

JEFFREY ROMFO, Appellant v CITY OF NORTH BATTLEFORD and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 287, Respondents

LRB File No. 029-20; April 19, 2021

Chairperson, Susan C. Amrud, Q.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

For the Appellant, Jeffrey Romfo:

Marilyn P. Adsit

For the Respondent, City of North Battleford:

Brent M. Matkowski

For the Respondent, Canadian Union of Public
Employees, Local 287:

Will Bauer

Appeal from decision of Adjudicator dismissing appeal – Adjudicator made error of law in calculating final date for filing of Notice of Appeal – Decision of Adjudicator cancelled and appeal remitted to Adjudicator to be determined on its merits.

Appeal from decision of Adjudicator dismissing appeal – Adjudicator made error of law when he disregarded relevant evidence respecting when Notice of Appeal was filed with Director – Decision of Adjudicator cancelled and appeal remitted to Adjudicator to be determined on its merits.

REASONS FOR DECISION

Background:

[1] **Susan C. Amrud, Q.C., Chairperson:** The matter before the Board is an appeal from a decision of an Adjudicator pursuant to section 4-8 of *The Saskatchewan Employment Act* ["Act"]. This matter commenced when Jeffrey Romfo ["Employee"] made a complaint pursuant to Part III of the Act against his employer, the City of North Battleford ["Employer"]. Occupational Health Officer Shawn Tallmadge made a decision dated December 7, 2018 in which he found that the Employer had not acted contrary to section 3-35 of the Act. The Employee appealed that decision to an Adjudicator, who dismissed his appeal by decision dated February 3, 2020. That decision did not deal with the substance of the appeal, but rather dismissed the appeal because it was, according to the Adjudicator, filed one day late. The relevant findings, for the purposes of this appeal are as follows:

[10] The Appellant contends that delivery to and receipt at the central government mailroom sufficiently discharges the filing responsibility under subsection 3-35(1). This is at odds with

the position of the City and the statement of Karla Kobayashi in her November 18 email referred to above.

[11] In short, a primary question to be addressed in this application is whether delivery to and arrival of the Notice of Appeal in a central government mailroom satisfies the requirement of "filing a written notice of appeal with the director of occupational health and safety." If this question is answered in the affirmative, then the City's application will be dismissed. If this question is answered in the negative, the Notice of Appeal will not have been filed in time and I will need to determine the effect of the answer on my jurisdiction to hear the appeal.

[12] In its written submission, the City contends "that section 3-53(2) requires the appeal to be delivered to the Director of Occupational Health and Safety by the deadline, not that it be "in the mail". It further provided the following definitions and citations with respect to the meaning of "file":

The definition of "file" within *The Dictionary of Canadian Law*, 3d ed (Toronto: Thomson Carswell, 2004) is:

1. To leave with the appropriate office for keeping. 2. Register. 3. **Requires actual delivery. A mailed document is not filed until received by the appropriate party.**

The definition of "file" within *Black's Law Dictionary*, 8th ed (St. Paul: Thomson Reuters, 2014) included:

1. To **deliver** a legal document to the court clerk or record custodian for placement into the official record. <Tuesday is the deadline for filing a reply brief-> [Emphasis in original]

[13] I accept both definitions set out above, and find that the term "file" indicates a positive duty to deliver to the appropriate office. While the method of delivery remains the choice of an appellant, the obligation to ensure delivery to the appropriate office is the appellant's responsibility. In this case, the Appellant chose to mail the Notice of Appeal in the hope that it would reach its intended destination within the relevant timeframe. As such, he accepted a risk that delivery might not be effected by the statutory deadline.¹

[2] The facts that were before the Adjudicator when he made his decision are as follows. The decision of the Occupational Health Officer is dated December 7, 2018. The return address on the letter from Tallmadge to the Employee advising him of the decision was 8th Floor, 122 3rd Avenue North, Saskatoon. It was served on the Employee on December 11, 2018. The Employee's Notice of Appeal was sent by registered mail, addressed to 8 Floor, 122 3 Avenue North, Saskatoon. It was delivered by Canada Post to the government mail room at 122 3rd Avenue North on January 3, 2019 and signed for by a person in that office on that date. A representative of the Saskatoon office of the Director of Occupational Health and Safety ["Director"] picked it up from the mail room and stamped it received on January 4, 2019. The Saskatoon OHS office then sent the appeal to the Regina OHS office which stamped it received

¹ *Jeff Romfo v City of North Battleford and Canadian Union of Public Employees, Local 287*, February 3, 2020, LRB File No. 005-19.

on January 7, 2019. At the hearing before the Adjudicator the Employer and Employee both agreed that the Notice of Appeal was due on January 3, 2019, and the Adjudicator made his decision on that basis.

[3] The written submissions filed by the Employee and Employer prior to the hearing of this appeal focused on the issue of whether the Notice of Appeal was received by the Director on January 3rd or January 4th. At the hearing, the Board raised the issue of whether the deadline for filing the Notice of Appeal was January 3rd or January 4th, and allowed the parties an opportunity to address this issue in written submissions that were filed after the hearing.

Argument on behalf of the Employee:

[4] The Employee argues that the Adjudicator erred in law when he determined that the Notice of Appeal was not filed with the Director until January 4, 2019. He argues that he addressed his Notice of Appeal to the address to which the Director advises members of the public to address their correspondence. If they have a mail room at that address that first receives mail addressed to the Director, receipt by that mail room of the Notice of Appeal is sufficient service on the Director. The mail room does not belong to Canada Post but belongs to the Government of Saskatchewan. As of January 3, 2019, the Notice of Appeal was no longer in the possession of Canada Post. The Notice of Appeal was not “in the mail”; it was in the possession and control of the Director. The public at large including the Employee is entitled to rely on the address for service as contained on the letterhead and official government website that informs the public that the mailing address for this office is 122 3rd Avenue North in Saskatoon.

[5] The Employee referred the Board to section 43 of *The Employment Standards Regulations*, which prescribes the manner for service on the Director of Employment Standards. It includes the following provisions:

Service on director of employment standards

43(1) For the purposes of subsection 9-9(3) of the Act, a document or notice may be served on the director of employment standards:

. . .

(b) by prepaid registered or certified mail addressed to the director of employment standards at the business address of the director.

(2) If a document or notice is served pursuant to clause (1)(b), service is deemed to have been effected:

(a) on the delivery date shown on the signed post office receipt card; or

(b) if the delivery date is not shown, on the day on which the signed post office receipt card is returned to the sender.

[6] If these provisions had also been prescribed for the Director, the Notice of Appeal would have been considered served on January 3, 2019. They should be applied to service of the Employee's Notice of Appeal. The Employee also referred to service provisions in *The Queen's Bench Rules* which, he argued, should also be considered by the Board in determining whether service had been effected on January 3rd.

[7] With respect to the issue of whether the deadline for filing the Notice of Appeal was January 3rd or 4th, the Employee argues that the deadline is January 4th. By properly counting Boxing Day as a holiday, it is not a business day.

Argument on behalf of the Employer:

[8] The Employer argues that the attempt by the Employee to introduce new evidence should be disallowed. The proper process to apply for the introduction of fresh evidence was not followed.

[9] Next, the Employer points out that this is an appeal only on a question of law. Relying on *Lepage Contracting Ltd. v Saskatchewan (Employment Standards)*,² it argues that the standard of review is therefore correctness. The Employer argues that the Employee has not identified an error of law, and has only raised questions of fact. Factual issues are not before the Board.

[10] The Employer argues that the Adjudicator did not make an error in law when he determined that delivery to a central government mail room does not satisfy the obligation to file the Notice of Appeal in the appropriate office.

[11] The Adjudicator found as a fact that the Notice of Appeal was received in the mail room on January 3, 2019, and that it did not arrive at the Saskatoon OHS Office until January 4, 2019, at which time they acknowledged receipt of the package.

[12] With respect to when service was effected, the Employer refers to section 4 of *The Occupational Health and Safety Regulations, 1996*:

Giving notice to division

4(1) *Subject to subsection (3), where these regulations require notice to be given to the division, the notice must be in writing, directed to the director or an officer and delivered to the director or officer personally or by fax, courier or post.*

(2) *Notice is deemed not to have been given pursuant to subsection (1) until the notice is actually received by the director or an officer.*

² 2020 SKCA 29 (CanLII).

It argues that this can be considered the prescribed method for service on the Director or at least informative with respect to the necessity for the Employee to ensure that the Director has actually received the Notice.

[13] The Employer also argues that the obligation to ensure the delivery of his appeal rested on the Employee. There is no statutory obligation on the Director to search out and acknowledge receipt of documents. The Adjudicator made no error in making that finding. It referred to subsection 9-9(4) of the Act which, it argues, would apply in this matter:

(4) A document or notice served by registered mail or certified mail is deemed to have been received on the fifth business day following the day of its mailing, unless the person to whom it was mailed establishes that, through no fault of that person, the person did not receive the document or notice or received it at a later date.

[14] The Employer argues that the Adjudicator did not make an error of law in relying on the agreement of the parties to determine that the last day for filing the appeal was January 3, 2019. The Employee did not raise the issue of the calculation of the time limit as a ground of appeal. If the Board is nevertheless prepared to review the issue of the time limit, the Employer agrees that the final day for filing the Notice of Appeal was January 4, 2019.

[15] The Respondent, Canadian Union of Public Employees, Local 287, made no written or oral submissions.

Relevant Statutory Provisions:

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

Interpretation

1-2(1) In this Act:

...

(b) "business day" means a day other than a Saturday, Sunday or holiday;

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.

...

(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.

Appeal of occupational health officer decision

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

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

Appeals re harassment or discriminatory action

3-54(1) An appeal mentioned in subsection 3-53(1) with respect to any matter involving harassment or discriminatory action is to be heard by an adjudicator in accordance with Part IV.

(2) The director of occupational health and safety shall provide notice of the appeal mentioned in subsection (1) to persons who are directly affected by the decision.

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.

Service

9-9(1) In this section, "director" means the director of employment standards appointed pursuant to Part II, the director of occupational health and safety appointed pursuant to Part III or the director of labour relations appointed pursuant to Part VI.

(3) A document or notice to be given to or served on the director must be given or served in the prescribed manner.

[17] The following provision of *The Interpretation Act, 1995* was in effect at the time of the hearing before the Adjudicator and is relevant to the determination of this appeal:

General definitions

27(1) In an enactment:

"holiday" means:

(a) Sunday;

(b) New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, Saskatchewan Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day, and when one of those dates, other than Remembrance Day or Boxing Day, falls on a Sunday, it includes the following day;

(c) any day appointed by an Act of the Parliament of Canada or by proclamation of the Governor General or Lieutenant Governor as a public holiday.

Analysis and Decision:

[18] The Employee attempted to raise new evidence in argument before the Board. The prerequisites for that to happen³ were not followed, so that evidence will be disregarded.

³ See, for example, *Missick v Regina's Pet Depot*, 2020 CanLII 90749 (SK LRB), at para 10-15.

[19] This appeal comes to the Board on a question of law, pursuant to section 4-8 of the Act. The Employer is correct that the standard of review applicable to this appeal is the appellate standard of correctness.

[20] With respect to errors in findings of fact, the Board's jurisdiction to review such errors is limited. They must be found to be grounded in errors of law. Before the Board can set aside a finding of fact made by the Adjudicator, the Employee must satisfy the Board that the Adjudicator made that finding of fact on the basis of no evidence or irrelevant evidence, in disregard of relevant evidence or on a mischaracterization of relevant evidence or on an unfounded or irrational inference of fact.

[21] The Board has determined that the Adjudicator made errors of law that lead to the conclusion that the Adjudicator's decision must be set aside.

[22] First, the Adjudicator made an error in law when he found that January 3rd was the final day for the filing of the Notice of Appeal. The OHS Officer's decision was served on the Employee on December 11, 2019. Under section 3-53, the Notice of Appeal was to be filed "within 15 business days after the date of service of the decision". Those 15 days were:

- December (2018): 12, 13, 14, 17, 18, 19, 20, 21, 24, 27, 28, 31; and
- January (2019): 2, 3, 4.

[23] The error the parties and the Adjudicator made in their original calculation was in counting December 26th, Boxing Day, as a business day. According to subsection 27(1) of *The Interpretation Act, 1995*, Boxing Day is a holiday. Therefore, it is not a business day under the Act. The parties are now in agreement that according to the proper interpretation of the law, the final day for filing the Notice of Appeal was January 4, 2019. The parties agree that the Notice of Appeal was filed no later than January 4, 2019. Accordingly, the appeal was filed in time. The Employer did not provide the Board with any jurisprudence that would indicate that the Board cannot consider this issue.

[24] The second issue that the Board will address is whether the Notice of Appeal was filed with the Director on January 3, 2019. Subsection 9-9(3) of the Act provides: "A document or notice to be given to or served on the director must be given or served in the prescribed manner". Unfortunately, no manner has been prescribed. None of the provisions in section 9-9 apply to service on the Director. Both parties provided examples of legislative provisions that establish

rules for filing of documents in other situations or on other persons. None of them are applicable to this issue. Therefore, it was left to the Adjudicator to determine whether the action taken by the Employee constituted filing with the Director. There is no suggestion that filing with the actual individual who has been appointed as the Director is required. Therefore, the issue is when filing with an agent of the Director has occurred. The Adjudicator did not turn his mind to this issue. The decision respecting what day the Notice of Appeal was filed was a decision to be made by the Adjudicator, not by the office of the Director. The fact that the OHS Office considered it filed on January 4th is irrelevant.

[25] The Adjudicator appeared to accept the Employer's argument that the Notice of Appeal was still in the mail on January 3rd. The evidence before the Adjudicator indicated that was clearly not the case. Canada Post was no longer in possession of the document; it had been delivered to a person who was authorized to accept mail on the Director's behalf. The Notice of Appeal was no longer in the possession of Canada Post after they delivered it to the mail room at 122 3rd Avenue North, Saskatoon and a person there signed for it. Was the person in the government mail room who signed for receipt of the Notice of Appeal on January 3, 2019 an agent of Canada Post, or an agent of the Director? There is no basis in fact or law on which that person could be considered to be an agent of Canada Post. Therefore, that person was an agent of the Director. The stamps on the Notice of Appeal indicate that a different agent of the Director then came into possession of the Notice of Appeal on January 4, 2019, and a further agent of the Director came into possession of it on January 7, 2019. The Board has determined that the Adjudicator made an error in law when he disregarded this evidence. The Notice of Appeal was filed with the Director on January 3, 2019.

[26] The Adjudicator made errors of law which led him to determine that he was without jurisdiction to hear the appeal and that the appeal was a nullity. That decision is cancelled. The appeal is remitted back to the Adjudicator for a determination of the appeal on its merits.

DATED at Regina, Saskatchewan, this **19th** day of **April, 2021**.

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson