JAMES PRUDEN, Appellant v. OLYSKY LIMITED PARTNERSHIP, Respondent

LRB File No. 036-18; July 18, 2018

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

For the Appellant, James Pruden	Self-represented
For the Respondent, Olysky Limited Partnership	Brent Matkowski

Section 3-35 of *The Saskatchewan Employment Act* – Complaint of discriminatory action dismissed by occupational health officer.

Section 4-8 of *The Saskatchewan Employment Act* – Employee appeals decision of Adjudicator that dismissed his appeal as being filed beyond the appeal period prescribed by section 3-53 of that Act.

Appeal dismissed – *The Saskatchewan Employment Act* provides no discretion to any decision-maker to extend the appeal period – Decision of Adjudicator reasonable – *The Limitations Act*, section 8, does not apply.

REASONS FOR DECISION

Background:

[1] **Susan C. Amrud, Q.C., Chairperson**: Mr. Pruden appeals to the Board from a decision of an Adjudicator on an appeal from a decision of an occupational health officer that the action taken by his former employer, Olysky Limited Partnership, was not discriminatory action pursuant to Part III of *The Saskatchewan Employment Act* ("Act").

[2] On March 29, 2017 Mr. Pruden filed a complaint of discriminatory action with the Ministry of Labour Relations and Workplace Safety against his former employer, Olysky Limited Partnership. On April 11, 2017, his complaint was dismissed. Mr. Pruden was served with a copy of the decision by registered mail on April 19, 2017. Mr. Pruden filed an appeal of that decision on July 6, 2017. Unfortunately, this was after the 15 business day appeal period set out

in section 3-53 of the Act had expired. As a result, the Adjudicator had no choice but to dismiss the appeal, which she did, by decision dated February 4, 2018[1].

Relevant Statutory Provisions:

[3] The following provisions of the Act are applicable to this appeal:

> *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.*
>
> *(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.*
>
> *(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(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.*

Analysis:

[4] 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 Mr. Pruden 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[2], in *Thiele v Hanwell*, 2016 CanLII 98644 (SK LRB) ("*Thiele*"). The Board's conclusions are set out in paragraphs 33 and 35:

---

[1] LRB File No. 143-17.

[2] The appeal in *Thiele* arose out of an Adjudicator's decision pursuant to Part II of the Act but is equally applicable to appeals arising out of an Adjudicator's decision pursuant to Part III of the Act.

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

[5] 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[3] that would rebut this presumption is relevant here. Therefore, the issue before the Board is whether the Adjudicator's decision was reasonable.

[6] Given the thoroughness of the Adjudicator's decision, there is no need to repeat the facts of this case in further detail here. The issue in this appeal is a question of law: the appropriate interpretation of subsection 3-53(2) of the Act. The Adjudicator relied on the

[3] 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".

thorough analysis of this issue in *Brady v. Jacobs Industrial Services Ltd.*, 2016 CarswellSask 481 (SK LA). Paragraph 53 is particularly relevant here:

> *When the Saskatchewan Employment Act came into effect, the case law was clear that time limits are interpreted as mandatory and relief against failure to meet a time limit is not available unless expressly stated in the Act. If the legislature intended there be any relief from the time limit for appeal in s. 3-53(2), it could easily have included an express provision. Indeed, where the legislature intended to provide jurisdiction to waive or extend time limits, it did do so expressly. For example, s.6-49(3)(f) gives an arbitrator power to relieve against breaches of time limits in collective agreements. Similarly, s. 2-93 grants specific authority for the Court of Queen's Bench to extend the time for making an application to set aside an order or judgment. The legislature did not give any similar power to an adjudicator or to anyone else in the case of an appeal under s. 3-53, and I have no authority to imply such authority.*

[7] At paragraph 32, the Adjudicator stated:

> *In light of the mandatory nature of the time established for filing a written notice of appeal in section 3-53(2) of The Saskatchewan Employment Act and the absence of any authority on the part of an adjudicator, or anyone else, to extend that time period, I find that Mr. Pruden's notice of appeal was not filed in time. I therefore have no jurisdiction to hear the appeal.*

[8] Taking into account the case law[4] provided to the Board by Olysky Limited Partnership, the Board finds that not only is the Adjudicator's decision reasonable, it is correct. Mr. Pruden has not proven that the Adjudicator made an error of law in her decision.

[9] While it is unfortunate that Mr. Pruden did not file his appeal in time, the fact remains that he knew there was a time limit and he did not comply with it. As the Adjudicator noted, Mr. Pruden believes that applying the time limit to his case is unfair. While there may be considerable sympathy for Mr. Pruden's circumstances, by the Adjudicator and the Board, neither has the power to change this law. Only the Legislature can provide that remedy.

---

[4] *Wieler v. Saskatoon Convalescent Home*, 2014 CarswellSask 718 (SK LRB); *Onsite Oilfield Services Inc. v. Government of Saskatchewan*, 2018 CarswellSask 125 (SK LRB); *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61; *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers (UBCJA, Local 1985) v. Saskatchewan (Labour Relations Board)*, 2013 SKQB 273; *C.J.A., Local 1985 v. Graham Construction & Engineering Ltd.*, 2008 SKCA 67; *Brady v. Jacobs Industrial Services Ltd.,* 2016 CarswellSask 481 (SK LA); *Sheng v. Cre-8-tive Minds Early Learning Child Care Inc.,* LRB File No. 053-17 (SK LA); *Egware v. Regina (City)*, 2016 SKQB 388; *Saskatchewan (Director of Employment Standards) v. Maxie's Excavating*, 2018 CarswellSask 61 (SK LRB); *Segers v. British Columbia (Superintendent of Motor Vehicles)*, 1999 CarswellBC 609 (BCSC); *Isinger v. British Columbia (Superintendent of Motor Vehicles)*, 2017 BCCA 81.

[10] At the conclusion of the hearing the Board asked the parties to provide further submissions on the issue of whether section 8 of *The Limitations Act* would apply to potentially assist Mr. Pruden. Section 8 states:

> *Persons under disability*
> *8(1) The operation of any limitation period established by this Act or any other Act or regulation is suspended during any period in which the claimant:*
> *(a) is a minor; or*
> *(b) is a person who, by reason of mental disability, is not competent to manage his or her affairs or estate and is not represented by a personal guardian or property guardian pursuant to The Public Guardian and Trustee Act or a decision-maker pursuant to The Adult Guardianship and Co-decision-making Act who:*
> *(i) is aware of the claim; and*
> *(ii) has the legal capacity to commence the proceeding on behalf of that person or the person's estate.*
> *(2) A claimant is presumed to have been capable of commencing a proceeding with respect to a claim at all times unless the contrary is proved.*

[11] The issue was whether Mr. Pruden could be found to be suffering from a mental disability that would apply to extend the time limitation in subsection 3-53(2) of the Act. Olysky Limited Partnership argued that section 8 of *The Limitations Act* does not apply to this matter, as that Act only applies to "court proceedings", by virtue of section 3:

> *Application of Act*
> *3(1) Subject to subsections (2) to (5), this Act applies to claims pursued in court proceedings that:*
> *(a) are commenced by statement of claim; or*
> *(b) are commenced by originating notice and are not proceedings in the nature of an application.*

[12] That interpretation is confirmed in *Fecyk v. Bracken and The Office of Residential Tenancies*, 2017 SKQB 85 (CanLII). *The Limitations Act* does not apply to the interpretation of subsection 3-53(2) of the Act.

[13] Therefore, Mr. Pruden's appeal is dismissed.

DATED at Regina, Saskatchewan this **18th** day of **July, 2018**.

LABOUR RELATIONS BOARD

_____
Susan C. Amrud, Q.C.
Chairperson