



LRB File No. 143-17

IN THE MATTER OF:

A Preliminary Application on Timeliness and Jurisdiction Under Part III of
The Saskatchewan Employment Act

BETWEEN:

JAMES PRUDEN

Appellant/Respondent

-and-

OLYSKY LIMITED PARTNERSHIP

Respondent/Applicant

-and-

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

For the Appellant/Respondent: Self-represented

For the Respondent/Applicant,
Olysky Limited Partnership: Brent Matkowski, MLT Aikins LLP

**DECISION REGARDING APPLICATION ON TIMELINESS AND JURISDICTION
UNDER PART III OF *THE SASKATCHEWAN EMPLOYMENT ACT***

I. Introduction and Background

1. The Appellant, James Pruden, filed a written notice of appeal regarding the April 11, 2017 decision of Mr. Ron Duckworth, Occupational Health Officer. Mr. Duckworth, in his decision, had dismissed Mr. Pruden's complaint, concluding that the employer, Olysky Limited Partnership, had not undertaken discriminatory action when it terminated Mr. Pruden's employment.

2. The Respondent, Olysky Limited Partnership (“Olysky”), raised a preliminary issue concerning the timeliness of the appeal, and therefore the jurisdiction of the Adjudicator to hear it, as the notice of appeal is dated July 6, 2017. Olysky’s position is that the Mr. Pruden has not complied with the requirements set out in section 3-53(2) of *The Saskatchewan Employment Act*, which states:

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. Following remittance of the Occupational Health and Safety Division (“OH&S”) file materials to the parties from the Adjudicator, a case management teleconference regarding the appeal was originally scheduled for September 14, 2017. However, this was adjourned to enable Mr. Pruden to seek legal assistance. On October 16, 2017, the re-scheduled date of the teleconference, Mr. Matkowski, on behalf of Olysky, confirmed that this preliminary application would be brought. The parties agreed that the application would be heard on December 7, 2017 and this was later confirmed by service of the Notice of Hearing. It was further established that Olysky would provide its written argument by November 13, 2017. Mr. Pruden then had until November 23, 2017 to provide any additional documents or materials on which he would rely, with Olysky permitted to file an additional written argument by November 30, 2017, if new issues were raised by Mr. Pruden’s materials.

4. In the course of the teleconference, Mr. Pruden indicated that he had sent additional materials which were not included in the OH&S file. As Adjudicator, I undertook to inquire about this. Upon checking, it was noticed that the file contained an incorrect delivery confirmation slip regarding the decision letter of April 11, 2017. By email correspondence to the parties dated November 9, 2017, I provided the correct delivery confirmation received from OH&S and confirmed that the only documents provided to the OH&S office were those previously disclosed. It was also noted that Mr. Pruden may have submitted documents to other divisions, such as Wage Assessment.

5. At the outset of the hearing on December 7, 2017, both the nature of the application and the process were reviewed. The parties confirmed that they had no objections to my jurisdiction to hear the preliminary application. Towards the close, however, the parties did request that I

reserve my decision on the matter for at least four weeks to enable them to explore a potential resolution of the matter. On January 9, 2018, I was advised that the parties were unable to reach a resolution and that my decision was required.

6. In the course of the hearing, Mr. Matkowski presented submissions on behalf of Olysky and Mr. Pruden testified under oath and presented oral argument. In addition, the following exhibits were filed:

- ADJ-1: Notice of Hearing
- O-1: Decision Letter of Ron Duckworth dated April 11, 2017
- O-2: Canada Post Registered Mail Tracking label
- O-3: Canada Post tracking printout indicating a delivery date of 2017/04/19
- O-4: Written notice of appeal dated July 6, 2017
- O-5: 24 pages excerpted from the package of materials received from OH&S
- O-6: Letter dated September 7, 2017 from Saskatchewan Human Rights Commission to James Pruden
- P-1: Regina Retina Centre appointment notice for February 13, 2018
- P-2: Sunrise Health Region appointment card for January 31, 2018
- P-3: Yorkton Regional Health Centre Medical Imaging Department appointment notice for January 25, 2017

II. The Applicant's Submissions

7. In support of Olysky's application, Mr. Matkowski noted that, pursuant to section 3-53(2) of *The Saskatchewan Employment Act*, a party has 15 business days after service of the decision of the Occupational Health Officer in which to appeal. The decision was rendered April 11, 2017 [Exhibit O-1] and the documentation provided by OH&S indicates the Appellant was served with the decision by registered mail on April 19, 2017 [Exhibits O-2 and O-3].

8. To comply with the 15 business day timeline set out in the legislation, an appeal would have had to have been filed by no later than May 11(*sic*), 2017. However, Mr. Pruden's written notice of appeal is dated July 6, 2017, some 38 business days beyond the allowable appeal period. Counsel for Olysky also submitted that the Appellant appears to have acknowledged the issue regarding the lack of timeliness in his wording of the notice of appeal.

9. Olysky's position is that, as there is no provision in the legislation for the Adjudicator, or anyone, to extend the timeline for an appeal beyond the 15 business days set out in section 3-53(2), there is no jurisdiction to proceed with hearing the appeal. Reliance is placed on the

August 1, 2016 decision of Adjudicator Anne Wallace, Q.C. in *Brady v Jacobs Industrial Services Ltd.*, 2016 CarswellSask 481, a case with facts quite similar to the current matter.

10. In *Brady*, Adjudicator Wallace determined there was no jurisdiction to hear the appeal and the appeal was a nullity. As in the current case, *Brady* concerned an allegation of discriminatory action. The employee, who had received the January 29, 2015 decision denying the complaint on February 6, 2015, did not appeal until July 20, 2015.

11. Adjudicator Wallace reviewed the mandatory nature of the appeal requirements set out in section 3-53 of *The Saskatchewan Employment Act* and noted that the appeal timelines are designed to bring certainty to the process, allowing the parties to make important operational decisions. She went on to conclude that, as a decision maker, there was no authority to extend the time limit. Therefore, where the Appellant having failed to comply with the mandatory timelines, there was no jurisdiction to hear the appeal.

12. A similar conclusion was reached by Adjudicator Clifford Wheatley, appointed under Part II of the Act in *Qian Sheng v Cre-8-tive Minds Early Learning Child Care Inc.*, LRB File No. 053 – 17 regarding section 2-75(2) of the Act in the context of a wage assessment appeal. Section 2-75(2) is nearly identical in wording to section 3-53(2). Section 2-75(2) states:

An appeal pursuant to this section must be commenced by filing a written notice of appeal with the director of employment standards within 15 business days after the date of service of a wage assessment.

13. As the Appellant had not filed the appeal within the required period, Adjudicator Wheatley concluded he had no jurisdiction to hear the Appeal, and it was therefore dismissed.

14. Counsel for Olysky also cited the case of *Egware v Regina (City)*, 2016 SKQB 388, where the Court concluded it could not extend the time to appeal prescribed by *The Cities Act*, SS 2002, c. C-11.1. Justice Schwann noted that where the statute intends it to be a condition of appeal, a time limit is substantive and cannot be extended by even the Court of Queen's Bench. In light of this, Mr. Matkowski submitted:

If a Superior Court does not have authority to extend a similar time period unless the legislation provides discretion, it follows that a statutory adjudicator which lacks the inherent jurisdiction of a Superior Court must also be unable to extend a time unless the legislation specifically allows it.

15. In reviewing the evidence, Mr. Matkowski emphasized the “Summary” page in Exhibit O-5, where a note by someone within OH&S—possibly Mr. Duckworth, from the context—states:

I explained the appeal process for OH&S several times to him [James Pruden] verbally as well enclosed the standard written notice to him with the decision letter. I cautioned him about the time line requirements for appeal.

16. In summarizing Olysky’s position, counsel noted that the evidence is clear that Mr. Pruden missed the 15 day appeal period set out in the legislation. Therefore, the law prevents the appeal from proceeding. Further, even if there was authority to extend the time limit, there is no reason to do so in this case.

III. The Respondent’s Submissions

17. Mr. Pruden, who is self-represented and evidently has some difficulty expressing himself both verbally and in writing, noted his health issues. While he acknowledged that once he received the letter of April 11, 2017 he looked at the calendar and learned he had only four days remaining in the appeal period, he says he found the matter extremely stressful and could not find help to write out the appeal.

18. Mr. Prudent spoke of headaches, for which he is scheduled to see a neurologist, as well as difficulty with his eyes since they were burned, which makes reading more challenging. He also experiences a lot of pain in his hand from a previous injury, making writing difficult.

19. The reference to “Olysky G.P. Inc.” in Mr. Duckworth’s April 11, 2017 letter [Exhibit O-1] was confusing to Mr. Pruden, as he understood he was employed by “Olysky LP.” Mr. Pruden says he phoned people, including the OH&S Officer, Mr. Duckworth, to ask for help, but no one would assist him. He says he “felt lost.” Eventually, however, he just “wrote it [the notice of appeal] out as best [he] could.”

20. Mr. Pruden considers the 15 day limitation period, and the potential loss of his ability to have his appeal heard under Part III of *The Saskatchewan Employment Act*, to be unfair.

IV. Analysis

21. As noted above, section 3-53(2) of *The Saskatchewan Employment Act* states:

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.

22. In the instant case, the evidence demonstrates that Mr. Pruden received Mr. Duckworth's April 11, 2017 letter dismissing his complaint of discriminatory action on April 19, 2017. While there was some initial confusion in the OH&S file, Exhibit O-3 does confirm that Canada Post made the delivery of the registered mail that day. To comply with the requirements of section 3-53(2), I calculate that Mr. Pruden would have had to file his notice of appeal by May 10, 2017. Yet he did not.

23. It was not until July 6, 2017 that Mr. Pruden submitted a notice of appeal. In that notice, he acknowledged the delay. He stated:

. . . Ron Duckworth never gave me . . . enough time to learn how to appeal. When I got the letter I had only about 4 days until the time 15 days. . .

24. Similarly, in the course of the hearing, Mr. Pruden was very forthright. He said:

Everything he [Mr. Matkowski] said is true. I got the letter. Opened it. Went to the calendar. 4 days left.

25. While it is unclear how Mr. Pruden calculated only four days to launch an appeal from receipt of the letter on April 19, 2017, when it was actually a longer period, it is evident that he was well aware there were time restrictions.

26. While there may be considerable sympathy for Mr. Pruden's circumstances, as he was apparently unable to find someone to assist him in writing out a notice of appeal, the provisions set out in section 3-53(2) are mandatory requirements and cannot be waived by an adjudicator appointed under Part III of *The Saskatchewan Employment Act*. There is no authority provided in the legislation to extend the time for an appeal.

27. The *Brady* decision addresses the issue squarely and is recent authority. I agree with the analysis provided by Adjudicator Wallace.

28. At paragraphs 35 and 36 of the *Brady* decision, the mandatory nature of the timeline set out in section 3-53(2) is noted:

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*.

...

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. . .

29. Later, at paragraphs 49 through 53, Adjudicator Wallace reviews the case law regarding the inability of a statutory decision maker to extend the time limit. Her reasoning is sound and applies to the case at hand:

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 & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 (S.C.C.) 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)* [1968 CarswellSask 16 (Sask. C.A.)], March 21, 1968; *Wascana Energy Inc. v. Gull Lake No. 139 (Rural Municipality)* [1998 CarswellSask 294 (Sask. C.A.)], 1998 CanLii 12344.

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* [1987 CarswellSask 250 (Sask. C.A.)], 1987 CanLii 4873.**

52 s. 4-4(5) says a technical irregularity does not invalidate a proceeding 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: *U.S.W.A. v. Baron Metal Industries Inc.*, [1999] O.L.R.B. Rep. 363 (Ont. L.R.B.). 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.**

[Emphasis added]

30. As noted by counsel for Olysky, similar conclusions were reached in both the LRB decision in *Qian Sheng v Cre-8-tive Minds Early Learning Child Care Inc.* as well as the Queen's Bench decision of *Egware v Regina (City)*.

31. While, again, Mr. Pruden's circumstances may arouse sympathy, the Courts have recognized that there is considerable value in upholding the certainty of a fixed appeal period. In *Cheong v Ontario (Minister of Finance)*, [2004] OJ No. 378, the Ontario Court of Appeal noted, at paragraph 31:

The inability of the court to relieve against the ninety day limitation period that results from this statutory interpretation may seem to carry draconian results. Indeed, as

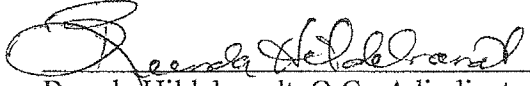
Iacobucci and Major JJ wrote in their dissenting in *Novak v Bond*, [1999] 1 S.C.R. 808 (SCC) at para. 8: “Almost all applications of limitations statutes will seem harsh. But their finality should not obscure their value.”

V. Conclusion

32. In light of the mandatory nature of the time established for filing a written notice of appeal in section 3-53(2) of *The Saskatchewan Employment Act* and the absence of any authority on the part of an adjudicator, or anyone else, to extend that time period, I find that Mr. Pruden’s notice of appeal was not filed in time. I therefore have no jurisdiction to hear the appeal.

33. The application by Olysky is granted and Mr. Pruden’s appeal is a nullity.

Dated at Saskatoon, Saskatchewan this 4th day of February, 2018.


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.