BARBI-ROSE WEISGERBER, Appellant v. RURAL MUNICIPALITY OF MAPLE CREEK #111 and GOVERNMENT OF SASKATCHEWAN, DIRECTOR, EMPLOYMENT STANDARDS, Respondents

LRB File No. 024-18; June 15, 2018

Chairperson, Susan C. Amrud, Q.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

For the Appellant Barbi-Rose Weisgerber:	Self-represented
For the Respondent, Rural Municipality of Maple Creek #111	Kevin Hoy
For the Respondent, Government of Saskatchewan, Director, Employment Standards	Lee Anne Schienbein

Section 4-8 of *The Saskatchewan Employment Act* – Employee appeals a decision of an Adjudicator in respect of a Wage Assessment made by the Director - Appeal of an Adjudicator's decision made without hearing evidence or submissions, in light of apparent agreement of all parties to an amount significantly lower than the amount set out in the Wage Assessment.

Standard of Review – Board confirms that the standard of review of the decision of the Adjudicator is reasonableness.

Decision of Adjudicator – Board reviews Adjudicator's decision on reasonableness standard – Board determines that the Adjudicator's decision was not reasonable as it was made without any evidence or any assessment of whether the amended amount was calculated in accordance with *The Saskatchewan Employment Act* – Decision remitted back to Adjudicator to be reconsidered.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Chairperson: This matter comes before the Board as an appeal from a decision of an Adjudicator with respect to a Wage Assessment issued pursuant to section 2-74 of *The Saskatchewan Employment Act* ("Act").

[2] On May 17, 2017, Mr. Ron Byers, on behalf of the Director of Employment Standards ("Director") issued a Wage Assessment in favour of Barbi-Rose Weisgerber ("Employee") against the Rural Municipality of Maple Creek #111 ("Employer") in the amount of $11,443.38. The Employer appealed. An Adjudicator was appointed and a hearing was set for December 7, 2017. On December 4, 2017 Mr. Randy Armitage, on behalf of the Director, advised the Adjudicator, the Employer and the Employee that he had recalculated the amount owing. He advised the Employer and the Employee that the recalculated amount owing was $6,901.44. The Employer advised Mr. Armitage that it would pay the reduced amount; the Employee indicated to Mr. Armitage that she accepted that amount. Mr. Armitage advised the Employee that she was not required to appear at the hearing as a witness for the department and there would be no reason for the hearing to proceed. The Director did not amend the Wage Assessment.

[3] Without hearing evidence or submissions, the Adjudicator issued a decision on December 20, 2017 varying the amount owing by the Employer under the Wage Assessment to $6,901.44. The Board's records indicate that the decision was served on the Employee by registered mail on January 30, 2018. On February 2, 2018, the Employee filed an appeal with the Board.

Argument on behalf of the Parties:

[4] The Employee was self-represented at the hearing, but was accompanied by an advocate. The Employee's submissions, orally and in writing, were that, after initially acquiescing to the reduced amount, she changed her mind because she thought she was entitled to the amount set out in the Wage Assessment. She indicated that she had worked first with Mr. Byers on establishing her claim. Based on their discussions, it was her opinion that the vacation she first earned in 2004-2005, but had not used in that year, had been used by her in the following year. This would mean that an equivalent amount had rolled over year by year, and on the termination of her employment, she was entitled to have paid out to her all earned but unused vacation, including that amount (which at that point would have been part of her 2015-16 vacation entitlement). It was her understanding that the $11,443.38 that is set out in the Wage Assessment includes that amount. She argued that the fact that she initially agreed to the amended amount should not affect her right of appeal to this Board[1]. In her oral submissions,

[1] Neither the Employer nor the Director raised this issue in oral or written argument.

she also raised an issue as to whether the Employer had appealed the Wage Assessment within the time limit allowed by subsection 2-75(2) of the Act. She did not provide any specific submissions on that issue. There was a suggestion in the Employee's written submission that just cause for termination and pay in lieu of notice were also issues in this appeal, but at the hearing she confirmed that they were not.

[5] The Employer argued that the appropriate standard of review on this appeal is reasonableness. The Employer is of the view that the Adjudicator's decision was reasonable, in light of the circumstances: Mr. Armitage advised the Adjudicator that he had recalculated the amount owing, and that both the Employer and Employee accepted the amended amount. The Employer disagrees with the Employee's interpretation of the calculation of unused vacation, and stated that there is no possible chance of success by the Employee in arguing that Mr. Armitage's calculation is wrong. Therefore, it is of the view that there is no reason to remit this matter back to the Adjudicator. The Employer argued that, since there are no facts in evidence before the Board with respect to the calculation of the amount owing, the Board cannot exercise its authority to vary the decision. Finally, the Employer denied that its appeal was out of time.

[6] The Director's position is that Mr. Armitage had a good faith understanding that the Employee was in agreement with the amended amount when he made that submission to the Adjudicator. The Director cautioned the Board against varying the Order based on the Employee's written and oral submissions about the facts, since they are not sworn statements. The Director did not object to the matter being remitted back to the Adjudicator, but did not believe it was necessary, as their opinion respecting the amount owing has not changed. The Director objected to the Employee's suggestion that the Employer's appeal to the Adjudicator was out of time. The Director noted that this argument was not included in the Employee's Notice of Appeal to this Board, and therefore could not be raised at the hearing of this appeal.

[7] All of the parties filed submissions that the Board reviewed, and that were helpful to the Board. In addition, the Director filed an Affidavit of Randy Armitage that the Board admitted under clause 4-8(4)(g) of the Act.

Relevant Statutory Provisions:

[8] A number of provisions of the Act were cited to the Board as being relevant in this appeal:

> *Vacation pay*
> *2‑27(2) With respect to an employee who is entitled to a vacation pursuant to section 2‑24 but who does not take that vacation, the employer shall pay the employee's vacation pay not later than 11 months after the day on which the employee becomes entitled to the vacation.*
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> *Wage assessments*
> *2‑74(8) The director of employment standards may, at any time, amend or revoke a wage assessment.*
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> *Commencement of appeal to adjudicator*
> *2‑75(1) Any of the following may appeal a wage assessment:*
> *(a) an employer or corporate director who disputes liability or the amount set out in the wage assessment;*
> *(b) an employee who disputes the amount set out in the wage assessment.*
> *(2) An appeal pursuant to this section must be commenced by filing a written notice of appeal with the director of employment standards within 15 business days after the date of service of a wage assessment.*
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> *Time limits for claims to director of employment standards*
> *2‑89(2) Recovery of wages pursuant to this Part is limited:*
> *(a) to wages that became payable in the 12 months preceding the day on which the claim was made to the director of employment standards; or*
> *(b) if the employment with the employer has ended, to wages that became payable within the last 12 months of employment with that employer.*
>
> *Procedures on appeals*
> *4‑4 (6) Notwithstanding that a person who is directly affected by an appeal or a hearing is neither present nor represented, if notice of the appeal or hearing has been given to the person pursuant to subsection (1), the adjudicator may proceed with the appeal or the hearing and make any decision as if that person were present.*
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> *Decision of adjudicator*
> *4‑6(1) Subject to subsections (2) to (5), the adjudicator shall:*
> *(a) do one of the following:*
> *(i) dismiss the appeal;*
> *(ii) allow the appeal;*
> *(iii) vary the decision being appealed; and*
> *(b) provide written reasons for the decision to the board, the director of employment standards or the director of occupational health and safety, as the case may be, and any other party to the appeal.*
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> *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.*
> *. . .*
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> *(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) in 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.*
> *. . ..*
>
> *(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.*

Analysis:

[9] The first issue for the Board to determine is the appropriate standard of review to be applied in this appeal. Section 4-8 of the Act allows the Employee to appeal the Adjudicator's decision to the Board on a question of law. The Board recently conducted an extensive analysis of the standard of review to be applied in appeals such as this one, in *Thiele v Hanwell*, 2016 CanLII 98644 (SK LRB) ("*Thiele*"). The Board's conclusions are set out in paragraphs 33 and 35:

> *[33] Applying the Edmonton East (Capilano) analysis here, I find the presumption of reasonableness operates. The adjudicator had to interpret particular provisions of the SEA. For the purposes of appeals under Parts II and IV, the SEA qualifies as the "home statute". Moreover, none of the four (4) Dunsmuir categories that would rebut this presumption is relevant here. Nor following the Court's direction in Edmonton East (Capilano), is there any need to embark upon a contextual analysis.*
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> *. . .*
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> *[35] The now classic formulation of the revised reasonableness standard is found in Dunsmuir v New Brunswick, [2008] 1 S.C.R. 190, 2008 SCC 9. There Bastarache and LeBel JJ. explained it as follows at paragraphs 46 – 47:*
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> > *[46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an*

> *unreasonable decision in the context of administrative law and, especially, of judicial review?*
> *[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. [Emphasis added in Thiele]*

[10] Based on these conclusions, the Board finds that the applicable standard of review in this case is reasonableness. As in *Thiele*, none of the four *Dunsmuir* categories[2] that would rebut this presumption is relevant here. Therefore, the issue before the Board is whether the Adjudicator's decision was reasonable.

[11] In paragraphs 46 and 47 of *Dunsmuir v New Brunswick*, cited in paragraph 9, above, the Supreme Court notes that both the process of articulating the reasons and the outcomes are relevant to an assessment of reasonableness. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. However, also to be considered is whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law. Based on these requirements, the decision in this case is not reasonable. No evidence or legal argument was tendered to the Adjudicator. He was not aware of the basis on which the amount set out in the Wage Assessment was calculated or the basis on which it was re-assessed. At issue appears to be whether vacation entitlement originally earned but not used in 2004-05 rolled over year by year and now affects the calculation of the amount of vacation entitlement used in each subsequent year and therefore the amount now payable as part of the vacation pay owing to the Employee, or whether it was lost because it was not used or paid out in 2005-06.

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[2] In *Thiele* (para 30), the Board cited these four categories from the decision of the Supreme Court of Canada in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 (CanLII) at para 24: "The four categories of issues identified in *Dunsmuir* which call for correctness are constitutional questions regarding the division of powers, issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", "true questions of jurisdiction or vires", and issues "regarding the jurisdictional lines between two or more competing specialized tribunals".

[12] The issue in this matter revolves around the appropriate interpretation of subsection 2-27(2) of the Act:

> *2-27(2) With respect to an employee who is entitled to a vacation pursuant to section 2-24 but who does not take that vacation, the employer shall pay the employee's vacation pay not later than 11 months after the day on which the employee becomes entitled to the vacation. (emphasis added)*

[13] Again, here, the *Thiele* decision is instructive with respect to the principles of statutory interpretation to be applied:

> *[38] The first principle is the modern rule of statutory interpretation which applies to all question of statutory interpretation. The Supreme Court per Brown J. very recently summarized this rule in Krayzel Corporation v Equitable Trust Co., 2016 SCC 18 (CanLII). He stated at paragraph 15:*
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> > *[15] Statutory interpretation entails discerning Parliament's intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense, in harmony with the statute's schemes and objects: Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21. Throughout, it must be borne in mind that every statute is deemed remedial and is to be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": Interpretation Act, R.S.C. 1985, c. I-21, s. 12.*
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> *[39] In this passage, Brown J. references the federal Interpretation Act. It should be noted, however, that The Interpretation Act, 1995, S.S. 1995, c. I-11.2, s.10 is to the same effect. See also: Holtby-York v Saskatchewan Government Insurance, 2016 SKCA 95 (CanLII), at para. 6.*
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> *[40] The second principle relevant here emphasizes the remedial nature of Part II of the SEA. The Supreme Court identified this principle when it interpreted provisions of Ontario's Employment Standards Act ["ESA"], a statute similar in effect to Part II of the SEA. For example, in Machtinger v HOJ Industries Ltd., 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, Iacobucci J. for the Court stated at page 1003:*
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> > *Section 10 of the Interpretation Act, R.S.O. 1980, c. 219, provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit." The objective of the [ESA] is to protect the interests of employees by requiring employers to comply with certain minimum periods of notice of termination. To quote, Conant Co. Ct. J. in [Pickup v Litton Business Equipment Ltd. (1983), 3 C.C.E.L. 266], at p. 274, "the general intention of this legislation [i.e. the [ESA]] is the protection of employees, and to that end it institutes reasonable, fair and uniform minimum standards." The harm which the [ESA] seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to employers.*
> >
> > *. . . . .*

> *Accordingly, an interpretation of the [ESA] which encourages employers to comply with the minimum requirements of the [ESA], and so extends its protections to as many employees as possible, is to be favoured over one that does not.*

[41] Similarly, in Rizzo & Rizzo Shoes Ltd, supra, Iacobucci J. again writing for the Court reiterated the interpretative approach to the ESA which he had advocated in Machtinger, supra. At page 47, he stated:

> *Finally with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see e.g., Abrahams v Attorney General of Canada, 1983 CanLII 17 (SCC), [1983] 1 S.C.R. 2, at p. 10; Hills v Canada (Attorney General), 1988 CanLII 67 (SCC), [1988] 1 S.C.R. 513, at p. 537).*

[14] Based on these principles, the interpretation of subsection 2-27(2) used by the Director to calculate the amount owing, and therefore adopted by the Adjudicator in his decision, is required to be determined in a broad and generous manner, with any doubt resolved in favor of the Employee. The Act does not require that the vacation entitlement be used in the year it was earned. In fact, section 2-24 states that the Employee is not entitled to the vacation until the completion of a year of employment. Subsection 2-27(2) provides that vacation pay does not become payable for an unused amount until 11 months after the Employee became entitled to the vacation. Without any information before the Board or the Adjudicator with respect to how the two widely different amounts owing were calculated, it is not possible for the Board or the Adjudicator to determine whether the Act was properly interpreted by the Director. The amended amount was apparently calculated based on a presumption that the Employer contravened the Act by not allowing the Employee to use her vacation and not paying out any unused amount remaining 11 months after she became entitled to it.

[15] Because of the process that this case followed, there was no evidence before the Board or before the Adjudicator. Given the wide discrepancy between the first and second calculations of the amount owing, and the absence of the Employee from the hearing, it was not reasonable for the Adjudicator to accept the amended amount without taking any steps to confirm it was based on a proper interpretation of the Act.

[16] The Board accepts the arguments of the Employer and the Director that there are insufficient facts before the Board to allow it to exercise its discretion pursuant to clause 4-

8(6)(a) to amend the Adjudicator's decision. Instead, the Board orders that this matter be remitted back to the Adjudicator to determine how much the Employee is entitled to be paid for unused vacation entitlement. Since this matter will be a hearing of the Employer's appeal from the original Wage Assessment, the issue of whether the Employer's appeal was filed in time may also be considered by the Adjudicator.

DATED at Regina, Saskatchewan, this **15th** day of **June, 2018.**

LABOUR RELATIONS BOARD

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Susan C. Amrud, Q.C.
Chairperson