SASKATCHEWAN POLYTECHNIC STUDENTS' ASSOCIATION INC., Appellant v RYAN BENARD, Respondent

LRB File No. 070-20; 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, Saskatchewan Polytechnic Students' Association Inc.: Richard K. Gabruch

For the Respondent, Ryan Benard: Adam R. Touet and Sarah Loewen

Appeal from decision of Adjudicator – Grounds of appeal limited to questions of law – Standard of review correctness.

Appeal from decision of Adjudicator – Termination of employment – Employer did not satisfy Board that Adjudicator made errors of law – Employer ordered to reinstate employee and pay him all wages owing since Occupational Health Officers ordered him reinstated.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: The Saskatchewan Polytechnic Students' Association Inc. ["SPSA"] is a not-for-profit membership corporation that represents the interests of students and provides student services at the campuses of Saskatchewan Polytechnic, an educational institution in Saskatchewan with campuses in Regina, Saskatoon, Moose Jaw and Prince Albert. The events relevant to this appeal took place primarily at the Prince Albert campus.

[2] Ryan Benard commenced employment with SPSA, as Campus Manager for Prince Albert, on August 19, 2016. On August 18, 2017 he made a written complaint against the general manager. He sent his complaint by email to the president and the three other members of the executive council of SPSA's board of directors. The detailed facts of what occurred next are set out in the Adjudicator's decision, and need not be repeated here. Suffice it to say that the executive council chose to treat Benard's complaint as not constituting a harassment complaint and repeatedly demanded that he provide them with written evidence, and meet with them and the general manager. When Benard continued to request that the process followed by them respect his privacy and protect him from reprisals, his employment was terminated, purportedly

for insubordination: “you have been terminated for cause due to your continuous refusal to comply with SPSA HR 7 – Employee Complaints Policy.”

[3] Benard made a complaint of discriminatory action pursuant to sections 3-35 and 3-36 of *The Saskatchewan Employment Act* [“Act”]. On February 28, 2018, Occupational Health Officers issued a decision that found as follows:

> *In the information provided by the employer, it suggests that Mr. Benard was terminated for undermining corporate policy and procedure as well as insubordination. However, the information provided shows the termination of Mr. Benard was based solely on Mr. Benard not adhering to policy (HR-7) that is in place at the workplace to handle claims of harassment. The Policy HR-7 does not meet the requirements of Occupational Health and Safety Legislation, therefore any action taken on a worker with respect to that policy would be considered unlawful. Further, terminating a worker for not providing specifics of a harassment complaint is punitive towards the complainant.*
>
> *It is the decision of these officers, the termination of Mr. Benard solely for not providing more specific information related to his claim of harassment prior to utilizing the above mentioned work process, is an unlawful discriminatory action pursuant to section 3-35(f). The employer must cease the discriminatory action, reinstate Mr. Benard to his former employment under the same terms and conditions under which he was formerly employed, pay him any wages he would have earned had he not been wrongfully discriminated against, and remove any reprimand or reference to the matter from any employment records with respect to this worker.*

[4] SPSA appealed that decision to an Adjudicator. The Adjudicator identified the three issues he was to determine, as follows[1]:

> 1. *Did the employee engage in activities that come within the ambit of s. 3-35 and that could be the reason for his termination?*
> 2. *Did the employer take discriminatory action against the employee?*
> 3. *Was the termination for good and sufficient other reason within the meaning of s. 3-36(4)?*

[5] With respect to whether Benard had engaged in activities that come within the ambit of section 3-35 of the Act, he found:

> *[63] It is entirely clear the employee meant to complain of harassment and that he made that intention clear to the employer, first in the initial written complaint, but more emphatically in the subsequent correspondence during the period prior to his termination.*
>
> *[64] In conclusion on this issue, when the employee made his complaint in August of 2017, he was, in the words of the adjudicator in Calow, engaging the employer’s statutorily required harassment policy and asking the employer to deal with what the employee*

[1] *Saskatchewan Polytechnic Students’ Association Inc. v Ryan Benard,* April 13, 2020, LRB File No. 077-18, at page 13.

> *considered to be harassment. In doing so, the employee was seeking enforcement of the Act and regulations.*

[6] The Adjudicator next found that SPSA took discriminatory action against Benard:

> *[65] The term "discriminatory action" is normally thought of as pejorative. As defined in s. 3-1(1)(i) of the Act, it is merely descriptive of an employer action. The definition specifically includes termination. Therefore, the termination of the employee constituted discriminatory action within the meaning of s. 3-35.*

[7] Finally, the Adjudicator concluded that SPSA did not establish that it had good and sufficient other reason for terminating Benard:

> *[66] Given the affirmative answers to the first two issues, the onus is on the employer to establish that the employee was terminated for good and sufficient other reason.*
> *. . .*
> *[71] I do not find these arguments persuasive. The general sentiment of the employer's position is that it was genuinely and reasonably pursuing a process for considering the employee's complaint, while the employee was unreasonably resisting participation in that process. That position is not supported by the evidence.*
> *. . .*
> *[83] Considering the entire series of exchanges between the employer and the employee from the time the complaint was made on August 18, 2017, until the employee was terminated on October 3, I conclude that the employee met the reasonable expectations of him in the investigation of his complaint and the employer's decision to terminate him was, in contrast, unreasonable. I therefore cannot find that the employer's reasons for terminating the employee amounted to "good and sufficient other reason".*

[8] The matter before the Board is an appeal of the Adjudicator's decision.

Standard of Review:

[9] At the hearing of the appeal, the Board asked the parties to give further consideration to the issue of the applicable standard of review, and provided an opportunity for them to file further written submissions on this issue.

Argument on behalf of SPSA:

[10] SPSA referred to *Canada (Minister of Citizenship and Immigration) v. Vavilov*[2] ["*Vavilov*"]:

> *It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including*

[2] 2019 SCC 65 (CanLII), at para 37.

questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see Housen, at paras. 10, 19 and 26-37.

[11] It also referred to *Housen v Nikolaisen*[3] ["*Housen*"]:

[8] On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: Kerans, supra, at p. 90.

. . .

[10] The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error". . .

. . .

[27] Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In Southam, supra, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> *. . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.*

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

. . .

[33] Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. This nuance was recognized by this Court in St-Jean v. Mercier, [2002] 1 S.C.R. 491, 2002 SCC 15, at paras. 48-49:

> *A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (Southam, at para. 35).*
>
> *Generally, <u>such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts</u>.* [emphasis in original]

[3] 2002 SCC 33 (CanLII), [2002] 2 SCR 235.

[12] SPSA relies on the decision of the Board in *Missick v Regina's Pet Depot*[4] ["*Missick*"]:

> *[23] As outlined, pursuant to section 4-8, an appeal from an adjudicator's decision on a wage assessment comes to the Board on a question of law. It is therefore incumbent on the Board to apply the standard of correctness in accordance with Housen v Nikolaisen, 2002 SCC 33 (CanLII), [2002] 2 SCR 235 ["Housen"].*

[13] SPSA acknowledges that this appeal is on a question of law. Relying on *Wieler v Saskatoon Convalescent Home*[5] ["*Wieler*"], SPSA states that the Board has identified that questions of law may be characterized as questions of law alone; questions of mixed fact and law; or findings of fact that may be reviewable as questions of law. With respect to the third category, it refers to *PSS Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*[6] ["*PSS Professional Salon Services*"], which stated that 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.

[14] It also refers to *Lepage Contracting Ltd. v Saskatchewan (Employment Standards)*[7] ["*Lepage*"], which, it says, found that the following constituted questions of law:

- If the Adjudicator asked the wrong question in deciding the issue under appeal;
- If the Adjudicator disregarded or mischaracterized relevant evidence when he made a finding of fact;
- If the Adjudicator made a finding of fact based on no evidence.

[15] SPSA concludes that the standard of review on a question of law is correctness. Where the errors are strictly errors in fact or errors of mixed law and fact, it says, the standard applicable on appeal is that of palpable and overriding error, unless the question of mixed law and fact can amount to a pure error of law in which case the standard of review is correctness.

Argument on behalf of Benard:

[16] Benard argues that the appeal to the Board is not addressed in *Vavilov* and therefore the presumption that the standard of review is reasonableness continues to apply. However, if the Board follows its decision in *Missick*, he acknowledges that the appellate standard of review,

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[4] 2020 CanLII 90749 (SK LRB).
[5] 2014 CanLII 76051 (SK LRB).
[6] 2007 SKCA 149 (CanLII).
[7] 2020 SKCA 29 (CanLII).

correctness, would apply. Benard relies on *Wieler* as providing that the right of appeal for questions of law is not restricted to questions of pure law or extractable questions of law, but to include questions of mixed fact and law as well as questions of fact which may be considered errors of law. Under this expansive interpretation of the right of appeal, he argues, the appropriate analysis is the application of the standard of correctness for questions of pure law and the application of the standard of palpable and overriding error for questions of mixed fact and law and questions of fact.

Relevant Statutory Provision:

[17] The appeal to the Board from the decision of the Adjudicator is provided for in subsection 4-8(2) of the Act:

> ***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.*

Analysis and Decision respecting Standard of Review:

[18] In *Missick*, the Board determined that, in light of *Vavilov*, on an appeal from an Adjudicator's decision, the Board will apply the appellate standard of review, correctness, in accordance with *Housen*. This finding was confirmed by the Court of Appeal for Saskatchewan in *Lepage*:

> *[15] 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. . . .*

[19] In applying the standard of correctness in accordance with *Housen*, the Board must keep in mind that the Act limits this appeal to questions of law, and therefore SPSA's grounds of appeal must first be reviewed to determine whether they actually raise questions of law. The Court of Appeal for Saskatchewan explained this in *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]

[20] In *Housen*, 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.

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

[22] 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 before applying them to the facts as he found them.

[23] Finally, with respect to findings of fact, the Board held as follows in *Missick*:

> *[18] 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.*

[24] 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]

[25] It is not sufficient for SPSA to argue that it disagrees with the Adjudicator's interpretation of the facts. It must meet this very high bar of satisfying the Board that the Adjudicator made his findings 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.

Appeal from Adjudicator's Decision:

Argument on behalf of SPSA:

[26] SPSA raises seven grounds of appeal.

[27] First, the Adjudicator erred in law by finding that the termination of Benard's employment constituted discriminatory action within the meaning of section 3-35 of the Act. SPSA argues that section 3-35 does not apply because Benard did not actually make a harassment complaint. The Adjudicator incorrectly applies the test to the evidence before him. SPSA interprets Benard's complaint as pertaining to his dissatisfaction with how the workplace operated, rather than harassment.

[28] Second, the Adjudicator erred in law by relying on evidence that was not before him. SPSA argues that since Benard did not testify as to specific events of bullying and harassment, the Adjudicator had no evidence on which he could have made his findings. Findings of fact made without evidence constitutes an error of law.

[29] Third, the Adjudicator erred in law by failing to consider all of the evidence. It says that the Adjudicator ignored the impact of Benard's actions on SPSA's ability to meet its obligations to investigate his complaint. The Adjudicator also failed to properly consider Benard's legislative obligation to co-operate with a person carrying out an investigation. Failing to consider the evidence of SPSA's efforts and Benard's repeated refusal to co-operate also impacted the Adjudicator's findings regarding whether SPSA had good and sufficient other reason for terminating Benard's employment.

[30] Fourth, the Adjudicator erred in law by contradicting his own findings. It says that even though the Adjudicator characterized Benard's complaint as being "largely, if not entirely, concerns about the management and governance" and relating to "managerial shortcomings"[8], he then characterized them as meaning or intending to complain of harassment. Then, even though he acknowledged that SPSA's position was that it was genuinely and reasonably pursuing a process for considering Benard's complaint, while Benard was unreasonably resisting participation in that process, the Adjudicator rejected those arguments, stating SPSA's position was not supported by the evidence.

[31] Fifth, the Adjudicator erred in law by misapplying the Act in regard to SPSA's obligations. SPSA disagrees with the Adjudicator's suggestion that "the employee was entitled to expect his reasonable needs would factor into the employer's management of the investigation"[9]. Nowhere in the Act, it says, is there a duty on an employer to consult an employee as to how a harassment investigation should proceed. The Adjudicator incorrectly stated and applied the law in reaching the conclusion that SPSA committed a discriminatory action as defined in clause 3-1(1)(i) of the Act.

[32] Sixth, the Adjudicator erred in law by failing to properly apply the definition of "good and sufficient other reason". Here SPSA says that Benard's refusal to provide particulars of his complaint constituted insubordination. It argues that if it can be shown that SPSA had a good and sufficient other reason for the termination, then SPSA is not in breach of section 3-35. It is not necessary for SPSA to prove just cause for termination[10]. It argues that there was no evidence to suggest that SPSA terminated Benard's employment because he was attempting to enforce the Act. In its view, the evidence was clear that Benard was terminated solely for insubordination. If

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[8] At para 22.
[9] At para 73.
[10] *International Women of Saskatoon Inc. v Ivette Gonzalez*, May 6, 2020, LRB File No 203-19, at para 65.

the exercise of an employee's rights in making a complaint was a motivating factor in the decision to terminate employment, then the termination will be found to be a reprisal for the employee exercising his rights.[11] SPSA says that its evidence was clear and uncontradicted that the decision to terminate Benard's employment was not a reprisal for bringing forward a complaint. It did not terminate Benard because he lodged a complaint, but because he repeatedly refused to comply with requests or directives. This is an important distinction that was overlooked by the Adjudicator.

[33] Finally, SPSA argues that the Adjudicator erred in law by failing to address the breaches of the fundamental principles of natural justice and by failing to render his decision within the statutory time period. First, the principles of natural justice require that SPSA know the case against it. Since it has never been told the specifics of the alleged harassment, this principle has been breached in this matter, and the Adjudicator took no steps to correct it. Without knowing the details of the complaint, a determination cannot be made as to whether Benard had a complaint that was entitled to protection under section 3-35 of the Act. The Adjudicator further erred in failing to render his decision as required by law. The delay contributed to the breaches of natural justice in this case.

Argument on behalf of Benard:

[34] Benard argues that the Adjudicator reasonably found as a fact that Benard's complaint constituted a harassment complaint. Whether a complaint is harassment within the meaning of the Act is a question of fact. Based on the evidence outlined in detail in the decision[12], the Adjudicator reasonably concluded that Benard intended to complain of harassment. After making the finding of fact that the nature of the complaint was harassment, he reasonably concluded that the statutory protections applied.

[35] The Adjudicator relied only on evidence properly before him in reaching his conclusion. He did not require evidence of the particulars of the complaint to reach his determination. Finding that the complaint also contained allegations regarding governance and management does not contradict the finding that the nature of the complaint was harassment.

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[11] *Barton v Commissionaires (Great Lakes)*, 2011 CanLII 18985 (ON LRB).
[12] At para 62.

[36] The Adjudicator reasonably concluded that SPSA did not have good and sufficient other reason to terminate Benard's employment. In *International Women of Saskatoon Inc. v Ivette Gonzales*[13] ["*Gonzales*"], the Adjudicator held:

> *For a discriminatory action, including termination, to have been taken for good and sufficient other reason, the action must not be arbitrary and must be objectively reasonable.*

[37] The threshold for good and sufficient other reason is whether there was a causal connection between the protected conduct and the discriminatory action.[14] Since the decision to terminate Benard was directly connected to his having exercised a protected activity under the Act, SPSA has not discharged its onus in this regard. The Adjudicator reasonably found that Benard's actions did not amount to insubordination.

[38] The Adjudicator did not misapply the Act in his assessment of SPSA's obligation to investigate the complaint. That obligation required it to consider the reasonable interests of its employee. The Adjudicator properly considered SPSA's efforts to investigate the complaint. That the Adjudicator reached a conclusion unfavorable to SPSA is not indicia of having failed to properly consider the evidence. He properly found that SPSA had an obligation to establish an objectively reasonable process to investigate the complaint.

[39] The Adjudicator reasonably considered Benard's duty to co-operate. The duty of an employee to co-operate extends only as far as the request made by the employer is reasonable. The Adjudicator found that the Policy did not require Benard to attend the meeting arranged by the president or provide written details of his complaint prior to the meeting. Yet, when he raised concerns about the process and sought to remedy them before proceeding, his requests were characterized by SPSA as insubordination. The Adjudicator did not accept that position. The Policy requires that complaints be dealt with in a "fair" manner. The Adjudicator did not err when he found that "Fairness here surely means fairness for everyone concerned, including the employee making the complaint"[15].

[40] The proceedings did not breach the principles of fundamental justice. The adjudication was not a trial of Benard's harassment complaint. The evidence that is relevant to this matter is only what was known by SPSA about the complaint at the time it terminated Benard from his

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[13] May 6, 2020, LRB File No. 203-19, at para 71.
[14] *Lund v West Yellowhead Waste Resource Authority Inc.*, 2017 CanLII 30151 (SK LRB) at para 40.
[15] At para 77.

employment. With respect to delay in receipt of the Adjudicator's decision, Benard relies on *United Food and Commercial Workers, Local 1400 v. Tora Regina (Tower) Limited (Giant Tiger, Regina)*[16]. In that matter, the Court of Appeal for Saskatchewan held that delay, in and of itself, will not be considered a denial of natural justice. A breach of natural justice will only be found if there is unreasonable delay and the delay causes prejudice. The delay here was not unreasonable and it did not cause any prejudice to SPSA. Any additional costs incurred by SPSA for not reinstating Benard is the result of their own, fully informed choices.

Relevant Legislative Provisions:

[41] The following provisions of the Act apply to this appeal:

> ***Interpretation of Part***
> *3-1(1) In this Part and in Part IV:*
>
> > *(i) "discriminatory action" means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes termination, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty, but does not include:*
> >
> > *(i) the temporary assignment of a worker to alternative work, pursuant to section 3-44, without loss of pay to the worker; or*
> >
> > *(ii) the temporary assignment of a worker to alternative work, without loss of pay to the worker, while:*
> >
> > *(A) steps are being taken for the purposes of clause 3-31(a) to satisfy the worker that any particular act or series of acts that the worker refused to perform pursuant to that clause is not unusually dangerous to the health or safety of the worker or any other person at the place of employment;*
> >
> > *(B) the occupational health committee is conducting an investigation pursuant to clause 3-31(b) in relation to the worker's refusal to perform any particular act or series of acts; or*
> >
> > *(C) an occupational health officer is conducting an investigation requested by a worker or an employer pursuant to clause 3-32(a);*
>
> *(l) "harassment" means any inappropriate conduct, comment, display, action or gesture by a person:*
> >
> > *(i) that either:*
> >
> > *(A) is based on race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; or*
> >
> > *(B) subject to subsections (4) and (5), adversely affects the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated; and*
> >
> > *(ii) that constitutes a threat to the health or safety of the worker.*

[16] 2008 SKCA 38 (CanLII) at para 17.

(4) To constitute harassment for the purposes of paragraph (1)(l)(i)(B), either of the following must be established:

(a) repeated conduct, comments, displays, actions or gestures;

(b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, that has a lasting, harmful effect on the worker.

(5) For the purposes of paragraph (1)(l)(i)(B), harassment does not include any reasonable action that is taken by an employer, or a manager or supervisor employed or engaged by an employer, relating to the management and direction of the employer's workers or the place of employment.

General duties of employer

3-8 Every employer shall:

(d) ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment with respect to any matter or circumstance arising out of the workers' employment.

General duties of workers

3-10 Every worker while at work shall:

(a) take reasonable care to protect his or her health and safety and the health and safety of other workers who may be affected by his or her acts or omissions;

(b) refrain from causing or participating in the harassment of another worker;

(c) cooperate with any other person exercising a duty imposed by this Part or the regulations made pursuant to this Part; and

(d) comply with this Part and the regulations made pursuant to this Part.

Discriminatory action prohibited

3-35 No employer shall take discriminatory action against a worker because the worker:

(a) acts or has acted in compliance with:

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

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

(iii) a code of practice issued pursuant to section 3-84; or

(iv) a notice of contravention or a requirement or prohibition contained in a notice of contravention;

(b) seeks or has sought the enforcement of:

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

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

Referral to occupational health officer

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

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

(a) cease the discriminatory action;

(b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;

(c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and

(d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.

(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).

. . .

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.

. . .

Written decisions

4-7(1) Subject to the regulations, an adjudicator shall provide the written reasons for the decision required pursuant to clause 4-6(1)(b) within the following periods:

(b) with respect to an appeal pursuant to Part III:

(i) subject to subclause (ii), 60 days after the date on which the hearing of the appeal is completed; and

(ii) with respect to an appeal pursuant to section 3-54, the earlier of:

(A) one year after the date on which the adjudicator was selected; and

(B) 60 days after the date on which the hearing of the appeal is completed.

. . .

(4) A failure by an adjudicator to comply with subsection (1) or with an order made pursuant to subsection (3) does not affect the validity of a decision.

[42] Section 36 of *The Occupational Health and Safety Regulations, 1996* places requirements on employers to develop and implement harassment policies:

Harassment

36(1) An employer, in consultation with the committee, shall develop a policy in writing to prevent harassment that includes:

> *(a) a definition of harassment that includes the definition in the Act;*
> *(b) a statement that every worker is entitled to employment free of harassment;*
> *(c) a commitment that the employer will make every reasonably practicable effort to ensure that no worker is subjected to harassment;*
> *(d) a commitment that the employer will take corrective action respecting any person under the employer's direction who subjects any worker to harassment;*
> *(e) an explanation of how complaints of harassment may be brought to the attention of the employer;*
> *(f) a statement that the employer will not disclose the name of a complainant or an alleged harasser or the circumstances related to the complaint to any person except where disclosure is:*
>
> > *(i) necessary for the purposes of investigating the complaint or taking corrective action with respect to the complaint; or*
> > *(ii) required by law;*
>
> *(g) a reference to the provisions of the Act respecting harassment and the worker's right to request the assistance of an occupational health officer to resolve a complaint of harassment;*
> *(h) a reference to the provisions of The Saskatchewan Human Rights Code respecting discriminatory practices and the worker's right to file a complaint with the Saskatchewan Human Rights Commission;*
> *(i) a description of the procedure that the employer will follow to inform the complainant and the alleged harasser of the results of the investigation; and*
> *(j) a statement that the employer's harassment policy is not intended to discourage or prevent the complainant from exercising any other legal rights pursuant to any other law.*
>
> *(2) An employer shall:*
>
> > *(a) implement the policy developed pursuant to subsection (1); and*
> > *(b) post a copy of the policy in a conspicuous place that is readily available for reference by workers.*

Analysis and Decision:

[43] Three of the grounds of appeal raised by SPSA ask the Board to overturn the Adjudicator's findings of facts (relying on evidence not before him; failing to consider all evidence; contradicting his own findings). This would require the Board to find that, in his consideration of the evidence, the Adjudicator made findings based on no evidence, based on irrelevant evidence or in disregard of relevant evidence, based on a mischaracterization of relevant evidence or based on an unfounded or irrational inference of fact.

[44] The Board finds no errors in the Adjudicator's findings of facts that could be reviewable as a question of law. The decision of the Adjudicator spells out that he had ample evidence before him to make his findings. His decision clearly spells out that he carefully considered all of the evidence put before him. He did not ignore relevant evidence, take into account irrelevant evidence, mischaracterize relevant evidence, or make irrational inferences on the facts. It is clear from the Adjudicator's decision that he considered all of the evidence before him. The Adjudicator did not contradict his own findings. He rejected SPSA's arguments when they were not supported

by evidence. He did not in all cases accept SPSA's interpretation of the facts. SPSA has not satisfied the Board that any of the Adjudicator's findings of fact should be overturned.

[45] SPSA argues that the Adjudicator erred in law by finding that the termination of Benard's employment constituted discriminatory action contrary to section 3-35 of the Act. The Board rejects this ground of appeal. As the Adjudicator went to great lengths to spell out, Benard made a harassment complaint. The fact that he made other complaints as well does not deprive him of the protection of Part III of the Act. The Adjudicator correctly interpreted the Act when he found that Benard made a harassment complaint that engaged the protection of section 3-35 of the Act. The Adjudicator correctly interpreted the Act when he determined that SPSA took discriminatory action against Benard contrary to section 3-35.

[46] Next SPSA argues that the Adjudicator erred in law by misapplying the provisions of the Act in regard to SPSA's obligations. SPSA disagrees with the Adjudicator's suggestion that "the employee was entitled to expect his reasonable needs would factor into the employer's management of the investigation". Nowhere in the Act, it says, is there a duty on an employer to consult an employee as to how an investigation should proceed. The Adjudicator noted that, even though SPSA argued that it terminated Benard for refusing its instruction that he comply with the Policy, the instructions that it gave him were inconsistent with the Policy. SPSA also ignores the finding by the Occupational Health Officers that its Policy does not comply with Part III of the Act. The Adjudicator did not misinterpret the provisions of the Act that it applied to this issue. The Adjudicator found as a fact that Benard did not refuse to co-operate with SPSA's investigation of his complaint. In arriving at this conclusion the Adjudicator did not take into account irrelevant evidence, disregard relevant evidence or make an irrational inference of fact. Therefore, there is no error of law.

[47] SPSA argues that the Adjudicator erred in law by failing to properly apply the definition of "good and sufficient other reason". It argues that if it can be shown that SPSA had a good and sufficient other reason for the termination, then SPSA is not in breach of section 3-35. It is not necessary for SPSA to prove just cause for termination. SPSA says that Benard's refusal to provide particulars of his complaint constituted insubordination. It argues that there was no evidence to suggest that SPSA terminated Benard's employment because he was attempting to enforce the Act. In its view, the evidence was clear that Benard was terminated solely for insubordination. The Adjudicator did not overlook SPSA's evidence on this issue. The Adjudicator just did not interpret it in the way that SPSA wanted him to interpret it. SPSA may have convinced

itself that it had good and sufficient other reason to terminate Benard, but it did not convince the Adjudicator.

[48] Clause 3-36(4)(b) of the Act provides that the onus is on SPSA to establish that the discriminatory action, Benard's termination, was taken for good and sufficient other reason. The Adjudicator correctly identified the test to be applied to the facts as he found them. The Board finds that the Adjudicator correctly interpreted the definition of good and sufficient other reason.

[49] The finding of the Adjudicator is consistent with the following finding in *Banff Constructors Ltd. v Lance Arcand*[17], with which the Board agrees:

> *The issue I am called upon to determine on this appeal is not whether the complaints made by the employee while he was employed by the employer would have been substantiated had a complete investigation been conducted, nor whether he was in fact subjected to harassment. I must determine whether he was laid off because he complained about what he believed to be harassment. Having answered the first two questions set out above in the affirmative, I must now consider whether the employer laid the employee off for "good and sufficient other reason".* [emphasis added]

[50] In *Gonzales*, the Adjudicator found that for a discriminatory action, including termination, to have been taken for good and sufficient other reason, the action must not be arbitrary and must be objectively reasonable. In this matter, the Adjudicator found as a fact that the termination of Benard's employment was arbitrary and not objectively reasonable. He found as a fact that SPSA did not satisfy its onus of establishing that the termination was taken for good and sufficient other reason.

[51] Subsection 3-36(4) of the Act places an onus on SPSA to establish that it terminated Benard for good and sufficient other reason. This, the Adjudicator found, it failed to do. The Adjudicator made no error in law in coming to this conclusion.

[52] Lastly, SPSA argues that the Adjudicator erred in law by failing to address the breaches of the fundamental principles of natural justice and by failing to render his decision within the statutory time period. The delay, it says, contributed to the breaches of natural justice in this case.

[53] In its Reply Submissions SPSA suggests that it was a breach of the fundamental principles of natural justice for the Adjudicator to not delineate the types of complaints that are and are not entitled to protection under the Act. The Board does not accept that suggestion. As Benard noted,

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[17] April 28, 2020, LRB File No. 184-19 at para 51.

the appeal was not a trial of the issue of whether Benard was subjected to harassment at his workplace. The evidence that is relevant to the issues that were before the Adjudicator was the evidence that was before SPSA when it made the decision to terminate Benard. This argument has no merit.

[54] Section 4-7 of the Act required the Adjudicator to provide written reasons for his decision within 60 days after the hearing of the appeal was completed. SPSA indicates that the hearing was held on November 19 and 20, 2019, and that written arguments were filed on December 4 and 6, 2019, meaning that the Adjudicator's written reasons should have been provided to the parties by February 4, 2020. The Adjudicator actually provided his written reasons on April 13, 2020. Delay alone does not constitute a denial of natural justice. A breach of natural justice will only be found if there is unreasonable delay and the delay causes prejudice[18]. The Board finds that the delay was not unreasonable and, in any event, SPSA specified no prejudice caused to it by the delay. Subsection 4-7(4) of the Act specifically provides that a delay in providing written reasons does not affect the validity of a decision. There was no breach of natural justice.

Mitigation:

[55] The final issue to be determined is whether the Adjudicator erred in his determination of mitigation. On this issue, the Adjudicator found as follows:

> *[88] Subs. (2) requires me to reduce the award of wages by both the amount the employee earned plus what he "should have earned". Subs. (3) places the onus on the employer to establish those amounts. To meet this onus, it is not enough for the employer to point to the apparent employability of the employee and ask me to conclude that he should have found appropriate employment. This is particularly so because there is a continuing order requiring the employer to reinstate the employee. The employer is effectively asking me to determine that the employee should have concluded the order would never be given effect and should have treated his separation from the SPSA workplace as permanent. With that knowledge, the employee should (according to what I assume is the employer's position) have sought to re-establish himself in a different employment situation.*
>
> *[89] This ignores the legal reality established by the order of the occupational health officers. Under that order, the employee was entitled to be reinstated. By dismissing the appeal, I am reinforcing and continuing that order for reinstatement. While one might reasonably expect an employee in circumstances such as these to find ways to earn other income, it is also reasonable to expect the employee to organize his affairs based on the assumption the order for reinstatement would eventually be given effect. By exercising its right of appeal, which it clearly was entitled to do, the employer has increased the amount it will have to pay to the employee pursuant to the original order as confirmed on the appeal, and that amount will continue to increase until the employee is reinstated or the parties reach an agreement to resolve the matter. While that may seem unfair to the employer, it*

[18] *United Food and Commercial Workers, Local 1400 v. Tora Regina (Tower) Limited (Giant Tiger, Regina),* 2008 SKCA 38 (CanLII).

> *reflects the framework of rights and responsibilities established by the applicable legislation.*

[56] Subsections 3-36(5) and (6) of the Act apply to this issue:

> *(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).*

[57] SPSA argues that the Adjudicator erred in law by misapplying the facts to the Act as it relates to Benard's obligation to mitigate his losses. First, it says, the Adjudicator failed to take into account income actually earned by Benard. Second, it says, the evidence showed that Benard was not actively seeking other remunerative employment. It acknowledged that the onus was on SPSA, but argues that it discharged its onus by showing that he could have earned more than he did between the termination of his employment and the hearing. He was fit to work full time earning no less than the minimum wage. He did not take reasonable steps to seek comparable employment and if he had done so, he could have procured comparable employment. He had an obligation to mitigate his losses.[19] He took no steps to return to work following the decision of the Occupational Health Officers or the Adjudicator. His decision to work without income (for his spouse's start-up business) should be at his peril and SPSA should not be responsible for his resulting losses.

[58] Benard argues that the Adjudicator reasonably concluded that SPSA did not discharge its onus to establish that Benard should have earned additional income. The Adjudicator's findings are supported by the evidence. The onus is on SPSA. No evidence was tendered by SPSA at the hearing on the issue of mitigation nor on the availability of comparable employment. Therefore, there was no basis on which the Adjudicator could have determined that Benard should have earned other income. The Adjudicator's decision also hinged heavily on the legal reality established by the reinstatement order. An employee's duty to mitigate ends with an order for reinstatement.[20]

[59] Benard relied on *Benjamin v Cascades Canada ULC*[21], which held:

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[19] *Koskie v Child Find Sask. Inc.*, 2015 CanLII 90523 (SK LRB),at para 39.
[20] *Canadian Merchant Service Guild v Desgagnés Marine Petro Inc.*, 2017 CanLII 141546 (CA LA).
[21] 2017 ONSC 2583 (CanLII).

ii) The onus is on the employer to establish a failure to mitigate

[94] Laskin C.J. then reviewed the onus to establish reasonable mitigation of damages in wrongful dismissal cases. Laskin C.J. held that the onus is on the employer to establish that the employee failed to reasonably mitigate damages arising from the dismissal. He held (Michaels, at para. 11):

> *In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages.* ***If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue****, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences.*

[95] Laskin C.J. commented that that the burden on any defendant to establish that the plaintiff failed to reasonably mitigate damages is not "light", including in the case of wrongful dismissal. Laskin C.J. adopted the following passage from Cheshire and Fifoot's Law of Contract (1972), 8th ed. (Michaels, at para. 12):

> *But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.*

iii) The requirements the employer must establish to satisfy the onus

[96] Laskin C.J. then considered the requirements on an employer to meet the onus. He held that the employer needs to establish that the employee either found employment or (Michaels, at para. 11):

> *(i) the employee did not take reasonable steps to seek comparable employment "by the exercise of proper industry in the search", and*
> *(ii) if the employee had done so, the employee "could have procured" such comparable employment.*

Laskin C.J. adopted the following passage from Williston on Contracts, supra, at p. 312 (Michaels, at para. 11):

> *It seems to be the generally accepted rule that* ***the burden of proof is upon the defendant to show that*** *the plaintiff either found, or,* ***by the exercise of proper industry in the search, could have procured other employment of an approximately similar kind reasonably adapted to his abilities****, and that in absence of such proof the plaintiff is entitled to recover the salary fixed by the contract.*

. . .

[147] For the above reasons, I find that the retraining and other cases relied upon by Benjamin are consistent with the principles in the cases relied upon by Cascades. Retraining on its own is not evidence of a failure to reasonably mitigate damages; rather, if an employer can establish that comparable work is available and the employee made a

> *choice to retrain and not to seek comparable employment, retraining would not constitute reasonable mitigation.* [emphasis in original]

[60] Similarly in this matter, the onus was on SPSA to establish the amount by which the award of wages should be reduced to reflect what Benard earned or should have earned.

[61] Both parties relied on *Canadian Merchant Service Guild v Desgagnés Marine Petro Inc.*[22]. In that decision, the Arbitrator found that the duty to mitigate ended once the order for reinstatement was awarded. SPSA attempts to distinguish that decision on the basis that in its view Benard did not report for employment or take any other steps to return to work following the order for reinstatement. As the Board pointed out to SPSA at the hearing, the obligation to reinstate Benard rests on SPSA. It has refused throughout to comply with the reinstatement order. SPSA did not reinstate Benard to his employment when ordered to do so by the Occupational Health Officers, or when ordered to do so by the Adjudicator. SPSA applied to the Board for a stay of the Adjudicator's decision, which application was dismissed by Order dated November 25, 2020. As of the date of the hearing of the appeal it had still not taken any steps to reinstate Benard. The law is clear that once the Occupational Health Officers ordered SPSA to take steps to reinstate Benard, he was back in their employ. This means that, since that date, the amount of wages it owes to Benard has continued to accumulate.

[62] The Board finds that the Adjudicator correctly interpreted the law applicable to the issue of mitigation. The onus was on SPSA. With respect to the issue of whether the Adjudicator failed to take into account income actually earned by Benard, SPSA has not satisfied the Board that his findings of fact are subject to review. With respect to the issue of the amount Benard should have earned, SPSA acknowledged in its written submissions that it did not tender evidence of comparable employment that was available to Benard, as the law requires it to do. As the Adjudicator pointed out, the law is clear that it is not sufficient for SPSA to just point to Benard's apparent employability. This is particularly so when it is subject to a continuing order to reinstate Benard.

Conclusion:

[63] SPSA's appeal is dismissed. SPSA is once again ordered to reinstate Benard to his former employment under the same terms and conditions under which he was formerly employed, pay

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[22] 2017 CanLII 141546 (CA LA).

him the wages he would have earned had he not been wrongfully terminated, and remove any reprimand or reference to this matter from his employment records.

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

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

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson