Saskatchewan
Labour Relations Board

CHRISTINE IRELAND, Applicant v NU LINE AUTO SALES & SERVICE INC., Respondent

LRB File No. 017-21; October 8, 2021
Chairperson, Susan C. Amrud, Q.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

For Christine Ireland: Jared M. McRorie, Preyanka Prasad

For Nu Line Auto Sales & Service Inc.: Brent Matkowski

Standard of review on appeal from Adjudicator to Board is appellate standard of correctness – Board undertook full exercise in statutory interpretation – Legislative intent that Board is to apply an appellate standard of review of correctness.

Appeal dismissed – Adjudicator correctly identified and applied the law to the facts as she found them – Employer did not take discriminatory action against employee.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: Christine Ireland began her employment as General Sales Manager with Nu Line Auto Sales & Service Inc. ["Employer"] on March 1, 2018. On multiple occasions throughout 2018 and 2019 she informed the Employer's owner/manager, Brad Huziak, that the work environment and atmosphere were untenable and she was considering resigning, but did not do so. On June 27, 2019 she requested that she be laid off so she could obtain employment insurance and pursue a different career. Huziak declined her request as there was no shortage of work or other basis for issuing a layoff.

[2] In early June 2019 Ireland was put on medical leave by her doctor. She was at home for two weeks, following which she returned to work. Her doctor provided a further medical note dated June 28, 2019 indicating that Ireland would be off work for medical reasons from June 26, 2019 to August 6, 2019. Ireland began her leave on June 27, 2019. She made a claim through the Employer's benefit plan for short term disability benefits that was denied. She made a claim to the Workers' Compensation Board that was also denied. In July 2019 she filed a harassment complaint with Occupational Health and Safety. An Occupational Health Officer ["OHS Officer"] investigated the complaint, but made no findings. On July 26, 2019 her doctor extended her

medical leave to October 2019, but the Employer was not informed or provided with a copy of the new medical note.

[3] Ireland did not return to work on August 7, 2019, as the Employer was expecting. Later that day she received a notification on her business cell phone that she was no longer an administrator of the Employer's Facebook page.

[4] On or about August 13, 2019 the Employer's office was broken into and some cash was stolen. The security code for the office had recently been changed. The person who entered the building used the old security code, which Ireland knew. When Huziak and the office manager spoke to the Royal Canadian Mounted Police officer ["RCMP Officer"] investigating the theft, they identified Ireland as a potential suspect. On August 14, 2019 Ireland was interviewed by the RCMP Officer respecting the break-in. Also on August 14, 2019, Ireland's business cell phone service was disconnected.

[5] On August 27, 2019 the Employer's office manager received a call from Service Canada indicating that the Employer needed to file a Record of Employment ["ROE"] with respect to Ireland. With assistance from Service Canada staff, the office manager completed the ROE. Ireland's occupation was listed as Finance Manager. The reason for issuing the ROE was noted as "Code K (Other)". Expected Date of Recall was indicated as "Not Returning". Under comments it was noted: "Christine was absent from work with a Dr. note from Jun 27 return date of Aug. 6. She has not returned as of today – we assume she quit as we have not heard from her." Service Canada then advised Ireland that she was not eligible for Employment Insurance sickness benefits because she had quit her job. This alerted Ireland to the error that had been made in her doctor's office of not supplying the Employer with the extended medical note.

[6] On September 2, 2019 Ireland submitted an amended complaint to Occupational Health and Safety alleging discriminatory action.

[7] On September 5, 2019 Ireland sent an email to Huziak and the office manager advising them that she was still on medical leave. They also received a new doctor's note dated September 4, 2019 indicating that she would need to remain off work from August 7, 2019 to October 6, 2019. Later that day the office manager filed an amended ROE with Service Canada changing the expected date of recall from "Not Returning" to "Unknown" and changing the reason for issuing the ROE from "Code K (Other)" to "Code D – Illness or Injury"; the comment was not removed or changed.

[8] On September 10, 2019 Service Canada again denied her claim for sickness benefits because she had, according to the ROE, quit her job. However, sometime in October 2019 Service Canada allowed her claim and she commenced receiving Employment Insurance sickness benefits.

[9] Ireland did not return to work on October 7, 2019, or provide a further doctor's note to the Employer until on or after October 22, 2019. As a result, on October 17, 2019 the Employer cancelled Ireland's benefits.

[10] On October 25, 2019 the OHS Officer issued the following decision:

> *It is the decision of this officer, the dismissal of Christine Ireland, is an unlawful discriminatory action pursuant to section 3-35(f) of the Act. The employer must therefore:*
>
> - *Cease the discriminatory action;*
> - *Reinstate Christine Ireland to her former employment on the same terms and conditions under which she was formerly employed;*
> - *Pay Christine Ireland any wages she would have earned had he* [sic] *not been wrongfully discriminated against; and*
> - *Remove any reprimand or reference to the matter from any employment records with respect to this worker.*

[11] The accompanying Notice of Contravention issued to the Employer included the following Details:

> *Occupational Health and Safety (OHS) received a complaint of Discriminatory Action on September 6, 2019 from Christine Ireland. The employer failed to provide good and sufficient other reasons for issuing an ROE stating job abandonment without adequately communicating with the worker which would effectively be deemed a termination. The findings are that the employer did take discriminatory action pursuant to section 3-35 of The Saskatchewan Employment Act. The Employer shall reinstate the worker pursuant to Section 3-36(2)(a)(b)(c)(d). of The Saskatchewan Employment Act. The employer is to make the necessary arrangements for the workers reinstatement.* [as written]

[12] On November 12, 2019 the Employer appealed that decision on the basis that it did not take discriminatory action against Ireland and that, contrary to the implicit findings of the OHS Officer, it did not terminate Ireland's employment on August 27, 2019 or otherwise.

[13] The Employer did not apply for a stay of the OHS Officer's decision. Instead, on January 3, 2020 and February 6, 2020 the Employer wrote to Ireland to set up next steps for her return to work. She did not provide the information requested in these letters. On May 21, 2020 the Employer again wrote to Ireland, this time indicating that her employment would be terminated if

the requested information was not provided in seven days. Ireland did not provide the requested information, and instead responded by email on May 26, 2020 that she was not going to respond to any requests until after the hearing before the Adjudicator. On June 1, 2020 Huziak sent a letter to Ireland advising her that her employment was terminated effective immediately on the basis of job abandonment.

[14] The Adjudicator issued her decision respecting the Employer's appeal on January 22, 2021[1]. She relied on *Banff Constructors Ltd. v Lance Arcand*[2] ["*Arcand*"] in finding that the issues to be determined were:

> *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)?*

[15] With respect to whether Ireland engaged in a protected activity within the ambit of section 3-35 of *The Saskatchewan Employment Act* ["Act"], the Adjudicator found that she did:

> *231 Even though the Harassment Complaint filed by Ms. Ireland in July, 2019 was not investigated by the OH&S Officer, the filing of the Complaint in itself is a protected activity within the parameters of Sec. 3-35. Therefore, at the time that the Harassment Complaint was filed, Ms. Ireland was engaging in a protected activity.*
> *…*
>
> *234 I find that with the shifting of the Harassment Complaint to a Discriminatory Action Complaint, Ms. Ireland was still engaged in a protected activity within the meaning of section 3-35. It is an action listed within section 3-35(a)(i).*[3]

[16] With respect to whether the Employer took discriminatory action (as defined by clause 3-1(1)(i) of the Act) against Ireland, the Adjudicator found that it did not:

> *232 In considering the Britto case, I find that the Respondent has not established a prima facie case of discriminatory action, although I did find that the worker was engaged in a protected activity, the second part of the framework proving that the Employer took action against the worker falling within the scope of section 3-1(1)(i) was not established.*
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> *233 In considering the Beggs case I find that this case was not similar to the Beggs case as argued by the Respondent. The issuing of the Record of Employment by Nu Line was*

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[1] *Nu Line Auto Sales & Service Inc. v Christine Ireland*, January 22, 2021, LRB File No. 259-19.
[2] April 28, 2020, LRB File No. 184-19 at para 46.
[3] A numbering issue in the Adjudicator's decision resulted in a duplication of paragraph numbers 225 to 234. The paragraphs quoted here are from the first instance of the numbering of paragraphs as paragraphs 231 and 234.

> *not a discriminatory action as defined in Section 3-1(1)(i). The ROE was not completed as a termination of employment, but as a requirement of an Employer to complete when there has been an interruption of earnings as per The Employment Insurance Act. The fact that the form was not completed correctly was not a discriminatory action as the submission of the ROE when amendments were made did result in Ms. Ireland receiving benefits from Service Canada.*
>
> *234 In regards to the issuance of the ROE the relationship is between the Employer and Service Canada. In order for termination of an Employee to occur there must be direct communication of that fact to the Employee from the Employer. There was no such communication at the time the ROE was issued in the evidence that was presented.*[4]

[17] The Adjudicator also found that the actions of indicating on the ROE that her position was Finance Manager (rather than General Sales Manager), removal of her duty as administrator of the Employer's Facebook page and cancellation of her business cell phone service were not discriminatory actions. The incorrect designation of her position was an error that did not adversely affect her terms or conditions of employment. Removal of Ireland as administrator of the Facebook page was a business decision to have someone else continue to perform Ireland's duties during her absence. Cancellation of her business cell phone service was a business decision – Ireland was not conducting the Employer's business during her medical leave. She was provided with a cell phone and a laptop to use in the conducting of business[5].

[18] As the Adjudicator found that the Employer had not taken discriminatory action against Ireland, it was unnecessary for her to determine whether the Employer had good and sufficient other reason for taking discriminatory action. The Adjudicator found, in the alternative, that if she was wrong in this finding, in any event no back wages would be payable to Ireland since she was unable to work and earn any wages during the time period for which she claimed them:

> *254 I agree with the submission by the Appellant in para. 99 of his Brief that there can be no back wages where the employee choses* [sic] *not to return to work or was medically unable to earn wages. In this case Ms. Ireland had provided medical notes from her Doctor up to December 31, 2019 that she was not able to return to work. Therefore she was on medical leave and was unable to earn wages. From that time on, there were no medical notes provided and Ms. Ireland did not return to work so she earned no wages for that period.*

[19] The Adjudicator also found that the Act did not provide her with the jurisdiction to award the compensatory damages claimed by Ireland.

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[4] The paragraphs quoted here are from the second instance of the numbering of paragraphs as paragraphs 232 to 234.
[5] At para 8.

[20] On February 11, 2021, Ireland filed an appeal to the Board from the Adjudicator's decision. These Reasons address that appeal.

Argument on behalf of Ireland:

[21] Ireland identified four issues to be decided in the appeal:

- Standard of review;
- Did the Adjudicator err in failing to correctly apply the test for discriminatory action?
- Did the Adjudicator err by ignoring, misapprehending and misapplying the law with respect to evidence?
- What is the quantum to be paid to Ireland as a result of the discriminatory action by the Employer?

Standard of Review:

[22] Following the hearing of this matter, the Saskatchewan Court of Appeal released its decision in *E.Z. Automotive Ltd. v Regina (City)*[6] ["*EZ Automotive*"]. The parties were granted leave to file written submissions respecting the effect of that decision on the standard of review applicable to this matter.

[23] Ireland argues that *EZ Automotive* confirms that the Board's approach, of applying a correctness standard to appeals on questions of law, is the appropriate standard.

[24] In *Canada (Minister of Citizenship and Immigration) v Vavilov*[7] ["*Vavilov*"], the Supreme Court of Canada held that the presumption of a reasonableness standard of review is rebutted where there is a statutory appeal mechanism. Thus section 4-8 of the Act rebuts the presumption of reasonableness because it is a statutory appeal mechanism and because it only allows appeals on a question of law.

[25] Even if *Vavilov* does not apply to internal appeals, it is clear that legislative intent is of crucial importance. The Act indicates an intent that if the Adjudicator made an error of law then the Board has the authority to overturn that decision and substitute a decision that correctly

[6] 2021 SKCA 109 (CanLII).
[7] 2019 SCC 65.

applies the law. *EZ Automotive* found it inappropriate to apply a reasonableness standard to questions of law.

Appeal from Adjudicator's Decision:

[26] Ireland agrees with the Adjudicator that *Arcand* established the appropriate test for the Adjudicator to apply in determining this matter.

[27] First, Ireland was required to show that she was engaged in a protected activity under the Act. The Adjudicator correctly found that Ireland was engaged in a protected activity.

[28] Second, Ireland was required to establish a *prima facie* case of discriminatory action. This is not a particularly onerous burden. To establish a *prima facie* case of discriminatory action required Ireland to establish that the Employer took action against her falling within the definition of discriminatory action in clause 3-1(1)(i) of the Act.[8] Ireland relies on the following actions of the Employer as discriminatory action: removal of her Facebook administrative access; the Employer sent the RCMP Officer to her home to investigate her as a former employee suspected of theft; the Employer cancelled her business cell phone service; the Employer submitted two ROEs that both indicated she had resigned; her health benefits were changed and then cancelled. The removal of her Facebook administrative access, and reinforcement of this action by the later events, established the *prima facie* case.

[29] Ireland relies on the evidence of the RCMP Officer who investigated the break-in as evidence that she had been terminated. The Adjudicator stated that his testimony included the following statement:

> *111 . . . They [Manager and Front Counter Person] referred to the person as a former employee. That was she was a no show, and was not working.*

[30] Ireland argues that since the RCMP Officer's evidence was in direct conflict with that given by Huziak and the office manager respecting whether they referred to her as a former employee, the Adjudicator was required to assess his credibility in comparison to the credibility of Huziak and the office manager.

[31] Ireland disagrees with the Adjudicator's finding that the mis-description of her position on the ROE, removal of her duties as administrator of the Facebook page and cancellation of her

[8] *Britto v. University of Saskatchewan*, 2016 CanLII 74280 (SK LRB).

business cell phone service did not adversely affect the terms and conditions of her employment. Ireland relied on *Beggs v. Westport Foods Ltd.*[9] ["*Beggs BCCA*"] to argue that the Employer should have been found to have terminated her employment when it refused to update her inaccurate ROE.

[32] Ireland argues that the Adjudicator failed to analyze the other discriminatory actions taken against her: termination of her health benefits and the Employer's lack of efforts to return her to work.

[33] The culmination of these factors triggered the reverse onus on the Employer to show good and sufficient other reason for Ireland's termination. Ireland argued that the Employer had no good and sufficient other reason for taking these discriminatory actions against her.

[34] Ireland relies on *JR v Chip and Dale Homes*[10], which stated that the length of time between an employee's protected activity and an employer's alleged discriminatory action is relevant, to argue that the short period of time involved here required the Adjudicator to undertake a more careful analysis of the Employer's actions.

[35] With respect to remedy, Ireland requests that in lieu of reinstatement, the Employer pay her:

- Back pay representing base wages of $1,250 per week from mid-June 2019 to at least the date of this decision;
- Back pay representing lost commissions of $1,153.85 per week for the same time frame;
- Compensatory damages of $25,000; and
- Legal expenses on a solicitor-client scale or alternatively, $1,000/day for each day of the hearing and the appeal.

Ireland argues that she is entitled to compensation from the date of the discriminatory action which, according to her, occurred as early as June 27, 2019.

[36] She submits that there were no *bona fide* efforts by the Employer to return her to work. She relies here on *Beggs v. Westport Foods Ltd.*[11] ["*Beggs BCSC*"] which she says indicates that

[9] 2011 BCCA 76 (CanLII).
[10] August 23, 2016, LRB File No. 030-15.
[11] 2010 BCSC 833 (CanLII).

the letters provided to her by the Employer in 2020 were lacking in the substance they should have contained. Ireland argues that the Adjudicator erred by neglecting to analyze the substance and *bona fide* character of the letters.

[37] Ireland also relied on the following summary of abandonment in *Betts v IBM Canada Ltd.*[12]:

> *While an actual resignation must be clear and unequivocal, the test for abandonment is similar to the test for resignation: do the statements or actions of the employee, viewed objectively by a reasonable person, clearly and unequivocally indicate an intention to no longer be bound by the employment contract. . . .*

This, she argues, means that she did not abandon her employment when she declined to provide the information requested by the Employer or return to work in June 2020.

[38] With respect to the issue of the Board's power to order the payment of legal expenses. Ireland argues that the Board has authority to make that Order pursuant to subsection 6-103(1) and clause 6-103(2)(c) of the Act. These provisions, Ireland argues, give the Board the power to grant remedies that are incidental to the attainment of the purposes of the Act and allow the Board to make whole the aggrieved party in discriminatory action cases, including through awarding legal expenses to an individual such as Ireland, who was terminated for seeking the health and safety protections of the Act. The legal expenses she incurred were incidental to the discriminatory action complaint. Further, an award of legal expenses would be an Order that is ancillary to remedies provided for in the Act in discriminatory action cases.

[39] Ireland also refers to *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*[13] ["*Hartmier*"], a duty of fair representation case. The Board ordered the union in that matter to reimburse the applicant for a portion of her legal expenses on the basis that she should be compensated for a breach of the statutory duty owed to her. Applying that rationale to this matter, Ireland requests that her full legal expenses be awarded because the Employer breached the statutory duty it owed to her.

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[12] 2015 ONSC 5298 (CanLII) at para 57.
[13] 2017 CanLII 20060 (SK LRB).

Argument on behalf of Employer:

Standard of Review:

[40] The Employer argues that *EZ Automotive* clarified that *Vavilov* was not meant to change the standard of review for internal administrative appeals, such as an appeal to the Board from the Adjudicator's decision. Pre-*Vavilov* determinations of the Board are therefore determinative with respect to the applicable standard of review[14]. This means that the standard of review is reasonableness. The intention of the Legislature is to give deference to the Adjudicator, who has directly observed and assessed the evidence.

[41] The Adjudicator's decision clearly demonstrates an understanding and appreciation of the relevant legal test. The Adjudicator clearly concluded that Ireland was not terminated. The Adjudicator reviewed the appropriate facts and law. The Adjudicator's decision should be upheld on the reasonableness standard.

Appeal from Adjudicator's Decision:

[42] Ireland is restricted to appealing the Adjudicator's decision to the Board on a question of law. Many of Ireland's arguments go beyond that jurisdiction and should therefore be disregarded by the Board.[15]

[43] The Adjudicator's decision dealt with an appeal of Ireland's discriminatory action complaint. Any references by Ireland to the merits of her harassment complaint or the workplace conditions are beyond the scope of this appeal. The Adjudicator noted:

> *When the Harassment Complaint was changed to a Discriminatory Action complaint, it was agreed by the parties hereto that the Harassment Complaint was out of the scope of the appeal. The appeal would only deal with whether there was discriminatory action taken against Ms. Ireland.*[16]

[44] In *Wieler v Saskatoon Convalescent Home*, the Board considered the extent of its authority on an appeal on a question of law. The Board found that, in addition to questions of law, in appropriate circumstances, questions of mixed fact and law can be shown to involve an error in law. Findings of fact may also be reviewable as questions of law:

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[14] For example, *Thiele v Hanwel*, 2016 CanLII 98644 (SK LRB); *Onsite Oilfield Services Inc. v. Government of Saskatchewan*, 2018 CanLII 38243 (SK LRB); *Lund v West Yellowhead Waste Resource Authority Inc.*, 2017 CanLII 30151 (SK LRB).

[15] *Simonson v Finning Canada and the Cat Rental Store*, 2020 CanLII 103929 (SK LRB).

[16] The paragraph quoted here is from the first instance of the numbering of a paragraph as paragraph 232.

> *The Courts have also noted that in appropriate circumstances, findings of fact may be reviewable as questions of law where the findings are unreasonable in the sense that they ignore relevant evidence, take into account irrelevant evidence, mischaracterize relevant evidence, or make irrational inferences on the facts.* [17]

[45] The Employer argues that none of the Adjudicator's findings of fact in this matter are reviewable as questions of law.

[46] The Employer agrees that the Adjudicator correctly relied on *Arcand* as establishing the relevant legal test that she was to apply to the facts as she found them.

[47] The Employer takes no issue with the Adjudicator's finding that Ireland was engaged in a protected activity.

[48] The Employer argues that the Adjudicator correctly found that the Employer had not engaged in discriminatory action.

[49] The Adjudicator correctly found that employers are required by the *Employment Insurance Regulations*[18] to complete a ROE whenever there is an interruption of earnings. The ROE filed as an exhibit before the Adjudicator indicates that there are a number of reasons that cause an interruption of earnings that do not involve a termination of employment. Issuing the ROE was not a discriminatory action.

[50] The Adjudicator also correctly found that none of the other actions cited by Ireland had any adverse effect on the terms and conditions of her employment, and therefore no discriminatory action was taken by the Employer against Ireland. The removal of Ireland as an administrator for the Facebook page was a business decision made because the Employer needed to manage the page in her absence. The cancellation of her business cell phone service was also a business decision that was made because she was not conducting the Employer's business. These were normal business continuity measures when an employee is away from work and unable to perform their duties.

[51] With respect to the Employer's interaction with the RCMP Officer investigating the break-in, the Employer argued that whether or not Huziak and the office manager referred to Ireland as

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[17] 2014 CanLII 76051 (SK LRB) at para 16.
[18] SOR/96-332.

a former employee is irrelevant to the Adjudicator's decision. Such a statement would not equate to termination of employment.

[52] The Adjudicator correctly held that no back wages are payable when an employee chooses not to return to work or is medically unable to return to work. An employer is entitled to sufficient proof of illness when an employee claims to be medically unable to return to work[19].

[53] The Employer argues that Ireland is seeking damages and remedies that are beyond the scope of the powers of the Board.

[54] With respect to legal expenses, the Employer submits that the Board does not have jurisdiction to award costs when hearing an appeal of a decision of an Adjudicator because the Act has not provided the Board with that power.[20] The powers of the Board, Adjudicator and OHS Officer all flow from section 3-36 of the Act, which provides a closed list of remedies.

[55] The Employer also disagrees that the Board can rely on *Hartmier* as a precedent to authorize an award of costs. First, *Hartmier* is in an entirely different context, being a duty of fair representation claim. Second, the Employer argues, *Hartmier* is no longer good law, having been decided prior to *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*. In the alternative, if there is any basis to award costs, they should be awarded in favour of the Employer.

Relevant Statutory Provisions:

[56] The following provisions of the Act were considered in the determination of this appeal:

> *Interpretation of Part*
> *3-1(1) In this Part and in Part IV:*
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> > *. . .*
> > *(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*

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[19] *Saskatchewan (Labour Relations and Workplace Safety) v Saskatchewan Government and General Employees' Union*, 2015 CanLII 23030 (SK LA).
[20] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), [2011] 3 SCR 471.

(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);

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;

(c) assists or has assisted with the activities of an occupational health committee or occupational health and safety representative;

(d) seeks or has sought the establishment of an occupational health committee or the designation of an occupational health and safety representative;

(e) performs or has performed the function of an occupational health committee member or occupational health and safety representative;

(f) refuses or has refused to perform an act or series of acts pursuant to section 3-31;

(g) is about to testify or has testified in any proceeding or inquiry pursuant to:

(i) this Part or the regulations made pursuant to this Part; or

(ii) Part V or the regulations made pursuant to that Part;

(h) gives or has given information to an occupational health committee, an occupational health and safety representative, an occupational health officer or other person responsible for the administration of this Part or the regulations made pursuant to this Part with respect to the health and safety of workers at a place of employment;

(i) gives or has given information to a radiation health officer within the meaning of Part V or to any other person responsible for the administration of that Part or the regulations made pursuant to that Part;

(j) is or has been prevented from working because a notice of contravention with respect to the worker's work has been served on the employer; or

(k) has been prevented from working because an order has been served pursuant to Part V or the regulations made pursuant to that Part on an owner, vendor or operator within the meaning of 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.

(3) If an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 3-35, the occupational health officer shall advise the worker of the reasons for that decision in writing.

(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.

(5) The amount of money that an occupational health officer may require to be paid pursuant to clause (2)(c) is to be reduced by an amount that the officer is satisfied that the worker earned or should have earned during the period when the employer was required to pay the worker the wages.

(6) The employer has the onus of establishing the amount of the reduction mentioned in subsection (5).

Compliance undertakings and notices of contravention

3-38(1) An occupational health officer shall act pursuant to subsection (2) if the occupational health officer is of the opinion that a person:

(a) is contravening any provision of this Part or the regulations made pursuant to this Part; or

(b) has contravened any provision of this Part or the regulations made pursuant to this Part in circumstances that make it likely that the contravention will continue or will be repeated.

(2) In the circumstances mentioned in subsection (1), the occupational health officer shall:

(a) subject to subsection (4), require the person to enter into a compliance undertaking; or

(b) serve a notice of contravention on the person.

(3) For the purposes of subsection (2):

. . .

(b) a notice of contravention must:

(i) cite the contravened provision of this Part or of the regulations made pursuant to this Part;

(ii) state the reasons for the occupational health officer's opinion; and

(iii) require the person to remedy the contravention within a period specified by the occupational health officer in the notice of contravention.

Decisions not stayed by appeals

3-57(1) Subject to subsections (2) and (3), the commencement of an appeal pursuant to section 3-53 or 3-56 does not stay the effect of a decision that is being appealed.

(2) The director of occupational health and safety may, on the director's own motion, stay the effect of all or any portion of a decision if an appeal from that decision is to be heard by the director.

(3) An adjudicator may, on the adjudicator's own motion, stay the effect of all or any portion of a decision if an appeal from that decision is to be heard by the adjudicator.

> *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.*
> *. . .*
> *(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.*
>
> *General powers and duties of board*
> *6-103(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*
> *(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
> > *. . .*
> > *(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act;*

[57] The Board also considered certain provisions of the *Employment Insurance Regulations*. Section 14 of those Regulations describes situations where an interruption of earnings occurs. Relevant to this matter is subsection (2), which states:

> *(2) An interruption of earnings from an employment occurs in respect of an insured person at the beginning of a week in which a reduction in earnings that is more than 40% of the insured person's normal weekly earnings occurs because the insured person ceases to work in that employment by reason of illness, injury or quarantine, pregnancy, the need to care for a child or children referred to in subsection 23(1) of the Act or the need to provide care or support to a family member referred to in subsection 23.1(2) of the Act, to a critically ill child or to a critically ill adult.*

[58] Subsection 19(2) of those Regulations then states:

> *19(2) Every employer shall complete a record of employment, on a form supplied by the Commission, in respect of a person employed by the employer in insurable employment who has an interruption of earnings.*

Analysis and Decision:

Standard of Review:

[59] The first issue for the Board to address is the applicable standard of review. In recent appeals pursuant to Part IV of the Act[21], the Board has found that the applicable standard of review is correctness, relying on the following determination by the Court of Appeal for Saskatchewan in *Lepage Contracting Ltd. v Saskatchewan (Employment Standards)*:

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[21] For example, *Lepage Contracting Ltd. v Lance McCutcheon*, 2020 CanLII 10515 (SK LRB*); Saskatchewan Polytechnic Students' Association Inc. v Ryan Benard*, 2021 CanLII 31416 (SK LRB).

> *The Board dealt first with a jurisdictional issue raised by the Director and the standard of review. It decided, in my view correctly, that because LCL's statutory right of appeal to the Board was limited to questions of law, the standard of review was the appellate standard applicable to such questions, being correctness: Decision at para 30; Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at paras 36–37, 441 DLR (4th) 1. . . .*[22]

[60] In *EZ Automotive*, the Court of Appeal provided further direction with respect to this issue. It stated:

> *[53] In City Centre – the key Saskatchewan authority on the approach to be taken in determining the internal standard of review – Whitmore J.A. asked the following question:*
>
> > *[42] …What approach should be taken in determining the standard of review to be applied by an administrative appellate tribunal to the decision of an administrative tribunal of first instance? That is, should the approach be that of Dunsmuir, the appellate standard as stated in Housen v Nikolaisen, 2002 SCC 33, [2002] 2 SCR 235 [Housen], or something else entirely?*
> >
> > *[43] As will be demonstrated below, courts have not followed Dunsmuir or Housen in this context, and have instead taken different approaches. While the proper approach and what factors are considered remains unsettled, there is, nevertheless, one common theme among jurisdictions: What role did the Legislature intend the appellate tribunal to play? I will summarize the varying approaches taken to resolve this question.*
> >
> > *. . .*
> >
> > *[59] In my view, this is the proper approach to determining the standard of review that the Committee should apply in the present case. <u>The standard of review should be determined by conducting a full exercise in statutory interpretation, which ultimately will answer what respective roles the Legislature intended the Committee and Board to fulfill.</u> Consequently, I will now turn to the governing principles of statutory interpretation, which demonstrate the Legislature intended for the Committee to fulfill a traditional appellate role such that it gives deference to the Board on questions of fact.*
>
> *. . .*
>
> *[73] In the result, it is my view that selecting the internal standard of review to be applied by the PAC calls for an analysis of the kind carried out in City Centre; that is, "[t]he standard of review should be determined by conducting a full exercise in statutory interpretation, which ultimately will answer what respective roles the Legislature intended the Committee and Board to fulfill" (at para 59). That interpretation must be in accordance with the modern principle codified in s. 2-10(1) of The Legislation Act.* [emphasis added by Court]

[61] In other words, *EZ Automotive* requires the Board to conduct a full exercise in statutory interpretation to determine the appropriate standard of review for the Board to apply to the Adjudicator's decision.

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[22] 2020 SKCA 29 (CanLII) at para 15.

[62] When Ireland made her OHS complaint, it was first considered by an OHS Officer. Pursuant to section 3-6 of the Act, the Minister responsible for the administration of the Act ["Minister"] may appoint any employees of the Ministry over which the Minister presides as OHS Officers. Section 3-36 of the Act applies to an OHS Officer who is in receipt of a discriminatory action complaint. No process is prescribed that an OHS Officer must follow before making a decision.

[63] Where, as in this case, a person who is directly affected by an OHS Officer's decision is not satisfied with that decision, it may be appealed to the OHS Director. Pursuant to section 3-3 of the Act, the Minister shall appoint an employee of the Ministry as the OHS Director. This appeal is governed by section 3-53 of the Act, which establishes a process for the purpose of ensuring that all parties have an opportunity to make representations to the OHS Director before a decision is made. Under subsection 3-53(10), the OHS Director may, instead of hearing the appeal, choose to refer it directly to an Adjudicator.[23] Under section 3-54, if the matter at issue in the appeal involves harassment or discriminatory action, the appeal goes directly from the OHS Officer to an Adjudicator. That is what occurred in this matter.

[64] Part IV of the Act provides details with respect to appeals to Adjudicators. Unlike the OHS Officers and OHS Director, who are employees of the Ministry, Adjudicators are chosen and appointed to be independent of the Ministry. They are appointed by the Lieutenant Governor in Council after consultation by the Minister with labour organizations and employer associations. While the Act allows for qualifications to be prescribed by regulation, no qualifications have been prescribed. Adjudicators are appointed for a term not exceeding three years, may be reappointed, and are paid for their services at rates approved by the Lieutenant Governor in Council (section 4-1).

[65] The Board Registrar selects the Adjudicator who will hear an appeal (section 4-3). Section 4-4 sets out some of the rules of procedure that apply to hearings before an Adjudicator:

> *Procedures on appeals*
> *4-4(2) Subject to the regulations[24], an adjudicator may determine the procedures by which the appeal or hearing is to be conducted.*
> *(3) An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.*
> *(4) An adjudicator may determine any question of fact that is necessary to the adjudicator's jurisdiction.*
> *(5) A technical irregularity does not invalidate a proceeding before or by an adjudicator.*

[23] If the Director hears the appeal, s. 3-56 provides for an appeal from the OHS Director to an Adjudicator.
[24] No regulations have been enacted on this issue.

[66] Section 4-5 provides significant powers to an Adjudicator, for example, to require parties to provide particulars and produce documents or things; to summon and enforce the attendance of witnesses; to administer oaths and affirmations; to receive and accept any evidence and information that the Adjudicator considers appropriate. The Adjudicator is also to make efforts to encourage settlement of a harassment or discriminatory action appeal.

[67] Following the hearing, section 4-6 provides that the Adjudicator can dismiss or allow the appeal or vary the decision being appealed. The Adjudicator is required to provide written reasons for the decision.

[68] Section 4-8 allows a person directly affected by the Adjudicator's decision to appeal to the Board, but only on a question of law. Section 4-10 allows the OHS Director to appeal from a decision of an Adjudicator to the Board on a question of law or a question of mixed law and fact. The appeal in both cases is heard on the basis of the record, which consists of: the decisions of the OHS Officer and OHS Director; the notices of appeal filed with the OHS Director and the Board; any exhibits filed before the Adjudicator; the Adjudicator's decision; and any other material that the Board may require to properly consider the appeal. After considering the appeal, the Board may affirm, amend or cancel the decision or order of the Adjudicator or remit the matter back to the Adjudicator for amendment of the Adjudicator's decision or order, with any directions that the Board considers appropriate.

[69] The final appeal available to a dissatisfied party is an appeal on a question of law to the Court of Appeal from the Board, if a judge of the Court of Appeal grants leave to appeal:

> *Appeal to Court of Appeal*
> *4-9(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.*
> *(2) A person, including the director of employment standards or the director of occupational health and safety, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.*

[70] Based on the criteria set out in *EZ Automotive*, the Board finds that these provisions lead to a finding that the legislative intent is that the Board is to apply an appellate standard of review of correctness to the Adjudicator's decision.

[71] In *EZ Automotive*, after undertaking a full statutory review of the appellate scheme applicable in that matter, the Court made the following finding with respect to the internal standard

of review to be applied by the Planning Appeals Committee of the Saskatchewan Municipal Board on appeals from the Development Appeals Board:

> *[91] I would first note that the decision-making structure in relation to planning and development appeals is, for the purposes of the standard of review analysis, substantially the same as the assessment appeal process considered in City Centre. To paraphrase City Centre, the PAC, unlike the Board, is not a tribunal of first instance. The Board receives evidence and hears witnesses. It creates the record. The PAC, on the other hand, decides on the basis of that record and hears new evidence only in narrow circumstances. Its function is not to conduct hearings de novo, but to review for error. If an error is found, it may correct it, by confirming, revoking or varying the decision – including a decision of a development officer – and, within the limits specified in s. 221 of the PDA, may make the decision it considers advisable.* [emphasis added by Court]

[72] Applying that rationale to this appeal, the Board, unlike the Adjudicator, is not a tribunal of first instance. The Adjudicator receives evidence and hears witnesses. She creates the record. The Board, on the other hand, decides on the basis of that record and hears new evidence only in narrow circumstances. Its function is not to conduct hearings *de novo*, but to review for error. If an error is found, it may correct it, by amending or cancelling the decision or remitting it back to the Adjudicator with directions, as specified in subsection 4-8(6) of the Act.

[73] As in *EZ Automotive*, this appellate structure means that the Board has a traditional appellate function. This is even more true here, where the Legislature has only provided for an appeal from an Adjudicator to the Board, and from the Board to the Court, on questions of law. *EZ Automotive* reinforces this finding:

> *[94] I agree that "stacked" appeals based on a reasonableness standard would not make sense. The goal is to determine what respective roles the Legislature intended the PAC and the Board to fulfill. The Legislature has provided for appellate oversight by this Court. If the apex internal appellate tribunal – here, the PAC – was obliged to apply a reasonableness standard in relation to questions of law, the question for this Court on an appeal would not be whether the Board or the PAC erred in interpreting the law. Rather, it would be whether the PAC adopted and correctly applied the reasonableness standard of review when considering the Board's decision. If that was the case, the first and last word on the interpretation of the legislation and bylaws would rest with the Board, within the limits of reasonableness. In the result, the Court would be unable to effectively exercise its appellate oversight function. The appropriate standard is correctness.*

[74] Again, applying that rationale to this appeal structure, the goal is to determine what respective roles the Legislature intended the Board and the Adjudicator to fulfill. The Legislature has provided for appellate oversight by the Court. If the apex internal appellate tribunal – here, the Board – was obliged to apply a reasonableness standard in relation to questions of law, the question for the Court on an appeal would not be whether the Adjudicator or the Board erred in interpreting the law. Rather, it would be whether the Board adopted and correctly applied the

reasonableness standard of review when considering the Adjudicator's decision. If that was the case, the first and last word on the interpretation of the Act would rest with the Adjudicator, within the limits of reasonableness. In the result, the Court would be unable to effectively exercise its appellate oversight function. The appropriate standard is correctness.

[75] In applying the standard of correctness, the Board must keep in mind that Ireland is restricted by the Act to appealing the Adjudicator's decision to the Board only on a question of law, and therefore Ireland's grounds of appeal must first be reviewed to determine whether they actually raise questions of law.

[76] The Court of Appeal for Saskatchewan explained this in *PSS Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*[25] ["*PSS Professional Salon Services*"]:

> *[58] True, the presence or absence of a right of appeal is one of the four contextual factors to be considered in selecting an appropriate standard of review, but a right of appeal confined to a question of law is of greater significance than this. I say this with the distinction in mind between a ground of review and a standard of review. There must be a tenable ground for review before the issue of an appropriate standard of review arises. Here, the right of appeal, confined as it is, serves to limit the ground upon which an appellant may seek judicial review, limiting the ground to questions of law.*
>
> *[59] This serves to dictate the first order of business: To determine if the ground upon which the appeal is based gives rise to a question of law, for unless it does so there is no right in the appellant to seek judicial review of the decision of the Tribunal, nor any power in the Court to conduct that review.* [emphasis in original]

[77] In *Housen v Nikolaisen*[26] the Supreme Court of Canada explained the application of the appellate standard of review. Where the only ground of review is, as here, a question of law, the standard applies as follows.

[78] First, on a pure question of law, the standard of review is correctness.

[79] Second, if it is determined that a matter being reviewed involves the application of a legal standard to a set of facts, it is thus a question of mixed fact and law. A question of mixed fact and law is subject to review on the correctness standard if an extricable question of law can be identified, and it is found that the Adjudicator's interpretation of that law was not correct. The extricable question of law raised in this appeal is whether the Adjudicator properly interpreted the relevant provisions of the Act and the *Employment Insurance Regulations* before applying them to the facts as she found them.

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[25] 2007 SKCA 149 (CanLII).
[26] 2002 SCC 33 (CanLII), [2002] 2 SCR 235.

[80] Finally, with respect to findings of fact, the Board held as follows in *Missick v Regina's Pet Depot* [27]:

> *Ms. Missick asks the Board to review various, alleged factual errors, but the Board's jurisdiction to review such errors is limited. They must be found to be grounded in errors of law. Factual questions rarely meet the test for a question of law. A finding of fact may be grounded in an error of law only 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.*

[81] The Court of Appeal for Saskatchewan described the test as follows in *PSS Professional Salon Services*:

> *[60] It is clear that the appeal against the decision of the Tribunal comes down to its findings of fact. This is not to say that there is, therefore, no tenable ground for review of the decision, but it must be understood that the decision is only reviewable to the extent the findings of fact upon which it rests are attended by error of law.*
>
> *. . .*
>
> *[67] As a matter of statutory implication, then, persons fastened with the duties and exercising the powers of a human rights tribunal when called upon to hear a complaint, are required as a matter of principle (much as judges are), to determine the facts in controversy on the basis of the relevant evidence before them (leaving aside matters of fact in relation to which they may take judicial notice). Hence, they are required in principle to consider and weigh the relevant evidence as the faculty of judgment commends when exercised impartially, fairly, in good faith, and in accordance with reason, bearing in mind the governing standard of proof and the location of the onus of proof.*
>
> *[68] It follows that a tribunal cannot reasonably make a valid finding of fact on the basis of no evidence or irrelevant evidence. Nor can it reasonably make a valid finding of fact in disregard of relevant evidence or upon a mischaracterization of relevant evidence. To do so is to err in principle or, in other words, to commit an error of law. (In addition to the cases referred to above, see Toneguzzo-Norvell v. Burnaby Hospital, 1994 CanLII 106 (SCC), [1994] 1 S.C.R.114 at 121; Wade & Forsyth, Administrative Law (7th ed.) (Oxford: Clarendon Press, 1994) at pp. 316—20; Jones & de Villars, Principles of Administrative Law (4th ed.) (Toronto: Thomson Carswell, 2004) at pp. 244—43 and 431—36; and Hartwig v. Wright (Commissioner of Inquiry), 2007 SKCA 74). Nor can a tribunal reasonably make a valid finding of fact based on an unfounded or irrational inference of fact.*
>
> *[69] The all-important point is that to make a finding of fact on any of these bases is to err in principle by offending the implicit requirements of the statute, as well as the common law duty of procedural fairness perhaps. To suppose otherwise is to suppose the legislature intended, in conferring power upon a human rights tribunal to determine facts in controversy much as judges do, to empower the tribunal to engage in unfounded, unreasonable, or arbitrary fact-finding. The fact-finding process, or method by which facts in controversy are to be determined in this quasi-judicial setting, does not permit of this, either in its statutory or common law conception.* [emphasis in original]

[27] 2020 CanLII 90749 (SK LRB) at para 18.

[82] It is not sufficient for Ireland to argue that she disagrees with the Adjudicator's interpretation of the facts. She must meet this very high bar of satisfying the Board that the Adjudicator made her findings of fact on the basis of no evidence or irrelevant evidence, in disregard of relevant evidence, on a mischaracterization of relevant evidence or on an unfounded or irrational inference of fact.

Appeal from Adjudicator's Decision:

[83] The Board finds that the Adjudicator properly identified the legal issues she was to address, as set out in *Arcand*.

[84] First, the Adjudicator correctly found that she was to determine whether Ireland was engaged in a protected activity. The Adjudicator found that she was. Neither party takes issue with that finding.

[85] The Adjudicator then was to determine whether the Employer took discriminatory action against Ireland. Discriminatory action is defined in clause 3-1(1)(i) of the Act. It requires the Adjudicator to have found "an action or threat of action" by the Employer that "does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion". The Adjudicator found that the Employer did not take discriminatory action against Ireland.

[86] In *Britto v. University of Saskatchewan*[28], the Board agreed with the Adjudicator that in an appeal from an OHS Officer, the initial onus is on the employee to establish a *prima facie* case of discriminatory action. The employee must establish that the employer took action against the employee falling within the definition of "discriminatory action" as set out in clause 3-1(1)(i) of the Act.

[87] The question for the Adjudicator, then, was whether Ireland established a *prima facie* case that any of the actions she complained of had an adverse effect on the terms and conditions of her employment. This is a question of mixed fact and law. The role for the Board is to determine whether the Adjudicator properly interpreted the law that she applied to the facts as she found them.

[28] 2016 CanLII 74280 (SK LRB), at para 10.

[88] The Adjudicator correctly interpreted the *Employment Insurance Regulations* when she found that the completion of the ROEs did not affect Ireland's terms and conditions of employment. Completing the ROE was a statutory obligation with which the Employer was required to comply. The Adjudicator found as a fact that the office manager incorrectly describing her title could have no effect on Ireland's terms and conditions of employment because the office manager had no authority to change the terms and conditions of Ireland's employment. The office manager testified before the Adjudicator that it was a clerical error. The Adjudicator accepted that evidence[29] and there is no basis on which the Board would overturn that finding.

[89] Next, no matter what Huziak and the office manager said to the RCMP Officer about Ireland's work status, a discussion with a third party does not change the terms and conditions of her employment. The Board does not agree with Ireland's assertion that the Adjudicator preferred the evidence of the Employer's witnesses over that of the RCMP Officer. Even if Huziak and the office manager advised the RCMP Officer that Ireland was a former employee, again, the Adjudicator correctly interpreted clause 3-1(1)(i) when she found that such a statement to a third party would not satisfy its requirements. Ireland took issue with the fact that the Adjudicator did not undertake an extensive analysis of the credibility of the witnesses on this issue. The Board is of the view that it was unnecessary for the Adjudicator to do so, as it was not relevant to the determination she was required to make.

[90] Ireland was on an extended leave of absence from her employment. The duties she would have performed had she been at work had to be carried out by someone else in her absence. The Adjudicator found that assigning someone else to perform her duties in her absence (Facebook administrator) cannot be characterized as an action that adversely affected the terms or conditions of her employment. The Board finds no error of law in that determination.

[91] The Adjudicator found that the Employer provided Ireland with cell phone service for the purposes of carrying out her job responsibilities; since she was not carrying out those responsibilities during her leave of absence, there was no obligation on the Employer to continue to provide her with cell phone service. The Adjudicator found that cancelling the cell phone service that was provided to her for the purpose of carrying out her employment duties cannot be characterized as an action that adversely affected the terms or conditions of her employment. Again, the Board finds no error of law in that determination.

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[29] At para 240.

[92] Turning next to the Employer's letters of January 3, February 6 and May 21, 2020, Ireland argues that what she describes as the Employer's lack of efforts to return her to work was discriminatory action. She argues that she was justified in ignoring those letters because there was no indication of whether the matters she complained of in her harassment complaint had been addressed. This argument entirely ignores the request by the Employer in the letters that stated:

> *We would like to determine when and whether a return to work is possible. To assist us the return to work and accommodation process, we ask that you provide updated medical information indicating:*
>
> 1. *When a return to work is expected;*
> 2. *What accommodations may be necessary for a return to work; and/or*
> 3. *If a return to work is not expected in the short-term, whether a return to work is expected within the next 6-12 months.*[30]

[93] The Employer requested updated medical information to explore a return to work or accommodation in the workplace. The Adjudicator correctly found that Ireland cannot veto that process by not responding to return-to-work requests yet still claim entitlement to wages.

[94] Ireland contends that *Beggs BCSC* is equivalent to this matter. The court in that matter found that Beggs had not resigned and was terminated by her employer. *Beggs BCCA* confirmed the decision of the Superior Court that Beggs had been dismissed from her employment. *Beggs BCCA* found that the crucial factor in assessing the effectiveness of a dismissal is the clarity with which it was communicated to the employee. Applying the analysis in *Beggs BCCA* to the present matter, the Board finds no error in the Adjudicator's interpretation of the law she was to apply to the facts as she found them. There was no clear and unequivocal act by the Employer in 2019 that could be characterized as a termination.

[95] With respect to the letters of re-employment that the Employer sent to Ireland in 2020, she relies on the following statement in *Beggs BCSC*:

> *[94] The letter of August 28, 2009 from the employer was not an appropriate offer to the plaintiff that she could have her old job back. The letter set out no terms or conditions, no hours or days of work, nothing with regard to her pay or what duties she would be expected to perform. The plaintiff had no way of knowing if her same job was being offered, and if not, what job or conditions she was expected to work under.*

[30] Document Book A of the record, pages 63, 77 and 80.

[96] The Board does not agree that *Beggs BCSC* is persuasive in this matter. It was a wrongful dismissal case in the courts. The Adjudicator found as a fact that the letters provided to Ireland left no ambiguity about the job to which she would be returning because, unlike Beggs, Ireland had not been terminated. The OHS Officer ordered that she be reinstated and the Employer was doing its best to comply with that Order. As in *Saskatchewan (Labour Relations and Workplace Safety) v Saskatchewan Government and General Employees' Union*[31], Ireland's refusal to provide the Employer with the information it required to bring her back into the workforce appropriately led to the letter of June 1, 2020 terminating her employment.

[97] The only issue that Ireland raised that could possibly have been interpreted to affect the terms and conditions of her employment was when the Employer removed her health benefits. The evidence accepted by the Adjudicator on this issue was that the Employer did not do this until October 17, 2019, ten days after her second medical note expired without her returning to work or providing any explanation for her absence. The Adjudicator found that this did not meet the requirements to be characterized as discriminatory action. The Board finds no error in this determination: as Ireland had abandoned her position, she had no employment status at that time.[32]

[98] Ireland has not persuaded the Board that the Adjudicator made an error of law when she determined that the Employer did not take discriminatory action against her. The Adjudicator found that the actions by the Employer did not adversely affect Ireland's employment. Ireland argues that the Adjudicator failed to appreciate the true impact those actions had on Ireland's employment. Ireland has not convinced the Board that any of the Adjudicator's findings of fact could be characterized as an error of law. An appeal to the Board is not an opportunity to revisit all the facts. It is a review of the decision based on the factual findings of the Adjudicator. It is the Adjudicator who heard the evidence. Revisiting factual findings only takes place in the narrowest of circumstances where a question of fact becomes a question of law. Ireland has not satisfied the Board that the Adjudicator made her findings of fact on the basis of no evidence or irrelevant evidence, in disregard of relevant evidence, on a mischaracterization of relevant evidence or on an unfounded or irrational inference of fact. As a result, the Board is bound by the Adjudicator's findings of fact; no error of law was identified.

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[31] 2015 CanLII 23030 (SK LA).

[32] At page 32 of Document Book A, the record includes a doctor's note addressed "To Whom It May Concern", dated October 22, 2019, that stated: "Christine Elizabeth Ireland will be off work for medical reasons between the following dates: 7th October, 2019 to 31st December, 2019".

[99] Even if the Adjudicator had been wrong in her determination that the Employer took no discriminatory action against Ireland, she correctly found that no back wages would have been payable. The Adjudicator found as a fact that Ireland was unable to work and earn any wages during the time period for which she claimed them. Further, she failed to participate in the return to work process; she cannot veto the process and still claim back wages. A finding of discriminatory action only entitles an employee to wages she would have earned.

[100] The Adjudicator also correctly determined that she had no authority to order the payment of compensatory damages.

[101] In her appeal to the Board Ireland argued that the Board should order the Employer to pay her legal expenses. In light of the Board's findings, there is no need to consider the parties' arguments respecting this issue.

[102] The Board thanks the parties for the comprehensive oral and written arguments they provided, which the Board has reviewed and found helpful.

[103] The decision of the Adjudicator is affirmed.

DATED at Regina, Saskatchewan, this **8th** day of **October, 2021.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson