

CANADA / JUDGMENT

Wayzhushk Onigum Nation v. Kakeway

2001 FCT 819

COURT

Federal Court

DECIDED

20 July 2001

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Court (s) Database

Federal Court Decisions

Date

2001-07-20

Neutral citation

2001 FCT 819

File numbers

T-1777-99

Decision Content

Date: 20010720

Docket: T-1777-99

Neutral Citation: 2001 FCT 819

Between:

WAYZHUSHK ONIGUM NATION,

Applicant,

- and -

DOROTHY KAKEWAY,

Respondent.

REASONS FOR ORDER

Muldoon, J.

1. Introduction

- [1] This is an application by the applicant, the Wayzhushk Onigum Nation, under section 18.1 of the Federal Court Act, R.S.C. 1985, Chap.F-7 as amended, for judicial review of a decision dated September 6, 1999, by Mr. J.F.R. Taylor, an adjudicator appointed under subsection 242(1) of the Canada Labour Code, R.S.C. 1985, Chap.L-2 as amended. The adjudicator awarded the respondent, Dorothy Kakeway, the sum of \$20,400 by way of salary in lieu of notice of the termination of her employment.

2. Statement of Facts

- [2] The current chief and council of the Wayzhushk Onigum Nation were elected on December 2, 1997. As part of a third-party management review initiated by the chief and council, each individual employment contract with the band was examined, and, as a result, the respondent's employment was terminated. The respondent complained under subsection 240(1) of the Canada Labour Code, and an adjudicator was appointed under subsection 242(1) of the Canada Labour Code.
- [3] On July 22, 1999, the adjudicator advised both parties in writing that he had set a hearing date for August 5, 1999. Shortly thereafter, acting on Chief Skead's instructions, Irene Skead, the band office receptionist, arranged for an adjournment to August 31, 1999. The adjudicator confirmed this change by sending an amended notice of hearing to the parties dated July 30, 1999. The notice of hearing which was sent to the applicant was addressed to Chief Steve Skead. On August 31, 1999, the date of the hearing, nobody appeared on behalf of the applicant at the appointed time and place. The chief and all of the band office employees were attending a function with the Minister of Indian Affairs and Northern Development in Sioux Narrows. Consequently, the band was not represented at the hearing. The events which followed were related by the adjudicator at page 1 of his decision:
- [4] I must note, at the outset, that although the date and time for the hearing of this matter were set specifically to meet the convenience of the Respondent and only after a telephone discussion between myself and a representative of the Band, when I was assured that August 31st, 1999 at 2 o'clock in the afternoon (rather than an earlier date that I had suggested) would, indeed, be convenient. I confirmed that date and time by way of a letter to the Chief of the Respondent Band and to the Claimant. No-one appeared on behalf of the Band at the time and place appointed. After waiting for twenty minutes, I attempted to contact the Band office by telephone, but there was no-one there to answer my call. I therefore proceeded to hear the evidence of the first two witnesses referred to below and was initially obliged to rely, for the Band's position, upon the written explanation offered to Human Resources Development Canada by Ms. Linda Copenace, the Band's Operations Manager, for the termination of Mrs. Kakeway's employment. That letter of explanation, dated February 9th, 1999, reads as follows:

As everyone is well aware, Wauzhushk Onigum Nation is under Third Party Management with Ininew Financial Services.

This was due to the fact that Wauzhushk Onigum Nation is facing severe financial difficulties brought on by the mismanagement, lack of reporting on funds that were allocated to the First Nation and also improper use of funds by previous chief and council and administration.

All of the above forced the band to be placed under third party with cutbacks being implemented in all programs.

Dorothy Kakeway was paid \$94.00 a day to do a 2 hour school run. This expenditure far exceeded our allocated budget and since we had to cut back in all areas we decided at the time to combine all transportation arrangements required by the band.

The band also never had a contract for busing with Dorothy Kakeway.

We also at that time gave notice to the Keewatin-Patricia School Board who have provided school busing to our First Nation students.

If you should have any further inquiries please feel free to contact me at 807-548-5663.

[5] Despite the fact that no-one from the Respondent Band bothered to show up at the hearing on August 31st and having returned to Winnipeg that evening without being able to contact anyone involved in the Band's administration, I telephoned the Band Office the following morning in order to give the Band's representatives yet another opportunity to explain its position respecting this claim. I was told that Chief Steve Skead was away. I asked to speak to Ms. Linda Copenace, the Band's Operations Manager, and was told that she had someone with her but would call me back shortly. Having had no call, I called again in the later part of the afternoon and managed to speak with Ms. Copenace. I asked her why no-one had appeared at the hearing of the Claimant's appeal. Her response was that she, herself, had been ill and had only just returned to work that same morning (September 1st); the Chief, she said, had been called away, along with all the other chiefs in the region, for an important meeting with the federal Minister of Indian Affairs. She "guessed someone should have called" me. She did not deny receipt of my letter confirming the date, time and place of the hearing.

[6] The simple facts are that:

(a) Chief Skead had not been called away to an important meeting with the Minister. He had been attending the formal opening or ribbon-cutting ceremony at Sioux Narrows of the new Lake of the Woods Resource Council Building. There had been nothing sudden or last-minute about that gathering, which had been planned for many weeks and for which the invitations had gone out in mid-July. While the Minister had certainly been present, there was no 'meeting' in any consultative sense.

- (b) Linda Copenace was not at home, in bed or otherwise, at 14:00 hours on August 31st, as she had alleged. She was, in fact, present along with the Chief and all of the other personnel employed at the Band Office - roughly a dozen people at the expense of the Band, from the janitor on up - at that same ribbon-cutting ceremony.
- [7] The foregoing facts were first related to me by Mrs. Kakeway, the Complainant, whose husband had been present at the Sioux Narrows gathering. I spoke with Mr. Kakeway, who confirmed those facts. Since Mr. Kakeway's evidence might have been considered biased, I spoke with the assistant to Mr. Clifford Bob, Director of the Lake of the Woods Resource Council, who re-confirmed those same facts for me and, at my request, also checked the Guest Book and assured me that Ms. Copenace had signed that book to signify her presence at Sioux Narrows on August 31st.
- [8] The inability of Ms. Copenace to explain truthfully the absence of Band representatives from the hearing of this adjudication taints any other evidence that I heard or received from her, to the point at which, wherever her evidence differs from that of the Complainant's witnesses, I accept the latter rather than that of Ms. Copenace.
- [4] At page 5 of the decision, after discussing the respondent's evidence, the adjudicator discussed the oral and written evidence which was submitted on behalf of the applicant by Ms. Linda Copenace, the band's operations manager:
- [19] When I spoke with Ms. Copenace on September 1st, I first asked her whether her letter of February 4th, 1999, still represented the Band's position respecting the termination of Mrs. Kakeway's employment. She replied that it did.
- [20] I advised her that, contrary to her assertion that "The band also never had a contract for busing with Dorothy Kakeway", I had been furnished with the original of just such a contract and that Ms. Eleanor Skead had testified that the contract had been authorized by Band Council Resolution (BCR). Ms. Copenace expressed doubt as to the existence or validity of any such resolution. However, while I accept the evidence of Ms. Eleanor Skead on the point, I find that the question whether Mrs. Kakeway's original contract was authorized by formal BCR is irrelevant to the dispute now before me...
- [21] When speaking with Ms. Copenace on September 1st, I advised her of Mrs. Kakeway's assertion that she had had no notice of an impending change in the Band's approach to the whole matter of student transportation, let alone notice of her own impending dismissal. In response, Ms. Copenace has sent me copies of several letters intended to support the Band's position...
- [5] The adjudicator concluded at page 12 of the decision that the respondent was unjustly dismissed in a callous and demeaning manner, without notice, without cause and without explanation. He stated that the manner of its execution caused the respondent much heartache and embarrassment flowing from her loss of status and credibility within the small community. After discussing the Supreme Court decision in *Wallace v. United Grain*

Growers Ltd., [1997] 3 S.C.R. 701, and the effect of bad faith conduct by an employer, the adjudicator held that the applicant was to pay the respondent twelve months' salary, or \$20,400, in lieu of notice.

3. Issues

[6] The applicant submits the following grounds to set aside the order of the adjudicator:

- a. The adjudicator failed to observe the principles procedural fairness by proceeding with the hearing without the participation of the applicant;
- b. The adjudicator exceeded his jurisdiction and failed to observe procedural fairness by conducting an ex parte investigation; and
- c. The adjudicator erred in assessing the amount of salary in lieu of notice by failing to consider that the respondent was to provide for the maintenance and repairs to her vehicle, thus reducing her net annual salary.

4. Absence of the Applicant at the Hearing

[7] The applicant submits that it was denied procedural fairness because Chief Skead was not present during the oral hearing to provide evidence on behalf of the band. The applicant submits that the adjudicator should have adjourned the hearing to a later date.

[8] There are two arguments in this submission. Firstly, the applicant contends that the chief, through the machinations of the band office employees, never received notice of the hearing. Secondly, the applicant submits that the prejudicial conduct of its operations manager, Linda Copenace, caused the adjudicator to decide against the band. Can the effects of those two arguments be logically or justly laid at the respondent's doorstep? Underlying the applicant's submissions is its contention that Chief Skead had always intended to participate in the hearing, and that his presence was essential to the just resolution of the matter before the adjudicator. But he absented himself.

Absence of Notice

[9] The applicant contends that Chief Skead was not aware of the hearing until he received the reasons for the decision approximately one week after the hearing. However, Irene Skead, the band office receptionist, states in her affidavit sworn on November 11, 1999, that she told the chief about the rescheduled hearing date shortly after arranging it by telephone with the adjudicator, (paragraph 7, et seq.). On cross-examination, she stated that Chief Skead had specifically requested that date. Upon receiving the adjudicator's confirmation letter dated July 30, 1999, Irene Skead says that she placed a copy of it on Chief Skead's desk, and marked the date in his desk calendar, (paragraphs 8 and 10). She also states that she brought the letter to Linda Copenace's attention.

- [10] Irene Skead says that she reminded chief Skead about the hearing several times, but that he never requested that the date be changed. She states that she again reminded him on the morning of hearing date, but that he told her that "it was not important", (paragraphs 9 and 10). Chief Skead denies that he was ever informed about the hearing date, and denies ever having said that the hearing was not important.
- [11] Chief Skead states in his affidavit that upon learning that the hearing had been rescheduled to August 31, 1999, which was the same day as a meeting with the Minister of Indian Affairs and Northern Development in Sioux Narrows, he "requested that a staff member in the Band office" reschedule the hearing date. He does not specifically state to whom he issued this request. Additionally, during cross-examination, counsel for the respondent effectively demonstrated that Chief Skead does not specifically remember having made this request. Because the hearing of this case in Court on May 2, 2001 lasted only half a day the transcript is slim but almost all of it is important. The facts about the adjudicator's hearing on August 31, 1999, recorded on pp. 56 through 71, are revealing.
- [12] Chief Skead never followed up on his request to reschedule the hearing, but rather assumed that his directive, if issued, was being carried out. When asked why he did not notice that the hearing date was still scheduled in his calendar, he noted that he had three calendars, and that they been removed from his office, but he could not recall when they had been taken. As to why he never received the letter which Irene Skead says that she left on his desk, Chief Skead stated that the usual practice was for Irene Skead to bring letters to the attention of the person in charge of a matter, regardless of who the addressee was. He assumed that Irene Skead brought the letter to the attention of Linda Copenace, and he assumed that Irene Skead would tell Linda Copenace about the change in dates. Linda Copenace stated, however, that the usual practice was for Irene Skead to direct the mail to the chief and to the council, and to nobody else.
- [13] Chief Skead's credibility is fragile. In his affidavit, Chief Skead states that many employment records, including those of the Dorothy Kakeway, were deliberately removed or destroyed by terminated employees. No evidence was tendered to demonstrate that terminated employees were guilty of such sabotage. Moreover, on cross-examination, it became apparent that Chief Skead had never actually seen these employment records, and had in fact assumed that they existed. He had no recollection of ever having seen Dorothy Kakeway's employment records. Moreover, he assumed that the band office staff were filing the appropriate documents into the appropriate employment records. Despite this lack of personal knowledge, he nonetheless swore in his affidavit that the documents were destroyed by terminated employees.

- [14] Paragraph 242(2)(b) of the Canada Labour Code states that an adjudicator shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and to make submissions. The applicant urges that paragraph 242(2)(b) amounts to the right to be notified of a hearing date, to the right to make oral submissions during a hearing, and to the right to an adjournment for a good reason. Those are all valid rights, which depend for enforcement to a large degree on a party's own conduct.
- [15] The applicant submits that when a party has not been notified of a hearing, the refusal to adjourn constitutes a violation of the audi alteram partem rule, and constitutes a denial of procedural fairness. To support its submission, the applicant submits *Roché Percée Coal Mines Union, Local 1623 v. Manalta Coal Ltd.* (1990), 84 Sask. R. 212, and specifically the following excerpt from *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 contained therein:

...the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

- [16] One can hardly quarrel with this statement of the law, however, *Roché Percée Mines Union, Local 1623*, supra is distinguishable. In *Roché Percée Mines Union, Local 1623*, supra, the uncontradicted evidence before the Court was that one of the hearing participants had never been advised of the date and place of the hearing. In the case at bar, the evidence demonstrates that the band, indeed, the chief, personally, was in fact notified of the hearing date.
- [17] The applicant cites *Jim Patrick Ltd. v. United Stone & Allied Products Workers of America* (1959), 21 D.L.R. (2d) 189 (Sask. C.A.) for the proposition that there is a denial of procedural fairness when a principal is not aware of a hearing and does not give instructions regarding the representations to be made. However, *Jim Patrick Ltd.*, supra, is also distinguishable because the two directors of the company involved in the adjudication swore that they knew nothing of a hearing before the Labour Relations Board. However, the evidence here demonstrates that several employees of the band office were aware of the hearing.
- [18] Finally, the applicant submits *Re Sreedhar v. Outlook Union Hospital Board et al.* (1972), 32 D.L.R. (3d) 491 (Sask. C.A.), for the proposition that the rules of procedural fairness are violated when a decision is rendered without permitting an affected party to attend and to give evidence. *Re Sreedhar*, supra is distinguishable because the hospital by-laws there provided the right to any member against whom charges were made to appear before the hospital board in his own defence. Here, paragraph 242(2)(b) of the Canada Labour Code states that it is for the adjudicator to determine the procedure to be followed during an

adjudication, and that the adjudicator must give the parties the opportunity to present evidence and to make submissions. In the case at bar, the adjudicator did in fact give the parties the opportunity to present evidence, before and after the hearing.

- [19] The applicant submits that procedural fairness is violated when a party instructs its agent to secure an adjournment and, because the instruction was not obeyed, a negative decision is rendered without the allowing the party to give evidence. Firstly, in this instance, there is doubt whether Chief Skead ever directed that an adjournment be sought. Secondly, evidence was provided to the adjudicator by Linda Copenace, the band's operations manager.
- [20] The internal incompetence of the band to prepare for the hearing does not amount to a lack of notice. Several band members knew about the hearing date, including Irene Skead and Linda Copenace. Whether Chief Skead actually requested that the date be changed is contested, however, it is clear that he never followed up to ensure that his directive was being carried out. This Court does not accept the applicant's contention that procedural fairness was violated because of the applicant's internal maladministration.

Actions of the Operations Manager

- [21] The applicant submits that at all material times, the band operations manager, Linda Copenace, was charged with coordinating the band's response to the complaint. The applicant submits that she failed to carry out her obligations to its prejudice. Specifically, she did not attend the hearing, and she mislead the adjudicator after the hearing. Because of her conduct, the applicant submits that the band was denied an opportunity to make representations to the adjudicator.
- [22] The applicant submits that Chief Skead was responsible for overseeing the functioning of the band office, and that Linda Copenace was charged with specific responsibilities such as handling the band's response to this complaint. Chief Skead stated that, in his opinion, his job was to ensure that "people are doing their jobs." However, Linda Copenace denies that it was her job to take care of employment matters. She contends that her job consisted mainly of dealing with the band's creditors, and that she never made management decisions, nor decisions regarding employment contracts.
- [23] Linda Copenace states that she knew about Dorothy Kakeway's complaint, and that she filed a response on behalf of the band. However, she states that she filed the response because the chief was not present in the band office to pick up the telephone at the time. She states that she never received specific instructions about what to do regarding the complaint. She states that she was never involved in setting hearing dates, nor was she informed about any change in dates. She never discussed the matter with the chief, and never discussed that she might have to give evidence at the hearing. She assumed that the chief was handling the matter directly.

- [24] Chief Skead stated that he assumed that Linda Copenace was doing her job which, in his opinion, included coordinating the band's response to the complaint. However, he never specifically informed her of this responsibility. In fact, he never discussed the matter with her, even if only to confirm that he would participate in the hearing. It is disingenuous for Chief Skead to state that Linda Copenace was not doing her job when it would appear that neither was he. By his own definition, his job was to ensure that Linda Copenace was doing her job. A short meeting would have confirmed that nothing was being done. In the absence of any discussion between the chief and Linda Copenace, the applicant cannot seriously allege that the blame lies entirely with her.

Evidence Submitted by the Applicant

- [25] Chief Skead now maintains that he always intended on attending the hearing because his presence was essential. He stated that "people expected him to be there for some reason", and notes that the correspondence from the adjudicator was addressed to him. However, he never met with anybody to discuss the hearing, and the letter to which he refers is one which he steadfastly denies ever having seen before the hearing. Finally, he routinely delegated this type of responsibility to others. His actions are not those of a person who intended to participate in this process, and his ex post facto contentions are not credible.
- [26] The applicant seeks to be excused from the actions of its operations manager, Linda Copenace, who had the ostensible authority to make submissions on behalf of the band. She was the person who initially submitted band's response; the notice of hearing specifically referred to her participation; Chief Skead assumed that she was taking care of the matter; and she responded to the adjudicator after the hearing. There was no outward manifestation that Linda Copenace did not have the authority to deal on behalf of the band.
- [27] As the band's representative, Linda Copenace discussed the matter with the adjudicator on September 1, 1999. Following this conversation, she approached Margaret Skead, the band's education director, and gathered relevant documents which she then forwarded to the adjudicator. It is misleading for the applicant to imply that Linda Copenace's actions were malicious because she did not consult with the chief regarding these submissions when the chief had never demonstrated an interest in the matter. That the band is not satisfied with her performance is an internal matter. The adjudicator provided the applicant the opportunity to submit evidence, which it did, and the adjudicator's decision demonstrates that he carefully analyzed these submissions.

Summary

- [28] The evidence demonstrates that the band was absent from the oral hearing by its own mismanagement. The failure of the band to make submissions at the hearing resulted from the inattention of its administrative staff, including the chief and the operations manager.

[29] Paragraph 242(2)(b) of the Canada Labour Code states that an adjudicator shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions. A party which fails to attend the hearing by its own mismanagement cannot later be heard to complain that it did not have an opportunity to present its case. The adjudicator reports that he had a telephone conversation with Linda Copenace regarding the existence of an employment contract, and that he received several written documents regarding the matter at hand. Given the band's behaviour in this case, and given that the adjudicator received evidence from both parties, this Court concludes that the rules of procedural fairness were not violated.

5. Ex parte investigation

[30] The applicant submits that the actions of the adjudicator after the hearing constitute an ex parte investigation which denied it the right to a fair hearing. The applicant submits *Kane v. Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105 to support its position. In *Kane*, supra, a university president who had imposed a suspension attended the appeal hearing as a member of the Board of Governors, and provided additional information to the board after the close of the hearing, although he did not participate in deliberations, or vote on the decision. The board affirmed the suspension. Mr. Justice Dickson stated at pages 1113:

5. It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act ex parte, an appellate authority must not hold private interviews with witnesses...or, a fortiori, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party must, in the words of Lord Denning in *Kanda v. Government of the Federation of Malaya*..."...know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them...Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other."

...

6. The court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so...In the case at bar, the Court cannot conclude that there was no possibility of prejudice as we have no knowledge of what evidence was, in fact, given by President Kenny following the dinner adjournment...We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

[31] The adjudicator considered that Linda Copenace was not being truthful when she spoke to him on September 1, 1999, and drew a negative inference against her. Linda Copenace states that she was misunderstood, and that she never told the adjudicator that she was sick on the day of the hearing, and that she never said that the meeting in Sioux Narrows had come up suddenly. Although this Court cannot agree with the applicant's characterization of the

adjudicator's actions as an ex parte investigation, there was nonetheless confusion during the telephone conversation on September 1, 1999. The adjudicator explained his actions at page 2 of the decision, and despite the fact that his actions were reasonable under the circumstances, he should have provided Linda Copenace the opportunity to respond before drawing an adverse inference. This having been said, the adjudicator reviewed only the documentary evidence in reaching his decision, and did not apply the inference against the applicant.

- [32] In *Canadian Cable Television Assn v. American College Sports Collective of Canada, Inc.* (C.A.), [1991] 3 F.C. 626 (C.A.), an application was brought to set aside a decision of the Copyright Board. After the close of the hearing, the dissenting board member obtained additional information, none of which was adverse to the applicant's position. The applicant argued that the principle of audi alteram partem had been violated by the receipt of evidence, to which it did not have the opportunity to respond, outside of the hearing process.
- [33] The Federal Court of Appeal dismissed the application, holding that the principle of audi alteram partem had not been violated. Even if the dissenting member's actions could be attached to the entire board, any error attributable to the board would be inconsequential, and should not be a basis for judicial reversal. The Court held that board acted fairly towards the applicant, and that there had to be a real possibility that the result was affected. Much of the information received by the dissenting member was repetitive of, or supplementary to, the hearings, and none of it had any influence on the decision of the majority. For the Court to find that the principle of audi alteram partem is violated, it must be shown that the board placed at least some reliance on the information. The Court held that an inconsequential error of law, or even a number of them, which could have no effect on the outcome do not require the Court to set aside a decision.
- [34] The Federal Court of Appeal reviewed *Kane v. Board of Governors (University of British Columbia)*, supra, at page 648, and stated that the Court will not inquire whether the evidence did work to the prejudice of one of the parties when it might have done so. Put another way, the Court will inquire whether the evidence might have worked to the prejudice of one of the parties. A showing either of actual prejudice, or of the possibility of prejudice, is sufficient to constitute a violation of audi alteram partem.
- [35] At page 650, the Federal Court of Appeal stated:
- [39] The largest factor, however, militating against the applicant's argument is that there is not a shred of evidence that any of the information received by Latraverse had any influence whatsoever on the Board's decision, that is to say, on the decision of the Board majority. Two of the Board majority appear to have been aware that he had obtained some additional information, but not of its content. There is not a single reference in the Board's decision, direct or indirect, to any extra-hearing evidence. Latraverse simply was off on a frolic of his own, which seems not to have impinged at all on the minds of the majority.

- [40] Not only is there no case law which holds that the separate activities of a dissenting Board member can, without more, taint the deliberations of the majority, but I believe the Canadian Pacific case in this Court stands for the proposition that an applicant must show that the Board "placed at least some reliance on the information" in question (at page 757). Here there is no evidence at all of such reliance. Indeed, quite the contrary.
- [41] If a final word needs to be said, let it be that an inconsequential error of law, or even a number of them, which could have no effect on the outcome do not require this Court to set aside a decision under paragraph 28(1)(b) of the Federal Court Act. In *Schaaf v. Minister of Employment and Immigration*, [1984] 2 F.C. 334, at page 342, Hugessen J.A., after setting out the text of subsection 28(1), commented as follows:

In my view, nothing in the words used makes them other than attributive of jurisdiction. They create the power in the Court to set aside decisions which offend in one of the stated ways but do not impose a duty to do so in every case.

This appears also, I would suggest, from the wording of section 52, which describes the dispositions which are open to the Court on a section 28 application. The opening words are: "The Court of Appeal may" They are clearly permissive and nowhere is there a suggestion that the Court must act whenever it finds an error of law.

This is not to say that the Court is entitled to decline to exercise the jurisdiction which is given to it by sections 28 and 52, but simply that there is nothing in the language of the statute obliging the Court to grant the remedy sought where it is inappropriate to do so. While it can no doubt be argued that the statute creates certain rights for the litigant, it does so by granting powers to the Court and the latter must remain the master of whether or not they are to be exercised in any particular case.

In my view, the Board made no error of law by infringing the principle of *audi alteram partem* in this case, but if, hypothetically, the actions of Latraverse could somehow be attached to the whole of the Board, I think any error attributable to the Board would be inconsequential, a mere technical breach, and should not be a basis for judicial reversal. The authorities have all required a real possibility that the result was affected.

- [42] As it was put by Dickson J. (as he then was) in *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at page 631:
8. In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and with fairness.

I have no doubt that in the case at bar the Board acted fairly towards the applicant.

[36] Rudolph Hans Schaaf v. M.E.I., [1984] 2 F.C. 334 (C.A.), which was cited by the Federal Court of Appeal in Canadian Cable Television Assn, supra, concerned an application to set aside a deportation order. After informing the applicant that he would have an opportunity to present evidence and to make submissions, the adjudicator refused to accept the applicant's admission of the allegation against him, and made the deportation order without giving him the opportunity to present evidence, or to make submissions. The applicant alleged that the adjudicator erred in law because he failed to follow the procedural steps established by the legislation. The issue before the Federal Court of Appeal was whether the Court, having found an error of law, is obliged to set aside the decision even though the error was inconsequential, and the decision would necessarily have been the same if the error had not occurred. The Court dismissed the application. Mr. Justice Hugessen, with Mr. Justice Mahoney concurring, held that the adjudicator erred in law, but that the errors did not have any effect upon the outcome of the inquiry. The Court held that nothing in the words used in subsection 28(1) of the Federal Court Act makes them other than attributive of jurisdiction. They create in the Court the power to set aside decisions, but do not impose a duty to do so in every case. While the statute creates certain rights for the litigant, it does so by granting powers to the Court, and the Court remains the master of whether or not the created rights are to be exercised in any particular case.

[37] After discussing the facts of the case, Hugessen J. states at page 341:

It is, in my opinion, clear beyond dispute, however, that these errors could not and did not have any effect upon the outcome of the inquiry. In the light of the admission made by his counsel and confirmed by Mr. Schaaf himself, there is simply no evidence and no submission which human ingenuity could conceive that would cause the Adjudicator to render a decision different from the one he, in fact, rendered.

Subsection 28(1) of the Federal Court Act gives to this Court its jurisdiction to review and set aside decisions such as the one here under study.

...

In my view, nothing in the words used makes them other than attributive of jurisdiction. They create the power in the Court to set aside decisions which offend in one of the stated ways but do not impose a duty to do so in every case.

This appears also, I would suggest, from the wording of section 52, which describes the dispositions which are open to the Court on a section 28 application. The opening words are: "The Court of Appeal may..." They are clearly permissive and nowhere is there a suggestion that the Court must act whenever it finds an error of law.

This is not to say that the Court is entitled to decline to exercise the jurisdiction which is given to it by sections 28 and 52, but simply that there is nothing in the language of the statute obliging the Court to grant the remedy sought where it is inappropriate to do so. While it can no doubt be argued that the statute creates certain rights for the litigant, it does so by granting powers to the Court and the latter must remain the master of whether or not they are to be exercised in any particular case.

Any other view would, it seems to me, lead to absurdities which could not have been in the contemplation of the Legislature. This case provides a good example: I have characterised as an error in law the Adjudicator's view that Mr. Schaaf's admission of the facts alleged against him was not evidence which he was entitled to take into account. If this had been the only error and if the Adjudicator, after hearing the testimony offered by the Case Presenting Officer, had, in compliance with sections 32 and 34 of the Regulations, given an opportunity to Mr. Schaaf and his counsel to lead evidence and make submissions, it could not seriously be argued that the decision would have to be set aside because of such error. The situation does not change, in my opinion, because other errors equally inconsequential are added to the first. Individually and cumulatively they can have had no effect upon the outcome of the inquiry. In the language of paragraph 28(1)(b), they are not errors committed "in making" the decision.

...

In my view, the same considerations which have led the courts to hold these remedies to be discretionary apply with equal force to the recourse under section 28 of the Federal Court Act. A proper exercise of that discretion in the present case must lead to a refusal of the remedy sought on the ground that the error invoked is a simple procedural irregularity of no consequence.

[38] In *Popov v. M.E.I.* (1994), 75 F.T.R. 93 (T.D.), after discussing *Schaaf*, *supra*, and *Canadian Cable Television Assoc.*, *supra*, the Madam Justice Reed stated at page 96:

[22] The Federal Court of Appeal has applied *Schaaf* not only in cases of procedural irregularity but also to cases involving an error of law on a substantive point. For example, in *Ramirez v. Minister of Employment and Immigration*, [1992] 2 F.C. 306, *MacGuigan J.A.* held at 323 - 4, that:

From this passage it is unclear what the legal test was applied by the Refugee Division in determining that the appellant was an accomplice...[T]he reference is so general and the standard applied so elusive that I believe it must be said that the Refugee Division has erred in law, and its decision must be set aside and the matter remitted for redetermination unless, on the basis of the correct approach, no properly instructed tribunal could have come to a different conclusion. ...

- [39] In *Samhat v. M.E.I.* (1994), 80 F.T.R. 315 (T.D.), an application was brought for judicial review of a decision made by a panel of the Convention Refugee Determination Division. Madam Justice Simpson allowed the application, despite the panel's having committed reviewable errors. Citing *Sorobey v. Canada* (Public Service Commission Appeal Board), [1987] 1 F.C. 219 (C.A.), and *Canadian Cable Television Assoc.*, *supra*, she holds at page 318:
- [16] However, the question is not whether there was an error but whether the error is material or consequential. Put another way, the question is whether I am satisfied that, absent the error, the Board's decision would nevertheless, have been the same.
- [40] In *Dubé v. Lepage* (1997), 3 Admin. L.R. (3d) 99 (F.C.T.D.), Mr. Justice Teitelbaum stated at page 113:
- [45] In my opinion, therefore, the Director erred in his interpretation of paragraph 7(3)(e) of the Act, when he wrote that "the division will be refused only in rare circumstances. ...". However, this is a rather modest error and could have no effect on the result. I conclude, therefore, that, notwithstanding the error in law, judicial review is unwarranted in the case at bar.
- [41] After discussing the principle laid down in *Canadian Cable Television Assn*, *supra*, he continues at page 114:
- [46] This Court has consistently applied the principle cited above, that an inconsequential error of law that could have no effect on the outcome does not require the Court to set aside a decision...Reed J. also noted at p. 248 of *Popov* that this principle is applicable "not only in cases of procedural irregularity but also to cases involving an error of law on a substantive point."
- [47] In my opinion, the Director's error in law is an example of an inconsequential error that could have no effect on the outcome. The Director wrote in his decision that "I am not satisfied that the division is unjust owing to the financial repercussions on Mr. Dubé." In other words, notwithstanding the fact that the Director alluded to rare circumstances, the decision is based on the issue of whether or not the division was unjust. ...
- [42] Finally, in *Nooshinravan v. M.C.I.*, 2001 FCT 598, [2001] F.C.J. No. 909 (QL), Mr. Justice Blanchard states:
- [11] The applicant alleges that the visa officer breached procedural fairness by continuing to interview the applicant in the elevator after the conclusion of the official interview. The applicant states the following in his affidavit dated January 15, 2000:

I then left and ran into the visa officer in the elevator. There was another person in the elevator and the visa officer asked him to ask me about what is "wood carving". I answered that it is using hands and machine to make design in wood products.

- [43] After discussing *Canadian Cable Television Association*, *supra*, he continues:

- [12] In my view, the same reasoning should be applied in the case at bar. A conversation on an elevator does not amount to a breach of procedural fairness unless the applicant can demonstrate that the conversation was in fact a continuation of the interview and had an adverse effect on the Visa Officer's decision. The applicant has not shown that the Visa Officer relied on the information allegedly obtained in the elevator, nor that it had any influence over the decision of the Visa Officer, and therefore this alleged incident is inconsequential.
- [44] After having reviewed the adjudicator's reasons in their entirety, this Court finds that the foregoing jurisprudence applies to the case at bar. The adjudicator mistakenly did not allow Linda Copenace to respond to his assessment of their conversation. However, in coming to his conclusions, the adjudicator merely reviews the documents which were submitted by Linda Copenace, and does not apply the inference which he draws against her. That he never spoke with her again is merely a technical error of law which would not have changed the outcome of the hearing. As stated in *Canadian Cable Television Assoc.*, supra, there was no real possibility that the result was affected. Therefore, this Court declines to interfere on this ground.

6. Amount of the Award

- [45] Finally, the applicant submits that the decision of the adjudicator is patently unreasonable because he failed to deduct expenses which would have reduced the net amount realized by the respondent had her employment services been rendered over this period. The applicant submits that the adjudicator failed to consider that it was at all times a condition of the respondent's employment that she provide an appropriate vehicle, and that all costs of licencing, insurance, financing, oil, gasoline, maintenance, cleaning and repair be paid by Ms. Kakeway out of the salary she received from the band.
- [46] The respondent submits that an adjudicator acting under section 242 of the Canada Labour Code is given a broad power to fashion a remedy in the event of an unjust dismissal. This Court agrees with the respondent. The very strong privative clause in section 243 of the Canada Labour Code states that the decision of an adjudicator acting under section 242 of the Canada Labour Code is final and not subject to any review:

243 Decisions not to be reviewed by court

- (1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.

No review by certiorari, etc.

- (2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.

[47] It is well-established that the standard of review for interfering with the damage award of an adjudicator under section 243 of the Canada Labour Code is patent unreasonableness. This standard has been confirmed recently in several decisions of this Court, including: *Fraser v. Bank of Nova Scotia* (2000), 186 F.T.R. 225 (T.D.), *Gauthier v. Bank of Canada* (2000), 191 F.T.R. 219 (T.D.), *Roe v. Rogers Cablesystems Ltd.* (2000), 4 C.C.E.L. (3d) 170 (F.C.T.D.), and *Charles v. Lac La Ronge Indian Band* (2000), 192 F.T.R. 100 (T.D.).

[48] The adjudicator adverted to the respondent's conditions of employment at page 7 of the decision:

It was at all times a condition of her employment that she provide an appropriate vehicle and that all costs of licensing, insurance, financing, oil, gasoline, maintenance, cleaning and repair be paid by Mrs. Kakeway out of the salary she received from the Band.

[49] Given that the adjudicator reviewed the details of the applicant's employment contract, and determined that so-called Wallace factors existed in this case, this Court does not find that the award of twelve months salary in lieu of notice for an employee of 17 years to be patently unreasonable. In fact, the award seems to be quite reasonable, and this Court declines to interfere with it.

7. Conclusion

[50] This application will be dismissed. Party-and-Party costs are awarded to and in favour of the respondent, Kakeway, and are to be assessed, or agreed by the parties, on the high side of Column IV in Tariff B in the rules of this Court.

Judge

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Prepared on 29 October 2026 · Esheria