HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Brenda Everall

Applicant

-and-

Highland Shores Children's Aid Society, Michael Evans and Lisa Mascherin

Respondents

RECONSIDERATION DECISION

Adjudicator:	Denise Ghanam
Date:	February 9, 2024
File Number:	2022-49223-I
Citation:	2024 HRTO 196
Indexed as:	**Everall v. Highland Shores Children's Aid Society**

[1] The Tribunal issued Decision 2023 HRTO 1550 (the "Decision") dismissing the Application. In due course, the applicant requested reconsideration of the Decision.

[2] Under s. 45.7 of the *Human Rights Code* (the "*Code*") Tribunal may, at the request of a party or of its own initiative, reconsider its decisions in accordance with the Tribunal's Rules of Procedure. The Tribunal has issued Rule 26 governing requests for reconsideration and has also issued a Practice Direction on Reconsideration.

[3] After considering the Rules and the Practice Direction, the Tribunal has found many times (such as in *Sigrist and Carson v. London District Catholic School Board et al.,* 2008 HRTO 34) that reconsideration is a discretionary remedy. There is no right to have a decision reconsidered by the Tribunal even if the criteria in Rule 26 are met.

[4] As noted by the Divisional Court in *Landau v. Ontario (Minister of Finance),* 2012 ONSC 6926 as paragraph 17:

> A reconsideration is not an appeal or a hearing de novo. More importantly perhaps, there is no right to have a decision reconsidered.

[5] In *James v. York University and Ontario Human Rights Tribunal,* 2015 ONSC 2234 at para. 56, the Divisional Court confirmed the importance of not treating the Tribunal's reconsideration process as an appeal, or an opportunity to repair deficiencies in the original presentation of a case. The Court also held at para. 58 that it was reasonable for the Tribunal to decline to exercise its discretion to reconsider its original decision in that case as:

> …there were no compelling and extraordinary circumstances for doing so and there were no circumstances which outweighed the public interest in the finality of orders and decisions of the Tribunal.

ANALYSIS

[6] In the Request for Reconsideration (the "Request"), the applicant has cited all of the factors under Rule 26.5 as reasons to request reconsideration:

i. There are new facts or evidence that could potentially be determinative of the case and that could not reasonably have been obtained earlier.

ii. You were entitled to notice but, through no fault of your own, did not receive notice of the proceeding or a hearing.

iii. The decision is in conflict with established case law or Tribunal procedure and the proposed reconsideration involves a matter of general or public importance.

iv. Other factors exist that outweigh the public interest in the finality of Tribunal decisions.

I will review each of these factors in turn.

The question of new information

[7] With respect to this issue, the applicant sent 37 pages of information, most of which was a reproduction of the correspondence to the applicant from the Tribunal and to the Tribunal from the applicant, both on this file, as well as another file that was also still in process at the Tribunal at that time. The only new information provided was the applicant's opinion on or disagreement with various paragraphs from the Decision.

[8] I find that the applicant did not offer any new evidence not provided already to the Tribunal. Rather, they simply restated their case and the reasons they object to the Decision.

The question of notice

[9] With respect to notice of the proceeding, the applicant was provided with a Notice of Intent to Dismiss the Application (the "Notice") on August 3, 2022, wherein the jurisdictional concerns of timeliness and lack of connection to a prohibited ground were highlighted and the applicant was directed to provide submissions. In the Notice, the applicant was advised that once an adjudicator has reviewed their submissions they may **"dismiss your Application, in whole or in part, for one of the reasons described above."** The applicant responded to the Notice and provided submissions on September

2, 2022. The applicant clearly received the Notice, provided their response, and their submissions were carefully reviewed in a hearing in writing, with portions of their submission quoted in the final Decision. As such, no preliminary oral hearing was scheduled, so the applicant had notice of the only proceeding which occurred in this Application.

[10] In *Mohmand v. Human Rights Tribunal of Ontario and Ultimate Currency Exchange,* 2021 ONSC 528 at para. 27, there was an allegation of procedural unfairness arising from the applicant's failure to provide submissions in response to a Notice of Intent to Dismiss. In dismissing the application for judicial review , the Divisional Court found the decision to be reasonable, and found no breach of procedural fairness, stating that:

> I find no denial of natural justice here. The NOID provided adequate, even emphatic, notice that the jurisdiction issue was in play. It emphasized that written submissions were required by a specified deadline, failing which the application would be dismissed. That is precisely what happened. The reconsideration process of which the Applicant availed herself was discretionary but also governed by a defined set of criteria. The Adjudicator fairly determined the matter in accordance with that process and those criteria.

[11] In this case, similarly to the one cited above, the applicant was provided with adequate and emphatic notice of the jurisdiction issues. Accordingly, there is no basis to grant reconsideration on this ground.

The question of conflict with existing case law or Tribunal procedure

[12] While the applicant states that the Decision conflicts with exiting case law or Tribunal procedure, I note that they did not cite any specific cases to support that assertion. As stated in the Decision, the Tribunal's jurisdiction is limited to enforcement of the *Code.* The *Code* only prohibits actions that discriminate against people based on their enumerated ground(s) in a protected social area. This means that the Tribunal does not have jurisdiction over general allegations of unfairness unrelated to the *Code*. Applicants need to provide a factual basis that links their prohibited grounds to the alleged

adverse treatment, beyond their own bald assertion. Many files are dismissed for this failure to make the connection to their prohibited grounds on the basis of lack of jurisdiction by the Tribunal. While the applicant raised concerns about the length of time it took for the Tribunal to issue the Decision after they made their submissions, I note that this is part of the Tribunal's regular review procedure and given the current backlog, it may take a significant number of months until a Decision is written.

[13] This approach on jurisdiction has been upheld by the Divisional Court in Ontario. See *Hay v. Ontario (Human Rights Tribunal)*, 2014 ONSC 2858, *Bello v. Toronto Transit Commission*, 2014 ONSC 5535, and more recently, *Mehedi v. Mondalez Bakery,* 2023 ONSC 1737.

[14] The applicant further argued that they did not receive a Response to the Application from the respondents, and this was at odds with Tribunal process. Upon review of the Application, the Tribunal determined that there were preliminary issues of jurisdiction to be addressed. The applicant was advised of this in their first correspondence from the Tribunal after the Application was received that *"if there are no preliminary issues and if your Application is complete, the HRTO will send the Application to the respondent(s)."* Since there were preliminary issues, the applicant was provided with an opportunity to address these concerns, and the matter was dealt with through a written hearing. The Application was then dismissed for lack of jurisdiction at a preliminary stage, prior to reaching the stage where it would have been served on the respondents. This is consistent with standard Tribunal practice, as per Rule 13.2. The Notice referred to above cited two jurisdictional issues of concern. Since the Application was dismissed for lack of jurisdiction, the secondary question of timeliness was moot and not addressed in the Decision. This is also consistent with standard Tribunal practice.

[15] While it is obvious that the applicant disagrees with the Decision, I cannot find that it is in conflict with established case law or Tribunal procedure. The applicant has not established any manner in which the Decision conflicts with the Tribunal procedure or existing jurisprudence.

Other factors exist that outweigh the public interest in the finality of Tribunal decisions

[16] The final factor which the applicant cites to outweigh the public interest in the finality of this Decision is an allegation that the Member who reviewed their file and wrote the Decision has an undeclared conflict of interest. This conflict is owing to the Member's previous participation in community service on the Windsor-Essex Local Immigration Partnership (WE-LIP) committee and the Board of the Windsor Police Services. The applicant cites the fact that at the WE-LIP Community Forum in 2022, the keynote speaker was Jean Samuel, former Director of Equity & Diversity with the Ontario Association of Children's Aid Societies. Further, several members of the WE-LIP committee work for the Windsor-Essex Children's Aid Society (WECAS), and the Windsor Police Service also has both a voting member on the WE-LIP and is a partner with the WECAS in the Child/Youth Advocacy Centre.

[17] However, the Member did not attend the 2022 WE-LIP forum and has not been active on the Committee since 2020. The Committee represents a broad cross-section of organizations in Windsor-Essex that provide services to newcomer families, including the police, the WECAS, and educational institutions. The Member does not maintain affiliation with the WECAS, or other provincial Children's Aid societies nor hold any specific bias towards those organizations.

[18] To make out a case of bias, the decision-maker's words and conduct must demonstrate to a reasonable and informed person that they do not have an open mind to the evidence and arguments presented. See *R. v. S. (R.D.),* 1997 CanLII 324 (SCC).

[19] The well-established principles to be applied in considering apprehension of bias, as enunciated by the Supreme Court of Canada in *Committee for Justice and Liberty et al. v. National Energy Board et al.,* 1976 CanLII 2 (SCC) at p. 394, are as follows

> …the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter

> realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[20] Although these principles were set out in that decision's dissent, they have come to be consistently relied upon in cases regarding bias. As well, in *Yukon Francophone School Board, education Area #25 v. Yukon (Attorney General)*, ("*Yukon*") 2015 SCC 25 at para. 26 the Supreme Court found that "the inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias."

[21] As noted in a Court of Appeal case, *Canadian College of Business and Computers Inc. v. Ontario (Private Career Colleges*), 2010 ONCA 856 at paras. 24, 27:

> The threshold for a finding of real or perceived bias is high. Mere suspicion is insufficient to support an allegation of bias. Rather, a real likelihood or probability of bias must be demonstrated. . .[t]here is also a strong presumption in favour of the impartiality of an adjudicative decision-maker.

[22] The applicant has not met the high threshold for establishing reasonable apprehension of bias. Even if all their allegations related to the Member's past experience and interactions had some validity, that alone would be insufficient to create an apprehension of bias.

[23] The Supreme Court in *Yukon* has found that although an adjudicator or judge has a personal history and will have personal opinions on various issues, this is not indicative of a reasonable apprehension of bias. The strong requirement and presumption of impartiality that is built into our justice system means that an adjudicator must not demonstrate bias in their actions or words. The Supreme Court says thus as para. 33:

> Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions, or sensibilities. Rather, they require that the judge's identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one.

[24] The Court further indicated in that ruling at para. 36 that:

> Impartiality thus demands not that a judge discount or disregard his or her life experiences or identity, but that he or she approach each case with an open mind free from inappropriate and undue assumptions.

[25] Upon review of the applicant's position and the relevant legal tests, I find that a reasonable and informed person would not conclude that there is an apprehension of bias here. I cannot find support for the allegations of an undeclared conflict of interest.

[26] The applicant has not shown any compelling and extraordinary circumstances which warrant granting reconsideration and surpass the need for and importance of the finality of Tribunal decisions.

[27] After reviewing the file, the law, the jurisprudence, and the details of the Request noted above, I decline to exercise my discretion to reconsider the Decision. In sum, I find that the applicant has not established the existence of any of the criteria in Rule 26 that would lead to reconsideration. The original Decision stands as issued.

ORDER

[28] The Request for Reconsideration is denied.

Dated at Toronto, this 9th day of February, 2024.

D c Ghanam

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Denise Ghanam
Member