appealed from, was not issued until June 13, 2014.

[12] The Applicant also raised an issue alleging bias on the part of the Adjudicator related to her having asked the Employer to provide parking for her as well as to have someone plug her parking meter.

Employer's arguments:

[13] The Employer raised, as a preliminary matter, the failure of the Applicant to serve notice on the Employer as required by Section 4-8(3) of the *Act*.

[14] The Employer also argued that the Adjudicator had not erred in her determination that the Applicant had quit rather than being fired and pointed out that the Adjudicator accepted the Employer's explanation that the ROE entry had been a clerical error.

Executive Director's arguments:

[15] Counsel for the Director provided a written argument which I have reviewed and found helpful. In it, the Director argued that the Adjudicator had made an unreasonable finding of fact, which is reviewable as a question of law, by ignoring relevant evidence that the Employer terminated the Applicant. In support, the Director relied upon this Board's decision in *Barbara Wieler v. Saskatoon Convalescent Home*[3] and the Saskatchewan Court of Appeal decision in *P.S.S. Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission).*[4]

[3] [2014] CanLII 76051 (SKLRB), LRB File No. 115-14
[4] [2007] SKCA 149

[16] The Director argued that the Employer completed the ROE utilizing code "M". The Director argued that the Adjudicator ignored this evidence, or mischaracterized this evidence to reach the conclusion that the Applicant had quit rather than being terminated.

[17] The Director also argued that the Adjudicator failed to complete the task assigned to her and did not make one of the Orders required to be made by an Adjudicator in her review of the wage assessment appeal under Section 4-6(1) of the *Act*.

Analysis:

Preliminary Objection by the Employer

[18] At the hearing of this matter, the Board reserved decision on the preliminary objection and proceeded to hear argument on the merits. As noted above, the Director waived any failure on the part of the Applicant to provide notice of the Appeal to this Board. Only the Employer takes exception to the lack of notice. For the reasons that follow, this Board dismisses the preliminary motion.

[19] The Employer objects to the failure of the Applicant to provide it with notice of the Appeal as required by Section 4-8(3)(b) of the *Act*. This objection is more procedural in nature than in substance because the Employer acknowledges that he did receive a copy of the Notice of Appeal from the Board Registrar. The Applicant, in his argument, also noted that he relied upon this fact and therefore made no further effort to effect service on the Employer.

[20] In *Regina (City) v. Newell Smelski Ltd,.*[5] the Saskatchewan Court of Appeal said in respect of an alleged failure to file an assessment appeal within the statutory time frame:

> *But even if the 14 day period at issue in this case were to run from the day after the Board of Revision orally announced its decisions, the resulting failure of Newell Smelski to comply perfectly with the requirements of the opening phrase of clause 261(1)(a) would not necessarily have had the effect of depriving the Committee of jurisdiction to entertain the appeals. To have had that effect--an ultimate effect--such imperfect compliance would have to have had the effect, first, of nullifying the act of service or the notice of intention to appeal or both, and hence of extinguishing the company's right of appeal.*
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> *But not every failure to observe statutory requirements of a procedural nature carries with it such effects. If the legislature does not expressly provide for the effect of imperfect compliance or non-compliance with a requirement of this nature, the matter becomes one of implication, having regard for the subject matter of the*

[5] [1996] CanLII 5084 (SKCA)

> *enactment; the purposes of the requirement; the prejudice caused by the failure; the potential consequences of a finding of nullity; and so on.*

[21] This situation is not as severe as was the case in *Newell Smelski, supra. Newell Smelski* dealt with a failure to serve a notice of appeal within the statutorily prescribed period. However, in that case, as well as in this case, there is no express provision in the *Act* for non-compliance with the service requirement. The failure to observe the service requirement does not render the Notice of Appeal void, nor are we instructed to dismiss an appeal which fails to comply with the service requirement.

[22] This conundrum has been faced by Courts as well. In *Secretary of State v. Langridge,*[6] at page 595, Balcombe LJ addressed the principles at work in such cases.

> *When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The court must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been said that there must be "substantial compliance" with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess "the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act." In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision, and the importance of the procedural requirement in the overall administrative scheme established by the statute. Furthermore, much may depend upon the particular circumstances of the case in hand. Although "nullification is the natural and usual consequence of disobedience," breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned.*

[23] The requirement for service of a Notice of Appeal is an essential part of the scheme for appeals to Adjudicators prescribed by the *Act*. However, that requirement must also be seen in the light of reality which is that most appellants to this Board are self-represented and have little acquaintance with the legal process of service of documents.

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[6] [1991] 3 All E.R. 591 (C.A.)

[24] Additionally, the Employer has not demonstrated that it has suffered or will suffer substantial prejudice (other than being required to appear and defend the Adjudicator's decision) as a result of the failure to serve the Notice of Appeal as directed. Furthermore, the Employer did receive a copy of the Notice of Appeal from the Board Registrar upon its filing same with the Board.

[25] In this case, the Board also enjoys the power[7] to ensure that procedural irregularities do not avoid the determination of the real issues between the parties. Subsection (3) of Section 6-112 of the *Act* empowers the Board to provide relief "at any time and on any terms the board considers just…". As there is no demonstrated prejudice to the Employer and since the Director has waived the non-compliance, the Board is of the opinion that relief from the strict requirement for service is appropriate in this case, especially as the Employer received a copy of the Notice of Appeal from the Board Registrar. The provision of the Notice by the Registrar does not have the effect of service on the Employer, but, nevertheless, the Employer was in receipt of the Notice and was provided an opportunity to respond, which it did.

[26] For these reasons, the preliminary motion is denied.

Review of the Adjudicator's Decision

[27] A decision by an Adjudicator is reviewable only on a question of law.[8] What constitutes and error of law and the standard of review was set out by the Board in *Barbara Wieler v. Saskatoon Convalescent Home*[9] as follows:

> ***Standard of Review:***
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> ***[12]*** *The first question for the Board to consider is what the applicable standard of review in this matter is. For the reasons which follow, we find the applicable standard of review of questions of law is correctness, for questions of mixed fact and law, reasonableness, and for questions of fact which may be considered errors of law, reasonableness.*
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> ***[13]*** *Courts have determined that there are three categories of issues that may confront an Adjudicator in hearing and determining a case before them. These are questions of fact; questions of law; and questions of mixed law and fact.*

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[7] Section 6-112 of *The Saskatchewan Employment Act*
[8] Section 4-8(1) of the *Act*
[9] [2014] CanLII 76051 (SKLRB), LRB File No. 115-14

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

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

[15] *It was identified in the Housen case, supra, that in appropriate circumstances, a question of mixed fact and law can actually prove to be a question of law.[3] Accordingly, in addition to appeals on questions of fact, in appropriate circumstances, the Board may also be required to deal with issues of mixed fact and law which can be shown to involve an error in law. To illustrate this issue, we can draw on an example provided by the Supreme Court in the Housencase. At paragraph 27, the Court provided this example drawn from its decision in Canada (Director of Investigation and Research v. Southam Inc.:**[4]***

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

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

Questions of Law:

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

Questions of Mixed Fact and Law:

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

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

case, the Court was 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):*
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> > ***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.*
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> ***68*** *It follows, that a tribunal cannot reasonably make a valid finding of fact on the basis of no evidence or irrelevant evidence. Nor can it reasonably make a valid finding of fact in disregard of relevant evidence or upon a mischaracterization of relevant evidence. To do so is to err in principle or, in other words, to commit an error of law. (In addition to the cases referred to above, see Toneguzzo-Norvell v. Burnaby Hospital, 1994 CanLII 106 (SCC), [1994] 1 S.C.R. 114 at p. 121; Wade & Forsyth, Administrative Law (7th ed.) (Oxford: Clarendon Press, 1994) at pp. 316-320; Jones & de Villars, Principles of Administrative Law (4th ed.) (Toronto: Thomson Carswell, 2004) at pp. 244-43 and 431-436; and Hartwig and Senger v. Wright (Commissioner of Inquiry), et al., [2007] S.J. No. 337, 2007 SKCA 74 (Sask. C.A.) (CanLII)). Nor can a tribunal reasonably*

> *make a valid finding of fact based on an unfounded or irrational inference of fact. (Underling added.)*
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> *[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.*
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> ***[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 Issues in the Appeal:

[28] Both the Applicant, in its notice of appeal, and the Director, in their written and oral argument, alleged that the Adjudicator erred in concluding that the Applicant had quit their employment rather than being terminated. The Applicant raised an issue of bias concerning the actions of the Adjudicator. The Director also argues that the Adjudicator failed to fulfill her statutory mandate.

Quit vs. Terminated:

[29] The Director argues that the Adjudicator had made an unreasonable finding of fact which is reviewable as a question of law by ignoring relevant evidence that the Employer terminated the Applicant. That is, the Adjudicator ignored the evidence of the ROE in her conclusion that the Applicant quit.

[30] In *Whiterock Gas and Confectionary v. Swindler,* [10]Mr. Justice Chicoine dealt with a somewhat similar fact situation to the current case. In that case, two (2) employees were terminated for dishonesty. The adjudicator who dealt with the case concluded that the employees were not dismissed for just cause and confirmed the wage assessments issued in that case. The Adjudicator in that case, refused to view video surveillance footage which would have been relevant to determine if the evidence of the employer or the employee should be accepted. By not reviewing that evidence, the Court held that he had committed an error of law.

[31] At paragraphs [50] – [52], Mr. Justice Chicoine sums up the error on the part of the Adjudicator. He says:

> *[50] In addition to corroborating Ms. Gopher's testimony, the video clearly and unequivocally contradicts the evidence of Mr. Swindler to the effect that "as of the date of the video, his employment had already been terminated." This puts the lie to his explanation that the video shows him taking cigarettes without paying for them after he had been dismissed as an employee. The Adjudicator's refusal to view the video for himself meant that he ignored relevant evidence which proved, on a balance of probabilities, that Mr. Swindler was dishonest, not only in respect of the theft of the cigarettes while he was an employee, but also when he testified at the hearing. This refusal to view the video evidence constituted an error of law in the manner contemplated by Cameron J. in P.S.S. (at para. 68) wherein he stated that a tribunal cannot reasonably make a finding of fact in disregard of relevant evidence or upon a mischaracterization of relevant evidence.*
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> *[51] The question which arises from the finding that Mr. Swindler did take a package of cigarettes without paying for them on March 2, 2011, is whether this is the kind of dishonesty which gives rise to a breakdown in the employment relationship. Iacobucci J. in McKinley makes the point that not every act of dishonesty will result in the dismissal of the employee and that the principle of proportionality must be applied. However, I am of the opinion that Mr. Swindler's act of dishonesty in taking a package of cigarettes without paying for them was serious and went to the core of the employment relationship. Ms. Gopher was entitled to expect that all of her employees, especially employees in supervisory positions, could be entrusted to care for and protect the assets of the business. Among Mr. Swindler's duties as a supervisor was to make an accurate count of the cigarette inventory on a daily basis in order to prevent theft and also to cash out at the end of the day. The theft of even one package of cigarettes by a manager in Mr. Swindler's position in my opinion warrants dismissal for just cause.*
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> *[52] In consequence of my finding that the Adjudicator erred in law in failing to consider relevant evidence which proved at least on a balance of probabilities that Mr. Swindler committed a serious act of dishonesty while employed as a supervisor, I also conclude that Whiterock and Ms. Gopher did establish grounds to warrant dismissal for just cause. As a result, I will allow the appeal from the Adjudicator's finding confirming the Wage Assessment in relation to Mr. Swindler and rule that no amount is owed by Whiterock or Ms. Gopher to Mr. Swindler as pay in lieu of notice. It is not necessary for me to make any ruling on the issue whether overtime pay should have been included in calculating the amount of pay in lieu of notice and I decline to do so.*

[32] However, unlike the situation in *Whiterock*, *supra*, the Adjudicator did not fail to review relevant evidence. She received the ROE as an exhibit in the proceedings along with documents which clearly identified the meaning of the codes assigned in Block 16, being the reason for issuing the ROE. She would have been aware that the Code "M" signified a dismissal

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[10] [2014] SKQB 300

while a code "E" signified a quit. In addition, she had the testimony of the Employer who indicated that the coding on the ROE was a "clerical error".

[33] The standard of review of an error of law in relation to a question of fact is reasonableness. That standard of review was described by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*[11] by Justices Bastarache and LeBell JJ, at paragraph 47 as follows:

> *… In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*

[34] In *Whiterock, supra,* Mr. Justice Chicoine made it clear that dishonesty in an employment relationship warranted dismissal for cause. The Adjudicator concluded based upon the evidence before her:

> *… that the employee "quit" his employment is based on the evidence that after being accused of stealing 2 rolls of flux core welding wire (approximate value of $280.00), the employee returned the 2 rolls of wire to the employer, left his place of employment, returned later to retrieve his personal tools and never reported to work again. …*

The evidence of both parties was consistent regarding these issues.

[35] This conclusion is reasonable based upon the evidence and arguments provided to the Adjudicator. It was open to her to accept the Employer's evidence that the placement of the code "M" was a clerical error. She did not disregard the evidence of the ROE or reach an unreasonable conclusion. The conclusion reached falls within the range of possible acceptable outcomes and is defensible in respect of the facts as found. Accordingly, we find the decision to be reasonable.

Was there a reasonable apprehension of bias?

[36] At the hearing before me, the Applicant suggested that the adjudicator should be seen to have been biased as a result of her allegedly requesting that the Employer provide her parking or have someone ensure that her parking meter was kept current. This issue was not raised before the Adjudicator and accordingly, she had no opportunity to address the issue in her

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decision. Nor did the Board have any evidence before it that it could reasonably rely upon to reach any conclusion in respect of those allegations.

[37] If, indeed, the Applicant felt that there was a reasonable apprehension of bias, that issue would necessarily have to be raised with the Adjudicator. In the absence of evidence and since the issue has not been raised with the Adjudicator, the Board is unable to deal with this allegation.

The filing of the Appeal before the Wage Assessment was Issued?

[38] It is difficult to understand how an appeal could be filed prior to the Wage Assessment being issued by the Executive Director. It appears that the Ministry accepted the appeal notwithstanding that a Wage Assessment had not yet been issued. However, this point, as with the question raised at this hearing related to bias, was not raised before the adjudicator by way of objection and was not dealt with by her in her reasons. Absent the matter having been raised for consideration by the Adjudicator, the Board cannot rule regarding the propriety of this appeal.

[39] All parties accepted the jurisdiction of the Adjudicator to rule on the appeal. Accordingly, any impropriety would appear to have been waived.

Did the Adjudicator Fail to Complete Her Assigned Task:

[40] The Director argued that the Adjudicator failed to make an Order in accordance with her authority under *The Saskatchewan Employment Act* to dismiss the appeal, allow the appeal, or vary the decision being appealed. With respect, the Board does not agree. On reading the Adjudicator's decision, it is clear that the Adjudicator found that the Applicant had quit their employment. As a consequence of his having quit, as distinct from having been fired or laid off, the Applicant would not be entitled to any statutory notice or payment in lieu thereof. Logically, then, by her finding that the Applicant had quit, and was therefore not entitled to notice from his Employer, the appeal was allowed by the Adjudicator in accordance with the provisions of the *Act.*

Decision and Order:

[41] The Applicant's appeal is denied and the decision of the Adjudicator is affirmed.

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

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson