FARMS AND FAMILIES OF NORTH AMERICA INCORPORATED o/a FARMERS OF NORTH AMERICA, Appellant v NICOLE MASON, Respondent and GOVERNMENT OF SASKATCHEWAN, EXECUTIVE DIRECTOR OF EMPLOYMENT STANDARDS, Respondent

LRB File No. 042-19; July 8, 2019

Vice-Chairperson, Barbara Mysko (sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1)

For the Applicant Employer:	Tom Stepper
For the Respondent Nicole Mason:	Jay D. Watson
For the Respondent Government of Saskatchewan:	Steven Wang

Appeal from decision of Wage Assessment Adjudicator – Standard of review – Reasonableness is standard of review for appeals under section 4-8(1) of *The Saskatchewan Employment Act* – Board applies reasonableness standard to decision of Adjudicator.

Appeal from decision of Wage Assessment Adjudicator – 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 – Board considers whether the hearing was procedurally fair – Board determines that hearing was procedurally fair – Board makes determination on standard of reasonableness and on basis of whether the hearing was fair.

Appeal from decision of Wage Assessment Adjudicator – Appellant failed to appear at appeal hearing – Board considers written submissions of Appellant – Appellant has engaged in pattern of last minute requests for an adjournment – Prejudice to Employee – Board affirms decision of Adjudicator.

REASONS FOR DECISION

Introduction:

[1] Barbara Mysko, Vice-Chairperson: Farms and Families of North America Incorporated [the "Appellant" or "Employer"] appeals, pursuant to subsection 4-8(1) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [the "Act"], against a decision of an Adjudicator appointed under Part II of the Act. The Adjudicator's decision pertains to a wage assessment for the

Appellant's employee, Nicole Mason ["Employee"]. James Mann ["Mann"], CEO, is the principal representative of the Employer. The hearing of this appeal was held on May 28, 2019.

[2] The Employee was terminated from the workplace on August 13, 2018. She immediately took her claim to Employment Standards. The Director issued a wage assessment in the amount of $4,141.76. The Employer appealed the assessment on the following grounds:

> *Our grounds for the appeal are based on Ms. Mason's conduct as an employee of the company. She was insubordinate on numerous occasions causing conflict within the company. She seriously breached the confidentiality agreement she had with the company. As well, Ms. Mason also appears to be guilty of a sizable theft from the company.*

[3] The related hearing was held before the Adjudicator on December 24, 2018 and January 24, 2019. At the hearing, the Employee withdrew her claim for pay in lieu of notice, and so the claim subject to appeal was reduced to $3,277.36. The Adjudicator issued a decision on January 31, 2019, varying the amount of the assessment such that it was equal to the reduced amount of $3,277.36, and ordered the Employer to pay that reduced amount.

[4] The decision dated January 31, 2019 is the subject of this appeal. The Appellant suggests that the Adjudicator made a number of errors, described as follows:

(a) The Adjudicator erred by not properly assessing the evidence at the hearing in accordance with the law;
(b) The Adjudicator erred by disregarding, overlooking and/or mischaracterizing evidence;
(c) The Adjudicator erred by making unsupportable inferences of fact;
(d) The Adjudicator erred by basing her decision upon facts and/or evidence that were neither properly before her nor admitted;
(e) The Adjudicator served subpoenas on witnesses and requested documents, however the subpoenas were not complied with and the adjudicator failed to enforce her own subpoenas in accordance with the law;
(f) The Adjudicator failed to allow an adjournment in accordance with the law when one was reasonably requested based upon prior trial commitments.

[5] It is these alleged errors that this Board is to consider.

[6] All of the parties have filed written submissions in relation to this appeal, which the Board has taken into account in arriving at these Reasons.

Wage Assessment Appeal – Procedural History:

[7] The initial hearing began on December 24, 2018. During the hearing Mann asked for an adjournment to obtain evidence of the Employee's alleged dishonest conduct. He claimed that he needed to gain access to records belonging to another company and to track down the Employee's ex-boyfriend. The Adjudicator agreed to this request for an adjournment and agreed to issue subpoenas for two additional witnesses. The matter was adjourned to January 24, 2019. It was made clear at that time that no further adjournments would be granted. The subpoenas, later issued by the Adjudicator, were then forwarded to Mann for service.

[8] On January 21, 2019, counsel for the Employer, Tom Stepper ["Stepper"], emailed the Adjudicator stating that he had been "recently retained and instructed to serve certain subpoenas, as well as obtain certain documentary evidence, and given the fact that I am scheduled to appear in a cross examination in Calgary on that day, I respectfully request an adjournment if [sic] the 23rd date". By reply, the Adjudicator denied the request, referring to the earlier directive that there would be no further adjournments granted. Stepper repeated his request for an adjournment, which request was again refused. Following this exchange, there was no further communication from Mann or anyone on his behalf. Nor was there any indication that Mann would not be present at the hearing.

[9] When the hearing proceeded on January 24, 2019 neither Stepper nor his client were present. Attempts were made to contact Mann, to no avail. Shortly after the commencement of the hearing, a gentleman by the name of Bill Martin arrived, and announced that he was appearing on behalf of Mann. He had no substantive knowledge of the hearing but instead, was attending to request an adjournment on Mann's behalf. Bill Martin provided an unsworn affidavit in which Mann was purported to advise that he was in Toronto for legal proceedings.

[10] The Adjudicator denied the request for an additional adjournment, stating:

> *Both parties are entitled to a speedy resolution of this issue. Ms. Mason has been waiting for over five months for a decision and it would be unfair to her to grant yet another adjournment for an undetermined length of time so that Mr. Mann can obtain undetermined evidence. The request for an additional adjournment is denied.*

Wage Assessment Appeal – Adjudicator's Decision:

[11] The Adjudicator dismissed the appeal of the wage assessment, due in part to her assessment of credibility. In short, Mann's evidence consisted primarily of hearsay statements, allegedly made by the Employee's estranged ex-boyfriend.

[12] After hearing and considering the testimony, the Adjudicator held that there was not "one iota of evidence to suggest [that the Employee] did not do her work and should therefore not be paid". The Employee was not paid on the date in question, not because of Mann's deliberate action in response to poor performance, but because there were insufficient funds in the relevant bank account. The Employee was not alone - not one employee had received a pay cheque on the date in question.

[13] Mann used a variety of strategies to obtain and insist on the existence of evidence to support his allegations against the Employee. Despite those efforts, the Adjudicator found this insistence, overall, disingenuous.

Current Appeal – Procedural History:

[14] On April 9, 2019, this appeal was set down to be heard on May 28, 2019. At 7:19 a.m. on May 27, 2019, Stepper's agent emailed the parties to request an adjournment of the hearing to the afternoon of May 28, 2019. He indicated that he had another matter scheduled in court on the same day in Saskatoon, and so would be unable to appear at the Board hearing, as scheduled.

[15] The Board Registrar was copied on the email. The Registrar replied that adjournments are not simply provided when agreed to by counsel, but instead, leave from the Board must be granted. The Registrar advised that the Board was prepared to consider delaying the matter by two hours if needed, but an adjournment to the afternoon was not possible. Return travel arrangements had already been made. By reply, Stepper indicated that if the adjournment was not granted, he would have someone appear in his stead at the hearing, at the originally scheduled time.

[16] The Registrar replied that the Board would not be adjourning the matter, thanking Stepper for agreeing to make alternative arrangements. At 4:44 p.m. on the same date, Stepper emailed again, indicating that he was unable to have an agent to attend on his behalf and so therefore his "request for an adjournment remains". The Registrar responded that the Board had relied on his

undertaking and reminded him that it had been confirmed that the matter would proceed at 10 a.m. the following day.

[17] The Registrar indicated that the Board would proceed at 10 a.m., but would be willing to adjourn the matter from time to time, until noon, at which point his opportunity to make submissions would be concluded. After 12 p.m., the Board would begin the proceedings, with or without a representative for the Employer in attendance.

[18] The Board proceeded to commence the hearing at 10 a.m. on May 28, 2019. When Stepper did not appear, the Board adjourned out of an abundance of caution until 1:15 p.m., at which point Stepper had still not appeared, and the Board decided that it was appropriate to proceed. After the matter concluded, an email was received by the Registrar at 2:52 p.m., indicating that Stepper had finally arrived. At no time prior to this, did an agent appear in his stead.

[19] Prior to proceeding to hear the Appeal, although there was no further request for an adjournment, both counsel for the Employee and counsel for the Director of Employment Standards objected to any further adjournment due to the prejudice to the Employee. In effect, Stepper was indirectly granted his adjournment request, but despite this, he still failed to appear on the Employer's behalf.

Relevant Statutory Provisions:

[20] The following provisions of the *Act* are applicable:

> ***Procedures on appeals***
> ***4-4****(1) After selecting an adjudicator pursuant to section 4-3 and in accordance with any regulations made pursuant to this Part, the registrar shall:*
> *(a) in consultation with the adjudicator and the parties, set a time, day and place for the hearing of the appeal or the hearing; and*
> *(b) give written notice of the time, day and place for the appeal or the hearing to:*
> *(i) in the case of an appeal or hearing pursuant to Part II:*
> *(A) the director of employment standards;*
> *(B) the employer;*
> *(C) each employee listed in the wage assessment or hearing notice; and*
> *(D) if a claim is made against any corporate directors, those corporate directors; and*
> *(ii) in the case of an appeal or hearing pursuant to Part III:*
> *(A) the director of occupational health and safety; and*
> *(B) all persons who are directly affected by the decision being appealed.*
> *(2) Subject to the regulations, an adjudicator may determine the procedures by which the appeal or hearing is to be conducted.*

(3) An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.
(4) An adjudicator may determine any question of fact that is necessary to the adjudicator's jurisdiction.
(5) A technical irregularity does not invalidate a proceeding before or by an adjudicator.
(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.

Powers of adjudicator
4-5*(1) In conducting an appeal or a hearing pursuant to this Part, an adjudicator has the following powers:*

(a) to require any party to provide particulars before or during an appeal or a hearing;
(b) to require any party to produce documents or things that may be relevant to a matter before the adjudicator and to do so before or during an appeal or a hearing;
(c) to do all or any of the following to the same extent as those powers are vested in the Court of Queen's Bench for the trial of civil actions:
(i) to summon and enforce the attendance of witnesses;
(ii) to compel witnesses to give evidence on oath or otherwise;
(iii) to compel witnesses to produce documents or things;
(d) to administer oaths and affirmations;
(e) to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the adjudicator considers appropriate, whether admissible in a court of law or not;
(f) to conduct any appeal or hearing using a means of telecommunications that permits the parties and the adjudicator to communicate with each other simultaneously;
(g) to adjourn or postpone the appeal or hearing.

…

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.

Analysis:

Jurisdiction and Standard of Review:

[21] The standard of review on appeals, which are made pursuant to subsection 4-8(1), is "reasonableness".[1] To be deemed reasonable, a decision must fall "within a range of possible, acceptable outcomes" while demonstrating "justification, transparency and intelligibility within the decision-making process": *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190.[2]

[22] Subsection 4-8(1) of the Act limits an appeal pursuant to subsection 4-8(1) to a question of law. As the Board has observed, "[f]actual questions rarely meet the test for what may be characterized on appeal as a question of law".[3] This Board is permitted to interfere with the Adjudicator's finding of fact only if the Adjudicator is found to have committed a "palpable and overriding error" in making that factual finding: *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 (CanLII) ["*Housen*"].[4] A similar standard of deference applies in relation to the Adjudicator's assessment of a witness' credibility.

[23] The Board therefore has a very limited power to review and revisit alleged factual errors committed by the Adjudicator on a wage assessment. The Board must show deference to the Adjudicator's factual inferences, giving due regard to the Adjudicator's many advantages over this Board, including but not limited to the first-hand receipt of evidence at the hearing. The Board is not entitled to draw a different factual inference where it disagrees about the weight that should have been assigned to the evidence.

[24] The Board must, however, remember that an error is made where the finding of fact ignores relevant evidence, takes into account irrelevant evidence, mischaracterizes relevant evidence, or make irrational inferences of fact.[5]

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[1] *101254226 Saskatchewan Ltd. v Douglas Klymchuk and Government of Saskatchewan,* 2018 CanLII 8571 (SK LRB) ["*Klymchuk*"] at para 27; *Littlemore (Littlemore Express) v Saskatchewan*, 2017 CanLII 30147 (SK LRB) at para 28.
[2] *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190 at para 47.
[3] *Klymchuk* at para 18.
[4] *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 (CanLII) ["*Housen*"] at para 21.
[5] See, *P.S.S. Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, [2007] SKCA 149 (CanLII) (pre-dates *Dunsmuir*); *Whiterock Gas and Confectionary v Swindler*, [2014] SKQB 300 (CanLII) (post *Dunsmuir*).

[25] To the extent that the Appellant raises an issue of procedural fairness, this Board will, out of an abundance of caution, both consider whether the Adjudicator's decision was reasonable and whether, simply put, the procedure undertaken was fair.

Analysis:

[26] The Employer says that it relies on the Board's decision in *Matt's Furniture Ltd. v Hoffart*, 2016 CanLII 31172 (SK LRB) ["*Matt's Furniture*"] in support of its position on appeal. In that case, the Board remitted the matter to a new Adjudicator for a fresh hearing to determine whether the Employer had just cause to terminate the Employee. The Board found that the Adjudicator failed to address the fundamental question of whether the Employee had been terminated for just cause. The Adjudicator failed to embark on any factual determination in relation to that issue. Instead, he opted to research a peripheral issue and on the basis of his own research found that the Employer had failed to conduct a proper investigation into the Employee's performance issues. The Employer ignored relevant evidence about the reasons provided by the Employer about the termination.[6]

[27] Taking into account the Employer's reliance on *Matt's Furniture*, the Board will proceed to consider each of the Employer's objections to the Adjudicator's decision, in turn.

Did the Adjudicator err in her "assessment of the evidence at the hearing in accordance with the law"?

[28] To this point, the Employer states that the Adjudicator erred by failing to properly assess the evidence in that the related legal matters are sealed.[7] The Adjudicator's assessment of the evidence must be reviewed for palpable and overriding error.

[29] In assessing this argument, the Board gives consideration to the surrounding paragraphs of the Employer's brief. First, it is unclear how the legal proceedings are relevant to the claim against the Employee, other than to confirm that the reason for the under payment was not, in fact, caused by the Employee's conduct. Second, it is unclear how the Adjudicator could have erred in disregarding evidence that was not before her, namely the sealed legal documents. It is not the Adjudicator's role to assist the Employer in unearthing evidence to facilitate the Employer's case. She is restricted to assessing the evidence that comes before her. Third, the Adjudicator

[6] *Matt's Furniture Ltd. v Hoffart*, 2016 CanLII 31172 (SK LRB) ["*Matt's Furniture*"] at para 24-27.
[7] See, *Decision of Adjudicator* at 4, para 5.

correctly characterized as hearsay the evidence of conversations with the ex-boyfriend. There is no other conceivable characterization.

Did the Adjudicator err by "disregarding, overlooking and/or mischaracterizing evidence"?

[30] To this point, the Employer states that the Adjudicator overlooked the fact that the financial records of AgraCity have been withheld from Mann despite his role as Secretary-Treasurer.[8] It bears repeating that the Adjudicator is not responsible for assisting the Employer in presenting its case. The role of the Adjudicator is to assess the evidence presented. If it were the case, which is highly unlikely, that the financial records held a key piece of evidence in support of the Employer's case, it was up to Mann to uncover that evidence and bring it before the Adjudicator. It was not for the Adjudicator to grant repeated procedural concessions in the faintest hope that evidence, of questionable relevance, might be uncovered and presented at a future date.

Did the Adjudicator err by "making unsupportable inferences of fact"?

[31] The Employer suggests that the Adjudicator made an insupportable inference by finding that the failure to pay the Employee was a consequence of the scrimmaging between the Mann brothers.[9] Not only is this inference reasonable, and absent of any error, it is the only inference available on the evidence. There is nothing more to add on this point.

Did the Adjudicator err by "basing her decision upon facts and/or evidence that were neither properly before her nor admitted"?

[32] The Employer says that the Adjudicator erred by basing her decision upon facts and/or evidence that were neither properly before her nor admitted. The Employer attempts to shore up this argument by pointing to a section of the decision that contains the Adjudicator's alleged insupportable inference.[10] However, that section consists of the Adjudicator's factual summary of Mann's requests for an adjournment and issuance of subpoenas. The Adjudicator was not assessing evidence or drawing inferences of fact, but simply reciting the content of the procedural discussions leading up to her decision to both grant the adjournment and issue the subpoenas as requested.

[33] What actually occurred is quite the opposite from what the Employer suggests. As is apparent elsewhere in the decision, the Adjudicator did not base her conclusion on facts or

[8] See, *Decision of Adjudicator* at 4, para 7.
[9] See, *Decision of Adjudicator* at 5, para 3.
[10] See, *Decision of Adjudicator* at 7.

evidence that were improperly admitted. Instead, she properly disregarded evidentiary conjecture, while giving ample opportunity to the Employer to present the evidence that allegedly existed.

[34] This case is distinct from *Matt's Furniture*, in that the Adjudicator has made no palpable or overriding errors in her factual inferences or conclusions.

Did the Adjudicator err by "failing to enforce subpoenas in accordance with the law"?

[35] To this point, the Board simply considers whether the "failure to enforce subpoenas" as suggested by the Employer, rendered the hearing unfair.

[36] The Employer claims that the Adjudicator issued subpoenas that were served and that would have brought material evidence to the proceedings.[11] The Board notes that subclause 4-5(1)(c) gives the Adjudicator the power to summon and enforce the attendance of witnesses. Further to this power, the Adjudicator issued the subpoenas as requested, and forwarded them to Mann to serve on the named individuals. The Adjudicator made every reasonable effort to ensure that Mann was in receipt of the issued subpoenas, as requested.

[37] The Adjudicator is entitled, further to subsection 4-4(2), to determine the procedures by which the hearing is to be conducted. Furthermore, it is noteworthy that the Adjudicator's approach to the issuing and serving of subpoenas, while not required to be, is consistent with the approach of the courts in Saskatchewan.

[38] If Mann failed to serve the subpoenas, it is not for the Adjudicator to take extra measures to ensure another opportunity, or assume that responsibility personally. In the event that he did serve the subpoenas, which is not at all clear, it was his option whether to make an application to ensure their enforcement. No such application was made. It cannot be up to the Adjudicator to both cure Mann's absence from the hearing at which the witnesses were allegedly to appear, and to enforce their attendance at that hearing or any future hearing, in his absence.

Did the Adjudicator err by "failing to allow an adjournment in accordance with the law when one was reasonably requested"?

[39] The Employer claims that the original hearing date being December 24, 2018 was "intangible", and that the Adjudicator failed to grant a reasonable request for an adjournment.

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[11] See, *Decision of Adjudicator* at 7, para 5.

[40] There is no doubt that a decision maker has a duty to afford parties a fair opportunity to participate in the process through which their interests will be determined. The content of that opportunity varies with the particular case, taking into account the enabling legislation, the context of the hearing, the interests of the parties, and any relevant principles of fundamental justice. Whether to permit an oral hearing is a matter within the discretion of the Adjudicator. However, it is necessary that said discretion is exercised in a manner that is procedurally fair.

[41] The legislation sets out no legal requirement to afford a party an oral hearing on a wage assessment appeal. The Board notes subsection 4-4(6) of the Act, which reads:

> *(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.*

[42] All that is required is that notice be given. Granted, the usual course is for the Adjudicator to provide the party with a reasonable opportunity to appear and make submissions. However, there is no statutory obligation to do so.

[43] The Adjudicator provided the Employer with a reasonable opportunity to attend on the first occasion, by accommodating his schedule. When he attended and announced that he was not fully prepared, the Adjudicator then provided and facilitated another opportunity to attend, equipped with the requisite evidence. In the Board's view, the Adjudicator did more than was necessary to afford the Employer an opportunity to fully participate in the hearing.

[44] The Board notes that the content of the duty of procedural fairness is defined in part by the context of the matter in issue. In the current case, the wage assessment had determined that the Employee was owed a substantial sum of money. By the commencement of the second hearing date, five months had passed. A further adjournment would have caused even greater prejudice to the Employee.

[45] The Board encountered a similar situation in this appeal, in which an adjournment was requested at the eleventh hour. In this appeal, the Employer's counsel had scheduled another matter in another forum for the same date. He did not suggest that the scheduling conflict was beyond his control. The Board gave him every opportunity to attend or send an agent on the same date, and within a reasonable timeframe.

[46] The Board observes that the pattern of conduct in requesting last minute adjournments, appears designed to procedurally frustrate the final wage assessment decision. In any event, the Employer had an opportunity to, and did file, a written brief in support of its argument in this appeal, which the Board has considered in full.

[47] The Board dealt with a similar issue in *Klymchuk* and concluded that the absent party did not have an unrestricted entitlement to an oral hearing:

> *[30] To begin, an appellant does not have an absolute right to an oral hearing. Nothing found in Part IV of the SEA or in the common law principles of natural justice dictate that in all circumstances an appellant is entitled to a right of audience before this Board. While this Board's usual practice is to accord appellants in wage assessment appeals the opportunity to appear before it and make oral submissions, this is not a legal requirement. What is important is that the Board make an informed decision on all the information presented to it.*

[48] This is not a case involving the infringement of an interest protected by the *Charter*. Clearly, the principles of fundamental justice are not engaged. Given the interests at stake, the limited grounds for an appeal, the clear prejudice to the Employee, and the need for a final resolution, the Board concluded that it had provided the Employer with a fair opportunity to appear and present its argument orally, and through the filing of written submissions had presented the Board with a comprehensive understanding of its position.

Conclusion:

[49] In summary, the Adjudicator's decision falls within a range of possible, acceptable outcomes while demonstrating justification, transparency and intelligibility within the decision-making process. The reasons are clear, detailed, and well-reasoned. Moreover, the Adjudicator provided the Employer with ample opportunity to present his case through a fair process.

[50] Based on the foregoing, the Board orders, pursuant to subclause 4-8(6)(a) of *The Saskatchewan Employment Act*, that the decision of the Adjudicator is affirmed and the appeal dismissed.

DATED at Regina, Saskatchewan, this **8th** day of **July, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson