Date: 20140607

Files: 166-02-31313
166-02-32584
to 32586

Citation: 2006 PSLRB 71

Public Service
Staff Relations Act

Before an adjudicator

BETWEEN

ANNA CHOW

Grievor

and

TREASURY BOARD
(Statistics Canada)

Employer

Indexed as
Chow v. Treasury Board (Statistics Canada)

In the matter of grievances referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Herself
Harry Kopyto, legal agent
John R.S. Westdal, counsel
Richard Mercier, counsel

For the Employer: Drew Heavens, Treasury Board Secretariat
Karl Chemsi, counsel

Heard at Ottawa, Ontario,
February 20 and 21 and April 10, 2006.

I. Grievances referred to adjudication

[1] Miss Anna Chow ("the grievor") is employed at Statistics Canada, at the Tunney's Pasture location in Ottawa, as a multi-establishment analyst at the CR-05 group and level. On April 11, 2002, the grievor received a final-level reply from her employer to 84 grievances (where reference is made in this decision to a numbered grievance, the number cited corresponds with the identifier assigned by the grievor and which appears in the final-level reply on file).

[2] On May 3, 2002, the grievor referred 84 grievances to adjudication. The Public Service Staff Relations Board ("the former Board") indicated by letter dated May 21, 2002, that it was unable to process these grievances as the information submitted on the Form 14 (Reference to Adjudication) document was incomplete. The former Board returned the grievances to the grievor.

[3] On May 22, 2002, the grievor referred seven grievances (numbers 4, 15, 24, 66, 68, 69 and 77) to adjudication pursuant to subparagraph 92(1)(*b*)(i) of the *Public Service Staff Relations Act,* R.S.C., 1985, c. P-35 ("the former *Act*").

[4] In a letter dated June 17, 2002, the former Board declined to process three of the grievances referred to adjudication by the grievor as they appeared to be outside the jurisdiction of an adjudicator under subparagraph 92(1)(*b*)(i) of the former *Act.* The four remaining grievances were consolidated by the former Board as a single grievance under adjudication file 166-02-31313. They read as follows:

> ***GRIEVANCE 4***
> *I grieve that my employer has in effect suspended me since July 1, 2001, under the pretense of illness or disability issues, and thereby having violated Article 17, Discipline, of my Collective Agreement by not having followed proper procedures.*
>
> *Therefore I allege disguised discipline.*
>
> . . .
>
> ***GRIEVANCE 66***
> *I grieve that my employer had finally penalized me by not allowing me to return to work for no just cause since July 1, 2001.*
>
> . . .

> ***GRIEVANCE 68***
> *I grieve that my employer had financially penalized me by not allowing me to return to work since July 1, 2001.*
>
> . . .
>
> ***GRIEVANCE 77***
> *I grieve that my employer has in effect suspended me since July 1, 2001, under the pretence of Occupational Safety and Health Codes.*
>
> *Therefore I allege disguised discipline including a financial penalty.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the originals]

[5] On August 23, 2002, the former Board wrote to the parties to advise them that it had scheduled a hearing for PSSRB File No. 166-02-31313 on October 15, 2002. The grievor replied on September 4, 2002, and requested that the former Board hold the scheduled hearing on her reference to adjudication in abeyance until the Canadian Human Rights Commission (CHRC) issued a decision ". . . for the reason that my grievances relate to a prohibited ground of discrimination. . . ." The employer did not oppose the request, which was subsequently granted by the former Board.

[6] The grievor referred further grievances to adjudication on August 6, 2002. The former Board indicated by letter dated September 30, 2002, that it was unable to process these grievances as the information submitted on the Form 14 (Reference to Adjudication) document was incomplete. The former Board returned the grievances to the grievor.

[7] On December 19, 2002, the grievor referred 33 grievances to adjudication (numbers 94 to 110, 113, 114, 116 to 128 and 130). The date of the employer's final-level reply to these grievances, as well as to 13 others (together, numbers 85 to 130), was August 1, 2002.

[8] On June 3, 2003, the grievor wrote to the former Board to inquire as to the status of the grievances referred to adjudication in December 2002. On July 25, 2003, the former Board replied that it had opened files for 16 of the grievances referred to adjudication on December 19, 2002. The former Board returned 17 grievances to the grievor as they appeared to be outside the jurisdiction of an adjudicator pursuant to

subparagraphs 92(1)(*b*)(i) and (ii) of the former *Act*. The former Board regrouped the 16 remaining grievances referred to adjudication as three files, as follows:

> [PSSRB File No. 166-02-32584 (termination)]
>
> ***GRIEVANCE 94***
> *I grieve against the termination of my employment as explained in the letter dated May 22, 2002 that was signed by Mr. Richard Barnaby.*
>
> ***GRIEVANCE 95***
> *I grieve that the termination of my employment which was due to disciplinary measures.*
>
> *Therefore I allege disguised discipline including a financial penalty.*
>
> ***GRIEVANCE 96***
> *I grieve against the termination of my employment which in actuality constitutes disguised discipline.*
>
> ***GRIEVANCE 97***
> *I grieve that Mr. Richard Barnaby and my employer have wrongfully terminated my employment for no just cause.*
>
> ***GRIEVANCE 98***
> *I grieve that the termination of my employment is wrongful as my employer has executed constructive dismissal.*
>
> ***GRIEVANCE 120***
> *I grieve that the grounds for termination of my absence from work is wrongful, as stated in the letter of May 22, 2002, as I had provided fit to work medical notes from my physician.*
>
> ***GRIEVANCE 121***
> *I grieve that the grounds for termination of my employment due to my absence from work is wrongful, as stated in the letter of May 22, 2002, as my employer had falsified personal information with respect to my behavior to justify and legitimize having continued to deny me access to the workplace to perform my duties.*
>
> ***GRIEVANCE 122***
> *I grieve my employer's reason for termination of my employment is wrongful, due to my 'lack of cooperation' to complete the medical assessment with Health Canada by not having attended several prearranged physician's appointments, as I have attended all of these appointments (two).*

GRIEVANCE 123
I grieve my employer's reason for termination of my employment is wrongful, due to my 'lack of cooperation' to complete the medical assessment with Health Canada by having failed to sign the required consent form at one appointment which authorizes the physician to release the fitness to work assessment to the Employer, as my employer had falsified and fabricated information about me in the referral letter that was provided to me by the physician at the appointment.

GRIEVANCE 124
I grieve my employer's reason for termination of my employment is wrongful, due to my 'lack of cooperation' for having stated that I have signed the consent form involuntarily to undergo a current Health Canada medical evaluation, as I had provided this statement for all of the reasons of harassment by my employer as stated in my grievances.

GRIEVANCE 125
I grieve my employer's reason for termination of my employment is wrongful, due to my 'lack of cooperation' for having stated that I have signed the consent form involuntarily to undergo a current Health Canada medical evaluation, as the consent to undergo the medical assessment is voluntary as my employer was informed in writing twice by Dr. Lisa Taris of Health Canada.

GRIEVANCE 126
I grieve my employer's reason for termination of my employment is wrongful, due to my 'lack of cooperation' for having stated that I have signed the consent form involuntarily to undergo a current Health Canada medical evaluation, as I had informed in writing to my employer that I would full cooperate by participating in the medical assessment and sign all required documents as required by the medical assessment.

GRIEVANCE 127
I grieve my employer's reason for termination of my employment is wrongful, as I was verbally provided fully satisfactory work performance appraisals by my supervisors Christiane Leclair and Kathy Piening Faris, as well as an excellent letter of recommendation from Ms. Leclair for my work in OID; I had met the deadline and overall objective (as agreed upon by my supervisor and I) for my two month assignment in MCED; and my employer had falsified and fabricated my personal information of behavior problems in documents to Health Canada.

[PSSRB File No. 166-02-32585 (suspension)]

> ***GRIEVANCE 103***
> *I grieve against my employer's actions of having denied me access to the workplace to perform my duties, which originally done for the sole reason of coercing me to undergo the fit to work evaluation with Health Canada and sign all documents as required by the Health Canada medical assessment, with the real objective to release me for incapacity in order to place me on disability.*
> [PSSRB File No. 166-02-32586 (financial penalty)]
>
> ***GRIEVANCE 106***
> *I grieve that my employer has wrongfully initially denied me access to the workplace to perform my duties for no just cause.*
>
> *Therefore I allege disguised discipline including a financial penalty.*
>
> ***GRIEVANCE 107***
> *I grieve that my employer has wrongfully continued to deny me access to the workplace to perform my duties for no just cause, despite having provided several fit to work medical notes from my physician.*
>
> *Therefore I allege disguised discipline including a financial penalty.*
>
> [*Sic* throughout]
>
> [Emphasis in the originals]

[9] On August 6, 2003, the employer indicated by email to the former Board that it challenged an adjudicator's jurisdiction to hear PSSRB File Nos. 166-02-32584 to 32586 on the grounds that these matters were not referred to the former Board within the time frame prescribed in the *P.S.S.R.B. Regulations and Rules of Procedure, 1993* ("the *Regulations*").

[10] On August 11, 2003, the grievor requested that the three new adjudication files also be held in abeyance pending a decision by the CHRC. The former Board granted this request on August 28, 2003, and indicated that the grievor should inform the former Board once she was prepared to proceed.

[11] On March 31, 2004, the employer submitted a detailed written objection to the jurisdiction of an adjudicator to hear all four references to adjudication, and asked that they be dismissed. In summary, the employer advanced three objections. (1) All of the issues raised in the grievances are inextricably linked to the discrimination

allegations in the grievor's human rights complaint. As such, they fall outside the jurisdiction of an adjudicator under section 92 of the former *Act* and cannot be heard by an adjudicator unless the CHRC decides pursuant to the *Canadian Human Rights Act* (*CHRA*), R.S.C., 1985, c. H-6, that the grievor ought to exhaust the grievance process. (2) In respect of the alleged suspension and financial penalties raised in PSSRB File Nos. 166-02-31313, 32585 and 32586, no discipline ever occurred and there is no indication that any of the grievances allege a violation of the collective agreement. As a consequence, the requirements of section 92 of the former *Act* have not been met. (3) Concerning PSSRB File Nos. 166-02-32584 to 32586, the grievor referred her grievances to adjudication well beyond the time limits specified in the former *Regulations*.

[12] On May 19, 2004, Harry Kopyto, legal agent for the grievor, filed a reply that argued against the employer's objections to jurisdiction. The reply was referred to the employer for a response, and the former Board took the matter under consideration.

[13] On July 19, 2004, the former Board wrote to the parties to indicate that it had decided to hold the references to adjudication in abeyance until the former Board was informed that the CHRC had ruled on the grievor's complaint. On November 4, 2004, the grievor advised the former Board that the CHRC had rendered its decision.

[14] On November 15, 2004, the employer provided the former Board with a copy of the CHRC's decision, which dismissed the grievor's complaint. The employer maintained its position outlined in its letter of March 31, 2004 and noted that the CHRC had not decided that the grievor ought to exhaust the grievance process. In the employer's submission, the matters raised by the grievor were dealt with through the CHRC complaint process, and an adjudicator accordingly lacked jurisdiction to entertain the grievor's references to adjudication. The employer again asked that the former Board dismiss all four references.

[15] The grievor filed a response to the employer's submission on January 7, 2005. She argued that the issues raised in her grievances were not all inextricably linked to the discrimination allegations that were the subject of her CHRC complaint, nor did the CHRC consider all of the issues raised by her complaint. Separate issues remain to be decided. The grievances involve a suspension and financial penalties, and grievance 4 does cite a violation of the collective agreement. Due to faults in the CHRC

investigation, ". . . there was a denial of natural justice . . . ." by the CHRC. Thus, an adjudicator should have jurisdiction to hear the references to adjudication.

[16] On February 7, 2005, the employer confirmed in writing its continuing objections to jurisdiction for the reasons previously cited. Regarding the grievor's contention that there was a violation of the collective agreement in one of her grievances, the employer argued that the grievor had not filed a reference to adjudication under paragraph 92(1)(*a*) of the former *Act*, and that, contrary to what is required where a reference to adjudication concerns the application or interpretation of the collective agreement, she did not indicate that her bargaining agent had provided the necessary support for such a reference. The employer again asked the former Board to exercise its authority under the former *Regulations* to dismiss all matters.

[17] On February 9, 2005, the former Board advised the parties that it had decided to schedule a hearing on June 27 and 28, 2005, to determine the issue of jurisdiction.

[18] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force.

[19] The grievor applied on June 6, 2005 to postpone the hearing to secure counsel. The Chairperson of the Public Service Labour Relations Board (the "Board") granted the application on June 14, 2005, on objection by the employer, and required the grievor to provide the co-ordinates of her counsel no later than July 5, 2005. The Chairperson set down the four outstanding references to adjudication for hearing "peremptorily" in August or September 2005.

[20] In an email sent at 9:58 p.m. on July 5, 2005, the grievor stated that she was unable to provide the co-ordinates of her counsel because Legal Aid Ontario had not yet replied to her request for assistance. Board staff immediately asked the grievor if she was requesting an extension of time. Three weeks later on July 27, 2005, the grievor requested an extension of time giving as her reason the uncertain time frame for her efforts to secure counsel.

[21] On September 25, 2005, the grievor, indicating that she was still searching for counsel, asked the Chairperson to postpone the hearing, both until she received a response to her request for representational assistance from Legal Aid Ontario, and until such time as the Federal Court rendered a decision on an application that she had

submitted to review the CHRC's dismissal of her human rights complaint. The employer opposed the grievor's request. On October 18, 2005, the Chairperson denied the grievor's request and set February 20 to 22, 2006, as hearing dates.

[22] On February 14, 2006, John Westdal wrote to Board staff and indicated that he had been retained as counsel by the grievor earlier that day. Mr. Westdal requested a postponement of the hearing to allow counsel to consult and prepare. The employer opposed this request. In response to Mr. Westdal, Board staff outlined the record of applications from the grievor for postponements and reported that the Chairperson had denied Mr. Westdal's request (on file). On February 17, 2006, Mr. Westdal advised Board staff that the grievor no longer retained him as counsel.

[23] On February 16, 2006, Richard Mercier had notified Board staff that the grievor had contacted him on February 15, 2006, and that he now represented her interests. He requested a postponement of the hearing. The Chairperson considered this request and denied it. Board staff provided Mr. Mercier with information about the record of applications from the grievor for postponements (on file).

[24] On February 17, 2006, the grievor wrote to Board staff directly and asked that the Chairperson reconsider his decision to deny her request for postponement of the scheduled hearing. In her submission, the grievor also raised procedural questions concerning the timing and the admissibility of the employer's jurisdictional objections, and the decision to hold a hearing on the jurisdictional issues. She also inquired into the possibility of conducting the hearing on jurisdictional matters in writing through counsel. Board staff forwarded the grievor's submission to her counsel and indicated that these issues could be raised before the adjudicator at the outset of the scheduled hearing.

[25] Pursuant to section 61 of the *Public Service Modernization Act*, these references to adjudication must be dealt with in accordance with the provisions of the former *Act*.

II. Hearing of February 20 and 21, 2006

[26] In accordance with the former Board's decision communicated to the parties on February 9, 2005, the matters before me at the outset of the hearing on February 20, 2006 were the employer's objections to my jurisdiction to hear the grievor's references to adjudication pursuant to section 92 of the former *Act*. The grievor appeared without counsel. At the beginning, the employer confirmed that it maintained its objections to jurisdiction related to the issue of human rights and to discipline. In the course of the hearing, the employer withdrew its objection based on timeliness.

[27] The grievor raised three preliminary matters: (1) she requested a postponement of the hearing; (2) she challenged the timeliness and admissibility of the employer's jurisdictional objections in view of the August 6, 2003, agreement of the parties to hold her references to adjudication in abeyance pending the results of the CHRC complaint; and (3) she requested that I conduct the hearing on jurisdictional objections by way of written submissions from counsel.

[28] In the course of the hearing's two days, the following occurred. (1) I heard evidence and arguments respecting the grievor's request to postpone the hearing and to proceed on jurisdictional objections by way of written submissions from counsel. (2) I denied the grievor's request for postponement, with written reasons to follow. (3) I indicated that I could not grant at the outset the grievor's request to proceed by written submissions, but left open the possibility of revisiting this request during the course of the hearing. Written reasons on this point were also to follow. (4) I heard evidence and arguments with respect to the grievor's objection to the timeliness and admissibility of the employer's jurisdictional objections. After the grievor indicated that she was experiencing difficulty in understanding the employer's argument, the grievor accepted the opportunity to submit written rebuttal arguments by a specified date. (5) I heard the employer's first witness with respect to its jurisdictional objection on the subject of discipline, and the first part of the grievor's cross-examination. After informal discussions with the parties, I ruled that the evidence phase on the subject matter of discipline would be held in abeyance pending decisions on other preliminary matters. (6) I established time limits for written submission concerning the employer's jurisdictional objection on the subject of human rights.

[29] The Board's staff, on my behalf, subsequently confirmed the procedures and timelines for the required written submissions by letter to the parties dated February 23, 2006.

[30] Given that the parties made reference during the subsequent April 10, 2006, hearing to my oral ruling of February 20, 2006, denying the grievor's request for postponement or to proceed by way of written submissions, I report here first the written reasons for this ruling which I promised the parties. These reasons were drafted immediately after the initial hearing and before the grievor filed a request asking for my recusal from these matters.

A. Grievor's request for postponement and request to proceed by written submissions

1. Summary of the evidence

[31] The grievor testified that her bargaining agent had indicated to her at the time of termination of her employment in 2002 that it would not represent her in these grievances. She thus faced a situation where she would have to pay for legal advice and representation. She had very few funds available to her. After the termination of her employment, she returned to school. She is now a recent graduate, still has few funds and faces the obligation to pay off student loans. A death in the family in the summer of 2005 left her without the time or funds to attend to her case.

[32] She received a request from Board staff in June 2005 for the co-ordinates of her counsel. She did not reply to this request until September because a family member had died during the summer.

[33] She continues to have many "other obligations", including debts to repay. She only contacted her current counsel, Mr. Mercier, during the week prior to the hearing.

[34] In cross-examination, the grievor reported that her bargaining agent had informed her on July 16, 2002, that it was ceasing representation. She agreed with the employer that the absence of bargaining agent support for her case was not a "new" issue. She also acknowledged that her financial situation had been much the same since 2002, and that this was not a "new" issue. She conceded that she had not brought the issue of a death in the family to the attention of Board staff because she felt that this was a private matter. She nonetheless believes this fact to be relevant as it has affected the time and funds available to her to pursue her case.

[35] The employer indicated that it would rely on documents on the files before me, the CHRC Investigator's Report respecting the grievor's complaint (Exhibit E-1), and a Federal Court order of January 5, 2006, which dismissed the grievor's application for judicial review of the CHRC's decision (on file and resubmitted as Exhibit E-2).

2. Summary of the arguments

For the grievor

[36] The grievor argued that her personal circumstances, particularly those relating to her lack of funds and the death in her family in August 2005, are compelling reasons for postponing the hearing.

[37] Some of the delays in scheduling this hearing are not the grievor's responsibility. She noted that she had corrected the chronology of postponement requests and decisions in her letter to the Board dated February 17, 2006, and referred me to her written comments (on file).

[38] The grievor had just retained Mr. Mercier as her counsel. Mr. Mercier was unavailable to attend this hearing because he had a prior court commitment in Montreal.

[39] The grievor's bargaining agent previously declined to represent her. The grievor asserted that every employee has a right to be represented, and that she wishes to have access to legal advice to pursue her case.

[40] The grievor submitted that I should postpone the hearing so that she can have access to legal advice and representation. She also asked that I allow her to proceed by way of written submissions.

For the employer

[41] The employer argued that the grievor's behaviour reveals a pattern of seeking extensions and of requesting postponements, both in her references to adjudication before me and elsewhere.

[42] The grievor has not cited a new reason to justify a further postponement, other than the August 2005 death in her family. She did not at any time bring this fact to the attention of Board staff. The employer questions the grievor's credibility as a witness on this point.

[43] The grievor always has a reason to ask for an extension, and she always will have a reason to ask for an extension. The former Board frequently acceded to her requests, as outlined in the Board staff's letter of February 16, 2006 (on file), but the Chairperson has more recently determined that he could not agree to further requests. The employer takes the position that the pattern of behaviour exhibited by the grievor, as revealed in the chronology of the file, constitutes an abuse of process.

[44] The grievor's abuse of process was also apparent, according to the employer, during the CHRC complaint process and in her judicial review application to the Federal Court.

[45] The CHRC investigator noted the grievor's record of delays and her failure to respect directions when the investigator asked the grievor to submit a rebuttal (Exhibit E-1):

. . .

> 4. *On November 26, 2003, the complainant was asked to submit her rebuttal by January 5, 2004. She requested an extension of "several months" to submit her rebuttal because she was in the middle of exams and because she needed time to seek advice in the matter. In a letter, dated December 11, 2003, she was granted an extension of one month, to February 5, 2004, and advised that if she had not submitted her rebuttal by that date, the investigation would proceed without her further input* [*sic*]
>
> 5. *On January 30, 2004, the complainant sent a fax to say that she had received direction from a Legal Aid lawyer who had advised her to seek an extension of time to submit her rebuttal. She said that she had not yet found legal counsel to help with her complaint. She asked for a further extension for an unspecified period of time. She was granted a final extension of four weeks, to March 4, 2004, and told that if she had not submitted her rebuttal by that date, the investigation would proceed without her further input* [*sic*]
>
> 6. *On March 2, 2004, the investigator received another fax from the complainant requesting a third extension of "about two or three weeks" to allow her legal counsel to complete her rebuttal. The investigator telephoned the complainant and left a message for her asking her to tell her lawyer that a last extension until March 18, 2004, had been granted and that if the rebuttal had not been*

> *received by then, the investigation report would be submitted.*
>
> *7. Sixteen weeks after being asked to submit a rebuttal, the complainant still has not done so* [*sic*]

. . .

[46] Paragraph five of the CHRC investigator's report indicates that the grievor did secure legal direction as early as January 2004 from a legal aid lawyer. Paragraph six suggests that the grievor had retained legal counsel as of March 2004.

[47] When the grievor applied to the Federal Court to review the CHRC's decision, she clearly breached an order of that Court, and was censored for doing so by a prothonotary on January 5, 2006 (Exhibit E-2). The prothonotary dismissed the grievor's application primarily because of an abuse of process:

. . .

> *. . . The Applicant having failed to serve and file a motion record in response within the time provided by the* Federal Courts Rules*, the Repondent's motion to strike was, in due course, put before the Court for determination. . . .*

. . .

> *The Applicant did not file a responding motion record within the time allowed. On December 12, she did write informally to the Court seeking an indeterminate extension of time to do so, on the basis that, although verbally advised of the direction and of its content "several days" after the date of the direction, a written copy thereof was only successfully faxed to her on December 9, 2005. . . .*

. . .

> *. . . the lack of conformity of the Applicant's record with the Order of the Court was not inadvertent; it was deliberate. As such, the filing of that record constituted an abuse of process. Allowing the Applicant leave to amend and re-file would be to condone this abuse. The record further shows a pattern of behaviour on the part of the Applicant of filing inadmissible evidence in blatant disregard of the Court's Orders. Granting the Applicant leave to amend would merely be to invite further disobedience on the part of the Appellant.*

. . .

[48] The grievor has known about the employer's jurisdictional objections since the employer's letter of March 31, 2004 (on file). The grievor replied herself to the objections in writing as early as January 7, 2005 (on file). She has known since the employer's letter of February 7, 2005, following the CHRC decision, that the employer maintained its objections (on file).

[49] Pursuant to the former *Regulations,* an adjudicator may issue a decision based on written submissions or he may request more details from the parties in writing. An oral hearing is normally held for the benefit of the grievor. In this case, the employer submitted written arguments and asked, on several occasions, that the issue be decided without an oral hearing. The decision to refuse this request and proceed with an oral hearing should be seen as benefiting the grievor, but she has abused this decision. The grievor has known about this hearing for many months yet, one week prior to this hearing, the grievor retained Mr. Westdal as counsel. The next day, apparently, the grievor retained Mr. Mercier, from Montreal, as counsel.

[50] The "bottom line" is that the grievor's request for a postponement at this time and in this context is an abuse of process and should be dismissed. Her request to proceed in writing is simply another way of asking for an extension and should be dismissed.

<u>Rebuttal argument for the grievor</u>

[51] The grievor argued that it is not correct to conclude that she had retained counsel at earlier times. Her interaction with a legal aid lawyer, referenced in paragraph five of the CHRC investigator's report (Exhibit E-1), was limited to a telephone conversation during which this person made a suggestion about what she should do. The grievor did not retain this person as counsel. The referenced person in paragraph six of the CHRC investigator's report was not a lawyer, but rather a legal agent who worked with the grievor for only a short time.

[52] The grievor submits that she has not abused the process. Her requests for delays were submitted because she had not been able to find a lawyer who had accepted her case, and she did not have the funds to hire a lawyer. The legal aid lawyer and the legal agent ". . . didn't work out because they couldn't commit to my case." She is now trying to resolve the matter. She did retain a lawyer one week before

the hearing which shows that ". . . I have gone forward. . . .", that ". . . I am not just making excuses. . . .", and that ". . . I'm ready to commit to the case."

[53] Agreeing to proceed in writing would be to everyone's benefit. The employer should be more accommodating to the grievor's counsel and should work with him to establish a schedule. It would be an injustice not to allow the grievor to have access to her counsel.

B. Reasons

[54] The grievor submitted that I should order a postponement of this hearing. She also asked that we proceed to consider the jurisdictional objections by way of written submissions. There is some tension between these two requests. If I accept that we proceed by way of written submissions, the preliminary oral hearing will end and the issue of postponement to another time becomes moot. The grievor's submissions are unclear on this point. I have reconciled the possible tension between the two requests by considering the possibility of postponement first, and then treating the request to proceed in writing as a supplementary or alternate submission.

[55] An adjudicator has discretionary authority to control and determine procedures for the adjudication process, subject to the imperative of providing a fair hearing to the parties. This authority includes the authority to grant a request for adjournment (*Canadian Labour Arbitration,* Third Edition, by Messrs Brown and Beatty, at 3:2300). In the context of the former *Act*, an adjudicator's authority to determine hearing procedure is subsumed under the broad grant of authority given under subsection 96.1:

> ***96.1*** *An adjudicator has, in relation to the adjudication, all the powers, rights and privileges of the Board, other than the power to make regulations under section 22.*

[56] Various factors weigh upon the exercise of an adjudicator's authority to postpone a hearing, but the principal task is to weigh the prejudice to both parties of granting, or not granting such a request (*Canadian Labour Arbitration,* at 3:2340).

[57] At the heart of the grievor's argument in favour of postponement is the proposition that she deserves the benefit of legal advice and/or legal representation in this hearing. Should I reject her requests, she alleges that I will, in effect, deny her

access to the legal advice and/or representation that she feels she needs and is owed by right, for the hearing of February 20-21, 2006. The possibility of prejudice to the grievor is apparent. In the jurisdictional objections before me, there may be issues of law and other complexities that may be demanding for an unrepresented grievor, and possibly outside that grievor's abilities. In such circumstances, I believe that an adjudicator should exercise special caution, and require an unrepresented employee to proceed only where there are strong reasons for doing so.

[58] Having recognized this requirement, it is nonetheless crucial to acknowledge that there are two parties involved in this case. Making a decision on the grievor's request requires that I understand and evaluate the possible prejudice to each party of delaying or not delaying, and weigh the interests and rights of both parties in deciding how we are to proceed. I believe that I also should incorporate into my decision the public interest objective of insuring that the grievance redress procedure provided under the former *Act* works without undue delay, and that it not be held in disrepute.

[59] With these considerations in mind, I have considered carefully the arguments made by the grievor and the employer. This hearing of the grievor's request should not take place in isolation from the events preceding this hearing. My analysis cannot ignore the extensive record of correspondence, procedural submissions and decisions, beginning in 2002, on the grievor's references to adjudication, which establishes the context for the hearing. In this record and in the arguments of the parties before me, I find reason to deny the grievor's request for a postponement.

[60] The Board's decision to schedule an oral hearing was communicated to the parties on February 9, 2005, more than one year before the hearing. The former Board directed that a hearing should be held in order that an adjudicator consider oral arguments on the employer's objections to jurisdiction, in addition to those written submissions which are already on file. The existence and content of these objections were communicated to the grievor immediately following the employer's correspondence of March 31, 2004, almost two years ago. Mr. Kopyto, the grievor's legal agent, responded in writing to the arguments shortly thereafter. The grievor herself submitted written arguments opposing the employer's objections on January 7, 2005. These facts establish that the grievor has known what the employer proposes for a long period of time, has had many months to prepare her representations on the jurisdictional objections, and in fact has submitted

representations in the past on these objections both directly and through her legal agent. There are no surprises here for the grievor.

[61] The clock started ticking for this hearing in February 2005. Setting aside events prior to February 2005, when delays were substantially the result of a decision by the former Board to hold the grievor's references to adjudication in abeyance, what does the record show?

[62] The former Board, on February 9, 2005, scheduled a hearing for the grievor's four references to adjudication for June 27 and 28, 2005, almost five months later. This February notice adequately forewarned the parties that a hearing was on the horizon. With the February notice in her hands, the grievor had considerable time to contact and work with counsel in anticipation of the tentative hearing dates. The former Board did not receive a response from either party indicating that the tentative hearing dates posed a problem. Board staff confirmed June 27, and 28, 2005, as hearing dates by written notice on May 6, 2005 (on file), still seven weeks in advance.

[63] Four weeks later, the grievor applied to postpone the June hearing to secure counsel. Her request of June 6, 2005, taken at face value, establishes that her search for counsel was underway at least by early June 2005, eight months prior to the current hearing. The employer objected to the grievor's application for an extension but the Chairperson, on consideration, granted the grievor's request. The notice to the parties of June 14, 2005, rescheduled the four outstanding references to adjudication for hearing "peremptorily" in August or September 2005. A "peremptory" order, as defined by the *New Shorter Oxford English Dictionary*, is one which is "absolute", "imperative" and "admitting no refusal", one which is "positively fixed, absolutely settled" and "essential." The language used by Board staff conveyed to the parties that the process would proceed.

[64] Board staff also asked in the June 14, 2005 notice that the grievor provide the co-ordinates of her counsel no later than July 5, 2005. I note in the Board's record of correspondence that the grievor sent an email at 9:58 p.m. on July 5, 2005, that she was unable to provide the co-ordinates of counsel because she was still waiting for a reply from Legal Aid Ontario to her request for assistance (on file). Board staff asked in a return email message that the grievor clarify whether she was requesting an extension of time (on file). On July 27, 2005, three weeks later, the grievor submitted such a request stating that she did not know how long her search for counsel would

take. She repeated her request on September 25, 2005, indicating that she was still searching for counsel, and added a new element by proposing that the matter be held in abeyance pending the results of a Federal Court application that she had made. The employer opposed the grievor's request.

[65] On October 18, 2005, the Chairperson denied the grievor's request and set February 20 to 22, 2006, as hearing dates. I take this decision by the Chairperson as indicating that he did not accept that the grievor's continuing search for counsel or her involvement in a Federal Court application justified a further postponement under all of the circumstances known to the Chairperson at that time. The effect of the Chairperson's decision, nonetheless, was to provide the grievor over four additional months to prepare for the hearing. Board staff confirmed the February hearing dates in writing on December 13, 2005, (on file) and sent a further official notice of the hearing to the parties on January 23, 2006 (on file).

[66] Neither the records on file nor the evidence given at the hearing indicate what happened in the grievor's search for counsel between the Chairperson's October 18, 2005, denial of the grievor's postponement request and the week of February 13, 2006. All that can be said with certainty is that Board staff received a letter from Mr. Westdal on February 14, 2006, four working days prior to the scheduled hearing, in which Mr. Westdal indicates that he had been retained as counsel by the grievor "earlier today". Then, Mr. Mercier informed Board staff that he was engaged as counsel by the grievor on February 15, 2006, to represent her interests. On February 16, 2005, Mr. Westdal advised Board staff that he was no longer counsel for the grievor. The Chairperson denied requests for a postponement from both lawyers.

[67] Are there reasons in evidence that explain why it is reasonable that the grievor was unable to retain counsel until the week before the hearing, despite knowing the hearing dates for months in advance? Her testimony and arguments refer to a lack of funds and to her personal situation as reasons for the delays. On the issue of finances, she has conceded in cross-examination that this factor has existed in her life for a very long time, since her termination of employment in July 2002. While a lack of funds is obviously not a small problem, it certainly is not a new problem for her. The chronology shows, I believe, that the grievor had sufficient time to find a solution. As to her personal situation, the only new evidence before me is that there was a death in her family in August 2005. Once again, the impact of a family death should not be

discounted, but it is also not a new factor today, six months later. The grievor offered no details in her testimony about the circumstances surrounding this event and it appears that she did not inform Board staff in her postponement applications that this event had occurred. At the hearing, she did not reveal anything that would allow me to understand how this family situation affected her search for counsel, or her financial situation, or to know what the linkages might be to what has since transpired.

[68] Without satisfactory reasons to explain and justify the delays that have occurred, I am left to contemplate the possibility that either the grievor has not been sufficiently diligent in her search for counsel or that some of her applications for postponement constitute dilatory tactics.

[69] The employer asserts that there is, in the pattern of the grievor's behaviour in this process and in other redress procedures, clear evidence of abuse of process. I do not believe that I need to make a finding on this proposition. It is nonetheless noteworthy that the evidence of the grievor's comportment in other redress procedures led both an investigator with statutory authority under the *CHRA* and a prothonatory of the Federal Court to pronounce on her conduct in an obviously negative fashion.

[70] What happened in other processes, however, does not determine my conclusions here. The grievance adjudication process is separate and distinct. I must judge the grievor on how she has acted during this process. Doing so, I conclude from the record and the evidence that the grievor has not been diligent in her preparations for this hearing. Moreover, I cannot find satisfactory explanations that would relieve her of responsibility for this lack of diligence. It is simply not reasonable to accept that she was only able to retain counsel for this hearing on February 14, 2006, given all that has gone before. She mentioned several times in evidence and argument that it had been very difficult for her to find counsel who would "commit" to her case. The grievor, I believe, cannot abdicate her own responsibility as a grievor to pursue her case with diligence by seeking to attribute the problem to a lack of commitment to her case among the legal agents and counsel she has encountered.

[71] In weighing the possible prejudice to the grievor's interests that will be caused by denying her request for postponement, I therefore take into consideration that she is in significant part directly responsible for the difficult circumstances in which she

finds herself today. To the extent that there is possible prejudice to the grievor, she is the principal author of the prejudice.

[72] On the other side of the ledger, the employer faces the prejudice of continuing delays in a case that was triggered by events more than four years ago. The employer reasonably expects that this case should move forward. In view of the possibility that eventual corrective action could reinstate the grievor, it is obvious that further and lengthier delays could expose the employer to heightened prejudice. Moreover, I am concerned that accepting the grievor's request for postponement under these circumstances would signal to her that scheduling decisions taken by the former Board and the Chairperson and past rulings on other postponement requests can be ignored. If I felt that the record and evidence showed that the former Board or the Chairperson had acted hastily in these matters, or that they had disregarded the grievor's interests over the many months leading up this hearing, I might reach a different conclusion, but this is not the case.

[73] I note that the former Board and adjudicators have denied requests for adjournment in the past where there was a record of excessive delays or where counsel or the bargaining agent representative was unavailable. In *Varzeliotis v. Treasury Board (Environment Canada)*, PSSRB File Nos. 166-02-9721 to 9723, 10273 and 10879 (1983) (QL), the grievor engaged counsel once the employer had concluded its evidence, and counsel then requested an adjournment. The adjudicator denied the request on the grounds that there had been excessive delays and that the grievor had had ample time to prepare for her case. In this situation, the grievor and counsel then withdrew from the hearing, but the hearing continued in their absence. In *Barzotto v. Treasury Board (Revenue Canada – Customs and Excise)*, PSSRB File No. 161-02-520 (1988) (QL), a complainant appeared before the former Board unrepresented and read a statement by the complainant's bargaining agent requesting an adjournment of the hearing. The bargaining agent had advised the former Board five weeks earlier that its representative was unavailable for the hearing. The former Board dismissed the request and the complaint, holding that there had been adequate opportunity for the complainant to make representational arrangements.

[74] In ruling to continue the hearing, I do not ignore that the grievor may prove to be unable to respond effectively to all of what lies ahead. This brings me to her second request, that the matter proceed by way of written submissions.

[75] The general practice is to decide on the basis of written submissions only where the questions to be determined are restricted to issues of law and argument. Where the facts are in dispute, adjudicators prefer to receive oral evidence and to provide the parties an opportunity in open hearing to test the evidence each has adduced. At the outset of a hearing, it is sometimes difficult to judge with precision the extent to which preliminary matters will require testimony and the production of other evidence. In this case, a reasonable observer would predict that, at least with respect to the employer's objection relating to discipline, it is highly likely that evidence will be needed. On this matter, I note that the filings of the parties do tend to indicate that there is no agreement on the factual basis on which the grievor's allegations of discipline are founded. For this objection, proceeding by way of written arguments is unlikely to afford me the evidence I will need to make a decision, unless the parties subsequently reach an agreement on the facts.

[76] For this reason, if no other, I cannot make a decision granting the grievor's application to proceed in writing at this stage. I understand, as well, that accepting the grievor's application would, as argued by the employer, have the same effect as granting her the postponement that I have denied above.

[77] I do, however, leave open the possibility of revisiting the grievor's application during the course of the hearing. As the nature of the debate over preliminary matters becomes more apparent and the need for evidence, or lack thereof, is clarified, it may be appropriate to reconsider a written option on some of the issues. I will also be better able to weigh the grievor's ability to represent herself as the hearing goes forward and, where necessary, to adjust the procedure if there is a need to insure that both parties have a fair and balanced opportunity to place their cases before me.

III. <u>Hearing of April 10, 2006</u>

[78] On March 7, 2006, Mr. Mercier requested, on the grievor's behalf, that the adjudicator recuse himself from further involvement in this matter on the grounds that there existed a reasonable apprehension of bias. The employer, in reply, opposed the request. I ruled that a hearing be held on that request.

[79] At the hearing on April 10, 2006, to consider the recusal request, Mr. Mercier represented the grievor as counsel.

A. Grievor's request for recusal

1. Summary of evidence

[80] The parties led evidence through two witnesses, the grievor on her own behalf, and Drew Heavens, senior employer representation officer for the Treasury Board Secretariat, on behalf of the employer.

[81] The grievor testified relying on a summary of contemporaneous notes taken at the February 20 to 21, 2006, hearing. She indicated that she came to the hearing on February 20, 2006, knowing that its subject was the employer's two preliminary objections to jurisdiction concerning human rights and discipline. She testified that she was aware that if either objection succeeded, an adjudicator would not have jurisdiction to consider her grievances. She was not aware, however, how complex the issues might be in discussing the employer's objections. She said that she had not had an opportunity for full consultation with a lawyer to prepare for the hearing.

[82] The parties did not discuss the employer's jurisdictional objections on February 20, 2006. Instead, the first subject was the grievor's request for a postponement or to proceed by way of written submissions. The adjudicator denied this request. The remaining time on the first day of the hearing, until approximately 4:30 p.m., was spent on the grievor's objection to the timeliness and admissibility of the employer's jurisdictional objections. After the grievor made her representations in support of this objection, the employer presented arguments, which the grievor stated she did not understand. The grievor recalls being so upset by remarks made by counsel for the employer relating to the "kickback" of her CHRC complaint that she ceased taking notes of what counsel said. She requested again that the adjudicator allow her to proceed by way of written submissions. The adjudicator did not make a decision at the end of the day. Also, she testified that the adjudicator neither explained what would happen the following day, nor did he alert the grievor that she should be prepared to bring witnesses on the following day.

[83] According to the grievor, at the beginning of the second day of the hearing on February 21, 2006, the adjudicator again failed to explain what was to occur that day. He reconfirmed his initial ruling denying an adjournment or to proceed in writing, and told the grievor that he now wanted the parties to explain the facts of the case. He did not mention the issue of discipline but asked the employer to begin with its witnesses.

The grievor testified that she was under the impression that the employer, unlike her, was aware that there would be testimony on the second day because the employer's first witness came with prepared notes and responses to questions on paper. The grievor cross-examined the witness, but insists that she had no opportunity to tell the facts of her case. The grievor's evidence was that, at the end of the morning of February 21, 2006, the adjudicator did not tell the grievor to prepare her own testimony for the afternoon.

[84] The grievor testified that, during the afternoon of February 21, 2006, she asked to admit evidence in the form of transcripts of audiotaped conversations that she had with her supervisors. The employer objected to this evidence. The adjudicator asked how the taped conversations were relevant to the issue of discipline and the grievor gave a more detailed explanation. The adjudicator did not discuss the reasons given. At this point, the grievor alleged that the adjudicator appeared "scared" and "panic stricken." The facial features of counsel for the employer displayed a similar reaction. The adjudicator asked the employer how the hearing should proceed. The latter elaborated its objections to the relevance of the tapes and its concern about the amount of time that would be required to debate the issue. The employer then proposed that consideration of the discipline issue stop and that the parties instead proceed to address the employer's human rights objection in writing. The grievor recalls that the adjudicator did not ask for her opinion but said that he was in complete agreement with the employer's proposal and would so order. The grievor testified that the adjudicator did not answer her request to submit the audiotape evidence but instead excused himself from the room for five minutes. He then indicated on his return that everyone should go home and that he wanted to meet with the parties privately. He gave no reasons for ending the hearing. This new procedure took the grievor completely by surprise because she believed that there was "no good reason to stop the hearing".

[85] The grievor explained how she met with counsel for the employer and the adjudicator in the adjudicator's office for what the adjudicator called an "off-the-record" conversation. At this meeting, counsel for the employer talked further about the audiotapes and repeated his proposal on how the case should proceed. The grievor testified that the adjudicator neither asked her for her opinion, nor did counsel for the employer. According to the grievor, she finally asked: ". . . does anyone want to hear what I have to say?", and then expressed her desire to finish the hearing on

discipline as well as her opinion that the employer's proposed approach prejudiced her interests. The adjudicator replied in the negative causing the grievor to remark ". . . I haven't a clue why I'm here if this decision is pre-determined." The grievor recalls that the adjudicator then yelled ". . . I don't like what you're insinuating. You are treading on dangerous ground. I'm the adjudicator. I get to decide on the order of proceedings." The grievor asked whether there could be an oral hearing to receive submissions from her counsel instead of written submissions, to which the adjudicator yelled "no". She asked if her counsel could have input into setting the deadlines for receiving written submissions, to which the adjudicator also yelled "no".

[86] As a result of the adjudicator's conduct during the two days' of hearing, the grievor testified that she lost confidence in the adjudicator's ability to decide the case impartially. She cited eight reasons for her loss of confidence. (1) The adjudicator did not inform her to bring witnesses on the second day of the hearing. (2) The adjudicator inexplicably suspended the hearing on February 21, 2006, immediately after the employer objected to the admission of her audiotape evidence. The adjudicator should have, but did not discuss and address the admissibility of the audiotape evidence. (3) The adjudicator should have, but did not finish the hearing on discipline. (4) The adjudicator did not answer the grievor's question on audiotapes or allow their submission. (5) The adjudicator denied her request for a postponement or to proceed in writing. He then inexplicably reversed his decision. (6) On February 21, 2006, the adjudicator modified the process to rule first on the employer's human rights objection. (7) The adjudicator appeared "scared and panic-stricken" in dealing with the question of the audiotapes, conducted a meeting "off the record", failed to ask the grievor for her input on how to proceed, and never explained the process. (8) The adjudicator raised his voice on several occasions. In the grievor's submission, the expressions "raised his voice" and "yelled" are interchangeable.

[87] According to the grievor, if the adjudicator does not recuse himself, he will be acting in a manner that is entirely biased, as has been shown by his conduct at the hearing on February 20 and 21, 2006.

[88] In cross-examination, the employer inquired about the grievor's use of notes taken at the hearing as a basis for her testimony. Asked how many pages of notes she had taken on the first day of the hearing, she replied that there were two or three pages, and that she had stopped taking notes at the point when the employer made its

arguments. She did not take notes during discussion of her request for postponement because she did not think it was that important, and that her friend, a "Chinese man" in attendance at the hearing, was taking notes. Asked how many pages of notes she took during the off-the-record meeting on the afternoon of February 21, 2006, the grievor replied that she did not know.

[89] The grievor acknowledged that she was upset with the adjudicator's initial ruling not to adjourn the hearing or to proceed by way of written submissions. She did not, however, accept the proposition subsequently put to her by the employer that the adjudicator's ruling on February 21, 2006, had in fact given her what she had sought at the outset. She did agree that the adjudicator's decision, summarized by Board staff in the letter of February 28, 2006, established deadlines for her to submit written arguments, both in rebuttal of the employer's argument on the timeliness of jurisdictional objections as well as to the employer's jurisdictional objection concerning human rights. Asked whether this procedure was intended to allow her to consult with her lawyer, she replied that she could not speculate on this point, but accepted that she would have the opportunity to consult with her lawyer as a result of the ruling. She also acknowledged that the Board staff's letter asked the parties to discuss the admissibility of future evidence in advance of future proceedings, and that this reference in the letter did relate to the question of her proposed audiotape evidence. The grievor recalled that the employer had indicated at the hearing that the question of admitting the tape would involve a "big debate" and concurred that she had not provided a copy of the tape or transcripts of the tape to the adjudicator or to the employer.

[90] With regards to the "back-room" meeting on the second day of the hearing, the grievor did not recall that this session lasted for approximately two hours, as suggested by the employer, but did remember that it began between 4p.m. and 5p.m. and that she left at about 6p.m. She first stated that ". . . she could not specify. . . ." and then had "no comment" on whether the adjudicator had allowed her to comment during the meeting. Then she said that she did talk during the course of the session. The grievor confirmed that the adjudicator did raise the issue of sharing the audiotape evidence during the conversation.

[91] Asked what was the basis of her impression that both the adjudicator and counsel for the employer were worried about the tapes — "panic stricken" in her words

— the grievor stated that both the adjudicator and counsel were concerned that the tapes or transcripts of the tapes would be admitted, in which case the employer would lose its jurisdictional objection concerning discipline. She suggested that the adjudicator was not "clueless" about the tapes or transcripts of the tapes because he had asked her about their relevance. She agreed that he had never asked to examine or review the tapes or transcripts of the tapes.

[92] Mr. Heavens joined the Treasury Board Secretariat in 2002, following experience as chief of labour relations for Environment Canada. His current duties as senior employer representation officer include providing assistance to Justice Canada legal counsel and departmental advisors in the preparation of adjudication cases and advising departments on issues such as termination of employment. Mr. Heavens was assigned the grievor's file shortly after joining the Treasury Board Secretariat and subsequently liaised with the former Board on scheduling matters and with respect to jurisdictional objections on this file. Mr. Heavens frequently attends adjudication hearings on cases involving Treasury Board. He was present during the whole hearing on February 20 and 21, 2006, as an observer, and took 35 to 40 pages of notes on what transpired.

[93] Mr. Heavens recalled that the first one to two hours of the hearing of February 20, 2006, involved a discussion of the process and order for considering both the employer's jurisdictional objections and the preliminary matters raised by the grievor. He said that this initial phase required some time because the adjudicator made extra efforts to explain the process very thoroughly to the grievor, who was appearing without counsel. Included in the adjudicator's explanations was a discussion of the distinction between evidence and argument, and of why there might be a requirement for the parties to lead evidence to provide the adjudicator with a factual basis for deciding a jurisdictional objection.

[94] Mr. Heavens recalled that, throughout the two days of the hearing, the adjudicator provided the grievor with multiple breaks in the proceeding so that she could manage her presentations. The adjudicator frequently explained aspects of the procedure and repeated himself a number of times to ensure that she understood what was happening and what was required.

[95] The adjudicator ruled at the beginning of the afternoon of the first day against the grievor's request for a postponement and to proceed by way of written

submissions. Mr. Heavens testified that the adjudicator provided thorough oral reasons for making this ruling and did so again on the second morning of the hearing. The adjudicator's tone, according to Mr. Heavens, was consistently respectful of both parties and both parties were fully heard before the adjudicator made rulings. Mr. Heavens expressed the view that he heard nothing but well thought out rationales from the adjudicator. The witness recalled that the process took longer than the employer had anticipated because the adjudicator repeatedly provided explanations to the grievor.

[96] In the course of the hearing, Mr. Heavens remarked to another colleague in attendance that the hearing offered an excellent learning opportunity, and was akin to an "adjudication 101 course" given the care taken by the adjudicator to explain the process to the grievor.

[97] Mr. Heavens did not remember the grievor mentioning any concern about bias or impartiality on the part of the adjudicator during the hearing. At one point, when the grievor remarked to the adjudicator that ". . . I'm sorry if you're frustrated with me", the adjudicator replied: ". . . I'm not frustrated, I'm just explaining. . . ." On several occasions, the grievor thanked the adjudicator for giving her extra time and for offering explanations, one time saying: ". . . thank you for being gracious with me."

[98] In cross-examination, Mr. Heavens outlined how the grievor's preliminary matters were discussed. After the grievor and the employer completed their main arguments on the grievor's submission that the employer's objections were untimely (near the end of the first day), the grievor explained that she did not understand what the employer had said and was unable to make rebuttal arguments. She asked that the adjudicator reconsider whether she might be permitted to make written arguments. The hearing then adjourned for the day in order for the adjudicator to consider the request.

[99] At the resumption of the hearing the next morning, the adjudicator reiterated his original ruling that the hearing should proceed, but offered the grievor three options with respect to her rebuttal argument on the timeliness objection: (1) that she proceed to make an oral rebuttal argument; (2) that she decline the opportunity to make an oral rebuttal argument; or (3) that she make her rebuttal argument subsequently in writing, in which event the employer would have an opportunity to comment on her written submissions. The grievor chose the third option. The

adjudicator specified March 8, 2006, as the deadline for this submission. The adjudicator did not conduct a discussion about this due date.

[100] On February 21, 2006, the employer led evidence on the jurisdictional objection related to discipline through its first witness. Into the afternoon, the grievor cross-examined this witness reaching a point where she indicated that she wanted to put to the witness audiotape evidence of conversations with her supervisors, a proposal which prompted the employer to open a discussion about the relevance and admissibility of this evidence.

[101] Close to 4p.m., deliberations on this matter had not finished. The employer's objection concerning discipline was unfinished and the rest of the evidentiary phase on discipline still lay ahead. The adjudicator adjourned the session and asked to meet the parties privately. Mr. Heaven's understood that the adjournment and the private meeting with the parties was linked to the employer's objection to the admissibility of the grievor's proposed audiotape evidence. He did not agree with the grievor that the adjudicator had terminated the hearing.

[102] Asked in cross-examination whether he thought that the grievor would be able to understand the issues at the hearing, Mr. Heavens replied that he was not in a position to judge. He did agree that the jurisdictional objection related to human rights could be a complicated matter for someone who is not an expert.

[103] Mr. Heavens stated that he was not surprised by the adjudicator's ruling at the end of the hearing to modify the process to be followed. In his view, this ruling made sense given the time remaining for the hearing that day as well as the nature of the audiotape admissibility issue that had emerged. The ruling also gave the grievor an opportunity to consult with a lawyer.

[104] Asked if he had realized during the course of the two days that the grievor needed a lawyer, Mr. Heavens could not say so unequivocably. He recalled that the adjudicator had taken much time to explain the process to the grievor and she, for her part, had shown herself able to manage the process during the preliminary issue of the postponement request and during her main argument on the timeliness objection. Mr. Heavens did agree with the grievor that it was possible that less time would have been lost if the grievor had had a lawyer present.

[105] To the point made that the grievor's counsel, Mr. Mercier, would have been available the following week had the adjudicator postponed the hearing at the outset, Mr. Heavens indicated that adjudication hearing schedules and those for the employer's counsel run three months in advance and that it would not have been possible to hear the case the following week.

2. Summary of the arguments

For the grievor

[106] The grievor referred me to a dozen passages from Patrice Garant's leading textbook, *Droit administratif*, 5th edition, 2004, outlining principles of natural justice and procedural fairness that establish the basis for the conduct of a hearing by an adjudicator. Given the number of references (pages 713, 740, 741, 742, 744, 770, 771, 772, 773, 774, 813 and 814), the passages cited by the grievor are not reproduced here. I, instead, report the principal inferences drawn by the grievor from the text and their application to the facts of the case at hand.

[107] The grievor argued that the basis of natural justice in administrative law are the two principles *audi alteram partem* and *nemo judex in sua causa*. The former requires that the parties affected by a decision have the right to be heard. The latter holds that a trier of a case cannot be involved in that case, thus signifying the right of the parties to be treated impartially and without prejudice.

[108] Under the doctrine of reasonable expectations, which represents an extension of the rules of natural justice, the injured party has the right to know beforehand exactly how proceedings will be carried out. The underlying purpose of this right is to prevent surprises for which a party cannot prepare. In this case, the adjudicator did not make the procedure for the hearing known in advance and thus violated the rules of natural justice. While an adjudicator does have discretionary authority in the conduct of a hearing, this authority is neither total nor complete. It must be exercised in a fashion that respects all rules of natural justice.

[109] Central to the grievor's assertion that there is a reasonable apprehension of bias in this case is the adjudicator's failure to recognize and protect the grievor's right to be represented. Cross-examination of Mr. Heavens, an experienced observer familiar with hearing procedure, established that a reasonable person would understand the

grievor's need for legal representation. The adjudicator himself came to be sympathetic to the grievor's need for a lawyer when he finally decided to allow her to make written submissions on certain issues, thereby affording her the opportunity to consult with counsel. Failing this opportunity, it is clear that the grievor would have been harmed.

[110] The nature of the preliminary matters before the adjudicator were such as to demand extreme caution on the part of the adjudicator, particularly in respect of the employer's human rights jurisdictional objection that goes to the very heart of the adjudicator's competence. Given the fundamental nature of this objection, the adjudicator should have dealt with it immediately at the outset of the hearing. He should have realized immediately that his only option was to suspend the hearing in the face of this complex legal matter. Instead, the adjudicator waited two days before accepting that the grievor could not fully exploit her rights.

[111] Because discussion began on the employer's jurisdictional objection concerning discipline without a determination by the adjudicator of the employer's human rights objection at the beginning of the hearing before all other issues, the employer renounced its right to pursue further its human rights objection. By turning to the discipline issue, the adjudicator opened questions relating to the merits of the case rather than determining, as was required, the prior matter of his jurisdictional competence. When the time came for the grievor to prove discipline, the employer raised an objection, the complexity of which required that the adjudicator end the hearing.

[112] Evidence to the effect that the adjudicator took a great deal of time to explain the proceedings to the grievor proves that continuing the hearing without a lawyer was impossible. This is exactly what the adjudicator eventually realized but, in the meantime, the grievor experienced two days of "living hell".

[113] The doctrine of reasonable expectations requires that the adjudicator respect the procedural decisions that he makes. At the end of the second day, the adjudicator surprisingly substituted the initial procedure with an opposite procedure. He should have started that way at the very beginning with the human rights objection.

[114] The right to be heard — *audi alteram partem* — goes beyond the right to speak. Especially where the debate involves legal matters, it includes and requires the right to

be duly represented. In these situations, as summarized by Garant, at 814, ". . . *la jurisprudence a reconnu que la représentation par avocat s'imposait*."

[115] An adjudicator must allow every element of evidence to be brought before him. This adjudicator denied the grievor an opportunity to provide her audiotape evidence regarding the issue of discipline. The adjudicator could have and should have looked at this evidence, made a decision admitting the evidence (because it is admissible) and continued the hearing. In the alternative, he should have simply adjourned to a later date and allowed the grievor's counsel to address the matter. What is absolutely necessary in administrative law is a party's opportunity to present her case adequately. The grievor ". . . could not imagine that this would be possible without representation."

[116] According to the grievor, the following irregularities in the conduct of the hearing create for her a reasonable apprehension that the adjudicator is biased: (1) the adjudicator's refusal to grant the grievor a postponement so that she could secure counsel; (2) the repeated refusal of the adjudicator to accept written submissions; (3) the adjudicator's failure to recognize the complex legal nature of the debate and decide on procedure accordingly; (4) the adjudicator's failure to rule on the jurisdictional objection concerning human rights at the beginning of the hearing; (5) the adjudicator's failure to find that the employer, by opening debate on its jurisdictional objection concerning discipline, had renounced its jurisdictional objection concerning human rights; and (6) the fact that the adjudicator ordered a completely new order of proceeding when he encountered the employer's objection to the admissibility of the grievor's audiotape evidence.

[117] The grievor referred me to the decision of the majority of the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board),* [1978] 1 S.C.R. 369, at 385, which confirms that the principle of a reasonable apprehension of bias applies to tribunals such as an adjudicator, and which endorses, at 391, an earlier finding of the Court to the effect that ". . . a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification. . . ."

[118] The grievor argues that the employer's witness, Mr. Heavens, is a well-informed, reasonable person who understood through his observation of the hearing that the grievor needed counsel. If Mr. Heavens was not entirely sure how and why the hearing had come to an end, then it is hard to imagine what the grievor would have been able to understand in the course of the proceedings. It cannot be allowed that an

unrepresented person who does not understand the situation can be required to proceed and deal with complex legal issues without the help of a lawyer. This is the essence of the *audi alteram partem* principle.

[119] The grievor submits that the adjudicator's procedure was unclear. After a certain point, everything changed. It is thus easy to understand why the grievor could not follow the adjudicator and consequently lost confidence in him.

For the employer

[120] The employer technically has no interest in who decides these references to adjudication, whether the current adjudicator or another. It does oppose the grievor's request for recusal because the principles underlying the issue of recusal are very important. The first principle is that a trier of fact should take an application for recusal very seriously, and that the threshold for granting a recusal should be high. There must be clear grounds for the application, and it is the applicant's burden to prove a reasonable apprehension of bias. Recusal must be used sparingly.

[121] The second principle is that the criterion for sustaining a recusal request is that a reasonable person, well informed about the whole situation, would view the trier of fact as partial. The employer emphasizes that it is vital that this reasonable person know the full context of the case.

[122] The third principle is that a party who is unhappy with a ruling made by a trier of fact does not have grounds for a recusal request on that basis alone.

[123] What do we know about the context for this recusal application? We know that the grievor requested many postponements over the last two years or more. She had full opportunity over this period to seek legal advice. She, in fact, hired and fired three or four lawyers, one of whom (Mr. Westdal) was hired a week before the February hearing and then dismissed when he failed to secure a postponement from the Chairperson. The grievor indicated in her February testimony that none of her earlier lawyers were ". . . committed to her case." The grievor cannot, however, consider adjudicators in the same manner. She cannot seek to pick another adjudicator if she thinks the existing adjudicator is not ". . . committed to her case." That is exactly what she is trying to do. The grievor was unhappy with the adjudicator's denial of her

request to postpone or to proceed by way of written submissions at the February hearing and now she wants another adjudicator.

[124] The employer repeatedly objected to the grievor's requests for postponement over the many months leading up to the hearing, including requests submitted last May and July after the Chairperson established initial hearing dates. Despite the employer's opposition, the Chairperson granted the grievor's requests, but finally required in the case of her July application that she find a counsel and report his/her identity to the Board staff within a short, defined period. She failed to do so. Last fall, the grievor again requested a postponement but this time the Chairperson refused. At that point, the grievor had at least three or four months' advance notice of the February hearing dates but she only hired counsel one week before the hearing, and then fired the first of two lawyers hired that week. Both of these lawyers requested postponements and the Chairperson refused both times. All of this establishes the context that a reasonable person must know view in considering what happened at the February hearing.

[125] There are many misunderstandings in the grievor's evidence and arguments. Regarding the question of discipline, the issue before the adjudicator was solely jurisdictional and not the merits of the case. The grievor's onus was to demonstrate that the employer actually did impose discipline. If she could not establish the fact of discipline, the adjudicator could not accept jurisdiction under the terms of the former *Act*. The evidence before the adjudicator was adduced to allow him to determine whether there was discipline, not to evaluate the merits of imposing discipline. Indeed, through the two days of hearings, there was no discussion at all of the merits of the case. The grievor is thus wrong to allege that the adjudicator did not give her the opportunity to present her case on discipline. At the point during the afternoon of February 21, 2006, when the hearing adjourned, the employer had only examined its first witness and the grievor was in the process of conducting her cross-examination of that witness. The adjudicator neither ended consideration of the jurisdictional objection concerning discipline nor did he foreclose the grievor's opportunity to present evidence, contrary to what the grievor alleges. The state of proceedings on discipline at the end of the second day is absolutely clear from the Board staff's February 23, 2006, letter summarizing what the adjudicator had ruled:

. . .

> *Proceedings on the employer's jurisdictional objection concerning "discipline" will be suspended temporarily pending an interim written decision from the adjudicator on the following matters:*
>
> *1. Written confirmation of the adjudicator's ruling on the grievor's request to postpone the hearing and/or to proceed by way of written submissions.*
> *2. Ruling on the grievor's objection to the timeliness and admissibility of the employer's jurisdictional objections.*
> *3. Ruling on the employer's jurisdictional objection concerning "human rights".*
>
> . . .
>
> *Once the adjudicator has issued his interim written decision, the Board's Registry Operations will consult with the parties and will determine a date for resumption of the hearing, should it be required, to continue the evidence phase with respect to the employer's jurisdictional argument on "discipline" as well as to receive arguments on this matter. . . .*

. . .

[126] The grievor's interpretation of the right to be represented by a lawyer is also confusing. This principle is not applicable to most adjudication proceedings. Hundreds of cases proceed before adjudicators where grievors represent themselves or where bargaining agent representatives who are not lawyers argue on behalf of grievors. The passage cited by the grievor from Garant to the effect that a lawyer is required often applies to cases involving interpretation of the *Charter* or where fundamental issues of the right to life, liberty and security of the person are at stake.

[127] Assuming, for purposes of argument, that the grievor did need a lawyer, what in fact has happened? By virtue of the adjudicator's rulings allowing the grievor to make subsequent written submissions, first for her rebuttal argument on the issue of timeliness of the employer's jurisdictional objections, and, second, for her main argument on the employer's human rights objection, the grievor has effectively gained full access to counsel. The adjudicator suspended the hearing and, by doing so, resolved any issue that might exist about the grievor's need to be represented by a lawyer before the adjudicator decides the two outstanding jurisdictional questions.

[128] The real issue here is whether a reasonable person fully aware of the context would find anything in the hearing to support the proposition that the adjudicator was

partial or biased. The employer submits that such a reasonable person could not identify anything to substantiate the grievor's allegation. Mr. Heaven's testimony shows that throughout the hearing, the adjudicator provided the grievor with every possible explanation of the process. The adjudicator's tone was very respectful of both parties at all times. When the grievor remarked at one point that the adjudicator might be frustrated with her, the adjudicator replied clearly that that was not the case and continued to provide full explanations and allow her the time that she needed to proceed. As to the issue of "yelling", the grievor may have her own perspective that "raising his voice" meant that the adjudicator was "yelling", but, if "raising his voice" did occur, it was only after the two-hour private meeting at 6p.m. on February 21, 2006, when the adjudicator finally said "no" to further discussions and returned to the hearing room to make his ruling.

[129] The grievor argues that the adjudicator could have and should have looked at her audiotape evidence and alleges that the adjudicator instead ended consideration of evidence regarding discipline thereby violating her right to be heard. A reasonable person would know from what actually happened that the issue of the audiotape evidence remains outstanding. The adjudicator did not render a decision and the evidence phase regarding discipline remains very much open. The employer did raise a strong objection to introduction of the proposed evidence because the employer had neither received nor seen this evidence. To be able to continue to address such evidence, the employer must be able to determine its authenticity and relevance. In view of the possible lengthy debate on this matter, the adjudicator ruled that the parties should consult following the hearing on the question of disclosure, as is clear in the February 23, 2006, written confirmation of the adjudicator's instructions:

. . .

> *. . . As there may be procedural issues regarding the admissibility of possible future evidence at a resumed hearing, the adjudicator asks that the parties discuss these matters in advance with a view to facilitating proceedings on these issues, should the hearing resume.*

. . .

[130] It is, therefore, incorrect to state that the grievor could not present her evidence. The audiotape issue arose during the grievor's cross-examination of the employer's first witness and the grievor had not even started her own evidence. As to her not

being advised to bring witnesses on February 21, 2006, the hearing never reached this stage, with the first of several employer witnesses still in cross-examination on the afternoon of the second day of the hearing.

[131] The grievor's recusal application represents an abuse of process. The adjudicator, in his initial oral ruling denying a postponement, did not agree to declare the grievor in abuse of process, as asked by the employer. The employer now asks the adjudicator to reconsider the grievor's behaviour and declare that her application for a recusal is abusive. The grievor still wants to delay. She wants to find an adjudicator who she thinks will rule in her favour. At the hearing, the grievor took notes without listening to the many explanations of the procedure provided to her. Her only objective at the hearing was to record notes of "ulterior motives" for possible use against the adjudicator and the employer. Taking into account the grievor's entire pattern of behaviour over the last two years, her tactics and the resulting delays are prejudicial to the employer's interests. By contrast, the grievor has not been prejudiced. She has ultimately secured precisely what she always wanted — an adjournment, the opportunity to make written submissions and to consult counsel. Accepting the grievor's recusal request would mean condoning her unacceptable behaviour.

[132] The employer referred me to the following decisions on the issue of determining a reasonable apprehension of bias: *R. v. R.D.S.*, [1997] 3 S.C.R. 484; *Mattson v. ALC Airlift Canada Inc.*, (1993) B.C.J 1741 (QL); *Vincent v. Waterhen Lake First Nation*, 2004 FC 831; *Ronan v. Treasury Board (National Defence)*, PSSRB File No. 166-02-14203 (1987) (QL); and *McElrea v. Treasury Board (Industry Canada)*, PSSRB File No. 166-02-28144 (February 11, 1999) (QL). The employer also offered the full text of several decisions cited and quoted in the foregoing: *Committee for Justice and Liberty v. Canada (National Energy Board)*; *Energy Probe v. Atomic Energy Control Board*, [1985] 1 F.C. 563; and *Samson Indian Nation and Band v. Canada,* [1998] 3 F.C. 3 (T.D.). As appropriate, I will draw from these decisions in my reasons.

[133] The employer also made reference to section 25 and subsection 96(1) of the former *Act* in support of the position that an adjudicator is master of his/her proceedings. The employer argued that subsections 8(2) and 84(2) of the former *Regulations* give an adjudicator authority to request written submissions. Section 64

of the former *Regulations* allows an adjudicator ". . . to adjourn any hearing and specify the time, place and terms of its continuance."

Rebuttal arguments for the grievor

[134] The grievor argued that she did not proceed with her recusal application with the intention of postponing or delaying the proceedings. The fact that she asked the adjudicator at the hearing to continue consideration of the discipline issue refutes any allegation either that she refused to proceed or that she used the recusal application as a tactic to delay.

[135] The grievor submitted that she did not, contrary to what was alleged by the employer, obtain what she wanted. She did not secure postponement of the hearing at the outset. Subsequently, she was not allowed to continue the hearing at the end as she wanted.

[136] The grievor does not contend that the adjudicator's bias was voluntary or wilful. She takes the position that the bias arose involuntarily because the adjudicator wanted to proceed with the hearing so much that it took him two days to realize that this was not possible for the grievor. The perception of bias is found in his failure to recognize at the outset that the grievor could not proceed. Despite good intentions, the adjudicator's actions had the effect of antagonizing the grievor and causing her to lose confidence in him.

[137] The grievor did not comment on the cases cited by the employer.

B. Reasons

[138] In important respects, the testimony of the two witnesses summarized above describes totally different hearings and totally different experiences. I feel compelled to say that I have found it hard to weigh some of what the grievor said in her testimony because it seems to me so entirely at odds with what I recall and noted about the two days of hearing in February. As but one example, I recall engaging the grievor throughout the two hours' of the private meeting with the parties at the end of the second day of the hearing, asking questions of her and trying to answer her questions. It was not easy because the grievor seldom answered questions directly, appeared preoccupied with taking notes and sometimes did not seem to listen. For her part, however, she apparently recalls being virtually left out of the conversation for the

full two hours, a conversation which for her was a dialogue of consensus between myself and counsel for the employer. She remembers an adjudicator who "yelled" or at least "raised his voice" while I recall, at most, adopting a firm tone closing the discussion after being told by the grievor that I was not interested in her perspective, had predetermined my decision and may not have the authority to proceed in the direction under discussion.

[139] How do you reconcile this type of difference? The only answer I have is to try, to the best of my ability, to apply the guidance given by the courts on how a trier of fact should assess the existence of a reasonable apprehension of bias. The frequently cited passage from the Supreme Court of Canada case, *Committee for Justice and Liberty v. Canada (National Energy Board)*, at 394, conveys the essence of the required approach:

. . .

> *. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information . . . what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly. . . .*

. . .

[140] *R. v. R.D.S.* adds that the reasonable person ". . . is not a 'very sensitive or scrupulous person', but rather a right-minded person familiar with the circumstances of the case." *R. v. R.D.S.* goes on to specify that the threshold for determining bias is high:

. . .

> *Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See Stark, supra, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to*

> *fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.*

. . .

[141] *CNG Transmission Corp. v. Canada (National Energy Board)*, [1992] 1 F.C. 346 (T.D.), reminds us that the issue is not whether the trier of fact is actually biased:

. . .

> *With respect to the question of reasonable apprehension of bias, there is no dispute that the issue is not whether the members named are actually biased (and counsel for the applicant made it quite clear they were not making such an allegation) but whether the circumstances could properly cause a reasonably well-informed person to have a reasonable apprehension of a biased appraisal or judgment by the member, however unconscious or unintentional it might be.*

. . .

[142] *Adams v. British Columbia* (*Workers' Compensation Board)* (1989), 42 B.C.L.R. (2d) 228 (C.A.), also provides helpful direction on the nature of the evidence required to demonstrate an appearance of bias:

. . .

> *. . . sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom (the allegation) is made will not bring an impartial mind to bear upon the cause . . . suspicion is not enough. . . .*

. . .

[143] I note at the outset that the grievor, both in her testimony and argument, referred on a number of occasions to the fact that she lost confidence in the adjudicator's impartiality. This raises an important initial point. While I accept the grievor's statements about "loss of confidence" as an accurate expression of her sentiments, I respectfully suggest that it is not the grievor's attestation or sentiments that determines the issue of recusal. The grievor's evidence is important to help identify aspects of the adjudicator's behaviour that need to be examined, but the grievor herself cannot serve as a proxy for the well-informed reasonable person of the legal test. Were this possible, there would be no debatable issue at hand because the grievor's own evaluation of the adjudicator's bias would conclusively determine the

outcome of the recusal request. Obviously, the "reasonable person" construct requires something more.

[144] In this case, we must presume that the reasonable person has the required knowledge of all of the events of the hearing of February 20 and 21, 2006, including the private meeting held by the adjudicator with the parties for the final two hours of the second hearing day. We must presume that he or she has knowledge of hearing procedures to understand the context for conducting the hearing and to evaluate the procedural decisions made by the adjudicator. He or she must also be familiar with the context of the case outside the hearing; i.e., with the history of the grievor's references to adjudication and the decisions made by the former Board and the Chairperson leading up to the hearing.

[145] In this application for recusal, the burden of proof lies with the grievor. In this case, a reasonable person must in this case examine all of the aspects of the adjudicator's conduct at the hearing of February 20 and 21, 2006, which the grievor alleges reveals a reasonable apprehension of bias, and determine whether the grievor has, through this proof, met her burden to establish grounds for recusal.

[146] The grievor's case focuses variously on the following actions or lack of action as indicators of bias. (1) At the beginning of the hearing, the adjudicator refused to grant the grievor a postponement or permission to proceed by way of written submissions so that she could secure counsel. He later inexplicably reversed his decision. (2) The adjudicator failed to recognize the complex legal nature of the debate and decide on procedure accordingly. (3) The adjudicator failed to rule on the jurisdictional objection concerning human rights at the beginning of the hearing. The adjudicator failed to find that the employer, by opening debate on its jurisdictional objection concerning discipline, renounced its jurisdictional objection concerning human rights. (4) The adjudicator did not explain the hearing process. The adjudicator did not inform the grievor that she should bring witnesses on the second day of the hearing. (5) The adjudicator should have, but did not, discuss and address the admissibility of the audiotape evidence. (6) The adjudicator ordered a completely new order of proceeding when he encountered the employer's objection to the admissibility of the grievor's audiotape evidence. The adjudicator reversed his initial decision on a postponement and on written submissions and modified the process in order to rule first on the employer's human rights objection. (7) The adjudicator should have, but

did not, finish the hearing on discipline. (8) On February 21, 2006, the adjudicator conducted a meeting "off the record" with the parties, failed during this meeting to ask the grievor for her input on how to proceed, and never explained the process. The adjudicator "yelled" or "raised his voice" on several occasions.

1. At the beginning of the hearing, the adjudicator refused to grant the grievor a postponement or permission to proceed by way of written submissions so that she could secure counsel. He later inexplicably reversed his decision.

[147] The reasons for ruling against the grievor's request to postpone the hearing or allow her to proceed by way of written submissions are detailed in the previous section of this decision. I do not believe that a reasonable person will find this ruling tainted by an apprehension of partiality or bias. To the contrary, the legal test requires that the reasonable person be presumed to have knowledge of the full context of the situation. In this case, the context — a record extending over four years — offers a substantial basis for questioning the *bona fides* of the grievor's request to postpone at the beginning of the hearing on February 20, 2006. The record shows that the Chairperson initially acceded to a request from the grievor to delay the hearing in order that she secure counsel. When it became clear that the grievor was not diligent in her efforts to obtain representation, the Chairperson then denied all further applications for postponement, including two applications made by the grievor's two lawyers the very last week before the February hearing. As an adjudicator independently seized of the matter, when the hearing opened on February 20, 2006, I was not bound by the Chairperson's previous determinations but it is certainly not unreasonable that I considered this very lengthy history as important context in ruling on the grievor's renewed postponement request.

[148] Had the grievor offered at the hearing new evidence or new reasons to justify a postponement or an alternate written process, the ruling could have been different. The issue, in my mind, was not predetermined. As the reasons for my decision indicate, however, the grievor provided very little that was new at the hearing, conceding in cross-examination that the problematic conditions that she cited in support of her requests for postponement were of long standing. The single new circumstance mentioned in her testimony was the death of a family member in August 2005, but the grievor did not provide any information that revealed how this unfortunate event in her life had precluded her six months later from engaging counsel.

[149] It is uncontested that an adjudicator has the authority to grant or deny a request to postpone or adjourn, or to decide to proceed through written submissions. The grievor argues that this authority must be exercised in a fashion that respects the rules of natural justice, which is clearly true. It falls to the grievor then to demonstrate that there was in my exercise of this discretionary authority at the outset of the hearing evidence of a reasonable apprehension of bias. The grievor may disagree with the ruling (and clearly does), and another reasonable person might in fact conclude that the ruling was wrong, but the issue here is the grievor's onus to show further that a reasonable person would apprehend the possibility of bias in what was decided or how the decision was taken.

[150] The grievor argues that the ruling violated the *audi alteram partem* principle and that it is in this violation of the rule that we find the evidence of bias, albeit involuntary. She contends that the right to be heard, in the circumstances of this case where complex legal issues are involved, required that the grievor have the benefit of counsel and that counsel represent her in the proceedings. To quote Garant ". . . *la representation par avocat s'imposait.*" I suggest that a reasonable person knowledgeable of proceedings under the former *Act* would find that numerous hearings under the authority of the former *Act*, including hearings where complex legal issues arose, proceeded with unrepresented parties or with parties represented by persons who are not lawyers. If the decision taken at the hearing on February 20, 2006, to continue in the absence of the grievor's counsel, indicates the possibility of bias, then hundreds of other adjudication hearings conducted without counsel representing one or both parties should be seen as probable violations of the *audi alteram partem* principle as well.

[151] In my view, a reasonable person would not agree. He or she would not apprehend bias in the initial ruling to proceed, in light of the total context, but might find otherwise if, in proceeding, it became evident that the unrepresented party could not handle issues arising in the course of the hearing and that the adjudicator was unprepared to address this eventuality. This is precisely why, when I made the decision denying the grievor's postponement request, I indicated in the oral ruling (in support of which written reasons were provided earlier in this decision) that I would monitor the nature of the issues as they arose and was prepared to reconsider the possibility of proceeding by written submissions once I had a better idea of what was before us, and of the grievor's capacity to represent herself. Through much of the first

day, the grievor managed the process adequately with the benefit of procedural explanations given to her. It was only at the stage of her rebuttal argument on the issue of the timeliness and admissibility of the employer's jurisdictional objections that she struggled in the face of legal precedents cited by the employer. Seeing her problem, I adjusted the process at that point to offer the grievor the opportunity to accomplish her rebuttal arguments through written submissions with the assistance of counsel, an offer that she accepted.

[152] I note, parenthetically, that the courts have recognized that unrepresented parties may not be as capable as counsel to conduct hearings but that this, in and of itself, does not preclude the possibility of a fair hearing. In considering this issue, for example, the Ontario Court of Appeal, in *Davids v. Davids*, [1999] O.J. No. 3930 (QL), observed:

. . .

> *36 . . . The fairness of this trial is not measured by comparing the appellant's conduct of his own case with the conduct of that case by a competent lawyer. If that were the measure of fairness, trial judges could only require persons to proceed to trial without counsel in those rare cases where an unrepresented person could present his or her case as effectively as counsel. Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the unrepresented litigant have a lawyer's familiarity with procedures and forensic tactics. It does require that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present their case. In doing so, the trial judge must, of course, respect the rights of the other party.*

. . .

It is important to note that the Ontario Court of Appeal's comments applied to a case litigated in a family law court, not before an administrative tribunal. If anything, the nature of procedure in administrative tribunals is such as to make them less demanding for the unrepresented party than a formal court of law, and less exclusively a forum for counsel.

[153] On the second morning of the hearing after determining how to move forward on the grievor's preliminary objection, the proceedings turned to the employer's two

jurisdictional objections. At this point, I had some indication that legal arguments would prove difficult for the grievor but nothing to suggest that she was incapable of following evidence or of cross-examining a witness. I therefore allowed the proceedings to continue with the hope that the time remaining could be productively used for the first part of the presentation of evidence by the employer concerning its jurisdictional argument on discipline. We did not proceed with the other available option, the human rights jurisdictional objection, because it was apparent to me that this could bring us more quickly to the type of legal arguments where the grievor might feel less comfortable or less capable.

[154] The employer completed examination-in-chief of its first witness on the discipline issue by mid-day and the grievor began her cross-examination. Though some of her questions in cross-examination were not precisely focused, as might be expected of an inexperienced litigant, the grievor did show a capacity to proceed and to secure refinements and admissions from the witness. I allowed her ample extra time when she needed it to prepare her questions. It was only when the issue of her proposed audiotape evidence arose in cross-examination mid-afternoon that the prospect of more complex legal arguments (this time on relevance and admissibility) again arose. This was the point at which I decided to pause and discuss the process privately with the parties. My objective was to identify a practical way of proceeding in the future, given that the initial two days allocated for the hearing were almost exhausted, and to talk on a preliminary basis with the parties about the potentially difficult debate ahead concerning the proposed audiotape evidence.

[155] The effect of the procedural rulings, first with respect to the grievor's rebuttal argument and then at the end of the second day to proceed with further written submissions, was to afford the grievor the opportunity, as initially sought, to make written submissions on two of the preliminary issues then outstanding, and to do so with the benefit of counsel. A reasonable observer, I believe, would seriously question whether there was possible bias in these rulings given that the grievor's preferred option in the end formed an integral part of the ruling on future procedure. The grievor argues that I should have made this decision at the outset. Then she argues that, by altering the process later on to accommodate her, my decision was again wrong and revealed possible bias.

[156] This brings us to the allegation that, by changing the process "inexplicably" at the end of the second day, I violated due process and frustrated the grievor's reasonable expectation to know how the hearing would proceed. A reasonable observer, I believe, would not accept that the change in procedure was "inexplicable". He or she would observe that I held the option of proceeding by way of written submissions in reserve when I made my first ruling denying the postponement request, and communicated this possibility to the parties at the time. When I offered the grievor this option on the morning of the second day with respect to her rebuttal argument, I again provided reasons, linked to my initial ruling. A reasonable observer would also find, I believe, that the further changes made to the procedure at the end of the second afternoon of the hearing were a practical response to the situation as it evolved, a response that did not foreclose the grievor's rights. On this question, the reasonable observer might well have considerable difficulty accepting that the grievor can, on the one hand, impugn an initial procedural ruling that denied the grievor's preference to adjourn or to proceed in writing and then hold, on the other hand, that the adjudicator was not entitled to adjust the procedure thereafter to this effect.

2. The adjudicator failed to recognize the complex legal nature of the debate and decide on procedure accordingly.

[157] Following from discussion of the preceding point, this second allegation, to be successful, requires that a reasonable person find that the only sound choice available to me as an adjudicator on February 20, 2006, was to recognize the complex nature of the debate at the very outset and accept the grievor's postponement request. Otherwise, the evidence shows that I did recognize the legal complexities as they emerged and did fashion procedural rulings accordingly.

[158] On the basis of the information on file prior to the hearing, there was reason to suspect that the parties would likely encounter difficult legal issues at some stage. This suggested the need for caution in determining how or whether to proceed with the hearing, as reflected in my earlier comments (paragraph 57 above):

> *. . . The possibility of prejudice to the grievor is apparent. In the jurisdictional objections before me, there may be issues of law and other complexities that may be demanding for an unrepresented grievor, and possibly outside that grievor's abilities. In such circumstances, I believe that an adjudicator should exercise special caution, and require an unrepresented employee to proceed only where there are strong reasons for doing so.*

My comments weighed the interests of the parties, examined the possible prejudices to both, and found that there were in fact strong reasons for proceeding. Caution, however, remained (paragraph 77 above):

> *. . . I do, however, leave open the possibility of revisiting the grievor's application during the course of the hearing. As the nature of the debate over preliminary matters becomes more apparent and the need for evidence, or lack thereof, is clarified, it may be appropriate to reconsider a written option on some of the issues. I will also be better able to weigh the grievor's ability to represent herself as the hearing goes forward and, where necessary, to adjust the procedure, if there is a need, to insure that both parties have a fair and balanced opportunity to place their cases before me.*

[159] Once more, I accept that one might disagree with this decision. I do not believe, however, that a reasonable person would find persuasive evidence supporting a reasonable apprehension of bias in my willingness to entertain an option other than postponement at the outset, particularly given that the actual decision to proceed was, in an important sense, conditional and open to review.

3. The adjudicator failed to rule on the jurisdictional objection concerning human rights at the beginning of the hearing. The adjudicator failed to find that the employer, by opening debate on its jurisdictional objection concerning discipline, renounced its jurisdictional objection concerning human rights.

[160] I find no compelling basis to the argument that an adjudicator must determine a jurisdictional objection concerning human rights first in preference to any and all other preliminary matters. This is a question of process and/or law and not one of reasonable apprehension of bias. At the February hearing, the employer maintained two jurisdictional objections, one regarding discipline and the other human rights. Both objections were predicated on the employer's interpretation of the grievance procedure and the mandate of an adjudicator under sections 91 and 92 of the former *Act*. Nothing in the former *Act* stipulates that an adjudicator must dispose of one before considering the other. Further, given an adjudicator's authority to determine procedure for a hearing, an adjudicator could, for example, chose to hear a human rights jurisdictional objection first, reserve a decision on this issue, and move forward at a hearing to receive evidence and arguments on another jurisdictional challenge. The choice is ultimately a practical matter reflecting the context of the case before the adjudicator. The reality is that a correct decision must be made on the human rights

question at some point. That it may not be the first of the jurisdictional decisions rendered does not by this fact alone introduce the possibility of bias.

[161] The grievor also alleges that the employer waived its right to argue its human rights jurisdictional objection by being party to a process that turned first to other issues. If there is any support for this proposition, of which I am dubious, I cannot see how a reasonable person would find in this point a logical link to the issue of reasonable apprehension of bias here in question.

[162] In any event, under my procedural ruling at the end of the day on February 21, 2006, I will be ruling on the human rights issue before the employer's jurisdictional objection concerning discipline.

4. The adjudicator did not explain the hearing process. The adjudicator did not inform the grievor that she should bring witnesses on the second day of the hearing.

[163] The grievor alleges that the adjudicator did not explain the hearing process. Mr. Heavens, cited by the grievor in her argument as a reasonable and experienced person, provided flatly contradictory evidence. He said that the adjudicator repeatedly provided explanations of the process to the grievor, offered full reasons for his rulings, and did so in a respectful manner. The hearing, in Mr. Heavens' view, served as an "adjudication 101" for someone wanting to learn about the process given the care taken by the adjudicator to ensure that the grievor knew what was happening and why. The grievor, according to Mr. Heavens, thanked the adjudicator on several occasions for his explanations and for "being gracious" with her.

[164] There is, by contrast, reason to question the accuracy of the grievor's recall, based on the contemporaneous note-taking on which she claimed to rely in her testimony. While Mr. Heavens took 35 to 40 pages of notes during the hearing, and was confident in his ability to remember events, the grievor admits to taking only two or three pages each day, and to taking none after she became upset with the employers' argument in reply to her preliminary objection. With respect to the private meeting on the second day, the grievor "could not specify" or had no comment about the notes that she took. Some of her answers to the employer's questions in cross-examination about her note-based recollection of events seemed tentative or evasive. She did make reference in her evidence-in-chief to the fact that an acquaintance of hers in the audience took notes, but she did not offer this person as a witness to corroborate her allegations. Taking all of this into consideration, I believe that a

reasonable person would very likely find cause to prefer the evidence of Mr. Heavens to that of the grievor, and to find that there was no basis for the allegation that the adjudicator did not explain the hearing process.

[165] As to the adjudicator's alleged failure to forewarn the grievor of her need to bring witnesses on the second day of the hearing, a reasonable person would note that I did explain the process for giving evidence through witnesses, did distinguish between evidence and argument for the grievor, and did talk to her about her opportunity to cross-examine. By the end of the first day, the reasonable person would know that testimony by witnesses had not yet begun. A ruling was first required on how or whether to proceed with the grievor's rebuttal argument on her own preliminary objection. After I ruled on the second morning to allow the grievor to make her rebuttal arguments in writing, I discussed with the parties the order of proceeding on the employer's objection related to discipline. Here, the employer accepted to begin with its witnesses, and it was clear that the grievor's witnesses would follow thereafter. By the end of the second afternoon, the reasonable person would note that the grievor's cross-examination of the first of several employer witnesses was still underway. There was not yet any requirement for the grievor to call her witnesses and there was no prejudice to her right to do so because the time for the grievor's evidence lay entirely ahead. To be sure, any witnesses brought by the grievor to the hearing on the second day would have played no role in the proceeding. A reasonable person, I believe, would not conclude that there was any reasonable apprehension of bias in these circumstances.

5. The adjudicator should have, but did not discuss, and address the admissibility of the audiotape evidence.

[166] The facts, as known to a reasonable person, demonstrate that I recognized that the debate ahead concerning the admissibility of the audiotape evidence might prove difficult, as has sometimes been the case in other adjudication hearings, and took reasonable first steps to facilitate and manage the debate. Understanding that disclosure of this type of evidence is often the first matter to be discussed given possible issues of provenance, accuracy and authenticity, I asked questions of the grievor at the hearing designed to help me understand the nature and source of the proposed evidence. I sought the employer's preliminary reaction, which indeed confirmed that there was a debate ahead, and then sought an opportunity to consult with the parties privately on these matters. Finally, as a result of this latter discussion,

I asked the parties to try to work out a solution to any concerns about disclosure and in anticipation of a continuation of the hearing at a later date. As cited earlier, the written instructions of February 23, 2006, confirm the approach:

. . .

> *. . . As there may be procedural issues regarding the admissibility of possible future evidence at a resumed hearing, the adjudicator asks that the parties discuss these matters in advance with a view to facilitating proceedings on these issues, should the hearing resume.*

. . .

[167] The evidence is thus clear that I did, contrary to the grievor's allegation, discuss the audiotape evidence with the parties and address it by outlining the next step to be taken. The grievor obviously does not accept this decision as anything other than evidence of a reasonable apprehension of bias. The grievor appears to believe that the only option available to me at the time was to render then and there an immediate decision on admissibility, presumably in agreement. I suggest that a reasonable person would recognize the adjudicator's obligation at that point to afford the other party the opportunity to air its concerns about relevance and admissibility of the proposed evidence, based on some factual knowledge of the evidence itself. This means turning first to the question of disclosure. The instinct to ask the parties as a first step to consult on disclosure reflects a practical concern to solve problems co-operatively, where possible, and to find a way of facilitating the subsequent hearing process. None of this has anything to do with prejudging the admissibility issue or the possible probative value of the evidence. A reasonable person, I believe, would find no reasonable apprehension of bias here.

6. The adjudicator ordered a completely new order of proceeding when he encountered the employer's objection to the admissibility of the grievor's audiotape evidence. The adjudicator reversed his initial decision on a postponement and on written submissions and modified the process in order to rule first on the employer's human rights objection.

[168] I believe that the discussion of several of the allegations above adequately addresses this point. I wish, nonetheless, to consider the grievor's testimony that I appeared "scared" and "panic-stricken" when the issue of audiotape evidence arose. Aside from the question of whether the grievor's recollection and interpretation of facial expressions was accurate or relevant, I believe that there may be an inference in

the grievor's testimony which, if true, would constitute an extraordinarily serious charge. It is the suggestion that I had some knowledge of the nature of the audiotape evidence proposed by the grievor, sufficient to lead me to conclude that this evidence would damage the employer's jurisdictional objection and that, further, I might wish to act in a fashion to protect the employer from this damage.

[169] The grievor's evidence in cross-examination was that she had not provided the audiotape or transcripts of the audiotape to me. There is thus absolutely no evidence that I know anything about the contents of the grievor's audiotape save for the fact that she mentioned during the hearing that it contained several conversations with her supervisors. I here confirm that, to this date, I know nothing else about the contents. I, therefore, have no basis for judging whether the proposed evidence will be injurious to the employer, and absolutely no interest in protecting the employer in this respect. To suggest otherwise, even indirectly, is totally unfounded.

[170] As to facial expressions, I am at a loss to explain why the grievor believes that I was "scared" and "panic-stricken" when I can recall no such emotions at all, nor is there any other corroborative evidence to this effect. At best, the grievor may have noted in my face heightened attention when the issue of audiotapes emerged, this because I am aware, as any adjudicator would be, that the question of admissibility of video or audiotape evidence still elicits animated debate in this jurisdiction. Perhaps the grievor truly believes that I was "scared" and "panic-stricken" but this does not make it so. In any case, it is virtually impossible, in these circumstances, to conclude that a reasonable person would or could base a finding of a reasonable apprehension of bias in the grievor's reading or misreading of facial features.

7. The adjudicator should have, but did not, finish the hearing on discipline

[171] For all practical purposes, the grievor proposes an impossibility. With only an hour or two remaining in the time available for the hearing, with the grievor's cross-examination of the employer's first witness still to complete, with the question of disclosure and admissibility of the audiotape evidence ahead, with more employer witnesses to be called, with the grievor's proof yet to begin, and with arguments to be made by both parties, how could the hearing on discipline finish on February 21, 2006, as the grievor seems to ask? I note that the grievor suggests that I in fact terminated the proceedings relative to the discipline issue and foreclosed the possibility of the grievor leading her own evidence. A reasonable person would unequivocably know

from the course of the hearing and the subsequent written summary of my ruling that this suggestion lacks any foundation whatsoever.

8. On February 21, 2006, the adjudicator conducted a meeting "off the record" with the parties, failed during this meeting to ask the grievor for her input on how to proceed, and never explained the process. The adjudicator "yelled" or "raised his voice" on several occasions

[172] The practice of holding a private meeting with the parties to discuss procedural issues or management of the hearing is not uncommon and can sometimes serve a useful purpose. In this case, with the time remaining for the hearing rapidly coming to an end and the new evidentiary issue of the audiotape obviously now before us, I felt that a private discussion might help us prepare the way ahead. The employer had offered in open hearing a suggestion on how to proceed, and I hoped that a more informal setting would afford the parties an easier opportunity to discuss this or other options and, possibly, forge a consensus on next steps. Contrary to what the grievor indicated in her testimony, I had neither agreed to nor embraced the procedural proposal made by the employer during the hearing. It was time to hear more views from both sides.

[173] The meeting took place in a vacant anteroom to the main hearing room maintained for this purpose as well as for mediation proceedings. The grievor seems to have thought, incorrectly, that the room in question was the "adjudicator's office", but clearly nothing turns on this point. At the outset, I described the discussion as "off-the-record" and indicated that this meant that nothing said in the room would form part of, or influence evidence and arguments at the hearing. However, the grievor's allegation relieves me of such undertaking.

[174] At the beginning of these reasons, I used the example of this private meeting to illustrate the challenge of reconciling the grievor's testimony about what happened throughout February 20 and 21, 2006, with my own recollection and notes of the events and/or with the testimony of the employer's witness. Had a "reasonable person" sat in on the private meeting as an observer, I am confident that he or she would be quite puzzled by much of what the grievor has said about what transpired. Based on contemporaneous notes, the nature and extent of which she either cannot now specify or on which she has no comment, the grievor testified first that she was not involved in the discussion but then said in cross-examination that she did talk. Whatever the real extent of her involvement (which I recall to be more frequent), she

clearly holds the view that her opinions did not affect the decision that was subsequently made, or that the matter was essentially predetermined in favour of the employer's preferred approach.

[175] A reasonable observer would, I suggest, agree that a substantial part of the private meeting was consumed by an effort to find out from the grievor what exactly she wanted to have happen and to discuss what part written submissions aided by her counsel could play in bringing consideration of several of the outstanding preliminary questions to a decision point. A reasonable person would note that, at some point well into the two-hour session when it seemed that a solution was emerging, the grievor focussed increasingly on the issue of discipline and began to argue that it was prejudicial to her not to have her audiotape evidence heard at that time. Despite efforts to convince her that nothing had been decided on the discipline objection and that all of the possibilities for her presenting evidence on discipline still lay ahead, pending the other preliminary matters, the grievor became insistent on the point. When I continued to try to explain why there was no foreclosure on her evidence, the grievor grew more agitated, alleged that no one was listening to her and that I had already made up my mind, and challenged whether I had the authority to make a decision on future procedure of the type being discussed.

[176] At this point, I am sure that a reasonable observer would indeed have noted that my voice changed. It did increase in volume, though not considerably, and the language chosen became firmer as I brought the discussion to an end. There was neither yelling nor any words chosen that were disrespectful, nor any imperious assertion to the effect that "I'm the adjudicator and I get to decide!" I accept as quite possible that my manner of bringing the private session to an end may have revealed both fatigue at the end of a long afternoon and some element of frustration with what had become a difficult conversation. To the extent that this caused any discomfort to the grievor, I sincerely regret the circumstances. I do not believe that these events, however, would in any way lead a reasonable person to a conclusion that a reasonable apprehension of bias can be said to exist.

[177] I note here the situation reviewed in *Mattson*, where counsel based an allegation of bias or of a reasonable apprehension of bias on the fact that the judge in the case was "irritated" at the hearing and that this irritation had spilled over into the way in which the judge dealt with witnesses. The trier of fact in this case found no basis for

bias nor for a reasonable apprehension of bias. Whether or not the circumstances of *Mattson* are analogous to those examined here, I think it does suggest that a reasonable person should be cautious in interpreting "irritation" or a raised voice as a convincing indicator of bias in and of itself.

[178] In summary, a reasonable person well-informed of the full context of the case and of the events of the hearing of February 20 and 21, 2006, would, I believe, find that the grievor has not established grounds for recusal regarding any of the impugned actions, rulings or events above.

[179] I therefore deny the grievor's request that I recuse myself from further involvement in these proceedings. In so doing, I associate myself fully with the adjudicator's closing observation in *McElrea*, another adjudication case involving a recusal request denied by an adjudicator:

. . .

> *I have also considered the way the hearing has unfolded and the manner in which I have handled it. I am satisfied that I have acted in an appropriate manner and that the grievor's case has not been prejudiced in any way. I wish to state clearly and unequivocally that I have not pre-judged this case in any way; I decide each case I hear on the basis of the totality of the evidence and submissions put before me and the legal principles applicable. I do not believe that, as de Grandpré J. put it in* Committee for Justice and Liberty et al. v. National Energy Board et al., supra, *". . . an informed person, viewing the matter realistically and practically-and having thought the matter through-[would] conclude. . . ." that my conduct could have given rise to a reasonable apprehension of bias.*

. . .

[180] The employer has asked that I determine that the grievor's request for my recusal constitutes an abuse of process. This determination would, in my view, require substantial and convincing evidence that the grievor's application was advanced, in significant part, with the intent of delaying or obstructing the process, or for other invidious motives. While I can certainly understand the employer's frustration with the record of delays in bringing these grievances to a final result, I do not believe that I have before me a sufficient basis in evidence to reach a conclusion of abuse of process. The grievor's testimony reveals a conviction that the adjudicator's actions during the hearing of February 20 and 21, 2006, undermined her confidence in the impartiality of

these proceedings. While I have found above that there is no reasonable apprehension of bias, I do not doubt that the grievor thinks that there is bias and has pursued her request for recusal based on this belief. The effect of her application has been to lengthen the process, but I am not convinced by the evidence that delay was the primary reason for the grievor's request. Moreover, if evidence of abuse of process had been successfully adduced, it is unclear what the effect of declaring an abuse of process would be in the context of this recusal proceeding. The employer did not propose that I take any action as a consequence of declaring an abuse of process. In the end, denial of the grievor's recusal request is the primary, salient result.

[181] For the reasons outlined above, I make the following order:

(The Order appears on the next page)

IV. Order

[182] The grievor's request for a postponement of the hearing scheduled for February 20 and 21, 2006, is denied. (order delivered orally on February 20, 2006)

[183] The grievor's request to proceed on the employer's jurisdictional objections by way of written arguments is denied. I may nevertheless revisit this order during the course of the hearing, where appropriate. (order delivered orally on February 20, 2006)

[184] The grievor's recusal request is denied.

[185] These proceedings will continue in accordance with my ruling of February 21, 2006, as confirmed in writing by Board staff on February 23, 2006, with the following modification of due dates and time periods:

1. The grievor shall submit written rebuttal arguments, if any, concerning the objection to the timeliness and admissibility of the employer's jurisdictional objections **no later than 4p.m. on June 28, 2006.** The employer will have **14 days** thereafter to file any written comments on the grievor's submission.

2. The employer will submit its written arguments on its objection to jurisdiction concerning human rights **no later than 4p.m. on the date July 5, 2006.** The grievor will have **21 days** thereafter to file her arguments and response. The employer will have then have **14 days** in which to file any written comments on the grievor's submission.

June 7, 2006.

Dan Butler,
adjudicator