Saskatchewan
Labour Relations Board

OLYMPIC MOTORS (SK) I CORPORATION and THOMAS GLEN, Appellants v CHIAN-KAI KAO and GOVERNMENT OF SASKATCHEWAN, DIRECTOR OF EMPLOYMENT STANDARDS, Respondents

LRB File No. 007-22; December 1, 2022
Chairperson, Susan C. Amrud, K.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

For Olympic Motors (SK) I Corporation and Thomas Glen:	Kevin C. Mellor
For Chian-Kai Kao:	Self-represented
For Government of Saskatchewan, Director of Employment Standards:	Alyssa Phen

Appeal from decision of Adjudicator – Appeal dismissed, but mathematical error in Adjudicator's decision corrected – Employer did not satisfy Board that hearing before Adjudicator was not conducted in a procedurally fair manner – Employer did not satisfy Board that Adjudicator made findings of fact that amounted to errors of law – Employer did not satisfy Board that Adjudicator made errors of law in interpretation of section 2-59.1 of *The Saskatchewan Employment Act*.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, K.C., Chairperson: On January 4, 2022, an Adjudicator selected pursuant to section 4-3 of *The Saskatchewan Employment Act* ["Act"] upheld the wage assessment and determined that Olympic Motors (SK) I Corporation and Thomas Glen ["Employer"] owe Chian-Kai Kao ["Kao"] $12,032.36 for pay instead of notice and $3644.67 for unpaid vacation pay (less statutory deductions). The Employer filed an appeal from that decision with the Board on January 21, 2022[1]. The Employer does not deny liability for the unpaid vacation pay. The Government of Saskatchewan, Director of Employment Standards ["Director"] asks the Board to correct a mathematical error in the Adjudicator's decision.

[1] LRB File No. 007-22.

[2] Kao worked for the Employer as a finance officer. On March 20, 2020, the Saskatchewan Chief Medical Health Officer ordered in-school learning in all primary and secondary schools suspended. That Public Health Order led to the closure of Douglas Park Elementary School, commencing March 21, 2020; it did not reopen until September 8, 2020. Kao was required to provide care and support to his child, a student at that school, during that time. Kao requested a leave of absence from his employment pursuant to section 2-59.1 of the Act. He submitted a letter to the Employer on March 21, 2020 that included the following statement: "I am formally requesting to take Public Health Emergency Leave". The Employer approved the leave. Starting April 20, 2020, the Employer attempted to persuade Kao to return to work. Kao refused and the Employer terminated his employment on June 25, 2020.

[3] The Adjudicator found that Kao was entitled to Public Health Emergency Leave ["PHE Leave"] because:

- A Public Health Order caused the suspension of in-school learning;
- The Order affected his child, as the school she attended was closed; and
- He was required to provide care and support for his child because she could not go to school during the day.

Argument on behalf of Employer:

[4] In summary, the Employer's grounds for appeal are:

- The Adjudicator did not conduct the hearing in a procedurally fair manner in accordance with natural justice;
- Kao did not satisfy subsection 2-59.1(5) of the Act that allows an employee to add PHE Leave time to his time worked, to calculate time worked for the purpose of section 2-60; and
- Kao resigned his employment on September 15, 2020 and is therefore not entitled to pay instead of notice pursuant to sections 2-60 and 2-61 of the Act.

[5] The Employer argues that the hearing was not conducted fairly because the Adjudicator allowed Kao to give his evidence by telephone, while the Employer's witnesses gave their testimony by video conference. The Employer argues that it is a fundamental right that both parties be allowed to conduct the hearing under the same process. The Adjudicator allowed Kao to not answer questions regarding the facts necessary to prove whether subsection 2-59.1(5) was applicable. He allowed Kao to be evasive, rude and demeaning, making it difficult to elicit evidence

from him. The Employer states that they should have been able to adduce the evidence they thought was relevant to make their legal arguments and were denied that opportunity.

[6] The Employer argues that clause 2-59.1(5)(a) of the Act does not apply to Kao because no one listed in that clause directed him to self-isolate. The Employer then argues that clause 2-59.1(5)(b) does not apply to Kao because he did not prove that he was required to provide care and support to his child. There was no evidence before the Adjudicator that Kao was required to care for a child. The Employer speculates that Kao did not have to, nor did he, provide care to his child. That means he was on leave because the Employer voluntarily agreed to let him self-isolate; he was not on a PHE Leave. The Adjudicator made an error of law when he accepted Kao's assertion that he had to provide the care, without allowing all the questions regarding this relevant issue to be asked and answered.

[7] The Employer argues that Kao must prove that no other childcare options were available before he would be entitled to PHE Leave. Under subsection 2-59.1(5), Kao must demonstrate that he was required to provide support for his child. The Employer acknowledges that there was a Public Health Order. However, the Employer argues, evidence was denied to them when they questioned Kao about whether someone else could have cared for the child. The Employer argues that it is incumbent on Kao to produce evidence that he had to care for and support his child, and he produced none.

[8] The Employer also argues that Kao resigned from his employment on September 15, 2020 and is therefore not entitled to any pay instead of notice. On September 15, 2020, Kao send a text message to the Employer resigning from his employment. The Adjudicator mistakenly accepted Kao's assertion that the message was sent for the purpose of prodding the Employer to pay out his vacation pay.

[9] The Employer relies on *Nutrien Ltd. v United Steelworkers, Local 7689 (Dale Hansen)*[2], where the arbitrator set out the principles that apply to a determination of whether an employee has resigned:

> *[61] Arbitrator Brandt summarized the law surrounding resignation as follows:*
>
> > *The law in this area is quite clear. In order that an employee be found to have effectively resigned her employment it must be demonstrated not only that she had a "subjective intention" to resign but also that this intention be confirmed by some*

[2] 2021 CanLII 54674 (SK LA).

> *"objective conduct". The concern that underlies this doctrine is that resignations frequently are offered in the heat of the moment or at times of some personal stress and that they may not express the employee's real wishes. Consequently, arbitrators have looked at conduct over and above the expression of a desire to resign employment in order to satisfy themselves that the intention to resign is one of which is continuing and real …*

[10] Applying this test, the Employer argues, leads to a conclusion that Kao voluntarily removed himself from his employment. The Employer asked him to come back multiple times. He refused. He moved to Vancouver. When asked to come back to work in September, he resigned. Since he resigned, he is not entitled to any pay instead of notice. The Adjudicator made an error of law by not properly considering the evidence before him on this issue.

Argument on behalf of Kao:

[11] Kao states that he did not refuse to answer the Employer's questions. The Adjudicator determined which questions were appropriate. The Employer objects to Kao's evidence merely because it does not accord with the Employer's theory of the facts. When Kao provided his evidence by telephone, the Employer's representatives could hear him clearly and simultaneously. The Adjudicator conducted a hearing that was respectful of the rights of all of the parties.

[12] Kao met with Thomas Glen, owner, and Josh Jors, general manager, of the Employer, on March 21, 2020 to request access to PHE Leave and to provide written notice that he needed to access the leave to care for his child. Glen approved the leave and was aware Kao needed to take care of his child, as their children attended the same elementary school. According to the Adjudicator, Glen stated that the letter from Kao to himself dated March 21, 2020 was self-explanatory that Kao needed to provide support for his family at home. Glen acknowledged that he approved Kao's request for PHE Leave. Kao stated in evidence that at the meeting with Glen and Jors on March 21st he explained the details of why he needed the leave, which was to stay home with his child to provide her with care and support. Kao stated they discussed his return to work would be as soon as the government lifted the emergency order.

[13] The Employer's suggestion that Kao could have relied on other family members to provide care to his child is not relevant to his right to access and remain on this job-protected leave as long as the Public Health Order was in place. There is no requirement in the Act for an employee to provide detailed information to their employer to access or remain on PHE Leave. The Act does

not require an employee to provide proof of spousal separation, age or ability of in-laws, or availability of others to provide childcare, to access or remain on PHE Leave.

[14] Jors sent Kao an email on June 25, 2020 taking his refusal to return to work as job abandonment and wishing him best of luck in his endeavors. Five days after this dismissal email, the Employer issued a Record of Employment; it indicated that Kao had quit. This is a clear form of termination. The Employer hired a replacement finance manager on June 1, 2020.

[15] The Adjudicator found that Kao's September 15, 2020 message, 11 weeks later, had no bearing, because at the time it was sent, the evidence showed that Kao did not have a job from which to resign. He was terminated on June 25, 2020.

[16] Kao does not accept the Employer's assertion that it tried to pay him his vacation pay by mailing out a cheque to him. Kao states that during his employment, he was always paid by direct deposit. The Employer provided no proof of its assertion that a cheque was sent to him.

Argument on behalf of Director:

[17] The Director argues that the Adjudicator conducted the hearing fairly. The Director pointed to subsection 4-4(2) and clause 4-5(1)(f) of the Act, which authorize the Adjudicator to determine the hearing procedures, including by using telecommunication.

[18] The Director relied on *South East Cornerstone School Division No. 209 v Oberg*[3] ["*Oberg*"] as establishing the framework for procedural fairness, and confirming that the hearing complied with that framework.

[19] The Director submits that employees are not required to prove that they have exhausted all options for childcare in order to access PHE Leave. Therefore, evidence related to Kao's relationship with his spouse, and whether other family members could have provided childcare for the child, is irrelevant. The Employer could not have been prejudiced by the nature of the testimony provided over the phone.

[20] Next, the Director argues that the Adjudicator correctly determined that Kao was required to provide care and support to his child, and therefore was entitled to PHE Leave. There is no reviewable question of law with respect to the issues of whether Kao was entitled to PHE Leave and whether Kao resigned or was terminated. In interpreting the Act, the Adjudicator correctly

[3] 2021 SKCA 28 (CanLII).

recognized that Part II of the Act must be interpreted in a broad and generous manner, and any doubt must be resolved in favour of the employee. Any doubts the Adjudicator might have had arising from difficulties of language, if there were any, were appropriately resolved in favour of Kao.[4]

[21] Finally, the Director addressed the Employer's submissions that the Adjudicator erred when making findings of fact. Here, the Director relied on *Missick v Regina's Pet Depot*[5], which held that 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. The Director submits that the issues raised by the Employer do not meet this standard.

[22] The Director does, however, suggest that the Adjudicator incorrectly found that the Employer owes Kao $15,577.03, rather than $12,032.36, as set out in the wage assessment, by double-counting the vacation pay. The Director asks that the Board correct this mathematical error.

Relevant Statutory Provisions:

[23] The parties relied on a number of provisions of the Act in this appeal.

[24] Clause 2-1(h) states:

> *2-1 In this Part and in Part IV:*
>
> . . .
>
> *(h) "employment leave" means a leave mentioned in Subdivision 11 of Division 2 that an employee is entitled to.*

Section 2-59.1 appears in Subdivision 11 of Division 2, meaning references to "employment leave" in Parts II and IV of the Act apply to PHE Leave.

[25] Sections 2-6 and 2-8 provide important protections for employees who take employment leave:

> *2-6 No provision of any agreement has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by this Part.*

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[4] *Government of Saskatchewan, Executive Director, Employment Standards v McKeown*, 2019 CanLII 120650 (SK LRB).
[5] 2020 CanLII 90749 (SK LRB).

2-8(1) Unless authorized by this Part, no employer shall take discriminatory action against an employee because the employee:

. . .

(d) has applied for or taken an employment leave or is otherwise absent from the workplace in accordance with this Part.

[26] Section 2-47 authorizes an employer to require verification of circumstances for employment leaves. As will be seen below, it does not apply to PHE Leave:

2-47(1) In this section, "nurse practitioner" means a nurse who is entitled pursuant to The Registered Nurses Act, 1988 to practise in the nurse practitioner category.

(2) If an employment leave involves a medical issue and the employer so requires, the employee shall provide written evidence in the form of a certificate from a duly qualified medical practitioner or nurse practitioner as to the reason for the leave or the extension of the leave.

(3) If an employment leave requires the verification of other circumstances and if the employer so requires, the employee shall provide written evidence to verify those circumstances, in the prescribed manner.

[27] Section 2-59.1 sets out the rules respecting PHE Leave:

2-59.1(1) In this section, 'chief medical health officer' means the person designated as chief medical health officer pursuant to The Public Health Act, 1994.

(2) This section applies if either:

(a) a public health emergency has been determined by the World Health Organization and the chief medical health officer has issued an order declaring:

(i) that the public health emergency applies to Saskatchewan; and

(ii) that individuals in Saskatchewan must take measures to prevent or reduce the spread of disease, including isolating themselves from other individuals; or

(b) the chief medical health officer issues an order declaring that, in the opinion of the chief medical health officer, a disease present in Saskatchewan is sufficiently harmful to the public health that individuals in Saskatchewan must take measures to prevent or reduce the spread of disease, including isolating themselves from other individuals.

. . .

(5) An employee is entitled to a public health emergency leave for the period during which an order of the chief medical health officer issued pursuant to subsection (2) is in force if:

(a) any of the following have directed employees to isolate themselves to prevent or reduce the spread of the disease that is the subject of the order:

(i) the employer of the employees;

(ii) a duly qualified medical practitioner;

(iii) the Government of Saskatchewan;

(iv) the chief medical health officer; or

(b) the employee is required to provide to care and support to the employee's child family member who is affected by a direction or order of the Government of Saskatchewan or an order of the chief medical health officer.

. . .
(10) Sections 2-43 and 2-47 do not apply to an employee covered by this section.

[28] Sections 2-60 and 2-61 describe an employer's obligation to provide notice or pay instead of notice when terminating an employee's employment:

2-60(1) Except for just cause, no employer shall lay off or terminate the employment of an employee who has been in the employer's service for more than 13 consecutive weeks without giving that employee written notice for a period that is not less than the period set out in the following Table:

Table

Employee's Period of Employment	*Minimum Period of Written Notice*
more than 13 consecutive weeks but one year or less	*one week*
more than one year but three years or less	*two weeks*
more than three years but five years or less	*four weeks*
more than five years but 10 years or less	*six weeks*
more than 10 years	*eight weeks*

(2) In subsection (1), "period of employment" means any period of employment that is not interrupted by more than 14 consecutive days.

(3) For the purposes of subsection (2), being on vacation, an employment leave or a leave granted by an employer is not considered an interruption in employment.

(4) After giving notice of layoff or termination to an employee of the length required pursuant to subsection (1), the employer shall not require an employee to take vacation leave as part of the notice period required pursuant to subsection (1).

2-61(1) If an employer lays off or terminates the employment of an employee, the employer shall pay to the employee, with respect to the period of the notice required pursuant to section 2-60:

(a) if the employer is not bound by a collective agreement that applies to the employee, the greater of:

(i) the sum earned by the employee during that period of notice; and

(ii) a sum equivalent to the employee's normal wages for that period.

[29] Sections 4-4 and 4-5 include provisions that address the Adjudicator's authority respecting the conduct of hearings:

> *4-4(2) Subject to the regulations, an adjudicator may determine the procedures by which the appeal or hearing is to be conducted*
>
> *4-5(1) In conducting an appeal or a hearing pursuant to this Part, an adjudicator has the following powers:*
>
> *. . .*
>
> *(f) to conduct any appeal or hearing using a means of telecommunications that permits the parties and the adjudicator to communicate with each other simultaneously.*

[30] Section 4-8 confirms that an appeal to the Board from an Adjudicator's decision is on a question of law:

> *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.*
>
> *. . .*
>
> *(6) The board may:*
>
> *(a) affirm, amend or cancel the decision or order of the adjudicator; or*
>
> *(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.*

Analysis and Decision:

[31] Section 4-8 of the Act allows for an appeal to the Board from a decision of an Adjudicator only on a question of law. The Employer, therefore, is required to satisfy the Board that the Adjudicator made an error of law in his decision.

[32] The Employer's first ground of appeal is that the Adjudicator did not conduct the hearing in a procedurally fair manner. While both the Employer and the Director relied on the following findings in *Oberg*, neither provided the Board with their assessment of how these factors do or do not apply to this matter:

> *[31] The Board's second concession relates to the general framework to be applied when answering this first issue. The Chambers judge looked to Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at paras 23–27 [Baker] for guidance. In Baker, L'Heureux-Dubé J. identified five non-exhaustive factors as assisting in the determination of the content of the duty of procedural fairness owed in a particular context. These factors were summarized by the Chambers judge as follows:*
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> *[21] Five important factors assist in determining the degree of procedural fairness owed by a public body to someone affected by its decision. The following factors*

> *are not comprehensive, but they provide a basic framework for assessing procedural fairness:*
>
> > *(a) The nature of the decision and the process used to make it. The more the process provides for a decision resembling judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required;*
> >
> > *(b) The nature of the statutory scheme and the terms of the statute under which the body operates. Greater procedural protections are required when no appeal procedure is provided in the statute or when the decision will finally determine the issue;*
> >
> > *(c) The importance of the decision to the individual affected. The greater the impact on the lives of those it affects, the more stringent the procedural protections;*
> >
> > *(d) The legitimate expectations for procedural fairness of the person challenging the decision, which is often informed by any policy the public body has in place respecting processes for decision-making; and*
> >
> > *(e) The choices of procedure made by the body itself, particularly when the statute gives the decision-maker the ability to choose its own procedures, or when the body has expertise in determining what procedures are appropriate.*
>
> *[32] Unifying this list of non-exhaustive factors "is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker" (Baker at para 22).*

The Board's review of these factors leads to the conclusion that the Employer has not proven that the hearing was procedurally unfair.

[33] The Employer does not believe it was fair for the Adjudicator to hear the evidence of the Employer's witnesses by audio and video, and the evidence of Kao by audio only. The Employer argues that "it is a fundamental right that both parties be allowed to conduct the trial under the same process"[6], but provides no jurisprudence to support that assertion. Assessment of body language, heavily relied on by the Employer in support of this argument, is only one factor in the assessment of credibility. The Adjudicator made a determination that he could appropriately assess Kao's credibility through audio evidence. The Employer has not convinced the Board that he made an error of law in making that determination. The Adjudicator had considerable documentary evidence before him that confirmed Kao's oral evidence.

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[6] Brief of Law on Behalf of the Appellants, para 33.

[34] The Employer also stated that the Adjudicator allowed Kao to not answer questions regarding the facts necessary to prove whether subsection 2-59.1(5) of the Act was applicable. In other words, the Employer objected to the Adjudicator's rulings respecting what evidence was relevant and admissible, and what evidence was not. The Employer argues that it is incumbent on Kao to produce evidence that he, rather than someone else such as his spouse or in-laws, had to care for and support his child. The Adjudicator correctly decided not to allow these questions to be put to Kao because they were not relevant; subsection 2-59.1(10) specifically provides that section 2-47 of the Act does not apply to PHE Leave. There is no requirement in the Act for Kao to provide detailed information to the Employer to access or remain on PHE Leave. The Act does not require an employee to prove that no other family member is available to provide care and support for their child before they will qualify for the unpaid PHE Leave. This means that the Employer could not require Kao to provide the evidence it argues was missing in this matter. While the Employer may not agree with that provision, that is the choice made by the Legislature when it enacted the criteria governing PHE Leave.

[35] The Board finds that the Adjudicator correctly interpreted the Act. The following passages in *Government of Saskatchewan, Executive Director, Employment Standards v McKeown*[7] are equally applicable in this matter:

> *[26] Part II of the Act provides minimum standards to protect employees in the context of their employment. It is remedial, benefits-conferring legislation. It must be interpreted in a broad and generous manner, and any doubt must be resolved in favour of the employee.*
>
> *. . .*
>
> *[36] Furthermore, Part II of the Act is a benefits-conferring statutory scheme, designed to protect employees from periods of uncertainty in employment. Benefits-conferring legislation must be interpreted in a broad and generous manner. Doubt arising from difficulties of language, if there were any, should have been resolved in favour of McKeown.*

[36] The Act was amended in March 2020 to create a new employment leave to address the public health emergency resulting from the COVID-19 pandemic. The government recognized that, with schools and daycare centers closing due to the pandemic, some employees would need to stay home from work to care for their children. Section 2-59.1 was enacted to provide an unpaid, job-protected leave during a public health emergency for employees who must provide care and support to a child family member affected by a Public Health Order. The facts show that Kao was eligible to access and remain on this leave. The Chief Medical Health Officer's Public Health Order

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[7] *Supra* note 4.

dated March 17, 2020 suspended in-person learning at all primary and secondary schools. Kao's child was therefore unable to attend school.

[37] The Employer argues that they did not know why Kao was away from work. The Adjudicator did not accept that evidence, based on the documentary evidence before him.

[38] The dispute in this matter arose as a result of the Employer's emails attempting to recall Kao from his leave. The Adjudicator correctly found that the Employer's repeated attempts to recall Kao to work from his leave, and then treating his refusal to report to work as job abandonment, amounts to termination of his employment.

[39] The Employer was required to grant Kao the PHE Leave and to allow him to remain on leave until his child was no longer affected by the school closure. The Employer did not have a right to recall him from that leave. The evidence accepted by the Adjudicator was that Kao was not on a leave voluntarily provided by the Employer (as some of his co-workers were); he was on PHE Leave pursuant to section 2-59.1 of the Act. This finding was supported by the documentary evidence before him.

[40] The documentary evidence was clear that Kao was terminated from his employment on June 25, 2020, long before he sent the September 15, 2020 text purporting to resign. Jors' email of June 25, 2020 was followed on June 30, 2020 by a Record of Employment, indicating that Kao had quit. It was appropriate for the Adjudicator to rely on this written evidence as proof that the Employer terminated Kao effective June 25, 2020. The Employer objected to the Adjudicator admitting the June 25, 2020 email into evidence because it was marked "without prejudice". The Adjudicator correctly found that the settlement privilege indicated by the proper use of that phrase was inapplicable to that document.

[41] With respect to the factual issues raised by the Employer, the Board held in *Missick v Regina's Pet Depot*[8]:

> *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.*

[8] *Supra* note 5, at para 18.

The Board finds that none of the factual issues questioned by the Employer meet this standard.

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

Conclusion:

[43] The Employment Standards Officer found that the Employer owes Kao $12,032.36, being $7,930.18 for two weeks pay instead of notice and $4,102.18 for vacation pay ($457.41 + $3,644.67). The Adjudicator stated that the Employer owes Kao $12,032.26 for pay instead of notice plus $3,644.67 for unpaid vacation pay. Subject to correcting this mathematical error, the decision of the Adjudicator is affirmed.

DATED at Regina, Saskatchewan, this **1st** day of **December, 2022.**

LABOUR RELATIONS BOARD

Susan C. Amrud, K.C.
Chairperson