Saskatchewan
Labour Relations Board

JONATHAN ASCHENBRENER, Appellant v SASKATCHEWAN HEALTH AUTHORITY, Respondent

LRB File No. 154-22; July 11, 2023
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

The Appellant, Jonathan Aschenbrener:	Self-Represented
Counsel for the Respondent, Saskatchewan Health Authority:	Paul Clemens

Appeal of Adjudicator Decision – Section 4-8 of *The Saskatchewan Employment Act* – Alleged Breach of Procedural Fairness – Alleged Errors in Statutory Interpretation – Alleged Jurisdictional Error.

Occupational Health and Safety – Sections 3-31 and 3-35 of the Act – Allegation of Discriminatory Action – Reasonable Grounds – No Investigation – Officer Found No Discriminatory Action – Appeal to Adjudicator – Sections 3-53 and 3-54.

Procedural Fairness – Accommodation at Appeal Hearing – No Breach of Procedural Fairness Established.

Non-Suit Application – Appropriate to Allow – Identified and Substantively Applied the Correct Test.

Jurisdiction – Accommodation Raised in Context of Work Refusal – Relevant Issue – Appropriate to Consider.

Duty to Accommodate Issue – Disregarded Evidence – Findings of Fact Outside Constraints of Non-Suit – Reasonableness of Grounds – Section 4-8(6)(b) – Remitted to Adjudicator.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to an appeal filed by Jonathan Aschenbrener on September 13, 2022 [the Appellant]. Until his employment was terminated on February 25, 2021, the Appellant worked as an Environmental Services Worker in a supervisory role for the Saskatchewan Health Authority [SHA].

[2] In or around 2020, the Appellant made requests to his Employer for accommodation in the workplace. The Appellant was on a leave of absence while the parties exchanged

communications, including with the assistance of medical documentation, about the accommodations and his potential return to work. In 2021, when SHA required that the Appellant attend work, he refused, citing dangerous conditions. As a result of his refusal to attend work, the Appellant was considered absent without leave. SHA then requested that the Appellant attend an in-person meeting. He made a request to attend the meeting electronically, which request was refused. After he did not attend the meeting, SHA terminated the Appellant's employment.

[3] On or about March 3, 2021, the Appellant filed a complaint of discriminatory action against SHA. On May 10, 2021, the occupational health and safety officer [OHS officer] issued a decision finding that the termination of his employment was not an unlawful discriminatory action contrary to section 3-35 of the Act. The Appellant appealed that decision pursuant to section 3-53. On November 3, 2021, an adjudicator was selected for the appeal of the OHS officer's decision pursuant to section 4-3. At the hearing before the adjudicator, SHA brought an application for non-suit, which the adjudicator granted, and thereby dismissed the appeal and upheld the decision of the OHS officer.

[4] In the present appeal, the Appellant raises a number of issues that fall into three general categories as follows:

1. The hearing was procedurally unfair.
2. The adjudicator applied the wrong standard to an employee's right to refuse dangerous work.
3. The adjudicator exceeded her jurisdiction by making a determination on a human rights matter.

[5] In accordance with the Board's usual process, deadlines were set for written submissions and a hearing was scheduled. Both the Appellant and SHA filed written submissions to support their respective positions.

Application for Fresh Evidence:

[6] On the first day of the hearing, the Board identified that the Appellant was alleging a breach of procedural fairness which allegation was based on, in part, evidence that was not on the record and therefore not before the Board. The Board explained that any new evidence could only be admitted and considered further to a successful fresh evidence application.

[7] With the benefit of that information, the Appellant indicated that he wished to bring an application to adduce fresh evidence. The Board adjourned the proceedings to provide the parties with an opportunity to file pleadings and written submissions with respect to such an application, as deemed necessary, all of which were ultimately filed with the Board.

Adjudicator's Decision:

[8] In the decision, the adjudicator summarized the evidence that came before her, including lists and requests for accommodation, requests from SHA for more information, responses from the Appellant, and pertinent aspects of the Appellant's testimony in chief and in cross.

[9] The adjudicator's decision addressed the application for non-suit brought by SHA. She outlined the evidence presented by the Appellant, determined that an adjudicator appointed pursuant to Part III of the Act has jurisdiction to consider a non-suit motion, and then determined the test to be applied on such a motion. The adjudicator described the central question as, "Does Mr. Aschenbrener have a *prima facie* case such that a trier of fact could find in his favour on the basis of the uncontradicted evidence?"

[10] The adjudicator found that there was no objective evidence to support the Appellant's belief that his workplace was unusually dangerous to his health and safety, but that, instead, there was evidence to the contrary. She also found that SHA had sufficiently met the Appellant's accommodation requests but even if it had not there was no objective evidence demonstrating that the Appellant's attendance at the workplace met the definition of dangerous work. To the contrary, the Appellant had attempted to use section 3-31 inappropriately as a way of resolving his accommodation complaints. Finally, some of the Appellant's complaints were not substantiated by medical evidence. An employee has a duty to bring forward medical evidence of a disability and to request accommodation.

[11] The adjudicator granted the non-suit motion and dismissed the appeal.

Summary of Arguments – Fresh Evidence Application:

Appellant:

[12] The Appellant relies on the test for the admission of fresh evidence established in *Palmer v The Queen*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759 [*Palmer*], arguing that the test weighs heavily in favour of admitting the evidence he seeks to adduce. He states that his hearing disability was known to the participants in the hearing and was the basis for his request for an

accommodation. He asserts that he was not accommodated appropriately and that, because of this, the hearing was unfair.

SHA:

[13] SHA argues that the evidence sought to be adduced is largely irrelevant, could have been produced at the hearing, and is tainted by credibility issues, but in any event, does not support a finding that the hearing was unfair. Either way, any evidence adduced by the Appellant must be weighed against the evidence sought to be adduced by SHA. The Appellant received a fair hearing in the context of an occupational health and safety appeal before an adjudicator. He knew the case he had to meet on the non-suit motion, testified, filed evidence, had the benefit of support people at the hearing, had an audio and written transcript at the hearing, and received written reasons for decision.

Summary of Arguments – Substantive:

Appellant:

[14] The Appellant relies on *FL Receivables Trust 2002-A v Cobrand Foods Ltd*., 2007 ONCA 425 (CanLII) [*FL Receivables*], to argue that it was procedurally unfair not to allow him to present his closing arguments. He believes that the adjudicator did not understand his case and that if he had been able to present his case and his arguments the decision would have been different.

[15] The Appellant contends that the parties had agreed on two issues to be determined by the adjudicator on the appeal: whether the legislation was followed; and whether there was good and sufficient reason for the termination. He sought to establish that SHA did not follow the right to refuse legislation; therefore, the termination was improper. Instead of considering these two issues, the adjudicator considered whether the workplace was unusually dangerous and whether SHA met the duty to accommodate.

[16] The Appellant argues that an employee has the right to refuse unusually dangerous work. When an employee exercises that right an employer is required to follow the procedures set out in the Act. Instead of investigating the complaint as required, SHA chose to terminate, thereby committing a discriminatory action. SHA did not accept that mental health could be an imminently and unusually dangerous occurrence and therefore a basis for a work refusal. SHA did not understand or follow its obligations under the Act.

SHA:

[17] The adjudicator properly outlined the legal issue and correctly stated the law relating to non-suit motions. She found that there was not sufficient evidence that the Appellant had reasonable grounds to refuse to perform the work. Having found that the Appellant's attendance at the workplace was not unusually dangerous, the adjudicator concluded that the threshold was not met, the refusal was not a protected activity, and SHA did not have a duty to investigate his complaint. As a result, there was no requirement for SHA to provide good and sufficient other reason for the termination.

[18] The adjudicator considered the evidence presented by the Appellant and found that it supported the position of SHA with respect to his accommodation requests.

[19] Moreover, the Appellant was found to have inappropriately attempted to use section 3-31 of the Act to resolve his accommodation complaints.

[20] SHA states that the hearing was procedurally fair. Contrary to the Appellant's argument, SHA was not required to present its case prior to a ruling on the non-suit motion. The adjudicator addressed the central issues that were before her and allowed the Appellant to fully present his case and his arguments within the parameters of the non-suit motion and the proper exercise of her discretion. The Appellant was given the opportunity to have a representative available to assist and did receive assistance at the hearing, including through a note-taking service which resulted in a live transcript during cross examination and non-suit arguments.

[21] There is no basis in fact to suggest that the adjudicator made findings of fact based on an improper belief that the Appellant did not have a hearing disability.

Applicable Statutory Provisions:

[22] The following provisions of the Act, effective as of the relevant dates, are applicable:

> ***3-1****(1) In this Part and in Part IV:*
>
> > *. . .*
> >
> > *(i)* ***"discriminatory action"*** *means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes termination, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty, but does not include:*
>
> *. . .*

3-31 *A worker may refuse to perform any particular act or series of acts at a place of employment if the worker has reasonable grounds to believe that the act or series of acts is unusually dangerous to the worker's health or safety or the health or safety of any other person at the place of employment until:*

(a) sufficient steps have been taken to satisfy the worker otherwise; or

(b) the occupational health committee has investigated the matter and advised the worker otherwise.

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

(a) acts or has acted in compliance with:

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

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

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

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

(b) seeks or has sought the enforcement of:

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

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

…

(f) refuses or has refused to perform an act or series of acts pursuant to section 3-31;

…

(h) gives or has given information to an occupational health committee, an occupational health and safety representative, an occupational health officer or other person responsible for the administration of this Part or the regulations made pursuant to this Part with respect to the health and safety of workers at a place of employment;

…

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 (3), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and*
>
> *(d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.*

(3) If an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 3-35, the occupational health officer shall advise the worker of the reasons for that decision in writing.

(4) If discriminatory action has been taken against a worker who has acted or participated in an activity described in section 3-35:

> *(a) in any prosecution or other proceeding taken pursuant to this Part, there is a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 3-35; and*
>
> *(b) the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason.*

…

3-53*(1) A person who is directly affected by a decision of an occupational health officer may appeal the decision.*
…

(4) Subject to subsections (10) and section 3-54, an appeal pursuant to subsection (1) is to be conducted by the director of occupational health and safety.
…

3-54*(1) An appeal mentioned in subsection 3-53(1) with respect to any matter involving harassment or discriminatory action is to be heard by an adjudicator in accordance with Part IV.*

(2) The director of occupational health and safety shall provide notice of the appeal mentioned in subsection (1) to persons who are directly affected by the decision.

4-4*(2) Subject to the regulations, an adjudicator may determine the procedures by which the appeal or hearing is to be conducted.*

(3) An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.

(4) An adjudicator may determine any question of fact that is necessary to the adjudicator's jurisdiction.

(5) A technical irregularity does not invalidate a proceeding before or by an adjudicator.

(6) Notwithstanding that a person who is directly affected by an appeal or a hearing is neither present nor represented, if notice of the appeal or hearing has been given to the person pursuant to subsection (1), the adjudicator may proceed with the appeal or the hearing and make any decision as if that person were present.

(7) The Arbitration Act, 1992 does not apply to adjudications conducted pursuant to this Part.

> ***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.*
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> *. . .*
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> *(6) The board may:*
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> > *(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*

Preliminary Issue – Fresh Evidence:

[23] The Appellant seeks to adduce, by way of fresh evidence, emails between himself, the adjudicator and counsel for SHA, a hearing aid prescription, an audiological report, and his own descriptions of events that took place during the appeal to the adjudicator.

[24] In support of this application, he relies on the following criteria for admitting fresh evidence, as set out in *Palmer*:

> *(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.*
>
> *(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.*
>
> *(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.*

[25] Applying the *Palmer* test, the Board makes the following findings.

[26] First, the documents. Although there was no physical bar to producing these documents at the hearing – they were in existence by the end of the hearing on the non-suit application – the documents were not relevant or necessary until after the procedural fairness concern arose. As such, due diligence could not have been exercised so as to produce the documents earlier. Next, the evidence is relevant to the question of whether the Appellant was afforded procedural fairness. Lastly, the evidence is sufficiently credible in that it consists of documents that came between the parties and the adjudicator and documents that are dated and apparently signed by a medical practitioner. Obvious concerns arising from the Appellant's admission that the audiological report

was "taken out of a recycle bin", are assuaged by the existence and the contents of the prescription document.

[27] Next, the descriptions sought to be adduced satisfy the tests for due diligence and relevance. The Board has made certain observations about the credibility of specific statements which it will address later in these Reasons. The descriptions are otherwise sufficiently credible.

[28] With respect to the last question, the issue raised on the fresh evidence application is whether the procedure was fair, not whether the evidence supports the result or does not support the result. The criterion must be responsive to that issue. By extension, the last question is more properly framed as whether the evidence could reasonably demonstrate that the procedure was unfair.

[29] As such, subject to the Board's observations on credibility, the Board is satisfied that it is appropriate to admit and review the proposed evidence for the purpose of determining whether the procedure was fair. In other words, it is appropriate to admit the evidence for the purpose of assessing the final criterion.

[30] Separate from the *Palmer* test, it has also been said that "appeals of administrative decisions should be restricted to the evidentiary record that was before the administrative decision-maker when it rendered its decision".[1] In such cases, the question to ask is "when should the record be supplemented?" The Saskatchewan Court of Appeal has accepted a non-exhaustive list of exceptions to the general rule of not supplementing, including an exception for the purpose of raising "procedural defects that cannot be found in the evidentiary record such as fraud, bribery, or bias".[2]

[31] To be sure, the present matter is an internal appeal to the Board arising from section 4-8 of the Act. The Court of Appeal in *Saskatchewan (Workers' Compensation Board) v Gjerde*, 2016 SKCA 30, [2016] 4 WWR 423 [*Gjerde*] considered when the record should be supplemented on judicial review of an administrative tribunal's decision. The Court later adopted this analysis on an appeal of an administrative decision in *101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 31 (CanLII).[3]

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[1] *101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 31 (CanLII), at para 48.
[2] *Ibid*, at para 51.
[3] *Ibid*, at para 52.

[32] However, in future cases, it may be appropriate to refine the test that applies to admitting evidence on appeals of adjudicators' decisions, in particular with respect to matters raising procedural fairness.

[33] Either test, however, supports admitting and reviewing the proposed evidence for the purpose of determining whether the procedure was fair.

[34] The reply evidence sought to be adduced by SHA will also be admitted for the same reasons and purpose as set out in the foregoing sections, subject to the same caveat with respect to credibility.

Substantive Analysis:

[35] This appeal was filed pursuant to subsection 4-8(2) of the Act, which permits an appeal of an adjudicator's decision on a question of law. The Board has previously determined that the standard of review to be applied on such appeals is correctness.[4]

[36] The Board has found that issues of procedural fairness may raise questions of law[5] and that the correctness standard extends to questions of procedural fairness.[6]

[37] In reviewing for procedural fairness, however, the limited right of appeal (on questions of law) necessitates deference to an adjudicator's findings of fact and to an adjudicator's application of the law to the facts where said application does not raise extricable questions of law.

[38] There are also good reasons to show deference to an adjudicator's choice of procedure. In his article, *The Standard of Review for Questions of Procedural Fairness*[7], Professor McKee describes the obvious tension between the correctness standard of review for questions of procedural fairness and the calls for deference to the decision-maker's choice of procedure as highlighted by the fifth *Baker* factor.[8] McKee's proposed remedy is to afford deference when

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[4] *Christine Ireland v Nu Line Auto Sales & Service Inc*., 2021 CanLII 97414 (SK LRB).
[5] *Riverside Electric Ltd. v Schlamp*, 2022 CanLII 113733 (SK LRB) [*Riverside Electric*]; *Knapp v ICR Commercial Real Estate*, 2019 SKQB 59 (CanLII).
[6] *Riverside Electric*, at para 44.
[7] Derek McKee, "The Standard of Review for Questions of Procedural Fairness", (2016) 41 Queen's LJ 2 at 381. See also, Paul Daly, "Future Directions in Standard of Review in Canadian Administrative Law: Substantive Review and Procedural Fairness," *Administrative Law & Practice*, Vol 36 No 1 March 36 CJALP 1-89 at 85.
[8] *McKee*, *supra*, at 378-8:

> Such a contextual, fact-sensitive approach to procedural fairness is in principle compatible with correctness review. However, L'Heureux-Dubé J concluded her list of factors in *Baker* by declaring:
>
>> [T]he analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to

determining which procedures were required and not when determining whether the decision-maker complied with those requirements. In the Board's view, this approach is consistent with the existence of section 4-4 of the Act and with a correctness review which asks whether the procedure was fair in the circumstances.[9] It is also consistent with the Board's reliance on the *Baker* factors in determining the content for procedural fairness. This is the approach that the Board will take.

[39] As such, the appeal raises three main issues:

1. Was the procedure fair in the circumstances?
2. Did the adjudicator apply the wrong standard to the worker's right to refuse?
3. Did the adjudicator exceed her authority in deciding the duty to accommodate issue?

1. Was the procedure fair in the circumstances?

[40] The first issue to determine is whether the procedure was fair in the circumstances. It is well established that the content of procedural fairness is variable depending on the context. The Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [*Baker*] set out five factors to assist in determining the content of procedural fairness in a particular context. These are:

1. The nature of the decision and the decision-making process employed;
2. The nature of the statutory scheme and the precise statutory provisions;
3. The importance of the decision to the individuals affected;
4. The legitimate expectations of the party challenging the decision;
5. The nature of the deference accorded to the body.

> > the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints.
>
> This "fifth factor" can be interpreted as a call for judicial deference with regard to procedure. Understood as such, it is incompatible with correctness review.

See, also, *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [*Baker*].

[9] As opposed to a review that identifies the best possible procedure: see, *Daly, supra*, at 85. It should also be mentioned that the Board on this appeal is considering whether the underlying procedure was fair; not whether the adjudicator made the correct determination about fairness.

[41] The following factors weigh in favour of a higher degree of procedural fairness in this case. First, an appeal with respect to any matter involving discriminatory action is to be heard by an adjudicator in accordance with Part IV, rather than by the Director of Occupational Health and Safety.[10] Greater procedural protections are consistent with the intention disclosed by this requirement. Next, the adjudicator's decision relates to whether the Appellant was engaged in a protected activity and therefore whether the termination of his employment was discriminatory action as set out in the Act. The decision has consequences for the Appellant's livelihood, which is a significant personal interest. Lastly, the present matter engages the applicable test for discriminatory action, which has a general application to the public.

[42] On the other hand, as alluded to, section 4-4 of the Act affords an adjudicator significant flexibility in conducting an appeal. An adjudicator may determine the procedures by which the appeal is to be conducted; is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate; and may proceed with the appeal in the absence of a person directly affected if the notice of appeal has been given to that person in accordance with the Act. Finally, the grounds of appeal are relatively narrow, suggesting deference to the adjudicator on factual issues. [11]

[43] In the current case, the legitimate expectations of the Appellant will depend on the specific issue raised and the circumstances that are relevant to that issue.

[44] The Board will take the foregoing factors into consideration in determining whether the procedure was fair in the circumstances.

[45] Next, the Appellant argues that each of the following issues demonstrate that the procedure was unfair:

a. He was denied public observers with no reasons given.

b. The adjudicator asked opposing counsel an evidentiary question which is not clear in the decision.

c. He has been treated unfairly and in a discriminatory fashion on the basis of disability.

d. There were issues with the closed captioning and there was no effort to make the hearing "very" transcribable.

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[10] Subsection 3-54(1).
[11] See, in comparison, *Riverside Electric*, at para 93.

e. Due to his hearing difficulties, he was unable to understand the cross examination.

f. The adjudicator addressed issues that were a significant departure from what the parties had agreed would be addressed.

g. The adjudicator did not allow him to present his case and did not permit him to provide closing arguments.

h. The adjudicator overturned the findings of another decision maker without investigation, weighing of evidence, or determining credibility.

i. The adjudicator observed that on a non-suit application there would be no findings of fact or assessments of credibility but then made findings of fact.

j. The adjudicator made a decision without evidence from SHA.

[46] First, the Appellant takes issue with the fact that he was denied public observers at the hearing. He suggests that the denial of public observers was procedurally unfair and breached his *Charter* rights. In response, the Employer argues that occupational health and safety appeals are equivalent to private arbitrations and, as such, there was no requirement to allow public observers at the appeal.

[47] The Board does not agree that appeals heard by adjudicators pursuant to Part IV are equivalent to private arbitrations. For one, subsection 4-4(7) states that *The Arbitration Act, 1992* does not apply to adjudications conducted pursuant to Part IV. Second, an appeal to an adjudicator is not a matter heard pursuant to an agreement between the parties. Third, there is a public interest in the decisions made on occupational health and safety matters.[12]

[48] On the other hand, the Act does not explicitly require that the appeals be heard in public. It provides discretion to an adjudicator to determine the procedures by which the appeal or hearing is to be conducted. There is no reference in the statute to the role of the public in the proceedings.

[49] More significantly, no person who was barred from the proceedings has raised an allegation of an infringement of their *Charter* rights or freedoms. The Appellant has not specified who he wished had had the opportunity to attend but was prevented from doing so.

[12] Relatedly, pursuant to section 3-42, if a person enters into a compliance undertaking or an occupational health officer serves a notice of contravention, the officer is required to provide the undertaking or notice to the committee or representative or post it in a conspicuous location.

[50] Clearly, the Appellant was present at the proceedings, and he was accompanied at different points by different people. The Appellant has not persuaded the Board that his interests are directly engaged by the existence or absence of public observers.

[51] Even if the Appellant's interests could be said to be directly engaged by the absence of public observers, he has not persuaded the Board that he was denied procedural fairness due to their absence. He argues that the absence of public observers impacted the outcome of his case. He contends that the presence of public observers would have ensured his fair treatment. However, he has not specified how this could be except by describing the other fairness concerns he has and suggesting indirectly that the presence of public observers could have prevented those problems from arising. Yet, the Board has found that the Appellant's procedural rights have otherwise not been breached (as outlined in the following paragraphs). In summary, there is no basis for this complaint.

[52] Next, the Appellant takes issue with the adjudicator having sought an answer from SHA's lawyer on an evidentiary question:

> *Prior to adjourning to render her decision on the Non-Suit motion, Ms. Paulsen asked Mr. Clemens directly the reason why I was denied the ability to attend the meeting I was terminated for not attending. Mr. Clemens answered this, and it's substantial information to my Case. It was clearly important enough for Ms. Paulsen to ask Mr. Clemens directly for the information prior to rendering a decision, yet it wasn't included in her evidence.*

[53] The decision focuses on the Appellant's case as established or not established through the Appellant's evidence. Where the adjudicator explicitly considered the position of SHA (for example, "SHA says it has met the accommodations"[13]) she did so because it was necessary for determining the nature and scope of the issues before her.

[54] There is no indication in the decision that the adjudicator relied for her analysis or conclusion on the answer provided by SHA's lawyer. Nor has the Appellant indicated where in the decision there is evidence of such reliance. To the contrary, he indicates that the lawyer's response did not show up in the evidence. He did not indicate what the response was or how it was significant. As such, the Appellant has not established that the adjudicator's conduct rendered the proceeding unfair.

[55] Next, the Appellant makes interrelated allegations of unfair treatment related to his disability. He states that due to his hearing difficulties, he was unable to understand the cross

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[13] *Decision*, at para 91.

examination. Furthermore, he contends that there were issues with the closed captioning service and there was no effort to make the hearing "very" transcribable. More generally, he asserts that his disability or disabilities were the basis for the adjudicator's discrimination against him.

[56] The Board is not persuaded by these allegations. There is no indication that the Appellant sought accommodation before he raised concerns during cross examination that he was having difficulty following and hearing the questions that were being put to him. In the decision, the adjudicator took note that "[n]o such difficulties were raised during the pre-hearing meeting, the mediation or discussions that took place during [the appellant's] evidence in chief".[14] The Appellant takes issue with this statement but does not indicate that he had specifically asked for accommodation at an early stage. Either way, after the Appellant raised his concerns, the hearing was adjourned to search for and obtain a note-taking service. The Appellant both acknowledges that his diagnosis changed mid-hearing and bases his request for accommodation, in part, on the existence of this change. In his email dated April 28, 2022, he does not indicate that any other accommodation is needed.

[57] The Appellant relies on an email from the adjudicator dated May 5, 2022 in which she invites him to contact Saskatchewan Deaf and Hard of Hearing Services before the hearing date (instead of waiting until the day of the hearing). She then provides him with contact information for that purpose. Instead of disclosing an unfair process, this email displays the adjudicator's attempt to assist the Appellant while maintaining a reasonable degree of order.

[58] The note-taking service was arranged and was cost-shared between SHA and the Union. In an email from the adjudicator dated April 26, 2022 (relied upon by the Appellant) the adjudicator indicates that the meeting was opening early so that "the computerized note-takers can test the system and work with me on process".

[59] When the hearing resumed the note-taking service was engaged and the cross-examination continued. As disclosed by their fresh evidence, the Appellant and SHA's affiant have differing perspectives of what occurred with respect to the transcription service. These differing perspectives raise questions about the respective credibility of the conflicting statements. The Appellant states that he was reprimanded for raising issues. SHA's affiant states that he was not. The Appellant states that there were issues with the quality of the transcription services mainly

[14] *Decision*, at para 8.

due to the pace of the proceedings. SHA's affiant states that he recalled the captioners asking SHA's counsel to slow down at the outset of the cross only.

[60] The Board finds that it is not necessary to resolve these differing perspectives, for the following reasons.

[61] The Board does not take the Appellant's comments to mean that he tried and was prevented from seeking clarification of the questions that were being asked or the submissions that were being made. SHA's affiant indicated that the adjudicator advised that any party could stop and ask for clarification of the transcription. Nor has the Appellant indicated in what way the adjudicator's assessment of the evidence was tainted by what he believes were deficiencies in his cross examination. Instead, in his Notice of Appeal he focuses on the fairness of the proceeding, work refusal law, and the adjudicator's jurisdiction.

[62] Although the Appellant suggests that there was no effort to make the hearing "very" transcribable, he has not provided specifics as to questions or submissions that he did not understand. There is no indication that the Appellant sought a further adjournment of the hearing for reasons related to accommodation. Although he says that he proposed "simply writing the question down" for the cross examination, the Union also has a right to fairness and the note-taking service was a reasonable and fair arrangement.

[63] Next, there is no evidence that the adjudicator doubted that the Appellant had a disability, whether related to hearing or mental health. To the contrary, the Appellant's fresh evidence application seeks to enter medical documentation which he relies on to establish the hearing disability, medical documentation which the adjudicator apparently did not demand despite the Appellant offering to provide it in the email exchange dated April 28, 2022. The implication of this evidence is that the adjudicator accepted that it was appropriate to accommodate without medical substantiation (even if she was justified in seeking it).

[64] To be sure, it may assist the Appellant to better understand the adjudicator's reasons at paragraph 103. There, the adjudicator explains that "[if the Appellant] has a hearing disability that impacted his ability to perform his job duties" then he had a duty to request accommodation on that basis. In the Board's view, the adjudicator in this passage did not express disbelief of the existence of a disability generally, but rather, provided a description of the Appellant's duties, in particular, in the event that his disability impacted his performance of his job duties. The

Appellant's concern with the adjudicator's use of the word "if" to describe his condition may reflect a misunderstanding of the adjudicator's use of appropriate analytical language in this passage.

[65] There is no evidence that the adjudicator doubted that he had any other disability. Nor is there any indication that the adjudicator lacked objectivity in relation to mental health disabilities, generally. To the contrary, the adjudicator rebuked SHA for taking the position that mental health was irrelevant to an assessment of whether a worker has reasonable grounds for making a work refusal. Although the Board would tend to agree with the Appellant that SHA and its representatives have some work to do to improve the tone used with respect to these issues, the Board is not persuaded that the well was poisoned or that the adjudicator lost her objectivity due to the cross-examination questions or the submissions made.

[66] Next, the Appellant suggests that the hearing was unfair because he was prevented from making closing arguments. To be sure, he does not suggest that he was prevented from making arguments on the non-suit application. In the decision, the adjudicator explains that, in relation to the non-suit motion, "[b]oth parties provided [the adjudicator] with written materials, in advance, as well as provided oral submissions".[15]

[67] Rather, the Appellant suggests that he should have been provided a full hearing and that the determination of his matter on a non-suit motion was unfair. Related to this, he argues that it was an error for the adjudicator to make a decision without evidence from SHA.

[68] This argument reveals a lack of understanding about the procedures available to the adjudicator generally and the mechanics of non-suit procedure specifically. First, there is no error disclosed by the adjudicator in proceeding to consider the non-suit motion. The adjudicator considered her discretion pursuant to subsection 4-4(2) of the Act to "determine the procedures by which the appeal or hearing is to be conducted". She took into account the duties of an adjudicator in issuing a decision pursuant to section 4-6, which includes dismissing the appeal. She concluded that she had the authority to dismiss an appeal if the Appellant had not made out a *prima facie* case.

[69] Furthermore, the Appellant did not challenge the adjudicator's jurisdiction to hear the non-suit motion.

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[15] *Decision*, at para 11.

[70] Having concluded that the non-suit motion was properly before her, the adjudicator proceeded to identify and apply the correct legal test.

[71] The adjudicator relied on the legal test used in non-suit applications as set out in *K. v Miazga*, 2003 SKQB 451 (CanLII), [2004] 7 WWR 547 [*Miazga*]:[16]

> *16. The general legal test to be applied in determining non-suit applications is well established. It is whether a prima facie case has been made out at the conclusion of the plaintiffs' case in the sense that a reasonable trier of fact (a judge or properly instructed jury) could find in the plaintiffs' favour on the basis of the uncontradicted evidence adduced. Where the nature of the case requires the drawing of inferences of fact from other facts established by direct evidence, the test includes the question of whether the inferences that the plaintiffs seek could reasonably be drawn from the direct evidence adduced if the trier of fact chooses to accept the direct evidence as fact.*
>
> *17. I use the term prima facie case to indicate that the applicants have a lesser onus than having to demonstrate the absence of "any" evidence on a material issue. The case law clearly establishes that the applicants need only demonstrate the absence of "sufficient" evidence, which if left uncontradicted, could satisfy a reasonable trier of fact that the case has been made out on a balance of probabilities. The ruling on a nonsuit motion is a question of law. The determination of the credibility or believability of the evidence is a question of fact to be subsequently determined in the action if the non-suit application fails.*

[72] The test on a non-suit application is whether a *prima facie* case has been made out at the conclusion of the applicant's, or the appellant's, case. The decision-maker makes this determination after the appellant's case has closed.

[73] There is no legitimate basis for the Appellant's concerns about not having had a full hearing or an opportunity to provide closing arguments. Within the context of a non-suit application, he had the opportunity to present evidence and to make closing arguments.

[74] Nor was it unfair for the adjudicator to make a decision in the absence of evidence from SHA. The nature of a non-suit application is to require a determination on the case brought by the appellant. If there is sufficient evidence only then, depending on the procedure chosen, will it be necessary for the respondent to present evidence.

[75] The present case is not at all comparable to *FL Receivables*, in which the trial judge had forgotten to reconvene for final argument, and for that reason was found to have erred. There, the judge made decisions on two non-suit motions, one of which was dismissed, and then proceeded to make a ruling against the defendant for whom the non-suit motion had been dismissed in the

[16] And, as per the *Decision* at para 72, adopted in *Ceapro Inc. v Saskatchewan*, 2008 SKQB 76 (CanLII) and *Cherkas v Richardson Pioneer Limited*, 2020 SKQB 7 (CanLII).

absence of further submissions. Here, the non-suit motion was granted, not dismissed. That was the end of the matter.

[76] Related to this, the Appellant suggests that the adjudicator erred when she provided direction in the presentation of his case. He states that when he was told to simply explain why each document was important, he lost sight of his plan and the consequence was an unravelling of the narrative he had intended to present. He states that this was contrary to the direction previously given by the adjudicator about simply "tell[ing] your story". The Board understands the difficulty in presenting a case to a tribunal. However, adjudicators need to be able to control the process and to impose a degree of order on the proceedings. There is nothing unusual or unacceptable in the adjudicator's directions to the Appellant, as they have been described.

[77] In conclusion, the Board has considered the evidence sought to be adduced with respect to procedural fairness and, taking into account the *Baker* factors, finds no support for the foregoing allegations that the proceeding was unfair. Even if no deference were extended to the adjudicator's choice of procedure, the Board finds no error at all in the choices the adjudicator made to adopt the procedures that have been put in issue.

[78] Lastly, the Appellant also argues that the adjudicator breached procedural fairness by departing from the issues as agreed to by the parties. The Board will consider this argument in conjunction with the Appellant's related allegation that the adjudicator exceeded her jurisdiction, in the third section.

2. Did the adjudicator apply the wrong standard to the right to refuse?

[79] In the decision, the adjudicator described the question before her:

> *81. The analysis is, in plain language, in consideration of the uncontradicted evidence, am I able to find that Mr. Aschenbrener refused to attend work because he had reasonable grounds to believe that his attendance at work was unusually dangerous to his health and safety.*
>
> *82. The 'lens' from which this question must be answered is whether, in consideration of all of the evidence, a reasonable person would believe that Mr. Aschenbrener's attendance at his place of employment was unusually dangerous to his health or safety. It is not from the personal perspective of Mr. Aschenbrener from which this question is decided, it is that of a reasonable person.*

[80] While the adjudicator acknowledged that the Appellant believed that his workplace was unusually dangerous, she found that the "objective evidence [did] not support this belief".[17]

[81] The Appellant suggests that in every case in which a worker refuses to perform an act that either sufficient steps must be taken to satisfy the worker otherwise or the occupational health committee must investigate the matter and advise the worker otherwise. The Appellant argues that because he refused to perform his work and was not satisfied that sufficient steps had been taken, it was necessary that an investigation be carried out. Because he refused to attend work pursuant to section 3-31, the onus shifted to the Employer to show that it had terminated his employment for good and sufficient reason.

[82] The Appellant's interpretation of the legislation is inconsistent with a plain reading of the statute. Section 3-31 states that a "worker may refuse to perform" an act "if the worker has reasonable grounds to believe that the act or series of acts is unusually dangerous". On his reading of the provision, the Appellant seeks to omit the phrase "has reasonable grounds to" and to instead interpret the provision as allowing a worker to "refuse to perform" an act if the worker believes, subjectively, that it is "unusually dangerous".

[83] The requirement that the work refusal be based on reasonable grounds is a threshold requirement. Pursuant to section 3-33, an occupational health officer determines whether the act or series of acts that the worker has refused to perform is or are "unusually dangerous". However, if the work refusal is not made on reasonable grounds, then there is no requirement for an investigation or for an occupational health officer to determine whether the act is unusually dangerous.

[84] A threshold requirement of reasonableness is also found in section 3-36, which allows a worker to refer a matter to an occupational health officer if the worker has "reasonable grounds" to believe that the employer has taken discriminatory action against the worker.

[85] Accepting the Appellant's argument would mean that, no matter what the circumstances, a worker could refuse to perform an act and, having so refused, persist in the refusal until the completion of the investigation (s. 3-32). Any other worker would have an equal opportunity to refuse the same work (s. 3-34). Even in the case of an unreasonable refusal, an employer would be prevented from assigning work and managing the workplace.

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[17] *Decision*, at para 85.

[86] To be sure, Part III of the Act is benefits-conferring legislation, is to be "construed as remedial", and "is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects"[18]. However, the Appellant's interpretation is contrary to the intention of the legislation, which is to ensure safe workplaces and manage risk by permitting refusals based on reasonable grounds. The Appellant's interpretation is overbroad, impractical, and overlooks legitimate management interests by omitting the requirement for reasonableness as a threshold criterion.

[87] In setting out the analytical framework, the adjudicator relied on *I.B.E.W., Local 213 v Jim Pattison Sign Co.*, 2004 CarswellBC 3348, [2004] BCCAAA No 201 (Dorsey) and *Inverness County Municipal Housing Corp. v. C.U.P.E., Local 1485*, 1987 CarswellNS 597, 30 LAC (3d) 229, 7 CLAS 13 (Baker, MacLellan, McDougall), as well as the adjudicator's decision on appeal in *Britto v University of Saskatchewan*, 2016 CanLII 74280 (SK LRB). The analysis adopted in each of those decisions supports the adjudicator's approach in this case.[19]

[88] Therefore, the adjudicator correctly considered whether the Appellant had reasonable grounds for refusing to perform the work as a threshold issue.

[89] The Appellant also suggests that the adjudicator made findings of fact, thereby contradicting the analytical framework she used to make her determination. Although he frames the issue as one involving procedural fairness, it relates, instead, to whether the adjudicator correctly applied the test on a non-suit application.

[90] On this issue, the adjudicator explained that she had examined the issues in light of the uncontradicted evidence and in a manner most favourable to the Appellant:

> *67. Although the evidence has been reviewed above, it is important to note that, in accordance with the jurisprudence on non-suit motions, no findings of fact or assessments of credibility have been made. Further, nothing in this decision should be taken as determinative on a question of law. I have simply examined the legal issues in the context of the uncontradicted evidence to determine whether there is sufficient evidence within the meaning of the non-suit test.*
>
> *68. I have also considered all of the evidence in a way that is most favourable to [the Appellant].*

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[18] Section 2-10 of *The Legislation Act* states that every Act "is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects".

[19] The adjudicator also briefly considered *Pintiliciuc and SaskEnergy Inc., Re*, 2016 CarswellSask 900, a case dealing with clause 3-35(h) of the Act.

[91] The adjudicator's task was to determine whether a reasonable trier of fact could find in the Appellant's favour on the basis of the uncontradicted evidence adduced. The adjudicator relied on the following passage from *Miazga*:

> *16. […] Where the nature of the case requires the drawing of inferences of fact from other facts established by direct evidence, the test includes the question of whether the inferences that the plaintiffs seek could reasonably be drawn from the direct evidence adduced if the trier of fact chooses to accept the direct evidence as fact.*
>
> *17. […] The ruling on a nonsuit motion is a question of law. The determination of the credibility or believability of the evidence is a question of fact to be subsequently determined in the action if the non-suit application fails.*

[92] On a non-suit motion, an adjudicator must review the evidence to determine what tendency it has "to establish the issue in dispute including all such inferences of fact [the adjudicator] would be warranted in drawing from the direct facts [the adjudicator] found to be proved."[20] The question is whether a reasonable adjudicator (as trier of fact) could find in the Appellant's favour. The decision-maker is required to consider whether the inferences that the Appellant seeks could reasonably (and logically) be drawn from the evidence if accepted as fact.[21] Overall, the adjudicator is required to consider the evidence in the light most favorable to the Appellant.

[93] The adjudicator should not find the facts, make determinations of credibility, or "decide whether the [appellant's] case will be proven on a balance of probabilities if no further evidence is called".[22]

[94] At paragraph 72 of the decision, the adjudicator referred to the requirement that the Appellant's attendance at work be "unusually dangerous to his health or safety". The language in this passage focused not on whether the evidence tended to show reasonable grounds but on whether the Appellant had proven that the work was unusually dangerous. Similar language is used at paragraph 104, but in that passage the adjudicator adds that the Appellant was to have proven as much "on an objective basis".

[95] However, in many other passages the adjudicator clarified that her assessment was based on the uncontradicted evidence (paragraph 81), pertained to reasonable grounds (paragraphs 81, 85, 86), and was situated in the perspective of a reasonable person (paragraphs 81, 88).

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[20] *Miazga*, at para 19.
[21] *Ibid*, at para 16. See also, *Hander v Kumar,* 2022 SKCA 33 (CanLII) [*Hander*], at para 32.
[22] *Hander*, at para 32.

Reviewing the reasons in their entirety, it is this reasoning that predominated the adjudicator's analysis and which the adjudicator adopted and applied.

[96] To the extent that the Appellant sought to have drawn only the mere inference that he had refused to perform the work, this inference was insufficient to ground a *prima facie* case. The adjudicator described an email in which the Appellant expressed his belief that refusing to attend work was his subjective decision based on what he felt safe doing and his testimony in cross examination that doing so was "ultimately [his] decision".[23] The Appellant believed that if he refused to perform the work, he was not required to perform it. The related inference that he sought to have drawn did not support a claim of reasonable grounds.

[97] In these respects, the adjudicator adopted the correct legal test and substantively applied it in the correct manner.

3. Did the adjudicator exceed her authority in deciding the duty to accommodate issue (and departing from the issues as agreed to)?

[98] The Appellant argues that the adjudicator addressed issues that were a significant departure from what the parties had agreed would be addressed. Although this ground does not disclose procedural unfairness it does disclose an error of law, as explained in the following paragraphs.

[99] First, the Appellant argues that the adjudicator failed to consider whether the legislation was followed. However, to determine whether the legislation was followed, it was necessary for the adjudicator to consider whether there was sufficient evidence such that a reasonable trier of fact could find in the Appellant's favour, and therefore, whether there was sufficient evidence such that a reasonable trier of fact could find reasonable grounds for the work refusal. This argument does not disclose an error.

[100] Second, the Appellant suggests that SHA's duty to accommodate should not have been addressed. However, the Appellant had taken the position that SHA had a duty to accommodate him, had failed to accommodate him, and that therefore, he was justified in refusing to attend work. The adjudicator's decision suggests that the Appellant sought to have drawn the inference that the accommodations had not been met and that therefore he was entitled to refuse to attend work:

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[23] *Decision*, at paras 85 and 86.

> *89. There was evidence presented related to workplace accommodation of [Mr. Aschenbrener]. The issue was whether the accommodations had been met by SHA.*
>
> *90. The proposed accommodations were set out …:*
> *…*
>
> *91. [Mr. Aschenbrener] continues to believe that not all of the accommodations listed by his health care provider have been met by the employer. The evidence presented by [Mr. Aschenbrener] supports the position by SHA.*

[101] The adjudicator had exclusive jurisdiction over the appeal of the dismissal of the discriminatory action complaint. As such, the adjudicator had jurisdiction to consider the issues that arose from the complaint. Given the Appellant's position, it was appropriate for the adjudicator to consider whether there was sufficient evidence that tended to show that an unmet accommodation request could constitute reasonable grounds.

[102] The adjudicator found that the Appellant's own evidence supported SHA's position that the accommodations were met; the Appellant's statements impugning the Employer's conduct were not supported by his own evidence; and certain of his claims were not medically substantiated, which would have been required in the context of his duty to facilitate an accommodation.

[103] While these findings are consistent with insufficient evidence of a *prima facie* case of reasonable grounds, with respect, the adjudicator disregarded relevant evidence, thereby calling into question the bases for those findings.

[104] As mentioned, the Board's jurisdiction on this appeal is restricted to questions of law. Findings of fact (or in this case, conclusions about the tendency of the evidence) may be found to be questions of law only if they were based on no evidence, on irrelevant evidence or in disregard of relevant evidence or based on an irrational inference of fact. It is within this framework that the Board has assessed the adjudicator's findings.

[105] First, the Appellant takes issue with the adjudicator's determinations in relation to the audio recording of the return-to-work meeting on February 1, 2021. He states that the Employer never once met with him to discuss the accommodation. He relies on the audio recording of the meeting held on February 1 as evidence of the Employer's approach.

[106] Having reviewed the recording and all of the documentary evidence, the Board finds no error of law (as described above) in the adjudicator's findings that SHA could not "be described as having 'refused' to discuss accommodation nor that the Appellant was not "refused by the employer to discuss accommodation at every turn". Moreover, it is noteworthy that the adjudicator

(and not the Board) was privy to the testimony given by the Appellant. Certainly, the adjudicator had the advantage when assessing the inferences to be drawn from the evidence, having been privy to the Appellant's testimony, including any testimony about earlier or surrounding communications.

[107] The Appellant also argues that the adjudicator overturned the findings of another decision maker without investigation, weighing of evidence, or determining credibility. To be specific, the Appellant takes issue with the adjudicator's determinations in relation to the OHS Decision, dated December 10, 2020. In effect, he states that the adjudicator failed to consider relevant evidence of harassing conduct (which he says has not been addressed) as found by that Officer, or overturned the findings of fact that were made by the OHS officer in that decision, and thereby discounted the existence of reasonable grounds.

[108] In the earlier decision, the OHS Officer found that, although there was no discriminatory action in his view, the Appellant had been treated in a heavy-handed manner when he attempted to raise concerns with illicit sharps in the workplace. He stated that the letter of expectation, which was disciplinary in nature, "could be construed as harassing" and "could serve to adversely affect the worker's psychological wellbeing". He also observed "how extraordinarily difficult it must be for any worker in this facility to exercise their 3 basic worker rights as they pertain to this issue".

[109] He stated that after the impugned meeting, the Appellant went off on the first of multiple medical leaves due to the "alleged" impact on his mental health. He then said that the impugned actions "could cause a worker to be humiliated or intimidated and could serve to adversely affect the worker's psychological wellbeing". And, finally, he declared that "if these letters routinely use [similar language] these letters may serve to cause the worker ongoing psychological harm".[24]

[110] In the decision under appeal, the adjudicator found that the following statement made by the Appellant was not supported by the evidence: "…the [OHS] Officer identified harassing behavior which would affect a worker psychologically, which it had (leading to months of time off work)".[25] At paragraph 101, she observed that, instead, the first reference to psychological harm was in Exhibit A-17, an email in which the Appellant describes the decision of the OHS Officer. In the email, the Appellant states, "I worry that such harassment would continue and lead to more

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[24] The Board notes that there is also an email in evidence in which the decision-maker attempted to explain the decision after the fact.
[25] *Decision*, at para 100.

psychological harm to myself, as it has in the past". The implication of the adjudicator's decision is that the Appellant, in his email, had misdescribed the OHS Officer's decision.

[111] Although the OHS Officer's decision may or may not be found to have definitively determined that the Appellant suffered psychological harm, it cannot possibly be said that Exhibit A-17 was the first reference to psychological harm, generally. The adjudicator's reasons disregarded the passages from the OHS Officer's decision, as noted above, which referred to psychological wellbeing and psychological harm, and which described the conduct of the Employer that could cause a worker psychological harm.

[112] Relatedly, the adjudicator found that the Appellant should not expect SHA to respond to claims of psychological harm without supporting medical evidence – that instead of "psychological harm", the medical evidence referred to "needs". The adjudicator did not mention the notes contained in the forms, dated June 23, 2020 and September 10, 2020, or explain whether those notes may or may not have supported the Appellant's claims of "psychological harm". In this respect, the reasons disregarded the foregoing medical notes and did not consider what inferences might be drawn from those notes.

[113] The preceding findings were made in support of the adjudicator's observations that the Appellant was militant and resolved and that he attempted to resolve his accommodation complaints through section 3-31.

[114] Given the foregoing, the Board cannot conclude that the adjudicator considered all such inferences of fact that she would be warranted in drawing from the direct facts (in the light most favourable to the Appellant). To be sure, what inferences are to be drawn are not for this Board to decide.

[115] The adjudicator also observed that it was not necessary for SHA to meet all the accommodations the Appellant had requested because the objective evidence was otherwise lacking.[26] The adjudicator had found that the Appellant had presented no objective evidence that the workplace was unusually dangerous and that there was even evidence in the Appellant's own case that supported SHA's position.[27] The adjudicator drew this conclusion before fully assessing the evidence of accommodation. The Appellant had taken the position that the alleged failure to accommodate had resulted in unusually dangerous work. It was therefore necessary for the

[26] *Decision*, at para 95.
[27] *Decision*, at paras 87 and 88.

adjudicator to consider whether the accommodation evidence supported the inferences the Appellant had sought to have drawn as to whether his work refusal was reasonable.

[116] Finally, the adjudicator "found" at paragraph 104 that certain accommodations had been "met" and that SHA had "met" its duty to accommodate[28]. The question before the adjudicator was whether the evidence tended to establish the reasonableness of the Appellant's grounds for refusing to work. The adjudicator had properly set out the correct legal framework; however, more precision was warranted to provide clarity with respect to the distinction she was making between inferences, which she was permitted to draw, and ultimate findings, which she was not.

[117] With respect to the first sentence in paragraph 104, the Board has addressed this issue in paragraphs 93 to 97 of these Reasons.

[118] In summary, the adjudicator did not exceed her jurisdiction by considering the evidence of accommodation. To be sure, to the extent that the adjudicator made ultimate findings of fact, she went beyond the constraints of a non-suit motion.

[119] Going forward, it will be necessary for the adjudicator to consider whether the accommodation evidence, including the evidence that was disregarded, supports the inferences the Appellant has sought to have drawn as to whether his work refusal was based on reasonable grounds.

[120] Pursuant to clause 4-8(6)(b) of the Act, the matter is remitted to the adjudicator for amendment of the decision in accordance with the direction provided in these Reasons. Although remitting the matter will extend the time to a final decision, the outcome of this matter is not inevitable and, by remitting the decision, it remains with the adjudicator to apply the law to the facts of this case.

[28] *Decision*, at paras 104, 105.

[121] An appropriate order will accompany these Reasons.

DATED at Regina, Saskatchewan, this **11th** day of **July, 2023.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson