MATT'S FURNITURE LTD., Applicant v. DAVID HOFFERT, Respondent and EXECUTIVE DIRECTOR, EMPLOYMENT STANDARDS, Respondent

LRB File No. 274-15; May 26, 2016
Kenneth G. Love, Q.C., Chairperson (sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicant:	Mr. David G. MacKay
For the Respondent:	Self Represented
For the Respondent Executive Director Employment Standards:	Ms. Lee Anne Schienbein

Appeal from the decision of an Adjudicator – Section 4-8 of *The Saskatchewan Employment Act* – Board reviews decision of Adjudicator – Board finds that Adjudicator erred by failing to address question of whether employee had been terminated for cause or not.

Appeal from the decision of an Adjudicator – Board reviews decision of Adjudicator – Board finds Adjudicator erred by relying upon his own research and not upon the evidence adduced at the hearing – Board orders fresh hearing before a newly appointed Adjudicator.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: This is an appeal of a decision by an Adjudicator appointed pursuant to Section 2-75 of *The Saskatchewan Employment Act* (the *"SEA"*). Matt's Furniture Ltd. (the "Employer") appeals against the decision of an Adjudicator dated November 12, 2015, which decision upheld the determination of the Executive Director, Employment Standards (the "Executive Director") that the Respondent, David Hoffert had been terminated without cause and was entitled to receive payment in lieu of notice in the amount of $5,813.66.

Preliminary Matter:

[2] The Employer filed its Notice of Appeal on December 21, 2015. The Executive Director, Employment Standards raised a preliminary issue with respect to the filing of the appeal. By way of explanation, the Employer advised that the decision had been served on its counsel by way of email and had not been recognized by counsel and was not opened until sometime later. The appeal was filed shortly after the email was opened. The Executive Director raised the question of whether or not proper service of the decision had been made on the Employer as required by the *SEA.*

[3] However, neither the Respondent nor the Executive Director objected to the application on the basis that it had been filed late. Counsel for the Executive Director, in her submission to the Board agreed with counsel for the Employer that service of the decision may not have been properly made. Based upon this agreement, I have determined that the appeal has been properly lodged.

Facts:

[4] The facts in respect of this matter are outlined in the decision of the Adjudicator and need not be repeated here. Reference will be made to the decision and the factual underpinnings as necessary in respect of the analysis and decision in this matter.

Relevant statutory provision:

[5] The relevant statutory provision in this case is as follows:

> *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.*

Employer's arguments:

[6] The Respondent filed a written Brief which the Board has reviewed and found helpful. The Employer argued that the Adjudicator had erred in law by engaging in his own research with respect to a health condition of the Respondent and then utilizing that research to reach a conclusion unsupported by the evidence presented at the hearing. In so doing, the Employer argued that the Adjudicator ignored relevant evidence, took into account irrelevant

evidence, mischaracterized relevant evidence or made irrational inferences on the facts as outlined by the Saskatchewan Court of Appeal in *P.P.S Salon Services Inc. v. Saskatchewan Human Rights Commission*[1].

[7] The Employer also argued that the Adjudicator failed to discuss and make a determination with respect to the issue that he was to determine, which was whether or not the Respondent was terminated with just cause or not.

Respondent's arguments:

[8] The Respondent appeared at the hearing, but made no arguments with respect to the legal issues involved in this appeal.

Respondent Executive Director's arguments:

[9] The Executive Director also filed a written Brief which the Board has reviewed and found helpful. In that Brief, the Executive Director argued that the Adjudicator determined the Employer had failed to establish that the termination of the Respondent was for just cause and, as such, his determination that pay in lieu of notice was required to be paid was reasonable. The Executive Director argued that the onus of proof that the Respondent had been terminated with just cause fell on the Employer, who had failed to meet that onus.

[10] The Executive Director also argued that in order for the Employer to rely upon just cause as his reason for termination of the Respondent it is a basis principle that there be proportionality between the misconduct alleged and the termination, in the context of the entire employment relationship. The Executive Director argued that no such proportionality existed in this case and that discharge was too harsh a penalty for the alleged misdeeds of the Respondent during his employment.

Analysis:

[11] The Board has outlined the standard of review for questions of law, questions of mixed law and facts, and factual questions which may be reviewable as errors of

[1] [2007] SKCA 149 (CanLII)

law in *Wieler v. Saskatoon Convalescent Home*[2]. That decision established the following standards of review:

> **1.** *Errors of Law will be reviewed on the "correctness" standard.*
> **2.** *Errors of Mixed Law and Fact will be reviewed on the "reasonableness" standard.*
> **3.** *Errors of Fact which may be reviewable as questions of law will be reviewed on the "reasonableness" standard.*

[12] In its decision in *P.S.S. Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission),*[3] 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."[4]

[13] 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:*

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[2] [2014] CanLII 76051 (SKLRB) LRB File No. 115-14
[3] [2007] SKCA 149 (CanLII)
[4] [2014] SKQB 300 (CanLII) at para [34]

> *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.)*

[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.

This case, invokes the reasonableness standard based upon the analysis above by Mr. Justice Chicoine.

Did the Adjudicator err in law by overlooking, disregarding, or mischaracterizing relevant material?

[14] Paragraphs 67 and 68 quoted above from Mr. Justice Cameron's decision in *P.S.S. Salon Services* outline the nature of the inquiry which we are required to make insofar as the Adjudicator's decision is concerned.

