

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Overwaitea Food Group LP v. Bates***,  
2006 BCSC 1201

Date: 20060804  
Docket: S061968  
Registry: Vancouver

**Re: The decision of the British Columbia Human Rights Tribunal  
(Lindsay M. Lyster, Member) in *Bates v. Overwaitea Food Group*,  
a Division of Great Pacific Industries Inc., dated January 25, 2006**

Between:

**Overwaitea Food Group LP**

Petitioner

And

**Elizabeth A. Bates**

Respondent

Before: The Honourable Mr. Justice Silverman

## **Reasons for Judgment**

Counsel for the Petitioner

M.H. Korbin

Counsel for the Respondent, Elizabeth A.  
Bates

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Columbia Human Rights Tribunal

D. Paluck

Date and Place of Hearing:

June 7, 2006  
Vancouver, B.C.

## INTRODUCTION

[1] This is an application for judicial review of a Decision (the "Deferral Decision") of the British Columbia Human Rights Tribunal (the "Tribunal").

[2] The Deferral Decision, dated January 25, 2006, dismissed the Petitioner's application to defer further consideration of the Respondent's Human Rights complaint (the "Complaint") until the outcome of certain arbitration proceedings.

[3] The Petitioner seeks to have the Deferral Decision set aside and/or quashed, and to have the matter remitted to the Tribunal with such directions as may be appropriate.

[4] The Respondent seeks to have the Deferral Decision upheld, and to have the Petitioner's application for judicial review and consequent relief dismissed.

[5] In simple terms, the Petitioner argues as follows:

1. The Tribunal breached the rules of natural justice and/or procedural fairness and did not act fairly by making the Deferral Decision on a basis not argued by the parties and without giving the Petitioner the opportunity to address the substance of the reasoning in the Deferral Decision.
2. Further, or in the alternative, the Tribunal was wrong or reached a patently unreasonable decision in concluding that the Permanent Arbitration Process is incapable of dealing appropriately with the subject matter of the Complaint.
3. Further, or in the alternative, if the Deferral Decision, or any aspect thereof, was a discretionary decision, then the Deferral Decision was patently unreasonable for one or more of the following reasons:
  - (a) the Tribunal's discretion was exercised arbitrarily;
  - (b) the Deferral Decision was based entirely or predominantly on irrelevant factors; and

- (c) the Deferral Decision failed to take statutory requirements into account.

[6] In simple terms, the Respondent argues as follows:

1. The Tribunal did not breach the rules of natural justice or procedural fairness, but acted fairly in dismissing the Petitioner's application to defer the Complaint.
2. The Deferral Decision was discretionary.
3. The Deferral Decision was not patently unreasonable.

[7] The Tribunal does not support the position of either party, although it made submissions with respect to the record, the relevant legislation and procedures, and the relief available under the **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241, (the "**JRPA**").

## **BACKGROUND**

[8] The Respondent has been employed by the Petitioner since June of 1985.

[9] She is a member of a Union (the "Union") which at all material times has had a collective agreement with the Petitioner.

[10] The Petitioner and the Union have developed a sophisticated process (including what they refer to as a Permanent Arbitration ("PA") Process) dealing with accommodating employees with disabilities, including provision for a dispute resolution process in which (among other things):

1. A PA arbitrator is involved in a wide variety of disputes that arise in the PA Process, including the question of whether the Petitioner has satisfied its duty to accommodate.

2. Either side may attempt to persuade the PA arbitrator that he should decline jurisdiction and direct the parties to refer unresolved PA's to formal arbitrations under the collective agreement.

[11] The PA Process was in place at all material times. The Process is designed to put PA's before an arbitrator who has expertise in accommodation matters in an expedited and relatively inexpensive manner.

[12] On July 17, 2003, the Respondent suffered a disability. Since that time, she has been either off work or requesting accommodation from the Petitioner with respect with her return to work.

[13] The Union filed a Grievance, in accordance with the collective agreement and its ancillary procedures on the Respondent's behalf on September 7, 2004, alleging that the Petitioner was failing in its duty to accommodate the Respondent's disability (the "Grievance").

[14] By letter dated March 11, 2005, the Union advanced the Grievance to arbitration.

[15] On April 13, 2005, the Respondent filed her Complaint under the ***Human Rights Code***, R.S.B.C. 1996, c. 210, (the "***Code***"). She noted in the written Complaint (among other things) the following:

1. "A Grievance was filed by my Union in regards to work accommodation. At this time they feel that the Grievance procedure has become exhausted and it has been referred to arbitration."
2. "It is my hope that your intervention will speed the process up."

[16] On July 26, 2005, the arbitrator issued an interim Decision regarding the Grievance which included the following:

... all issues concerning her [the Respondent's] accommodation [including liability] remain within the PA process for the time being. Any matter related to her accommodation may be placed before me at the request of either party for a ruling.

[17] The arbitrator's letter of July 26 also noted the importance of waiting, before it could proceed further, for the results of a three-person medical panel.

[18] On October 31, 2005, the Petitioner filed its response to the Complaint before the Tribunal. At the same time, it formally made an application, in writing, to the Tribunal to defer the Human Rights proceeding until after the Grievance proceedings were completed. The Tribunal's dismissal of that application is the Deferral Decision which is the subject of this judicial review.

[19] The results of the medical panel were available on November 15, 2005.

[20] On November 24, 2005, the Respondent filed her written response before the Tribunal.

[21] On December 7, 2005, the Petitioner filed its Reply.

[22] On December 7, 2005, the Petitioner wrote to the arbitrator noting, among other things, the following:

1. The information from the medical panel was now available.
2. Therefore, the Petitioner wished to proceed with the PA Process which had been on hold.

3. This will also include a determination of whether the company breached the **Code**...

[23] The arbitrator has not yet responded to the letter of December 7, 2005. As a result, no date has been set for any hearing, within the PA Process, on the merits.

[24] On January 25, 2006, the Tribunal delivered the written Deferral Decision dismissing the Petitioner's application to defer the Complaint. That Decision is the subject of this judicial review.

[25] August 16, 2006 is the date set for the arbitrator to decide whether or not he will continue to exercise jurisdiction with respect to the Grievance and the PA Process. No date has been set to deal with the merits.

[26] September 11-14, 2006 are the dates set for the Tribunal hearing on the merits.

## **RELEVANT LEGISLATION**

### **Human Rights Code**

**25** (1) In this section and in section 27, "**proceeding**" includes a proceeding authorized by another Act and a grievance under a collective agreement.

(2) If at any time after a complaint is filed a member or panel determines that another proceeding is capable of appropriately dealing with the substance of a complaint, the member or panel may defer further consideration of the complaint until the outcome of the other proceeding.

**27** (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

...

(f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

**Administrative Tribunals Act, S.B.C. 2004, c. 45 (“the ATA”)**

**59** (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

**PETITIONER’S ARGUMENT**

[27] The Petitioner argues as follows:

1. The Tribunal’s power to defer is derived from s. 25(2) of the **Code**.
2. The definition of “another proceeding” in s. 25(2) is informed by s. 25(1) which includes “a grievance under a collective agreement.”
3. The Tribunal did not act fairly by making the Deferral Decision on a basis not argued by the parties and without giving the Petitioner the opportunity to address the substance of the reasoning in the Deferral Decision.
4. The Petitioner was denied procedural fairness and natural justice because the Tribunal based its Deferral Decision upon two factors, about which the Petitioner was not given the opportunity to make

submissions, and which the Respondent had never raised. In fact, the factors were not raised until they appeared in the Deferral Decision.

5. The two aspects of the Tribunal's Decision which the Petitioner was not given the opportunity to respond to were:
  - (a) the significance of counsel not being part of the PA Process; and,
  - (b) the non precedent-setting aspect of the PA Process, thereby denying the public of an educational and useful decision.
  
6. The Petitioner relies upon an affidavit which indicates that, if permitted the opportunity to address these points before the Tribunal, the Petitioner would have advanced evidence and argument on the following issues:
  - (a) the expertise of the Union representative and the Petitioner representatives who represent the parties at the PA Arbitration;
  - (b) the expertise of the PA arbitrator in disability and accommodation matters;
  - (c) the great lengths the parties have gone to in order to achieve the Duty to Accommodate Protocol Agreement, including the dispute resolution process;
  - (d) the nature of the Union's statutory and exclusive right to represent the Petitioner's employees, including the Respondent, in negotiating terms and conditions of employment, including this Duty to Accommodate Protocol Agreement;
  - (e) the fact that often in grievance arbitrations, including those dealing with Human Rights matters, non-lawyers represent unions and/or employers;
  - (f) the fact that the Tribunal, one month before issuing its Decision in the case at bar, came to the opposite conclusion in a similar case and held that this very same PA Process did appropriately deal with the substance of a Human Rights complaint; and
  - (g) the consequences to the PA Process the Petitioner and Union have so painstakingly achieved if the Tribunal concludes that the process does not appropriately deal with Human Rights matters. In particular, such a

conclusion would create a situation where an employee unhappy with results of the PA Arbitration can simply forum shop and file a complaint with the Tribunal and say the PA Process is inadequate. This would create duplication and delays and wasted money, which are the very things that ss. 25 and 27 of the **Code** are designed to avoid.

7. Section 59(5) of the **ATA** governs issues relating to rules of natural justice. The test ultimately is "... whether, in all of the circumstances, the tribunal acted fairly."
8. The Petitioner has referred me to a number of cases and texts, specifically:

**Kane v. University of British Columbia**, [1980] 1 S.C.R. 1105, [1980] 3 W.W.R. 125, 110 D.L.R. (3d) 311, 18 B.C.L.R. 124;

Sara Blake, **Administrative Law in Canada**, 4<sup>th</sup> ed. (Markham: Lexis Nexis Canada Inc., 2006);

**Danakas v. Canada (War Veterans Allowance Board)** (1985), 59 N.R. 309, 10 Admin. L.R. 110 (F.C.A.);

**Martin v. Prince Edward Island (Workers' Compensation Board)** (2000), 195 Nfld. & P.E.I.R. 277, 2000 PESCTD 93;

**Canada (Attorney General) v. McKenna**, [1995] 1 F.C. 694, 88 F.T.R. 202 (T.D.);

**Canada (Attorney General) v. McKenna**, [1999] 1 F.C. 401, 167 D.L.R. (4<sup>th</sup>) 488 (C.A.);

**Re Ellis and Ministry of Community and Social Services** (1980), 110 D.L.R. (3d) 414, 28 O.R. (2d) 385 (H.C.J. Div. Ct.);

**Barker v. Park Willow Developments**, [2004] O.J. No. 2985 (S.C.J.) (QL);

**Atkinson v. Christian Labour Assn. of Canada, Local No. 66**, 2002 BCSC 1884.
9. The Deferral Decision was simply wrong, and this judicial review should be successful on that basis.
10. Alternatively, the Petitioner argues that if the Tribunal's Deferral Decision is considered discretionary, such that the standard of review is patent unreasonableness, the Petitioner then argues

that the Deferral Decision was indeed patently unreasonable, given the denial to the Petitioner of an opportunity to make submissions on the significant issues.

[28] Therefore, the Petitioner argues that this application for judicial review should be successful on the basis that there has been:

1. A denial of natural justice, and a wrong decision; or,
2. A denial of natural justice, and a patently unreasonable decision.

### **THE DEFFERAL DECISION**

[29] The Deferral Decision was delivered on January 25, 2006. It dealt with a number of issues. Among those issues was the Tribunal's consideration of the Petitioner's application to defer the proceedings in their entirety. The Tribunal rejected that application, giving written reasons.

[30] The Deferral Decision concluded that proceedings under the **Code** are of a more public nature than PA proceedings, noting as follows:

... It is interesting that only the arbitrator, and not the parties, have the authority to refer the matter to formal arbitration. Such a process may be a sensible and efficient means of resolving workplace accommodation issues. It is, however, very different from the kind of public, adjudicative process envisioned for the resolution of human rights complaints under the **Code**. In particular, decisions of the Tribunal are public, and form part of the case law which guides the Tribunal and the wider community in future cases. As such, the Tribunal's decisions serve an important educative function, as by them both the parties involved and others who read decisions on the Tribunal's website or elsewhere may learn about their rights and obligations under the **Code**.

[31] The Deferral Decision also commented upon what it considered to be differences in the right to legal representation, between the two types of proceedings, noting as follows:

Further, parties before the Tribunal are entitled to legal representation ... Given the special nature of the rights in issue, parties to human rights complaints are entitled to the benefit of legal representation. The Letter of Agreement and Protocol specifically abrogate this right.

[32] Generally, relating to both topics, the Deferral Decision noted as follows:

As I have said, the process envisioned under the Letter of Agreement and Protocol is a valid and doubtless valuable one. Through it, Overwaitea, the Union and individual employees may be able to achieve appropriate workplace accommodations. It is not, however, a process which I view as capable of dealing appropriately with the substance of Ms. Bates's complaint. Given its non-precedential nature, any decision which an arbitrator under the Letter of Agreement and Protocol might make would not serve the public interest in the development and public elucidation of human rights principles. Furthermore, in the absence of all parties' consent, I cannot view a process in which a party is not allowed to have legal counsel as capable of dealing appropriately with the substance of the rights and obligations created under the **Code**.

Looking at the matter as a whole, while the grievance and arbitration process may be able to provide the parties with a speedy resolution, it is inadequate in two other important respects. Specifically, the denial of the right to counsel renders the process unfair, given the importance of the fundamental rights at stake. Further, the non-precedential and without prejudice nature of the proceedings is inconsistent with the public interest in the resolution of human rights complaints. For these reasons, I decline to defer further consideration of the complaint.

## **RESPONDENT'S ARGUMENT**

[33] The Respondent argues as follows:

1. The requirement of s. 59(5) of the **ATA** that the Tribunal act "fairly" was complied with. However, even if it was not complied with; then

2. The Deferral Decision was a discretionary one, and it was not patently unreasonable.

[34] In addition to those cases and texts referred to me by the Petitioner, the Respondent (and the Tribunal) has referred me to a number of cases, specifically:

**Nicholson v. Haldimand – Norfolk( Regional) Police Commissioners**, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, 23 N.R. 410;

**Martineau v. Matsqui Institution (No. 2)**, [1980] 1 S.C.R. 602, 106 D.L.R. (3d) 385, 30 N.R. 119, 50 C.C.C. (2d) 353;

**Knight v. Indian Head School Division No. 19**, [1990] 1 S.C.R. 653, [1990] 3 W.W.R. 289, 69 D.L.R. (4<sup>th</sup>) 489, 43 Admin. L.R. 157;

**Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817, 174 D.L.R. (4<sup>th</sup>) 193, 243 N.R. 22, 14 Admin. L.R. (3d) 173;

**West Fraser Timber Co. (c.o.b. Eurocan Pulp & Paper Co.) v. Thomson** (2001), 38 Admin. L.R. (3d) 178, 2001 BCSC 1139;

**West Fraser Timber Co. (c.o.b. Eurocan Pulp & Paper Co.) v. Thomson** (2002), 45 Admin. L.R. (3d) 318, 2002 BCCA 455;

**Hines v. Canpar Industries Ltd.**, 2006 BCSC 800;

**Berezoutskaia v. BC (Human Rights Tribunal)** (2006), 51 B.C.L.R. (4<sup>th</sup>) 4, 2006 BCCA 95;

**United Mineworkers of America, Local 1656 v. Cardinal River Coals Ltd.** (1985), 67 A.R. 74 (Q.B.);

Donald J.M. Brown & The Honourable John M. Evans, **Judicial Review of Administrative Action in Canada**, looseleaf (Toronto: Canvasback Publishing, 2005);

**Mobil Oil Canada Ltd. v. Canada – Newfoundland Offshore Petroleum Board**, [1994] 1 S.C.R. 202, 111 D.L.R. (4<sup>th</sup>) 1, 115 Nfld. & P.E.I.R. 334, 21 Admin. L.R. (2d) 248;

**Health Sciences Association of BC v. BC (Industrial Relations Council)** (1992), 91 D.L.R. (4<sup>th</sup>) 582, 67 B.C.L.R. (2d) 250 (C.A.);

**Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)**, [1993] 2 S.C.R. 756, 105 D.L.R. (4<sup>th</sup>) 385, 154 N.R. 104, 15 Admin. L.R. (2d) 1;

*Tremblay v. Quebec (Commission des affaires sociales)*,  
[1992] 1 S.C.R. 952, 90 D.L.R. (4<sup>th</sup>) 609, 136 N.R. 5, 3 Admin.  
L.R. (2d) 173;

*Villella v. Vancouver (City) (No. 3)*, 2005 BCHRT 405.

[35] In greater detail, the Respondent argues as follows:

1. Section 59(5) of the **ATA** contains the essential principles to be considered.
2. Prior to the enactment of the **ATA**, the common law had developed a concept of “fairness”. “Fairness” is something less than the full panoply of rights involved in traditional natural justice observed by courts: **Nicholson; Martineau**.
3. Procedural fairness in an administrative context is lessened in order to allow administrative tribunals the degree of flexibility necessary to balance fairness to the parties with the need for administrative efficiency: **Knight**.
4. The fairness required in a particular situation falls on a spectrum or sliding scale of procedural entitlements: **Martineau**, per Dickson J.
5. Where a particular situation falls on the spectrum depends upon a variety of factors, including:
  - (a) the role of the particular decision within the statutory scheme;
  - (b) whether the decision is determinative of the issue;
  - (c) the importance of the decision to the individuals affected; and
  - (d) the procedures of the tribunal itself, and the expertise of the tribunal regarding procedure: **Baker**.
6. An important consideration is whether the decision under review is a preliminary decision. In **Knight**, L’Heureux-Dube J. stated at p. 669:

A decision of a preliminary nature will not in general trigger the duty to act fairly, whereas a decision of a more final nature may have such an effect.

7. This principle was followed in *West Fraser Timber*, where the Court of Appeal said at para. 7:

Because those persons were carrying out the preliminary steps of investigation and filtering, the full panoply of rules of natural justice does not apply to them as it would to a body carrying out a hearing in the full sense, ...
8. In this particular case, the Respondent submits that the following facts reduce the level of procedural fairness required:
  - (a) the impugned decision is an interlocutory or preliminary decision;
  - (b) the impugned decision did not dispose of any rights of the Petitioner;
  - (c) the Petitioner will have a full opportunity to defend against the Complaint at the hearing before the Tribunal set for September 11-14, 2006;
  - (d) the impugned decision is a discretionary one;
  - (e) the impugned decision is regarding a procedural matter (the Tribunal's "gate keeping" function); and
  - (f) the Tribunal sets its own procedure and has expertise in that regard.
9. In these circumstances, if there was a duty of fairness owed to the Petitioner at all, it was a minimal one, at the low end of the spectrum.
10. That duty of fairness was met by the Tribunal. The Tribunal gave the Petitioner ample opportunity to provide submissions to it, and the Petitioner did so. The Tribunal considered the Petitioner's submissions. The Respondent submits that no more was required.
11. Even if the circumstances in this case can be characterized as the Tribunal failing to allow the Petitioner to argue a specific point, this is not a breach of the duty of fairness: ***United Mineworkers of America***.
12. The Tribunal's Decision that the PA Process is not capable of appropriately dealing with the substance of a Human Rights complaint was amply supported by the materials submitted to it.

In particular, the Petitioner and the Union signed a letter, describing the PA Arbitration as:

informal, practical and expedited. Neither party shall be represented by legal counsel, and the arbitrator is encouraged to mediate disagreements. Decisions of the arbitrator under the authority of this agreement shall be final and binding, but without prejudice or precedent.

13. In the alternative, if this Court finds that there was a breach of a duty of fairness, the Respondent submits that this is one of those rare cases where relief should be denied the Petitioner on the basis that the Decision to deny the deferral application was inevitable.
14. Although it is normally the case that a Court reviewing a tribunal's decision will not wade into the arena of what the decision would have been in other circumstances, the Court will deny relief where remedies are impractical or the decision is inevitable: Brown & Evans, *Judicial Review of Administrative Action in Canada; Mobil Oil*.
15. In *Mobil Oil*, the Supreme Court of Canada quoted H.W.R. Wade, *Administration Law*, 6<sup>th</sup> ed. (Oxford: Clarendon Press, 1988) at p. 535, where the author stated:

A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim are such that it would in any case be hopeless.
16. In the case at bar, the Respondent submits that the Petitioner's claim for deferral of the Human Rights hearing is hopeless because of the increased risk of a multiplicity of proceedings and increased delay if the Human Rights matter is deferred.
17. With regard to the issue of delay, the Tribunal hearing is set for September 11 to 14, 2006, and is fast approaching. In contrast, although the Petitioner requested, on December 7, 2005, that the arbitrator set the matter down for the merits to be dealt with, within the PA Process, no such date has been set. A date of August 16, 2006 was set to determine whether or not he will continue to exercise jurisdiction.
18. The Respondent submits that if the Court provides a remedy to the Petitioner in this case, the inevitable result will be delay, in

that the Tribunal dates of September 11 to 14, 2006 will likely be lost.

[36] With respect to the standard of review, the Respondent argues as follows:

1. The Deferral Decision is a discretionary one.
2. It was made under s. 25(2) of the **Code**, which expressly states that "... the member or panel *may* defer further consideration ...".
3. The standard of review for a discretionary decision is *not* correctness. The standard is patent unreasonableness. Section 52(3) of the **ATA** states that a court must not set aside a discretionary decision ... unless it is patently unreasonable.
4. Section 59(4) of the **ATA** sets out the only four circumstances in which a discretionary decision can be patently unreasonable.
5. In this case, the Tribunal's Deferral Decision was not patently unreasonable. In accordance with s. 52(3), the court "must not" set aside such a decision.

#### **THE STANDARD OF REVIEW**

[37] In my view, the following principles must inform my decision in this case.

[38] I am satisfied that s. 59(5) of the **ATA** determines the test to be applied to the question of whether or not rules of natural justice and procedural fairness were applied in this case.

[39] It is common ground that s. 59 of the **ATA** applies to the **Code** by virtue of an express section in the **Code**.

[40] Counsel agree that there is no prior authority determining the standard of review under the **ATA** for decisions of the Tribunal under s. 25(2) of the **Code**.

[41] Having heard submissions from all parties, I am satisfied that a decision under s. 25(2) of the **Code** is a discretionary one. I come to this conclusion for the following reasons:

1. Section 25(2) expressly uses the word “may”.
2. There is a decision of this Court dealing with s. 27(1)(f), which is similar to s. 25(2). That Court decision concluded that Tribunal decisions under s. 27(1)(f) are discretionary: **Hines**.
3. The reasoning in **Hines** relating to s. 27(1)(f) is equally applicable to the reasoning in this case and I adopt that reasoning. It follows that decisions under s. 25(2) are discretionary in nature.

[42] By virtue of s. 59(3) of the **ATA**, the Deferral Decision “must not” be set aside unless it is patently unreasonable.

[43] By virtue of s. 59(4) of the **ATA**, a discretionary decision is “patently unreasonable” if the discretion has been exercised in one of four enumerated ways.

[44] Where s. 59(3) is applicable, the common law no longer controls the meaning of “patent unreasonableness.” Rather, it is now controlled by s. 59(4) of the **ATA**:  
**Berezoutskaia**.

[45] Section 59(4) does not state whether the four enumerated categories of patent unreasonableness are the *only* four ways in which a discretionary decision can be patently unreasonable. Neither does this seem to have been argued in **Berezoutskaia**. For the purposes of this case, it is not necessary to decide if there might be other situations which could result in a finding of “patent unreasonableness” where s. 59(3) is applicable.

[46] Applying the foregoing principles, my task is to decide if:

1. the Tribunal “acted fairly” in exercising its discretion in arriving at the Deferral Decision; and,
2. even if it did not act fairly, if the Deferral Decision was patently unreasonable, having regard to the four factors enumerated in s. 59(4) of the **ATA**.

**CONCLUSION**

[47] In my view, the Tribunal breached the rules of natural justice and procedural fairness and acted unfairly by making its Deferral Decision on the basis of factors that were not argued before them.

[48] By virtue of the procedure adopted by the Tribunal, the Petitioner did not know the case to be met and did not have the opportunity to address the factors before the Tribunal.

[49] Applying the standard required by s. 59(5) of the **ATA**, I am satisfied, for the same reasons, that the Tribunal did not act fairly.

[50] The Petitioner could not have anticipated these factors because they were not presented or relied upon by the Respondent. Rather, the Tribunal appears to have unilaterally determined their significance and relied upon them, without having heard submissions from either side.

[51] By ruling as it did, the Tribunal effectively determined that the PA Process, developed by the Petitioner and the Union, was an inadequate process, without giving the Petitioner the opportunity to address that argument.

[52] The Tribunal's breach of natural justice and procedural fairness in this case tangibly affected the manner in which the case proceeded. In this regard, the Petitioner's affidavit evidence demonstrates that other steps would have been taken in terms of evidence and argument had the Tribunal sought submissions on the factors it relied upon in making the Deferral Decision. The Petitioner was prejudiced by the Tribunal's denial of natural justice and denial of a fair hearing.

[53] Although I have already decided that the Tribunal did not act fairly in arriving at the Deferral Decision, it does not necessarily follow that it was patently unreasonable. Consequently, I now address that question as guided by ss. 59(3) and (4) of the *ATA*.

[54] In my view, the Deferral Decision was patently unreasonable, for the following reasons:

1. the Petitioner did not have an opportunity to present evidence, or to make submissions with respect to the admissibility of evidence;
2. the Petitioner did not have an opportunity to present argument on the factors which formed the basis of the Decision;
3. the Decision was made entirely without receiving evidence and/or argument from the Petitioner;
4. the two factors that form the basis of the Deferral Decision are not merely significant; they are *the only two factors* that form the basis for the Decision.

[55] It is the *manner* of arriving at the Deferral Decision which causes the Decision itself to be both unfair and patently unreasonable. If the Tribunal had heard relevant evidence and submissions from the Petitioner, and arrived at the same Decision,

after due consideration, then both the unfairness and the patent unreasonableness would disappear.

[56] I reject the argument that the Deferral Decision was inevitable, and would have been the same Decision, even if the Tribunal had acted fairly, and the Petitioner had been permitted to tender evidence and make submissions. It may well be that the Tribunal would arrive at the same Decision in those circumstances, but in my view, that is far from a certainty. The factors relied upon by the Tribunal are both important and complex. There are meritorious arguments, both for and against, which must be considered.

[57] A patently unreasonable procedure will not always result in a patently unreasonable decision. For example, it will not be so in cases where the decision is inevitable, no matter what arguments might have been made. That is not the situation before me. The defect in procedural fairness in this case, while not motivated by bad faith, is a glaring one and has the effect, in the circumstances of this case, of reducing the Deferral Decision itself to one of patent unreasonableness.

[58] Applying the categories of patent unreasonableness as set out in s. 59(4) to the facts of this case, I am satisfied that the Tribunal exercised its discretion arbitrarily, and in so doing, contravened ss. (a).

[59] In *Berezoutskaia*, Smith J.A. discussed one possible meaning of the word “arbitrary” at para. 21:

In my view, if the Tribunal member had made findings of fact that were not supported by the evidence or were otherwise unreasonable as the appellant alleges, her decision to dismiss the complaint based on that

error would have been arbitrary in the sense that it would not have been made according to reason and principle, and it would therefore have been patently unreasonable by virtue of s. 59(4)(a).

[60] In the same case, Smith J.A. stated at para. 27:

Applying s. 59(4), I conclude that the chambers judge was correct to dismiss the petition. The Tribunal member fully considered the submissions of the parties and afforded the appellant a fair consideration of her complaint. Although some of her conclusions have the appearance of findings of fact, she properly addressed the weighing and evaluation of the evidence ...

[61] In my view, the discretion of the Tribunal, in the instant case, was exercised arbitrarily in the sense that it was not based on reasoned argument. It was not based on reasoned argument because the Tribunal did not hear any argument at all (from either side) on the factors which formed the basis for the exercise of its discretion.

[62] It follows that this application for judicial review is successful on the basis of the failure of the Tribunal to hear submissions from the Petitioner with respect to the following:

1. whether or not certain evidence is relevant and admissible on the issues to be decided;
2. the substance of the issues to be decided.

[63] I order that the portion of the Tribunal's Decision of January 25, 2006, which dismisses the Petitioner's application to defer further consideration of the Respondent's Human Rights Complaint, be set aside.

[64] I further order that the Petitioner's application to defer be remitted to the Tribunal with the following directions. The Tribunal will:

1. hear submissions from both parties with respect to those factors that will be significant in informing its decision;
2. hear submissions from both parties with respect to admissibility of evidence and receive such evidence as it considers appropriate after due consideration of such submissions; and,
3. reconsider its decision with respect to the Petitioner's application to defer after due consideration of the foregoing and all other relevant matters.

[65] These directions deal only with the Petitioner's right to be heard on relevant issues. Nothing in these reasons is intended to influence or suggest any outcome which the Tribunal may arrive at after following the foregoing directions.

[66] In referring to the Petitioner's right to be "heard" and in directing that the Tribunal shall "hear" the parties, I use those words in the broadest sense, which does not necessarily include an oral hearing. It is not my intention to make any direction with respect to the ordinary procedures of the Tribunal. If those procedures ordinarily involve written submissions without an oral hearing, my use of those words is not intended to have any effect upon those procedures.

[67] The Respondent shall pay the Petitioner's costs. There will be no order for costs with respect to the Tribunal.

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The Honourable Mr. Justice Silverman