QUEEN'S BENCH FOR SASKATCHEWAN

Citation: 2011 SKQB 59

Date: 2011 02 03
Docket: Q.B.G. No. 955 of 2010
Judicial Centre: Saskatoon

IN RE: A DECISION OF AN ADJUDICATOR APPOINTED PURSUANT TO SECTION 51 OF *THE OCCUPATIONAL HEALTH AND SAFETY ACT, 1993*:

AND IN RE: AN APPEAL OF THAT DECISION PURSUANT TO SECTION 56(1) OF *THE OCCUPATIONAL HEALTH AND SAFETY ACT, 1993*:

BETWEEN:

ANDREA DUNKLE

APPELLANT

- and -

OCCUPATIONAL HEALTH AND SAFETY DIVISION (MINISTRY OF ADVANCED EDUCATION, EMPLOYMENT AND LABOUR)

RESPONDENT

Counsel:

Gary L. Bainbridge 664-2468 664-2469 for the appellant
Sharon H. Pratchler, Q.C. for the respondent

JUDGMENT
February 3, 2011

LAING C.J.Q.B.

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[1] The appellant appeals the decision of an adjudicator appointed under s. 51 of *The Occupational Heath and Safety Act, 1993*, S.S. 1993, c. O-1.1 ("the Act"). Section 56 of the Act allows for an appeal to this court on a question of law or jurisdiction.

[2] The appellant was employed as an occupational health officer, and had been

so employed for 15 years when her employment was terminated for insubordination on June 8, 2009. The appellant maintained she was not insubordinate as a matter of law, and that her dismissal was in contravention of s. 27 of the Act, which states that no employer shall take discriminatory action against a worker because the worker seeks, or has sought, enforcement of the Act or regulations.

[3] In a decision dated June 17, 2010, the adjudicator held the employer had not discriminated against the appellant, but had terminated her employment for other good and sufficient reason within the meaning of s. 28(4) of the Act. The effect of the decision is that the appellant remains terminated from her employment.

[4] The grounds of appeal are:

(a) That the Adjudicator made reversible errors in law by failing to consider the Appellant a "worker", as defined in the *Act*, when her employment was terminated;

(b) That the Adjudicator made reversible errors in law by failing to correctly apply *The Occupational Health and Safety Act, 1993* in finding (*inter alia*) that the Appellant was not the subject of discriminatory action (as defined);

(c) That the Adjudicator exceeded his jurisdiction by purporting to determine that there was cause for the Appellant's dismissal, when the sole and exclusive arbiter of that question is a labour arbitrator pursuant to s. 25(1) of *The Trade Union Act*; and

(d) Such further and other grounds as counsel may advise and the Court allow.

[5] The relief requested is that the decision of the adjudicator be set aside, and that she be reinstated and paid her wages from the date of her termination.

BACKGROUND FACTS

[6] The facts in this matter are not in dispute.

[7] In May 2006, the appellant in her role as an occupational health officer was assigned to investigate three complaints of harassment from the Saskatoon Correctional Centre. As a result of her investigation she dismissed the three complaints on the basis they were labour relations matters and not occupational health matters. However, as a result of other correctional service workers coming forward during the investigation, she ended up issuing a number of Notices of Contravention against the Correctional Service, which alleged a number of workplace safety issues.

[8] The Ministry of Corrections and Public Safety appealed the notices of contravention to the director of the Occupational Health and Safety Division as allowed for in s. 49 of the Act. In a decision dated October 26, 2008, the director allowed the appeals and overturned most of the contraventions referred to in the notices.

[9] Pursuant to s. 50 of the Act, a person who is directly affected by a decision of the director may appeal the decision to an adjudicator. The appellant appealed the decision of the director in a letter dated November 14, 2008. The letter stated with respect to the grounds of appeal:

> I am appealing your decision based on two separate grounds. Your decision has attacked my credibility, integrity and competence as an Occupational Health and Safety Officer and jeopardizes my future ability to deal effectively with this as well as other workplaces. Secondly, based on the training I have been provided, it is my opinion your decision makes incorrect interpretations of the Occupational Health and Safety legislation that may have far reaching negative impact on health and safety, not only in this workplace, but all

> Saskatchewan workplaces. This affects me as an Occupational Health Officer who enforces this legislation throughout Saskatchewan.

[10] By December 31, 2008, the appellant had not received an acknowledgement of her appeal, and retained legal counsel to make inquiries on her behalf. Her counsel directed a letter to the director of the division dated January 6, 2009 in which he inquired into the status of the appeal. This was followed up with a letter dated January 27, 2009 requesting a response. In letters dated January 28, 2009 addressed to the appellant and to her counsel, the director advised the appellant's letter would not be accepted as a notice of appeal. In the letter to the appellant's counsel the director offered the following reason:

> Ms. Dunkle's letter raises a number of internal issues and concerns that warrant further discussion, and it is my intention to respond directly to her; however, Ms. Dunkle's submission cannot be accepted as a Notice of Appeal.
>
> The role of an occupational health officer under *The Occupational Health and Safety Act, 1993* is to investigate complaints and make decisions about the application of the legislation in provincially regulated workplaces. The legislation allows those affected by an officer's decision, namely workers and employers, to appeal to the director, and ultimately to an adjudicator and the court. Based on our interpretation of the legislation, and in consultation with the Ministry of Justice and the Attorney General, an officer whose decision forms the basis of the appeal is not "a person directly affected by a director's decision" within the spirit and intent of section 50 of *The Occupational Health and Safety Act, 1993*.

[11] In a letter dated March 12, 2009, counsel for the appellant wrote to the director. The letter stated in part:

> We could not disagree more with your interpretation that your office acts as a gate keeper to the appeal procedure. We understand that you believe that our client is not "directly affected" by this decision, and we understand further that you believe that she therefore has no right of appeal. Indeed, you may be correct in law on both of those decisions. However, with the greatest of respect, that is not your

> decision. That is the decision of an adjudicator.
>
> Section 50 of *The Occupational Health and Safety Act, 1993* does not provide your office with any discretion whatsoever as to accepting a Notice of Appeal. To the exact contrary, section 50(3) states that on receipt of a Notice of Appeal, "the Director shall" (emphasis added) transmit the notice of appeal to an adjudicator.
>
> Accordingly, this will be our formal demand that section 50(3) of *The Occupational Health and Safety Act* be complied with by your office, and that the Notice of Appeal which has previously been provided to your office be transmitted to an adjudicator. If we do not receive confirmation that this has been done, our client will consider her legal options in this matter, which will likely include an application to the Court of Queen's Bench for a writ of *mandamus*, and the consequent costs as a result of having to make this application.

[12] On March 18, 2009, the appellant received an email from her immediate supervisor which stated she was required to attend a meeting on March 23, 2009. The email stated:

> In light of recent correspondence received from Gary Bainbridge concerning your attempt to appeal the Director's decision, it is important that we meet very quickly to discuss the correspondence we have received in the context of the employer/employee relationship. In addition to this issue we will also discuss the issues arising out of the Director's decision in terms of the Branch's expectations in how investigations are conducted, the evidentiary standard needed to issue a Notice of Contravention; objectivity in both action and appearance, and the tone of written reports.
>
> As the purpose of this meeting is to provide you with clear expectations on all of these issues of an employee/employer relationship, for this meeting HR has arranged for a representative from the union (Kenton Emery, Agreement Administrative Advisor for the Ministry of AEEL who has confirmed his availability to attend this meeting 775-7210) along with HR, myself, and Jennifer.
>
> Therefore, you are required to attend the scheduled meeting which will take place in boardroom 10.1 on the 10th floor Sturdy Stone, Saskatoon, Monday March 23 commencing at 11:00 am

The meeting took place on March 26, 2009.

[13] On March 23, 2009, the director wrote to counsel for the appellant. The letter stated:

> I write in response to your letter of letter [*sic*] dated March 12, 2009.
>
> As stated in our letter to you dated January 28, 2009, Ms. Dunkle's letter of November 14, 2008 cannot be accepted as a Notice of Appeal. An officer whose decision forms the basis of the appeal is not "a person directly affected" by a director's decision, and in her capacity as an Occupational Health Officer, Ms. Dunkle does not have standing to launch an appeal.
>
> As we previously advised, Ms. Dunkle's letter raises a number of issues and concerns that warrant further discussion. These matters fall within the ambit of the employment relationship and will be addressed directly with Ms. Dunkle on that basis.

[14] In a letter dated April 3, 2009, the director of Safety Services for the Occupational Health and Safety Division wrote to the appellant. In the letter she pointed out the appellant was an employee, and as such she was subject to the direction and oversight of management in the division, repeated she did not have standing to bring an appeal of the director's decision, and went on to state:

> By taking the actions you have undertaken to challenge the Executive Director's decision in response to the employer's appeal of Notice of Contravention ADU - 0102 and Officer Report ADU - 0159 you have engaged in actions that are in conflict of interest with your employer which constitutes serious misconduct, bringing into question your ability to carry out your assigned duties on behalf of the Branch. This has been exacerbated by your decision to retain legal counsel to represent your interests in the matter. Your actions constitute insubordination in that they appear designed to directly challenge the lawful authority of your superiors and to bring the Branch and its policies and procedures into disrepute. This cannot and will not be tolerated.

> You are therefore directed to cease and desist from engaging in any further actions to challenge the decisions reached by the Executive Director or the Branch in this or any other matter related to your activities as an OHO on behalf of the Branch and are hereby cautioned that a failure to immediately comply will result in severe disciplinary action up to and including discharge.

[15] On April 15, 2009, the appellant's counsel wrote to the Minister of Labour indicating he was doing so on behalf of the appellant. The letter stated in part:

> Please accept this letter as a formal discriminatory action complaint pursuant to section 28 of *The Occupational Health and Safety Act, 1993* ("Act"). Given an obvious conflict of interest within your Department which you will understand in a moment, this complaint is being referred directly to your office for immediate action. We are requesting an independent investigation by a third party with no relationship to the present parties.

[16] In a letter dated May 4, 2009, the director of Safety Services wrote to the appellant and stated in part as follows:

> On April 15, 2009, the Ministers Office of Advanced Education, Employment and Labour received a letter from your solicitor on your behalf dated April 15, 2009.
>
> As a result of your continuing misconduct, as evidenced by your decision to pursue and support actions to challenge the decisions of the Executive Director of the Occupational Health and Safety Branch contrary to the express verbal and written direction given to you on March 27 and April 3, 2009, your ability to serve the Occupational Health and Safety Branch, the Ministry and the Government of Saskatchewan has been brought into question. Management has lost confidence in your ability to perform your job without bringing the administration of the OHS Act and the Branch into disrepute. Therefore we have determined that our only course of action given the clear warnings contained in our letter of April 3, 2009, is to relieve you of your duties pending a full review of your actions and a determination of the appropriate disciplinary response.
>
> You are hereby relieved of duty with pay until further notice. You will

> be contacted once our review has been concluded and a determination has been reached regarding your status as an employee.
>
> We ask that you immediately turn in your computer, cell phone, office keys and identification, as well as any work related files or notebooks in your possession. In order to ensure continued service to our clientele, we ask that you disclose what specific actions will need to be taken to properly cover your workload during your absence.
>
> If you have any questions during this time please contact me directly.

[17] In a letter dated May 14, 2009, the director of Safety Services repeated the alleged misconduct of the appellant and went on to state:

> Our analysis of the situation has determined that you have engaged in a planned course of action designed to challenge the lawful authority of the Executive Director and the authority of your employer in a manner that warrants consideration of the termination of your employment. However, based upon our hope that your service with the Government of Saskatchewan can be continued and your employment salvaged we have determined that one final effort shall be made to encourage you to comply with the directives provided earlier. Therefore you will be suspended without pay effective immediately. Your suspension shall continue indefinitely until such time as you have agreed to the attached Acknowledgements and Actions or if you do not commit to these acknowledgements and actions within twenty-one days [*sic*]. If you have not agreed to be bound by the acknowledgements and actions by signing and returning the attached document to the Public Service Commission's Saskatoon office (9th floor Sturdy Stone) by the close of business June 4, 2009 your employment will be terminated for just cause on June 5, 2009.
>
> It is our sincere hope that you will reconsider your position, come immediately into compliance with directives issued earlier, agree to the attached Acknowledgements and Actions and return to work at the earliest opportunity.

The acknowledgement the appellant was requested to sign included paragraphs that she had engaged in a course of action to challenge the lawful authority of the executive director, that despite being requested to desist and despite being warned disciplinary

action would follow, she did persist, that she understood that her actions were insubordinate, and that she agreed to comply in the future, failing which she recognized her employment would be terminated.

[18] The appellant did not sign the acknowledgement. On June 8, she received a letter advising her that effective June 5, 2009, her employment with the Government of Saskatchewan, Occupational Health and Safety Division was terminated for just cause.

[19] On June 8, 2009, the appellant filed a formal complaint of discriminatory action on the basis that she was terminated by her employer while attempting to seek enforcement of the Act. She requested a formal investigation pursuant to s. 28 of the Act. She wrote a follow-up letter on June 11, 2009 and a third one on June 25, 2009 in which she indicated she had received no response to her complaint. In a letter the same date the director of Safety Services acknowledged her letters of June 8 and June 11, 2009 and stated that the investigation of her complaint of discriminatory action was being held in abeyance pending the conclusion of the grievance process.

[20] On July 6, 2009, counsel for the appellant forwarded to the director a notice of motion for *mandamus* compelling the respondent to comply with the Act. A lawyer from the Saskatchewan Justice Department contacted counsel for the appellant on July 8. In a letter to that counsel dated July 9, counsel for the appellant clarified what was being sought in the *mandamus* application which was that the appellant's discriminatory action complaint be processed in the usual course, and the letter went on to say:

> We also wish to confirm our specific advice to you that Ms. Dunkle has not abandoned, and does not abandon by virtue of bringing this application, her rights pursuant to section 50 of the same Act. As indicated, the rights which she has pursuant to that section have been temporarily eclipsed by being terminated from her employment.

[21] A letter dated July 28 from the lawyer acting for Saskatchewan Justice advised that an officer would be appointed to investigate the appellant's complaint of discriminatory action, and went on to say, "As a result, I trust we can simply adjourn the application sine die." The *mandamus* application was adjourned *sine die*.

[22] The Act provides for the appointment of extra-provincial officers to investigate complaints. An occupational health officer for Manitoba was appointed to investigate the appellant's complaint pursuant to s. 27 of the Act. In a one and one-half page letter dated September 21, 2009, he stated in part:

> It appears, therefore, that the intent of the Act is to provide a right of appeal to particular parties, not including an Occupational Health Officer (OHO). An OHO is not directly affected by a Notice of Contravention in the same way as a worker at the workplace referenced in the Notice of Contravention.
>
> After the director rescinded the NCs you issued, no Notice of Contravention was in effect for you to enforce. Therefore, you could not have been seeking enforcement of the Act under section 27.
>
> As well, the Act contains no provision allowing an OHO to appeal a director's decision. Therefore, you could not have been acting in compliance with the Act under section 27 because there was no applicable provision for you to comply with.
>
> Based on the evidence provided, your conduct did not consist of any of the actions described in section 27 of the Act. Therefore, it is my decision that AEEL did not discriminate against you for any reason described in section 27 of the Act.

[23] The appellant appealed the decision to the director in a letter dated October 5, 2009. Counsel for the appellant requested that the director defer addressing the appeal and transfer the same directly to an adjudicator who would normally act on appeal from her decision. The letter stated the basis for the appeal is as follows:

1. The Officer completely ignored, or refused to consider, the actions taken by the worker other than the s. 50 appeal that led to the employer taking discriminatory action against her. In particular, the Officer completely failed to refer to the fact that the worker filed a s. 27 complaint with the Minister directly, and suffered further discriminatory action as a result of seeking enforcement of the Act in that second circumstance;

2. The Officer fundamentally erred in law in imposing as a requirement for a s. 27 complaint that a worker who "seeks ... the enforcement of the Act" must be successful in that attempt, when the legislation imposes no such requirement, and when workers have the "right to be wrong"; and

3. The Officer exceeded his jurisdiction and authority by (incorrectly) ruling that the worker was not a person "directly affected", when the sole and exclusive arbiter of that expression in these circumstances is an adjudicator appointed pursuant to s. 50 of the legislation, which this Officer was not.

The director did refer the matter to the adjudicator who rendered the decision which is the subject of this appeal.

THE LEGISLATION

[24] The provisions of the Act relevant to the appellant's appeal, and her complaint of discriminatory treatment are as follows:

> 2(1) In this Act:
>
> ...
>
> (f) **"director"** means the director of the division;
>
> (g) **"discriminatory action"** means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes dismissal, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty, but does not include:

...

(p) **"occupational health and safety"** means:

(i) the promotion and maintenance of the highest degree of physical, mental and social well-being of workers;

(ii) the prevention among workers of ill health caused by their working conditions;

(iii) the protection of workers in their employment from factors adverse to their health;

(iv) the placing and maintenance of workers in working environments that are adapted to their individual physiological and psychological conditions; and

(v) the promotion and maintenance of a working environment that is free of harassment;

...

(ff) **"worker"** means a person who is engaged in an occupation in the service of an employer;

...

27 No employer shall take discriminatory action against a worker because the worker:

...

(b) seeks or has sought the enforcement of:

(i) this Act or the regulations; or

...

28(1) A worker who, on reasonable grounds, believes that the employer has taken discriminatory action against him or her for a reason mentioned in section 27 may refer the matter to an occupational health officer.

(2) Where an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 27, the occupational health officer shall issue a notice of contravention requiring the employer to:

(a) cease the discriminatory action;

(b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;

(c) pay to the worker any wages that the worker would have

earned if the worker had not been wrongfully discriminated against; and

(d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.

(3) Where an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 27, the occupational health officer shall advise the worker of the reasons for that decision in writing.

(4) Where discriminatory action has been taken against a worker who has acted or participated in an activity described in section 27, there is, in any prosecution or other proceeding taken pursuant to this Act, a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 27, and the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason.

...

49(1) A person who is directly affected by a decision of an occupational health officer, other than a decision that may be appealed to a special adjudicator pursuant to section 56.1, may, within 21 days after the date of the decision, appeal the decision to the director by notice in writing.

(2) On an appeal pursuant to subsection (1), the director shall:

(a) affirm, amend or cancel the decision appealed against; and

(b) provide written reasons for the decision made pursuant to clause (a).

50(1) A person who is directly affected by a decision of the director may appeal the decision to an adjudicator in accordance with subsection (2) within 21 days after the date of the decision.

(2) An appeal pursuant to subsection (1) is to be commenced by filing a written notice of appeal with the director that:

(a) sets out the names of all persons who have a direct interest in the decision appealed against;

(b) identifies and states the decision appealed against;

(c) sets out the grounds of the appeal; and

(d) sets out the relief requested, including any request for the suspension of all or any portion of the decision appealed against.

(3) On receipt of a notice of appeal, the director shall:

(a) transmit the notice of appeal to an adjudicator selected from the list mentioned in subsection 48(1); and

(b) provide a copy of the notice of appeal to each person whose name is set out in the notice pursuant to clause (2)(a).

51(1) Instead of hearing an appeal pursuant to section 49, the director may refer the appeal to an adjudicator by forwarding to an adjudicator selected from the list mentioned in subsection 48(1):

(a) the notice of appeal;
(b) all information in the director's possession that is related to the appeal; and
(c) a list of all persons who, in the opinion of the director, have a direct interest in the decision appealed against.

(2) The director shall provide a copy of the notice of appeal and the information mentioned in clause (1)(b) to each person mentioned in clause (1)(c).

52(1) An adjudicator shall, on receipt of a notice of appeal pursuant to section 50 or 51:

(a) set a time, day and place for the hearing of the appeal; and

(b) give written notice of the time, day and place for the hearing to:

(i) the appellant;
(ii) each person mentioned in clause 51(1)(c); and
(iii) any other person that the adjudicator considers should be given notice.

(2) An adjudicator may determine the procedures by which the hearing is to be conducted.

(3) An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.

(4) An adjudicator may determine any question of fact that is necessary to the adjudicator's jurisdiction.

(5) No proceedings before or by an adjudicator shall be invalidated by reason of any irregularity or technical objection.

53(1) After a hearing pursuant to section 52, the adjudicator shall:

(a) affirm, amend or revoke the decision appealed against; and

(b) provide written reasons for the decision to the director and all parties to the appeal.

(2) A certified copy of a decision by an adjudicator may be filed in the office of the local registrar of Her Majesty's Court of Queen's Bench for Saskatchewan, and when so filed becomes a decision of the court and may be enforced as such.

...

56(1) An appeal lies to Her Majesty's Court of Queen's Bench for Saskatchewan from:

(a) a decision of an adjudicator on a question of law or a question of jurisdiction; and

(b) a decision of an adjudicator in relation to section 33.

(2) The decision of Her Majesty's Court of Queen's Bench for Saskatchewan on a appeal pursuant to this section is final and conclusive, and is not open to review or appeal on any grounds.

ADJUDICATOR'S DECISION

[25] The adjudicator framed the question he was to decide as "whether the Investigating Officer erred in concluding that the Appellant was not the subject of discriminatory action." He noted the appellant was a worker employed by an employer, and had been dismissed by the employer, and that the "next question to be answered is whether she was dismissed as a result of her seeking the enforcement of the Act or regulations." The balance of the decision addressed this second question.

[26] He noted that on the surface it appeared the appellant was dismissed because of her work as an occupational health officer, but went on to note he also had to

consider her actions in challenging internal decisions of the division, and making herself a party to an appeal in which she acted as a statutory decision maker. With respect to the director's refusal to accept the appellant's original notice of appeal, he noted at paras. 89 and 90:

> 89. While there was a significant amount of evidence submitted in relation to the Director's refusal to accept the Appellant's letter of November 14, 2008 as a Notice of Appeal, I concur with the parties that this is not a matter over which I have jurisdiction nor is it a matter which has been fully resolved at law. For one, this issue is not one which is the subject of this adjudication. Also, as documented in a letter from the Appellant's legal counsel, an application to the Court of Queen's Bench for a writ of *mandamus* had been considered by the Appellant to fully address this situation [c.f. Exhibit #24]. It is my understanding that this application has not proceeded.
>
> 90. ... Ultimately, the test is about the actions of the employer and whether the actions were discriminatory in nature in the context of the legislation or whether they were justified for good and sufficient other reason.

[27] Relevant paragraphs from the adjudicator's decision follow:

> 84. The record clearly establishes that the Appellant was:
>
> a) A worker employed by the employer
> b) dismissed by the employer (employment relationship terminated)
>
> ...
>
> 99. As the officer designated to investigate the Saskatoon Correctional Centre and the one who brought the investigation to its full extent, the Appellant clearly conducted herself as an Occupational Health Officer, and not as a worker affected by the substance of her investigation, nor as a worker affected by the substance of her own reports and ultimately not as a worker who could be affected by the notices of contravention she issued.
>
> 100. To remain objective and fair in the discharge of her duties as an officer, the Appellant could not have been directly or even indirectly affected by activities and work conditions at the Correctional Centre nor could she be affected by the outcomes of her own investigative work and reports and subsequent decisions she made to

enforce the legislation. As a witness, she testified that she could not be affected by the outcome of her own investigations and decisions. [c.f. Above paragraphs 63 & 64]

101. To investigate matters which could impact her as a "worker" or as a "person" would have put her in a direct conflict of interest. To accept that the outcomes of her own investigation (as a statutory decision maker) could have a direct impact on her as an individual would frustrate the essential requirement that workplaces be assessed on a fair and impartial basis, as contemplated by the legislation.

...

104. As a member of the Division charged with the administration of the Act, the Appellant participated in the first step of many towards identifying final remedial actions to ensure that safety issues were properly addressed at the Correctional Centre. The process for the administration of the legislation provides a clear mandate and statutory powers for Occupational Health Officers (cf. Section 72), none of which are for an officer to become an advocate for employers or for workers. **In the absence of clear expression of intention by the legislation, the powers and rights of Occupational Health Officers have to be limited to those specified under the Act**. In the course of enforcement of the Act, it would be difficult to accept that an Occupational Health Officer could switch from being an inspector to being an affected party, or change from being a statutory decision maker into an appellant on the same matter.

...

109. I therefore accept the position argued by the Respondent that **the Appellant is not a person who is directly affected** by the decisions in relations to ADU-012 and that, as such, the Appellant's continued actions were proceeding in a manner which was defiant and insubordinate to the Division's responsibilities and employer's directives.

110. The legal standards to establish "insubordination" are:

a) A clear order must have been issued.
b) The person issuing the order must have had the power to make the order.
c) The employee must have disobeyed the order.
d) There must have been no legal basis for having disobeyed the order.

I am satisfied that all four standards have been met in this case.

111. It is therefore my opinion that the Appellant's decision to challenge the outcomes of the Director's review of NC-ADU-0102 and Officer's Report ADU-0159 gave rise to a reasonable response from her employer. The employer's response included clear communications, related explanations and ultimately the opportunity for a last chance agreement to salvage the relationship. [c.f. Exhibit # 30]

112. After having carefully reviewed all of the evidence submitted by both parties, acknowledging the facts in this matter, and giving due consideration to the legislation, I have reached the conclusion that the cumulative actions of the employer with respect to the progressive disciplinary steps leading to and including the employee's dismissal were justified. These cumulative actions were clearly within the realm of human resource management. As such, **the actions of the employer were taken against the worker for good and sufficient other reason.**

POSITION OF THE PARTIES

(i) *The Appellant*

[28] The appellant's position is:

(1) The Act should be interpreted and applied without an employer-employee overlay, and that s. 50 of the Act states the director on receipt of a notice of appeal, "shall transmit the notice of appeal to an adjudicator". This was not done. The adjudicator erred in law in not considering the wording of s. 50 of the Act.

(2) The adjudicator accepted that the director, as the employer of the appellant, had the right to exercise a gatekeeper function with respect to the appellant's appeal. The adjudicator erred in law in assigning such a gatekeeper function to the director, as the Act does not authorize such a function.

(3) Whether the appellant's interpretation of s. 50 is right or wrong, there is no doubt on the facts she was disciplined for pursuing her belief that she was a person directly affected by the director's decision in bringing the appeal pursuant to s. 50, and the adjudicator erred in law in concluding she was not engaged in seeking to enforce the Act within the meaning of s. 27(b)(i).

(4) In any event, the adjudicator went beyond his jurisdiction in commenting on the appropriateness of the discipline administered to the appellant.

(ii) *The Respondent*

[29] The respondent's position is there are no errors of law or jurisdiction in the adjudicator's award. The position is:

(1) It was appropriate for the adjudicator to consider if the appellant had a right to appeal the director's decision, and he was correct in concluding she did not. Both s. 49 (Appeal to director) and s. 50 (Appeal to adjudicator) grant a right of appeal to a person directly affected by the decision. The appellant as the decision maker of first instance was not a person directly affected by her own decision for the purpose of an appeal to the director. It follows she could not be a person directly affected by the decision of the director. Case law such as *Brewer v. Fraser Milner Casgrain LLP*, 2008 ABCA 160, 292 D.L.R. (4th) 750, holds that a statutory tribunal cannot participate in an appeal from its decision beyond arguing its own jurisdiction and explaining the record, nor can a party who participated in the decision-making process prior to the tribunal decision.

(2) If she was not a worker in the workplace to which the director's decision pertained, she could not be a person directly affected by the decision. If she had no right of appeal then she could not be a person seeking to enforce the Act within the meaning of s. 27(b)(i).

(3) Occupational health officers are employees of the division and must exercise their statutory powers in accordance with the procedures, policies and interpretations of the Act set out by the management of the division. To not do so is insubordination.

(4) Her dismissal was for good and sufficient other reason.

ANALYSIS

[30] As noted above, the facts are not in dispute. The appellant on November 14, 2008 appealed a decision of her director, which decision had largely reversed the notices of contravention to the Saskatoon Correctional Centre the appellant had issued in her role as an occupational health and safety officer. When the appellant did not receive a response acknowledging her appeal, she retained a lawyer to follow up on her behalf. The lawyer in turn wrote two letters to the director requesting a response. On January 28, 2009, the director advised that the appellant's submission would not be accepted as a notice of appeal because she was not a person directly affected by the director's decision. Her lawyer replied in a letter dated March 12, 2009 in which he took issue with the director acting as a gatekeeper to the appeal procedure. He stated in part:

> We could not disagree more with your interpretation that your office acts as a gate keeper to the appeal procedure. We understand that you believe that our client is not "directly affected" by this decision, and

> we understand further that you believe that she therefore has no right of appeal. Indeed, you may be correct in law on both of those decisions. However, with the greatest of respect, that is not your decision. That is the decision of an adjudicator.

As noted at para. 89 of the adjudicator's decision, *supra*, he agreed that the question of whether the director was entitled to refuse the appellant's letter as a notice of appeal was "not a matter over which I have jurisdiction nor is it a matter which has been fully resolved at law", and went on to say "this issue is not one which is the subject of this adjudication."

[31] The focus of the adjudicator's analysis thereafter was on the appellant's status as an employee of the Division of Occupational Health and Safety, which is charged with administering the Act, and on the fact she was the initial decision maker in the director's decision she sought to appeal. This led him to decide the appellant's status did not give her the right to appeal, and as a result of this finding, her actions thereafter in attempting to pursue an appeal were insubordinate. For this reason the discipline imposed on her was not discriminatory but "for good and other reason". In arriving at this conclusion he did not engage in any analysis of the provisions of the Act.

[32] In the normal course an employee, such as the appellant, is subject to direction by the employer. However, the facts in this matter are not the normal course. The Act places limitations on what an employer can do with respect to a worker who is seeking to enforce the Act. Those limitations are that the employer cannot take discriminatory action.

[33] The Act is one of general application, and is to be interpreted in the usual manner in accordance with the common law rules of statutory interpretation. It is an Act

that applies to workers generally. There is no provision in the Act which states the occupational attributes of the worker are to be taken into account. As noted at para. 84 of the adjudicator's decision, he clearly found the appellant was a worker employed by the employer. The issue in this matter was not whether the respondent *qua* employer was entitled to direct the appellant not to pursue the appeal, but whether the Act allowed the respondent to discipline the appellant for non-compliance with the direction.

[34] The adjudicator concluded the respondent's director was exercising employer authority, as opposed to statutory authority, in directing the appellant to desist in her appeal, because he concluded he did not have jurisdiction to interpret s. 50 of the Act as to whether the Act gave her the right to do so. He was right in this respect because the Act does not explicitly or implicitly provide the director with gatekeeper authority over the merits of an appeal or an individual status to appeal.

[35] One can agree the director offered strong reasons for her conclusion the appellant was not a person directly affected by her decision and therefore lacked status to appeal. However, as pointed out by her counsel from the outset, such a conclusion on the merits did not answer the question whether the director had jurisdiction under the Act to administratively dismiss an appeal. The fact situation in this matter is somewhat unique, but one can imagine situations where workers or employers who are not in the business or enterprise affected by a decision might wish to argue for status to appeal; for example, an employee of Burger King seeking to appeal a decision in favour of McDonald's. It is to be noted that s. 50 of the Act gives the right of appeal to a person who is directly affected by a decision of the director. The word "person" is broader than defined terms in the Act such as "worker" or "employer". The director's authority as an employer of the appellant cannot be taken into account in determining her authority under the Act. The Act either provides the director with administrative gatekeeping authority,

or it does not.

[36] A right to appeal for those persons "directly affected by a decision" appear in any number of statutes (e.g., s. 147.81(2) of *The Securities Act, 1988*, S.S. 1988-89, c. S-42.2), and these words also reflect the common law requirement for status to appeal. Who is directly affected by a decision in any specific fact situation can be controversial (e.g., *Canada Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1980] 1 F.C. 396; *Prince Edward Island (Workers' Compensation Board) v. MacDonald*, 2007 PESCAD 4, 264 Nfld. & P.E.I.R. 112). What the case law establishes is that it is for the appeal body to decide any controversy over whether a person who seeks to appeal is directly affected by the decision. A person's status to appeal is a judicial determination to be decided by the judicial body charged with hearing the appeal.

[37] Section 50(3) of the Act noted above states, "On receipt of a notice of appeal, the director shall: (a) transmit the notice of appeal to an adjudicator ...". Section 27(3) of *The Interpretation Act*, 1995, S.S. 1995, c. I-11.2, states:

> 27(3) In the English version of an Act:
>
> (a) **"shall"** shall be interpreted as imperative; ...

R. Sullivan and E.A. Driedger in their text *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at page 57 note in the context of administrative obligations the word "shall" is used in legislation when the legislature wishes to impose a duty. The duty imposed on the director in s. 50(3) was to transmit the notice of appeal to an adjudicator. This the director did not do.

[38] A gatekeeping function is most often found with respect to the validity of complaints in matters of professional discipline, where the initial reviewer has the right to decide if the complaint has enough substance to go forward. As pointed out in *Brewer v. Fraser Milner Casgrain LLP, supra*, at para. 66, when a gatekeeper role is assigned, that person has an obligation to make an impartial decision. The director could not be a gatekeeper from her own decision, because such a decision would breach the branch of natural justice which states one cannot be a judge in his or her own cause. It would be for the adjudicator appointed pursuant to s. 50(3) of the Act to determine if any particular person who sought to appeal was directly affected by a decision of the director.

[39] It follows from the foregoing conclusion that the adjudicator erred in law when he concluded at para. 110 of his decision there was no legal basis for the appellant having disobeyed the order not to pursue her appeal, which resulted in his finding of insubordination. The appellant did have a legal right to have her appeal processed to an adjudicator, and she therefore had a legal basis for declining to desist in this pursuit.

[40] The analysis of s. 50(3) is relevant, because despite the adjudicator stating he did not have jurisdiction to decide if the director had a gatekeeper role pursuant to s. 50, he went one step beyond this and decided the appellant did not have a right to appeal. This was also an issue he did not have the jurisdiction to decide, as it belonged to the jurisdiction of the adjudicator appointed pursuant to s. 50(3). Again, it was not necessary for the adjudicator to decide this on the basis of the issue before him, and to the extent he did, he erred in law in doing so.

[41] The issue before the adjudicator was whether the appellant in pursuing an appeal under the Act was seeking to enforce the Act within the meaning of s. 27(b)(i) of the Act. The section does not provide authority to decide the merits of the enforcement

action being sought. The section requires determination of two matters: (1) was the complainant seeking to enforce the Act; and (2) was the complainant subject to discriminatory action as a result of seeking to do so.

[42] The evidence is overwhelming and uncontradicted that from the time the appellant filed her notice of appeal, her actions thereafter, carried out largely through her lawyer, were in pursuit of having her appeal processed in accordance with the provisions of the Act. Pursuing an appeal of a director's decision clearly falls within the provision of s. 27(b)(i) of seeking enforcement of the Act. It is hard to imagine it would even be suggested otherwise with any other worker employed by any other employer.

[43] The appellant was terminated as an employee for pursuing the appeal after refusing her employer's request to desist. Termination of employment clearly falls within the definition of discriminatory action. There is no evidence the employer terminated the appellant for any other good and sufficient reason. The termination was not because she was insubordinate in any other respect, or inexcusably absent, or dishonest, etc. The adjudicator's conclusion there was good and sufficient other reason was not based on fact, but on an erroneous legal conclusion that she was insubordinate, and that she did not have the right to appeal, which is a finding he did not have jurisdiction to make. A finding based on no evidence is an error in law.

[44] There is no issue that the standard of review on a statutory appeal with respect to the interpretation of a statute of general application is one of correctness. For the reasons set out above the statute did not give the adjudicator the authority to decide the appellant did not have status to appeal, and did not give him the authority to determine the merits of the enforcement action the appellant was pursuing. His interpretation that the statute allowed him to make such findings was incorrect.

[45] The adjudicator's errors of law in concluding the appellant was insubordinate in declining the respondent's request to desist in the appeal, but without taking into account she had a legal basis provided to her by the Act to desist, and in concluding the respondent had good and sufficient other reason for the discipline administered to her without a factual basis for the finding, were unreasonable.

[46] The adjudicator's decision is set aside. It is appropriate to grant the relief available in s. 28 of the Act when an employer has been found to have taken discriminatory action against a worker for a reason mentioned in s. 27, as the relief in that section is mandatory by reason of the use of the word "shall". The respondent is ordered to:

a) cease any further discriminatory action against the appellant;
b) reinstate the appellant to her former employment on the same terms and conditions under which she was formerly employed;
c) pay to the appellant any wages that she would have earned if she had not been wrongfully discriminated against; and
d) remove any reprimand or other reference to this matter from any employment records maintained by the respondent with respect to her.

[47] The status of the appellant's appeal remains as it was at the time it was filed with the director. If the appellant remains insistent that her appeal be processed pursuant to s. 50(3) to an adjudicator for resolution, it is ordered that the director do so.

[48] The appellant is entitled to taxable costs of the application on double Column 4 of the tariff of costs.

[49] Judgment accordingly.

C.J.Q.B.
R.D. LAING