MARWIN BRITTO., Applicant v. UNIVERSITY OF SASKATCHEWAN, Respondent and EXECUTIVE DIRECTOR, OCCUPATIONAL HEALTH AND SAFETY, Respondent

LRB File No. 099-16; October 31, 2016

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

For the Applicant:	Gordon D. Hamilton
For the Respondent:	John R. Beckman, Q.C.
For the Respondent Executive Director Occupational Health and Safety:	No one appearing

Appeal from an Adjudicator – Part IV of the Saskatchewan Employment Act .

Errors of Law – Appellant cites numerous errors of law – Board confirms prior standard of review of decisions by Adjudicators.

Error of Law – Appellant alleges that Adjudicator made several errors in her interpretation of *The Saskatchewan Employment Act*. Board reviews question and finds that the Adjudicator did not err. Alternatively, Board determines that deference due to Adjudicator in respect of analysis of home statute.

Error of Law – Appellant alleges that adjudicator did not take various facts into proper consideration in her decision. Board reviews issue and finds that Adjudicator did not err.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Chairperson:** This is an appeal against a decision of an Adjudicator appointed pursuant to Section 4-3 of *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1 (the *"SEA")*. Dr. Marwin Britto ("Dr. Britto") appeals against the decision of an Adjudicator dated April 14, 2016, which decision confirmed the determination of the Occupational

Health Officer, that determined that the Respondent, the University of Saskatchewan (the "University"), did not suspend him from his employment in retaliation for exercising his rights under the *SEA*.

Facts:

[2] In her decision, the Adjudicator made the following findings of fact:

> 1. *The Appellant ("Dr. Britto") joined the University in an out-of-scope position as Associate Dean of the University Library starting on September 23, 2013. His offer of employment included tenure in an in-scope academic position (Librarian IV) after the end a renewable five-year term as Associate Dean.*
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> 2. *The position of Associate Dean reports to the Dean of the University Library, Vicki Williamson. When Dr. Britto commenced his employment as Associate Dean, Dean Williamson was on a sabbatical scheduled to end on June 30, 2014. In the interim, from September 23, 2013 to June 30, 2014, Dr. Britto reported to the Acting Dean. There was some interaction between Dean Williamson and the Appellant in the months leading up to the Dean's return from sabbatical culminating in a "current state of assessment meeting" on June 9, 2014. According to the Appellant's complaint, he was informed by Dean Williamson at that time, that if he did not improve his performance within a few months, he would be removed from his position as Associate Dean.*
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> 3. *On her return, Dean Williamson met regularly with Dr. Britto between July 3, 2014 and October 16, 2014 to discuss her expectations for an improvement of his work performance. On October 16, 2014. Dr. Britto was advised by Dean Williamson that, on her recommendation, the Interim Provost and Vice President Academic ended his term as Associate Dean. Dr. Britto remained part of the University Library as a tenured, in-scope employee in the position of Head of Library Services, Information and Technology. (LS&IT) In this capacity, Dr. Britto continued to report to Dean Williamson.*
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> 4. *It appears that Dr. Britto was subsequently on medical leave for a period of time, returning from his medical leave on or about November 28, 2014. It further appears that during his absence, Dr. Britto was reassigned from his position as Head of LS&IT to the position of Project Librarian, reporting to Dean Williamson.*
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> 5. *On or about December 12, 2014, Dr. Britto filed a complaint pursuant to the University's Discrimination and Harassment Prevention Policy (the "December 2014 Complaint) alleging discrimination and harassment by Dean Williamson.*
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> 6. *On January 16, 2015, the Appellant met with Officers of the Occupational Health and Safety Division to discuss the OH&S procedure.*
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> 7. *On January 21, 2015, the Appellant was advised by the employer, via Human Resources, that a formal investigation of his complaint was to be conducted by external investigators. The Appellant was further advised that, in the interim, he would not be reporting to Dean Williamson (as Dr. Britto had also requested).*
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> 8. *On January 29, 2015, in the course of an investigative interview, the Appellant revealed to the external investigators that he had recorded meetings and*

conversations between he and Dean Williamson on ten (10) separate occasions from July 3, 2014, up to and including October 16, 2014. The recordings also included conversation between colleagues of the Appellant in which the Appellant was not a party to the conversation. Dr. Britto made the recordings using his mobile phone, without Dean Williamson's or the other colleagues' knowledge or consent. Through the Additional Statement of Facts, the Appellant indicates that in two (2) or three (3) instances persons who were not the target of the recording were picked up by the recording microphone [on his mobile smart phone] on an incidental basis. For the purposes of this hearing and only for the purposes of this hearing, this statement, while not admitted by the University, is not contested.

9. *On or around February 9, 2015, the Appellant provided the electronic audio recordings to the investigators, after which the investigators ordered transcripts.*

10. *On February 25, 2015, in the course of the investigation, the Appellant signed a confidentiality agreement which "requires all participants in an investigation to keep the matters confidential and not retaliate against anyone who participates in an investigation". The Appellant was advised that this was a new requirement for harassment investigations with the Respondent.*

11. *On February 27, 2015, the Appellant sought the assistance of an Occupational Health Officer by submitting a completed Harassment Confidential Questionnaire, detailing the same allegations of discrimination and harassment brought to the attention of the employer in his December 2014 Complaint.*

12. *On or around March 5, 2015, the Appellant was presented with an Undertaking of Confidentiality and Retaliation Protection agreement which is said to have stated: "No one involved will discuss or share information outside the investigator for [sic] corrective process. Information will be kept confidential and is to be shared on a "need to know" basis only. Failure to maintain confidentiality of information acquired and shared during the process, except as noted, may result in disciplinary action, up to and including dismissal".*

13. *On March 10, 2015, the investigators provided the recordings and transcripts to human resource representatives at the University which were, in turn, provided to Dean Williamson. A Human Resources representative brought the issue of the recordings to the attention of the Interim President of the University, and recommended the Interim President take action with respect to the Appellant.*

14. *On April 2, 2015, the Interim President, notified the Appellant by letter stating the Appellant was relieved of his regular duties and suspended from his position with pay pending a separate investigation into the matter of the "surreptitious recordings". The Appellant was assigned new office space at the University and permitted to continue research and scholarly work during the period of suspension. In the letter, Dr. Barnhart noted that the suspension was not intended to be punitive or disciplinary and was intended to allow time for the University to investigate the circumstances of the surreptitious recordings and to consider the necessary steps to take.*

15. *On April 8, 2015, the Appellant filed a Discriminatory Action complaint with OH&S alleging at Paragraph 1, page 4 that the suspension was in direct retaliation for exercising a right under the Act, with reference, at Paragraph 3 to the December, 2014 complaint against Dean Williamson.*

Relevant statutory provision:

[3] Relevant statutory provisions are as follows:

Appeal of occupational health officer decision

3-53*(1) A person who is directly affected by a decision of an occupational health officer may appeal the decision.*

(2) An appeal pursuant to subsection (1) must be commenced by filing a written notice of appeal with the director of occupational health and safety within 15 business days after the date of service of the decision being appealed.

(3) The written notice of appeal must:

(a) set out the names of all persons who are directly affected by the decision that is being appealed;

(b) identify and state the decision being appealed;

(c) set out the grounds of the appeal; and

(d) set out the relief requested, including any request for the suspension of all or any portion of the decision being appealed.

(4) Subject to subsection (10) and section 3-54, an appeal pursuant to subsection (1) is to be conducted by the director of occupational health and safety.

(5) On conducting an appeal pursuant to subsection (1), the director of occupational health and safety shall:

(a) provide notice of the appeal to persons who are directly affected by the decision; and

(b) provide an opportunity to the persons who are directly affected by the decision to make written representations to the director as to whether the decision should be affirmed, amended or cancelled.

(6) The written representations by a person mentioned in clause (5)(b) must be made within:

(a) 30 days after notice of appeal is provided to that person; or

(b) any further period permitted by the director of occupational health and safety.

(7) The director of occupational health and safety is not required to give an oral hearing with respect to an appeal pursuant to subsection (1).

(8) After conducting an appeal in accordance with this section, the director of occupational health and safety shall:

(a) affirm, amend or cancel the decision being appealed; and

(b) provide written reasons for the decision made pursuant to clause (a).

(9) The director of occupational health and safety shall serve a copy of a decision made pursuant to subsection (8) on all persons who are directly affected by the decision.

(10) Instead of hearing an appeal pursuant to this section, the director of occupational health and safety may refer the appeal to an adjudicator by forwarding to the adjudicator:

(a) the notice of appeal;

(b) all information in the director's possession that is related to the appeal; and

(c) a list of all persons who are directly affected by the decision.

Appeals re harassment or discriminatory action
3-54*(1)An appeal mentioned in subsection 3-53(1) with respect to any matter involving harassment or discriminatory action is to be heard by an adjudicator in accordance with Part IV.*

(2)The director of occupational health and safety shall provide notice of the appeal mentioned in subsection (1) to persons who are directly affected by the decision.

. . .

Right to appeal adjudicator's decision to board
4-8*(1)An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.*

(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.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and

(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

(a) in the case of an appeal or hearing pursuant to Part II, the wage assessment or the notice of hearing;

(b) n the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly

> *consider the appeal.*
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> *(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.*
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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*
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> *(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.*

Employee's arguments:

[4] Dr. Britto argued that the adjudicator had committed four (4) errors of law. Those errors were as follows:

> 1) The Adjudicator misapplied the legal test and/or the proper approach to a determination as to whether or not there was a nexus, *prima facie* linkage, or connection between the discriminatory action and the protected activity, and who had the burden of proof in relation to the existence of that nexus.
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> 2) The Adjudicator erred in law by failing to consider and address all of the evidence before her, particularly:
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> a) The second reason for the suspension, namely the allegation over misleading a search committee nearly two (2) years earlier, was not considered.
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> b) The third stated reason for the suspension, namely the need to rehabilitate the atmosphere and the environment in the Library, was not considered.
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> c) Dean Williamson's reference to the "tense situation" in the Library at the time of the suspension, a time when she indicated that she and the University were being attacked, was not considered.

3) The Adjudicator erred in her interpretation of the governing legislation that the investigators hired by the University were not persons responsible under Section 3-35(h) of the administration of Part III of *The Saskatchewan Employment Act*.

4) The Adjudicator misinterpreted the meaning of "good and sufficient other reason" as set out in section 3-35 of *The Saskatchewan Employment Act.* The decision failed to examine the sufficiency of the reason when she [the Adjudicator] failed to consider whether the stated reasons or reasons were tainted by any improper motives against the appellant.

Employer's arguments:

[5] The Employer argued that the Adjudicator had applied the correct legal text and had properly interpreted the words "on reasonable grounds" in section 3-36 of the *SEA* as requiring the Appellant to meet the threshold of establishing a *prima facie* relationship between the discriminatory action and his rights under the *SEA*.

[6] The Employer also argued that the Adjudicator had engaged with the evidence, considered all submissions and authorities submitted by the parties.

[7] The Employer argued that the Adjudicator had properly determined the role and responsibilities of the external investigators engaged by the Employer to investigate the complaints.

[8] Finally, the Employer argued that the Appellant acknowledged that the Adjudicator correctly instructed herself with respect to the law guiding interpretation of the phrase "good and sufficient other reasons". The Employer argued that the Appellant engaged with the Appellant's arguments in this regard.

Analysis:

[9] Both parties agreed that the standard of review by this Board is as set out in *Weiler v. Saskatoon Convalescent Home*[1]. In summary, the standards of review are as follows:

1. Questions of Law will be reviewed on the correctness standard;
2. Questions of Mixed law and fact will be reviewed on the reasonableness standard;
3. Questions of fact, that are reviewable as questions of law, will be reviewed on the reasonableness standard.

Did the Adjudicator err with respect to her determination of the connection between the discriminatory action and the burden of proof in respect thereto?

[10] The Adjudicator began her analysis of this issue at paragraph [45] of her decision. At paragraph [45] *et seq*, she says:

> *[45] The framework for analysis begins with Section 3-36(1) which provides that the worker must have reasonable grounds to believe that the employer took discriminatory action against him or her for a reason mentioned in section 3-35. In other words, the initial onus is on the worker to establish a prima facie case of discriminatory action.*
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> *[46] The initial burden on the worker to establish a prima facie case of discriminatory action is not a particularly onerous one. To achieve the objects of the Act and its important purpose of encouraging occupational health safety, workers must be secure in the knowledge that they may exercise rights or obligations--raise health and safety concerns--without fear of reprisal. For that reason, where a worker establishes a prima facie case of discriminatory action, the reverse onus is triggered and the employer bears the heavier burden of disproving the presumption imposed in Section 3-36(4).*
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> *[47] To establish a prima facie case of discriminatory action, requires the worker to establish to following:*
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> > *(a) That the employer took action against the worker falling with the scope of Section 3-1 (1)(i) of the Act describing "discriminatory action"*
> >
> > *(b) That the worker was engaged in one or more health and safety activities protected by Section 3-35 of the Act; and*
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> *[48] That there is some basis to believe that the employer took discriminatory action against the worker "for a reason" mentioned in section 3-35. In other*

[1] [2014] CanLII 76051 SKLRB

> *words, there must be a prima facie linkage or nexus between the worker's protected activity and the employer's action.*
>
> *[49] A determination that a prima facie case of discriminatory action has been established raises 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 and triggers a reverse onus, wherein it falls to the employer to establish, on a balance of probabilities, that discriminatory action was taken against the worker for good and sufficient other reason.*

[11] The Adjudicator notes at paragraph 58 that both parties before her cited this decision. She goes on to quote from paragraph 42 of the *Lewis* decision to support her conclusion at paragraphs [61] and [62] of her decision as follows:

> *[61] For the reasons stated above, I am satisfied that the Appellant established, prima facie, the adverse of the suspension on the tenns and conditions of his employment. As such, the suspension falls squarely within the scope of Section 3-1 (1)(i) as a discriminatory action.*
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> *[62] As noted by Matheson, J. in Lewis, supra at paragraph 42:*
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> *Innumerable examples could be recited of actions by an employer which have an Effect on employees, but are entirely unrelated to occupational health safety, as sanctions for tardiness; realignment of work schedules, salary adjustments because of economic factors; etc. To constitute a prohibited discriminatory action; however, the action by the employer must be for one of the reasons set out in section 27.*

[12] Having determined that the Appellant had *prima facie* established that his suspension had an adverse effect on the terms and conditions of his employment, the Adjudicator then turned to the issue as to whether or not the Appellant was engaged in an activity protected by section 3-35 of the *SEA* that could be the reason or one of the reasons for the employer's action, i.e.: was there any *prima facie* nexus or casual connection between the protected activity and the employer's action.

[13] At paragraph [72] of her decision, the Adjudicator says:

> *For the reasons stated above, I find that the Appellant has not established a prima facie connection between his activity protected by section 3-35(b) (the filing of a complaint) and the action taken by the University to impose a suspension with pay four months later, upon becoming aware that the Appellant had recorded conversations between himself and Dean Williamson.*

[14] The analysis that she undertook was similar to the analysis undertaken by Mr. Justice Matheson in his decision in *Lewis v. Regina School Division No. 4*[2]. In that decision, Mr. Justice Matheson reviewed similar legislation under the then, *Occupational Health and Safety Act, 1993*[3]. At paragraph [46] *et seq*. he says:

> *[46] Section 28(1) of the Act permits a worker to refer alleged discriminatory action to an occupational health officer.*
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> *[47] Section 28(2) states that "where discriminatory action has been taken against a worker who has acted or participated in an activity described in section 27", there is a presumption of discriminatory action and the onus is on the employer to establish that the discriminatory action was taken for other reasons.*
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> *[48] The reverse onus provision never came into play in this instance; the Board did not take any discriminatory action against Ms. Lewis because she acted or participated in an activity described in s. 27.*

[15] Rather than rely upon the analysis in *Lewis*, the Appellant argues that the provisions should be analyzed in a similar fashion to the way this Board analyzes statutory provisions dealing with anti-union animus, citing *Canadian Union of Public Employees, Local 4195 v. Saskatchewan Rivers School Division No. 119*[4]. With respect, I cannot agree. While concept from other areas of the law are often helpful, I cannot ignore prior judicial opinion respecting similar legislative provisions. Nor could the Adjudicator. I find no error of law in the analysis taken by the Adjudicator.

[16] Additionally, even if the Board had not reached the conclusion above, where an Adjudicator, as here, is interpreting her home statute, the Board is required to give deference to the Adjudicator in that interpretation. In the application of the reasonableness standard, I am guided as well by the Supreme Court decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador[6]*. In that decision, the Court said:

> *[12] It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that* ***the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision****". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:*

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[2] [2003] SKQB 344 (CanLII)
[3] S.S. 1993 c. O-1.1
[4] [2003] CanLII 62887 (SKLRB) at para. 22

> *"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)*
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> *…*
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> *[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)*

[17] On review of the decision on this point, the decision of the adjudicator reviewed the relevant evidence and her decision based upon that the reasons adequately explain the basis for the decision and that decision is transparent, intelligible, and falls within the range of reasonable interpretations of the statutory provisions.

Did the Adjudicator err in law by failing to consider and address all of the evidence before her?

[18] The Appellant alleges that the adjudicator ignored or did not deal with certain aspects of the evidence, particularly evidence related to two other reasons for the suspension of Dr. Britto and the "tense" situation in the library at the time of the suspension. The Appellant argued that this failure was sufficient to make these errors reviewable, citing *P.S.S. Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission)*[5]. The Employer argues that the adjudicator properly dealt with the evidence before her and that there is nothing to suggest that the Adjudicator erred in her analysis.

[19] *P.S.S. Professional Services* was applied in the context of a Labour Standards Adjudication by Mr. Justice Chicoine in *Whiterock Gas and Confectionary v. Swindler*[6]. At paragraph [38] Mr. Justice Chicoine says:

> *[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:*
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> > ***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. 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*

[5] [2007] SKCA 149 (CanLII)
[6] [2014] SKQB 300 (CanLII)

> *(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.*

[20] Following the direction given by Mr. Justice Chicoine and Mr. Justice Cameron, I am required to subject the Adjudicator's decision to a significant searching or testing in reviewing the reasonableness of the conclusions reached.

[21] The Appellant argued that by ignoring or failing to deal with the other reasons given by Dean Williams in his letter which suspended the Appellant amounted to a denial of natural justice. The Appellant argues that the first evidence overlooked was the rational that the suspension arose because the Appellant related to an allegation that a search committee had been misled by the Appellant some two years earlier.

[22] This evidence (i.e.: evidence that arose years before the alleged discriminatory action) could not and should not have been considered by the Adjudicator. Any such evidence could not establish any link between the suspension of the Appellant and his participation in a protected activity. Nor could it provide any justification for any action taken by the Employer with respect to any nexus between the two.

[23] Similarly, evidence that there was a tense atmosphere in the workplace (the library) and the need to rehabilitate the atmosphere in the workplace provide no linkage between the protected activity and the suspension of Dr. Britto.

[24] None of this evidence bears upon the question being considered by the Adjudicator which was whether there was a demonstrated connection between the Employer's action in suspending Dr. Britto and whether or not he was engaged in a protected activity.

The Adjudicator erred in her interpretation of the governing legislation that the investigators hired by the University were not persons responsible under Section 3-35(h) of the administration of Part III of *The Saskatchewan Employment Act*.

[25] The Adjudicator explains this issue beginning at paragraph [82] of her decision. She says:

> *[82] Clearly, the Appellant did not give information to an occupational health committee, an occupational health and safety representative or an occupational health officer, he gave information to the investigators in the course of their complaint investigation. The issue, then, is whether the external investigators are "other person(s) responsible for the administration of this Part or the regulations made pursuant to this Part with respect to the health and safety of workers at a place of employment".*

[26] The complaint that was under investigation was a complaint that Dr. Britto had secretly recorded conversations between himself and Dean Williamson (and others incidentally). He voluntarily provided those recordings to the investigators. The Adjudicator determined that these external investigators were not "other persons" as described in subsection 3-35(h) of the *SEA*. She concluded that the Employer had the authority to conduct such investigations.[7]

[27] Based upon my analysis above, this is also an issue of statutory interpretation within the special expertise of the adjudicator which would require that we have deference to her determination. On review of her rationale I find that her decision adequately explains the basis for the decision and is transparent, intelligible, and falls within the range of reasonable interpretations of the statutory provisions.

Did the Adjudicator misinterpreted the meaning of "good and sufficient other reason" as set out in section 3-35 of *The Saskatchewan Employment Act.* The decision failed to examine the sufficiency of the reason when she [the Adjudicator] failed to consider whether the stated reasons or reasons were tainted by any improper motives against the appellant.

[28] This argument is in relation to the Adjudicator's alternative reasoning that even if she was wrong with respect to her conclusion that Dr. Britto failed to establish a *prima facie* case of discriminatory action, that she would nevertheless have found that the Employer had

[7] See Paragraph [88] of her decision

successfully rebutted the presumption that his suspension was ***because he filed a complaint of harassment*** [emphasis mine]. In so doing, she acknowledged her satisfaction "on the evidence and accept the University's submission its decision to suspend the Appellant pending an investigation…was the sole reason, and not a pretext".[8]

[29] Since I have supported the Adjudicator's reasons in the first instance, it is not necessary for me to deal with this alternative argument.

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

DATED at Regina, Saskatchewan, this **31st** day of **October, 2016.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[8] See paragraph [75] of the Adjudicator's decision