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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

DANIEL POIRIER

Grievor

and

DEPUTY HEAD
(Department of Crown-Indigenous Relations and Northern Affairs)

Respondent

Indexed as
Poirier v. Deputy Head (Department of Crown-Indigenous Relations and Northern Affairs)

In the matter of an individual grievance referred to adjudication

Before: Patricia H. Harewood, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Pierre Brabant, counsel

For the Respondent: Karl Chemsi, counsel

Decided on the basis of written submissions,
filed July 8, 2024,
and heard by videoconference,
July 9, 2024.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Grievance before the Board

[1] This is an interim decision dealing with the employer's objection to the admissibility of a potential expert witness for Daniel Poirier ("the grievor").

[2] The grievor wishes to have someone testify as an expert witness, to assess the reliability of the investigation report of the Department of Crown-Indigenous Relations and Northern Affairs ("the employer") that led to his dismissal. The employer objects to the proposed expert witness's admissibility on the grounds that it is neither necessary nor relevant and therefore does not meet the admissibility test set out in the seminal case of *R. v. Mohan*, [1994] 2 S.C.R. 9.

[3] The parties filed written submissions on July 8, 2024. The Board heard their oral arguments virtually on July 9, 2024, over a two-hour period.

[4] The question that the Board must address is whether all the admissibility criteria for an expert witness set out in *Mohan* have been met.

[5] For the following reasons, I allow the employer's objection. I conclude that the expert opinion evidence on the employer's final investigation report is neither necessary nor relevant. It does not meet at least two of the four criteria set out in *Mohan*.

[6] The grievor did not convince me that on a balance of probabilities, the testimony would be necessary for the Board, to help me render my decision on the merits. And given the *de novo* nature of Board proceedings, the testimony of a person who did not conduct the investigation and who has no personal knowledge of the circumstances of the grievance would not be relevant.

[7] The Board has extensive labour relations expertise, including reviewing investigation reports in the context of a grievance challenging a termination. Allowing such a witness to testify on the reliability of the employer's investigation report would have the undesired effect of usurping the Board's function and unnecessarily distracting it.

A. Background

[8] The grievor filed his grievance on May 3, 2021, after the employer's decision to dismiss him as follows in his termination letter: "[translation] … you contravened the *Values and Ethics Code* in four areas of misconduct as concluded in the final investigation report …". The four areas of misconduct were harassment, sexual harassment, abuse of authority, and lack of judgment. His grievance was referred to the Board on July 12, 2021, for a hearing *de novo*.

[9] To date, the Board has heard 5 days of hearing on the merits, from January 15 to 19, 2024. Ten hearing days remain on the schedule, for fall 2024. The employer has already called two witnesses, Mélissa Duguay, who is one of the complainants, and François Paltrinieri (who is one of the two people who conducted the investigation and drafted the final investigation report). The grievor had the opportunity to cross-examine them, and his witnesses remain to be heard.

[10] The parties exchanged documents before the hearing. At the pre-hearing conference on December 5, 2023, the grievor's counsel raised the fact that he intended to have Élise Corriveau testify as an expert witness on labour relations. He alleged that she specializes in psychological-harassment and sexual-harassment investigations. He indicated that he wanted her to testify as an expert witness, to assess the reliability of the employer's final investigation report.

[11] The employer objected to admitting the opinion of the grievor's alleged expert witness. The Board ordered that the grievor share a copy of Ms. Corriveau's résumé with the employer by no later than December 15, 2023. The Board was to then hear the parties' arguments on the employer's objection during the week of December 19, 2023.

[12] On December 14, 2023, the grievor filed a request that the Board recuse itself on the grounds of a concern of a conflict of interest on its part. Accordingly, it determined that the parties' arguments on the recusal request were to be heard before hearing the preliminary objection to the admissibility of the grievor's alleged expert witness and that the objection would be heard at the hearing.

[13] The Board provided the parties with an opportunity to submit written and oral arguments on the recusal request. I rendered a decision on December 20, 2023,

dismissing the grievor's request (see *Poirier v. Deputy Head (Department of Crown-Indigenous Relations and Northern Affairs Canada)*, 2023 FPSLREB 120).

[14] As for the objection as to an expert witness's admissibility, the grievor requested to be heard at the hearing. The Board agreed to do it after the employer's evidence. The five days of hearing in January passed, and the employer still did not complete its evidence.

[15] On May 28, 2024, the grievor wrote to the Board, to request a hearing date to hear submissions on the admissibility of his potential expert witness. The letter reads in part as follows:

> [Translation]
>
> …
>
> *We have to schedule a date for the testimony of the grievor's potential expert. However, the employer objected, and no decision has yet been rendered. This situation seems unreasonable, given the case's complexity and the length of the proceedings.*
>
> *Therefore, we would like to make submissions on this matter before the fall hearings. We would then focus on organizing the evidence to be administered, notably reserving a date for the expert's testimony.*
>
> *This could all be done via videoconference. We believe that the submissions should not exceed one hour.*
>
> …

[16] The employer agreed with the grievor's proposal to set a date to argue the admissibility of an expert opinion for the grievor before the fall hearing dates. It responded as follows: "[translation] The employer confirms and reiterates its objection to the expert evidence's admissibility, as provided by Mr. Brabant (Testimony of Elise Corriveau, as well as her document 'Critical Review of the Investigation Report')".

[17] The basis of the employer's objection is, among other things, applying the relevance test, necessity in assisting the trier of fact, the absence of any exclusionary rule, and a properly qualified expert (see *Mohan*).

[18] I set a date to hear the parties on the issue of the grievor's proposed expert witness's admissibility. The hearing was held on July 9, 2024, over a two-hour period.

B. Notes on the evidence

[19] The parties did not adduce into evidence any documents or testimony.

[20] In addition, it is important to emphasize that the Board does not decide the qualifications of the alleged expert witness whom the grievor proposed.

[21] In this decision, I will refer to that person as a "potential expert witness", but at no time has the Board qualified or admitted her as an expert witness. Unlike in *Mohan*, in which the Ontario Court of Justice had the opportunity to hear the potential testimony of a potential expert witness, no *voir dire* proceeding took place to determine whether the submitted evidence would be admissible.

[22] Both parties agreed that they had exchanged documents about the potential expert witness, including Ms. Corriveau's résumé and her report. However, although the Board was copied on the documents, none of them was adduced in evidence before it. Therefore, they are not part of the Board's record and will be removed from the case management system.

[23] Therefore, the Board did not rely on the documents' accuracy or inaccuracy or contents when it rendered this decision.

II. Summary of the arguments

[24] The parties made their written submissions on July 8, 2024, as the Board requested. They referred to their submissions throughout their oral arguments on July 9, 2024.

[25] I will only summarize the parties' submissions.

A. For the employer

[26] The employer noted that although it made the objection, the grievor has the onus to establish that the admissibility of Ms. Corriveau's testimony as an expert witness is necessary.

[27] The admissibility of an expert witness's evidence is an exception to the general rule that ordinary witnesses testify on the facts.

[28] An expert witness's evidence is admissible only if the trier of fact, or in this case the Board, determines that it requires the expertise, without which it could not draw its own conclusions.

[29] Although with its discretionary power under s. 20(e) of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; "the *Act*"), the Board may accept any evidence, whether or not admissible in a court of law, it cannot go against the general principle of procedural fairness and natural justice that includes the rules of the admissibility of expert evidence.

[30] The employer noted that admitting opinion evidence would create an injustice for it.

[31] The basic principle is found in *Mohan*, at para. 17, in which the Supreme Court of Canada set out the four conditions on which admitting expert witness evidence depends: relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule, and a properly qualified expert.

[32] The employer stated that it would focus on the necessity criterion.

[33] The employer cited *Mohan*, at para. 21, to emphasize that the role of an expert witness's opinion is to assist the trier of fact on a matter that is outside the trier's expertise and knowledge. And the expert witness's opinion should not merely be helpful; it must be necessary.

[34] The employer noted that in the document exchange, the grievor shared Ms. Corriveau's résumé and her report. Although those documents were not adduced in evidence, the Board was copied when they were sent.

[35] The employer noted that it had no choice but to at least review the topics in the report, which include opinions on how its investigation should have been conducted, on the directives and other policies that it should have consulted, and on the list of the respondents' allegations. The opinion comes down to criticism of the employer's investigation report, which led to the grievor's dismissal.

[36] The employer noted that that is not an expert opinion and that the Board's role is to draw its own conclusions on the investigation report's facts.

[37] Thus, the only way the Board could conclude that the expert opinion testimony should be admitted is for it to decide that without the opinion, it would be unable to form its own opinion.

[38] The employer submitted that this is not a situation in which the trier of fact, in other words the Board, cannot draw its own conclusions.

[39] In addition, the Supreme Court of Canada has noted that it would even be dangerous to admit an expert opinion when it is not necessary. Experts should not usurp the functions of the trier of fact (see *Mohan*, at para. 24). That expertise, which would in no way help, could mislead the courts.

[40] The Board (and its members) are the labour relations experts. They are appointed specifically for that labour relations experience and specialization. They deal daily with disciplinary measures, reprisal complaints, harassment grievances, and terminations.

[41] *Mohan* and *White Burgess Langille Inman v. Abbott*, 2015 SCC 23 ("*White Burgess*"), present another reason. When there is hesitation as to the possibility of admitting an expert witness's opinion, it must be determined whether the value is worth the cost. It is not in the economic sense but to assess whether the probative value is overborne by its prejudicial effect (see *Mohan*, at para. 18).

[42] According to the employer, the prejudicial effect of admitting the alleged potential expert witness is that someone who did not conduct the investigation and has no connection to the matter would give their subjective opinion on how the investigation should have been conducted. That opinion is not necessary and would taint the record and distract the Board with unnecessary considerations (see *White Burgess*, at para. 18).

[43] Assuming that procedural injustice occurred in the employer's investigation, it is wholly cured by a hearing *de novo* (see *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.)(QL)). The grievor would then be informed of the allegations against him and have the opportunity to respond. Thus, even if hypothetically the investigation report had some shortcomings that incidentally harmed the grievor, everything would be corrected by the hearing before the Board. It is not relevant to admit that evidence, so the Board must exclude that opinion and not consider it.

B. For the grievor

[44] The grievor noted that the context is a termination based on allegations of psychological harassment, sexual harassment, abuse of authority, and lack of professional judgment.

[45] The grievor alleges that the person who carried out the investigation for the employer was not qualified and did not know the methodology for carrying out such an investigation, and the Board decided to hear that witness.

[46] He argued that given the nature of the serious allegations against him and the consequences they have caused him for the rest of his life and on his interpersonal relationships, the opinion of an expert witness with experience in these issues is required to assess the report's reliability.

[47] The grievor asked the following question: "[translation] Did the employer ensure the report's reliability?"

[48] The grievor submitted that the employer's investigator, Mr. Paltrinieri, testified during two hearing days. Therefore, it is relevant to ask a person who conducts only psychological-harassment investigations at the federal and provincial levels whether in fact the investigation was conducted properly.

[49] The grievor acknowledged that expertise in labour relations investigations is part of the Board's jurisdiction. Yet, he stated that he searched a long time for Board decisions involving a grievor who was the subject of an administrative investigation into psychological and sexual harassment, and he found none.

[50] With respect to *Tipple* and the principle that everything is corrected in a hearing *de novo* if natural justice errors occurred during the investigation, it is not the important thing; rather, when the discipline was imposed, did the employer ensure the report's reliability?

[51] The grievor stated that with respect to the necessity criterion, the expert opinion is necessary, as it is outside the Board's expertise, due to stigma. According to him, in *Mohan*, the Supreme Court of Canada stated that one must not be too strict with respect to the necessity criterion.

[52] Since Mr. Paltrinieri testified for two days on the investigation report's reliability, it is relevant to ask someone who conducts only federal and provincial investigations whether the administrative investigation was properly conducted such that it led the employer to conclude that the grievor should be dismissed. The grievor asked this: "[translation] Can I have an expert criticize the report?"

[53] The grievor wants someone to raise the investigator's flaws and errors, to inform the Board. He cites *Robitaille v. Deputy Head (Department of Transport)*, 2010 PSLRB 70 at paras. 311 and 320; those paragraphs are about the employer's obligations with respect to harassment investigations, through which it must ensure a high-quality investigation.

[54] The grievor submitted that the only difference with *Robitaille* with respect to the allegations was that there was a formal complaint, but it involved allegations of abuse of authority. The Board concluded that the investigation report had been incorrectly conducted and that it was not reliable.

[55] In this case, if the investigation report is unreliable, the decision is flawed.

[56] Therefore, the grievor asked that the objection be dismissed.

C. The employer's rebuttal

[57] The employer mentioned that the grievor did not respond to the following question at issue: "[translation] How is an expert witness's opinion necessary and relevant to help the Board form its own opinion about the investigation report and disciplinary process?" It added that the Board specializes in such matters. It is so specialized that the Federal Court of Appeal gives great deference to the Board and labour relations adjudicators' expertise. As a result, the Federal Court of Appeal does not intervene, because of that expertise.

[58] The Board can read the directives and practices for dealing with this type of complaint and determine whether the investigation breached the directives.

[59] The employer submitted that the grievor's counsel required a witness to help with his argument, but there is no evidence that an expert witness's opinion would help the Board.

[60] The facts in *Robitaille* differ completely from those in this case. That decision did not address the question of the admissibility of an expert witness's opinion.

[61] The grievor asked if the facts in the investigation were reliable and added that the facts will be presented orally before the Board at the hearing, and the Board will decide.

III. Reasons

[62] As a quasi-judicial administrative tribunal, the Board may accept evidence that is not admissible before a court of law. Section 20(e) of the *Act* states as follows:

Powers of Board	***Pouvoirs de la Commission***
20 *The Board has, in relation to any matter before it, the power to*	***20*** *Dans le cadre de toute affaire dont elle est saisie, la Commission peut :*
(a) *summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath in the same manner as a superior court of record;*	***a)*** *de la même façon et dans la même mesure qu'une cour supérieure d'archives, convoquer des témoins et les contraindre à comparaître et à déposer sous serment, oralement ou par écrit;*
(b) *order pre-hearing procedures, including pre-hearing conferences that are held in private, and determine the date, time and place of the hearings for those procedures;*	***b)*** *ordonner la tenue de procédures préparatoires, notamment de conférences préparatoires à huis clos, et en fixer les date, heure et lieu;*
(c) *order that a pre-hearing conference or a hearing be conducted using any means of telecommunication that permits all persons who are participating to communicate adequately with each other;*	***c)*** *ordonner l'utilisation de tout moyen de télécommunication permettant à tous les participants de communiquer adéquatement entre eux lors des conférences préparatoires et des audiences;*
(d) *administer oaths and solemn affirmations;*	***d)*** *faire prêter serment et recevoir des affirmations solennelles;*
(e) accept any evidence, whether admissible in a court of law or not *….*	***e) accepter des éléments de preuve, qu'ils soient admissibles ou non en justice;***
…	[…]

[Emphasis added]

[63] However, despite that rule, the Board must respect procedural fairness for all parties. As stated in the preamble to the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2), the resolution of matters arising in respect of terms and conditions of employment must be fair, credible, and efficient. Admitting evidence that would not help the Board will not respect procedural fairness or the goals of the efficiency, credibility, and fairness in its processes.

[64] The analysis has two parts. First, *Mohan* sets out as follows the criteria that apply when the trier of fact (in this case, the Board) must determine the admissibility of an expert witness's opinion:

…

(a) relevance;

(b) necessity in assisting the trier of fact;

(c) the absence of any exclusionary rule;

(d) a properly qualified expert.

…

[65] These criteria are mandatory. Thus, they must all be met to satisfy the first part of the analysis.

[66] If the *Mohan* criteria are met, the Board must proceed with the second part of the analysis, to analyze what the case law describes as the risks and benefits. In *White Burgess*, the Court explains the second part of the test as follows:

…

… At the second discretionary gatekeeping step, the judge balances ***the potential risks and benefits of admitting the evidence*** *in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In* Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in* J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in* Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the*

> *trial process that may flow from the admission of the expert evidence": para. 76.*
>
> …
>
> [Emphasis added]

[67] While administrative tribunals have more informal and flexible processes, the parties may turn to expert witnesses to help the Board with, for example, scientific information or in subjects in which it is not an expert. (See *Powell v. Deputy Minister of Human Resources and Skills Development Canada*, 2009 PSST 27 at para. 21, and *Praught v. President of the Canada Border Services Agency*, 2009 PSST 1 at para. 39 (standardized-test experts); *Coupal v. Canadian Food Inspection Agency*, 2021 FPSLREB 124 at para. 20 (job-evaluation expert); and *Barr v. Treasury Board (Department of National Defence)*, 2006 PSLRB 85 at paras. 58 to 62 (qualified experts in the following fields: human performance, kinesiology and human biodynamics, and exercise physiology.))

[68] As the parties focused primarily on the criteria of necessity and relevance, I will explain how the grievor failed to convince me that those criteria were met and why it is not necessary to analyze the other criteria.

A. An expert witness's opinion is not required

[69] As for the criterion of necessity to assist the trier of fact, the Supreme Court of Canada began its analysis in *Mohan*, at para. 21, pointing out that ordinary witnesses normally testify based on their personal knowledge. They do not give opinions. However, the rule for admitting expert opinion evidence is an exception to that rule. By nature, an expert has specific knowledge that exceeds that of an ordinary witness. So, the expert must share their opinion, to assist the trier of fact. The Supreme Court of Canada further explained it in *R. v. Abbey*, 1982 CanLII 25 (SCC).

[70] At page 42 of *Abbey*, Dickson J. (later the chief justice) stated this:

> …
>
> *With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate.* ***"An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and***

> ***knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary"*** *(*Turner *(1974), 60 Crim. App. R. 80, at p. 83,* per *Lawton L.J.)*
>
> …
>
> [Emphasis added]

[71] The Supreme Court then commented further as follows on the necessity criterion:

> …
>
> *This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provides information "which is likely to be* ***outside the experience and knowledge of a judge or jury"*** *… As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature.…*
>
> …
>
> [Emphasis added]

[72] It is undisputed that the grievor wants an expert witness's opinion to criticize the investigation report of Mr. Paltrinieri, who testified during the first week of the hearing. The grievor believes that this witness is necessary, given the nature of the allegations in the final investigation report and their alleged impact on his life and career. He submitted that this type of assessment is outside the Board's knowledge and experience.

[73] Paradoxically, the grievor acknowledged at the same time that the Board is a labour relations expert, which includes reviewing investigation reports and other evidence in disciplinary cases. He cited *Robitaille* (the Federal Court allowed the judicial review on issues not related to the conclusion that the investigation was not properly conducted, and the Federal Court of Appeal denied the appeal), which has nothing to do with the issue of an expert witness's admissibility, in an attempt to establish that sexual harassment accusations stigmatize the accused and that the employer's investigation report had to be of high quality.

[74] However, while the grievor is silent on the topic, *Robitaille* confirms that the Board has expertise in the area of reviewing labour relations investigations. Mr. Robitaille filed a grievance challenging the disciplinary sanction that he received as a result of a harassment complaint and the employer's investigation, during which the investigator determined that the allegations were founded. In *Robitaille*, at para. 16, with respect to a proceeding *de novo*, the adjudicator noted the following:

> *[16] … I need not defer to the conclusions of the decision maker who ruled on the grievance at the final level* ***or the conclusions of the investigators who investigated the harassment complaint****. In reaching my decision, I must consider only the evidence before me at the hearing.*
>
> [Emphasis added]

[75] Then, the adjudicator rigorously assessed the applicable guide and policy, to determine what constituted harassment, and dissected the final investigation report. Ultimately, the adjudicator concluded that the investigation process infringed the grievor's rights to procedural fairness in several ways. She conducted her own analysis and assessment of the facts, which the Board is required to do in this type of case, given its expertise.

[76] Thus, obviously, I do not see how the expertise of the expert witness whom the grievor proposed is necessary to help me determine whether his termination was appropriate. He wants the alleged expert witness to assess the employer's investigation report, even though that function is an integral part of the Board's experience, expertise, and knowledge. Assessing such evidence is at the very core of its expertise.

[77] Indeed, I was able to find decisions in which the Board had to examine investigation reports involving allegations of sexual harassment and abuse of power (see *Talusan v. Treasury Board (Immigration and Refugee Board)*, 2024 FPSLREB 49; *Weinstein v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLREB 100; and *Doro v. Canada Revenue Agency*, 2019 FPSLREB 6). The Board's labour relations expertise includes knowledge related to directives, policies, and interpreting and applying provisions in applicable collective agreements when misconduct allegations have been made.

[78] In addition, I do not agree with the weight that the grievor wishes to give to Dickson J.'s comments that one should not be too strict with the necessity criterion.

Dickson J. clarified it with the following sentence in the same paragraph, stating that required is that the opinion **be necessary** in the sense that it provides information that "… **is likely to be outside the experience and knowledge of a judge or jury**" [emphasis added]. In this case, the grievor failed to convince me that on a balance of probabilities, the proposed expert witness's opinion would provide information outside the Board's experience and knowledge.

[79] Similarly, the grievor's argument that one should not be too strict with the necessity criterion ignores the evolution of the case law, which tightens and clarifies the tests for expert witness evidence admissibility, to strengthen a gatekeeper judge's role or, in this case, a gatekeeper Board member's role. In *White Burgess*, the Supreme Court of Canada was clear that one ensures that the dangers related to the expert's testimony are avoided, such as the danger of substituting the Board's role with an expert's opinion.

[80] Therefore, the fact that the grievor does not meet the necessity criterion should end the analysis because, as I stated earlier, *Mohan*'s four admissibility criteria are mandatory. Nevertheless, as the parties argued the relevance criterion, I will address it very briefly.

B. An expert witness's opinion is not relevant

[81] It goes without saying that all evidence submitted must be relevant. Relevance is the cornerstone of the rules of evidence in our administrative justice system. In the context of the admissibility of an expert witness's opinion, Sopinka J. elaborated further on that criteria as follows in *Mohan*:

> …
>
> *[18] Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as* [a] *question of law. Although prima facie admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility.* ***This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." See*** **McCormick on Evidence** ***(3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process.*** *Evidence that is otherwise logically relevant may be excluded on this basis, i****f its probative value is overborne by its***

> ***prejudicial effect**, if it involves an inordinate amount of time which is not commensurate with its value **or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability**. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see* Morris v. The Queen*, 1983 CanLII 28 (SCC), [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.*
>
> …
>
> [Emphasis added]

[82] Applying the relevance criterion, my view is that the admissibility of the expert witness's evidence is not relevant, for two reasons.

[83] First, I agree with the adjudicator's comments in *Robitaille* based on the Federal Court of Canada's succinct decision in *Tipple*. The Board need not defer to lower-level decisions or to an investigation report that the employer led, as the hearing before it is *de novo*. Given that I must assess all the evidence admitted to the file at the hearing, including the employer's investigation report, I do not see how the evidence of an expert opinion on an investigation report's reliability would be relevant.

[84] Second, in this case, I do not believe that the value is worth the cost. The proposed expert witness did not conduct the investigation and has no connection to the facts of the case.

[85] And I agree with the employer's argument that there would potentially be a prejudicial effect on the proceeding if the potential expert witness gave her subjective opinion on an investigation report, which I am supposed to assess as one piece of evidence among others. That could lead the Board to consider facts that are not at all relevant.

[86] It is also possible that admitting that evidence could distort the process, in the sense that I would put more weight on the opinion than it merits.

[87] Before concluding, I must respond to the grievor's argument that the employer had the opportunity to have the investigation report's author testify and that he needs an expert to highlight the report's alleged shortcomings.

[88] The evidence of the expert witness's opinion that the grievor would like to introduce into evidence cannot be compared to the evidence of one of the investigation report's authors, Mr. Paltrinieri, who testified at the hearing. He was not qualified as an expert witness. He did not give an expert opinion on the investigation. Rather, he related how he conducted it. In addition, the grievor had the opportunity to cross-examine him on the final report and his process. He is entitled to cross-examine any of the employer's other witnesses.

[89] As the opinion evidence from the grievor's proposed expert witness is neither necessary nor relevant, it does not meet the admissibility criterion for an expert witness set out in *Mohan*. In this case, it is not admissible.

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

(The Order appears on the next page)

IV. Order

[91] The employer's objection is allowed.

September 16, 2024.

FPSLREB Translation

Patricia H. Harewood,
a panel of the Federal Public Sector
Labour Relations and Employment Board