NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Hyson*, 2017 NSCA 46

Date: 20170601
Docket: CA 453266
Registry: Halifax

Between:

Nova Scotia Public Service Long Term Disability Plan Trust Fund

Appellant

v.

Annette Hyson and Dr. Colin F. Davey

Respondents

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: January 25, 2017, in Halifax, Nova Scotia

Subject: Procedural fairness and natural justice; *audi alteram partem*

Summary: Ms. Hyson was employed as a clerk with the provincial government. In December 2013, she filed a claim for long term disability benefits under the Nova Scotia Public Service Long Term Disability Plan Trust Fund. Unsuccessful in her internal application and appeal, she appealed her denial of benefits to the Medical Appeal Board.

After a hearing, the Board determined that Ms. Hyson was not disabled within the meaning of the Plan. In doing so, it referenced extraneous material not placed before it by either of the parties. On judicial review, the court found that the Board's reference to extraneous materials, without providing Ms. Hyson with an opportunity to speak to them, constituted a breach of procedural fairness. The decision was set aside, to be reheard by a differently constituted Board.

Before this Court the appellant submits that as a tribunal with specialized medical knowledge, the Board had every right to reference extraneous information in reaching its decision, likening it to a court referencing caselaw or legal authors not cited by the parties. Although acknowledging that the Board owed Ms. Hyson a high level of procedural fairness, the reference to the extraneous materials did not breach that duty.

Issues: Did the Board's reference to extraneous materials, without affording Ms. Hyson the opportunity to respond to them, breach the duty of procedural fairness?

Result: Appeal dismissed.

What is central to the appeal is not the fact that the Board referenced extraneous material, but rather, what followed. The principle of *audi alteram partem* is a fundamental component of procedural fairness and natural justice. It requires a party to be aware of the case it must meet and the right to be heard. The Board's failure to advise Ms. Hyson of its use of extraneous materials, and give her an opportunity to respond thereto, breached that fundamental principle. Except in the most extraordinary of cases, such a breach will render a decision void.

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Appellant

v.

Annette Hyson and Dr. Colin F. Davey

Respondents

Judges:	Fichaud, Bryson and Bourgeois JJ.A.
Appeal Heard:	January 25, 2017, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Bourgeois J.A.; Fichaud and Bryson JJ.A. concurring
Counsel:	Colin D. Bryson, Q.C., for the appellant Nicolle A. Snow, for the respondent Annette Hyson

Reasons for judgment:

[1] The respondent Annette Hyson was employed as a clerk with the Nova Scotia Department of Natural Resources. By virtue of her employment, she was insured for long term disability coverage under the Nova Scotia Public Service Long Term Disability Plan Trust Fund ("the Plan"). In December 2013, Ms. Hyson filed a claim for long term disability benefits. Her claim was denied both on initial application, and following an internal appeal.

[2] Ms. Hyson appealed her denial of benefits to the Medical Appeal Board, a body constituted pursuant to the terms of the Plan. After a hearing, the Board determined Ms. Hyson was not disabled within the meaning of the Plan and the disallowance of benefits was upheld. Ms. Hyson then sought judicial review of the Board's determination arguing, amongst other things, that she was not afforded procedural fairness. She asserted that the Board improperly referenced material not presented as evidence during the hearing, to which she had no opportunity to respond.

[3] In his written decision, the reviewing judge, Justice James L. Chipman agreed with Ms. Hyson (2016 NSSC 153). He concluded that the Board's reference to extraneous materials, without providing Ms. Hyson with an opportunity to speak to them, constituted a breach of procedural fairness. The reviewing judge set aside the decision, directing the matter be reheard by a differently constituted Board.

[4] The Nova Scotia Public Service Long Term Disability Plan Trust Fund ("the appellant") comes to this Court seeking to challenge the decision of Chipman J. In short, the appellant asserts the Board's use and treatment of extraneous material did not constitute a breach of procedural fairness and, as such, its decision ought to be restored.

Background

The Board Decision

[5] The Board was constituted of one member, Dr. Colin F. Davey. Dr. Davey was named as a respondent before this Court, and in the court below. He has not participated in the proceedings. As such, any reference to "respondent" in the course of this decision should be interpreted as meaning Ms. Hyson solely.

[6] The Board conducted a hearing on November 13, 2015. The proceedings were not recorded, but based on the materials before us, this Court is aware, generally, of how matters unfolded. Ms. Hyson and her husband gave evidence. She was represented by legal counsel who made submissions on her behalf. The appellant's position was put forward by the Disability Case Manager for Manulife Financial, the Plan's Administrator. The Board was provided with extensive medical information, including Ms. Hyson's medical files and various medical reports including opinions requested by Manulife.

[7] For the purposes of this decision, it is not necessary to review the evidence in detail. In short, Ms. Hyson submitted that she was disabled in accordance with the terms of the Plan, primarily due to cognitive difficulties she attributed to her suffering from Post-Treatment Lyme Syndrome (PTLS). She argued the medical evidence submitted to the Board supported her inability to work due to her cognitive limitations and, as such, she fell within the Plan's definition of "disabled".

[8] The Plan Administrator submitted that it was not at all clear that Ms. Hyson was in fact suffering from PTLS, or that the evidence established her inability to work. The Administrator highlighted that the medical advisors who reviewed Ms. Hyson's submitted materials did not support the diagnosis, nor the objective existence of the limitations being claimed. The Plan Administrator also pointed to inconsistencies in the opinions rendered by Ms. Hyson's primary physician, and raised concerns with respect to the opinions expressed by other experts she relied upon in advancing her claim.

[9] Although Ms. Hyson suggested to this Court that the evidence before the Board was exclusively supportive of her claim, I disagree. A review of the medical evidence presented to the Board was anything but one-sided or conclusive. Although some evidence was supportive of a finding of disability, other evidence raised questions about such a conclusion. It was the Board's responsibility to assess all of the evidence before it and ultimately determine whether Ms. Hyson met the definition of disability within the Plan. The appellant concedes that, if accepted, there was sufficient evidence upon which the Board could have found Ms. Hyson to be disabled. It also submits that the Board, as it was entitled to, weighed the evidence and preferred that which negated the claim of disability, and that this Court has no business undertaking a re-weighing exercise.

[10] On December 16, 2015 the Board rendered a 28-page written decision in which it reviewed the voluminous medical documentation before it, as well as the evidence provided and submissions made at the hearing. There is no doubt the Board was well aware of the conflicting views of the parties. In its decision, the Board undertook an extensive review of the material submitted by the parties, after which, it commenced its analysis. In the course of the analysis, the Board made reference to a number of materials or sources of information which had not been presented or referenced by either party. This included reference to:

- The American Medical Association Guide to the Evaluation of Permanent Impairment, 6th Edition;
- *Hill's* criteria for causation;
- An article from the New England Journal of Medicine;
- CDC Guidelines;
- An internet website entitled "drugbank.ca"; and
- An internet website entitled "notifbutwhen.ca".

[11] The Board did not advise the parties it intended to refer to materials outside those presented as part of the hearing. As such, the parties were not given the opportunity to speak to these extraneous materials.

[12] The Board dismissed Ms. Hyson's appeal, concluding:

> Based on the available evaluations Ms. Annette Hyson [*sic*] diagnosis is Mild Major Depressive Disorder, with characterological traits, syncope secondary to Mobitz II Heart Block treated with pacemaker insertion and Lyme Disease treated with appropriate antibiotics. There is substantial evidence for drug interactions and side effects causing cognitive symptoms and behaviours. The PTLS diagnosis, being one of exclusion, appears to have been made prematurely and without careful consideration of a differential diagnosis. The work performance and deficiencies have not been addressed as a precipitating factor for the time loss. Focus has been on the multitude of symptoms with little assessment or counselling directed to the workplace factors or medication effects.
>
> In conclusion the Medical Appeal Board **having considered all of the above information** finds Ms. Annette Hyson [*sic*] diagnoses do not meet the criteria for functional capacity impairment limitation based on the objective evidence. The functional capacity restriction is based on reported side effects or symptoms. There is insufficient information to recommend restricting activities beyond a sedentary to light level of work demand.

> The Plan definition states the complete inability to meet job requirements warrants total disability. Ms. Hyson does not meets [*sic*] the criteria for total disability. (Emphasis added)

The Judicial Review Decision

[13] Ms. Hyson filed an Amended Notice for Judicial Review with the Supreme Court of Nova Scotia in which she alleged the decision-maker erred:

- By applying the wrong test and considering the wrong factors when determining whether she was disabled within the meaning of the Plan;
- By referencing documents and information that were not admitted into evidence and were not properly before it in the decision-making process;
- By making findings of fact based on information and documents that were not admitted into evidence and were not properly before it, and applied those findings of fact in its determination;
- By giving evidence in the course of the decision-making process; and
- As a result of the above errors, it ignored or disregarded medical opinions and evidence relating to the issue of her disability, thus resulting in an improper determination.

[14] The appellant filed an Amended Notice of Participation in which it denied the Board erred at all, and specifically in the manner alleged by Ms. Hyson.

[15] A review of the transcript shows that although other issues were addressed by the parties, the procedural fairness issue was front and center during the review hearing. Counsel for Ms. Hyson submitted that the Board owed her a duty of procedural fairness and that given the circumstances, it was a high duty – akin to that expected in court proceedings.

[16] In the court below, counsel for the appellant acknowledged the existence of a duty, and that it was a "high level" one. In making that concession, however, counsel encouraged the reviewing judge to be mindful of "context":

> So context is important here. So our context here is context is to – what procedural fairness is required context is important. So the questions therefore in this context today where we have a specialized appeal court headed by a doctor dealing with fundamentally medical issues, whether it's procedurally unfair for

> that doctor to refer to and rely upon medical literature not referenced by the parties.
>
> That's in essence what the question is.

[17] The appellant further argued that the Board's reference to extraneous medical information was comparable to a judge's reference to non-cited caselaw or legal journals. In both contexts, it was argued, it is acceptable and desirable in order to fulfil the adjudicative function of the decision-maker. The appellant further submitted that even if the court had concern regarding the materials referenced by the Board, none were material to the conclusions ultimately reached and, as such, could not be seen as prejudicial to Ms. Hyson.

[18] The appellant repeats the above assertions in this Court.

[19] The reviewing judge found the procedural fairness issue as being dispositive of the matter before him. He rejected the appellant's assertion that the Board's reference to extraneous materials was akin to a court's reference to legal authorities, relying on a number of authorities from this Court. He concluded:

> [27] Several cases from the Nova Scotia Court of Appeal hold that it is a material error to resort to extrinsic authority (see *Nova Scotia (Community Services) v. B.F.*, 2003 NSCA 119, *G.L. v. Children's Aid Society of Cape Breton-Victoria*, 2003 NSCA 112, *Children's Aid Society and Family Services of Colchester County v. E.Z.*, 2007 NSCA 99 and *R. v. B.M.S.*, 2016 NSCA 35). Nevertheless, in *Gallant v. Gallant*, 2009 NSCA 56, the Court of Appeal added that a tangential mention, which does not materially alter the result, is appropriate (see para. 13).
>
> [28] When I consider the circumstances of this case coupled with the *Baker* factors (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817) and the procedural fairness jurisprudence, I arrive at the conclusion that the Applicant should have been afforded the opportunity to respond to the independent research.
>
> [29] Based on my review of the Record inclusive of Dr. Davey's decision (as will be more fully addressed below), I am of the view that his reliance on the outside sources amounts to much more than tangential mention. Accordingly, I have determined it appropriate to continue my analysis in the context of the Appeal Board decision, as set out in the following section.

[20] Not only was the reference to the material inappropriate, the reviewing judge was of the view that the outside research undertaken by the Board "significantly influenced" its findings. As noted earlier, the Board's decision was set aside, the

reviewing judge directing that Ms. Hyson's appeal be reheard by a differently constituted board.

Issues

[21] In its Notice of Appeal, the appellant sets out the following grounds of appeal:

> The Appellant says the learned trial Judge erred in law in that he:
>
> 1) Held that the Respondent, Dr. Colin F. Davey, sitting as the Appeal Board, violated the principles of procedural fairness by failing to afford the Respondent, Annette Hyson the opportunity to respond to certain "independent research", namely, Hill's criteria for causation and the AMA Guides to the Evaluation of Permanent Impairment, 6th edition;
> 2) Held that the Respondent, Dr. Colin F. Davey, sitting as the Appeal Board, violated the principles of procedural fairness by failing to afford the Respondent, Annette Hyson the opportunity to respond to certain "independent research", namely the websites "drugbank.ca" and "notifbutwhen.ca".

[22] In its factum, the appellant reframes the issue for determination as follows:

> Did the "independent research" conducted by the Appeal Board breach the Appeal Board's duty of fairness, and if so and to the extent that it did, was the breach sufficiently material to the Appeal Board's decision so as to justify setting the Appeal Board's decision aside?

[23] Ms. Hyson also filed a Notice of Contention, requesting that the reviewing judge's decision be affirmed for reasons different than those articulated in his decision. Given that the procedural fairness issue is dispositive of this appeal, it is not necessary to address the Notice of Contention.

Standard of Review

[24] The standard of review this Court applies in reviewing a lower court's decision respecting an alleged breach of procedural fairness has been recently set out in *Jono Developments Ltd. v. North End Community Health Association*, 2014 NSCA 92:

> [41] The reviewing judge correctly identified the principle that no standard of review analysis governs judicial review, where the complaint is based upon a denial of natural justice or procedural fairness. (See for example, **T.G. v. Nova**

> **Scotia (Minister of Community Services)**, 2012 NSCA 43, leave to appeal refused, [2012] S.C.C.A. No. 237, at ¶90).
>
> [42] Instead, a court will intervene if it finds an administrative process was unfair in light of all the circumstances. This broad question, which encompasses the existence of a duty, analysis of its content and whether it was breached in the circumstances, must be answered correctly by the reviewing judge (see: **T.G. v. Nova Scotia (Minister of Community Services), supra**, at ¶8; **Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.**, 2010 NSCA 19, ¶28; **Nova Scotia (Community Services) v. N.N.M.**, 2008 NSCA 69, ¶40; and **Kelly v. Nova Scotia Police Commission**, 2006 NSCA 27, ¶21-33.

[25] Similarly, in *Burt v. Kelly*, 2006 NSCA 27, the task this Court is to undertake was described as follows:

> [20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty. In my respectful view, the judge did not adequately consider the first of these steps.
>
> [21] The first step – determining the content of the tribunal's duty of fairness – must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step – assessing whether the Board lived up to its duty – assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for this review.

[26] There is no dispute that the Board owed Ms. Hyson a duty of procedural fairness. Both parties further agree that the duty is a "high" one. What remains to be determined is whether the reviewing judge correctly ascertained the content of that duty, and was correct in finding it was breached.

Analysis

The Content of the Duty of Fairness

[27] Both parties agree that when asked to determine the content of a duty of fairness, a court is to be guided by the principles as articulated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Justice L'Heureux-Dubé set out several non-exhaustive factors as being important to defining the extent and content of the duty of fairness:

- The nature of the decision being made and the decision-making process;
- The nature of the statutory scheme and terms of the statute pursuant to which the decision-maker acts;
- The importance of the decision to the individual affected by it;
- The legitimate expectations of the parties; and
- The procedures chosen by the decision-maker, particularly if the statute has left the choice of such procedures to the decision-maker (*Baker*, at paras. 23 to 28).

[28] The reviewing judge concluded that the Board erred in referencing extrinsic material without providing Ms. Hyson an opportunity to respond to it. The entirety of the court's analysis with respect to the content of the duty has been previously set out herein at para. [19].

[29] Because defining the content of the duty of fairness is highly contextual, a more fulsome analysis of the *Baker* factors ought to have been undertaken by the reviewing judge. This Court in *Kelly* has clearly signalled that this step ought not to be treated summarily. Although I ultimately agree with the reviewing judge's conclusion, applying the *Baker* factors to the matter at hand explains why such is the case.

(i) The Nature of the Decision and the Decision-making Process

[30] Administrative decisions fall along a spectrum ranging from those which are highly discretionary, to those which are entirely adjudicative. There is no question that the role of the Board here is an adjudicative one – it must hear evidence, oral and written, find facts and render a disposition within its mandated framework.

Although less formal, the process itself resembles that of a court proceeding. As Ms. Hyson correctly points out, the essential function of the Board in this context, making a determination of disability based upon evidence, is very similar to that of a court in civil disability claims. This factor attracts a high duty of procedural fairness, the content of which ought to reflect closely that afforded to litigants before civil courts.

(ii) The Nature of the "Statutory" Scheme

[31] In *Baker*, a statutorily created administrative body was the focus of the analysis. That is not the case here; rather, the Board is a creature arising from negotiated agreements between the Province of Nova Scotia and the Nova Scotia Government & General Employees Union (the "NSGEU"). It is more akin to an arbitral body. In any event, one still looks to its creational underpinnings in undertaking a duty of fairness analysis. The Board's mandate and authority are contained within the following documents:

- A Trust Agreement between the Province of Nova Scotia and the NSGEU;
- The LTD Plan;
- The LTD Plan Appeal Guidelines; and
- The contract between the LTD Fund and Dr. Davey.

[32] There are a number of provisions contained within the above documents which are relevant to the duty of procedural fairness, and its content.

[33] The LTD Plan document sets out the procedure for appealing a denial of benefits:

> 6. (1) When the Administrator has ruled that an employee is not disabled, said decision **may not be challenged by an action in the courts**, but may be appealed through the Board of Trustees of the Nova Scotia Public Long Term Disability Plan, who will be responsible to schedule an appeal hearing in accordance with Section 6(3).
>
> (2) The decision resulting from the appeal hearing **shall be final and not subject to further review**.
>
> (3) An Appeal System has been established with the following provisions:

(a) The appeal will be limited to determining whether or not the employee is disabled, as defined herein.

(b) The appeal will be heard by an Appeal Board established by the Board of Trustees.

(c) The appeal will be conducted pursuant to Guidelines established by the Board of Trustees pursuant to this Plan.

(d) The employee shall bear his or her own costs of the appeal; however, if the appeal is successful, the employee shall receive costs as permitted by the Appeal Guidelines.

(e) Any appeal is to be initiated no later than 30 days following final denial of the employee's claim by the Administrator. (Emphasis added)

[34] The Appeal Guidelines contain the following provisions:

(1) A claimant whose claim for LTD benefits has been denied, or terminated, on the basis that the claimant does not meet the definition of disability will be advised of the right to appeal and the appeal process, **including the right to a copy of the documentation upon which the decision is based**.

. . .

(8) The Appeal Board may consist of one or more qualified medical doctors as determined by the Board of Trustees.

(9) The parties before the Appeal Board are the Claimant and the Board of Trustees (represented by the Chief Executive Officer and the Claims Administrator).

. . .

(12) The Claimant, or his/her representative may present evidence in support of his/her appeal that:

(a) Has been submitted to the Claims Administrator, and

(b) Has regard to the Claimant's disability as of the date of the decision being appealed.

(13) The Appeal Board may request the presence of any persons as may be determined by it to have evidence relevant to the issues in dispute in the appeal.

(14) (a) The Appeal Board shall render a written decision . . .with (14) fourteen calendar days after the Appeal Board has heard or received all evidence.

. . .

(15) The Appeal Board is required to give reasons for its decision.

. . .

> (17) The Appeal Board's decision **is final and binding, and not open to judicial review**. (Emphasis added)

[35] The Agreement between the appellant and Dr. Davey provides:

> 2.01 The Trustees and Dr. Davey agree that the Appeal Board and its proceedings shall be conducted in accordance with the standards and provisions set out in the Plan, the Appeal Guidelines and the other Guidelines made pursuant to the Plan.
>
> . . .
>
> 2.07 The Trustees, staff of the LTD office and staff of the Claims Administrator shall not in any way interfere with the conduct of an Appeal Board hearing or the decision-making process of the Appeal Board. **The Appeal Board and its individual members shall conduct the appeal process of the Plan in a manner that provides procedural fairness, applies the rules of natural justice and which results in unbiased decisions by members of the Appeal Board**.
>
> 2.08 The Appeal Board members shall render decisions in an independent manner **and shall only received and consider submissions from the Claims Administrator, staff of the LTD office or the appellant and his/her representatives at hearings** scheduled and conducted in accordance with the appeal procedures set out in the Plan, the Appeal Guidelines, this Agreement and the Guidelines made pursuant to the Plan. **Both the Trustees and the appellant, directly or through their representatives, shall be given adequate notice and full opportunity to present their respective cases to the Appeal Board**. (Emphasis added)

[36] A strong privative clause appears not only in the LTD Plan, but it is repeated in the Appeal Guidelines. This is strongly supportive of a high degree of procedural fairness being afforded to the parties (*Baker*, at para. 24). The Agreement between Dr. Davey and the appellant sets out the expectation that the Board, in the exercise of its mandate, heed the principles of procedural fairness and natural justice. In accepting the opportunity to sit as a member of the Medical Appeal Board, Dr. Davey unequivocally bound himself to abide by these principles.

[37] The above provisions are also informative with respect to the content of the duty. The Appeal Guidelines make clear that a claimant who has been denied benefits is to be fully informed of their right to appeal to the Board, the appeal process and to be provided with a copy of the documentation upon which their claim had been denied. They are entitled to receive all material the appellant may submit to the Board for consideration. A claimant, prior to attending at a Board

hearing, should know what to expect, but also have full knowledge of the evidence to be relied upon in challenging their disability claim.

[38] Similarly, Article 2.08 of Dr. Davey's contract with the appellant directs that the Board shall only receive and consider information obtained from the parties at the hearing, and that both parties shall be given adequate notice and full opportunity to present their respective positions. Although not referencing it by name, this contractual expectation on Dr. Davey is an expression of the principle of *audi alteram partem*. It is recognized as being a fundamental component of natural justice (*Therrien (Re)*, 2001 SCC 35 at para. 82; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 104; and *Waterman v. Waterman*, 2014 NSCA 110 at para. 63).

[39] Guy Régimbald in *Canadian Administrative Law*, 2nd ed. (Toronto: Lexis Nexis, 2015) describes the principle as follows:

> **3.2 RIGHT TO NOTICE OR "KNOWING THE CASE TO BE MET"**
> The duty to act fairly is based on two fundamental principles, one of which is usually referred to in its Latin form as *audi alteram partem* – the right to hear the other side. As L'Heureux-Dubé J. noted, *audi alteram partem* is a rule "so fundamental in our legal system that I do not think there is any necessity to discuss it at length". The rule refers to the requirement that individuals must know the case being made against them and be given sufficient information to provide them with a reasonable and meaningful opportunity to answer the case before the decision maker renders its decision: "if the right to be heard is a real right which is worth anything, then it must carry with it a right in the accused man to know the case which is made against him". As held by the SCC in *Charkaoui*, the requirement of adequate notice is inherently linked to that of a fair hearing, in that a fair hearing requires that the affected person be informed of the case against him or her, and be permitted respond to that case. [Footnotes omitted]

(iii) The Importance of the Decision

[40] As noted in *Baker*, "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated" (at para. 25). Here, the Board's decision is highly important to Ms. Hyson. It is determinative as to whether she will be entitled to disability benefits, a decision with significant and long term import to her financial security. This factor also points to a higher level of procedural fairness.

(iv) The Legitimate Expectations of the Parties

[41] In *Baker*, Justice L'Heureux-Dubé described this factor as follows:

> 26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface, supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness*: Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D. J. Mullan, Administrative Law (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 J.L. & Social Pol'y 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[42] As noted by Farrar J.A. in *Jono, supra*, the application of the legitimate expectation doctrine is two-tiered; one must first consider whether legitimate expectations arise in the context before the court, and further, if there was a failure to comply with the expectations, whether it substantial:

> [92] As noted above, the existence of legitimate expectations does not end the inquiry. As per the rationale described by Brown and Evans above, the concerns addressed by this doctrine are only engaged when there has been a failure to comply with the legitimate expectations in a "material respect."
>
> [93] It is useful, at this point, to repeat Binnie, J.'s comments in *Mavi*:
>
> > 68 Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that

> the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite. See *Mount Sinai Hospital Center*, at paras. 29-30; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 (CanLII), 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 78; and *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 (CanLII), 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131. It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking: Brown and Evans, at pp. 7-25 and 7-26.
>
> [94] Thus, where legitimate expectations are engaged, a breach of the duty of fairness can be established if there is a substantial deviation from the authority's representation, but not every contravention will give rise to a breach of the fairness duty. (Emphasis in original)

[43] In the present instance, Ms. Hyson would have the legitimate expectation that the Board would follow the terms of its mandate, particularly in relation to the provisions outlined above. This would include the legitimate expectation that she would be aware of all information upon which a determination of disability would be made, and that she would have the opportunity to speak to that material.

(v) Decision-maker's Own Choice of Procedure

[44] Administrative bodies have differing degrees of latitude in terms of the procedures chosen to reach their conclusions. In the present instance, the procedure to be employed is specified in the foundational documents set out earlier. This includes not only the requirement to conduct matters in accordance with the principles of procedural fairness and natural justice, but also to adhere to specific directions respecting the treatment of evidence to be used in reaching its conclusions.

Conclusion Regarding the Nature and Content of the Duty of Procedural Fairness

[45] All of the above factors support the conclusion that Ms. Hyson was owed a high degree of fairness. In terms of the content, the above provisions also make clear that Ms. Hyson had the right to be informed of, and make representations with respect to, evidence or information that affected the Board's disposition. The Board had a duty to comply with the principle of *audi alteram partem* both contractually and as a fundamental principle of natural justice.

Did the Board Breach its Duty of Procedural Fairness and, if so, was the Breach Material?

[46] As referenced earlier, the appellant argues that as a tribunal with specialized medical knowledge, the Board had every right to reference extraneous information, likening it to a court referencing caselaw or legal authors not cited by the parties. The appellant submits that the Board is constituted of medical doctors for a reason. They are expected to use their specialized knowledge to assess and consider the disputed disability claims coming before the Board. That knowledge properly includes undertaking additional research or informational review on issues before them. The appellant says this can come as no surprise to Ms. Hyson, given her union negotiated and agreed to the Board's composition. Given that medical doctors are appointed to hear matters based on the consensual framework described earlier, the appellant argues Ms. Hyson's complaint regarding Dr. Davey's reference to extraneous material is entirely unwarranted.

[47] The difficulty with the appellant's argument is that it is not the Board's reference to the materials which is central to this appeal – it is what it did, or did not do, after consulting the materials, which is relevant. What is critical to the outcome is whether the Board's failure to advise Ms. Hyson of its review of these materials, and her resulting inability to respond to them, breached the duty of procedural fairness and the principle of *audi alteram partem* in particular.

[48] There are a number of authorities in the administrative law context which are of assistance. A specialized decision-maker's reference to extraneous materials or evidence, and the obligation flowing thereafter, has been considered on a number of occasions. Two Supreme Court of Canada decisions, *Pfizer Co. Ltd. v. Deputy Minister of National Revenue*, [1977] 1 S.C.R. 456 and *Kane v. University of British Columbia*, [1980] S.C.J. No 32, are particularly relevant to the matter at hand.

[49] In *Pfizer*, the Tariff Board had upheld a tariff classification relating to three drug products imported from the United Kingdom. At issue was whether the drugs were a derivative of tetracycline. The Board heard expert evidence adduced by the parties on the proper classification of the products. After the hearing, it undertook its own research. Writing for the Court, Justice Pigeon found the Board's conduct to be problematic:

> Counsel for the appellant has pointed out that the two publications there mentioned had not been put in evidence nor referred to at the hearing, and took

> exception to this procedure. In my view, the objection is well founded. While the Board is authorized by statute to obtain information otherwise than under the sanction of an oath or affirmation (*Tariff Board Act*, c. T-1, s. 5(9)), this does not authorize it to depart from the rules of natural justice. It is clearly contrary to those rules to rely on information obtained after the hearing was completed without disclosing it to the parties and giving them an opportunity to meet it. (p. 463)

[50] In *Kane*, a professor suspended for questionable behaviour took issue with the conduct of the University of British Columbia disciplinary committee. After hearing from the parties, the committee posed further questions regarding the matter to the university president during the course of a dinner break. Dr. Kane was not present during the dinner, nor was he informed of the information provided. The dinner meeting concluded with the passing of a resolution ordering Kane's suspension.

[51] The majority of the Court concluded that the committee obtaining additional information from the president, without giving Dr. Kane an opportunity to speak to it, amounted to a breach of natural justice and the principle of *audi alteram partem* in particular. In reaching that conclusion, the Court articulated several principles:

- A tribunal is free, within reason and its mandate, to determine its own procedures, and a Court on reviewing its decision need not insist upon the "trappings of a court";
- As a constituent of the autonomy it enjoys, a tribunal must observe natural justice which is only "fair play in action";
- To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument;
- A tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity "for correcting or contradicting any relevant statement prejudicial to their views";
- A tribunal is not entitled "to continue privately to obtain evidence between the end of a hearing and the reaching of a decision without notifying the parties . . . so as to give the parties an opportunity of having a further hearing if need be, or, at any rate, commenting on the information and making their submissions thereon"; and

- The court will not inquire whether the *ex parte* evidence did work to the prejudice of the parties; it is sufficient if it might have done so (pages 8 to 9).

[52] I have also found informative a number of other appellate decisions. In *Hecla Mining Co. of Canada v. Cominco Ltd.*, [1988] F.C.J. No. 552, the Federal Court of Appeal set aside a decision of the Minister of Indian Affairs and Northern Development who had reviewed an order of the Mining Recorder pursuant to the *Canada Mining Regulations*. Pivotal to that outcome was the fact that following submissions, the Minister had received a letter from the Mining Recorder setting out a number of further assertions and opinions. The letter was never shared with the parties prior to the issuance of the Ministerial order.

[53] On appeal, it was submitted that the contents of the letter were immaterial, and that the Minister would have rendered the same decision in any event. Having found that not providing the parties with an opportunity to address the contents of the letter constituted a breach of the principle of *audi alteram partem*, the court relying on further authority from the Supreme Court of Canada, rejected the notion that the breach was harmless:

> Counsel for the first respondent attempted to argue that the Minister's breach was of little consequence and that even had the applicant been afforded an opportunity to reply or comment on the Mining Recorder's letter, there is nothing it could usefully have said or done. That submission cannot stand in the light of the decision of the Supreme Court in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, where Le Dain J., at 660-661, said:
>
> > Certainly a failure to afford a fair hearing, which is the very essence of the duty to act fairly, can never of itself be regarded as not of "sufficient substance" unless it be because of its perceived effect on the result or, in other words, the actual prejudice caused by it. If this be a correct view of the implications of the approach of the majority of the British Columbia Court of Appeal to the issue of procedural fairness in this case, **I find it necessary to affirm that 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.** (Emphasis added)

[54] More recently, the Saskatchewan Court of Appeal in *Saskatoon Co-operative Association Limited v. Saskatchewan Joint Board Retail, Wholesale and Department Store Union*, 2016 SKCA 94, quashed a decision of the Labour Relations Board, having found it breached the principle of *audi alteram partem*.

[55] In that case, the Board rendered an oral decision at the conclusion of a hearing. A written decision subsequently followed in which it was clear that the Board had, in the interim, referenced a website, the contents of which supported the conclusions rendered in the oral decision. On judicial review, the Court of Queen's Bench found that the Board's reference to the website was a technical breach of the principle of *audi alteram partem*, but it declined to quash the decision, finding that the information referenced had "no practical effect on the decision" (2015 SKQB 84).

[56] On appeal, the Court of Appeal quashed the Board decision, and considered the practical effect of the breach, if any, to be immaterial:

> 32 The Board's consultation of RWDSU's website is best framed as a breach of procedural fairness that impinges on the parties' participatory rights or, more simply, can be classified as a breach of *audi alteram partem*. In *IWA v Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282, for example, Justice Gonthier for the majority, citing *Board of Education v Rice*, [1911] AC 179 at 182 (HL), stated that the "essence of the *audi alteram partem* rule" has been to ensure parties are "given a 'fair opportunity ... for correcting or contradicting <u>any relevant statement prejudicial to their view</u>'" (emphasis added, at 339).
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> 33 In the appeal before us, the Chambers judge likewise found the Board's actions constituted a breach of *audi alteram partem*, but he did not act on this finding (*QB Decision* at para 21). He did not err by finding a breach of the principle of *audi alteram partem*, but he did err by failing to quash the decision on the footing that the Board's error could have had no effect on the result. RWDSU argued that the judge did not err in so holding.
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> 34 In *Cardinal*, the Supreme Court considered whether a court could weigh prejudicial effect when considering the validity of a decision rendered as a result of a lack of procedural fairness. Justice Le Dain, speaking for the Court in *Cardinal*, affirmed that "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" (at 661). In *Hecla Mining Company of Canada v Cominco Ltd.*, (1988) 116 NR 44 at para 3 (FCA) [*Hecla Mining*], the Federal Court of Appeal rejected a party's submission that "the Minister's breach was of little consequence and that even had the applicant been afforded an opportunity to reply or comment on the Mining Recorder's letter,

> there is nothing it could usefully have said or done," relying on the Supreme Court's affirmation in *Cardinal*.

[57] Based on the above, I am satisfied that the Board breached its duty of procedural fairness. In referencing extraneous materials without notifying Ms. Hyson of same, or providing her with the opportunity to comment thereon, the Board infringed the principle of *audi alteram partem*. I reject the proposition that any breach should be forgiven, as the Board's reference to the extraneous information was immaterial. Whether the material influenced the Board in its decision or not, absent exceptional circumstances, a breach of a fundamental principle of procedural fairness and natural justice is the only "harm" required and serves to render the decision void (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202). Incidentally, I agree with the reviewing judge's view that the material was instrumental in the Board's conclusion. Two opposing theories were advanced in the evidence submitted by the parties. The material referenced by the Board clearly was aligned with the position advanced by the appellant, and the Board undoubtedly utilized it assessing the evidence presented.

Disposition

[58] For the reasons above, I would dismiss the appeal with costs payable by the appellant to Ms. Hyson in the amount of $2,000.00, inclusive of disbursements. The matter should be, as ordered by the reviewing judge, reheard by a differently constituted Board.

Bourgeois J.A.

Concurred in:

Fichaud J.A.

Bryson J.A.