LRB File No. 238-16

IN THE MATTER OF:

An appeal with respect to the decision of Occupational Health and Safety Officers dated September 27, 2016, pursuant to Section 3-53 of *The Saskatchewan Employment Act*.

BETWEEN:

101051348 SASKATCHEWAN LTD. (CUSTOM LAWN CARE)

Appellant/Applicant
(Employer)

-and-

CURTIS GALEY

Respondent

Director of Occupational Health and Safety
Ministry of Labour Relations and Workplace Safety

Respondent

For the Appellant: Christopher J. (Kit) McGuinness, Miller Thomson LLP

For the Respondent, Curtis Galey: Patrick McKenna, Cuelenaere Kendall Katzman & Watson

---

PRELIMINARY ISSUE OF INTERIM RELIEF

I. Introduction and Background

1. The Appellant, 101051348 Saskatchewan Ltd. ("Custom Lawn Care"), has brought an application for interim relief pursuant to section 3-57 of *The Saskatchewan Employment Act*, which provides:

> 3-57 (1) Subject to subsections (2) and (3), the commencement of an appeal pursuant to section 3-53 or 3-56 does not stay the effect of a decision that is being appealed.

(2) The director of occupational health and safety may, on the director's own motion, stay the effect of all or any portion of a decision if an appeal from that decision is to be heard by the director.

(3) An adjudicator may, on the adjudicator's own motion, stay the effect of all or any portion of a decision if an appeal from that decision is to be heard by the adjudicator.

2. Custom Lawn Care requests a stay, in whole or in part, of the decision of Occupational Health and Safety Officers, Shawn Tallmadge and Mike Luciak, outlined in their letter of September 27, 2016. The final paragraph of that letter states:

> It is the decision of these officers, the layoff of Mr. Galey prior to exhausting the above mentioned work refusal process, is an unlawful discriminatory action pursuant to section 3-35(f). The employer must cease the discriminatory action, reinstate Mr. Galey to his former employment under the same terms and conditions under which he was formerly employed, pay him any wages he would have earned had he not been wrongfully discriminated against, and remove any reprimand or reference to the matter from any employment records with respect to this worker.

3. The Respondent, Mr. Galey, had raised safety concerns regarding a damaged trailer hitch on June 1, 2016. He was sent home from work and subsequently his Record of Employment indicated that he had been given a lay off on that date. On June 3, 2016, Mr. Galey filed a complaint of Discriminatory Action with the Occupational Health and Safety Division.

4. The matter was investigated during the summer months. Following the decision of September 27, 2016, an appeal was launched by Custom Lawn Care on October 13, 2016. Hearing dates for the appeal were being canvassed at the time this application was heard and have now been set for March 6 and 7, 2017.

5. The application for the stay was originally scheduled to be heard on December 21, 2016, but was adjourned at the request of Mr. Galey's counsel, who had just been retained. The matter was heard by teleconference on Thursday, January 19, 2017. Prior to the teleconference, counsel for both parties agreed that a stay, if granted, would be retroactive to December 21, 2016.

6. In connection with the application for interim relief, both parties provided written submissions. These, together with the oral arguments presented in the teleconference, were

considered in my decision to deny the application for a stay, for the reasons outlined in the following.

II. The Applicant's Submissions

7. On behalf of Custom Lawn Care it is argued that, due to the seasonal nature of the work, it is impossible for the employer to comply with the direction of the Occupational Health and Safety Officers. Custom Lawn Care is particularly concerned with the ordered reinstatement, indicating that it does not retain any of its seasonal employees in the Fall and Winter months.

8. By a spreadsheet appended to its Written Submissions, Custom Lawn Care indicated that the seasonal employees were laid off in the period September 12 – 21, 2016, although the Written Submission suggested that the last day of work for seasonal employees was September 6, 2016.

9. In support of its request for a stay, counsel for Custom Lawn Care relied upon several Ontario cases. The first, *The Regional Municipality of Hamilton-Wentworth*, [1998] OLRB Rep. July/August 709 outlines three factors, at paragraph 6 of the decision, for considering whether a stay should be granted. These are:

(a) whether the suspension of the order (or, alternatively, the failure to suspend the order) would endanger worker safety;

(b) the prejudice to the parties if the order is or is not suspended; and

(c) whether there is a strong *prima facie* case for a successful appeal of the order.

10. With respect to the first factor, Custom Lawn Care indicates that whether or not the order of September 27, 2016 is stayed, worker safety will not be endangered. In support of this, it states that the trailer hitch was repaired shortly after Mr. Galey's concern was raised, and notes that Lawn Care Technicians are not employed in the winter months. Custom Lawn Care further submits that this factor is "the overriding factor in considering a suspension," as determined by the Ontario Labour Relations Board in *Vitafoam Products Canada Ltd.* v *Manie Dharramnaraine, CAW Local 512,* 2004 CanLII19664.

11. Regarding the second factor, Custom Lawn Care submits that it is prejudiced if the order of September 27, 2016 is not stayed as it cannot comply with the order. It states:

> Custom Lawn Care simply does not have any work for the Complainant at this time due to the seasonal nature of the Lawn Care Technician position. As such, the potential damages award for the Respondent continues to increase and Custom Lawn Care cannot do anything to mitigate such damages by way of offering re-employment.

12. As to the third factor, which requires a strong *prima facie* case, Custom Lawn Care submits that this element should be tailored to the facts relating to this particular appeal. It suggests that it was denied procedural fairness during the conduct of the investigation and was not able to respond to the issues identified by the Occupational Health and Safety Officers.

13. Custom Lawn Care further references paragraph 6 of the *Vitafoam Products* decision, where it is noted:

> If there is no strong *prima facie* case established the suspension will usually not be granted . . . however, it is not necessarily fatal to the application.

14. The decision in *Vitafoam Products* cites the case of *Mohawk College of Applied Arts & Technology (Re)* 1995 CarswellOnt 5819, where the Adjudicator was "not in a position to make a determination with regard to whether the Appellant has established a strong *prima facie* case." Despite such circumstances, a stay was granted as there were no safety issues and declining to grant the stay "would be somewhat prejudicial to the Appellant as compliance would no doubt require significant resources and . . . would be unnecessarily onerous for the Appellant . . .".

III. The Respondent's Submissions

15. On behalf of the Respondent, Mr. Galey, it is argued that there is no onerous prejudice suffered by the Appellant to warrant the granting of a stay of the order of September 27, 2016.

16. Regarding the Appellant's allegation that its ability to comply with the terms of the order of September 27, 2016 is frustrated, Mr. Galey's counsel submits that such does not properly apply the terms of the order made by the Occupational Health and Safety Officers.

17. The order requires reinstatement to Mr. Galey's former employment "under the same terms and conditions under which he was formerly employed" and to "pay him any wages he would have earned had he not been wrongfully discriminated against." Nothing in the order

requires Custom Lawn Care to employ Mr. Galey for an indefinite or unreasonable duration of time.

18. Applying the three-pronged test noted in the *Hamilton-Wentworth* decision relied upon by the Appellant, the Respondent's position regarding the first factor is that current and ongoing worker safety has no bearing on the current appeal, particularly given the position of Custom Lawn care that worker safety will not be endangered whether or not a stay is granted.

19. As to the element of prejudice, the Respondent submits that Custom Lawn Care has failed to establish prejudice which would warrant the granting of a stay. In light of the terms of the order, which reference "the same terms and conditions" under which Mr. Galey had been employed, the Appellant's concerns regarding indefinite reparations are exaggerated.

20. With respect to the question of whether the Appellant has established a *prima facie* case, the Respondent submits that Custom Lawn Care has failed to even address the finding of discriminatory action made against it. On behalf of Mr. Galey, reference is made to an earlier portion of paragraph 6 of the *Vitafoam Products* decision, in which it is stated:

> The applicant's degree of prejudice will be the basis of the decision to grant the suspension only if there is a strong *prima facie* case made out and the health and safety risks are not significant.

21. The Respondent emphasizes that the September 27, 2016 decision was a finding of discriminatory action by Custom Lawn Care against Mr. Galey. A legitimate safety concern was brought to the attention of the Appellant and it responded by terminating Mr. Galey's employment.

22. In seeking to argue that a shortage of work was the reason for the layoff, the spreadsheet information provided by the Appellant demonstrates that employees remained working with Custom Lawn Care well after Mr. Galey's termination and two new employees were hired for the same seasonal period. Such does not constitute a *prima facie* case for the Appellant.

23. Additionally, regarding the claim by Custom Lawn Care that it was denied procedural fairness in the investigation process and is therefore now prejudiced in bearing the onus of demonstrating a strong *prima facie* case, the Respondent notes that the investigating Officers clearly sought the input of Custom Lawn Care. The materials made available to the parties from

the Occupational Health and Safety Division demonstrate repeated attempts to contact Custom Lawn Care, including correspondence for which it refused to accept delivery.

24. Ultimately counsel for the Appellant responded to the Occupational Health and Safety Officers. The Respondent submits that this letter, dated August 2, 2016, clearly communicates Custom Lawn Care management's version of the events in issue. Furthermore, the information set out in the letter was noted and considered in the September 27, 2016 decision.

IV. Analysis

25. The Appellant, Custom Lawn Care, submitted that the three-part test outlined in the *Hamilton-Wentworth* decision is appropriate for determining whether interim relief by way of a stay ought to be granted. The Respondent did not dispute the application of this test. The three factors are, again:

(a) whether the suspension of the order (or, alternatively, the failure to suspend the order) would endanger worker safety;

(b) the prejudice to the parties if the order is or is not suspended; and

(c) whether there is a strong *prima facie* case for a successful appeal of the order.

26. As the *Hamilton-Wentworth* decision is one from the Ontario Labour Relations Board, during the hearing of this application, I raised with counsel the Saskatchewan decision of the Adjudicator in *Saskatchewan Power Corporation* v *Nazarisi*, LRB file No. 042-16 rendered April 21, 2016 ("*SaskPower*"). In that preliminary decision, the test utilized was that laid out by the Supreme Court of Canada in *RJR-MacDonald Inc.* v *Canada (Attorney General)*, [1994] 1 SCR 311. It, too, has three factors:

(i) Whether there is a serious question to be considered;

(ii) Whether irreparable harm will result if interim relief in the form of a stay is not granted;

(iii) Whether the balance of convenience favours the interim relief sought.

27. With respect to the first element of the *RJR-MacDonald* test, as to whether there was a serious question to be considered, both counsel agreed there was. Regarding the second factor, there was some question as to whether there would be irreparable harm if a stay was granted or

not. Lastly, each counsel submitted that the balance of convenience favoured his respective client.

28. The test in *Hamilton-Wentworth*, albeit from outside Saskatchewan, is compelling, particularly as it was decided four years after the *RJR-MacDonald* case and deals directly with workplace issues. In contrast, *RJR-MacDonald* addressed an interlocutory motion to stay implementation of regulations regarding the advertisement of tobacco products made under the *Tobacco Products Control Regulations* pending a final decision on the constitutional validity of the *Tobacco Products Control Act*.

29. The order in issue in the *Hamilton-Wentworth* decision involved a direction that the owner "ensure that no children under the age of 14 are allowed in or about the workplace." The Ontario Labour Relations Board rejected the application for a stay of this order, noting that protection of the public, and thus potentially the workers, was a factor. Further, the applicant had failed to establish any prejudice to it in the event the order was maintained.

30. The Ontario Labour Relations Board, at paragraph 6 of the decision, clarified who bears the onus in an application of this nature and noted the deference afforded to decisions by inspectors:

> It is fair to say that the onus lies upon the party desiring the suspension order to establish that such an order ought to issue. Furthermore, the decision of Adjudicator Herman in *General Motors of Canada Limited* (File No. 3666-96-HS, decision dated June 2, 1997) stands for the proposition that a certain degree of deference must be afforded to decisions made by inspectors for the purpose of considering the suspension of those orders pending their appeal. In the absence of some persuasive reason to interfere with that order pending the hearing of the appeal on the merits, the original order ought not to be suspended.

Would a stay endanger worker safety?

31. The first branch of the test in the *Hamilton-Wentworth* decision pertains to safety. In the case at hand, the Appellant, Custom Lawn Care, has asserted that the trailer hitch, which was the subject of Mr. Galey's concern, was repaired. As such, worker safety will not be endangered if the stay is granted. Counsel for the Appellant also relied upon the *Vitafoam Products* decision to suggest that worker safety is "the overriding factor" in considering a stay. However, the context of that comment in the *Vitafoam Products* decision does not, in my view, diminish the need for

an applicant to demonstrate a strong *prima facie* case. The Ontario Labour Relations Board, at paragraph 6 of the decision, stated:

> The overriding factor in considering a suspension is the health and safety of the workers if the suspension is granted. For example, even if a strong *prima facie* case is established, there still has to be satisfaction that health and safety is not being risked in the course of the suspension.

32. In light of these comments, and Custom Lawn Care's assertion in the case at hand that "whether or not the order is suspended, worker safety will not be endangered," I accept the submission on behalf of the Respondent, Mr. Galey, that safety concerns are not pertinent to this particular application.

Is there prejudice to either party?

33. Regarding the second branch of the test, Custom Lawn Care submits that it is prejudiced by its inability to offer re-employment to Mr. Galey at the present time, given the seasonal nature of the work. It alleges that the potential damages award continues to increase, while it has no ability to mitigate the quantum.

34. Subsection 3-36(2)(b) of *The Saskatchewan Employment Act* directs an occupational health officer, where he has determined discriminatory action has occurred, to serve a notice requiring the employer to reinstate the worker "on the *same terms and conditions* under which the worker was formerly employed" (italics added). The order of September 27, 2016 is consistent with this legislative direction.

35. While neither party provided evidence on this application as to precisely what those terms and conditions are, counsel for the Respondent acknowledged that "the damages at stake are not indefinite." He further noted that the September 27, 2016 decision of the Occupational Health and Safety Officers does not require the Appellant to employ Mr. Galey "for an indefinite or unreasonable duration of time." Thus, there appears to be recognition that lawn care in Saskatchewan is subject to climate conditions. On the other hand, counsel for the Respondent also emphasized that some employees, according to the spreadsheet provided by the Appellant, have maintained employment with Custom Lawn Care through winter seasons.

36. This consideration of whether a party is prejudiced is not entirely unlike the assessment of whether irreparable harm will result if a stay is not granted. This second branch of the *RJR-MacDonald* case was applied in the *SaskPower* decision. There the Appellant, SaskPower, sought a stay of the order of the Occupational Health and Safety Officer as the position which the Respondent, Ms. Nazarisi, had previously held had been abolished. While the Adjudicator did not accept that compliance with the order would require a full reorganization of its business, she did, at paragraph 14 of the decision, note that:

> . . . should the eventual decision on the merits of the appeal favour it, SaskPower would have accommodated an unnecessary and significant burden for which there would be no remedy, as SaskPower cannot recover damages from Ms. Nazarisi in these proceedings.

37. The Adjudicator further noted that the harm to Ms. Nazarisi, while financially daunting, was not irreparable. At paragraph 17 of the decision, the Adjudicator stated:

> Guided by *RJR-MacDonald, supra,* "irreparable" refers to the nature of the harm suffered rather than its magnitude. In this instance, there is meaningful risk of harm to SaskPower than [*sic*] cannot be remedied. I am further guided by *Potash Corporation of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership, supra.* In the passage cited by SaskPower, the Court of Appeal refers to a "meaningful doubt as to the adequacy of damages if the injunction is not granted" as being a "relatively low standard". In this case, the meaningful risk exceeds . . . that low standard inasmuch as the recovery of damages are not a remedy available to the Applicant in these proceedings.

38. In the *SaskPower* case, some ten months had past between Ms. Nazarisi's last day of work, on May 20, 2015, and the hearing of the application for the stay on March 31, 2016. Mr. Galey, in the case at hand, was laid off nearly eight months ago. His strenuous objection to the stay application, and his current unemployment, imply hardship. However, no other particular prejudice was argued.

39. While I do not accept the submission on behalf of Custom Lawn Care that its potential liability to Mr. Galey is ever-increasing, there is uncertainty as to the amount at this juncture. Coupled with this current ambiguity, the "low standard" in relation to the irreparable harm test may suggest that some prejudice to the Appellant could potentially be present. In this regard, the comments of the Adjudicator in the *SaskPower* are informative:

> The enforcement provisions of the Act would protect the Respondent if SaskPower were to fail to comply with any remedy ultimately ordered. There are no similar safeguards in the legislation to assist SaskPower in the event it is successful on appeal and the Respondent was unable or unwilling to reimburse SaskPower.

40. However, I am mindful that the design and provisions of *The Saskatchewan Employment Act* are largely to ensure employee protection and thwart discriminatory action. The wording of sub-section 3-57(1), which indicates that the decision of the Occupational Health and Safety Officers is not stayed by an appeal, is consistent with this. The granting of a stay is clearly considered exceptional. Given the direction to Occupational Health and Safety Officers under subsection 3-36(2) of the Act, orders such as that currently under appeal are certainly not uncommon. Thus, what warrants granting the exception to subsection 3-57(1)? The mere fact that an employer engages seasonal labour does not, in my view, constitute a sufficient exception.

41. I further do not accept that the Appellant has no ability to mitigate its loss. The terms and conditions of employment should be ascertainable, thus enabling calculation of the amount of wages which would have been paid to Mr. Galey but for his layoff. Any challenge the Appellant has in making such a calculation is countered by the prejudice that the Respondent has experienced in not receiving payment.

42. In the *SaskPower* decision, as noted above, the Adjudicator was of the view that a "full reorganization" would not be necessary to comply with the order of the Officer, although there would be an accommodation which might be a "significant burden." Such a burden is not present in the current case. Although the Appellant, Custom Lawn Care, has expressed a sincere concern regarding reinstatement of a seasonal employee during the off-season, I am of the view that such may also be addressed by the terms and conditions of employment. Indeed, in calculating the wages, there must be a consideration of the length of the lawn care season.

Has the Appellant shown a strong prima facie case?

43. The third prong of the test outlined in the *Hamilton-Wentworth* decision is whether there is a strong *prima facie* case for a successful appeal of the order.

44. The order of September 27, 2016 is based on a finding by the Occupational Health and Safety Officers that Mr. Galey's layoff occurred prior to the employer exhausting the appropriate

work refusal process and, as such, constituted an unlawful discriminatory action. By letter dated October 13, 2016, counsel for Custom Lawn Care gave notice of the appeal. The ground cited was "irregularities in investigation process which resulted in denial of procedural fairness to employer."

45. In the application for a stay, Custom Lawn Care reiterated this claim, saying that the Occupational Health and Safety Officers did not interview its management personnel. The Appellant added that it has been prejudiced by this denial of procedural fairness "as it now bears the onus of proving a strong *prima facie* case."

46. In summarizing the case law on the requirement for a strong *prima facie* case, the Ontario Labour Relations Board in *Vitafoam Products* noted, at paragraph 6:

> The applicant's degree of prejudice will be the basis of the decision to grant the suspension only if there is a strong *prima facie* case made out and the health and safety risks are not significant . . .If there is no strong *prima facie* case established the suspension will usually not be granted, . . . however, it is not necessarily fatal to the application.

47. The decision of the Adjudicator in *Mohawk College (Re),* April 19, 1995 is cited as authority for the lack of a strong *prima facie* case not being fatal to an application for a stay. That case is very different from the present in that the order in question in *Mohawk College* required certain Joint Health and Safety Committees to be established at various campuses. The grounds for the stay were that such would represent an unnecessary duplication of work given that a joint process was currently underway with a view to the establishment of a single multi-site joint committee. Further, the process was being assisted by an official of the Ontario Ministry of Labour.

48. In such circumstances, the Adjudicator determined it would be somewhat prejudicial to the Appellant to deny the stay. As to whether a *prima facie* case had been established on the merits of the appeal, the Adjudicator simply noted that she was "not in a position" to make such a determination.

49. In the case at hand, the submissions of the Respondent counter the Appellant's claim of a denial of opportunity to provide input to the Occupational Health and Safety Officers. In

referencing the volume of materials supplied to the parties, counsel for the Respondent notes attempts by the Officers to contact Custom Lawn Care, the submission ultimately provided to the Officers by counsel for Custom Lawn Care, and the fact that the Officers took such information into account in their decision of September 27, 2016.

50. In support of the application for a stay, the Appellant has not demonstrated a *prima facie* case on the issue of a denial of procedural fairness, which it has cited as the grounds for its appeal. Further, there is nothing in the information provided in support of the stay application which addresses the issue of whether or not there was discriminatory action. There is only an indication that two workers were also laid off, albeit several months after the Respondent, Mr. Galey, due to the lawn care season drawing to a close. This is not enough to show a *prima facie* case.

The Hamilton-Wentworth test vs. the RJR-MacDonald test

51. In light of the foregoing, the Appellant has not met the three-part test outlined in *Hamilton-Wentworth.* As noted above, the *Hamilton-Wentworth* case, although decided in Ontario, deals directly with occupational health and safety matters and was decided after the *RJR-MacDonald* case. As such, I find it to be the more appropriate test in applications pursuant to section 3-57 of *The Saskatchewan Employment Act.*

52. If, however, the three-part test in *RJR-MacDonald* is to be utilized, as it was in the Adjudicator's decision in *SaskPower*, I remain of the view that the Appellant, Custom Lawn Care, has failed to demonstrate that the circumstances warrant the granting of a stay.

53. Both parties acknowledged that there is a serious question to be considered on this appeal. However, on the second branch of the *RJR-MacDonald* test, as to irreparable harm to the Appellant, as discussed above in the context of considering the prejudice to either party, I do not see the potential for a "significant burden" on the Appellant as was found to be the case in *SaskPower.*

54. Finally, the Adjudicator in *SaskPower* noted, at paragraph 27 of her decision:

> Given the nature of the issues raised on appeal pertaining to the reasons for the Respondent's dismissal, I am inclined to agree with SaskPower that reinstatement of the

Respondent pending appeal could re-ignite, if not exacerbate, issues alleged by the Respondent and further complicate the very issues under appeal.

Such concerns are not present in the current appeal. Thus, the balance of convenience does not, in my view, favour the interim relief sought by the stay application.

55. For the reasons set out in the foregoing, I am of the view that the Appellant, Custom Lawn Care, has failed to demonstrate the criteria necessary for granting the exception to the provision in section 3-57 of *The Saskatchewan Employment Act*. As such, the decision of September 27, 2016 will not be stayed.

56. This, of course, does not prevent any interim agreement between the parties, or a joint consideration of the terms and conditions of the Respondent's employment, pending the hearing of the appeal, particularly as both parties have counsel.

V. Order

57. The application for a stay is dismissed and the September 27, 2016 decision of the Occupational Health and Safety Officers remains in effect.

Dated at Saskatoon, Saskatchewan this 8th day of February, 2017.

Brenda Hildebrandt, Q.C., Adjudicator

Right to appeal adjudicator's decision to board

s. 4-8

(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III 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 persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(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.