ALLAN VELDMAN, Appellant v RURAL MUNICIPALITY OF BUCHANAN NO. 304, Respondent

LRB File No. 127-22; January 6, 2023
Chairperson, Susan C. Amrud, K.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

For Allan Veldman: Self-represented

For Rural Municipality of Buchanan No. 304: Courtney Riviere

Application to Produce Fresh Evidence – Application granted with respect to one set of emails that were sent to Adjudicator before she issued her decision.

Appeal allowed – Adjudicator denied procedural fairness to appellant by refusing to consider or grant his request for adjournment of hearing.

Appeal allowed – Adjudicator made errors of law in considering issue that was not before her, in making decision on basis of no evidence, in finding that onus of proof was on appellant.

Remedy – Respondent required to reinstate appellant, pay all wages he would have earned if his employment had not been wrongfully terminated, remove reference to this matter from appellant's employment record and post Order and Reasons on its website.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, K.C., Chairperson: These Reasons address two applications filed with the Board by Allan Veldman. The first is an Appeal from the decision of an Adjudicator made pursuant to Part III of *The Saskatchewan Employment Act* ["Act"], filed July 27, 2022[1]. The second is an Application to Produce Fresh Evidence on that Appeal.

[2] Veldman made a complaint of discriminatory action against the Rural Municipality of Buchanan No. 304 ["Employer"] after the Employer terminated his employment on May 5, 2021. On June 25, 2021, an occupational health and safety officer ["OHS officer"] found that the

[1] LRB File No. 127-22.

termination was an unlawful discriminatory action contrary to section 3-35 of the Act. The OHS officer ordered the Employer to:

> a) reinstate Veldman to his former employment under the same terms and conditions under which he was formerly employed;
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> b) pay any wages he would have earned had there not been a discriminatory action; and
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> c) remove any reprimand or reference to the matter from any employment records with respect to this matter.

[3] The OHS officer concluded the June 25, 2021 letter as follows:

> *It is the employer's responsibility to contact the worker to arrange for reinstatement upon receipt of this decision.*

[4] The Employer did not appeal the finding that the termination was an unlawful discriminatory action or its obligation to reinstate Veldman to his employment. However, it did appeal the amount that it was required to pay to Veldman, on the basis that the OHS officer's Order did not take into account the amount Veldman earned during the period in question. The appeal by the Employer was contained in a letter dated July 13, 2021 that stated:

> *Occupational Health and Safety (OHS) ruled in favor of Allan Veldman's complaint filed against the R.M. of Buchanan No.304 regarding his termination. We have been trying to work with Allan on his return to work however also have questions regarding the payment of wages he would have earned had there not been a discriminatory action.*
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> *Since Mr. Veldman is now working for the R.M. of Keys No.303, we would like to appeal the decision of the Occupational Health and Safety Officer of June 25, 2021, pursuant to Section 3-53(1) of The Saskatchewan Employment Act on the grounds that the decision did not take into account the worker's actual earnings during the period when we were required to pay him the wages, as contemplated by Section 3-36(5) of the Act. We are requesting information as to his actual earnings so as to enable the necessary calculations to be made.*

[5] The Employer's appeal was heard by an Adjudicator on March 29, 2022. There was considerable confusion in the evidence before the Adjudicator respecting the Employer's efforts to put Veldman back to work[2], but as of the date of the hearing before the Adjudicator, and as of the date of the hearing before the Board, the Employer had not yet complied with its obligation to reinstate Veldman to his employment.

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[2] *The R.M. of Buchanan No. 304 v Allan Veldman*, LRB File No. 091-21, at para 42.

[6] The Adjudicator issued her decision on July 14, 2022. Despite the fact that the issue was not before her, the Adjudicator held, at paragraph 44:

> *Accordingly, I find that the RM did try to reinstate Mr. Veldman to his former employment under the same terms and conditions under which he was formerly employed.*

[7] Next, she found that Veldman's last day of work with the Employer was August 17, 2021. The Adjudicator stated, at paragraph 49:

> *The RM, through its legal counsel, corresponded with Mr. Veldman on August 17, 2021, inquiring as to when he planned to return to work (Exhibit A14). The onus then shifted to Mr. Veldman to make reasonable response to his employer. However, Mr. Veldman chose not to do so.*

[8] Finally, after finding that the amount owed by the Employer to Veldman from May 3 to August 17, 2021 was $19,240, the Adjudicator deducted $6,630 being the amount that the Employer has already paid to Veldman ($624 + $4,576 + $1,430), leaving $12,610 payable. She then turned to the issue of whether the Employer was entitled to reduce that amount by any wages Veldman earned during that period. Veldman obtained alternative employment during this time period with the Rural Municipality of Keys. The Employer filed evidence that Veldman earned a total of $7,590 from the RM of Keys, being $2,227.50 on June 25, 2021, $2,667.50 on July 9, 2021 and $2,695 on July 23, 2021. Veldman agreed that this evidence was accurate. The Adjudicator deducted these amounts from the amount payable by the Employer to Veldman, leaving $5,020 payable.

[9] In paragraph 70 of her decision, the Adjudicator then stated:

> *Neither party presented any evidence of Mr. Veldman's pay from the RM of Keys from July 17, 2021 to August 17, 2021.*

[10] However, the Adjudicator held, at paragraph 72, that "it appears" that Veldman worked similar hours of work until August 17th, and "it is likely" he earned $5,250 during that time period. According to her calculation, this meant that no further amount was owing by the Employer for wages. The Adjudicator concluded her calculations at paragraph 78 as follows:

> *Within 30 days of the release of this decision, Mr. Veldman shall provide confirmation of his pay from the RM of Keys, to legal counsel for the RM, for the time period of July 16, 2021 to August 17, 2021. If Mr. Veldman does not provide this information, within the allocated time period, then the figures used in my calculation shall be presumed correct.*

Application to Produce Fresh Evidence:

[11] When Veldman filed his Appeal of the Adjudicator's decision, he indicated an intention to file additional documentation for the purpose of proving his Appeal. When his Appeal came before the Board for scheduling, at the September 13, 2022 Motions Day, the Board advised him that he would need to file an Application to Produce Fresh Evidence. The deadline set by the Board was October 18, 2022. On October 18, 2022, Veldman filed with the Board the fresh evidence he proposed that the Board consider on his Appeal, consisting of a variety of documents and a video recording relating to this matter and to other disputes between the Employer and the Veldman family. On October 19, 2022, the Board Registrar emailed Veldman to explain the appropriate procedure. The Board Registrar advised Veldman that he now needed to file two applications, by October 24th: one requesting permission to file new documents and setting out his reasons why permission for fresh evidence should be approved (the Application to Produce Fresh Evidence); and one requesting permission to file the first application late. On October 24, 2022, Veldman filed an Application to Produce Fresh Evidence, asking for an Order allowing him to submit the evidence that in his view was significant to his case, to prove that the Adjudicator violated his rights by being biased and not giving him a fair hearing. On the same day he filed a request for an extension of the time for making the Application, on the basis that he had originally misunderstood what was required of him. The Executive Officer granted the request for the extension of the time to file the Application to Produce Fresh Evidence, and it was considered by the Board with the Appeal.

[12] The Employer opposed the Application to Produce Fresh Evidence. It referred to *Palmer v The Queen*[3] ["*Palmer*"] which sets out the principles to be applied in determining the admissibility of fresh evidence on an appeal:

> *(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see McMartin v. The Queen.*
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> *(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.*
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> *(3) The evidence must be credible in the sense that it is reasonably capable of belief, and*
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> *(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.*

[3] 1979 CanLII 8 (SCC), [1980] 1 SCR 759 at page 775.

[13] The Employer noted that these principles have been adopted by the Board in considering similar applications.[4] The Employer argues that none of the items proposed to be produced as fresh evidence satisfies these principles. First, with the exercise of due diligence, many of the proposed pieces of evidence could have been put before the Adjudicator. Second, none of the proposed evidence is relevant to the appeal. None of it is relevant to the determination of whether the amount of wages owing by the Employer to Veldman pursuant to the OHS officer's Order should be reduced having regard to Veldman's new employment. None of it demonstrates any indication of bias or lack of fairness on the part of the Adjudicator. Turning to the third principle, the Employer argues that the proposed evidence does not include any information that would allow the Board to assess its reliability or credibility. Finally, the proposed evidence does not address the issues that were before the Adjudicator; therefore, it could not reasonably be expected to have affected her decision.

Analysis and Decision on Application to Produce Fresh Evidence:

[14] The Board finds that the fresh evidence rules set out in *Palmer* weigh against the admission of most of the proposed evidence.

[15] The proposed evidence that is dated before March 29, 2022 is not accepted as evidence. With the exercise of due diligence it could have been presented to the Adjudicator. Much of it appears to have been before the Adjudicator.

[16] The undated documents are not accepted because there is no indication of when they were created or by whom, meaning the Board is unable to assess their credibility or reliability. The same determination applies to the video submitted, which includes no indication respecting when the recorded event occurred.

[17] Information about the person who conducted a harassment investigation for the Employer is not accepted because it is not relevant to an issue before the Board on this Appeal and could not reasonably be expected to have affected the Adjudicator's decision.

[18] That leaves only a series of emails exchanged among counsel for the Employer, Veldman and the Adjudicator following the hearing. In its written and oral submissions on the Application to Produce Fresh Evidence, the Employer did not comment on these documents.

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[4] *Missick v Regina's Pet Depot*, 2020 CanLII 90749 (SK LRB); *Metz v Johannes Van Den Berg*, 2021 CanLII 34893 (SK LRB).

[19] The first set of emails were sent on April 1, 2022. The Employer's counsel sent detailed information to the Adjudicator providing the Employer's argument respecting an appropriate calculation of the amount the Employer should be required to pay to Veldman, closing with: "I trust that the above outlines the calculations that were requested at the Adjudication". Later the same day Veldman replied, providing his response to that email. The Board finds that these emails are admissible. They could not, with the exercise of due diligence, have been put before the Adjudicator at the hearing on March 29, 2022, because they had not yet been created at that date. They are relevant, as they bear on decisive issues in this appeal, whether Veldman received a fair hearing before the Adjudicator and whether the Adjudicator made an error of law in her determination of the appeal. While they are not accompanied by an affidavit, as the Board would normally expect them to be, the Employer did not challenge their authenticity or credibility; they are reasonably capable of belief. They were in the possession of the Adjudicator before she issued her decision and therefore they can reasonably be expected to have affected the result. Considering their timing, it would have been appropriate to include them as part of the record of the adjudication, pursuant to clause 4-8(4)(g) of the Act.

[20] In September 2022, a further series of emails were exchanged, respecting enforcement of the Adjudicator's decision. These emails do not contain information that is relevant to this matter or that could reasonably be expected to have affected the Adjudicator's decision. These emails are not accepted as evidence.

Appeal:

Argument on behalf of Veldman:

[21] Veldman appeals the Adjudicator's decision on the following grounds:

a) the Adjudicator violated his right to have legal counsel at the hearing, when she refused his request for an adjournment of the hearing after his lawyer withdrew four days before the hearing;

b) the Adjudicator was biased against him;

c) he was unaware of the matters at issue in the hearing.

[22] Veldman's appeal lists a number of incidents that occurred before and during the hearing that, from his perspective, mean that he did not receive a fair hearing. The first date set for the hearing was February 3, 2022. Veldman requested subpoenas, which the Adjudicator did not

provide to him until January 30, 2022, only three days before the date of the hearing. This, he argued, was unfair, as it did not give him time to serve the subpoenas in advance of the hearing.

[23] As it turned out, Veldman contracted COVID-19, and was therefore unable to attend the hearing on February 3, 2022. As a result, the Adjudicator adjourned the hearing until March 29, 2022, with the warning that the hearing would proceed that day with or without him. The lawyer who was representing Veldman withdrew on March 25, 2022. Veldman asked the Adjudicator for an adjournment to obtain alternate legal counsel, and the Adjudicator refused. Veldman therefore represented himself at the hearing. He does not believe he received a fair hearing, as he was required to proceed without counsel, and he believes that the Adjudicator did not let him ask the questions he wanted to ask the witnesses or make all of his submissions.

[24] A particular concern was with respect to what issues were before the Adjudicator. Veldman argued in his Notice of Appeal that he was not informed by the Adjudicator as to what matters were in issue with respect to the Employer's appeal: "I had asked the adjudicator on multiple times as to what exactly I was fighting, and she never told me until the last half hour of the court"; "the adjudicator without allowing me to prove my case wrote down that I refused to go back to work therefore I quit on the 17th of Aug. 2021. Which was not part of the appeal and was not told to me that I had to prove anything about that part of the decision".

Argument on behalf of Employer:

[25] The Employer appropriately interpreted Veldman's first ground of appeal to mean that he is arguing that he was denied procedural fairness or natural justice. With respect to the issue of whether the Adjudicator should have granted Veldman an adjournment when his counsel withdrew, the Employer argues that there is no absolute right to an adjournment. The Adjudicator was not satisfied that there was a need to adjourn the hearing. A decision to grant or refuse an adjournment should not be interfered with if it is decided on proper grounds:

> *[2] While the granting of or refusal to grant an adjournment is undoubtedly a matter within the Board's discretion, none the less, when there has been a wrongful refusal to grant an adjournment, resulting in the denial of natural justice, certiorari may lie to quash the order and directions of the Board: Regina v. Medical Appeal Tribunal (Midland Region); Ex parte Carrarini, [1966] 1 W.L.R. 883; and Jim Patrick Ltd. v. United Stone & Allied Products Workers of America, Local 189 (1959), 1959 CanLII 222 (SK CA), 29 W.W.R. 592, 21 D.L.R. (2d) 189 (Sask. C.A.). Whether or not there has been a wrongful refusal to grant an adjournment must be determined in the light of the facts in each case.*
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> *[3] Where an applicant alleges that there has been a wrongful refusal to grant an adjournment it is, as a general rule, for the applicant to show a good reason for the adjournment not attributable to his actions. . . .*

> . . .
> *[15] The first question for determination is whether or not, viewed in the light of all of the evidence, the refusal of the Board to grant an adjournment was a wrongful exercise of its discretion. If it was, then the second question for determination is whether such refusal resulted in a denial of natural justice. If the refusal to grant the adjournment was not a wrongful exercise of the Board's discretion, the second question, of course, does not arise.*[5]

[26] The Employer argues that the evidence shows that the refusal to grant the adjournment was not wrongful. The Adjudicator demonstrated that she carefully considered adjournment requests when she twice previously granted adjournment requests made by Veldman, once following a winter storm when he was required to work to clear the roads of snow, and once when Veldman was sick with COVID 19. Veldman has not provided any evidence that proves that the Adjudicator did not consider this third request in good faith.

[27] In any event, the Employer argues, the refusal of the adjournment did not result in a denial of natural justice to Veldman. The Employer argues that Veldman was owed minimal procedural fairness in the appeal to the Adjudicator. The appeal was only with respect to the narrow issue of wages owing. The decision would not greatly affect him as the appeal was only with respect to a reduction in wages owing by the Employer to him. The procedure to be followed at the hearing was clearly established to Veldman by the Adjudicator. Veldman knew of the date of the hearing and had all necessary information to proceed on the date of the hearing. He was not denied an opportunity to have his case heard; he attended and testified at the hearing. The Employer argues that nothing has been filed with the Board that would prove that Veldman was not aware of, or could not make himself aware of, the matters in issue in the appeal or that he could not make his own case before the Adjudicator. The Employer argues that whether or not Veldman had legal counsel representing him at the hearing would not have affected the decision made by the Adjudicator. The Employer states that the matters in issue in the appeal were discussed as early as the pre-hearing on December 9, 2021, and in later emails, thus Veldman was well aware of them. With respect to the subpoenas, since the hearing did not proceed on February 3, 2022, the short receipt of them was not in the end a practical issue.

[28] Turning to Veldman's second ground of appeal, the Employer argues that Veldman has not provided any evidence that the Adjudicator was biased against him. The test that must be met

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[5] *Piggott Construction Ltd. v Labour Relations Board of Saskatchewan*, 1973 CanLII 884 (SK CA).

is whether a reasonably informed bystander could reasonably perceive bias on the part of the Adjudicator. More than a mere suspicion of bias is required.[6] Veldman has not met this test.

[29] Finally, the Employer argues that subsection 4-8(2) of the Act clearly states that an appeal from an Adjudicator's decision can only be made on a question of law. Findings of fact made by the Adjudicator cannot be appealed to the Board unless they rise to the point of being errors of law:

> *In other words, it is not sufficient for Lapchuk to argue that he disagrees with the Adjudicator's interpretation of the facts. He must meet this very high bar of satisfying the Board that the Adjudicator made her findings of fact on the basis of no evidence or irrelevant evidence, in disregard of relevant evidence, on a mischaracterization of relevant evidence or on an unfounded or irrational inference of fact.*[7]

[30] The Employer argues that it is clear from the Adjudicator's decision that she made determinations of fact based on the evidence she deemed relevant. She weighed the evidence submitted by both parties. Therefore, the Board should not interfere with her findings of fact.

[31] The law is clear that if Veldman earned wages elsewhere during the time the Employer is required to pay him for lost wages, those earnings are to be deducted from the amount owing by the Employer. The Adjudicator correctly identified and applied the law in reaching this conclusion.

Relevant Statutory Provisions:

[32] The following provisions of the Act are applicable in this matter:

> *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*

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[6] *Finch v Assn. of Professional Engineers and Geoscientists of British Columbia*, 1996 CanLII 773 (BCCA); *Koskie v Child Find Sask. Inc.,* 2015 CanLII 90523 (SK LRB).
[7] *Lapchuk v Saskatchewan*, 2021 CanLII 143202 (SK LRB) at para 52.

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

[33] The first issue for the Board to determine is whether Veldman was denied procedural fairness or natural justice when the Adjudicator refused his request for an adjournment of the March 29, 2022 hearing, after his counsel withdrew on March 25, 2022.

[34] When the Adjudicator adjourned the hearing date of February 3, 2022, on the basis that Veldman had COVID 19 and therefore could not participate, she stated, in an email to the parties dated February 2, 2022: "Mr. Veldman – when we set a new hearing date – the hearing will proceed on that date – whether you participate or not".

[35] In *Mervilus v Canada (Minister of Citizenship and Immigration)*[8], the Federal Court reviewed a decision of the Immigration Appeal Division to deny the applicant an adjournment to obtain counsel:

> *[20] The right to counsel is not absolute; what is absolute, however, is the right to a fair hearing. Le Dain J. explains the importance of a fair hearing as follows in Cardinal v. Director of Kent Institution, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643:*
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> > *. . . the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the*

[8] 2004 FC 1206 (CanLII).

> *basis of speculation as to what the result might have been had there been a hearing. [page 661]*
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> *. . .*
>
> *[25] The following principles can therefore be drawn from the case law: although the right to counsel is not absolute in an administrative proceeding, refusing an individual the possibility to retain counsel by not allowing a postponement is reviewable if the following factors are in play: the case is complex, the consequences of the decision are serious, the individual does not have the resources - whether in terms of intellect or legal knowledge - to properly represent his interests.*

[36] In *Markwart v Prince Albert (City)*[9] ["*Markwart*"], the Court of Appeal for Saskatchewan considered the same issue:

> *[31] I agree the appellants were given the opportunity to be heard. However we do not know whether their case was presented in the best light. In other words, would counsel have argued the case better than the appellant? We do not have an answer to that question and it may or may not have been argued more successfully. Counsel may have been able to persuade the City to consider the option of a compromise or to give the appellants more time. This is obviously speculation, however, the opportunity to have counsel argue the case was denied the appellants and in my view the Chambers judge erred by saying the appellants made a mistake in choosing a counsel who was not available. That was not necessarily the mistake or fault of the appellants. Blame should not have been placed on the shoulders of the appellants for having chosen a counsel who, given the short period of time, was not available.*
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> *. . .*
>
> *[33] Although the decision to grant or refuse an adjournment is a discretionary one the seriousness of the potential injury to the applicant is a relevant consideration.*
>
> > *While a decision to grant or refuse an adjournment is said to be a matter of discretion, the tribunal's decision cannot be contrary to procedural fairness. Thus, the basic question is whether an adjournment was required in order to ensure that the individual concerned had a reasonable opportunity in all the circumstances to present proofs and arguments to the decision-maker, and to answer the opposing case. As well, it may be relevant to consider the seriousness of the injury likely to be sustained by the applicant as a result of an erroneous or adverse determination of the dispute. For example, a request for an adjournment in proceedings that may result in the deprivation of a right protected by the Charter must be considered especially carefully.* [Donald J.M. Brown and John M. Evans, Judicial Review of Administrative Action in Canada, looseleaf (Toronto: Canvasback Publishing, 1995) at pp.9-108 &109]
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> *The Chambers judge failed to consider a serious effect the decision would have on the appellants.*

[37] Veldman had a good reason to ask for an adjournment, that was attributable, not to his actions, but to the actions of his former counsel. Although the right to counsel is not absolute in an administrative proceeding, refusing a party the possibility to retain counsel by not allowing an adjournment is reviewable in the following circumstances: the case is complex; the consequences

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[9] 2006 SKCA 122 (CanLII).

of the decision are serious; the individual does not have the resources - whether in terms of intellect or legal knowledge - to properly represent his interests. Applying these factors to this matter, the Board finds that the Adjudicator's decision to refuse the adjournment is reviewable.

[38] While the case does not at first blush seem complex, the manner in which the Adjudicator chose to address the Employer's limited appeal turned it into a complex case, as evidenced by the issues before the Board in this matter. The Employer and the Adjudicator acknowledged in advance of the hearing that the Employer's appeal was not of the entire decision, but only of the narrow issue of whether the Employer could deduct, from the amount it owed Veldman, the amount he had earned from other employment. However, during the hearing the Adjudicator chose to treat the appeal as if it was an appeal of all of the OHS officer's Order. At paragraph 5 of her decision the Adjudicator stated: "The Notice of Appeal asks for an Order quashing the decision". In fact, the Notice of Appeal did not ask for such an Order. When faced with this change in approach mid-hearing, Veldman did not have the legal knowledge to be able to address it.

[39] Second, the consequences of the Adjudicator's decision were serious for Veldman. The Adjudicator purported to remove his right to be reinstated to his employment. The amount of money at stake was significant.

[40] Third, Veldman did not have the legal knowledge to properly represent his interests at the hearing. Being thrust into the position of having three days to review the sizeable record in this matter and prepare to examine and cross-examine witnesses and provide legal argument would be a daunting task even for a lawyer. Given that Veldman is not a lawyer, the task was impossible. He also did not have the legal knowledge to properly represent his interests when it became apparent that the Adjudicator was making errors of law in the conduct of the hearing.

[41] The Board is also troubled by the Adjudicator's position, as set out in her February 2, 2022 email to Veldman, that no further adjournment requests from him would even be entertained, let alone properly considered. The fact that Veldman had been granted two previous adjournments for totally unrelated reasons does not justify the Adjudicator's decision to refuse to grant or even consider Veldman's adjournment request.

[42] The Board finds that the Adjudicator's decision, to refuse to grant Veldman's request for an adjournment of the March 29, 2022 hearing, was a wrongful exercise of the Adjudicator's discretion.

[43] Having found that the Adjudicator's decision to refuse the adjournment is reviewable, the Board now turns to the question whether this wrongful refusal to grant an adjournment resulted in a denial of natural justice. The Board finds that it did. Veldman did not have an adequate opportunity to prepare for the hearing or present his case. He was ill-equipped to deal with the appeal on his own, and was not able to respond to the legal issues that arose during the hearing. As the Court of Appeal noted in *Markwart*, while he was given an opportunity to be heard, we do not know whether his case was presented in the best light. Would counsel have argued the case better than he was able to? While the Board cannot speculate on what the outcome might have been had Veldman been represented by counsel during the hearing, it is clear that the Adjudicator failed to consider the serious effect that the decision to deny the adjournment would have on Veldman. The Board finds that Veldman was denied procedural fairness by the Adjudicator.

[44] The second issue on this appeal is whether Veldman has established a reasonable apprehension of bias by the Adjudicator against him. The Board finds that this ground is not established. In *Koskie v Child Find Sask. Inc.*[10], the Board held:

> *More than a mere suspicion of bias is required. There must be some evidence which would lead "an informed person, viewing the matter realistically and practically—and having thought the matter through" to conclude that the decision maker was biased. None of the indicia to support such a conclusion is present here. There are no serious grounds on which to base such a conclusion. The Adjudicator, as an administrative officer is performing a quasi-judicial function and therefore deserves a strong presumption of impartiality. There is no real likelihood or probability of bias which arises from the fact that the Appellant made an application to compel the Adjudicator to render her decision.*

Applying those principles to this matter, the Board finds that Veldman has not provided evidence that demonstrates a reasonable apprehension of bias by the Adjudicator.

[45] The third issue on this appeal is whether the Adjudicator made errors of law in her decision. The Board finds that several errors of law were made.

[46] The Employer did not appeal the finding that the termination was an unlawful discriminatory action. However, it did appeal the amount that it was required to pay to Veldman, on the basis that the OHS officer's Order did not take into account the amount Veldman actually earned during the period in question.

[47] Despite the fact that the issue was not before her, the Adjudicator held, at paragraph 44:

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[10] *Supra* note 6 at para 45.

> *Accordingly, I find that the RM did try to reinstate Mr. Veldman to his former employment under the same terms and conditions under which he was formerly employed.*

[48] It was an error of law for the Adjudicator to purport to rule on an issue that was not before her. The Employer's appeal did not raise this issue. The Employer and the Adjudicator had, on several occasions in advance of the hearing indicated that this issue would not be considered during the hearing.

[49] An email from counsel for the Employer to Veldman, dated July 27, 2021 states:

> *I confirm that the RM has appealed the decision of the Occupational Health and Safety Officer of June 25, 2021. However, the only issues raised on the appeal are (i) whether a reduction should be made for what you earned during the relevant period, pursuant to section 3-36(5) of The Saskatchewan Employment Act, SS 2013, c. S-15.1, and (ii) if so, the amount of the reduction. The RM has not appealed the decision that you are to be reinstated.*

[50] An email dated August 24, 2021 from counsel for the Employer to the administrator for the Employer, that was in evidence before the Adjudicator, states: "the only issue on the appeal of the decision of the Occupational Health and Safety Officer is whether there should be a deduction for what he has earned at Keys and, if so, the amount of the same".

[51] In an email dated January 26, 2022 addressed to the parties, the Adjudicator refused to order the Employer to provide Veldman with two documents he requested on the basis that they were not relevant to the issue before her, which she described as "very narrow issues on appeal":

> *The parties need to be very clear that the only topics for discussion at the hearing will be what the calculation of Mr. Veldman's wages should be from May 5, 2021 to present and whether there are any mitigating factors that influence that calculation.*
>
> *Further, given that Mr. Veldman has advised that he is prepared to return to work at the RM, I would like to see the proposal for the return to work plan by the RM for Mr. Veldman.*

[52] Similarly, in the email dated January 30, 2022 providing the requested subpoenas to Veldman, the Adjudicator cautioned the parties: "I remind the parties that the witnesses [sic] testimony should focus only on the calculation of wages and any other considerations related to the calculation of wages that the parties would like me to take into account".

[53] The Adjudicator found, at paragraph 49, that Veldman's last day of work with the Employer was August 17, 2021:

> *The RM, through its legal counsel, corresponded with Mr. Veldman on August 17, 2021, inquiring as to when he planned to return to work (Exhibit A14). The onus then shifted to Mr. Veldman to make reasonable response to his employer. However, Mr. Veldman chose not to do so.* [emphasis added]

[54] During the hearing of this Appeal, the Employer argued that this finding was not an error of law, and that the onus was on Veldman to take steps to resume his employment. As the Board pointed out to the Employer during the hearing of this Appeal, that submission is entirely at odds with the law, as recently articulated in *Saskatchewan Polytechnic Students' Association Inc. v Benard*[11] ["*Benard*"]:

> *Both parties relied on Canadian Merchant Service Guild v Desgagnés Marine Petro Inc. 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.*

[55] It was an error of law for the Adjudicator to find that the onus shifted to Veldman on August 17, 2021. She provided no basis on which she made that finding. The onus is on the Employer to comply with the OHS officer's Order that required it to put Veldman back to work. Further, the Employer did not appeal that Order or apply for a stay of that Order pending its appeal to the Adjudicator or pending the outcome of this Appeal. Since the Employer did not appeal that portion of the OHS officer's Order, that issue was not before the Adjudicator and it was an error of law for her to purport to address it.

[56] Even if it could be argued that the issue was before the Adjudicator for the purpose of calculating the amount owing by the Employer to Veldman, her determination that the Employer's obligation to pay ended on August 17, 2021 was contrary to the evidence as she found it. At paragraph 42 she found that on August 23, 2021: "legal counsel for the RM and legal counsel for Mr. Veldman have a conversation as to whether Mr. Veldman is returning to work for the RM. No

[11] 2021 CanLII 31416 (SK LRB) at para 61.

determining information is provided". In other words, on August 23, 2021, the parties were still discussing Veldman's return to work.

[57] In *PSS Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*[12], the Court of Appeal for Saskatchewan stated:

> *[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. . . . 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]

[58] Even if the Board had found that the Adjudicator was properly considering the issue of Veldman's return to work, her finding that Veldman's employment ended on August 17, 2021 was made in disregard of relevant evidence. This was also an error of law.

[59] The second issue considered by the Adjudicator was whether the Employer had paid Veldman the wages he would have earned had there not been a discriminatory action. This portion of her decision is tainted by the error of law she made in finding that the Employer's obligation to pay Veldman ended on August 17, 2021. However, the Adjudicator correctly held that the Employer was entitled to reduce the amount it owed to Veldman by $6,630 being the amount that the Employer has already paid to Veldman ($624 + $4,576 + $1,430) after his wrongful termination. During the period of his wrongful termination, Veldman obtained alternative employment with the Rural Municipality of Keys. The Employer filed evidence that Veldman earned a total of $7,590 from the Rural Municipality of Keys, being $2,227.50 on June 25, 2021, $2,667.50 on July 9, 2021 and $2,695 on July 23, 2021. Veldman agreed that this evidence was accurate. The Adjudicator correctly deducted these amounts from the amount payable by the Employer to Veldman.

[60] Then, in paragraph 70, the Adjudicator stated:

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[12] 2007 SKCA 149 (CanLII).

> *Neither party presented any evidence of Mr. Veldman's pay from the RM of Keys from July 17, 2021 to August 17, 2021.*

[61] At this point, the Adjudicator made a further error in law when she found, at paragraph 72, that "it appears" that Veldman worked similar hours of work until August 17th, and "it is likely" he earned $5,250 during that time period. These excerpts from the Adjudicator's decision make it clear that she made findings based on no evidence. This is an error of law.

[62] The Adjudicator attempted to correct this error by making the following Order, at paragraph 78:

> *Within 30 days of the release of this decision, Mr. Veldman shall provide confirmation of his pay from the RM of Keys, to legal counsel for the RM, for the time period of July 16, 2021 to August 17, 2021. If Mr. Veldman does not provide this information, within the allocated time period, then the figures used in my calculation shall be presumed correct.*

[63] In her decision, the Adjudicator relied on subsection 3-36(5) of the Act:

> *(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.*

[64] However, she did not take into account subsection 3-36(6):

> *(6) The employer has the onus of establishing the amount of the reduction mentioned in subsection (5).*

[65] This means that the Order at paragraph 78 of the Adjudicator's decision was based on another error of law. It ignores subsection 3-36(6) of the Act, which states that the onus of proof is on the Employer, not Veldman. The Adjudicator's estimate of an amount that Veldman might have earned from July 16, 2021 to August 17, 2021 is not deductible from the amount that the Employer is required to pay to him.

Conclusion:

[66] Correctly applying the law in this matter leads to a conclusion first, that there is a continuing Order requiring the Employer to reinstate Veldman. Second, as a result of the Employer choosing to ignore this obligation, the amount the Employer owes to Veldman has continued to increase and will continue to increase until Veldman is reinstated.

[67] The Board has determined that, rather than remit this matter to the Adjudicator, this is an appropriate case in which to amend the decision made by the Adjudicator. With these Reasons, the Board will issue an Order as described below.

[68] The Order will require the Employer to comply with the OHS officer's Order to reinstate Veldman to his former employment under the same terms and conditions under which he was previously employed.

[69] The Order will require the Employer to pay Veldman the wages he would have earned had he not been wrongfully terminated, from May 5, 2021 to the date of his reinstatement. The Employer is entitled to deduct from this amount $6,630, the amount that the Employer satisfied the Adjudicator that it has already paid to Veldman, and $7,590, the amount that the Employer proved that Veldman earned from the Rural Municipality of Keys during this time. The Employer did not provide evidence to the Adjudicator, or apply to the Board for leave to file evidence before the Board, respecting any other amounts that Veldman may have earned since May 5, 2021. Therefore, no further amounts are deductible from the wages owing by the Employer to Veldman.

[70] The Order will once again require the Employer to remove any reprimand or reference to this matter from any employment records with respect to this matter. Veldman raised concerns that this requirement in the OHS officer's Order was not sufficient, as the Employer has posted on its website minutes of its meetings that contain inaccurate statements made about him when he was wrongfully terminated. To address this issue, the Order will also require the Employer to post on its website the Order and Reasons in this matter.

DATED at Regina, Saskatchewan, this **6th** day of **January, 2023.**

LABOUR RELATIONS BOARD

Susan C. Amrud, K.C.
Chairperson