

**ANITA FULLER, Applicant v GREAT WESTERN BREWING COMPANY LIMITED,
Respondent**

LRB File No. 039-21; July 20, 2021

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

For Anita Fuller: Marcus Davies

For Great Western Brewing Company Limited: Brent Matkowski and Shane Buchanan

Appeal from Adjudicator filed late – Board has no authority to extend time limitations fixed by *The Saskatchewan Employment Act*.

Appeal from Adjudicator – Appeal not in compliance with requirement in Regulations to attach copy of decision being appealed – Appeal not served as required by Act and Regulations – Proof of service not filed with Board as required by Regulations – Appeal is void – Decision of Adjudicator is affirmed.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: On March 11, 2021, an Adjudicator selected pursuant to section 4-3 of *The Saskatchewan Employment Act* [“Act”] ordered that:

- a) Anita Fuller be returned to work at Great Western Brewing Company Ltd. on the same terms and conditions of employment that were in place on December 14th, 2018 provided that she is medically fit to return to work; and
- b) The balance of the appeal be dismissed.¹

[2] By letter dated March 29, 2021 Fuller’s counsel wrote to the Registrar of the Board. In Written Submissions to the Board, Fuller described the purpose of the letter as follows: “to advise that she intended to appeal the decision of the adjudicator, and provided the grounds on which she would base the appeal”². The Board received this letter on April 1, 2021. Fuller’s counsel filed a Notice of Appeal in the wrong Form on April 5, 2021, and in the correct Form on April 9, 2021.

¹ *Anita Fuller v Great Western Brewing Company Ltd.*, March 11, 2021, LRB File No 284-19.

² Written Submissions Regarding Preliminary Matter on Behalf of the Appellant, Anita Fuller, para 3(c).

However, in neither case was the Adjudicator's decision attached to the Notice of Appeal. Fuller did not serve the letter of March 29, 2021 or either Notice of Appeal on Great Western Brewing Company Limited ["GWBC"] or their counsel.

Argument on behalf of Fuller:

[3] Fuller argues that the delay in filing the Notice of Appeal should be waived by the Board. She relies on *Dishaw v Canadian Office & Professional Employees Union, Local 397*³ ["Dishaw"], which cited the following criteria for assessing delay:

In the context of civil actions, in its frequently cited decision in Carey v. Twohig, [1973] 4 W.W.R. 378 (Sask. C.A.), the Saskatchewan Court of Appeal enunciated criteria for determining whether an action should be dismissed by reason of excessive delay - that the delay be inordinate; that the inordinate delay be inexcusable; and that the defendant be seriously prejudiced by the delay. The essence of the inquiry expressed in that case was whether justice could be done despite the delay.

[4] *Dishaw* also cited the following passage from *Brody v. East York Health Unit*⁴:

*In determining whether the delay in a particular case is unreasonable or excessive, the Board will consider, among other things, such matters as the length of the delay, and the reasons for it, the time at which the applicant became aware of the alleged statutory violation, whether the remedy claimed would have a disruptive impact upon a pattern of relations developed since the alleged contravention, and whether the claim is such that fading recollection, unavailability of witnesses, and the deterioration of evidence would hamper a fair hearing in the dispute. **It is generally accepted that the scale of delay that the Board would find acceptable is to be measured in months rather than years** (see *City of Mississauga*, [1982] OLRB Rep. March 420). However, there is no specified limit with respect to delay, and the Board will consider the circumstances in each case to determine whether the delay is undue. [Emphasis added in Dishaw]*

[5] Relying on these two passages, Fuller argues that the length of delay is not an issue, given the Appeal was only filed a few days late. She also argues that GWBC has suffered no prejudice. On these two bases, Fuller asks the Board to exercise its discretion under section 30 of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* ["Regulations"] and extend the deadline for filing the appeal.

Argument on behalf of GWBC:

[6] GWBC states that, pursuant to clause 4-8(3)(a) of the Act, there is a 15 business day limitation period in which to file an appeal of the Adjudicator's decision. Fuller did not file her appeal within that time period, and the Board has no authority to waive that non-compliance.

³ 2009 CanLII 507 (SK LRB), at para 29.

⁴ [1997] O.L.R.D No. 157.

GWBC also notes that subsection 4-8(3) requires Fuller to attach a copy of the Adjudicator's decision to the Notice of Appeal, and to serve the Notice of Appeal on GWBC. She has not complied with either of these requirements.

[7] GWBC argues that the Board has no jurisdiction to hear the appeal as the Act provides the Board with no authority to extend the timeline fixed in the Act.⁵

[8] It also argues that the appeal should be dismissed because GWBC has suffered actual prejudice from Fuller's actions. If she had filed an appeal within the limitation period, it intended to file a cross-appeal.

Relevant Legislative Provisions:

[9] The following provisions of the Act are applicable to this matter:

Interpretation

1-2(1) *In this Act:*

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

Written decisions

4-7(5) *As soon as is reasonably possible after receiving a decision, the board shall serve the decision on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.*

Right to appeal adjudicator's decision to board

4-8(1) *An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.*

(2) *A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III 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.*

[10] The following provisions of the Regulations were also considered:

Notice of appeal, re Parts II, III or V of the Act

4(2) *A person who intends to appeal shall:*

(a) *file with the board a notice of appeal in Form 1 (Notice of Appeal);*

(b) *serve a copy of Form 1 on the persons mentioned in clause 4-8(3)(b) or 4-10(2)(b) of the Act and on the adjudicator; and*

(c) *file with the board proof of service of Form 1 in accordance with clause (b).*

⁵ *Canadian Union of Public Employees v Mcknight*, 2016 CanLII 44867 (SK LRB); *Egware v Regina (City)*, 2016 SKQB 388 (CanLII); *Pruden v Olysky Limited Partnership*, 2018 SKCA 75 (CanLII).

Authority to vary time

30(1) On the request of any employer, union, labour organization or other person, the registrar may extend the time fixed by these regulations for filing any Form or document or doing any other thing authorized or required by these regulations, if the period at or within which the matter ought to have been done has not expired.

(2) On the request of any employer, union, labour organization or other person, the executive officer may by order set a further or other time than the time fixed by these regulations for filing any Form or document or doing any other thing authorized or required by these regulations.

(3) The executive officer may issue an order pursuant to subsection (2) whether or not the period at or within which a matter mentioned in that order ought to have been done has expired.

(4) The executive officer may impose any terms and conditions on an order issued pursuant to subsection (2) that the executive officer considers appropriate.

(5) Anything done at or within the time specified by the registrar pursuant to subsection (1) or in an order pursuant to subsection (2) is as valid as if it had been done at or within the time fixed by these regulations.

Non-compliance

35 Non-compliance with these regulations does not render any proceeding void unless the board directs otherwise.

Analysis and Decision:

[11] Clause 4-8(3)(a) of the Act requires an appeal from a decision of an Adjudicator to be filed with the Board within 15 business days after the date of service of the decision of the Adjudicator. The Registrar served the Adjudicator's decision on the parties on March 11, 2021. That means that an appeal of that decision would have to have been filed with the Board on or before April 1, 2021. While Fuller advised the Board on April 1, 2021 that she intended to appeal, she did not actually file a Notice of Appeal in Form 1 of the Regulations until April 9, 2021. She has yet to file a Notice of Appeal in compliance with the Regulations. Paragraph 10 of Form 1 states:

10. The following items must be attached to this Notice of Appeal:

- *A copy of the written decision/order of the adjudicator*

The written decision/order of the Adjudicator that she proposes to appeal was not attached to the Notice of Appeal filed on April 9, 2021.

[12] Both the Act and the Regulations required Fuller to serve GWBC with the appeal. The Regulations also required Fuller to file with the Board proof of that service. To this day, Fuller has not complied with either of these requirements.

[13] The time for Fuller to comply with these three requirements has long since passed. Fuller did not apply to the Executive Officer to request an Order setting a further or other time for complying with the requirements of the Regulations with which she has not complied.

[14] Section 30 of the Regulations authorizes the Executive Officer of the Board to extend a time limitation fixed by the Regulations. It does not authorize the Executive Officer to extend a time limitation fixed by the Act. The 15 business day time limitation for filing an appeal of an Adjudicator's decision is fixed by the Act.

[15] In *Canadian Union of Public Employees v Mcknight*⁶, the Board held that it had no jurisdiction to hear a late-filed appeal:

As in the case before the Alberta Court of Appeal, this Board has no inherent authority to enlarge the time in which an application must, by statute, be filed. Section 27 of the Board's Regulations permits the Executive Officer of the Board to, on request, by order, "set a further time or other time than the time prescribed in these regulations...". That provision would not assist the Union in this case since the enlargement applies only to times prescribed in the regulations. While the form of application for review of an adjudicator's decision is provided for in section 4 of the Board's Regulations, the time limitation is prescribed by statute and may not be varied by the Board or its Executive Officer utilizing the authority given in section 27 of the Board's Regulations.

[16] In *Egware v Regina (City)*⁷, the Saskatchewan Court of Queen's Bench held that there is no inherent right of appeal to an administrative tribunal or to the court. Further, there is no authority to extend a time fixed for a statutory appeal if the statute creating the right of appeal does not provide that authority:

Mr. Egware did not appeal from the decision of the RAB within 30 days prescribed by s. 329(4) of the Act. As the right of appeal to this Court pursuant to s. 329(4) is a function of statute and there is no statutory authority under the Act to extend or enlarge the time for bringing an appeal, this Court does not have the authority to extend the time fixed to appeal.

[17] In *Pruden v Olysky Limited Partnership*⁸, the Court of Appeal dismissed an application for leave to appeal a Board decision, on the following basis:

[24] In the Adjudicator Decision, the adjudicator set out ample authority for her conclusion that she could not extend the time for service of the notice of appeal. Cited extensively was Brady v Jacobs Industrial Services Ltd, 2016 CanLII 49900 (Sask LRB) [Brady], a recent decision of an adjudicator appointed pursuant to s. 3-53 of the Employment Act. In that case, after reviewing the limitation period contained at s. 3-54(2) of the Employment Act, that adjudicator explained as follows:

[36] The mandatory nature of the appeal requirements makes it clear the legislature intended to provide certainty as to when an appeal has been properly commenced. This permits those directly affected by a decision as well as the Ministry to know with certainty whether or not the decision has been appealed. ...

⁶ 2016 CanLII 44867 (SK LRB), at para 29.

⁷ 2016 SKQB 388 (CanLII), at para 55.

⁸ 2018 SKCA 75 (CanLII).

...

[49] As an adjudicator under the [Employment Act], I only have the authority delegated to me by the Act. ... [T]ribunals created by statute cannot exceed the powers granted to them by their enabling statute, they must adhere to the statutory jurisdiction and they cannot trespass in areas where the Legislature has not assigned them authority. I have already noted above that the statutory requirements for an appeal are mandatory, including the time limit within which to file an appeal. Any authority to permit me to extend or waive the time limit for the appeal must be found in the Act.

[50] The law in Saskatchewan is clear that any substantive right to extend the time for an appeal must be found in the statute creating the right of appeal: Jordan v. Saskatchewan (Securities Commission), SK CA, March 21, 1968; Wascana Energy Inc. v. Rural Municipality of Gull Lake No. 139 et al., 1998 CanLII 12344 (SK CA).

[51] There is no express provision anywhere in the Saskatchewan Employment Act that gives authority to the adjudicator or to anyone else to extend or waive the time limits for an appeal.

[18] These authorities lead to only one conclusion: the Board has no authority to extend the appeal period set out in the Act. The Board is without jurisdiction to hear Fuller's appeal. The Notice of Appeal filed by Fuller is void. With these Reasons, an Order will issue affirming the decision of the Adjudicator.

DATED at Regina, Saskatchewan, this **20th** day of **July, 2021**.

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson