KITCHEN DESIGN STUDIOS, Appellant v JOHN MORRISON, Respondent and GOVERNMENT OF SASKATCHEWAN, DIRECTOR, OCCUPATIONAL HEALTH AND SAFETY, Respondent

LRB File No. 140-23; April 19, 2024
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Appellant, Kitchen Design Studios:	Michael R. Scharfstein
The Respondent, John Morrison:	Self-Represented
Counsel for the Respondent, Government of Saskatchewan:	Not Participating

Appeal of Adjudicator Decision – Part III of *The Saskatchewan Employment Act* – Occupational Health and Safety – Discriminatory Action – Section 4-8 of the Act – Alleged Breach of Procedural Fairness – Alleged Error of Law in Disregarding Evidence – No Breach or Error Committed – Decision Affirmed – Appeal Dismissed.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** Kitchen Design Studios, the appellant, filed an appeal of an adjudicator's decision[1], pursuant to section 4-8 of *The Saskatchewan Employment Act* [Act]. The primary issues are whether the adjudicator denied the appellant procedural fairness and disregarded relevant evidence in fact finding.

[2] This matter originated with a Notice of Contravention dated February 23, 2022 (NoC-1). NoC-1 indicates that, following a formal complaint, it was determined that the appellant had taken discriminatory action against the respondent, John Morrison pursuant to section 35 of the Act. NoC-1 required the appellant to reinstate Morrison pursuant to section 36.

[3] A second NOC was issued, dated May 12, 2022 (NoC-2). NoC-2 indicated that:

> *On February 23rd, 2022 Notice of Contravention number 1-00020203 was generated with the requirements of the employer specified within the document. The "Shall Be Remedied By" date on the document for the employer was set as February 23rd, 2022. A Progress*

[1] LRB File No. 106-22.

> *Report on Notice of Contravention 1-00020203 accompanied the Notice of Contravention with the requirement set on this document of a written progress report required within 5 business days of February 23rd, 2022. The aforementioned documents were mailed to the employer via Canada Post, and delivery confirmed on February 24th, 2022. To date this officer has not received from the employer any Progress Report with respect to NOC 1-00020203, nor has any appeal been received from the employer with respect to any document either Notice of Contravention or Decision Letter served by this Officer.*
> …

[4] On or about May 19, 2022, the appellant emailed a letter, presumably written by the owner Brian Kachur, to Occupational Health and Safety (OHS) Officer Mike Luciak. The author apologized for the lengthy response time as he was struggling with health complications; indicated that it was not possible to comply with "this order of compliance" for numerous reasons; and then outlined the reasons that it was not possible to reinstate Morrison (primarily that the reinstatement would result in a "hostile and unsafe work environment").

[5] On June 3, 2022, the appellant commenced an OHS appeal of both NoCs to the Director of OHS (Director), pursuant to sections 3-53 and 3-54 of the Act. On November 10, 2022, the Board Registrar selected the adjudicator for the appeal. The hearing of the OHS appeal took place on March 21 and 22, 2023. The adjudicator issued a decision on September 8, 2023. The decision turned on the adjudicator's finding that the appellant had failed to comply with the limitation period.

[6] The limitation period for an appeal of the Director's decision is set out at section 3-53:

> ***3-53****(1) A person who is directly affected by a decision of an occupational health officer may appeal the decision.*
>
> *(2) An appeal pursuant to subsection (1) must be commenced by filing a written notice of appeal with the director of occupational health and safety within 15 business days after the date of service of the decision being appealed.*
> …

[7] Relevant parts of the adjudicator's decision include the following:

> *[18] OHS served KDS with the First Decision and NoC-1 on February 24, 2022. KDS appealed same on June 3, 2022. This was outside the time period imposed by section 3-53(2) of the SEA.*
>
> *[19] OHS served KDS with the Second Decision and NoC-2 on March 13, 2022. KDS appealed same on June 3, 2022. This was within the time period imposed by section 3-53(2) of the SEA.*
> *...*
>
> *[24] I am of the view the Second Decision and NoC-2 are neither a fresh finding of discrimination, nor a continuation of same. Further, they can in no way be interpreted as or constituting an extension or waiver of the time limit created by section 3-53(2) of the*

> *SEA. They are a confirmation KDS has neither appealed, nor provided the Progress Report required by the First Decision and NoC-1. It reiterates the requirement of the Progress Report and reinstatement of Morrison already ordered.*
>
> *[25] For the reasons above, I conclude that no relief is available to remedy the late filing of the Appeal of the First Decision and NoC-1 in this case. Accordingly, I have no jurisdiction to hear the Appeal of same. That portion of the Appeal is dismissed.*
>
> *[26] That leaves me with the Appeal of the Second Decision and NoC-2. The evidence is clear, KDS did not comply with the requirements of same. I therefore dismiss that portion of the Appeal.*

[8] The appeal of the adjudicator's decision was heard by the Board on March 13, 2024. The appellant and Morrison were in attendance at the hearing. The appellant filed a brief and made oral submissions. Morrison also made brief submissions. The Director did not participate.

Grounds of Appeal:

[9] The appellant has raised two primary grounds of appeal. In its brief of law, the appellant poses these grounds as questions for the Board's determination:[2]

> *A. Was the appellant denied procedural fairness?*
>
> *a. More particularly, did the Adjudicator err by failing to disclose to the parties the determinative issue of the OHS appeal, being whether the Adjudicator had the requisite jurisdiction to hear and decide the OHS Appeal?*
>
> *B. Did the adjudicator err in law by committing an error in principle in fact finding, by making a factual finding that disregarded relevant evidence?*
>
> *a. More particularly, did the Adjudicator err in making a factual finding that KDS had been served with NoC-1 in the face of evidence that Mr. Kachur had been battling health complications, and may not have been properly served with NoC-1?*

[10] The appellant asks the Board to remit the matter to the adjudicator for redetermination, pursuant to subsection 4-8(6) of the Act.

Arguments:

Appellant

[11] A breach of procedural fairness is a question of law, over which the Board has jurisdiction. The standard of review for a breach of procedural fairness is correctness.

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[2] *Appellant's Brief of Law*, at 9.

[12] A high degree of procedural fairness was required at the hearing of this matter. Applying the *Baker* factors, the conclusions to be drawn are summarized as follows:

I. The nature of the decision is an adjudicative one, turning on questions of fact and law. The process followed resembled a judicial process.

II. The duty of procedural fairness is consistent with the scheme of the Act and the function of the Adjudicator.

III. The decision was of extreme importance to the appellant as it finally determined the issues. The merits of the appeal were also important to the appellant given the potential for significant backpay and the impact on staffing.

IV. Given the quasi-judicial nature of the appeal, the appellant's legitimate expectations were to be adequately informed of the issues to be determined, and to be given the opportunity to respond fully and to present evidence on those issues. The breach of these expectations caused the appellant extreme prejudice.

V. The adjudicator had a choice with respect to the procedure adopted.

[13] The adjudicator dismissed the appeal after finding that the appellant had failed to appeal NoC-1 within the limitation period. Prior to this, the adjudicator had not raised the limitation period as a live issue and the appellant would not have known to address it.

[14] The appellant argues as follows:

> *On the record of appeal, the Adjudicator did not raise this as a determinative issue to be decided at the Hearing.*
>
> *This inference can be drawn based on the written reasons of the Adjudicator. At para 7 of the Adjudicator's Decision, the Adjudicator stated that KDS "tendered no evidence concerning its failure to file a written notice of appeal of NoC-1 with the direction of OHS within fifteen (15) business days after the date of service of same." Had the adjudicator raised the issue of jurisdiction at, or prior to, the Hearing, an inference can be drawn that KDS would have addressed this as an issue.*
>
> *Further, the ability to draw such an inference is even greater when the Adjudicator himself concluded that KDS assumed that the OHS Appeal was brought within the applicable time period. To this end, the Adjudicator stated that KDS "appeared content to rely upon the fact that the Appeal of both NoC-1 and NoC-2 was filed with the director of OHS within fifteen (15) business days after the date of service of NoC-2."*[3]

[3] *Appellant's Brief of Law*, at 15-16.

[15] An inference can be drawn that the appellant did not know the case it had to meet. A party is entitled to know the case it has to meet. It is a breach of procedural fairness to make a decision that turns on an issue not identified, and about which a party did not make submissions.

[16] The adjudicator also erred in law by making a finding of fact that disregarded relevant evidence. The following excerpt from *Professional Salon Services* is on point:[4]

> *[86] So far as the duty to give reasons extends to setting forth the facts, the Tribunal was not required, just as judges are not required, to refer to all of the evidence bearing upon a fact in controversy: Woolaston v Minister of Manpower and Immigration, supra. The mere failure to mention a particular portion of the evidence, then, does not in itself amount to disregard or oversight. That said,* ***it is commonplace among judicial and quasi-judicial decision-makers****, whether explicitly or implicitly required to give reasons setting forth the facts and explaining the basis for their decisions,* ***to refer to those portions of the evidence having significant probative value in relation to a fact in controversy, particularly those portions with opposing force or weight, for it is here where the case on the facts rises or falls on balance****.*
>
> *[87] The point is this:* ***The failure to mention a particular portion of the evidence must be considered in conjunction with the significance or probative value of that evidence when considering whether the decision-maker disregarded or overlooked relevant evidence material to its findings of fact****.*
>
> *[Emphasis added by appellant]*

[17] The adjudicator concluded that NoC-1 was served on the appellant despite evidence of Kachur's health complications and his inability to respond to NoC-1 within the statutory timeline. The adjudicator disregarded this evidence entirely. In the reasons, there is no mention of it.

[18] Furthermore, the adjudicator disregarded the evidence that the appellant did not respond to the OHS Decision or the NoCs until after NoC-2 was personally served. This evidence tends to demonstrate that when NoC-2 was properly served the appellant responded appropriately; given this evidence, it can be inferred that the service of NoC-1 by registered mail was not effective.

[19] Given the failure of the adjudicator to mention the foregoing evidence, an inference can be drawn that he failed to consider it.

Morrison

[20] Morrison's submissions were brief, focusing on his assertion that the company and Kachur are not synonymous.

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[4] *P.S.S. Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149.

Applicable Statutory Provisions:

[21] The following provisions of the Act are applicable:

> ***3-53****(1) A person who is directly affected by a decision of an occupational health officer may appeal the decision.*
>
> *(2) An appeal pursuant to subsection (1) must be commenced by filing a written notice of appeal with the director of occupational health and safety within 15 business days after the date of service of the decision being appealed.*
>
> *…*
>
> *(4) Subject to subsections (10) and (11) 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.*
>
> *...*
>
> ***4-8****(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.*
>
> *(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.*
>
> *(3) A person who intends to appeal pursuant to this section shall:*
>
> > *(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and*
> >
> > *(b) serve the notice of appeal on all parties to the appeal.*
>
> *(4) The record of an appeal is to consist of the following:*
>
> > *(a) in the case of an appeal or hearing pursuant to Part II, the wage assessment or the notice of hearing;*
> >
> > *(b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;*
> >
> > *(b.1) in the case of an appeal pursuant to Part V, any written decision of a radiation health officer or the director of occupational health and safety,respecting the matter that is the subject of the appeal;*
> >
> > *(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III or Part V, as the case may be;*
> >
> > *(d) any exhibits filed before the adjudicator;*

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(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:

[22] The issues before the Board are as follows:

I. What are the Board's jurisdiction and the applicable standard of review?
II. Was the procedure followed by the adjudicator fair in the circumstances?
III. Did the adjudicator err in law by making a factual finding that disregarded relevant evidence?

I. What are the Board's jurisdiction and the applicable standard of review?

[23] 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.[5]

[24] The first substantive issue raises a question of procedural fairness. Matters of procedural fairness may raise questions of law. If so, the correctness standard applies.[6] The appropriate query is whether the procedure was fair in the circumstances.[7]

[25] The second substantive issue raises a question about the adjudicator's findings of fact. Findings of fact may be found to raise questions of law if they are alleged to have been based on no evidence, on irrelevant evidence or in disregard of relevant evidence or based on an irrational

[5] *Christine Ireland v Nu Line Auto Sales & Service Inc*., 2021 CanLII 97414 (SK LRB).
[6] *Riverside Electric Ltd. v Schlamp*, 2022 CanLII 113733 (SK LRB); *Knapp v ICR Commercial Real Estate*, 2019 SKQB 59 (CanLII).
[7] *Jonathan Aschenbrener v Saskatchewan Health Authority*, 2023 CanLII 61453 (SK LRB) [*Aschenbrener*], at paras 38-9.

inference of fact.[8] The appellant argues that the adjudicator disregarded relevant evidence and, by arguing as much, raises a question of law.

II. Was the procedure followed by the adjudicator fair in the circumstances?

[26] The appellant alleges that the adjudicator erred by failing to disclose to the parties the determinative issue of the appeal, being whether the adjudicator had jurisdiction to hear and decide the merits. This allegation is based on the following:

i. "On the record of appeal, the Adjudicator did not raise this as a determinative issue to be decided at the Hearing".[9]

ii. In his reasons, the adjudicator stated that the appellant had "tendered no evidence concerning its failure to file a written notice of appeal of NoC-1 with the direction of OHS within fifteen (15) business days after the date of service of same."

iii. In his reasons, the adjudicator stated that the appellant "appeared content to rely upon the fact that the Appeal of both NoC-1 and NoC-2 was filed with the director of OHS within fifteen (15) business days after the date of service of NoC-2."

iv. According to the appellant, there was no evidence, such as a registered mail receipt, that NoC-1 was properly served. The appellant could not respond to an issue about which it was unaware.

[27] Finally, the appellant asserts that it did not know that jurisdiction was an issue and therefore it could not have known to present evidence about why Kachur was incapacitated during the material times.

[28] The appellant argues, that applying the *Baker*[10] factors, a high degree of procedural fairness was owed. The *Baker* factors are these:

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.

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[8] *Canadian Natural Resources Limited v Campbell*, 2016 SKCA 87 (CanLII), at para 12; *P.S.S. Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149, at paras 60–65.
[9] *Appellant's Brief of Law*, at 15.
[10] *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817.

[29] In the Board's view, the following factors weigh in favour of a higher degree of procedural fairness in this case. First, an appeal with respect to a matter involving discriminatory action is to be heard not by the Director but by an adjudicator in accordance with Part IV. This requirement is consistent with greater procedural protections. Second, in the present case, NoC-1 required the appellant to reinstate Morrison to his former employment and to pay back wages. The adjudicator's decision was a final determination, preventing him from considering the merits of the appellant's substantive arguments against the reinstatement decision. The appellant had a legitimate expectation to know the issues that were determinative of the matter.

[30] On the other hand, section 4-4 of the Act affords an adjudicator significant flexibility in conducting an appeal.[11] In particular, the adjudicator may consider any question of fact that is necessary to the adjudicator's jurisdiction 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.

[31] Furthermore, the limits on the record of appeal suggest that a degree of deference is owed to the adjudicator. Pursuant to subsection 4-8(4), the record of appeal includes the Director's written decision(s), the notice of appeal filed with the Director (NoA-D), any exhibits filed before the adjudicator, the written decision of the adjudicator, the notice of appeal to the Board (NoA-B), and "any other material that the [B]oard may require to properly consider the appeal". The record does not include a recording or a transcript of the hearing.

[32] On this issue, the Board has previously observed:[12]

> *[84] The record of an appeal as set out in clauses 4-8(4)(a) to (f) of the Act does not include a recording or a transcript of the hearing. Furthermore, there is no requirement, in the statute or otherwise, for adjudicators to record their hearings. Therefore, the Board does not interpret clause 4-8(4)(g), which lists as part of the record "any other material that the [Board] may require to properly consider the appeal", as including either a recording or a transcript of the hearing before the Adjudicator in this matter. The Board cannot now require that an item be included in the record that does not exist in its complete form for no other reason than that there was no requirement to create it.*

[33] The appellant argues that "[o]n the record of appeal", the adjudicator did not raise jurisdiction as a determinative issue to be decided at the hearing.

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[11] *Aschenbrener*, at para 42.
[12] *Freeman v Munch*, 2023 CanLII 46604 (SK LRB).

[34] However, the record is limited to the items described at clauses 4-8(4)(a) to (f) of the Act. As such, there is no transcript of the hearing before the Board.

[35] Despite this limitation, the appellant did not attempt to present any other evidence to support its assertion. In the appeal hearing, the Board drew counsel's attention to the Board's practice note dealing with appeals.[13] Counsel acknowledged that the Board has a process to bring fresh evidence before the Board, indicated that the appellant did not take that approach, and offered that the appellant instead took the approach that "the record speaks for itself", confining its submissions to the record.

[36] Counsel also indicated that they were not present at the hearing of the appeal before the adjudicator, and that the lawyer representing the appellant was no longer available.[14] Given this, the record as it stands contains the only available evidence.

[37] In relation to this argument, the Board observes that Kachur was the recipient of the formal harassment complaint and swore the notice of appeal in this matter.

[38] According to the appellant, the adjudicator's reasons give rise to an inference that the adjudicator did not disclose jurisdiction as a live issue. In support of this argument, the appellant relies on two observations made by the adjudicator: (1) the appellant did not present evidence about compliance with the notice of appeal timeline, and; (2) the appellant "appeared content to rely upon the fact" that the appeal of both NoCs was filed within fifteen days after the service of the second one.

[39] Neither of these statements leads to such an inference. The appellant might just as easily have made an informed decision not to call such evidence and to rely on its compliance with the second timeline.

[40] Furthermore, based on NoA-D, the appellant had conceded that it missed the first appeal deadline. In other words, the appellant made an informed choice as to how to address the jurisdictional issue.

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[13] The Board asked counsel to review the section of the practice note dealing with fresh evidence and to comment on it.

Practice Note 7 - Appeals under Part IV of the Act. While the practice note is dated February 1, 2024, the Board's case law indicates that fresh evidence applications on questions of procedural fairness have previously been made and considered: *Aschenbrener*, at paras 6-7, 23-34.

[14] He had, unfortunately, passed away.

[41] On this point, the adjudicator made the following, accurate, observation:

> *[6] Within paragraph thirteen (13) of the Appeal, KDS asserts:*
>
> *Mr. Kachur was unable to appeal the Notice of Contravention within the stipulated appeal period because he was suffering from prolonged side effects from a severe coronavirus infection in the fall of 2021, which also prevented Mr. Kachur from fully participating.*

[42] If, as asserted in this excerpt, "Mr. Kachur was unable to appeal the Notice of Contravention within the stipulated appeal period" then, at some point, Kachur was properly served such that the running of the time period was triggered.

[43] In other words, the appellant chose to take the position that, although NoC-1 was served on the appellant, extenuating circumstances prevented the appellant from appealing NoC-1 within the stipulated appeal period.

[44] There are parallels between this position and the appellant's argument now before the Board. However, rather than suggesting, as in NoA-D, that there were extenuating circumstances preventing the appellant from appealing NoC-1 before the expiry of the time period, the appellant now argues that there were extenuating circumstances that resulted in the appellant not being properly served.

[45] Elsewhere in NoA-D, the appellant explained in detail why it chose not to comply with NoC-1 after it was served. In particular, two paragraphs begin with the phrase "[a]fter the Notice of Contravention was served" and then outline the appellant's concerns with returning Morrison to the workplace.[15]

[46] Relatedly, NoA-D sets out two grounds of appeal:

> *(a) The finding that Mr. Morrison was discriminated against was unreasonable and unsupported by the evidence before the Officer; and*
>
> *(b) Mr. Morrison's reinstatement would create a hostile and unsafe working environment at Kitchen Designs, to the detriment of its other employees.*

[47] In summary, the appellant had conceded that it did not comply with the timeline and, having conceded as much, it then chose to justify its non-compliance – both with respect to the timeline and its obligations arising from NoC-1. The adjudicator's reasons suggest not that he

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[15] *Notice of Appeal to Director*, at paras 14, 18.

failed to provide the appellant with an opportunity to address the jurisdictional question, but that the appellant made informed choices about how to present its case.

[48] And, the record provides no indication that the appellant, if it had attempted to make an alternative argument, was dissuaded from making said argument at the hearing.

[49] Furthermore, the appellant claims that it was an error of law for the adjudicator to conclude, based on the evidence, that NoC-1 was properly served. The appellant claims that, in the absence of a registered mail receipt, the adjudicator could not have found that service was proper. To the contrary, the appellant conceded that NoC-1 was properly served. And, even if it had not so conceded, NoC-1 contains information indicating that it was served by registered mail.[16] NoC-2 confirms that NoC-1 was "mailed to the employer via Canada Post, and delivery confirmed on February 24th, 2022". Had it not been confirmed, there is a presumed date for service via registered mail:

> ***9-9*** *(2) Unless otherwise provided in this Act, any document or notice required by this Act or the regulations to be served on any person other than the director may be served:*
>
> *…*
>
> *(b) by sending a copy of the document or notice by registered or certified mail to the last known address of the person or to the address of the person as shown in the records of the ministry;*
>
> *(3) A document or notice to be given to or served on the director must be given or served in the prescribed manner.*
>
> *(4) A document or notice served by registered mail or certified mail is deemed to have been received on the fifth business day following the day of its mailing, unless the person to whom it was mailed establishes that, through no fault of that person, the person did not receive the document or notice or received it at a later date.*

[50] A document served by registered mail is deemed to have been received on the fifth business day following the day of its mailing unless the purported recipient establishes that they did not receive it. The purported recipient bears the onus to establish that he or she did not receive the document through no fault of their own.

[51] Even if the appellant reversed its position[17], it was aware that timeliness was a problem, and it bore the onus to present evidence to rebut the presumed date of receipt.

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[16] *NoC-1*, at 4.

[17] As contained in the assertion that, "Mr. Kachur was unable to appeal the Notice of Contravention within the stipulated appeal period".

[52] Finally, the appellant relies on *Danakas, Arsenault*, and *Rodgerson* for the proposition that the appellant was entitled to know the case it had to meet.[18] While the appellant was so entitled, these cases are distinguishable on the facts.

[53] In *Danakas*, the War Veteran's Allowance Board dismissed a veteran's appeal on the basis that the applicable army was not a "a force of any of His Majesty's allies or powers associated with His Majesty". What had been communicated to the veteran was that his "service eligibility" was in issue, a term that was later found to be "broad and imprecise". The Board staff had assisted the veteran in establishing his membership in the army but, while doing so, had failed to indicate that the status of that very army could be a problem. The narrow but ultimately determinative issue could not, unlike in the current case, reasonably have been known by the veteran.

[54] In *Arsenault*, the adjudicator had rejected an interpretation of the collective agreement that had been agreed to by the parties and then proceeded to adopt a new interpretation of the collective agreement without providing notice to the parties that said interpretation was being considered. Furthermore, it was conceded by the respondents that the parties had not been provided notice of the interpretation and that the alternative interpretation had not been discussed at the hearing.

[55] In *Rodgerson*, the Registrar of Motor Vehicles had suspended a driver's license due to an individual's medical condition. The individual had been made aware that the Registrar was concerned about a primary medical condition but not that the Registrar was concerned about a secondary condition. It was the secondary condition that formed the basis for the suspension. After finding that the individual had not been provided notice of this second concern, the Tribunal decided not to allow the Registrar to add it as an allegation. The case had initially turned on one issue, but the individual had been advised that another issue altogether would be determinative.

[56] Contrary to the circumstances disclosed by these cases, the record in the present appeal suggests that the appellant made informed choices about how to present its case, not that the adjudicator failed to disclose the determinative issue.

III. Did the adjudicator err in law by making a factual finding that disregarded relevant evidence?

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[18] *Danakas v Canada (War Veteran's Allowance Board)*, 1985 CarswellNat 148, *Arsenault v Canada (Attorney General)*, 2016 FCA 179 (CanLII), *Rodgerson v Registrar of Motor Vehicles*, 2023 CanLII 113694 (ON LAT).

[57] The appellant suggests that Kachur had been dealing with health complications during the material time and may not have been properly served with NoC-1. Relatedly, the appellant argues that the adjudicator disregarded these facts when dismissing the appeal.

[58] The Board observes, first, that the appellant in NoA-D did not raise an issue with proper service. NoA-D, as outlined, suggests that the appellant had conceded that NoC-1 was properly served but had instead chosen to rely on Kachur's health circumstances as the primary reason for not filing the appeal within the time period.

[59] The Board has confirmed that, in the absence of a statutory provision providing authority to extend the time for an appeal, there is no authority to extend a time period:[19]

> *[83] Finally, the authorities are clear that a person's right to appeal expires if not brought within the statutory time limitation and that, in the absence of a statutory provision providing authority to extend the time for an appeal, there is no authority to extend the time period: Jordan v Saskatchewan Securities Commission (1968), 1968 CanLII 519 (SK CA), 64 WWR 121 (Sask CA); Houston v Saskatchewan Teachers' Federation, 2009 SKCA 70; Brady v Jacobs Industrial Services Ltd, 2016 CanLII 49900 (Sask LRB); Egware v Regina (City), 2016 SKQB 388 (CanLII); Pruden v Olysky Ltd, 2018 SKCA 75.*

[60] On the other hand, if service is not perfected, then the timeline does not begin to run.[20]

[61] Consistent with this case law, the appellant now relies on that same allegation (health complications) to suggest instead that Kachur was not properly served.

[62] However, as mentioned, there is no indication that proper service was an issue before the adjudicator. As such, it cannot be said that the adjudicator disregarded relevant evidence.

[63] Even if the appellant could now complain that the adjudicator disregarded evidence in relation to this issue, the evidence relied on is scant and could not possibly have been found to have been determinative.

[64] In particular, the appellant relies on the following excerpt from an email sent to the OHS officer,

> *…I apologize for the lengthy response time as I was struggling with Covid and the adverse health complications it caused me.*

[65] It is noteworthy that the full sentence states:

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[19] *Saskatchewan v Martell*, 2021 CanLII 122408 (SK LRB).
[20] See, for example, *Wish Upon A Star Early Learning Centre Inc. v Fertuck*, 2021 CanLII 46145 (SK LRB).

> *This document is in response to the request for compliance sent to me, I apologize for the lengthy response time as I was struggling with Covid and the adverse health complications it caused me.*

[66] This statement is not evidence that necessarily tends to prove that Kachur had been suffering from health complications. It is evidence that Kachur communicated to the OHS officer that he had been suffering from health complications.

[67] Furthermore, this singular statement, in which Kachur acknowledged that the "request for compliance" had been sent to him, could not possibly be taken as evidence that Kachur was not properly served. The statement explicitly provides a reason for Kachur not having responded, not for Kachur not having been served.

[68] As explained in *Professional Salon Services*, a decision-maker's failure to mention evidence must be considered in conjunction with the probative value of that evidence. The evidence put in issue by the appellant could not have had the probative value that the appellant attributes to it.

[69] The appellant also relies on the evidence that it did not respond to the NoCs until after NoC-2 was served and suggests that this tends to prove that it was not served properly with NoC-1. However, the fact that the appellant responded only after NoC-2 was served tends to prove only that it responded when it responded - nothing more. The adjudicator could not have come to a different conclusion.

[70] According to the information provided in NoC-1 and NoC-2, NoC-1 was served by registered mail and delivery was confirmed on February 24, 2022.[21] The adjudicator found as a fact that NoC-1 was served on February 24, 2022. In making this finding, the adjudicator did not disregard relevant evidence. The adjudicator did not commit an error of law.

[71] Pursuant to clause 4-8(6)(a) of the Act, the decision of the Adjudicator is hereby affirmed. The appeal is dismissed.

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[21] NoC-1, Exhibit G-1, at 4; NoC-2, Exhibit G-2, at 1.

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

DATED at Regina, Saskatchewan, this **19th** day of **April, 2024.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson