

**In the Matter of an Appeal to an Adjudicator Pursuant to Section 3-53 of *The Saskatchewan Employment Act, SS. 2013, Chapter S-15.1***

Decision Appealed from: Occupational Health Officer Report 1755  
January 29, 2015

LRB File 156-15	
Appellant:	Lyle Brady
Respondents:	Jacobs Industrial Services Ltd.  Director, Occupational Health and Safety, Ministry of Labour Relations and Workplace Safety
Intervenor:	International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers Local Union No. 771

**Ruling on Jurisdiction**

**I. Introduction and Background**

1. Lyle Brady (“Brady”) seeks to appeal Occupational Health and Safety Report 1755 dated January 29, 2015 (the “Report”) to an adjudicator pursuant to s. 3-53 and s. 3-54 of *The Saskatchewan Employment Act* (the “Act”). I was appointed as Adjudicator to hear this case.
2. The Report, written by Occupational Health Officer Kent Rhodes, deals with a complaint of discriminatory action by Mr. Brady against a former employer, Jacobs Industrial Services Ltd. (“Jacobs”). During his employment with Jacobs, Mr. Brady was a member of and represented by the International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers Local Union No. 771 (the “Union”).
3. Upon receipt of the appointment, I contacted the parties to arrange for a pre-hearing meeting by conference call. In managing the pre-hearing process I issued a Process Direction on January 28, 2016 and Process Direction #2 on March 19, 2016.
4. There is no dispute that:
  - a. On October 14, 2014, Mr. Brady filed with the Ministry a complaint of discriminatory action against Jacobs, alleging Jacobs had taken discriminatory action against him in his employment because of his occupational health and safety activities (the “Complaint”).
  - b. By Occupational Health and Safety Report 1755 dated January 29, 2015 (the “Report”), the Occupational Health Officer dismissed the Complaint.

- c. On July 20, 2015, Mr. Brady, by email, filed a Request for an Appeal Hearing” with the Ministry (the “Appeal Request”).
5. The lapse of time between the Report and the Appeal Request raises the issue of whether Mr. Brady filed the Appeal Request within the time required by the *Act*. The relevant subsections of Section 3-53 of the of the *Act* read:
    - 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.**
    - (3) The written notice of appeal **must**:
      - (a) set out the names of all persons who are directly affected by the decision that is being appealed;
      - (b) identify and state the decision being appealed;
      - (c) set out the grounds of the appeal; and
      - (d) set out the relief requested, including any request for the suspension of all or any portion of the decision being appealed. [emphasis added]

6. Section 3-54 of the *Act* reads:

- 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.

7. In Process Direction #2, I said this:

16. On the face of it, it appears Mr. Brady received the Report on February 6, 2015. Under the *Act*, then, he had fifteen business days from February 6, 2015 in which to appeal. The OHS File shows the Appeal Request was filed July 20, 2015, many months after the 15 business day requirement would have run out. Mr. Brady, however, says he started his appeal on February 11, 2015 and I have invited him to provide evidence to establish he did so.

17. These sections taken together mean that Mr. Brady’s appeal with respect to a matter involving discriminatory action is to be heard by an adjudicator.

18. The preliminary jurisdictional issues before me, then, are:

- a. Did Mr. Brady file his appeal of the Report within the statutory time limit? and
- b. If Mr. Brady did not file his appeal within the statutory time limit, is there any relief available from his failure to do so, i.e., is there any way the time limit can be ignored or waived?

19 For me to deal with the substantive issue of whether the Occupational Health Office was wrong in deciding there was no discriminatory action against Brady, I must have jurisdiction to do so. The only way I have jurisdiction is if the appeal is properly before me in accordance with the requirements of the *Act*.

20. I have already asked the parties to identify for me the documents in the OHS File which they consider relevant to the question of whether the appeal was filed in time and to identify any additional documents that might shed light on the timeliness question. Jacobs and the Ministry have raised questions about the relevance of many documents

Brady suggests are relevant. On the face of it, it does not appear that anything that occurred before the Occupational Health Officer issued the Report on January 29, 2015, could possibly be relevant to the question of whether the appeal was filed in time. The filing of the appeal by its very nature must occur after the Report was issued. Therefore, without a final determination on the issue, I make a preliminary determination that nothing before January 29, 2015 is relevant to the question of whether Mr. Brady filed his appeal on time as required by the *Act*. I will, however, address any additional issues in this regard at the in person hearing referred to below. I will also address any other issues in relation to disclosure of documents at that time.

### **Conclusion and Directions**

21. As I have said, I must first determine the jurisdictional questions. The process to do that will be as follows:

- a. I will convene an in-person hearing to hear the evidence and argument with respect to the jurisdictional issues of:
  - i. Did Mr. Brady file his appeal of the Report within the statutory time limit? And
  - ii. If Mr. Brady did not file his appeal within the statutory time limit, is there any relief available from his failure to do so, i.e., is there any way the time limit can be ignored or waived?
- b. At the outset of the hearing:
  - i. I will discuss with the parties the documentary evidence that might be entered by consent on the jurisdictional issues. I will enter into evidence any documents agreed upon by Mr. Brady and Jacobs; and
  - ii. I will discuss with the parties whether there are factual matters which are not in dispute which might be agreed upon by consent.
- c. In addition to any factual matters and documents agreed upon, I will hear evidence from Mr. Brady and Jacobs, with respect **only** to the jurisdictional questions, in the following manner:
  - i. Mr. Brady will present his evidence first.
  - ii. Jacobs will present second.
  - iii. Mr. Brady will then have a right to call reply evidence, if any on any new matter raised by Jacobs.
  - iv. In addition to any evidence entered by agreement, any other evidence will be entered through witnesses who will testify in person. Any additional documents will need to be entered through a witness.
  - v. Witnesses will be sworn and there will be a right to cross-examination. If I have questions, I will also ask my questions.
- d. After all the evidence has been entered, I will hear argument from Mr. Brady and Jacobs and representation from the Ministry on the jurisdictional questions **only**.
- e. Following the hearing, I will make a decision on whether I have jurisdiction to hear Mr. Brady's appeal. If I find I do have jurisdiction to hear the appeal, then I will issue further process directions on how the appeal will be heard.

7. I had also earlier granted the Union status to attend the hearing and to make submissions on the jurisdictional question. I did not permit the Union to call evidence.
8. I convened the jurisdiction hearing in Regina on June 2, 2016. Lyle Brady attended the hearing supported by his spouse, Rose Brady. Alison Adam represented Jacobs. Lee Anne Schienbein represented the Director of Occupational Health and Safety. Gary Caroline and Lyndsay Watson represented the Union.
9. The evidence concluded on June 2, 2016, but there was insufficient time for arguments. I adjourned the hearing to June 29, 2016 to hear final arguments by telephone. Mr. Caroline advised the Union would submit written argument and would not be appearing on the telephone conference. The telephone conference for final submissions proceeded on June 29, 2016.

## **II. Issues**

10. The issues are:

- a. Did Mr. Brady file his appeal of the Report within the statutory time limit set out in s. 3-53(2) of the *Saskatchewan Employment Act*?
- b. If Mr. Brady did not file his appeal within the statutory time limit, is there any relief available from his failure to do so, i.e., is there any way the time limit can be ignored or waived?

## **III. The Hearing**

11. In accordance with Process Direction #2, at the outset of the hearing, the parties agreed to enter into the record, by consent, subject to any arguments with respect to relevance, weight and reliability, the following documents:
  - a. A set of documents identified by the Director of Occupational Health and Safety;
  - b. A set of documents identified by Jacobs;
  - c. A set of documents identified by Brady.
12. The parties also agreed to the basic facts set out in paragraph 4 above. Lyle Brady and Rose Brady both testified. Jacobs called Mike Carr, Deputy Minister of Labour Relations and Workplace Safety and Mike Brodziak, Jacobs' General Manager. Lyle Brady also testified in reply. Some additional documents and an audio recording of a meeting were entered either through witnesses or by consent. I will refer to them as necessary in this decision.

### Lyle Brady

13. Brady began his case by testifying on his own behalf. He began by wanting to read from notes he had made the night before the hearing. The other parties agreed Brady could refer to his notes as long as everyone was provided with a copy. I arranged for the notes to be copied and the hearing continued.

14. Brady testified:

- a. Brady met with Kent Rhodes on January 8, 2015 and Rhodes said he had made his decision on Brady's Complaint before he even interviewed Brady. When Brady and his wife walked into the meeting with Rhodes, Rhodes said, "We have made a decision on your case". Brady was shocked because he hadn't even made a statement yet. Brady told Rhodes that without his statement, "I appeal this immediately." Brady told Rhodes he was disgusted with Rhodes' investigation practices and that Rhodes' concern for job safety was pathetic.
- b. Brady met with Mike Carr on February 11, 2015. At that meeting:
  - o Brady raised with Carr a 1997 accident at Vanscoy where Brady broke his back.
  - o Brady told Carr about the January 8 meeting with Rhodes and told Carr the reason for the meeting with Carr was to continue with his appeal process.
  - o Carr stopped Brady and said he'd heard the occupational health and safety story from Rhodes and that the Ironworkers were bringing forward a medical mental health issue. Carr said he had Jacobs' statement and was interested in hearing Brady's side of the story.
  - o Brady explained to Carr that at the Jacobs Colonsay site two men had received electric shock and Brady was very concerned for the one man who was 65 and on heart meds. The man had received 240 volts electricity twice in less than a minute. When Brady got to the ground, he was the man's first aider. The man's arms were very sore, he didn't speak clearly and Brady sat him down and got Jacobs safety supervisor.
  - o Brady told Carr he was concerned about the Gallery One project because many of the bolts that were rotten or missing had been sheared through the shank and that the framed underpinnings could also be sheared or cracked off. This meant the Gallery One was a very serious structurally unsafe work environment.
  - o Brady told Carr the first time he spoke to the mines inspectors they guaranteed the bolts were changed out. The second time the same inspector said he didn't inspect the gallery, that he did not check the bolts but that he was told by the Jacobs supervisor that the bolts were changed out. Brady understands this mines inspector quit his job right after that.
  - o Brady was concerned Carr's department, the OHS, were shirking on their duties. Brady discussed several other very serious accidents on other job sites with Carr as well. Carr said he would look into all of them, but that it was a lot to take in and he would need some time.

- c. Brady phoned Carr in March to see how his appeal hearing was going. They talked on the phone for an hour and Carr asked Brady to make another appointment in April. In April Carr wrote a letter to Ironworkers Local 771 in Regina and to a psychiatrist. At this time Brady told Carr he felt Carr wasn't really accomplishing anything in this appeal hearing. Carr explained he was not helping Brady with an appeal hearing. He said that was not his job, but the Director's job. Brady asked Carr why he didn't send Brady to Ray Anthony's office and Carr never did answer that question.
- d. In frustration, Brady phoned Premier Wall's office to understand how he could continue his appeal. Wall put Brady in touch with Rob Norris, the Minister of Labour. Norris directed Brady to the Department of Labour and Brady then filed a grievance [a duty of fair representation complaint] against the Union. That is when Brady also "wrote the appeal once again".

15. In cross-examination by employer counsel:

- a. Brady confirmed he received the Report on February 6, 2015 and signed for it. He has read the report many times including the section of the report containing the instructions on how to file an appeal.
- b. Brady said Mike Carr may have called him the first time on January 15, 2015 because Brady had called the Premier's office to raise concerns over his pension and the Union's failure to dispatch him. Brady also had concerns that occupational health and safety were not doing due diligence on many job sites. Brady doesn't specifically remember a January 15 call. Brady doesn't remember telling Carr that he had a complaint before OHS or that he didn't yet have a decision on the complaint. The only reason he was talking to the deputy was always about safety. Brady denies that Carr told him he couldn't get involved in an active investigation, but that he would look into it and find out when Brady might expect a decision.
- c. Brady recalls "It all started in February." "The men were still on the iron and we did not have an inspection in sight." Brady says that on February 11, Carr told him he was concerned and would start an investigation immediately.
- d. Brady denies that Carr asked him to put his issues in writing and he denies sending Carr an email with attached letter and photo on February 20, 2015. Brady says he spoke with Carr four times in February. When counsel put to Brady that the February 20 email was in response to Carr asking him to narrow his issues, Brady said, "That may be his statement, but anytime I had information I sent it to him after he started dialogue with me."
- e. Brady agreed that between February and July, he met with Carr a number of times. He agrees his pension was one of the topics, but it was not the primary topic. Brady was concerned because the Union was not fairly representing him and had told OHS Brady had ongoing mental health

issues. Carr prepared a letter for Brady to send to the Union and he asked Brady for a waiver for medical evidence. Brady was concerned that the Union was not dispatching him. Carr drafted the letter to the Union and Brady signed it.

- f. When it was put to Brady that the first time he raised directly with Carr his intention to appeal the Report was at a meeting on July 7, 2015, Brady said “That’s ridiculous. I remember telling Carr on February 11<sup>th</sup> why I was in his office, very clearly. That’s the reason I went to see him.” Brady doesn’t recall if Carr told him on July 7 that the proper process would have been to file an appeal. Brady agrees Carr may have told him Carr had no role in the appeal process and couldn’t assist him with the appeal.
  - g. Brady said he met with Carr on February 11, February 20 and February 25, 2015.
  - h. Brady said when he filed his Appeal Request on July 20, 2015, “That is when we basically started all over again.” When asked to confirm this was the first time he put his appeal request in writing, Brady said, “That’s a loaded question.” He then said, “The first time I appealed it was orally to Kent Rhodes. Every time I met an officer after that I appealed this.” Brady finally agreed the July 20 Appeal Request was the first time he put his appeal in writing.
16. There is in evidence a February 20, 2015 email from Brady’s email address to Mike Carr:

Mr. Mike Carr,

Sir, please see attached letter and photo. Thanks.

LYLE BRADY

In the letter, addressed to Mike Carr, Brady raises issues about the Union suspending Brady from dispatch and concerns about Brady’s pension. There is no mention of the Complaint or anything about an appeal.

17. During Brady’s cross-examination, an issue arose with respect to the recording of the January 8, 2015 meeting involving Kent Rhodes and Lyle Brady. The recording was not originally included in the material the parties agreed to put before me. Brady insisted the recording was relevant even though it pre-dates the January 29, 2015 Report. Brady said at that meeting Kent Rhodes told Brady and Rose Brady that he had decided the Complaint against Brady and that Brady had immediately appealed the decision right then. The parties all agreed the recording should be produced and should be played for everyone before Brady’s cross-examination continued.
18. The recording begins with an introduction by David Milo, Senior Investigator, Occupational Health and Safety. He states the date as January 8, 2015 and identifies those present with him as Kent Rhodes, Lyle Brady and Rose Brady. After introductions, Rhodes says:

Lyle, I just kinda wanted to go through, kinda what we spoke about on the phone there previous and, ah, I haven’t made a decision yet and I need all the information before I can make a decision, but I just wanted to make it very clear to you about the appeal

process, and that both parties can appeal my decision. Whether I rule against you or rule against the employer, either side can appeal the decision and that starts over. But I haven't made a decision as of yet, okay.

19. Brady responded that he appreciated the system being there for him. Rhodes went on to say that they would be talking about when Brady worked for Jacobs at the Colonsay mine and Brady's claim of discriminatory action. Rhodes and Milo then went on to interview Brady about what happened at the Colonsay mine. During the interview, Rhodes read Brady a letter from Jacobs in which Jacobs set out their response to Brady's discriminatory action Complaint. When Rhodes finished reading the letter, Brady said, "There's several things in there that I will definitely appeal." Milo told Brady this was his opportunity to respond and Brady said it would take time to put together a response. Rhodes tells Brady if he wanted a week to write something up to respond to the Jacob's letter, that would be fine. Brady says he will do that, that he has evidence.
20. After everyone heard the recording, employer counsel continued with cross-examination. Brady insisted the January 8, 2015 recording starts after the beginning of the meeting. Rose Brady began interjecting during the cross-examination to say she was at the meeting and she knew what happened. On application by employer counsel, I excluded Rose Brady from the hearing for this portion of the cross-examination and advised Lyle Brady that if he wanted to later call Rose Brady as a witness, he would be free to do so. When Brady's cross-examination continued:
  - a. Brady insisted that before the recording began, Rhodes made one statement for sure that he was inviting Brady there that day to make a statement but that he had already made a decision on the case. When Rhodes began the recording, he said the exact opposite. The other thing they discussed before the recording began rolling was a fire at the Co-op Upgrader.
  - b. Brady agreed Rhodes gave him one week to provide additional information. Brady tried to meet the one week but compiling the evidence took a lot longer than that. Rhodes pushed Brady and eventually Brady provided as much as he could by January 27.
21. In reply, Brady said he had a few meetings with Rhodes where they had heated conversations about Rhodes' "pathetic investigation practices".

#### Rose Brady

22. Rose Brady then testified that she noticed some phrases and sentences that "aren't on the recording." "I say the audio was tampered with. Rhodes said something in that meeting and it was replaced." At the meeting Rhodes said he had already made a decision but he was giving Brady a chance to present. "Rhodes did not say he hadn't made a decision because that's contrary to what he did say."



## Mike Carr

23. Brady's case closed and Jacobs began their case by calling Mike Carr, Deputy Minister of Labour Relations and Workplace Safety. Carr testified:

- a. In early January 2015, Carr received call from the Minister's office to say Brady had called the Premier and the Minister about some concerns Brady had with respect to his union and with respect to a pension asset. In the normal business of government, matters like this are referred by Minister's office to the Ministry.
- b. Carr was familiar with Brady because of conversations years earlier with respect to a WCB claim and injury. Carr told the Minister's office he would be happy to talk to Brady.
- c. Sometime around the 13th or 14th of January Brady called Carr's office and on the 14th Carr returned the call and said he would talk to Brady. On January 15, Brady called back and they had a fairly lengthy conversation about a variety of concerns about safety, WCB and Brady's Union not dispatching him to work. Brady also expressed concerns about the security of his pension asset. He was trying to decide whether he would stay in Saskatchewan. Carr asked Brady to put his concerns in writing to try to narrow things down. Brady told Carr he had a concern about an OHS complaint he filed and he was concerned about the length of time it was taking to arrive at an answer. Carr told Brady that as Deputy Minister Carr had no ability to influence the investigation or insert himself into it. Carr said he could find out the status of the investigation and get someone to get in touch with Brady.
- d. Carr contacted the OHS office and his understanding is the officer reached out to Brady and provided him with information on the status of Brady's complaint.
- e. Brady responded to Carr's request to put his concerns in writing with an email of February 20, 2015 together with an attached letter. Carr told Brady he should do some things with respect to the Union and that he could provide advice about the pension if Brady could provide information on where asset was.
- f. Following receipt of information from Brady, Carr undertook to ensure the pension asset was held in trust and was subject to the provisions of *Pension Benefits Act*. Carr assured Brady all he needed to do was continue his contributions or talk to the trustee to secure the asset if he chose to leave the trade and move to a different jurisdiction.
- g. With respect to ability to be dispatched by the Union, Carr explored the opportunity to challenge the Union's position by providing medical information of Brady's fitness to work. Brady was concerned that his doctors were reluctant to give him further information in writing, so Carr helped Brady draft a letter to his doctor and asked Brady to sign a medical authorization so the doctor could release medical information. Carr's letter

to the doctor is dated April 13, 2015 and Brady signed the medical authorization on April 15, 2015. Carr also drafted a letter for Brady to send to the Union. The letter is dated May 25, 2015. Carr suggested Brady deliver the letter to the Union.

- h. Carr's diary shows he met personally with Brady on each of February 25, April 15, June 3 and July 7, 2015. The first time Carr became aware Brady wanted to appeal the Rhodes Report was when his staff informed him on July 6, 2015 that Brady wanted to raise the issue. Carr inquired of the OHS Division and confirmed Brady had not filed an appeal.
- i. When Carr met with Brady on July 7, Carr expressed concern there is a timeline associated with the requirement to file an appeal. Carr told Brady that it was a statutory time limit and one Carr has no authority to interfere with, that Carr had no standing under the *Act* to do anything to allow someone to get access to an appeal outside of the time limits. Carr did not give Brady any information on where or how to file an appeal.
- j. Between the January telephone discussion and the discussion on July 7, 2015, Brady never raised anything with Carr about the Complaint or an appeal of the Report.

24. Brady, with assistance from Rose Brady, then cross-examined Carr:

- a. Carr maintained that throughout his communications with Brady he made it clear to Brady that he was assisting Brady only with the matters raised in Brady's February 20, 2015 email. Those issues were with respect to the pension and the Union's refusal to dispatch Brady.
- b. Carr confirmed Ken Rhodes has never told Carr that Brady appealed directly to Rhodes.
- c. Carr maintained all his conversations with Brady have been about WCB, pension and union dispatch issues. He maintained that when Brady brought up the OHS case in January, he told Brady he could not intervene in an investigation.
- d. When Rose Brady suggested to Carr that Brady presented the "Jacobs problem" at a meeting on February 11, 2015, Carr said he did not recall a meeting on February 11. With respect to the OHS Complaint, Carr only recalls the telephone conversation in which Brady expressed concern about having filed a complaint and not having heard anything back. Carr believes this conversation took place on January 15.
- e. Carr maintained that if Brady had raised the issue of an appeal directly, Carr would have said he has no authority under the statute to make an appeal or conduct an investigation just as he did when Brady raised the issue in July. All he can do is undertake to make inquiries on the status of matters. Carr will not become involved in any active investigation or in any appeal of any decision. There are statutory requirements in legislation that make it clear how appeals are to be handled.

- f. Brady may have come to Carr's office three times in February, but Carr's records show he only actually met with Brady once, on February 25, 2015 after he received the February 20 letter. The next meeting after that was April 15 when Brady signed the medical consent. Carr does not recall any meeting on March 26.

#### Mike Brodziak

25. Mike Brodziak is the General Manager of Jacobs. He testified that the Colonsay project was completed as of July 19, 2014. The workers were laid off and the project was closed. People involved in the project have since retired or moved on to other things.

#### Brady's Reply Evidence

26. Jacobs then closed their case, and Brady testified in reply. He said that while Carr says they met four times, he actually met with Carr on February 11, February 20, February 25, March 25, March 26, April 14, May 20, May 25 and June 1.
27. As Brady was testifying about these dates, it was obvious he was looking at a document. When Jacobs' counsel objected to Brady referring to a document not in evidence, I asked Brady what he was looking at. It turned out he was looking at a typed timeline Rose Brady had put together the night before the hearing. Brady explained they had made this timeline from calendars he had kept. Jacobs' counsel asked that Brady produce the calendars. When Brady went to produce the calendars, Rose Brady grabbed the package out of Brady's hand and began making notes on some of the pages. I asked Rose Brady to stop writing on the documents. Brady then produced the documents. There are four sheets stapled together - two printed 2015 calendars and two printed 2014 calendars. These calendars show the 12 months of the year on one sheet in a four by three grid with each month in a box showing the days of the week and the dates. There is handwriting all over the sheets. Some of it is Brady's and some of it is Rose Brady's.
28. Brady insisted these documents show he met with Carr on February 11 because the "11" is circled and he has written "MC" beside it. Brady repeated that he brought up his appeal at that time. "If your house is on fire, you don't stop to do the paperwork."
29. When asked in cross-examination what the difference between the two calendars is, Brady said he couldn't put all the information on one calendar, so he used two. The notation "MC" shows either meetings or telephone calls with Mike Carr, but they would be direct communications. On the original documents there were also some things that were whited out. Brady said he has a habit of doodling, so he may have written his name on the pages or something and decided to white it out.

#### **IV. Positions**

30. Jacobs submits:

- a. Brady has not met the time limit for filing his appeal;
- b. The adjudicator has no authority to waive or extend the time limit;

- c. In the alternative, if there is authority to extend the time limit, that authority should not be exercised in this case.

31. The Director submits:

- a. There is no evidence Brady filed an appeal within the statutory deadline;
- b. There is no authority for the adjudicator to waive or extend the deadline.

32. At the hearing Brady took the position:

- a. He began his appeal when he met with Kent Rhodes on January 8, 2015.
- b. He continued his appeal when he met with Mike Carr on February 11, 2015 and his appeal never stopped.

33. During final submissions Brady submits:

- a. This isn't about money. It's about the safety of the workers and that it was an emergency situation. People were hurt on the job site and didn't get first aid.
- b. Susan Boan opened Brady's discriminatory action complaint on October 14, 2014. It was then closed October 15, 2014 and then without a written appeal it was re-opened on October 19. On December 8, 2014, Director Ray Anthony was aware of this from an email from Susan Boan. Boan told Anthony she felt Brady had quit his job.
- c. Kent Rhodes picked this up and began a "restart" on November 24, 2014. On January 8, 2015, Brady and Rose Brady sat with Rhodes for a meeting. The meeting took an hour and the recording is only 25 minutes. So where is the rest of it?
- d. On January 27, Rhodes ordered Brady to respond to the January 8 meeting by one o'clock. On January 29, Rhodes denied the complaint and on February 6, 2015, by registered mail, Brady received his decision.
- e. From February 11, 2015, Brady and Carr met many times over until July. In these meetings, Brady was also present at the office downtown Albert Street and requested to meet with Ray Anthony in person. Anthony refused to meet. Anthony was aware on December 8 of the first appeal.
- f. On July 6, 2015, Kent Rhodes and Susan Boan told Brady to send an appeal letter to Ray Anthony. Clearly there were many appeals, and written or not, everyone was well aware of it.

## **V. Analysis**

Did Mr. Brady file his appeal of the Report within the statutory time limit?

34. s. 3-53(1) of the *Act* creates for a person directly affected by a decision, a right of appeal from the decision of an occupational health officer. No one disputes that Brady was a person directly affected by the Report in this case. He had a right of appeal.

35. ss. 3-53(2) and (3) of the *Act* contain certain mandatory provisions that must be met for an appeal to be perfected. Both subsections use the word “must”. s. 27(3)(a.1) of the *Interpretation Act* says that “must” is to be interpreted as imperative. Therefore, the requirements of ss. (2) and (3) are mandatory. To commence an appeal the following requirements must be met:

- The appeal must be commenced by written notice of appeal;
- The written notice of appeal must be filed with the director;
- The notice must be filed with the director within fifteen business days after the date service of the decision being appealed.

ss. (3) also sets out the requirements of the written notice of appeal. It must:

- Set out the names of all persons who are directly affected by the decision that is being appealed;
- Identify and state the decision being appealed;
- Set out the grounds of the appeal; and
- Set out the relief requested, including any request for the suspension of all or any portion of the decision being appealed.

36. The mandatory nature of the appeal requirements makes it clear the legislature intended to provide certainty as to when an appeal has been properly commenced. This permits those directly affected by a decision as well as the Ministry to know with certainty whether or not the decision has been appealed. I must now examine the circumstances of this case to determine whether Brady met the requirements of the legislation for the filing of an appeal.

37. The Report was issued on January 29, 2015. Brady accepted service of the Report by registered mail on February 6, 2015. In his evidence in cross-examination at the hearing, Brady acknowledged that he received the decision on February 6, 2015, that he read it and that he understood the instructions on how to file an appeal which are included at the end of the Report. The documents in evidence by consent verify that Brady did receive the Report on February 6, 2015 and that the Report contains detailed information about how to file an appeal. Taking into account the statutory holiday (Family Day) which fell in the time for filing the appeal, the fifteen business day time limit expired on March 2, 2015. Brady filed the written Appeal Request on July 20, 2015, well outside the fifteen business days set out in s. 3-53(2). There is no question the Appeal Request of July 20, 2015 was filed outside the time for filing an appeal. Without more, that would end the matter.

38. Brady, however, claims he began his appeal on January 8, 2015 when he met with Kent Rhodes, that he continued his appeal when he met with Mike Carr on February 11, 2015 and that his appeal never stopped. I must now assess the evidence with respect to these allegations. To ensure procedural fairness, I gave Brady significant leeway to allow him to present evidence to establish that he had sufficiently complied with the mandatory statutory provisions within the fifteen business days set out in ss. (2). I will now examine the evidence with respect to Brady’s claims.

39. Beginning with the allegation that Brady started his appeal on January 8, 2015 at the meeting with Kent Rhodes, Brady testified Rhodes told him on January 8 that he had already made a decision on Brady's complaint and that Brady told Rhodes he was going to appeal. Brady also said he got into a heated discussion with Rhodes during that meeting. The audio recording of that meeting is in evidence. From the recording, it is apparent Rhodes did not say he had made a decision on Brady's complaint. Indeed, Rhodes actually said he had not made a decision. There is no argument or heated discussion on the recording. Milo and Rhodes are interviewing Brady about his Complaint. They are trying to determine whether there has been discriminatory action under the *Act*. Having listened to the recording, Brady then testified the recording did not start at the beginning of the meeting and the part where Rhodes said he had made a decision was not on the recording. Rose Brady then testified the recording was tampered with and was recorded at more than one meeting.
40. With respect to what actually occurred, based on the recording, I am satisfied the meeting on January 8 was as reflected in the recording. Brady's evidence is inconsistent with the recording. There is nothing in the recording to suggest the recording was tampered with in any way. The purpose of the meeting was for Milo and Rhodes to interview Brady about his Complaint. Rhodes makes it clear he has not made a decision. When Brady says there are several things he will appeal, he is referring to statements in Jacobs' written response to Brady's Complaint. Rhodes then goes on to invite Brady to provide his own response to the Jacobs' letter and suggests a week would be a reasonable timeframe. Other material before me by consent shows that Brady provided his information to Rhodes on January 27, 2015, two days before Rhodes issued the Report.
41. There are several reasons why the events of January 8, 2015 do not amount to an appeal under s. 3-53. The most obvious, of course, is that there was no decision at this point for Brady to have appealed. The meeting happened before Rhodes issued the Report on January 29, so Brady could not possibly have appealed a decision which had not been issued. For the appeal period to begin to run, there must be a decision that has been served. This by implication requires that the decision being served must be in writing. Since there was no decision at this point, there was nothing to appeal. Furthermore, there was no written notice of appeal, it was not filed with the director and there is nothing to show ss. (3) has been complied with. There was no appeal on January 8, 2015.
42. Brady has claimed both that he started his appeal of the Report on February 11, 2015 through an email to Mike Carr and that he continued his appeal on February 11, 2015 through a meeting with Mike Carr. Brady has not produced any email of February 11, 2015 to show he started an appeal at that time. Brady testified he had several conversations with Mike Carr starting in February, 2015 and that in those conversations he advised Carr of his intention to appeal. Carr testified Brady was consulting with him on separate and distinct topics from the occupational health and safety matter. Those topics included Brady's pension and the Union's refusal to dispatch Brady. Carr said Brady did not raise his intention to appeal until July of 2015.

43. Where Carr's evidence and Brady's evidence differs, I prefer Carr's evidence. Brady's evidence is inconsistent with the documentary evidence. His evidence is also inconsistent from one telling to the next. For example, Brady first said he called the Premier's office and the Minister's office in March after he spoke to Carr and felt Carr wasn't accomplishing anything on the appeal. In cross-examination, he said he may have called the Premier's office when he wasn't getting answers about his pension and the Union's failure to dispatch him. Brady claims the only reason he talked to Carr was because of safety issues and yet all the documents before me show Carr was dealing with Brady about the pension and dispatch issues. Brady denies Carr told him to put his concerns in writing and yet the only written concerns in the relevant time frame are found in Brady's February 20, 2015 letter attached to his email of the same date. The concerns put in writing are the pension and dispatch issues. The concerns on which Carr wrote letters for Brady were the pension and dispatch issues.
44. I put no weight on the Brady's calendars. There is nothing to verify when the notations were made on the calendars or what they mean. By Brady's own admission, the "MC" beside a circled date refers to a meeting or a telephone call, but there is no indication of which. There is also no way to know which notations Brady made and which Rose Brady made. Rose Brady even made notations on the calendars during the hearing. Brady also whited out things that had been written on the calendars. The calendars are simply not reliable. There is no documentary evidence to corroborate Brady's evidence about appealing the Report.
45. Carr's evidence about the subject matter of his meetings with Brady is consistent with the documents in evidence and also makes sense in the entire context of what happened. In Brady's letter attached to his February 20, 2015 email to Carr, Brady refers to the pension and the Union's refusal to dispatch Brady. Carr testified that Brady sent him this email in response to Carr's request that Brady put in writing his concerns about his pension and the Union's failure to dispatch him. This email is consistent with that objective. The letter does not reference Brady's discriminatory action Complaint. It does not reference the Report and it does not reference any intention to appeal the Report. Carr's actions are also consistent with Carr's evidence about the subject matter of his discussions with Brady. Carr wrote a letter with respect to Brady's medical fitness for work and prepared a medical release form for Brady to sign. He also drafted a letter to the Union for Brady to sign about the Union's refusal to dispatch.
46. I am satisfied the first time Brady spoke with Carr about his Complaint was in January when Brady had not yet received the Report. Carr told Brady at that time that he would look into the matter and have someone contact him about when a decision might be made. Carr contacted Rhodes. Rhodes spoke to Brady and asked Brady to provide his information. Brady did this on January 27 and Rhodes issued the Report on January 29. Between January 29 and March 2, there is nothing in writing to suggest Brady intends to appeal or is appealing the Report. Brady did not take any of the steps necessary to perfect an appeal under the *Act*.
47. Even if Brady had raised his intention to appeal with Carr, Brady's own evidence is not sufficient to constitute an appeal. There is no appeal in writing. There is nothing

addressed to or delivered to the director and the mandatory requirements of ss. (3) have not been met.

48. The July 20, 2015 Appeal Request is clearly marked as a request for an appeal, is addressed to the Director of Occupational Health and Safety and refers to the January 29, 2015 Report by date. This demonstrates Brady knew what was required in an appeal request. The simple fact is Brady missed the deadline for the filing of an appeal.

Is there any relief available from Brady's failure to file the appeal in time?

49. As an adjudicator under the *Act*, I only have the authority delegated to me by the *Act*. If authority is required for this proposition, I refer to *Atco Gas and Pipelines v. Alberta* [2006] S.C.R. 140 where, at paragraph 35, the Supreme Court of Canada says that tribunals created by statute cannot exceed the powers granted to them by their enabling statute, they must adhere to the statutory jurisdiction and they cannot trespass in areas where the legislature has not assigned them authority. I have already noted above that the statutory requirements for an appeal are mandatory, including the time limit within which to file an appeal. Any authority to permit me to extend or waive the time limit for the appeal must be found in the *Act*.
50. The law in Saskatchewan is clear that any substantive right to extend the time for an appeal must be found in the statute creating the right of appeal: *Jordan v. Saskatchewan (Securities Commission)*, SK CA, March 21, 1968; *Wascana Energy Inc. v. Rural Municipality of Gull Lake No. 139 et al.*, 1998 CanLii 12344 (SK CA).
51. There is no express provision anywhere in the *Saskatchewan Employment Act* that gives authority to the adjudicator or to anyone else to extend or waive the time limits for an appeal. s. 4-4(2) says an adjudicator may determine the procedures by which an appeal or hearing is to be conducted. This provision deals only with an adjudicator's ability to control procedural matters in an appeal hearing and does not allow an adjudicator to extend the time for filing the appeal. A delegated power that allows a decision-maker to make rules of practice and procedure does not extend to allowing the decision-maker to alter a statutory time limit: *Bassett v. Canada (Government) et al.*, 1987 CanLii 4873 (SK CA).
52. s. 4-4(5) says a technical irregularity does not invalidate a proceeding before or by an adjudicator. Failure to comply with a statutory time limit, however, is not a technical irregularity. It is a substantive matter that goes to jurisdiction: *Baron Metal Industries Inc.* [1999] OLRB Rep May/June 363. Furthermore, at the point the appeal is filed, it is an appeal filed with the Director, so at that point it is not yet a proceeding before or by an adjudicator.
53. When the *Saskatchewan Employment Act* came into effect, the case law was clear that time limits are interpreted as mandatory and relief against failure to meet a time limit is not available unless expressly stated in the *Act*. If the legislature intended there be any relief from the time limit for appeal in s. 3-53(2), it could easily have included an express provision. Indeed, where the legislature intended to provide jurisdiction to waive or extend time limits, it did do so expressly. For example, s.6-49(3)(f) gives an arbitrator power to relieve against breaches of time limits in



collective agreements. Similarly, s. 2-93 grants specific authority for the Court of Queen's Bench to extend the time for making an application to set aside an order or judgment. The legislature did not give any similar power to an adjudicator or to anyone else in the case of an appeal under s. 3-53, and I have no authority to imply such authority.

54. There is therefore no basis to grant a waiver or extension of the time to appeal the Report. Given this conclusion, I will not address Jacobs' third point raised above. Suffice it to say here that if I did have power to extend or waive the time to appeal, I would not do so in this case.

## **VI. Conclusion**

55. Lyle Brady filed his Appeal Request with respect to the Report outside the fifteen business day time limit in s. 3-53(2) of the *Saskatchewan Employment Act*. There is nothing in the *Act* to grant the adjudicator or anyone else power to waive or extend the time limit for appeal. Therefore, the adjudicator has no jurisdiction to hear the appeal. The appeal is a nullity.

Issued at Saskatoon, Saskatchewan, August 1, 2016.



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Anne M. Wallace, Q.C.  
Adjudicator – August 1, 2016