C.A. No. 131106

NOVA SCOTIA COURT OF APPEAL

Cite as: Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board), 1997 NSCA 29

Chipman, Matthews and Flinn, JJ.A.

BETWEEN:	)	
	)	
FUTURE INNS CANADA INC.	)	Ian Blue, Q.C. and
	)	Blair H. Mitchell
Appellant	)	for the Appellant
	)	
- and -	)	
	)	
LABOUR RELATIONS BOARD (NOVA SCOTIA); THE ATTORNEY GENERAL OF NOVA SCOTIA representing HER MAJESTY THE QUEEN in the right of the Province of Nova Scotia; DIRECTOR OF PUBLIC PROSECUTIONS; HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION, LOCAL 662; JEAN DEARMAN; GLORIA RAFUSE; CINDY MILLIGAN; LINDA RAFUSE; and PATRICIA HUBLEY	)	Louise Walsh Poirier for the Respondent, Labour Relations Board Gordon Forsyth for the Respondents Union and Jean Dearman, Gloria Rafuse, Cindy Milligan, Linda Rafuse and Patricia Hubley
Respondents	)	
	)	
	)	Appeal Heard: February 5, 1997
	)	
	)	Judgment Delivered: February 26, 1997

THE COURT: The appeal is allowed with costs; the order of the Chambers judge is set aside and the matter is remitted to the Board for a rehearing as per reasons for judgment of Chipman, J.A.; Matthews and Flinn, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal by Future Inns Canada Inc. from a judgment in the Supreme Court dismissing **certiorari** applications to quash three orders of the Labour Relations

Board (Nova Scotia) ordering Future Inns to reinstate the individual respondents, to pay them compensation, and refusing to reconsider the first two orders. Other respondents are Hotel Employees & Restaurant Employees International Union, Local 662, (the Union); the Labour Relations Board (Nova Scotia), (the Board); The Attorney General of Nova Scotia and the Director of Public Prosecutions. The last two named respondents did not appear at the appeal.

Future Inns operates a 120 room hotel in Dartmouth, which has been in business since September, 1989. It offers no frills accommodation.

The hotel manager is Dorothy Lemire. Reporting to her are the head housekeeper, the assistant housekeeper, desk clerks and the maintenance man. There are about 20 housekeepers. Ms. Lemire is responsible for the discipline of the employees working under her.

Housekeepers start work at 8:00 a.m. and leave after cleaning the guest rooms for which they are responsible. This is usually between 2:30 p.m. and 4:00 p.m. On Saturdays their work commences at 9:00 a.m. and they leave when they finish. Each day nine housekeepers are scheduled, and each is expected to clean about 12 to 15 rooms.

Ms. Lemire normally works from 8:00 a.m. to 3:00 p.m., but is often called upon to return to the hotel to attend to various situations such as improperly cleaned rooms.

Ms. Lemire testified before the Board about the need for quality housekeeping in the hotel. She often checked rooms personally. If rooms were not properly cleaned, the housekeeper would be sent back, and in the case of repeated deficiencies, reprimands and ultimately dismissals followed.

On December 2, 1994, Ms. Lemire and the head housekeeper met with the housekeepers to emphasize the importance of proper cleaning of the rooms. On the following Monday, Ms. Lemire found that a room cleaned by the respondent, Gloria Rafuse, was not properly done. She suspended Ms. Rafuse for one week. She also posted a

notice warning that if rooms were not cleaned to the satisfaction of the manager and head housekeeper, a one week suspension could follow.

In February, 1995, Ms. Lemire was concerned about the quality of the housekeeping and its effect upon the hotel's business and reputation.

On Friday, February 10, 1995, Ms. Lemire had left work at 3:00 p.m. but returned to the hotel about 4:30 p.m. While she was at the front desk, a guest called to complain about no towels. Ms. Lemire took the towels to the guest and decided to check some other rooms. In her room check she found a pair of underpants under the bed in a room that Jean Dearman had cleaned. She also found bloody kleenex, dirty kleenex, candy wrappers and pieces of wool in rooms cleaned by Gloria Rafuse. She thereupon determined to fire Dearman and Gloria Rafuse. She advised her employers of this intention. She made arrangements with the hotel's accountant to make up the final pay for Dearman and Gloria Rafuse. She picked up the documents at the accountant's office and drove to Dearman's home in Dartmouth. She arrived at 6:00 p.m. She advised Dearman that she was being dismissed "due to neglect of duties". She went to Gloria Rafuse's home in Windsor Junction, but she was not at home.

On the following day, Saturday, February 11th, Ms. Lemire went to the hotel to deliver notice to Gloria Rafuse. They met in the housekeepers' room. Ms. Lemire told her she was dismissed. When asked why, she said it was because of "lack of duties". She advised Gloria Rafuse that she had personally checked her room. Gloria Rafuse then cleaned out her locker. She discussed the matter with the respondents Linda Rafuse, Patricia Hubley and Cindy Milligan. The four of them then walked upstairs, put their keys in the front desk, and walked out together. Ms. Lemire asked Linda Rafuse if she was working that day and was told that none of them was. Ms. Lemire said that she was then left with 54 rooms to clean on a Saturday and no housekeepers to clean them.

Ms. Lemire decided that Milligan, Hubley and Linda Rafuse had quit, and did not want them to return.

On the following Monday, Linda Rafuse, Hubley and Milligan arrived at the hotel and asked Lemire for their jobs back. Lemire refused, saying that anybody leaving her with 54 rooms did not deserve to have a job.

In the meantime other events occurred in late January and early February, 1995. The respondent Dearman had become concerned about Gloria Rafuse's one week suspension in December and the suspension of another housekeeper for a missing glass and an unlocked window in a room. Ms. Dearman's husband belonged to a union. He contacted Paul Burgwin, a representative of the respondent Union.

Paul Burgwin asked Ms. Dearman to get the housekeepers together for a meeting. In January, 1995, Dearman discussed forming a union with them. These discussions took place in an outside smoking area and at a nearby Tim Hortons and took place over a period of two weeks. A meeting was scheduled for Ms. Dearman's home on the evening of Wednesday, February 8, 1995, to which all the individual respondents were invited. A further meeting was arranged for Sunday, February 12th, to sign up union membership cards and collect dues.

On February 13, 1995, the Union, on behalf of the respondents Dearman, Gloria Rafuse and Cindy Milligan made a complaint of unfair labour practice to the Board on Form 16 under the **Act** against Future Inns. It alleged:

> **Nature of Complaint:** The individual complainant are all members of the Complainant Union. The Union has been organizing employees of the Respondent in connection with an application for certification pursuant to the **Trade Union Act of Nova Scotia** which was made on February 13, 1995. The individual complainants were dismissed from their employment on February 10 and 11, 1995, because of their support for the Union. The Respondent is refusing to employ the complainants because they are members of a trade union and have participated in the activities of a trade union. The Respondent is attempting to intimidate its employees to compel

> them to refrain from being a member of a trade union or participating in the activities of a trade union.

On February 15, 1995, the Union, on behalf of the respondents Linda Rafuse and Patricia Hubley, filed a complaint against Future Inns on Form 16 in the same terms.

The complaints were heard by a panel of the Board on April 26, June 27 and 28, 1995. The Union was represented by counsel. Future Inns was represented by Charles Henman, a lay person. The Board heard the testimony of Ms. Dearman, Linda Rafuse, Gloria Rafuse, Paul Burgwin and Ms. Lemire.

Following the hearing, the Board issued Order LRB 4367 on July 19th which dismissed the respondent Union's application for certification. The order then disposed of the complaints of unfair labour practices as follows:

> AND the Board having been satisfied that the acts of Unfair Labour Practice were committed pursuant to Section 53 of the **Trade Union Act**;
>
> . . .
>
> AND the Board does further order the Respondent to reinstate Jean Dearman, Gloria Rafuse, Cindy Milligan, Linda Rafuse and Patricia Hubley to their former positions and to pay to these individuals all compensation earned as if they had not been terminated by the Respondent.
>
> AND the Board retains jurisdiction in this matter should the parties be unable to reach agreement on the issue of compensation entitled to be received by these five employees.

On October 16, 1995, the Board issued an order reciting Order LRB 4267, that the Board had been reconvened for a hearing on the matter of compensation, was satisfied that none of the five former employees had been reinstated or compensated, and that Linda Rafuse, Gloria Rafuse and Patricia Hubley still sought reinstatement and compensation while Jean Dearman and Cindy Milligan no longer sought reinstatement, but compensation only. The order then required Future Inns to make compensation as follows:

Linda Rafuse	$ 9,465.92
Gloria Rafuse	$ 7,222.45

Patricia Hubley	$ 5,081.63
Jean Dearman	$ 3,537.09
Cindy Milligan	$ 4,326.63
TOTAL:	**$29,633.72**

The Board further made calculations of the pay periods for Linda Rafuse, Gloria Rafuse and Patricia Hubley in the event reinstatement did not occur on October 16, 1995.

By letter dated October 26, 1995, the interim Chief Executive Officer of the Board denied Future Inns leave to bring an application for reconsideration of Order LRB 4267.

Future Inns has not reinstated any of the employees. As a consequence of its failure to abide by the order of the Board, the Minister of Labour has given written consent to the prosecution of Future Inns under s. 86 of the **Act** for failure to comply with an order made under s. 57 thereof.

Future Inns brought applications to the Supreme Court for orders in the nature of **certiorari** to quash the orders of the Board. The applications were heard on June 3, 4 and 19, 1996, at which time evidence was adduced before the Chambers judge on behalf of Future Inns and the respondents.

By decision dated August 9, 1996, the Chambers judge dismissed the applications of Future Inns and concluded:

(a) The decisions of the Board were protected by the privative clause in paragraph 19(1) of the **Act**. They could only be reviewed on the standard of patent unreasonableness of the Board's decisions.

(b) It was not possible to determine from the order of the Board what subsection of s. 53 of the **Trade Union Act** the Board found was violated, giving rise to an unfair labour practice. On a review of the transcript and the evidence, the Chambers judge

concluded that there was some evidence on which the Board could find an unfair labour practice. The privative clause in the **Act** precluded the court from weighing the evidence and coming to its own conclusion on this issue. As there was evidence upon which the Board could find that Future Inns committed an unfair labour practice, the decision of the Board was not patently unreasonable.

(c) The Board had not breached the rules of natural justice in failing to advise Future Inns of its right to counsel even though there was no doubt that the Chair of the Board knew that Mr. Henman was "out of his depth".

(d) Evidence relating to a comment made by counsel for the respondent Union and to smiles or laughter on the part of some members of the Board did not raise a reasonable apprehension of bias.

(e) While it may have been preferable if the Board had given reasons for its decision, it was not obligated to do so, and thus did not act in a procedurally unfair manner.

Future Inns appeals to this Court, raising three principal issues - procedural fairness, reasonable apprehension of bias and failure to give reasons. As I have concluded that the Board's order must be quashed because it failed to give reasons, it is not necessary to deal with the other two issues.

In recent years, with the development of a multitude of tribunals with varying degrees of protection from judicial review, it has become fashionable for such tribunals to give reasons for their decisions. In many jurisdictions, the giving of reasons is now required by statute. In Nova Scotia, the Law Reform Commission has recommended that such legislation be enacted. See **Final Report, Reform of the Administrative Justice System in Nova Scotia,** January, 1997, pp. 55-57.

The Chambers judge acknowledged that reasons would have been desirable.

Nevertheless, we start this inquiry with the recognition that the Board is not bound by legislation to provide reasons for its decision and that in the absence of such a requirement reasons are not generally mandated. We must canvass the authorities to see the extent to which we have the power at common law to quash the orders because no reasons were given.

In **Re R.D.R. Construction Limited v. Rent Review Commission** (1983), 55 N.S.R. (2d) 71, this Court heard an appeal from the Rent Review Commission established under the **Rent Review Act**, 1975 S.N.S., c. 56. The appeal was, by s. 27 of the **Act**, confined to a question law or jurisdiction.

The appellant landlord requested a rent increase from the Residential Tenancy Officer who dealt with the application at a hearing and issued a decision fixing approved rents. The Officer's decision was appealed to the Commission which held a hearing. The Commission refused to provide certain information respecting the process followed by the officer in fixing the rents.

In deciding that there was a failure of natural justice on the part of the Commission going to jurisdiction in that it did not make the information available to the appellant, Cooper, J.A., on behalf of this Court, said at p. 81:

> In my opinion fair play in this case requires that the record of the proceedings before the Officer should have been made available to the appellant. This is particularly important where, as here, the Officer's decision does not contain reasons but only a recital of what was done and the result. In particular her reasons for rejecting the financial information and the conclusions drawn from it by the appellant were not given. How then could the appellant adequately present its case before the Commission or decide what additional evidence it should adduce?

At p. 83 Cooper, J.A. said:

> It has been commonly accepted that in the absence of a statutory requirement a person in the position of the Officer is not bound to give reasons for his or her decision. in **Re Glendenning Motorways Inc. and Royal Transportation Ltd. et al.** (1975), 59 D.L.R. (3d) 89 (Man. C.A.), Hall, J.A.,

said at p. 92, referring to a decision of the Highway Traffic and Motor Transport Board of Manitoba:

> On the question of whether the Board is required to give written reasons for its decision approving the application, again, there is no statutory requirement for this to be done. Whether it should be is, of course, a matter for the Legislature. Unless the court is prepared on some basis to compel the Board to give written reasons, I cannot see any useful purpose in repeatedly expressing a desire that the Board furnish written reasons for its decision.

But in **Norton Tool Co. Ltd. v. Tewson**, [1973] 1 W.L.R. 45 (National Industrial Relations Court), Sir John Donaldson for the court had this to say at p. 49:

> Our jurisdiction is limited to a consideration of questions of law. Accordingly, it is not sufficient for an appellant to satisfy this court that, within the range of discretion conferred upon the tribunal, it might or even would have reached a different conclusion. If an appellant is to succeed, he must satisfy this court that the tribunal has erred in principle. But it is a corollary of the discretion conferred upon the tribunals that it is their duty to set out their reasoning in sufficient detail to show the principles upon which they have proceeded. A similar obligation lies upon this court, when sitting as a court of first instance from which appeal lies to the Court of Appeal on questions of law alone. Were it otherwise, the parties would in effect be deprived of their right of appeal on questions of law. No great elaboration is required and the task should not constitute a burden . . .

In **deSmith's, Judicial Review of Administrative Action** (4th Ed.) at p. 148, after the author had stated "There is no general rule of English law that reasons must be given for administrative (or indeed judicial) decisions" he said at p. 149:

> In certain other situations there may be <u>an implied duty</u> to state the reasons or grounds for a decision (Michael Akehurst, 'Statements of Reasons for Judicial and Administrative Decisions' (1970) 33 M.L.R. 1954). A person prejudicially affected by a decision must be adequately notified of the case he has to meet in order to exercise any right he may have to make

> further representations (see Chap. 4, **post**) or effectively to exercise a right of appeal (**Norton Tool Co. Ltd. v. Tewson**, [1973] 1 W.L.R. 45, 49, and cases cited in note 11, **ante**)...
>
> It seems to me that in this case there was such an implied duty for the reasons stated in the passage from **deSmith**, which I have just quoted.

(emphasis added)

In **Re Yarmouth Housing Ltd. v. Rent Review Commission** (1982), 54 N.S.R. (2d) 28, this Court heard an appeal from the Rent Review Commission which confirmed the decision of a tenancy officer denying a requested rent increase. An appeal to this Court pursuant to the **Rent Review Act** was allowed on the ground that the Commission erred in law the fixing the approved rent. After holding that the matter should be remitted to the Commission, Cooper, J.A., on behalf of the Court, said at p. 41:

> I add also that in my opinion the Commission is required to give reasons for its decisions. This question was considered by this court in **R.D.R. Construction Limited v. Rent Review Commission**, . . ., with respect to decisions of residential tenancy officers. It was there stated that there was an implied duty on the part of such officers to give reasons for their decisions and reference was made to **Norton Tool Co. Ltd. v. Tewson**, [1973] 1 W.L.R. 45, and **deSmith's, Judicial Review of Administrative Action** (4th Ed.) at p. 148. In my view the same reasoning applied to decisions of the Commission. It should not confine itself merely to a recital of the information before it and its conclusions, but it has a duty to set out why it has rejected the information and evidence produced before it by the applicant. The applicant is entitled to know on what grounds his appeal has been rejected and where, in the opinion of the Commission, he has gone wrong.

(emphasis added)

A recent case dealing with failure to give reasons is **Re Williams v. Minister of Citizenship and Immigration** (1996), 139 D.L.R. (4th) 658 (F.C.T.D.). There, Reed, J. of the Federal Court, Trial Division, quashed a decision of a delegate of the Minister of Citizenship and Immigration determining that the applicant should be deported. The applicant was a permanent resident of Canada who had lived in the country for some 21

years. He had been convicted of serious drug related offences and the Minister's delegate determined, under s. 70(5) of the **Immigration Act**, that he was a danger to the public and should be deported. The delegate gave no reasons for his decision. On an application for judicial review, it was urged that the decision was inconsistent with s. 7 of the **Charter** and s. 2(e) of the **Canadian Bill of Rights**.

The headnote in the report summarizes the court's reasoning:

> The concept of danger to the public is not so vague that it provides insufficient guidance for informed legal debate. Nevertheless, the principles of fundamental justice, natural justice and fairness require that the permanent resident be given the reasons for the determination that he was a danger to the public. Reasons are required because the consequences of the decision are substantial, and the decision-making process gives no assurance that the ultimate decision-maker has considered the permanent resident's submissions. In addition, without reasons, it is not clear what criteria in determining danger to the public are being applied, and whether they are consistent and lawful.

At p. 670, Reed, J. referred to the text by deSmith, Woolf and Jowell, **Judicial Review of Administrative Action**, 5th ed. (London: Sweet & Maxwell, 1995) containing a discussion of the extent to which the principles of natural justice require a decision maker to give reasons. There is such a requirement where a statute expressly or impliedly so requires, and in limited situations where reasons are important to assess whether an action for judicial review can be maintained Reed, J. said at p. 670:

> . . . This last is said to exist when the issue for the individual is of such importance that he cannot be left to receive an unreasoned decision, as if "the distant oracle has spoken and that is that" (**R. v. Secretary of State for the Home Department, ex p. Doody**, [1994] 1 A.C. 531 (H.L.) at 565).

Reed, J. referred to **R. v. Civil Service Appeal Board, ex p. Cunningham**, [1991] 4 All E.R. 310 (C.A.) where Lord Donaldson M.R. stated at p. 319:

> . . . the Board should have given outline reasons sufficient to show to what they were directing their mind and thereby indirectly showing not whether their decision was right or wrong, which is a matter solely for them, but whether their

> decision was lawful. Any other conclusion would reduce the board to the status of a free-wheeling palm tree.

Reed, J. then referred to **R. v. Secretary of State for the Home Department, ex p. Doody, supra**, where Lord Mustill said at p. 564:

> . . . It is not, as I understand it, questioned that the decision of the Home Secretary on the penal element is susceptible to judicial review. To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it is important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed.

At p. 672, Reed, J. reaches the following conclusions on the basis of material considered by her:

> The absence of jurisprudence with respect to the requirement of written reasons in Canada may exist because, in most cases, where section 7 interests (or even lesser interests) are involved, there are statutory requirements that written reasons be given. The giving of reasons serves several purposes. First and perhaps most importantly, it gives some assurance to the individual concerned that his or her submissions have been considered (the absence of reasons can create a disturbing impression of injustice). Secondly, it provides a meaningful basis on which an assessment can be made as to whether or not to appeal the decision or to seek judicial review when that is the appropriate remedy. Thirdly, from the perspective of a reviewing Court, indeed, in the case of judicial review, it is very difficult, often impossible, to know on what basis a decision was made if reasons are not given. Reasons are not as important when a full right of appeal exists. In such circumstances the reviewing Court can consider all the evidence and determine whether in its view errors exist with respect to the conclusions drawn. In the case of judicial review, however, a reviewing Court starts with a presumption that deference must be accorded to the decision-maker.
>
> A person is entitled to some assurance that all factors have been considered, and to a fair opportunity to exercise his or her right of judicial review with respect to decisions made

> inadequately. Reasons allow both the person concerned and a Court, on judicial review, to know whether the appropriate legal test has been applied by the decision-maker.
>
> (emphasis added)

Reed, J. has referred to three specific purposes served by the giving of such reasons. I would add another which would be obvious to any judge. When one sits down to prepare the reasons to support a conclusion tentatively reached, the articulation of the reasons tests the validity of the conclusion. At times, the writer is compelled to change the result. The preparation of supporting reasons is the best self-assessment a decision maker can make of his or her decision.

The greater the protection from judicial review accorded to a Tribunal, the greater may be the need for reasons.

In **Williams, supra**, Reed, J. said at p. 673:

> The circumstances of this case are such that the principles of fundamental justice, natural justice and fairness are not met unless the applicant is given reasons for the decision that has been made. This follows from a number of considerations. In the first place the consequences for the individual are substantial. Secondly, the decision making-process (through three levels of immigration officials) gives no assurance that the ultimate decision-maker, in fact, considers the applicant's submissions directly. Thirdly, reading the **Guidelines** that have been issued, and the evidence of the applicant's offences that formed the basis for the decision, it is not clear what reasoning led to this applicant being found to be a present or future danger to the public. Fourthly, in the absence of even brief reasons, a reviewing Court on judicial review cannot determine whether the decision-makers (the delegates of the Minister) are applying consistent and lawful criteria in making decisions that an individual is a danger to the public in Canada.

The respondents refer to **R. v. Burns** (1994), 165 N.R. 374 (S.C.C.). There, the British Columbia Court of Appeal set aside convictions for indecent assault and sexual assault and ordered a new trial because the reasons of the trial judge did not enable the court to determine whether the judge had properly directed himself to all the evidence and the legal questions bearing on the issues. The trial judge's reasons were indeed brief,

consisting of a statement that he had accepted the complainant's evidence as to the alleged incidents and that based thereon he was satisfied beyond a reasonable doubt that the accused was guilty.

In reversing the British Columbia Court of Appeal, the Supreme Court of Canada, in addressing the duty of a trial judge to give reasons said at p. 382:

> Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under s. 686(1)(a). This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points: see **R. v. Smith (D.A.)**, [1990] 1 S.C.R. 991; 111 N.R. 144; 109 A.R. 160, affing. 95 A.R. 304 (C.A.), and **R. v. MacDonald**, [1977] 2 S.C.R. 665; 9 N.R. 271. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside the verdict.
>
> This rule makes good sense. To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, and these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case.

Burns, supra, is not authority for the proposition that courts, let alone other tribunals, can render significant decisions without reasons in all cases. I take this decision to mean that a minimum requirement is that a judge provide a statement of conclusions in brief compass so that the court can then see if these are supported by the evidence.

My view of **Burns, supra**, is confirmed upon a reading of the short judgment of the Supreme Court of Canada delivered by Iacobucci, J. in **R. v. Barrett**, [1995] 1 S.C.R. 752:

> We all agree that this appeal is governed by the principles recently discussed by our Court in **R. v. Burns**, [1994] 1 S.C.R. 656, and related cases. The decision in **Burns** was not

> available to the Ontario Court of Appeal when it rendered its judgment. While it is clearly preferable to give reasons and although there may be some cases where reasons may be necessary, by itself, the absence of reasons of a trial judge cannot be a ground for appellate review when the finding is otherwise supportable on the evidence or where the basis of the finding is apparent from the circumstances. The issue is the reasonableness of the finding not an absence or insufficiency of reasons. In this case, the basis for the ruling of the trial judge on the **voir dire** is clear. The only issue was credibility. The trial judge's ruling demonstrated that he did not accept the evidence of the accused. In these circumstances, the failure of the trial judge to state the basis of his decision on the **voir dire** did not occasion an error of law or miscarriage of justice. We also find no error in law in the charge to the jury.
>
> (emphasis added)

It is to be observed that Iacobucci, J. was careful to note that there may be some cases where reasons may be necessary. In **Barrett, supra**, it is clear that the court was satisfied that the ruling demonstrated that the trial judge did not accept the evidence of the accused. The only issue was credibility.

The scope of appellate review in a criminal case is wider than the standard of review of a decision of a tribunal protected by a privative clause such as that contained in s. 19(1) of the **Act**. A court can examine the evidence and reweigh it to some extent to determine whether the verdict was reasonable. Section 19(1) of the **Act** provides that a decision or order of the Board in any proceeding "is final and conclusive and not open to question or review". It was common ground among the parties to this appeal that before a decision so protected can be questioned, the appellant must demonstrate that it was a patently unreasonable decision.

In **C.A.I.M.A.W. v. Paccar of Canada Ltd.**, [1989] 2 S.C.R. 983 Laforest, J. said at pp. 1003-4:

> Where, as here, an administrative tribunal is protected by a privative clause, this Court has indicated that it will only review the decision of the Board if that Board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function:

> see **CUPE, Local 963 v. N.B. Liquor Corp.**, [1979] 2 S.C.R. 227. The tribunal has the right to make errors, even serious ones, provided it does not act in a manner "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review". The test for review is a "severe test"; see **Blanchard v. Control Data Canada Ltd.**, [1984] 2 S.C.R. 476, at p. 493. This restricted scope of review requires the courts to adopt a posture of deference to the decisions of the tribunal. Curial deference is more than just a fiction courts resort to when they are in agreement with the decisions of the tribunal. Mere disagreement with the result arrived at by the tribunal does not make that result "patently unreasonable". The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result. Privative clauses, such as those contained in ss. 31 to 34 of the Code, are permissible exercises of the legislative authority and, to the extent that they restrict the scope of curial review within their constitutional jurisdiction, the Court should respect that limitation and defer to the Board.
>
> (emphasis added)

In **National Corn Growers Association et al. v. Canadian Import Tribunal** (1990), 114 N.R. 81(S.C.C.), the Supreme Court of Canada affirmed a decision of the Federal Court dismissing an application for judicial review claiming that the Tribunal decision was patently unreasonable. In his closing remarks, Gonthier, J. said at p. 122:

> I would add one final observation. In the course of these reasons, I have at times dealt in some detail with the manner in which the Tribunal arrived at its conclusion. Unlike my colleague, Wilson, J., I do not think that the Tribunal's references to the provisions of the **GATT**, as well as all other aspects of the reasoning by which it arrived at its interpretation of **SIMA**, are totally irrelevant to a determination of an application for judicial review. With respect, I do not understand how a conclusion can be reached, as to the reasonableness of a tribunal's interpretation of its enabling statute without considering the reasoning underlying it, and I would be surprised if that were the effect of this court's decision in **C.U.P.E.**, supra . . .
>
> (emphasis added)

Clearly, reasons are not always required. In **Khaliq-Kareemi v. Health Services and Insurance Commission (N.S.)** (1989), 89 N.S.R. (2d) 388, this Court allowed an appeal from a decision in Supreme Court reversing an order of the Commission finding that a psychiatrist had fraudulently submitted claims and habitually claimed for services not medically required. No reasons were given by the Commission. This Court held that they were not necessary because the charges were abundantly clear. The only issue was whether the evidence established the allegations. Jones, J.A. said at p. 401:

> . . . The charges before the Commissioner were abundantly clear. The only issue was whether the evidence established those allegations. The Commission obviously accepted the evidence supporting the allegations and rejected the evidence of the respondent. Apart from the issue of credibility reasons would have added little or nothing. In my view reasons were not required in the circumstances.

I am satisfied that courts can and should require written reasons from a Tribunal wherever there are substantial issues to be resolved. How can the court determine the existence of a rational basis for the decision of the Tribunal if it does not know how the Tribunal arrived at the result? If the determination of the reasonableness of a tribunal's decision can only be made by considering "the reasoning underlying it" and these reasons are not obvious from a review of the issues and the record, written reasons are necessary. Failure of a tribunal to do so in such cases makes its decision a patently unreasonable decision which will be set aside. The disappointed litigant and the reviewing court must know the process followed by a Tribunal in order to see, in the case of the litigant, if a review should be sought, and in the case of the court whether interference with the decision is warranted.

Counsel for the Board emphasizes that no case has been found where a court has held that failure to give reasons makes a tribunal's decision patently unreasonable. No case on point is needed. The principle is clear. Patent

unreasonableness can assume many forms. I am prepared to reach the result here on the application of fundamental principles.

As well, the cases I have reviewed support the conclusion that in such cases there is an implied duty to give reasons. Breach of this duty is a breach of the rules of natural justice.

I will review the issues before the Board and consider the evidence heard by it in order to judge whether it can be said that its decision without reasons is, in the circumstances, patently unreasonable, and whether there was an implied duty to give reasons.

The complaints break down into the following allegations:

(a) the complainants were dismissed on February 10 and 11 because of their support for the Union;

(b) Future Inns is refusing to employ the complainants because they are members of a trade union;

(c) Future Inns is refusing to employ the complainants because they have participated in the activities of a trade union;

(d) Future Inns is attempting to intimidate its employees to compel them to refrain from being a member of a trade union or participate in the activities of a trade union.

The Board simply stated that it was satisfied that the acts of unfair labour practice by Future Inns were committed pursuant to s. 53 of the **Act**. That section details a number of unfair labour practices:

> 53 (1) No employer and no person acting on behalf of an employer shall
>
> > (a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union.

. . .

Prohibited activities of an employer are listed in s. 53(3) of the **Act**.

> 53 (3) No employer and no person acting on behalf of an employer shall
>
> > (a) refuse to employ or to continue to employ any person or otherwise discriminate against any person in regard to employment or any term or condition of employment, because the person
> >
> > > (i) is or was a member of a trade union,
> > >
> > > (ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union,
> > >
> > > (iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Act,
> > >
> > > (iv) has made or is about to make a disclosure that he may be required to make in a proceeding under this Act,
> > >
> > > (v) has made an application or filed a complaint under this Act,
> > >
> > > (vi) has participated in a strike that is not prohibited by this Act or exercised any right under this Act;

It will be observed that the complaints appear to allege violations of both ss. 53(1)(a) and 53(3)(a) with respect to five different complainants, as well as an attempt to intimidate its employees generally which appears to allege a violation of s. 53(1)(a).

In assessing the complaints, the Board was required to take into account s. 56(3) of the **Act** with respect to complaints falling within s. 53(3)(a):

> 56 (3) Where the complainant establishes that it is reasonable to believe that there may have been failure by an employer or any person acting on behalf of an employer to comply with clause (a) of subsection (3) of Section 53, the burden of proving there is no failure shall be upon the employer or the person acting on behalf of the employer.

There was no evidence before the Board that prior to February 14, 1995, either the Union, the individual respondents or anyone else informed Ms. Lemire or any other representative of the appellant that the individual respondents were trying to organize a union at the hotel. Ms. Lemire testified at the hearing that she was unaware of any discussions about forming a union until February 14, 1995, when she was so advised by a representative of the Board. By then, the termination of the five individual respondents had taken place. There was evidence that the dismissals of Ms. Dearman and Gloria Rafuse were carried out in a manner different from the way in which such matters were normally handled.

Three of the individual respondents, Gloria Rafuse, Linda Rafuse and Dearman testified that they suspected they had been fired because they were trying to form a union. However, they were unable to point to any evidence that Ms. Lemire or anybody else acting on behalf of Future Inns knew that a union was in the process of being formed. Ms. Lemire denied such knowledge.

The employer's knowledge of the attempted formation of the Union is critical to establishing the case against the employer. The Chambers judge addressed this key issue:

> Mrs. Lemire was the sole management employee called by Future Inns at the hearing. There were discrepancies between the information filed by Mrs. Lemire with the unemployment insurance people with respect to these terminations and her evidence at the hearing as to why Gloria Rafuse and Jean Dearman were fired. She could not explain these discrepancies. Jean Dearman was fired at home. No prior employees had been fired at their homes. Jean Dearman and Gloria Rafuse were fired with haste. The rooms they cleaned on Friday were stated by Mrs. Lemire to be unacceptable. Jean Dearman was not to work again until the following

> Monday. Gloria Rafuse was to work the next day, Saturday. Mrs. Lemire went to their homes Friday night to fire them. She found Jean Dearman at home and fired her on Friday evening. She did not find Gloria Rafuse at home, and fired her the following day when she reported to work. There was evidence from the complainants that there was a grapevine in the hotel, whereby Mrs. Lemire would be aware of most things going on at the hotel. There was also evidence that Fred George, who worked as a maintenance man at the hotel, was related to Mrs. Lemire. There was a lack of any substantial warnings to Mrs. Dearman that her work was not satisfactory, although this was not the case with respect to Gloria Rafuse, who had been suspended for one week for poor work two months earlier. Jean Dearman and Gloria Rafuse were fired on Friday night and Saturday morning respectively, in the time between the first organizing meeting on Wednesday night and the second proposed organizing meeting on Sunday night. All of this provides evidence from which the Board could infer knowledge of the unionizing effort and anti-union animus. Accordingly, I find there was evidence before the Board on which it could find that Future Inns committed an unfair labour practice and therefore, the decision of the Board was not patently unreasonable.
>
> (emphasis added)

The Chambers judge directs these comments to the dismissals of Ms. Dearman and Gloria Rafuse only. The conclusion respecting these firings is that evidence to support a reasonable inference that Future Inns engaged in prohibited practices arise from:

(a) Ms. Lemire attempted to fire two of the employees at home.

(b) There was evidence about a grapevine at the hotel.

(c) A maintenance man at the hotel was related to Ms. Lemire.

(d) That there was a lack of substantial warnings to Dearman that her work was not satisfactory.

I have examined the record before the Board and in the absence of any reasons from the Board giving insight into its thinking, it appears to me that what the Chambers judge characterizes as "evidence from which the Board could infer knowledge of the Union effort and anti-union animus" is anything but substantial. General statements

such as Gloria Rafuse's comment, "Well, I mean everybody talks" are not sufficient foundation upon which one can draw reasonable inferences. Neither Gloria Rafuse or any of the other witnesses on behalf of the claimants could point to any piece of information about the Union's activities having reached management's ears. Ms .Lemire's testimony that she had no knowledge of the Union's activities is clear as is her testimony that she fired the employees for unsatisfactory performance. She had fired other employees in the past for such things as the use of bad language to guests and poor housecleaning. Lemire testified that she had spoken to Dearman about poor work "many, many times".

Ms. Dearman conceded that she had been spoken to on a previous occasion about alleged unsatisfactory work. Gloria Rafuse had been suspended for a week for poor housekeeping in December of 1994. Linda Rafuse had walked out some two years earlier and had been taken back in spite of reservations held by Ms. Lemire. In August of 1994 she had been put on probation for one month for lack of supervision of housekeepers.

Did the Board find Ms. Lemire not credible? We do not know.

A compelling case for the giving of reasons arises from the number of issues before the Board which were aired over three days of hearings. The question of knowledge on the part of Future Inns of Union activities was a substantial issue which should have been addressed.

There were three distinct situations involved in the complaints. Only two of the five individual respondents were fired directly; the other three - Linda Rafuse, Hubley and Milligan walked out upon the dismissal of Gloria Rafuse. They knew they had left their jobs because the following Monday they came to ask for them back. The allegation of dismissals refer to the dates February 10 and 11. It is not contended that anybody was dismissed on February 13. We have no analysis from the Board as to what it considered were the acts of Future Inns in discharging or failing to hire these employees or of intimidation generally.

The Board was confronted with complaints dealing with three separate dismissals: (a) Ms. Dearman; (b) Gloria Rafuse; (c) Linda Rafuse, Cindy Milligan and Patricia Hubley. As to each of these, it was called upon to decide:

(i) Whether the dismissal was because of support by the employee for the Union. This appears to allege a violation of s. 53(1)(a) of the **Act** - interference with the formation of a trade union or the representation of employees by a trade union. The reverse onus provision of s. 56(3) has no application. The dismissal could also be a violation of s. 53(3)(a)(vi). The Board did refer to the fact that all five respondents were "terminated" by Future Inns. This is the only clue to its thinking, leading one to suspect that the "acts" of unfair labour practice were terminations. These were alleged to have occurred on February 10 and 11.

(ii) Whether the refusal to employ was because the employees were members of the trade union. This appears to allege a violation of s. 53(3)(a)(i). There was no allegation of a refusal to continue to employ. The Board seemed to be thinking of terminations. The reverse onus provisions of s. 56 may be looked at if the threshold of establishing union membership has been reached. On the evidence, these employees had not become Union members prior to their dismissal. Indeed, it is not apparent from the evidence whether they ever became Union members. The Board has afforded no indication of what, if anything, it thought about these considerations.

(iii) Whether the refusal to employ took place because the employee participated in the activities of a trade union. This could be a violation of s. 53(1)(a) of the **Act**. It could also, depending on what view the Board took of the evidence, be a violation of s. 53(3)(a)(vi) of the **Act**, because the employee was exercising a right under s. 13(1) of the **Act**. There is no allegation of a refusal to continue to employ. The Board seems to have been thinking in terms of terminations. Unfortunately, there is no finding in this

respect and it is uncertain at best whether the reverse onus provisions of s. 56(3) have application.

There is a general allegation that Future Inns attempted to intimidate its employees to compel them to refrain from being a member of a trade union or participate in the activities of a trade union. This alleges a violation of s. 53(1)(a). The reverse onus section is not applicable to that subsection.

I observe that during the argument before the Board counsel for the Union urged the reverse onus section upon the Board. Mr. Henman did not appear to have made any analysis of the effect of s. 56(3), although he referred briefly to it in his submissions. In short, s. 56(3) may or may not have applied to the fact finding process depending on what facts were found and which alleged acts of unfair labour practice were being considered. There is no indication that this was thought out by the Board.

As to all of the complaints, we do not have the benefit of any analysis whether, if the reverse onus section applied, the Board addressed its mind to the prerequisite for its application, namely on what basis it was reasonable to believe that there may have been a failure by Future Inns to comply with s. 53(3)(a).

Counsel for the respondents urge that it is not the role of the reviewing court on a **certiorari** application to second guess the Board on the weight and sufficiency of the evidence before it. They say that the absence of detailed reasons by the Board does not make its decision patently unreasonable or remove curial deference to its decisions. They emphasize that the patently unreasonable test sets a very high threshold for judicial review, as indeed it does. They tell us that enough can be found in the record to support the conclusions of the Board. That is also the conclusion of the Chambers judge as appears from the passage I have quoted from her decision.

I am satisfied that neither the arguments of counsel for the respondents nor the rationalizations of the Chambers judge form an adequate substitute for reasons from the Board showing what underlay its conclusions on the many issues here presented to it.

The respondents are in effect asking this Court to guess at the reasoning underlying the conclusions of the Board simply because there is evidence upon which the Board could, if it chose, base its conclusions. The real problem here is that we simply do not know what it was that drove the Board to its conclusions. The issues relating to these five employees were complex and the concerns of the parties substantial. The order of the Board imposes significant monetary liability upon Future Inns. Failure to comply with the order also renders Future Inns subject to prosecution.

In the circumstances, the Board acted in a patently unreasonable manner in giving this decision without reasons. There was an implied duty on the Board here to furnish reasons. It was in breach of the rules of natural justice or fair play. It is simply not sufficient that the matter was resolved by the following terse conclusions:

> AND the Board having been satisfied that the acts of Unfair Labour Practice were committed pursuant to Section 53 of the **Trade Union Act**;
>
> . . .
>
> AND the Board does further order the Respondent to reinstate Jean Dearman, Gloria Rafuse, Cindy Milligan, Linda Rafuse and Patricia Hubley to their former positions and to pay to these individuals all compensation earned as if they had not been terminated by the Respondent.

Counsel for the Union suggested that this Court remit the matter to the Board with an order that it furnish reasons for its decision. The Board has already made its decision. It was a decision reached in a patently unreasonable manner and contrary to the rules of natural justice. To ask it to make up reasons after the fact would be a futile exercise.

I would allow the appeal and set aside the order of the Chambers judge. I would quash the decision of the Board and remit the matter to the Board for a rehearing. This must, to the greatest extent possible, be heard before a differently composed panel. I would also award costs to the appellant on the appeal against the respondents Union and Board, jointly and severally, in the amount of $2,500.00, plus disbursements. On the same basis, I would award the appellant costs against those respondents before the Chambers judge in the amount fixed by her, $2,500.00, inclusive of disbursements. As between these two respondents, one-half of the costs should be paid by each.

Chipman, J.A.

Concurred in:

Matthews, J.A.

Flinn, J.A.