THE DIRECTOR OF EMPLOYMENT STANDARDS, Appellant v SASKATCHEWAN INDIAN GAMING AUTHORITY, Respondent and LISA ULPH, Respondent

LRB File No. 164-19; November 4, 2019

Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

For the Appellant:	Steven Wang
For the Respondent, SIGA:	Sarah Bridgette and James MacGowan
For the Respondent, Lisa Ulph:	No one appearing

Section 4-10 of *The Saskatchewan Employment Act* – Appeal from Decision of Wage Assessment Adjudicator – Appeal filed by Director – Board determines that reasonableness is appropriate standard of review – Four *Dunsmuir* factors, which may rebut presumption of reasonableness, are not present.

Employer appeals Wage Assessment for termination with cause – Adjudicator finds termination with cause, overturning Wage Assessment – Adjudicator failed to cite case law in support of conclusion – Adjudicator considered relevant contextual factors in arriving at determination that termination was justified.

Adjudicator's decision discloses transparency, justification, and intelligibility in decision-making process and falls within a range of reasonable alternatives – Appeal dismissed.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On July 12, 2019, the Director of Employment Standards filed this appeal in relation to an Adjudicator's decision dated June 20, 2019, on a wage assessment against the Saskatchewan Indian Gaming Authority ["SIGA"] in relation to an employee, Lisa Ulph.

[2] On March 26, 2019, the Director issued a wage assessment against SIGA in the amount of $5,500. The Employer appealed the wage assessment, and a hearing was held on June 5, 2019. On appeal, the Employer argued that the employee had been dismissed with cause. The

Employee did not attend the hearing, and no evidence was presented on her behalf. The Adjudicator found that the Employer had just cause to dismiss the employment of the Employee, and allowed the appeal accordingly, setting aside the wage assessment.

[3] In the Notice of Appeal, the Director lists the following grounds for appeal:

> *a. The Adjudicator erred by incorrectly applying the law;*
>
> *b. The Adjudicator erred by concluding that the Saskatchewan Indian Gaming Authority had cause to terminate Lisa Ulph's employment;*
>
> *c. The Adjudicator mischaracterized relevant evidence and made inferences on the facts resulting in findings of fact that are reviewable as questions of law; and*
>
> *d. The Adjudicator breached procedural fairness by not providing adequate reasons for the decision.*

[4] The appeal was heard on October 28, 2019. The Director and the Employer participated in the appeal. The Employee advised the Board in advance of the hearing that she did not plan to participate in the proceedings. At the conclusion of the hearing, the Board reserved its decision.

Adjudicator's Decision:

[5] The Employee worked for SIGA as a Surveillance Operator from November 14, 2008 until December 14, 2018. She was dismissed for one incident, an alleged breach of trust. According to the evidence presented at the hearing, the Surveillance Operator position involves monitoring security screens, cash, staff and guest behavior, and identifying policy breaches. The primary role is to enforce the rules and policies of SIGA pertaining to the conduct of other employees or patrons. The consequence of noncompliance with rules and policies is suspension or revocation of licenses. The Employer, on appeal, clarified that the consequences for noncompliance may not have been the revocation of the license, but rather the loss of the Saskatchewan Liquor and Gaming tag.

[6] At the time of her termination, the Employee was in the process of extending a leave when she attended at the casino with her grandchild, who was under the age of 19, to submit her leave extension documentation. Against corporate policy, the Employee entered through the employee entrance, continued through another staff entrance to the casino and then up a stairwell to the surveillance room with the minor. The main purpose of the Surveillance Operator position is to enforce the rules and so the Employee had received considerable training about policy and regulation.

[7] At the hearing, the Employer led evidence that outlined the alternatives available to the Employee, including calling someone at SIGA or entering the casino through the front doors and asking to speak with security or a supervisor. The Employer suggested that the Employee's breach of trust was irreparable, the Employee had been trained in the rules and regulations, she was responsible for enforcing them, and her conduct could have resulted in consequences for the casino's operations.

[8] In reviewing the evidence, the Adjudicator observes and then concludes:

> *The employee chose not to give or call any evidence and, as such, the employer's evidence is uncontradicted. I accept the evidence set forward by both of the employer's witnesses as being credible.*
> *…*
>
> *Section 2-75(9) of The Act states that the wage assessment provided to me is proof in the absence of evidence to the contrary that the amount stated in the wage assessment is due and owing.*
>
> *I accept the uncontradicted evidence of the employer to constitute evidence to the contrary within the meaning of the above section 2-75(9) and that evidence shows the employer had just cause to terminate the employment of the employee.* [1]

Argument on Behalf of the Parties:

[9] The Director submits that the Adjudicator's finding that the Employee was dismissed with cause was not reasonable, and that the Adjudicator breached procedural fairness by failing to provide adequate reasons. The Director asks that the wage assessment be reinstated or alternatively, that the matter be reverted to the Adjudicator for reconsideration through the application of the appropriate jurisprudence.

[10] The Employer argues that the Adjudicator's finding was reasonable, that the termination was for cause, that the Employee's position necessitated a high degree of integrity, and that her conduct on this one occasion was sufficiently serious to justify termination in the absence of progressive discipline. The Employer asks that the Adjudicator's decision be upheld.

Applicable Statutory Provisions:

[11] The following provisions of the Act are applicable:

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[1] At page 10 and 11.

2-1 *In this Part and in Part IV:*

. . .

(p) ***"pay instead of notice"*** *means an amount of money that is payable to an employee pursuant to subclause 2-61(1)(a)(ii);*

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) In subsection (1), ***"period of employment"*** *means any period of employment that is not interrupted by more than 14 consecutive days.*

(3) For the purposes of subsection (2), being on vacation, an employment leave or a leave granted by an employer is not considered an interruption in employment.

(4) After giving notice of layoff or termination to an employee of the length required pursuant to subsection (1), the employer shall not require an employee to take vacation leave as part of the notice period required pursuant to subsection (1).

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

(ii) a sum equivalent to the employee's normal wages for that period; or

(b) if the employer is bound by a collective agreement that applies to the employee, the entitlements provided for in the collective agreement.

(2) For the purposes of subsection (1), if the wages of an employee, not including overtime pay, vary from week to week, the employee's normal wages for one week are deemed to be the equivalent of the employee's average weekly wage, not including overtime pay, for the 13 weeks the employee worked preceding:

(a) the date on which the notice of layoff or termination was given; or

(b) if no notice of the layoff or termination was given:

(i) the date on which the employee was laid off or terminated; or

(ii) a date determined in the prescribed manner.

(3) If an employer lays off or terminates the employment of an employee at a remote site, the employer shall provide transportation without cost for the employee to the nearest

point where regularly scheduled transportation services are available.

. . .

2-75*(9) The copy of the wage assessment provided to the adjudicator in accordance with subsection (8) is proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing, without proof of the signature or official position of the person appearing to have signed the wage assessment.*

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.*

(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.

(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.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(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.

. . .

4-10 *The director of employment standards and the director of occupational health and safety have the right:*

(a) to appear and make representations on:

(i) any appeal or hearing heard by an adjudicator; and

(ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and

(b) to appeal any decision of an adjudicator or the board.

Analysis:

[12] The Director submits that reasonableness is the appropriate standard of review on an appeal of an adjudicator's decision arising from Part II of the Act: *Oil City Energy Services Ltd. v Fadhel*, 2018 CanLII 38250 (SK LRB) at paragraph 13. The Director states further that reasonableness is the appropriate standard of review in relation to the adequacy of reasons, relying on *Ottenbreit v Paul*, 2015 SKQB 326 ["*Ottenbreit*"] in which Barrington-Foote J. explains:

> *[57] The landlord has also alleged that the hearing officer's reasons were inadequate. An absence of reasons may constitute a breach of the duty of fairness, and thus an error of law. In this case, there are reasons. The issue is therefore the adequacy of those reasons. Inadequate reasons may also disclose an error of law in the context of the reasonableness analysis of the decision which is, in my view, the appropriate analysis in relation to this issue.*
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> *[58] The first question that arises is the standard of review that applies in this context. That issue was addressed in Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 (CanLII), at paras 14 – 22, [2011] 3 SCR 708 [Newfoundland Nurses]. Abella J. there agreed, relying on the seminal decision in Baker, that the duty of fairness will sometimes require a decision maker to give reasons. She then comments as follows:*
>
> > *22 It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there are reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.*

[13] To be clear, adequacy of reasons is not a discrete or stand-alone ground of review: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), [2011] 3 SCR 708, at paragraph 14. Nonetheless, reasons should "adequately explain the bases of [the] decision": *Newfoundland Nurses* at paragraph 18, quoting from *P.S.A.C. v Canada Post Corp.*, 2010 FCA 56 (CanLII), [2011] 2 FCR 221 (Fed CA), at paragraph 163 (per Evans J.A., dissenting), rev'd 2011 SCC 57 (CanLII), [2011] 3 SCR 572. The Board reviews the reasonableness of the reasons for determining whether the reasons disclose "justification, transparency and intelligibility within the decision-making process" and for determining whether the result falls within a range of reasonable outcomes.

[14] This appeal does not properly raise any of the four *Dunsmuir* categories that would rebut the presumption that the applicable standard of review is reasonableness. This includes the category of law or issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". Therefore, the standard of review on this appeal

is reasonableness. The issue before the Board is whether the Adjudicator's finding that the Employee was terminated with cause was reasonable.

[15] In reviewing a decision on the reasonableness standard, the Board is guided by the framework outlined in *Dunsmuir* and repeated in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*., [2016] 2 SCR 293, 2016 SCC 47 (CanLII):

> *[36] A decision cannot be reasonable unless it "falls within a range of possible, acceptable outcomes" (Dunsmuir, at para. 47, per Bastarache and LeBel JJ.). Reasonableness is also concerned with "the existence of justification, transparency and intelligibility within the decision-making process" (ibid.). […]*

[16] The Board must recognize the legitimacy of multiple possible outcomes. It is not for the Board to impose its preferred interpretation, but instead to decide whether the adjudicator's decision is reasonable.

[17] The Board's task is to review the adjudicator's reasons for the existence of justification, transparency and intelligibility within the decision-making process. The Board 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". In performing this task, the Board must adopt a deferential standard, appreciating that adjudicative matters may give rise to a number of possible, reasonable conclusions.

[18] The Director describes the issue before the Board as one of mixed fact and law that raises a question of law. The Director relies on *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32, as follows:

> *[43] The process for characterizing a question as one of three principal types — legal, factual, or mixed — is also well-established in the jurisprudence (Canada (Director of Investigation and Research) v. Southam Inc., 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at para. 35). In particular, it is not disputed that legal questions are questions "about what the correct legal test is" (Sattva, at para. 49, quoting Southam, at para. 35); factual questions are questions "about what actually took place between the parties" (Southam, at para. 35; Sattva, at para. 58); and mixed questions are questions about "whether the facts satisfy the legal tests" or, in other words, they involve "applying a legal standard to a set of facts" (Southam, at para. 35; Sattva, at para. 49, quoting Housen v. Nikolaisen, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235).*
>
> *[44] That said, while the application of a legal test to a set of facts is a mixed question, if, in the course of that application, the underlying legal test may have been altered, then a legal question arises. For example, if a party alleges that a judge (or arbitrator) while applying a legal test failed to consider a required element of that test, that party alleges that the judge (or arbitrator), in effect, deleted that element from the test and thus altered the legal test. As the Court explained in Southam, at para. 39:*

> *. . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.*
>
> *Such an allegation ultimately challenges whether the judge (or arbitrator) relied on the correct legal test, thus raising a question of law (Sattva, at para. 53; Housen, at paras. 31 and 34-35). Accordingly, such a legal question, if alleged in the context of a dispute under the Arbitration Act, and assuming the other jurisdictional requirements of that Act are met, is open to appellate review. These "extricable questions of law" are better understood as a covert form of legal question — where a judge's (or arbitrator's) legal test is implicit to their application of the test rather than explicit in their description of the test — than as a fourth and distinct category of questions.*

[19] On an appeal, the Board's power to review alleged factual errors, grounded in an error of law, is very narrow. A finding of fact may be grounded in an error of law if it is based on no evidence, made on the basis of irrelevant evidence or in disregard of relevant evidence, or based on an irrational inference of fact: *P.S.S. Professional Salon Services Inc. v Saskatchewan Human Rights Commission et al*., 2007 SKCA 149 (CanLII).[2]

[20] The Director raises two main issues with the Adjudicator's decision: 1) the Adjudicator failed to cite any case law in support of the conclusions reached; and (2) the Adjudicator failed to take into account all of the contextual factors necessary for arriving at those conclusions. Notably, the Director indicated in oral argument that he does not take issue with any of the Adjudicator's findings of fact. The main question, in this case, is whether the Adjudicator failed to consider a required element of the applicable legal test, in effect deleting that element from the test and thereby altering the test. In considering this question, the Board may assess the Adjudicator's application of the applicable test, rather than relying solely on the Adjudicator's description of the test.

[21] On the first issue, the Board notes that the Adjudicator did not cite any case law, despite having received legal submissions and associated authorities from the Director. On the issue of assessing a decision that fails to cite jurisprudence, the Supreme Court in *Newfoundland Nurses* notes:

> *[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*

[2] *P.S.S. Professional Salon Services Inc. v. Saskatchewan Human Rights Commission et al*., 2007 SKCA 149 (CanLII), (2007), 302 Sask R 161 at paras 60-65 (leave to appeal to SCC dismissed [2008] SCCA No 69).

> *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.*
>
> *…*
>
> *[18] Evans J.A. in Canada Post Corp. v. Public Service Alliance of Canada, 2010 FCA 56 (CanLII), [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57 (CanLII), [2011] 3 S.C.R. 572) that Dunsmuir seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:*
>
> > *When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]*

[22] In this case, not only does the Adjudicator's decision fall short of citing all of the relevant jurisprudence; it falls short of citing any jurisprudence. Still, the Board must consider whether the reasons disclose why the Adjudicator made his decision and whether the reasons permit the Board to determine whether the conclusion falls within a range of reasonable alternatives.

[23] The Adjudicator's decision summarizes the evidence and outlines the logic used in reaching the conclusions. The Adjudicator notes that the Employer's evidence is credible and is not contradicted.

[24] The Director argues that the Adjudicator failed to take into account all of the contextual factors necessary to arrive at the conclusion that the termination was with cause. The Director suggests that, in assessing whether a single breach of policy and regulation justified the termination, the Adjudicator should have relied on the test as outlined by Laing J. of the Saskatchewan Court of Queen's Bench in *Balzer v Federated Co-Operatives Limited*, 2014 SKQB 32 (CanLII) ["*Balzer*"][3]:

[3] Finding that termination was with cause affirmed on appeal to *Balzer v Federated Co-operatives Limited*, 2018 SKCA 93 (CanLII).

[49] Following McKinley, it can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional -- dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct.

[50] Application of the standard consists of:

1. *determining the nature and extent of the misconduct;*
2. *considering the surrounding circumstances; and,*
3. *deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).*

[51] The first step is largely self-explanatory but it bears noting that an employer is entitled to rely on after discovered wrongdoing, so long as the later discovered acts occurred pre-termination. See Lake Ontario Portland Cement Co. v. Groner, 1961 CanLII 1 (SCC), [1961] S.C.R. 553.

[52] The second step, in my view, is intended to be a consideration of the employee within the employment relationship. Thus, the particular circumstances of both the employee and the employer must be considered. In relation to the employee, one would consider factors such as age, employment history, seniority, role and responsibilities. In relation to the employer, one would consider such things as the type of business or activity in which the employer is engaged, any relevant employer policies or practices, the employee's position within the organisation, and the degree of trust reposed in the employee.

[53] The third step is an assessment of whether the misconduct is reconcilable with sustaining the employment relationship. This requires a consideration of the proved dishonest acts, within the employment context, to determine whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship.
…

[60] While the McKinley case and the foregoing case were concerned with dishonesty as a ground for dismissal, in Bonneville v. Unisource Canada Inc., 2002 SKQB 304 (CanLII), [2002] 10 W.W.R. 509, Barclay J., at paragraphs 32 to 35, adopted the McKinley approach with respect to all employee misconduct (applied by Klebuc J., as he then was, in Graf v. Saskatoon Soccer Centre Inc., 2004 SKQB 282 (CanLII), [2005] 4 W.W.R. 522). I agree.

[61] In this matter, the dismissal of Mr. Balzer was for breach of a major rule in his failing to observe regulations for safety, equipment operation, accident prevention and fire prevention. In the case of Hancock v. Sobey's Stores Ltd. (1988), 1988 CanLII 5513 (NL SC), 70 Nfld. & P.E.I.R. 338, [1988] N.J. No. 221 (QL) (Nfld. S.C.T.D.), the Court accepted the seven factors a company must establish to constitute a cause for discharge compiled by Howard A. Levitt in the text The Law of Dismissal in Canada (Aurora, Ont.: Canada Law Book, 1985) at page 103, and found them to be an appropriate guide. The factors are:

1. *The rules must be distributed.*
2. *The rules must be known to the employees.*
3. *The rules must be consistently enforced by the company.*
4. *The employees must be warned that they will be terminated if a rule is breached.*
5. *The rules must be reasonable.*
6. *The implications of breaking the rules in question are sufficiently serious to justify termination.*
7. *Whether a reasonable excuse exists.*

Item No. 6 in the foregoing is the proportionality requirement.

[25] The Adjudicator did not cite *McKinley v BC Tel*, [2001] 2 SCR 261, 2001 SCC 38 (CanLII) ["*McKinley*"], a leading case on the assessment of whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. According to the Court in *McKinley*, when an employer asserts dismissal for just cause, the employer bears the burden of proving, on the balance of probabilities, that there are reasonable grounds to justify the dismissal. To satisfy this burden, the employer must demonstrate that dismissal was a proportionate response to the alleged misconduct in question, striking an effective balance between the severity of the employee's misconduct and the sanction, with regard to all the surrounding circumstances.[4]

[26] Nonetheless, the Adjudicator did consider the nature and extent of the misconduct and the surrounding circumstances. He considered the nature of the Employee's position, the Employee's seniority, the fact that the Employee was aware of the relevant policies, and the potential consequences of the breach. Based on these circumstances, the Adjudicator concluded that the termination was warranted. In this respect, the Adjudicator, although not explicitly referring to *McKinley*, was alive to the importance of context and took into account various, relevant contextual factors.

[27] Laing J. in *Balzer* suggests that the factors to consider in the second step of the *McKinley* test include age, employment history, seniority, role and responsibilities, type of business, relevant policies or practices, employee's position, and degree of trust. Significantly, almost all of these factors receive treatment in the decision under appeal. Granted, the decision does not address the issue of "age", which no party has suggested is relevant; and it limits any analysis of "employment history" to the Employee's expected knowledge and familiarity with the relevant rules and regulations.

[28] The Director argues that the Adjudicator failed to consider factors that should properly have played in the Employee's favour, such as seniority. Upon review of the decision, it is clear that the Adjudicator considered seniority but determined that this factor weighed in the Employer's

[4] At paras 53 to 57.

favour, and not the Employee's. In this vein, the Board notes the following observation made by the Adjudicator at page 11:

> *I am satisfied that the Employee would have known the consequences to the employer and herself, of her breaching these government regulations and corporate policies. This knowledge would have come about as a result of her training and 10 years of employment in her sensitive security position with the employer.*

Due to the Employee's seniority, the Director reasonably imputed knowledge to the Employee of the existing rules and the consequences of a breach.

[29] The Director argues that additional factors were not taken into account "in favour of the Employee": the Employee's role and responsibilities, her employment history, the fact that her misconduct was not a dishonest act, and the fact that her termination did not arise following progressive discipline. The Board notes that most if not all of these issues were, in fact, considered by the Adjudicator, but that the Adjudicator determined that these factors counted against the Employee.

[30] With respect to progressive discipline, the Adjudicator observes and then later concludes:

> *The employer stated that the Corporation was not alleging progressive discipline but that the employee was dismissed for cause for the one incident…* [5]
> …
> *She was aware bringing a minor onto the premises and, more importantly taking them into the security and surveillance room, was a serious breach of the Licences held by the Employer.*[6]

[31] It is evident from these passages that the Adjudicator was alive to the higher standard that applies in cases involving a single breach.

[32] The Adjudicator does not specifically state that the Employee's misconduct did not arise from a dishonest act, but highlights integrity and trust as relevant to the particular breach. Furthermore, while the Employee's decision not to participate in the hearing may have had an impact on the available evidence, the Adjudicator was not free to supplement the record.

[33] The Director argues that the Adjudicator failed to consider the third and the fourth of the *Balzer* factors. To recap, these factors are described as follows:

> *3. The rules must be consistently enforced by the company.*

[5] At page 7.
[6] At page 10.

4. The employees must be warned that they will be terminated if a rule is breached.

[34] The Adjudicator did not explicitly consider whether SIGA had consistently enforced the rules or whether SIGA warned employees of termination in the face of a breach. But both of these factors pertain, to some extent, to whether the Employee would have been aware of the potential consequences of a breach. The Adjudicator's decision is not held to a standard of perfection. Clearly, the Adjudicator turned his mind to the Employee's likely awareness of the relevant rules and the potential consequences of breaching those rules.

[35] Furthermore, although the seven factors as outlined in *Balzer* are highly instructive, they do not need to be rigidly and explicitly followed in all cases. In drawing this conclusion, the Board takes into account the internal inconsistency in the aforementioned passage, as underlined:

> *In the case of Hancock v. Sobey's Stores Ltd. (1988), 70 Nfld. & P.E.I.R. 338, [1998] N.J. No. 221 (QL) (Nfld. S.C.T.D.), the Court accepted the seven factors a company must establish to constitute a cause for discharge compiled by Howard A. Levitt in the text The Law of Dismissal in Canada (Aurora, Ont.: Canada Law Book, 1985) at page 103, and found them to be an appropriate guide.*
>
> [Emphasis added]

What is clear, in this case, is that the Adjudicator undertook a full, contextual analysis, including consideration of the relevant, related factors, obviating the need for the explicit itemization of each of the *Balzer* factors.

[36] The Adjudicator's reasoning demonstrates that he was alive to the many factors that contribute to establishing cause for termination. His consideration of the Employee's position, role and responsibilities, the nature of the business, the relevant policies or practices, and the significance of the trust relationship suggests that he was aware of the concept of proportionality in assessing the existence of just cause. Unfortunately for the Employee, the application of these factors, in the Adjudicator's assessment, did not support upholding the wage assessment.

[37] The decision makes apparent that the Adjudicator understood that termination for a single act of breaching a policy or rule may occur only when the misconduct is so serious that it is irreconcilable with sustaining the employment relationship. The Adjudicator appreciated that this determination necessitated a contextual inquiry into the circumstances of the alleged misconduct, the employment context, and the existing relationship. The Adjudicator undertook such an inquiry.

[38] The Director also takes issue with the Adjudicator's statement, at page 9, "that the corporation had no alternative but to terminate the employee". The Director states that this is not an appropriate finding of fact, and by making this "finding" the Adjudicator has irreparably tainted the remainder of his analysis and by extension, his conclusions. However, the Adjudicator's comment must be considered in context, including the whole of the impugned comment, which reads:

> *The employer states that the conduct of the employee was such that the corporation had no alternative but to terminate the employee.*

[39] This statement is followed by a relatively detailed summary of relevant evidence, leading to the Adjudicator's conclusion that the Employee would have known the consequences of breaching the regulations and policies, and leading to his conclusion on just cause. The Adjudicator does not appear to have simply accepted the Employer's evidence that it "had no alternative but to terminate", but instead has properly considered whether there was just cause to terminate under the circumstances.

[40] Finally, the Director argues that the Adjudicator erred in interpreting subsection 2-75(9) of the Act, which reads:

> ***2-75****(9) The copy of the wage assessment provided to the adjudicator in accordance with subsection (8) is proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing, without proof of the signature or official position of the person appearing to have signed the wage assessment.*

[41] The Director states that this subsection is purely procedural, and is therefore not to be applied to the merits of a case, other than by creating a rebuttable presumption pertaining to the calculation or the amount owing. Along these lines, former Vice-Chairperson Mitchell observed in *Gina Meacher (Gee's Family Restaurant) v Hunt*, 2017 CanLII 43925 (SK LRB) that subsection 2-75(9) is "correctly characterized" as "creating a rebuttable presumption of 'correctness'".[7] It is clear, therefore, that the presumption operates against an Employer who wishes to demonstrate that the wage assessment is either not due and owing and/or not correct. Those were not the issues in this case.

[42] In his reliance on subsection 2-75(9), the Adjudicator set up a rebuttable presumption that the notice set out in section 2-60 is required. To demonstrate that written notice is not required, the Employer bears the burden of proving, on the balance of probabilities, that the Employee was

[7] At para 18.

terminated with just cause. The application of a rebuttable presumption is, theoretically, at least as stringent as the requirement to demonstrate just cause on a balance of probabilities. Although the Adjudicator's interpretation of subsection 2-75(9) was incorrect, his application of a rebuttable presumption was notionally advantageous or, at worst neutral, in its effect on the Employee. Practically, the Adjudicator undertook an assessment of whether the Employer, bearing the legal onus, had demonstrated just cause. It would therefore serve no purpose to cancel or amend the Adjudicator's decision on this basis.

[43] The Board finds that the Adjudicator's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[44] The Board is grateful to the parties for their helpful submissions, all of which the Board has considered in arriving at this determination.

[45] The Board concludes that the Adjudicator's decision satisfies the reasonableness standard and, accordingly, the Adjudicator's decision is affirmed.

DATED at Regina, Saskatchewan, this **4th** day of **November, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson