CHARLES LITTLEMORE o/a LITTLEMORE EXPRESS, Appellant v GOVERNMENT OF SASKATCHEWAN, DIRECTOR OF EMPLOYMENT STANDARDS and AARON HUMBLE, Respondents

LRB File No. 041-17; April 13, 2017

Vice-Chairperson, Graeme G. Mitchell, Q.C. (sitting alone pursuant to Section 9-95(3) of *The Saskatchewan Employment Act*, SS 2013, cS-15.1)

For the Appellant:	Charles Littlemore as agent
For the Respondent, Executive Director:	Lee Anne Schienbein
For the Respondent, Aaron Humble:	Aaron Humble appearing by telephone

Appeal from Decision of Wage Assessment Adjudicator – Board determines that reasonableness is standard of review for purposes of appeals under section 4-8(1) of *The Saskatchewan Employment Act*.

Appeal from Decision of Wage Assessment Adjudicator – Appellant challenges Adjudicator's findings of fact – Board adopts deferential approach to Adjudicator's factual conclusions – Board determines that Adjudicator made no palpable and overriding error.

Appeal from Decision of Wage Assessment Adjudicator – Just Cause – Appellant asserts it had just cause to terminate employee – Board reviews Adjudicator's conclusion that Appellant lacked just cause to terminate employee and must compensate the employee for the statutory notice period under section 2-61(1) of *The Saskatchewan Employment Act* – Board finds the Adjudicator's conclusion satisfies the reasonableness standard.

Practice and Procedure – Appellant's agent appeared at hearing and requested adjournment because of ill health – Board denied Appellant's request and proceeded with hearing.

REASONS FOR DECISION

INTRODUCTION

[1] **Graeme G. Mitchell, Q.C., Vice-Chairperson:** Charles Littlemore o/a Littlemore Express [the "Appellant"], pursuant to subsection 4-8(1) of *The Saskatchewan Employment Act*,

SS 2013, cS-15.1 [the "*SEA*"], appeals against a decision of an Adjudicator appointed under Part II of the *SEA*.

[2] A wage assessment dated November 30, 2016 – Wage Assessment No. 8396 ["Wage Assessment"] – was issued against the Appellant respecting the Respondent, Aaron Humble ["Aaron"] in the amount of $1,011.24 for unpaid wages and holiday pay. The Appellant appealed against this wage assessment pursuant to subsection 2-75(1)(a) of the *SEA*.

[3] On January 16, 2017[1], the Board's Registrar, pursuant to subsection 4-3(1) of the *SEA,* appointed Mr. Ralph Ermel to adjudicate this appeal. Adjudicator Ermel heard the appeal on January 24, 2017.

[4] On February 21, 2017, Adjudicator Ermel released his Decision in which he affirmed the Wage Assessment.

[5] On March 6, 2017, the Appellant appealed to this Board against Adjudicator Ermel's Decision. In its Notice of Appeal, the Appellant set out the following ground of appeal:

> *I was not given full disclosure on Humble's complaint against me. It was never explained what happens to a person who commits perjury in claiming against me. As in lies were said in writing which have been proven to be lies. Humble became violent in Hearing Room. I was scared for my safety. Adjudicator did nothing to protect me.*

[6] The Appellant further sought a stay of the Adjudicator's Decision pending the conclusion of its appeal. The Appellant elaborated on his request in its Notice of Appeal as follows:

> *Humble has proved to be a liar and the order should be thrown out. He also exhibits violent tendencies which r [sic] what the hearing was about in the first case. Humble now thinks it is OK to go and verbally abused women. Humble swears at Adjudicator several times at end of hearing. This shows extreme contempt of the people in court room.*

[7] The appeal was heard on April 7, 2017. Mr. Charles Littlemore, the Appellant's owner and manager appeared as its agent. Ms. Lee Anne Schienbein appeared on behalf of the Respondent, Director. Aaron participated in the hearing by telephone.

[8] At the conclusion of this hearing, the Board reserved its decision. These Reasons for Decision explain why the Board has concluded that the Appellant's appeal must be dismissed.

PRELIMINARY MATTER

[9] At the outset of the hearing, Mr. Littlemore, on behalf of the Appellant, requested an adjournment. He submitted that he was suffering from a severe cold with flu-like symptoms which would impair his effectiveness in presenting his case. He stated that his voice could fail him at some point in the course of the hearing, and he may also have to leave the hearing room because of a coughing fit.

[10] Ms. Schienbien on behalf of the Director took no position on Mr. Littlemore's request. She indicated that she was not opposed to an adjournment but would leave it in the Board's hands as to how to dispose of Mr. Littlemore's request.

[11] By virtue of subsection 6-111(1)(k) of the *SEA*, this Board has the power "to adjourn or postpone the hearing or proceeding". An administrative tribunal's decision whether to accept a party's request for an adjournment is a discretionary one. See *e.g.*: *Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560, 1989 CanLII 131, at p. 569. In *Prassad*, *supra*, Sopinka J. stated at pp. 568-9:

> *As a general rule, [administrative] tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion.*

[12] After hearing from the parties, the Board dismissed Mr. Littlemore's request. This situation was not a medical emergency in which the Appellant's agent was incapacitated. At worst, his cold was an inconvenience and would not seriously impair his ability to make full argument to the Board. When asked if his situation meant he was not prepared to present his argument at the hearing, he replied that it did not.

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[1] LRB File No. 001-17. The date on the document entitled Appointment reads "January 16, 2016". This is clearly an error and should read "January 16, 2017. Pursuant to section 6-113 of the *SEA*, however, this error does not affect the legitimacy of the Appointment.

[13] Accordingly, in view of the fact that the issues on the appeal were not complicated; all parties had assembled for the hearing, and Mr. Littlemore, although feeling unwell, appeared fit enough to present his case, the Board denied his request to adjourn the hearing of this appeal. It should be noted that although the hearing was relatively brief, Mr. Littlemore appeared to regain his strength as it progressed.

FACTS

[14] The Appellant operates a courier trucking company in Regina. Aaron commenced full-time employment with the Appellant on January 30, 2014. His job responsibilities included driving the company's trucks and other vehicles, swamping and other labourer's duties.

[15] Aaron appeared to have had a troubled employment history with the Appellant. For example, in June 2014, a few short months after Aaron was hired, the Appellant suspended him for one (1) day because of unacceptable behavior[2]. The Appellant directed Aaron to provide it with a letter of apology which he did.[3] He was also not permitted to make deliveries on behalf of the Appellant for a period of three (3) to four (4) months. At the hearing before Adjudicator Ermel, Aaron conceded that he had behaved badly on that occasion and deserved his punishment.[4]

[16] Subsequently, on January 22, 2015, the Appellant issued a second letter of reprimand to Aaron for using inappropriate and foul language. Again, the Appellant asked Aaron to provide it with a written apology, and, again, Aaron complied with the Appellant's request.

[17] Following this incident, there were no further performance issues for a period of approximately 20 months. Aaron testified that on August 18, 2016, he returned to work following his vacation leave. When he reported for work that morning at approximately 7:50 a.m., Mr. Littlemore handed him a letter terminating Aaron's employment with the Appellant. He testified he thought this was a joke, and when he asked Mr. Littlemore to explain the reason for the termination, Mr. Littlemore told him to leave the Appellant's premises immediately or he would call the police.

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[2] Exhibit ER4
[3] See: Decision of Adjudicator at 4.
[4] See: *Ibid*.

[18] Aaron later learned that the Appellant fired him because of an allegation he had been speeding, which he denied. He thought a friend of his former spouse had made the allegation to Mr. Littlemore.[5]

[19] Mr. Littlemore stated that he did not advise Aaron of the reason for his termination because the alleged speeding incident was the "straw that broke the camel's back".[6] At the hearing, Mr. Littlemore testified that he had already received numerous complaints from customers about Aaron's poor performance.

[20] He also expressed the opinion that Aaron had been a disloyal employee because he had been looking for other employment opportunities while in the Appellant's employ.

[21] At the hearing, Mr. Littlemore submitted an unsigned letter dated December which he characterized as a threat from Aaron.[7]

THE ADJUDICATOR'S DECISION

[22] Adjudicator Ermel reviewed the facts and recounted in some detail the testimony presented on behalf of both Aaron and the Appellant. He summarized his findings in the section entitled "Analysis" as follows:

> *Mr. Littlemore is arguing that five documents (letter to him from Cheshire Homes dated October 30, 2016 and marked ER2, letter to Saskatchewan Labour Board from Ian O'Brian, Branch Manager ATS Healthcare Solutions undated and marked ER3, letter to Mr. Humble from Mr. Littlemore dated January 22, 2015 and marked ER5, letter from Wascana Day Care dated November 16, 2016 and marked ER7) provide the basis for justifying the August 18, 2016 termination and establishe [sic] just cause.*
>
> *It needs to be noted that Documents marked ER2, ER3 and ER7 were constructed and provided to Mr. littlemore [sic] after Mr. Humble's termination.*
>
> *The letter of suspension dated June 11, 2014 covered a specific offense which Mr. Humble admitted to and following the direction of providing a letter of apology to the complainant. The next incident which produced the January 22, 2015 warning was also admitted to by Mr. Humble and he wrote another letter of apology to the complainant. There is no further documentation until some 19 months later when Mr. Humble is terminated on August 18, 2016 for allegedly speeding with a company vehicle in the Wholesale Club's parking lot.*

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[5] *Ibid*.
[6] *Ibid*., at 3.
[7] *Ibid*., at 2.

[23] Adjudicator Ermel characterized the central issue on the appeal against the Wage Assessment as whether the Appellant had just cause to fire Aaron on or about August 18, 2016. He addressed this issue in the last section of his Decision entitled "Decision: as follows:

> *I have no reason to disbelieve to [sic] contents of document ER2, ER3 and ER7.even though they were solicited after the fact by Mr. Littlemore in an effort to bolster his "just cause" arguments. Even if I reduce their authenticity since Mr. Langgard could not cross-examine the authors, the information paints a picture of performance and behaviourial issues for Mr. Humble throughout his employment. The two disciplinary letters meted out by Mr. Littlemore are concrete examples of behavior issues. However, Mr. Humble did deal with both as expected and given there is nothing more until August 18, 2016 either lessens their effect or negates them completely as building stones for a progressive discipline process leading to culminating incident sufficient for a successful "just cause" claim.*
>
> *That leaves the speeding incident primarily on its' own. Mr. Littlemore determined that this third hand complaint was the last straw and with no investigation terminated Mr. Humble for "just cause".*
>
> *Perhaps Mr Humble's approach to the needs of Littlemore Express was such that his employment could not work going forward and perhaps an end to that employment was necessary in Mr. Littlemore's assessment. However, "just cause" has not been established and therefore the appeal is dismissed and the Wage assessment in the amount of $1011.24 (two weeks' pay-in-lieu of notice and three hours report for duty pay) is upheld. [Emphasis added.]*

[24] As a consequence, and in accordance with subsection 4-6(1)(a)(i) of the *SEA*, Adjudicator Ermel dismissed the Appellant's appeal.

ISSUES

[25] In her helpful Brief of Law, counsel for the Director identified at page 3 the central issue on this appeal as follows:

- Did the Adjudicator reasonably conclude that the Employer failed to prove just cause and the Employee is entitled to pay in lieu of notice? ["The Just Cause Issue"]

RELEVANT STATUTORY PROVISIONS

[26] The following provisions of the *SEA* authorize appeals from wage assessment adjudicators and outline the remedial powers of the Board on such appeals:

> ***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.*
>
> *. . . . . .*
>
> *(6) The board may:*
>
> *(a) affirm, amend or cancel the decision or order of the adjudicator; or*
>
> *(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.*

[27] For purposes of this appeal, the following provisions of the *SEA* are also relevant:

> ***2-60****(1) Except for just cause, no employer shall lay off or terminate the employment of an employee who has been in the employer's service for more than 13 consecutive weeks without giving that employee written notice for a period that is not less than the period set out in the following Table*
>
> ***Table***
>
Employee's Period of Employment	***Minimum Period of Written Notice***
more than 13 consecutive weeks but one year or less	*one week*
more than one year but three years or less	*two weeks*
more than three years but five years or less	*four weeks*
more than five years but 10 years or less	*six weeks*
more than 10 years	*eight weeks*

> ***2-61****(1) If an employer lays off or terminates the employment of an employee, the employer shall pay to the employee, with respect to the period of the notice required pursuant to section 2-60:*
>
> *(a) if the employer is not bound by a collective agreement that applies to the employee, the greater of:*
>
> *(i) the sum earned by the employee during that period of notice; and a copy of the wage assessment; and*
>
> *(ii) a sum equivalent to the employee's normal wages for that period..*

STANDARD OF REVIEW

[28] The Board identified the relevant standard of review for the purpose of appeals pursuant to subsection 4-8(1) of the *SEA* most recently in *Burton Aggregates Ltd. v Government of Saskatchewan, Executive Director, Employment Standards and Rae-Anne Hofl*in, LRB File No. 272-16, 2017 CanLII 20063 (SK LRB) ["*Burton Aggregates*"] at para. 22.

There the Board cited its earlier decision in *Thiele v Hanwell*, 052-16 to 056-16, 2016 CanLII 98644 (SK LRB) at paragraphs 26-34 where the Board relying on the recent decision of the Supreme Court of Canada in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 SCR 293, 2016 SCC 47, concluded at paragraph 33 that "reasonableness" was the appropriate standard of review on such appeals.

[29] In *Burton Aggregates, supra*, the Board also acknowledged at paragraph 23 that it had a very limited power to review and revisit alleged factual errors committed by a wage assessment adjudicator. See further: *Weiler v Saskatoon Convalescent Home,* 2014 CanLII 76051 (SK LRB) and *Anwar Group International Ltd. and Naveed Anwar v Jeannine Poulin and Director of Employment Standards*, LRB File No. 171-15, 2016 CanLII 30541 (SK LRB). The Board noted that to successfully appeal against an adjudicator's factual findings, an appellant must satisfy a very rigorous standard. This standard was first identified in *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 (CanLII), where the Supreme Court of Canada ruled that an appellate body may only interfere with finding of facts made by a lower tribunal – in this case, a wage assessment adjudicator – if the appellant demonstrates the tribunal committed "a palpable and overriding error in coming to a factual conclusion": *Housen*, *supra*, at para. 21 [emphasis is original].

[30] It is these standards of review that are relevant on this appeal.

ANALYSIS AND DECISION

A. The Appellant's Submissions

[31] Mr. Littlemore argued that Adjudicator Ermel made numerous factual errors. He pointed to some typographical errors and alleged factual misstatements which he submitted demonstrated that the Decision was so flawed that it should be over-turned for that reason alone. He went so far as to submit that Adjudicator Ermel's Decision was so deficient that he should be found to have committed perjury for filing it. Mr. Littlemore stated that if he had filed such a report, he would have been fired immediately. The Board will not dignify this outrageous allegation with a response, other than to record that Mr. Littlemore made it at the hearing.

[32] Mr. Littlemore also submitted Adjudicator Ermel erred when he determined that the Appellant did not have "just cause" to fire Aaron in August 2016. In particular, he pointed to

the following statement found on a website from an unidentified ministry of the Government of Saskatchewan. This statement reads as follows:

> *Just cause for termination generally involved employee misconduct. Employers are expected to manage employee misconduct as they would other employee performance issues Where an employee has engaged in misconduct, the employer may terminate the employment relationship for just cause.*
>
> *Employers should:*
> - *be objective in assessing employee performance;*
> - *impose proportional disciplinary responses, and*
> - *keep records of employee misconduct and performance reviews.*
>
> *Employers carry the burden of proof. Employers alleging just cause must be able to prove that employee misconduct was serious enough to justify immediate dismissal. The employer must be able to prove misconduct on an objective standard.*

[33] Mr. Littlemore submitted that he had complied with all of these factors. Aaron had "engaged in misconduct" on the job, he had previously been subject "to proportional disciplinary responses" and his "misconduct was serious enough to justify immediate dismissal". He submitted that he had kept adequate records that documented Aaron's misconduct. He concluded that Adjudicator Ermel failed to take many of these factors into account in making his assessment and, as a consequence, his Decision should be over-turned.

B. <u>The Director's Submissions</u>

[34] Counsel for the Director, Ms. Schienbien made two (2) principal submissions. First, she argued that the Appellant was simply taking exception to Adjudicator Ermel's factual findings and conclusions. For the most part, she suggested that Mr. Littlemore was repeating the factual assertions he made before Adjudciator Ermel. As Mr. Littlemore had failed to demonstrate that the Wage Assessment Adjudicator committed any palpable or over-riding error in fact-finding, there was no basis for this Board to entertain his assertions.

[35] Second, Ms. Schienbein submitted that Adjudicator Ermel's conclusion that Mr. Littlemore lacked "just cause" for terminating Aaron in August 2016 is a reasonable one. At the outset, she characterized the issue of whether just cause exists in a particular case as an issue of mixed fact and law. She relied, in particular, on *Smith v General Recorders Ltd.* (1994), 121 Sask R 296 (QB) where Wimmer J. stated at page 302:

> *There is no compendium of employment misdemeanours which alone or in combination will justify the summary dismissal of an employee. Each case stands to be decided according to its own facts. Clearly though, it is not enough that an employer is displeased by the employee's performance. There must be some serious conduct or substantial incompetence.*

[36] Turning to Adjudicator Ermel's Decision, Ms. Schienbein submitted that he was alive to the various considerations that come into play when making the assessment of whether just cause exists in a particular case. She pointed to the fact that Adjudicator Ermel weighed the alleged event which motivated the Appellant to terminate Aaron's employment, the progressive discipline followed by the Appellant respecting Aaron's prior misconduct, and the significant passage of time that separated those prior incidents, and the alleged speeding accusation.

[37] Ms. Schienbein submitted that in addition to these considerations, Adjudicator Ermel instructed himself on the issue of proportionality, an important consideration when deciding the issue of just cause. In particular, she directed the Board to his explicit reference to the Supreme Court of Canada's judgment in *McKinley v BC Tel*, [2001] 2 SCR 261, 2001 SCC 38 ["*McKinley*"] as demonstrating an understanding of the relevant considerations of what constituted "just cause". She also relied on *Walker v Keating* (1973), 6 NSR (2d) 1 (CA); *Henry v Foxco*, 2004 NBCA 22, and an excerpt from David Harris's text entitled "Wrongful Dismissal" on this aspect of the appeal.

[38] As a consequence, she submitted that Adjudicator Ermel's conclusion on this issue satisfied the reasonableness standard.

C. Analysis

1. Alleged Factual Errors Made by the Wage Assessment Adjudicator

[39] Turning first to the Appellant's arguments respecting factual errors allegedly committed by Adjudicator Ermel in his Decision, the Board concludes there is no merit to this particular ground of appeal.

[40] The Appellant pointed to certain typographical errors that appeared in the Decision. In particular, he took exception to the following sentence found at page 5 under the heading "Final Argument": "Mr Littlemore agrees that Mr. Humble is owed three hours reporting for work on August 18, 2016, but should be paid severance for bad behavior". He maintains that

Adjudicator Ermel misunderstood the Appellant's submissions because he had argued that Aaron "should **not** be paid severance for bad behavior". Mr. Littlemore submitted the omission of the word "not" is clear evidence that Adjudicator Ermel failed to understand the facts of the case.

[41] The Board acknowledges that the word "not" was omitted but when the entire Decision is read as a whole, it is apparent that this was an over-sight on Adjudicator Ermel's part. It certainly does not demonstrate that the Adjudicator misconstrued the evidence. Rather, Adjudicator Ermel reviewed the evidence presented at the hearing in an acceptable manner and made appropriate findings of fact supported by testimony he found to be credible. Indeed, he permitted Mr. Littlemore to produce various documents which had been solicited after Aaron's termination to prove "just cause", and accepted them as evidence supporting Mr. Littlemore's complaints about Aaron's job performance.

[42] At the hearing, Mr. Littlemore was unable to demonstrate any aspect of Adjudicator Ermel's Decision that could remotely be described as demonstrating "palpable and overriding error" in making his factual conclusions. Accordingly, for these reasons this ground of appeal must be dismissed.

2. The "Just Cause" Issue

[43] On the question of whether the Appellant demonstrated it had "just cause" to terminate Aaron in August 2016, it would have certainly been preferable had Adjudicator Ermel offered a more fulsome discussion and analysis. However, it is important on this aspect of the appeal for the Board to recall the Supreme Court of Canada's direction in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 ["*Newfoundland and Labrador Nurses' Union*"]. There, writing for the Court, Abella J., when reviewing an arbitrator's decision alleged to be deficient, stated as follows at paragraph 16:

> *Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn., 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons*

> *allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met. [Emphasis added.]*

[44] When Adjudicator Ermel's Decision is read in its entirety and in accordance with Abella J.'s direction in *Newfound and Labrador Nurses' Union*, *supra*, the Board must conclude that his analysis and conclusions on the "Just Cause" Issue satisfy the reasonableness standard.

[45] It is apparent that Adjudicator Ermel understood the requisite elements for proving "just cause" in a particular case. He adverted to the Supreme Court's judgment in *McKinley*, *supra* which would signal he was aware of the concept of proportionality and its' significance in such cases. He applied these various factors to the facts as he found them in this case, and concluded that the Appellant lacked just cause to terminate Aaron. In the final paragraph of his Decision, Adjudicator Ermel appeared to empathize with Mr. Littlemore's desire to terminate Aaron's employment with the Appellant. While not taking exception to Mr. Littlemore's right to sever the Appellant's contract with Aaron, he determined that in doing so, the Appellant was obliged to pay Aaron's two (2) week's pay in lieu of notice by virtue of section 2-61(1) of the *SEA*, in addition to the three (3) hours of "report for duty" pay that Mr. Littlemore concede he owed to Aaron.

[46] Accordingly, for these reasons, this ground of appeal, too, must be dismissed.

D. Conclusion

[47] For all of these reasons, the Board concludes that Adjudicator Ermel's Decision satisfies the reasonableness standard and must be affirmed. Accordingly, the Appellant's appeal is dismissed.

[48] An appropriate Board Order will accompany these reasons.

DATED at Regina, Saskatchewan, this **13th** day of **April, 2016.**

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson