AMROTH BUILDERS LTD., Appellant v JEAN BOSCO NDIKUMUKIZA, Respondent and DIRECTOR OF EMPLOYMENT STANDARDS, GOVERNMENT OF SASKATCHEWAN, Respondent

LRB File No. 251-24; April 9, 2025
Chairperson, Kyle McCreary (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*
Citation: *Amroth Builders v Director of Employment Standards*, 2025 SKLRB 17

For the Appellant, Amroth Builders Ltd.:	Ian Dodd
The Respondent:	Jean Bosco Ndikumukiza
Counsel for the Respondent, Director of Employment Standards, Government of Saskatchewan:	Savannah Downs

Part IV Appeal – Procedural Fairness – Director provided late disclosure of preliminary objection before adjudicator – Appellant requested adjournment – Adjournment denied for reasons related to the merits of the proceeding – Appeal allowed as failure to provide notice of the issue and allow an opportunity to respond to the case to meet rendered hearing unfair

REASONS FOR DECISION

Background:

[1] **Kyle McCreary, Chairperson:** Amroth Builders Ltd. (the "Appellant") appeals against an adjudicator's decision dated November 28, 2024, (the "Decision") dismissing the Employer's appeal of a wage assessment made by the Director of Employment Standards (the "Director") in favour of Jean Bosco Ndikumukiza (the "Employee").

[2] The Director issued a wage assessment against the Appellant on May 23, 2024. The Appellant appealed the wage assessment on June 24, 2024, in LRB File No. 127-24.

[3] On November 15, 2024, an adjudicator was selected to hear the appeal.

[4] The adjudicator arranged a Zoom call on November 27, 2024, for "the purpose of setting a date for the hearing to be argued": the Decision at para 3.

[5] On November 27, 2024, the Director filed written submissions raising a preliminary objection on the jurisdiction on the basis of Section 2-75 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 ("the SEA"), 2.5 hours prior to the call: the Decision at para 4.

[6] The adjudicator determined at the start of the call to consider the preliminary objection prior to setting a date for the appeal: the Decision at para 7.

[7] The Appellant requested an adjournment, which was denied: the Decision at para 25. The adjudicator determined that the appeal was not filed within the time period prescribed under s. 2-75(2) and dismissed the appeal.

[8] On December 19, 2024, the Appellant appealed to this Board.

Argument on behalf of the Appellant:

[9] The Appellant argues that the adjudicator permitted the Director to file a late challenge and denied the Appellant's request for an adjournment. The Appellant claims they were denied due process.

[10] The Appellant also argues various factual issues related to service of the wage assessment and the representations made by the agents of the Director in communications.

[11] In oral argument, the Appellant also raised arguments related to Section 11(d) of the *Charter* and the *United Nations Declaration on Human Rights*.

Argument on behalf of the Employee:

[12] The Employee filed late submissions. The Appellant consented to the Board considering these late submissions, and the Director took no position. The submissions focus on the underlying merits of the wage assessment and the Employee's interactions with the Appellant. The Board does not find the issues raised by the Employee to be in issue in this decision.

Argument on behalf of the Director:

[13] The Director argues that the adjudicator made no error of law in the application of the test for the time limitation under s. 2-75 of the SEA. The Director also argues that the hearing was procedurally fair, but if a breach is found this matter should be remitted to the adjudicator for reconsideration.

Relevant Statutory Provisions:

[14] This appeal to the Board is pursuant to s. 4-8 of the SEA, which reads:

> ***Right to appeal adjudicator's decision to board***
> ***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:*
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> > *(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:*
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> > *(a) in the case of an appeal or hearing pursuant to Part II, the wage assessment or the notice of hearing;*
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> > *(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;*
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> > *(d) any exhibits filed before the adjudicator;*
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> > *(e) the written decision of the adjudicator;*
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> > *(f) the notice of appeal to the board;*
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> > *(g) any other material that the board may require to properly consider the appeal.*
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> *(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 and Decision:

Jurisdiction and Standard of Review

[15] The Board's jurisdiction on appeals under Part IV is restricted to questions of law: *Wright v Govt of Sask (OH&S)*, 2025 SKLRB 12; *Carrier v SIGA*, 2025 SKLRB 7; and *Tysdal v Cameron*, 2025 SKLRB 1. The standard of review on questions of law is one of correctness.

[16] Whether a hearing was procedurally fair is a question of law reviewable on a correctness standard: *Riverside Electric Ltd. v Schlamp*, 2022 CanLII 113733 (SK LRB).

[17] While the duty of procedural fairness varies, it is a question of law whether in the circumstances the hearing was fair or not, as stated by the Court of Appeal in *Malik v Saskatchewan (Victim Services)*, 2024 SKCA 96 (CanLII):

> *[31] In terms of the issue of procedural fairness raised by Mr. Malik, as I have previously noted, this question is subject to a correctness standard of review. This requires that the Court to "determine whether the procedure at issue was fair in the circumstances" (Akpan v The University of Saskatchewan Council, 2021 SKCA 129 at para 20, 10 Admin LR (7th) 61, quoting Kupsar v Regina Provincial Correctional Centre, 2020 SKCA 142 at para 37, 97 Admin LR (6th) 181 [Kupsar]. See also Sran v University of Saskatchewan (Academic Misconduct Appeal Board), 2024 SKCA 32 at para 57). The factors the Court will consider in determining whether the duty of fairness has been met were set out in Canada (Attorney General) v Mavi, 2011 SCC 30, 332 DLR (4th) 577:*
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> > *[42] A number of factors help to determine the content of procedural fairness in a particular legislative and administrative context. Some of these were discussed in Cardinal, a case involving an inmate's challenge to prison discipline which stressed the need to respect the requirements of effective and sound public administration while giving effect to the overarching requirement of fairness. The duty of fairness is not a "one-size-fits-all" doctrine. Some of the elements to be considered were set out in a non-exhaustive list in [Baker v Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 817] to include (i) "the nature of the decision being made and the process followed in making it" (para. 23); (ii) "the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'" (para. 24); (iii) "the importance of the decision to the individual or individuals affected" (para. 25); (iv) "the legitimate expectations of the person challenging the decision" (para. 26); and (v) "the choices of procedure made by the agency itself, particularly when the statute leaves to 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" (para. 27). Other cases helpfully provide additional elements for courts to consider but the obvious point is that the requirements of the duty in particular cases are driven by their particular circumstances. The simple overarching requirement is fairness, and this "central" notion of the "just exercise of power" should not be diluted or obscured by jurisprudential lists developed to be helpful but not exhaustive.*
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> *See also Toutsaint v Investigation Committee of the Saskatchewan Registered Nurses' Association, 2023 SKCA 11 at para 19, 477 DLR (4th) 213; Chenjelani v Institute of*

Chartered Professional Accountants of Saskatchewan, 2022 SKCA 66 at paras 10–15; and Kupsar.

[18] The questions raised in the notice of appeal are issues of procedural fairness and will be reviewed on a correctness standard.

[19] While the Appellant has framed this case as a matter of due process and a right to a fair trial, the Board views this case as raising issues of procedural fairness. While the legal concepts are related, procedural fairness has its own analytical framework that is contextual to the administrative law setting.

[20] The *Charter* and Charter values have general application to the Board, but s. 11(d) is not engaged by this case. Section 11 of the *Charter* relates to "offences" and is generally restricted to Criminal matters. The potential to apply outside of Criminal matters was discussed by the Alberta Court of Appeal in *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 (CanLII):

> *[20] The appellants argue that the Commission's proceedings have the potential to violate their right under s. 11(d) to be presumed innocent of an offence until proven guilty in a fair and public hearing. The chambers judge concluded that the appellants have not been charged with an "offence" within the meaning of s. 11 because the potential consequences that may arise under ss. 198 and 199 of the Securities Act are not penal in nature.*
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> *[21] The chambers judge referred to the decision of Wilson J. in R. v. Wigglesworth, 1987 CanLII 41 (SCC), [1987] 2 S.C.R. 541, 45 D.L.R. (4th) 235 ("Wigglesworth"), in which she described the kind of matters that typically are covered by s.11. She distinguished between public matters, "intended to promote public order and welfare within a public sphere of activity", and "private, domestic or disciplinary matters" which are "primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity": Wigglesworth at para. 23. The former matters, those of a public nature, include criminal offences and quasi-criminal offences under provincial statutes, and are the kind of offences to which s. 11 was intended to apply. The latter matters include administrative proceedings instituted for the protection of the public in accordance with the policy of a statute. Section 11 will typically not apply to such proceedings. Administrative hearings before securities commissions are generally held to fall into this latter category.*
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> *[22] As the chambers judge noted, Wilson J. in Wigglesworth went on to state that the protections provided by s. 11 may apply to private or regulatory matters if there is the imposition of "true penal consequences". She opined at para. 24 that true penal consequences might include a "fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity".*
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> *[23] The appellants rely on this last statement to argue that the potential penalties they face, for fines of up to $1 million per contravention of securities law, amount to true penal consequences and that the protections guaranteed by s. 11 are therefore engaged. The chambers judge rejected that argument, emphasizing the need to consider the purpose of the sanction, and not just its magnitude, in assessing whether it amounts to a true penal consequence. Moreover, when considering the purpose of the sanction it is necessary to*

> *consider the overarching purposes of the Securities Act, which include the protection of investors and the public, the efficiency of the capital markets, and ensuring public confidence in the system. In the end, the chambers judge agreed with this Court's conclusion, at para. 54 of Brost, that the increase in the magnitude of administrative penalties reflects a legislative intent to ensure that the penalties are not simply considered another cost of doing business. He therefore concluded that no true penal consequences arise under ss. 198 and 199 of the Securities Act and that s. 11 of the Charter is, accordingly, not engaged here. I agree.*
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> *[24] The appellants point to a recent decision of the British Columbia Court of Appeal which considered the nature of administrative penalties similar in magnitude to those at issue here. In Thow v. British Columbia (Securities Commission), 2009 BCCA 46, 266 B.C.A.C. 140 at para. 49, ("Thow") (decided after the decision of the chambers judge in this case), the court concluded that the imposition of administrative penalties totalling $6 million ($1 million per contravention) was "punitive" and therefore the amendment to the British Columbia Securities Act which permitted such penalties could not be applied retrospectively. In the course of considering whether the presumption against retrospectivity should apply, the Court said that the penalty was "'punitive' in the broad sense of the word; it was designed to penalize Mr. Thow and to deter others from similar conduct": ibid.*
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> *[25] The appellants urge us to apply this same reasoning to the question of whether the sanctions set out in ss. 198 and 199 of the Securities Act amount to "true penal consequences" for purposes of the s. 11 analysis. I prefer the reasoning of LeBel J. in Cartaway Resources Corp., 2004 SCC 26, [2004] 1 S.C.R. 672 at para. 60, ("Cartaway") where he found that general deterrence is "an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative". He agreed with Ryan J.A., the dissenting judge in the appeal court in that case, when she wrote that "[t]he notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others". As the Supreme Court concluded in Cartaway, general deterrence is a relevant factor when the Commission imposes sanctions designed to carry out the public protection purposes of securities regulation. To the extent that Thow reaches a different conclusion, I decline to follow it.*

[21] The Board agrees with this analysis. The wage assessment at issue does not have "true penal consequences". Wage assessments are meant to maintain employee rights and are not assessed on the basis of "redressing the wrong done to society at large". As such, section 11 is not engaged in this case.

[22] As it relates to *the United Nations Declaration on Human Rights*, the Board also views this as inapplicable to the case. The declaration has not been adopted into domestic law of Saskatchewan or Canada, and therefore does not bind this Board. International law can have interpretative value in relation to the *Charter*, see *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 (CanLII), [2015] 1 SCR 245; however, the Board does not view recourse to it as necessary to determine whether the hearing at issue was procedurally fair.

[23] Considering the case through the lens of procedural fairness, the Board considers the first issue raised by the Appellant related to a late challenge to be a question of notice of the case to

meet, and the denial of the adjournment is a question of whether there was a breach of procedural fairness in the exercise of the adjudicator's discretion in deciding an adjournment.

Did the Appellant Have Notice of the Case to Meet?

[24] Procedural fairness varies by context. A party may not be entitled to notice if it is not required by the context. The Board must consider whether the Appellant was entitled to notice of the case to meet in this adjudication. The Court of Appeal discussed the contextual approach to procedural fairs in *South East Cornerstone School Division No. 209 v Oberg*, 2021 SKCA 28:

> *[31] …The Chambers judge looked to Baker v Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 23–27 [Baker] for guidance. In Baker, L'Heureux-Dubé J. identified five non-exhaustive factors as assisting in the determination of the content of the duty of procedural fairness owed in a particular context. These factors were summarized by the Chambers judge as follows:*
>
> > *[21] Five important factors assist in determining the degree of procedural fairness owed by a public body to someone affected by its decision. The following factors are not comprehensive, but they provide a basic framework for assessing procedural fairness:*
> >
> > > *(a) The nature of the decision and the process used to make it. The more the process provides for a decision resembling judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required;*
> > >
> > > *(b) The nature of the statutory scheme and the terms of the statute under which the body operates. Greater procedural protections are required when no appeal procedure is provided in the statute or when the decision will finally determine the issue;*
> > >
> > > *(c) The importance of the decision to the individual affected. The greater the impact on the lives of those it affects, the more stringent the procedural protections;*
> > >
> > > *(d) The legitimate expectations for procedural fairness of the person challenging the decision, which is often informed by any policy the public body has in place respecting processes for decision-making; and*
> > >
> > > *(e) The choices of procedure made by the body itself, particularly when the statute gives the decision-maker the ability to choose its own procedures, or when the body has expertise in determining what procedures are appropriate.*
>
> *[32] Unifying this list of non-exhaustive factors "is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker" (Baker at para 22).*

[25] When considering these factors, there is a support for a high level of procedural fairness before the adjudicator and a finding that there was a requirement for substantive notice of a hearing. The adjudication process resembles a court process as it is an adversarial process before a decision maker, this supports high levels of fairness and notice. While there are appeals, they are restricted to questions of law, which supports a requirement of fair notice when trying the facts. The decisions are important, but they do not raise to the level of liberty interests at stake in some administrative hearings, this may support a lower level of procedural protection on some issues, but does not support not requiring notice. The legitimate expectations of the parties are that there will be notice, as pursuant to s. 4-4 of the SEA, there is a requirement of written notice of the time day and place for a hearing. While the adjudicator may choose their own process, there is no power under s. 4-5 that allows the adjudicator to waive the notice requirement under s. 4-4 and the adjudicator had given notice of a scheduling hearing.

[26] Considering the above factors, the Board finds that procedural fairness requires notice to be given when a merits-based issue is to be decided in an adjudication under Part IV of the SEA. The notice of the call complied with the requirements of hearing notice under s. 4-4 of the SEA, however, that the prior notice was of a call for the setting of dates. There was no prior notice of an objection pursuant to s. 2-75. The Appellant was only advised that issues other than dates were being decided when the call commenced. The Appellant was also only apprised of the Director's objection immediately before the call. This does not constitute adequate notice. The lack of notice denied the Appellant the opportunity to put forward their views and evidence and have them considered by the adjudicator. This failure of notice renders the Decision procedurally unfair.

Did the Adjudicator Breach Procedural Fairness in Not Granting the Adjournment?

[27] The Appellant also takes issue with the adjudicator's denial of the Appellant's adjournment request. Adjournments are discretionary decisions and are generally only reviewed on whether they are exercised judicially and in accordance with procedural fairness. The Saskatchewan Court of King's Bench reviewed the factors that a tribunal should consider in deciding an adjournment in *Green v Arthurs*, 2023 SKKB 75 (CanLII):

> *[20] The denial of an adjournment can amount to a breach of a public body's common law duty of procedural fairness. This is not to say that administrative bodies must grant adjournment requests as a matter of right. There is no absolute right to an adjournment at common law. The question whether an adjournment request should be granted is a matter of a tribunal's discretion, albeit discretion that must be exercised judicially and in accordance with the principles of natural justice and procedural fairness.*
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> *[21] Various factors come into play when a tribunal, or a court, is faced with an adjournment request. In the case of a request to adjourn the trial of a civil action in a superior court, the decision in Lameman v Alberta, 2011 ABQB 40, 51 Alta LR (5th) 117, provides helpful guidance. There Yamauchi J. set out 11 non-exhaustive factors a trial judge should consider in deciding whether to grant the adjournment. Of these factors, I find six of them would similarly apply to administrative proceedings. Described in language particular to administrative proceedings, these factors are:*
>
> *a. the nature of the tribunal's process and its obligation to decide the case on its merits and make a just determination of the matters in dispute;*
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> *b. the prejudice caused to a party by granting or refusing the adjournment;*
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> *c. the applicant's explanation for the inability to proceed on the scheduled date;*
>
> *d. the length of the adjournment requested and any resulting disruption;*
>
> *e. the history of the proceedings, including other adjournments and delays as well as which party caused them; and*
>
> *f. whether the adjournment is found merely to be an attempt to delay proceedings.*

[28] The adjudicator's analysis of the request for an adjournment is contained at para 25 of the Decision, which reads:

> *25. Mr. Dodd says he is unsure of when he received notice of the Wage Assessment and when he submitted the appeal and deposit. He requested that I adjourn the hearing and reconvene it after he has had an opportunity to determine for himself whether he missed the relevant limitation period. I refused Mr. Dodd's request for an adjournment, because the evidence filed by the Director irrefutably establishes that Mr. Dodd and Amroth Builders Ltd. Did attempt to file their appeal of the Wage Assessment significantly outside of the 15 business day limitation period. I see no reason to further delay payment to Mr. Ndikumukiza.*

[29] The focus of this analysis appears to be on prejudice to the Employee and the underlying merits of the Director's argument. The adjudicator did not consider the context of the lack of notice either of the jurisdictional issue or that the hearing was not just for scheduling but was to be potential determination of the case. The analysis does not balance the potential competing prejudices between the parties.

[30] The decision to deny the adjournment was not procedurally fair. A short adjournment could have been granted to minimize prejudice to the Employee while also granting the Appellant an opportunity to respond to the Director's objection and address the issue of lack of notice of the jurisdictional hearing. Denying an adjournment on the basis of already reaching an adverse conclusion on the merits was not a proper exercise of discretion.

[31] Considering the issue of lack of notice and the denial of the adjournment, the adjudicator must reconsider the Director's preliminary objection after granting the Appellant the opportunity to present evidence and argument on ss. 2-75 and 9-9.

Conclusion:

[32] As a result, with these Reasons, an Order will issue that the Appeal in LRB File No. 251-24 is granted and pursuant to s. 4-8(6)(b), the matter is remitted to the adjudicator for amendment of the decision in accordance with these Reasons. The Appellant had a right to notice, which has now been provided. The adjudicator shall provide an opportunity for the Appellant to meet the Director's case as it relates to the timeliness of the appeal. The adjudicator may still find there is a lack of jurisdiction, but the Appellant must have an opportunity to meet the Director's case and have their views and evidence considered before that decision is made.

[33] The Board thanks the parties for the helpful submissions they provided, all of which were reviewed and considered in making a determination in this matter.

DATED at Regina, Saskatchewan, this **9th** day of **April, 2025.**

LABOUR RELATIONS BOARD

Kyle McCreary
Chairperson