Saskatchewan
Labour Relations Board

K.C., Applicant v KEEWATIN YATTHÉ REGIONAL HEALTH AUTHORITY, Respondent and THE DIRECTOR OF OCCUPATIONAL HEALTH AND SAFETY (OHSD), Respondent

LRB File No. 071-20; July 20, 2020
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

For the Applicant, K.C.:	Self-Represented
For the Respondent, Keewatin Yatthé Regional Health Authority:	Josée M. Berthelet and James Streeton
For the Respondent, The Director of OHSD:	No One Appearing

Application to Set Aside the Adjudicator's Selection and Direct Registrar to Select another Adjudicator to Hear Appeal pursuant to Section 4-7 of *The Saskatchewan Employment Act* – Application granted.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** This matter comes before the Board as an Application pursuant to subsection 4-7(2) of *The Saskatchewan Employment Act* [Act]. The Applicant asks the Board to set aside the adjudicator's selection and direct the Registrar to select another adjudicator to hear an appeal brought pursuant to Part III, Division 8 of the Act.[1] The current matter was heard as a WebEx hearing pursuant to the Board's Covid-19 Notice. Neither the Director nor the adjudicator participated in these proceedings.

[2] For privacy reasons, the Applicant has asked to be identified in these Reasons with initials. Where the Reasons have required a reference to the Applicant's gender, the Board has chosen to the use the neutral, although traditionally plural, "they" or "them".

[3] The general background to this Application is summarized as follows. The Applicant filed a complaint of workplace harassment. The complaint was investigated and it was determined to be unfounded. According to the Applicant, it was found that the investigation had been conducted in a manner that was fair, unbiased, and thorough. The Applicant then filed an appeal of that

[1] LRB File No. 020-16.

determination and the subject adjudicator was appointed to adjudicate that appeal. In the letter of appeal, the Applicant stated that the OHS officers' decision lacked transparency. On March 8, 2016, the Board appointed an adjudicator pursuant to then subsection 4-3(2) of the Act, listing the Respondents as Keewatin Yatthé Regional Health Authority [Employer], and the Director of Occupational Health and Safety [Director]. The adjudicator has not provided written reasons for a decision.

[4] The adjudicator's designation to hear appeals pursuant to Part III, Division 8 of the Act was cancelled by Order-in-Council dated June 7, 2016. However, subsection 4-1(3) of the Act enables the adjudicator to continue with a hearing that is not completed as if her term had not expired:

> *(3) If the term of an adjudicator expires after the adjudicator has begun hearing a matter but before the hearing is completed, the adjudicator may continue with the hearing as if his or her term had not expired, and the decision is effective as though he or she still held office.*

[5] In 2018, dissatisfied by the absence of a decision on the appeal, the Applicant brought an action against the adjudicator in the Court of Queen's Bench for Saskatchewan. The Court issued a Fiat dated May 14, 2019 dismissing the application, in part, for these reasons:

> *The Act provides as follows:*
>
> > *s.4-7(2) Any party to a proceeding before an adjudicator may apply to the Court of Queen's Bench for an order directing the adjudicator to provide his or her decision if the deadline in subsection (1) has not been met.*
>
> *However, to allow for such enforcement measures, the adjudicator must have put herself into position to render a decision. In short, she must have dealt with the appeal. Then, the Act allows for an avenue to cause her to render her decision. In the absence of a hearing having been held, there is nothing to enforce as against the adjudicator.*
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> *In the result, as the prerequisite under the Act allowing the court to act has not been completed, this application must be dismissed.*

[6] Since that Fiat was issued, the legislature has amended the Act, allowing a party to a proceeding before an adjudicator to apply to the Board for an order "directing the adjudicator to provide the adjudicator's decision", pursuant to subsection 4-7(2), if the deadline in subsection 4-7(1) has not been met. More precisely, subsection 4-7(3) of the Act gives the Board the power to do all or any of the following on such an application: direct the adjudicator to provide the decision; establish the period within which the decision is to be provided; set aside the adjudicator's

selection and direct the Registrar to select another adjudicator to hear the appeal; and make any other order the Board considers appropriate.

[7] Due to the delay, the Applicant asks the Board to select another adjudicator and permit the appeal to begin again. While the Employer does not oppose the Board directing the adjudicator to provide the decision, it opposes the request for an order setting aside the adjudicator's selection and directing the Registrar to select another adjudicator to hear the appeal. It opposes the second form of relief because, as declared in the Employer's Reply:

> *(a) A key witness in this matter has, since the initial hearing of the matter, retired from the Keewatin Yatthé Regional Health Authority.*
>
> *(b) The events relevant to the matter before the adjudicator occurred approximately 4 years ago, in 2016. Re-hearing the matter would likely result in significant gaps in memory on the part of witnesses and would not produce the most accurate information upon which a new adjudicator would be required to render a decision.*
>
> *(c) Re-hearing this matter would be costly and time consuming.*

[8] The Employer led no further evidence. For the purpose of considering this Application, the Board accepts that one of the key Employer witnesses has retired since the initial hearing of the matter. The Applicant did not challenge whether this assertion was factual.

[9] The Employer proposes that, at this stage, the Board should make only an order directing the adjudicator to provide the decision by a certain date. Failing issuance of said decision by that date, the Employer asks that the Board then, and only then, consider whether to set aside the adjudicator's selection and direct the Registrar to select another adjudicator.

Argument on Behalf of the Parties:

[10] The following represents a summary of the arguments of the parties.

[11] The Applicant states that the Board should direct the Registrar to select another adjudicator for two main reasons. First, the delay has been significant and has caused the Applicant serious prejudice. Due to this delay, the Applicant has been unable to access work in their chosen field in northern Saskatchewan for six years. The required certification has been withheld, and the Applicant has been unable to pursue the related complaint because the current appeal is outstanding. In short, the delay in this matter has assisted in keeping the Applicant out of the workplace.

[12] Second, the adjudicator has demonstrated that she is incapable of issuing an objective decision. Through correspondence with the parties, she has demonstrated partiality toward the Employer by siding with the Employer's procedural suggestions and placing responsibility for certain delays at the feet of the Applicant. She has repeatedly promised to issue the decision but then has failed to follow through on those commitments.

[13] The Employer counters by stating that, to some extent, the delay is reasonable. The adjudicator made special efforts to ensure that the procedure was fair and helpful to the parties. This took time. Despite the Applicant's insistence, there is nothing in the correspondence or in the actions of the adjudicator to suggest that she is partial to the Employer or will render a decision that is anything but objective. The Board cannot infer bias in this case.

[14] As for the requested remedy, if the Board directs the Registrar to select another adjudicator for the hearing of this appeal, the parties will be required to expend yet more resources and commit yet additional time. This reality, combined with the retirement of a key Employer witness and the likely issues with witness recall, will result in an unfairness for the Employer.

Facts:

[15] The following is a summary of the timeline in issue on this Application:

a. The Applicant filed the underlying appeal on February 2, 2016;
b. The adjudicator was selected on March 8, 2016;
c. Although there is an approximately two-year gap in the evidentiary timeline, the following evidence suggests that very little progress was made during those two years;
d. In evidence is a series of emails between the parties and the adjudicator about procedural matters in March, April, and May, 2018;
e. On March 31, 2018, the adjudicator wrote an email to the parties indicating that the "next step" was to decide on the hearing process and set a date for a hearing or timeline for written submissions. The adjudicator indicated that a case conference to discuss process and set dates was "premature until clarity is gained as to **all** the issues which are to be adjudicated", noting that the requests for remedy included issues that were not included in the grounds for appeal;

f. On April 16, 2018, counsel for the Employer emailed the adjudicator and the Applicant, seeking a "management type pre hearing conference, at least by telephone". At that point, it remained unclear to counsel what the Applicant considered the record to be;

g. On April 17, 2018, the adjudicator emailed about scheduling a "'pre' pre-hearing conference";

h. On October 2018, the Ombudsman issued a report pertaining to the same adjudicator but related to a different matter. There, the "sole issue [was] the adjudicator's failure to render a decision as required under [the Act]". That appeal had been heard in June 2016 and the adjudicator still had not rendered her decision at the time of the Ombudsman's report. Despite repeated requests for the decision, the adjudicator had failed to provide it;

i. On May 14, 2019, the Applicant wrote to the Employer and the adjudicator:

> *This email is in response to Ms. Blanke's letter of May 10, 2019 by which I am somewhat confused. In our email correspondence of April 3/19, all parties agreed to postponement of the appeal decision from April 25th to May 9th and a postponement of the CQB hearing to May 16/19 to accommodate Ms. Massett's schedule and her lack of availability "for the majority of April and potentially first two weeks of May."*
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> *Ms. Blanke's OH &S appeal decision was not received on May 9. Her email on May 10th carried no decision but rather entirely new considerations. All parties were aware that this appeal has been ongoing since 2016, more than 3 years. The extended delay has worked to the advantage of the Defendant in terms of my employment issues and I believe that this latest delay is an additional attempt to further accommodate the Defendant/Ms. Massett.*

j. It is unclear what decision is being referred to in this email;

k. On May 14, 2019, the Court issued its Fiat dismissing the Applicant's matter against the adjudicator. Although listed as a Respondent in that matter, the adjudicator "elected not to participate" in the proceeding. According to the Fiat, the Applicant had been attempting to contact the adjudicator over the course of time, resulting in no response;

l. Briefs in the underlying appeal were exchanged on June 21, 2019;

m. At some point, the Applicant contacted the Ombudsman complaining about the delay in respect of this appeal. On October 15, 2019, the Applicant received an email from the Ombudsman's representative stating, "What I can tell you is that when she contacted me via email on October 7 she said "The [Applicant's] decision will be rendered very shortly, early this week"; and

n. According to the Applicant, the adjudicator made several commitments that she did not fulfill.

[16] Lastly, the Applicant claims to be in a disadvantageous position due to a lack of procedural understanding and a lack of assistance from the adjudicator.

Applicable Statutory Provisions:

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

> ***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.*
>
> *…*
>
> ***4-6****(1) Subject to subsections (4) and (5), the adjudicator shall:*
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> *(a) do one of the following:*
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> *(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.*
>
> *(2) Repealed. 2020, c 12, s.12.*
>
> *(3) Repealed. 2020, c 12, s.12.*
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> *(4) If, after conducting a hearing concerned with section 2-21, the adjudicator concludes that the employer has breached section 2-21, the adjudicator may exercise the powers given to the Court of Queen's Bench pursuant to sections 38 to 41 of The Saskatchewan Human Rights Code, 2018 and those sections apply, with any necessary modification, to the adjudicator and the hearing.*
>
> *(5) If, after conducting a hearing concerned with section 2-42, the adjudicator concludes that the employer has breached section 2-42, the adjudicator may issue an order requiring the employer to do any or all of the following:*
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> *(a) to comply with section 2-42;*
>
> *(b) to pay any wages that the employee has lost as a result of the employer's failure to comply with section 2-42;*
>
> *(c) to restore the employee to his or her former position;*

(d) to post the order in the workplace;

(e) to do any other thing that the adjudicator considers reasonable and necessary in the circumstances.

4-7*(1) Subject to the regulations, an adjudicator shall provide the written reasons for the decision required pursuant to clause 4-6(1)(b) within the following periods:*

(a) with respect to an appeal or hearing pursuant to Part II, 60 days after the date on which the hearing of the appeal or the hearing is completed;

(b) with respect to an appeal pursuant to Part III:

(i) subject to subclause (ii), 60 days after the date on which the hearing of the appeal is completed; and

(ii) with respect to an appeal pursuant to section 3-54, the earlier of:

(A) one year after the date on which the adjudicator was selected; and

(B) 60 days after the date on which the hearing of the appeal is completed;

(c) with respect to an appeal pursuant to Part V, 60 days after the date on which the hearing of the appeal is completed.

(2) If the deadline in subsection (1) has not been met, any of the following may apply to the board for an order directing the adjudicator to provide the adjudicator's decision:

(a) any party to a proceeding before an adjudicator;

(b) the director of employment standards or director of occupational health and safety, as the case may be.

(3) On an application made pursuant to subsection (2), the board may do all or any of the following:

(a) direct the adjudicator to provide the decision;

(b) establish the period within which the decision is to be provided;

(c) set aside the adjudicator's selection and direct the registrar to select another adjudicator to hear the appeal;

(d) make any other order the board considers appropriate.

(4) A failure by an adjudicator to comply with subsection (1) or with an order made pursuant to subsection (3) does not affect the validity of a decision.

(5) As soon as is reasonably possible after receiving a decision, the board shall serve the decision on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(6) This section applies to all appeals or hearings that:

(a) were commenced before the coming into force of this section and for which written reasons have still to be provided on or after the coming into force of this section; or

(b) are commenced on or after the coming into force of this section.

Analysis:

[18] This is the Board's first occasion to consider an application pursuant to subsection 4-7(2) of the Act. It is therefore necessary to provide a general outline of the governing principles. The Board notes, however, that it did not benefit from extensive argument on the applicable law. The Applicant referred only to two cases. On the issue of delay, they referred to *R v Saskatchewan Union of Nurses*, 2017 CanLII 87132 (SK LA); and on the issue of bias, they referred to *Wewaykum Indian Band v Canada*, 2003 SCC 45 (CanLII), [2003] 2 SCR 259.

[19] To begin, a specific remedy under section 4-7 is not automatic. The Applicant bears the onus to persuade the Board that the order sought is appropriate. To satisfy the onus, at a minimum, the Applicant must demonstrate that the statutory requirements, determined by reference to sections 4-6 and 4-7 of the Act, have been met. Subsection 4-7(1) of the Act states:

4-7*(1) Subject to the regulations, an adjudicator shall provide the written reasons for the decision required pursuant to clause 4-6(1)(b) within the following periods:*

(a) with respect to an appeal or hearing pursuant to Part II, 60 days after the date on which the hearing of the appeal or the hearing is completed;

(b) with respect to an appeal pursuant to Part III:

(i) subject to subclause (ii), 60 days after the date on which the hearing of the appeal is completed; and

(ii) with respect to an appeal pursuant to section 3-54, the earlier of:

(A) one year after the date on which the adjudicator was selected; and

(B) 60 days after the date on which the hearing of the appeal is completed;

(c) with respect to an appeal pursuant to Part V, 60 days after the date on which the hearing of the appeal is completed.

[20] In this case, the statutory requirements are:

a. the adjudicator must have been selected to hear an appeal pursuant to Part III about which written reasons for a decision have not yet been provided; and

b. the delay in providing the written reasons must have surpassed the applicable statutory time limit.

[21] The underlying appeal was brought pursuant to section 3-54 of the Act. Therefore, according to section 4-7, the adjudicator shall provide the written reasons for the decision the earlier of: (A) one year after the date on which the adjudicator was selected; and (B) 60 days after the date on which the hearing of the appeal is completed. The adjudicator was selected on March 8, 2016. Therefore, the written reasons should have been delivered on or before March 9, 2017. Since the date of the selection, four years and four months have passed with no written reasons for decision. The written reasons for decision are therefore three years and four months past due.

[22] Both of the parties suggested that the applicable time period is not one year after the selection, but 60 days after the date on which the hearing of the appeal was completed. Although this is an incorrect interpretation of the legislation, it is worth calculating the length of the delay as though that interpretation were correct. The parties agreed that the hearing date was June 21, 2019, the date that the parties exchanged briefs. 60 days following that hearing date, then, is August 20, 2019. On this timeline, the written reasons for decision are 11 months past due.

[23] The statutory requirements have been met in the current case. The adjudicator was selected to hear an appeal pursuant to Part III; the applicable time limit is one year after the date on which the adjudicator was selected; and the adjudicator has not provided the written reasons within that time limit.

[24] The applicable time limit is mandatory. There is no statutory ability to extend the time limit, except to the extent that a remedy pursuant to clause 4-7(3)(b) to “establish the period within which the decision is to be provided” might be considered an extension. Nor is there any conditional language, such as that contained in section 6-116 (Deadline for Board Decisions), or any opportunity for an extension, such as that contained in section 6-50 of the Act (arbitration).

[25] The mandatory time limit aligns with the statutory objective of ensuring that the appeal is concluded in an expeditious manner. Furthermore, the timeline starts to run on the date that the adjudicator is selected, indicating that the appeal process, not just the decision-writing process, is to be conducted in an expeditious manner.

[26] On the other hand, the mandatory time limit is not determinative of the existence or the nature of the remedy that might flow from an application pursuant to subsection 4-7(3).

[27] This distinction was confirmed by the Court in *United Food and Commercial Workers, Local 1400 v Affinity Credit Union*, 2019 SKQB 236 (CanLII), as follows:

> *[12] Section 27(3) of The Interpretation Act, 1995, SS 1995, c I-11.2 (in force throughout 2015 to 2018 but in 2019 replaced with The Legislation Act, SS 2019, c L-10.2 to the same effect) states that the word "shall" in an Act shall be interpreted as imperative. Ruth Sullivan, Sullivan on the Construction of Statutes, 6th ed (Markham: LexisNexis Canada, 2014) states the following:*
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>> *§4.80 "Shall" / "must". When "shall" and "must" are used in legislation to impose an obligation or create a prohibition, they are always imperative. A person who "shall" or "must" do something has no discretion to decline. A person prohibited from doing something is equally devoid of lawful choice. The issue that arises in connection with "shall" and "must" is not whether they are imperative, but the consequences that flow from a failure to comply. In some legislation, the consequences are clearly set out, as in the Criminal Code or legislation that regulates through licensing or prohibition. In other contexts the legislation is silent and it is left to the court to determine whether non-compliance can be cured.*
>
> *[13] Sullivan goes on to make the point that while "shall" is always binding and never confers discretion, a question does arise as to whether a breach leads to a nullity or whether the failure can, in appropriate circumstances, be viewed as being merely directory, because a nullity would cause hardship and not serve the legislative purpose.*

[28] Here, the statute makes clear by providing for alternative remedies that the adjudicator's failure to meet the deadline does not necessitate only one result. For example, it does not necessarily result in the adjudicator's loss of jurisdiction. Clearly, there is a practical need to ensure that, in appropriate cases, decision makers can continue to act. The question is whether this is one of those cases.

[29] Having established that the minimum statutory requirements have been met, the Board will next consider whether the requested remedy is appropriate. The leading case on delay in administrative proceedings is *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*]. There, the Court considered whether delay in processing complaints, on the part of the then British Columbia Council of Human Rights warranted a stay of proceedings as an abuse of process at common law. The Court held that a stay of proceedings imposes on an applicant a heavy burden:

> *180 Whoever asks for a stay of proceedings carries a heavy burden. In a human rights proceeding, such an order not only stops the proceedings and negates the public interest*

> *in the enforcement of human rights legislation, but it also affects, in a radical way, the interest of the complainants who lose the opportunity to have their complaints heard and dealt with. The stay of proceedings should not generally appear as the sole or even the preferred form of redress: see R. v. O'Connor, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411 , at para. 68. A more prudent approach would limit it to those situations that compromise the very fairness of the hearing and to those cases where the delay in the conduct of the process leading to it would amount to a gross or shocking abuse of the process. In those two situations, the interest of the respondent and the protection of the integrity of the legal system become the paramount considerations. The interest of the complainants would undoubtedly be grievously affected by a stay, but the prime concern in such cases becomes the safeguarding of the basic rights of the respondent engaged in a human rights proceeding and the preservation of the essential fairness of the process itself: see Ratzlaff [(1996), 1996 CanLII 616 (BC CA), 17 BCLR (3d) 336], at para. 19. Whatever its consequences, a stay may thus become the sole appropriate remedy in those circumstances.*

[30] In *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81, at paragraph 142, the Court of Appeal for Saskatchewan summarized the principles identified in *Blencoe*:

> 1. *The period of delay must be so inordinate as to be clearly unacceptable (at paras 115 and 121). Whether a delay is inordinate turns on contextual factors, including "the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, and whether the respondent contributed to the delay or waived the delay, and other circumstances of the case" (at para 122).*
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> 2. *The party claiming abuse of process must show that the inordinate delay "directly caused [them] a significant prejudice" that is related to the delay itself (at para 115, emphasis added). In order for there to be abuse of process, "the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected" (at para 133).*
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> 3. *The analysis requires a weighing of competing interests. "In order to find an abuse of process, the court must be satisfied that 'the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted'" (at para 120).*
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> 4. *A stay is not the only remedy available in administrative law proceedings. However, where a respondent asks for a stay, they will bear a heavy burden (at para 117). A finding of abuse of process is available only in the "clearest of cases" (at para 120).*

[31] Ultimately, the issue of delay is one of procedural fairness, the content of which is variable and dependent on the nature of the proceeding and the governing legal framework.

[32] Here, there are two important differences with *Blencoe*. First, there is a mandatory statutory time limit for the provision of written reasons. The legislature has provided clear guidance about the acceptable time limit. The time limit is not subject to any qualifications or capable of an extension. Second, the Employer is not seeking a stay of proceedings, and

therefore the Board is not considering extinguishing the right of a party to pursue the realization of their rights through litigation. None of the requested remedies would bring this matter to an end.

[33] The Board is considering whether to direct the Registrar to select another adjudicator, with the goal of ensuring greater efficiency in the resolution of the underlying appeal, while allowing the case to proceed. Even if another adjudicator is selected, the right to have a hearing remains intact, as does the right to have s/he who hears the matter decide the matter.

[34] The first *Blencoe* principle is whether the period of delay is so inordinate as to be clearly unacceptable. Given the foregoing distinctions, the appropriate question is not whether the delay is so inordinate as to be clearly unacceptable but whether it is sufficiently unacceptable to justify the remedy being sought.

[35] The second *Blencoe* principle asks that the inordinate delay be found to have directly caused significant prejudice related to the delay itself. Again, the Applicant is not seeking a stay of proceedings. Under the current circumstances, the more appropriate question is whether the delay caused sufficient prejudice (related to the delay itself) to justify the remedy being sought.

[36] The third *Blencoe* principle is that "the court must be satisfied that 'the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted'". Here, the Board is not considering whether to bring the matter to an end; therefore, there is no question about whether the enforcement of the legislation will be impeded. The proper question is whether the requested remedy is appropriate taking into account considerations of fairness in relation to the parties and concerns with the administration of justice.

[37] Next, the Board will apply these three questions to the current case.

[38] In relation to the first question, the Board has found that the delay is sufficiently unacceptable to justify the remedy being sought, that is, to set aside the adjudicator's selection and direct the Registrar to select another adjudicator to hear the appeal. The Board will outline its reasons, as follows.

[39] First, while the Board's information is limited, the issues raised by the appeal seem to be relatively straightforward. This does not appear to be a highly complex appeal. To facilitate expeditious resolution, section 4-4 of the Act provides the adjudicator with the flexibility to

determine the procedures by which the appeal is to be conducted, and ensures that the adjudicator is not bound by the rules of law concerning evidence. The adjudicator may accept any evidence that the adjudicator considers appropriate. This flexibility should lessen the potential for procedural hurdles that may interfere with the timely conclusion of a matter.

[40] Second, the underlying matter involves a complaint of harassment in employment. It is well established that work-related conflict has the potential to impact every aspect of an individual's life – financial, relational, social, mental and physical. Both employers and employees have a strong interest in resolving allegations of harassment in a careful, but also a prompt manner, where possible.

[41] Lastly, there is no evidence that the Applicant in any way contributed to the delay after July 21, 2019, or in any significant way contributed to the delay prior to July 21, 2019. Nor is there any evidence that the Applicant either expressly consented to or acquiesced to the delay outside of some limited postponements and delays attributable to a lack of procedural clarity or time required for response.

[42] Granted, it is possible that the Applicant could have made better efforts to respond to certain inquiries. However, there is no evidence of a pattern of dilatory conduct on the part of the Applicant. Instead, the adjudicator appears to have taken a particularly technical approach to the hearing of the appeal. By contrast, the Applicant appears to have been attempting to move this matter along.

[43] It is also unclear why, two years after the adjudicator's selection was made, the Employer had to request a management pre-hearing conference. Despite this request, the hearing still did not occur until over a year later. Even prior to the hearing, the Applicant felt compelled to file a Court application, apparently after attempting but failing to contact the adjudicator. Lastly, there is no evidence before the Board that the adjudicator has provided any explanation for the delay.

[44] A summary of the Board's conclusion on the first question is as follows. The delay was longer than required by the nature of the proceeding; the Applicant is not responsible for the delay or a significant portion of the delay; and the adjudicator has not provided any satisfactory explanation for the delay. The delay is such that the Board has lost confidence in the adjudicator's ability to bring this matter to a close in any additional, reasonable timeframe. The delay is sufficiently unacceptable to justify the remedy being sought.

[45] The second question is whether the delay caused sufficient prejudice (related to the delay itself) to justify the remedy being sought. The Applicant testified that the passage of time has negatively impacted their job prospects and assisted the Employer in keeping them out of the workplace. The Board recognizes that this aspect of the alleged prejudice arises only to the extent that the Applicant's complaint is upheld. However, it remains the case that the Applicant has endured a cloud of uncertainty and insecurity with respect to employment for over four years. The Applicant has also invested time and effort in the resolution of this appeal. Despite that effort, the resolution of the appeal remains elusive. The delay in providing reasons also means that the Applicant is not able to pursue a related litigation, which has compounded the associated uncertainty and insecurity in employment.

[46] I am satisfied that the Applicant has demonstrated sufficient prejudice (related to the delay itself) to justify directing a selection of another adjudicator. In addition, it is my opinion that the assessment of prejudice in this case should take into account the mandatory statutory time limit. The time limit is clear and unequivocal. This distinguishes the assessment from *Blencoe*, such that some prejudice may be presumed.

[47] The third question is whether the requested remedy is appropriate taking into account considerations of fairness in relation to the parties and concerns with the administration of justice. The Board has answered this question in the affirmative. Given the circumstances, fairness for the Applicant necessitates the selection of another adjudicator. Given its loss of confidence, the Board is not persuaded that the Employer would be better served, at least in terms of timing, by continuing to wait for the adjudicator to provide her reasons. On the other hand, the Board is fully aware that, should it direct the Registrar to select another adjudicator, the Employer may be faced with additional costs. Weighed against the right of the Applicant to an expedient resolution, the additional costs are less concerning.

[48] Furthermore, the Board is not persuaded that either the retirement of a key Employer witness, or the potential impact to witness recall, is sufficiently prejudicial to shift the balance in favour of the Employer. First, the retirement of a witness is not necessarily indicative of the witness' ability to testify; second, given the timing of and manner in which this proceeding has unfolded, the additional delay associated with selecting another adjudicator should not contribute significantly to a further loss of recall. Furthermore, it appears that the parties to the underlying appeal have relied, to a large extent, on documentary evidence.

[49] Finally, the parties, and the public, must have confidence in the selection process. The process assigns responsibility to adjudicators for deciding issues that can have a direct impact on one's work environment and livelihood. Employees who launch appeals pursuant to Part III are often, for reasons related to the matters under appeal, self-represented. They are not held to the same standard as counsel in navigating complex litigation processes. The appeal process provides the necessary flexibility to adjudicators to deal with and resolve these matters in an efficient matter. Expediency is a central component of access to justice. The Board must consider this objective of facilitating access to justice for self-represented parties involved in employment-related disputes.

[50] Lastly, the Board will address the Applicant's bias argument in brief. The parties have not provided the Board with any authorities that address whether a lack of objectivity in decision-making can be inferred from a delay in providing written reasons. Nor is the Board persuaded that the time that has elapsed is necessarily indicative of an inability to render an objective or rational decision. Furthermore, the Board is not persuaded that it can draw such a link on the basis of the evidence in this case. The adjudicator's occasional preference for the Employer's procedural suggestions is easily explained by the Employer's greater familiarity with the litigation process.

[51] If the Board were to simply direct the adjudicator to provide the written reasons for decision within a certain timeframe, it is unlikely that doing so would have the intended effect. Likewise, if the Board were to adopt the Employer's suggestion and direct the adjudicator to provide the decision, and then require yet another hearing, for yet another inquiry into whether to set aside the adjudicator's selection, the Board will have caused further, unnecessary, and potentially detrimental delay. For these reasons, the Board believes that it is necessary to provide the remedy that the Applicant has requested.

[52] It is also worth noting that there is no secondary agenda evident on this Application. The Applicant does not appear to be attempting to remove the adjudicator as a form of pre-emptory, collateral attack. Although the Applicant has cited bias as a concern, the Board is under the impression that the request for a direction to select another adjudicator represents nothing more than a genuine desire to move this matter along, and is entirely reasonable.

[53] For the foregoing reasons, the Board makes the following Order:

a. The adjudicator's selection in relation to LRB File No. 020-16 is set aside; and

b. The Registrar is directed to select another adjudicator to hear the appeal in LRB File No. 020-16.

DATED at Regina, Saskatchewan, this **20th** day of **July, 2020.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson