

Date: 20110630

Docket: 09/87

Citation: *Gedge v. Hearing Aid Practitioners Board*, 2011 NLCA 50

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

JOE GEDGE

APPELLANT

AND:

HEARING AID PRACTITIONERS
BOARD

FIRST RESPONDENT

AND:

THE ADJUDICATION TRIBUNAL
(OF JANUARY 18, 2008) CONSISTING
OF SYLVIA HURLEY,
SECRETARY, ROSALIND
ABBOTT, AND JAMIE LOUGHLIN

SECOND RESPONDENT

Coram: Rowe, White and Hoegg, JJ.A.

Court Appealed From: Supreme Court of Newfoundland & Labrador,
Trial Division (General) 200801T0825

Appeal Heard: March 9, 2011

Judgment Rendered: June 30, 2011

Reasons for Judgment by White, J.A.

Concurred in by Rowe and Hoegg, JJ.A.

Counsel for the Appellant: Dana Lenehan, Q.C.
Counsel for the First Respondent: James Oakley
Counsel for the Third Respondent: No appearance

White, J.A.:

[1] This appeal is about reasonable apprehension of bias in a professional disciplinary tribunal.

BACKGROUND

[2] The appellant, Joe Gedge, is an audiologist and the owner of Beltone Audiology and Hearing Clinic which operates fifteen clinics on the west coast of the island of Newfoundland. He is licenced as a hearing aid practitioner by the first respondent the Hearing Aid Practitioners Board (the “board”), a regulatory body governed by the *Hearing Aid Practitioners Act*, SNL 2005, c.H-2.01 (the “Act”).

[3] The governing scope of the *Act* regulates only persons licenced by the board. At the relevant time there were fourteen such persons.

[4] Paul Robbins is licenced under the *Act*. He is a former business partner of Gedge. Robbins and Gedge have had an acrimonious relationship for several years. Gedge also alleges that there is competition between their clinics.

[5] Jamie Loughlin is licenced under the *Act*. He is chair of the board’s disciplinary panel. Loughlin is Gedge’s primary competitor in Corner Brook.

[6] Joe Lynch is licenced under the *Act*. He is registrar of the board. Lynch is an employee of Robbins. On June 6, 2006, Lynch alleged that Gedge had:

- failed to complete ten hours of mandatory continuing education;
- verbally abused Michael Edwards (another of Robbins’ employees, also licenced under the *Act*); and

- fitted three patients with hearing aids without first conducting an audiogram. (This is from his review of files without any patient complaints).

[7] As registrar of the board, Lynch investigated his own allegations and found all of them to have merit. The concerns relative to fitting patients without audiograms were brought forward as allegations of professional misconduct. The complaints authorization committee approved the allegations for adjudication. The chair of the disciplinary panel then appointed an adjudication tribunal.

THE TRIBUNAL AND ITS DECISION

[8] As chair of the disciplinary panel, Loughlin chose a tribunal to hear the complaint. The tribunal he chose was made up of:

- Loughlin;
- Rosalind Abbott (licenced under the *Act*). She is an employee of Paul Robbins and his girlfriend; and
- Sylvia Hurley (not a person licenced under the *Act*) who represented the public as provided for in the *Act*.

(“the tribunal”)

[9] A hearing date was set for January 18, 2008. A registered letter was sent to Gedge notifying him of the hearing date and of the composition of the tribunal. In his affidavit (filed before the applications judge), Gedge states that he never saw the letter. It was opened by his daughter, who concealed it from him out of concern for his ill health at the time.

[10] On the morning of the hearing before the tribunal, Gedge did not appear. Nor did anyone on his behalf. Loughlin (chair of the tribunal) telephoned Gedge’s office. He was told by Gedge’s daughter that Gedge would not attend. The tribunal decided to proceed in his absence. A plea of not guilty was entered. The tribunal heard testimony from Lynch and Michael Edwards, and issued a decision.

[11] The tribunal found Gedge:

- guilty of failing to complete ten hours of continuing education contrary to the regulations under the *Act*;

- not guilty, in light of his apology, of conduct unbecoming a licenced hearing aid practitioner in relation to alleged verbal abuse of Michael Edwards; and
- guilty of the three charges of professional misconduct. While there was, at the relevant times, no formal bylaw against installing a hearing aid based on an old audiogram, the tribunal found that there was an “unwritten understanding” that a new audiogram ought to be performed.

[12] The tribunal imposed a \$3,000 fine and suspended Gedge’s licence for six months. It also published a large notice in a newspaper circulated in the area of Gedge’s practice.

THE DECISION OF THE APPLICATIONS JUDGE

[13] Gedge appealed the tribunal’s decision to the Trial Division. He argued, *inter alia*, that there was a reasonable apprehension that the tribunal was biased.

[14] The applications judge dismissed the appeal, finding that the tribunal acted reasonably in convicting Gedge under the *Act*, and that Gedge could not raise the issue of reasonable apprehension of bias because he had not raised it before the tribunal.

ISSUES

[15] This appeal is principally based on the argument that there is a reasonable apprehension of bias. Additionally, it is submitted that the tribunal’s reasons were inadequate and its findings incorrect. In light of my decision regarding reasonable apprehension of bias, it is not necessary for me to deal with the adequacy of the tribunal’s reasons.

[16] I consider the issues for this Court to be:

- (1) did the applications judge err in finding that Gedge could not raise the issue of apprehension of bias because it was not raised before the tribunal;
- (2) if so, was there reasonable apprehension of bias; and
- (3) if there was, what is the remedy.

STANDARD OF REVIEW

[17] The critical decision by the applications judge is set out at para. 79 of his decision:

The allegation of a reasonable apprehension of bias against the Adjudication Tribunal should first have been raised before the Tribunal and in failing to do so, the appellant was foreclosed from raising it for the first time on this appeal.

[18] This decision by the applications judge is one of law. The standard of review is, thus, correctness.

ANALYSIS

- *reasonable apprehension of bias not raised before the tribunal*

[19] In rejecting Gedge's argument on reasonable apprehension of bias, the applications judge stated:

[70] Mr. Gedge did not attend the hearing before the Adjudication Panel nor did he send a representative or make written submissions. He was given the full opportunity to do so. He has not established on this appeal any reason for departing from the ordinary practice described in the **Abitibi** case and which ought to be applied in the majority of cases, i.e., that the allegation of bias should first be raised before the person who is challenged and only later by the Court. The appellant did not lead any evidence on which this Court could rely to consider the matter. The allegations are remote from the complaints and this is not the [forum] in which to lead new evidence in any event.

[20] It is accurate that Gedge did not attend the hearing before the tribunal, send a representative or make written submissions. Gedge, by affidavit, states that the letter notifying him of the hearing was kept from him by his daughter. There is no evidence that he was told of the telephone call on the day of the hearing. In short, there is nothing in the record from which an inference could be drawn that Gedge knew that the hearing was taking place when it did.

[21] The applications judge refers to "the ordinary practice described in the *Abitibi* case" which is to raise the issue of bias before the person (or persons) challenged and, if one fails to do so, one cannot raise bias in a judicial review.

[22] In *Communications, Energy and Paperworkers Union of Canada, Local 60N v. Abitibi Consolidated Company of Canada*, 2008 NLCA 4, Roberts J.A. states:

[35] ... The lack of consensus and the variety of opinions are, as I said at the beginning, somewhat surprising. Nevertheless, the most persuasive point of view, and the one which I adopt, is that the question of bias, when raised, should be dealt with by the person against whom the allegation is made. The theoretical problems noted by the applications judge in para. 33 of his Reasons ... are outweighed, in my opinion, particularly in the case of consensual labour arbitration boards, by the practical considerations of efficiency and speedy resolution of employee/employer grievances. The prompt resolution of grievances in the work place is what the arbitration procedure is designed to effect. Grievances which are allowed to fester do nothing for labour peace and good working conditions. Obligated recourse to the court as soon as an allegation of bias is raised would have the effect of causing long and unnecessary delays.

(Underlining added.)

[23] Other authorities also support the proposition that a reasonable apprehension of bias must be raised at the first possible opportunity. The basis for this rule is waiver: a party cannot ask for a remedy from a tribunal and afterwards claim reasonable apprehension of bias. See *Callahan v. Newfoundland (Deputy Minister of Social Services)* (1993), 113 Nfld. & P.E.I.R. 1 (Nfld. T.D.) and *Frecker v. Newfoundland (Medical Care Commission)* (1999), 177 Nfld. & P.E.I.R. 298 (Nfld. C.A.).

[24] But the waiver rule can only apply if the person alleging a reasonable apprehension of bias had a prior opportunity to raise the issue. The apprehension must be raised at the first possible opportunity. See *Chipman Wood Products (1973) Ltd. v. Thompson* (1996), 138 D.L.R. (4th) 761, 42 Admin. L.R. (2d) 259 (NBCA). For Gedge, this was before the applications judge, as he could not raise concerns relative to bias before the tribunal because he was not aware of when it was meeting or of its composition.

[25] As a waiver contemplates knowledge and a conscious decision to ignore and as there was no evidence before the applications judge from which he could conclude that Gedge waived his opportunity to raise reasonable apprehension of bias before the tribunal, he cannot be, in the words of the applications judge, “foreclosed from raising it for the first time on this appeal”. The applications judge erred in this conclusion – one which goes to the heart of this appeal. Accordingly, I conclude that he erred in law

in determining that Gedge was precluded from raising the issue of bias before the court.

- ***was there reasonable apprehension of bias***

[26] It follows that Gedge did raise the issue of reasonable apprehension of bias at the first opportunity. He raised it before the applications judge, who for the reasons just noted, declined to deal with it. Thus, it falls to this Court to decide whether there was a reasonable apprehension of bias.

[27] The test for reasonable apprehension of bias was set out in the dissenting reasons of de Grandpré J. in *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369. Although de Grandpré J. disagreed with the majority about the application of the test to the facts, his formulation has often been cited by the Supreme Court of Canada: see, for instance, *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 31 *per* L’Heureux-Dubé and McLachlin JJ. and at para. 112 *per* Cory J.

[28] De Grandpré J. said at pp. 394–395:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. ... [T]hat test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

... The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the “very sensitive or scrupulous conscience”.

[29] The actual composition of the tribunal is not in dispute. The relationships of the members of the tribunal, the registrar and Gedge are not in dispute. Do any of these relationships give rise to a reasonable apprehension of bias?

[30] There are four ways in which the composition of the tribunal could raise a reasonable apprehension of bias:

1. The panel was selected by Loughlin, who was a competitor of Gedge and would profit from sanctions against him;
2. The chair of the panel was Loughlin;

3. One member of the panel, Abbott, was an employee of Robbins, with whom Gedge had an acrimonious relationship;
4. One member of the panel, Abbott, was the girlfriend of Robbins.

[31] There are other circumstances that might not raise a reasonable apprehension of bias on their own, but which accentuate concerns about the impartiality of Abbott, the girlfriend and employee of Robbins:

1. The complaint was filed, investigated, and referred to the complaints authorization committee by Lynch, an employee of Robbins and co-worker of Abbott;
2. The information on which two of the counts were based was provided by Edwards, who was also an employee of Robbins, and co-worker of Abbott.

[32] These circumstances are of particular concern since the only witnesses at the hearing were Lynch and Edwards.

[33] With the exception of the public representative on the tribunal, Sylvia Hurley, everyone involved from the perspective of the board in investigating, making preliminary determinations, choosing the members of the tribunal, sitting on the tribunal, and giving evidence before it would, in the view of an “informed person”, raise concerns about fairness in the carrying out of the hearing and the matters attendant to it. Thus, I accept Gedge’s submission that there was a reasonable apprehension of bias.

[34] Was it not plain to the members of the tribunal that bias could be reasonably apprehended? Even if all the conflicts were not apparent to the tribunal, should it have been obvious, for example, that a business competitor in a small market with few professionals could not properly serve as a member of a disciplinary tribunal? Of course, there is a practical problem with a profession that has so few members. Everyone will know everyone else (not, in itself, a problem) and many persons will be in competition in small markets. It is incumbent on the board and the tribunal to ensure that the process is fair, and this is particularly so where the outcome and penalty have the potential to seriously damage or even destroy a career. This involves considering whether the tribunal members can sit in judgment even if no objection (for whatever reason) is raised before them. That was not done here. It should have been.

- *remedy*

[35] Accordingly, I would quash the decision of the tribunal and remit the matter to the board. A new hearing before the existing tribunal is not an option. There is a reasonable apprehension of bias. If the allegations against Gedge are to be pursued, a new tribunal must be put in place.

CONCLUSION

[36] I would allow the appeal, set aside the decision of the applications judge, and quash the decision of the tribunal, with costs to the appellant here and on the application before the Trial Division.

C.W. White, J.A.

I concur:

M. Rowe, J.A.

I concur:

L.R. Hoegg, J.A.