IN THE MATTER OF:

AN APPEAL OF DECISION PURSUANT TO SECTION 3-53 OF *THE SASKATCHEWAN EMPLOYMENT ACT*, S.S. 2013, c. S-15.1, AS AMENDED, (THE "*SEA*") AND A HEARING PURSUANT TO SECTION 3-54 OF THE *SEA*

BETWEEN:

Kitchen Design Studios,

APPELLANT,

- and -

John Morrison,

RESPONDENT.

APPEARANCES:

For the Appellant, Kitchen Design Studio:	Robert P. Emes
Respondent, John Morrison:	Self Represented

BEFORE:

T. F. (Ted) Koskie, B.Sc., J.D., Adjudicator

DECISION DATE:

September 8, 2023

DECISION

I. INTRODUCTION

[1] John Morrison ("Morrison") lodged a complaint[1] pursuant to section 3-36 of the *SEA*

[1]Complaint received by Occupational Health and Safety, Ministry of Labour Relations and Workplace Safety, Government of Saskatchewan ("OHS") on December 30, 2021

alleging that Kitchen Design Studios ("KDS") had taken discriminatory action against him for a reason mentioned in section 3-35 of the *SEA*.

[2] An OHS officer decided KDS had taken discriminatory action against Morrison for a reason mentioned in section 3-35 of the *SEA* (the "First Decision") and served the Decision and Notice of Contravention Number 1-00020203 ("NoC-1")[2] on KDS on February 24, 2022, requiring KDS to:

a) pay Morrison any wages that he would have earned if he had not been wrongfully discriminated against;

b) cease the discriminatory action;

c) reinstate Morrison to his former employment on the same terms and conditions under which he was formerly employed; and

d) remove any reprimand or other reference to the matter from any employment records it maintained with respect to Morrison.

[3] An OHS officer decided KDS had failed to provide a Progress Report as required by NoC-1 (the "Second Decision") and served the Second Decision and Notice of Contravention Number 1-00021436 ("NoC-2")[3] on KDS on March 13, 2022, requiring KDS to submit a Progress Report and reinstate Morrison.

[4] On June 3, 2022, KDS appealed both NoC-1 and NoC-2 (the "Appeal").[3]

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[2]Exhibit G-1, First Decision and NoC-1 dated February 23, 2022

[3]Exhibit G-2, Second Decision and NoC-2 dated March 12, 2022

[3]Exhibit G-3, Notice of Appeal

[5] The Saskatchewan Labour Relations Board appointed me as the adjudicator to hear and determine the Appeal.

2. FACTS

[6] Within paragraph thirteen (13) of the Appeal, KDS asserts:

> Mr. Kachur was unable to appeal the Notice of Contravention within the stipulated appeal period because he was suffering from prolonged side effects from a severe coronavirus infection in the fall of 2021, which also prevented Mr. Kachur from fully participating.

[7] At the hearing of this matter, KDS:

a) tendered no evidence concerning its failure to file a written notice of appeal of NoC-1 with the director of OHS within fifteen (15) business days after the date of service of same; and

b) appeared content to rely upon the fact that the Appeal of both NoC-1 and NoC-2 was filed with the director of OHS within fifteen (15) business days after the date of service of NoC-2.

[8] Within subparagraph (a) of paragraph twenty-four (24) of the Appeal, KDS seeks the following "relief":

> That the Notices of Contravention dated February 23rd, 2022 and March 14th (*sic*), 2022, alleging discrimination and a failure to reinstatement (*sic*) Mr. Morrison are suspended in their entirety.

[9] KDS focussed its evidence and argument on whether KDS:

a) harassed Morrison;

b) discriminated against Morrison; and

c) had "good and sufficient reason" for any action it took against Morrison.

For reasons that will follow, I do not find it necessary to review and analyze that evidence.

[10] There is no controversy that KDS has not complied with both the First Decision and NoC-1 and the Second Decision and NoC-2.

3. ISSUES

[11] The first issue at hand is whether I have jurisdiction to hear the Appeal of NoC-1.

[12] The second issue is the disposition of the Appeal of NoC-2.

4. DECISION

[13] I rule I have no jurisdiction to hear the Appeal of the Fist Decision and NoC-1 and I dismiss that part of the Appeal.

[14] I further rule there is no evidence to support the Appeal of the Second Decision and NoC-2 and I dismiss that part of the Appeal.

[15] As a consequence of the foregoing, the entirety of the Appeal is dismissed.

5. REASONS

5.1 LEGISLATION

[16] The relevant provisions of the *SEA* are as follows:

PART III
Occupational Health and Safety

DIVISION 1
Preliminary Matters for Part

Interpretation of Part
3-1(1) In this Part and in Part IV:

. . .

(i) "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 termination, 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:

(i) the temporary assignment of a worker to alternative work, pursuant to section 3-44, without loss of pay to the worker; or

(ii) the temporary assignment of a worker to alternative work, without loss of pay to the worker, while:

(A) steps are being taken for the purposes of clause 3-31(a) to satisfy the worker that any particular act or series of acts that the worker refused to perform pursuant to that clause is not unusually dangerous to the health or safety of the worker or any other person at the place of employment;

(B) the occupational health committee is conducting an investigation pursuant to clause 3-31(b) in relation to the worker's refusal to perform any particular act or series of acts; or

(C) an occupational health officer is conducting an investigation requested by a worker or an employer pursuant to clause 3-32(a);

(j) "employer" means, subject to section 3-29, a person, firm, association or body that has, in connection with the operation of a place of employment, one or more workers in the service of the person, firm, association or body;

. . .

(m) "notice of contravention" means a notice of contravention served pursuant to section 3-38;

. . .

(gg) "worker" means, subject to subsection (6):

(i) an individual, including a supervisor, who is engaged in the service of an employer;

(ii) a member of a prescribed category of individuals;

but does not include an inmate, as defined in *The Correctional Services Act, 2012*, of a correctional facility as defined in that Act who is participating in a work project or rehabilitation program within the correctional facility;

. . .

DIVISION 5
Right to Refuse Dangerous Work; Discriminatory Action

. . .

Discriminatory action prohibited

3-35 No employer shall take discriminatory action against a worker because the worker:

(a) acts or has acted in compliance with:

(i) this Part or the regulations made pursuant to this Part;

(ii) Part V or the regulations made pursuant to that Part;

(iii) a code of practice issued pursuant to section 3-84; or

(iv) a notice of contravention or a requirement or prohibition contained in a notice of contravention;

(b) seeks or has sought the enforcement of:

(i) this Part or the regulations made pursuant to this Part; or

(ii) Part V or the regulations made pursuant to that Part;

(c) assists or has assisted with the activities of an occupational health committee or occupational health and safety representative;

(d) seeks or has sought the establishment of an occupational health committee or the designation of an occupational health and safety representative;

(e) performs or has performed the function of an occupational health committee

member or occupational health and safety representative;

(f) refuses or has refused to perform an act or series of acts pursuant to section 3-31;

(g) is about to testify or has testified in any proceeding or inquiry pursuant to:

(i) this Part or the regulations made pursuant to this Part; or

(ii) Part V or the regulations made pursuant to that Part;

(h) gives or has given information to an occupational health committee, an occupational health and safety representative, an occupational health officer or other person responsible for the administration of this Part or the regulations made pursuant to this Part with respect to the health and safety of workers at a place of employment;

(i) gives or has given information to a radiation health officer within the meaning of Part V or to any other person responsible for the administration of that Part or the regulations made pursuant to that Part;

(j) is or has been prevented from working because a notice of contravention with respect to the worker's work has been served on the employer; or

(k) has been prevented from working because an order has been served pursuant to Part V or the regulations made pursuant to that Part on an owner, vendor or operator within the meaning of that Part.

Referral to occupational health officer

3-36(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 3-35 may refer the matter to an occupational health officer.

(2) If an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 3-35, the occupational health officer shall serve 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) subject to subsection (5), 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) If an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 3-35, the occupational health officer shall advise the worker of the reasons for that decision in writing.

. . .

DIVISION 8

Appeals

3-52(1) In this Division:

(a) "adjudicator" means an adjudicator appointed pursuant to Part IV;

(b) "decision" includes:

(i) a decision to grant an exemption;

(ii) a decision to issue, affirm, amend or cancel a notice of contravention or to not issue a notice of contravention; and

(iii) any other determination or action of an occupational health officer that is authorized by this Part.

(2) In this Division and in Part IV, "person who is directly affected by a decision" means any of the following persons to whom a decision of an occupational health officer is directed and who is directly affected by that decision:

(a) a worker;

(b) an employer;

(c) a self-employed person;

(d) a contractor;

(e) a prime contractor;

(f) an owner;

(g) a supplier;

(h) any other prescribed person or member of a category of prescribed persons;

but does not include any prescribed person or category of prescribed persons.

Appeal of occupational health officer decision

3-53(1) A person who is directly affected by a decision of an occupational health officer may appeal the decision.

(2) An appeal pursuant to subsection (1) must be commenced by filing a written notice of appeal with the director of occupational health and safety within 15 business days after the date of service of the decision being appealed.

(3) The written notice of appeal must:

(a) set out the names of all persons who are directly affected by the decision that is being appealed;

(b) identify and state the decision being appealed;

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

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

. . .

(10) Instead of hearing an appeal pursuant to this section, the director of occupational health and safety may refer the appeal to an adjudicator by forwarding to the adjudicator:

(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 are directly affected by the decision.

. . .

Appeals re harassment or discriminatory action
3-54(1) An appeal mentioned in subsection 3-53(1) with respect to any matter involving harassment or discriminatory action is to be heard by an adjudicator in accordance with Part IV.

(2) The director of occupational health and safety shall provide notice of the appeal mentioned in subsection (1) to persons who are directly affected by the decision.

Providing appeal material to adjudicator
3-55 In the case of an appeal mentioned in subsection 3-53(10) or section 3-54 that is to be heard by an adjudicator, the director of occupational health and safety shall forward to the adjudicator:

(a) the notice of appeal mentioned in subsection 3-53(2);

(b) all information in the director's possession that is related to the appeal; and

(c) a list of all persons who have been provided notice of the appeal pursuant to clause 3-53(5)(a) or subsection 3-54(2).

Appeal of director's decision to adjudicator
3-56(1) A person who is directly affected by a decision of the director of occupational health and safety made pursuant to subsection 3-53(8) may appeal the decision to an adjudicator in accordance with subsection (2) within 15 business days after the date of service of the decision.

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

(a) sets out the names of all persons who are directly affected by the decision being appealed;

(b) identifies and states the decision being appealed;

(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 being appealed.

. . .

PART IV
Appeals and Hearings re Parts II, III and V

. . .

Adjudicator's duties
4-2 An adjudicator shall:

(a) hear and decide appeals pursuant to Part II and conduct hearings pursuant to Division 5 of Part II;

(b) hear and decide appeals pursuant to Division 8 of Part III;

(c) hear and decide any appeals pursuant to Division 6 of Part V; and

(d) carry out any other prescribed duties.

Selection of adjudicator
4-3(1) In this section and sections 4-4 and 4-7, "registrar" means an employee of the ministry who is designated as the registrar by the chairperson of the board.

(2) The director of employment standards and the director of occupational health and safety shall inform the board of an appeal or hearing to be heard by an adjudicator.

(3) On being informed of an appeal or hearing pursuant to subsection (2) and in accordance with any regulations made pursuant to this Part, the registrar shall select an adjudicator.

Procedures on appeals
4-4(1) After selecting an adjudicator pursuant to section 4-3 and in accordance with any regulations made pursuant to this Part, the registrar shall:

(a) in consultation with the adjudicator and the parties, set a time, day and place for the hearing of the appeal or the hearing; and

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

(i) in the case of an appeal or hearing pursuant to Part II:

(A) the director of employment standards;

(B) the employer;

(C) each employee listed in the wage assessment or hearing notice; and

(D) if a claim is made against any corporate directors, those corporate directors;

(ii) in the case of an appeal or hearing pursuant to Part III:

(A) the director of occupational health and safety; and

(B) all persons who are directly affected by the decision being appealed; and

(iii) in the case of an appeal or hearing pursuant to Part V:

(A) the director of occupational health and safety; and

(B) all persons who are directly affected by the decision being appealed.

(2) Subject to the regulations, an adjudicator may determine the procedures by which the appeal or 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) A technical irregularity does not invalidate a proceeding before or by an adjudicator.

(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.

(7) *The Arbitration Act, 1992* does not apply to adjudications conducted pursuant to this Part.

Powers of adjudicator

4-5(1) In conducting an appeal or a hearing pursuant to this Part, an adjudicator has the following powers:

(a) to require any party to provide particulars before or during an appeal or a hearing;

(b) to require any party to produce documents or things that may be relevant to a matter before the adjudicator and to do so before or during an appeal or a hearing;

(c) to do all or any of the following to the same extent as those powers are vested in the Court of Queen's Bench for the trial of civil actions:

(i) to summon and enforce the attendance of witnesses;

(ii) to compel witnesses to give evidence on oath or otherwise;

(iii) to compel witnesses to produce documents or things;

(d) to administer oaths and affirmations;

(e) to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the adjudicator considers appropriate, whether admissible in a court of law or not;

(f) to conduct any appeal or hearing using a means of telecommunications that permits the parties and the adjudicator to communicate with each other simultaneously;

(g) to adjourn or postpone the appeal or hearing.

(2) With respect to an appeal pursuant to section 3-54 respecting a matter involving harassment or a discriminatory action, the adjudicator:

(a) shall make every effort that the adjudicator considers reasonable to meet with the parties affected by the decision of the occupational health officer that is being appealed with a view to encouraging a settlement of the matter that is the subject of the occupational health officer's decision; and

(b) with the agreement of the parties, may use mediation or other procedures to encourage a settlement of the matter mentioned in clause (a) at any time before or during a hearing pursuant to this section.

Decision of adjudicator
4-6(1) Subject to subsections (4) and (5), the adjudicator shall:

(a) do one of the following:

(i) dismiss the appeal;

(ii) allow the appeal;

(iii) vary the decision being appealed; and

(b) provide written reasons for the decision to the board, the director of employment standards or the director of occupational health and safety, as the case may be, and any other party to the appeal.

. . .

5.2 ANALYSIS

[17] Section 3-53(2) of the *SEA* provides that an appeal pursuant to section 3-53(1) must be commenced by filing a written notice of appeal with the director of OHS within fifteen (15) business days after the date of service of the decision being appealed.

[18] OHS served KDS with the First Decision and NoC-1 on February 24, 2022. KDS appealed same on June 3, 2022. This was outside the time period imposed by section 3-53(2) of the *SEA*.

[19] OHS served KDS with the Second Decision and NoC-2 on March 13, 2022. KDS appealed same on June 3, 2022. This was within the time period imposed by section 3-53(2) of the *SEA*.

[19] Section 3-53(2) of the *SEA* contains a mandatory provision that must be met to perfect an appeal.

[20] An adjudicator appointed pursuant to the *SEA* only has the authority delegated within the *SEA* itself. I am of the view any power to extend or waive the time permitted to file an appeal would need to arise from the provisions of the *SEA*.[4]

[21] This issue was considered in *Brady* v *Jacobs Industrial Services Ltd.*[5] a decision that addressed the time for appeal of an occupational health and safety report under the *SEA*. Addressing the time to appeal under sections 3-53 and 3-54, it said:

> There is no express provision anywhere in the *Saskatchewan Employment Act* that gives authority to the adjudicator or to anyone else to extend or waive the time limits for an appeal. s. 4-4(2) says an adjudicator may determine the procedures by which an appeal or hearing is to be conducted. This provision deals only with an adjudicator's ability to control procedural matters in an appeal hearing and does not allow an adjudicator to extend the time for filing the appeal. A delegated power that allows a decision-maker to make rules of practice and procedure does not extend to allowing the decision-maker to alter a statutory time limit: *Bassett* v. *Canada (Government) et al.*, 1987 CanLii 4873 (SK CA).
>
> s. 4-4(5) says a technical irregularity does not invalidate a proceeding before or by an adjudicator. Failure to comply with a statutory time limit, however, is not a technical irregularity. It is a substantive matter that goes to jurisdiction: *Baron Metal Industries Inc.* [1999] OLRB Rep May/June 363. Furthermore, at the point the appeal is filed, it is an appeal

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[4] *Jordan v. Saskatchewan (Securities Commission)*, SK CA, March 21, 1968

[5] *Brady v Jacobs Industrial Services Ltd.*, 2016 CanLII 49900 (SK LA)

> filed with the Director, so at that point it is not yet a proceeding before or by an adjudicator.
>
> When the *Saskatchewan Employment Act* came into effect, the case law was clear that time limits are interpreted as mandatory and relief against failure to meet a time limit is not available unless expressly stated in the *Act*. If the legislature intended there be any relief from the time limit for appeal in s. 3-53(2), it could easily have included an express provision. Indeed, where the legislature intended to provide jurisdiction to waive or extend time limits, it did do so expressly. For example, s.6-49(3)(f) gives an arbitrator power to relieve against breaches of time limits in collective agreements. Similarly, s. 2-93 grants specific authority for the Court of Queen's Bench to extend the time for making an application to set aside an order or judgment. The legislature did not give any similar power to an adjudicator or to anyone else in the case of an appeal under s. 3-53, and I have no authority to imply such authority.[6]

[22] I am in agreement with *Brady*. There is no express provision in the *SEA* that would permit me to extend or waive the time limit created by section 3-53(2).

[23] Without more, that would normally dispose of the Appeal of the First Decision and NoC-1. However, that brings me to an analysis of the Appeal of the Second Decision and NoC-2:

a) first as to its effect on the Appeal of the First Decision and NoC-1; and

b) second as its own merit.

[24] I am of the view the Second Decision and NoC-2 are neither a fresh finding of discrimination, nor a continuation of same. Further, they can in no way be interpreted as or constituting an extension or waiver of the time limit created by section 3-53(2) of the *SEA*. They are a confirmation KDS has neither appealed, nor provided the Progress Report required by the First Decision and NoC-1. It reiterates the requirement of the Progress Report and reinstatement of Morrison already ordered.

[25] For the reasons above, I conclude that no relief is available to remedy the late filing

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[6] *Ibid* at para 51-53

of the Appeal of the First Decision and NoC-1 in this case. Accordingly, I have no jurisdiction to hear the Appeal of same. That portion of the Appeal is dismissed.

[26] That leaves me with the Appeal of the Second Decision and NoC-2. The evidence is clear, KDS did not comply with the requirements of same. I therefore dismiss that portion of the Appeal.

[27] The entirety of the Appeal is dismissed.

Dated at Saskatoon, Saskatchewan, on September 8, 2023.

T. F. (TED)KOSKIE, B.Sc., J.D.,
ADJUDICATOR