ANDRITZ HYDRO CANADA INC., Applicant v TIMOTHY JOHN LALONDE and DIRECTOR OF OCCUPATIONAL HEALTH AND SAFETY, GOVERNMENT OF SASKATCHEWAN, Respondents

LRB File No. 004-21; July 13, 2021
Chairperson, Susan C. Amrud, Q.C.; Board Members: Aina Kagis and Gary Mearns

For Andritz Hydro Canada Inc.:	Steve Seiferling
For Timothy John Lalonde:	Self-represented
For Director of Occupational Health and Safety, Government of Saskatchewan:	Steven Wang

Application for summary dismissal of appeal granted – No reasonable chance of success – Grounds of appeal do not address Adjudicator's finding that employer had good and sufficient other reason to dismiss employee – Plain and obvious that appeal cannot succeed.

Application that appeal be summarily dismissed with costs – Costs not granted – On this application Board is without authority to order costs.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: Timothy Lalonde was employed by Andritz Hydro Canada Inc. ["Employer"] from July 15, 2019 until he was dismissed on August 19, 2019. Lalonde filed a complaint of discriminatory action pursuant to section 3-35 of *The Saskatchewan Employment Act* ["Act"]. On November 1, 2019, an Occupational Health Officer issued a decision finding that the Employer had acted contrary to section 3-35 in dismissing Lalonde, and ordered him reinstated. The Employer appealed that decision. On December 21, 2020, after a seven-day hearing, an Adjudicator set aside that decision, finding that the Employer had good and sufficient other reason to terminate Lalonde's employment.[1] Lalonde appealed to the Board from that decision.[2] The Employer now applies to the Board for summary dismissal of that appeal, with costs. The Employer asked that its application be considered by an *in camera* panel of the Board pursuant to subsection 32(4) of *The Saskatchewan Employment (Labour Relations Board) Regulations* ["Regulations"].

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[1] *Andritz Hydro Canada Inc. v Tim Lalonde*, December 21, 2020, LRB File No 257-19.
[2] LRB File No. 001-21.

Argument on behalf of Employer:

[2] The Employer argues that the appeal should be summarily dismissed as it is frivolous, vexatious, an abuse of process and has no reasonable chance of success.

[3] Subsection 4-8(2) of the Act requires that an appeal of an Adjudicator's decision be based on a question of law. No questions of law are raised in Lalonde's appeal. The grounds on which Lalonde purports to rely in support of his appeal include unsubstantiated accusations, personal attacks and reasons for appeal that are unsupportable at law.

[4] Subsection 4-8(3) of the Act requires an appellant to serve the notice of appeal on all parties to the appeal. Lalonde did not serve the Employer with the notice of appeal.

[5] The Employer referred the Board to *International Brotherhood of Electrical Workers, Local 529 v KBR Wabi Ltd* [3] as establishing the test for summary dismissal:

> *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
>
> *2. In making its determination, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.*

[6] While Lalonde's appeal suggests that he is entitled to an appeal on the grounds that hearsay evidence and conjecture were allowed at the hearing, he has not established that hearsay evidence and conjecture were inappropriately admitted at the hearing. Lalonde's assertion that "hearsay evidence is not allowed in Canada" is wrong in law. Further, he failed to point out what the hearsay was and failed to identify how it interfered with the Adjudicator's decision even if hearsay was admitted. Any hearsay that did arise at the hearing did not form the basis for the Adjudicator's decision.

[7] Lalonde also appears to allege that his rights under the *Canadian Charter of Rights and Freedoms* ["*Charter*"] were breached at the hearing. However, he does not indicate which sections of the *Charter* were breached or how they were breached.

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[3] 2013 CanLII 73114 (SK LRB) at para 79.

[8] The questions determined by the Adjudicator were whether the Employer took discriminatory action against Lalonde, within the meaning of clause 3-1(1)(i) of the Act, and, if so, whether it had good and sufficient reason to do so. None of the issues raised by Lalonde in his notice of appeal are related to or have any impact on the Adjudicator's decision on those issues. The notice of appeal contains no allowable grounds of appeal and therefore no arguable case.

[9] The Employer suggests that in a case such as this, where the appeal to the Board is frivolous, vexatious and an abuse of process, the Board ought to award costs. It refers to *Pannu Bros. Trucking Ltd. and Beckett (Re)*[4] ["*Pannu Bros. Trucking*"] where, in his consideration of the authority of a referee to award costs pursuant to the *Canada Labour Code*, a federal adjudicator stated:

> *12 Looking at the wages recovery scheme in the Code as a whole, it seems more likely to me that the risks of having to pay costs under this section of the Code were aimed more at intransigent employers or those who deliberately delay the wage collection process by taking frivolous or vexatious appeals.*
>
> *13 In any event, the Employer is not suggesting in this case that the cost of the proceedings be assessed against the Employee, nor do I have to explore examples of situations where costs should be awarded against employers. The issue before me goes solely to costs being assessed against an employee and in this regard, my view is that costs should be awarded against employees under section 251.1.2 (4) (c) of the Code only in rare and exceptional circumstances. For example, one situation that comes to mind when costs could be a consideration, is where an employee files a complaint vindictively or, takes a frivolous or vexatious appeal against an unfounded complaint finding by an Inspector, thus causing unwarranted expenses to an employer.*

[10] Lalonde's appeal, it argues, is the kind of case that *Pannu Bros. Trucking* had in mind as appropriate for an award of costs.

Argument on behalf of Lalonde:

[11] Lalonde did not address the legal arguments raised in this application. Instead, in his Reply and written submissions, he made personal attacks on the Adjudicator and raised matters that are not at issue in the appeal. In his notice of appeal, Lalonde stated that "hearsay evidence is not allowed in Canada" and that the Adjudicator "clearly relies on hearsay evidence several times". He further stated "I deserve a fair and just hearing under the charter of rights and freedoms and equal access to the law. Hearsay of conjecture being used as evidence to remove me from site is not equal access to the law."[5] Lalonde stated that his constitutional rights were violated and

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[4] 2000 CarswellNat 6961.
[5] As written.

that he was not given a fair hearing or offered equal access to the law. He did not elaborate on what occurred at the hearing that could lead to such a conclusion.

Argument on behalf of Director of Occupational Health and Safety:

[12] The Director of Occupational Health and Safety advised the Board that he takes no position on this application.

Relevant Legislative Provisions:

[13] The following provisions of the Act were considered in this matter:

> ***Interpretation of Part***
> *3-1(1) In this Part and in Part IV:*
>
> *. . .*
>
> *(i) "discriminatory action" means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes termination, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty, but does not include:*
>
> *(i) the temporary assignment of a worker to alternative work, pursuant to section 3-44, without loss of pay to the worker; or*
>
> *(ii) the temporary assignment of a worker to alternative work, without loss of pay to the worker, while:*
>
> *(A) steps are being taken for the purposes of clause 3-31(a) to satisfy the worker that any particular act or series of acts that the worker refused to perform pursuant to that clause is not unusually dangerous to the health or safety of the worker or any other person at the place of employment;*
>
> *(B) the occupational health committee is conducting an investigation pursuant to clause 3-31(b) in relation to the worker's refusal to perform any particular act or series of acts; or*
>
> *(C) an occupational health officer is conducting an investigation requested by a worker or an employer pursuant to clause 3-32(a).*
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> ***Discriminatory action prohibited***
> *3-35 No employer shall take discriminatory action against a worker because the worker:*
>
> *(a) acts or has acted in compliance with:*
>
> *(i) this Part or the regulations made pursuant to this Part;*
>
> *(ii) Part V or the regulations made pursuant to that Part;*
>
> *(iii) a code of practice issued pursuant to section 3-84; or*
>
> *(iv) a notice of contravention or a requirement or prohibition contained in a notice of contravention;*
>
> *(b) seeks or has sought the enforcement of:*
>
> *(i) this Part or the regulations made pursuant to this Part; or*
>
> *(ii) Part V or the regulations made pursuant to that Part.*

Referral to occupational health officer

3-36(1) A worker who, on reasonable grounds, believes that the employer has taken discriminatory action against him or her for a reason mentioned in section 3-35 may refer the matter to an occupational health officer.

(2) If an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 3-35, the occupational health officer shall serve a notice of contravention requiring the employer to:

> *(a) cease the discriminatory action;*
>
> *(b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;*
>
> *(c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and*
>
> *(d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.*

. . .

(4) If discriminatory action has been taken against a worker who has acted or participated in an activity described in section 3-35:

> *(a) in any prosecution or other proceeding taken pursuant to this Part, there is a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 3-35; and*
>
> *(b) the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason.*

Procedures on appeals

4-4(3) An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.

Right to appeal adjudicator's decision to board

4-8(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III or Part V 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 parties to the appeal.*

. . .

(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.*

Board powers

6-104(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:

> *. . .*
>
> (e*) fixing and determining the monetary loss suffered by an employee, an employer or a union as a result of a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate.*

Powers re hearings and proceedings

6-111(1) With respect to any matter before it, the board has the power:

> *. . .*

> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*
> *(q) to decide any matter before it without holding an oral hearing.*

[14] When the Application for Summary Dismissal was filed, section 32 of the Regulations provided as follows:

> ***Applications for summary dismissal***
> *32(1) In this section:*
> *(a) "application to summarily dismiss" means an application pursuant to subsection (2);*
> *(b) "original application" means, with respect to an application to summarily dismiss, the application filed with the board pursuant to the Act that is the subject of the application to summarily dismiss;*
> *(c) "party" means an employer, union or other person directly affected by an original application.*
> *(2) A party may apply to the board to summarily dismiss an original application.*
> *(3) An application to summarily dismiss must:*
> *(a) be in writing; and*
> *(b) be filed and served in accordance with subsection (5).*
> *(4) In an application to summarily dismiss, a party shall specify whether the party requests the board to consider the application for summary dismissal by an in camera panel of the board or as a preliminary matter at the outset of the hearing of the matter that is the subject of the original application.*
> *(5) If a party requests that the application to summarily dismiss be heard:*
> *(a) by an in camera panel of the board, the application to summarily dismiss must be filed with the registrar, and a copy of it must served on the party making the original application and on all other parties named in the original application, at least 30 days before the date set for hearing the original application;*
> *(b) as a preliminary matter at the outset of the hearing of the matter that is the subject of the original application, the application to summarily dismiss must be filed with the registrar, and a copy of it served on the party making the original application and on all other parties named in the original application, at least three days before the first date set for hearing of original application.*
> *(6) An application to summarily dismiss must contain the following information:*
> *(a) the full name and address for service of the party making the application;*
> *(b) the full name and address for service of the party making the original application;*
> *(c) the file number assigned by the registrar for the original application;*
> *(d) the reasons the party making the application to summarily dismiss believes the original application ought to be summary dismissed by the board;*
> *(e) a summary of the law that the applicant believes is relevant to the board's determination.*

Analysis and Decision:

[15] Clause 6-111(1)(p) of the Act authorizes the Board to summarily dismiss a matter if the Board is of the opinion that there is a lack of evidence or no arguable case. While this is the first time that the Board has been asked to apply this provision to an appeal pursuant to section 4-8 of the Act, the Board has determined that it is applicable. Lalonde's appeal is a "matter" before the Board.

[16] While the test the Board normally applies on an application for summary dismissal is well-established, in this situation it will require some modification. For the Employer to satisfy the Board that Lalonde has no arguable case, it needs to satisfy the Board that, based on the grounds of appeal, there is no arguable case, in other words, no reasonable chance of success.

[17] The first issue raised by Lalonde's appeal that could be considered a question of law is with respect to whether the Adjudicator inappropriately admitted or relied on hearsay evidence. Lalonde's description of the law of hearsay is inaccurate. *The Law of Evidence in Canada* devotes 181 pages to the issue of the admission of hearsay and makes it clear that in some situations hearsay is admissible:

> *If a statement constitutes hearsay, it is presumptively inadmissible unless it falls within a recognized traditional exception to the rule or unless it is shown to meet the criteria of necessity and reliability under the "principled approach" adopted by the Supreme Court of Canada. The onus lies on the proponent of the evidence to establish these criteria on the balance of probabilities.*[6]

[18] Further, subsection 4-4(3) of the Act gives an adjudicator discretion to accept "any evidence that the adjudicator considers appropriate".

[19] The Adjudicator reviewed the evidence in great detail. Turning to the issues before him, the Adjudicator found that Lalonde was engaged in an activity protected by section 3-35 of the Act, in that he reported what he considered to be health and safety concerns respecting his workplace. Next, the Adjudicator found that Lalonde's dismissal from employment qualified as a "discriminatory action" within the meaning of clause 3-1(1)(i) of the Act. This required him to then consider the issue of whether the Employer had good and sufficient other reason, within the meaning of clause 3-36(4)(b) of the Act, for dismissing Lalonde. In determining the answer to this question, the Adjudicator stated:

> *[354] I am left questioning Mr. Lalonde's motivations and intent in many circumstances, and doubt his sincerity about becoming a team player with others at the work site. He intentionally resisted reducing his concerns, especially safety concerns, to writing within his employer's protocols and systems and he only ever wrote to SaskPower, the site owner. This was inconsistent with the obligation agreed to within the Project Agreement as well as orientations and policy reviews.*
>
> *[355] There were valid concerns raised by a number of witnesses regarding Mr. Lalonde's insolent behaviour and resistance to observing the worksite rules, notably, the delays in messages returning to the worksite and the ability to address safety concerns in a timely way. Mr. Lalonde said that he was acting reasonably in submitting the concerns*

[6] Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 5th ed. (LexisNexis Canada Inc.), 2018, para 6.62.

> *directly to SaskPower yet was disregarding protocols that applied to all workers on the site that were developed and taught to ensure the highest level of safety and appropriate responding to valid concerns. In short, Mr. Lalonde believed he could choose what rules to observe and what rules to ignore. This situation created a valid concern for the employer. If even a handful of workers on site adopted a similar approach, significant problems could develop on the site.*
>
> *[356] Mr. Lalonde was confronted about his concerns and was informed that his approach had to change. He purportedly agreed to change his ways during his conversations with Mr. Labelle and others, but he did not. I accept the evidence of Mr. Labelle, who indicated that he was prepared to give Mr. Lalonde a second chance and both were prepared to move on. Mr. Lalonde's agreement to work better with others was immediately abandoned by him, and he demonstrated to Andritz and SaskPower staff that his commitments were not sincere and he could not be trusted. All of the events, conversations, and interviews occurred within a very few weeks at the commencement of work at a new worksite.*
>
> *[357] I accept that it was not the reporting of safety concerns that led the Appellant to lay off Mr. Lalonde, but rather Mr. Lalonde's insolence, insubordination, and failure to follow established safety reporting protocols that underpinned the decision. The sum of the insolence, insubordination, and failure to follow established safety reporting protocols created the potential for new safety concerns, which the Appellant wanted to avoid. This is clearly set out in the evidence of Francoys Gauthier and Marcel Labelle, and I accept their evidence in this regard. The evidence is corroborated by Josh Beckman of SaskPower.*

[20] As a result, the Adjudicator found that the Employer had good and sufficient other reason to terminate Lalonde's employment.

[21] In making the crucial determination whether the Employer had good and sufficient other reason to terminate Lalonde's employment, the Adjudicator made it clear that he was not relying on hearsay. Lalonde provided no evidence that the Adjudicator inappropriately admitted or relied on hearsay evidence.

[22] The second ground of appeal that could be characterized as raising a question of law is Lalonde's allegation that he did not receive a fair hearing, and that his *Charter* rights were contravened. Lalonde provides no evidence or arguments to support this allegation. To the contrary, the Adjudicator's decision discloses that Lalonde was represented by legal counsel throughout the appeal to the Adjudicator. The hearing before the Adjudicator proceeded from September 21 through 26, 2020, and resumed on October 6, 2020. The Employer called four witnesses; Lalonde and the Occupational Health Officer testified on his behalf. Lalonde did not specify how this did not provide him with a fair hearing.

[23] In *Roy v Workers United Canada Council*[7], the Board outlined the applicable test to apply on an application for summary dismissal:

> *Generally speaking, summary dismissal is a vehicle for the disposition of applications that are patently defective. The defect(s) must be apparent without the need for weighing of evidence, assessment of credibility, or the evaluation of novel statutory interpretations. Simply put, in considering whether or not an impugned application ought to be summarily dismissed, the Board assumes that the facts alleged in the main application are true or, at least, provable. Having made this assumption, if the Board is not satisfied that the main application at least discloses an arguable case, and/or if there is a lack of evidence upon which an adverse finding could be made, then the main application is summarily dismissed in the interests of efficiency and the avoidance of wasted resource.*

[24] In *Lyle Brady v International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local Union 7715*[8], the Board emphasized that it will only summarily dismiss an application if it is plain and obvious that the application cannot succeed. The test is a stringent one. If the Board concludes that the application has no reasonable prospect of success then it may dismiss the application on a summary basis, but it should do so only in plain and obvious cases, or in cases where the underlying application is patently defective.

[25] The Board has considered the material filed by Lalonde in support of the appeal and in response to this application. This material must be considered against the backdrop of the applicable statutory provision, which allows for an appeal only on a question of law. The Board has determined that the appeal must be dismissed. It is plain and obvious that the appeal cannot succeed. Lalonde has not identified any grounds on which his appeal could succeed. Lalonde has filed an appeal, in form, but there is no arguable question of law in the allegations he has made that address the finding by the Adjudicator that the Employer had good and sufficient other reason to dismiss him.

[26] In *Browne v Canron Ltd., Eastern Structural Division*,[9] the Ontario Labour Relations Board dismissed a matter before it due to personal attacks in the materials and because the filing was so wanting in form as to be an abuse of the Board's process:

> *The Board has a broader concern, however. It unanimously dismissed the complaint as being so wanting in form as to be an abuse of its process. Quite apart from the offense to the individuals concerned this Board, like any tribunal, has a duty to safeguard the integrity of its proceedings. It cannot permit the use of forms in Board proceedings as a means to convey personal insult. The Legislature did not intend and common decency will not allow this tribunal to be demeaned as a conduit for frivolous, vexatious or inflammatory matter.*

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[7] 2015 CanLII 885 (SK LRB), at para 9.
[8] 2017 CanLII 68781 (SK LRB).
[9] 1977 CarswellOnt 835, [1977] OLRB Rep 34 (OLRB), at para 7.

[27] This comment applies equally to Lalonde's appeal and is another reason for which the Board finds it appropriate to summarily dismiss the appeal.

[28] Clause 4-8(3)(b) of the Act required Lalonde to serve the Employer with his appeal. He did not serve them. If this was the only deficiency in the appeal, the Board might be prepared to waive it, as the Employer suffered no prejudice as a result. In the circumstances of this case, however, it is another reason that leads to the conclusion that the appeal must be dismissed.

[29] With respect to the issue of costs, the Employer did not identify any authority that would empower the Board to order costs in this situation.

[30] The Board rarely orders a party to compensate another party for legal expenses, and when it does, it relies on clause 6-104(2)(e) of the Act which applies only to monetary loss suffered by an employee, an employer or a union as a result of a contravention of Part VI, the regulations made pursuant to Part VI or an order or decision of the Board. None of those criteria applies here.

[31] Subsection 4-8(6) of the Act sets out the powers of the Board on an appeal from an adjudicator, and it does not include a power to order costs.

[32] *Pannu Bros. Trucking*, referred to by the Employer, was a decision under the *Canada Labour Code*, which specifically stated, in clause 251.12(4)(c), that a referee may award costs. A similar power does not appear in the Act.

[33] Accordingly, the request for costs is denied.

[34] With these Reasons, an Order will issue dismissing Lalonde's appeal.

[35] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **13th** day of **July, 2021.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson