Docket No.: CA 159567
Date: 20000804

NOVA SCOTIA COURT OF APPEAL

[Cite as: Sobeys v. Mills, 2000 NSCA 91]

Freeman, Flinn, Cromwell, JJ.A.

BETWEEN:

TREVOR MILLS

Appellant

- and -

SOBEYS INCORPORATED

Respondent

REASONS FOR JUDGMENT

Counsel:	Appellant in person M. Ross Langley for the respondent
Appeal Heard:	May 24, 2000
Judgment Delivered:	August 4, 2000
THE COURT:	The appeal is dismissed with costs fixed at $1,000.00 plus disbursements as per reasons for judgment of Flinn, J.A.; Freeman and Cromwell, JJ.A. concurring.

Flinn, J.A.:

[1] The appellant filed a complaint with the Labour Standards Board of Nova Scotia against his former employer, the respondent. The complaint, containing various counts, arose out of the termination of the appellant's employment.

[2] The Director of Labour Standards is required under s. 21(1) of the **Labour Standards Code**, R.S., c. 246 (the **Code**) to inquire into the complaint and attempt to effect a settlement.

[3] The Director wrote a letter to the appellant advising the appellant of his intention not to proceed further with the appellant's complaint against the respondent, that he has exhausted all avenues of obtaining a settlement, and advised that the sections of the **Code**, of which the appellant had been complaining against the respondent, had been complied with.

[4] The appellant appealed the Director's decision to the Labour Standards Tribunal. The Tribunal dismissed the appellant's appeal, and the appellant now appeals to this court.

[5] The facts surrounding the appellant's employment with the respondent and the termination therefrom are found by the Tribunal to be as follows:

> 3. The Complainant began his employment with the Respondent in November 1984. He worked on a part-time basis, receiving a variety of hours per week on an as needed basis. The Complainant's employment ended with the Respondent in December 1996.

4. In May of 1986, the Complainant transferred to the Respondent's produce department. He was promised more hours in the produce department but unfortunately did not receive the promised hours. As a result, the Complainant requested a leave of absence in 1986 to go work for another company. The Complainant was not given a leave of absence from Sobeys' officials in 1986 and therefore resigned his employment with the Respondent. He was paid all appropriate payments upon his termination and was given his Record of Employment indicating he quit his employment with the Respondent.

5. In May 1987, the Complainant received a phone call from the Respondent's store manager inquiring whether the Complainant would return to work with the Respondent. The Complainant agreed to return to work. The Complainant maintained employment with the Respondent from May 1987 until December 1996 on a "part-time" basis with regular hours. While there were occasions where tension did exist between the Complainant and the Respondent, all witnesses described the Complainant as a hard working and diligent employee who was valued by the Respondent.

6. On December 17, 1996, the Complainant arrived for work around 7:00 a.m. At approximately 7:20 a.m. the Complainant saw on a wall of the Respondent's premises a written phrase "Trevor blows goats". The Complainant naturally became angry about the incident and asked the store manager to retain a handwriting expert to determine who wrote the derogatory statement. The store manager indicated that he would investigate the matter.

7. It is at this point where the facts become disputed between the parties. The Complainant contends that after a heated discussion, the store manager informed him that if he left the store "the door would swing only one way". The Complainant interpreted this to mean he was fired. The Complainant then gave his keys and markers to the store manager.

8. The Respondent, through its store manager, Mr. Rideout, indicated the Complainant informed him he had one week to find the person who wrote the derogatory comments and then left the store after handing over his keys, name tag, apron and case cutter. This version of events was supported by the evidence of Randy MacKenzie, a former Sobeys employee who was present during the heated discussion.

9. After the Complainant left, Mr. Rideout indicated he tried to contact the Complainant to encourage him to return to work. The Complainant never attempted to contact the Respondent in an effort to return to work. A termination letter was sent out registered mail in January of 1997. The Complainant indicated that he received a copy of the termination letter.

[6] I will review the appellant's complaints and the manner in which the Tribunal dealt with them. The appellant's complaints related to four alleged breaches of the **Code**:

1. Section 32 of the **Code** deals with the requirement of an employer to give the employee a non-broken vacation of at least two weeks where the employee works for an employer during a continuous 12 month period. The appellant complained that the respondent breached s. 32 of the **Code** by terminating the appellant's employment while he was on vacation. The appellant's position is that when he left the respondent's premises on December 17, 1996 that he was entitled, at that time, to two weeks vacation; and that the respondent should have assumed that he was on vacation and his employment should not have been terminated at that time.

2. Section 57 of the **Code** provides that an employer shall not pay a female employee at a rate of wages less than the rate of wages paid to a male employee, or a male employee at a rate of wages less than the rate of wages paid to a female employee employed for substantially the same work performed in the same establishment, the performance of which requires substantially equal skill, effort and responsibility. The appellant complained that he was not being paid at a level commensurate with employees doing a similar job.

3. Section 71 and 72 of the **Code** deal with termination of employment. The appellant complained that his employment was terminated without notice and without cause. He also complains that the respondent should have granted him a leave of absence between May 1986 and May 1987, and, as a result, he should have been considered as an employee with ten years of service.

4. The appellant also made a complaint that the employer violated s. 45 of the **Code** dealing with posting of schedules for work. The appellant has, since, withdrawn that particular complaint.

[7] As to the complaint under s. 32 of the **Code**, the Tribunal said the following:

> 11. The Complainant argued that on December 17, 1996, he went on vacation when he left the store and was fired while he was on vacation. Therefore, he argues he should not have been terminated while he was on vacation.
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> 12. The Complainant accepts he was paid all appropriate amounts of vacation due to him in January 1997.
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> 13. The Labour Standards Tribunal does not accept the Complainant's argument. He did not follow appropriate procedures to request a vacation nor did he indicate on December 17, 1996 or any time thereafter he was on vacation. As the Complainant was paid for all outstanding vacation time in January 1997, the Section 32 complaint is dismissed.

[8] As to the appellant's complaint under s. 57 of the **Code** the Tribunal said the following:

> 14. The Complainant argued he was not paid at a level commensurate with employees doing a similar job. The Complainant did not produce any evidence of any part-time employee being paid more than him doing a similar job.
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> 15. Among other things, Section 57(2)(a) and Section 57(2)(b) of the LABOUR STANDARDS CODE allows an employer to pay employees a differential pay level based on a merit system and a seniority system within that company. The Tribunal accepts that any differential in pay between employees at Sobeys is based on a company wide merit and seniority system of promoting employees. The Tribunal heard extensive evidence regarding this system and accepts that this "merit" and "seniority" system is an appropriate and acceptable system based on the length of employment an employee has with a company as well as the type of service that employee provided to Sobeys. In short, it does not violate the requirements of Section 57.
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> 16. As the Complainant was paid the highest amount given to a part-time employee at Sobeys, the Labour Standards Tribunal finds that the Section 57 complaint is dismissed as a result of no evidence being offered to demonstrate a violation of Section 57.

[9] As to the appellant's complaint under ss. 71 and 72 of the **Code** the Tribunal

said the following:

> 17. The key determination under Sections 71 and 72 is whether the Complainant was "terminated" or "quit" in December of 1996. If the Complainant was terminated, he would be permitted to a notice pursuant to Section 72(l)(c) of the LABOUR STANDARDS CODE. Obviously if the Complainant quit, he would not be entitled to any notice.
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> 18. The Complainant argued that he was terminated by the Respondent when he was told the "door swings one way" on December 17, 1996 by Mr. Rideout, the store manager. The Complainant further argued he was constructively dismissed as a result of working in an environment where he was sexually harassed. Sexual harassment stems from the statement on the wall of the Respondent's store.
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> 19. Unfortunately, the Complainant gave no evidence of what perceptions, if any, he had following the reading of the derogatory comments on the wall. Instead, the Complainant waited until final argument to bring up the issue thereby not allowing himself to be cross-examined by the Respondent's counsel on the issue. As a result, the Tribunal is not in a position to determine if the derogatory comments created an environment of sexual harassment thereby creating an environment where the Complainant was constructively dismissed. We simply have no sworn evidence subject to cross-examination to make a determination of this matter. The Tribunal was also concerned with the "tactical" manner in which the subject was brought forward.
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> 20. With respect to whether the Complainant was terminated or quit, the Tribunal concludes the Complainant quit on December 17, 1996. In reviewing the actions of the Complainant, it is clear the Complainant walked out of the Respondent's store while scheduled for work on December 17, 1996. It is equally clear, the Complainant turned in his "tools of the trade" and never made any attempt to contact the Respondent following the December 17, 1996 incident, in spite of the fact he was scheduled for a number of shifts following December 17, 1996.
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> 21. Overall then, the Tribunal is satisfied the actions of Mr. Mills clearly form an intention on the part of the Complainant to quit his employment. His actions further create a manifestation of an intention to quit by not returning to work and by not contacting the Respondent to indicate that he would return to work on a specific date or under certain conditions. Quite simply, the Complainant left work and never informed the employer of when, if at all, he would be returning. This is clearly a classical "quit" situation as evident by other decisions of this Tribunal: LEBLANC v. MILLER (L.S.T. No. 1153, December 12, 1994).
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> 22. Therefore the Labour Standards Tribunal dismisses the Section 71 and Section 72 complaint.

[10] The appellant raises several grounds of appeal which I will summarize as follows:

1. He submits that the Tribunal erred in law in deciding that he had quit his job in 1986, and again in 1996; in deciding that he had not been constructively dismissed on December 17, 1996; in deciding that he was not on vacation on December 17, 1996; and in deciding that the employer was justified in paying him a lesser rate than female employees doing a similar job on the basis that the female employees were full-time employees and that the appellant was a part-time employee.

2. He further submits that the Tribunal failed to follow the principles of natural justice by denying him the right to have certain witnesses subpoenaed; by refusing to admit into evidence sworn statements of former employees of the respondent; by refusing to allow him re-direct examination of himself as a witness; by refusing to consider certain human rights case law with respect to s. 57 of the **Code**; and by imposing limitations on his final argument.

[11] An appeal to this court, from a decision of the Tribunal, is limited to a question of law or jurisdiction as set out in s. 20(2) of the **Code**:

> **20(2)** Any party to an order or decision of the Tribunal may, within 30 days of the mailing of the order or decision, appeal to the Nova Scotia Court of Appeal on a question of law or jurisdiction.

[12] In considering the appellant's grounds of appeal I refer, firstly, to two decisions of this court in appeals from decisions of the Tribunal. In **Crossman v.**

Labour Standards Tribunal (N.S.) (1991), 109 N.S.R. (2d) 274 p. 277 Chief Justice Clarke said the following with respect to s. 20(2) of the **Code**:

> Thus the two grounds for appeal are questions of law or jurisdiction. There can be no doubt that the subject matter of the two complaints fell within the jurisdiction of the Tribunal as provided by the **Act**.
>
> That leaves to be decided whether the appeal raises a question of law. On that issue it is necessary again to refer to the **Act** to determine the direction given by the legislature. Section 20(1) states:
>
> "If in any proceeding before the Tribunal a question arises under this Act as to whether
>
> (a) a person is an employer or employee;
>
> (b) an employer or other person is doing or has done anything prohibited by this Act,
>
> the Tribunal shall decide the question and the decision or order of the Tribunal is final and conclusive and not open to question or review except as provided by sub-section (2)."
>
> This means first, that an appeal is not a new trial. It is not for this Court to hear the evidence all over again and render a fresh decision as though the Tribunal never existed or had no jurisdiction. It means second, that the decision of the Tribunal on whether CanStone has "done anything prohibited by (the) Act" is a "question" to be decided by the Tribunal whose decision is "final and conclusive" unless by subsection (2) it has committed an error on a question of law.
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> In this instance, the issues are essentially questions of fact to be determined by the Tribunal. In such a situation the law is settled that where the enabling legislation gives the Tribunal the authority to make final and conclusive decisions of fact, the issue on appeal only becomes a question of law where there is no evidence before the tribunal which can support the findings it has made.

[13] Further in **Halifax Developments Ltd. v. Sutton** (1995), 142 N.S.R. (2d) 264, Justice Freeman of this court said the following concerning a review by this court of a decision of the Tribunal involving the determination of whether an employee was laid off or discharged at p. 267:

> The determination of what constitutes a lay-off or a discharge involves interpretation of the **Labour Standards Code** and jurisprudence and is a question of law to which the standard of correctness applies. Whether a particular set of circumstances is a lay-off or a discharge is a question of fact within the core jurisdiction of the Tribunal. The standard of review of factual findings by the

> Tribunal involves a high degree of deference and Tribunal decisions on issues of fact will be interfered with only when they are patently unreasonable.

[14] I will deal, firstly, with the submission of the appellant that the Tribunal erred in determining that he quit his job in 1996, and that he was not discharged, suspended or laid off, without notice, so as to bring into play ss. 71 and 72 of the **Code**.

[15] Whether the appellant quit his job, or whether he was discharged, suspended or laid off by the respondent without notice is a matter which is entirely within the jurisdiction of the Tribunal to decide. The Tribunal, in my opinion, made no error in law in its consideration of this question. Further, this court will only interfere with the Tribunal's factual determinations if they are patently unreasonable. The findings of the Tribunal that the appellant's departure from his job in December 1996 was a "classic quit situation" is not patently unreasonable. In fact, it is supported by the evidence which was before the Tribunal. I would not interfere with the Tribunal's conclusion.

[16] Since it has been determined that the appellant quit his job in 1996, it is irrelevant whether the appellant was an employee for "ten years or more" so as to bring into play s. 7l of the **Code**. Therefore, consideration of whether the appellant should have been a given a leave of absence in 1986 is also irrelevant. The appellant was not discharged or suspended within the meaning of s. 71 of the **Code**.

[17] On the issue of constructive dismissal, the appellant alleges that the respondent failed to take adequate steps to address the problem of the disparaging

remarks written about the appellant on the wall in the store. That failure, the appellant alleges, constitutes a breach of the respondent's sexual harassment policy and constitutes constructive dismissal.

[18] In **Sheppard v. Sobeys Inc.** (1997),149 Nfld. & P.E.I.R. 328 (Nfld. C.A.) the court was dealing with a claim for constructive dismissal which was alleged to have arisen from harassment and abuse at the hands of other employees. O'Neill, J.A. on behalf of the court said the following at p. 334:

> As the term constructive dismissal suggests, there is no actual dismissal by the employer. However, the employee must establish that there has been a variation of a fundamental term of the contractual relationship between the employer and the employee of such severity and effect, which, in the absence of the agreement of the employee, would amount to a repudiation of the contract. The employee is thereupon entitled to treat the contract as at an end. Clearly, abusive treatment, which would include harassment of an employee by co-employees, and particularly where these co-employees occupy senior or supervisory positions to the employee, can be construed as a variation of a fundamental term of a contract of employment such as to constitute a repudiation of the contract by the employer.

See also **Farbour v. Royal Trust**, [1997] l S.C.R. 846 per Gonthier, J. at p. 863 and **Stacey v. Electrolux Canada** (1987), 76 N.S.R. (2d) 91.

[19] The respondent's sexual harassment policy makes it clear that human rights legislation prohibits sexual harassment and discrimination on the basis of sex and "Sobeys Inc. complies with such legislation and expects all employees to comply as well." The policy also provides that "Sobeys Inc. will not condone situations in which a course of conduct or comment creates a workplace environment which is intimidating, hostile or offensive to an individual's sexual dignity . . . "

[20] As to reporting an incident the policy provides as follows:

> Employees who are sexually harassed in any way are encouraged to report the incident(s) to the attention of their immediate supervisor or unit manager. If an employee is not comfortable discussing the situation with these people, they may contact their Personnel Supervisor or the Division Vice President of Human Resources at Sobeys Inc. Head Office in Stellarton, Nova Scotia.

[21] I reject the appellant's assertion that he was constructively dismissed, even if it could be said that the response of management at the store, to the disparaging remarks about the appellant on the wall, was not adequate. There are two reasons why the appellant's assertion in this regard has no merit. Firstly, management's response - even if inadequate - is not so fundamental to the employment relationship so as to demonstrate an intention no longer to be bound by the employment contract. Secondly, the appellant had the option under the sexual harassment policy to discuss the matter with the Personnel Supervisor or the Division Vice-President of Human Resources, which he failed to do.

[22] I would not interfere with the Tribunal's conclusion that the appellant was not constructively dismissed, although I arrived at that same conclusion for different reasons.

[23] With respect to the appellant's complaint under s. 32 of the **Code**, related to vacation, the Tribunal made no reviewable error in upholding the Director's dismissal of this complaint. Further, because of the finding that the appellant quit his job, and in view

of his acknowledgment that he was paid for all outstanding vacation time in January 1997, this issue is irrelevant.

[24] With respect to the appellant's complaint under s. 57 of the **Code**, the Tribunal made no reviewable error in its conclusion that the differential in pay (of which the appellant was complaining) arose from "an appropriate and acceptable system based on the length of employment an employee has with a company as well as the type of service that employee provided. In short, it does not violate the requirements of s. 57."

[25] I will now deal with the issues which the appellant raises under the heading "denial of natural justice."

[26] The first issue which the appellant raises is that the majority of witnesses which he subpoenaed were excused from testifying, or their subpoenas were struck. These witnesses, according to the appellant, were to have provided evidence in two areas. Firstly, to support his complaint under s. 57 of the **Code** as to the differential in rates of pay; and, secondly, to support his position that the respondent did not fully investigate the matter of the disparaging remarks which were written on the wall in the store.

[27] It is clear from reviewing the record of this hearing that the witnesses which the appellant was not permitted to call were all witnesses who were to testify as to the comparison of rates of pay of full-time employees with the rates of pay of part-time employees. That comparison is not relevant to the appellant's complaint under s. 57 of the **Code**. Section 57 is not concerned with differentials in pay between full-time and part-time employees. Therefore, evidence about their respective rates of pay was not relevant.

[28] In my opinion the Tribunal made no error in law or jurisdiction in refusing to hear this testimony.

[29] There are three other issues which the appellant raises under the heading "denial of natural justice."

> 1. The Tribunal has broad discretionary power as to evidence which it may receive in dealing with a complaint under the **Code**. Section 17(8) of the **Code** permits the Tribunal to "receive and accept any evidence and information on oath, affidavit or otherwise as in its discretion it deems fit and proper, whether admissible as evidence in a court of law or not."
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> The appellant represented himself at the hearing before the Tribunal and indicated to the Tribunal that he had sworn statements from witnesses to assist him in proving his complaint. Without any inquiry as to the nature of

the sworn statements; i.e., who the witnesses were and, generally, what the statements contained, the chairman of the Tribunal refused to allow the appellant to introduce the statements. The appellant submitted three cases (**Mailman v. Baxter Foods Limited** decision #868 - **Sparks v. Jus-Mar Investments Limited** decision #1409 and **Bulmer v. Corporate Communications Limited** decision #1311) where the Tribunal has exercised its discretion and admitted similar evidence in the past.

2. After the appellant gave his evidence at the hearing, and after he was cross-examined, the following exchange took place:

> VICE-CHAIR Okay. Mr. Mills, you may go back to your seat?
> MR. MILLS Can I re-direct?
> VICE-CHAIR No, you can't re-direct yourself.
> MR. MILLS Okay.

There is no indication as to what subjects were to be covered by the appellant's re-direct examination; however, it is clear that he was refused the right to re-direct.

3. The appellant complains that he was "cut off" by the Tribunal during his final argument, and was not given the appropriate time to complete his submission.

[30] These submissions must be considered, firstly, in conjunction with the relief which the appellant is seeking on this appeal. The relief which the appellant requests on this appeal is that the decision of the Tribunal be set aside, that he be reinstated in his job, and that he receive retroactive pay back to December 17, 1996. He also seeks other monetary relief in the form of an increased hourly wage, interest on all retroactive pay, Canada pension plan and Sobeys pension plan benefits, and costs.

[31] These submissions of the appellant, even if valid, cannot form the basis of an order of this court that the appellant be reinstated in his job. That would involve a determination by this court that the Tribunal erred in law, or in jurisdiction, in concluding that the appellant quit his job. I have already concluded, earlier in these reasons, that the Tribunal made no such error in law, and these latter three submissions of the appellant do not persuade me to alter that opinion.

[32] In my opinion, in refusing to allow the appellant to introduce the sworn statements which he represented to the Tribunal he wished to present, without the Tribunal making any inquiry as to the nature of the statements, the Tribunal erred in law. Likewise, the Tribunal erred in law in refusing to allow the appellant re-direct examination of himself.

[33] What can, or should, this court do in the face of those errors in law?

[34] There is no suggestion in the **Judicature Act**, R.S.N.S. 1989, c. 240 or the **Nova Scotia Civil Procedure Rules** that this court must act whenever it finds an error. This court's authority is clearly permissive as opposed to mandatory. That does not mean that this court may decline to exercise its jurisdiction, but simply that the court is not mandated to grant a remedy where it is inappropriate to do. Where, for example, the court finds an error of law in the decision of a Board, Commission, or Tribunal, it is not obliged to set aside the decision where the error is inconsequential, and could not have any affect on the outcome of the hearing (see **Schaaf v. Minister of Employment and Immigration**, [1984] 3 W.W.R. 1 (Fed. C.A.) per Hugessen, J. at p. 8).

[35] I will examine the Tribunal's errors in this light.

[36] With respect to the refusal of the Tribunal to permit the appellant to conduct re-direct examination of himself, the appellant has not provided this court with any indication as to what subject matter would have been dealt with in that re-direct examination. Further, the appellant has not provided this court with any indication that there was a particular matter which he wished to raise in re-direct examination, which was important to his case, and which he was prevented from raising. Therefore, while the appellant clearly should have been permitted to conduct his re-direct examination, I am satisfied that there was no denial of natural justice, and that this error had no affect whatsoever on the outcome of the hearing before the Tribunal.

[37] With respect to the refusal of the Tribunal to permit the appellant to present the sworn statements which he represented were in his possession, those statements were not available on the hearing of the appeal, nor was there any indication as to what was contained in the statements. With the agreement of counsel for the respondent, the statements were provided to the court by the appellant following the hearing of the appeal.

[38] There were three statements, only one of which is a sworn statement. Troy Wood, who was employed by Sobeys on December 17, 1996 made a statement dated June 18, 1999 that at the time the appellant “walked off the job,” he (Mr. Wood) was never questioned about the “incident” by anyone in management or at head office. Further, that he was never told by anyone at Sobeys that if he saw the appellant, “after he walked out,” that he should tell the appellant to contact Sobeys. Troy Sandford made a statement dated June 18, 1999. Whether he was an employee of Sobeys is not disclosed. He states that the incident of the profanity written on the wall was never questioned by management after the appellant left, and that management took no action with respect to it. The third statement, a sworn statement, is from the appellant’s sister, Rhonda Mills, dated June 18, 1999. She states that no one from Sobeys contacted her before and after December 17, 1996 to relay any messages to her brother.

[39] The appellant submitted before the panel that these statements “back up” what he was saying; i.e., that the respondent did nothing to investigate the matter of the disparaging remarks written about him on the wall of the store.

[40] For the reasons which I have already set out in paragraphs 21 and 27 of these reasons for judgment, these statements could not possibly have affected the conclusion of the Tribunal, that the appellant quit his job. He was not dismissed, constructively or otherwise.

[41] Therefore, the failure of the Tribunal to permit the appellant to introduce these three statements does not warrant a rehearing.

[42] I will now deal with the appellant’s third complaint in this category, that he was “cut off” by the Tribunal and was not permitted the time to complete his argument. I have reviewed the transcript of this hearing. I have also considered the submissions which the appellant made on the hearing of this appeal. I am satisfied that the appellant made all of the points he wished to make to the Tribunal, and the Tribunal, clearly, appreciated the points which the appellant was making. In my opinion, there was no error on the part of the Tribunal, in the circumstances of this case, by requiring the appellant to complete his submissions within a certain time period; certainly not an error which warrants a new hearing.

[43] I will note one further matter. Although the appellant did not press the issue in his oral presentation, there is a submission in his factum that the Tribunal was biased. Having reviewed the entire record of this proceeding, I conclude that there is no basis whatsoever to this allegation. No right minded person, reviewing the entire proceeding before the Tribunal, could reasonably perceive that the Tribunal was biased against the appellant.

[44] For all of the reasons herein set out I would dismiss the appellant's appeal. I would order the appellant to pay to the respondent its costs of this appeal which I would fix at $1,000.00 plus disbursements.

Flinn, J.A.

Concurred in:

Freeman, J.A.

Cromwell, J.A.