Saskatchewan
Labour Relations Board

RIVERSIDE ELECTRIC LTD., Appellant v BRYCE SCHLAMP, Respondent and GOVERNMENT OF SASKATCHEWAN, DIRECTOR OF EMPLOYMENT STANDARDS, Respondent

LRB File No. 026-23; June 30, 2023
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Appellant, Riverside Electric Ltd.:	Steve Seiferling and Walker Patterson, Student-at-Law
The Respondent, Bryce Schlamp:	Self-Represented
Counsel for the Respondent, Government of Saskatchewan:	Justin Stevenson

Appeal of Adjudicator's Decision – Section 4-8 of *The Saskatchewan Employment Act* – Section 2-75 – Appeal of Wage Assessment.

Remitted to Adjudicator with Direction on Two Issues – Whether Leave Granted – Basis for Termination.

Supplemental Reasons of Adjudicator – Addressed First Issue Finding Leave – Did Not Adequately Address Second Issue – Error of Law Found.

New Issue – Unfair to Remit to Adjudicator to Consider New Issue – Adjudicator's Decision Cancelled.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an appeal filed on February 9, 2023 by Riverside Electric Ltd. [Employer], pursuant to section 4-8 of *The Saskatchewan Employment Act* [Act]. The Respondent, Bryce Schlamp, [Employee] was an employee of the Employer, having commenced his employment as an apprentice in 2011. On March 2, 2022, the Director of Employment Standards [Director] issued to the Employer and two of the Employer's corporate directors a wage assessment for $11,212.34 in favour of the Employee. The Employer commenced an appeal of the wage assessment pursuant to section 2-75 of the Act. The Adjudicator's decision upheld the wage assessment but amended the amount to $8,159.26.

[2] The Employer appealed that decision. The Board heard that appeal, found that the decision contained errors of law as set out in *Riverside Electric Ltd. v Schlamp*, 2022 CanLII 113733 (SK LRB) [*Riverside No.1*], and as a result, remitted two issues to the adjudicator, pursuant to clause 4-8(6)(b) of the Act. Further to the Board's Order, the adjudicator issued supplemental reasons on January 26, 2023 in which he affirmed his finding that the Employee had been terminated but varied the amount of the wage assessment again, this time to $5,506.17.[1]

[3] The Employer now appeals that decision. The Director participates in this appeal pursuant to clause 4-10(1)(a) of the Act. The Director takes no issue with the variation of the wage assessment. The Employee attended the appeal hearing but chose not to make any submissions, whether orally or in writing.

First Decision of the Board:

[4] In *Riverside No.1*, the Board explained that the adjudicator had erred in the application of the test he relied upon to determine whether there had been a termination or a voluntary resignation (as per *Beggs v Westport Foods Ltd*., 2011 BCCA 76 [*Beggs*]). The adjudicator had erred by applying the test for resignation and the test for termination as alternatives by default. After concluding that the test for resignation had not been met, the adjudicator concluded that the Employee had, therefore, been terminated. The Board found that the adjudicator had not considered whether the Employer had communicated in a manner consistent with the description in *Kalaman v Singer Valve Co. Ltd*., 1997 CanLII 4035 (BC CA), as cited by author David Harris and adopted in *Beggs*:[2]

> *A notice must be specific and unequivocal such that a reasonable person will be led to a clear understanding that his or her employment is at an end at some date certain in the future. Whether a purported notice is specific and unequivocal is a matter to be determined on an objective basis in all the circumstances of each case.*

[5] The Board found that the adjudicator "did not identify the specific and unequivocal act by the Employer that, objectively viewed, amounted to the Employee's termination".[3]

---

[1] LRB File No. 047-22.
[2] *Beggs v Westport Foods Ltd.,* 2011 BCCA 76 [*Beggs*], at para 37, citing *Wrongful Dismissal*, loose-leaf (Toronto: Thompson Canada Ltd., 1989).
[3] *Riverside Electric Ltd. v Schlamp*, 2022 CanLII 113733 (SK LRB) [*Riverside No.1*], at para 116.

[6] The Board also found that the adjudicator did not make a finding as to whether the Employee was on a leave, whether definite or indefinite, that was granted by the Employer. The issue had not been resolved and by not making that determination the adjudicator erred in law.[4]

Supplemental Reasons of Adjudicator:

[7] In his supplemental reasons, the adjudicator answered the question as to whether the Employee was on a leave of absence that was granted by the Employer:

> *From March 23, 2020 to June 8, 2020, the employee was on employment leave which was granted by the employer. As indicated above, the employer invited the employee to take the option to stay home due to Covid, which he did, until such time when he made several attempts to return to work with the employer.*

[8] He also found that the Employer terminated the Employee as a result of the following:

> *A review of the evidence shows that the employer transmitted a letter (Tab 6a, Employer's Exhibit 1), to its employees, including Mr. Schlamp, sometime before March 23, 2020.*
>
> *In this letter the employer discussed Covid, and invited [its] employees to exercise an option to remain home if they wanted to.*
>
> *On March 23, 2020 Mr. Schlamp, by way of text to the employer, advised that they would take the "stay at home" option offered by the employer.*
> *…*
> *The employee subsequently contacted the employer on May 11, 2020 to ask about going back to work. He was told by the employer that there was insufficient work to bring him back at that time.*
>
> *On May 29, 2020 the employee texted again inquiring about returning to work. He was again told that there was insufficient work to bring him back.*
> *On June 8, 2020 the employee met with Mr. Cassidy and asked about going back to work. He received a similar response.*
>
> *June 8, 2020, was the last attempt by Mr. Schlamp to request a return to work.*
>
> *He started looking for new employment which he obtained in July of 2020.*
>
> *From Mr. Schlamp's conduct it is clear that he thought he had been terminated on June 8, 2020. Mr. Schlamp no longer contacted the employer requesting to return to work, and started to seek new employment with a new employer. Nor did the employer have contact with Mr. Schlamp after that date.*
>
> *In my view the above actions by the employer, objectively viewed, amounted to the employee's termination.*
>
> *From March 23, 2020 to June 8, 2020, the employee was on employment leave which was granted by the employer. As indicated above, the employer invited the employee to take*

[4] *Riverside No.1*, at para 124.

the option to stay home due to Covid, which he did, until such time when he made several attempts to return to work with the employer.

Grounds of Appeal:

[9] The Employer alleges the following grounds of appeal:[5]

1) By failing to show how the [Employee's] choice to leave the Employer resulted in a layoff pursuant to section 2-60 of the Act;

2) By failing to analyze whether the [Employee's] choice to leave his employment was within the definition of resignation;

3) By concluding that there was a termination on June 8, simply by reason of a request to return to work;

4) By failing to show that the [Employee] was on a protected leave of absence pursuant to the Act, which could result in a layoff; and

5) By concluding that an employee can choose to leave his employment, without notice and without submitting any application for leave, and have it result in a layoff, rather than a resignation.

[10] The Employer also raised in its submissions, but not as a ground of appeal, that the adjudicator issued the supplemental reasons without seeking submissions from the parties. At the hearing of the appeal the Employer confirmed that it had not raised and was not raising procedural fairness as a ground of appeal.

[11] In *Riverside No. 1*, the Board addressed the Employer's interchangeable use of the terms "termination" and "layoff"[6] and therefore does not need to revisit that issue here.

Issues:

[12] There are two issues arising from this appeal:

a. Did the adjudicator err in law in determining that the Employee was on a leave granted by the Employer?

b. Did the adjudicator err in law in determining that the Employer terminated the Employee?

[13] There is also a third issue, involving constructive dismissal, that was raised by the Board.

---

[5] See, *Notice of Appeal*.
[6] *Riverside No. 1*, at paras 17 to 19.

Analysis:

1. Did the adjudicator err in law in determining that the Employee was on a leave granted by the Employer?

[14] In short, the adjudicator did not err in law in determining that the Employee was on a leave granted by the Employer. In *Riverside No. 1*, the Board gave the following direction to the adjudicator:

> *[124] It was necessary for the Adjudicator to make a determination as to whether the Employee was on a leave, whether definite or indefinite, that was granted by the Employer. There was conflicting evidence before the Adjudicator as to whether a leave was granted, but that issue was not resolved. By not making this determination, the Adjudicator erred in law.*

[15] In the decision, the adjudicator found:

> *From March 23, 2020 to June 8, 2020, the employee was on employment leave which was granted by the employer. As indicated above, the employer invited the employee to take the option to stay home due to Covid, which he did, until such time when he made several attempts to return to work with the employer.*

[16] The Employer takes issue with the fact that the adjudicator first found that a termination occurred and then found that the Employee was on leave. In the Board's view, this issue does not disclose an error of any consequence. Although it would have been preferable for the adjudicator to have considered whether there was a leave and then whether there was a termination, in that order, the adjudicator did not rely on his finding that there was a termination when deciding whether the Employer granted a leave. To the contrary, he based his finding as to whether the Employer granted a leave on the facts before him.

[17] The Employer also argues that there is no duty to return an employee to work when that employee is on a leave that has been granted by an employer, despite the wording of subsection 2-60(3). The Employer contends that only the employment leaves defined in Part II of the Act impose such an obligation on an employer. By extension, the Employer argues that, even if it had granted a leave, such leave was not "protected" and the Employer was not required to return the Employee to work.

[18] The Employer's argument re-argues an argument similar to that which the Board rejected in *Riverside No. 1*.

[19] Subsection 2-60(3) sets out two types of leave that are not considered an interruption in employment for the purposes of subsection (2). The first is an "employment leave" as defined in the Act; the second is a leave granted by an employer. As the Director explains, the "former is obligatory to provide, whereas the latter is at the discretion of the Employer".[7] Just because a leave that was granted by an employer was discretionary does not mean that the employer has no obligation to return the employee to work when the leave has ended.

[20] The Board is, once again, not persuaded by the Employer's argument. If the Employer's argument were accepted, it would allow for a situation in which an employer could grant an employee 15 days of leave and then terminate that employee afterwards without cause and without payment in lieu of notice, without any consequence to the employer or remedy for the employee. A leave that is granted by an employer is not considered an interruption in employment as set out in subsection 2-60(2). Absent an interruption in employment the prohibition and accompanying obligation, as set out in subsection 2-60(1), apply.

[21] The Employer also urges the Board to overturn the adjudicator's determination that the Employee was granted a leave, which was a conclusion based on mixed fact and law. As indicated, the Board finds no extricable error of law in the adjudicator's conclusion on this point.

[22] The Board is not persuaded that the adjudicator's reasons on this issue disclose an error of law.

2. Did the adjudicator err in law in determining that the Employer terminated the Employee?

[23] The short answer to this question is "yes".

[24] In *Riverside No. 1*, the Board remitted this issue to the adjudicator for the purpose of applying the framework he had adopted in determining whether there was a termination. The essence of that framework is captured in the following passage, reproduced again for ease of reference:

> *A notice must be specific and unequivocal such that a reasonable person will be led to a clear understanding that his or her employment is at an end at some date certain in the future. Whether a purported notice is specific and unequivocal is a matter to be determined on an objective basis in all the circumstances of each case.*

[7] *Director's Brief*, at para 12.

[25] The Board's finding with respect to this issue is summarized in its decision:

> *[112] The question before the Adjudicator was whether the Employer had communicated the termination in a manner that was "specific and unequivocal such that a reasonable person will be led to the clear understanding that his or her employment is at an end at some date certain in the future". The Adjudicator was obliged to identify the specific and unequivocal act by the Employer that, objectively viewed, amounted to a termination. It was the Employer's expressed, not actual, intention that mattered.*
>
> *[113] The Adjudicator did not demonstrate through his reasons that he considered whether there was a specific and unequivocal act by the Employer that, objectively viewed, amounted to a termination.*
>
> *…*
>
> *[116] The Adjudicator was obliged, after finding that there was no resignation, to turn to an assessment of the Employer's actions and to make a determination about those actions. The Board is not suggesting that the Adjudicator applied a subjective test, which also would have been in error,[27] but that the Adjudicator did not identify the specific and unequivocal act by the Employer that, objectively viewed, amounted to the Employee's termination.[28] The Adjudicator's error in this respect was an extricable error of law. In the absence of this analysis, the Board cannot conclude that the Adjudicator's decision was correct.*

[26] In the supplemental reasons, the adjudicator concluded that the Employer's actions "objectively viewed, amounted to the employee's termination" but did not address the requirement that the act be specific and unequivocal. As the Employer argues, there is no indication as to how the circumstances surrounding the third request from the Employee transformed the Employer's response to that request into specific and unequivocal notice or a specific and unequivocal act when the circumstances surrounding the prior two requests had not. Nor has the adjudicator addressed the issue as to whether and how, even if there were such an act, a reasonable person would be led to the clear understanding that his employment was at an end at some date certain in the future. There is no indication as to the certain date on which the employment would have been at an end.

[27] In summary, the adjudicator's reasons do not provide any greater clarity to the Board as to the specific and unequivocal act by the Employer. In the Board's view, the adjudicator did not correctly apply the framework that he had adopted for determining whether there was a termination, and thereby erred in law.

[28] The adjudicator has had two opportunities to identify the specific and unequivocal act by the Employer that, objectively viewed, amounted to the Employee's termination. He has not done so. The Board is obliged to conclude that there was no such act disclosed by the evidentiary record, and therefore no related termination. What remain are the possibilities that the Employee

resigned at a later date, in or around June 8 (as opposed to March) or after, or was constructively dismissed.

Constructive Dismissal:

[29] The Board raised with the parties the issue of constructive dismissal, seeking submissions as to whether the issue had previously been raised by any party, whether it was fair in the circumstances for the Board to consider it, and whether it was relevant to the matter before the Board.

[30] The Employer took the position that constructive dismissal should not be considered for the following reasons:

1. The issue had not previously been raised by any party in first instance and the Board should not intervene in a manner that could be taken as advocating for any party;
2. The Board does not have jurisdiction to consider constructive dismissal on an employment standards matter;
3. The Employer has not had sufficient time to review the issue and make submissions on it.

[31] The Employer relied for its position on *R. v Mian*, 2014 SCC 54 (CanLII), [2014] 2 SCR 689 [*Mian*].

[32] The Director took the position that constructive dismissal can and should be considered if the Board is inclined to cancel[8] the decision of the adjudicator due to an error on termination. Although the issue was not raised by any parties in the first instance, the facts of the matter are straightforward, and the Board could determine on this appeal whether constructive dismissal took place. The Director also relied for its position on *Harpold v Saskatchewan (Corrections and Policing)*, 2020 SKCA 98 (CanLII) [*Harpold*].

[33] In the Board's view, it is necessary only to deal with the first of the Employer's arguments. Given that constructive dismissal is a distinct issue that has not previously been raised by any party (including by the Director on this or the previous appeal), it would be unfair for the Board to consider it in the present appeal. When challenged on their position, the Director acknowledged that, without the issue having been raised by the parties at first instance, there would have been

[8] See, subsection 4-8(6) which gives the Board the power to affirm, amend, cancel, or remit.

no reason for the Employer to have turned its mind to whether it was necessary to present any evidence in relation to that issue.

[34] Therefore, the only available option would be to remit the matter to the adjudicator for a *de novo* hearing on constructive dismissal. This course of action would, in the Board's view, only marginally reduce the resulting unfairness to the Employer, requiring as it would yet a third round of hearings[9] and providing the Employee and the Director another opportunity to make their cases, this time to address an issue that neither had previously raised.

[35] Parenthetically, the Board also notes that the onus on constructive dismissal has been found to rest with the employee.[10]

[36] In coming to these conclusions, the Board (while recognizing that it is not an appellate court) is guided by the reasoning in *Mian*:

> *[38] Our adversarial system of determining legal disputes is a procedural system "involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker" (Black's Law Dictionary (9th ed. 2009), sub verbo "adversary system"). An important component of this system is the principle of party presentation, under which courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present" (Greenlaw v. United States, 554 U.S. 237 (2008), at p. 243, per Ginsburg J.).*
>
> *…*
>
> *[41] The question then is how to strike the appropriate balance between these competing principles. Appellate courts should have the discretion to raise a new issue, but this discretion should be exercised only in rare circumstances. An appellate court should only raise a new issue when failing to do so would risk an injustice. The court should also consider whether there is a sufficient record on which to raise the issue and whether raising the issue would result in procedural prejudice to any party. This test is sufficiently flexible while also providing for an appropriate level of restraint to address the tensions inherent in the role of an appellate court.*

[37] The *Mian* factors lead to the following findings: the Director is represented by counsel (at least at the s. 4-8 appeal stage); there is not a sufficient basis on the evidentiary record to resolve the issue; and, there would be procedural prejudice to the Employer if the Board were to proceed to consider the issue. To be sure, this latter point takes into account whatever measures would have been implemented to permit the parties to respond to the issue if it were appropriate to proceed.

---

[9] Recognizing that in the second round the Adjudicator did not seek to "hear" from the parties.
[10] See, for example, *Boyer v Badger Daylighting Inc*., 2009 SKQB 210 (CanLII); *Kosteckyj v Paramount Resources Ltd*., 2022 ABCA 230 (CanLII).

[38] Furthermore, the Board finds *Harpold* to be distinguishable. *Harpold* involved an appeal from a decision to strike a statement of claim brought by a self-represented litigant. In the present case, there has been a hearing in which evidence was called. The Board agrees with the sentiment expressed in *Harpold*, that is, that it is appropriate to provide scope to self-represented litigants; but given the current stage of the proceedings, to do so in the present case would create an unfairness that could not be remedied through an alternative proceeding.

[39] As such, the Board will not consider constructive dismissal and will therefore cancel the adjudicator's decision upholding a portion of the wage assessment, pursuant to subsection 4-8(6) of the Act.

Costs:

[40] Lastly, the Employer seeks costs in relation to this appeal. In *Riverside No. 1*, the Board observed that there is no power for the Board to award costs on an appeal:

> *[128] The Board recently considered the issue of awarding costs on an appeal in Andritz Hydro Canada Inc. v Timothy John Lalonde and Director of Occupational Health and Safety, 2021 CanLII 61031 (SK LRB) [Lalonde]. There, the Board succinctly disposed of the issue, as follows:*
>
> > *[30] The Board rarely orders a party to compensate another party for legal expenses, and when it does, it relies on clause 6-104(2)(e) of the Act which applies only to monetary loss suffered by an employee, an employer or a union as a result of a contravention of Part VI, the regulations made pursuant to Part VI or an order or decision of the Board. None of those criteria applies here.*
> >
> > *[31] Subsection 4-8(6) of the Act sets out the powers of the Board on an appeal from an adjudicator, and it does not include a power to order costs.*
> >
> > *[32] Pannu Bros. Trucking, referred to by the Employer, was a decision under the Canada Labour Code, which specifically stated, in clause 251.12(4)(c), that a referee may award costs. A similar power does not appear in the Act.*
> >
> > *[33] Accordingly, the request for costs is denied.*
>
> *[129] The Employer has not identified any authority that contradicts the Board's decision in Lalonde. There is no power to award costs. Nor would it be appropriate to do so.*

[41] The Employer makes the same argument in the present case as it did in *Riverside No. 1* and, again, does not provide any authority to contradict the Board's decision in *Lalonde* or in *Riverside No. 1*.

[42] As such, the Board declines the Employer's request for costs.

[43] For the foregoing Reasons, the Board hereby orders that the adjudicator's decision in LRB File No. 047-22 shall be cancelled, pursuant to subsection 4-8(6) of the Act.

[44] An appropriate Order will be issued with these Reasons.

DATED at Regina, Saskatchewan, this **30th** day of **June, 2023.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson