

**Labour Relations Board  
Saskatchewan**

**AUDREY KAUFMANN, Applicant v. SASKATCHEWAN GOVERNMENT AND  
GENERAL EMPLOYEES' UNION and GOVERNMENT OF SASKATCHEWAN,  
Respondents**

LRB File No. 287-00; February 22, 2006

Vice-Chairperson, Angela Zborosky; Members: Donna Ottenson and Leo Lancaster

For the Applicant: Audrey Kaufmann and Bob Hughes

For the Respondent Union: Rick Engel, Q.C.

**Reconsideration – Criteria – Breach of natural justice – Where part-time Board member testified in proceedings before Board and subsequent to hearing, but prior to decision being made, participated as panel member on other hearings where panel included chairperson of panel before which member testified, Board finds conflict of interest and reasonable apprehension of bias – Breach of natural justice entitles applicant to re-hearing of application – Board grants application for reconsideration.**

***The Trade Union Act, s. 13.***

**REASONS FOR DECISION**

**Background:**

[1] This is an application by the Applicant, Audrey Kaufmann, filed with the Board on October 21, 2004, for reconsideration of a decision of the Board dated August 1, 2003, in *Audrey Kaufmann v. Saskatchewan Government and General Employees' Union*, [2003] Sask. L.R.B.R. 344, LRB File No. 287-00. Ms. Kaufmann's original application alleged that Saskatchewan Government and General Employees' Union (the "Union") breached its duty of fair representation toward her in violation of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "Act"). The application was heard by a panel of the Board chaired by then Chairperson, Gwen Gray, Q.C. over four days in February, March and April, 2002 in Weyburn, Saskatchewan, with written arguments filed on June 19, 2002. The application was dismissed in the Reasons for Decision referred to above.

[2] Ms. Kaufmann's original application alleged, *inter alia*, that in 1993 the Union refused to file a grievance on her behalf in relation to work issues that resulted in

the loss of her employment with Saskatchewan Environment and Resource Management (“SERM” or the “Employer”), a department within the Government of Saskatchewan and that, although she filed a harassment claim under the collective agreement, it did not assist her with her situation. Ms. Kaufmann also asserted that she was forced into an unfair settlement at mediation between the Employer, the Union and herself.

**[3]** At the original hearing, the Union took the position that it represented Ms. Kaufmann throughout the course of her employment problems and that she and the Union accepted a settlement after getting legal advice. The Union denied that it was in breach of s. 25.1 of the *Act*.

**[4]** In its Reasons for Decision, *supra*, the Board dismissed the application, having determined that the Union did not act in a manner that was arbitrary, discriminatory or in bad faith.

**[5]** The Applicant’s application for reconsideration filed on October 17, 2004, asks for reconsideration on the following grounds:

*(1 a) I could not afford a lawyer and there is a lot of crucial evidence that was not adduced because of this reason. At the end of the hearings the Board commented on not hearing witness[es]. There are witnesses to be called on my behalf that I believe will further purge my claim and I believe will show possible purgation by their witness. I remember the Board told SGEU to get a lawyer and an accountant for me. This was not done. SGEU still has not resolved the tax issues and I have not heard from them in months. My last letter dated March 22, 2004 to SGEU has not been answered.*

*(1 b) I am ill and under a Doctors care for posttraumatic stress disorder and adjustment disorder. My illness was not presented to the Board. This whole issue from the very beginning continues to affect my health.*

*(2) There was a whole year wait for the Boards decision and I did not expect the out come [sic]. I believed that SGEU would be found liable and accountable for misrepresentation. I believed that part of Pat Gallagher’s testimony clearly shows that I was discriminated against because of being pregnant. This was only one more addition to my long list of SGEU not representing me.*

*(3 a) There is a possible fraud charge that is a legal issue and I remember being told that it is not for the Board to decide on that. I remember one Board member telling me that this legal issue should be looked into further. This has not been done.*

*(3 b) My complaint was for a certain time. There were a lot of things that were not of the correct time frame.*

*(4 a) SGEU witness[es] included Pat Gallagher who is also a Board member. From being a Board member, I believe that she would have a good idea what the Board would want to hear, were [sic] as I did not.*

*(4 b) The Board union representative, Mr. Hugh Wagner left the Board to pursue a career at SGEU, Therefore there was not any union representation for me on the Board.*

### **Arguments:**

**[6]** Ms. Kaufmann raised several issues with respect to the grounds for her application for reconsideration. First, she argued that there was evidence that she wished to adduce at the hearing of her application but did not do so. She identified several witnesses that she should have called to testify on her behalf, although she was unable to indicate the testimony she expected they would provide or how that testimony would have affected the result of the decision. Ms. Kaufmann also outlined alternate arguments she would have made on the evidence presented, or different interpretations of the evidence that she would have urged upon the Board. Ms. Kaufmann suggested that the reasons she did not lead this evidence or make certain arguments at the hearing were essentially two-fold: she was suffering from certain medical conditions at the time of the original hearing (illnesses that resulted from the workplace problems she experienced) which she believed affected her comprehension and concentration and prevented her from adequately presenting her case to the Board and she did not have legal counsel to assist her, which was particularly important given the manifestations of her illness. Ms. Kaufmann also suggested that, had she had a lawyer representing her at the original hearing, the lawyer would have ensured a fair and thorough hearing was held by ensuring that only relevant evidence was entered, objecting to the consideration of certain evidence such as the Union's handling of her harassment claim and the settlement obtained for her, and by seeking adjournments where necessary. Ms. Kaufmann believes that the evidence of her doctor would also have been helpful to the Board to provide overall advice as to whether Ms. Kaufmann required any adjournments

and when it was appropriate to resume, on how the hearing should be conducted to allow Ms. Kaufmann to fully present her case, and on the need for the assistance of legal counsel to make decisions about the presentation of Ms. Kaufmann's case in circumstances where the discussion of the events leading to her workplace problems acted as a trigger to her illness.

**[7]** Ms. Kaufmann filed a copy of the Manitoba Labour Board's decision in *Shachtay v. Creamery Workers' Union, Local 1*, [1986] C.L.L.C. 16,033, which she believed supported her position that the Union did not represent her fairly. Ms. Kaufmann argued that at the hearing and in its Reasons for Decision, the Board improperly focused on the proceedings the Union undertook on Ms. Kaufmann's behalf pursuant to the harassment provisions of the collective agreement and the settlement the Union obtained on her behalf, rather than on what she felt was her only claim against the Union, that is, that the Union failed to file a grievance on her behalf in relation to the loss of her position. She maintained that the Board should only have considered events during the time period that included her probationary period and for thirty days following the probationary period (the time in which a grievance must be filed), rather than on the conduct of the Union during the time period that followed these events.

**[8]** Ms. Kaufmann also argued that certain aspects in the conduct of the hearing were unfair. Firstly, she argued that one of the Union's witnesses who was instructing counsel was able to hear the evidence of the other Union witnesses and that this gave the witnesses the opportunity to collaborate on their stories. Secondly, she argued that one of the original panel members, Hugh Wagner, took a job with the Union after the hearing was concluded but before a decision was rendered (although the Reasons for Decision made it clear Mr. Wagner did not participate at all in the decision-making process), and that Mr. Wagner's absence from the deliberations was unfair because she did not have a "union representative" on the Board. Ms. Kaufmann also argued that three members of the Board constitute a quorum and when Mr. Wagner was unable to continue as a member of the panel, the Board should have re-heard the case with three members who were in a position to decide the matter.

**[9]** Finally, Ms. Kaufmann argued that there was a conflict of interest by reason of the fact that Patricia Gallagher, who testified on behalf of the Union before the

Board at the original hearing, sits as a member of the Board. She also argued that Ms. Gallagher's close personal ties to the Board provide her with the knowledge of what is appropriate to present to the Board and an understanding of how to proceed with this type of application. Ms. Kaufmann believes that, if she had not been affected by her illnesses or if she had had a lawyer representing her, an objection could have been made at the hearing to this witness testifying.

**[10]** Counsel for the Union, Mr. Engel, argued that none of the grounds put forth by Ms. Kaufmann was a viable ground for reconsideration. Mr. Engel referred the Board to its decision in *Warne et. al. v. Regina Exhibition Association Ltd.*, [1996] Sask. L.R.B.R. 261, LRB File Nos. 146-95 to 166-95, which sets out the foundations for a reconsideration and lists the criteria for such an application. Mr. Engel argued that the power should be exercised sparingly due to the need for timeliness and the finality of decisions. The Union argued that the mere lapse of time had caused difficulties for the Union in presenting its case at the original hearing, and that these difficulties would be further compounded should the Board grant the reconsideration application. The Union argued that the delay would give rise to a miscarriage of justice should the Board order a re-hearing which has the effect of requiring the Union to respond to events that occurred up to twelve years ago, particularly when the evidence which Ms. Kaufmann alleges is crucial to her case, was in existence at the time of the original hearing.

**[11]** The Union also argued that all of the evidence which Ms. Kaufmann now proposes to introduce is not crucial in the sense that she has not established that it could overturn the result. Ms. Kaufmann also did not provide good and sufficient reasons as to why the evidence was not adduced at the original hearing, except to say that she would have presented it had she had a lawyer represent her. Furthermore, some of the evidence she proposes to introduce was led at the original hearing and other evidence was not "new evidence" in that it was in existence at the time of the original hearing. In addition, the assertion that Ms. Kaufmann wished to have made a fuller or more effective argument at the original hearing is not grounds for overturning the result.

**[12]** The Union maintained that, even though Ms. Kaufmann's illnesses are serious, they did not impact on her capacity to bring the application or conduct a hearing.

The Union pointed out that it was Ms. Kaufmann's decision to file the application and to proceed with a hearing when she did. The Union stated that it would have been highly inappropriate and probably unlawful for the Board to have denied Ms. Kaufmann access to the hearing process or to have suggested that it would need to assess her mental capacity before she was allowed to proceed with a hearing of her application. The Union noted that the Board proceeded with the original hearing in a manner that accorded Ms. Kaufmann a high degree of fairness and accommodated the stress caused by a hearing. The Union argued that, in these circumstances, the Board had no reason to question Ms. Kaufmann's ability to present her case and that it would have been highly inappropriate for the Board to suggest to Ms. Kaufmann that she could not continue with the hearing. The Union argued that there was nothing in the report of Ms. Kaufmann's doctor, which was submitted at this hearing, that would contradict this position.

**[13]** With respect to the suggestion by Ms. Kaufmann that she required a lawyer to represent her, the Union maintained that the Board's processes are designed so that a lawyer is not required and, in fact, many parties have appeared before the Board without a lawyer. The decision not to have a lawyer, whether one decides not to utilize one or cannot afford one, should not provide a basis for a re-hearing.

**[14]** With respect to the argument that there was a denial of natural justice as a result of the absence of involvement by Mr. Wagner in the decision in this matter, the Union took the position that the Board was properly constituted to hear the application and a decision was rendered by a majority of the members of the Board, all in compliance with the legislation. The Union maintained that it was appropriate for Mr. Wagner to remove himself from the panel when he obtained employment with the Union in order that no conflict of interest would arise.

**[15]** With respect to the role of Ms. Gallagher as a member of the Board (although obviously not assigned to the panel that heard this matter) and a witness at the hearing on behalf of the Union, the Union argued that the decision of the Saskatchewan Court of Queen's Bench in *Bussiere v. Grain Services Union* (1998), 170 Sask. R. 256 had no application in the circumstances of this case. The Union argued that this situation fell within acceptable institutional bias as permitted by the legislation and interpreted by the courts.

## Analysis and Decision:

[16] The Board described the criteria applicable to an application for reconsideration in *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et al.*, [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93, as follows, at 107-108:

*Though the Board has the power under Section 5(i) to reopen decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster.*

...

*In the three jurisdictions we have alluded to above - Canada, British Columbia and Ontario - the recognition of the need to balance the claim for reconsideration against the value of finality and stability in decision-making is reflected in the procedures adopted by labour relations tribunals. In all of them, the procedure followed in connection with an application for reconsideration departs from the procedure employed for other kinds of applications. In all three cases, the applicant is required to establish grounds for reconsideration before a decision is made whether a rehearing or some other disposition of the matter is appropriate.*

*We have concluded that such a two-step approach is appropriate in cases of this kind. We do not agree with counsel for the Employer that we were mistaken in requiring that an applicant who seeks reconsideration of a decision of the Board must persuade us that there are solid grounds for embarking upon that course.*

...

*In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:*

*In Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532, the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations*

*Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*

1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
2. *if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
3. *if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
4. *if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
5. *if the original decision is tainted by a breach of natural justice; or,*
6. *if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

**[17]** In the present case, Ms. Kaufmann appeared to rely upon the second and fifth grounds, however, for the reasons that follow, it is necessary only that we assess the fifth ground, that is, that there was a denial of natural justice as a result of the involvement of the Union's witness, Ms. Gallagher, at the hearing of the application and her role as a member of the Board.

**[18]** While we do not accept Ms. Kaufmann's argument that that there was something improper about Ms. Gallagher testifying as a witness for the Union simply because she was a member of the Board (although not a member of the panel which heard Ms. Kaufmann's application), it is incumbent upon us to examine whether there was a denial of natural justice in this case as a result of Ms. Gallagher's role as a

member of the Board and the potential for a conflict of interest in circumstances where she was required to testify on behalf of the Union. In this regard, the Board must give due consideration to the decision of the Court of Queen's Bench for Saskatchewan in *Bussiere, supra*. In that case, two members of the union filed an application with the Board alleging a failure of representation by the union. An officer of the union swore a reply on behalf of the union and was the primary witness for the union at the hearing of the application. The union officer was also a part-time member of the Board, sitting as a union representative on tri-partite panels of the Board. During the time period in which the decision in the application was on reserve, the union officer sat on two different panels of the Board with the chairperson who heard the application at which the union officer had testified. Upon dismissal of the application by the Board, the applicants brought an application for judicial review in the Court of Queen's Bench, taking the position that the decision of the Board should be set aside on the basis of an apprehension of bias and arguing that the union officer should have taken a leave of absence following his participation as a witness in the case until a decision had been rendered, or that the union officer should not have been assigned to any hearings while the decision was pending in the application in which he participated as a witness. The applicants also argued that the union officer should not have sat with the chairperson while the decision was pending.

**[19]** In the *Bussiere* case, the Court rejected the argument that a Board member must take a leave of absence while personally involved in a case pending before the Board. The Court accepted, as an institutional constraint inherent to a labour relations board where a tri-partite panel is legislatively mandated, that a Board member may have a matter before a panel of the Board or that the panel knows the Board member appearing as a witness before it, and that no reasonable apprehension of bias arises simply by reason of such a fact. The Court did however accept the argument that there was a reasonable apprehension of bias as a result of the union officer sitting with the chairperson of the panel on two subsequent panels while a decision was pending on the subject application. At paragraphs 23 through 27 the Court stated:

*However, the issue of a board member who has personally participated in a hearing subsequently sitting with one or more panel members who have the same case under reserve leads to a*

different conclusion. There are no institutional constraints which are operable with respect to this fact situation.

...

The principle offended in this situation is the same one which resulted in the decision in *R. V. Sussex Justices, supra*. The principle is that in the interests of justice not only being done but manifestly being seen to be done, **a person who has an interest in the matter under reserve should not have private access to the decision-maker in circumstances where he or she may be in a position to directly or indirectly influence the decision.** If this occurs, as it did in this case, the appearance of impartiality is jeopardized for at least two reasons.

Firstly, *Black's Law Dictionary* defines "impartial" as: "favouring neither; disinterested; treating all alike; unbiased; equitable, fair and just". In the factual situation here under consideration, the parties are not being treated equally, and one side is being favoured, simply because the other party does not have the same opportunity to sit with the panel members who have the case under reserve.

Secondly, and perhaps more importantly, in the end result neither the involved person, nor the chairperson herself, would ever be able to subsequently say whether she was or was not unconsciously influenced in rendering the decision under reserve by the performance or comments of the "litigant" board member in the subsequent case. It is to avoid any such possibility of influence that impartiality demands the decision-maker remain free from the influence of any one party in the absence of the other while decision is reserved.

The Labour Relations Board of British Columbia has recognized this principle and its validity. In its "Guidelines for Members Concerning Conflict of Interest" it states at (4) on p.4:

*Where a member acts as a witness, counsel, or instructing witness before a panel, the member will not participate in any further proceedings with any member of that panel until such time as that panel issues its decision with reasons. It may be necessary to reschedule hearing dates. Therefore, the member is requested to notify the Associate Chair, Adjudication, as soon as practical that they will be acting, or have acted as counsel, instructing witness or will be testifying at a hearing.*

On the facts, an apprehension of bias was established when Mr. Wagner sat with chairperson Bilson on two subsequent panels prior to her rendering a decision in this case. The decision must

*be set aside and a new hearing ordered. The re-hearing should take place before a new panel chaired by the vice-chairperson of the Labour Relations Board. [emphasis added]*

[20] In the present case, Ms. Gallagher testified at the hearing on behalf of the Union. Board records show that, while the decision in the matter was under reserve, Ms. Gallagher sat on a number of occasions as a member of a tri-partite panel with the chairperson of the panel that heard the case at which she had testified. During the reconsideration hearing, the Union argued that the *Bussiere* case should be interpreted as standing for the proposition that apprehension of bias only arises in these circumstances when a Board member acted as a “litigant witness,” a witness who has some stake in the outcome of the Board’s decision such as an employee of the party, a person acting on behalf of the party, or as an instructor to counsel and that the apprehension does not arise where the Board member was merely a witness. The Union argued that this interpretation was proper because the mischief intended to be prevented was that it would be unfair for one *party* to have access to the chairperson of the matter that is under reserve while the other party does not have such access. The Union argued that Ms. Gallagher would not be considered a “litigant” witness because: (i) she was not employed for at least a year prior to this application being heard; (ii) Tim Davies acted as a witness and instructing counsel at the hearing of this application; and (iii) Ms. Gallagher was not a primary witness but simply presented evidence concerning a matter in which she had some involvement and in circumstances where she did not have a tangible enough interest at stake to suggest that there would be a reasonable apprehension of bias.

[21] We cannot accept the restrictive interpretation the Union proposes concerning the parameters of the *Bussiere* decision, *supra*. While Ms. Gallagher was no longer employed by the Union at the time of the hearing of the matter and there was no evidence that she was acting as an instructing witness at the hearing, her testimony was important to the Union’s response to the claim by Ms. Kaufmann that the Union had not represented her fairly. Ms. Gallagher testified concerning the circumstances of her involvement in the representation of Ms. Kaufmann and the judgments she exercised in the handling of Ms. Kaufmann’s employment problems. Her testimony was the subject of an assessment of her credibility by the panel that heard the matter. In these circumstances, it cannot be said that Ms. Gallagher was not “a person who has an

interest in the matter,” even if that interest was merely a matter of her reputation. In our view, the reference of the Court in *Bussiere* to “a litigant board member” was intended to include “a board member who has personally participated in a hearing” or “a person who has an interest in the matter under reserve” and that this could include a witness who was not an employee of the party, or acting as counsel or an instructing witness of the party. Our conclusion is supported by the Court’s acknowledgement in *Bussiere, supra*, that the conflict of interest policy of the British Columbia Labour Relations Board (quoted above) validated the principle the Court elucidated, that is, that the application of an apprehension of bias applied to a member who “acts as a witness, counsel, or instructing witness before a panel.”

**[22]** Aside from our interpretation of the scope of application of the *Bussiere* decision, *supra*, our conclusions rest on a motion made by the Board in 1999 (following the Court’s decision in *Bussiere*) adopting the policy “Conflict of Interest Guidelines for Board Members”. The policy’s “Conflict of Interest Procedures,” state at point 4 as follows:

*4. A member may be called upon to testify in a proceeding before the Board, or may act as counsel or instructing witness in a proceeding before the Board.*

*Procedure*

*Where a member acts as a witness, counsel, or instructing witness before a panel, the member will not participate in any further proceedings with any member of that panel until such time as that panel issues its decision with reasons. It may be necessary to reschedule dates. Therefore, the member is requested to notify the Registrar as soon as practical that they will be acting as counsel, instructing witness or witness at a hearing.*

*At the outset of each hearing in which a Board member so acts as counsel, instructing witness or witness, the chairperson shall advise the parties to the proceedings of the Board’s policy.*

**[23]** It is clear that, in this case, the Board breached the policy when Ms. Gallagher participated in subsequent proceedings with the chairperson of the panel that heard her as a witness in this case. It matters not whether Ms. Kaufmann personally apprehended bias in these circumstances; Ms. Gallagher’s participation on subsequent panels with the chairperson amounted to a conflict of interest as identified by the Board’s

policy. This conflict of interest gives rise to a reasonable apprehension of bias and therefore amounts to a breach of natural justice entitling Ms. Kaufmann to a re-hearing of her application.

**[24]** In making this finding, we are not suggesting that the breach of the policy was deliberate and, in fact, it appears to have arisen through inadvertence in assigning panels to hear matters. We are also not drawing the conclusion that the chairperson was unconsciously influenced by Ms. Gallagher nor that Ms. Gallagher attempted to influence the chairperson through her participation with the chairperson on other panels hearing other matters. Our finding is based on the proposition, adopted as part of Board policy, that these factual circumstances give rise to possible jeopardy to the appearance of impartiality when a part-time board member has access to the decision maker of a matter in which she was involved as a witness, in the absence of the other party, while the decision was on reserve.

**[25]** Our decision in this matter should also not be interpreted to mean that the decision of the first panel was wrong. Given the conclusion stated above and the resulting necessity of a re-hearing, it is not necessary for us to make any findings concerning the other matters raised by the Applicant as grounds for reconsideration of the Board's decision.

**[26]** For these reasons, the application for reconsideration has been granted and the Board will direct a re-hearing of the application filed by the applicant on November 17, 2000. The rehearing will take place with a panel composed of members other than those who heard the original application. A date for the re-hearing will be set in the usual manner.

**DATED** at Regina, Saskatchewan this **22nd** day of **February, 2006**.

**LABOUR RELATIONS BOARD**

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Angela Zborosky,  
Vice-Chairperson