Date: 20131114

File: 525-34-48
XR: 561-34-493

Citation: 2013 PSLRB 141

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

PETER GILKINSON

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Gilkinson v. Professional Institute of the Public Service of Canada

In the matter of a request for the Board to exercise any of its powers under section 43 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: John G. Jaworski, a panel of the Public Service Labour Relations Board

For the Applicant: Himself

For the Respondent: Steven Welchner, counsel

Heard at Toronto, Ontario,
July 23 and 24, 2013.
Written submissions filed
November 14, 20 and 21 and December 21, 2012, and January 2, 8 and 17, 2013.

REASONS FOR DECISION

I. Request before the Board

[1] Peter Gilkinson ("the applicant") requested a review of decision 2012 PSLRB 111 ("the decision") under section 43 of the *Public Service Labour Relations Act* ("the *Act*"), on the basis of new evidence and arguments that could not have been reasonably presented at the original hearing, and stated that there are other compelling reasons for the review.

[2] On November 29, 2010, the applicant filed a complaint under paragraph 190(1)(*g*) of the *Act*, alleging that the executive of the Audit, Financial and Scientific (AFS) Group of the Professional Institute of the Public Service of Canada (PIPSC or "the respondent") applied the PIPSC standards of discipline in a discriminatory manner when it took action against him.

[3] The complaint was heard on August 8, 2012. The applicant did not appear; nor was any evidence submitted. After the hearing was closed, the applicant wrote to the Public Service Labour Relations Board ("the Board") on a number of occasions to voice his concerns about the hearing process as well as to submit material requesting the panel of the Board recuse herself. The decision was rendered on October 15, 2012, in which the complaint was dismissed.

[4] The applicant applied to the Federal Court of Appeal for judicial review of the decision, which application was dismissed by that court after a status review of the file, in July 2013.

[5] On August 20, 2012, the applicant submitted an extensive email to the Board stating concerns about the hearing of his complaint. At this time, no decision had been rendered. On November 7, 2012, after the decision was rendered, the Board's registry services wrote to the applicant about his earlier correspondence to the Board about the Board's hearing of his complaint and instructed him to provide details in writing. The applicant provided those details via email on November 8, 2012.

[6] The parties were informed that the Board would hear the matter by way of written submissions. As part of the application process, the applicant had already filed written submissions on November 14, 2012. The respondent had filed written submissions as well, on November 20, 2012. On November 20, 2012, the applicant filed a response to the respondent's submissions, and on November 21, 2012, the

respondent replied to that response. On December 11, 2012, the Board wrote to the parties, confirming that the applicant would be given until January 3, 2013 to file any additional submissions, the respondent would be given until January 10, 2013 to respond to the applicant's additional submissions, and the applicant's reply, if any, to the respondent's further submissions would be due January 17, 2013.

[7] The applicant provided his further written submissions on January 2, 2013; the respondent provided its on January 8, 2013, and the applicant provided his reply to the respondent's further submissions on January 17, 2013.

[8] The application under section 43 identifies the following eight issues:

> 1. *Evidence for this Appeal – Sufficient, Subpoena's [sic]*
> 2. *Medical Note – Revised as requested*
> 3. *Medical Note – Medical Opinion overruled*
> 4. *Underlying Medical Issue – not suspicious*
> 5. *Conflict of Interest – Ms. Shannon*
> 6. *The Hearing – Issues*
> 7. *The pre-hearing period – 2nd postponement request/disclosure of documents*
> 8. *PSLRB Decision – Inaccuracies, clarifications, etc.*

[9] It was clear from the written submissions that the facts were not in dispute with one exception. The Board concluded that only one allegation raised by the applicant would require an oral hearing and this issues fell under Issue 6, "The Hearing – Issues." The issue to be dealt with during the oral hearing was set out in a letter to the parties on April 15, 2013, as follows:

> *Did Mr. Gilkinson's representative have an opportunity to lead evidence at the hearing on August 8, 2012?*

II. Summary of the evidence

[10] On November 29, 2010, the applicant filed a complaint under paragraph 190(1)(*g*) of the *Act*, alleging that the executive of the AFS Group applied the PIPSC standards of discipline in a discriminatory manner when it took action against him for refusing to withdraw a resolution that formalized the right of the Agency Professionals (APPA) representative to be involved in consultation. The applicant

sought as relief in the complaint an order of the Board requiring the respondent and the AFS Executive to rescind the discipline and to pay him compensation. On December 13, 2010, the PIPSC filed an extensive response with documentation.

[11] The respondent was represented by legal counsel whose office was, and continues to be, in Ottawa.

[12] The parties agreed to participate in mediation, and a session took place in Toronto, Ontario, on March 29, 2011. At this juncture, the parties discussed the potential for an agreed statement of facts ("ASF") and joint book of documents ("JBD"). The mediation was not successful, and as such, the complaint was placed back into the normal rotation to be scheduled for a hearing.

[13] On January 5, 2012, the Board wrote to the parties, advising them that the matter had been scheduled to be heard from August 8 to 10, 2012, in Toronto and that the date was considered final. The notice of hearing was sent to the parties via Priority Mail and email on July 4, 2012.

[14] On July 3, 2012, the Board contacted the parties, inquiring of their availability for a pre-hearing conference ("PHC") to discuss the management of the file and the hearing. The parties responded to the Board that same day, both indicating that they were available for a PHC on July 26, 2012.

[15] On July 26, 2012, a PHC was held with the panel of the Board assigned to hear the complaint. The applicant and counsel for the respondent were present. After the PHC, on the same day, a letter of direction was sent to the parties by the Board. The direction was as follows and was sent to the parties via email and facsimile:

> *Further to today's pre-hearing teleconference, this will serve to confirm the following:*
>
> - ***By no later than noon on August 3, 2012**, the parties are asked to submit their Agreed Statement of Facts if one has been established and to also advise the Board if the parties will be submitting a joint book of documents at the hearing.*
>
> [Emphasis in original]

[16] On July 26, 2012, the applicant sought two summonses with respect to witnesses he required to be present for the hearing. The summonses were both issued and sent to the applicant.

A. July 31, 2012

[17] On July 31, 2012, the applicant and counsel for the respondent exchanged emails. It is clear from the first email in the chain, from counsel for the respondent at 2:08 p.m., that the applicant had requested the respondent to consent to a postponement of the hearing. It is also clear that counsel for the respondent had made a request of the applicant for documents. The email is as follows:

> *I have spoken with my client, and the Institute does not consent to an adjournment. It is now more than a year and [sic] half from the date of your complaint, and it is not prepared to incur any further delay. When I advised you that I didn't need your documents, that was in relation to mediation.*
>
> *We tried once at conciliation to attempt to resolve this – obviously I was not very persuasive at the time. I am not sure that I can be more persuasive now. If you are seriously interested in potentially resolving this, I have instructions to ask our Board member to set aside at most the morning of the 8th for mediation with the Board member acting as our mediator (like med/arb). If we are unsuccessful at reaching an agreement by lunch, then the Board member will hear our complaint. But unless there is a real willingness to come to an agreement and move forward to a mediated resolution (obviously I can't ask for a guarantee in advance that this matter will settle), I suggest that we proceed on Wednesday August 8 as planned.*
>
> *In the meantime, we still need to prepare our Agreed Facts and Book of Documents.*
>
> *Let me know how you would like to proceed.*

[18] The applicant responded to that email at 2:26 p.m., in which he advised as follows:

> *I cannot work to a deadline of tomorrow morning …… the deadline is Friday August 3rd.*
>
> *I you are done tomorrow, we have no agreed set of facts.*
>
> *I have been working night and day at this.*
>
> *I actually pulled my first all nighter since University on Saturday nite to get the document done on the agreed timelines. I made an additional push late on Sunday.*
>
> *Like you I have work commitments and need to work during the day.*

> *I think you had an obligation to advise me of the time commitment. If you had, I would have booked off work.*
>
> *I you had sent me the Agreed set of Facts before I left for Vancouver, I could have reviewed them on the Cruise ship and done a lot of the work there and been ready when I came back.*
>
> *The Agreed set of facts came out of the blue for me.*
>
> *As I said, I offered to give you everything in March of 2011. When you turned me down, I thought it was over.*
>
> [*Sic* throughout]

[19] Counsel for the respondent replied to the applicant via email at 2:44 p.m. as follows:

> *Peter, I don't think your comments about my not living up to my obligations are fair.*
>
> *Before your holidays I stated: "If you would like to give me a list of documents that you would like included (and ideally the documents themselves), I can incorporate them." Your response was "I can't do much before I get back… I am working the rest of the week and then I will be out of town for 2 weeks on a work/vacation trip."*
>
> *I have at all times responded promptly to your messages, and sent you the first draft of the agreed facts as promised on your return. I have not tried to deceive you about the amount of work involved.*

[20] The applicant emailed counsel for the respondent at 2:51 p.m. as follows:

> *I have no issue with you and I consider you an honourable person.*
>
> *The issue is in my new job. I have never worked so hard in my life. I work days and evenings.*
>
> *It is just the way it is, I have to suck it up.*
>
> *I need to book time off 3 months in advance for their planning. I only booked off 3 days for the hearing because that is all I thought I needed. I didn't plan for this time*
>
> *I was away in Vancouver and other places, so I didn't have access to my home computer and I couldn't do anything if I wanted.*
>
> *In hindsight, I could have taken my binder to the Ontario Region office and had them make a copy for you.*

As they say …….. hindsight is 20/20.

[*sic* throughout]

B. <u>August 1, 2012</u>

[21] On August 1, 2012, at 10:06 a.m., the applicant, via email, asked the Board for a postponement of the hearing. The email was not sent to the respondent or its counsel. The email stated that the reason for the postponement request was that the applicant was of the opinion that the ASF and JBD were started too late in the process. The applicant set out how busy a schedule he had, having been out of town for work and a vacation during the weeks just before the PHC, and that he returned home to a draft ASF, with which he was not comfortable and that he was being pushed to sign off. The applicant went on to set out how busy he was the coming week and that he had not allocated time to this when planning his life. He further stated that he had spoken to a lawyer who had advised him of the significance of the ASF and as such the applicant felt the need to spend a considerable amount of time working through the draft document that counsel for the respondent had sent to him while he was away before the PHC.

[22] The Board provided a copy of the applicant's request for postponement to counsel for the respondent at 10:23 a.m. At 11:05 a.m., counsel for the respondent wrote to both the Board and the applicant, stating his opposition to the request.

[23] Counsel for the respondent stated that there was no requirement for an ASF and that the direction of the Board merely provided a deadline of Friday, August 3, 2012, at noon, to advise if there would be an ASF. The respondent's counsel further stated that it was clear that an ASF would not be achievable and, as such, was not going to expend any more time on working towards that end.

[24] In his email at 11:05 a.m., counsel for the respondent also stated that the applicant had promised to disclose the documents he would be relying upon at the hearing by July 30, 2012, and again by the end of the day on July 31, 2012. Both deadlines were not met. He stated that the applicant had then promised the production of the documents by noon on August 3, 2012, which deadline he stated he had reluctantly accepted. Counsel for the respondent requested that the Board issue an order requiring the applicant to disclose the documents by noon on August 3, 2012.

[25] At 11:39 a.m., the Board wrote to the parties, denying the applicant's request for a postponement. At 11:43 a.m., counsel for the respondent reiterated his request for

an order requiring documentary production from the applicant by noon on August 3, 2012. At 12:45 p.m., the applicant wrote back to the Board and counsel for the respondent, replying to the respondent's submissions on the request for postponement. At 1:23 p.m. the Board wrote back to the parties, confirming that the request for postponement was denied and ordering the applicant to disclose to counsel for the respondent any documents he intended to rely upon by noon on Friday, August 3, 2012. At 2:42 p.m., the applicant wrote to the Board and requested a similar order for disclosure as the one the Board had issued in favour of the respondent. The Board granted that request, and at 3:05 p.m., that order was made.

[26] At 3:43 p.m., the applicant sent an email to the Board following up on an earlier enquiry about legal costs. The date and time of the earlier enquiry was not provided. At 3:49 p.m., the Board wrote back via email to the applicant advising him that it could not provide legal advice. At 4:34 p.m., the applicant wrote back to the Board and again asked about legal costs. The Board advised him that it did not pay for any costs either party incurred, and with respect to his various questions about legal costs, it again told him that his questions were in the realm of seeking legal advice, which the Board could not provide. It referred him to the Board's website to look up decisions if he so chose.

C. <u>August 2, 2012</u>

[27] Late in the afternoon of August 2, 2012, the applicant attended at the Toronto office of the respondent and attempted to leave a copy of the documents that he intended to rely upon at the hearing. Counsel for the respondent wrote, via email at 4:21 p.m., to both the applicant and the Board, advising that he had instructed the respondent's staff at the Toronto office not to accept the documents, as he, as counsel, was the one who needed the documents by noon. He also articulated the reasoning for the request for the noon deadline, which was that he was leaving just after noon for a long weekend holiday, would be proceeding to Toronto immediately following the long weekend and would need to have the documents with him to review while on holiday.

[28] At 7:00 p.m., the applicant wrote a lengthy email to the Board, counsel for the respondent and others, stating that he believed that if he delivered the documents to a PIPSC office, it would in fact be considered received by the respondent, and someone could scan them and send them to counsel for the respondent. At 7:23 p.m., the applicant sent another email to the Board, counsel for the respondent and others, stating that he had stopped at a Staples retail store and had placed the material in an overnight courier addressed to the counsel for the respondent.

[29] In the course of the email sent at 7:00 p.m. to counsel for the respondent, the Board and others, the applicant made the following accusation with respect to counsel for the respondent:

. . .

> *PIPSC staff, at your direction, refused delivery and to even acknowledge that I attempted to deliver it. I think it would have been smarter to accept deliver and scan it at 9:00 am on Friday and shoot it off to you.*
>
> *It is my understanding that Martin Ranger is co-counsel. He is an employee of PIPSC. As such, delivery to a PIPSC office is in the world of tax law received*
>
> *I delivered it at 4:00 today. So there was plenty of time for someone to run it thru a scanner and send it to you. If PIPSC doesn't have a scanner, why do you think I would have one.*
>
> *Where things went "off" is the ruse you tried with Agreed Statement of Facts. It was a work of fiction on the key issues. I sent you my position on the key issues in March 2011, and it was not incorporated in the document. As a result, I was forced to spend a tremendous amount of critical time on the document, instead of putting the exhibits together.*
>
> *In fact, as I have come to learn, it would have been a critical mistake to sign off on it as is.*
>
> *As a PIPSC member, I think I was owed a duty of care not to try to pull a "fast one" on me.*
>
> *I thought that the Facts was an important key document and as such I allocated my time to it. If I had to choose between the two, the documents came second.*
>
> *As you will recall, we were asked to produce an Executive Summary, so I was trying to kill two birds with one stone – the Agreed Set of Facts would also serve as an Executive Summary, or so I thought.*
>
> *I challenge you to show me where my document is not a neutral rehashing of the facts. It is substantially a cut and paste of direct quotes, vs. slanted summarizations*
>
> *I in fact was the person who said countless time that we need an exhibit binder with an index to keep things organized.*
>
> *When I went away, I had a binder and a game plan. All I needed to do was make copies on Tuesday.*

> *These last 2 weeks have been absolute chaos, with endless demands on my time. My day was hijacked on Monday and Tuesday and then again yesterday and today.*
>
> *I am a member of PIPSC as well and that I think is forgotten.*
>
> . . .
>
> *When I saw this thing going off the rails, I suggested that we regroup and do it right. As a PIPSC member I think I am due that respect.*
>
> *PIPSC has run me ragged. The only way I knew I could comply was to photocopy everything and send it to you.*
>
> [*Sic* throughout]

[30] At 7:44 p.m., counsel for the respondent replied to the applicant's 7:00 p.m. email as follows:

> *I take offense with any suggestion that I have not acted, at any time, with the utmost good faith in dealing with you.*
>
> *While I will not address each of your comments, I remind you that you initially advised me on the telephone that in your view 95% of my initial draft Agreed Statement of Fact was correct. In my view, your suggestion, copied to the Board, that I engaged in a "ruse" and that I tried to pull a "fast one" on you is both unprofessional and defamatory.*
>
> . . .

[31] At 7:54 p.m., counsel for the respondent replied a second time to the applicant's 7:00 p.m. email, as follows:

> *This is the second time that you have suggested unprofessional behaviour on my part. When I challenged you on Wednesday about your comments, you responded that: "I have no issue with you and I consider you an honourable person". See the attached email thread. Your defamatory statements today are based on facts predating the Wednesday email thread. I accept that you are busy and frustrated by this process. I do not accept that the Institute or its counsel is to blame.*

[32] The applicant emailed counsel for the respondent at 7:55 p.m., incorporating the following responses to counsel's email of 7:44 p.m.:

> *I apologize and I will try to be more careful with my words. Lawyers are people of words and I know, or should know that words mean a lot.*

> *I am not a lawyer, so I don't know what is considered unprofessional language in the legal world. It is "street language" that we use at work. I you are offended, I apologize. I do try, and some would argue unsuccessfully, to be careful with what I say, but I will try to be more careful with my words in the future.*
>
> *I guess I am frustrated at being refused delivery. I thought I was making quite an effort to show goodwill by driving downtown vs. just throwing it in the overnite and hoping it arrived on time.*
>
> . . .
>
> [*Sic* throughout]

[33] The applicant emailed counsel for the respondent a second time at 7:58 p.m. as follows:

> *I did and do consider you an honourable person ….. lets [sic] leave it at that.*
>
> *Once again, I will try to be more careful with my words.*

D. <u>August 3, 2012</u>

[34] On Friday August 3, 2012, at 9:05 a.m. and 9:07 a.m. respectively, the applicant emailed the Board and counsel for the respondent, stating as follows:

> *I regret to inform you that I will be unable for medical reasons to attend the hearing next week.*
>
> *Please provide me with your fax number and I will provide the supporting document.*
>
> *I have advised my witnesses.*

[35] The Board received by facsimile a copy of a medical note from Dr. Tina Matthews, dated August 2, 2012 ("the August 2 note"), which stated as follows:

> *The above named patient is ill and unable to work for medical reasons. He will require at least 2 weeks off and will be reassessed then.*

[36] The August 2 note was not sent to counsel for the respondent.

[37] Upon receipt of the August 2 note, the Board's registry emailed the applicant at 11:40 a.m., confirming receipt of only the note (with no other correspondence

attached), enquired of him the purpose of it and asked him to clarify his intentions with respect to the hearing.

[38] Counsel for the respondent emailed the Board, the applicant and others at 10:50 a.m., responding to the applicant's email of 9:07 a.m., objecting to what appeared to be a postponement request. He suggested that it was suspicious and requested that the panel of the Board issue a direction that the hearing would proceed as scheduled on August 8, 2012.

[39] At 1:08 p.m., the Board wrote, via email, to the applicant, with a copy to counsel for the respondent, stating as follows:

> *. . . You are asked to indicate in writing, and provide a copy to the respondent, what your intentions are with respect to the hearing which is scheduled to proceed from August 8 to 10, 2012, in Toronto.*
>
> *More specifically, you are asked to indicate if you are asking for the postponement of the hearing, or an accommodation, or any other request which you may be seeking. You are reminded that if you fail to attend the hearing or any continuation thereof, the Board may dispose of the matter on the evidence and representations placed at the hearing, or based on the material in the file, without further notice to you.*

[40] The applicant responded to the Board's 1:08 p.m. email at 1:18 p.m., indicating that he was requesting a postponement of the August 8 to 10, 2012, hearing days.

[41] The panel of the Board ordered that a PHC conference call take place at 2:45 p.m. on August 3, 2012, to discuss the applicant's request for the postponement for medical reasons. The Board emailed the parties the necessary information to be able to call in. The applicant confirmed in an email response to the Board that he was aware of the PHC and the details necessary to call in; however, he advised that he would not participate without legal counsel. At 2:45 p.m., counsel for the respondent called in; however, the applicant did not. The Board's registry contacted the applicant, who confirmed his position that he was not going to participate in the PHC as he wanted to obtain legal advice. The PHC did not proceed.

[42] The Board wrote to the parties, advising that the hearing was not postponed and that the applicant's request for postponement due to medical reasons would be dealt with at the outset of the hearing on August 8, 2012. This letter was emailed to the

parties. The email to the applicant went to his work email address at 3:57 p.m. and to his home email address on Tuesday, August 7, 2012, at 8:51 a.m.

[43] At 5:02 p.m., counsel for the respondent sent an email to the applicant that he stated he dictated to his assistant over the phone as he was already away from the office. The email is as follows:

> *Just received your documents at 2pm this afternoon. Contrary to my understanding, you did not include an index page nor did you flag the disputed documents. I also have no idea which documents correspond with your document numbers. I am now away on a holiday with my son.*
>
> *In light of your decision not to call any evidence at the hearing (and instead to seek an adjournment) I cannot agree to proceed with a Joint Book of Documents.*
>
> *If your request for an adjournment is granted, we should then be able to work towards a proper Joint Book of Documents.*
>
> [*Sic* throughout]

E. <u>The hearing, August 8, 2012</u>

[44] The hearing commenced at 9:30 a.m. on August 8, 2012, at Toronto. The applicant was not present; however, he was represented at the hearing by his brother, Paul Gilkinson. Also present were Steven Welchner, counsel for the respondent, Martin Ranger, the respondent's in-house counsel, who was the respondent's client representative at the hearing, and Shannon Bittman, a full-time vice president of the respondent, under summons by the applicant.

[45] With respect to what occurred at the hearing on August 8, 2012, I heard evidence from Paul Gilkinson, Ms. Bittman and Mr. Ranger.

[46] In his evidence before me, Paul Gilkinson testified that at approximately 11:00 p.m. on August 7, 2012, the applicant asked him to attend the hearing on his behalf and gave him material to bring with him. The full and exact extent of the material was not divulged; however, the testimony described Paul Gilkinson as coming to the hearing with two large binders.

[47] Paul Gilkinson testified that when the applicant asked him to attend and request that the hearing be postponed, he reviewed a summary he found in the material, confirmed he had the August 2 note and confirmed he had the address for the hearing.

[48] Paul Gilkinson testified how he recalled the hearing proceeding on August 8, 2012. He stated that he had the August 2 note with him and that he made the request for a postponement. He also advised that he had not reviewed the material in any detail and that his knowledge of the case was marginal. He confirmed that he went to the hearing only to ask for a postponement.

[49] Exhibit R-1 is a copy of Mr. Ranger's transcribed notes, which he took at the hearing on August 8, 2012. The notes are typewritten and were transcribed from his original handwritten notes. Mr. Ranger stated that although he did not type the notes, as they were typed by an assistant, he confirmed that they match his original notes and that they reflect what occurred at the hearing before the panel of the Board on August 8, 2012.

[50] Exhibit R-1 was put to Paul Gilkinson in cross-examination, and he confirmed that the notes accurately reflect that he had advised the panel of the Board at the hearing that he was not prepared to argue the case and that he was there only to request a postponement. He also confirmed that from what he knew, it would have taken him at least a week to prepare to conduct the hearing. He had not reviewed the material and was not familiar with the procedures before the Board.

[51] According to the decision and Exhibit R-1, the panel of the Board asked Paul Gilkinson to contact the applicant and see about obtaining further medical evidence, as the August 2 note before the Board on August 8, 2012, was no different from the one delivered on August 3, 2012. A brief adjournment took place to allow this to occur. Both the decision and Exhibit R-1 disclose that after the adjournment, Paul Gilkinson advised the panel of the Board that the earliest the applicant could see his doctor was Friday, August 10, 2012. According to Exhibit R-1, the panel of the Board adjourned until 1:00 p.m., at which time it would rule on the postponement request. This is corroborated in the decision at paragraphs 12 and 13.

[52] Paragraph 13 of the decision states as follows:

> *[13] I adjourned the hearing to consider the merits of the postponement request, which had become an adjournment request. Before doing so, I advised the complainant's representative that, if I refused the complainant's request, I would proceed on the merits and that the burden of proof was on the complainant. I then advised him of the evidentiary threshold that the complainant had to meet to substantiate his claim, which was that he had complied with the mandatory provisions of the* Act*, and showing how the*

> *action taken against him was disciplinary and discriminatory, and that he would be required to express the requested remedy. I also explained that evidence was required to meet that threshold. He was advised that I could provide guidance on the process but that it was up to him or the complainant to conduct the case and present the required evidence through witnesses or documents. He was also advised that he would be given the right to cross-examine any witnesses called on behalf of the respondent.*

[53] Paul Gilkinson, Mr. Ranger and Ms. Bittman were all brought to that paragraph and asked if it was an accurate reflection of what occurred at the hearing. In cross-examination, Paul Gilkinson was brought through the paragraph sentence by sentence and was asked if each sentence was accurate. He confirmed that each was. When he was brought to the sentence referring to the panel of the Board providing guidance, he confirmed that he did not seek any guidance. He further stated that he did not ask any guidance of the panel of the Board as to how to introduce documentary evidence. Ms. Bittman also stated that she believed paragraph 13 of the decision was substantially accurate; however, she also stated that she did not recall that level of detail. Mr. Ranger, in his evidence, stated that paragraph 13 of the decision was an accurate reflection of what was stated.

[54] Paragraph 26 of the decision states as follows:

> *[26] At that point, the complainant's representative was given the option of adjourning for a couple of hours or until the next day, if he wished, to prepare for a hearing on the merits. He specifically rejected the offer. After a brief adjournment, the length of which he determined, he opted to commence the hearing on the merits that same afternoon. I again reminded him of the evidentiary threshold that he was required to meet to establish the case on behalf of the complainant and to meet the complainant's burden of proof.*

[55] Two of the witnesses before me were brought to paragraph 26 of the decision and were asked if it accurately reflected what occurred at the hearing on August 8, 2012. Paul Gilkinson confirmed that he was given the options as set out in paragraph 26, and as well, the panel of the Board reminded him of the threshold he had to meet. He stated that given his limited knowledge, adjourning to the next morning would not have put him in any better position, and he opted to proceed on the afternoon of August 8, 2012.

[56] Mr. Ranger testified that paragraph 26 of the decision corresponds with his recollection of the events on August 8, 2012.

[57] Paragraph 31 of the decision states as follows:

> *[31] The complainant's representative then closed his case without calling evidence, despite having summoned two witnesses and despite the presence in the hearing room of at least one of those witnesses. . .* [I] *urged him to call oral evidence. However, he chose to rest his case. I also note that the complainant's representative chose to not submit any documentary evidence in support of his case, despite having large binders of documents with him in the hearing room.*

[58] As with paragraphs 13 and 26 of the decision, the witnesses before me were brought to paragraph 31 of the decision and asked if it accurately reflected what occurred at the hearing on August 8, 2012. Paul Gilkinson stated that the first sentence was not accurate as he did not summons two witnesses. He did confirm that he did not call any evidence. With respect to the statement in the decision that the panel of the Board urged him to call evidence, he stated that he disagreed with it, stating that his recollection was that the panel of the Board urged counsel for the respondent to call evidence.

[59] With respect to the statement at paragraph 31 of the decision that he chose to close his case and not call any evidence, oral or documentary, Paul Gilkinson stated that he did not choose to not call any evidence. He stated that his main witness (the applicant) was not there. While Ms. Bittman was present, he stated that he was not able to use her to put the documents in evidence. In examination-in-chief, he stated he did not know what she knew and that she did not know the case. He further stated that he did not know the rules and was not aware that he could have called people in the hearing room as witnesses who were there on behalf of the respondent. In cross-examination, when it was suggested to him that he could have accepted the adjournment to the next day and could have met and talked to Ms. Bittman to see what she knew and what evidence could be led through her, Paul Gilkinson conceded that he could have done so, but he exercised his judgment and chose not to.

[60] Ms. Bittman testified that she did not recall whether the panel of the Board provided any guidance to Paul Gilkinson at the hearing on August 8, 2012. She stated that it was clear to her that Paul Gilkinson was way out of his element and was not prepared. She stated that she understood him to be there only to deal with the postponement request and that he was not prepared to deal with any other issues. In cross-examination, Ms. Bittman confirmed that paragraph 31 of the decision was not 100% accurate as it was the applicant who had obtained the summonses and not

Paul Gilkinson. She confirmed that she was in the hearing room during the proceedings and that Paul Gilkinson did not call any evidence. Ms. Bittman had no recollection of the panel of the Board cautioning Paul Gilkinson.

[61] Mr. Ranger testified that paragraph 31 of the decision corresponded to his recollection of what occurred at the hearing. When cross-examined on this point, he stated that the panel of the Board urged Paul Gilkinson to call evidence; however, he could not recall if the panel urged him to lead documentary evidence. When asked if Paul Gilkinson had documentary evidence with him at the time, Mr. Ranger stated that he believed that he did.

[62] In cross-examination, Mr. Ranger was brought to paragraph 31 of the decision, where it states that Paul Gilkinson chose not to submit any documentary evidence. Mr. Ranger stated that Paul Gilkinson did not ask about documentary evidence; nor did he try to put in documentary evidence. It was from this inaction of Paul Gilkinson that Mr. Ranger stated he concluded that Paul Gilkinson chose not to lead evidence. When asked if the panel of the Board instructed Paul Gilkinson how to lead evidence, he stated that she did not.

[63] Paul Gilkinson confirmed in cross-examination that there was another person in the hearing room on August 8, 2012. In cross-examination, counsel for the respondent suggested that Paul Gilkinson could have called that person as a witness. Paul Gilkinson stated that he did not realize he could call that person. While Paul Gilkinson did not identify the other person in the hearing room, counsel for the respondent referred to him as "Mr. Lazzara." Paul Gilkinson admitted in cross-examination that while the panel of the Board did not provide him with instructions that he could call Mr. Lazzara, he did not enquire of the panel of the Board whether he could call him. There was no evidence that Paul Gilkinson knew who Mr. Lazzara was or that Mr. Lazzara had any evidence that Paul Gilkinson could have used in putting in the applicant's case.

[64] Before Ms. Bittman gave her evidence in front of me, the applicant enquired as to what was necessary to have a witness declared hostile. After a discussion as to what requirements would be necessary, Ms. Bittman was called to the witness box and gave her evidence. Nothing in her evidence-in-chief caused me to reach a conclusion that she was hostile, which would have allowed the applicant to cross-examine her. During her cross-examination, it became clear that in fact Ms. Bittman and the applicant are close friends.

F. Post-August 8, 2012-hearing

[65] Subsequent to the completion of the hearing on August 8, 2012, the applicant obtained a second medical note from Dr. Matthews, dated August 10, 2012 ("the August 10 note"). This note states as follows:

> *The above named patient was ill and unable to work or attend the hearing of August 8-10, 2012 for medical reasons. Given the nature of his condition there were no accommodations that could allow him to work or attend the hearing. He will require at least two weeks off from work (and hence the hearing) and will be reassessed then.*
>
> *This note provides additional information with respect to the note of August 2, 2012.*

[66] Subsequent to the hearing, and contained in the materials provided to me as part of the written submissions, the applicant stated that on the night of August 1, 2012, he began having chest pains, which he attributed to the cumulative events and stress of the previous nine days, which included the ASF, the JBD and the information with respect to legal costs. He stated that the triggering event, which turned it from stress to panic, was that the Board did not provide him with factual information on legal costs, as requested. The applicant stated that he was fearful that due to his family history of heart troubles, the high level of stress would lead to a heart attack. He stated that he saw his family doctor on August 2, 2012.

[67] The applicant stated that he panicked because he was fearful that the Board could award legal costs against him, which was new information received at a very late date, and it caused him to exceed his tolerable stress level. He began to have panic attacks and chest pains. He stated that had he received factual information from the Board, he believes he would not have had the panic attacks and would not have required the medical leave, and as such, he would have attended the hearing on August 8, 2012.

[68] The applicant stated that he believes his doctor made the right decision by placing him on medical leave and "if she had not [he] believe[s] that [he] would have been sick or worse by the start of the hearing as the issue triggering [his] panic attack was outside [his] control."

[69] The applicant's evidence about panic attacks was provided via a Wikipedia article on panic attacks and an article dated November 18, 2012, entitled "The ballad of golfer Charlie Beljan" by Bill Lyon, published in *The Inquirer*. The article describes the

panic attacks suffered by Mr. Beljan, a professional golfer, and how they affected his life at a particular point in time.

G. Request for recusal

[70] The hearing of the complaint lasted one day, August 8, 2012. On August 10, 2012, the applicant wrote to the Board, suggesting that the panel of the Board should recuse herself. This was based on information the applicant stated that he received on August 8, 2012. According to the applicant, one of his summonsed witnesses, Carmine Paglia, had filed a grievance against the panel of the Board while she occupied her previous position, before being appointed to the Board. The applicant was of the view that that was a conflict of interest.

[71] There was no evidence presented in any form that suggested that Mr. Paglia was present at the hearing on August 8, 2012.

[72] On August 20, 2012, the applicant sent an email addressed to the Chairperson of the Board in which he set out many of the allegations he is relying on in this application, including new allegations of an additional potential conflict of interest. In the email, the applicant identifies Ray Lazzara, another person with whom he believes the panel of the Board had discussions, about a human resources file, again, at a time when she was in her previous position, before being appointed to the Board. The applicant identified Mr. Lazzara as someone who was to be one of the respondent's witnesses.

[73] There was no evidence that Mr. Lazzara was under summons by the respondent and no evidence that he was going to be called as a witness by the respondent.

[74] Paragraphs 38 through 50 of the decision address the recusal request.

H. Post-decision

[75] In his written submissions, the applicant appended a copy of the decision with his own comments interspersed with respect to the findings of fact, issues, arguments and reasons, which he felt were incorrect or inaccurate. This document generally identifies the same issues and makes the same arguments that the applicant has made in the other parts of his written submissions, and I will not repeat them.

[76] The applicant's judicial review application was dismissed for reasons of delay by the Federal Court of Appeal on July 29, 2013.

III. Summary of the arguments

A. For the applicant

[77] The applicant has submitted that there are eight separate issues to be addressed in this application, as follows:

1. *Issue 1 – Evidence*
2. *Issue 2 – Medical Note – New Evidence*
3. *Issue 3 – Expert Opinion overruled – New Argument*
4. *Issue 4 – Underlying Medical Issue – Not suspicious*
5. *Issue 5 – Conflict of Interest – Ms. Shannon*
6. *Issue 6 – The Hearing – Other Compelling reasons for Review*
7. *Issue 7 – The Pre-hearing period – 2nd postponement request/disclosure of documents*
8. *Issue 8 – PSLRB Case Inaccuracies, clarifications*

[78] The applicant stated in the summary of his submissions that the issues he has raised represent new evidence or arguments that could not reasonably have been presented at the original hearing or represent another compelling reason for review.

i. "Issue 1 – Evidence"

[79] The applicant submitted that Debi Daviau, a vice president with the respondent, is a material witness but that she did not respond to his requests for information. He submitted that since this is a written appeal and he could not subpoena Ms. Daviau and that her information is important to the case, the Board could convene an oral appeal or subpoena Ms. Daviau.

[80] The applicant submitted five emails with his material, which emails were dated December 18, 21 and 22, 2012, in which he sought of Ms. Daviau and others information related to his allegation of conflict of interest and his recusal request and the situation with Mr. Paglia.

[81] This issue relates to "Issue 5 - Conflict of Interest – Ms. Shannon."

ii. "Issue 2 - Medical Evidence - New Evidence"

[82] The applicant submitted that there is new evidence with respect to the medical note. He stated that roughly two weeks before the hearing, he had been misled by counsel for the respondent on a number of legal issues, including the requirement for an ASF, a JBD and service of documents on the respondent.

[83] The applicant stated that given his medical condition, he was advised by a lawyer that he not attend the PHC without a lawyer. He stated that he was not asked for further information about the medical reasons and if he had been asked, he would have been happy to provide it.

[84] The applicant stated that Paul Gilkinson attended the hearing on August 8, 2012 and advised him initially that further "unspecified" information was required and later that the issues involving his medical note were that it was handwritten instead of typewritten, it was submitted too close to the hearing date, it did not address medical issues involving the hearing but the applicant's work and it lacked detail. The applicant submitted that he contacted his physician and made the first available appointment on August 10, 2012, at which he obtained a further note, the August 10 note. The applicant submitted that the August 10 note satisfies the questions the panel of the Board had about the medical issue. The applicant suggested that this information could have been available at the outset of the hearing had the panel of the Board made inquiries of him on the Friday (August 3, 2012) before the start of the hearing.

iii. "Issue 3 - Expert Opinion Overruled - New Argument"

[85] The applicant submitted that the physician who authored his medical note would be deemed an expert and therefore that the information provided by the physician was an expert opinion. The applicant stated that if the panel of the Board had a concern about the opinion rendered by the physician in the note, it had two options open to it, either to request additional information or to subpoena the doctor, neither of which was done. It is the applicant's submission that the expert opinion of the physician was dismissed and overruled, a conclusion reached by the panel of the Board about the applicant, of whom she had no knowledge.

iv. "Issue 4 – Underlying Medical Issue"

[86] The applicant indicated in his written submissions that there is evidence in his family of heart attacks. He stated that on the night of August 1, 2012, he suffered

some chest pains, which were caused by events and stress from the previous nine days. He stated that the triggering event was that the Board had not provided him with factual information on costs and that high stress became panic. The applicant stated that due to his family history, he was fearful that the high stress would lead to a heart attack, and as such, he saw his physician on August 2, 2012.

[87] The applicant argued that the respondent had two lawyers and was going to spend $30,000.00. He stated that the panel of the Board had led him to believe that costs could be awarded against him; he stated that this "new" information at this very late date caused him to exceed his tolerable stress level and have panic attacks and chest pains. The applicant submitted that had the Board provided him with a factual response to his inquiry, he would not have had the panic attack, which required the medical leave, and he would have been at the hearing. In support of this issue, the applicant attached a Wikipedia article on panic attacks and a news article authored by Bill Lyon of *The Inquirer* entitled "The ballad of golfer Charlie Beljan" which sets out what occurred to professional golfer Charlie Beljan when he suffered a panic attack during a golf tournament.

v. "Issue 5 – Conflict of Interest"

[88] This issue related to Issue 1, about the evidence required of Ms. Daviau.

[89] The applicant stated that on the day of the hearing, it came to his attention that in April 2011, the panel of the Board who heard the matter was someone who had carriage of a complex human resources matter involving Mr. Paglia, who was a key witness for the applicant with respect to his complaint against the respondent. The applicant stated that the panel of the Board had several meetings with the respondent's vice president, Ms. Daviau, and that during those discussions, the panel of the Board made some inquiries about Mr. Paglia. The applicant stated that Mr. Paglia conveyed to him that Ms. Daviau conveyed to Mr. Paglia that the panel of the Board made an inquiry of her. The gist of the argument is that since the panel of the Board made the inquiry in her capacity with her former employer, before her appointment to the Board, she was in a conflict of interest with respect to the applicant and should have excused herself from hearing the matter.

[90] The applicant argued that the "Code of Conduct and Guidelines for Members of the Public Service Labour Relations Board" ("the Guidelines") require that Board members shall act with integrity and in a manner that will bear the closest public

scrutiny. The applicant stated that the Guidelines provide that Board members must strive to make their decisions in a manner that is independent, fair, objective, impartial, and free from conflict of interest and bias.

[91] The applicant stated that the duty as set out in the Guidelines does not stop at ensuring that there is no bias but that there is no reasonable apprehension of bias.

[92] The applicant stated that the panel of the Board had a discussion with one of the witnesses for the respondent, Mr. Lazzara, with respect to the issues that also involved Mr. Paglia, one of the witnesses of the applicant. The applicant argued that by virtue of meeting with Mr. Lazzara and with Ms. Daviau, the panel of the Board was in a conflict of interest with respect to the applicant's case and was biased against him.

vi. "Issue 6 – The Hearing – Other compelling reasons for review"

[93] The applicant submitted that when the hearing proceeded in his absence, Paul Gilkinson was advised to be ready to make arguments and present a case that he knew almost nothing about. He stated that Paul Gilkinson had been provided with binders of materials, including an executive summary, exhibits, opening and closing arguments, and case law. He stated that the panel of the Board did not permit Paul Gilkinson to read from the binders and would not allow him to submit the exhibits to be entered into evidence, as there was no one present to be cross-examined on the documents. The applicant stated that all the exhibits were (except for one) emails or documents of the respondent, including bylaws or records of meetings, and that they spoke for themselves.

[94] The applicant argued that not allowing Paul Gilkinson to read the opening remarks was incorrect in law and a breach of the Guidelines. The applicant stated that the Guidelines state that members must ensure that all parties with an interest in a matter before the Board are provided with a reasonable opportunity to present their cases and that a Board member must attempt to ensure that parties who are unrepresented are not unduly disadvantaged at the hearing. Had the Guidelines been followed, Paul Gilkinson would have been able to lead evidence.

[95] The applicant stated that his representative had no idea how the hearing worked and that no instruction was given to him. The evidence was clear that Paul Gilkinson was floundering in presenting his case; he was unaware of how to enter evidence or conduct a case.

[96] The applicant stated that Ms. Bittman's uncontradicted evidence, after reading the decision, was that the panel of the Board wrote the decision in the manner she did to cover herself.

[97] The applicant argued that the evidence of Mr. Ranger was not credible and that he was evasive.

vii. "Issue 7 – The pre-hearing period – 2nd postponement request/disclosure of documents"

[98] The applicant stated that he had received a letter from the Board dated July 4, 2012, stating that if he planned on entering exhibits at the hearing, he would have to have enough copies of the documents for the Board and the other party at the hearing. He stated that he had his documents ready and that he planned to make the required copies the day before the hearing.

[99] The applicant stated that he was out of town for two weeks before July 23, 2012, when he received an email from counsel for the respondent applying considerable pressure on him about an ASF, a JBD and an executive summary. The applicant argued that despite being very frustrated with this request, as he had suggested that process a year earlier, he threw himself into this process and rewrote the draft that counsel for the respondent had sent to him. He stated that he assumed that the ASF, JBD and executive summary were required documents, but they were not, and that he should have been so advised. He stated that it was the respondent's counsel who was doing things at the last minute.

[100] The applicant argued that it was his view that things were in complete disarray and that he had been led to believe that without the ASF, JBD and executive summary, the hearing would be inordinately long. He stated that when he received no response from counsel for the respondent with respect to his ASF, he requested a rescheduling of the hearing such that those materials could be put in order. The request was objected to by counsel for the respondent and denied by the panel of the Board. In addition, the respondent requested an order requiring the applicant to turn over his documents to it, and the panel of the Board made an order requiring the applicant to deliver his documents to the respondent within 48 hours.

[101] The applicant stated that he attempted to deliver the documents as ordered to the respondent's Toronto office but that the respondent refused to accept them at that

office or assist him in scanning and electronically sending or using an internal mail system to send the documents to counsel for the respondent in Ottawa. The applicant argued that the documents, which were supposed to reach counsel for the respondent by noon on August 3, 2012, did not reach him until 2:00 p.m. that day, and as such, he was told by counsel for the respondent that he (the applicant) did not have any exhibits for the hearing. He argued that counsel for the respondent was an officer of the court and that it was inappropriate for him in law to take advantage of the applicant, who was an unrepresented litigant. He argued that counsel for the respondent took advantage of the applicant's lack of knowledge by running him off his feet.

[102] The applicant went on to argue that the reason behind the August 2 note was related to the panel of the Board who was to hear the case not providing certain information about costs. The applicant stated that he requested that information from the Board both in writing and in a phone call in the two weeks before the hearing. The applicant argued that the panel of the Board who was to hear the case led him to believe that the Board did award costs, and he felt that since the respondent was represented by two lawyers and would likely expend $30,000.00 in costs, he felt he would be responsible for those costs if he were unsuccessful, and given the disarray that the case was in, he felt the chance of his success against two lawyers was not good.

[103] The applicant argued that he contacted lawyers and that the information he was seeking from the Board was indeed factual and not legal in nature, and therefore, the Board was required to provide him with that information. The applicant argued that he had a difficult time finding information on costs on the Board website because there is nothing in the *Act* about costs. The applicant argued that all the information on costs should have been provided to him by the Board when he requested it. He argued that had the Board provided him with the factual information, he would not have required the medical leave and would have attended at the hearing. He stated that he did eventually find out that the Board has no authority to award costs.

[104] The applicant stated that his first request for a postponement was made because he felt the case was in disarray because counsel for the respondent had "cut things too tight" and given that he worked during the day, he thought it was best for all if they took the time to "get things in order." He stated the reason behind his second request for postponement, the one related to the August 2 note, was that the

panel of the Board did not provide him with the information he requested on costs, which in turn required him to be placed on medical leave.

viii. "Issue 8 – PSLRB Decision – Inaccuracies, clarifications"

[105] The applicant submitted that there are numerous inaccuracies and clarifications that are required in the facts, as reported in the decision. He argued that several of the quotes from emails are out of context. Further, he argued that the conclusions reached by the panel of the Board do not flow logically from all the facts and documents available at the time the decision was written.

[106] In support of his arguments on this issue, the applicant attached a copy of the decision, with his comments interspersed within it. These comments are similar if not identical to the allegations and arguments he has made with respect to the other seven issues.

B. For the respondent

[107] At the outset of its submissions, the respondent set out the legal basis for the Board to reconsider the decision under subsection 43(1) of the *Act.* The respondent argued that reconsideration is not an alternative to an appeal and does not allow the Board to draw a different conclusion from the evidence. The purpose of reconsideration, according to the respondent, is to allow a party to present new evidence or arguments that could not ". . . reasonably have been presented at the original hearing . . ." or ". . . where some other compelling reason . . . exists . . . ." Reconsideration should be used ". . . judiciously, infrequently, and carefully." The respondent further submitted that a reconsideration must

- not be a relitigation of the merits of the case;
- be based on a material change in circumstances;
- consider only new evidence or arguments that could not reasonably have been presented at the original hearing;
- ensure that the new evidence or arguments have a material and determining effect on the outcome of the complaint;
- ensure that there is a compelling reason for reconsideration; and

- be used ". . . judiciously, infrequently and carefully. . . ."

[108] The respondent relied on *Czmola v. Treasury Board (Solicitor General - Correctional Service of Canada),* 2003 PSSRB 93; *Quigley v. Treasury Board (Citizenship and Immigration,* PSSRB File No. 125-02-77 (19980604); *Chaudhry v. Treasury Board (Correctional Service of Canada),* 2009 PSLRB 39; and *Buenaventura Jr. v. Telecommunications Workers Union,* 2012 FCA 69.

[109] The respondent addressed the merits of the reconsideration application under the following four headings:

1. *Denial of requested adjournment for medical reasons;*
2. *Allegation that the Board member had a reasonable apprehension of bias;*
3. *The Applicant was not denied procedural fairness at the hearing; and*
4. *Allegations concerning the pre-hearing period.*

i. <u>"Denial of requested adjournment for medical reasons"</u>

[110] The respondent argued that the applicant's submission that he did not realize that the panel of the Board might require more detailed information to support his requested adjournment is neither reasonable or credible, as the applicant was aware of the direction made by the panel of the Board after the applicant's request for postponement that the hearing would proceed as scheduled and that the panel of the Board would hear the parties' submissions on the request for postponement for medical reasons at the outset of the hearing.

[111] The respondent submitted that at the outset of the hearing, the panel of the Board permitted Paul Gilkinson an opportunity to secure further medical information to discharge the onus on the applicant to provide sufficient medical information that he was unable to participate in the hearing. Paul Gilkinson advised the Board that the applicant would not see his physician until August 10, 2012. The respondent stated that the applicant's incorrect assumption that he would be given additional time to obtain more medical information or that the panel of the Board would of its own motion subpoena the applicant's physician cannot support the request for reconsideration.

[112] The respondent argued that the August 2 note provided very little information, in that it stated only that the applicant could not attend work. The respondent's position is that the absence of the ability to cross-examine the physician on the note and the limited information it contains, coupled with the suspicious circumstances surrounding it (it was part of the second or third request for postponement in as many days, no mention of an illness had been made before that time, and a previous postponement request had been denied), made it and the request for postponement for medical reasons suspicious. The respondent argued that had further information been provided to the panel of the Board, either before or at the hearing, the panel of the Board would have had more information on which to assess the situation. The respondent stated that on reconsideration, the Board may not draw a different conclusion from the evidence.

[113] The respondent also stated that the applicant is seeking to merely relitigate the Board's discretionary ruling denying his request for postponement for medical reasons. There is no new evidence on this point. There is no material change in circumstances. The August 10 note should not be considered new evidence that might have resulted in a different decision, as the panel of the Board concluded that further medical evidence would have to be submitted on a timely basis to be considered. On August 8, 2012, the panel of the Board expressly rejected the applicant's offer of obtaining further medical evidence on August 10, 2012, as it would have necessitated adjourning the entire three-day hearing. The August 10 note was still deficient as the only difference between it and the August 2 note was the addition that the applicant could not attend the hearing. There was no other information; nor could the information be tested by the respondent or the panel of the Board.

[114] The respondent stated that the applicant is attempting to submit information on the physical conditions he was experiencing at the time he made his postponement request and obtained his August 2 note. The applicant is trying to rely on the fact that he was suffering chest pains caused by panic attacks. This was information that was in existence at the time of the original postponement request and the hearing, and neither the applicant nor Paul Gilkinson provided this information to the panel of the Board. In addition, that information was not provided by the applicant's physician.

ii. "Allegation that the Board member had a reasonable apprehension of bias"

[115] The respondent stated that the applicant acknowledged that as of the first day of the hearing, he was aware of the factual situation with respect to Mr. Paglia that he

alleged amounts to a conflict of interest. He had an obligation to raise the concern at that time and not stay silent and raise the matter after the end of the hearing.

[116] The applicant had a responsibility to raise that allegation with the respondent such that the respondent would be in a position to lead evidence and make submissions, if necessary, on the allegation, which was solely hearsay. The respondent did not have this opportunity.

[117] Despite the fact that the information was available at the time of the hearing, the panel of the Board was apprised of the allegation by the applicant in writing only after the hearing was completed. The person whom the applicant alleged was the subject of the allegation as being against the Board member was not called as a witness. The panel of the Board addressed the allegation in the decision at paragraph 47. The panel of the Board applied the correct legal test in determining if there was a conflict of interest or a reasonable apprehension of bias.

[118] There are no new facts related to the allegation of a conflict of interest or a reasonable apprehension of bias that were not known to the applicant either at the time of the hearing or at the time he raised the issue in August 2012. The applicant is attempting to relitigate this issue. In any event, the respondent argued that the issue was rendered moot when the applicant's representative chose not to call any evidence in support of the complaint.

[119] The respondent argued that there is no need to depart from having a decision rendered based on written submissions in response to the reconsideration application, given that the applicant knew of the allegations with respect to the conflict of interest or an apprehension of bias at the date of the August 8, 2012, hearing and did indeed raise the facts he was relying upon after the close of that hearing. The respondent stated that the applicant should not be permitted to try to call *viva voce* evidence that could have been called during the course of that hearing and that was not called.

[120] The respondent further argued that the applicant should not be allowed to raise a new conflict of interest allegation with respect to Mr. Lazzara, who was allegedly involved in the same fact scenario the applicant alleged involved Mr. Paglia. The respondent is alleging Mr. Lazzara was a witness to the facts that the applicant stated were the basis for the allegation of a conflict of interest or bias of the panel of the Board with respect to Mr. Paglia. There is no evidence that Mr. Lazzara could provide

any evidence of the alleged conflict of interest or bias; nor is there any evidence that he was going to give evidence on behalf of the respondent.

iii. "The applicant was not denied procedural fairness at the hearing"

[121] The allegations made by the applicant do not reflect what occurred at the hearing. Paul Gilkinson chose not to submit any evidence despite having large binders of documents with him in the hearing room.

[122] The evidence of the witnesses bore out what was set out at paragraphs 13 and 26 of the decision. The panel of the Board explained to Paul Gilkinson that he bore the burden of proof of establishing his allegations, and she offered him time to prepare further before proceeding. Paul Gilkinson chose not to take the extra time to prepare.

[123] Paul Gilkinson conceded in cross-examination that it was open to him to call Ms. Bittman to give evidence, but he exercised his judgement and chose not to, despite that Ms. Bittman had been summoned by the applicant and might have had relevant evidence to provide to the hearing. On cross-examination, Paul Gilkinson also conceded that the panel of the Board did not prevent him from calling any other person who was in the hearing room as a witness.

[124] Paul Gilkinson stated that he was thwarted at every turn and that he could not call evidence, but the reason for this was quite simply that he did not have his main witness, whom the panel of the Board had decided did not have a reasonable excuse for not attending the hearing.

[125] There was evidence that there were binders of materials. However, the evidence was that Paul Gilkinson did not attempt to put the evidence in; nor did he ask the panel of the Board how to put the evidence in.

[126] Paul Gilkinson admitted that he knew very little about the complaint, having received the material at 11:00 p.m. the night before the hearing. On a scale of 1 to 10, his level of competence to proceed was 1, the lowest possible. If one looks at the applicant's submissions, in his email to the Board dated August 10, 2012, at 4:57 p.m., the applicant stated that ". . . he [Paul Gilkinson] knew virtually nothing about the case itself."

[127] It is the argument of the applicant that the panel of the Board had an obligation to take substantial active steps to assist Paul Gilkinson in introducing the documents

in the binder. In an adversarial forum, like a labour board proceeding, the presiding Board member has no obligation to give an unrepresented party advice on how to introduce documents if no request was made to introduce documents and no advice was sought.

[128] At paragraph 13 of the decision, the panel of the Board stated that she told Paul Gilkinson that she could provide guidance on the process. Paul Gilkinson conceded in cross-examination that not only did the panel of the Board make that statement but also that he never actually asked for any advice with respect to what witnesses he would be permitted to call; nor did he ask how he could introduce documents other than through a witness. However, the applicant argued that the panel of the Board did not provide the guidance that Paul Gilkinson thought he needed.

[129] According to the evidence of Mr. Ranger, the panel of the Board did advise Paul Gilkinson that documents had to be introduced through a witness. The respondent submitted that the panel of the Board acted appropriately and fully in line with the Board's guidelines.

[130] With respect to the issues of credibility that the applicant has made with respect to the evidence, the respondent stated that Mr. Ranger answered every question put to him in a straightforward and forthright manner and that at no time was he required to be directed to answer a question. This is in contrast to the evidence of Paul Gilkinson who, on several occasions, had to be directed by the panel of the Board to stop avoiding a question and answer it directly. If any evidence should be discounted, it should be that of Paul Gilkinson.

[131] The respondent argued that if this panel of the Board determines that the panel in the decision in fact did have a positive obligation to instruct Paul Gilkinson on how to introduce documents, regardless of whether or not he sought that advice, the respondent submitted that in any event, the documents could have been introduced only through a witness, and Paul Gilkinson conceded in his evidence that he had no intention of calling any witnesses.

[132] The applicant argued that his documents should have been entered irrespective of any witness. He argued that unlike a civil trial before the courts, the rules of administrative tribunals are relaxed. While that is so in a general sense, there are certain rules of evidence that are universally respected in order to abide by the rules of procedural fairness and natural justice. One of those rules is that, absent an agreement

between the parties, documents must be tendered through a witness who can actually testify as to the nature of the documents, their authenticity, and their nature and relevance to the proceeding, which can be also tested on cross-examination.

[133] With respect to the introduction of documents at a hearing, "Ontario Courtroom Procedure," 2007, states as follows at page 278: "If the document is not going to be admitted by way of consent, admission or a 'notice to admit' then counsel must call the custodian to identify it and establish its admissibility." This rule is restated at page 291 under the chapter entitled "Exhibits," which states as follows: "The tendering counsel calls a witness and qualifies the witness to give evidence on one or more of the admissibility requirements, *i.e.* adduces testimony to show that the witness has the personal knowledge of the admissibility requirements."

[134] In *Manitoba Housing Authority v. International Union of Operating Engineers, Local 827,* [1995] M.G.A.D. No. 19 (QL), the union in that case called an employer witness for the sole purpose of identifying certain documents to be produced pursuant to a subpoena. The union then objected to the cross-examination by the employer of the witness, arguing that the documents themselves could have been admitted without a witness and that the employer should not be allowed to cross-examine a management-friendly witness. In rejecting the union's objection, the arbitrator stated that to get the documents admitted, the union was required to call a witness. In making this finding, the arbitrator stated at page 6 as follows:

. . .

> *We are also cognizant of our right to receive evidence "… whether the evidence or information is admissible in a court of law or not" and of our authority to determine our own procedure. . . . Nevertheless, there are rules of evidence to be applied because the process is recognized as being adversarial in nature. Boards of arbitration do conduct their proceedings in accordance with commonly accepted procedures and the rules of evidence, modelled on the rules of civil procedure.*
>
> *In our view, the first issue to be addressed is the Union's position that the documents we ordered the Employer produce to the Union can be filed as Exhibits without the necessity of calling any witnesses. Our primary focus will be on the interviewers' notes but the same considerations apply to the Employer's criteria and weightings and the scoring sheets completed by the interviewers.*

> *In addressing this issue we see no difference between an order for production and the issuance of a subpoena duces tecum. We ruled that our order of production was for purposes of disclosure and to enable the Union to review the documents. It did not automatically mean that they were admissible as Exhibits. . . .*
>
> . . .

[135] The Chairperson in *Manitoba* summed up the decision with respect to the introduction of documents at page 17 as follows:

> . . .
>
> *(V) SUMMARY*
>
> . . .
>
> 1. *The documents which we ordered be produced are not admissible as exhibits without being properly filed through a witness. Our order for production fulfilled the requirement for disclosure to the Union to assist it in the preparation and presentation of its case but the documents cannot simply be filed as an exhibit unless (i) there is an agreement between the parties to do so or (ii) the documents are properly admitted through a witness. Succinctly put, there is a difference between production and admissibility.*
>
> . . .

[136] In *Labourers' International Union of North America, Local 1089 v. Doug Chalmers Construction Limited,* 2001 CanLII 7888 (OnLRB), the Ontario Labour Relations Board stated at paragraph 1 as follows:

> *. . . We would observe that unless the parties agree that the Board should receive those documents as evidence without proof a witness would ordinarily be required to prove those documents so that they might be introduced into evidence.*

[137] The best evidence with respect to what occurred at the hearing on August 8, 2012, is contained in Exhibit R-1, which are the notes Mr. Ranger took during the hearing before any indication that there was going to be a reconsideration hearing. The decision, Exhibit R-1 and Paul Gilkinson confirm that documents and their introduction were discussed at the hearing of August 8, 2012.

[138] In addition, the applicant, in his own written submissions, stated that the panel of the Board had warned his representative that if she disallowed the postponement

request, he should be prepared to present the case. This is found in the email attached to the applicant's written submissions, at Tab 18, being the email sent to the Chairperson of the Board on August 20, 2012. On page 6 of that email, under the sub-heading "**3. The Hearing**," the applicant stated as follows:

> *The decision was made to proceed in my absence and my brother was advised to be ready to make opening arguments and present the case, for a case he knew almost nothing about.*
>
> . . .
>
> *It is my understanding that Ms Shannon wouldn't let my brother read from the binders for the opening remarks and would not allow the Exhibits to be entered as there was no one present to cross examine with respect to them.*

[139] Although the applicant argued that the panel of the Board refused to let Paul Gilkinson read the opening statement from the binders, Paul Gilkinson did make an opening statement.

[140] The applicant was warned by emails sent on Friday, August 3, 2012, that the hearing had not been postponed and that if the hearing was not postponed, the applicant should be prepared to proceed. Although he was aware of this, the applicant waited until 11:00 p.m. the night before the hearing to give the material to Paul Gilkinson, who had no time to prepare or read about the rules of procedure. The difficulty Paul Gilkinson had in understanding the case and procedures is the fault of the applicant.

iv. "Allegations concerning the pre-hearing period"

[141] The allegations made by the applicant concerning the pre-hearing period suggest that counsel for the respondent was taking advantage of him during this time, as the applicant lacked knowledge with respect to process. He is also suggesting that counsel was putting pressure on him with respect to the ASF and JBD, was misleading him with respect to the production of documents, was doing things at the last minute, did not respond to the applicant's concerns about the ASF and JBD, and was running the applicant off his feet. These allegations were made at the commencement of the hearing, were addressed at the hearing and are reflected in the decision at paragraphs 6 and 9. The dispute over pre-hearing process was therefore squarely before the panel of the Board at the time of the hearing and is not something that is new.

[142] The respondent also argued that the pre-hearing process issues are all alleged events that predate the commencement of the hearing and as such are certainly not new and are things that were in fact dealt with before the hearing. These allegations were raised in pre-hearing communications between the applicant and counsel for the respondent before the hearing and were copied to the Board. The communications are set out at Tabs C through F of the respondent's submissions. The respondent indicated that all these issues were dealt with before the hearing and that the applicant agreed that counsel for the respondent acted in no way inappropriately and apologized to counsel for the respondent for his behaviour and for making the allegations. The respondent argued that the applicant is being disingenuous, complaining once again about the exact behaviour he acknowledged he was incorrect in alleging the first time.

[143] The respondent argued that the allegation by the applicant that when he understood his documents had not arrived by the noon deadline on August 3, 2012, he could not enter his exhibits, is an unreasonable interpretation of the email correspondence sent by the respondent's counsel. The email merely refers to the lack of a JBD and could not be construed as suggesting that the applicant could not enter documents into evidence.

[144] The respondent stated that the applicant's suggestion that the respondent's counsel misled him about the deadline for the delivery of the documents is incorrect. Counsel for the respondent was in contact with his office after leaving for his vacation and when advised of the arrival of the documents after the deadline, dictated the email that was sent to the applicant.

[145] The respondent argued that at all times in the pre-hearing process it acted reasonably and in good faith; however, for the purposes of the section 43 application, the events that the applicant is relying on with respect to pre-hearing matters were all well known to the applicant and either were addressed by the applicant or could have been addressed by the applicant at the outset of the hearing.

C. Applicant's reply

[146] With respect to the respondent's submissions on subsection 43(1) of the *Act*, the applicant stated that the case law of this Board, its predecessor, the Public Service Staff Relations Board (PSSRB), the Canada Industrial Relations Board (CIRB), and the Federal Court, with respect to its interpretation, should be disregarded. The applicant stated based on jurisprudence predominately related to the interpretation of the *Income Tax*

Act, R.S.C. 1985, c. 1 (5th Supp.), that subsection 43(1) of the *Act* should be interpreted to allow the Board to sit in review of a panel of the Board's decision, as if it were an appellate court. It would be reasonable to believe that this is what Parliament intended with respect to its wording of subsection 43(1) of the *Act*.

[147] The applicant argued that on a practical level, having the Board sit as an internal court of appeal would improve the process of the Board and render better service to the public.

[148] The applicant stated that the plain and ordinary meaning of what is set out in subsection 43(1) of the *Act* should be applied, and as such, the interpretation of subsection 43(1) is not as is set out in *Czmola, Quigley* or *Chaudhry*.

[149] With respect to the decision of the Federal Court of Appeal in *Buenaventura Jr.,* the applicant stated that the interpretation of the respondent is incorrect.

[150] The applicant stated that the August 2 note was provided five days before the start of the hearing and that further information was not requested until the start of the hearing. He stated that the notice from the Board that the hearing was not postponed and the medical postponement request was sent to his work email and not his home email, and he did not actually receive the notice until August 7, 2012.

[151] The applicant disagreed with the respondent's assertion that he (the applicant) did not realize that the panel of the Board might require more detailed medical information, as he believed that if the panel of the Board needed it, it should have requested what it needed. He stated that when further information was requested, the first available medical appointment was made for the Friday (August 10, 2012) morning.

[152] The applicant stated that he understood the issues with the August 2 note were that it was not typed, it did not refer to the hearing and it did not address accommodation issues. He stated that he advised the panel of the Board on August 3, 2012, that the August 2 note covered the hearing and that no accommodation was available. He stated that the normal practice of doctors is to hand-write notes. He further stated that had the information been requested on August 3, 3012, when he submitted the August 2 note, he would have had it available for the hearing. He stated that to provide additional information on a timely basis would have required him to have been given time. It was in his view patently

unreasonable on the day of the hearing to request additional information and expect it could be reasonably obtained on that day.

[153] The applicant disagreed with the respondent's submission that he was the author of his own misfortune. He stated that on August 3, 2012, he contacted two lawyers, one of whom advised him he was unavailable and the other of whom did not call him back until the evening of August 3, 2012. He stated that when he had not heard back from the Board on August 3, 2012, he assumed that another PHC conference call would take place on Tuesday, August 7, 2012. The second lawyer he spoke to agreed to participate in a PHC on the Tuesday but would not go on the record; that lawyer also gave him names of other lawyers, whom the applicant contacted and left messages for but who did not return his call. It was only when he was left with no options that he contacted Paul Gilkinson and asked him to take time off work, attend the hearing and submit the August 2 note.

IV. Reasons

[154] This application for review is based on subsection 43(1) of the *Act,* which reads as follows:

> ***43.*** *(1) Subject to subsection (2), the Board may review, rescind or amend any of its orders or decisions, or may re-hear any application before making an order in respect of the application.*

[155] Section 43 of the *Act* came into force on April 1, 2005. That section is identical to section 27 of the *Public Service Staff Relations Act,* R.S.C. 1985, c. P-35, which applied before April 1, 2005. This Board and its predecessor, the PSSRB, have developed jurisprudence in this area.

[156] In his submissions, the applicant argued that I should interpret the words in subsection 43(1) of the *Act* to mean that the Board should act as an "internal court of appeal." He stated that it is reasonable to believe that this is what Parliament intended. Further, he suggested that on a practical level, it would improve the process of the Board.

[157] I disagree with the applicant's submissions in this respect. Subsection 51(1) of the *Act* states as follows:

> ***51.*** *(1) Subject to this Part, every order or decision of the Board is final and may not be questioned or reviewed in any court, except in accordance with the* Federal Courts Act *on*

> *the grounds referred to in paragraph 18.1(4)*(a)*, (*b*) or (*e*) of that Act.*

[158] It is clear that Parliament intended that Board decisions be final and not questioned except within the clearly mandated limits set out in subsection 51(1) of the *Act*. Accepting the applicant's reasoning would go against Parliament's very clear intention that Board orders and decisions are final. In fact, if one accepts the applicant's logic, there would be no finality to Board orders or decisions. Anyone who is not satisfied with a Board decision would merely apply under subsection 43(1) of the *Act* and seek another panel of the Board to rehear the case and render a new decision. This could be done ad infinitum, and there would be no finality.

[159] I accept and agree with the respondent's submissions with respect to the meaning of subsection 43(1) of the *Act*. This Board and its predecessor, the PSSRB, have consistently held that reconsideration is not an alternative method of appeal and does not permit the Board to draw a different conclusion from the evidence; is to allow a party to present new evidence or arguments that could not reasonably have been presented at the original hearing; or, is for cases where there is some other compelling reason for a review.

[160] Section 18 of the *Canada Labour Code,* R.S.C. 1985, c. L-2 ("the *Code"*) and section 44 of the *Code*'s regulations provides a similar authority for reconsideration (to that of subsection 43(1) of the *Act*) to the CIRB.

[161] Section 18 of the *Code* and section 44 of the *Code*'s regulations were recently opined upon by the Federal Court of Appeal in *Buenaventura Jr.* At paragraph 31, the Court held that the CIRB has asserted that there has been a consistent adherence to the principle that CIRB decisions are final and that its reconsideration power is to be exercised with restraint, so that reconsideration is the exception rather than the norm.

[162] As I see no reason to depart from the accepted jurisprudence in this area, I shall follow the guidelines as set out by the Board in *Chaudhry*, which states at paragraph 29 as follows that a reconsideration must:

. . .

- *not be a relitigation of the merits of the case;*
- *be based on a material change in circumstances;*

- *consider only new evidence or arguments that could not reasonably have been presented at the original hearing;*
- *ensure that the new evidence or argument have [sic] a material and determining effect on the outcome of the complaint;*
- *ensure that there is a compelling reason for reconsideration; and*
- *be used "…judiciously, infrequently and carefully…" (*Czmola*).*

[163] While the applicant has set out eight separate issues, which he stated are grounds supporting his application, in reality, the eight are variations of four arguments, as follows:

1. Postponement request based on medical reasons;
2. Recusal of the panel of the Board for conflict of interest or bias;
3. Pre-hearing documentary disclosure; and
4. Refusal by the panel of the Board to allow the applicant's representative to lead evidence at the hearing.

[164] Issue 8 was identified by the applicant as "PSLRB Case Inaccuracies, clarifications." As set out at paragraph 75 of this decision, the applicant attached a copy of the decision with his comments interspersed through it at those points where he felt the decision was incorrect. As stated earlier, I do not accept that it is the bailiwick of the Board to act as an internal appellate court of decisions of other panels of the Board. Issue 8 is merely an attempt to appeal the decision of the panel of the Board that rendered the decision. This is the jurisdiction of the Federal Court of Appeal, and the arguments in that respect should have been addressed to that body.

A. <u>Postponement request based on medical reasons</u>

[165] This encompasses Issues 2, 3 and 4 of the application.

[166] On Wednesday, August 1, 2012, at 10:06 a.m., the applicant sent an email to the Board, requesting a postponement of the hearing. The reasons for that request are set out in the email. In general, he felt he did not have sufficient time to prepare for the hearing. That postponement request was opposed by the respondent. The panel of the Board denied the request.

[167] On Friday, August 3, 2012, at 9:05 a.m., the applicant emailed the Board, to the attention of the registry officer responsible for the file, as follows:

> *I regret to inform you that I will be unable for medical reasons to attend the hearing next week.*
>
> *Please provide me with your fax number and I will provide the supporting document.*
>
> *I have advised my witnesses.*

[168] The applicant forwarded via facsimile a medical certificate, the August 2 note, which stated that he was unable to work and that he would be reassessed in two weeks. Initially, the applicant did not present a request for a postponement with the August 2 note; however, when the Board's registry officer contacted him and asked him what he wished to do with respect to the hearing scheduled for the following week, he then requested a postponement based on the August 2 note.

[169] The applicant did not provide a copy of the August 2 note to counsel for the respondent, who objected to the request, suggesting that it was suspicious and requested a copy of the August 2 note. The Board's registry services, at the request of the panel of the Board seized with the matter, scheduled a PHC by teleconference for August 3, 2012, at 2:45 p.m., to address the applicant's request. The parties were emailed the call-in particulars. Despite being aware of the PHC and the call-in particulars, the applicant did not call in. While counsel for the respondent was on the line for the PHC, the applicant was contacted by a member of the Board's registry staff. The applicant advised the registry officer that he would not attend the PHC as he was seeking legal advice.

[170] The PHC did not proceed, and the applicant's postponement request was deferred, to be dealt with at the outset of the hearing. This was communicated to the parties via correspondence sent by facsimile and email shortly after the aborted PHC. The correspondence was emailed to the applicant's work email at 3:57 p.m. that same day and to his home email on Tuesday, August 7, 2012, at 8:51 a.m.

[171] On August 8, 2012, the applicant did not attend the hearing. The applicant's brother, Paul Gilkinson, attended on the applicant's behalf as his representative. At the outset of the hearing, he restated the applicant's request for a postponement, stating that the hearing process and the documentary production process were stressful to the applicant and that in the interests of the applicant's health, the postponement should be granted. No further material other than the August 2 note was presented.

[172] As set out at paragraph 12 of the decision, before to ruling on the postponement request, the panel of the Board asked Paul Gilkinson to contact the applicant to determine when and if further medical information could be secured that would discharge the onus on the applicant to provide sufficient medical evidence that he was unable to participate in the hearing. After a brief adjournment, Paul Gilkinson advised the hearing that the information could not be secured before Friday, August 10, 2012.

[173] The panel of the Board weighed the evidence before it, considered the arguments and determined that the information provided in support of the request for the postponement was not satisfactory. This is set out at paragraphs 13 through 25 of the decision.

[174] The hearing proceeded in the applicant's absence. After the conclusion of the hearing, the applicant forwarded the August 10 note to the Board.

[175] The applicant set out a number of submissions with respect to his request for a postponement based on medical reasons. In short, the applicant's material failed to meet the test as set out in *Chaudhry*. All the information that the applicant submitted as part of this application was known to him at the time he made his initial request for postponement for medical reasons on August 3, 2012. All this information was known to the applicant when he saw Dr. Matthews on August 2, 2012. This information should have been provided to the panel of the Board as it was available and could have been considered at that time. There has been no change in circumstances whatsoever. What did change is that the applicant, when unsuccessful in obtaining his postponement, and upon having his case dismissed, decided to divulge the information, hoping that it would now be taken into consideration.

[176] The applicant also argued that if the August 2 note was not sufficient, it was incumbent on the Board to instruct him as to what was required of him. He suggested that it was the Board that was deleterious in this respect and that therefore he should not have been punished. According to his submissions, by the outset of the August 8, 2012, hearing, it was far too late for the panel of the Board to require him to obtain more explicit medical information; in his view, the Board had waited too long. This argument is without merit. Upon receiving the email and August 2 note on the morning of August 3, 2012, the Board immediately enquired of the applicant his intentions with respect to the hearing. The August 2 note did not mention the hearing or what ailment was requiring the applicant to be off work. When the applicant advised

the Board of his request for postponement, which was via email August 3, 2012, at 1:18 p.m., the Board immediately convened a PHC via teleconference for 2:45 p.m. that same day to deal with the matter.

[177] At the time scheduled for the PHC, counsel for the respondent called in, and the panel of the Board was available, yet the applicant, who was seeking the postponement, did not call in. In fact, when contacted, the applicant advised the Board that he would not be participating as he was seeking legal advice.

[178] The panel of the Board gave the applicant the opportunity to explain his request at a PHC, which was arranged within an hour-and-a-half of his request for postponement. To suggest that the panel of the Board waited until the hearing commenced on August 8, 2012, is not only disingenuous but also misleading. Not only did the panel of the Board not dismiss the applicant's request outright when he failed to attend the PHC, she deferred it to the outset of the hearing, despite the applicant knowingly choosing to not attend the PHC, which he was well aware of and was able to attend and that had been scheduled to address his request. The applicant chose not to participate in the process, to his own detriment.

[179] The applicant's further submissions on that point simply are not believable. He suggested that he had lined up a lawyer for a PHC on Tuesday, August 7, 2012. There is absolutely no indication that there was any suggestion of a PHC to be held on August 7, 2012. The last communication from the Board, which at its latest was sent to the applicant at his home email address at 8:51 a.m., August 7, 2012, advised the applicant that the postponement request was to be spoken to at the outset of the hearing on August 8, 2012. The only other correspondence sent to the applicant after the aborted PHC was the email from counsel for the respondent at 5:02 p.m. on August 3, 2012, which referenced his request for a postponement. There is no evidence anywhere that would suggest that another PHC was going to take place; quite frankly, this can be viewed only as wishful thinking on the part of the applicant.

[180] The applicant also argued that the panel of the Board overruled an expert opinion. This argument is also without merit. Whether or not Dr. Matthews is an expert is a determination that is to be made by the Board. Someone is not an expert only by virtue of the fact that they have a professional designation or particular qualification that is recognized by an association or governing body. Expertise in a particular subject matter must be established through evidence led before the tribunal that is being asked to accept someone as an expert.

[181] The August 2 note of Dr. Matthews was before the panel of the Board on August 3, 2012, and August 8, 2012. The information that allegedly was the basis for that note, and Dr. Matthews' determination that the applicant should be off work, was known to the applicant (and assumedly Dr. Matthews) at the time the August 2 note was written. It does not speak to the qualifications of the author; nor does it render an opinion on a subject matter that the author has been qualified as an expert on. All the note states is that the applicant is ill. It does not state what ails the applicant; nor does it state that the author is qualified to diagnose and treat whatever the ailment is. The note itself and the alleged underlying information supporting the note, as well as whatever Dr. Matthews' qualifications are, were all available at the time of the hearing and were never put forward. It was incumbent on the applicant to bring the appropriate information forward at that time of the hearing if he wished to rely upon it.

B. <u>Recusal of the panel of the Board for conflict of interest or bias</u>

[182] This section encompasses Issues 1 and 5 of the application.

[183] The test for determining whether a reasonable cause exists for the apprehension of or a reasonable likelihood of bias was developed as follows by the Supreme Court of Canada in *Committee for Justice and Liberty et al. v. National Energy Board et al.,* [1978] 1 S.C.R. 369, which states as follows:

. . .

> *The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, 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. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. . . ."*

. . .

[184] In *Adams v. British Columbia (Workers' Compensation Board)* (1989), 42 B.C.L.R. (2d) 228 (B.C.C.A.), the Court raised the question of the nature of the evidence required to demonstrate an appearance of bias at paragraph 13 and in part states the following:

. . .

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

[185] It is up to Board members to make the determination as to whether they should recuse themselves based on the test articulated earlier in this decision. The facts that the applicant is relying upon in support of the recusal argument with respect to Mr. Paglia were known to him at the time of the hearing; the applicant stated he became aware of the facts on August 8, 2012. Indeed, despite the fact that the information came to the panel of the Board after the hearing had been completed, she addressed the applicant's concerns and rejected his argument, which she set out at paragraphs 28 through 49 of the decision.

[186] There are two different factual components to the applicant's argument for recusal. One is with respect to Mr. Paglia, and the other with respect to Mr. Lazzara. There is nothing new in the material the applicant has put forward with respect to Mr. Paglia. As stated at the outset of these reasons, I did not accept the applicant's argument that I sit as an appellate court; it is not for me to draw a different conclusion from the evidence. If the applicant was of the view that the panel of the Board erred in her application of the law with respect to the recusal regarding Mr. Paglia, it was open to him to pursue it at the Federal Court of Appeal; he chose not to.

[187] The second factual component to the applicant's recusal argument involves Mr. Lazzara who, according to the applicant, was going to be called by the respondent as a witness and, according to the applicant, was also involved in a human resources matter in which the panel of the Board was involved at a time before her appointment to the Board. This component also fails, quite simply because there was no evidence called at the August 8, 2012 hearing. Mr. Lazzara did not give any evidence. He was not under summons from either party. There was no evidence that either party was going to call Mr. Lazzara. As Mr. Lazzara was not a witness, any potential for a conflict of interest or apprehension of bias based on an alleged relationship with him must fail.

[188] Finally, the reconsideration application is not before the former panel of the Board but me; I know neither Mr. Paglia nor Mr. Lazzara, and as such, this argument is redundant before me.

C. Pre-hearing documentary disclosure

[189] This section encompasses Issue 7 of the application.

[190] After the complaint had been filed but before it had been scheduled for a hearing, the parties met on March 29, 2011, and participated in a mediation session. At the time of the mediation, the parties discussed the preparation and delivery of an ASF and a JBD.

[191] The hearing was scheduled to take place August 8 to 10, 2012, at Toronto. Before the scheduled hearing date, a PHC took place on July 26, 2012, during which, among other things, the preparation of an ASF and a JBD was discussed. It was agreed by the parties at that time that if they had an ASF, it would be submitted to the Board no later than August 3, 2012. It was also confirmed to the parties that if they proceeded with a JBD, they would advise the Board.

[192] On Monday, July 26, 2012, the applicant requested the Board issue two summonses to witness. Both summonses were issued by the Board and sent to the applicant via priority post and regular mail.

[193] On August 1, 2012, counsel for the respondent requested of the Board a disclosure order. The basis for the request was that the applicant had promised to provide his documents to the respondent by way of two self-imposed deadlines of July 30 and July 31, 2012, which had not occurred. The respondent's counsel advised that he required the disclosure by noon on August 3, 2012, as he was leaving for a vacation for the long weekend and wanted to bring the documents with him to prepare. The order was made. The applicant made a similar request of the Board for an order for disclosure from the respondent, which was also made on August 1, 2012.

[194] Late in the afternoon of Thursday, August 2, 2012, the applicant attended at the Toronto office of the respondent, attempted to leave documents with that office and requested that office forward them to counsel for the respondent. That request was denied. That evening, the applicant went to a Staples retail store and put the documents in an overnight courier bag addressed to counsel for the respondent. The documents did not arrive at the office of counsel for the respondent before the August 3, 2012 noon deadline. Before to the noon deadline, on the morning of August 3, 2012, the applicant had already written to both the Board and counsel for the respondent, stating that he would not be in attendance at the hearing scheduled

for August 8 to 10, 2012, due to medical reasons. The applicant forwarded the August 2 note to the Board the morning of August 3, 2012, and requested a postponement of the hearing. A PHC was scheduled for 2:45 p.m. on August 3, 2012, which the applicant refused to attend. In an email sent at 5:02 p.m. on August 3, 2012, from counsel for the respondent, the applicant was advised that the documents had not arrived by the noon deadline.

[195] All the facts surrounding the ASF, JBD and documentary disclosure existed and were well known to the applicant before the August 3, 2012, request for postponement. Indeed, the allegations by the applicant about the respondent putting unreasonable demands on him in an attempt to break him were clearly put before the panel of the Board as it is referred to at paragraph 6 of the decision. As there is nothing new about this pre-hearing disclosure issue and it is certainly something that was well known to the applicant at the time of the original hearing, it does not meet the test for reconsideration set out in *Chaudhry*.

[196] I would be remiss if I did not address the applicant's allegations with respect to counsel for the respondent, which he set out under this heading. At numerous places in his submissions, the applicant called into question the integrity of counsel for the respondent. When the full documentation of the pre-hearing discussions was put before me, it was clear that these allegations were made by the applicant before the request for postponement was made on the morning of August 3, 2012, and that the applicant had conceded in correspondence, also before the morning of August 3, 2012, that he was being inappropriate in his comments directed at counsel. In an email on July 31, 2012, after one such comment was challenged by counsel for the respondent, the applicant wrote back to him, stating, "I have no issue with you and I consider you an honourable person. . . The issue is with my new job." Later, when again challenged by counsel for the respondent about allegations suggesting counsel was taking advantage of him, the applicant wrote back to counsel for the respondent as follows: "I apologize and I will try to be more careful with my words. Lawyers are people of words and I know, or should know that words mean a lot." Finally, when challenged a third time about comments, the applicant stated, "I did and do consider you an honourable person."

[197] I have seen the exchange between the parties, and it is clear that the applicant was frustrated by a number of things going on in his life. It is also patently clear from the documentation that the applicant was the one who was not prepared and who was

not in a position to proceed. For reasons not evident to me, the applicant attempted to blame all his difficulties and misfortune in preparation on counsel for the respondent. The only person to blame for the applicant not being prepared was the applicant. Nothing that was before me indicated in any way, shape or form that counsel for the respondent acted in a manner that could be construed as inappropriate.

[198] What makes this submission by the applicant perplexing and troubling is that when all the documents were placed before me, the applicant's reply submission on this point was that he stands by his original allegations and that he was not above making apologies in order to get things on track. It demonstrated clearly to me that the applicant is prepared to say anything to get his way and is also prepared to ignore what has clearly been written by him.

[199] The applicant also suggested that in some way counsel for the respondent, before the hearing, led the applicant to believe that he could not lead any documentary evidence at the hearing because the documents, which were to be provided before noon on August 3, 2012, had not arrived. The applicant based this argument on the email that was sent from counsel for the respondent at 5:02 p.m. on August 3, 2012. This argument does not withstand the scrutiny of the evidence. The email was sent at 5:02 p.m. on August 3, 2012; by that time, the applicant had already advised the Board and counsel for the respondent that he would not be attending the hearing and that he was seeking a postponement of the hearing. This matter could have been addressed at the PHC that the Board had scheduled for 2:45 p.m. on August 3, 2012; however, the applicant had chosen not to participate in it. In addition, the email itself is quite clear, as it was sent after the applicant had stated he would not be attending the hearing and was seeking a postponement. Finally, counsel for the respondent stated in the email as follows: "If your request for an adjournment is granted, we should then be able to work towards a proper Joint Book of Documents." There was absolutely nothing in the email from counsel for the respondent that suggested that the applicant could not lead evidence or produce documents at the hearing.

D. Refusal by the panel of the Board to allow the applicant's representative to lead evidence at the hearing

[200] This section encompasses Issue 6 of the application.

[201] Paragraphs 51 through 57 of the decision quite simply state that the applicant provided no evidence whatsoever to support his complaint under paragraph 190(1)(*g*)

of the *Act*. It is not in dispute that no evidence was presented at the hearing on August 8, 2012. The applicant argued that Paul Gilkinson was not permitted by the panel of the Board to lead evidence.

[202] At the hearing of August 8, 2012, after the postponement request was denied, the Board offered to the applicant's representative the opportunity to adjourn for either a couple of hours or until August 9, 2012, to more fully prepare for the hearing, which was rejected by the applicant's representative, who chose to proceed immediately.

[203] There is nothing in the material filed by the applicant to suggest that this is incorrect; in fact, the evidence of Paul Gilkinson before me was that an adjournment of a few hours was not going to be of any significant help. He admitted that he could have taken the adjournment offered by the panel of the Board and spoken with Ms. Bittman, who was at the hearing by virtue of a summons, but that he exercised his judgement and chose instead to proceed.

[204] The evidence of Paul Gilkinson was clear: he had only marginal knowledge of what the case was about and admitted that he would need at least a week to prepare to proceed; he did not come to the hearing prepared to proceed but only to request a postponement; he was not familiar with the hearing procedures; he was not familiar with the material he had in his possession; and the main witness for the complaint who knew and had prepared the entire case (his brother, the applicant) was not present.

[205] Paul Gilkinson was quite frank in his evidence when he stated that going to the hearing on August 8, 2012, was like going to the hockey rink anticipating a non-contact game and instead finding himself playing in a full-contact match. He was in a precarious position, and one could sense his frustration at being placed in this position when he gave his evidence before me. However, Paul Gilkinson was in the position he was in due to steps taken by his brother, the applicant. The die, so to speak, was cast before he appeared in front of the panel of the Board on August 8, 2012. It was clear from the documentation provided to me that the applicant was not, in his own view, prepared for the hearing. He requested a postponement on August 1, 2012, because he felt the case was not ready to proceed. The respondent objected to this, and the postponement was denied. The applicant's own email correspondence produced after the hearing clearly indicates that he was overwhelmed by his work, the hearing and by taking a vacation shortly before the hearing. In his

admission to counsel for the respondent, in one of their email exchanges, he admitted to working long days and nights and staying up all night, like he did in university.

[206] According to the decision, after a brief adjournment, the panel of the Board stated that Paul Gilkinson made opening remarks and then chose not to lead any evidence, was specifically urged by the panel of the Board to call the witness that had been summonsed and was in the hearing room (now identified as Ms. Bittman), declined that offer not once but twice and did not call any witnesses, and did not attempt to file any documentary evidence despite having large binders of material with him.

[207] Paul Gilkinson stated that he started the case right away without accepting the offer of the adjournment because "a few more hours wouldn't have helped," he was "thwarted by not putting in [his] primary witness and documents; almost thwarted by not allowing [him] to make an opening statement," and he "hoped counsel [for the respondent] would put a witness in [the box] so [he] could cross question [*sic*] that witness." He also stated that he had no indication he could put in documents without testimony to support them, and he was unprepared to present a case without his key witness. His only option was to come up with an opening statement and a closing statement and hope that counsel for the respondent would lead some evidence, so he could cross-examine it. He stated his focus was to get the story down through his opening statement or closing statement. He further stated that every time he tried to put evidence in, it was thwarted by counsel for the respondent or the panel of the Board.

[208] It was clear to me from the evidence that Paul Gilkinson felt that he could not lead evidence; this is different from not being allowed to lead evidence. Paul Gilkinson was not someone who would be considered an experienced representative. When parties appear before this Board, it is not uncommon for them to be represented by a bargaining agent representative, legal counsel, or someone who appears before this Board or other administrative tribunals and is familiar with its procedures or the procedures in general before courts and administrative tribunals. While Paul Gilkinson was there as the applicant's representative, he did not appear there with the experience and knowledge of someone trained in labour law, law in general, litigation or advocacy. In simple terms, he was a layperson representing another layperson.

[209] In general, evidence is introduced by witnesses. The evidence can be given through oral testimony or by documents or things. Documents and things have to

either be agreed to by the parties or be introduced through a witness. However, the difficulty that Paul Gilkinson faced was no different than if the applicant had been represented by someone else. The case, as I understand it, turned on the evidence to be led by the applicant. He was the main witness and as such would have been able to identify the documents. Paul Gilkinson was left without the main witness to the complaint, a complaint that he admitted he knew very little about. Paul Gilkinson did not have his main witness. This was not because he was not allowed to call his main witness; this is because the main witness was not there, because he chose not to be there.

[210] The applicant had asked for summonses for two witnesses for the hearing, Ms. Bittman and Mr. Paglia. Ms. Bittman was in attendance. There is no evidence that Mr. Paglia was in attendance. I was not provided with any evidence that the summons was served on Mr. Paglia. Although the applicant was not there, and there was no evidence that Mr. Paglia was there, Ms. Bittman was present at the hearing. Paul Gilkinson was cross-examined on this point by counsel for the respondent, as follows:

> *Q: Did you know that Shannon Bittman was one of Peter Gilkinson's witnesses and she was in the hearing room?*
>
> *A: Yes.*
>
> . . .
>
> *Q: One of Peter Gilkinson's witnesses was a vice-president, is it fair to assume that she had relevant evidence?*
>
> *A: I had no idea what he had determined. I wasn't there to lead a case. I was there to ask for a postponement.*
>
> *Q: Could you have adjourned to the next day and met with Ms. Bittman?*
>
> *A: Yes*
>
> *Q: You exercised your judgment and chose not to?*
>
> *A: Yes, that is a fair statement.*

[211] The reason Paul Gilkinson did not call the witnesses on behalf of the applicant at the hearing of August 8, 2012, was that only one of them was there, and he chose not to call that witness. This is not because the panel of the Board did not allow him to call the witnesses but because either they were not there or he chose not to call them.

[212] With respect to entering the documents into evidence, there are only two ways to do so: either on the consent of the parties or through a witness. As Paul Gilkinson did not call any witnesses (Ms. Bittman out of choice and the applicant because he was not there), unless counsel for the respondent consented to the documents being put forward on consent, they were not going to get entered into evidence.

[213] The applicant argued that the panel of the Board did not provide Paul Gilkinson guidance with respect to putting in evidence. Paul Gilkinson stated that the Board provided him with no guidance with respect to putting in evidence. Yet, Paul Gilkinson conceded in his evidence that he never asked the panel of the Board for guidance with respect to what witnesses he could call or how to introduce documentary evidence.

[214] Quite simply put, Paul Gilkinson was at a disadvantage; however he was in that situation due to the actions of the applicant. I do not accept that the panel of the Board did not allow Paul Gilkinson to call evidence or introduce documents. The Board's Guidelines state that Board members, ". . . must attempt to ensure that parties who are unrepresented are not unduly disadvantaged at the hearing. . ." and ". . . it is appropriate to clearly explain the procedure to be followed. . ." and ". . . may, in clear and simple language, outline for the party the relevant evidentiary and procedural rules that have a bearing on the conduct of the proceeding." The Board member though is not counsel; nor could she have acted as a party's advocate. A Board member is certainly not required to educate non-represented parties in the minute intricacies of the rules of evidence and procedure.

[215] I find that the evidence before me clearly shows that Paul Gilkinson was given basic direction on the conduct of the hearing and on the calling of evidence. This is clear from the applicant's written submissions, in which he refers to his email to the Chairperson of the Board on August 20, 2012. On page 6 of that email, under the subheading "**3. The Hearing**," the applicant stated as follows:

> *The decision was made to proceed in my absence and my brother was advised to be ready to make opening arguments and present the case, for a case he knew almost nothing about.*
>
> . . .
>
> *It is my understanding that Ms Shannon wouldn't let my brother read from the binders for the opening remarks and would not allow the Exhibits to be entered as there was no one present to cross examine [sic] with respect to them.*

[216] It is clear that the panel of the Board gave direction with respect to procedure at the hearing. If she had not, the applicant could not have made the above submission. Quite frankly, without the applicant present to give evidence, his representative's hands were tied. He knew almost nothing about the case and did not know who anyone was or what, if anything, they could contribute. By his own admission, he was there to ask for a postponement and nothing more.

[217] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[218] The application for reconsideration of the decision rendered on October 15, 2012, in PSLRB File No. 561-34-493 (2012 PSLRB 111), is dismissed.

November 14, 2013.

John G. Jaworski,
a panel of the Public Service
Labour Relations Board