



GREGORY KEVIN SIMONSON, Appellant v FINNING CANADA AND THE CAT RENTAL STORE, Respondent

LRB File No. 116-20; December 29, 2020

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

For the Appellant, Gregory Kevin Simonson

Self-Represented

Counsel for the Respondent, Finning Canada and the
Cat Rental Store:

Brent Matkowski

Section 4-8 of *The Saskatchewan Employment Act* – Appeal from Decision of an Adjudicator – Occupational Health and Safety – Section 3-35 – Protection from Discriminatory Action – Worker Terminated for Safety Policy Breach – Good and Sufficient Other Reason – Decision Affirmed.

REASONS FOR DECISION

Introduction:

[1] Barbara Mysko, Vice-Chairperson: On September 4, 2019, the Occupational Health and Safety Division received a formal complaint of discriminatory action from Gregory Simonson [Simonson], a former worker of Finning Canada and the Cat Rental Store [Finning]. Finning operates a Caterpillar dealership in Regina. In April 2019, Simonson was hired by Finning to work as a Yard/Warehouse person at the dealership. On August 23, 2019, he was terminated from his job after allegedly committing a safety policy breach. After he was terminated, Simonson complained to the Occupational Health and Safety Division that the termination amounted to retaliation, contrary to section 3-35 of *The Saskatchewan Employment Act* [Act].

[2] An occupational health and safety officer investigated Simonson's complaint, and then on December 31, 2019, issued a decision finding that Finning had provided good and sufficient information, documentation, and other reason for Simonson's termination. The officer concluded that the actions taken by Finning were not discriminatory.

[3] Simonson appealed that decision pursuant to sections 3-53(1) and 3-54(1) of the Act. On February 6, 2020, an Adjudicator was selected to hear the appeal, and on June 3, 2020, a hearing of the appeal took place. In the Adjudicator's Decision, dated June 22, 2020, he dismissed the

appeal pursuant to section 4-6 of the Act, having found that Finning had established that Simonson was terminated for good and sufficient other reason.

[4] On July 10, 2020, Simonson appealed that Decision to this Board, pursuant to section 4-8 of the Act. The Notice of Appeal states:

The adjudicator failed to consider the series of events in chronological order.

This would have established a pattern showing that Finning retaliated against me after I filed my initial grievance.

In the Finning Harassment and Bullying policy, it clearly states the process of an investigation and resolution which Finning did not comply with. I did not receive a copy of the results of the investigation in writing, had no in person meeting with HR and the alleged harasser and then stonewalled my appeal proceedings. Evidence crucial to the investigation was withheld and their decision was based solely on hearsay from other employees.

I should have been protected by the Whistleblower and No Retaliation sections of the Code of Conduct which I was not.

Finning failed to interpret and apply the Code of Conduct in my favour when it should have and then applied that very same policy against me at a later date with respect to the overhead door. The Overhead Door policy and training related to this are ambiguous when referencing acceptable circumstances for walking under overhead doors. It states that if a door is deemed unsafe to walk through it must be barricaded which it was not. During my employment I witnessed employees walking under these doors on a daily basis without incident or consequence.

The terms of the Overhead Door policy should be construed against the drafter as Finning did not make the expectations clear and the employees set a contradictory example. The training dates for this Life Saving Rule did not correspond with the new hire time line as I worked for over three months before receiving this training.

The adjudicator failed to address the numerous occupational health and safety issues stating that they had no bearing on the appeal even though these were unlawful acts that put me in danger.

[5] On December 18, 2020, the parties presented their oral arguments during a Webex video hearing before this Board. The parties filed helpful briefs and made oral arguments, all of which were reviewed and considered. For the following reasons, the Adjudicator's Decision is affirmed.

Factual Background:

[6] Prior to his termination, Simonson had raised a number of concerns related to occupational health and safety matters in the workplace, which were then investigated by Finning and found to be substantiated in part. Two significant events resulted from that investigation. First, Finning terminated one of its managers. Second, Finning issued a letter of a discipline to

Simonson because of various concerns raised by his co-workers in the course of its investigation. The concerns were that Simonson had been taking photos and recordings of his co-workers without permission, had been taking photos and video recordings of Finning's equipment and yard for purposes outside of his regular duties, and had embarrassed a manager by imitating and mocking him. The letter of discipline in relation to those concerns was issued on August 14, 2019.

[7] Simonson requested an appeal of his discipline and was advised that a meeting would be arranged. But before that meeting could take place, Simonson was found to have breached Finning's overhead door policy by walking underneath an overhead door. According to the Adjudicator, the purpose of the policy was "to prevent incidents caused by overhead doors and overhead door failures (para 8). At Finning, there had been safety issues with overhead doors in the past, including a fatality in a Finning affiliate in 2013 (para 12). Finning viewed Simonson's action in walking underneath the overhead door as a serious safety violation.

[8] The Adjudicator made numerous factual findings in the course of his reasons, including the following:

- Simonson was considered to be working in a safety sensitive position (para 8);
- Simonson agreed to comply with all employer policies as a condition of employment (para 11);
- Finning took Simonson's initial concerns seriously (para 50);
- On August 20, 2019, a co-worker observed Simonson walking under an overhead door; On August 21, 2019, Finning provided a safety refresher training on the overhead door policy, which Simonson attended (para 22);
- On August 22, 2019, a manager was advised by another co-worker that Simonson was observed walking under an overhead door the previous afternoon, after the safety refresher (para 22);
- Simonson ultimately admitted to having walked underneath the overhead door (para 22);
- There was a people access door in the adjacent bay 30 feet away (para 23);
- On August 22, Simonson was sent home pending an investigation, and then was terminated the following day (paras 25, 26).

[9] Finally, at paragraph 24 of the Decision, the Adjudicator made the following observation:

The employee also stated at the hearing that employees commonly walk under overhead doors without being disciplined. Mr. Pllbeam stated that he was not aware of that. He said walking under overhead doors in these circumstances simply wasn't allowed in this facility.

Applicable Statutory Provisions:

[10] The following provisions are applicable to this appeal:

3-53(1) *A person who is directly affected by a decision of an occupational health officer may appeal the decision.*

(2) An appeal pursuant to subsection (1) must be commenced by filing a written notice of appeal with the director of occupational health and safety within 15 business days after the date of service of the decision being appealed.

(3) The written notice of appeal must:

- (a) set out the names of all persons who are directly affected by the decision that is being appealed;*
- (b) identify and state the decision being appealed;*
- (c) set out the grounds of the appeal; and*
- (d) set out the relief requested, including any request for the suspension of all or any portion of the decision being appealed.*

(4) Subject to subsection (10) and section 3-54, an appeal pursuant to subsection (1) is to be conducted by the director of occupational health and safety.

(5) In conducting an appeal pursuant to subsection (1), the director of occupational health and safety shall:

- (a) provide notice of the appeal to persons who are directly affected by the decision; and*
- (b) provide an opportunity to the persons who are directly affected by the decision to make written representations to the director as to whether the decision should be affirmed, amended or cancelled.*

(6) The written representations by a person mentioned in clause (5)(b) must be made within:

- (a) 30 days after notice of appeal is provided to that person; or*
- (b) any further period permitted by the director of occupational health and safety.*

(7) The director of occupational health and safety is not required to give an oral hearing with respect to an appeal pursuant to subsection (1).

(8) After conducting an appeal in accordance with this section, the director of occupational health and safety shall:

- (a) affirm, amend or cancel the decision being appealed; and*
- (b) provide written reasons for the decision made pursuant to clause (a).*

(9) The director of occupational health and safety shall serve a copy of a decision made pursuant to subsection (8) on all persons who are directly affected by the decision.

(10) Instead of hearing an appeal pursuant to this section, the director of occupational health and safety may refer the appeal to an adjudicator by forwarding to the adjudicator:

- (a) the notice of appeal;*
- (b) all information in the director's possession that is related to the appeal; and*
- (c) a list of all persons who are directly affected by the decision.*

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.*

...

4-8(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.*

Analysis:

[11] Pursuant to section 4-8 of the Act, Simonson has the right to appeal the Adjudicator's Decision to this Board on a question of law. The Board has a narrow jurisdiction to review a question of fact, where that question amounts to a question of law. To be reviewable as an error of law, the question of fact must be alleged to be 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: *Wieler v Saskatoon Convalescent Home*, 2014 CanLII 76051 (SK LRB).

[12] The appropriate standard of review on an appeal of an adjudicator's decision is the appellate standard of review, as outlined in *Housen v Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 SCR 235 [*Housen*].¹ On a question of law, the standard of review is correctness.

[13] Simonson's primary concern is that the Adjudicator failed to consider the series of events in chronological order, and by failing to do so, overlooked a pattern of retaliation against him. His remaining concerns may be summarized as follows:

- Finning did not comply with its own harassment policy. For instance, Finning did not provide Simonson with a written copy of the results of the investigation, arranged no in-person meeting with Simonson, Human Resources, and the alleged harasser, and stonewalled Simonson when he attempted to appeal. Crucial evidence was withheld and Finning's decision was based on hearsay evidence of other employees;
- Simonson was not protected by the whistleblower and "no retaliation" sections of the relevant Code of Conduct when he should have been;
- Finning failed to interpret and apply the Code of Conduct in his favour, as was required, but then applied the Code against him despite the fact that both the policy at issue on this appeal and the safety training were ambiguous;
- Due to unclear expectations and inconsistent compliance, the terms of the overhead door policy should have been construed against the drafter. Further, the training dates did not correspond with the new hire timeline;
- The Adjudicator in his Decision failed to address numerous occupational health and safety issues which should have been addressed.

[14] The Board will address each of these grounds of appeal, in turn.

[15] The first ground of appeal is that the Adjudicator did not consider the series of events in chronological order, and therefore disregarded what was a pattern of retaliation by Finning against Simonson for having raised occupational health and safety concerns. Clearly, this is not a question of law unless it can be said that, by disregarding the chronology of events, the Adjudicator disregarded a relevant fact or that the Adjudicator incorrectly applied the legal test.

[16] In considering this question, the Board must first assess whether the Adjudicator failed to consider the relevant events in chronological order. A careful review of the Decision provides no indication that this was the case. In the section entitled "Evidence and Findings of Fact", the

¹ *Lepage Contracting Ltd. v Lance McCutcheon*, 2020 CanLII 10515 (SK LRB); *Missick v Regina's Pet Depot*, 2020 CanLII 90749 (SK LRB).

Adjudicator provided a detailed summary of the facts, including the complaint brought by Simonson, the subsequent meeting with management, Finning's investigation of that complaint, the termination of the Finning manager, the complaints against Simonson, Simonson's request for an appeal of his discipline, the events surrounding the alleged policy violation, and his termination. The Adjudicator demonstrated a full appreciation of the salient events and the order in which they occurred.

[17] Next, the Adjudicator correctly applied the relevant three-part test, and in doing so, demonstrated an understanding of the nature of the allegation, being that Finning had retaliated against Simonson for taking discriminatory action. That test is outlined at paragraph 32 of the Decision:

1. *Did the employee engage in protected activities, i.e. activities that come within the ambit of s. 3-35?*
2. *Did the employer take discriminatory action against the employee within the meaning of that term as defined in s.3-1(1)(i)?*
3. *If the first two questions are answered in the affirmative, was the discriminatory action taken for good and sufficient other reason within the meaning of s. 3-36(4)?*

[18] The correct onus with respect to that test is outlined at paragraph 33:

The employee will bear the onus of proving the first two. Because of the presumption and reverse onus, the employer will bear the onus of establishing the discriminatory action was taken for a reason other than because the employee engaged in the protected activities, i.e. for good and sufficient other reason.

[19] With respect to the first two parts of the test, the Adjudicator found that Simonson had met his onus to demonstrate that his actions constituted the exercise of a protected activity and that the Employer had taken discriminatory action against him. As a result of these conclusions, the onus then shifted to Finning to establish "that the discriminatory action was taken against the worker for good and sufficient other reason". For a discriminatory action to be taken for good and sufficient other reason it "must not be arbitrary and must be objectively reasonable" (paras 42-4).

[20] There is nothing in the Decision to suggest that the Adjudicator, in considering the evidence, disregarded the chronology of events. Furthermore, in order for the Adjudicator to have concluded, as he did, that Simonson met the first two stages of the test, he had to have an appreciation of the order of certain key events, such as Simonson's complaints, the investigation,

and the termination. As such, the first ground of appeal discloses no basis for cancelling, amending, or remitting the Decision.

[21] The next issue relates to Finning's compliance with its own harassment policy in the context of the investigation. Simonson says that he did not receive a copy of the results of the investigation in writing, had no in-person meeting, and was stonewalled in his appeal proceedings. He says further that crucial evidence was withheld and that Finning's decision was improperly based on hearsay evidence.

[22] The Adjudicator considered a similar argument on appeal and made the following observations:

[55] The employee asserts that the employer did not handle the investigation properly, including his concern that it lacked transparency. Again, this has no bearing on the appeal except to the extent it might bring into question the employer's sincerity in conducting the investigation. However, as noted above, the evidence is persuasive that the employer took the employee's concerns seriously and conducted a thorough investigation.

[23] The Board agrees that Finning's compliance with its own harassment policy was relevant to the main appeal only to the extent that it might demonstrate whether Finning was sincere in conducting its investigation. Having found that this issue was relevant to this limited extent, the Adjudicator then considered whether Finning took Simonson's complaints seriously and found that it did, including by terminating one of the managers.

[24] The Adjudicator noted, as well, that the fact that "the investigation also revealed conduct on the part of the employee that led to a letter of discipline does not detract from the conclusion the company took his concerns seriously" (at para 50). Clearly, the Adjudicator considered the evidence in relation to the letter of discipline and did not find that it contributed to a pattern of retaliation. He also noted that Finning tried to establish a culture of safety through its training programs and other initiatives, that Finning held a safety refresher course after the report of the breach on August 20, and that Simonson was found to have breached the policy later the same day after the refresher course occurred.

[25] The Adjudicator did not disregard relevant facts with respect to the investigation conducted by Finning into Simonson's complaints. He was alive to the relevant facts, but found that Finning had established good and sufficient other reason.

[26] The next ground suggests that Simonson should have been protected by the whistleblower and "no retaliation" sections of the Finning Code of Conduct. Simonson is likewise

protected by section 3-35 of the Act, which prohibits discriminatory action. The purpose of that prohibition is to protect workers who raise occupational health and safety issues from retaliatory action.

[27] As previously outlined, the Adjudicator outlined the correct legal test to apply on a complaint of discriminatory action. He then considered the case law involving terminations in which a single serious violation may lay the foundation for a termination. He considered the seriousness with which Finning took the overhead door policy and found:

[51] Finning's position is that it reacted to a serious safety violation by the employee in the same manner it would in relation to any employee, particularly where the violation occurred later the same day the employee was retrained on the safety rule. I accept that and find it was a reasonable option for the employer to terminate the employee. Consequently, I find that the employer's reasons for termination constituted good and sufficient other reason within the meaning of the reverse onus.

[28] Finally, the Adjudicator correctly noted that "good and sufficient other reason" is not to be equated to a finding that Finning terminated the worker for just cause (para 41).

[29] The next issue relates to the overhead door policy. Simonson alleges that Finning inconsistently applied the Code of Conduct, and that the overhead door policy is ambiguous, the expectations around the policy unclear, and the example set by other employees contradictory. This ground is equivalent to an attempt to re-argue the main appeal. The Board agrees with Finning's argument against upholding this ground of appeal:

57. The Adjudicator made clear findings regarding the overhead door incident. The Adjudicator reviewed the specific policy (para 8 and 9). The Adjudicator reviewed the circumstances leading up to the violation. The Adjudicator acknowledged Finning's safety culture and the refresher provided to the Appellant on the overhead door policy immediately before the Appellant walked under the overhead door (para 44). The Adjudicator outlined Finning's evidence that employees were not permitted to walk underneath the overhead door (para 24). The Adjudicator held that Finning viewed the breach as a single serious safety violation (para 48).

[30] This ground of appeal fails to disclose an error of law. The Adjudicator's factual findings are clear. There is nothing to indicate that he arrived at his conclusions on the basis of irrelevant evidence, in disregard of relevant evidence, or based on an irrational inference of fact.

[31] The last issue relates to the allegation that the Adjudicator failed to address numerous occupational health and safety issues. This ground seems to reflect a misunderstanding of the Adjudicator's jurisdiction on the appeal. In considering a similar argument, the Adjudicator suggested that the particular occupational health and safety issue was not relevant to the appeal:

[54] The employee expressed concern that the employer had not provided adequate training for him related to the handling of hazardous waste, including the loading and unloading of dangerous goods and the refueling of equipment. This has no bearing on the appeal.

[32] The Adjudicator was correct to decide that the question of whether Finning provided adequate training was not relevant to the determination of the appeal.

[33] In his submissions, Simonson also alleges that his inadequate training was a consequence of Mr. Hall's retaliatory conduct. Similar allegations were made before the Adjudicator in the main appeal. However, the Adjudicator found that "the evidence is persuasive that the employer took the employee's concerns seriously and conducted a thorough investigation" (para 55). The Board is not persuaded that the Adjudicator overlooked some evidence that might necessitate a re-assessment of this conclusion. Instead, by raising this concern, Simonson appears to be re-litigating the Adjudicator's findings with respect to Finning's investigation.

[34] In conclusion, the Board's jurisdiction to hear an appeal from an adjudicator's decision is limited to a question of law. The Notice of Appeal enumerates a number of grounds that primarily raise questions related to the Adjudicator's findings of fact. These questions are reviewable only in a very narrow set of circumstances, as set out in these reasons. The Board has reviewed the Decision to determine whether it discloses an error of law and has determined that it does not. In the Board's opinion, the Adjudicator correctly outlined and applied the legal test and reached the conclusions through careful and thoughtful reasoning. There is no indication that there was a failure to consider relevant evidence.

[35] For the foregoing reasons, the Adjudicator's Decision in LRB File No. 006-20 is affirmed.

DATED at Regina, Saskatchewan, this **29th** day of **December, 2020**.

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson