



**Ombudsman
Saskatchewan**
Promoting Fairness

Investigation Report

**Complaint about a Saskatchewan Employment Act
Adjudicator**



October 2018

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THE COMPLAINT AND THE ISSUE

The Complainant's name has been changed to protect her privacy.

Jane contacted our Office because she was concerned she had been waiting too long for an appeal decision from Ms. Rusti-Ann Blanke, an adjudicator appointed under *The Saskatchewan Employment Act*.

After an investigation, an occupational health officer concluded that Jane's employment was terminated unlawfully. This meant Jane was to be reinstated. Jane's employer appealed. Ms. Blanke was assigned to hear the appeal. Jane's employer successfully applied to have Jane's reinstatement stayed until the matter was heard and decided. The matter was heard in June 2016, but Ms. Blanke still has not rendered her decision.

The sole issue is the adjudicator's failure to render a decision as required under *The Saskatchewan Employment Act*.

FACTS

Jane was terminated from her position by her employer in May 2015. In November 2015, she made an allegation of discriminatory action to the Occupational Health and Safety Division (OH&S) of the Ministry of Labour Relations and Workplace Safety. She claimed that she was harassed by her supervisor and another co-worker, and after reporting this to her manager, her employment was terminated.

In a February 10, 2016 notice of contravention, the Occupational Health Officer assigned to investigate Jane's allegation decided that her termination was an unlawful discriminatory action contrary to section 3-35 of *The Saskatchewan Employment Act*. The officer's notice letter offered mediation and conflict resolution services to assist with Jane's return to work.

Her employer appealed the officer's decision. Ms. Blanke was assigned to hear the appeal. Upon the employer's application, on April 21, 2016, Ms. Blanke stayed the effect of the officer's decision until the hearing on the dismissal. This meant Jane was not reinstated and did not return to work. In her interim decision, Ms. Blanke stated:

The appeal is proceeding expeditiously toward a hearing currently set...for...June 1 and...2, 2016.

...

I am not impervious to the...submissions about the harm to [Jane] — the "very human and financial problem" that exists for [Jane] today, and every day that this matter remains unresolved. I appreciate that she has been living in significantly reduced circumstances on an income from Employment Insurance, the expiry of which is imminent.

Ms. Blanke conducted the hearing on the dismissal on June 1 and 2, 2016.

Ms. Blanke's designation as an adjudicator to hear appeals pursuant to Part III, Division 8 of *The Saskatchewan Employment Act*, was cancelled by Order-in-Council dated June 7, 2016, but under the Act her role in completing her decision continued as though she still held office.

On December 14, 2016, Jane emailed Ms. Blanke noting she had been waiting a long time for a decision and hoping she would get it soon. Ms. Blanke told Jane she anticipated her decision would be issued "before the end of the month."

By February 2018, Ms. Blanke had still not rendered a decision. As well, she had not communicated with the parties as to what was causing the delay or when she would complete it.

On February 20, 2018, in response to the employer's lawyer's request for an update, Ms. Blanke said:

Just a quick note on the status of the release of my decision. It will be ready for release "today", but not before the end of the business day. I've been fighting fires today, and it looks like I'm not going to get a chance to complete [sic] my final review and proofing until tonight.

We contacted Ms. Blanke on April 25, 2018. In a May 4, 2018 email to us, she said:

On reflection, while proof-reading, I felt that the written decision required major editing. Unfortunately, it was necessary for me to go out of province to I took my laptop with me, but didn't have much opportunity (or endurance) to complete the task while I was away. As (bad) luck would have it, on my return I was involved in....., I finally, this past week, feel that I'm back to normal.....

...
The...decision is ready to issue, and I will distribute it Monday morning [May 27, 2018.]

...
...I do not want this to come off as a litany of excuses I will just say that 2017 has been an extremely difficult year on multiple fronts,[.]
...Coupled with an [sic] still overwhelming amount of work on my plate, it has been, at times, almost paralyzing — certainly extremely difficult to focus on one task with others looming in the background. In retrospect, I regret that I didn't have foresight to reduce my consultancy commitments sooner[.]

...
Although my term of appointment as an adjudicator has ended, I am still responsible for the completion the appeals assigned to me. Thewas a bit of a set-back, but I have taken steps to reduce my consultancy to near zero in order to focus exclusively on my adjudicative duties.

Ms. Blanke did not issue the decision as she said she would. We contacted her again on June 18, 2018, asking for the status of the decision. She did not respond.

ANALYSIS AND FINDINGS

Ms. Blanke's role as an adjudicator is governed by Part IV of *The Saskatchewan Employment Act*. She was appointed under subsection 4-1(1):

After any consultation by the minister with labour organizations and employer associations that the minister considers appropriate, the Lieutenant Governor in Council may appoint as adjudicators for the purpose of hearing appeals or conducting hearings pursuant to Parts II and III one or more individuals who possess the prescribed qualifications.

Even though her appointment ended shortly after she heard the appeal in Jane's case, subsection 4-1(3) empowers her to complete her duties and subsection (4) provides for her to be remunerated when she has done so.

Section 4-7 required Ms. Blanke to deliver written reasons for her decision 60 days after the date of the hearing – or August 1, 2016, in Jane's case.

While we acknowledge she told us 2017 was a difficult year for her, Ms. Blanke has not provided us with any evidence to support her statements. Further, any difficulties she may have had in 2017 would not explain her failure to render the decision as she was required to do, well before the end of 2016. Also, while we acknowledge she had told us other personal matters arose in 2018, they cannot reasonably explain why she repeatedly told the parties and the Ombudsman that she was on the cusp of issuing the decision, but then then failed to do so.

We find Ms. Blanke's failure to complete the decision in Jane's case within the statutory timeframe is contrary to the law, and the extraordinary delay in her doing so since then is extremely unfair to all parties to the proceedings.

RESPONSE TO THE FINDINGS

On July 26, 2018, we provided Ms. Blanke with a summary of our investigation and providing her an opportunity to respond. We told her that we contemplated recommending that she render a decision in this case by a certain deadline. However, given her repeated failure to release it, we had no faith that such a recommendation would be followed. Ms. Blanke responded to our preliminary findings on July 30, 2018. She stated that she did not dispute the facts or our findings. She also indicated that she would deliver the decision to the parties' legal counsel, to Jane, the Board Registrar of the Saskatchewan Labour Relations Board, Occupational Health and Safety, and to our Office by the following day.

That did not happen.

The Saskatchewan Employment Act provides for a party to apply to the Court of Queen's Bench for an order directing an adjudicator to provide his or her decision. We did not think that it was reasonable or fair for Jane to have to incur the costs of such a court application. During our investigation, we learned that

there had been some discussion within the Ministry of Labour Relations and Workplace Safety about whether it had the legal standing to apply to the court to require Ms. Blanke to render a decision in Jane's case. Therefore, we approached the ministry about this possibility. However, on September 12, 2018, the ministry advised us that while it shared our concern regarding the lack of timeliness of Ms. Blanke's decisions, it determined that it was not a party to the process.

As of October 31, 2018, neither the Ombudsman nor anyone else has received a copy of Ms. Blanke's decision. As well, we understand that she has six other outstanding cases in which has had not rendered decisions.

NO RECOMMENDATIONS

Our Office is sympathetic to Jane's situation and, given her financial circumstances, we understand she does not believe she is able to apply to the court for an order compelling the adjudicator to carry out her duty. We suspect that this is similar to the other six cases in which the parties are awaiting a decision from Ms. Blanke.

As an Ombudsman, we would typically make recommendations to improve the process. The timelines and requirements in *The Saskatchewan Employment Act* are reasonable. The Act clearly requires decisions to be rendered within 60 days and provides for a party to have recourse to the courts to apply for an order directing the adjudicator provided his or her decision if the deadline has not been met.

In this case, it is the adjudicator's actions that are contrary to law and unreasonable. We have considered making a recommendation that the adjudicator provide her decision on Jane's and all her outstanding cases within a specific period of time. However, because the adjudicator has repeatedly told the parties and the Ombudsman that she was going to release the decision and then failed to do so, we have no confidence such a recommendation would be accepted or carried out. Otherwise, there are no reasonable recommendations that we could make in this case that could improve this situation.

Unless Ms. Blanke does the right thing and renders a decision, or Jane or her employer applies to the court for an order forcing Ms. Blanke to render her decision, there does not appear to be any reasonable resolution to the problem.

We hope, however, that making this report public will prompt the adjudicator to fulfill her commitments on these outstanding appeals. Jane and her employer have waited for nearly two and half years for a final decision about her employment situation. This is extremely unfair.

REFERENCES

STATUTES, REGULATIONS AND BYLAWS

The Saskatchewan Employment Act

ABOUT US

The Ombudsman is an independent officer of the Legislative Assembly of Saskatchewan. Under *The Ombudsman Act, 2012*, one of our roles is to investigate complaints about administrative actions and decisions of provincial ministries, agencies of the government, publicly-funded health entities, municipal entities, and their council members, board members, officers and employees. After an investigation, we can make recommendations to a government entity if the Ombudsman is of the opinion the government entity or officials:

- Have made a decision, an omission or a recommendation to a minister, or has acted in a way that appears to be: contrary to law; wrong, unreasonable, unjust, oppressive, improperly discriminatory, based on a mistake of law or fact; or was made or done in accordance with a law or a practice that is unreasonable, unjust, oppressive or improperly discriminatory.
- Have exercised a power, duty or function conferred or imposed on them by an Act for an improper purpose, on irrelevant grounds, or by taking into account irrelevant considerations.
- Should have given reasons for a decision, action, omission or recommendation that was the subject-matter of the investigation.

Ombudsman Saskatchewan does not advocate for the people who complain to us nor for the government entities and officials we investigate. We are neutral, impartial and independent from the government entities and officials we oversee. Our mission is to promote and protect fairness and integrity in the design and delivery of provincial and municipal government services.