Court of Appeal for Saskatchewan
Docket: CACV4144

Citation: ***Buchanan (Rural Municipality) v Veldman*, 2024 SKCA 111**
Date: 2024-12-09

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Between:

Rural Municipality of Buchanan No. 304

Appellant (Respondent)

And

Allan Veldman

Respondent (Appellant)

Before:	Caldwell, Kalmakoff and Kilback JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Justice Neal W. Caldwell
In concurrence:	The Honourable Justice Jeffery D. Kalmakoff The Honourable Justice Keith D. Kilback
On appeal from:	Saskatchewan Labour Relations Board, Regina
Appeal heard:	October 18, 2024
Counsel:	Allison Graham for the Appellant Allan Veldman on his own behalf

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Caldwell J.A.

I. OVERVIEW

[1] Allan Veldman was hired in 2019 as a seasonal employee of the Rural Municipality of Buchanan No. 304 [RM]. The RM terminated his employment on May 5, 2021. Mr. Veldman brought a "discriminatory action" complaint against the RM pursuant to s. 3-36 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [*SEA*], alleging that it had terminated him because he had filed a workplace harassment complaint.

[2] An occupational health officer [Officer] investigated the matter and found that the RM had unlawfully terminated Mr. Veldman. On June 25, 2021, the Officer issued a "notice of contravention" requiring the RM to cease its discriminatory action, to reinstate Mr. Veldman's employment, to pay Mr. Veldman any wages that he would have earned but for the discriminatory action [backpay], and to remove any reprimand from Mr. Veldman's file [*OHS Decision*].

[3] The RM appealed the *OHS Decision* to an adjudicator [Adjudicator] with respect to the calculation of the backpay owing to Mr. Veldman. It alleged that the Officer had failed to consider and deduct wages that Mr. Veldman had earned after his termination by working for the Rural Municipality of Keys No. 303 [Keys], as was required under s. 3-36(5) of the *SEA* (subsequently repealed in 2023). On July 14, 2022, the Adjudicator allowed the RM's appeal, making the following findings in her unreported decision [*Adjudicator Decision*]:

(a) the RM had made efforts to reinstate Mr. Veldman, and he had declined to be reinstated;

(b) Mr. Veldman's last day of employment with the RM was August 17, 2021, and, therefore, he was owed backpay from May 3, 2021, to August 17, 2021; and

(c) Mr. Veldman's earnings from Keys during that period should be deducted from the backpay owed by the RM.

[4] Mr. Veldman appealed the *Adjudicator Decision* to the Saskatchewan Labour Relations Board [LRB] on what the LRB interpreted were largely grounds of procedural fairness or natural

justice. It found that the Adjudicator had denied Mr. Veldman natural justice by declining a request for an adjournment. The LRB went on to find that the Adjudicator had made errors of law, including by making a finding on an issue not placed before her, by improperly shifting the onus to Mr. Veldman, and by making findings of fact on the basis of no evidence and in disregard of relevant evidence. The LRB rejected Mr. Veldman's allegation that the Adjudicator was biased against him. In remedy, the LRB amended the *Adjudicator Decision* to state that the RM owed backpay to Mr. Veldman commencing on May 5, 2021, and continuing until the RM reinstated him to his employment. In other respects, the LRB affirmed the *OHS Decision*: *Veldman v Rural Municipality of Buchanan No. 304*, 2023 CanLII 183 (Sask LRB) [*LRB Decision*].

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[5] The RM was granted leave to appeal from the *LRB Decision* under s. 4-9(1) of the *SEA* on grounds that ask whether the LRB erred in law when reviewing the *Adjudicator Decision* by:

(a) determining that the Adjudicator had erred when she assessed the backpay owing to Mr. Veldman by considering whether the RM had discharged its duty to reinstate him and whether he had abandoned his position by refusing to accept reinstatement;

(b) finding that the Adjudicator had breached the duty of procedural fairness owed to Mr. Veldman;

(c) finding that the Adjudicator had made palpable and overriding errors of fact; and

(d) making its own findings of fact and substituting its own decision rather than remitting the matter for a new hearing, without providing the parties an opportunity to make submissions on the issues of remedy and damages.

[6] After considering the grounds of appeal, I conclude that the LRB erred in law when determining that the Adjudicator had denied Mr. Veldman procedural fairness. It also erred by finding that the Adjudicator had exceeded her jurisdiction when she determined that, on August 17, 2021, both the RM's obligation to reinstate Mr. Veldman as well as Mr. Veldman's employment had ended. I further find that the LRB erred in law when it rejected facts found by the Adjudicator.

[7] In the result, I would quash the *LRB Decision* and reinstate the *Adjudicator Decision*, which itself effectively affirmed the *OHS Decision* while addressing the amount of backpay owing to

Mr. Veldman. I would remit to the Adjudicator those matters left to be completed under the *Adjudicator Decision*, i.e., confirmation of Mr. Veldman's earnings from Keys, calculation of holiday pay and statutory deductions, and any issues arising therefrom.

II. JURISDICTION AND STANDARDS OF REVIEW

[8] To my knowledge, this is the first appeal from a decision of an occupational health officer [OHS officer] to reach this Court under the appellate regime established in the *SEA*. As such, this Court has not opined on jurisdictional issues or the applicable standards of review. Mr. Veldman is not represented by legal counsel and did not provide submissions addressing those issues. I will therefore only briefly explain my understanding of this Court's jurisdiction and the standard of review applicable to this appeal.

[9] The jurisdiction for this Court to hear the RM's appeal is found in s. 4-9(1) of the *SEA*, which provides that, with leave of a judge of this Court, "an appeal may be made to the Court of Appeal from a decision of the [LRB] pursuant to section 4-8 on a question of law". As noted, the RM was granted leave to appeal from the *LRB Decision*. Because the *SEA* does not identify the appellate powers of this Court in such an appeal, they are those set out in *The Court of Appeal Act, 2000*, SS 2000, c C-42.1. Consistent with this Court's apex role in the appellate regime under the *SEA* and the dicta in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], and in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, this Court reviews questions of law on the standard of correctness.

[10] There are three other levels of decision-making in the regime that the Legislature has established under the *SEA* as it relates to complaints of discriminatory action by an employer. The other decision makers are OHS officers, adjudicators and the LRB. At the first level, an OHS officer decides whether an employer has taken discriminatory action against an employee and, if so, the officer serves a notice of contravention imposing requirements on the employer to take specific actions to remedy the discriminatory action (s. 3-36(2)). Those first-level decisions may be appealed to adjudicators (ss. 3-53(1) and 3-54(1)). The decisions of adjudicators may be appealed to the LRB (s. 4-8(2)). LRB decisions may be appealed to this Court (s. 4-9(1)).

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[11] The standards of review to be applied at each decision-making level are determined by examining the roles the Legislature intended each decision maker to fulfill (see *Vavilov*; *E.Z. Automotive Ltd. v Regina (City)*, 2021 SKCA 109 at paras 66–73, [2022] 4 WWR 55; and *Affinity Holdings Ltd. v Shaunavon* (*Town)*, 2022 SKCA 83 at paras 10–20, 474 DLR (4th) 71). Because this issue was raised but not argued in this appeal, the following discussion is not an authoritative determination of the applicable standards of review. Applying the principles of statutory interpretation (see *The Legislation Act*, SS 2019, c L-10.2), I conclude, for the purposes of this appeal, that:

(a) OHS officers make findings of fact on a balance of probabilities and, if they find discriminatory action has occurred, they are required by law to serve the employer with a notice of contravention directing the employer to take the specific actions set out under s. 3-36(2) of the *SEA*. The details of the actions required under that subsection are left to the OHS officer's discretion to determine based on the facts of the contravention.

(b) Adjudicators conduct a *de novo* assessment of the issues raised in appeals from notices of contravention. This is because, *inter alia*, adjudicators may receive new evidence, hear argument, make findings of fact, draw conclusions based on the law and facts, and accordingly dismiss or allow the appeal, or vary the notice of contravention being appealed (*SEA*, ss. 4-4 to 4-7). The right to appeal under s. 3-53(1) is unrestricted, permitting an appellant to raise questions of law, fact and mixed fact and law related to a notice of contravention. Without limitation, the grounds of appeal could challenge an OHS officer's finding that a provision of the *SEA* or *The Saskatchewan Employment (Labour Relations Board) Regulations*, S-15.1 Reg 1, had been contravened, the detail of the resultant actions required under s. 3-36(2), or both. As to the standards of review, adjudicators should not interfere with a notice of contravention unless the appellant establishes that the decision is in error or that it has been overtaken by subsequent events. If an alleged error relates to the governing law, the standard of review is correctness. If an alleged error relates to the facts found by the OHS officer or that officer's application of the governing law to those facts, the standard of review would be palpable and

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overriding error (see *Vavilov* at para 37 *et seq.*). No standard of review would apply when, based on new evidence, the adjudicator is asked to determine whether a required action under a notice of contravention has been overtaken by subsequent events. In that circumstance, if the adjudicator is satisfied that the evidence before them raises the issue, they would decide it on a balance of probabilities based on the evidence (see *Yorkton (City) v Mi-Sask Industries Ltd.*, 2021 SKCA 43 at paras 29–34, [2021] 6 WWR 18).

(c) The LRB acts as a true appellate decision maker, reviewing only questions of law arising from adjudicator decisions (s. 4-8(2)); there is no right to appeal an adjudicator's decision to the LRB on a question of fact or mixed fact and law. An appeal to the LRB is taken on the record before the adjudicator, which is described under s. 4-8(4). The LRB is empowered to affirm, amend or cancel an adjudicator's decision, or it may remit the matter to the adjudicator with any directions it considers appropriate (s. 4-8(6)). Consistent with the LRB's supervisory appellate role and the limitations on the right of appeal, the LRB should review the questions of law properly placed before it on the standard of correctness (*Vavilov* at para 37 *et seq.*).

III. ANALYSIS

[12] In part because appeals to the LRB and to this Court are each limited to questions of law, the focus of these reasons is on the content of the *LRB Decision*, although the facts that underpin that decision and the *Adjudicator Decision* are indirectly at issue. Since a denial of procedural fairness usually results in the quashing of the decision in question, I will address the procedural fairness ground of appeal first.

A. Did the LRB err in law by concluding that the Adjudicator had breached the duty of procedural fairness?

[13] In addition to the background set forth above, a few other facts are important to know. To begin, the hearing before the Adjudicator occurred on March 29, 2022. Counsel for Mr. Veldman, who was his second in this matter, withdrew four days before that hearing. This led Mr. Veldman

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to request an adjournment the day before the scheduled hearing, on March 28, 2022. That request was his third request for an adjournment, the first two having been granted. With regard to the second adjournment (which was also requested one day prior to a hearing, which had been scheduled for February 3, 2022), the Adjudicator wrote: "Mr. Veldman – when we set a new hearing date – the hearing will proceed on that date – whether you participate or not".

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[14] That is, the Adjudicator granted the second adjournment declaring that the March 29, 2022, hearing date would be peremptory. On that footing, when she came to consider Mr. Veldman's subsequent request for an adjournment, the Adjudicator denied it, writing in an email dated March 28, 2022:

> Mr. Veldman,
>
> I will re-send the Teams link as soon as I am finished sending this email.
>
> You are required to be at the hearing tomorrow – you have not had '3 days notice' – you were advised on February 2, 2022 that you were required to be at the hearing – you should have made alternate work arrangements on that date. Having a lawyer does not mean that you were not required to be personally present. I further advised you, on February 2, 2022, that the hearing would proceed tomorrow [i.e. March 29, 2022] – regardless of whether you participate – that is up to you. Your wife is free to observe.
>
> Given my comments, I am going to delay the start time of the hearing tomorrow from 10am to 1:30pm. Based on [the RM lawyer's] comments that she does not believe the hearing will take a long period of time, we should be able to finish in an afternoon.

[15] Although neither party remarked on it, I observe from her email that the Adjudicator in effect granted an adjournment, albeit one that postponed the hearing by only half a day. Given the parties' positions on the adjournment issue, I will nonetheless proceed on the basis that the Adjudicator denied Mr. Veldman's request. In that regard, the RM does not dispute that the LRB correctly identified the legal principles for determining whether procedural fairness has been denied by the rejection of an adjournment request. It submits, however, that the LRB made errors of law in its application of those principles.

1. Denial of procedural fairness

[16] In its decision, the LRB found that the Adjudicator had denied Mr. Veldman procedural fairness because she did not adjourn the hearing in the face of the following factors:

(a) the adjournment request was not attributable to Mr. Veldman's actions but those of his former counsel (at para 37);

(b) the "manner in which the Adjudicator chose to address the [RM's] limited appeal turned it into a complex case" and, because the Adjudicator "chose to treat the appeal as if it was an appeal of all of the [*OHS Decision*]", which was a "change in approach mid-hearing", Mr. Veldman "did not have the legal knowledge to be able to address it" (at para 38);

(c) the consequences of the Adjudicator's decision "were serious" for Mr. Veldman because the Adjudicator "purported to remove his right to be reinstated to his employment" and the "amount of money at stake was significant" (at para 39); and

(d) Mr. Veldman "did not have the legal knowledge to properly represent his interests at the hearing" given that he had three days to review the "sizeable record" and to "prepare to examine and cross-examine witnesses and provide legal argument", which would be "a daunting task even for a lawyer" and, for Mr. Veldman, it would be an "impossible" task (at para 40).

[17] The LRB also seems to have held that the fact that Mr. Veldman did not have the requisite legal knowledge to properly represent his interests had been established because it was "apparent that the Adjudicator was making errors of law in the conduct of the hearing" (at para 40). In addition, the LRB remarked that it was "troubled by the Adjudicator's position … that no further adjournment requests from [Mr. Veldman] would even be entertained, let alone properly considered". In the latter regard, it observed that the two previous adjournments had been granted "for totally unrelated reasons" which did not "justify the Adjudicator's decision to refuse to grant or even consider [Mr. Veldman's] adjournment request" (at para 41). Taken altogether, the LRB found that the refusal to grant Mr. Veldman's adjournment request "was a wrongful exercise of the Adjudicator's discretion" (at para 42). This finding caused the LRB to conclude in a circular way that the "wrongful refusal to grant an adjournment resulted in a denial of natural justice" because (at para 43):

(a) Mr. Veldman "did not have an adequate opportunity to prepare for the hearing or present his case";

(b) Mr. Veldman "was ill-equipped to deal with the appeal on his own, and was not able to respond to the legal issues that arose during the hearing";

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(c) although Mr. Veldman "was given an opportunity to be heard, we do not know whether his case was presented in the best light"; and

(d) it was "clear that the Adjudicator failed to consider the serious effect that the decision to deny the adjournment would have on [Mr. Veldman]".

[18] I agree that questions about the fairness of a hearing before an adjudicator may be reviewed by the LRB on the standard of correctness, even though a standard of review is not truly applied in that circumstance (see *Eagle's Nest Youth Ranch Inc. v Corman Park (Rural Municipality #344)*, 2016 SKCA 20 at para 20, 395 DLR (4th) 24; see also *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339; *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 28, 470 DLR (4th) 328; and *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). Generally, whenever a reviewing tribunal is considering an allegation of breach of procedural fairness, the tribunal should be concerned with the fairness of the process having regard to all the circumstances (*CP Railway* at paras 54–55).

[19] In the instant context, where the LRB was concerned with whether procedural fairness had been breached by the denial of an adjournment request, it was proper to consider the existence and content of the duty of procedural fairness with the ultimate issue being whether, in all the circumstances, fairness required an adjournment (*Abrametz v Law Society of Saskatchewan*, 2023 SKCA 114 at paras 41–42 [*Abrametz CA*], referring to *Markwart v Prince Albert (City)*, 2006 SKCA 122 at para 33, 277 DLR (4th) 360, and the authorities cited therein). The nature of an adjournment request and the context in which it is made are also important factors when determining the content of the duty of fairness. Sometimes hearing dates are made peremptory to ensure that the public interest in the administration of justice is advanced by preventing unnecessary delay and avoiding wasted cost and efforts. When that occurs, an adjournment to a peremptory hearing date is generally such that no further adjournments will be granted except in acutely compelling circumstances.

[20] When considering procedural fairness issues, I start from the premise that "the values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process,

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appropriate to the statutory, institutional, and social context of the decision" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 28). In *Abrametz CA*, Barrington-Foote J.A. remarked that the impact of the denial of an adjournment on a party's ability to represent their case and to respond to the other side was one of several potentially relevant considerations. Drawing upon the decision in *The Law Society of Upper Canada v Igbinosun*, 2009 ONCA 484 at para 37, 96 OR (3d) 138, and Donald Brown et al, *Judicial Review of Administrative Action in Canada*, looseleaf (Rel 2024-03) (Toronto: Thomson Reuters, 2009) (WL) at §9:79, Barrington-Foote J.A. identified other factors relevant to the determination of whether an adjournment should be granted or denied, including:

(a) the nature of the consequence of the hearing or the decision to be made;

(b) the applicant's ability to present their case and respond to the other side;

(c) the desirability of having the matters at issue decided;

(d) whether the purposes of the statutory scheme would be undermined;

(e) the possible prejudice or risk to the parties or the public, including from or in related proceedings, if they exist;

(f) the timeliness of the request;

(g) the reasons for requesting an adjournment;

(h) the requested length of the adjournment;

(i) whether the applicant has complied with previous orders;

(j) whether previous adjournment requests have been granted or denied;

(k) whether the scheduled hearing date is peremptory and whether other hearing dates were peremptory; and

(l) whether the applicant is represented by counsel or had been represented by counsel up until the time of the adjournment request.

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In addition, in the specific circumstance where the applicant has requested an adjournment to obtain legal representation, the tribunal may consider whether it is an honest attempt to exercise the right to counsel or an attempt to orchestrate delay.

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[21] When considering the *LRB Decision* on this issue, it is palpably apparent that the LRB misapprehended or overlooked several factors relevant to the content of the duty of procedural fairness in this case. Among them, the LRB misapprehended the scale and complexity of the hearing before the Adjudicator and the consequences that would flow to the parties from the decision to be made in that hearing.

[22] The LRB plainly misunderstood the Adjudicator's description of the RM's notice of appeal as requesting "an Order quashing the [*OHS Decision*]" (*Adjudicator Decision* at para 5). That phrase does not mean that the Adjudicator changed the issue "mid-hearing" and that Mr. Veldman "did not have the legal knowledge to be able to address it" (*LRB Decision* at para 38; see also paras 37 and 40). The Adjudicator's description of the notice of appeal, when placed in context in the *Adjudicator Decision*, does not support either of the conclusions that the LRB drew from it.

[23] The impugned phrase – "an Order quashing the decision" – was part of the Adjudicator's explanation of the background to the appeal before her and the issues it raised as well as the relief sought by the RM. In that regard, she wrote:

> 2. The occupational health officer's decision found the termination of Mr. Veldman's employment was an unlawful discriminatory action contrary to section 3-35 of the *Act*.
>
> 3. The occupational health officer ordered that the RM must reinstate Mr. Veldman to his former employment under the same terms and conditions under which he was formerly employed, pay any wages he would have earned had there not been a discriminatory action, and remove any reprimand or reference to the matter from any employment records with respect to this matter.
>
> 4. The RM did not appeal the finding of the occupational health officer that the termination of Mr. Veldman's employment was an unlawful discriminatory action contrary to section 3-35 of the *Act*. However, the RM did appeal the decision on the grounds that the decision did not take into account the workers' actual earnings during the period the RM was required to pay the wages, as contemplated by section 3-36(5) of the *Act*.
>
> 5. The Notice of Appeal asks for <u>an Order quashing the decision</u> and that the employer be directed to pay Mr. Veldman any wages he would have earned had he not been terminated, for the RM to cease the discriminatory action and to reinstate Mr. Veldman and to remove any reprimand, if same exists, or other reference to the matter from Mr. Veldman's employment records.
>
> (Emphasis added)

[24] Respectfully, the conclusion at paragraph 38 of the *LRB Decision* that the Adjudicator had improperly broadened the issues to include reconsideration of the order to reinstate Mr. Veldman under the *OHS Decision* is wholly unsupported by the record. As can be seen from the foregoing quote from the *Adjudicator Decision*, the Adjudicator well knew that the issue before her was Mr. Veldman's "actual earnings during the period the RM was required to pay [him backpay], as contemplated by section 3-36(5) of the *Act*" (at para 4).

[25] As I read it, paragraph 5 of the *Adjudicator Decision* sets forth the Adjudicator's understanding that, while the RM wanted to quash the *OHS Decision*, it did not seek to set aside *any* of the actions it was required to take pursuant to that decision. To emphasise this point, drawing from the parts of the paragraph in question that are directly relevant, the Adjudicator's understanding was that the RM had asked for "an Order quashing the decision and that the employer <u>be directed … to reinstate Mr. Veldman</u>" (emphasis added). Put differently, I have no hesitation concluding that the Adjudicator understood that the RM simply wanted to vary the *OHS Decision* through the determination or crystallisation of its liability to Mr. Veldman for backpay. For these reasons, I conclude that the LRB incorrectly found that the Adjudicator had exceeded her jurisdiction by improperly broadening the issues before her.

[26] Furthermore, the narrowness of the issue identified by the RM and addressed by the Adjudicator, as well as the parts of the record relevant to that issue, undermines the LRB's finding that Mr. Veldman lacked the ability to respond to the RM's appeal on its merits or that his ability to do so was compromised by the denial of the adjournment. I say this for several reasons.

[27] The issue the Adjudicator addressed was not complex. It involved an assessment of whether or when the employment relationship between Mr. Veldman and the RM had ended and, thereafter, was simple arithmetic based on the evidence of Mr. Veldman's earnings with the RM and subsequently with Keys. Determination of these issues involved consideration of the testimony of only three witnesses (the RM administrator, the Reeve and Mr. Veldman) and 22 exhibits. As this suggests, while scale and complexity are a matter of subjective relativity, the record in this case was neither voluminous nor intricate. In addition to statements of Mr. Veldman's earnings from Keys, some of which his lawyer had provided to the Adjudicator, the exhibits were well

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known to Mr. Veldman. Most were copies of correspondence to him regarding the RM's reinstatement efforts and his responses thereto.

[28] Furthermore, the decision that the Adjudicator was required to make (and the one she made), while significant to the RM, did not entail meaningful economic consequences for Mr. Veldman, mainly because he had found new employment with Keys. This is evident from the *Adjudicator Decision*, where the Adjudicator wrote in conclusion of her analysis:

> **CONCLUSION**
>
> 74. The RM attempted to reinstate Mr. Veldman to his former employment under the same terms and conditions under which he was formerly employed for the period of May 3, 2021 to August 17, 2021. Mr. Veldman refused to co-operate, or even communicate, with the RM. Accordingly, Mr. Veldman's employment ended with the RM on August 17, 2021.
>
> 75. The wage calculation time period is May 3, 2021 to August 17, 2021.
>
> 76. The following is a summary calculation of wages owing from the RM to Mr. Veldman, as well as payments already made by the RM. Finally, payments made by Mr. Veldman's new employer, the RM of Keys, were also considered.
>
> Amounts owing to Mr. Veldman by the RM of Buchanan:
>
> May - $5,200
> June - $5,720
> July - $5,460
> August - $2,860
>
> Total - $19,240
>
> The following payments were made to Mr. Veldman:
>
> $624 - RM of Buchanan
> $4,576 - RM of Buchanan
> $1,430- RM of Buchanan
> $2,227.50 - RM of Keys
> $2,667.50 - RM of Keys
> $2,695 - RM of Keys
> $2,500 - RM of Keys
> $2,750 - RM of Keys
>
> TOTAL- $19,470
>
> 77. <u>It appears that no amounts are owing from the RM to Mr. Veldman</u>. However, there have been two assumptions made with respect to the amount of the last two payments by the RM of Keys, which are discussed in more detail in the schedule below.
>
> (Emphasis added)

[29] As can be seen, the evidence established that Mr. Veldman was earning slightly less from his employment with Keys than he would have earned from the RM had it not unlawfully terminated him. This means that, regardless of the date on which the RM reinstated him or on

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which its obligation to do so ended, the difference owing to Mr. Veldman after applying s. 3-36(5) of the *SEA*, if anything, would not be significant. This scenario radically differs from circumstances where an applicant for an adjournment faces criminal jeopardy, significant financial liability to the other side or third parties, or the potential curtailment of their ability to earn a living.

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[30] Moreover, although not referenced in the *LRB Decision*, the content of the duty of procedural fairness in this case is informed by the fact that an adjudicator has the express power to "adjourn or postpone the appeal or hearing" (*SEA*, s. 4-5(1)(g)). It is, however, more critical that the Legislature granted the following power to adjudicators who hear appeals from decisions made by OHS officers:

> **4-4**(6) Notwithstanding that a person who is directly affected by an appeal or a hearing is neither present nor represented, if notice of the appeal or hearing has been given to the person pursuant to subsection (1), the adjudicator may proceed with the appeal or the hearing and make any decision as if that person were present.
>
> (Emphasis added)

[31] This statutory factor was unfortunately overlooked by the LRB. While not determinative of the issue, s. 4-4(6) of the *SEA* weighs heavily in the mix when determining whether the procedures that were followed by the Adjudicator respected the duty of fairness. The omission to consider this express power of adjudicators to proceed with hearings in the absence of interested parties, when assessing the content of the duty of fairness owed to Mr. Veldman, fatally undermines the legal soundness of the *LRB Decision* on that issue. In straightforward terms, s. 4-4(6) of the *SEA* means that an adjudicator may, in appropriate circumstances, proceed in the absence of an affected person without violating the duty of procedural fairness.

[32] That being said, because one reason for making a hearing date peremptory is to further the interests of justice, an adjudicator would be entitled to exercise their discretion under s. 4-5(1)(g) of the *SEA* to "adjourn or postpone the appeal or hearing", even when peremptory, where the facts and circumstances of the case demand it. Nonetheless, on the facts of this case as understood by the Adjudicator, I agree with the caution given in *Bihari v Bihari*, 2019 SKQB 240 at para 5, where, when referring to a peremptory hearing date, Currie J. wrote that "only the direst of circumstances can excuse the matter not proceeding on the adjourned date".

[33] Lastly, this was not a situation where the LRB was entitled to draw inferences that contradicted the Adjudicator's understanding of the facts upon which she had granted the earlier adjournments. As I understand the record, the peremptory nature of the March 29, 2022, hearing date reflected the fact that Mr. Veldman had made a last-minute request to adjourn the previous hearing date and that he was on his second set of legal counsel at that time, among other considerations. Pointedly, the Adjudicator's correspondence when granting Mr. Veldman's second adjournment request bluntly dispelled any expectations he might have had about obtaining another adjournment or that the hearing would not proceed in his absence.

[34] When all of this is evaluated, the content of the duty of fairness in this case as it relates to a request to adjourn a peremptory hearing quickly lowers due to the nature of the scheme under the *SEA*, the express powers and discretion afforded to adjudicators, the role of an adjudicator's decision within the statutory scheme, the importance of the adjudicator's decision to interested persons, and other statutory and contextual indicators of the content of the duty of fairness in this case. I agree that, although the LRB correctly identified the governing law, it erred in law by overlooking or materially misapprehending factors that were material to the proper assessment of the content of the duty of fairness.

[35] Having regard to all of the circumstances, Mr. Veldman was not denied procedural fairness in the proceedings before the Adjudicator. I would set aside the LRB's finding to the contrary.

2. The remedy for a denial of procedural fairness

[36] It is not strictly necessary to address the remedy for a denial of procedural fairness because I would quash the LRB's finding that the Adjudicator had denied Mr. Veldman procedural fairness. I would simply remark that, if the LRB had been correct in reaching that finding, its review of the *Adjudicator Decision* should have ended there and then, only to be followed by the exercise of its power under s. 4-8(6)(b) of the *SEA* to remit the matter to the Adjudicator for a rehearing. This conclusion is reinforced by the fact that the LRB could not "speculate on what the outcome might have been" but for the denial (*LRB Decision* at para 43).

[37] Although this matter falls under the internal appellate regime established under the *SEA*, the dicta of this Court in *SBLP Southland Mall Inc. v Regina (City)*, 2022 SKCA 115, 474 DLR (4th) 702, remains applicable, where it wrote:

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> [73] In traditional terms, a breach of procedural fairness by an administrative body is considered an excess of jurisdiction, i.e., the decision-maker in question has exceeded its jurisdiction by failing to act fairly (*Cardinal* at para 23). Where an administrative decision-maker exceeds its jurisdiction by failing to fairly adjudicate the matter before it, the resulting decision is void *ab initio* (*Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at paras 40-42; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 108, [2008] 1 SCR 190 [*Dunsmuir*]). In judicial review proceedings, courts usually remedy such failures by compelling the administrative body to remake the decision at issue under a fair process, which may or may not involve the same decision-maker (*South East Cornerstone School Division No. 209 v Oberg*, 2021 SKCA 28 at paras 139–140, 457 DLR (4th) 224; *Dunsmuir* at para 108; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 142, [2019] 4 SCR 653).

[38] While there are circumstances when the traditional remedy of remittal may not be appropriate, the LRB did not explain why it declined to remit the matter to the Adjudicator. It simply stated that it had "determined that, rather than remit this matter to the Adjudicator, this is an appropriate case in which to amend the decision made by the Adjudicator" (at para 67). That was an error.

B. Did the LRB err in law by concluding that the Adjudicator had exceeded her jurisdiction?

[39] As noted in the analysis of procedural fairness, I find that the LRB erred in law when it concluded that the Adjudicator had exceeded her jurisdiction. Under this ground, I will explain why the LRB incorrectly concluded that the Adjudicator lacked the jurisdiction specifically to determine Mr. Veldman's last day of employment, and why it erred by concluding that the Adjudicator had improperly shifted an onus to Mr. Veldman. With respect, those rulings are legally incorrect.

1. Ruling on a matter not at issue

[40] In summarising the finding that the Adjudicator had ruled on an issue not before her, the LRB wrote:

> [46] The Employer did not appeal the finding that the termination was an unlawful discriminatory action. However, it did appeal the amount that it was required to pay to Veldman, on the basis that the [Officer's notice of contravention] did not take into account the amount Veldman actually earned during the period in question.
>
> [47] Despite the fact that the issue was not before her, the Adjudicator held, at paragraph 44:

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> Accordingly, I find that the RM did try to reinstate Mr. Veldman to his former employment under the same terms and conditions under which he was formerly employed.
>
> [48] It was an error of law for the Adjudicator to purport to rule on an issue that was not before her. The Employer's appeal did not raise this issue. The Employer and the Adjudicator had, on several occasions in advance of the hearing indicated that this issue would not be considered during the hearing.

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[41] Frankly, I do not understand how the issue of whether or when the RM's obligation to pay Mr. Veldman wages might end or might have ended was not before the Adjudicator. That information was irrefutably necessary to answer the issue the RM had raised in its appeal to the Adjudicator and, as noted below, there are no statutory restrictions on the right of appeal to an adjudicator. Although not referenced in the LRB's analysis of this issue, earlier in its decision the LRB quoted from the July 13, 2021, correspondence from the RM to the Director of the Occupational Health and Safety Division, which served as the RM's notice of appeal from the *OHS Decision*. In that letter, the RM administrator wrote:

> Occupational Health and Safety (OHS) ruled in favor of Allan Veldman's complaint filed against the R.M. of Buchanan No. 304 regarding his termination. We have been trying to work with Allan on his return to work however also have questions regarding the payment of wages he would have earned had there not been a discriminatory action.
>
> Since Mr. Veldman is now working for the R.M. of Keys No. 303, <u>we would like to appeal the decision of the Occupational Health and Safety Officer of June 25, 2021, pursuant to Section 3-53(1) of *The Saskatchewan Employment Act* on the grounds that the decision did not take into account the worker's actual earnings during the period when we were required to pay him the wages, as contemplated by Section 3-36(5) of the Act.</u> We are requesting information as to his actual earnings so as to enable the necessary calculations to be made.
>
> (Emphasis added)

[42] At the time of the *OHS Decision*[1], s. 3-36(5) of the *SEA* required the Officer to reduce the amount of backpay he ordered the RM to pay by the amount that Mr. Veldman had "earned or should have earned" during the period the RM was required to pay him backpay:

> **3-36**(5) The amount of money that an occupational health officer may require to be paid pursuant to clause 2(c) [i.e., backpay] is to be reduced by an amount that the officer is satisfied that the worker earned or should have earned during the period when the employer was required to pay the worker the wages.

[43] For obvious reasons, the calculation required by s. 3-36(5) cannot be made without knowing the commencement and end date for the "period when the employer was required to pay the worker the wages". That information is necessary for the determination of: (a) the amount of

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[1] The Legislature repealed s. 3-36(5) of the *SEA* effective May 17, 2023.

backpay owing to the worker during that period; and (b) the amount a worker "earned or should have earned" during that period.

[44] However, because the Officer had prospectively ordered the RM to reinstate Mr. Veldman, he could not know if or when that would occur. Since the Officer did not know "the period when the employer was required to pay the worker the wages", the Officer could not perform the calculation required to determine: (a) the amount of backpay owing to Mr. Veldman; and (b) the amount he "earned or should have earned" for the purposes of s. 3-36(5). I find no fault in that. Nonetheless, it explains why the absence of that information formed the basis for the RM's appeal to the Adjudicator. As noted, the only issue the RM raised in its notice of appeal was the set-off under s. 3-36(5) of Mr. Veldman's earnings from Keys against the amount of backpay it was required to pay him. I note further that the RM had requested in its notice of appeal to the Adjudicator "information as to [Mr. Veldman's] actual earnings so as to enable the necessary calculations to be made".

[45] For the purposes of this ground of appeal on the issue of jurisdiction, it is important to know that a "person who is directly affected by a decision of an occupational health officer may appeal the decision" (*SEA*, s. 3-53(1)). The word *decision* is defined under s. 3-52(1)(b) as including "a decision to issue, affirm, amend or cancel a notice of contravention or to not issue a notice of contravention". The term *person who is directly affected by a decision* means "persons to whom a decision of an occupational health officer is directed and who is directly affected by that decision", including an employer (s. 3-52(2)). As mentioned, the right of appeal under s. 3-53(1) is not otherwise conditional or limited; the appellant may raise questions of law, fact and mixed fact and law related to the decision that is the subject of the appeal. Where a decision involves a finding of discriminatory action, an appeal therefrom "is to be heard by an adjudicator in accordance with Part IV" (s. 3-54(1)). Under Part IV of the *SEA*, an adjudicator "may determine any question of fact that is necessary to the adjudicator's jurisdiction" (s. 4-4(4)). Under s. 4-6(1), an adjudicator has the power to dismiss or allow the appeal or to "vary the decision being appealed".

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[46] As such, there is a straight line between the RM's appeal from the *OHS Decision* and the Adjudicator's jurisdiction to hear it. That is, the appeal fell squarely within the jurisdiction of the Adjudicator under the *SEA*. The LRB erred in law when it concluded otherwise.

2. The Adjudicator's authority to find certain facts

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[47] With respect to the Adjudicator's finding that Mr. Veldman's employment with the RM had ended on August 17, 2021, and her understanding of an employee's onus to cooperate with reinstatement efforts, the LRB wrote in its decision:

> [53] The Adjudicator found, at paragraph 49, that Veldman's last day of work with the Employer was August 17, 2021:
>
> > The RM, through its legal counsel, corresponded with Mr. Veldman on August 17, 2021, inquiring as to when he planned to return to work (Exhibit A14). *The onus then shifted to Mr. Veldman to make reasonable response to his employer.* However, Mr. Veldman chose not to do so. [emphasis added [by the LRB]]
>
> …
>
> [55] It was an error of law for the Adjudicator to find that the onus shifted to Veldman on August 17, 2021. She provided no basis on which she made that finding. The onus is on the Employer to comply with the [Officer's notice of contravention] that required it to put Veldman back to work. Further, the Employer did not appeal that [notice of contravention] or apply for a stay of that [notice of contravention] pending its appeal to the Adjudicator or pending the outcome of this Appeal. Since the Employer did not appeal that portion of the [Officer's notice of contravention], that issue was not before the Adjudicator and it was an error of law for her to purport to address it.
>
> [56] Even if it could be argued that the issue was before the Adjudicator for the purpose of calculating the amount owing by the Employer to Veldman, her determination that the Employer's obligation to pay ended on August 17, 2021 was contrary to the evidence as she found it. At paragraph 42 she found that on August 23, 2021: "legal counsel for the RM and legal counsel for Mr. Veldman have a conversation as to whether Mr. Veldman is returning to work for the RM. No determining information is provided". In other words, on August 23, 2021, the parties were still discussing Veldman's return to work.
>
> …
>
> [58] Even if the Board had found that the Adjudicator was properly considering the issue of Veldman's return to work, her finding that Veldman's employment ended on August 17, 2021 was made in disregard of relevant evidence. This was also an error of law.

[48] To address the RM's appeal, it is plain that the Adjudicator had to determine the period during which the RM was required to pay wages to Mr. Veldman and what his earnings from Keys were during that period. To do that, she perforce either had to decide when the RM had reinstated Mr. Veldman or whether — and, if so, when — its obligation under the *OHS Decision* to reinstate

him had come to an end. These are all questions about the facts of this matter, which the Adjudicator was empowered to determine pursuant to s. 4-4(4) of the *SEA*. Furthermore, the Adjudicator had the authority under s. 4-6(1) to vary the *OHS Decision* according to the facts as she found them.

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[49] To be clear about this, I agree with the LRB that, because the RM did not challenge the Officer's order to reinstate Mr. Veldman and did not dispute the finding that it had wrongfully terminated him through discriminatory action, those matters were not before the Adjudicator. Nonetheless, they were relevant for the purposes of s. 3-36(2)(c) of the *SEA* because the finding of wrongful termination and the reinstatement order permitted the Officer to "serve a notice of contravention requiring the employer to … pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against", as the Officer did in the *OHS Decision*.

[50] Since adjudicators have the jurisdiction to determine the period during which an employer is required to pay wages to an employee and what the employee's earnings from another employer were during that period, they logically also have the authority to decide whether and when the employer has satisfied any obligation to reinstate the employee under a notice of contravention. Furthermore, where an employer has not reinstated an employee by the time of an adjudication, the adjudicator may be put to determining what is preventing the employer from complying with the reinstatement order under the notice of contravention.

[51] If an employer has no reasonable explanation for failing to reinstate the employee, then they will have opened themselves up to potential prosecution for an offence pursuant to s. 3-78(a) for failure "to comply with any term or condition imposed on that person by a notice of contravention", or pursuant to s. 3-78(f) for failure "to comply with an order, decision or direction made pursuant to [Part III of the *SEA*] or the regulations made pursuant to [Part III]". If convicted of a first offence under s. 3-78(a), a person is liable to a fine not exceeding $20,000 and, if it is a continuing offence, to "a further fine not exceeding $2,000 for each day or portion of a day during which the offence continues" (s. 3-79(4)(a)). Offences under s. 3-78(f) attract liability on summary conviction to a fine not exceeding $4,000. Relevant to the issue of an employer's failure to comply

with a duty or requirement to do something under a notice of contravention, s. 3-80 further provides:

> **Onus on accused re duty or requirement**
>
> **3-80** In any proceedings for an offence pursuant to this Part or the regulations made pursuant to this Part respecting a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, the onus is on the accused to prove, as the case may be, that:
>
> (a) it was not practicable or not reasonably practicable to do more than was actually done to satisfy the duty or requirement; or
>
> (b) there was no better practicable means than was actually used to satisfy the duty or requirement.

[52] In my assessment, s. 3-80 illatively recognises that there may be reasonable explanations for why reinstatement, even though required under a notice of contravention, is "not practicable or not reasonably practicable". As such, given the role of adjudicators under the statutory scheme, I have no hesitation concluding that, in an appeal from a notice of contravention where the employee has not been reinstated as ordered, an adjudicator may consider *why* reinstatement has not occurred.

[53] This issue of failure to comply with a notice of contravention will be particularly important where the employer submits that its efforts to reinstate have been ignored or thwarted by the employee. In that regard, drawing on s. 3-80 and *Evans v Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 SCR 661 [*Evans*], I conclude that an employer would have to establish that it was not reasonably practicable to satisfy the reinstatement requirement. That could be done by proving that an objectively reasonable person, standing in the shoes of the employee who had been unlawfully terminated, would have accepted the reinstatement opportunity the employer had proposed to implement in satisfaction of the reinstatement requirement.

[54] A reasonably practical means of satisfying a reinstatement requirement would have to include, at minimum, reinstatement to the same or a substantially equivalent position, at the same or better salary and benefits, and in not dissimilar working conditions and location. Indeed, most of those attributes were expressly included in the *OHS Decision*, where the Officer wrote that the RM must "reinstate Allan Veldman to his former employment under the same terms and conditions under which he was formerly employed".

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[55] However, even if those factors were present, an adjudicator's analysis of the practicability of reinstatement would also involve consideration of any potential barriers to reinstatement, such as demeaning, undignified or stigmatised work, acrimonious personal relationships, the history of the employment, an atmosphere of hostility or humiliation in the workplace, the existence of litigation, and the timing and clarity of the means by which the employer sought to satisfy the reinstatement requirement (*Evans* at paras 29–30; see also, for example, *Saskatchewan Polytechnic Students' Association Inc. v Ryan Benard*, 2021 CanLII 31416 (Sask LRB) [*Benard*]).

[56] It will not always be reasonably practicable to compel the reinstatement of an employee. The analysis of whether it is reasonably practicable to do so is contextual and multifactorial. However, in all cases where an employer alleges that it cannot fulfil the obligation, the employer would have to establish that it had made reasonable efforts to reinstate the employee, that those efforts were implicitly or explicitly rejected by the employee, and that there was no better reasonably practicable means of reinstating the employee. Where an employer establishes those facts to the satisfaction of an adjudicator on a balance of probabilities, the adjudicator may deem the employer's obligation to reinstate the employee under a notice of contravention to have been discharged.

[57] Addressing this from a different angle, given the fines payable for the offence of failing to comply with the terms of a notice of contravention, the foregoing interpretation forestalls the possibility, although remote, that a wrongfully terminated employee could abuse the statutory process by declining an employer's reasonably practicable efforts to reinstate them in an effort to force the employer to do more than what an objective person might consider reasonable in the circumstances. The Legislature could not have intended for notices of contravention to be used as bargaining leverage. That result would be inconsistent with the purpose of the *SEA* and the principles of justice.

[58] I also reach this conclusion for reasons that include the fact that, at times relevant to this matter, the Legislature had made plain by the language of subsections 3-36(5) and (6) that an order under s. 3-36(2)(c) of the *SEA* to pay a worker "any wages that the worker would have earned if the worker had not been wrongfully discriminated against" was, in the sense that the amount received by the employee is reduced by their actual earnings from other employment, analogous

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to the how the common law remedy of damages for wrongful dismissal also takes into account actual earnings from other employment.

[59] Subsections 3-36(5) and (6) recognised that, where the employer has proven that an employee has earned wages elsewhere, that fact served to reduce the employer's liability for wages lost due to the employer's discriminatory action in terminating the employee. Of course, subsections 3-36(5) and (6) are no longer part of the *SEA*, but they were in effect when the RM terminated Mr. Veldman and when the Adjudicator and the LRB ruled on that matter.

[60] The result which those provisions mandate is consistent with the common law, where damages for wrongful dismissal are meant to compensate a terminated employee for lack of notice and not to penalise the employer for the fact of the wrongful dismissal. The common law notice period provides employees with the opportunity to seek replacement employment and to arrange their affairs accordingly. As such, an employer may provide an employee with sufficient working notice of termination or terminate immediately and pay the employee the amount they would have earned during the notice period as damages in lieu of notice. In the latter case, the employee is obliged to make a reasonable effort to mitigate the damages by seeking an alternate source of income. See, generally, *Evans*. When other income is earned, it reduces the amount payable by the employer. When it was in effect, s. 3-36(5) mirrored the practical effect of the employee's duty of mitigation at common law in this way.

[61] I conclude therefore that, in as much as it held that the Adjudicator had exceeded her jurisdiction by ruling "on an issue that was not before her", the LRB erred in law (*LRB Decision* at para 48). The Adjudicator had the jurisdiction to determine Mr. Veldman's last day of work because it had been put at issue by the RM's notice of appeal. That question was not outside her jurisdiction even though the RM had not appealed against the reinstatement order under the *OHS Decision*.

3. Fact-finding and an onus to cooperate

[62] Further, I find that the LRB erred in law when it concluded that the Adjudicator had erred when she deemed Mr. Veldman's last day of work to have been August 17, 2021. In my assessment, the Adjudicator properly considered the issue and concluded, on the basis of the testimony she heard and the documentary evidence before her, that the RM had made several

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reasonable attempts to reinstate Mr. Veldman, and that he had ignored or thwarted reinstatement, thereby ending the RM's obligation to reinstate him. Respectfully, the LRB conflated the issue of whether Mr. Veldman's reinstatement was appropriate (which was not under appeal and not considered in the *Adjudicator Decision*) with whether the RM had discharged its obligation to reinstate him (which was put at issue and was determined in the *Adjudicator Decision*).

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[63] Most markedly, having failed to grapple with the issues that the RM had put before the Adjudicator, the LRB ruled that the RM was legally obliged to pay backpay to Mr. Veldman *until he decides to return to work for the RM*, which may never occur. By reason of its indefinity, the LRB ruling perpetuated the dispute between the RM and Mr. Veldman and effectively established a contingency fund for Mr. Veldman. Under the *LRB Decision*, for so long as Mr. Veldman declines to return to work for the RM, the RM remains obligated to reinstate him and to pay him backpay accrued from May of 2021 to the date of reinstatement. The RM has no means of crystallising, curtailing or ending its liability to Mr. Veldman. This result is consistent with neither law nor reason.

[64] I further agree with the RM that the LRB misapprehended the law when contradicting the Adjudicator's reasoning that, after the RM had asked Mr. Veldman on August 17, 2021, when he planned to return to work, the "onus then shifted to Mr. Veldman to make reasonable response to his employer" (*Adjudicator Decision* at para 49). Relying on its own decision in *Benard*, the LRB wrote that it had "pointed out to the [RM] during the hearing of this Appeal, that [that] submission is entirely at odds with the law" (*LRB Decision* at para 54). The LRB went on to write:

> [55] It was an error of law for the Adjudicator to find that the onus shifted to Veldman on August 17, 2021. She provided no basis on which she made that finding. The onus is on the [RM] to comply with the [Officer's notice of contravention] that required it to put Veldman back to work. Further, the [RM] did not appeal that [notice of contravention] or apply for a stay of that [notice of contravention] pending its appeal to the Adjudicator or pending the outcome of this Appeal. Since the [RM] did not appeal that portion of the [Officer's notice of contravention], that issue was not before the Adjudicator and it was an error of law for her to purport to address it.

[65] As noted above, *Evans* provides a basis in law for the Adjudicator's finding. I also have found error in the LRB's conclusion that the issue of determining backpay was outside the Adjudicator's jurisdiction. I further find that the circumstances of *Benard*, respectfully, are not analogous to the facts of this matter. In that case, the employer had "refused throughout to comply with the reinstatement order" and, at the date of the hearing before the LRB, "had still not taken

any steps to reinstate [the employee]", who had not obtained other employment (at para 61). Here, Mr. Veldman quickly obtained new employment with Keys and was still employed there at the time of the hearing before the LRB, eight months later. Moreover, the RM had not and does not dispute the reinstatement order, has attempted to reinstate Mr. Veldman, and acknowledges that it continues to be liable to him for backpay.

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[66] Moreover, contrary to the LRB's assessment, the Adjudicator articulated a sound basis in the evidence for her finding that Mr. Veldman's employment had ended on August 17, 2021. The Adjudicator's reasoning behind that finding was as follows:

> **ISSUE ONE - Did the RM of Buchanan reinstate Mr. Veldman to his former employment under the same terms and conditions under which he was formerly employed.**
>
> 42. Based on the testimony provided, the following is a timeline of events:
>
> > <u>July 6, 2021</u> – Ms. Hadubiak contacted Mr. Veldman and told him to return to work the following day. Mr. Veldman advised he was not available until July 12, 2021.
> >
> > <u>July 7, 2021</u> – Mr. Skortez called Mr. Veldman and told him to stay home until he heard further from Council.
> >
> > <u>July 12, 2021</u> – Mr. [*sic*] Hadubiak emailed Mr. Veldman telling him to return to work the following day, July 13, 2021. (Exhibit A-8)
> >
> > <u>July 12, 2021</u> – Mr. Veldman provided Ms. Hadubiak with a letter from his doctor advising that he was unable to return to work until July 24, 2021, for medical reasons. (Exhibit A-9)
> >
> > <u>August 4, 2021</u> – The RM Council resolves to have their legal counsel send Mr. Veldman a letter asking whether he is able to return to work. (Exhibit A-11)
> >
> > <u>August 17, 2021</u> – Legal counsel for the RM writes Mr. Veldman asking if he is able to return to work. (Exhibit A-14)
> >
> > <u>August 23, 2021</u> – Legal counsel for the RM and legal counsel for Mr. Veldman have a conversation as to whether Mr . Veldman is returning to work for the RM. No determining information is provided.
> >
> > <u>September 9, 2021</u> – Mr. Veldman's legal counsel withdraws.
>
> 43. Attempts were made by the RM to determine a return to work date, with Mr. Veldman, on July 6, 2021, July 12, 2021 and August 17, 2021. Mr. Veldman was on a medical leave until July 23, 2021. Through legal counsel, on August 17, 2021, the RM, through their legal counsel [*sic*], communicated with Mr. Veldman again to determine a return to work date. Mr. Veldman refused to communicate with the RM legal counsel.
>
> 44. Accordingly, I find that the RM did try to reinstate Mr. Veldman to his former employment under the same terms and conditions under which he was formerly employed.

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> **ISSUE TWO: Did the RM of Buchanan pay any wages Mr. Veldman would have earned had there not been a discriminatory action?**
>
> 45. The first point to consider is what was Mr. Veldman's last day of work with the RM. The RM argues that it was June 7, 2022, as that was Mr. Veldman's first day of work with the RM of Keys. In the alternative, the RM posits that Mr. Veldman's last day of work was July 24, 2021, the end of his medical leave.
>
> 46. Mr. Veldman did not put forward a specific date in his testimony or argument.
>
> 47. I find that Mr. Veldman's last day of work with the RM was August 17, 2021. As determined above, efforts were made on July 6, 2021 and July 12, 2021 by the RM to return Mr. Veldman to work. While the RM could expect Mr. Veldman to return to work in a reasonable amount of time, giving him less than 24 hours notice on July 6, 2021, was not. Mr. Veldman's position that he would return to work on July 12, 2021, was reasonable.
>
> 48. Mr. Veldman then presented a doctor's letter indicating that he was medically unable to work until July 24, 2021. Mr. Veldman did not communicate with the RM after that date.
>
> 49. The RM, through its legal counsel, corresponded with Mr. Veldman on August 17, 2021, inquiring as to when he planned to return to work (Exhibit A14). The onus then shifted to Mr. Veldman to make reasonable response to his employer. However, Mr. Veldman chose not to do so.
>
> 50. In fact, Mr. Veldman's testimony was that he deliberately did not respond to the RM's legal counsel because he did not "deal with lawyers", he only dealt with the RM Council directly. This was not a reasonable position for Mr. Veldman to take.
>
> 51. Moreover, Mr. Veldman did not follow his own commitment to only correspond with the RM, because he did not do that either. Mr. Veldman simply did nothing. That was not reasonable behaviour by Mr. Veldman. Accordingly, I determine Mr. Veldman's last day of work with the RM to be August 17, 2021.

[67] The LRB was not entitled to wholly reject the Adjudicator's findings of fact by stating that the Adjudicator had improperly shifted the onus and provided no basis for her findings. As can be seen, the Adjudicator reasonably found, based on the evidence before her, that the RM had discharged its onus, and that Mr. Veldman had not provided any evidence that would forestall that finding. Most pointedly, the Adjudicator observed that Mr. Veldman had testified that he chose not to respond to the RM's attempt to reinstate him on August 17, 2021. She found this was not reasonable given the circumstances, thereby effectively ending the RM's obligation to reinstate him.

[68] On the bottom line of this ground of appeal, I conclude that the LRB erred in law in several ways in its review of the *Adjudicator Decision*. The issues raised by the RM's appeal from the *OHS Decision* fell squarely within an adjudicator's jurisdiction pursuant to the *SEA*.

C. Did the LRB err in law by finding that the Adjudicator had made palpable and overriding errors of fact or by making its own findings of fact?

[69] As noted above with respect to the right of appeal from an adjudicator's decision to the LRB, the LRB has no jurisdiction to consider allegations of factual error in an adjudicator's decision. As the LRB recognised (at paragraph 57 of its decision), questions involving the facts as found by an adjudicator are reviewable by the LRB only if they amount to questions of law. In *P.S.S. Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149, [2008] 5 WWR 440, this Court wrote:

> [68] It follows that a tribunal cannot reasonably make a valid finding of fact on the basis of no evidence or irrelevant evidence. Nor can it reasonably make a valid finding of fact in disregard of relevant evidence or upon a mischaracterization of relevant evidence. To do so is to err in principle or, in other words, to commit an error of law. (In addition to the cases referred to above, see *Toneguzzo-Norvell v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at p. 121; Wade & Forsyth, *Administrative Law* (7th ed.) (Oxford: Clarendon Press, 1994) at pp. 316-20; Jones & de Villars, *Principles of Administrative Law* (4th ed.) (Toronto: Thomson Carswell, 2004) at pp. 244-43 and 431-36; and *Hartwig and Senger v. Wright (Commissioner of Inquiry), et al*, 2007 SKCA 74 (Sask C.A.)). Nor can a tribunal reasonably make a valid finding of fact based on an unfounded or irrational inference of fact.
>
> [69] The all-important point is that to make a finding of fact on any of these bases is to error in principle by offending the implicit requirements of the statute, as well as the common law duty of procedural fairness perhaps. To suppose otherwise is to suppose the legislature intended, in conferring power upon a human rights tribunal to determine facts in controversy much as judges do, to empower the tribunal to engage in unfounded, unreasonable, or arbitrary fact-finding. The fact-finding process, or method by which facts in controversy are to be determined in this quasi-judicial setting, does not permit of this, either in its statutory or common law conception.
>
> [70] Having regard for all of this, it becomes apparent that even though the right of appeal is confined to a question of law, and even though the appeal comes down to the tribunal's findings of fact, the appellant's case gives rise to a question of law and rests, therefore, on a tenable ground. It is not as though the question is whether the tribunal's findings of fact are unreasonable or unsupported by the evidence in the sense of the sufficiency and weight of the evidence. Rather, the question is whether the findings of fact are unreasonable in the sense the tribunal erred in principle by disregarding, overlooking, or mischaracterizing evidence material to its findings of fact. …
>
> (Footnotes omitted)

See also: *R v J.M.H.*, 2011 SCC 45 at para 24 *et seq.*, [2011] 3 SCR 197; and, e.g., *Oil City Energy Services Ltd. v Fadhel*, 2018 CanLII 38250 (Sask LRB); *Matt's Furniture Ltd. v Hoffert*, 2016 CanLII 31172 (Sask LRB); and *Sim & Stubbs Holdings Ltd. v Hill*, 2015 CanLII 80542 (Sask LRB).

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[70] In the *LRB Decision*, the LRB found that the Adjudicator had erred in law in two ways. When doing so, the LRB departed from its proper appellate role by substituting its own findings of fact for those of the Adjudicator. The Adjudicator's conclusions were grounded in the evidence that was before her, but the LRB gave no deference to her findings and simply reweighed the evidence.

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1. Disregard of relevant evidence

[71] The LRB concluded that, by finding that the RM's backpay obligations had ended on August 17, 2021, the Adjudicator had erred in law because that finding was "contrary to the evidence as [the Adjudicator] found it". It said this was the Adjudicator making a finding of fact in disregard of relevant evidence (see *LRB Decision* at paras 56, quoted above, and 58).

[72] The record does not support the conclusion that the Adjudicator erred in law in this way. Where a question is about what happened before the parties came to be involved in the adjudicative proceedings, it is a question of fact. If the decision maker can answer that question without reference to a legal standard, it is a question of fact. If it involves the application of the law to the facts, it is a question of mixed fact and law. If the issue on appeal requires the reviewing tribunal to consider how the decision maker weighed the evidence, it is a question of fact. These non-exhaustive indicia of questions of fact and of mixed fact and law are present in this case where the issue is: When did the RM's backpay obligations to Mr. Veldman end?

[73] I find no support for the LRB's statement that the Adjudicator's finding that the RM's backpay obligations had ended on August 17, 2021, was contrary to the facts as the Adjudicator had found them. There is also no support for the LRB's conclusion that the Adjudicator had disregarded relevant evidence when making that finding. The LRB's assessment of the Adjudicator's finding as having resulted from an error of law in the fact-finding process is entirely refuted by the Adjudicator's documented assessment of the evidence and her reasoning at paragraphs 42–51 of the *Adjudicator Decision* (quoted earlier).

[74] In short, the LRB departed from its proper appellate role by substituting its own findings of fact, most notably about what had occurred between the parties regarding the RM's efforts to reinstate Mr. Veldman. The Adjudicator's conclusions in that regard were grounded in the

evidence that was before her. The LRB gave no deference to her findings and simply reweighed the evidence, which was an error of law on the part of the LRB.

2. Finding fact on the basis of no evidence

[75] The LRB also held that the Adjudicator had erred in law by making a finding about what Mr. Veldman had earned from Keys between July 17, 2021, and August 17, 2021, based on no evidence. In that regard, the LRB wrote:

> [60] Then, in paragraph 70, the Adjudicator stated:
>
> > Neither party presented any evidence of Mr. Veldman's pay from the RM of Keys from July 17, 2021 to August 17, 2021.
>
> [61] At this point, the Adjudicator made a further error in law when she found, at paragraph 72, that "it appears" that Veldman worked similar hours of work until August 17th, and "it is likely" he earned $5,250 during that time period. These excerpts from the Adjudicator's decision make it clear that she made findings based on no evidence. This is an error of law.

[76] It is correct that a finding of fact made on the basis of no evidence at all is an error of law. It is not, however, an error of law to draw an inference from the available evidence or the facts and fill a gap in the evidence.

[77] More importantly, in this case both the Adjudicator and the LRB proceeded from the incorrect understanding that neither party had presented evidence to the Adjudicator about what Mr. Veldman had earned between July 17, 2021, and August 17, 2021. The record confirms that the RM had adduced into evidence employee pay-summaries from Keys from June 5, 2021, to January 28, 2022.

[78] Because I would reinstate the *Adjudicator Decision*, and since she allowed for the parties to confirm the inference that she drew about Mr. Veldman's earnings, I would remit this issue to her for reconsideration.

IV. CONCLUSION

[79] In summary, I conclude that the LRB erred in law when it determined that the Adjudicator had denied Mr. Veldman procedural fairness. It also erred in law by finding that the Adjudicator had exceeded her jurisdiction and by improperly rejecting the facts as found by the Adjudicator.

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[80] In the result, I would quash the *LRB Decision* and reinstate the *Adjudicator Decision*. I would revive the Adjudicator's directions regarding those matters she left to be completed under paragraph 78 of her reasons, i.e., confirmation of Mr. Veldman's earnings from Keys, calculation of holiday pay and statutory deductions, and any issues arising therefrom, thereby allowing her to address those issues.

[81] Given the circumstances of the matter, I am not inclined to order costs against Mr. Veldman. Each party shall bear their own costs in this Court and before the LRB.

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"Caldwell J.A."
Caldwell J.A.

I concur. "Kalmakoff J.A."
Kalmakoff J.A.

I concur. "Kilback J.A."
Kilback J.A.