[15] The Adjudicator's decision starts with a recitation of the evidence which was heard from various witnesses. However, the Adjudicator makes no express findings of fact with respect to any of this evidence. The closest thing to a factual determination is the first three paragraphs of his Analysis where he says:

> *There is no dispute that after nine or ten years of, in the words of Travis Kutsuk, trusting and dependable, valued performance on the part of David Hoffer, there was a dramatic change.*
>
> *While there were many references to the change beginning in the fall of 2014, all examples provided by the Employer occurred in 2015.*
>
> *Mr. Hoffert admitted to most of the allegations, claiming he could not remember some. Nevertheless the record shows a number of errors and omissions that several months earlier were routine tasks for him.*

[16] The Adjudicator then goes on to suggest that the Employer's reaction to this change in Mr. Hoffert was incorrect. He says:

> *The concern for me, is the stategy followed by the Employer in dealing with this sudden change in performance. Their reaction to each incident was to blame Mr. Hoffert, criticize him, and warn him. There is no evidence before me that a consideration of other factors was taken. There are a myriad of external work factors that can cause a change in performance. Those factors range from family issues, addition issues, personal issues and health issues.*

[17] Notwithstanding the recognition of these various factors that may cause a change in performance, there was no evidence heard by the Adjudicator in respect of any of these issues. Rather, he then took it upon himself to do his own research into one particular illness, which was referenced in the evidence given, but in no way relied upon by any party as a justification for the change in performance. He does, however, note that the Employer did not give any consideration to this condition as a possible factor.

[18] The Adjudicator then determined that this illness was the cause of the performance issues, which, coupled with a lack of progressive discipline being followed, showed that the Employer had not "gone the extra mile to do a thorough investigation of all factors", including the possible link to the illness which the Adjudicator investigated, and still concluded termination was warranted. The Adjudicator did, however, acknowledge had the Employer gone that extra mile, then "just cause may have been upheld".

[19] Mr. Justice Cameron in paragraph 67 of *P.S.S. Salon Services* notes that it is essential for "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". He goes on in paragraph 68 to say:

> *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.*

[20] In this case, the Adjudicator extensively reviewed the evidence which he heard from various witnesses. One of the only two (2) references in the evidence to any illness on the part of the Respondent is found in cross-examination of Mr. Kutsak, a witness for the Employer. In his cross-examination, Mr. Kutsak testified that the Respondent had had a health concern about five (5) years ago when he received a diagnosis concerning the illness. Mr. Kutsak noted that the Respondent participated in a trial, but quit because he was required to travel for treatment.

[21] In his cross-examination, the Respondent responded to questions concerning his illness. In his testimony, he acknowledged that he was unsure if his illness was a factor in the mistakes he was making. He also acknowledged he was not undergoing active treatment, but had been involved in a treatment trial but discontinued the trial because of impact on his kidneys from the treatment. He acknowledged that all of this had been "years ago".

[22] What the reasonableness standard is was described by Bastarache and LeBel JJ. In *Dunsmuir v. New Brunswick*[5] at paragraphs 47-49:

> *47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. 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.*
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> *48 ...What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (Mossop, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554 at p. 596, per L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., The Province of Administrative Law (1997), 279 at p. 286 (quoted with approval inBaker, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at para. 65, per L'Heureux-Dubé J.; Ryan, 2003 SCC 20 (CanLII),[2003] 1 S.C.R. 247 at para. 49).*
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> *49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers....*

[23] The reasonableness standard requires that the decision under review be justifiable, transparent, and intelligent within the decision making process. Additionally, it must

[5] [2008] SCC 9 (CanLII)

"fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

[24] In this case, the function of the Adjudicator was to determine if the wage assessment made by the Executive Director should be upheld or varied. The wage assessment was issued on the basis that the Respondent had not been terminated for just cause and was therefore entitled to receive pay in lieu of notice as provided for in the *SEA*.

[25] However, the Adjudicator failed to address this fundamental issue. He did not give any consideration to, nor did he make any factual findings in respect of, the usual determinants of a finding of "just cause". That determination is fact driven.[6]

[26] The Adjudicator did not embark on any factual determination as he was required to do in respect of a determination of whether or not just cause existed for the termination of the Respondent. Rather, he took it upon himself to research an issue which was peripheral, at best, based upon the evidence recounted and utilized that research to establish the rationale for his finding that the Employer had failed to conduct a thorough investigation regarding all of the factors, which might have contributed to the Respondents performance issues. In so doing, his determinations were unreasonable and must be quashed.

[27] The Adjudicator in this case ignored the relevant evidence concerning the reasons supplied by the Employer that the termination was for just cause and mischaracterized the evidence regarding the Respondent's illness by doing his own research, leading to a conclusion that was not supported by the evidence itself. That research became the focus of the decision which he made and he disregarded all of the other evidence that he had heard on the question of just cause.

[6] See *Whiterock Gas and Confectionary v. Swindler* [2014] SKQB 300 (CanLII)

[28] The matter is remitted to a new Adjudicator, to be appointed by the Board, for a fresh hearing to determine whether or not the Employer had just cause to terminate the Respondent.

DATED at Regina, Saskatchewan, this **26th** day of **May, 2016**.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson